Industrial Hard Chrome, Ltd., Bar Technologies LLC, Fluid Power Manufacturing *and* United Steelworkers of America, AFL–CIO, CLC. Case 13–CA–43487

March 31, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On February 27, 2007, Administrative Law Judge George Alemán issued the attached decision. The Respondent filed exceptions and a supporting brief; the General Counsel filed an answering brief. The General Counsel filed cross-exceptions and a supporting brief; the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as amended,[2] and to adopt the recommended Order as modified.[3]

We have amended Conclusion of Law 2 and the remedy section of the judge's decision, and modified the judge's recommended Order, as set forth below, to delete Quality Control Inspector Phanvilay (Hit) Sundara from the judge's list of unlawfully discharged employees entitled to reinstatement and backpay.[4] We have substituted a new notice to conform to the modified Order.

AMENDED CONCLUSION OF LAW

We substitute the following for Conclusion of Law 2.

"2. By discharging employees Paris Figueroa, Heraclio Arizaga, Adan Guerra, Leonel Hernandez, Eduardo Nava, David Nuñez, Silverio Corona, Juan Peña, Porfirio Huerta, Ramon Gonzalez, Juan Nieves Jr., Jesus Salgado, Boualoth Hansana, Agustin Morales, Saybandith K. Sundara, Oudavone Hansana, David Soto, Southone Cavan, and Ruben Romero for engaging in a lawful work stoppage, the Respondent violated Section 8(a)(1) of the Act."

AMENDED REMEDY

We substitute the following for the second paragraph of the remedy section of the judge's decision.

"To remedy its unlawful discharge of Paris Figueroa, Heraclio Arizaga, Adan Guerra, Leonel Hernandez, Eduardo Nava, David Nuñez, Silverio Corona, Juan Peña, Porfirio Huerta, Ramon Gonzalez, Juan Nieves Jr., Jesus Salgado, Boualoth Hansana, Agustin Morales, Saybandith K. Sundara, Oudavone Hansana, David Soto, Southone Cavan, and Ruben Romero, the Respondent shall be required to, within 14 days from the date of the Order, offer them reinstatement to their former positions, or, if their positions no longer exist, to substantially equivalent positions, without prejudice to the rights and privileges they previously enjoyed."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Industrial Hard Chrome, Ltd., Bar Technologies LLC, and Fluid Power Manufacturing, Geneva, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Within 14 days from the date of the Board's Order, offer Paris Figueroa, Heraclio Arizaga, Adan Guerra, Leonel Hernandez, Eduardo Nava, David Nuñez, Silverio Corona, Juan Peña, Porfirio Huerta, Ramon Gonzalez, Juan Nieves Jr., Jesus Salgado, Boualoth Hansana,

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's factual findings, we note that, contrary to the Respondent's claim that the judge did not "even mention" its June 30, 2006 letter to employees purportedly "dispelling" a rumor that they had been fired, the judge, in sec. II,A,2,. of his decision, both addressed the letter and rejected the Respondent's argument.

[2] No exceptions have been filed to the judge's conclusions that the Respondent violated Sec. 8(a)(5) by unilaterally implementing an EAP program and Sec. 8(a)(1) by engaging in unlawful surveillance.

In adopting the judge's conclusion that the Respondent, through General Manager Parker, violated Sec. 8(a)(1) by telling employees represented by the Union that they had no union representation, we find it unnecessary to pass on whether the Respondent also violated Sec. 8(a)(1) through Production Manager Peterson's statement to employee Salgado that the Union was not allowed on company property.

In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(1) by discharging employees for engaging in a lawful work stoppage, we find it unnecessary to pass on whether the Respondent also violated Sec. 8(a)(3) by the discharges. Finding the 8(a)(3) violation would not materially affect the relief (i.e., reinstatement and make-whole remedy) for violating Sec. 8(a)(1).

[3] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[4] The record established that Hit did not join the work stoppage, but was instead released from work a few hours later because, with the work stoppage, there was no production for him to inspect. He called in sick over the next 2 days and then joined his coworkers on the picket line. There is no evidence that Hit was ever discharged. Because the General Counsel has not established that Hit was treated unlawfully, Hit is not entitled to any remedy.

Agustin Morales, Saybandith K. Sundara, Oudavone Hansana, David Soto, Southone Cavan, and Ruben Romero full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed."

2. Substitute the following for paragraph 2(b).

"(b) Make Paris Figueroa, Heraclio Arizaga, Adan Guerra, Leonel Hernandez, Eduardo Nava, David Nuñez, Silverio Corona, Juan Peña, Porfirio Huerta, Ramon Gonzalez, Juan Nieves Jr., Jesus Salgado, Boualoth Hansana, Agustin Morales, Saybandith K. Sundara, Oudavone Hansana, David Soto, Southone Cavan, and Ruben Romero whole for any loss of earnings and other benefits resulting from their unlawful terminations in the manner set forth in the remedy section of the decision."

3. Substitute the attached notice for that of the 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 threaten you with discharge for engaging in protected concerted activity.

WE WILL NOT seek to undermine your support for the United Steelworkers of America, AFL–CIO, CLC, which is your duly certified collective-bargaining representative, by telling you that you do not have union representation; and WE WILL NOT, without justification, take photographs of your lawful picketing activities or engage in any other surveillance of your protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against you for engaging in a protected work stoppage to protest supervisory mistreatment of employees, or for engaging in any other protected concerted activity.

WE WILL NOT institute and implement an employee assistance plan (EAP) without first giving the United Steelworkers of America, AFL–CIO, CLC, which is your exclusive bargaining representative, prior notice and an opportunity to bargain over such a plan.

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

WE WILL, on request from the Union, rescind the EAP program we instituted on June 13, 2006, and bargain in good faith with the Union regarding the institution of any such program.

WE WILL, within 14 days from the date of this Order, offer Paris Figueroa, Heraclio Arizaga, Adan Guerra, Leonel Hernandez, Eduardo Nava, David Nuñez, Silverio Corona, Juan Peña, Porfirio Huerta, Ramon Gonzalez, Juan Nieves Jr., Jesus Salgado, Boualoth Hansana, Agustin Morales, Saybandith K. Sundara, Oudavone Hansana, David Soto, Southone Cavan, and Ruben Romero full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to the seniority or any other rights or privileges they previously enjoyed.

WE WILL make Paris Figueroa, Heraclio Arizaga, Adan Guerra, Leonel Hernandez, Eduardo Nava, David Nuñez, Silverio Corona, Juan Peña, Porfirio Huerta, Ramon Gonzalez, Juan Nieves Jr., Jesus Salgado, Boualoth Hansana, Agustin Morales, Saybandith K. Sundara, Oudavone Hansana, David Soto, Southone Cavan, and Ruben Romero whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Paris Figueroa, Heraclio Arizaga, Adan Guerra, Leonel Hernandez, Eduardo Nava, David Nuñez, Silverio Corona, Juan Peña, Porfirio Huerta, Ramon Gonzalez, Juan Nieves Jr., Jesus Salgado, Boualoth Hansana, Agustin Morales, Saybandith K. Sundara, Oudavone Hansana, David Soto, Southone Cavan, and Ruben Romero, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done, and that the discharges will not be used against them in any way.

INDUSTRIAL HARD CHROME, LTD., BAR TECHNOLOGIES LLC, FLUID POWER MANUFACTURING

Ed Castillo and *Elizabeth Cortez, Esqs.*, for the General Counsel.
Bruce Mills and *Julia Proscia, Esqs.,* for the Respondent.
Anthony Alfano, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE ALEMÁN, Administrative Law Judge. This case was tried in Chicago, Illinois, on October 13–6, 2006.[1] The unfair labor practice charge was filed by United Steelworkers of America, AFL–CIO, CLC (the Union) on July 7, and amended on August 15. A complaint was thereafter issued on August 18, by the Acting Regional Director for Region 13 of the National Labor Relations Board (the Board) alleging that Industrial Hard Chrome, Ltd., Bar Technologies LLC (Bar Tech), Fluid Power Manufacturing, a single employer (herein the Respondent), had violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act).

Specifically, the complaint alleges that the Respondent violated Section 8(a)(1) of the Act by threatening employees with discharge because they engaged in union or other protected concerted activity; by telling them they did not have union representation, and by engaging in unlawful surveillance of their union activities. It further alleges that the Respondent violated Section 8(a)(3) and (1) by verbally, and thereafter in writing, terminating several employees who walked off the job to protest their mistreatment by Daniel Bustamante, an admitted supervisor and agent of the Respondent. Finally, the complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally, and without prior notice to the Union, implementing an Employee Assistance Program.[2] In a timely-filed answer, the Respondent has denied the above-complaint allegations.

All parties at the hearing were afforded a full and fair opportunity to be heard, to present oral and written evidence, to examine and cross-examine witnesses, and to argue orally on the record.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is an Illinois corporation with an office and place of business in Geneva, Illinois, where it is engaged in the business of manufacturing of industrial products for use in hydraulic systems. During the past calendar year, a representative period, the Respondent purchased and received at its Geneva facility goods and services valued in excess of $50,000 from points located outside the State of Illinois. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Factual Background

1. The Employee Assistance Program (EAP)

The Respondent has three operational divisions at its Geneva facility—Industrial Hard Chrome (IHC) and Fluid Power Manufacturing, both of which are situated in the same building, and Bar Technologies, located in an adjoining facility. Bar Technologies' function is to acquire the raw material needed for its production process from steel mills and grind and convert it into round steel shafts. The steel shafts are then sent to IHC where it is hardened and plated or polished, and sold in such fashion to clients of Respondent, or sent to Fluid Power where it is cut or machined to meet a customer's particular specifications.

Fred Parker is the Respondent's superintendent and general manager and has overall responsibility for its operation. Richard Peterson is vice president of production in charge of operations and manufacturing; James Segerson is vice president of sales and marketing; Bruce Busse is Respondent's plant manager; and Daniel Bustamante a first-shift supervisor. Betty Axelsen is employed in human resources, although the record does make clear what her position is in that department.

The Respondent and the Union began contract talks following the Union's certification in April 2005. At the outset, the Union's bargaining committee consisted of Union Representatives Mark Trone and Alfredo Martinez, and included employees Paris Figueroa, a second-shift machine operator with IHC, Jesus Salgado, a Bar Tech employee, and Luigi Saballa. When Saballa was terminated in June 2005, he was replaced on the committee by Steve Swanson, a Bar Tech maintenance employee.

At some point during the negotiations, sometime in early March according to Trone, the parties began addressing the various company policies in effect, one of which was its drug and alcohol policy. On March 3, Parker sent Trone an e-mail containing a copy of the Respondent's policy statements and plant rules as attachments. On receipt of the documents, Trone reviewed the drug and alcohol policy that came as an attachment, and found that the Respondent did not have an "employee assistance plan" (EAP) for employees. During a March 13 bargaining session, Trone asked Parker if the Respondent had an EAP program for employees, and described to him the benefits of such a program. Parker answered that the Company's health insurance program addressed such employee issues and indicated that he did not favor instituting an EAP program.

