

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD**

CC-1 LIMITED PARTNERSHIP D/B/A COCA COLA PUERTO RICO BOTTLERS Respondent Employer	Cases No. 24-CA-11018, et al.
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And
CARLOS RIVERA, et als.
Charging Parties

And

UNION DE TRONQUISTAS DE PUERTO RICO, LOCAL 901, INTERNATIONAL BROTHERHOOD OF TEAMSTERS Respondent Union	Cases No. 24-CB-2648, et al.
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And
CARLOS RIVERA et als.
Charging Parties

Cases No.
24 CB-2706, et al.

And
MIGDALIA MAGRIZ, et als.
Charging Parties

**RESPONDENT EMPLOYER'S ANSWERING BRIEF TO GENERAL COUNSEL'S
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

COMES NOW, **CC1 LIMITED PARTNERSHIP D/B/A COCA-COLA PUERTO RICO BOTTLERS**, hereinafter referred to as "CCPRB", through the undersigned attorneys, and pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board ("Board"), files its Answering Brief to General Counsel's Exceptions to the Administrative Law Judge's Decision.

PRELIMINARY STATEMENT

This case deals with an illegal and unauthorized work stoppage and strike conducted by CCPRB's employees in the year 2008. The Administrative Law Judge found that on September 9, 2008, employees of the bargaining unit engaged in a work stoppage and that four Shop Stewards (Carlos Rivera, Félix Rivera, Francisco Marrero and Romián Serrano) were correctly terminated because their actions violated Articles 12 and 13 of the expired collective bargaining agreement. The ALJ correctly held that Articles 12 and 13 survived the expiration of the collective bargaining agreement. Therefore, he held that the four Shop Stewards' terminations were valid because they had encouraged other employees to stop working in violation of the aforementioned articles and CCPRB's Rules of Conduct. However, the ALJ held that Shop Steward Miguel Colón was discharged in violation of the Act.

The ALJ also found that an illegal and unauthorized strike held by CCPRB's employees on October 20-22, 2008 was an unfair labor practice protected by the National Labor Relations Act. Consequently, the ALJ held that the discharge of the employees who participated in said illegal strike was an unfair labor practice. Respondent CCPRB presented exceptions to these findings of the ALJ and demonstrated that the October strike was not an unfair labor practice because it was not called to protest alleged unfair labor practices of CCPRB but rather to undermine the Union's bargaining position and grant control of the negotiations to a different group of employees.

Counsel for the General Counsel ("CGC") filed exceptions with respect to some of the ALJ's findings, particularly regarding the ALJ's findings with respect to the discharge of the four Shop Stewards. Respondent CCPRB respectfully submits,

as will be shown below, that the findings of the ALJ with respect to CGC's exceptions are supported by credible evidence and case law.

II. ARGUMENT

CGC's Exceptions

Exception 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, notwithstanding the finding that the contract had expired and that the no-strike clause itself did not survive its expiration.

Exception 2 – The failure to find that the discharge of Shop Stewards Carlos Rivera, Romián Serrano, Félix Rivera, and Francisco Marrero violated Section 8(a)(1) and (3) of the Act.

CGC argues that the articles which imposed an affirmative duty on the Shop Stewards regarding work stoppages did not survive the expiration of the collective bargaining agreement. The ALJ correctly found that said articles survived the expiration of the CBA. Although the ALJ held that the agreement had expired on July 31, he held that the parties operated under and adhered to the terms and conditions of the expired agreement, until they executed the successor CBA. (ALJD p. 7, lines 48-51.) The ALJ based his decision on NLRB v. Katz, 369 U.S. 736, 743 (1962), pursuant to which most contractually established terms and conditions of employment are mandatory subjects of bargaining and cannot be changed unilaterally on contract expiration. See Local Joint Exec. Bd. of Las Vegas v. NLRB, 540 F.3d 1072 (9th Cir. 2008). Although most mandatory subjects of bargaining fall within the prohibition on unilateral change, the Board has carved out very few exceptions to the unilateral change rule which include union-security and dues-checkoff provisions and arbitration and no-strike clauses. Litton Financial Printing Division v. NLRB, 501 US 190, 198-200 (1991).

