

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 24**

CC-1 LIMITED PARTNERSHIP D/B/A COCA-COLA
PUERTO RICO BOTTLERS

Respondent Employer

and

Cases 24-CA-11018 et al.

CARLOS RIVERA, et al.

Charging Parties

and

UNION DE TRONQUISTAS DE PUERTO RICO,
LOCAL 901 INTERNATIONAL BROTHERHOOD
OF TEAMSTERS

Respondent Union

and

Cases 24-CB- 2648, et al.

CARLOS RIVERA, et als.

Charging Parties

and

MIGDALIA MAGRIS, et als.

Charging Parties

Cases 24-CB- 2706, et al.

**EXCEPTIONS OF COUNSEL FOR THE GENERAL COUNSEL TO THE ADMINISTRATIVE LAW
JUDGE'S DECISION AND RECOMMENDED ORDER, AND BRIEF IN SUPPORT THEREOF**

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**EXCEPTIONS OF COUNSEL FOR THE GENERAL COUNSEL TO THE ADMINISTRATIVE LAW
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COMES NOW Counsel for the General Counsel ("CGG") and pursuant to § 102.46 of the Board's Rules and Regulations respectfully files the following Exceptions and Brief In Support Thereof to the Decision and Recommended Order of Administrative Law Judge Bruce D. Rosenstein dated April 16, 2010, in the above-captioned matter.

I. Exceptions:

1. The failure to find that the clause imposing a higher duty on the shop stewards not to engage in strike action did not survive the expiration of the contract (and therefore that

the shop stewards did not violate the same), notwithstanding the finding that the contract had expired and the no-strike clause itself did not survive its expiration.

2. The failure to find that the discharge of shop stewards Carlos Rivera, Romian Serrano, Felix Rivera and Francisco Marrero violated Section 8(a)(1) and (3) of the Act.
3. The failure to order, as a remedy, the expungement from the files of employees any reference to the “last chance” agreement, notwithstanding the finding that such agreement was unlawful. In the alternative the failure to allow an amendment to the complaint.
4. The failure to find that the discharge of Dennes Figueroa was due to his participation in the strike and in violation of Section 8(a)(1) and (3) of the Act.
5. The failure to order the expungement of the discharge letters from the records of the strikers.

II. The Administrative Law Judge’s Decision

This case was tried before the Administrative Law Judge, Bruce D. Rosenstein, herein ALJ, on December 7 through December 17, 2009, and January 11, 2010, in San Juan, Puerto Rico, pursuant to a Third Consolidated Amended Complaint and Notice of Hearing in the CA cases and a Second Consolidated Amended Complaint and Notice of Hearing in the CB cases. The ALJ’s Decision, herein ALJD, issued on April 16, 2010.

With regards to the allegations against Respondent Employer, the ALJ found that on September 9, 2008,¹ unit employees concertedly ceased work to protest that Respondent Employer tried to oust Union representative Jose Adrian Lopez, from the Employer’s facility. While the ALJ found that the work stoppage held on September 9, was protected, it found that four shop stewards (Carlos Rivera, Felix Rivera, Francisco Marrero and Romian Serrano) lost the protection of the Act because they encouraged other employees to abandon their work

¹ All dates refer to year 2008, unless otherwise noted.

stations, that is, to join the work stoppage, in contravention of the Shop Steward (Delegates) provisions of the parties' expired CBA. However, the ALJ found that the termination of the fifth shop steward (Miguel Colon) was unlawful because there was no evidence in the record that he arrived at the Employer's facility before the work stoppage had taken place, thus, he did not instigate or promote the stoppage.

Further, the ALJ found that the unit employees engaged in an unfair labor practice strike from October 20 to October 22 to protest, in significant part, the discharge of the above-mentioned stewards, including the unlawful discharge of shop steward Miguel Colon. As a result, it found that the Employer unlawfully terminated the employment of thirty four (34) of the unit employees that engaged in said unfair labor practice strike, and conditioned the reinstatement of four (4) other strikers on the signing of an unlawful "last chance agreement" waiving their Section 7 rights. The ALJ also found that, later on, the Employer unlawfully terminated the employment of these four strikers because they allegedly breached the provisions of the "last chance agreement." Lastly, the ALJ dismissed the allegation that employee Dennes Figueroa was subsequently discharged because he participated in the strike.²

III. Brief in Support of the Exceptions

THE FAILURE TO FIND THAT THE CLAUSE IMPOSING A HIGHER DUTY ON THE SHOP STEWARDS NOT TO ENGAGE IN STRIKE ACTION DID NOT SURVIVE THE EXPIRATION OF THE CONTRACT, NOTWITHSTANDING THE FINDING THAT THE CONTRACT HAD EXPIRED AND THAT THE NO-STRIKE CLAUSE ITSELF DID NOT SURVIVE ITS EXPIRATION. (EXCEPTION 1)

THE FAILURE TO FIND THAT THE DISCHARGE OF SHOP STEWARDS CARLOS RIVERA, ROMIAN SERRANO, FELIX RIVERA AND FRANCISCO MARRERO VIOLATED SECTION 8(A)(1) AND (3) OF THE ACT. (EXCEPTION 2)

² Regarding the charges against Respondent Union, the ALJ found that the Union violated Section 8(b)(1)(A) by expelling from union membership, removing from their Shop Steward positions, and imposing a fine of \$10,000 to its members Migdalia Magriz, Martiza Quiara and Silvia Rivera because they attended a meeting the Coca Cola employees held on October 12, where a strike vote was ratified, and because they participated in the October 20-22 strike.

A. The Clause Imposing a Higher Duty on The Shop Stewards Did Not Survive The Expiration of The Contract

In his decision, the ALJ found that Respondent Employer's employees engaged in a protected work stoppage on September 9, 2008. (ALJD slip op. 12) Inconsistently, the ALJ found that Respondent Employer lawfully discharged shop stewards Carlos Rivera, Romian Serrano, Felix Rivera and Francisco Marrero because they encouraged other employees to participate in said work stoppage, which the ALJ found to be a protected concerted activity. As stated by the AJ, the aforementioned shop stewards "encouraged other bargaining unit employees to abandon their work stations and join the group of employees heading towards the warehouse," where employees gathered during the protected work stoppage, and "did not instruct bargaining unit employees not to leave their work stations nor did they urge them to return" to work. The ALJ found that the actions of these stewards violated the terms of Articles 12 and 13 of the expired collective-bargaining agreement between Respondent Employer and the Union, herein the contract, and that it also violated Respondent Employer's rules of conduct. (ALJD slip op. 13)

The ALJ based its decision on the fact that Article 12-Delegates (or shop stewards) of the expired contract, states in pertinent part that the shop stewards have the authority to perform:

"the transmission of messages and information that is originated and/or is authorized by the Local Union or its officials and when said messages and information are: (b) If they are not presented in writing, are of a normal routine and do not involve strikes, slowdowns, or any other interference in the company business." Article 12 also states that "upon carrying out his duties as such, the delegate (shop steward) will not interrupt the work of the rest of the employees. In fact, the delegate (shop steward) will not have the authority to declare strikes or any other action that paralyzes or obstructs the work of the company or work place." (JT Exh. 1, pages 21-22).

The ALJ also based his decision on the fact that Article 13-Union Representatives of the expired contract states in pertinent part that:

“representatives of Local 901 will notify the Company of their intention to visit the work area and will comply with the rules and procedures established by the Company for visitors. These visits will not interrupt work.”

In the instant case, the record clearly established, and the ALJ found, that the parties’ contract expired on July 31 (JT Exh. 1). Thereafter, by joint stipulation, the parties agreed to extend the contract until July 31 (JT Exh. 2). Contrary to the position of Respondent Employer, that the contract was extended in writing to August 30 (JT Exh. 11(b)), and thereafter to midnight on September 9, the ALJ found that such an agreement did not exist. In this regard, the ALJ specifically noted that the Employer did not introduce any written agreement extending the contract until August 30 and credited Lopez’ testimony that the Union did not agree, orally or in writing, to extend the contract beyond July 31. The ALJ also considered the fact that one of the Employer’s Attorneys (attorney Collazo) conceded during the hearing that no written agreement existed that extended the parties’ contract beyond July 31 (Tr. 770).

Furthermore, in a letter dated September 9 (JT Exh. 11(b)), Respondent Employer clearly stated that when the Union informed it of its desire to extend the contract for 30 additional days, Respondent Employer notified the Union that it would consider such an extension during the next bargaining session to be held on September 9. On September 9, Respondent Employer notified the Union that it had not agreed to extend the contract. Evidently, as Respondent Employer’s own letter demonstrates, there had been no written or oral agreement between the parties to extend the contract until September 9. Moreover, Article 33-Total Agreement of the expired contract, prohibits oral modifications to the contract. In this regard, it is well established that an expiring written collective-bargaining agreement may be orally extended, in the absence of a contractual prohibition on oral modifications. See, e.g., Quebecor World Mt. Morris II, LLC, 353 NLRB No. 1 slip op. (September 8, 2008), and Certified Corp. v. Hawaii Teamsters, 597

F.2d 1269, 1272 (9th Cir. 1979). Here, the only written extension of the contract executed by the parties was until July 31. Since the contract prohibits oral modifications and the parties did not execute any other written extension after July 31, it is clear that, as found by the ALJ, the contract had expired and that Respondent Employer's contention that the contract had *de facto* been extended has no merit.

While the ALJ found that the parties' contract had expired on July 31, it incorrectly found that the terms of Articles 12-Delegates (shop stewards), which is a waiver by the Union of the Section 7 rights of shop stewards, continued in full force and effect until the parties executed their successor agreement on February 2, 2009. The ALJ based its decision on NLRB v. Katz, 369 U.S. 736, 743 (1962). However, it is submitted that the ALJ's reliance on such case is misplaced. The NLRB v. Katz doctrine, "whereby an employer violates the Act if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment," has been extended to "cases in which an existing agreement has expired and negotiations on a new one have yet to be completed". See, e. g., Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co., 484 US 539, 544, n. 6, 98 L. Ed. 2d 936, 108 S. Ct. 830. However, this doctrine against unilateral changes should not be extended to the case at hand. The application of NLRB v. Katz to the instant case implies that a contractual waiver of the Section 7 rights of a shop steward to engage in concerted protected activity during the term of a contract would remain in effect indefinitely after the contract's expiration under the "unilateral change" doctrine established in NLRB v. Katz and its progeny.

