

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

MARQUEZ BROTHERS ENTERPRISES, INC.

and

Case 21-CA-39581

ALFONSO MARES, An Individual

and

Case 21-CA- 39609

JAVIER AVILA, An Individual

Stephanie Cahn, Esq., for the General Counsel.

David S. Allen and Sergio A. Perez, Esqs.
(Jackson Lewis, LLP) of Los Angeles, California
for the Respondent.

DECISION

Statement of the Case

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Los Angeles, California, on March 28–30, 2011. Alfonso Mares filed the charge in Case 21–CA–39581 on November 17, 2010,¹ Javier Avila filed the charge in Case 21–CA–39609 on December 8 and the General Counsel issued the consolidated complaint on January 31, 2011. The complaint alleges that Marquez Brothers Enterprises, Inc. (MBE) violated Section 8(a)(3) and (1) by terminating Mares and Avila because they engaged in union activities and violated Section 8(a)(1) by encouraging employees to ask for the return of their authorization cards from Teamsters Local 63, International Brotherhood of Teamsters (the Union) , interrogated employees concerning their union activities, and threatened an employee with unspecified reprisals for being involved with the Union. MBE filed a timely answer that, as amended at the hearing, admits the allegations in the complaint concerning the filing and service of the charges, interstate commerce and jurisdiction, labor organization status, and supervisory and agency status of certain individuals. MBE denied the allegations in the complaint concerning the agency status of Mario Perez and Bertha Yontomo; MBE also denied that it had engaged in unlawful conduct.

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

¹ All dates are in 2010 unless otherwise indicated.

Findings of Fact

I. Jurisdiction

5 MBE, a corporation, has been engaged in the wholesale distribution of Hispanic foods. Its main office is located in City of Industry, California, and it annually purchases and receives goods valued in excess of \$50,000 from points located outside the State of California. MBE admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of
10 Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

15 MBE is a distributor of Mexican foods products to retail grocery stores throughout southern California; its warehouse distribution facility is in the City of Industry. Among the products MBE distributes are perishable dairy products such as cheese, sour cream, and yogurt. MBE employs about 30 employees, called perishable sales drivers, who deliver these
20 products to the stores using refrigerated trucks. These employees also stock the products on refrigerated shelves in the stores for purchase by consumers. Generally, these employees work on assigned routes and visit the stores on a designated schedule

I now describe MBE practices that are important in understanding the alleged unlawful
25 terminations of Mares and Avila. The perishable products delivered and stocked by the perishable sales drivers have an expiration date. The perishable sales drivers must check these products on display at the stores to be certain that the products are not being offered for sale after their expiration dates. Removal of these expired products is very important to MBE for several reasons. First, if a customer consumes spoiled product the customer could get sick.
30 And both the stores and consumers are not happy when they purchase or even see expired products on display. The record in this case has various descriptions of MBE's policy concerning when the product should be removed from the display shelves. Alfonso Mares, a driver, testified that products should be removed 2 days before the expiration date but that some stores required that the product be removed 5 days before the expiration date. Javier Avila, also a driver, testified that Elizabeth Lara, MBE's owner, and wife of Francisco Lara, MBE's vice
35 president of operations, told him that product should be removed the day of or the day before the expiration date. According to Avila, his immediate supervisor, Cesar Barajas, told him that he should remove any product that would expire before his next visit to the store. Abel Gastelum, another driver, understood that stores had different policies concerning when nearly
40 expired product should be removed; some stores required removal 7 days before the expiration date and others 5 or 6 days. Arturo Perfecto is MBE's controller; he also oversees human resources. He explained that the basic rule is that there should never be expired product at the stores and to insure that this happens drivers must remove all items from the stores that will expire before the driver's next visit there. And human error plays a part in this process. As
45 Avila credibly explained in response to my question:

As far as like, say, there's about 1,000 units on the shelves. So, if we don't – when we – we have like a certain amount of time to get to our other stores. So, sometimes we're
50 such in a hurry that we are looking as much as we can, to the best of our knowledge. We're digging to see what we can find.

Sometimes, maybe like one or two pieces might have slipped. So, the next time we come in, they'll still be on the shelves. So, we will pull them out and take them out as soon as possible.

5 Similarly, Gastelum explained:

[Y]ou had to do six stores even up to eight stores some routes a day between six in the morning till like 12 or 11. They won't receive you past that so that you're trying to do is get out of there quick. You get stuck in traffic, a receive(er) will hold you back.

10 So you're basically you're on a rush trying to do your job, you do a quick review of your product we have and you unload it and fill and you're trying to get out of there.

So I mean, pretty sure everybody has left product expired not because they wanted to, I mean, because they didn't have the time to check everything.

15 Importantly, MBE seems to recognize that occasionally product that should have been removed will remain at a store. This is so because MBE sends its supervisors to the stores and they find these expired products still at the store and this does not automatically result in termination or even written discipline of the driver. Rather, drivers may simply be advised to be more careful. Completing the picture, stores are given credit for expired merchandise that is removed by the drivers. The drivers themselves prepare the paperwork needed for the credits and this is a regular part of the servicing process. Drivers are paid an hourly rate plus a .5 percent commission on his sales minus credits.

25 A perishable sales driver must not only be careful not to overstock product that will result in excessive expired product, the driver must also leave enough product so that the shelves do not become empty. If someone from the store directs the driver to leave a certain quantity of product, then the driver simply does as he is directed. But often the driver does not get specific directions from store personnel so the driver must make an estimate as to how much product should be left at the store. The driver does so by taking into account past history and whether a product is on sale at a lower price. The perishable sales drivers must sometimes leave enough product available at the stores so that the shelves can be replenished by store employees if the sales driver is not scheduled to come back to restock the shelves. But despite best efforts sometimes stores run out of products. As Gastelum, a relief perishable sales driver, credibly explained, from time to time stores do run out of products distributed by MBE. When that occurs the store typically contacts MBE and requests additional product be delivered. An MBE account executive or supervisor then contacts the sales driver who then makes an additional delivery to the store with the additional product. As Perfecto explained:

40 If someone comes out and buys everything, there's nothing we can do except respond to the customer and go do that product.

There is no evidence that the sales drivers are automatically disciplined when a store run out of product.

45 Finally, at the trial Arturo Perfecto pointed out the importance MBE places on good customer service and maintaining professional relationship with store personnel. He acknowledged that in the past stores have requested that they not be serviced by a particular MBE employee. MBE then honors the request and assigns a different employee to service that store. He admitted that this process of accommodation does not necessarily result in the termination of any employee.

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B. Alfonso Mares

Alfonso Mares began working for MBE on January 17, 2005; he worked as a driver delivering the perishable products described above. Mares ran the same assigned route for
 5 about 4–½ years. For the biggest stores on his route Mares made deliveries three times a week, for other stores twice a week, and for the smaller stores only once a week. Mares typically began work at between 3:45 and 4 a.m. and typically ended work at between 3 and 4 p.m., although sometimes he worked until 6 p.m. His immediate supervisor was Andes Veloz.