Trone testified that the next time the EAP program was raised as an issue occurred following a fatal employee accident at the facility on May 31. Trone recalls that on May 31, he was

[1] All dates are in 2006, unless otherwise indicated.

[2] The Union was certified on April 21, 2005, as the exclusive collective-bargaining representative of the following employees of the Respondent:

> All full-time and regular part-time production and maintenance employees employed by the Employer (Industrial Hard Chrome Ltd., Bar Technologies, LLC, and Fluid Power Manufacturing) at its facilities currently located at 501 Fluid Power Drive, Geneva, Illinois; but excluding all other employees, office clerical employees, and guards, professional employees, and supervisors as defined by the Act.

involved in contract talks with another company when he received a phone call from Parker informing him of the accident. As negotiations were scheduled for June 1, Trone asked for a postponement of the negotiations in light of the accident, and Trone agreed. The next bargaining session was scheduled for June 8, but a few days before June 8, Trone received a call from Parker again asking for a postponement because the accident was still fresh in the minds of employees. In the days following the accident, the Respondent called in crisis counselors from TriCity Family Services, a county agency, to help employees cope with the death of their fellow coworker.

On June 13, Trone received an e-mail from Parker reminding Trone about a proposed meeting scheduled for June 23. In his e-mail, Parker told Trone that as a result of the accident, the Respondent realized it did not have a "formal" EAP program in place, and that it had, consequently, discussed and agreed to have TriCity Family Services launch an EAP program for employees that same week. A copy of the agreement entered into between the Respondent and TriCity Family Services that same day, June 13, was received into evidence as General Counsel's Exhibit-14. In his memo, Parker admits being advised by legal counsel that the EAP program was a matter that needed to be negotiated with the Union, but that because of the Company's "need for the program and the critical timeliness, we are confident the Union will not have an issue." (GC Exh.-2). Trone testified that at no time before implementing the EAP program did the Respondent ever inform him or the Union of the Kane County agency referred to by Parker in his memo, nor had it notified the Union of the services that would be available to employees under the program. Trone replied to Parker's e-mail, and sent Martinez a copy, advising that either he or Martinez would be available to meet on June 23. (Tr. 377–378; GC Exh.-2.) On June 14, employees were informed of the EAP program via a memo from Parker (GC Exh.-16), and orientation sessions were held that day.

A bargaining session was held on June 23, which Martinez, but not Trone, attended. At this meeting, Parker gave Martinez a brochure and related information about the EAP program, and told Martinez that the Respondent had instituted the program as result of the industrial accident. Martinez did not comment on the EAP program, and simply told Parker that he and his committee members would look it over and furnish a copy to Trone. Further, in response to a prior proposal from the Union, Parker provided Martinez at this meeting with a counterproposal that, inter alia, called for the establishment of an EAP for employees, this despite the fact that the Respondent had already contracted with TriCity for the implementation of such a program more than a week earlier, on June 13. (Tr. 337–339; see GC Exh.-18 at p. 28.) The parties agreed to meet again on June 26. Later that day, Martinez called Trone to update him on what had occurred, informed him of the EAP literature, and mentioned that Parker had stated that the EAP program had been implemented. Trone recalled speaking with Martinez, and feeling shocked on hearing that the Respondent had gone ahead and implemented the EAP program because the Respondent had not bargained with the Union over it. Trone received the EAP literature from Martinez on the morning of June 26, before the scheduled bargaining session. At the June 26 meeting, Parker asked Trone, who was in attendance, if he had had a chance to read the EAP literature he had given Martinez. Trone answered he had not as he had just gotten it that morning. As of the hearing date, the parties had not yet reached agreement on an initial contract. Trone admits that the Union has not offered a counterproposal to the EAP language in the Respondent's proposal contained in General Counsel's Exhibit 18.

2. The work stoppage

The record reflects that the Respondent maintained two work shifts, from 6 a.m.–6 p.m., and from 6 p.m.–6 a.m. Employees in each shift received four 15–minute break periods, the start and end of which were signaled by the sound of a bell. (See R. Exh.-7.) Several employees testified as to the practice regarding the break periods. Figueroa, a machine operator on the second shift at IHC, testified that employees usually began heading toward the break area some 2 to 3 minutes before the break bell rang in order to wash up. (Tr. 26). Heraclio Arizaga, also a machine operator on the second shift at IHC, similarly testified to leaving for break a few minutes before the bell rang in order to use the washroom, but that he did not do so that often. He further testified that at no time before June 23, was he spoken to or told to stop his occasional practice of leaving for break before the break bell rang. (Tr. 108.) IHC machine operator, Eduardo Nava, testified that he and others had been leaving for break to wash up five minutes before the break bell rang ever since November 2004, when he first began working for Respondent. (Tr. 278).

Bustamante became a supervisor on the second shift in May 2005. During his tenure, Bustamante was reassigned from second shift to the first shift, and then back to the second shift on Monday, June 19. On returning to the second shift, Bustamante supervised some 14 employees. He contends that from the first day back to the second shift, he noticed that employees were returning from their breaks after the bell had sounded for them to return. He explained that the policy regarding breaks was that employees were to take no more than 15 minutes for their break periods. However, he also testified that during his 1 year as supervisor on the second shift, he frequently observed employees leaving for break "a couple of minutes" before the break bell rang, but never disciplined any employee for these alleged infractions of the rule. Bustamante claims that at no time during his 1 year as supervisor did he ever observe any first-shift employees leaving early for, or returning late from, their scheduled 15-minute breaks, and that it was the second-shift employees who engaged in the conduct (Tr. 397–398, 425).

Bustamante claims he told the second-shift employees that first day back on second shift that they were taking too long on breaks and that they were not to take anything more than 15 minutes for their breaks. He testified that while he had not made much of the fact that employees had, in the past, left a few minutes early and returned a few minutes late from their breaks, it was only after these few minutes were lengthened to about 5 minutes that he decided to begin a stricter enforcement of the 15-minute break period. (Tr. 427, 429.) The employees, however, continued the practice of going on break a few minutes early and returning a few minutes later from breaks for

several more days. On Thursday, June 22, Bustamante claims he again spoke to the employees and cautioned that he would issue written warnings to them if they continued with the practice. On Friday, June 23, presumably after noticing that employees had not heeded his warning, Bustamante prepared written warnings to be issued to all second-shift employees. Before doing so, he discussed the matter with Busse on the following Monday, June 26, who agreed that Bustamante should proceed with the warnings. (Tr. 399.) Busse signed off on the warnings (See R. Exh.-8). Attached to the warnings was a memo prepared by Busse on June 26, and posted next to the employee timeclock, explaining the break policy, advising that it had come to his attention that employees were not adhering to the policy, that they should consider the memo to them as a warning, and cautioning that they could face "further disciplinary action, up and including termination" if they disregarded the warning and continued with their practice. In all, some 12 employees had written warnings prepared on them.

Bustamante contends that when he tried to distribute them to the affected employees, the latter refused to sign or accept the warnings. For example, he explained that when he tried to give employee Paulo Lazarini the warning, Lazarini declined to accept it, claiming that it was unfair. Lazarini, according to Bustamante, then called other employees who gathered around Bustamante's workstation. Bustamante then told the other employees that since they were already present he would give them their warnings also. The employees, however, declined to accept them and asked to speak with Busse. The employees accused Bustamante of trying to intimidate them and of being unfair, and insisted on speaking with Busse. Bustamante then called for Busse, and learned that he was in Axelsen's office. When he contacted Axelsen, he asked her to send Busse, along with Parker, down to speak with the employees. (Tr. 405.) Busse arrived some 5 minutes later, accompanied by Parker.

On meeting with the employees, Busse reminded employees of the 15-minute break policy. According to Bustamante, several employees complained that he (Bustamante) was not being fair, and was simply trying to intimidate and pick on them by issuing them warnings. Busse purportedly replied that rules are rules and must be followed. The employees also told Busse that Bustamante was disrespectful to them, and when Busse asked how the latter was being disrespectful, one employee replied that Bustamante regularly told them he was the boss and could do whatever he wanted. Busse purportedly told employees they had elected a union to represent them, and that if they had a problem they should have the Union discuss their concerns with him and Parker. Busse then agreed not to issue the warnings, but instructed employees that they were not to abuse the break privilege by exceeding their 15-minute break period. The employees agreed they would honor the policy and returned to work. (Tr. 406–407.)

Parker gave a similar account. He recalls being present when Busse spoke to the employees. Busse, he explained, told employees during that encounter about the 15-minute break policy and that warnings had indeed been prepared for them. He contends that employees began complaining that Bustamante was treating them unfairly regarding the break periods, but Busse reminded them that this was the rule, and that if they had a problem with it, they should take it to the Union that they selected to represent them. At that point, Busse looked at his watch and remarked that the employees had already taken up 45 minutes of his time and that they should now return to work. The employees complied.

The following day, June 27, an incident occurred between Bustamante and Arizaga. Arizaga was supervised by Bustamante from the start of his shift at 6 p.m. until midnight, and by Supervisor Ben Campos from midnight to 6 a.m. Arizaga testified that on June 27, he arrived for work at 5:45 p.m. and went directly to his locker to retrieve his steel-toed shoes and waited for the bell to ring announcing the start of the shift. When the bell sounded, Arizaga, as was the practice, walked to Supervisor Bustamante's station, accompanied by another employee, Oscar, to get his earplugs and gloves. Arizaga claims that as he and Oscar walked by Bustamante, the latter remarked aloud in Spanish, "There's a bunch of crybabies, Who is the worst crybaby of all?" Arizaga took personal offense at Bustamante's remark, believing it was being directed at him, and asked Bustamante if he intended the remark to be for him, and that if Bustamante had a problem with him, the latter should let Arizaga know and discuss the matter with him directly without calling him names. Bustamante, according to Arizaga, replied that Arizaga knew why Bustamante was calling him a "cry baby," to which Arizaga replied that he did not know. Arizaga claims that Bustamante was, by now, becoming loud and went on to say that Arizaga should "be a man" and not be "a little girl," and that Arizaga should tell the truth and admit that he knew what Bustamante was referring to. Arizaga claims that he too began raising his voice and then began walking away, mumbling under his breath as he did so. Bustamante, believing that Arizaga had said something about him, angrily approached Arizaga and asked what he had said. Arizaga responded that he had not said anything and was simply going to his work station. Bustamante, he contends, apparently did not believe Arizaga and, as the latter continued heading towards his workstation, Bustamante followed him and, in a loud voice, insisted on knowing what Arizaga had said. When Arizaga answered that he was going back to his workstation, Bustamante told him, "You know what, just go home, you're fired because with your little attitude, I can't take it."

