UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

CALIFORNIA CARTAGE COMPANY, LLC;
ORIENT TALLY COMPANY, INC.;
AND CORE EMPLOYEE MANAGEMENT, INC.

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

And

INTERNATIONAL BROTHERHOOD OF TEAMSTERS

CALIFORNIA CARTAGE COMPANY, LLC; ORIENT TALLY COMPANY, INC.; NFI CALIFORNIA CARTAGE HOLDING COMPANY, LLC; 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

EMPLOYER,

And

INTERNATIONAL BROTHERHOOD OF TEAMSTERS

PETITIONER

Lindsay R. Parker, Esq., and Phuong Do, Esq., for the General Counsel.
J. AL Latham Jr., Esq., and *Ryan D. Derry, Esq., (Paul Hastings LLP),* for the Respondents.
Hector De Haro, Esq., and Julie Gutman Dickinson, Esq., for the Charging Party.

DECISION AND REPORT ON OBJECTIONS

STATEMENT OF THE CASE

Dickie Montemayor, Administrative Law Judge. This case was tried before me on July 23, 2018, in Los Angeles, California. Charging Party, International Brotherhood of Teamsters (Union) filed a charge on December 23, 2016, alleging violations by Respondent Cartage, Respondent Orient and Respondent Core. The original charge was subsequently amended five separate times. The last amendment occurred on August 31, 2017. A separate charge was filed by the Union on August 13, 2017 and thereafter amended on March 29, 2018. On April 27, 2018, an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing was issued. The complaint alleged *inter alia* that the Respondents demoted an employee and thereafter terminated him in violation of Section 8(a)(3) and (1) of the Act. (See Complaint Paragraphs 21 and 23). During the pendency of the proceedings, these allegations were the subject of a settlement agreement. (GC Exh. 2). During the trial, General Counsel withdrew the allegations contained in paragraphs 18, 2,1 and 23. After the hearing was concluded, the Regional Director issued notification dated November 1, 2018, that the settlement agreement had been closed on compliance. The notification made clear that other allegations raised in the complaint (paragraphs 17, 18, 19, and 20) were still in issue. There was an apparent discrepancy in the letter in that it seemingly contradicted the General Counsel's withdrawal of paragraph 18 at trial. There is no question however that the General Counsel in fact withdrew the allegations of paragraph 18 at trial. (See GC Brief p. 2 note 2, See also Tr. 298). The remaining allegations (paragraphs 17, 19, and 20) allege that the Respondents violated Section 8(a)(1) of the Act. Respondents filed an answer to the complaint denying that they violated the Act.

On May 9, 2018, the Regional Director issued a Report on Objections and Order Consolidating Cases and Notice of Hearing finding that the Petitioner's Objections raise substantial and material factual issues and could be grounds for setting aside the election. The Order accordingly directed a hearing on Petitioner's Objections Nos. 1,9,10,11,12,13,14,19 and consolidated the matters with those referenced above.

At the trial in this matter, the parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On September 28, 2018, the parties filed briefs in the matter. I carefully observed the demeanor of witnesses as they testified, and I rely on those observations here. I have studied the whole record, including the post-hearing briefs and based upon the detailed findings and analysis below, I conclude that the Respondents violated the Act essentially as alleged.

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, and I find that:

1. (a) At all material times until about October 1, 2017, Respondent Cartage, a California corporation, with a principal place of business located at 2931 Redondo Avenue, Long Beach, California, and a warehouse facility located at 2401 East Pacific Coast Highway, Wilmington, California (Wilmington Facility), was engaged in the business of warehousing, transloading, and distribution.

(b) At all material times until about October 1, 2017, Respondent Orient, a California corporation, with a principal place of business located at 2931 Redondo Avenue, Long Beach, California, was engaged in the business of providing labor services and provided labor services for Respondent Cartage at the Wilmington facility.

(c) At all material times until about October 1, 2017, Respondent Cartage and Respondent Orient were affiliated business enterprises with common officers, ownership, directors, management and supervision, and 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.

(d) At all material times until about October 1, 2017, based on its operations, Respondent Cartage and Respondent Orient constituted a single-integrated business enterprise and single employer within the meaning of the Act.

2. (a) During the 12-month period ending October 1, 2017, Respondent Cartage and Respondent Orient, in conducting their business collectively derived gross revenues in excess of $500,000 and performed services valued in excess of $50,000 directly to customers located outside the State of California.

3. At all material times until about October 1, 2017, Respondent Cartage and Respondent Orient were an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

4. (a) At all material times Respondent Core, a California corporation, with a principal place of business located at 20767 South Avalon Boulevard, Carson, California, and a branch location located at 5230 Benito Street, Montclair, California, has been engaged in the business of providing temporary staffing services to companies.

(b) During the 12-month period ending October 1, 2017, Respondent Core, in conducting its business operation described above in paragraph 7(a), provided services valued in excess of $50,000 to Respondent Cartage and Respondent Orient.

5. At all material times, Respondent Core has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

6. (a) At all material times through about October 1, 2017, Respondent Cartage, Respondent Orient and Respondent Core were parties to a contract which provided that Respondent Core was the agent for Respondent Cartage and Respondent Orient in connection with hiring and employing employees at the Wilmington Facility.