10 Mares got in touch with a union in May 2010. He spoke several times by telephone with Gary Smith, an organizer for Teamsters Local Union 952. Smith admitted that he told Mares to be careful that his identity as a union supporter would not be known to management. Smith also admitted that he instructed Mares and the other union supporters “To be very careful not to allow yourselves to be known by management – that your intentions are to organize.” Mares
 15 then spoke to about 17 employees and asked if they wanted to support a union at MBE. He did this at the MBE facility at the start of his workday. Sixteen employees put their names and telephone numbers on a list and Mares gave the list to Smith. One of the employees who Mares spoke to about a union and who put his name and telephone number on the list was Jesse Agosto. Mares spoke to Agosto on June 1 at about 3:45 a.m. Agosto lives at home with his
 20 mother, Bertha Yontomo, who also works for MBE as an accounts receivable clerk. At about 9:30 p.m. that day Yontomo called Mares on the Nextel radio that MBE issues to employees and complained that she wanted her son’s name removed from the union list. Fearing that he might be terminated, Mares pretended that he did not know what Yontomo was talking about. Yontomo retorted that Mares knew exactly what she was talking about. Mares again replied
 25 that he did not know what she was talking about, but if he found something out about it he would ask them to take Yontomo’s son’s name off the list. By the end of the next day, as more fully described below, Mares was fired.

30 As indicated, Yontomo works in collections for MBE. She regularly calls drivers and informs them when a customer is delinquent in payments to MBE and that the driver should no longer make deliveries to that customer or should only accept cash for any deliveries. She works in an office near that of MBE’s controller, Arturo Perfecto.

35 At the trial the General Counsel presented Andres Veloz, Mares’ supervisor, with an occurrence report that Veloz prepared in Spanish on June 1, 2010 concerning Mares that read:

40 Some days ago the client, La Sabrosa Market in Orange (CA), La Senora Gloria and Fernando were saying that this salesperson was offering poor service. He was not cleaning the yogurt cooler, and he was always in a bad mood. They did not know why they had him as a salesperson, and they would rather not ask him for anything more because they could see that he always had a bad look on his face. And he suggested to me that I should change him. This salesperson has already been spoken to and told to change his attitude with clients but he said that that’s how he was and he was not going to change. Also, some time ago at Superior #110 Benjamin in charge of the deli
 45 complained of poor service, that he would drop off what he wanted but he would not talk to him. And this salesperson said that it was something personal that he was going to talk with the client himself, but I told him that that was not the solution, but I told him that I was going to speak with the client so that this would not become any worse.
 Please give him a verbal warning.²

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² I correct errors in the translation of the document.

5 The occurrence report form indicates that it is “used by front line managers and supervisors to record daily employee occurrences, *as they happen*, and the contents are reviewed daily with the HR representative.”(Emphasis supplied.) Because the report refers to events that occurred sometime earlier and not on June 1, the General Counsel asked Veloz what made him prepare the report on June 1 but Veloz did not answer the question. After I assured myself that Veloz understood the question and after several long pauses, some gulps and few sighs it became apparent that Veloz was reluctant to answer the question. I infer he was reluctant to do so because a truthful answer would be against the interests of his employer. 10 Veloz did admit that the events concerning La Sabrosa could have occurred anywhere between 5 days and a year before he wrote the report. Veloz also admitted that when he received reports about poor service from Mares he did not issue any written discipline but instead only talked to Mares about the complaints.

15 The next day, on June 2 at about 2:30 p.m. Veloz called Mares and told him that he had found expired product at Superior Warehouse # 110, Food 4 Less, and Big Saver. Mares told Veloz that Veloz should leave the expired product in the back rooms at the stores and he would take care of it during his next delivery to the store. Veloz told Mares that he should be a little more careful.

20 That same day, June 2, Veloz prepared another occurrence report concerning Mares that read as follows:

25 On Wednesday, 6/2/10 passing by this salesperson’s stores to see how service was, and I saw the deli sections I encountered expired product. Food 4 Less 393 in Santa Ana: Cotija Rancho Grande, COD 50412, one piece from May 15, ’10, Jocoque, COD 50055, one piece from April 14, ’10; at Superior #110, two pieces of Panela Mex. COD 51004 from June 2, ’10; at Big Saver #7, six pieces of Panela Mex. COD 51004 from May 28, ’10, two Jocoque, COD 50055 from April 14, ’10. Also, on prior days to this customer Superior #110 and Big Saver #7 I visited them on 6/1/10 and Food 4 less #393. What I had seen on 6/2/10, all of this product should have been picked up without exception.

35 Beneath the heading on the form concerning what type of action needs to be taken Veloz wrote, “I leave it to the criteria of management.” If indeed expired product was found at those stores MBE would have generated some paperwork indicating that the stores were given credit for the expired product. Interestingly, MBE did not present any documentary evidence to support Veloz’s report of finding expired product. Turning to the Superior Warehouse # 110 incident that is mentioned in the occurrence report, Mares made deliveries there three times a week on Monday, Wednesday, and Friday. He last delivered there on June 1, the day before he was terminated. Mares credibly testified that he checked the shelves there for expired product and records indicate that Mares did not credit that store with any expired products. Mares credibly testified that the only time Veloz spoke to him about expired product on the shelves at Superior Warehouse #110 was on June 2.

45 I make several observations concerning this occurrence report. Despite the indication in the report that Veloz visited stores serviced by Mares on 2 consecutive days, Veloz testified that he did not remember whether he did so. And there is no good explanation how product that should have been removed from the shelves weeks ago remained there, especially given the fact that Veloz is charged with regularly visiting the stores to search for expired product and when, according to the report, Veloz had been to these stores the day before. 50

Also on June 2, when Mares arrived back to the warehouse at around 4 p.m. Javier Granados, MBE's general sales manager, instructed him to turn in his keys and paperwork. Mares asked if Granados could explain what was happening; Granados answered that he did not know anything and he took Mares upstairs to the office area where Mares waited for about 2-3 hours. Finally Granados escorted Mares into the office of human relations. Present there was Zulema Pintado, human resources assistant. Pintado informed Mares that he was being terminated because he had been aggressive with a customer and they had found expired product on display in three of the stores that Mares serviced. Mares denied that he had ever been aggressive with anyone and that he had never had a problem at any store with bad behavior. He asked that MBE show him the credit reports that would be proof that expired products had been found in stores on his route; he was not shown any such documents. Instead, Mares was given two documents. The first was a final written warning that indicated:

On 6/01/10 Sales Supervisor Andres Veloz visited La Sabrosa Market and received a complaint regarding the bad service and bad attitude of Alfonso Mares. The customer informed Andres Veloz that she felt unsafe talking to Alfonso because he was very aggressive in the manner that he talked to the customer. When the customer requested additional products and better customer service regarding the rotation and merchandising of the products sold Alfonso responded in a negative manner and was reluctant to provide the services requested. As a result of the incident the customer requested Andres to assign a new Perishable Sales Representative to her account. On 6/01/10 Alfonso Mares provided service to customer Superior Warehouse #110. Sales Supervisor Andres Veloz visited the store on the same day after Alfonso had completed the service. Andres found several spoiled items on the shelves with expiration dated from May 2010. On several occasions and in department meetings has been trained/educated on the importance of rotating all perishable items and issuing credit for the expired products. These procedures must be done on every service date. It is very important to maintain all company products in a safe and proper condition for public consumers to purchase.

The warning indicated that Mares could improve by:

Immediate improvements in customer service and work performance are required. Perishable Sales representatives are required to provide complete customer service to all customers on all occasions. Customers must be treated with courtesy and respect and should be addressed in a professional manner at all times. Future related incidents will result in additional disciplinary action up to and including termination.