At one point during their exchange, Bustamante, according to Arizaga, bumped his chest into Arizaga's chest, which Arizaga took as a threat and prompted him to back away from Bustamante. Arizaga then turned to several employees who were nearby and commented that Bustamante was firing him for no reason. Bustamante responded by saying that he could fire any "dumb asses" that he wanted to. Arizaga took offense at Bustamante's description of him as a "dumb ass," and headed towards the timeclock. He contends that as he was heading to the timeclock, employee Nava and other employees approached and asked him not to clock out, that they had had enough and wanted to speak with someone higher up in management than Bustamante. At some point, Bustamante allegedly approached Arizaga again near the timeclock, and got real close to him, enough so that, according to Arizaga, he could feel Bustamante spraying him with saliva as he told Arizaga that the latter would remember Bustamante as he was going to

make sure Arizaga got fired. (Tr. 118–120.) Arizaga claims that employee Nava was nearby and would have heard Bustamante's remark. Arizaga claims he did not respond, and that, a short while later, quality control employee Phanvilay Sundara, known to employees simply as Hit and apparently a friend of Bustamante,[3] came over and pulled Bustamante aside to speak with him. Arizaga claims that following "Hit's" conversation with Bustamante, the latter returned a short while later and appeared calm. According to Arizaga, Bustamante, in a calm voice, told employees he was giving them 5 minutes to return to work. Arizaga assumed it meant he too was to return to work, although he still believed he had been fired. Figueroa, however, purportedly told Bustamante that they were not returning to work until they spoke with someone with more authority than Bustamante.

Arizaga contends that not long afterwards, as Bustamante passed by him presumably on his way to the restroom, he again called Arizaga a "cry-baby" or "cry-girl" or something to that effect, and that, while he did not respond for fear of further provoking Bustamante, Hit, who apparently overheard Bustamante, commented to another employee named Gino Velasquez that this was not how a supervisor should react to an employee. (Tr. 125.) After that exchange, he and the other second-shift employees went outside the facility and sat around some benches in the break area to wait for some higher-management official to come and speak with them.

Figueroa claims he witnessed some of what occurred between Arizaga and Bustamante that day. Thus, he testified that he was walking behind Arizaga and overheard the two arguing loudly. He contends that at one point during their exchange, Arizaga told Bustamante, "If you have the balls, tell it to my face if you are talking about me," and Bustamante replied, "Yes, I'm talking about you, and you know what I am talking about." (Tr. 30.) This exchange continued until Arizaga told him he was going to his workstation and began walking away. As he did so, Bustamante, believing that Arizaga had said something about him, approached Arizaga and asked what he had said under his breath. Arizaga answered that he had only commented that he was returning to work, but Bustamante refused to accept his answer and insisted on knowing what, if anything else, Arizaga might have said. Figueroa claims that at this point, Bustamante got up close to Arizaga, about 1 inch away, and told the latter that he would fire him during the weekend and threatened that Arizaga would not be there tomorrow. When Arizaga asked why he wanted to fire him, Bustamante answered only, "You know why." According to Figueroa, this latter exchange was provoked by Bustamante. Figueroa claims he tried to convince Bustamante to discuss the matter with Busse the following day and not to fire Arizaga. Bustamante, however, did not respond to Figueroa's suggestion.

In the interim, employees began gathering around and one employee, Porfirio Huerta, told Figueroa in Spanish, which the latter translated to Bustamante in English, that the employees wanted to speak with the owner, and that if they were not allowed to speak with the owner, the employees would walk out. Bustamante purportedly told employees that no one was going to come or would listen to them, and that, if they walked out, they would all lose their jobs. Figueroa explained that, in threatening to walk out, employees were reacting to Bustamante's treatment of Arizaga and to what they perceived to be Bustamante's general mistreatment of employees. He recounted how employees disapproved of Bustamante's regular practice of threatening them with discharge if they did not do as he asked. (Tr. 34–35, 39.) On hearing Bustamante's threat, the employees, totaling about 18 in number, walked away and congregated around the timeclock for some 15 minutes. Bustamante then came over and told employees that Parker would be coming to speak with them. Employees at that point exited the building and went over to the break or picnic area to wait for Parker. Figueroa, like Arizaga, recalls seeing Hit on several occasions trying to calm down Bustamante.

Hit confirmed Arizaga's and Figueroa's testimony. Thus, he testified to witnessing an exchange between Bustamante and Arizaga as the latter was walking to his work station, saw Bustamante get real close to Arizaga to the point where Bustamante's chest touched Arizaga's shoulder, and heard Bustamante tell Arizaga in a loud voice, "Be a man, don't be a woman, tell me the truth." Hit pulled Bustamante aside, asked him what was doing, and then tried to calm him down. Bustamante, he contends, told him that Arizaga had said something and he wanted to know what it was. When Bustamante tried to go back to Arizaga, Hit pulled him back and, in the presence of employee Gino Velasquez, told Bustamante, "Relax, okay, your temper is [getting] higher and higher." Bustamante again explained that Arizaga had said something to his coworker, Oscar, but that he, Bustamante, believed it was really directed at him and he wanted to know what it was Arizaga had said. Bustamante, according to Hit, admitted that Arizaga had not said anything to him directly. Hit then offered to go talk to the employees to encourage them to return to work, but Bustamante stated that they were waiting for Parker or Petersen to come and talk to them, but that he did not believe either would come as it was too late in the day. According to Hit, Bustamante's temper again flared up and he told Hit to go tell the employees, who Bustamante described as a "bunch of fucking crying baby and one fucking woman," to return to work and he would forget what happened. Hit again tried to calm Bustamante, and asked Velasquez if he had heard what Bustamante had said about the employees, and the latter replied he had. Hit then left to ask Arizaga what had transpired. Bustamante, however, approached Hit and instructed him to return to work because Parker and Petersen were coming, and if they found Hit with the group, they would fire him. Hit agreed and returned to work. At one point during this entire exchange, Hit recalled Bustamante telling Arizaga that he should return to work or he will be fired. He further recalled another incident Bustamante had with another employee, Luigi, about a year earlier (the "Luigi incident"), during which Bustamante began yelling at Luigi to return to his workstation or he would be fired. Hit contends that during that earlier incident, he again had to calm down Bustamante. (Tr. 242–244, 247–248, 250.)

[3] Hit, an inspector at the facility, testified that he and Bustamante often had lunch together and that he considered himself Bustamante's friend (Tr. 240–241).

Bustamante, not surprisingly, gave a somewhat different version of the incident with Arizaga. He testified that as Arizaga and his coworker Oscar passed by his supervisory workstation, Arizaga commented aloud to Oscar, "Those damn tattle-tale, crying women, they always got to do it." On hearing this, Bustamante remarked, "Yeah, yeah, you're right, you know, those damn, tattle-tale women, they always got to do it." Arizaga, he contends, turned to him and said, "[I]f you have something to say, go ahead and say it," to which Bustamante replied, "You know what you are saying." Arizaga then asked Bustamante, "Did I say your name?," and Bustamante replied, "No, but I know you are talking about me, so cool it." Bustamante claims that Arizaga began arguing with him at that point, and that he too began to argue with Arizaga, but that he soon thereafter told Arizaga to go back to work, and the latter complied. Bustamante, however, contends that as he was returning to work, Arizaga, called him a "fucking dude." When he asked Arizaga to repeat what he had said, Arizaga answered he had said something else, and did not mean it, at which time Bustamante allowed him to return to work.

Bustamante claims that after Arizaga left for his workstation, other employees gathered around him and began complaining that he was picking on Arizaga. Arizaga, he contends, returned seconds later and Bustamante told him, "I thought I just sent you to your work station." Arizaga answered that he wanted to be part of the meeting, and Bustamante replied that he had not called any meeting and that none was taking place. Arizaga purportedly replied that he was going to stick around anyway. Bustamante then directed Arizaga to return to work and if he didn't, he was going to send Arizaga home. Arizaga asked, "Oh, are you firing me?," and Bustamante answered he was not, but that he would send Arizaga home if he refused to return to work. Bustamante claims that while he has authority to suspend an employee for a day for breaking company rules, he lacks authority to fire anyone. (Tr. 409.) There is, however, no evidence to suggest that employees knew that Bustamante lacked such authority.

Bustamante contends that Arizaga then began, and thereafter continued, arguing with him, at which point he directed Arizaga to go home and to return the following day and speak with Busse. Arizaga purportedly turned to the other employees and told them, "You guys saw it, he fired me, you guys are my witnesses." (Tr. 411.) Arizaga then began heading towards the timeclock, followed by Bustamante. As they did so, other employees followed them, explaining to Bustamante that they too were going along because Bustamante had been picking on Arizaga and that, tomorrow or some other day, it might be one of them that gets picked on by Bustamante (Tr. 411). Bustamante purportedly told the employees to return to work, that this was between him and Arizaga, but the employees responded, "No, this has to do with all of us, we're not moving [or] going back to work until you call Parker or Busse." Bustamante told employees he was not going to call either of them because employees had already spoken to Busse the day before, that there was nothing more for either Parker or Busse to say to them, that they should return to work, and that they risked losing their jobs if they did not do so. (Tr.434–435.) Instead of returning to work, the employees left the facility and congregated outside in the break or picnic area situated between IHC and the Bar Tech facility. Bustamante admits becoming a little angry or irritated during this incident, but denies that he became very angry or explosive. He does, however, admit that Hit tried to calm him down by telling him to "cool it" as employees began heading towards the timeclock with Arizaga. (Tr. 412.)

I credit Arizaga and Figueroa over Bustamante and find that it was the latter who provoked an argument with Arizaga by calling him a "cry-baby" as the latter went to Bustamante's workstation to obtain his equipment and supplies. By either Arizaga's or Bustamante's account, it is clear that it was Bustamante who interjected himself into a conversation Arizaga was having with a fellow employee. Bustamante, according to his own account, simply assumed Arizaga was referring to him when the latter purportedly made the "crying women" comment to a coworker, and initiated the argument that ensued by accusing Arizaga of talking about him. Thus, Bustamante's own testimony makes clear that he did not know, and simply assumed, that he was the subject of the personal conversation Arizaga was having with his coworker. I do not, in any event, place any credence in Bustamante's testimony regarding his exchange with Arizaga. Bustamante came across as unreliable and insincere. His claim, for example, that he only became "a little bit irritated," or "a little bit aggravated but not angry" during his exchange with Arizaga, is simply not credible, and is at odds with Hit's description of Bustamante as being very loud and whose temper continued to rise and became very high during the incident. Hit, as noted, had to pull Bustamante away on at least two occasions to try and calm him down. In sum, Bustamante's testimony regarding his exchange with Arizaga is rejected. Bustamante's depiction of himself as being only a "bit irritated" is also disputed by employee Nava who credibly described Bustamante as being "very, very upset," "very angry," and "yelling real loud" that he wanted to fire Arizaga. (Tr. 291, 296.) I find, instead, that it was Bustamante who initiated and provoked the exchange by interjecting himself in Arizaga's conversation with his coworker and calling Arizaga a "cry-baby" or some other inappropriate name. I am also convinced that, as credibly testified to by Arizaga and Hit, Bustamante, at one point during his exchange with Arizaga, made physical contact with Arizaga. The record does not make clear what, if anything, might have provoked Bustamante to confront Arizaga, but it would not be too far-fetched to surmise that Bustamante might have been unhappy with the fact that the warnings he wanted to issue to the second-shift employees the day before had been rescinded by Busse. Regardless of the reason for Bustamante's provocation of Arizaga, it is clear that it was this particular incident, which the second-shift employees viewed as abusive behavior by Bustamante, which prompted employees to stop working, and to congregate outside in the break area, until they had a chance to address their concerns about Bustamante with higher-management officials.