CGC, using what one circuit court has called the “**ambiguous Board dictum**”¹ of Gordon L. Rayner d/b/a Bay Area Sealers, 251 NLRB 89 (1980), claims that a provision may not survive the expiration of a CBA if it governs the employer-union relationship instead of the employer-employee relationship. However, it has been held that this exception “eviscerates the rule” since virtually all mandatory subjects of bargaining implicate the institutional employer-union relationship. Southwestern Steel & Supply v. NLRB, 806 F.2d 1111, 1113-1114 (D.C. Cir. 1986). As held by Southwestern Steel, CGC’s argument that the contract provisions which survive the expiration of the agreement are only those which relate to the employer-employee relationship is incorrect.

CGC also argues that the Katz doctrine should not be extended to the case at hand. However, they fail to support this allegation with anything more than their claim that such an extension would imply that a provision like Article 12 would remain in effect indefinitely. This is incorrect, inasmuch as by its own terms the unilateral change doctrine prohibits change to a condition of employment unless it has been bargained to impasse. The CGC did not submit any evidence that the provisions of Article 12 were bargained to impasse.

CGC argues that Article 12 does not impose an affirmative duty upon the shop stewards to instruct employees to return to work, but that this duty arises out of the no-strike clause contained in Article 5, which had expired. This allegation ignores the duty imposed by Article 12 on the shop stewards not to “interrupt the work of the other employees.” The ALJ found that the evidence established that the discharged Shop Stewards encouraged other bargaining unit employees to abandon their work

¹ Southwestern Steel & Supply v. NLRB, 806 F.2d 1111, 1113-1114 (D.C. Cir. 1986)

stations. (ALJD p. 13, lines 8-10). Thus, they violated Article 12 of the CBA which the ALJ correctly found survived the expiration of the agreement.

Notwithstanding the above, even assuming that Article 12 did not survive the expiration of the agreement, CCPRB did not violate the NLRA by discharging Carlos Rivera, Félix Rivera, Romián Serrano and Francisco Marrero.²

CCPRB dismissed the Shop Stewards "pursuant to a reasonably held good faith belief" that their violations of the company's Standards of Behavior and Discipline (Rules of Conduct) merited discharge and that such violations were not protected activity under the Act. After the September 9 incident, CCPRB conducted an investigation which concluded that the Shop Stewards violated CCPRB's Rules of Conduct. (Tr. 848, Ln. 8-13 Lourdes Ayala; Exhibits 3 and 4). Based on the results of this investigation, CCPRB decided to discharge the Shop Stewards.

The ALJ correctly held that the actions of the discharged Shop Stewards on September 9 violated the Employer's Rules of Conduct. ALJD p. 13, lines 20-21.

CCPRB's Rules of Conduct (Joint Exhibit 8) prohibit the following conduct, in the pertinent part:

- Rule 33: Being on company property without authorization (Joint Exhibit 8, p. 14);
- Rule 35: Fighting, provoking acts of violence, or disturbing the peace on company property, be it physically, verbally or by any other means (Joint Exhibit 8, p. 14);

² CCPRB has filed exceptions to the ALJ's determination that CCPRB violated the Act by discharging Miguel Colón, the remaining of the five Shop Stewards. The ALJ found that Miguel Colón did not participate in the September 9 work stoppage and did not encourage employees to participate in said stoppage. In making his determination, the ALJ disregarded the uncontested testimony of Supervisor Troche who testified that he saw Miguel Colón instigating the employees to leave their work areas. The ALJ rejected this portion of Troche's testimony stating that "Troche did not make this statement in his pre-trial affidavit". (ALJD p. 14, ln. 6-8). However, the record does not support the ALJ's conclusion because Troche did in fact make reference to Miguel Colón's actions in his pre-trial affidavit. CCPRB refers the Board to its Exceptions and Brief in Support of Exceptions where this issue has been fully discussed.