Mares wrote on the warning form that he never argued with anyone at Sabrosa Market and that concerning the expired product at Superior Warehouse #110 he went to the store on June 1 and did not find any expired products.

I make the following observations concerning the written warning given to Mares on June 2. The written warning is inconsistent with the occurrence report prepared by Veloz in that the warning indicates that the La Sabrosa complaint occurred on June 1 while the occurrence report makes clear that it occur some time ago. The written warning indicates that the customer felt "unsafe" talking to Mares whereas the occurrence report makes no such assertion. And there is no mention in the occurrence report of any customer complaint from La Sabrosa that the "customer requested additional products and better customer service regarding the rotation and merchandising of the products sold Alfonso responded in a negative manner and was reluctant to provide the services requested" that is described in the written warning. The

Superior Warehouse #110 incident described in the written warning also does not match up with the description in the occurrence report. The warning indicates that on June 1 Veloz found expired product there but there is no mention of expired product in the occurrence report prepared by Veloz on June 1. To the contrary, the only complaint Veloz made to Mares
5 concerning expired product at that store was the next day, June 2. In sum, the written warning both increased the magnitude of the alleged misconduct and heightened the immediacy of that conduct. This shows, at least, that MBE itself recognized that the alleged misconduct described by Veloz in his occurrence report would be insufficient to support the disciplinary measures it intended to mete out to Mares.

10 The record compels me to give more details concerning the La Sabrosa Market incident described in the occurrence report and written warning. La Sabrosa Market is apparently a family-owned business run by Fernando and Gloria Tinajero. Mares delivered to that store once a week on Wednesday. Mares usually dealt with Fernando but also occasionally dealt with
15 Gloria. His dealings generally involved ascertaining from them how much and what type of product to leave at the store. Mares' interactions with them also involved casual conversations about family; for example Mares knew about Gloria's grandson who sometimes was at the store with her. Mares never received any complaints from MBE about his conduct at La Sabrosa prior to his discharge. The last time Mares was at La Sabrosa was on May 26. After Mares was
20 fired, as described more fully below, he, of course, told his wife what had happened. Thereafter Mares and his wife contacted Gloria Tinajero concerning the complaint she had supposedly made about Mares. The result was that on June 16 Gloria Tinajero signed the following statement that was written in Spanish:

25 On June 02, 2010, I was informed the following incident with Marquez Brothers Company one of the drivers of that company name Alfonso Mares call me to inform me that he was no longer working for that company because he was terminated from his job because he was very aggressive with me. I'm the owner of one of the stores he used to
30 serve, store name is La Sabrosa Market. His supervisor Andres Veloz said that Alfonso was really aggressive with me and that he gave me really bad service. He said I felt unsafe talking to him and that I don't want him in my store anymore. And that is a lie I did not say any of those things to him, I did talk to him and said that Alfonso forgot to plug the refrigerator and that the product was going [to] go bad. That's all I said to him. I don't know why Andres is lying.

35 The facts in the preceding paragraph are based on the credible portions of Mares' testimony. I have considered the testimony of Gloria Tinajero. Tinajero testified that she was "not really" satisfied with the service Mares provided to her store because he had a bad attitude. According to Tinajero, Mares "always had complaints about how much he was working and
40 things like that." Mares also did not like it when Tinajero made him wait before checking in the products or when she sent him to the butchers to have them check the products. She said the butchers complained to her about Mares "all the time" about Mares' bad attitude. Tinajero also complained about an incident when Mares dropped off a cooler of yogurt and left it unplugged in front of the register instead of leaving it in an aisle. Someone else plugged in the cooler and
45 this was during the summertime. Tinajero complained to Andres Veloz about this incident. In response to a leading question about whether Mares seemed "angry or aggressive" during this incident, Tinajero volunteered that "He always was like that." Tinajero admitted that she signed the letter set forth above, but claimed she did so only to help Mares get unemployment benefits after Mares, his wife, and child came to her store and complained that it was her fault that
50 Mares was fired. But Tinajero renounced that letter and claimed it was not true. On December 15, 2010, Tinajero wrote in Spanish on the bottom half of a copy of the letter:

I, Gloria Tinajero, signed this letter for Alfonso Mares, written by his wife saying that he wanted to get unemployment and I trusted in him and I did not³ read the letter in detail [in which] it says it is a lie that they fired him because of me.
I did complain to the supervisor Andres Veloz a few times about his service.

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Tinajero then gave a copy of this to Veloz. Tinajero admitted that she complained to Veloz about three times over a period of about a year. She denied she ever told Veloz that she felt unsafe with Mares. I credit only portions of Tinajero’s testimony. It strikes me as credible that when Tinajero would make Mares wait until she became available to check in MBE merchandise that Mares would become impatient. Remember, the drivers worked long hours, were on a tight schedule to make the deliveries during designated times, and had to deal with traffic problems. And I also conclude that during the “summertime” Mares delivered the cooler of yogurt but did not plug it in. But I conclude this incident must have occurred during the summer 2009. After all, official summer was still almost a month away when Mares last visited the store on May 26 and if the incident had happened during any warm weather that spring then Tinajero would have been able to give a more precise date. I further conclude that Tinajero did complain to Veloz, but not anyone else from MBE, about these matters. I otherwise find Tinajero to be an unreliable witness. Her testimony concerning Mares’ alleged shortcomings was clearly exaggerated and sometimes in response to leading questions; her demeanor was entirely unconvincing.

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Returning now to the meeting of June 2, MBE did not allow Mares the opportunity to improve that is described in the written warning. Instead, Pintado gave Mares a second document that indicates that he was terminated. It reads as follows:

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On 6/02/10 supervisor Andres Veloz reviewed customer store Food 4 Less #393 and found various expired products on the stores shelves. Perishable Sales Representative Alfonso Mares had provided service to the store earlier that same day.

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On 6/02/10 Sales Supervisor Andres Veloz also reviewed customer store Big Sabor r#7 and again found several expired products on the store shelves.

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The customer service that Alfonso Mares provided to these customers is unacceptable and well below management’s expectations. Alfonso is not following proper procedures for rotating items and for issuing credit for expired items. Alfonso is not completing his work responsibilities and as a result is jeopardizing the public consumer’s safety as well as the customer’ good standing with customers. Alfonso’s poor work performance can’t be tolerated.

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Comparing Veloz’ June 2 occurrence report with the June 2 termination, I note that there is no mention of any expired product found at Superior Warehouse #110 by Veloz on that date. As noted above, MBE mentions Veloz finding expired product at Superior Warehouse #110 on June 1 and that that was inconsistent with the occurrence report completed by Veloz and dated June 1.

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Mares’ termination notice mentions Food 4 Less # 393. Mares normally delivers there twice a week – on Tuesday and Friday. Because of the Memorial Day Holiday that fell on Monday, May 31, the delivery dates were changed and the last time Mares delivered there before his discharge was on Wednesday, June 2. Records indicate that on that date Mares found expired products or products that were about to expire at that store and credited the store for those products. Finally, the termination notice mentions Big Saver #7. Mares delivered

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³ I correct the translator’s inadvertent error in omitting this word from the translation.

there once a week, normally on Thursday. Mares last delivered there on May 27. Documents show that on that date Mares discovered expired products or products that were about to expire at that store and gave the store credit for those expired documents.