Bustamante claims that, once outside, he told employees that if they refused to return to work, they would have to clock out and leave. The employees, however, declined to punch out, insisting instead that they were staying put until they spoke with Parker or Busse. Bustamante then went inside to try and

figure out what to do next. He got hold of employee Gino Velasquez to serve as a witness in the event something else transpired with the employees. He contends that when he returned to the timeclock area, Arizaga complained that Bustamante had pushed him and that he had witnesses to the event. Other employees present, according to Bustamante, also claimed to have seen it and that Bustamante could call the police if he wanted to because he, not them, would get into trouble. Bustamante denied ever touching or hitting Arizaga, but admits becoming angry and, at one point, standing only about 6 inches from Arizaga. (Tr. 408–409, 414.)

After he and other employees left the facility and gathered in the break area, Figueroa called Union Representative Martinez to report what had occurred between Arizaga and Bustamante and on what employees were doing. Martinez instructed him to call the police and report the incident, and agreed to go to the facility. Martinez confirmed receiving a call from Figueroa complaining that things were heating up rapidly at the facility, and that Bustamante was harassing employees and had assaulted an employee. Martinez told Figueroa he would be at the facility in about 45 minutes. Martinez received a second call from Figueroa while on his way to the facility during which Figueroa identified Arizaga as the employee who had allegedly been assaulted and mentioned that employees were milling around in the company parking lot. While waiting for Martinez to arrive, Figueroa went to the Bar Tech facility and notified Jesus Salgado, another union representative, of what was transpiring. Salgado agreed to join him and the other employees in protesting Bustamante's conduct. According to Salgado, when Figueroa told him how Bustamante had purportedly pushed or bumped Arizaga in the chest, he immediately thought back to the "Luigi incident" which also involved what he and other employees viewed as their alleged mistreatment by Bustamante. Martinez arrived a short while later and observed two local police officers—officers Burton and Olson—at the facility and Figueroa being escorted out of the facility by Parker and Busse.

In the meantime, Bustamante, following his encounter with Arizaga and the employee walkout, notified Busse at home and informed him of what was going on. Busse told Bustamante to hold everything at bay if he could, that he was on his way to the facility, and to notify Parker and call him back after doing so. Bustamante then called Parker as instructed and, after doing so, called Busse again. Busse, Parker, and Peterson, who was called by Parker, arrived some 30 minutes later. On their arrival, Bustamante told the managers about the incident between himself and Arizaga. He told them that Arizaga had returned to work after being instructed to do so, that employees nevertheless remained and began gathering around his workstation, and that Arizaga then joined the employee group and refused to return to work when instructed to do so.

Parker recalls Bustamante telling him that Arizaga had been told that he would have to clock out if he did not intend to return to work. Matters apparently escalated at that point, according to Parker's version of what Bustamante told him, and employees then walked out. Bustamante purportedly told Parker that it was after the walkout that Arizaga began to accuse Bustamante of pushing or shoving him. Bustamante denied to Parker, Busse, and Peterson ever pushing Arizaga. Neither Parker, Busse, or Peterson, however, questioned Arizaga about the incident or bothered to ascertain his side of story. Busse recalls Bustamante saying that the incident began when Arizaga called Bustamante a "dirty name or something," as he walked by Bustamante on his way to his workstation. Bustamante could not recall what purportedly was said by Arizaga to Bustamante. Bustamante allegedly told Busse that after some words were exchanged, Arizaga returned to work as instructed, but that employees then gathered around his (Bustamante's) workstation, told Bustamante that if Arizaga was being sent home then they too would be leaving, and then went outside and gathered around the break area. (Tr. 598.)

Parker then went out to meet with the employees and observed officers Burton and Olson were already present. Because of his lack of proficiency in Spanish, and to avoid any possible misunderstanding, Parker brought another employee, Jorge Ortega, to serve as his interpreter when he addressed employees, many of whom spoke little English. On seeing the police officers, Parker approached them and asked why they were there. One of them replied that they had received a complaint about a "battery" having been committed. Parker told the police officers that the employees were engaged in a work stoppage, and asked if he needed to speak to the group. The police officer replied he only wanted to speak to the two individuals involved. Bustamante and Arizaga were then taken aside by the police officers, and Parker proceeded to address the employees who were some 10–12 feet away. Using his interpreter, Parker claims he told employees that they were engaged in an unauthorized work stoppage,[4] and that if they did not return to work they would be in danger of losing their "positions and benefits." Receiving no response from the employees, Parker contends he repeated his admonition to employees to return to work or risk being fired. When employees failed to respond, Parker then turned to Figueroa and asked if he intended to return to work. Figueroa, he contends, replied that he would be returning to work, but not at that moment. Peterson recalls that Figueroa answered, "Yes," when asked if he was returning to work, but did not move. Not satisfied with Figueroa's response, Parker asked him again and Figueroa replied that he was not returning to work. (Tr. 521–522.) According to

[4] Parker initially testified to telling employees that they were engaged in an "unlawful" work stoppage. He then corrected himself and claimed he actually told employees the walkout was "unauthorized" rather than "unlawful." His testimony in this regard is contradicted by Ortega who, as noted, served as Parker's interpreter during the June 27 incident. Thus, called as a witness by the Respondent, Ortega claims that Parker actually told employees that they were "participating in an unlawful work stoppage." (Tr. 574.) I credit Ortega and find that Parker, for whatever reason, possibly to make what he told employees seem more palatable at the hearing, altered his account of what he in fact said to employees that evening. Parker contends that some months prior to this incident, he had heard rumors about a possible walkout by employees, and that he had decided that if such a walkout did occur, he would tell employees that they were engaged in an "unauthorized" work stoppage and risked termination if they did not immediately return to work. Parker explained that he considered any work stoppage, including one involving a protest over a protected activity, to be "unauthorized." (Tr. 521, 546–547.)

Peterson, Figueroa replied, "No, not yet," when asked by Parker the second time to return to work. Busse claims that when Parker asked Figueroa if he was returning to work, Figueroa replied, "No, I'm not going back to work." (Tr. 604.) Busse's assertion in this regard contradicts both Parker's and Peterson's testimony, as well as Figueroa's own claim, that the latter stated his intent to return to work but not right away as he was waiting for Martinez to arrive. Busse's contrary description of what Figueroa said is rejected as fully contrived and not credible.

Busse testified that he fired Figueroa when the latter said he was not returning to work, and that, when Figueroa declined to leave, he (Busse) notified the police officers that Figueroa was no longer employed at the facility and was refusing to leave. The police officer then instructed Figueroa that he would have to leave or he could be charged with trespassing. Figueroa got up and left, followed, with some exceptions, by the employees who were gathered around. Parker and Peterson both admit that, unlike Bustamante, who was allowed to give his version of what led up to the work stoppage, employees, including Arizaga, were not afforded that opportunity. (Tr. 494, 545–546.) Busse further admitted that after Figueroa was told he was fired, neither he nor any of the other managers present told employees that they could still return to work. (Tr. 616.)

Figueroa claims that Parker then addressed the employees gathered in the break area and instructed them to listen because he only wanted to say this one time. Parker asked employees if they were going to return to work. Receiving no responses, Parker turned to Figueroa and asked the latter if he was going back to work. Figueroa replied that he was waiting for Union Representative Martinez to show up. Parker again asked Figueroa if he was returning to work, and Figueroa replied that he was but that he was going to wait for Martinez. Figueroa contends that Parker asked him a third time if he was returning to work, and that he again answered that he was but that he was first going to wait for Representative Martinez. Parker then told Figueroa, "You have no Union representative" and, pointing to the street, instructed Figueroa that he was fired. Figueroa claims that Peterson and Busse likewise informed him he was fired. (Tr. 49–51.) Hit likewise recalled Parker telling Figueroa, when the latter said he was waiting for his union representative to arrive, that Figueroa had no union representative. (Tr. 253.)

Salgado similarly recalled Parker addressing employees, telling them that he was only going to say this once, and that if employees did not return to work, they would be fired. He further recalled Parker telling Figueroa, in response to the latter's insistence that he was going to wait for his union representative, Martinez, to arrive, that "[y]ou don't have a union representative," and firing Figueroa when the latter refused to return to work immediately. (Tr. 183.) Salgado claims that a short while later, Peterson turned to him and likewise warned Salgado that he too would be fired if he did not return to work. (Tr. 184.) When Salgado replied that he and the others were waiting for Martinez to arrive and solve the problem, Peterson smiled and said that Martinez was not allowed on company property, and reiterated that Salgado would be fired if he did not return to work. Salgado claims that a short while later, the police officers approached the group of employees and told them they were no longer allowed on Respondent's property and would have to leave. (Tr. 184, 187.) Peterson claims not to have said anything to the employees that night, denying implicitly Salgado's assertion that he told Salgado he would be fired if he did not return to work and that Martinez was not permitted on company property. (Tr. 478–479.) Peterson, however, did claim that the Union was not allowed on company property, a claim Parker disagreed with (Tr. 496, 548).

I credit Figueroa and Salgado over Parker and Peterson. Parker, it should be noted, was never asked to admit or deny Figueroa's claim of being told by Parker that he had no union representation. Thus, I find that Parker indeed told Figueroa, when the latter said he was waiting for his union representative to arrive, that he, Figueroa, had no union representation. Unlike Parker, Peterson, as indicated, implicitly denied the statements attributed to him by Salgado by claiming that he never spoke to any employees, including presumably Salgado, during the encounter that evening. Peterson's overall testimony, including his denial of Salgado's claim, was not very convincing. Peterson's testimony on whether union representatives were allowed on company property was, as noted, directly challenged by Parker who, when told about Parker's claim, averred that Peterson's testimony on this matter was "not correct." I found Salgado's testimony more reliable and trustworthy, and believe that Peterson did in fact speak to Salgado that evening by telling him he would be fired if he did not return to work, and, when told by Salgado that he and others were waiting for Union Representative Martinez to arrive, replied that the Union was not allowed to come onto the Respondent's property.