- Rule 38: Using obscene and/or dirty language; obscene and/or abusive behavior towards employees, supervisors, customers or visitors to the company (Joint Exhibit 8, p. 14);
- Rule 39: Inciting a fellow worker to violate the standards of disciplinary behavior or orders given by management (Joint Exhibit 8, p. 14);
- Rule 42: Deliberately interfering with or restricting production and/or performance (Joint Exhibit 8, p. 15).

As shown by the evidence and determined by the ALJ, during the night of September 9, the Shop Stewards violated Rule 33 by entering CCPRB's production, warehouse and dispatch areas without authorization, while they were all off-duty. In fact, Félix Rivera and Francisco Marrero went even farther because they provided unauthorized access to a nonemployee (López) to critical areas of the plant. (Tr. 198, Ln. 18-25; Tr. 199, Ln. 1, José Adrián López).

Once inside the plant, the Shop Stewards deliberately interfered and restricted production by yelling at all employees to stop working and by ordering them out of their work areas. (Tr. 871, Ln. 3-25; Tr. 872, Ln. 19-17; Tr. 876, Ln. 13-25; Tr. 877, Ln. 1-8, 14-25; Tr. 878, Ln. 1-14; Tr. 883, Ln. 25, Armando Troche; Tr. 994, Ln. 10-11, 21-25; Tr. 995, Ln. 1; Tr. 997, Ln. 3-10; Tr. 998, 3-10; Tr. 999, 2-7, Marcos Mercado). These actions constituted a violation of Rules 39 and 42. The Shop Stewards also yelled obscene comments and employed aggressive and boisterous behavior, which disturbed the peace within the CCPRB property, in violation of Rules 35 and 38.

In addition, Francisco Marrero and Félix Rivera's conduct was particularly egregious. During the incident at the cafeteria, and while López was insulting Victor Colón, these Shop Stewards approached Victor Colón in a very threatening manner. Later on, at the warehouse, Armando Troche asked López and the Shop Stewards the reasons why they were stopping production. Francisco Marrero reacted violently

and yelled at Armando Troche: "shut up, you asshole, this has nothing to do with you" (Tr. 882, Ln. 1-9, Armando Troche). Afterwards, at the intersection of the dispatch/food area, Francisco Marrero and Félix Rivera circled Victor Colón in a threatening and intimidating manner, joined later by Romián Serrano. Francisco Marrero in a confrontational and threatening tone told Víctor Colón while the Shop Stewards and López were circling him: "it is good this is happening to you, that is why they shot you bastard" (in reference to an incident which occurred in 2001 when Colón was shot while working for another employer) (Tr. 546, Ln. 1-14, Víctor Colón; Tr. 882, Ln. 11-16, Armando Troche). The behavior of these Shop Stewards violated Rules 35 and 38. Their actions independent of the alleged protected work stoppage, would have justified their discharge under CCPRB's Rules of Conduct. Hence, the same disciplinary action would have taken place regardless of the allegedly protected activity. Thus, the ALJ's decision regarding the disciplinary actions against Carlos Rivera, Félix Rivera, Romián Serrano and Francisco Marrero is correct and should be confirmed.

In its Exceptions, CGC failed to argue as to why the decision of the ALJ regarding the violation by the Shop Stewards of the Rules of Conduct should be reversed. Thus, they have waived this argument.

CGC claims that the ALJ incorrectly applied the balancing test of Wright Line, 251 NLRB 1083 (1980), because allegedly CCPRB did not demonstrate that the same action would have taken place in the absence of protected conduct of the Shop Stewards. CGC claims that CCPRB cannot meet the Wright Line standard because the only employees disciplined were the Shop Stewards. This argument ignores the fact that CCPRB did present competent and credible evidence that the Shop Stewards violated the rules and regulations of the Company and were the only

employees who engaged in the violations of the rules cited above. No other employees violated Rules 33, 35, 38 and 39 and such other employees engaged in violation of Rule 42 only at the behest of the four Shop Stewards. Thus, CCPRB did in fact demonstrate that even in the absence of union activity, it would have taken the same actions against the Shop Stewards because they violated the rules and regulations of the company. Moreover, the ALJ held that based on the evidence, which was not rebutted by CGC, CCPRB had sustained the disciplinary action taken against the Shop Stewards.