5 The facts in the preceding paragraphs are again based on Mares' credible testimony. I again consider the testimony of Andres Veloz, Mares' supervisor. Veloz credibly testified that Mares was neither a good nor bad employee but somewhere in between. He also credibly testified that in the past he had found expired product on the shelves of the stores that Mares serviced and he would simply advise Mares of this and Mares would reply "Oh. I missed it."

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I now review Mares' disciplinary record at MBE. On October 23, 2009, Mares was given a verbal warning stemming from a customer complaint. The customer complained of the bad service that Mares had been providing because of spoiled product that was not being removed; the customer indicated that he was going to reduce the shelf space available for MBE products. 15 This warning indicated "Future related incidents will result in additional disciplinary action up to and including termination." On June 6, 2009, Mares was given a verbal warning for too frequently requesting on the morning of his deliveries for additional product to deliver to customers instead of requesting the additional product earlier in the delivery process. On February 9, 2009, Mares received a verbal counseling for delivering products to one store but invoicing another store. On July 19, 2008, Mares received a verbal warning that concerned a 20 16 pound shortage of product. On March 21, 2008, Mares was given a written warning for errors he made in his inventory reports. On April 12, 2007, Mares received a written warning for the same type of mistake; he delivered product to one store but invoiced it to another store. On July 7, 2007, Mares received a final written warning for failing to provide a store with enough of 25 an item that apparently was on sale and being "demonstrated" in that store. In sum, the last discipline Mares received was a verbal warning some 7 months before his termination.

At the hearing, MBE brought up the matter of Mares' personal appearance. But this matter was neither given as a reason in Mares' otherwise comprehensive discharge papers nor is there any written evidence of warnings or previous discipline on this subject. I conclude this was made up after the fact as an additional reason for termination. 30

In addition, Augustin Vasquez and Francisco Lara, MBE's vice president of operations, related a meeting that they had with Mares in March 2010 after incidents of poor service to customers by Mares. According to Vasquez and Lara, they raised these concerns but Mares responded that he thought he was doing a good job. But there is no written documentation of that meeting and no occurrence reports of any problems with Mares' performance around that time. I credit Mares' denial that he ever had a meeting with Lara concerning his job performance over the testimony of Vasquez and Lara. 35

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Aside from the terminations described in this case, the record shows that MBE has terminated three perishable sales drivers. On October 15, 2008, a perishable sales driver was terminated because on October 7, 2008, his supervisor found expired product on the shelf, on October 10, 2008, two cases of product were not accounted for in his inventory and on October 13, 2008, a store complained that the driver had failed to issue it a credit for expired product; the store expressed dissatisfaction with the driver and asked that another driver service that store. The terminated driver had been placed on a 30-day probationary period on October 3 due to performance problems. On May 18, 2009, another perishable sales driver was terminated. On April 28, 2009, expired product was found at two stores serviced by this driver. On May 11, 45 2009, expired product was again found on the shelves at two stores; in addition three complete cases of expired product were found in the stock room of a store. On May 12, 2009, expired product was again found at a store. Finally, due to poor customer service by this driver, MBE 50

had lost shelf space at three stores. On June 26, 2009, the third perishable sales driver was terminated. On June 6, 2009, this driver was placed on a 30-day probationary period because of spoiled product at a store. On June 24, 2009, supervisors found a total of 36 items on the shelves that should have been removed because they were past or near their expiration dates.

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Analysis

I apply the shifting burden analysis in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F. 2d. 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), in assessing the legality of Mares' termination. I have concluded above that Mares engaged in union activity. That activity was extensive; he procured the names and contact information from about 17 coworkers.

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Turning to the issue of whether MBE had knowledge of that activity, the General Counsel contends that Bertha Yontomo is an agent of MBE under Section 2(13) of the Act. .In *Pan-Oston Co.*, 336 NLRB 305, 306 (2001), the Board explained the test for determining agency status:

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The Board's test for determining whether an employee is an agent of the employer is whether, under all of the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management. *Waterbed World*, 286 NLRB at 426–427 (and cases cited therein). The Board considers the position and duties of the employee in addition to the context in which the behavior occurred. *Jules V. Lane*, 262 NLRB 118, 119 (1982).

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. . . .

Although not dispositive, the Board will consider whether the statement or actions of an alleged employee agent were consistent with statements or actions of the employer. The Board has found that such consistencies support a finding of apparent authority

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Yontomo works as an accounts receivable collection clerk with an office near Perfecto's office. She tells the drivers when to stop making deliveries to a store because that store has not paid its bills or to only accept cash for a delivery. Certainly Yontomo would be an agent of MBE for purposes of telling drivers when to stop making deliveries. But the evidence is simply insufficient to support a finding that Yontomo is otherwise an agent of MBE within the meaning of Section 2(13).

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The Board has held that both knowledge and unlawful motive can be inferred based on the particular set of facts presented by a case. *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), and cases cited therein. I conclude that the circumstances in this case compel the finding that MBE must have had knowledge of Mares' union activity⁴ and that Mares' union activity was a motivating factor in his termination. First, there is the element of timing. Mares successfully solicited Yontomo's son to sign a list indicating support for the union during the early morning of June 1. That same night Yontomo called Mares on the Nextel telephone and angrily insisted that Mares remove her son's name from the list of union supporters. By the end

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⁴ In arguing that even if Yontomo is not an agent of MBE the General Counsel argues that "the elements of ... knowledge may be established by circumstantial evidence." While this is a correct statement of law, *Montgomery Ward*, supra, the case cited to by the General Counsel, *Vulcan Wireproofing Co.*, 327 NLRB 110, 1109–110 (1999), does not support that proposition. Rather both the Board's and the administrative law judge's finding of knowledge were based on admitted supervisors. I remind General Counsel that he like all parties must take care to accurately support propositions of law.

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of the next day Mares was fired. Also, remember that Mares was kept waiting 2 to 3 hours outside the human resources office after the end of his workday before he was presented with his termination papers. With no other credible explanation in the record for this delay, it becomes apparent that MBE had not fully prepared the paperwork it felt it needed to justify Mares' discharge but it nonetheless felt compelled to hastily terminate him that evening. Importantly there is no other event other than the discovery of Mares' union activities on June 1 that credibly explains his abrupt termination. As more fully described above, the written warning was based on an event that occurred months ago. That same written warning falsely indicated that expired product was discovered on June 1. Also, at the trial MBE presented testimony challenging Mares' appearance; this however, was never mentioned in any disciplinary records. This shift in the reasons given for Mares' discharge further supports my conclusion that the discharge was unlawfully motivated. Finally, as explained below there is no doubt that MBE was hostile to the notion that employees should be represented by a union. Although the direct evidence of animus occurred after Mares' discharge, I conclude that MBE attitude towards unions was the same during spring as it was during fall. All of these factors support the conclusion that the General Counsel has met his initial burden under *Wright Line*.

