JD(ATL)–24–09
Lorain, OH

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

CAMACO LORAIN
MANUFACTURING PLANT

and **CASE 8–CA–36785**

UNITED AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA, UAW, REGION 2–B

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SUPPLEMENTAL DECISION

Statement of the Case

KELTNER W. LOCKE, Administrative Law Judge: Although I conclude that Respondent violated Section 8(a)(3) and (1) by suspending an employee for engaging in union and protected concerted activities, I further conclude that Respondent did not violate the Act when it discharged the employee later.

Procedural History

This case began on September 18, 2006, when the United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Region 2–B, which I will refer to as the "Union" or the "Charging Party", filed the initial charge in this case. The Union amended this charge on November 30, 2006.

After an investigation, the Regional Director for Region 8 of the National Labor Relations Board issued a Complaint and Notice of Hearing dated November 30, 2006. In doing so, the Regional Director acted for the General Counsel of the Board, whom I will refer to as the "General Counsel" or the "government."

The General Counsel amended the Complaint and Notice of Hearing, which I will call the "Complaint," once before and once during the hearing. Respondent filed timely answers to the Complaint and its amendments.

On March 13, 2007, a hearing opened before me in Cleveland, Ohio. The parties presented evidence on March 13 and 14, 2007, and counsel argued the case orally on March 15, 2007. On March 16, 2007, I issued a bench decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations, followed by a Certification of Bench Decision issued in accordance with Section 102.45 of the Rules and Regulations.

The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

On December 18, 2008, the Board issued an Order Remanding the case to me. See *Camaco Lorain Mfg. Plant*, 353 NLRB No. 64 (December 18, 2008).

As instructed by the Board, I afforded counsel the opportunity to file briefs, which I have read and considered.

The Order Remanding directs me, in part, to "provide a written decision addressing each of the *contested complaint allegations*." (Italics added.) The Board's use of the phrase "contested complaint allegations" rather than the narrower phrase "remanded issues" indicates to me that the Board seeks a full new decision rather than only a decision addressing the remanded issues. For clarity, I will list and summarize the remanded issues under a separate heading below, but otherwise, the decision will resemble an initial decision to comply with the Board's instructions.

Remanded Issues

The full meaning and significance of the remanded issues will become apparent later, when the contested complaint allegations are discussed. However, it may benefit clarity to list the issues now, so that they may be kept in mind as the decision proceeds. The Board remanded the following issues:

1. Did Supervisor Lewie Jones violate Section 8(a)(1) of the Act on April 26, 2006, by asking employees Vargas and Velazquez about a meeting – specifically, "How was the meeting?" – in apparent reference to a union organizing meeting the previous day? In applying the criteria set forth in *Rossmore House*, 269 NLRB 1176 (1984), I am to consider whether the employees' responses – one a denial and the other silence – should weigh in favor of a finding of unlawfulness pursuant to *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964), *Sproule Construction Co.*, 350 NLRB 774, 774 fn. 2 (2007), and *Grass Valley Grocery Outlet*, 338 NLRB 877, 877 fn. 1 (2003).

2. Did the evidence establish that employees had joked with Supervisor Jones about the Union meeting?

3. Did Jones' question to Vargas and Velazquez – "How was the meeting?" – unlawfully create an impression of surveillance?

4. Were the protected activities of employee Samuel Serrano a substantial or motivating factor in Respondent's May 30, 2006, decision to suspend Serrano for three days? In considering this issue, I am to take into account the testimony of Human Resources Manager Karin Mayfield that the decision to suspend Serrano was a "team decision."

5. Does other evidence support a finding that animus entered into Respondent's decision to impose this discipline? Other evidence to be considered includes the timing of the suspension and Serrano's meeting with Human Resources Manager Mayfield on the day Jones initiated the decision to discipline Serrano.

6. Did Supervisor Jones or lead man Frank Dellipoala report Serrano's alleged threat to Human Resources Manager Mayfield? If it was Jones, does that affect the finding that Respondent would have disciplined Serrano even in the absence of protected activity?

7. Did employee Daniel Clarkston tell Supervisor Jones that he (Clarkston) was going to punch Human Resources Manager Mayfield? If so, what distinguishes this conduct from Serrano's conduct which resulted in disciplinary action?

8. The Board concluded that Serrano did not make any statement during a meeting at which General Manager Mike Allen introduced an incentive program designed to increase production. Allen testified that he discharged Serrano for comments made to him on the production floor. The Board directed me to make credibility findings regarding this conversation and to determine how these findings affect my conclusion that Serrano's discharge was lawful.

Admitted Allegations

In its Answers to the Complaint and its amendments, Respondent admitted a number of allegations. Based on those admissions, I find as follows:

The Union filed the charge and amended charges, and Respondent received copies of them, as alleged in paragraphs 1(A) through 1(D) of the Complaint, as amended.

Respondent, a Delaware corporation with an office and place of business in Lorain, Ohio, manufactures automotive seat frames. At all material times Respondent, which meets the Board's standards for the exercise of jurisdiction, has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

During all times relevant to the allegations in the Complaint, the following individuals were Respondent's supervisors within the meaning of Section 2(11) of the Act and its agents within the meaning of Section 2(13) of the Act: General Manager Mike Allen, Human Resources Manager Karin Mayfield, and Supervisor Lewie Jones.

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

Contested Allegations

Complaint Paragraph 6

The subparagraphs of Complaint paragraph 6 allege that in April 2006 Respondent, by its supervisor, Lewie Jones, made unlawful statements to employees, more specifically, that Jones interrogated employees about their Union activities, created the impression that the Respondent was engaged in surveillance of their Union activities, and stated that such Union activities would be futile.

The record establishes that some time in the first part of 2006, employee Samuel Serrano contacted the Union, and received instructions on how to organize Respondent's production workers. Serrano and five other employees attended a meeting with a Union organizer on April 26, 2006. This meeting took place at a Denny's restaurant in Lorain, Ohio, where Respondent's plant is located.

An employee, Andre Vinson Cheers, testified that the day after the meeting at Denny's, Supervisor Jones asked him how the meeting went. Also, according to Cheers, Jones requested that Cheers work late and then told him, "You're smarter than Sam [Serrano]. You've been around here longer than him." According to Cheers, Jones added that there was not going to be a union in the plant that employees tried it before, "and people got fired."

However, I do not credit Cheers' testimony, which Jones denied. Respondent had discharged him and resentment over that termination would incline him, if anything, to bend his testimony in a way that hurt Respondent. Jones also had been discharged, but testified in a way that did not offer him any satisfaction of revenge.

Another employee Alejandro Velazquez testified that after he returned from the union organizing meeting at Denny's restaurant, Supervisor Jones came up to where he was working and asked "How was the meeting?" Velazquez did not answer but continued to work. Jones never asked him again about any type of Union meeting,

Jones denied making the statement in question. Therefore, I must determine which testimony should be credited. At the time of the hearing, Velazquez remained employed by Respondent. Therefore, it was not in his interest to give testimony which might result in a finding adverse to Respondent. That factor militates in favor of finding Velazquez' testimony to be credible.

Respondent, however, had discharged Jones before the date of the hearing. Although Jones did not manifest any hostility towards his former employer, it would be reasonable to conclude that he would not be inclined to slant his testimony in favor of a company which had discharged him. Thus, any biasing effect of employment status would be about equal for both Velazquez and Jones. Therefore, it provides no basis for determining which testimony more likely is reliable.

Similarly, my observations of the demeanor of both witnesses do not help decide which testimony to credit. Both witnesses appeared to be telling the truth.

Jones particularly impressed me because of his willingness to admit when he did not know the answer to a question. In other respects, he seemed candid almost to the point of bluntness. In view of this candor, I would be reluctant to conclude that Jones untruthfully denied asking about the meeting because personal pride prompted him to conceal a possible unfair labor practice.

In sum, both witnesses seemed to be reliable and any credibility resolution necessarily would entail too much guesswork for comfort. However, more than one witness testified that Jones asked about the Union meeting, which makes it more likely that Jones made the statement in question.