As noted, after being discharged, Figueroa told Parker and the other management representatives that he was nevertheless going to wait at the facility for Martinez to arrive. Parker, however, walked over to the police officers and informed them that Figueroa had been fired and could not remain on the premises. One of the officers, Figueroa did not recall which, then notified him that he could not remain as he had been fired, and would have to leave. Figueroa at that time went to the facility, retrieved his belongings, and left. Martinez arrived soon after Figueroa dropped off his personal belongings in his vehicle. Figueroa explained to Martinez that he had been fired. Both then situated themselves across the street, off the Respondent's property. They were joined soon thereafter by the other second-shift employees.

Bustamante claims that after Busse and Parker arrived, all three, along with Petersen, headed towards where the employees were and, on arriving, observed officers Burton and Olson present. Officer Burton approached Bustamante and told him Arizaga was accusing him of battery. Bustamante denied doing so. Officer Burton, he contends, then asked Arizaga if he wished to press charges against Bustamante, but Arizaga said he did not, and simply wanted Bustamante to refrain from doing so in the future. The policeman informed Bustamante that Arizaga was not pressing charges, and that Bustamante was not to push Arizaga. Bustamante replied, "Okay." (Tr. 418.)

Bustamante contends that soon after this discussion with officer Burton, Petersen approached Arizaga and asked what he

intended to do. Arizaga, according to Bustamante, turned to officer Burton and stated that he was being threatened by Petersen and Bustamante. Officer Burton purportedly told Arizaga that this was not a threat, that Arizaga was simply being told that he was to be spoken to regarding the incident. Following this last exchange, Bustamante went inside the facility and observed employees removing things from their lockers and preparing to leave the facility. Only two employees—Mark Batista and a temp employee—remained working in Bustamante's department after the employees walked out.

Arizaga testified as follows regarding his conversation with officer Burton. When the officers arrived, Arizaga identified himself as the one who had allegedly been battered. Arizaga told officer Burton that the incident occurred inside the facility and proceeded to explain what had occurred and how Bustamante had bumped him in the chest. He contends that Parker approached at one point and had a brief conversation with Burton which he could not overhear. Parker then went over to talk to the employees and, at one point, he contends, screamed at Figueroa, asking if the latter wanted to go back to work. Figueroa replied that he did. Parker then instructed Figueroa to return to his workstation, but Figueroa declined to do so right away, stating that he was waiting for his union representative to arrive. Parker again asked Figueroa to return to his workstation if he wanted to work, but Figueroa again declined to do so until Martinez arrived. According to Arizaga, both Parker and Busse at that point pointed to the street and told Figueroa he was fired. Figueroa purportedly protested to the police officers that he did not want to leave the premises, but one of them, officer Olson according to Arizaga, told him he had to leave the premises as he had been fired. Figueroa left the premises at that point.

The police officers then asked Bustamante for his version of the incident and, after hearing it, asked Arizaga if he wanted to press charges against Bustamante. Arizaga claims that Parker, who apparently was nearby, cautioned Arizaga to think about what he was going to do. (Tr. 134.) Arizaga did not respond to Bustamante. He contends that officer Burton then asked if he intended to stay or to join his coworkers who had walked off the job. Arizaga replied that he was joining his coworkers. At that point, Arizaga went to the facility to retrieve his personal belongings, placed them in his car which was in the company parking lot, and then returned to the Bar Tech parking lot where the employees had gathered to decide what to do next. Union Representative Martinez apparently arrived a short time later. Arizaga contends that a Bar Tech manager whom he could not identify approached the group and told him they had to leave the Bar Tech parking lot as it was company property. Arizaga and the other employees then left the parking lot and gathered out to Averil Street, which adjoins company property.

Called as a witness by the General Counsel, officer Burton explained that he went to IHC to investigate a "battery" complaint. When he arrived, and after identifying Arizaga as the alleged victim, he was told by Arizaga, through an employee interpreter, that Bustamante had bumped him in the chest while he, Arizaga, was speaking with another employee. According to Burton, the "bumping" occurred while Bustamante and Arizaga were exchanging words and after Bustamante referred to Arizaga as a baby. Employees, according to what Burton was told, walked out of the facility in response to the incident. Burton also spoke with Bustamante, who told him he had exchanged words with Arizaga, had called him a baby because he was out of his work area, but denied ever bumping into Arizaga. At one point during his conversation with Bustamante, three individuals wearing suits, one of whom Burton identified as Parker, approached and asked Burton what was going on. Burton replied that he was investigating a complaint of battery and would get back to them when he was finished. When Parker asked if he could address the employees while the investigation was going on, Burton told him he was free to do so as they were his employees. Parker and the other two suited individuals walked towards the employees and Burton overheard him say to the employees several times that they were engaged in a walkout and would be fired if they did not return to work. Burton then observed some of the employees head back towards the "main building." Parker approached Burton a few minutes later and told him that those employees who had not returned to work were no longer employed and had to leave the premises. (Tr. 266–268.) This latter claim by Officer Burton is corroborated by Salgado who testified to hearing Parker tell Burton to kick the employees off the property, which Salgado interpreted to mean that he and the other employees had been fired. (Tr. 230.)

Officers Burton and Olson then informed the employees who remained outside that as they no longer worked there, they would have to leave the premises, and to take the issue up with their Union. (Tr. 268.) The employees then left after retrieving their personal belongings from the facility. Burton was unable to say whether any employee sought to speak with Parker during his exchange with the employees, but did recall hearing Parker tell employees, "It's too late, you've been fired, you're done," or words to that effect. Burton believes that Parker's remark was directed at an employee who might have been trying to return to work. No battery charge was ever filed by Arizaga. According to Burton, at one point after his translator left, Arizaga told him that there had been no physical contact between him and Bustamante and that he simply wanted Bustamante spoken to about his treatment of employees. On further examination, and after being shown a sworn affidavit he gave to the Board, Burton recalled that Arizaga did tell him that Bustamante had brushed up against his chest. Burton also told Bustamante before leaving that he could not make physical contact with an employee, that it was a crime, that he could be arrested for such behavior, and that he needed to treat his employees better. (Tr. 260, 270, 273–274.)

On the morning of June 28, the day following the Bustamante-Arizaga incident and walkout by employees, the first-shift employees did not report for work but instead took part in the picketing engaged in by the second-shift employees outside the Respondent's facility. Parker testified that he spoke with Trone on June 28, regarding the walkout and was told by Trone that the employees were engaged in a protected concerted activity to protest what they perceived to be the hostile work environment created by Bustamante. That same morning, Peterson, accompanied by Busse, posted a help-wanted sign outside the Respondent's facility. (Tr. 489.) According to Peterson, the

Respondent also placed a help-wanted ad in a local newspaper at around the same time. (Tr. 504.)

Martinez recalls arriving at the facility around 6 a.m. that day and noticing that the employees were already there milling around in a corn field across the street from the Respondent's facility. Employees began asking Martinez what their status was and he replied that he did not yet know. The day before, when the incident first occurred, employees had told Martinez on his arrival that Parker had fired all of them. As he was chatting with employees, Martinez noticed Busse and Peterson exit the facility and place a help-wanted sign on the Respondent's front lawn. Martinez then approached Busse and Peterson and asked both of them what was going on, to which Peterson countered, "You tell us," explaining that, so far, the first shift had not shown up. Martinez told Peterson that the first-shift employees were across the street together with the second-shift employees protesting over the events of the previous night. Martinez claims that Peterson then stated that the second shift had been fired and that the first shift was extremely late and would be assessed points for being late or absent. As to the second-shift employees, Peterson, according to Martinez, explained that they had been fired for "acting as a mob" and for "trying to dictate to the company who they were going to have as a supervisor on the second shift." (Tr. 353.) He told Martinez that employees were jealous of Bustamante and that the entire event of the night before had been orchestrated by employees. Martinez responded that if the Company rescinded its actions of the previous night and reinstated the employees, he could try to persuade them to return to work. Peterson, Martinez contends, simply answered that the first shift was extremely late and would be assessed points, but that the second shift had been fired.

Peterson recalls speaking with Martinez soon after posting the help-wanted sign. He recalls Martinez mentioning that Parker had fired "everyone" the night before, and that he told Martinez that only one employee had been fired and that the other employees had walked off the job. When Martinez offered to persuade employees to return to work if the Company rescinded the firings and made employees whole, Peterson reiterated that only one employee had been fired and that the rest had walked off their jobs. Petersen testified that, as far as he knew, the first-shift employees were only late in reporting for work and could have returned to work if they wanted to. Asked if the second-shift employees could have done so, Peterson answered that they too could have returned to work at that point in time. However, when asked why the help-wanted sign was posted if no employee, with the exception of Figueroa, had not been terminated, Peterson replied, unconvincingly, that the sign was posted because the Respondent did not know what was going on. He explained that with the first-shift employees not showing up for work on June 28, and the second-shift employees walking out the night before, the Respondent had no idea what was going on but nevertheless needed to continue operations.

Busse gave similar testimony regarding the exchange he and Peterson had with Martinez on the morning of June 28 as the help-wanted sign was being posted. Thus, he testified that Martinez approached them and asked what was going on, and that Peterson answered he did not know. Martinez, he contends, told Peterson that the Respondent had fired all the employees the night before, and Peterson purportedly replied that it wasn't true, that only one employee, Figueroa, had been fired. Martinez replied that the Respondent had a hostile work environment at the plant, to which Busse purportedly replied that it was the employees who had created the hostile work environment by not following the rules, that it was the supervisors' job to manage the employees and enforce the rules. (Tr. 608.) Neither Peterson nor Martinez made any mention in their respective versions of their June 28, exchange about Busse making any such comments or remarks.

I credit Martinez over Peterson and Busse and find, as testified to by Martinez, that Peterson told him the second-shift employees had been fired the night before for refusing to end their protest of Bustamante's conduct and not returning to work after being ordered to do so by Parker. As previously discussed, officer Burton, a nonpartisan witness with no interest whatsoever in the outcome of this proceeding, testified, credibly I find, and consistent with Salgado's recollection, to being told by Parker on the evening of June 27, that the second-shift employees who had refused to return to work were no longer employed and would have to leave the facility grounds. Martinez' claim, therefore, as to what Peterson and Busse said to him on the morning of June 28, about the second-shift employees being fired, is fully consistent with officer Burton's and Salgado's testimony of what occurred the night before. Further, neither Peterson nor Busse were particularly convincing witnesses from a demeanor standpoint. Peterson was somewhat nervous on the witness stand, behavior which I attribute to his discomfort in having to shade the truth to conform to the Respondent's defense, rather than to the experience of being a witness. Busse's testimony was likewise suspect. His explanation, for example, as to why the Respondent posted the help-wanted poster on the morning of June 28, made little sense given his and Peterson's claim that only one employee, not the entire shift, had been fired the night before, and was, moreover, somewhat evasive. Thus, asked to explain why the help-wanted sign was posted, Busse could only "guess" that the Respondent was going to "need employees . . . to fulfill our requirements to our customers." (Tr. 607.) Further, while claiming that the Respondent had been planning on hiring additional employees "anyway" and that the posting of the help-wanted sign on that morning was no more than a mere coincidence, Busse nevertheless conceded that the sign was posted in reaction to what had occurred the night before. (Tr. 618.) I find, based on Martinez', officer Burton's, and Salgado's mutually corroborative testimony, that the second-shift employees who, like Figueroa, declined to return to work on June 27, were in fact terminated that same evening for doing so.[5]

[5] The second-shift employees terminated on June 27, included Paris Figueroa, Heraclio Arizaga, Adan Guerra, Leonel Hernandez, Eduardo Nava, David Nuñez, Silverio Corona, Juan Peña, Porfirio Huerta, Ramon Gonzalez, Juan Nieves Jr., Jesus Salgado, Boualoth Hansana, Agustin Morales, Saybandith K. Sundara, Phanvilay Sundara, Oudavone Hansana, David Soto, Sourhone Cavan, and Ruben Moreno.