I now examine whether MBE has met its burden of showing that it would have terminated Mares even if he had not engaged in union activity. I have already described how the La Sabrosa Market event occurred months ago and was not sufficiently serious to support any discipline at the time. Remember Veloz uncomfortably never did provide a credible explanation of why he prepared the occurrence report containing stale information on June 1, the very day when Mares' solicited Yontomo's son in the early morning hours. And even then MBE seems to recognize that personalities between drivers and customers sometimes clash and it does not automatically respond to these realities by terminating the drivers. What remains of MBE's case against Mares are the pieces of expired product that his supervisor, Veloz, reportedly found on June 2. As the General Counsel points out in his brief, MBE would normally have documents showing that it credited the stores for the expired product. MBE did not submit documentary evidence to support Veloz testimony and offered no explanation as to why the documents did not exist. In any event, the evidence is clear that employees are not automatically fired because expired products are found. To the contrary, Veloz himself admitted that in the past when he found expired product in Mares' stores he simply advised Mares to be more careful. The record supports Veloz's description of Mares as being neither a good nor a bad employee, but as one somewhere in the middle. The other discharged employees relied upon by MBE to support its contention that Mares would have been fired anyway are not comparable. Two of those employees had been on disciplinary probation and the third committed a series of errors in rapid succession. Remember MBE last disciplined Mares months before his termination, and even then it was merely a verbal warning and Mares had worked there for over 5 years before his abrupt termination. MBE cites several cases in its brief to argue that the Board has strongly validated an employer's right to insist that its employees provide good customer service. That is indeed the case. But in doing so the Board measures the level of customer service by the employer's own standards. Here, whatever customer service problems Mares may have had they were not sufficiently serious breaches to cause MBE to fire him until after he engaged in union activities. I conclude that MBE has not met its burden under *Wright Line*. By discharging Alfonso Mares because he engaged in union activity, MBE violated Section 8(a)(3) and (1).

Javier Avila

Javier Avila began working for MBE in May 2008; he worked as a perishable sales driver. He was among the employees who agreed to list their names as union supporters on the paper circulated by Mares. Mares' termination ended efforts at unionization for several months.

5 However, in around August or September MBE cut the pay rates of the drivers so in September Avila revived the unionization effort. Avila spoke to other drivers and a number of them indicated that they would support an effort to be represented by a union. Avila then talked to an employee of another employer that had a union. Avila received information about the Union and then called Teamsters Local 63, International Brotherhood of Teamsters, but Avila was unable reach anyone there. Another employee of MBE, however, did reach that union and a meeting with a union agent was arranged. Avila then spoke to coworkers and told them about the union meeting and encouraged them to attend. Avila spoke to about 25 coworkers about this matter over a fortnight in September. The meeting was held on September 24; employees and a union agent attended and Avila signed an authorization card on behalf of the Union. Another union meeting was held about 2 weeks later.

10 On October 6 the Union filed a petition to represent MBE's drivers; that petition was withdrawn on October 15. The union filed another petition on October 14 and on October 15 the Union and MBE signed an agreement for a stipulated election. The election was held on November 19 and the Union lost 17 to 20 with one challenged ballot. The results were certified on November 29.

20 Prior to the election Francisco Lara, MBE's vice president of operations, held meetings that the drivers were required to attend after they had completed their normal workday. At these meetings Lara expressed his view as to why a union was not needed at MBE. Lara testified that at these meetings Avila volunteered "Don't worry about me boss. I am with you: I am with the company. I know unions are a bad decision." Lara testified that Avila would roll up the papers that were distributed at these meetings and announce that he did not want to know anything else about the Union because he was with the Company 100 percent. According to Lara, Avila said this at each of the three to five or six to eight meetings that Avila attended. Perfecto testified at the hearing before Lara, and Perfecto made no mention of Avila's statements during the meetings. Perfecto was in the hearing room while Lara testified and then was recalled. Perfecto testified that he attended one of the meetings and that meeting Avila indicated that he was with the Company. Avila denied that at these meetings he said anything like "Don't worry boss. I'm for the company." Instead, Avila testified that he did not speak at all at these meetings. These meetings were held after the end of the regular workday of about 12 hours; Avila explained that he was tired and anxious to get home. But Avila admitted that other employees stated that they agreed with Lara that a union was a bad choice. I have earlier not credited the testimony of Lara and I do not do so again here. It strikes me as exaggerated that Avila would make such statements at each meeting. And Perfecto's testimony on this matter struck me as more of an attempt to support his superior than relate the facts. In any event, Avila denial was convincing and his demeanor was persuasive.

40 On a Friday in October Mario Perez, a sales account executive for MBE, called Avila on Avila's mobile telephone. Perez asked if he could ask Avila a personal question. Avila replied that he could do so. Perez then asked if Avila was involved in what was happening in the Union. Avila answered no, he was not, and that he did not have time for things like that. Perez' agency status is in dispute. Perez works with MBE's bigger customers on matters such as pricing, product promotions and the like. Avila explained that about twice a month he would contact Perez directly if his direct supervisor, Cesar Barajas, was not available. Avila sought information from Perez concerning whether there was a sale on certain products in stores that were part of Perez' accounts. Sometimes Perez would supply the information and other times Perez answered that he would get back to Avila with the information but would not do so. Abel Gastelum, a relief perishable sales driver, testified that Perez would occasionally appear at stores that he was servicing and direct his work by telling him how to do his work. On one

occasion Gastelum and another employee were delivering a cooler and Perez was very angry at them because they did not bring product to fill the cooler. Perez did not testify at the hearing.

Analysis

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The complaint alleges that MBE, through the conduct of Perez, unlawfully interrogated an employee concerning his union activity. I first resolve the issue of whether Perez is an agent of MBE. I have described Perez’s duties in the preceding paragraph. I conclude the record is insufficient to support a finding that he is an agent of MBE within the meaning of Section 2(13). Remember, the burden is on the General Counsel in this situation. It follows that I dismiss this allegation in the complaint.

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In October Avila was in Superior # 102, a store on his route. Cesar Barajas, a sales supervisor of MBE and Avila’s direct supervisor, happened to be at the store at the same time. As Avila was stocking yogurt on the shelves Barajas asked Avila, in Spanish, if he could ask him a question and asked if Avila was part of the Union. Avila answered no. Barajas replied, again in Spanish, “Oh, because you’re burnt with the lady. And you’re also in the black list.” Avila answered that he did not have time for the Union or things like that, and that he was there to work. When Barajas mentioned the “lady” he was referring to Elizabeth Lara, wife of Francisco Lara and an owner of MBE, who the employees referred to as “La Senora.” And being “burnt” is a colloquialism that means that they or someone is on to you, or that they know what is going on.

Analysis

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The complaint alleges that by the conduct described above, MBE unlawfully interrogated an employee concerning his union activities and threatened an employee with unspecified reprisals for being involved with the Union. As indicated above, Barajas told Avila that he was “burnt” with “La Senora.” In context, this meant that Elizabeth Lara had learned of Avila’s union activities. Barajas continued, telling Avila that he was on a blacklist because of those activities. The Board has long held that it is unlawful to tell employees that they are being blacklisted because they support a union. By threatening an employee with unspecified reprisals because he engaged in union activity, MBE violated Section 8(a)(1). Questioning employees about their union activities is not a per se violation of the Act. Rather, all relevant circumstances must be considered to determine whether the questioning is coercive. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985); *Rossmore House*, 269 NLRB 1178 (1984). The facts show that Barajas, Avila’s immediate supervisor and the person charged with monitoring his work, asked Avila whether he was part of the Union. Avila falsely answered that he was not. Barajas continued by saying in slang that Elizabeth Lara knew of his union activities and that Avila was on a blacklist. Under all the circumstances, and especially because Barajas threatened Avila that he was on a blacklist, I conclude that MBE violated Section 8(a)(1) by coercively interrogating an employee concerning his union activities.