CGC argues that the reasons for the discharge were pretextual because the ALJ rejected a number of the reasons set forth in the suspension letters CCPRB gave to the Shop Stewards. However, the ALJ gave credence and adopted the reasons included in the suspension letters regarding the violation of the rules and regulations. Lourdes Ayala, former Human Resources Director, testified, in response to questions of the ALJ, that the reasons for the discharge were included in the September 22 and October 10 letters³. Among these reasons, was the violation of Rules 33, 35, 38, 39, and 42. These reasons were not pretextual or contrived but supported by uncontroverted substantial evidence.

CGC spent a considerable portion of its brief in support of its exceptions arguing that Francisco Marrero's threat against Victor Colón was not egregious enough to lose the protection of the Act. However, this argument ignores that Francisco Marrero's threat constituted a violation of CCPRB's Rules of Conduct. The ALJ correctly held that the discharged Shop Stewards, including Marrero, violated CCPRB's Rules of Conduct. Their discharge was lawful because CCPRB would have taken the same action against Marrero in the absence of his protected activity.

³ Joint Exhibits 3 and 4; Tr. 810-813.

Courts have advised triers of facts against viewing union or concerted activity as a shield from lawfully motivated discipline. See NLRB v. Anchorage Times Publishing Co., 637 F. 2d 1359 (9th Cir. 1981); Sahara Las Vegas Corp., 284 NLRB 337, 347 (1987). CGC also claims that Marrero's conduct did not warrant his termination because another employee named Luis Ocasio was only suspended for displaying a hostile attitude towards a supervisor. However, CGC did not even discuss if the infractions committed by Luis Ocasio were similar to those committed by Marrero. Thus, this barebones allegation does not support CGC's contention that Marrero's conduct did not warrant his termination. Furthermore, Marrero's conduct was but an aggravating factor to other actions which justified the termination of the four Shop Stewards. The ALJ correctly found that the actions of the four Shop Stewards, including Francisco Marrero, in provoking the work stoppage, engaging in disruptive and threatening behavior and disregarding the directives of supervisors, violated the rules of conduct of CCPRB and that CCPRB would have taken the same disciplinary actions even in the absence of their protected activities. CGC has not put forth any argument which would merit reversing this decision.

CGC argues that the ALJ erred when he credited Supervisor Armando Troche's testimony that he saw Shop Stewards Félix Rivera, Romián Serrano, Carlos Rivera and Francisco Marrero instructing employees to stop working. According to CGC, Troche's testimony was contradicted by the testimony of other witnesses.

CGC accepts that it is the Board's policy not to overrule the credibility determinations made by an administrative law judge. It claims that this policy has an exception when the credibility determinations are based on illogical or inadequate rationale. Since 1950, the Board ruled that it is its policy to attach great weight to an

administrative law judge's credibility findings because the demeanor of witnesses is a factor of consequence in resolving issues of credibility and it is the ALJ and not the Board who has had the advantage of observing witnesses while they testified. See Standard Dry Wall Products, 91 NLRB 544 (1950). The ALJ's determination to give credit to Troche's testimony about the Shop Stewards instructing the employees to stop working, was based on his observation of the demeanor of Troche in the witness stand. Thus the Board should not disturb these determinations.

The cases cited by CGC to support its allegation that the credibility determinations based on illogical or inadequate rationale do not support its claim that the Board should overrule the ALJ's determination to credit Troche's testimony. In Kelco Roofing, 268 NLRB 456 (1983), the Board decided to intervene with the administrative law judge's credibility determinations because the judge's findings were "not based on his observation of the witnesses' demeanor." Id. In the same manner, the judge's credibility determinations in Custom Recovery, Div. of Keystone Resources, Inc. v. NLRB, 597 F.2d 1041 (5th Cir. 1979), were not based on the witnesses' demeanor