Thus, another employee, Raphy Vargas, testified that Jones asked him a similar question. According to Vargas, the day after the meeting, Jones approached him and asked, "How was the meeting yesterday?" Vargas replied that he did not know what meeting Jones was talking about, and Jones did not say anything else.

Vargas also remained employed by Respondent and the record provides no reason to believe that he harbored a grudge against his employer or its management. There is no reason to doubt the truthfulness of his testimony.

Therefore, based on the testimony of Velazquez and Vargas, I conclude that Jones did ask employees how they enjoyed the meeting. Now, I must determine whether Jones' questions interfered with, restrained, or coerced employees in the exercise of their Section 7 rights, either by constituting unlawful interrogation or by creating the impression among employees that Respondent had placed their Union activities under surveillance. First, I will consider whether Jones' questions constituted unlawful interrogation.

In *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Union Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), the Board applied the standards articulated by the court in *Bourne Co. v. NLRB*, 332 F.2d 47 (2d Cir. 1964). The *Bourne* test factors are as follows:

1. The background, i.e. is there a history of employer hostility and discrimination?
2. The nature of the information sought, e.g. did the interrogator appear to be seeking information on which to base taking action against individual employees?
3. The identity of the questioner, i.e. how high was he in the Company hierarchy?
4. Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of "unnatural formality"?
5. Truthfulness of the reply.

See also *Mediplex of Danbury*, 314 NLRB 470, 472 (1994). *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958 (2004).

With respect to the first *Rossmore House* factor, the record does not establish a history of employer hostility or discrimination. Although the record includes references to a previous

settlement, the government did not offer any settlement agreement into evidence, so it is not possible to determine whether such an agreement, if it exists, includes a nonadmissions clause.

In *Painters District Council 9 (We're Associates)*, 329 NLRB 140, 143 (1999), the judge noted that informal settlement agreements and formal settlement stipulations containing nonadmission clauses cannot be used to establish a proclivity to violate the Act. Thus, the only type of settlement agreement that can be used to establish proclivity to violate the Act is a formal settlement, without a nonadmission clause. See *Teamsters Local 122*, 334 NLRB 1190, 1192 (2001).

There is no indication that Respondent ever entered into a formal settlement without a nonadmission clause. Accordingly, I conclude that the record does not establish any history of employer hostility or discrimination.

As to the second *Rossmore House* factor, the record does not establish that Jones was seeking information on which to base disciplinary action.

Jones was a first–line supervisor, not a member of higher management. Additionally, he asked the questions in the workplace, in what might be called the "employee's domain" rather than in a locus of authority. Thus, the third and fourth *Rossmore House* factors also militate against a finding of coercive interrogation.

The Board's Order Remanding directed me, in applying the criteria set forth in *Rossmore House*, above, to consider whether the employees' responses – one a denial and the other silence – should weigh in favor of a finding of unlawfulness pursuant to *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964), and, particularly, the Board's recent decisions in *Sproule Construction Co.*, 350 NLRB 774, 774 fn. 2 (2007), and *Grass Valley Grocery Outlet*, 338 NLRB 877, 877 fn. 1 (2003).

In *Sproule Construction*, the Board followed the framework set out in *Rossmore House*, above, to determine whether, under all the circumstances, the interrogation reasonably tended to restrain, coerce or interfere with rights guaranteed by the Act. The Board found that the questioning "was coercive given that (a) the questioning occurred while the applicants were seeking employment; (b) *the applicants sought to conceal their support for the Union*; (c) the Respondent offered no legitimate explanation for the questioning; and (d) the questioning occurred in the context of serious unfair labor practices." 350 NLRB 774 at fn. 2 (italics added).

Thus, the Board regarded the employees' reluctance to reveal their union support as one indication that the questioning was coercive. Presumably, if the interrogation did not have a coercive effect, the employee would feel more comfortable discussing his union activity and would therefore be more likely to do so. Following *Sproule Construction*, I conclude that the employees' reluctance to disclose whether they attended a union organizing meeting weighs in favor of finding that the interrogation was coercive.

The Board also directed that I examine whether the evidence establishes that employees had joked with Supervisor Jones about the Union meeting. In its Order Remanding, the Board

stated, in part:

> The judge found that Jones credibly testified that some employees had joked about the Union. In fact, however, Jones named only one such employee: employee Danielle Harris. Jones [Harris] did not testify, and there appears to be no other record evidence suggesting that Vargas or Velasquez (or anyone other than Harris) had ever joked with Jones about union meetings. Moreover, Vargas, whom the judge appears to have credited, expressly testified that Jones did not question him in a joking manner. The judge does not address this contrary testimony. We therefore remand the interrogation and impression of surveillance allegations to the judge for further analysis.

Employee Raphy Vargas testified that sometime in April 2006, Sam Serrano invited him to attend a Union organizing meeting at Denny's Restaurant in Lorain, Ohio. Vargas went to this meeting and, according to his testimony, stayed for three to five minutes.

Vargas further testified that the next day, Supervisor Jones asked, "How was the meeting yesterday." According to Vargas, he replied that he did not know what Jones was talking about, and Jones did not say anything else to him. Although Vargas testified that "the rest of the employees" were present when Jones asked the question, Vargas did not identify any other employee by name and also did not indicate the number of employees present.

When the General Counsel asked Vargas if Jones ever questioned him again about the Union, Vargas answered "No."

The Board's Order Remanding, quoted above, stated that Vargas "expressly testified that Jones did not question him in a joking manner." The Order Remanding referred to Vargas' testimony as "contrary testimony." It may be helpful to quote the relevant portion of Vargas' testimony verbatim. On direct examination, Vargas testified as follows:

> Q: . . .What did Mr. Jones say to you?
> A: How was the meeting yesterday?
> Q: Did he say anything else?
> A: No.

Vargas returned to this subject briefly during his cross–examination:

> Q: . . .And Mr. Jones said to you how was the meeting; correct?
> A: How was the meeting, yeah?
> Q: Did he say so in kind of a joking fashion?
> A: Well, he just asked me, you know, normal, how was the meeting yesterday?
> Q: Did he threaten your job at all?
> A: No.

Jones testified as follows:

> Q: Did you ever ask Raphy Vargas how was the meeting back in April of '06?
> A: I'm going to say, to the best of my recollection, I don't think I've ever talk[ed] to Raphy about a union —
> Q: It doesn't stick —
> A: — let alone asking how the meeting went.

Q: It doesn't stick in your mind at all that you said that?
A: No.

Thus, Jones did not squarely deny having made the statement, but only testified that he did not recall it. Accordingly, I find that Jones did make the statement which Vargas attributed to him. Additionally, I find that Jones asked the question in his normal tone of voice.

The Bench Decision and Certification noted that the employees, rather than Jones, initiated the joking. I based this finding on Jones' testimony. For the reasons stated in the Bench Decision and Certification, including my observations of Jones while he testified, I concluded that he was a reliable witness and that his testimony should be credited. Because of my reliance on Jones' testimony, which I credit on this point, I continue to find that employees joked about the Union meetings at Denny's Restaurant and that employees, not Jones, initiated the joking.

However, the Board directed me to determine whether the evidence established that employees had joked about the meeting *with Jones*. Based on Jones' uncontradicted testimony, which I credit, I find that employee Danielle Harris told Jones about the Union organizing meetings and joked with him about them. Specifically, Jones testified that Harris "would rub my belly and say I'd — I'll meet you at Denny's in a laughing way."

Jones' testimony suggests that at some point, someone invited him to attend one of the organizing meetings. This unnamed individual may have been Harris.

Jones' testimony that employees reacted with amusement to Serrano's union organizing efforts appears plausible in the rather unusual circumstances of this case. Jones testified that he did not believe Serrano had the "clout" to persuade employees to unionize. In most cases, I would doubt the reliability of such a comment, but most cases do not involve a union organizing effort by an employee who engaged in bizarre workplace behavior.