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Also in October after Avila had completed his shift and had returned to the warehouse he walked into room that the drivers use to complete their paperwork. Present at a table in the room were Cesar Barajas, Julio Ponce, and Augustin Vasquez. Vasquez, like Barajas, was a sales supervisor; Ponce was a perishable sales driver like Avila. Barajas said that he needed to talk to Avila after Avila completed his shift. Avila completed his remaining tasks; he then returned to that area. Barajas handed Avila a sheet of paper and told him to go ahead and read it and sign it. The paper read:

HOW TO GET YOUR AUTHORIZATION CARD BACK FROM TEAMSTERS LOCAL 73

Many employees have asked us how they can get their signed union authorization cards back. These employees are concerned that they were tricked by Teamsters Local 73 into signing authorizations cards which are legally binding documents. If you have been tricked into signing a card, you can get your card back by writing a letter to the Union and asking for your card back. All your letter to the Union has to say is:

KENNETH HAARALA
PRESIDENT
(DATE)
TEAMSTERS
LOCAL 63
845 OAK PARK ROAD
COVINA, CA 91724-3624

DEAR SIR:

I REVOKE THE AUTHORIZATION CARD. PLEASE RETURN MY ORIGINAL AUTHORIZATION CARD. THANK YOU.

SINCERELY,
(SIGNATURE)

Mail the letter to the Union and keep a copy for yourself. It is up to you whether you want to get your card back or not.

If you have not been told about UNION DUES, FEES, FINES, ASSESSMENTS AN UNION RULES ... Feel free to ask your supervisor for information.

The second page of the document read:

October 12, 2010

KENNETH HAARALA
PRESIDENT
TEAMSTERS
LOCAL 63
845 OAK PARK ROAD
COVINA, CA 91724-3624

DEAR SIR:

I REVOKE THE AUTHORIZATION CARD. PLEASE RETURN MY ORIGINAL AUTHORIZATION CARD. THANK YOU.

SINCERELY,

MBE prepared all this paperwork and Arturo Perfecto, MBE's controller, gave it to Barajas. Avila dated and signed the form. Barajas gave Avila an envelope and told Avila to address the envelope to the Union. Avila then addressed the envelope, placed the form in the envelope and asked if he was to mail it. Barajas said "No, don't worry about it, we'll take care of it." So Avila gave the envelope and form back to Barajas. Avila neither placed a stamp on the envelope nor had he ever requested information from anyone concerning how he could have his authorization card returned. Abel Gastelum was employed by MBE as a relief perishable sales representative

until March 18, 2011 when he was terminated.⁵ He had signed an authorization card for the Union and had never asked anyone for information concerning how he could get that card back. On October 12 when he returned to the warehouse he encountered Barajas and Augustin Vasquez. Vasquez told Gastelum that the box cutters had arrived so he should go to the front office and get one. As Gastelum was going to the front office coworker Julio Ponce ran after him and told him that the Union was a bad idea and that it was not appropriate to have a union and that he should talk to the owner about the Union as well. Ponce said that if Gastelum signed a paper that Ponce was giving out then Gastelum would get his union card back. After Gastelum got his box cutter he went to clock out and Ponce followed him and gave him the papers about how he could get his card back. Gastelum looked at the papers and because he was unsure whether he wanted to sign them he told Ponce that he would sign them and give them back to him later. But Ponce said that it was okay to sign now and that everything was fine, so Gastelum was about to sign when Augustin Vasquez, who was in the lunchroom near them, told Gastelum to come inside the lunchroom, that he could sign there and no one will see him. So Gastelum went into the lunchroom, signed the letter and addressed the envelope that have been previously described. Vasquez and Barajas were seated at a table working on their laptops; on the table were three stacks of papers, one for each of the documents described above. Vasquez and Barajas are not usually seated at that table, especially at the end of the workday. Ponce folded the letter that Gastelum had signed, placed it into the envelope, and put it on a stack of other sealed envelopes that were addressed to the Union. No employee ever asked MBE for information concerning how to get their authorization card back.

The foregoing facts are based on Avila's and Gastelum's credible testimony. Both their testimonies were supported by factual detail and their demeanors were convincing. Barajas denied that he questioned Avila or any employee concerning his union activities. He testified in a summary fashion that Avila told him that he was for the Company and not the Union, but Barajas' explanation during cross-examination about how this subject came about was both evasive and unpersuasive. In addition, Barajas' demeanor was not convincing; he seemed anxious to support his employer rather than to accurately relate the facts. Moreover, Barajas admitted that he distributed the documents concerning the return of the union authorization cards; he therefore must have at least known that those employees who completed that paperwork and returned it to him had supported the Union by signing authorization cards. I do not credit Barajas' testimony to the extent it conflicts with the testimony of Avila or Gastelum. Vasquez likewise admitted that he gave employees the documents concerning the return of their authorization cards.

Analysis

The complaint alleges that MBE unlawfully solicited employees to ask the Union to return their authorization cards. The facts show that MBE created the information concerning how employees could get their authorization cards back. MBE then distributed this information to employees, watched as the employees completed the paperwork, collected the paperwork from the employees and apparently franked the envelopes. No employee asked MBE for such assistance.

The Board has held that "an employer may lawfully inform employees of their right to revoke their authorization cards, even where employees have not solicited such information, as long as the employer makes no attempt to ascertain whether employees will avail themselves of

⁵ Gastelum filed a charge with the NLRB over his termination and at the time of the trial no decision had been made concerning the merits of the charge.

this right nor offers any assistance, or otherwise creates a situation where employees would tend to feel peril in refraining from such revocation.” *Mariposa Press*, 273 NLRB 528, 529–530 (1984); *R. L. White Co.*, 262 NLRB 575, 576 (1982).

5 Here, MBE did not merely create the paperwork needed to revoke the authorization cards and make that available to employees. Rather, Barajas and Vasquez participated in the process by soliciting employees to complete the paperwork and observing them as they did so. This has a natural tendency to coerce employees into revoking their authorization cards, thereby overriding any statement in the revocation forms that the choice was up to the
10 employees. By coercively encouraging employees to ask the Union to return the authorization cards that the employees had signed, MBE violated Section 8(a)(1).

During the morning of November 29 Barajas called Avila on the Nextel radio that MBE provided to them. As he normally did, Barajas said good morning, asked how Avila was doing that morning, and asked if Avila needed anything. Later that day, around noon, while Avila was
15 at Superior # 102, Barajas again called Avila. Barajas asked where Avila was, and Avila told Barajas his location. Barajas then asked if Avila left any Rancho Grande products at North Gate #19; those items normally sell for \$3.49 but had been on sale at that store for \$1.99. Avila asked what date was Barajas referring to; at that moment the call ended and Barajas appeared
20 in person at Superior #102. Apparently Barajas had called Avila while he too was in that store. Barajas again asked Avila if he had left product for the special sale at Northgate #19. Avila said no, he did not, because the shelf was already fully stocked with the product. Barajas said that the store had run out of the product and that Avila had to go there with more of that product. Avila said that he would do so. Avila then went to Northgate #19 and discovered that the
25 shelves were indeed empty of the sales item. Avila then left enough of those items to last several hours until Barajas could appear there with still more product that he said he would get from another driver. The matter seemed to end there. As Avila credibly testified, on occasions shelves will be empty because sometimes it is difficult to predict how much product will sell, especially if it is on sale. On those occasions someone from the store may call an MBE sales
30 supervisor and request additional product and MBE then does its best to supply the store with the requested items. In fact, this had occurred in the past with Avila and he was told to restock the shelves; he was not discipline.