CGC failed to present any evidence to contradict Troche's testimony during the hearing and so held the ALJ. In this case, the General Counsel presented only four witnesses regarding the September 9 events: López, who is not an employee, but a terminated and disgruntled former Union employee; Miguel Colón, who, according to his own testimony could only corroborate the last few incidents of the night, since he was not present during López' entry to the facilities, nor was he present during López' discussion with Victor Colón at the cafeteria and warehouse; José Rivera, who testified regarding the incident at the cafeteria between López and Victor Colón; and Alexis Hernández, who testified that, on September 9, he stopped

working without knowing why. That is, the General Counsel failed to present ANY witness to contradict the testimony of Troche, even though the General Counsel, once Troche testified, could have subpoenaed dozens of employees or used any of the Shop Stewards who were present during the entire trial and who had actual personal knowledge of the incident, and did not even have to be subpoenaed to rebut such testimony.

CGC claims that an adverse inference should be drawn against CCPRB because it allegedly failed to introduce the videos of the security cameras of the cafeterias where the incidents of September 9 took place. Contrary to what CGC claims, this does not warrant an adverse inference. According to Section 13-235 of the NLRB Division of Judges Book, the administrative law judge “may draw an adverse inference when a party fails to produce documents under his control, or to call witnesses reasonably assumed to be favorably disposed toward the party...” Thus, an ALJ may only draw adverse inferences in two situations: when a party fails to produce evidence under his control, or when it fails to call a witness reasonably assumed to be favorably disposed towards the party. In this case, CCPRB produced every single video and piece of paper regarding the September 9 incidents, including the entrance records. No adverse inference may be drawn when CCPRB produced all of the evidence under its control. CGC had the videos and documents and could have presented these to the ALJ if CGC considered these the best evidence of its contentions. CCPRB determined that it did not need to present such videos and documents because the General Counsel's witnesses admitted all of the matters as to which these had probative value and those admissions were the evidence that best and most clearly proved the defenses of CCPRB. Specifically, the testimony of López, the principal witness for CGC, proved everything CCPRB may have needed

to prove with the videos and entrance records: that he entered the premises, even after he was repeatedly told to leave, that he was accompanied by the Shop Stewards and that he, along with the Shop Stewards, stopped the work of the employees on duty. Those facts were later corroborated with the evidence offered by CCPRB.

It is important to correct a misrepresentation made by CGC in its brief regarding Troche's testimony. The ALJ did not find, as CGC claims in page 25, that Troche "manufactured evidence in its desire to lump" the actions of Miguel Colón with that of the other Shop Stewards. Although the ALJ did reject Troche's testimony with regards to Miguel Colón, he gave it credit and found it uncontradicted with regards to the other Shop Stewards. Furthermore, as set forth in CCPRB's brief and referenced in footnote 2 above, the ALJ rejected Troche's testimony as to Miguel Colon based on the erroneous belief that Troche had not made reference to Miguel Colon in his pre-trial affidavit.

Exception 3 – The failure to order, as a remedy, the expungement from the files of the 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.

In its decision, the ALJ found that the last chance agreement was invalid and ordered that an offer of reinstatement be made to the four employees who were discharged pursuant to this agreement. CCPRB's position is that the "last chance" agreement was valid, that even if invalid it bears no relation to the decision to discharge Luis Bermúdez, José Rivera, Virginio Correa and Luis Meléndez ("four discharged employees"), and that the ALJ erred when it determined that the agreement was invalid. CCPRB filed an exception with respect to this finding and it respectfully refers the Board to its Exception and the Brief in Support where this issue has been fully addressed.

In its Exceptions, CGC requests that the Board order the expungement from the employees' files of any reference to the "last chance" agreement. CGC argues that, should the four discharged employees be reinstated, the Employer could rely on the "last chance" agreement to impose further discipline on them. However, CGC's argument is not correct. Since October 24, 2009 the terms of the "last chance" agreement are no longer in effect. On February 6, 2009, CCPRB and the Union signed a new collective bargaining agreement with an effective date of February 1, 2009 through January 31, 2014. In Section 1, Article XIV of said collective bargaining agreement the parties agreed that for the purpose of applying progressive discipline, "the written warnings will remain without effect after twelve (12) months from the date of its implementation". Since the "last chance" agreement and its terms were only applicable to the October 23, 2008 suspension, said agreement has already expired pursuant to article XIV and it can no longer be used to discipline employees. Hence, the expungement remedy requested by CGC has become moot.