(b) At all material times through about October 1,2017, Respondent Cartage and Respondent Orient possessed control over the labor relations policy of Respondent Core, exercised control over the labor relations policy of Respondent Core, and administered a common labor policy with Respondent Core for the employees of Respondent Core.

(c) At all material times through about October 1, 2017, Respondent Cartage and Respondent Orient and Respondent Core were joint employers of the employees of Respondent Core.

7. (a) Since about October 1, 2017, Respondent NFI, a Delaware limited liability corporation licensed to do business in California, with a principal place of business located at 2931 Redondo Avenue, Long Beach, California, and a facility located at 2401 East Pacific Coast Highway, Wilmington, California has been engaged in the business of warehousing, transloading, and distribution.

(b) Since about October 1, 2017, Respondent Cartage Distribution, a· Delaware limited liability corporation licensed to do business in California, with a principal place of business located at 2931 Redondo Avenue, Long Beach, California, and a facility located at 2401 East Pacific Coast Highway, Wilmington, California, has been engaged in the business of warehousing, transloading, and distribution.

(c) Since about October 1, 2017, Respondent Transload, a Delaware limited liability corporation licensed to do business in California, with a principal place of business located at 2931 Redondo Avenue, Long Beach, California, and a facility located at 2401 East Pacific Coast Highway, Wilmington, California, has been engaged in the business of warehousing, transloading and distribution;

8. (a) Since about October 1, 2017 Respondent NFI, Respondent Cartage Distribution, and Respondent Transload have 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.

(b) Since about October 1, 2017, Respondent NFI, Respondent Cartage Distribution, and Respondent Transload have constituted a single-integrated business enterprise and a single employer within the meaning of the Act.

9. (a) Since about October 1, 2017, Respondent NFI, Respondent Cartage Distribution. and Respondent Transload, in conducting their business operations have derived gross revenues in excess of $500,000 and performed services valued excess of $50,000 directly to customers located outside the State of California.

(b) Since about October 1, 2017, Respondent NFI, Respondent Cartage Distribution, and Respondent Transload have been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

10. (a) Since about October 1, 2017, Respondent NFI, Respondent Cartage Distribution, Respondent Transload, and Respondent Core have been parties to a contract which provides that Respondent Core is the agent for Respondent NFI, Respondent Cartage Distribution, and Respondent Transload in connection with hiring and employing employees at the Wilmington Facility.

(b) Since about October 1, 2017, Respondent NFI, Respondent Cartage Distribution, and Respondent Transload have possessed control over the labor relations policy of Respondent Core, have exercised control over the labor relations policy of Respondent Core, and have administered a common labor policy with Respondent Core for the employees of Respondent Core.

(c) Since about October 1, 2017, Respondent NFI, Respondent Cartage Distribution, Respondent Transload, and Respondent Core have been joint employers of the employees of Respondent Core.

11. (a) About October 1, 2017, Respondent NFI purchased substantially all the assets of Respondent Cartage and Respondent Orient, a single employer.

(b) Since October 1, 2017, Respondent NFI, Respondent Cartage Distribution, and Respondent Transload, a single employer, has continued all operations of Respondent Cartage and Respondent Orient, a single employer, in basically unchanged form, and has employed as a majority of its employees, individuals who were previously employees of Respondent Cartage and Respondent Orient.

(c) Before engaging in the conduct, Respondent NFI was on notice about the pending charges alleging unfair labor practices by Respondent Cartage and Respondent Orient. Respondent NFI, as a single employer with Respondent Cartage Distribution and Respondent Transload, has continued the employing entity with notice of Respondent Cartage and Respondent Orient's potential liability to remedy its alleged unfair labor practices, and is a successor to Respondent Cartage and Respondent Orient.

12. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

13. At all material times until at least about October 1, 2017, the following individuals held the positions set forth opposite their respective names and were supervisors within the meaning of Section 2(11) of the Act and agents of Respondent Cartage, Respondent Orient, and Respondent Core within the meaning of Section 2(13) of the Act:

Robert Curry	CEO of Respondent Cartage and Respondent Orient
Hermann Rosenthal	General Manager of Respondent Cartage and Respondent Orient
Lisa Lyons	Executive Vice President of Respondent Core
Freddy Rivera	Operations Manager of Respondent Cartage and Respondent Orient
Jesus Ramirez	Supervisor of Respondent Cartage and Respondent Orient
Marco Gonzalez	On-Site Supervisor of Respondent Core
Enrique Gonzalez	Supervisor of Respondent Cartage and Respondent Orient
Frank Arias	Manager of Respondent Cartage and Respondent Orient
Jose Ortega	Supervisor of Respondent Core

II. ALLEGED UNFAIR LABOR PRACTICES

(i) Background

Respondents California Cartage Company LLC, Orient Tally Company, Inc. and its staffing company Core Employee Management Inc. jointly staffed and operated a container freight station providing ware housing, transloading, and shipping services. (GC Exh. 1(bb) and (ff)). The above named Respondents admitted that they were joint employers within the meaning of the Act. (Jt. Exh. 1).[1] In 2015, the Union began a campaign to organize the workforce. In furtherance of the campaign, the Union spoke to employees, distributed literature and held meetings. On September 22, 2015, the Union organized a strike. Thereafter, the Union began collecting Union authorization cards from employees. Respondents thereafter launched their own anti-union campaign. (GC Exh. 4, 5,6 Tr. 65-8, 71-2 148, 173). Respondents' messages were provided to employees in both English and Spanish. (GC Exh. 4, 9).