On the morning of June 28, following their termination the night before, the second-shift employees began picketing the Respondent, some carrying signs describing their activity as an unfair labor practice strike. The record reflects that most of the first-shift employees did not report for work that day and instead joined the second-shift employees in the picketing. (See GC Exh.-9.) It is undisputed, and the Respondent readily admitted at the hearing and on brief, that the picketing employees were photographed by Respondent's sales vice president, Jim Segerson. (Tr. 529; R. Br. 29.) The photographs, copies of which are in evidence as General Copunsel's Exhibit-9, were taken from Segerson's vehicle as it drove by the striking employees. Parker, Peterson, and Busse were identified by employees as being in the vehicle with Segerson when the pictures were taken. Parker claims that Segerson was simply testing out a new camera he purportedly had purchased on the day the photos were taken. He could not, however, explain why Segerson decided to photograph the picketing employees. There is no indication that Segerson took pictures of any other subject. Segerson was not called as a witness to explain his behavior. Parker admitted that employees who were photographed were never told why the pictures were taken, nor given assurances that the photographs would not be used against them in any way.

On or around June 30, Peterson sent each second-shift employee a letter, copies of which are in evidence as Respondent's Exhibit-40, dispelling what he contends was a rumor that several of them had been fired on June 27. The letter advised employees that only one employee, who was not identified therein allegedly for privacy reasons, had been terminated and that the other employees had voluntarily left their positions. It went on to say that those employees who voluntarily left their positions were either on strike or absent without notice. Peterson claims that he had learned of the rumor during the evening of June 27, and that he prepared and sent the letter to explain what had actually occurred. As found above, the credible evidence of record makes clear that the those second-shift employees who declined to return to work after being instructed to do so on June 27, were, along with Figueroa, terminated and ordered by officer Burton, on instructions from Parker, to leave the premises.

The picketing by first- and second-shift employees was still ongoing as of July 31. On July 31, Parker sent letters to the second-shift employees notifying them that they were being terminated as of that date due to either ". . . your voluntary resignation as shown by your continuing absence from the workplace or your participation in an illegal strike, or if not engaged in that strike, for violation of the company's absenteeism policy." (GC Exh.-10.) While a handful of the first-shift employees had returned to work by July 31, most remained out until August 21, when, according to Parker, they suddenly and inexplicably appeared at the facility ready to work. After consulting with Respondent's attorney, Parker allowed the employees to return to work.[6] Parker, seeking to distinguish the different treatment accorded the first-shift employees vis-à-vis the second-shift employees, explained that only those employees who had walked out or "abandoned" their positions on the evening of June 27, were sent termination letters. (Tr. 533.) He noted that on June 27, when the incident first occurred, the second-shift employees were twice asked to return to work or risk being terminated. He went on to explain that when employees refused to do so after the two warnings, "we elected that they would be terminated." In response to a leading question from Respondent's counsel, Parker backtracked from his termination statement and asserted instead that employees had not been terminated but rather had simply walked off the job after being warned that they would be fired. (Tr. 537.) His vacillating testimony in this regard is found not to be credible.

Parker was also asked if he knew why the first-shift employees did not report for work on June 28, and stayed out through August 21. He responded, "We didn't know why they were out there. They had not refused any direct report to come back to work." Parker's claim in this regard is also not credible since, by his own admission, Trone advised him on the morning of June 28, that the employees who were picketing outside the Respondent's facility during that period, which included both the first- and second-shift employees, were protesting what they believe to be a hostile work environment created by Bustamante.

Having found, contrary to the Respondent's assertion, that most, if not all, second-shift employees, in addition to Figueroa, were indeed terminated on June 27, I am convinced that the July 31 letter sent to the second-shift employees notifying them of their terminations as the latter date, is nothing more than a sham, concocted after the fact to create the impression that employees were not fired on June 27, but rather began a strike that day that continued through July 31. The credited evidence makes patently clear that the work stoppage was of short duration, lasting only from when Arizaga was told by Bustamante to go home on June 27, to the point in time that same evening when Parker notified officer Burton that the second-shift employees who had not returned to work were fired and should be removed from the premises.

B. Discussion

1. The protected nature of the work stoppage

The General Counsel contends, and I agree, that the work stoppage on June 27, was protected activity under Section 7 of the Act. The Board has long held that group complaints regarding the quality of supervision are directly related to working conditions and fall within the "rubric" of protected concerted activities. *Hacienda Hotel, Inc.*, 348 NLRB 854 (2006); *Rhee Bros.*, 343 NLRB 695 fn. 3 (2004); *Trompler, Inc.*, 335 NLRB 478, 479 (2001); *Astro Tool & Die Corp.*, 320 NLRB 1157, 1161 (1996); *Brother Industries (U.S.A.), Inc.*, 314 NLRB 1218, 1227 (1994); *Cambro Mfg. Co.*, 312 NLRB 634, 645 (1993); *Calvin D. Johnson Nursing Home*, 261 NLRB 289 fn. 2 (1982); *Avalon-Carver Community Center*, 255 NLRB 1064,

[6] The first-shift employees allowed to return to work on August 21, included Abundio Arroyo, Jose Guillen, Jose Sanchez, Jan Fee, Jorge Sanchez, Jorge Herrera, Jesus Herrera, Benjamin Marquez, Elieser Jaramillo, Jose Ramirez, Gustavo Zuniga, and Luis Herrera.

1070 (1981); and *Leslie Metal Arts Co.,* 208 NLRB 323, 325 (1974).

The record here makes patently clear that it was Bustamante's verbal and physical mistreatment of Arizaga that precipitated the work stoppage by Figueroa and the other second-shift employees on June 27.[7] Thus, as previously discussed, on June 27, Bustamante initiated and provoked an argument with Arizaga, without apparent justification, by calling Arizaga a "cry-baby" or some other similar but undesirable name, as the latter was preparing to begin his shift. As noted, the record does not make clear what, if anything, may have prompted Bustamante's behavior towards Arizaga. When Arizaga expressed indignation at Bustamante's remark and then sought to return to his workstation, Bustamante, again without apparent provocation from Arizaga, and believing that Arizaga might have muttered something under his breath about him, confronted Arizaga once again and asked the latter to repeat what he had purportedly said about him. I am persuaded that Bustamante at this point deliberately bumped Arizaga with his chest. Declining to believe Arizaga's claim that he had not said anything about him, Bustamante angrily told Arizaga that he was tired of the latter's attitude, that he was fired, and that he should go home.[8] The work stoppage that ensued was conducted by the second-shift employees in direct response to, and in protest over, Bustamante's treatment, including his purported firing, of Arizaga.

The disciplinary action taken by Bustamante against Arizaga, whether it was a termination as believed by Arizaga, or a suspension as claimed by Bustamante, resulting from the latter's unprovoked verbal and physical assault and harassment of Arizaga on June 27, adversely affected Arizaga's terms and conditions of employment as it led, at a minimum, to his dismissal from work that day presumably with a loss in pay. Arizaga's treatment by Bustamante could reasonably have convinced employees that, if allowed to continue, they too might be subjected to similar unprovoked harassment by Bustamante, with the likelihood that the latter might be prompted to take disciplinary action against employees for daring to speak out and defend themselves against Bustamante's misconduct. Indeed, Bustamante, as noted, admits being told by employees that they were supporting Arizaga out of concern that they too might be the recipients of such treatment from Bustamante in the future. In this respect, the second-shift employees' work stoppage to protest Bustamante's mistreatment of Arizaga involved a matter which directly affected their terms and conditions of employment. Accordingly, I conclude that the June 27 work stoppage fell within the protective ambit of Section 7.[9]

In so concluding, I reject as without merit the Respondent's assertion that the work stoppage was unprotected under the holding of *Emporium Capwell Co. v. Community Organization*, 420 U.S. 50 (1975). In *Emporium-Capwell*, a minority group of employees, dissatisfied with their union's reliance upon the existing collective-bargaining agreement's grievance procedure, refused to participate in it and, acting contrary to the union's advice, picketed their employer's store in an attempt to circumvent the union and bargain separately with the company over the terms and conditions of employment with respect to racial minorities. The Court found such conduct to be unprotected under Section 7 because it undercut the statutory principle of exclusive representation embodied in Section 9(a) of the Act. Here, there is no evidence that the work stoppage engaged in by second-shift employees on June 27, was somehow at odds with, or an attempt by employees to bypass, the Union, or, as argued by the Respondent, to engage in direct bargaining with it. Rather, the credited evidence makes patently clear that all the employees were seeking when they began their work stoppage was to call management's attention to Supervisor Bustamante's mistreatment of Arizaga and of his behavior in general towards them. As readily conceded by Parker and Peterson, the employees were never afforded that opportunity. Nor was Martinez, on behalf of the Union, given a chance to resolve the matter with employees. Rather, by the time Martinez arrived on the scene, Figueroa and the other second-shift employees had, as further discussed below, already been terminated and directed to leave the premises. Nothing in Martinez' testimony, or elsewhere in the record for that matter, suggests that the Union disapproved of, or was opposed to, the work stoppage. If anything, Trone's June 28 statement to Parker, that the second-shift employees were engaged in protected concerted activity, suggests that the Union viewed, and implicitly condoned, the work stoppage as a lawful exercise by employees of their Section 7 right, rather than as an attempt by these employees to

[7] I do not agree with the Respondent's intimation on brief that the walkout was also motivated by the warnings that Bustamante wanted to issue to second-shift employees on June 26, over their alleged misuse of the break period. (R. Br. 33.) Those warnings, as noted, were never issued, and the matter was successfully resolved when Busse agreed to withdraw the warnings and the employees returned to work without incident.