Furthermore, CGC also excepts to the ALJ's ruling during the hearing denying CGC's petition to amend the complaint in order to include 48 other employees who also signed the "last chance" agreement, but were not subject to any further disciplinary action. CGC requests that the ALJ's ruling be reversed, the amendment be allowed and a violation found, and the expungement remedy also provided to the other 48 employees. CGC argues that the amendment would not violate CCPRB's rights to due process because it amended its affirmative defenses to that effect. CCPRB disagrees.

Section 102.17 of the Board's Rules and Regulations permits the amendment of a complaint by the assigned administrative law judge, upon motion, during a hearing and until the case is transferred to the Board, upon such terms as may be

deemed just. The administrative law judge has wide discretion to grant or deny a motion to amend a complaint. Pincus Elevator, 308 NLRB 684 (1992).

In the case at hand, the ALJ correctly exercised his discretion in denying CGC's petition. CGC offered no convincing explanation why their last minute motion to amend a complaint without meaningful notice should be allowed. The fact is that CGC had knowledge of the signing of the "last chance" agreement by the other 48 employees well in advance of the hearing. It should also be noted that CGC amended the complaint on three occasions prior to the hearing and chose not to include the amendment it is now requesting. Allowing the amendment under these circumstances would be unjust and violate CCPRB's right to due process.

Exception 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.

The Wright Line decision established an allocation of burden of proof in cases alleging a violation of section 8(a)(3) of the Act, which imposes upon the General Counsel the initial burden to establish a prima facie case of discrimination by proving: (1) that the employee engaged in (or refrained from engaging in) protected activity; (2) that prior to the discharge the employer had knowledge of the discharged employee's protected union activities; and (3) that the employer's conduct was intended to discourage or encourage employees to engage in or refrain from engaging in protected concerted activity. The General Counsel must prove its case by preponderance of the evidence not mere speculations or unfounded inferences according to section 10(a) of the Act (29 USC sections 160(c)).

Contrary to what CGC alleges, there is no evidence in the record that sustains the General Counsel's allegation that CCPRB discharged Figueroa because he participated in a protected activity or assisted the Union. There is, however, ample

evidence as to the protected reasons for which CCPRB discharged Figueroa on December 18, 2008. Thus, the decision of the ALJ with respect to Dennes Figueroa is correct and must be affirmed.

As shown by the evidence on the record, during his shift on December 5, 2008 Figueroa violated Rule 30 (insubordination); Rule 35 (provoking acts of violence or disturbing the peace); Rule 36 (threatening); and Rule 39 (inciting) of "CCPRB's Rules of Conduct". None of Figueroa's violations constituted a protected activity as defined by Section 7 of the Act or assistance to the Union. Thus, it is evident that Figueroa was not discharged because of his participation in the October 20-22 strike.

During the hearing, CCPRB presented credible and competent evidence that showed that the reason to discharge Figueroa was completely unrelated to his alleged participation in the strike.

The first gross misconduct by Figueroa occurred during the first 2 hours of his shift. After covering the operator of the filler machine during his first 10 minute break, Figueroa, without notifying his supervisor or obtaining his supervisor's authorization decided to take his 10 minute break, instead of covering the 10 minute break of the labeling machine operator. This conduct by itself constituted a deliberate refusal to perform the task assigned by his supervisor in violation of Rule 35. In addition due to Figueroa's unauthorized action, the labeling machine operator, Victor Santiago (Santiago) was unable to enjoy his first 10 minute break.

At the hearing, Figueroa admitted that he did not cover the labeling machine operator's 10-minute break even though his supervisor had specifically instructed him to cover ALL of the operators' breaks in sequence (Tr. 1033, In. 15-19 Wilson De Jesús).