On November 28, 2016, the Union filed a petition seeking to represent approximately 250 permanent full time, part time, and temporary employees at the Wilmington, CA facility. An election was set and conducted on December 22, 2016.

1. The Rule Prohibiting Discussions Among Employees About the Union

In the workplace it had been a common practice for employees on the docks to speak in a generally uninhibited manner about both work related and non-work related matters. Like many typical work places, employees conversed about sports, the weather, and leisure activities. These conversations often took place while employees were on the clock and not during any scheduled breaktime but rather during the time when employees were waiting for forklift drivers to deliver the next set of goods for loading. (Tr. 63). Managers knew of this regular practice which was conducted openly and would sometimes join in the conversations. (Tr. 144, 145).

As the election was approaching, Respondents began having employee meetings about the Union and the election. Sometime in mid-December, before the election was held, supervisor Enrique Gonzalez held a meeting to discuss the Union, its constitution, and employees' concerns. Michael Johnson was employed as a lumper and attended the meeting during which he voiced his concerns about African-Americans being subjected to discrimination because they were allegedly not being afforded forklift operator training. (Tr. 70, 105, 109). After the meeting Johnson returned to work and as was customary began discussing issues with his co-workers Dwayne Wilson, Michael Morris, and Pacifico Bungato. (Tr. 146). The topic of the conversation was Union dues, how much was paid, and how those dues compared to the monies the workers paid to the staffing agency. (Tr. 146). Supervisor Enrique Gonzalez overheard the conversation. He then instructed the employees to stop talking and to get back to

[1] Respondents also stipulated that since about October 1, 2017 NFI, Cal Cartage Distribution, California Transload, and Core were joint employers of the employees Core assigned to work at the Wilmington facility. (Jt. Exh. 1). Respondents further stipulated that Nexem-Allied, LLC was a successor to Core for all purposes under the Act. (Jt. Exh. 2).

work. Enrique Gonzalez then directed Johnson to get in his golf cart and proceeded to drive Johnson to the forklift area to show him that one trainee was an African-American. Johnson reiterated his position that African-Americans were being discriminated against because only a single trainee out of six was in fact an African-American. Enrique Gonzalez then took him to see Core's on-site supervisor Marco Gonzalez. Enrique directed Johnson to tell Marco what he said during the company's anti-union meeting and what he was talking about with his co-workers. Johnson proceeded to recount the earlier events and his discussions with co-workers. He reiterated his belief that the employer discriminated against African-Americans and advised that he and his co-workers were discussing matters related to the Union. (Tr. 71, 110). Enrique called him a liar and Marco ended the meeting by twice directing Johnson to stop talking about the Union during work hours. (Tr. 71).

2. The Mandatory Employee Meeting

On the December 20, 2016, employees were advised individually that they were to attend a mandatory all employee meeting. The meeting involved the employees of the first shift and the managers. At this meeting, CEO and President Robert Curry spoke along with Operations Manager Freddy Rivera. Rivera's role was to translate Curry's speech into Spanish for the Spanish speaking employees. The meeting began with Curry speaking first and Rivera speaking after Curry. Curry had prepared notes but did not strictly follow the notes. (See various drafts of notes Jt. Exh. 3, GC Exh. 11, 12, 13). Rivera was given a copy of notes he was supposed to translate in advance of the meeting. Curry, however, veered off the prepared notes and Curry's speech did not completely conform to the notes Rivera was provided. He began to try to take notes when Curry veered off but stopped when he could not keep up. (Tr. 341). The actual notes used by Curry at the morning speech were destroyed after the morning session despite the fact that an afternoon speech was also planned. (Jt. Exh. 3).

An incomplete portion of Curry's speech was recorded by an employee who is now deceased on a cell phone. (Resp. Exh. 2). The recording contained an unexplained gap and did not record the complete speech. During his speech, Curry told employees about his previous history with the Teamsters; that they "broke" him and he had to close up operations; that 175-200 people lost their jobs, that they [the Teamsters] were a dictatorship; that if the Union won the election he would have to close, move or sell the company; that if the employees "wanted to keep their jobs they needed to vote no"; that they would lose their jobs because competitors would undercut the company; that he could not afford to pay employees more; that because of the Union's activities the Company had lost the Amazon contract and would have to close the account. (Resp. Exh. 2, Tr. 74, 113, 150, 158, 164, 166, 178, 182, 183).

Rivera spoke after Curry translating the note cards he was provided.[2] Rivera admitted that he did not directly translate everything that Curry said in the meeting because he "wasn't sure if it was okay for [him] to say it." (Tr. 21). Nevertheless Rivera, near the end of his speech, finished by telling employees that if the Union won the election, the company would have to

[2] Rivera maintained very cryptic incomplete notes from the afternoon and the morning meetings. (Resp. Exh. 4). He also maintained the Spanish version of the note cards from which Curry was supposed to speak from and from which he was to translate. (Resp. Exh. 5,6).

close or change location and that "everyone was going to be left without a job." (Tr. 194, 217, 218, 236).