In addition, the Board has determined that contract provisions governing the employer-employee, rather than employer-union, relationship survive. Gordon L. Rayner d/b/a Bay Area Sealers, 251 N.L.R.B. 89, (1980). Here, we are not presented with an expired contract provision

governing an employer-employee relationship; rather we are presented with an expired contract provision governing an employer-union relation, that is, the Union's waiver of shop stewards' statutory rights, permissible under the Union's representational capacity. In his decision, the ALJ failed to consider the fact that the language of Article 12 and 13, upon which he sustained the imposition of a higher standard on shop stewards, constituted a waiver of statutory rights which have to be "clearly and unmistakably" waived by the Union to be enforceable by Respondent.

The Supreme Court has long recognized that a union may waive a member's statutorily protected rights, including "his right to strike during the contract term, and his right to refuse to cross a lawful picket line." Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983). (Emphasis supplied). Such waivers are valid because they "rest on 'the premise of fair representation' and presuppose that the selection of the bargaining representative remains free." NLRB v. Magnavox Co., 415 U.S. 322, 325 (1974) (quoting Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 280 (1956); cf. NLRB v. Allis-Chalmers Manufacturing Co., 388 U.S. 175, 180-181, (1967). A waiver should not undermine these premises. NLRB v. Magnavox Co., supra, at 325.

Consistently, the Board has held that Section 7 of the National Labor Relations Act gives employees the right to engage in concerted activities for the purpose of collective bargaining or for other mutual aid or protection, and that Unions, in their representational capacity, may bargain away certain Section 7 rights such as the right to engage in strikes during the contract term, Mastro Plastics Corp. v. NLRB, supra; NLRB v. Allis-Chalmers Manufacturing Co., supra, and the right to sanction or encourage strikes, Fournelle v. NLRB, 670 F.2d 331, 338 (D.C. Cir. 1982). (Emphasis supplied) Such waivers of employee rights must, however, be

explicitly stated, clear and unmistakable. Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983). See Lear Siegler, Inc., 293 NLRB 446, 447 (1989).

Consistently with the “clear and unmistakable” standard, it has been long held that no-strike clauses do not survive contract expiration. See e.g. Litton Financial Printing Division v. NLRB, 501 U.S. 190, 199, 111 S. Ct. 2215, 115 L. Ed. 2d 177 (1991). The Courts have held that no-strike clauses do not survive the expiration of the contract in recognition of the statutory right to strike under Section 7 of the Act. See Litton Financial, supra.³

It is respectfully submitted that the higher standard imposed upon the shop stewards pursuant to Article 12 of the expired contract, expired together with the no-strike clause on July 31, 2008. Consistent with this proposition is the fact that the Court has recognized that “a union and an employer reasonably could choose to secure the integrity of a no-strike clause by requiring union officials to take affirmative steps to end **unlawful work stoppages**. A union could choose to bargain away this statutory protection to secure gains it considers of more value to its members. The Court has stated that the decision to undertake such **contractual obligations** promotes labor peace and clearly falls within the range of reasonableness accorded bargaining representatives.” Metropolitan Edison Co. v. NLRB, supra. Specifically, because no-strike provisions often have proved difficult to be enforce. See Boys Markets, Inc. v. Retail Clerks, 398 U.S., at 248-249, and Complete Auto Transit, Inc. v. Reis, 451 U.S., at 423-424. The Court in Metropolitan Edison stated that the “imposition of this duty is more closely related to the economic decision a union makes when it waives its members' right to strike. It merely requires union officials to take steps that are **ancillary** to the union's promise not to strike and provides the employer with an additional means of enforcing this promise.” (Emphasis supplied)

³ It is well established that Union waivers do not survive the expiration of a contract. Cf. Ironton Publs., 321 N.L.R.B. 1048, (1996).

To find, as the ALJ did, that Article 12 continued in full force and effect after the expiration of the contract would result in the extension of the expired no-strike clause, to be applicable exclusively upon shop stewards. This would adversely affect protected employee interests by discouraging qualified employees from seeking union office and by neglecting shop stewards' right to strike. As the Supreme Court stated in Metropolitan Edison, the higher standard (contained in Article 12 in our case) is supplementary (ancillary) to the no-strike clause (contained in Article 5). It would disrupt the purposes of the Act to find that the main provision, that is, the no-strike clause (Article 5) did not outlive the expiration of the contract, but that the ancillary provisions in Article 12 did survive.

In this regard, it should be noted that the waivers contained in Article 12-Delegates (shop stewards), and in Article 5-Strikes and Lockouts, of the parties' expired contract, are analogous. Article 5 states "during the duration of the agreement there will be no strike or picketing from part of the Union, its members or any other employee covered by this agreement, including pickets, sit down, stay-ins, walk-outs, slow downs, wildcat strikes, or sympathy strikes"; while Article 12 states that shop stewards "will not interrupt the work of the rest of the employees. In fact, the delegate (shop steward) will not have the authority to declare strikes or any other action that paralyzes or obstructs the work of the company or work place..."

Under the ALJ's proposition, the Union, its members and other employees covered by the expired contract could declare or engage in picketing, work stoppages and/or strikes once the contract has expired. However, the shop stewards could not do so because pursuant to Article 12, shop stewards could not declare strikes or any other action that paralyzed work, or could not transmit messages that involve strikes, even if the strike or other concerted action is a lawful one and even though the contract had expired.

It is clear that the work stoppage engaged by the employees herein was, as found by the ALJ, protected under Section 7 of the Act. However, even though the contract expired, the ALJ still subjected the shop stewards to a higher standard. The application of such standard is inherently destructive of employee interests and protected rights under these circumstances, i.e. where the contract had expired.

After a collective-bargaining agreement expires, it is reasonable to expect that the parties would engage in bargaining for a successor contract. However, under the ALJ's proposition, if the Union desired to impose economic pressure upon the Employer, during bargaining, by calling a strike or a work stoppage, it would have had to spread its message through employees, other than its shop stewards, because the limitations imposed on the shop steward's statutory rights had been waived, presumably *per saecula saeculorum*, in the event no further agreement for a successor contract was reached between the parties. The ALJ's finding restrains shop stewards from engaging in protected concerted activities for the purpose of mutual aid and protection, at a time when their co-workers and the Union, could lawfully engage in such activities.

Moreover, the expired language of Article 12 does not impose an affirmative duty upon the stewards to instruct bargaining unit employees not to leave their work stations or to urge them to return to work as stated by the ALJ. This affirmative duty was imposed only upon the Union pursuant to Section 2 of Article 5, which stated that "in case of any strike, picket, boycott, sympathy strike, slowdown, sitdown, etc., during the duration of this agreement, the Union will take all necessary steps to actively instruct and direct its represented employees to return to work..." (Emphasis supplied). It is clear that this affirmative duty was intended to last only while the contract was in effect. Additionally, the Board has made it clear that no-strike clauses

expire with the contract. Notwithstanding the above, the ALJ incorrectly imposed such duty on the shop stewards despite the fact that the contract, as well as the affirmative duty, had expired. Sustaining that after the expiration of the contract, and while employees are engaged in protected concerted activities, shop stewards have the affirmative duty to instruct their co-workers not to cease work and/or to return to their work areas, will in effect cause shop stewards to act against the interests of the Union and arguably as agents of their employer.

B. Unlawfulness of Disciplining The Shop Stewards More Severely Because of Their Union Status

On the other hand, even assuming, *arguendo*, that Article 12-Delegates (shop stewards), continued in full force and effect, a proposition that the CGC vehemently opposes, it should be noted that the "Board has found that disciplining union officials more severely than other employees for participating in an unlawful work stoppage is contrary to the plain meaning of Section 8(a)(3) and would frustrate the policies of the Act if allowed to stand." Precision Castings Co., 233 N. L. R. B., at 184. ⁴ This conduct, in the Board's view, is "inherently destructive" of protected individual rights because it discriminates solely on the basis of union status. See Consolidation Coal Co., 263 N. L. R. B. 1306 (1982); Indiana & Michigan Electric Co., 237 N. L. R. B. 226 (1978), *enf. denied*, 599 F.2d 227 (CA7 1979). The Board has concluded that an employer's contractual right to be free of unauthorized strikes does not counterbalance the "discriminatory effects of singling out union officers for especially harsh treatment." Consolidation Coal Co., 263 N. L. R. B., at 1309. (Emphasis supplied)⁵

⁴ Under Precision Casting Co., 233 NLRB 183 (1977), an employer violates section 8(a) (3) of the Act if it imposes greater discipline on union officers than on rank-and-file members who have committed the same offense because such disparate discipline discourages employees from becoming union officers. In Precision Casting Co., the Board found that the employer unlawfully singled out for punishment five union shop stewards.

⁵ In Consolidation Coal Company, 263 NLRB 1306 (1982), the Board affirmed the ALJ who found that the arbitration awards upholding the discharge of an employee on the grounds that he had instigated and led an unauthorized work stoppage were repugnant to the purposes and policies of the Act, as interpreted in Precision Casting Co., and thus failed to qualify for deferral under Spielberg Manufacturing Company, 112 NLRB 1080 (

In this case, it is even more “inherently destructive” to uphold the disciplines imposed to these four shop stewards because the September 9 work stoppage was protected activity under Section 7 of the Act and because, as noted by the ALJ, no discipline whatsoever was imposed on the other employees who abandon their work areas and joined the work stoppage. Moreover, Respondent Employer had no contractual right to be free of unauthorized strikes since the contract had expired.

C. The Shop Stewards did not Violate Article 13 of the Expired Contract

Although the above analysis applies to the language contained in Article 12, as well as to the pertinent parts of Article 13 (which the ALJ also found that the shop stewards had violated), it is submitted that Article 13-Union Representatives, was intended to apply only to Union Representatives, such as Business Agent Jose A. Lopez Pacheco, and not to shop stewards. If Article 13 was to apply to the shop stewards, then why did the parties bargain the duties and responsibilities of Union Representatives and shop stewards in separate articles? As a result, it is being submitted that the requirement of Article 13 to notify the Company of the intention to visit the work area⁶, to comply with the rules and procedures of the Company while visiting and not to interrupt work, applied exclusively to union business agents and not to shop stewards.