For example, uncontroverted evidence establishes that, to make a point, Serrano sometimes would lie on the floor and move in such a way that one witness referred to it as the "gator." In view of such behavior, it isn't difficult to believe that employees made jokes at Serrano's expense. Employees who had witnessed Serrano's strange antics in the workplace very plausibly might regard his union organizing efforts with amusement.

In the Certification of Bench Decision, I noted that the Board long has held that in determining the coerciveness of an interrogation, the Board applies an objective standard which considers the speaker's intent irrelevant. Even if a supervisor claimed that he only had been joking, that excuse fails to cleanse statements of their coercive effect, because employees can still detect the threat behind the smile and be affected by it.

After acknowledging that well-established principle, I reasoned that the unusual facts of the present case warranted a distinction. In attempting to make this distinction, I did not focus on the supervisor's intent in making the statement because that intent still remained irrelevant. Rather, I considered whether the employees who heard the question would regard it as a genuine attempt at humor without other intent, or would view it as coercive interrogation in disguise. Concluding that the employees reasonably would regard the question as a joke, I reasoned that the interrogation was noncoercive.

That analysis suffers from at least two flaws, one a matter of law and the other of fact. Legally, my reasoning cut with too fine a knife. It paid lip service to the principle that in determining the coerciveness of an interrogation, the Board applies a strictly objective standard focusing on how the allegedly coercive statement *reasonably would affect* employees' willingness to engage in protected activities. After acknowledging that principle, however, I transgressed it by considering what effect Supervisor Jones' question actually had on the two employees.

My reasoning assumed that I could take into account that the employees believed the supervisor to be joking and still subject his statement to an objective analysis. In effect, I was "objectively" determining whether Jones' question reasonably would have a coercive effect on employees who believed that the supervisor was asking it in jest.

To follow the Board's principle that it looks only to the effects a statement reasonably would have on employees, the judge must assume hypothetical employees who are average and, indeed, faceless. The moment I added a specific characteristic to the hypothetical employees – namely, that they knew the supervisor was joking – the analysis started becoming subjective because it had begun to focus on specific individuals, the employees who actually heard the supervisor's words. It is true that I went only a little bit down this path, taking into account only that the employees believed the supervisor to be joking, but going a "little bit" down this path was going too far. I erred.

Additionally, the credible evidence was insufficient to support my conclusion that the two employees believed Jones to be joking. My error thus was factual as well as legal.

As discussed further below, employees indeed joked about the Union organizing effort and at least one employee, Harris, joked to Supervisor Jones about it. However, those facts do not establish that Jones gave the appearance of joking or that employees reasonably would perceive him to be joking. Whatever merriment Jones may have felt inside, the evidence is insufficient to establish that employees perceived it.

Now, I will perform a *Rossmore House* analysis untainted by these errors. The first four *Rossmore House* factors still weigh against finding an unlawful interrogation. The record does not establish a history of employer hostility or discrimination. It also does not establish that Jones was seeking the information, or that he appeared to be seeking the information, as a basis for taking action against employees. Jones was not high in the management structure and the interrogation did not take place in a locus of authority.

Thus, only the fifth *Rossmore House* factor weighs in favor of finding that the question was coercive and therefore unlawful. Accordingly, I adhere to my conclusion that Jones' question did not constitute an unlawful interrogation.

The Board also directed that I determine whether Jones' question to Vargas and Velazquez – "How was the meeting?" – unlawfully created an impression of surveillance. Causing employees to believe their union activities are being watched obviously would interfere with, restrain and coerce them in the exercise of Section 7 rights.

In determining whether an employer has unlawfully created the impression of surveillance of employees' union activities, the Board asks whether, under all the relevant circumstances, reasonable employees would assume from the statement in question that their union or other protected activities had been placed under surveillance. *Waste Management of Arizona*, 345 NLRB 1339 (2005), citing *Flexsteel Industries*, 311 NLRB 257 (1993); *Schrementi Bros., Inc.*, 179 NLRB 853 (1969).

As the Board explained in *Frontier Telephone of Rochester*, 344 NLRB 258, 264 (2005), its essential focus has always been on the reasonableness of the employees' assumption that the employer was monitoring their union or protected activates. The Board applies an objective standard in assessing the reasonableness of a particular statement. Stated another way, the Board examines the facts and determines what message a reasonable employee would understand the statement to convey.

In *Frontier Telephone of Rochester*, above, the employees had used a website to help their organizing campaign. A supervisor told an employee that he was aware of a message that another employee had posted on a page at this website. After examining the statement and its context, the Board concluded that a reasonable employee hearing the supervisor's remark would assume that the supervisor had learned about the employee's message lawfully rather than as a result of having placed the employees' union activities under surveillance. Therefore, it dismissed this allegation.

The present facts appear to fall within the *Frontier Telephone of Rochester* precedent. At work, employees openly discussed the Union organizing meetings and at least one employee kidded Supervisor Jones about them. An employee even invited Jones to attend. In these circumstances, a reasonable employee likely would conclude that the supervisor learned of the Union meeting lawfully, rather than as the result of surveillance.

It may be noted that the fact that employees discussed the Union openly in the workplace is not itself determinative. Other circumstances may still lead a reasonable employee to conclude that management had placed workers' union activities under surveillance. Thus, in *Rogers Electric, Inc.,* 346 NLRB 508, 509 (2006), the Board noted that it has found that an employer creates an impression of surveillance when it monitors employees' concerted protected activity in a manner that is "out of the ordinary," even if the activity is conducted openly. See, e.g., *Loudon Steel, Inc.*, 340 NLRB 307, 313 (2003).

. The present record does not establish either that Respondent was acting in an "out of the ordinary" manner to observe employees or that the employees had any reason to form such a belief. Accordingly, I conclude that Supervisor Jones' question did not create an unlawful impression of surveillance. Therefore, I recommend that the Board dismiss this allegation.

The Complaint also alleges that in about April 2006, Respondent, by Supervisor Lewie Jones, made statements of futility regarding employees' union activities. This allegation rests on the testimony of employee Andre Cheers, who attributed to Jones a statement that there was not going to be a union in the plant, that employees tried it before "and people got fired. Jones denied making such a statement.

For the reason discussed above, I have not credited Cheers' testimony. Accordingly, I conclude that Jones did not make the statement in question. Therefore, I recommend that the Board dismiss this allegation.

Section 8(a)(3) Allegations

Suspension of Serrano

Paragraph 7(B) of the Complaint, as amended, alleges that on or about May 30, 2006, the Respondent suspended employee Sam Serrano. Paragraph 7(D) alleges, in pertinent part, that Respondent took this action to discourage employees from engaging in protected, concerted activity and/or because Serrano formed, joined and/or assisted the Union and engaged in protected concerted activity. Respondent does not dispute that it suspended Serrano, but denies that it did so for the unlawful reasons alleged.

Serrano began work for Respondent as a production employee in 2004. At some point, Serrano began complaining to Respondent's human resources director, Karin Mayfield, about how his supervisor, Lewie Jones, treated employees. Serrano made one such complaint to Mayfield the day before his May 30, 2006 suspension. Serrano's complaint to Mayfield will be discussed later in this decision.

The next day, a lead man, Frank Dellipoala, reported to Supervisor Lewie Jones that he had seen Serrano throwing his hands up and down in the air while standing by a machine. According to Dellipoala, when he asked Serrano what was wrong, Serrano said that he wasn't going to complain any more to the human resources director. Dellipoala quoted Serrano as saying words to the effect that he was "about to go off. This may be his domain in here, but it's mine out there. Lewie is going to pay."

Delliapoala gave testimony to this same effect at the hearing. Although Serrano consistently has denied making this statement, my observations of the witnesses lead me to credit Dellipoala's testimony. Therefore, I conclude that Serrano did say the words Delliapoala attributed to him.

After Supervisor Jones received this report from Dellipoala, he contacted Human Resources Manager Mayfield. According to Mayfield's testimony, which I credit, Jones wanted to discharge Serrano.