3. The January 18, 2017, Incident

The ordinary work process used by temporary employees who were not guaranteed work was to show up at the facility and check in. If work is available, the temporary employee is allowed to enter the work area. If no work is available, they are required to wait inside a fenced area to wait and see if work may later become available. On January 17, 2017, Michael Johnson checked in with Marco Gonzalez and was told there was no work available. While he waited, he noticed that other nonAfrican--Americans were being allowed in to work. He protested what he perceived as discriminatory treatment at one-point yelling, "this is blunt discrimination, and if y'all don't do something about it I will start filming." (TR. 126). Johnson thereafter began to film with his phone in an effort to document that African-Americans were being denied work. On January 18, 2017, Johnson again arrived for work and again was told there was no work available. He again yelled that he believed that he and others were the victims of discrimination. He thereafter began filming with his phone. Upon seeing Johnson filming Marco approached him and directed him to stop recording. He was told by Marco that it was illegal to film people without their permission. Johnson stopped recording. After Johnson spoke with his co-workers and obtained their permission he again began recording. The employees who were recorded all spoke about the discrimination that they perceived to be taking place. (GC Ex. 7). Marco thereafter approached Johnson told him "you're causing trouble, Mr. Johnson. If you don't stop filming, we will call the police on you. And if you want to film, you need to go up to the front, outside the facility, and start filming there." (Tr. 85, 124).

(ii) Credibility Resolutions

Credibility determinations by their very nature include examining the totality of the evidence and the confluence of factors such as inherent interests, demeanor of witness, corroboration of testimony, consistency with other facts both established and admitted inherent probabilities, and reasonable inferences that may be drawn from the record. *Daikishi Corp*., 335 NLRB 622 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Other factors for consideration include the passage of time, whether some testimony but not all must be credited of a particular witness as well as the notion that current employees who testify against their employers are often times particularly reliable because they are testifying against their own immediate and direct pecuniary interest. *NLRB v. Universal Camera Corp*. 179 F.2d 749 (2d. Cir. 1950*); Flexsteel Industries, Inc*. 316 NLRB 745 (1995); and *Gold Standard Enterprises, Inc*., 234 NLRB 618, 619(1978).

The findings relating to both incidents involving Michael Johnson and Marco Gonzalez are resolved in favor of Johnson. I credit his testimony regarding the incidents in question to be truthful. Marco Gonzalez was not called to testify and therefore I was unable to determine whether he disputed any of the facts as presented by Johnson. Although Enrique Gonzalez denied that he made statements attributed to him by Johnson, I was not persuaded by his testimony because another employee, Dwayne Wilson, corroborated Johnson's testimony. In analyzing this corroboration, I took into account that Wilson was a current employee and as the Board has recognized is likely to be particularly reliable because his testimony is given against

his pecuniary interest, and weighed it against the self-serving nature of the blanket denials of Gonzalez. See *Portola Packaging, Inc*., 361 NLRB 1316 (2014).

The factual findings regarding the Curry speech and the contents of it also hinge directly on the questions of credibility. Curry did not testify although a partial glimpse of his statements and demeanor can be observed in the recording of the speech that exists. The lack of his testimony, the incomplete recording with gaps, the destruction of the actual notes that he used in the speech, as well as the lack of complete notes from Rivera weigh against simply accepting without critical evaluation the blanket denials regarding what was said at the meeting. What comes through loud and clear from the record is that Curry had very strong opinions about the Teamsters and that it is not improbable that when he veered off of his scripted speech these feelings manifested themselves in the comments attributed to him by current employees. Two current employees Victor Gonzalez and Wilson provided testimony about the threats that were conveyed to them. I credit their testimony as truthful as offered against their own pecuniary interest. Moreover, some of that which was relayed by the witnesses was in fact corroborated by the Respondents' own reactions to the speech. For example, Curry's statements regarding Amazon caused Supervisor Lyons to become "concerned" and triggered her reaction and a required a trip back to the Amazon department with Supervisors Marcos and Enrique Gonzalez to talk to employees about "losing the Amazon business." (Tr. 379-382). I also note that the general consistency of employee testimony supports their version of events. Wilson testified that Curry indicated that if the Union came in they would "probably have to close down the warehouse." Victor Gonzalez testified that Curry said, "if the Teamsters came in he would have to close the company down." (Tr. 150, 175). Although slightly different in their recollection, the testimony is generally consistent regarding closing the company down if the Union was voted in.

Rivera denied that he made the statements attributed to him regarding closure. This was directly contradicted by Spanish speaking employees Carbajal, Arenas, and Rodriguez. I credit the testimony of Carbajal, Arenas and Rodriguez, their demeanor and the conviction of their version of the truth was convincing and their testimony was generally consistent. (Tr. 194,217, 236). Secondly, they independently and consistently testified that Rivera's comments were made at the end of his speech thus corroborating each other's version of events.[3]

(iii) Analysis

1. The Maintenance and Application of the No-Union Discussions Rule was Unlawful

In *The Boeing Co.*, 365 NLRB No. 154 (2017), the Board delineated the standards applicable to determine whether or not work place rules are lawful under the Act. In *Boeing,* the Board set forth 3 categories of rules. Category 3 rules are those rules that are unlawful to maintain because they prohibit or limit NLRA protected conduct, and they adversely impact on rights guaranteed by the NLRA outweighing any justifications associated with the rule. see also (See GC Memorandum 18-04).