[8] Bustamante's claim that he lacked the authority to fire anyone but could send an employee home does not render implausible Arizaga's claim that Bustamante told him he was fired. Rather, Bustamante's somewhat arrogant demeanor on the witness stand convinces me that Bustamante seemed to relish his position as supervisor over the second-shift employees, and that he would have made such a remark as a way of demonstrating his authority over them. As noted, there is no indication that employees knew that Bustamante lacked firing authority.

[9] Notice is taken of a Memorandum Opinion and Order issued on January 17, 2007, by Seventh Circuit District Court Judge Virginia Kendall denying the General Counsel's petition for injunctive relief in this matter. See 2007 WL 163204 (N.D.Ill.), 181 LRRM (BNA) 2313. In denying injunctive relief, Judge Kendall reasoned that there was little likelihood that the General Counsel could prevail on whether the June 27 work stoppage was protected because, in her view, "there is little or no connection between the June walk-out and work conditions for the employees at the plant." For the reasons already discussed, I respectfully disagree with Judge Kendall's analysis and opinion on this issue. Rather, I find, based on my credibility resolutions, and consistent with current Board law cited above, that Bustamante's supervisory misconduct affected Arizaga's terms and conditions of employment, and that the June 27 work stoppage by the second-shift employees was a reasonable and protected response to that conduct.

usurp or otherwise undermine the Union's right as their exclusive bargaining agent.[10] In sum, I find the *Emporium-Capwell* holding not to be applicable here.[11]

2. The 8(a)(1) allegations

(a) Threats of discharge

The complaint alleges that the Respondent violated Section 8(a)(1) when its supervisors and/or managers, on various occasions during the June 27 incident, threatened employees with discharge if they did not return to work. I find merit in the allegations. The record makes clear that soon after the employees notified Bustamante that they would not return to work until they spoke with higher management about his alleged abusive behavior towards Arizaga, Bustamante threatened that they would be fired if they did not return to work immediately. Bustamante, as noted, readily admitted telling employees that they risked losing their jobs if they did not return to work. Parker, as further noted, made a similar statement to employees when he arrived and found them gathered outside in the break area. Thus, he too admitted telling employees that if they did not return to work they would be in danger of losing their "positions and benefits." Similar threats of discharge unless they returned to work were made directly to Figueroa by Busse, and by Peterson to Salgado that same evening.

As found above, the work stoppage by employees on June 27, in protest over Bustamante's alleged mistreatment of Arizaga, was a protected activity under Section 7 of the Act. Employer threats to discharge employees for engaging in such protected activity, like those made by Bustamante, Parker, Busse, and Peterson, to the second-shift employees and specifically to Figueroa, Salgado, and Arizaga, have been found to be coercive and unlawful as they tend to discourage employees from continuing to exercise their Section 7 right to engage in such protests. See *Iowa Packing Co.,* 338 NLRB 1140, 1143 (2003); *Benesight, Inc.*, 337 NLRB 282 (2001); and *Accurate Wire Harness*, 335 NLRB 1096 (2001). Accordingly, I find that the above threats made by Bustamante, Parker, Busse, and Peterson violated Section 8(a)(1) of the Act, as alleged.

(b) Unlawful surveillance allegation

The complaint also alleges, and I agree, that the Respondent's photographing of employees as they picketed its facility constituted unlawful surveillance. The Respondent, as noted, admits that photographs of employees on the picket line were taken by its Vice President Segerson. It did not, however, offer any lawful justification for having taken the pictures. Rather, the only explanation proffered by Parker on cross-examination, which I reject as utter nonsense and as lacking, in any event, any corroboration from Segerson himself, is that Segerson was simply trying out his new camera. "Absent proper justification, photographing employees engaged in protected concerted activities constitutes unlawful surveillance because it has a tendency to intimidate employees, implant the fear of future reprisals, and interfere with the exercise of Section 7 rights." *Center Service System Division*, 345 NLRB 729, 754 (2005); *Engelhard Corp.,* 342 NLRB 46 (2004); *Town & Country Supermarkets*, 340 NLRB 1410, 1414 (2004); and *Kentucky River Medical Center*, 340 NLRB 536, 553 (2003). The Respondent having failed to provide a proper justification for the photographing, I find that the conduct amounted to an unlawful surveillance of its employees protected activities, and violated Section 8(a)(1) of the Act, as alleged.

(c) The "no union representation" remarks

The complaint further alleges as unlawful Parker's remark to Figueroa that the latter had no union representative, and Peterson's comment to Salgado that the Union was not allowed on company property. I have, as noted, credited Figueroa and Salgado that such statements were made to them.[12] Both

[10] The Union's failure to sanction the work stoppage would not have necessarily rendered it unprotected. See *East Chicago Rehabilitation Center, Inc. v. NLRB*, 710 F.2d 397, 401 (7th Cir. 1983). As pointed out by the court in *East Chicago Rehabilitation Center,* the selection by employees of a union to represent them does not result in an absolute waiver by employees of rights afforded them by Sec. 7 to protect themselves against an employer's unlawful actions, particularly when any action taken by employees in the exercise of those rights does not undermine or circumvent the union's representative status.

[11] Nor do I agree with the Respondent's further assertion that Trone's promise during negotiations, that the Union would give it advance notice of a strike, somehow precluded or waived the employees' Sec. 7 right to engage in a protected work stoppage. First, it should be pointed out that the parties, as of the date of the hearing, were still in negotiations and did not have a collective-bargaining agreement in effect. Consequently, Trone's assurance to the Employer was not part of any collective-bargaining agreement and hardly carried the weight of an enforceable "no-strike" clause applicable to unit employees. More importantly, however, is the well-established principle that waivers of statutory rights "are not to be lightly inferred, but instead must be 'clear and unmistakable.'" *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983); and *Georgia Power Co.,* 325 NLRB 420 (1998). The burden of proving that a waiver has occurred is on the party making the assertion, in this case the Respondent. *TCI of New York, Inc.*, 301 NLRB 822, 824 (1991). The Respondent here has presented no evidence whatsoever that the assurance given by Trone regarding prior notice by the Union in the event a strike was called, was intended to apply to other types of protected activity, including the right of employees to engage in concerted activity to protest supervisory misconduct. Thus, even if Trone's assurance of prestrike notification could somehow be construed as a binding prohibition on employees not to strike without prior notice, there is simply no evidence that such a prohibition was intended as a waiver of the employees' Sec. 7 right to engage other protected concerted activity for their mutual aid and protection.

Fineburg Packing Co., 349 NLRB 294, a decision recently issued by the Board on January 31, 2007, and which the Respondent in a post-trial submission asks that I take judicial notice of, is factually distinguishable and of no relevance here. In *Fineburg*, the Board did not address the merits of a work stoppage because the General Counsel had conceded in the complaint that the work stoppage was unprotected. Here, unlike in *Fineburg*, the protected nature of the work stoppage has been alleged and litigated. The only issue addressed by the Board in *Fineburg*, not raised here, is whether the work stoppage was condoned by the employer.

[12] The Respondent, on brief (pp. 27–28), claims that neither Bustamante or Peterson made any such remark either to Figueroa or to Salgado, and that there is no evidence to support any such allegation. As to Bustamante, the complaint does not allege that he told any employee that they did not have union representation. Rather, the complaint allegations charge that Parker and Peterson made such comments. Thus, no finding is being made here that Bustamante engaged

Parker's and Peterson's remark to Figueroa and Salgado respectively were made in response to statements by the latter that they were waiting for their Union Representative Martinez to arrive to discuss the incident. Parker's statement to Figueroa was patently false, for the Union did indeed represent Figueroa and other unit employees, a fact known to Parker. As to Peterson's remark to Salgado that the Union was not allowed on company property, Peterson and Parker gave conflicting statements regarding this prohibition, with Peterson asserting this was indeed company policy and Parker disputing that claim. In telling Figueroa that he had no union representation when in fact he was represented by the Union, and Salgado that the Union would not be permitted to come onto Respondent's property to hear the employees' concerns regarding Bustamante, the Respondent, I find, sought to convey to employees the impression that union representation was meaningless, and that it was futile for the employees to rely on the Union to speak for them. This rather dismissive attitude by the Respondent towards the employees' chosen representative could reasonably have caused employees to question, and thereby undermine, their continued support for the Union. In these circumstances, I find Parker's and Peterson's remarks to Figueroa and Salgado, respectively, were coercive and violated Section 8(a)(1) of the Act. See *Becker Group, Inc.*, 329 NLRB 103, 104 (1999).

3. The 8(a)(1) and (3) allegations

The complaint alleges, and I agree, that Figueroa and other second-shift employees were unlawfully discharged for participating in a lawful work stoppage. As previously discussed and found, the walkout by Figueroa and other second-shift employees to protest Bustamante's mistreatment of Arizaga was protected concerted activity under Section 8(a)(1) of the Act. An employer further violates Section 8(a)(1) of the Act by discharging employees who engage in a work stoppage over such matters. *Rhee Bros.*, supra at fn. 3. The Respondent contends that, except for Figueroa who admittedly was fired on June 27, for taking part in the work stoppage, no other employee was fired that evening. Rather, it insists that employees could have returned to work but voluntarily chose instead to walk off the job following Figueroa's termination. Its contention is without merit, for, as found above, officer Burton and Salgado both credibly testified that Parker instructed Burton to remove from its property the employees who had refused to return to work as they were no longer in the Respondent's employ. That the Respondent may not have used the words "You're fired" to terminate the second-shift employees, as it did with Figueroa, does not warrant a different conclusion, for the fact of discharge does not depend on the use of formal words of firing. Rather, it is sufficient if the words or actions of the employer "would logically lead a prudent person to believe his [her] tenure has been terminated." *Benesight, Inc.*, supra at 283 fn. 6; and *Swardson Painting Co.*, 340 NLRB 179 (2003). The determination of whether there was a discharge is judged from the perspective of the employees, and is based on whether the employer's statements or conduct "would reasonably lead the employees to believe that they had been discharged." *Kolkka Tables*, 335 NLRB 844, 846 (2001); also *Swardson Painting*, supra.

As previously discussed, on arriving at the scene on the evening of June 27, and seeing the employees gathered in the break area rather than working, Parker presented them with the ultimatum of returning to work or being fired.[13] When they refused to budge, the Respondent, using, I am convinced, Figueroa as an example, fired Figueroa when the latter refused Parker's directive to return to work. After officer Burton instructed Figueroa to leave because he had been fired for refusing to return to work, the remaining employees, who likewise declined to return to work, could reasonably have believed, and indeed were expressly told by officer Burton, that they too would have to leave the premises as they were no longer considered employed by the Respondent. Neither Parker, Peterson, or Busse sought, at that point, to clarify the employment status of those employees who declined to return to work after Figueroa's termination, or to dispel any belief the employees might have gotten from Figueroa's termination, or from officer Burton's instructions to them, that they had been fired. As credibly testified to by Martinez, on his arrival at the scene on June 27, the employees who were engaged in the work stoppage told him they believed they had been fired. Their belief in this regard would have been confirmed by the help-wanted sign the Respondent posted on its front lawn the very next day. Further, Martinez, as found above, also credibly testified that Peterson told him, as the help-wanted sign was being posted, that the second-shift employees were fired the previous night for taking part in the work stoppage. On these facts, I am convinced, and so find, that the second-shift employees who participated in the walkout on June 27, were, along with Figueroa, indeed terminated that evening for engaging in protected concerted activity, and that the terminations were unlawful and violated Section 8(a)(1) of the Act.