1955). The Board noted that the arbitration decision rested not on any notion of an obligation inherent in the no-strike clause, nor in any other clause of the collective bargaining agreement, but rather on obligations which the arbitrator found to be inherent in the position of union officer itself. The Board stated that “discrimination directed against an employee on the basis of his or her holding union office is contrary to the plain meaning of Section 8 (a) (3)... is a fundamental unassailable restatement of, and gives clear meaning to the words of the Act itself”: “It shall be and unfair labor practice for an employer...to interfere with, restrain, or coerce employees in the exercise of... The right...to form, join or assist labor organization... “Thus it is clear that the discriminatory punishment of union officers which we proscribed in Precision Casting Co., and which we have continued to proscribe since, is the sort of discrimination that runs a direct collision course with the purposes and policies of the Act, as articulated in this context by the express wording of the Act itself.” Consolidated Coal, supra, at 1307, 1308.

⁶ Note that the ALJ found that shop stewards were allowed to return to Respondent’s facilities during non-working hours.

D. Incorrect Application of the *Wright Line* Analysis

Applying the test balance established in Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the ALJ found that Respondent Employer met its burden of proof and sustained the discharge of the four shop stewards because of their participation in the September 9 work stoppage. However, the ALJ failed to correctly apply this long standing doctrine since Respondent did not demonstrate that the same action would have taken place even in the absence of the protected conduct of these five shop stewards. It is the role of the Board to evaluate whether the reasons the employer proffered for the discipline were the actual reasons or mere pretexts. Respondent must establish not merely that it could have issued the discipline for legitimate reasons, but that it actually would have done so, even in the absence of union activity. Nat'l Steel Supply, Inc., 344 N.L.R.B. 973, (2005). See also W. F. Bolin Co. v. NLRB, 70 F.3d 863, 871 (6th Cir. 1995) (to support an inference of unlawful motivation, the Board looks to such factors as inconsistencies between the proffered reasons for the discipline and other actions of the employer, deviations from past practice, and proximity in time of the discipline to the union activity).

Here, Respondents actions do not meet such standard since the only employees that were disciplined by Respondent were the shop stewards. None of the employees who ceased work on September 9 and gathered at the “conventional area” were disciplined. Respondent only singled out the five stewards who were also members of the Union’s bargaining committee.

It is evident that the alleged violations of the Respondent’s rules, given as reasons to discipline and later terminate the employment of these stewards, were pretextual. To that effect, note that the ALJ rejected a number of the reasons set forth in the suspension letters Respondent

gave to the shop stewards (JT Exh. 3(b)).⁷ The ALJ noted that former Human Resources Director Lourdes Ayala contradicted the statement contained in the letter that states, “For this reason, we were surprised when on the night of Tuesday, September 9, after the negotiation meeting finished, you entered without permission to the company”. Rather, the ALJ specifically noted that she testified that an employee can come back to the facility after finishing his or her shift if he goes through the main gate. The ALJ found this to be consistent with the content of the September 22 letter (JT Exh. 3(b)) that does not prohibit the shop stewards from returning to work after the completion of negotiations. Additionally, the ALJ credited the testimony of shop steward Miguel Colon that while performing Union duties there were no restrictions placed on his entrance into the facility outside of working hours. As a result, the ALJ found that there was no reason why the five shop stewards could not return to the facility the evening of September 9, and attend the meeting conducted by Union Representative Lopez to discuss terms and conditions of employment with bargaining unit employees.

The ALJ also stated that the record did not support the Respondent Employer’s assertion that the five shop stewards were asked on more than one occasion to abandon the facility and refused to follow those instructions. Rather, the ALJ noted that the only evidence presented by Respondent Employer was that Union Business Agent Lopez refused to follow the instructions of Ayala, the security guards, and Victor Colon that he was either not authorized to enter the facility or that he should leave the plant immediately. It should be specifically noted that Respondent’s main witness, Victor Colon, testified that he never asked any of the shop stewards to leave Respondent’s facility because the instructions he had received was to the effect that the

⁷ According to Respondent’s September 22 letter, on September 9 shop stewards entered without authorization to Respondent’s premises, encouraged other employees to abandon work, in various occasions refused to follow instructions to leave the premises and verbally abused supervisors. It should be noted that regarding the alleged verbal abuse against supervisors, Respondent Employer only submitted evidence concerning Francisco Marrero, which as discussed below it is submitted that such evidence is insufficient as to remove the Act’s protection from Marrero.

one who was not allowed to enter Respondent's facility was Union Representative Lopez (Tr. 593). Moreover, with respect to shop steward Miguel Colon, the ALJ found that the evidence established that he arrived at Respondent's facility on September 9 sometime after employees had already ceased working. Contrary to Respondent's suspension letter, the ALJ stated that it was established that Colon did not enter the facility unlawfully on the evening of September 9, and did not encourage any bargaining unit employee to abandon work nor was he requested to leave the facility by any Employer representative. To that effect, the ALJ rejected the testimony proffered by Supervisor Troche that shop steward Colon stated to employees to stop work and noted that Troche did not make such statement in his pre-trial affidavit (GC Exh. 14 (b)).

The above shows that Respondent's reasons to suspend and later terminate the five shop stewards were pretextual. Respondent disingenuously gave the same suspension and termination letter to all five shop stewards independently of the extent of their participation in the September 9 work stoppage. It also falsely accused the five shop stewards of refusing to follow instructions that were never proffered. Where "the evidence establishes that the reasons given for the Respondent's action are pretextual--that is, either false or not in fact relied upon--the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis." Rood Trucking Co., 342 NLRB 895, 897-898 (2004), citing, Golden State Foods Corp., 340 NLRB 382, 385 (2003). In Rood Trucking, the Board citing Laro Maintenance Corp. v. NLRB, 312 U.S. App. D.C. 260, 56 F.3d 224, 229 (D.C. Cir. 1995), stated that "when the employer presents a legitimate basis for its actions which the factfinder concludes is pretextual . . . the factfinder may not only properly infer that there is some other motive, but that the motive is one that the employer desires to conceal--an unlawful motive"

In addition, Respondent failed to conduct an investigation of the alleged conduct attributed to the shop stewards. Rather, the uncontroverted evidence established, and the ALJ found, that the shop stewards were summarily suspended and subsequently discharged without ever being afforded the opportunity to give their version of the events. The Board has inferred unlawful motive on employer's failure to conduct a meaningful investigation into the alleged wrongdoing of discriminates and the failure to give an employee the opportunity to explain his actions. New Orleans Cold Storage & Warehouse Co., 326 NLRB 1471 (1998). An employer's failure to investigate the alleged basis for discharging employees supports an inference of discriminatory motive. Road Trucking Company, 342 NLRB 895 (2004).

Even when under a Wright Line test balance Respondent Employer does not meet its burden of proof to sustain the termination of these four shop stewards, it is respectfully submitted that Wright Line is inappropriate for the facts of this case. The Wright Line analysis is appropriately used in cases that turn on the employer's motive. However, "the existence or lack of unlawful animus" is not material when "the very conduct for which employees are disciplined is itself protected concerted activity." Burnup & Sims, 379 U.S. 21 (1964), accord: Phoenix Transit System, 337 NLRB 510, (2002) (finding Wright Line inapplicable), enfd. mem. 63 Fed.Appx. 524 (D.C. Cir. 2003).

Here, the suspension and termination letters Respondent issued to these five shop stewards unmistakably establish that the conduct for which they were suspended and terminated was because of their September 9 protected concerted activity, thus violative of the Act.

E. Specific Allegations Against Shop Steward Francisco Marrero

In his decision, the ALJ stated that the evidence established "that Marrero raised an incident with Victor Colon that was abusive and a "clear" violation of the Employer's Rules of Conduct that carry the imposition of disciplinary action including termination." The ALJ also

noted that according to Supervisor Troche, shop steward Marrero “used abusive language when Troche requested that he keep his voice down” by calling him a “bastard”.

Although Respondent may argue that shop steward Francisco Marrero allegedly threatened V. Colon, CGC contends that even assuming, *arguendo*, that Colon’s version is true, the alleged comment does not constitute a threat or misconduct of such a nature as to warrant Marrero’s discharge.

Under Atlantic Steel Co., 245 NLRB 814, 816-817 (1979), when an employee is discharged for conduct that is part of the *res gestae* of concerted protected activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act. When cases “involve discipline of an employee for conduct that was part of the *res gestae* of protected activity, and the employer's motivation is not at issue. The issue in such cases often is whether the employee used language so offensive as to remove the Act's protection." Benjamin Franklin Plumbing, 352 NLRB 525 (2008); General Motors Corp., 347 NLRB No. 67 slip op. 3 at fn. 3, (2006) (not reported in Board volume); Nor-Cal Beverage Co., 330 N.L.R.B. 610, (2000), where the Board found the Wright Line analysis inappropriate where causal connection between protected activity and discipline is undisputed, the only issue is whether that activity lost its protection under the Act because of the conduct of the employee.

Pursuant to Atlantic Steel, an employer violates the Act by discharging an employee engaged in the protected concerted activity of voicing a complaint about his employment terms unless, in the course of that protest, the employee engages in opprobrious conduct, costing him the Act's protection. In assessing the conduct, the Board assesses four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practices.

Although under Atlantic Steel, *supra*, and Felix Industries, 331 NLRB 144,146 (2000), Respondent may claim that shop steward Francisco Marrero lost the protection of the Act on September 9, by allegedly making the following remark: “That’s why they shot at you, bastard” (ALJD page 10), CGC submits that even assuming, *arguendo*, that the alleged conduct imputed to Marrero in fact occurred, such conduct did not constitute a threat or misconduct of such a nature as to cost Marrero the protection of the Act. Marrero was engaged in concerted protected activity, and as admitted by Colon, only Lopez, and shop stewards Felix Rivera and Marrero were close to him when the alleged threat was made. Thus, the first factor (place of discussion) weighs in favor of protection. Similarly, the second factor weighs in favor of protection because the alleged statement was made in the context of the discussion related to concerted protected activity. Regarding the third factor, the nature of the outburst, Marrero’s alleged remark, this is why you got shot before, without more, does not constitute a threat of bodily harm, as alleged by Respondent, and, as discussed below in more detail, conduct including the use of foul language and profane words, in the course of protected concerted activity, generally will not deprive an employee of the Act's protection. Unites States Postal Services, 251 NLRB 252 (1980) *enfd.* 652 F. 2d 409, (5th Cir.1981). Finally, because Marrero's alleged outburst was provoked by the Respondent's unlawful conduct, the refusal to allow Union business agent Lopez to speak to employees and the attempt to oust him with the police in abrogation of the access clause, this factor also weights in favor of finding that Marrero's conduct did not cost him the protection of the Act.