[3] In other prior litigation before the Board, Rivera was found to have engaged in unlawful conduct in violation of Section 8(a)(1) of the Act. See *Orient Tally and California Cartage Company LLC,* 21-CA-160242; 21-CA-162991 (February 28, 2018).

The rule in question falls under Category 3 in the *Boeing* hierarchy as it directly restricts employees from discussing matters relating to the Union but does not prohibit discussions of other topics. See *Teledyne Advanced Materials*, 332 NLRB 539 (2000), *Orval Kent Food Co*., 278 NLRB 402 (1986), *Liberty House Nursing Homes*, 245 NLRB 1194 (1979), *Altercare of Wadsworth Ctr. For Rehab. & Nursing Care, Inc*., 355 NLRB 565 (2010). Discussing working conditions and unions during the height of a campaign and while an election is set to be undertaken is a core NLRA right. There is no legitimate justification in banning discussions that are sufficient to overcome Section 7 rights. The serious adverse impact of the central NLRA right to discuss matters relating to the union is not outweighed by any employer interest.

Accordingly, I find that the maintenance and application of the "no union discussion" rule on three separate occasions, once by Enrique Gonzalez and twice by Marco Gonzalez violates Section 8(a)(1) of the Act.

2. The Statements Made During the Captive Audience Meeting Were Coercive and Unlawful

The Board's standard for determining whether statements are permissible under Section 8(a)(1) as the expression of general views about unionism or whether the statements contain unlawful threats of reprisal or promise of benefit rest upon whether the statements could be reasonably construed as coercive. *Gissel Packing Co*., 395 U.S. 575 (1969), *Flagstaff Med. Center, Inc*., 357 NLRB 659 (2011).

It takes little imagination to conclude that Curry's threats to move the business or sell the business or close the business could be reasonably construed as coercive because in fact they were. The intended purpose of the threats was to coerce the employees into voting no at the election. So too, Rivera's closing statement that the company would have to close or move to a different location and the employees would be "left with no work" is on its face coercive. It was intended to be coercive and the employees clearly understood the statements to be threats. The coercive nature of the threats is amplified by the fact that the threats were communicated by the highest-level management officials. In reaching this conclusion, it is important to note that these statements were made without any objective evidence and or factual basis to support the notion that unionization would lead to the business catastrophe that Rivera and Curry promised.[4] See *Gissel* at 617. Rivera's statement made at the end of his presentation offering employees the threat of job loss to weigh in their voting considerations was openly, and on its face coercive. The Board has consistently held that such coercive statements violate the Act. See *Abramson, LLC,* 345 NLRB 171 (2005); *Seville Flexpack Corp*., 288 NLRB 518 (1988); Custom Coated Products, 245 NLRB 33 (1979); *Homer D. Bronson Co*., 349 NLRB 512 (2007); *Electro Wire Truck*, 305 NLRB 1015 (1991); *Reeves Bros., Inc*., 320 NLRB 1082 (1996)*; LRM Packaging*, 308 NLRTB 829 (1992); *Marathon Le Tourneau Co*., 208 NLRB 213 (1974). Applying these

[4] I separately find that Curry's statement that the Amazon account was lost and had to be closed violated the Act. There is no objective basis from which to conclude that the entire Amazon account was lost or closed because of Union activity and therefore violated Section 8(a)(1) of the Act. In fact, Lyons herself rushed to speak with individuals in the department to reassure employees and make clear that the account was not closed.

applicable precedents, I find that the unlawful threats violate Section 8(a)(1) of the Act and further find that the unlawful and coercive nature of the statements coming from the company's highest level managers interfered with the exercise of the free and untrammeled choice of employees in the election process. The comments were addressed to hundreds of employees and given their severity, cannot be said to have been "de minimus." *Bon Appetit Management Co.,* 334 NLRB 1042 (2001).

3. Threats to Call the Police on Michael Johnson Violated the Act

The concept of concerted activity has its basis in Section 7 of the Act. Section 7 of the Act in pertinent part states: "Employees shall have the right to self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection." In order for the actions to be protected under the statute they must be both "concerted" and engaged in for the purpose of "mutual aid or protection." *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 153 (2014). In general, to find an employee's activity to be "concerted," the employee must be engaged with, or on the authority of, other employees and not solely by and on behalf of the employee herself. Whether an employee's activity is "concerted" depends on the manner in which the employee's actions may be linked to those of his coworkers. See *NLRB v. City Disposal Systems*, 465 U.S. 822, 831 (1984); *Meyers Industries*, 268 NLRB 493, 497 (1984) *(Meyers I)*, remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented *Meyers Industries*, 281 NLRB 882, 887 (1986) *(Meyers II)*, affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). The Supreme Court has observed, however, that "[t]here is no indication that Congress intended to limit [Section 7] protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way." *NLRB v. City Disposal Systems*, 465 U.S. at 835; *Fresh & Easy Neighborhood Market, Inc*., 361 NLRB 151 (2014).