Later that day, Mayfield called Dellipoala into her office. Also present were Supervisor Jones and one of Respondent's managers, Athanasios ("Tom") Koutsorellis. Dellipoala described what Serrano had said and then left the meeting. Based on Dellipoala's testimony, which I credit, I find that Mayfield did not ask him about Serrano's union activity.

Mayfield then called Serrano into her office. Jones and Koutsorellis also were present. Mayfield asked Serrano about the statement Dellipoala had attributed to him and, according to Serrano, he denied making it. Nonetheless, Mayfield told Serrano he was suspended for the remainder of that day and for the three following days.

The Complaint alleges that this suspension of Serrano violated Section 8(a)(3) and (1) of the Act. In considering this allegation, I will follow the framework established by the Board in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must establish four elements by a preponderance of the evidence. First, the government must show the existence of activity protected by the Act. Second, the government must prove that Respondent was aware that the employees had engaged in such activity. Third, the General Counsel must show that the alleged discriminatees suffered an adverse employment action. Fourth, the government must establish a link, or nexus, between the employees' protected activity and the adverse employment action. More specifically, the General Counsel must show that the protected activities were a substantial or motivating factor in the decision to take the adverse employment action. See, e.g., *North Hills Office Services,* 346 NLRB 1099, 1101 (2006).

In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the respondent must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. *Wright Line*, 251 NLRB 1083, at 1089; *Hyatt Regency Memphis*, 296 NLRB 259, 260 (1989), enfd. in relevant part 939 F.2d 361 (6th Cir. 1991). See also *Manno Electric, Inc.*, 321 NLRB 278, 280 at fn. 12 (1996).

In its Order Remanding, the Board instructed me to determine whether the protected activities of employee Serrano were a substantial or motivating factor in Respondent's May 30, 2006 decision to suspend Serrano for three days. In considering this issue, I am to take into account the testimony of Human Resources Manager Karin Mayfield that the decision to suspend Serrano was a "team decision."

Additionally, I must determine whether other evidence supports a finding that animus entered into Respondent's decision to impose this discipline. Other evidence to be considered includes the timing of the suspension and Serrano's meeting with Human Resources Manager Mayfield on the day Jones initiated the decision to discipline Serrano.

First, I will analyze the significance of Mayfield's testimony that it was a "team decision" to suspend Serrano. She testified "Well, we discussed it and ultimately we all supported it. . ."

Mayfield did not identify specifically the composition of the "human resources team" which made this decision. Although it is possible that others participated in the decision besides Mayfield, Koutsourelis and Jones – the three persons present when Serrano was interviewed – the record does not establish such participation. Therefore, I will assume that only Mayfield, Koutsourelis and Jones took any part in that decision.

In its Order Remanding, the Board stated that it "appears from the record that Jones (who allegedly interrogated Vargas and Velazquez) may have been instrumental in that decision." The Boar's use of the word "appears" rather than some more conclusive phrase (such as "the record establishes") leads me to believe that the Board did not make a definite, binding finding on this issue but rather desired more analysis based on the evidence. In my view, the record establishes, at most, that Supervisor Jones attended the meeting at which the "human resources team" made the decision to discipline Serrano

Respondent's brief on remand states that there "is no evidence that Jones was a member of the 'team' or had any responsibilities in Human Resources at Camaco." However, determining whether or not this supervisor was a member of the "human resources team" in some official sense, does not get to the heart of the Board's concern. The pivotal question does not turn on Jones' status as a team "member" but on how much Jones participated in the decision-making process which resulted in Serrano's suspension. Thus, even if Jones had some official-looking certificate listing him as a member of the human resources team, that would not matter if he took no part in the decision-making. Conversely, even if Jones never attended a human resources team meeting before and never attended another one later, if he was present at this particular meeting and contributed to the discussion regarding Serrano, I must consider how and to what extent he affected the outcome.

Although the record does not reveal with numerical precision the extent to which Jones participated in the decision to suspend Serrano, it certainly suggests that Jones' role in that decision was greater than de minimis. Based on Mayfield's testimony, which I credit, when Jones first came to Mayfield concerning what Serrano had said, Jones wanted to discharge Mayfield. So, even if Jones expressed no opinion at all when the "human resources team" deliberated, Mayfield already knew that Jones sought the imposition of discipline.

Moreover, Mayfield's testimony that "we discussed it and ultimately we all supported it" indicates that Jones did participate to some extent in the decision-making process and ultimately agreed to suspend Serrano. Considering that Jones initially wanted Serrano fired, it would seem quite unlikely that he ever tried to influence the "team" to impose no discipline at all.

The record does not establish that either Mayfield or Koutsourelis knew about Serrano's attempts to organize a union at the time the "team" decided to suspend him. However, because Jones was a supervisor and agent of Respondent within the meaning of Sections 2(11) and 2(13) of the Act, respectively, his knowledge of Serrano's protected activities may be imputed to Respondent as a matter of law. Moreover, as discussed below, Serrano engaged in other protected activity and Mayfield was aware of it.

In its Order Remanding, the Board directed that I consider the timing of the suspension and Serrano's meeting with Human Resources Manager Mayfield on the day Jones initiated the decision to discipline Serrano. Citing *Real Foods Co.*, 350 NLRB 309, 311 (2007) and *Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004), the Board observed that the suspicious timing of an adverse employment action in relation to protected activity can support an inference of unlawful motivation. The Board quoted parts of Jones' testimony indicating that the supervisor's attitude towards Serrano changed for the worse after Serrano began his Union activities.

Specifically, Jones testified that Serrano had started out as "probably one of my most favorite employees" but that in early spring 2006 "the tables turned." In its Order Remanding, the Board observed that Serrano had begun his Union organizing activity shortly before this time period.

When Supervisor Jones described the change in Serrano's attitude and performance, he did not mention Serrano's Union activities. Instead he testified that "out of the blue" Serrano changed from a "focused" employee (presumably meaning focused on his work) to an unfocused

employee. Specifically, Jones testified as follows:

> He worked hard, he was focused. And, out of the blue, just like everything, the tables turned, you know. He wasn't focused.

Thus, Jones' "tables turned" remark, in context, does not refer to Serrano's protected activities but rather to his dedication to, or concentration upon, his work. Indeed, in both the sentence before the "tables turned" phrase and the sentence after that phrase, Jones used the word "focused." Before the change, Serrano was focused and afterwards he was not.

No evidence extrinsic to Jones' testimony sheds any light on what Jones meant by the "tables turned" remark. Accordingly, I must rely on context to ascertain the most likely meaning. The context, however, does not suggest that Jones had in mind Serrano's Union activities. To the contrary, the context, as quoted above, indicates that Jones' words described a decline in the attention Serrano paid to his job duties.

Under what circumstances would it be fair and logical to separate the "tables turned" phrase from its setting in Jones' testimony and consider it, in isolation, to suggest antiunion motivation? Doing so requires an assumption that Jones did not mean what he said.

Sometimes, the Board does conclude that a supervisor said one thing while meaning another. These instances typically concern a supervisor's comments to employees about a union. A supervisor may use facially innocent words to conceal an unlawful threat, but the words cannot sound *entirely* innocent because if they did, the employees would not discern the hidden threat at all. The Board, applying an objective standard, can determine what a typical employee reasonably would understand the message to be.

However, Supervisor Jones had no reason to sneak a covert threat into his testimony. From the witness stand, he was not talking to employees about unionization. Even assuming for the sake of analysis that Jones desired to dissuade employees from organizing – a doubtful assumption, considering that Respondent had discharged Jones well before the hearing – the courtroom would not provide him an opportunity.

In other words, no basis exists for assuming that Jones would intend the words of his testimony to convey something other than their obvious meaning. Specifically, Jones would have no other reason to describe Serrano as "focused" before the "tables turned" and not "focused" afterwards except to explain that Serrano had stopped paying attention to his duties.