In determining whether a verbal remark is a threat the Board uses the following test: “Whether the misconduct is such that under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of the rights protected under the Act”. The Board

has also held that this test applies not only to conduct directed at non-striking employees but also to conduct directed at non- employees such as supervisors. Virginia Mfg. Co. 310 NLRB 1261, 1272 (1993).

CGC also contends that by allegedly calling Colon a bastard would only establish that offensive conduct occurred, but not serious enough as to lose the protection of the Act. Medite of New Mexico, 316 NLRB 629 (1995); Wayne Stead Cadillac, 303 NLRB 432 (1991); Chesapeake Plywood, 294 NLRB 201 (1989) enfd. 917 F.2d 22 (4th Cir. 1990). It is well settled that the use of epithets, vulgar words or profanities does not deprive a striker of the protection of the Act. General Chemical Corp., 290 NLRB 76, 83 (1988) Linn v. Plant Guard Workers 383 U.S., 53, 60, 61 (1966). In Nor-Cal Beverage, Co., Inc., 330 NLRB 610, 611 (2000), the Board found that the usage of the word "scab" was not so egregious as to remove the mantle of protection. In the present case, as in Nor-Cal Beverage the comment was unaccompanied by any threat, or physical gesture, or contact.

In Briar Crest Nursing Home, 333 NLRB 935 (2001), the Board discusses what constitutes threats of bodily harm. In that case the Board made a comparison of Georgia Kraft Co., 275 NLRB 636, 636-637 (1985), and Wayne Stead Cadillac, 303 NLRB 432, 436 (1991). These cases illustrate how the Board has drawn the line between threats and ambiguous statements.

For instance, in Georgia Kraft, strikers went to the home of a nonstriking employee and told him "we'll take care of you (if you return to work)." In that case, the Board found the surrounding circumstances, the strikers were drunk, cursed in front of the non striker's pregnant wife and young daughter, and refused repeated requests to leave were coercive and intimidating.

Taking into account the context, the Board found the strikers' "take care of you" statement was not ambiguous, but rather a threat of bodily harm.

On the other hand, in Wayne Stead Cadillac, a striker told another striker's wife that her husband should reconsider returning to work because he "could get hurt." The Board adopted the judge's finding that this statement was too ambiguous to be considered serious misconduct for which the striker could be discharged. The judge took into consideration that the "take care of you" remark in Georgia Kraft conveyed that the speaker would take action against the person addressed and it was clear from the surrounding circumstances that the action threatened was to cause injury. In contrast, the person who "could get hurt" was not the person addressed. And, as the judge observed, the speaker could have been referring to the nonstriker's future relationship with the speaker and other strikers, if the nonstriker returned to work. Finally, contrary to the facts in Georgia Kraft, the judge could find nothing in the surrounding circumstances that made clear the striker intended the "could get hurt" statement to be a threat to cause bodily harm.

In our case Respondent alleges that Marrero's comment: "this is why you get into trouble; this is why they shot at you, bastard", constitutes a threat. However, unlike the remark in Georgia Kraft, this statement does not convey that the speaker would take action against Colon. Rather, the statement, if made, is making reference to an unrelated past incident in which Marrero was not involved.⁸ Based on this analysis, Marrero's statement is too ambiguous to constitute a threat. In Sodexo Marriot Services, Inc., 335 NLRB 538 (2001), the Board held that when the evidence establishes that the reasons for an employee's discharge was unlawful, it is unnecessary to determine whether the employee's misconduct during a group meeting was

⁸ It is noted that although Respondent claims that Marrero threatened Colon, neither Respondent nor Colon filed criminal charges against Marrero, even when they filed criminal charges against Lopez. It is also noted that Respondent admitted that there were surveillance cameras in the area, but no video was submitted into evidence.

sufficient to deprive the employee of protection of the Act because the evidence establishes such a reason is pretextual. Pratt Towers, Inc., 338 NLRB 61 (2002).

As discussed above, CGC demonstrated that Francisco Marrero engaged in union and/or concerted protected activity and admittedly, Respondent discharged him because of his participation in said activity. The evidence submitted by Respondent concerning the alleged incident in the warehouse between Francisco Marrero and supervisor Colon does not constitute enough evidence to support a finding that Marrero in fact engaged in the alleged conduct. In this regard, Supervisor Troche testified that he heard someone making the alleged comment but did not identify the employee who allegedly made it. Although Colon testified that he felt intimidated by the alleged remark attributed to Marrero, he did not file a police report, nor even a written report with the Company. Finally, even assuming, *arguendo*, for purposes of the analysis that the alleged comment was made, CGC submits that in accordance with Board law, the alleged statement does not constitute a threat or so egregious conduct as to deprive Marrero of the protection of the Act.

In this regard, it should be noted that the Supreme Court in Linn v. Plant Guard Workers Local 114, 383 U.S. 53 (1966), endorsed the Board's expansive definition of Section 7 activity with respect to free expression. The Court noted with approval that the Board has allowed 'wide latitude to the competing parties', and that the Board has concluded that epithets such as 'scab' are commonplace in these struggles and are not so indefensible as to remove them from the protection of Section 7. Also in Letter Carriers v. Austing, 418 U.S. 264 (1974), the Court reaffirmed that the word scab is most often used as an insult or epithet... federal law gives a union license to use intemperate, abusive or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point.

In addition, it is argued that Marrero's conduct did not warrant his termination and that Respondent does not customarily terminate an employee for this conduct. To that effect, note that GC Ex. 9 reflects that on October 8, Respondent imposed a disciplinary suspension of only 15 days to employee Luis Ocasio who allegedly had incurred in a second infraction for insubordination and who already had a prior suspension of 5 days "for displaying a defiant and hostile attitude toward a supervisor."

As a result, it is submitted that the conduct attributed to Marrero did not constitute a threat nor did it remove the Act's protection.

F. The ALJ Incorrectly Credited the Testimony of Armando Troche

In its decision the ALJ credited Supervisor Armando Troche that he saw shop stewards Felix Rivera, Romian Serrano, Carlos "Charlie" Rivera and Francisco Marrero instructing employees to stop working. However, Troche's testimony was wholly unreliable and contradicted by Respondent's main witness Operations Process Leader Victor Colon, as well as by CGC's witnesses Union Business Agent Jose A. Lopez Pacheco and Alexis Hernandez.

Colon's and Troche's accounts of the events cannot coexist since they are irreconcilable. In this regard, it should be noted that Colon testified that when Lopez, Francisco Marrero and Felix Rivera were "circling around him", no other supervisor was present, that only security guard Rafael Rodriguez was present (Tr. 596). If no supervisor was with Colon when he encountered Lopez and the two shops stewards, Troche, who is a supervisor, could not be present. This is evidenced by all the contradictions between Troche's and Colon's testimonies. Note that according to Colon, Lopez was accompanied by shop stewards Francisco Marrero and Felix Rivera (Tr. 545), while Troche testified that Lopez was accompanied by Francisco Marrero, Carlos "Charlie" Rivera, and a group of approximately 15 employees (Tr. 871 & 895). Colon's testimony was corroborated by Union Representative

Lopez, who also testified that he was with Felix Rivera, and Francisco Marrero (Tr. 118). Further, according to Troche, while he was with Victor Colon and the security guard, he saw Lopez, Francisco Marrero, Charlie Rivera other employees approaching them because all three of them (Charlie, Lopez and Francisco) were shouting to employees to stop work (Tr.871). Contradictorily, Colon testified that during the night of September 9 he did not see any shop steward asking employees to stop working (Tr. 594). Colon's recollection of the events was that after he (Colon) saw Lopez with Francisco and Felix walking through the hallway, he told Lopez that he had to leave the plant because he was not authorized, shortly thereafter, "the people that were working in the warehouse, the operators, had stopped operations to look at the show he was putting up at that moment..." (Tr. 545).

Additional evidence of contradictions between Troche and Victor Colon is that Troche testified that after encountering Lopez and the shop stewards, Victor Colon asked him to grant him access to an area where he could call the police (Tr.873). However, according to Victor Colon, when he found Troche he had already called the police (Tr. 545), and after encountering with Lopez, Francisco Marrero and Felix Rivera, he went to the offices (Tr. 548). Moreover, Troche testified that at some point other two stewards, Felix Rivera and Romian Serrano, joined Lopez, Francisco Marrero and Charlie Rivera (Tr. 876, 877). Most of what Troche testified he saw, he allegedly saw while Colon was with him (Tr. 869-877 & 899-902). He also testified that he saw Miguel Colon arriving last and asking employees to stop working (Tr. 883). However, Colon testified that he first saw Romian Serrano, Charlie Rivera, and Miguel Colon at the conventional area where all the employees were assembled during the work stoppage around 9:10 p.m. to 9:30 p.m (Tr. 554-556). Finally, it is noted that the ALJ discredited Troche's testimony that he saw shop steward Miguel Colon asking other employees to stop. The ALJ

noted that Troche did not testify as to that in his pre-trial affidavit (ALJD, page 14).

As a result, it can be said that Colon's testimony is consistent with Lopez' testimony that while employees were heading to the conventional area Romian Serrano arrived, and that Charlie Rivera and Miguel Colon arrived when employees were already gathered at the "conventional area" (Tr. 120). Employee Alexis Hernandez also testified that when he arrived to the "conventional area", he only saw "Romian, Felix, Frankie and Jose Adrian" (not Charlie Rivera or Miguel Colon) and that no shop steward asked him to stop work (Tr. 342-343). In addition, it should be noted that Troche contradicted even his own testimony, e.g. while he testified that all employees had ceased work to leave to the conventional area, and that only two supervisors together with the auditors remained working (Tr. 882), he claims he afterwards saw when Miguel Colon arrived and asked employees (who under his prior testimony already had ceased to work) to stop working (Tr. 883).

The ALJ sustained the discharge of shop stewards Carlos Rivera, Felix Rivera, and Francisco Marrero because they allegedly instigated other employees to abandon work as Troche testified. Besides Troche's testimony, there is no other testimony or evidence showing that Carlos Rivera, Felix Rivera, and Francisco Marrero encouraged other employees to abandon work. In addition, an adverse inference should be drawn by the fact that although Victor Colon testified that there were security cameras at this area, Respondent failed to introduce such videos as evidence (Tr. 596-597). The Board has long held that the failure to produce evidence in the possession of a party that may reasonably be assumed to be favorable to its position raises an adverse inference. Martin Luther King Sr. Nursing Center, 231 NLRB 15 fn. 1 (1977).