The question of whether an employee has engaged in concerted activity is a factual one based on the totality of record evidence. See, e.g., *Ewing v. NLRB*, 861 F.2d 353 (2d. Cir. 1988). The Board has found an individual employee's activities to be concerted when they grew out of prior group activity. *Every Women's Place*, 282 NLRB 413 (1986). The Board has found that "ostensibly individual activity may in fact be concerted activity if it directly involves the furtherance of rights which inure to the benefits of fellow employees*." Anco Insulations, Inc*., 247 NLRB 612 (1980). An employee's activity will be concerted when he or she acts formally or informally on behalf of the group. *Oakes Machine Corp*., 288 NLRB 456 (1988). Concerted activity has been found where an individual solicits other employees to engage in concerted or group action even where such solicitations are rejected. *El Gran Combo de Puerto Rico*, 284 NLRB 1115 (1987), enfd. 853 F.2d 966 (1st Cir. 1988).

It is well settled that employees concerted activities to protest perceived discriminatory practices is protected under the Act. *Fresh & Easy Neighborhood Market, Inc*., 361 NLRB 151 (2014). It is also well established that documenting the perceived discriminatory practices as part of the "res gestae" of protected and concerted activities falls squarely under the umbrella of the NLRA's protections. *White Oak Manor*, 355 NLRB 1280 (2010), enfd. 452 Fed. Appx. 374 (2011).

Applying these principles to the facts presented, I find that Johnson was engaged in protected and concerted activities which the employer was made directly aware of when Marco Gonzalez threatened to call the police on him. When an employer responds to protected and concerted activity by threatening to call the police it violates the Act. *Roadway Package System*, 302 NLRB 961 (1991), *All Am. Gourmet*, 292 NLRB 1111 (1989), *Winkle Bus Co*., 347 NLRB 1203 (2006). Respondents therefore violated Section 8(a) (1) of the Act.

(iv) Report and Recommendations on Objections

The Board has set forth the general standards to apply in deciding whether the results of the election should be set aside. In *Safeway, Inc.,* 338 NLRB 525 (2002), the Board set forth the following:

> It is well settled that "[r]epresentation elections are not lightly set aside." *NLRB v. Hood Furniture Mfg. Co.,* 941 F.2d 325, 328 (5th Cir. 1991) (citing *NLRB v. Monroe Auto Equipment Co.,* 470 F.2d 1329, 1333 (5th Cir. 1972), cert. denied 412 U.S. 928 (1973)). Thus, "[t]here is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *NLRB v. Hood Furniture Mfg. Co.,* supra, 941 F.2d at 328. Accordingly, "the burden of proof on parties seeking to have a Board-supervised election set aside is a 'heavy one.'" *Kux Mfg. Co. v. NLRB,* 890 F.2d 804, 808 (6th Cir. 1989) (quoting *Harlan #4 Coal Co. v. NLRB,* 490 F.2d 117, 120 (6th Cir. 1974), cert. denied 416 U.S. 986 (1974),

The proper test for evaluating conduct of a party is an objective one—whether it has "the tendency to interfere with the employees' freedom of choice." *Cambridge Tool Mfg*., 316 NLRB 716 (1995). The Board in *Taylor Wharton Division,* 336 NLRB 157, 158 (2001), set forth several factors that should be considered:

> In determining whether a party's misconduct has the tendency to interfere with employees' freedom of choice, the Board considers: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. See, e.g., *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986).

1. Objection No. 1

The Employer interfered with the fair operation of the election and affected the outcome of the election by holding two mandatory meetings that, collectively, involved most unit employees within 48 hours of the election wherein California Cartage Company, LLC's President and CEO, Robert Curry, threatened plant closure and job

loss if the employees voted for the Union, thereby intimidating unit employees in the exercise of their Section 7 rights.

Applying the standards set forth in *Cambridge Tool* to the facts, I find: (1) the threats were severe and were likely to cause fear among the employees; (2) hundreds of employees were subjected to the misconduct; (3) the misconduct occurred in close proximity to the election; (4) given the timing of the election the threats would have persisted in the minds of the employees; and (5) the misconduct can be directly attributed to the Respondent and in particular Curry's decision to veer off script. The threats made by Curry and Rivera, the highest level officials during the critical period, had the clear and unequivocal tendency to interfere with the employees' free choice. Thus Objection No. 1 is sustained.

2. Objection No. 9.

The Employer, its supervisors, agents and/or supporters interfered with the fair operation of the election and affected the outcome of the election by writing an anti-Union message inside of a polling booth in full view of voters during a busy period in the polling session, discovered only at the close of the first voting session, thereby influencing the outcome of the election.

Objection 9 revolves around the posting of a message of "No" inside one of the voting booths. At the hearing, the parties entered into the following stipulation regarding the facts:

1. With respect to Petitioner Objection No. 9 the Board Agent checked the voting booths 30 minutes prior to the close of the first voting session and the "no" message was not present at that time.

2. After the polls closed for the first voting session the "no" message was observed in one of the four voting booths. That voting booth was taken out of service before the second voting session. (GC. Exh. 3).