Could Jones have been using the phrase "tables turned" as a euphemism for "began a union organizing drive"? In the absence of credible extrinsic evidence indicating that Jones really meant the latter, I would not construe his testimony to mean something so different from the obvious import of the words. A judge isn't free to make words mean whatever he chooses them to mean at a particular moment.

Quite possibly, Serrano's interest in his job duties may have fallen at the same time his interest in organizing a union increased. Indeed, some kind of dissatisfaction with working conditions easily could prompt both changes simultaneously. However, even if Serrano stopped attending to his job performance at the same time he began focusing on unionization, the

concurrence of these events in time provides no logical basis to interpret Jones' testimony in a strained way.

As Serrano's supervisor, Jones would evaluate the quality of Serrano's work on a continuing basis. Jones had a legitimate reason to monitor how carefully Serrano was paying attention to his job duties. Considering that the supervisor bore responsibility for the quality of the work performed under his supervision, Jones naturally would be concerned when Serrano stopped focusing on his work and might well have taken this change personally.

As the Board noted, Jones wasn't always an easy supervisor. That, too, is consistent with the conclusion that Jones set high standards for his employees and regarded as apostasy a worker's change from focused to indifferent. If so, there would be nothing surprising about Jones' use of the "tables turned" expression to describe the change in Serrano.

As the Board noted, under some circumstances, unlawful motivation may be inferred from suspicious timing. However, when a judge draws such an inference, he risks the logical error described by the Latin phrase *post hoc ergo propter hoc*. The sequence of events might reflect a connection, but on the other hand, it might not. If the record includes other evidence of animus, it increases the likelihood that the timing of events reflects unlawful motivation. On the other hand, if the record does not contain evidence of animus apart from timing, drawing an inference from timing may be risky, unreliable and inappropriate.

Jones' "tables turned" remark cannot justify drawing an inference from timing because it had nothing to do with protected activity. In other respects, the record does not warrant such an inference.

On the other hand, two other things Jones said on the witness stand concern me. Jones testified that Serrano had turned on him "like a pit bull." This description suggests misconduct more active than merely paying insufficient attention to work duties. Jones also testified that "rather than focus on his work, [Serrano] was trying to create problems, so to speak, for me on a daily basis." That phrase "trying to create problems" possibly might refer to Serrano's Union organizing efforts or other protected activities.

Jones explained that Serrano "used performance as a tool to get attention." Although the exact meaning of this statement isn't clear, it doesn't manifestly pertain to any protected activity.

However, Jones also said that Serrano "wasn't happy with the way the plant was working and, you know, he would write everything down in big letters on the board for everybody to see and, you know, just — just trying to be extremely difficult." Under certain circumstances, the statute might protect this activity, if the words Serrano wrote on the board "for everybody to see" pertained to employees' wages, hours or working conditions.

Serrano's actions obviously irritated Jones. However, "unlawful motivation" entails more than being annoyed at someone. It involves not only a desire to take an adverse employment action against someone because of protected activity but also a willingness to break the law to accomplish that end. The fact that Jones believed Serrano was "trying to create problems" does not compel the conclusion that Jones would be willing to violate federal law if necessary to achieve that objective.

Although Jones' testimony that Serrano was "trying to create problems" and was "trying to be extremely difficult" raises concerns, it does not, by itself, justify inferring unlawful motivation from the timing of events. Serrano began his Union activity in late February or early March 2006, and the record suggests that Jones became aware of it some time in April, if not earlier. However, Respondent did not suspend Serrano until May.

In some instances, even a delay of this length will not render it inappropriate to infer unlawful motivation from the timing. If a respondent has manifested antiunion animus in other ways, it may be reasonable to conclude that disciplinary action coming that long after protected activity (or, more precisely, that long after the employer became aware of the protected activity) was an example of such animus in action. The present record, however, does not provide other substantial evidence of animus.

As the time span increases between the date an employer became aware of protected activities and the date of disciplinary action, so does the possibility that the two events merely are coincidental. Although coincidence in time between union activity and discipline is one factor the Board may consider, mere coincidence is not sufficient evidence of animus. *Neptco, Inc.*, 346 NLRB 18, 20 (2005), citing *Chicago Tribune Co. v. NLRB*, 962 F.2d 712, 717-718 (7th Cir. 1992). Based on the present record, I conclude that inferring animus from the timing of the particular events discussed above would not be appropriate.

The Order Remanding also directed me to consider Serrano's meeting with Human Resources Manager Mayfield on the day he was suspended. The Board stated, in part, that the "judge's decision. . .does not mention undisputed evidence that Serrano met with Mayfield about Jones' treatment of employees earlier on the very day that Jones initiated the discipline of Serrano. The General Counsel contends that the record supports an inference that Serrano's protected complaints to Mayfield played a role in Jones' decision to recommend discipline against Serrano."

This meeting took place the day before Mayfield informed Serrano that he was being suspended. An unpleasant encounter with Supervisor Jones prompted Serrano to go to the human resources manager's office. Serrano asked Mayfield for "corporate information," presumably meaning the name and address of a corporate official to whom a complaint could be addressed. He explained to Mayfield that he wanted this information "so that ways I could get a petition together and we will get Lewie Jones out of here."

Serrano testified that Mayfield said "you know what, that is just too many complaints on Lewie. . .we've got to do something about this right now." According to Serrano, Mayfield told him to go back to work and that she would talk with General Manager Mike Allen. Serrano further testified that later in the day, Mayfield came to him and reported that "everything was handled," that she had talked with General Manager Allen, who was very upset with Jones, and that Allen was taking care of it.

Without doubt, Serrano engaged in protected activity when he asked Mayfield for information he needed to send an employee petition to corporate management. The word "petition" itself suggests a document signed by more than one person. Serrano's use of the word "we" when he said "we will get Lewie Jones out of here" also implied that Serrano was acting

for employees other than himself or at least was seeking to initiate group action. In either case, Serrano's effort enjoyed the Act's protection. *Kvaerner Philadelphia Shipyard*, 347 NLRB 390, 392 (2006), citing *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984). It is well-settled Board law that the "activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much 'concerted activity' as is ordinary group activity." *Cibao Meat Products*, 338 NLRB 934 (2003).

Moreover, even apart from Serrano's use of the word "we," Human Resources Manager Mayfield reasonably would have understood that Serrano was acting for other employees because other employees also had complained about Supervisor Jones' practice of swearing and yelling. Such conduct certainly affected working conditions. Circulating and signing a petition concerning working conditions and sending it to higher management clearly falls within the Act's protection. *Igramo Enterprise, Inc.*, 351 NLRB 1337 (2007).

The very close proximity of this protected activity to management's decision to suspend Serrano indeed raises some suspicion concerning Respondent's motivation, but I am not sure that the timing, *standing by itself*, would warrant drawing an inference of animus. However, the timing does not stand by itself.

During the hearing, the General Counsel sought to amend the Complaint to add an allegation that Respondent had violated Section 8(a)(1) of the Act by maintaining a rule prohibiting employees from discussing their compensation with each other. The rule no longer was in effect. Applying the principles which the Board articulated in *Redd–I, Inc.*, 290 NLRB 1115, 1118 (1988), I denied the General Counsel's motion to amend the Complaint.

However, as the General Counsel argued during the hearing, evidence regarding this rule still remains relevant to the issue of Respondent's motivation. Indeed, it is quite relevant because it shows that Respondent had tried to chill the very same type of action which Serrano was trying to start, namely, employees discussing among themselves one of their conditions of employment.

Serrano clearly communicated to Human Resources Manager Mayfield that he intended to engage in such a discussion with other employees, because he told her that he wanted to circulate a petition protesting the way Supervisor Jones dealt with employees. Obviously, Serrano could not encourage employees to sign such a petition without first discussing it.

There is no logical reason to believe that Respondent would be less hostile to employee discussions about this particular working condition - the unpleasant environment created by Supervisor Jones' swearing and yelling - than it was to employee discussions about their wages.