Figueroa alleged at the hearing for the first time that his supervisor had authorized him to alter the sequence and take his 10 minutes break. There is no evidence in the record to sustain this allegation, besides Figueroa's self serving allegation. On the contrary, Wilson de Jesús (de Jesús), the 2-liter line supervisor on December 5, testified that upon noticing that Figueroa was at the cafeteria instead of covering Santiago for his 10 minute break, he proceeded to notify Quiles and they decided to jointly confront Figueroa at the cafeteria. When confronted, Figueroa said that he did not continue the sequence in the coverage of the Operators' 10-minute break periods because he was hungry (Tr. 37, In. 6-9 Wilson De Jesús). Figueroa's explanation does not constitute a valid excuse, because he had to request prior authorization from his supervisor to deviate from his instructions as to the manner and schedule of the operators' breaks' coverage. Moreover, in the meeting where CCPRB notified Figueroa of its decision to discharge him, he did not claim that he had been authorized by his supervisor to take his break without completing the whole of the first 10-minute break sequence coverage.

Notwithstanding the previous violations which warrant the imposition of disciplinary action by CCPRB, Figueroa's unprotected misbehavior continued and intensified during the rest of the shift. Approximately 2 hours later, while covering the filler operator in his 30-minute break, a valve of the filler exploded producing "low filled bottles". Pursuant to the established Good Manufacturing Practices (GMP), all "low filled bottles" must be removed from the line immediately by the operator and the operator must then proceed to "scrap" the bottles (Tr. P. 1038, 22-25; 1039 1-12 Wilson de Jesús).

Approximately 70 low filled bottles passed through and reached the labeling machine when Figueroa was covering Santiago's 30 minutes break (Tr. 1038 In. 6-

15 Wilson de Jesús). Figueroa removed the low filled bottles from the line and threw them on the floor (Tr. 1038, 9-15 Wilson de Jesús). Instead of scrapping the low filled bottles immediately to keep the area clean and organized pursuant to the GMP standards, Figueroa waited until the end of his 30 minute turn at the labeling machine to begin scrapping the bottles on the floor⁴.

When Victor Santiago returned to the labeling machine and saw the bottles and their content spilled all over the floor, he told Figueroa to scrap the remaining bottles and clean the area but Figueroa refused (Tr. 1030, In 12-20 Wilson de Jesús).

Both employees began arguing and Figueroa made inappropriate gestures to Santiago catching the attention of de Jesús who was nearby. (Tr. 1039, In. 13-19 Wilson de Jesús). Said misconduct does not constitute protected activity under the Act, but does violate rules 35 and 38 of CCPRB's Rules of Conduct.

Wilson de Jesús held a meeting with Santiago, Figueroa and Quiles, at the production area on December 5, 2008 (Tr. 1040, In. 5-10 Wilson de Jesús). During the meeting Figueroa stated he would not pick up the bottles in the floor of the labeling machine and clean the mess. (Tr. 1040, 1041, Wilson de Jesús) Figueroa's refusal did not constitute a protected activity but was an act of insubordination in violation of CCPRB's Rules of Conduct (Joint Exhibit 8). In view of Figueroa's relentless and hostile attitude de Jesús concluded the meeting and everyone returned to their jobs (Tr. 1040, In. 24-25; Tr. 1041, In. 1-11 Wilson de Jesús).

Close to the end of the shift, de Jesús once again instructed Figueroa to pick up the bottles still on the floor around the labeling machine. Figueroa finally did so. (Tr. 1041, In. 15-25; 1042 In. 1-3 Wilson de Jesús). However, after picking up the

⁴ It takes seconds to scrap a low fill bottle (Tr. 500 In 21-22 Dennes Figueroa)

bottles, when Figueroa walked by de Jesús he stated out loud "a new war is going to take place in this millennium". De Jesús asked Figueroa what he had said and once more Figueroa stated out loud "a new war is going to take place in this new millennium". Confused by Figueroa's threatening remark, de Jesús asked him if he was threatening him and Figueroa replied that he was not threatening de Jesús but rather the one over there, pointing to Santiago (Tr. 1041, In 15-25; Tr. 1042 In. 1-3 Wilson de Jesús). CCPRB's Rules of Conduct prohibit threatening any employee, verbally or by any other mean and provoking acts of violence or disturbing the peace (Joint Exhibit 8, Rules 35 &36).