On December 2 Avila returned to the warehouse sometime after 5 p.m. After he
35 completed his paperwork he went to pick up his paycheck. Avila went to the payroll area but was told by the person there that he did not have Avila’s check. So Avila went to see Elizabeth Lara because sometimes she gave out the checks. But Lara too said that she did not have his check. Avila then encountered Zulema Pintado, the human resources assistant, on the stairway. Pintado told Avila to wait right there. Avila waited there about an hour until Pintado
40 returned and instructed Avila to go the office of Javier Granados, MBE’s general sales manager. Accompanied by Pintado, Avila went to Granados’ office and Granados gave Avila his termination notice. Granados told Avila to read the notice and Avila did so. Granados announced that it was Avila final termination and Avila should sign the notice. Avila did so and left without saying a word. The notice described the reason for termination as:

45 You were hired May 20, 2008, at which point you were provided a copy of the Company Employee Handbook
Incident:
On November 29, 2010, while your Supervisor, Cesar Barajas, and you were at the
50 Superior #102 in Los Angeles Mr. Barajas received a call from the Northgate store #19 from the Deli Manager. The Deli Manager contacted Mr. Barajas to advise him that they needed Rancho Grande sales products (Queso Fresco, Queso Panela, Crema

Mexicana, Crema Natural) that were listed on their AD at \$1.99 and explained to Mr. Barajas that the store shelves were empty with respect to those sale products. Since this is one of the stores on your route, Mr. Barajas asked you how much El Rancho Grande sale products you had left at Northgate Store #19 on your last visit which was on Friday, November 26, 2010. Per Mr. Barajas, you responded that you had filled the deli shelf with the El Rancho Grande sale products and had left an additional two boxes of Rancho Grande sale products in the back of the store.

Because of the call, Mr. Barajas then left and drove to the Northgate Store #19. When Mr. Barajas arrived at Northgate Store #19 he discovered that there was NO! Rancho Grande sales product left on the deli shelves (see attached copy of picture of deli shelves taken on November 29, 2010). Upon review of the invoices for Northgate for November 26, 2010, Mr. Barajas discovered that you had NOT in fact sold any Rancho Grande Product to this store that was listed on sale on the AD, on November 26, 2010. This was contrary to what you stated to Mr. Barajas.

The above noted incident violates the following Company Policies:

Prohibited Conduct page 27-29 #2: Unacceptable Job Performance

You misrepresented to your supervisor that you had serviced a customer properly (Northgate Store #19) when in fact you had not done so.

Therefore, your continuous, unacceptable job performance has resulted in termination of your employment effective immediately (today, Thursday, December 2, 2010).

The termination notice also listed the following previous discipline given to Avila:

10/05/10 – Final Written Suspension: Performance

02/20/10 - Verbal: Performance

12/01/09 – Written Suspension: Performance

05/28/2009 – Final Written: Performance

05/19/2009 – Written: Performance

12/19/08 – Verbal: Performance

Along with several occurrence reports on file

Avila delivers to Northgate #19 twice a week, on Tuesday and Thursday. During the week prior to November 29 Avila was off from work on November 22 and 23; he therefore did not service that store on those dates; instead, another driver did so. Barajas testified that he informed Avila of the sale of the Rancho Grande product by leaving copies of the ads at his locker at the start of that week. However, Avila was not aware that there was a sale on the Rancho Grande product at that store because MBE gives this information to the drivers on Monday or Tuesday and, as mentioned, Avila did not work those days. Due to Thanksgiving, Avila serviced that store on Friday, November 26. Avila checked the deli shelves and observed that the shelves were full. He was unable to locate either the store manager or deli manager. Taking into account that it was Thanksgiving weekend and that it was the last weekend in the month during which people in the community were saving for rent money and sales typically decline, Avila made a judgment call that there was sufficient product on hand to last until his next delivery. He would then be able to stock it with fresh product. MBE documents show that on November 26 Avila serviced that store and supplied it with several different products, although not any of the Rancho Grande items that were on sale that weekend.

It will be recalled that the termination notice reports that Avila told Barajas that he, Avila, had left two cases of the Rancho Grande product at the store, but when Barajas checked the invoices they showed Avila had not in fact done so. At the trial Barajas testified that Avila did say that he had left two cases of the Rancho Grande product in the back of the store, but Barajas' demeanor was not credible. Avila credibly denied that he had said this to Barajas. I

again conclude that MBE is manufacturing issues to strengthen its case justify termination, this time by adding a charge of dishonesty against Avila.

5 I now describe Avila's disciplinary history at MBE. On December 19, 2008, received a verbal warning as follows:

The company received a complaint on 12/10/08 from the corporate buyer of Tapatio markets, Luis Escalone. The complaint was that Store #9 was out of product. Queso Fresco Casero was on special at the time.

10 Store #9 was scheduled for service on 12/08/08 by Javier Avila. Supervisor Cesar Barrajas questioned Javier Avila about the reason why the store was out of product. Javier responded that on 12/08/08 he did not service the store as scheduled because he did not have time and because it was too late.

Solution: What can the employee do to improve?

15 The company strives to provide its customers with the highest quality products and service. The situation described above is an example of poor customer service. This type situations need to [be] avoided as much as possible. The route supervisor should be informed whenever a customer is not serviced as scheduled.

20 On May 19, 2009, Avila received a written warning as follows:

On 05/19/09 Supervisor Paulo Cesar Barajas reviewed customer store Northgate #19. The store was serviced earlier that day by salesman Javier Avila. Paulo Cesar saw that Javier sold products to the customer but did not fill the yogurt are on the shelf. Javier also only left 1.5 cases on the shelf of the cheese that was on special/promotion at the store.

25 Paulo Cesar also noted that by 11:00 AM Javier had only serviced 3 customers. Javier clocked in at 5:07 AM in the morning. When asked for the reason for the slow progress in the day, Javier responded that if management wanted they could demote him to a relief salesman position.

30 Javier's negative attitude is not welcomed by management. The company strives to provide all customers with the best service possible. The service issues address[ed] above must [be] corrected and prevented in the future.

Solution: What can the employee do to improve?

35 Javier is placed on a 30 day probation period. Management will be looking for improvements to the areas of customer service and work performance.

Future related incidents can result in further disciplinary action up to and including termination.

40 On May 28, 2009, a little over a week later, an incident occurred for which Avila was given a final written warning as follows:

On 05/28/09 Supervisor Paulo Cesar Barajas reviewed customer store Superior #105. Paulo Cesar Barajas found 9 cases of spoiled yogurt products in the back cooler. Javier is not properly rotating the products at this store.

45 Javier is currently on a 30 day probation. The probation period ends on 6/17/09. A review of his work performance will be performed upon completion of the probation period.

Solution: What can the employee do to improve?

50 Future related incidents can result in further disciplinary action up to and including termination.

On December 2, 2009, Avila was suspended and again placed on a probationary period. The notice read:

5 You previously received Employee Disciplinary Records on the following dates for poor performance, April (sic) 28, 2009, and May 19, 2009. These Employee Disciplinary Records cited poor performance in the areas of customer service due to late arrivals, correct rotation of product and removal of expired product.