I do not, however, agree with the General Counsel that the discharges were motivated by antiunion considerations and thus unlawful under Section 8(a)(3) and (1) of the Act. To establish that the discharges violated Section 8(a)(3), the General Counsel must make a prima facie showing sufficient to support the inference that the discharges were motivated, if not wholly, at

in such conduct. Rather, only Parker and Peterson are charged with making the remarks, and, contrary to the Respondent's assertion, both Figueroa and Salgado credibly attributed the remarks to Parker and Peterson, respectively.

[13] The Respondent, on brief, contends that the employees, neither on June 27, or at any time thereafter, "gave any reason why they were not reporting for work." (R. Br.13.) Its argument in this regard is disingenuous at best, as well as patently wrong. Bustamante, as noted, informed Parker, Busse, and Peterson on their arrival that the employees had walked out following his confrontation with Arizaga. The Respondent therefore knew before going out to speak with employees that the walkout was sparked by the Bustamante-Arizaga incident. Further, both Parker and Peterson readily admitted that, while they asked Bustamante what had triggered the work stoppage, they never sought an explanation for the work stoppage from Figueroa or any of the other employees, this despite the fact that the police were on the scene investigating the incident. I am satisfied that the Respondent was fully aware that employees engaged in the work stoppage to protest what they believed to be Bustamante's alleged June 27 mistreatment of Arizaga.

least in part, by the employees' union activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983). While employees, as correctly noted by the General Counsel, did call their union representative, Martinez, to come to the facility presumably to help resolve the matter, it was their participation in the protected work stoppage, not the fact that they called Martinez to the facility, that prompted the Respondent to discharge them. The evidence of record thus fails to show any linkage between the summoning of Martinez to the facility and the termination of Figueroa and the second-shift employees. Accordingly, I find that the General Counsel has not made a prima facie showing that discharges were motivated by anti-union considerations and shall, consequently, recommend dismissal of the 8(a)(3) allegation.

4. The 8(a)(5) and (1) allegations

The complaint, as noted, alleges, and the General Counsel contends, that the Respondent's unilateral decision to implement the EAP program was unlawful. The Respondent, at the hearing and again on brief, admits having instituted the EAP program unilaterally without giving the Union prior notice. It contends, however, that its actions were motivated solely by the employees' best interest, e.g., to provide them with immediate grief counseling in light of the death of one of their fellow employees. It argues that despite failing to notify and bargain with the Union before entering into the EAP agreement with TriCity Family Services, it did notify the Union that it was willing to discuss and negotiate the program during their ongoing contract talks, and that the Union neither responded, nor offered any counterproposal, to its EAP program. I find merit in the complaint allegation.

It is well established that an employer must notify and bargain with its employees' collective-bargaining representative before changes are implemented in mandatory subjects of bargaining. *NLRB v. Katz*, 369 U.S. 736 (1962). In its answer to the complaint, the Respondent admits that creation and implementation of the EAP program is a mandatory bargaining subject. (GC Exh.-1(g), at par. VII(e)), and further admits, on brief, that it "acted peremptorily" in instituting the program without first bargaining with the Union. (R. Br. 43.) It nevertheless argues that because its heart was in the right place in unilaterally instituting and implementing the EAP program, e.g., to help employees cope with the tragic death of a fellow employee, no violation should be found. However, the fact that the Respondent may have had good intentions and was acting in good faith when it unilaterally implemented the EAP program does not render its conduct lawful, for the Board has held that good faith is no defense for unilateral conduct. See *Crystal Springs Shirt Corp.*, 229 NLRB 4, 6 (1977), citing *NLRB v. Katz*, 369 U.S. 736 (1962). In other words, a showing of subjective bad faith on the employer's part is unnecessary to establish a violation. *Register-Guard*, 339 NLRB 353, 359 (2003).

The Respondent's implicit suggestion on brief that the Union somehow waived its right to bargain over the institution of the EAP plan by failing to offer any counterproposals of its own is simply without merit. Clearly, the Union never had an opportunity to offer a counterproposal to the TriCity EAP plan, for, as evident from the Respondent's own admission, the Union did not learn of the TriCity EAP program until after it had been instituted and implemented by the Respondent. In effect, therefore, the Union was presented with a fait accompli regarding the EAP plan, and any counterproposal it might have been willing to offer would, consequently, have amounted to nothing more than a futile gesture. *Friendly Ford*, 343 NLRB 1058, 1068 fn. 12 (2004); *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982); and *NLRB v. Roll & Hold Warehouse & Distribution Corp.*, 162 F.3d 513, 518 (7th Cir. 1998). To render meaningful any bargaining over the EAP plan, the Respondent was obligated to notify the Union of its proposed actions under circumstances that would have allowed it a reasonable opportunity to offer counter arguments or proposals. When notice is given too short a time before implementation, the Board finds such notice to be nothing more than a fait accompli. *Friendly Ford*, supra; also *Bath Iron Works Corp.*, 302 NLRB 898, 912 (1991). The Respondent here, as noted, gave the Union no notice whatsoever before implementing the EAP plan on June 13.[14] Having failed to offer any proper justification for its unilateral conduct, I find, as alleged in the complaint, that the Respondent's unilateral implementation of the EAP plan on June 13, violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. By threatening employees with discharge for engaging in protected concerted activity, photographing picketing employees without justification, and telling employees represented by the Union that they have no representation, the Respondent violated Section 8(a)(1) of the Act.

2. By discharging employees Paris Figueroa, Heraclio Arizaga, Adan Guerra, Leonel Hernandez, Eduardo Nava, David Nuñez, Silverio Corona, Juan Peña, Porfirio Huerta, Ramon Gonzalez, Juan Nieves Jr., Jesus Salgado, Boualoth Hansana, Agustin Morales, Saybandith K. Sundara, Phanvilay Sundara, Oudavone Hansana, David Soto, Southone Cavan, and Ruben Romero for engaging in a lawful work stoppage, the Respondent violated Section 8(a)(1) of the Act.

3. By establishing and implementing an EAP program without giving the Union prior notice and an opportunity to bargain over the program, the Respondent has violated Section 8(a)(5) and (1) of the Act.

4. The above unlawful conduct engaged in by the Respondent are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[14] The Respondent here neither contends nor has produced evidence to show that economic exigencies compelled it to act unilaterally regarding implementation of the EAP program, or that the Union had continually delayed and avoided bargaining over this subject matter. In fact, the evidence, as previously discussed, shows that the Union had, just 2 months before the Respondent unilaterally instituted its EAP, proposed such a plan to the Respondent during negotiations. The Respondent at the time rejected the Union's proposal as being unnecessary. The Respondent's unilateral action, therefore, is not excusable under any of the limited exceptions discussed in *Register-Guard*, supra.

5. Except as set forth above, the Respondent has not engaged in any other unfair labor practice.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

To remedy its unlawful discharge of Paris Figueroa, Heraclio Arizaga, Adan Guerra, Leonel Hernandez, Eduardo Nava, David Nuñez, Silverio Corona, Juan Peña, Porfirio Huerta, Ramon Gonzalez, Juan Nieves Jr., Jesus Salgado, Boualoth Hansana, Agustin Morales, Saybandith K. Sundara, Phanvilay Sundara, Oudavone Hansana, David Soto, Southone Cavan, and Ruben Romero, the Respondent shall be required to, within 14 days from the date of the Order, offer them reinstatement to their former positions, or, if their positions no longer exist, to substantially equivalent positions, without prejudice to the rights and privileges they previously enjoyed.

The Respondent will also be required to make the above-named employees whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent shall further be required to, within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter to notify the above employees in writing that this has been done and that the discharges will not be used against them in any way.

To remedy its unlawful implementation of the EAP plan, the Respondent shall, if requested to do so by the Union, rescind the EAP program and bargain with the Union over the plan.

Finally, the Respondent shall be ordered to post an appropriate notice to employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The Respondent, Industrial Hard Chrome, Ltd., Bar Technologies LLC, Fluid Power Manufacturing, Geneva, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge for engaging in protected concerted activity, engaging in the surveillance of our employees by photographing without justification their lawful picketing activities, and telling employees represented by the Union, United Steelworkers of America, AFL–CIO, CLC, or any other labor organization, that they have no union representation.

(b) Terminating or otherwise discriminating against employees for engaging in a lawful work stoppage to protest supervisory mistreatment of employees, or for engaging in any other protected concerted activity.

(c) Instituting and implementing an employee assistance plan (EAP) for employees represented by United Steelworkers of America, AFL–CIO, CLC, without first giving the Union notice and an opportunity to bargain over the plan. The appropriate bargaining unit of employees represented by the Union include:

> All full-time and regular part-time production and maintenance employees employed by the Employer (Industrial Hard Chrome Ltd., Bar Technologies, LLC, and Fluid Power Manufacturing) at its facilities currently located at 501 Fluid Power Drive, Geneva, Illinois; but excluding all other employees, office clerical employees, and guards, professional employees, and supervisors as defined by the Act.

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

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

(a) Within 14 days from the date of the Board's Order, offer Paris Figueroa, Heraclio Arizaga, Adan Guerra, Leonel Hernandez, Eduardo Nava, David Nuñez, Silverio Corona, Juan Peña, Porfirio Huerta, Ramon Gonzalez, Juan Nieves Jr., Jesus Salgado, Boualoth Hansana, Agustin Morales, Saybandith K. Sundara, Phanvilay Sundara, Oudavone Hansana, David Soto, Southone Cavan, and Ruben Romero full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Paris Figueroa, Heraclio Arizaga, Adan Guerra, Leonel Hernandez, Eduardo Nava, David Nuñez, Silverio Corona, Juan Peña, Porfirio Huerta, Ramon Gonzalez, Juan Nieves Jr., Jesus Salgado, Boualoth Hansana, Agustin Morales, Saybandith K. Sundara, Phanvilay Sundara, Oudavone Hansana, David Soto, Southone Cavan, and Ruben Romero whole for any loss of earnings and other benefits resulting from their unlawful terminations in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges of the above employees, and within 3 days thereafter notify the employees in writing that this has been done, and that the discharges will not be used against them in any way.

(d) Upon request from the Union, rescind the EAP program and bargain in good faith with the Union over the institution or implementation of such a program for the unit employees represented by the Union.

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

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

(f) Within 14 days after service by the Region, post at its facility in Geneva, Illinois, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 13, 2006.

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

[16] 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."