As can be gleaned from the stipulation, there is no dispute regarding whether the "No" message was posted inside the voting booth. The question is whether applying the applicable standards the objection should be sustained. I find that it should not. In the first instance there is no evidence in the record from which to conclude that the actions can or should be attributed to Respondents. There is also no evidence to establish that the message stoked fear or reprisal. More significant is the fact that the message was present for a limited amount of time (less than 30 minute) in a single booth and visible only by limited number of persons who actually used the booth. Given the limited number of persons potentially affected and the 159-vote margin it is unlikely that it had any meaningful effect on the election. All of the above facts favor overruling the objection.

3. Objection No. 10

The Employer, its supervisors, agents and/or supporters interfered with the fair operation of the election and affected the outcome of the election by holding an employer sponsored holiday party wherein the Employer provided lunch, extended paid break time, and held a raffle for the employees while distributing new anti-

Union literature within 24 hours of the election, thereby interfering with the employees' Section 7 rights.

The facts regarding this objection are mostly undisputed. On December 21, 2016, the employer hosted a holiday party that lasted approximately 2 hours. Respondent in past years had hosted holiday parties since at least 2005. (Tr. 382,362). The party was approximately the same length as in prior years, the same caterer was used, the same band played at the party as in prior years, the holiday party was announced prior to the scheduled election and the amount spent on the party was similar to that spent in prior years. (Union Exh. 2). The Union failed to establish that anti-union literature was delivered at the party. (Tr. 94, 153). The holiday party would have taken place regardless of whether or not the union was active. *United Airlines Service Corp.,* 290 NLRB 954 (1988). All of the above facts make clear that that this part of the objection related to the holiday party itself (not including the gift card issue discussed below) should be overruled as there has been no showing that hosting of a holiday party as had been done in prior years had the tendency to interfere with the employees' freedom of choice.

4. Objection No. 11

The Employer, its supervisors and/or agents interfered with the fair operation of the election and affected the outcome of the election by offering anti-Union literature within 24 hours of the election directly to employees as they clocked out, permitting supervisors to assess the employees' support of management in the election, thereby interfering with the employees' Section 7 rights.

On December 21, 2016, Cal Cartage handed out a pamphlet as the employees were clocking out of their shifts. (Tr. Exh. 1). Respondent asserts that it was within its rights to distribute the literature and is not prohibited from doing so by the *Peerless Plywood* rule.[5] Although the Union objects to the timing of the literature it admits that the *Peerless Plywood* rule prohibiting election speeches does not specifically apply to literature and cites no other authority to support sustaining the objection. Accordingly, Objection 11 is overruled.

5. Objection No. 12

The Employer; its supervisors and/or agents interfered with the fair operation of the election and affected the outcome of the election by distributing gift cards to unit employees during the critical period, thereby interfering with the employees' Section 7 rights.

Gift cards in the same total amounts as in prior years were raffled off during the holiday party. The total value of $50 and $25 dollar increments which was changed from prior years because they wanted more winners. (Tr. 366). Respondent asserts that the gift cards were an ordinary part of the holiday party tradition. Nevertheless, the Board in *Atlantic Limousine Inc.,* 331 NLRB 1025 (2000), adopted a per se rule prohibiting raffles by unions or employers if the raffle is "conducted at any time during a period beginning 24 hours before the scheduled opening of the polls and ending with the closing of the polls." There is no dispute that the raffle occurred

[5] *Peerless Plywood*, 107 NLRB 427 (1953).

within the 24 hour period and current Board law requires sustaining the objection and setting aside the election. As the Board noted in *Atlantic Limousine, Inc.,* "if there is a showing that such a raffle has occurred during the proscribed period we will set aside the election upon the filing of a valid objection." *Id.* At 1028.

6. Objection No. 13

The Employer, its supervisors and/or agents interfered with the fair, operation of the election and affected the outcome of the election by interrogating workers regarding how the employees anticipated voting in the election, thereby intimidating employees in the exercise of their Section 7 rights.

Objection 13 revolves around a single incident in which employee Johnson, approximately two weeks before the election, was approached by a supervisor and questioned regarding how he was going to vote. (Tr. 86-87). The supervisor also asked other employees who were present how they intended to vote (approximately 4 others were present during the conversation). Respondent disputes that the conduct occurred but argues in the alternative that even if it did it was not of such a magnitude that it could possibly have influenced the election and therefore provides no grounds for setting aside the election. Given the limited number of employees who were questioned and the lack of any real evidence in the record of threats or intimidation that occurred during this conversation (what occurred after the conversation is discussed below), I concur with Respondent that this objection should be overruled. See *The Liberal Market,* 198 NLRB 1481 (1954).

7. Objection No. 14

The Employer, its supervisors and/or agents interfered with the fair operation of the election and affected the outcome of the election by retaliating against temporary workers by not permitting them to work because of their union support, perceived union support or protected concerted activities, thereby interfering with the employees' Section 7 rights.

Objection 14 revolves around an incident in which Johnson credibly testified that the day after the supervisor asked him who he was going to vote for, Gonzalez did not let him sign in and told him he was "short of work." (Tr. 88). Johnson further elaborated that he arrived at 4:00 a.m. and that others were allowed to sign in and work while he was told to wait. This practice continued until approximately sometime before 9:00 a.m. when he was told he could enter and work. Without question, denying work, (even if it amounts only to one half days work), to an employee because he or she voiced open support for the Union is objectionable conduct. This objectionable conduct especially when viewed in the aggregate with other objectional conduct discussed herein warrants sustaining the Union's objection.