The fact that Respondent suspended Serrano almost immediately after management learned that he intended to discuss working conditions with employees appears more sinister in light of the previous work rule prohibiting similar discussions. Accordingly, I conclude that unlawful motivation appropriately may be inferred from the timing of these two events, Serrano's disclosure to Mayfield that he intended to solicit employees to sign a petition about working conditions and his subsequent suspension, and I draw such an inference.

Therefore, I further conclude that the General Counsel has established all of the initial four *Wright Line* elements. The credited evidence proves that Serrano engaged in union activity. It also establishes that Serrano engaged in protected concerted activity in the presence of Respondent's human resources manager. Thus, the first two *Wright Line* criteria have been satisfied. Respondent's suspension of Serrano soon thereafter constitutes an adverse employment action sufficient to meet the third *Wright Line* requirement. The inference of unlawful motivation arising from the timing of the suspension establishes the final *Wright Line* element.

In sum, I conclude that Serrano's protected activities were a substantial and motivating factor in Respondent's decision to suspend him. In other words, management decided to act quickly, ostensibly because of its "no threats" policy intended to nip potential workplace violence in the bud, but also to nip Serrano's contemplated protected activity in the bud. The combined force of both the lawful motivation and the unlawful motivation sufficed to cause management to suspend Serrano. Would the lawful motivation, by itself, have been strong enough to produce the same result?

Therefore, Respondent must rebut the General Counsel's case. To defeat the conclusion that Serrano's suspension was unlawful, Respondent must prove by a preponderance of the evidence that it would have suspended Serrano in any event, even in the absence of protected activity. *American Gardens Management Co.*, 338 NLRB 644, 645 (2002).

Respondent asserts as its reason for suspending Serrano that he made a threatening statement. In assessing this defense, I keep in mind that an employer has a strong interest in maintaining a safe workplace. Similarly, an employer has a legitimate business interest in acting quickly after receiving a report of a threat, so that a potentially violent situation is prevented. *Bridgestone Firestone South Carolina*, 350 NLRB 526, 531 (2007),("The Board will not second-guess an employer's efforts to provide its employees with a safe workplace, especially where threatening behavior is involved.")

In determining whether Respondent has met its rebuttal burden, I begin by considering whether Respondent's asserted reason for suspending Serrano was pretextual. A finding of pretext defeats any attempt by a respondent to establish that it would have taken the adverse employment action even in the absence of protected activity. *Rood Trucking Co.*, 342 NLRB 895, 898 (2004).

The present facts raise the possibility of pretext because, although Respondent assertedly suspended Serrano for making a threat, most of the words attributed to Serrano do not, on their face, appear to be a threat. As discussed above, Leadman Frank Dellipoala testified that Serrano said to him, "this may be your domain, but that's [pointing towards the door] my domain" and "Lewie's going to pay." Those last words, "Lewie's going to pay," certainly might be a threat under some circumstances, but it does not appear that management focused on them. Instead, management appears to have been concerned that Serrano told the leadman "this may be your domain but that's my domain."

The "domain" comment attributed to Serrano does not sound like a threat. Indeed, to interpret it as threatening would require substantial "reading between the lines." Moreover, the

evidence does not establish that Serrano said these words with a menacing demeanor which could turn facially innocent words into a malicious message.

When Respondent's counsel examined Frank Dellipoala concerning Serrano's demeanor, Dellipoala testified as follows:

> Q. Okay. And can you tell the Court what you remember about that situation?
> A. In the morning, real early, when the shift first started up, Sammie said to me, this may be your domain, but that's my domain, and he pointed toward the door. And he said, and Lewie's going to pay.
> Q. Okay. What was your impression of — was — was Sam angry when he said that?
> A. It seemed like he was angry, to me. What he meant by it, I don't know.
> Q. Did he seem emotional?
> A. A little bit, yeah.

From Dellipoala's testimony, I find that Serrano was slightly angry when he made the putative threat. Dellipoala would not have described Serrano as a "little bit" emotional if Serrano had been a whole lot angry. Dellipoala's description does not depict someone so angry that he was about to let his emotions take over and control his conduct. Serrano's relatively mild anger hardly would communicate a message that Serrano contemplated taking some physical action against Jones and was in a state of mind to do it.

Moreover, it seems significant that immediately after saying that it "seemed like he was angry, to me," Dellipoala added, "What he meant by it, I don't know." It is reassuring to know that Dellipoala didn't understand what Serrano meant because neither do I.

So, in the absence of any other factor, it would be easy to conclude that Serrano did not, in fact, make a threat, and that there was no way Respondent reasonably could have believed Serrano had made a threat. That conclusion, in turn, would lead to the further conclusion that Respondent characterized Serrano's words as a threat simply to have an excuse to suspend him before he could engage in the protected activity of circulating a petition among employees.

However, there is another factor which should be considered. Serrano *himself* considered the "domain" statement (which he denied making) to be a threat. Thus, according to Serrano, Human Resources Director Mayfield asked him if he made the statement that "this is Lewie's domain, and that's my domain out there." Serrano testified that he told Mayfield "I would never make a comment like that, because I love life too much to ever put that type of thought into somebody's else mind." According to Serrano, he then fell on the floor, held his stomach, and moaned. From this response, I infer that Serrano himself believed that making the statement in question would be misconduct.

The record thus establishes that Serrano as well as Mayfield regarded the "domain" statement to be a serious impropriety. Therefore, I will not conclude that management seized upon this statement as a mere excuse for imposing discipline. Accordingly, no finding of pretext bars consideration of Respondent's rebuttal arguments and evidence. However, before beginning that analysis, I will devote the next paragraph to a small detail.

It may be noted that Dellipoala quoted Serrano as saying to him "this may be your domain," which would be equivalent to saying "this may be Dellipoala's domain." On the other hand, Serrano testified that Mayfield asked him if he had said "this is Lewie's domain. . ." Mayfield's testimony leaves unresolved the exact wording of her question to Serrano. If Serrano's version is correct, then technically he could deny that he said "this is Lewie's domain" even if he had told Dellipoala that this was his, Dellipoala's, domain. In any event, resolving this detail still would leave unexplained why both Mayfield and Serrano considered the statement about domains to be threatening.

Respondent's brief on remand does not fully address the issue of whether Respondent would have disciplined Serrano in any event, regardless of protected activity. During Respondent's oral argument, Respondent's counsel stated, "Other employees, such as Danny Clarkston were also suspended for violating this policy" against violence in the workplace. Essentially, Respondent contends that it treated Serrano as it had treated other employees, such as Clarkston, who presumably had not engaged in protected activity.

During his testimony, Clarkston admitted that Respondent had suspended him in September 2005 for making a comment which Respondent regarded as a threat against another employee, Ed McKinney. However, the fact that Clarkston did receive discipline in 2005 for making such a remark does not establish that Respondent has applied its policy evenly. That is because Clarkston did not receive discipline for a statement he admitted that he made in 2006, a statement which, on its face, clearly transgresses Respondent's "no threats" rule.

Clarkston admitted that sometime during the summer of 2006, he made the following remark to Supervisor Lewie Jones: "I told him I was mad, I told him that I would punch Karen [sic] in her pussy." From the record, it is clear that Clarkston was referring to Human Resources Manager Karin Mayfield, who had told Clarkston to clock out and go home. Clarkston had wanted to stay to work overtime.

Mayfield testified that she was not aware of any threats made by Clarkston against her. Crediting Clarkston, I conclude that he did tell Supervisor Jones that he was going to punch Mayfield, and further conclude that Jones did not report this threat to Mayfield.

Jones' failure to report the statement explains why Respondent failed to discipline Clarkston for making a clear and unambiguous threat but did discipline Serrano for making a statement which, on its face, seems much less threatening. However, the explanation for this disparate treatment does not render it innocent.

Respondent has admitted that Supervisor Jones was its agent. Although Jones ranked low in Respondent's management structure, that low rank does not negate his agency status. When Jones acted within the scope of his authority as agent, such action may be imputed to Respondent. Clearly, a first-line supervisor's responsibilities include deciding when an employee's actions violate a company rule or otherwise are so unacceptable that higher management should be informed.