The ALJ found that it was not rebutted by the CGC that these shop stewards encouraged other bargaining unit employees to abandon their work. However, CGC submits that there was

no need to rebut Troche's testimony since Respondent's own main witness, Victor Colon, had rebutted it. In this regard, it can be said that Colon's, Lopez', and Alexis Hernandez' testimonies consistently established that no shop steward encouraged other employees to abandon work, and that at least Carlos Rivera and Miguel Colon arrived at the "conventional area" after unit employees were already gather.

In view of the above, CGC submits that in the event it is found that these shop stewards were not entitled to engage in the concerted activity of September 9, that is, not to encourage other bargaining unit employees to concertedly stop working, a finding that the CGC strongly opposes since it is being argued that such conduct falls within the protection of the Act; in the alternative, it is submitted that there is no credible evidence to establish that at least Carlos Rivera, Felix Rivera, and Francisco Marrero⁹ encouraged other bargaining unit employees to abandon their work areas.

In this regard, it is noted that the only witness to link these shop stewards to the actions of asking employees to stop working was Troche, the one witness the ALJ found had "manufactured evidence in its desired to lump" the actions of Colon with that of the other shop stewards. It is submitted that the above discussion of the evidence shows that Troche also manufactured evidence to link the actions of Lopez with those of Carlos Rivera, Felix Rivera, and Francisco Marrero.

It is acknowledged that 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 that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). Where, as here, an ALJ's credibility choice is based on an illogical or

⁹ In addition to shop steward Miguel Colon, as to whom the ALJ found there was no evidence that he had engaged in any misconduct or had encouraged other employees to stop working.

inadequate rationale, the credibility resolution itself must fall. Kelco Roofing, Inc., 268 N.L.R.B. 456, 1983, Custom Recovery v. NLRB, 597 F.2d 1041, 1045 (5th Cir. 1979). See also NLRB v. E-Systems, 642 F.2d 118, 121 (5th Cir. 1981).

THE FAILURE TO ORDER, AS A REMEDY, THE EXPUNGEMENT FROM THE FILES OF EMPLOYEES ANY REFERENCE TO THE “LAST CHANCE” AGREEMENT, NOTWITHSTANDING THE FINDING THAT SUCH AGREEMENT WAS UNLAWFUL. IN THE ALTERNATIVE THE FAILURE TO ALLOW AN AMENDMENT TO THE COMPLAINT. (EXCEPTION 3)

In its decision, the ALJ found that Respondent Employer’s “last chance” agreement, in and of itself, was unlawful since it conditioned employees’ reinstatement from their suspensions on the relinquishment of their right to file unfair labor practice charges and give testimony to the Board. The ALJ ordered, as a remedy, that an offer of reinstatement be made to the four employees who were discharged pursuant to the unlawful agreement, and that these be made whole for any loss of earnings and benefits. However, the ALJ failed to order Respondent Employer to expunge from employees’ records such unlawful agreement.

Clearly, under those circumstances, an expungement remedy as to those four employees (to expunge said agreement from their files) would be appropriate to remedy the violation found, in order to avoid the possibility that the Employer may rely on it to impose discipline should they be reinstated as recommended by the ALJ.

Further, it should be noted that during the course of the hearing CGC moved to amend the Complaint to allege that 48 other employees were unlawfully subjected to the “last chance” agreement. CGC sought to so amend the Complaint after Respondent asked to amend its affirmative defense to include that the “last chance” agreement was not being enforced upon the remaining 48 unit employees who also executed the agreement and were not terminated by Respondent because the parties signed a successor contract which caused the agreement to expire; and after the ALJ stated that even if the agreement was found to be unlawful, that such a

finding would have no impact on the other 48 employees. The ALJ, however, denied CGC's motion to amend the complaint. First, the ALJ understood that the complaint allegations regarding the "last chance" agreement only alleged violations concerning four employees (Luis Melendez, Jose Rivera-Barreto, Luis Bermudez, and Virginio Correa), who after executing the agreement were subsequently discharged because they allegedly violated the terms and conditions of said agreement. According to the ALJ, there was no reference in the complaint to the 48 additional employees who also executed the "last chance" agreement. Secondly, the ALJ noted that unlike the four employees alleged in the complaint that executed the "last chance" agreement and were subsequently terminated, the 48 employees were reinstated on November 3, and no further disciplinary action was taken against them. However, the ALJ found that any violation found regarding the Employer's coercion of the 48 employees who had executed the "last chance" agreement would be cumulative.¹⁰

The CGC's position is that the complaint alleged two separate violations: one was the language of the "last chance" agreement itself as a separate violation (the agreement as a whole); and the other was that the above-mentioned four employees were discharged pursuant to said unlawful agreement. Thus, to permit the amendment to the Complaint to include all employees that executed such unlawful agreement would not violate Respondent's right to due process; more so when Respondent amended its affirmative defenses to that effect. (Tr. 46-62) Accordingly, CGC requests that ALJ's ruling denying the amendment be reversed, the amendment allowed and a violation found, and an expungement remedy provided to both the 4 employees who were discharged and to the other 48.

¹⁰ Although in its Decision, the ALJ found that the amendment to the complaint with respect to the additional 48 employees who executed the last chance agreement would have been cumulative, it failed to provide the proper remedy after finding such agreement to be unlawful.

In any event, CGC submits that in view of the fact that unlawfulness of the agreement is pleaded in the Complaint, and the finding that the agreement itself is unlawful, that the amendment referred to above was not indispensable. Thus, it is the CGC's position that an expungement remedy is warranted to remedy the violation found and that, as a matter of law, such a remedy can be granted by the Board regardless of whether it reverses the ALJ to allow the requested amendment.

Accordingly, the Board is requested to find that it was necessary for the ALJ to order nullification and/or expungement of the "last chance" agreement from the personnel records of all employees subjected to it to effectuate the purposes of the Act, as is customarily done by the Board. See, e.g. R.J. Houle Mech. Contrs., 342 NLRB 646, (2004).

THE FAILURE TO FIND THAT THE DISCHARGE OF DENNES FIGUEROA WAS DUE TO HIS PARTICIPATION IN THE STRIKE AND IN VIOLATION OF SECTION 8(A)(1) AND (3) OF THE ACT. (EXCEPTION 4)

Contrary to CGC's contention that employee Dennes Figueroa was discharged because of his participation in the October 20-22 strike, the ALJ found that Figueroa was discharged for legitimate business reasons unrelated to his participation in said strike (ALJ slip op 19).¹¹

In the summary of facts, the ALJ stated that Marlyn Cruz, a Human Resources Specialist, testified "that after a thorough investigation of the December 5 incident between Figueroa and another employee that established he had left his work station without authorization and had made threatening remarks to a co-worker, she orally terminated Figueroa on December 18." (ALJ slip op 17). However, in his decision the ALJ failed to mention the specific conduct he found proven or the legal analysis used in order to support his finding that Figueroa was discharged for legitimate business reasons and not in violation of Section 8(a) (1) and (3) of the

¹¹ Paragraph 21 of the Third Amended Consolidated Complaint alleges that on or about December 18, 2009, the Respondent discharged employee Figueroa, because he assisted the Union and/or engaged in concerted activities and to discourage employees from engaging in these activities.

Act. Rather, the ALJ merely indicated that “the testimony of supervisor De Jesus and that of Cruz was detailed and precise in comparison to the vague testimony presented by Figueroa”, and therefore he “fully credited supervisor’s De Jesus testimony that the word strike was not mentioned during the discharge meeting nor did Cruz state that one of the reasons for Figueroa’s discharge was based on his participation in the strike.”(ALJ Slip 19).¹²

CGC contends that the ALJ failed to consider relevant record evidence concerning the December 5 incident and the December 18 discharge meeting which demonstrated that Respondent’s purported reasons for Figueroa’s discharge was pretextual. In addition, the ALJ failed to find that the evidence in the record supports a finding that CGC carried its burden of proof to establish by a preponderance of evidence that Figueroa was terminated because of his participation in the October 20-22 strike.

1. The December 5 incident

a. The alleged early break without authorization

On December 5, due to a business necessity, supervisor Angel Quiles assigned Figueroa to cover the third shift operators’ breaks for the canned beverages and the two liters productions lines (Tr. 477).¹³ It is undisputed that the duties assigned to Figueroa on December 5 were not his regular duties. Figueroa credibly testified that he accepted the assignment without complaining, but asked supervisor Quiles’ permission to take his first break earlier, in view that he was going to be covering the breaks for the operators of the two production lines, to which

¹² Marlyn Cruz is the senior Human Resources Director (Tr. 395) and William de Jesus is the supervisor of the 2 litter production line, admittedly an agent and a supervisor of Respondent within the meaning of the Act, respectively. CGC contends that the record testimony failed to demonstrate that Cruz and De Jesus’ testimonies were detailed and precise as found by the ALJ. Rather, the record reflected, as discussed below, that Cruz’ testimony concerning the reasons for Figueroa’s discharge and what transpired during the termination meeting was vague and superficial, and reflected a lack of independent recollection. It is further noted, that De Jesus contradicted Cruz’ testimony with regard to the reasons that allegedly Cruz told Figueroa were the grounds for his discharge.

¹³ Dennes Figueroa was a production operator of the third shift 9:00pm -5:30 am in the canned production line (Tr. 473) and Angel Quiles was Figueroa’s direct supervisor (Tr. 1031). Wilson de Jesus is a production supervisor for the two litter area (Tr. 474 and Tr. 1030).