10 You are once again receiving an Employee Disciplinary Record for poor customer service on the following dates.

On 11/11/09 Supervisor Cesar Barajas was at Superior #102. He was reviewing the Deli Department and noticed several products that were not stock[ed] and were left with empty spaces. The Meat Department was not serviced because Javier had arrived to the store late. Cesar Barajas personally serviced the Meat Department and went ahead and made sure to give them the product needed and give them good service.

15 On 11/16/09 R Ranch #4 did not receive service due to late arrival. Javier Avila didn't service this store and also he didn't inform his supervisor.

All Daily Cheese Routes must receive good customer service on a daily basis to all our customers.

Solution: What can the employee do to improve?

20 The Company strives to provide its customers with the highest quality products and service. The situation described above is an example of poor customer service. These types of situations need to be avoided as much as possible.

All customers' stores need to be serviced as scheduled. The Route supervisor should be informed whenever a customer is not serviced as scheduled.

25 Javier Avila is placed on a 30 day probationary period. Management will be looking for improvements in the areas of customer service and work performance. Expected improvements include on time arrival to customers' stores, product delivered and stocked as required, appropriate communication with supervisor when service is not delivered to a customer as required.

30 Future related incidents will result in additional disciplinary action up to and including termination.

As a result of continued poor performance you are suspended and issued this final written warning.

35 Avila received a verbal warning on February 20, 2010, for incorrectly invoicing two stores. On October 5, 2010, Avila again received a suspension and final written warning described as follows:

40 On 09/08/10 Supervisor Cesar Barajas had received a call from an executive regarding Smart & Final #319. The store manager had found 7 pc. of Monterey dated 9/07/10 also the shelf was empty. Cesar Barajas personally went to the store to speak to the store manager of Smart & Final and they stated once again that this cannot happen again. Attach[ed] you have a picture of the empty shelf. We have received more chain stores from Smart & Final and that if we have provide (sic) more good service that would cause more problems for Marquez Brothers Ent., Inc.

45 On 9/15/10 Mr. Javier Avila was stopped at 4549 Live Oak St. in Cudahy, CA for duration of 40 minutes and when he was asked by his Supervisor Cesar Barajas, Javier had denied it[.] he claims that he was at a Superior market but he had serviced that store the day before the Superior is in a different address.

50 On 9/29/10 Supervisor Cesar Barajas had past to see a Superior #102. The sales representative has already pas (sic) to give service to the store. Javier did not leave any RG fresco (50403) did not fill up the tank attached you have a picture of the tank. Javier

also didn't service the shel[ves] with the following product cotija triangle, crema natural rg, fresco cremoso pack. [T]his last product he had the product in the back of the cooler he had to change the tank from RG fresco to the cremoso cheese. Having the entire product in the back of the cooler there they will not [sell.] Javier left 25 pc of cream casera (50054) on the section with the date of 10/01/10 2days of expired date, all route sales [k]new that we cannot leave any product with 2 days of expired date only if it's for at least five days only.

Solution: What can the employee do to improve?

Employee Javier Avila has been inform[ed] in the past for all his work performance and we don't see any improvement. Javier needs to improve on his work performance. Future related incidents will result in further disciplinary action up to and including termination

Barajas testified concerning the events described in Avila's disciplinary records; to the extent this testimony put a negative gloss on those events, I do not credit that testimony but instead rely on the disciplinary records themselves.

In sum, Avila's work history is checkered with disciplinary action. The most recent, a suspension accompanied by a final warning, advised Avila that future related incidents will result in further disciplinary action "up to and including termination." But this identical admonition is contained in almost every other written discipline given to Avila. Indeed, so far as this record shows it seems to be almost routinely added to written disciplinary actions.

Analysis

I again apply the shifting burden analysis in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F. 2d. 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982) in assessing the legality of Avila's termination. First, Avila clearly engaged in union activity. Next, MBE knew of this union activity. MBE first had generalized knowledge that union activity had occurred when the Union filed a petition and an election was conducted. MBE then had specific knowledge that Avila was involved when Barajas reveal that Elizabeth Lara knew of his union support and when, at Barajas' urging, Avila sought to get back the authorization card he had signed. Union animus is shown in a generalized form stemming from the comments made by Lara about unions in successive meetings he held with employees. A more virulent form of animus is shown by MBE's willingness to violate the law to prevent a free expression by its employees concerning their desire for representation, as shown by the unlawful suggestion that employees get back the union authorization cards that they had signed, coercively interrogating employees, and threatening an employee with unspecified reprisals because he had exercised his lawful right to support a union. Indeed, Avila himself was subject to each of these unlawful actions. Timing also supports the finding of an unlawful motive, inasmuch as Avila's termination occurred about two weeks after the election. And at least part of the justification given for Avila's discharge, that he falsely reported to his supervisor that he had left Rancho Grande product at the store, was simply false. This falsification was of no little concern, because it allowed the reasons MBE had to fire Avila to more congruently fit the Avila's last warning. I conclude the General Counsel has made a strong initial showing that Avila's termination was unlawfully motivated.

I now examine the record to determine whether MBE has met its burden of showing that it would have fired Avila even if he had not engaged in union activities. In fact, the shelves at a store serviced by Avila ran out of sales product, something that MBE certainly does not like to occur. I have concluded early in this decision that empty shelves happen, sometimes despite the best of efforts, and that there is no evidence that employees are automatically disciplined

And, for better or worse, there is nothing extraordinary about the unfair labor practices committed by MBE in this case. Board volumes are filled with cases where an employer breaks the law by firing union supporters and thereby snuffs out the organizational effort by employees. And mailing a notice to former employees is hardly the type of effective remedy that will have any effect. I deny the request.

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

ORDER

The Respondent, Marquez Brothers Enterprises, Inc., City of Industry, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting Teamsters Local 63, International Brotherhood of Teamsters or any other union.

(b) Coercively encouraging employees to ask the Union to return authorization that the employees had signed.

(c) Coercively interrogating any employee about union support or union activities.

(d) Threatening any employee with unspecified reprisals because he engaged in union activity.

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

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

(a) Within 14 days from the date of the Board's Order, offer Alfonso Mares and Javier Avila full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Alfonso Mares and Javier Avila 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.

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

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

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

10 (e) Within 14 days after service by the Region, post at its facility in City of Industry, California, copies of the attached notice in English and Spanish marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or
 15 other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the
 20 notice to all current employees and former employees employed by the Respondent at any time since June 2, 2010.

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

Dated, Washington, D.C. June 22, 2011

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 William G. Kocol
 Administrative Law Judge

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

APPENDIX

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Teamsters Local 63, International Brotherhood of Teamsters or any other union.

WE WILL NOT coercively encourage employees to ask the Union to return authorization that the employees had signed.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT threaten you with unspecified reprisals because you engaged in union activity.

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

WE WILL, within 14 days from the date of this Order, offer Alfonso Mares and Javier Avila full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Alfonso Mares and Javier Avila whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest compounded daily.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Alfonso Mares and Javier Avila, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

MARQUEZ BROTHERS ENTERPRISES, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

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

888 South Figueroa Street, 9th Floor

Los Angeles, California 90017-5449

Hours: 8:30 a.m. to 5 p.m.

213-894-5200.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 213-894-5229.