Higher management necessarily depends on first-line supervisors to be its eyes and ears on the plant floor. When such a supervisor turns a blind eye or a deaf ear to conduct which

violates a company rule or policy, it prevents management from imposing the discipline which otherwise would have resulted. The supervisor's failure to perform the duty he owed Respondent does not change the fact that the supervisor's action (or inaction) fell within the scope of his authority as Respondent's agent. Therefore, Supervisor Jones' condonation of Clarkston's threat may be imputed to Respondent even though higher management did not know about the threat.

It seems highly likely that higher management would have disciplined Clarkston had it known about his "punch Karin" comment. As already mentioned, on another occasion, management had disciplined Clarkston for another remark it had deemed a threat. Moreover, the record indicates management had disciplined other employees for making statements considered threats. Considering the highly offensive nature of Clarkston's "punch Karin" remark, and considering that the subject of this threat was Human Resources Manager Mayfield herself, it appears quite certain that Clarkston would have been disciplined had Mayfield known about his remark.

In sum, by reporting Serrano's ambiguous "threat" to higher management while failing to report Clarkston's clearcut threat, Supervisor Jones caused Respondent's disciplinary policy to be applied disparately. What inference properly may be drawn from such disparate treatment?

The difference in treatment might either reflect that Jones harbored some hostility towards Serrano or that he showed favoritism towards Clarkston. The fact that Jones, in effect, "excused" Clarkston's breach of a policy otherwise uniformly applied to all employees does not compel a conclusion that Jones was antagonistic to Serrano. It might be explained on the basis of favoritism towards Clarkston.

Therefore, I would hesitate before concluding that the disparate treatment which Jones accorded Clarkston and Serrano reflected antiunion animus. However, at this point in the analysis, the issue does not concern the *existence* of such animus, which I already have found to exist. Rather, it concerns the effect of this animus on the decision to discipline Serrano. Respondent must show that the animus did not affect the outcome of the decision–making process.

Even though Jones' disparate treatment of Clarkston and Serrano does not, in my view, warrant an inference of animus, it nonetheless casts serious doubt on Respondent's argument that it would have disciplined Serrano in any event. Considering the real prospect of harm raised by Clarkston's threat against Mayfield, Respondent had a legitimate business interest in acting quickly to discipline Clarkston. However, it did not.

Assessing the significance of this disparate treatment does not put the Board in the position of second-guessing Respondent's efforts to provide its employees with a safe workplace, a practice which the Board has eschewed. *Bridgestone Firestone South Carolina*, above. Rather, it only involves evaluating how consistently Respondent has applied its own policy. Inconsistent application of the policy takes the probative wind out of Respondent's sails.

Supervisor Jones instigated the discipline of Serrano but failed to refer Clarkston for discipline even though Clarkston made a statement clearly more threatening than that made by Serrano. Supervisor Jones also knew of Serrano's union activity.

Even assuming that the Serrano's "domain" remark equaled Clarkston's threat in seriousness, I would conclude that Respondent has not presented other persuasive evidence which would overcome the doubt raised by the disparate treatment of Clarkston and Serrano. Moreover, it is difficult to believe that Serrano's unclear statement, for which he received a 3-day suspension, rises to the same level of seriousness as Clarkston's unequivocal expression of intent to punch Human Resources Manager Mayfield.

As the Board observed in *International Baking Co. & Earthgrains,*, 348 NLRB 1133, 1138 (2006), it is not the law that an employer can prevail only by showing prior identical misconduct and discipline. However, where an employer disciplines an employee who had engaged in protected activity, and the discipline ostensibly is for making a threat although the actual language attributed to the employee does not, on its face, constitute a threat, it is reasonable for the trier of fact to be a bit skeptical. Where the same employer also fails to discipline an employee who did make a clear and ugly threat, and this employee is not shown to have engaged in protected activity, the skepticism deepens. An employer might address this skepticism, in part, by presenting evidence that employees in this particular workplace generally understood the words in question to be threatening. The record here does not establish that Respondent's employees generally would understand the words in question to convey a threat. To the contrary, Lead Man Dellipoala testified that he didn't know what Serrano meant.

Respondent also might address the skepticism by showing that it had promulgated a rule identifying a particular expression as a threat and prohibiting its use. Assuming that such a rule did not chill or discourage protected activity (as did Respondent's rule forbidding employees from discussing their wages), its existence would contribute, at least, to the plausibility of Respondent's claim. (Whether it would suffice, by itself, to carry Respondent's rebuttal burden is a different issue which need not be discussed here.)

Respondent has not presented evidence that any rule had informed employees that it attached a special meaning to remarks such as Serrano's "domain" statement and considered them unwelcome in the workplace. Respondent also has not shown that any other employee, after making a facially innocuous comment similar to Serrano's "domain" statement, then engaged in threatening conduct or otherwise presented a danger. Additionally, the evidence does not establish that Respondent had disciplined any other employee, under its "no threats" rule, for making a puzzling but not obviously threatening statement of a tenor similar to Serrano's "domain" remark. Further, Respondent has not convincingly explained why it interpreted Serrano's "domain" statement either as a threat of violence or as an indication that the employee might engage in violence.

Moreover, although the evidence indicates that Supervisor Jones bears responsibility for the disparate treatment of Clarkston and Serrano, it does not establish a reason for the disparity. Thus, the evidence does not prove that, but for Serrano's protected activity, Jones would have ignored Serrano's "domain" statement in the same way he ignored (and thereby condoned) Clarkston's "punch Karin" statement. It isn't clear whether Jones knew of Serrano's most recent complaint to Mayfield, but he certainly was aware that this "pit bull" (in Jones' words) had previously spoken to Mayfield about the way Jones treated employees and had tried to organize a union.

Respondent has admitted that Jones is its agent, and it has not presented any persuasive evidence or argument overcoming the general principle that the acts of an agent, within the scope of his authority, are attributable to the principal. Accordingly, Respondent has not carried its burden of establishing that it would have taken the same action against Serrano in the absence of protected activity. Therefore, I conclude that Respondent's suspension of Serrano violated Section 8(a)(1) and (3) of the Act and recommend that the Board so find.

The Board specifically directed me to address whether Supervisor Jones or Lead Man Dellipoala had reported Serrano's alleged threat to Human Resources Manager Mayfield and whether, if Jones had made the report, it would affect the finding in my original decision that Respondent would have disciplined Serrano even in the absence of protected activity. Jones, rather than Dellipoala, made the report to Mayfield. Moreover, Jones failed to report Clarkston's threat to higher management, resulting in disparate treatment. For the reasons discussed above, Jones' involvement in both decisions is highly significant and shows the error of my earlier finding, which this decision corrects.

Discharge of Serrano

Sometime during the latter half of August 2006, Plant General Manager Mike Allen announced that Respondent was instituting a new incentive system on a trial basis, and that it only would apply to one part of the plant, the section in which Serrano worked. The experimental program would increase the pay for all members of a team if the team's output met a specified production standard. If the team did not produce at the specified rate, no member of the team would receive the additional "incentive" pay. Respondent intended this system to reward teamwork and thereby improve production.

Allen informed the affected employees that the incentive would be a $1 per hour increase in wages. The production standard consisted of 60 units per hour.

After the meeting, Serrano expressed his skepticism to other employees. The record does not establish that any member of management heard these particular comments.

Although Allen was the plant's general manager, during this particular week, when the incentive plan was implemented, Supervisor Lewie Long was on vacation. Therefore, Allen assumed some of Long's responsibilities and spent more time than usual in the area where Long's employees worked.

Respondent ran more than one shift. According to Allen, employees on other shifts demonstrated that they could meet the production standard. About 6 a.m. on August 23, 2006, Allen spoke with Serrano in Serrano's work area. According to Allen, Serrano said "he wasn't going to bust his butt to make any more" because it was "not worth the buck."

Allen testified that Serrano made this remark in front of other employees and that it "broke my spirit" when it happened. He believed that Serrano could meet the standard because employees on other shifts already had met the standard. I infer that Allen also took offense because Serrano's stated unwillingness to work would keep the whole team from receiving the incentive.