CGC presents a self-serving version of the events which ignores the evidence presented and believed by the ALJ. CGC's contention, based solely on the testimony of Figueroa at the hearing, is that CCPRB discharged him for his participation in the October 20-22 strike and not for his sequence of violations of CCPRB's Rules of Conduct on December 5. There is no evidence in the record to support such allegation.

At the hearing, Figueroa alleged that at the December 18 meeting CCPRB's Human Resources Specialist, Marlyn Cruz, told him that CCPRB had decided to discharge him because he had threatened the wrong employee. He alleged that Cruz told him Santiago was a very valuable employee because he had continued working during the strike, in contrast to Figueroa who had participated in the October 20-22 strike. Figueroa's allegations are not credible or sustained by the record.

Figueroa testified that he was on an unpaid temporary non-occupational medical leave⁵ during the strike held from October 20-22. On November 24, upon

⁵ "SINOT" is the common name of Puerto Rico's unpaid non-occupational temporary leave policy granted by CCPRB to Figueroa from September 24 to November 24, 2008 to undergo a hand surgery. (Tr. 482, In 8-16 Dennes Figueroa; Tr. 962, In 1-5 Marlyn Cruz)

the conclusion of said leave, CCPRB unconditionally reinstated him to his former position. Figueroa also testified "upon his return to work on November 24, 2008 and until his discharge no CCPRB manager had ever made any comment regarding his participation in the strike" (Tr. 499, In 8-11 Dennes Figueroa). Moreover, the other two witnesses that were present at the December 18 termination meeting denied that Cruz made any reference to CCPRB's preference towards Santiago, nor to Figueroa's alleged participation in the October strike.

There is no corroborating evidence that Figueroa participated in the October strike nor is there any evidence that CCPRB knew of Figueroa's alleged participation in the October strike. The only witness, who testified that Figueroa participated in the October strike, was Figueroa.

Last but not least, there is no evidence in the record to support the allegations that CCPRB's decision to discharge Figueroa was designed to discourage employees from engaging in, or refraining from engaging in, protected concerted activity. On the contrary, it can only be concluded that CCPRB's decision to discharge Figueroa was motivated to guarantee a safe, orderly and respectful work environment by the enforcement of its Rules of Conduct when the same are violated by the employees.

In its exceptions, CGC has not put forth any evidence or argument that would warrant an intrusion into the credibility determinations made by the ALJ. Nor has it presented any argument which would merit overruling the decision made by the ALJ with respect to Dennes Figueroa. The decision of the ALJ in this respect is supported by competent and credible evidence and must be affirmed.

Exception 5 – The failure to order the expungement of the discharge letters from the records of the strikers.

In its decision, the ALJ found that the October 20-22 strike was an unfair labor practice and that CCPRB's decision to discipline employees involved in the strike violated the NLRA. CGC filed an exception claiming that the ALJ failed to include a provision requiring the expungement from the personnel files of any reference to the discharges of the employees. CCPRB's position is that the October 20-22 strike was an illegal strike and, therefore, the disciplinary actions taken against the employees who participated in that strike did not violate the NLRA. CCPRB filed an exception with respect to this finding and it respectfully refers the Board to its Exception and the Brief in Support where this issue has been fully addressed.

For the foregoing reasons, CCPRB requests that the ALJ decision be affirmed only with respect to the exceptions filed by the General Counsel.

Respectfully submitted, this 19th day of July 2010.

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CERTIFICATE OF SERVICE

We hereby certify that on this same date a true copy of this document was served upon the following:

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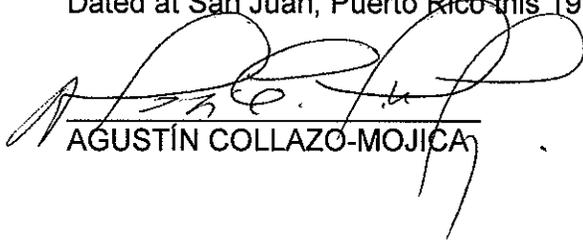
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