Quiles replied that it was okay (Tr. 477)¹⁴. It is also uncontroverted that De Jesus was not present during this conversation between Quiles and Figueroa. Although supervisor Wilson de Jesus testified that he was present subsequently when Quiles allegedly confronted Figueroa and told him that those were not the instructions he had given to him, it is noted that Respondent failed to call supervisor Quiles as a witness to deny Figueroa's testimony, and therefore De Jesus' testimony constitutes uncorroborated hearsay evidence (Tr. 1036-1037).¹⁵ CGC contends that De Jesus' testimony constitutes self serving hearsay evidence and therefore, unreliable and insufficient evidence to establish that Figueroa incurred in the alleged conduct of taking his first break without authorization.¹⁶ In any event, even assuming that the alleged conduct in fact occurred, the same does not constitute such a serious infraction as to warrant discharge.

b. The alleged threatening remark

Subsequently, and in regard to the alleged incident with another employee, the record reflects that on that same night of December 5, while Figueroa was covering the break for the filler operator, one of the valves of the machine broke down and began to throw out low-filled bottles which did not comply with the company measurement requirements (Tr. 478 and Tr. 1038). The filler machine fills an approximately 275-300 bottles per minute (Tr.478 and 1059). Figueroa testified that he was able to quickly stop the machine holding some 35 bottles in the filling area out of a total of some 60 bottles that were low-filled (Tr. 478). The other approximately 30 bottles continued through the conveyor to the labeling machine (Tr. 478). Supervisor De Jesus corroborated that only about 60-70 were low -filled bottles (Tr. 1038) which

¹⁴ Employees are allowed to take three breaks during their shifts. Two 10 minute break and one 30 minute break for lunch. The first break is a 10 minute break.

¹⁵ De Jesus' testimony as to the alleged unauthorized break was the only evidence submitted by the Respondent to establish its allegation that Figueroa was outside his workstation without authorization, and therefore, constitute unreliable and insufficient evidence to support a finding that Figueroa was not authorized to take an early break.

¹⁶ CGC and attorney for the Charging party timely objected to Respondent's attorney line of questions on the grounds that it called for hearsay testimony (Tr. 1034, 1035, 1036 and 1037).

takes less than one minute to happen (Tr. 1060). It is also undisputed that the valve break-down was a mechanical problem not caused in any way by Figueroa's fault or negligence.

With regard to the 35 bottles that were stopped at the filler machine, Figueroa testified that he conducted a procedure called scrapping, which consists of emptying the liquid that the bottles have inside and placing the empty bottles in a plastic bag (Tr. 478). Figueroa testified that another employee named Jonuel Colon who was in the area helped him to remove the bottles (Tr. 479). By the time Figueroa finished covering the 30 minute break at the filler machine, only five bottles remained to be scrapped, at which time the operator for which Figueroa was covering returned from his break and he continued emptying the remaining bottles (Tr. 479).

Figueroa then left to cover the break for the operator of the labeling machine, which during that shift was Victor Santiago. Figueroa testified that when he arrived at the labeling machine, Santiago had removed the approximately 30 low-filled bottles and placed them under a place called the warmer (Tr. 479). Figueroa testified that Santiago went on his break and he continued performing the normal tasks for the operation of the labeling machine and also proceeded to perform the scrapping process (Tr. 479- 480). Figueroa testified that when Santiago returned from his 30 minute break he had completed the scrapping process for 24 of the 30 low-filled bottles.¹⁷ According to Figueroa, when Santiago returned from his 30 minute break, he (Santiago) told him to finish scrapping the bottles or otherwise he would complain to supervisor De Jesus. Figueroa testified that he told Santiago to do as he wished, and added that he had to continue covering the breaks for the other operators because they could not go over the fifth hour without a break, and, that in any event, he performed all the tasks for the labeling machine, plus scrapped some 24 bottles (Tr. 480). Figueroa testified that by the time Santiago returned to the labeling machine only some 6 bottles remained for scrapping (Tr. 480).

¹⁷ Figueroa testified that he had to remove the bottles from a difficult area under the warmer (Tr. 480)

Figueroa testified that after he went to cover the break for the operator for the “Kister” machine he saw that Santiago had stopped his machine and went to speak with supervisor Wilson de Jesus (Tr. 481). He further testified that about five minutes later, supervisor De Jesus came to the “kister” machine and asked Figueroa to stop the machine and summoned him to a meeting with supervisors de Jesus and Quiles in which employee Santiago was also present. According to Figueroa, during that meeting Santiago gave his version of the events accusing him of having refused to help him with the scrapping process and of using foul language toward him. Figueroa testified that at no time did he use foul language toward Santiago (Tr. 482) and that he completed the scrapping process as to 24 of the 30 low filled bottles that were in the labeling machine. It is noted that Respondent failed to call employee Santiago as a witness during the trial.¹⁸ Therefore, Figueroa’s testimony regarding these two issues stands unrebutted. Figueroa further testified that during the meeting he was not allowed to give his version of the events, but rather was informed that the situation was going to be discussed the following day in a meeting with supervisor Victor Colon. That meeting with supervisor Colon never took place (Tr. 481)¹⁹.

2. The December 18 Discharge Meeting

On December 18 Figueroa was called to a meeting in the Human Resources office. Present at the meeting were supervisors De Jesus, Quiles, and Marlyn Cruz. According to Figueroa, when he entered the office, he asked Cruz if he could bring in another employee to serve as a witness for him, to which Cruz replied that the shop steward thing was when there was a union there, and asked him to sit down because his issue was going to be brief (Tr. 475)²⁰. Figueroa further testified that Cruz stated that she had conducted an investigation concerning an

¹⁸ In that regard, it is noted that there is absolutely no evidence in the record to establish that Figueroa used foul language toward Santiago when he returned from his break.

¹⁹ It is undisputed that the meeting with Victor Colon never took place.

²⁰ The refusal to allow union representation during a disciplinary meeting was settled as part of an Informal Settlement Agreement executed by the parties and approved by the ALJ (ALJ Ex 2.)

incident between him and employee Victor Santiago and had determined that Figueroa's attitude was not convenient for the company since he had gotten involved with an exemplary employee that had entered on the day of the strike and helped the company during that difficult situation. Cruz also told Figueroa that, given the fact that he was part of the strike, such sort of behavior was not going to be tolerated by the company, and at that point informed him that he was discharged (Tr. 475). Figueroa testified that he never received a termination letter from the company stating the reasons for his discharge (Tr. 484). As discussed below, Respondent admitted that no discharge letter was issued to Figueroa.

3. *Prima Facie Case*

The analysis of whether the discharge of Figueroa was in violation of Section 8(a)(3) and (1) of the Act is governed by the test articulated in Wright Line.²¹

The Supreme Court in Wright Line provides the Board with the analytical test to be used where it is alleged that an employer has discriminated or discharged an employee for engaging in concerted protected activity, as well as for an employee's union activities or support thereof. Under the Wright Line test, the General Counsel bears the burden of making a prima facie to support the inference that the protected conduct was a "motivating factor" in the employer's decision. Once that is accomplished, the burden shifts to the employer to demonstrate that the same action would have taken place notwithstanding the protected conduct.

Under that test the General Counsel must prove by a preponderance of the evidence that union animus and/or protected activity was a substantial or motivating factor in the adverse employment action. The elements required are (1) union or protected activity by the employee,

²¹ 251 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 (1983).

(2) employer knowledge of that activity, (3) an adverse employment action, and (4) union animus on the part of the employer.

Based on documentary evidence and credible record testimony, including Figueroa's testimony, all elements of Wright Line had been established. Figueroa testified that he participated in the strike on October 20-22 although at the time he was not scheduled to work due to his being on approved disability leave.²² Figueroa specifically testified that he attended the strike on October 20, from 12:30 or 1:00 pm, and stayed for about two hours in the early afternoon, and then, he returned to the picket-line at about 9:00 pm until 5:00 am. (Tr. 491) Figueroa testified that he also attended the strike on October 21 and 22 from 9:00 pm until 5:00 am, which were his regular working hours (Tr. 490). During cross examination Figueroa described the picket signs he observed while at the picket line (Tr. 494), how the employees' participation decreased during the second and third day of the strike (Tr. 495), those individuals who used the loud speakers during the manifestation (Tr. 496-497) and described his participation collecting the trash when the strike ended on the early morning hours of October 23 (Tr. 496).

Although Cruz denied having knowledge of Figueroa's participation in the strike, it is noted that the October 20-22 strike was conducted in plain view in front of the entrance area of the Respondent's facility (Tr. 399).²³ It is also noted that Cruz, while testifying as to another issue, conveniently admitted that from her office she observed when a security guard distributed a letter from the Union to the strikers in the manifestation (Tr. 959).²⁴ Curiously, that Union's letter was distributed during the early afternoon of October 20, within the same time frame that

²² Figueroa was on disability leave from September 24 through November 24, after which he returned to work.

²³ Cruz admitted that on October 20 at about 10:00 am several employees employed by the company abandoned their work area and gathered at the front gate of the premises, which is the only entrance and exiting point to the company with signs that indicated a strike. (Tr. 399)

²⁴ Joint Ex. 19

Figuroa was present at the picket line (Tr. 661-662 and 696).²⁵ This admission demonstrated that Cruz was not only able to observe from her office what transpired at the picket line during the three days of the strike, but that in fact, she observed the employees who had participated in the strike during the early afternoon of October 20. In addition, Respondent Operations Director Carlos Trigueros, also admitted that he observed when the Union letter was distributed to the strikers (Tr. 665).²⁶

Further, the fact that, admittedly, Cruz made reference to the “last chance” agreement and (as noted above) to the “events” during the discharge conversation is an implied admission of knowledge of Figuroa’s support of the strike and that the same played a part in the decision to discharge him, instead of utilizing progressive discipline or imposing a lesser disciplinary action. Thus, even if Cruz did not make an express reference to the strike, as found by the ALJ, her admitted reference to the fact that he was being discharged without further ado, notwithstanding the fact that he had not signed the “last chance” agreement, is an implied admission that Figuroa was being equated with the strikers who had executed the agreement.²⁷

Under the Wright Line test, after the General Counsel makes the required initial showing, the burden then shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee’s union activity. See Manno Electric, 321 NLRB 278, 280 fn.12 (1996). To establish this affirmative defense, “an employer cannot

²⁵ Carlos Trigueros testified that the letter arrived at the Company at noon or early afternoon on October 20 (Tr. 660), and was distributed to the strikers between 1:00 –2:00pm (Tr. 696)

²⁶ Triqueros testified that when the letter was distributed he was outside the offices, in an area that has an elevation of about 10 meters or 30 feet and where he could see clearly the strikers (Tr. 665). Triqueros testified in detail about the alleged reaction of the strikers.