Allen did not take immediate action, but waited through the day. He explained he had believed Serrano might come to him to disclaim the earlier statement. However, Serrano did not do so and Allen discharged him.

Serrano's testimony differs in some respects. According to Serrano, Allen came to Serrano's workplace and asked why Serrano had not made 60 parts per hour. Serrano testified:

> I said there is a communication error between you and Lewie, because Lewie Jones knows that I cannot run this cell.
>
> I have been replaced on this cell three times because I cannot consistently make the parts 60 an hour. And I feel like since I can't make this number, you know, I feel like you're kind of like coming down on me.
>
> I said, Mike, I'm not lazy. I do the best job I could do, but I seriously cannot handle this machine and I cannot make 60 parts an hour consistently.
>
> So. . .he put his hand up, he says, Sam, I heard you said a dollar's not enough. Is that true? I said, Mike, considering what you're saying, none of us feel that way.
>
> There's a lot of people that do not feel the dollar is not enough. I said considering me, myself, a dollar's not enough because I cannot do 60 parts an hour on this machine, not consistently. And considering how the machines run, that I wasn't going to be able to make it.

Some other employees witnessed this conversation between Allen and Serrano. I do not rely upon the testimony of employee witness Carl Donan because his recollection was sketchy and sometimes inconsistent with other accounts. For example, Donan stated that the conversation between Allen and Serrano, discussed above, took place "about three months" or "a couple of months" before Serrano's discharge. Other witnesses place the discharge on the same day as this conversation.

Employee witness Tammy Potts recalled Allen telling Serrano "that he better start producing more parts. And Sammy [Serrano] had told him that he's doing his best. And then Sammy told him that he didn't agree on that dollar, and that he wasn't the only one that didn't agree on it." Potts described Allen's demeanor as "angry."

Leadman Frank Dellipoala testified that Allen asked Serrano about his production, "why his numbers would go up and come down." Serrano "told him he comes in in the morning, he feels good. He goes later on in the day I get tired, and this is too much work and I'm not going to do it."

Allen then asked Dellipoala if he had anyone else who could run the machine. Dellipoala gave Allen the names of some employees, but added that they did not have Serrano's experience and would not produce as much as Serrano did.

The accounts of Allen, Serrano, Potts and Dellipoala differ in some details but, in general paint a fairly consistent picture of what transpired. The differences in testimony do not, in my view, suggest any attempt to conceal or distort, but rather reflect the kind of natural variations which result from differences in memory and viewpoint.

Based upon my observations of the witnesses, I have placed more trust in the testimony of Dellipoala than that of Serrano. To the extent that Dellipoala's testimony conflicts with that of Serrano or other witnesses, I resolve such conflicts by crediting Dellipoala.

However, Serrano's own testimony establishes that Respondent had a legitimate business justification for discharging Serrano. He stated unequivocally that he could not do the work expected. Thus, Serrano stated to Plant Manager Allen, "I seriously cannot handle this machine and I cannot make 60 parts an hour consistently."

Moreover, objective evidence supported Serrano's admission. His production fell short of the 60–parts–per–hour standard. Serrano not only claimed to be unable to meet the standard but proved his claim by failing to meet the standard.

Allen testified that other employees had demonstrated their ability to meet the standard, and I credit that testimony. Therefore, Allen might reasonably infer that Serrano did not meet the standard because he was unwilling to "bust his butt."

When asked, Leadman Dellipoala gave this assessment of Serrano: "When he wanted to work, he was one of the best on the job, but he didn't always want to work, in my opinion." The words which Allen attributed to Serrano seem consistent with Dellipoala's assessment.

Following the Board's *Wright Line* framework, I conclude that the General Counsel has established that Serrano had engaged in some protected activity and that Respondent had knowledge of it. The government also has proven that Respondent took an adverse employment action against Serrano by discharging him.

However, the General Counsel has not proven, by a preponderance of the evidence, a connection between Serrano's protected activity and his discharge. But even assuming that the government had established such a nexus, I conclude that Respondent has met its rebuttal burden.

Plant Manager Allen, seeking to improve both productivity and quality, drew on his understanding of Japanese manufacturers that had organized their employees into teams and rewarded each worker based on the performance of his or her team. Thus, he was introducing something entirely new to this plant and its employees.

Accordingly, Respondent cannot be expected to produce evidence that it had treated other employees similarly in similar instances. There were no similar instances because of the newness of the program.

However, the Act does not require an employer to retain an employee who is unable to meet its production standards. Thus, Section 10(c) of the Act provides in part that "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause."

An inability to meet an employer's nondiscriminatory standards certainly constitutes "cause." Serrano himself admitted that he told Respondent's plant manager the following: "I seriously cannot handle this machine and I cannot make 60 parts an hour consistently." His failure to meet those standards made this profession of inability convincing.

Respondent discharged Serrano for being unwilling to *try* to meet its standards, that is, for being unwilling to "bust his butt." Serrano's testimony, on the other hand, indicates he professed an inability rather than an unwillingness. However, Respondent had reason to believe that unwillingness contributed to Serrano's failure to meet the standard because other employees, on a different shift, had indeed met the standard.

It does not matter whether Serrano was unwilling or unable to meet the standards. Rather, what matters is that Serrano did not do so and said he could not do so. An employer need not keep on the payroll an employee who both failed to measure up and who predicts his continuing failure to measure up.

Remanded Issue 8

In its Order Remanding, the Board directed me to make credibility findings with respect to Serrano's conversation with Allen which led to Serrano's discharge. I have done so above.

The Board further directed me to determine how these findings affect my conclusion that Serrano's discharge was lawful. I regret the insufficient reasoning in my initial decision, but respectfully adhere to the conclusion that Serrano's discharge was lawful.

After examining the evidence anew and with the proper thoroughness specified by the Board, I conclude that Respondent reasonably believed that Serrano's future performance would fall below its standards and that Serrano was unwilling to expend the effort necessary to meet those standards. Therefore, I recommend that the Board dismiss these allegations.

Remedy

To remedy the unfair labor practices found herein, Respondent must make Sam Serrano whole, with interest, for all losses he suffered because Respondent suspended him on or about May 30, 2006. Respondent must also post the notice attached hereto as Appendix A, in the manner and for the duration specified below.

Because I have concluded that Respondent lawfully discharged Serrano, I do not recommend that the Board order Respondent to reinstate him to his former position or to any substantially equivalent position, and do not recommend that the Board order Respondent to make him whole for losses resulting from his discharge.

Conclusions of Law

1. The Respondent, Camaco Lorain Manufacturing Plant, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Region 2B, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(3) and (1) of the Act by suspending its employee, Sam Serrano, on or about May 30, 2006.

4. Respondent did not violate the Act in any other manner alleged in the Complaint.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended[1]

ORDER

The Respondent, Camaco Lorain Manufacturing Plant, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Suspending any of its employees because that employee engaged in union activity and/or other concerted activity protected by the Act.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self–organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

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

(a) Make employee Sam Serrano whole, with interest, for all losses he suffered because Respondent unlawfully suspended him on or about May 30, 2006.

(b) Within 14 days after service by the Region, post at its facilities in Lorain, Ohio, copies of the attached notice marked "Appendix A."[2] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt 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,

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

[2] If this Order is enforced by a judgment of the 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."**

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 May 30, 2006.

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

Dated Washington, D.C., September 28, 2009.

Keltner W. Locke
Administrative Law Judge

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

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 interfere with, restrain or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT suspend any employee because the employee engaged in union activity and/or other protected concerted activity.

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

WE WILL make Sam Serrano whole, with interest, for all losses he suffered because we unlawfully suspended him.

CAMACO LORAIN MANUFACTURING PLANT
(Respondent)

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

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

1240 East 9th Street, Room 1695, Cleveland, OH 44199–2086
(216) 522–3715, Hours 8:15a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (216) 522–3740.