8. Objection 19

The Employer, its supervisors, agents and/or supporters interfered with the fair operation of the election and affected the outcome of the election by providing the Union with an *Excelsior* list that contained numerous inaccuracies and omissions,

which prevented the Union from contacting unit employees, thereby interfering with the employees' Section 7 rights.

Objection 19 revolves around the issue that the voter list provided to the Union was defective and did not provide accurate contact information of eligible voters. (Union Exh. 4). The Union asserted that in fact 132 out of the 644 addresses on the voter list were incorrect addresses or over 20 percent of the eligible voters. (Union Exh. 5). The Employers argue that this Objection should be overruled. In this vein, the Employers assert that the Union's proof is deficient surrounding this issue because the Union's "bad address" list was incomplete, it had other information other than incorrect addresses (including admittedly good addresses), the list was used to determine whether to make a return visit to a home, and the Union could not prove that it in fact ever notified Employers of any deficiency in the addresses. (Tr. 267, 270, 278, 283-287). I agree and find that the proof offered by the Union regarding the list is insufficient to establish that the Employers interfered with the fair operation of the election. In fact, Union official Valenzuela admitted the inherent difficulties with accurate addresses even without any employer interference. He noted the work surrounding the addresses "is very difficult, and it's tough. We have -- we have people that live in garages. We have people that live in cars. I mean, it was really -- really different." (Tr.65). There is no proof to establish that any alleged incorrect and/or incomplete information was attributable to the Employers but rather was merely the result of the inherent difficulties with accurate addresses as Valenzuela testified. I concur with Employers that this Objection should be overruled.

CONCLUSIONS OF LAW

By maintaining and enforcing a no-union discussion rule, by threatening employees with job loss, facility closing, loss of work and/or the closing or loss of accounts if they voted in favor of the Union, and by threatening to call the police on an employee, the Respondents engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

The unfair labor practices committed by Respondents affect commerce within the meaning of Section 2(6) and 2(7) of the Act.

The Employers' conduct as alleged in Union objections 1, 12, 13, and 14, was objectionable and tended to interfere with the election. Union objections 9, 10, 11, and 19 are overruled. The Respondent's unfair labor practices and objectionable conduct warrant setting aside the election.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I shall order them to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

By maintaining and enforcing a no-union discussion rule, by threatening employees with job loss, facility relocation or closing, loss of work and/or the closing or loss of accounts if they voted in favor of the union, and by threatening to call the police on an employee, the

Respondents engaged in unlawful practices and Respondents shall be ordered to cease and desist from these actions.

I will order that the Respondents post a notice in the usual manner, including electronically to the extent mandated in *J. Picini Flooring*, 356 NLRB 11 (2010).

The General Counsel has also requested a notice reading. I will also order that the Respondents hold a meeting or meetings, scheduled to have the widest possible attendance, at which the attached notice marked "Appendix" shall be read to employees in the presence of a Board agent in both English and Spanish. This remedial action is intended to ensure that employees "will fully perceive that the Respondent[s] and its managers are bound by the Act's requirements." *Federated Logistics & Operations*, 340 NLRB 255, 258 (2003), enfd. 400 F.3d 920 (D.C. Cir. 2005).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondents, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) maintaining and enforcing a no-union discussion rule;

(b) threatening employees with job loss, facility relocation or closing, loss of work and/or the closing or loss of accounts if they vote in favor of the union; and

(c) threatening to call the police on an employee;

(d) in any like or related manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed in 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 its facility in Wilmington, California, copies of the attached notice marked "Appendix"[7] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondents' authorized representative, shall be posted by the

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

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

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 Respondents customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondents 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 Respondents have gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 28, 2016.

(b) Read the Notice to Employees in English and in Spanish to assembled employees at its Wilmington facility referenced above during paid working time.

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

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

Dated, Washington, D.C. September 9, 2019

Dickie Montemayor
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT maintain and/or enforce a no-union discussion rule.

WE WILL NOT threaten employees with job loss, facility relocation or closing, loss of work and/or the closing or loss of accounts if they vote in favor of the union.

WE WILL NOT threaten to call the police on an employee because he/she exercises his/her rights guaranteed under Section 7 of the Act.

CALIFORNIA CARTAGE COMPANY, LLC; ORIENT TALLY COMPANY, INC; CORE EMPLOYEE MANAGEMENT, INC.; NFI CALIFORNIA CARTAGE HOLDING COMPANY, LLC; CALIFORNIA CARTAGE DISTRIBUTION, LLC; CALIFORNIA TRANSLOAD SERVICES, LLC; ORIENT TALLY COMPANY, INC., A SINGLE EMPLOYER, AND NEXEM ALLIED LLC D/B/A CORE EMPLOYEE MANAGEMENT, INC., A JOINT EMPLOYER, CALIFORNA TRANSLOAD SERVICES, LLC; SUCESSOR EMPLOYER

(Employer)

Dated _____ By _____

(Representative) (Title)

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

U.S. Courthouse-Spring Street, 312 N. Spring Street, Suite 10150, Los Angeles, CA 90012
(213) 894-5200, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/21-CA-190500 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (213) 634-6502.