²⁷ It is important to note that the discharge of Figuroa took place following his return from his medical leave of absence; that the terms of Figuroa’s discharge were in line with the terms of the Respondent’s “last chance” agreement, i.e. that any infraction of company rules would result in immediate termination of employment. In addition, the timing of Figuroa’s discharge is also suspicious as within the same period of time, November 6, November 13, December 10, 2008 and January 9, 2009 Respondent terminated the employment of Bermudez, Barreto, Correa and Melendez, four strikers who were required to sign the last chance agreement. These discharges demonstrated that Respondent in fact treated Figuroa as a striker and applied the same standard of the last change agreement.

simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity.” W.F. Bolin Co., 311 NLRB 1118, 1119 (1993), petition for review denied 70 F. 3d 863 (6th Cir. 1995), enfd. mem. 99 F.3d 1139 (6th Cir. 1996); See also Desert Toyota, 346 NLRB 118, 119-120 (2005).

4. Respondent’s Defenses

Respondent presented the testimony of Marlyn Cruz and William De Jesus as their only witnesses concerning the discharge of Figueroa. CGC contends that Respondent failed to prove by a preponderance of the evidence that it would have discharged Figueroa even in the absence of his participation in the strike.

a. Testimony of De Jesus

With regard to the incident of December 5 between Figueroa and another employee (Victor Santiago), De Jesus admitted that he and Quiles called employees Figueroa and Santiago to a meeting because “they were both arguing among themselves”, but because during the meeting the issue was not resolved, he decided to make a report to Human Resources and to Victor Colon (Tr. 1041 and 1058). De Jesus further admitted that notwithstanding the alleged incident, subsequently and during that same night, he asked supervisor Quiles again to lend him Figueroa to continue covering the breaks for the operators of the two litters line (Tr.1041). De Jesus testified that then he asked Figueroa to please pick-up the bottles that he had left in the labeling machine area, to which Figueroa replied that he was going to pick them up, but that the following day Victor Colon was going to know the reasons why he did not want to pick them up when Santiago returned from his break (Tr.1041). De Jesus admitted that Figueroa complied with his instructions, as he testified that Figueroa in fact picked up the bottles. However, De

Jesus alleges that Figueroa, after picking up the bottles, made the following statement: "a new war is going to take place in this new millennium." According to De Jesus, he asked Figueroa if he was threatening him, to which Figueroa allegedly replied "that he was not threatening him, but the one who's over there", allegedly pointing at Santiago (Tr. 1042).

De Jesus admitted that although both employees, Santiago and Figueroa, were arguing during the December 5 incident, Santiago was not disciplined (Tr.1059). He also admitted that Santiago did not participate in the strike and remained working for the company during the strike (Tr. 1065). De Jesus further admitted that he was not involved in the alleged investigation of the December 5 incident, nor did he participate in the determination to discharge Figueroa, as he admitted that nobody from Human Resources asked his opinion nor did they consult with him or ask his opinion as to which of the two employees, or both should be disciplined (Tr. 1066).

With regard to the December 18 discharge meeting, supervisor De Jesus testified that during said meeting Cruz told Figueroa "that he had violated the rules of conduct of the company and that based on the penalties therein, he was discharged from his employment" (Tr. 1046). De Jesus testified that Cruz specifically told Figueroa that he had violated Rule #30, insubordination; Rule #35 fight or provoke violent acts; Rule #36 threat or intimidation to any employee or supervisor, Rule# 39, to provoke a co-worker to violate the rules of discipline and Rule #38 use of foul language towards supervisors (Tr.1047- 1048). According to De Jesus, Cruz did not mention anything about the strike and the issue of the strike was not a subject of discussion during the meeting (Tr. 1049).

b. Testimony of Marlyn Cruz

With regard to the December 18 discharge meeting, Cruz testified that the reasons for which Figueroa was discharged were because "he threatened a supervisor,

which was Wilson De Jesus, who was in the meeting, and also about some event that happened, that he was supposed to do some things that he didn't do and we had a loss of product because of that "(Tr. 961). Those were the only reasons mentioned by Cruz as the grounds for Figueroa's discharge. With regard to what transpired during the December 18 meeting and in response to the ALJ questions, Cruz testified as follows: (Tr. 962 line 13- 25)

Judge Rosenstein: Now, in addition, did you have discussion with Mr. Figueroa concerning his participation in the demonstration that occurred on October 20th though 22nd?

The Witness: I just clarified to him that this was not an event regarding the events, because he was not—he was in-- I don't know—a special license outside. So this was not because of the agreement that some employees signed for coming back and that's it. That was not regarding anything of that. I will just clarify that event. Maybe I can translate. What I wanted to clarify was that this had nothing to do with the stipulation and agreement because he returned to work, he came from being in a special leave. He was not active during the incident of the 20th.

(Tr. 962 line 23-25 and 963 line 1-16)

Judge Rosenstein: All right. What were the reasons you told him that he was being terminated?

The Witness: What I recall is because of the insubordination that he did and the hostile environment that was getting on because of the acts that he committed. And he accepted that he did some of the things. Other things he didn't accept.

Judge Rosenstein: Did you give him something in writing to that effect?

The Witness: Not that I remember.

Judge Rosenstein: Is that customary to orally terminate someone?

The Witness: Well, I received instructions that I didn't have to give him—give the employee any letter on the moment.

Judge Rosenstein: So your best recollection is that that is what you told him regarding the reasons that he was being terminated?

The Witness: Yeah.

It is noted that Cruz at no time during her testimony made any reference to the specific rules of conduct mentioned by De Jesus, nor to the alleged unauthorized early break or any other specific conduct.

Although Cruz denied having made any remark about the strike, she admitted making reference to the “last chance agreement,” a document that only some strikers were required to sign, but not Figueroa. As described above, Cruz admitted that during the discharge meeting she told Figueroa that he was not being discharged pursuant to the “last chance agreement” or stipulation that other employees signed in connection with the strike of October 20 (Tr. 961). It is undisputed that the “last chance agreement” was a document that only strikers were required to sign in order to return to work. In this regard, Cruz’ denial that Figueroa’s participation in the strike was not part of the discussion during the December 18 meeting should not have been credited, otherwise why would Cruz have referenced the last chance agreement during this meeting.²⁸

Cruz further admitted that she did not give Figueroa a discharge letter because she received instructions not to do so. (Tr. 963) If the discharge was unrelated to the strike, why not give him a discharge letter as was customary.²⁹ During cross examination, Cruz admitted that Victor Santiago was one of the employees that did not participate in the strike (Tr. 413) and that Santiago worked actively for the company during the three days of the strike (Tr. 414).

²⁸ Cruz should not be credited as a reliable witness. Cruz evaded answering questions on cross-examination. Although Cruz was called to testify as the Human Resources representative for Respondent Employer, when confronted with Respondent’s payroll records, she pretended not to know what those documents were. Cruz’ claimed ignorance as to such type of documents evinces her is virtually impossible to be believed. In addition, Cruz’s own testimony reflected a poor recollection of what transpired during Figueroa’s termination meeting.

²⁹ At the time of Figueroa’s discharge, other discharged strikers had already filed charges against the Respondent Employer.

5. The Respondent's Pretextual Reasons and Evidence of Disparate Treatment

Although Respondent contended that Figueroa was discharged for violation of company rules during the incident of December 5, namely leaving his work station without authorization and an alleged incident with an employee named Victor Santiago, Respondent's unlawful motivation is evidenced by Respondent's selective use of discipline and disparate treatment.³⁰ Thus, Figueroa was sanctioned with discharge while, in contrast, no disciplinary action whatsoever was taken against Santiago even though the evidence, as admitted by supervisor De Jesus, demonstrated that Santiago also engaged in the verbal altercation at issue. In that regard, De Jesus' report, which constitutes mostly uncorroborated hearsay, demonstrated that Santiago and Figueroa were both engaged in a discussion which caused De Jesus to "take both employees" (Santiago and Figueroa) to his office. (Re Ex. 3) In his report, De Jesus also admitted that he told both employees that he had seen them arguing in the hallway. (Re Ex. 3) De Jesus further admitted in his report that during the meeting at the office Santiago was excited and speaking in loud tone, as he stated "I then asked both employees, twice, to keep quiet until both calmed down, as both were excited" (Re Ex. 3).

With regard to the alleged threat, contrary to Cruz's testimony, De Jesus admitted that the alleged statement of Figueroa was not addressed to him. Figueroa's alleged misconduct consisted in making the alleged following statement "that a war is going to be in the new millennium." CGC submits that even if the alleged comment is credited, the statement by itself, in the absence of any other conduct, is too ambiguous as to constitute a threat, as it does not carry or convey any direct or implied message of bodily harm. Rather, a fair reading of said statement is that if Santiago was to continue accusing and creating problems with him, he was

³⁰ Figueroa credibly testified that he did not use profane words toward Santiago and denied having made any threat against Santiago or any supervisor.

not going to tolerate it silently, but was going to complain and expose Santiago's conduct. In that regard, it is noted that when De Jesus asked Figueroa to pick up the low-filled bottles, as admitted by De Jesus, Figueroa obeyed his instruction, but added that he was going to tell supervisor Victor Colon why he did not want to pick up them when Santiago was arguing with him. CGC contends that Figueroa's alleged conduct cannot be examined in a vacuum, but rather under the totality of the circumstances. In that sense, it is important to note that the malfunctioning of the filler machine occurred while Santiago was on duty in the labeling machine and, notwithstanding the above, Santiago merely removed the low filled bottles and placed them under the warmer and left them there without doing any scrapping.³¹ The undisputed evidence reflected that Figueroa, while covering Santiago's break not only operated the labeling machine, but also completed the scrapping of about 24 of the low filled bottles. As such, Santiago's conduct by complaining to a supervisor because Figueroa did not complete the scrapping of 6 bottles was defiant and a direct provocation.³²

Furthermore, Respondent failed to submit any evidence to prove that in accordance with Respondent's Standards of Behavior and Discipline, Figueroa engaged in any conduct so egregious as to warrant his discharge. In that regard, it is noted that contrary to Respondent's contention, Figueroa did not incur in any act of insubordination. As De Jesus admitted, Figueroa

³¹ Respondent at no time during the trial argued that the approximately 60 low-filled were caused by Figueroa's fault or negligence. Nor did Respondent submit any evidence to the effect that according to Respondent's procedures to cover employee Santiago was correct in ordering Figueroa to finish the scrapping process as to the remaining low filled bottles, rather than to continue the breaks, as Figueroa contends was the normal procedure and his instructions. In this regard, it is noted that Figueroa credibly testified that during the 30 minute break that he covered for Santiago he continued with the operation of the machine, plus conducted the procedure known as scrapping the low filled bottles and that only approximately 5-6 bottles still remained to be scrapped.

³² Although the ALJ in its decision made no reference to any alleged act of "insubordination", it is noted that supervisor De Jesus admitted that once he instructed Figueroa to pick up the low filled bottles in the warmer area, Figueroa in fact did so. Whether Figueroa refused to pick-up the low filled bottlers as allegedly requested by Santiago is not only uncorroborated hearsay evidence, but in any event, such a request from another rank and file employee does not constitute insubordination in the absence of evidence to support a finding that employee Santiago enjoyed the authority to order Figueroa. Such evidence was not presented during the trial.

picked-up the bottles as instructed by him. Also, as to the allegation that Figueroa took his first break without authorization, Figueroa credibly denied such allegation and Respondent failed to call supervisor Quiles to controvert Figueroa's testimony. As mentioned before, De Jesus testimony constitutes uncorroborated hearsay evidence and consequently unreliable and insufficient evidence. Even assuming, arguendo, that such conduct occurred, the evidence demonstrated that such conduct was not considered by Respondent as insubordination nor a serious infraction, as admittedly, De Jesus requested supervisor Quiles to lend Figueroa again during that same night. It is also noted that Respondent failed to submit any evidence to demonstrate that supervisor Quiles, Figueroa's direct supervisor and who, according to De Jesus, allegedly gave different instructions to Figueroa regarding when to take his break, had submitted any report to the Human Resources Office denouncing Figueroa's alleged departure from his instructions.

Respondent's animus and disparate treatment is also evidenced by the disciplinary action itself imposed on Figueroa. In that regard, Respondent has failed to establish that it would have discharged Figueroa even in the absence of his concerted protected activity, as it failed to submit any evidence to demonstrate that in the past it has discharged any employees for the same or similar conduct imputed to Figueroa. To the contrary, the evidence in the record clearly demonstrated that Respondent in the past has tolerated similar and more egregious conduct than that imputed to Figueroa without resorting to the disciplinary measure of discharge. A clear example of that is evidenced in GC Ex. 9, which reflected that Respondent on October 8, 2008 (only two months before), imposed a disciplinary suspension of 15 days to an employee who allegedly incurred in a second infraction for insubordination and who already had a prior suspension of 5 days "for displaying a defiant and hostile attitude toward a supervisor". GC Ex 9

reflects not only disparate treatment, but that Respondent in the past had departed from the strict application of its Policies and Rules of Conduct, and rather, had used a lenient and liberal approach. In GC Ex 9 the Respondent stated that the disciplinary action for a first infraction of Rule #30 "Insubordination" is a 3 days suspension and for the second infraction the disciplinary action is discharge. The employee disciplined pursuant to GC Ex 9 received a 15 days suspension for a second infraction of insubordination, notwithstanding that this same employee also had an additional infraction for hostile attitude toward a supervisor.

In addition, during the trial, the Respondent made an offer of proof. Although rejected by the ALJ, it is noted in the record, and evidenced that prior to December 5, employee Santiago had a prior incident with Figueroa involving an actual physical fight for which Santiago was actually disciplined but not discharged, as Santiago was still working for Respondent on December 5 (Tr. 498). That offer of proof constitutes a clear admission by Respondent which demonstrated that in the past the Respondent has tolerated serious types of misbehavior, including actual physical fights, and did not resort to such an extreme disciplinary measure as discharge.³³ Respondent also failed to submit any evidence to demonstrate that Figueroa had any prior disciplinary action.

Finally, Respondent contended that an investigation was conducted concerning the December 5 incident; however, it is significant to note, that as admitted by De Jesus, he was not consulted by Cruz nor the Human Resources office during the alleged investigation nor did he participate in the decision to discharge Figueroa. It is also significant to note that Figueroa was never interviewed or provided an opportunity to give his version of the incident or defend himself from Santiago's allegations until the discharge meeting. Also, it is undisputed that the

³³ It is further noted that the Charging Party attempted but was not allowed to cross examine De Jesus as to that prior incident, even after clarifying that the line of questions was directed to explore disparate treatment (Tr. 1067).

meeting with Supervisor Victor Colon which was supposed to take place on the following day of the incident, never took place. Cruz admitted that she terminated Figueroa verbally and that she received instructions not to provide a discharge letter to Figueroa. No reason was provided by Cruz as to why specific instructions were provided to not issue a letter of discharge. Respondent's failure to issue a discharge letter to Figueroa indicating the reasons for his discharge should be also considered suspiciously, as normally an employer would document a discharge for "alleged misconduct" in a written document in order to protect and defend itself from potential labor/employment law liabilities.³⁴ GC Ex. 9 provides light to this matter as it demonstrated that Respondent's practice is to document in writing disciplinary matters.

Motive or animus may be inferred from all the circumstances in the absence of direct evidence. A blatant disparity is sufficient to support a prima facie case of discrimination. Flour Daniel Inc., 304 NLRB 970 (1991). As stated by the Board: "A pretextual reason, of course supports an inference of an unlawful one." Keller Mfg. Co., 237 NLRB 712, 717 (1978)

The disparate nature of discipline, the unprecedented scope of an investigation, the absence of a cogent reason for conducting such an investigation, and the failure to afford a discriminatee any opportunity to answer the allegations raised by the investigation are factors that have repeatedly been found adequate to infer discriminatory motivation. Tubular Corp. of America, 337 NLRB 99 (2001).

As part of its initial showing General Counsel may offer proof that the employer's reasons for the personnel decision were pretextual. Pro- Spec Painting, Inc. 339 NLRB 946, 949 (2003) citing National Steel & Shipbuilding Co., 324 NLRB 1114, 1119 fn 11 (1997). When the employer presents a legitimate basis for its actions which the fact finder concludes

³⁴ A period of 13 days elapsed between the December 5 incident and the December 18 termination meeting. This is not the type of discharge that because of special circumstances an employer is required to make a determination to discharge an employee on the spot.

pretextual...the fact finder may not only properly infer that there is some other motive, but that the motive is one that the employer desires to conceal-an unlawful motive ...”(citing Shattuck Denn Mining Corp., v NLRB 362 F. 2d 466, 470 (9thCir. 1999 (internal quotations omitted)).

In Rood Trucking Co., 342 NLRB 895, (2004), the Board found contrary to the ALJ that the employer harbored animus and that the asserted reasons for the discharge was a pretext designed to conceal an unlawful motive. As part of the analysis the Board stated that a finding of pretext defeats any attempt by the Respondent to show that it would have discharged the discriminatees absent their union activities. This is because where “the evidence establishes that the reasons given for the respondent actions are pretextual - that is, either false or not in fact relied upon - the respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the Wright Line Analysis” Golden State Foods Corp., 340, 382, 385 (2003) (citing Limestone Apparel Co., 255 NLRB 722 (1981)³⁵

Therefore, CGC contends that the ALJ erred in finding that Respondent terminated the employment of Figueroa for legitimate business reasons. CGC submits that Respondent failed to demonstrate that Figueroa would have been discharged in the absence of his protected concerted activities. CGC has met the required burden of proof to persuade that Figueroa’s protected activity was a substantial or motivating factor in the challenged Respondent Employer’s decision to terminate him. The uncontroverted evidence demonstrated that Figueroa participated in the October strike, and the Respondent took adverse action against Figueroa and that said action was motivated for animus. Respondent failed to demonstrated that Figueroa would have been discharged even in the absence of Figueroa’s participation in the strike. Rather, the evidence reflected that Respondent’s purported reasons were pretextual as demonstrated by the evidence

³⁵ Rood Trucking, Id. at 898.

of disparate treatment. Furthermore, alleged conduct imputed to Figueroa, even if credited, was not so egregious as to warrant discharge in that Figueroa had no prior disciplinary record. The record reflects clear evidence of disparate treatment in the application of discipline.

THE FAILURE TO ORDER THE EXPUNCTION OF THE DISCHARGE LETTERS FROM THE RECORDS OF THE STRIKERS (EXCEPTION 5)

In his Decision, the ALJ found that since October 20 the bargaining unit employees were engaged in an unfair labor practice strike. Therefore, the Respondent's action in suspending four and terminating 34 employees for their participation in the October 20- 22 strike violated Section 8(a) (a) and (3) of the Act. (ALJ slip op at. 19). In his recommended Remedy and Order he provided that Respondent be required to offer the unfair labor practice strikers listed in the Remedy section of his decision reinstatement to their former positions, or if those positions no longer exist, to substantially equivalent positions and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision (ALJD slip op at. 32). However, inadvertently the ALJ failed to include a provision in his recommended Order requiring the expunction from the personnel files of any reference to the discharges of the employees.

The Board routinely orders a Respondent to remove from its files all references to unlawful discharges of discriminatees and to notify them in writing that this has been accomplished, and that the unlawful discharges will not be used against them in any way. Sterling Sugars, Inc., 261 NLRB 472 (1982). Accordingly, the recommended Remedy and Order, as well as the Notice to Employees, should be modified to include the standard expunction remedy. Respondent should be required to expunge from its records any reference to the discharges of the unfair labor strikers and to provide each of them with written notice of such expunction, and inform each of them that the unlawful conduct will not be used as a basis for

further personnel actions against them. Further, the Respondent must not make reference to the expunged material in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or use the removed material against these employees in any other way.

IV. Conclusion

Based on the above, Counsel for the General Counsel urges the Board to:

1. Provide an expungement remedy concerning the discharge of the strikers named in the Decision, including the four employees who were discharged pursuant to the “last chance”, and for the 48 employees who were reinstated upon having executed such unlawful agreement.

2. Find that Respondent terminated the employment of Dennes Figueroa because of his participation in the October 20-22 strike and/or concerted activity, as alleged in paragraph 21 of the Complaint, in violation of Section 8(a)(1) and/or (3) of the Act and provide the corresponding remedy for such finding.

3. Find that the clause imposing a higher duty on shop stewards did not survive the expiration of the collective bargaining agreement and, consequently, find that the discharge of the four named shop stewards violated Section 8(a)(1)(3) of the Act and provide the corresponding remedy for such finding .

Respectfully Submitted.

Dated at San Juan, Puerto Rico this 14th day of June, 2010.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this date a true and exact copy of the “EXCEPTIONS OF COUNSEL FOR THE GENERAL COUNSEL TO THE ADMINISTRATIVE LAW JUDGE’S DECISION AND RECOMMENDED ORDER, AND BRIEF IN SUPPORT THEREOF” was served by electronic mail (e-mail) to the following parties:

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