

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

CASE FARMS PROCESSING, INC.

and

UNITED FOOD & COMMERCIAL
WORKERS, LOCAL No. 880

Cases 8-CA-39152
8-CA-39187
8-CA-39257

Melanie Bordelois and Steven Wilson, Esqs.
for the General Counsel
Thomas Rooney and Melanie Webber, Esqs.,
for the Respondent.

DECISION

STATEMENT OF THE CASE

MARK CARISSIMI, Administrative Law Judge. This case was tried in Cleveland Ohio on May 16–May 20 and May 23–May 24, 2011. On February 24, 2011, an amended consolidated complaint and notice of hearing (the complaint) issued against Case Farms Processing, Inc., (the Respondent) based on charges and amended charges filed by United Food and Commercial Workers Union, Local No. 880 (the Union).¹

As amended at the hearing, the complaint alleges in paragraph 9 that the Respondent, violated Section 8(a)(1) of the Act by the following conduct of human resources manager Abel Acen: on August 11, 2010² telling an employee that little by little he was going to get rid of employees who participated in strikes at the Respondent's facility; in the beginning of August 2010, coercively telling an employee that he did not want the new employees to live in either Dover or New Philadelphia because supporters of the Union lived in those cities and they might convince the new employees to be union supporters; in the beginning of August 2010, soliciting

¹ The charge in 8–CA–39152 was filed by the Union on September 15, 2010; an amended charge was filed on October 14, 2010, and a second amended charge was filed on November 30, 2010. The charge in 8–CA–39187 was filed by the Union on October 14, 2010, and an amended charge was filed on January 31, 2011. The charge in 8–CA–39257 was filed by the Union on December 10, 2010.

² All dates refer to the year 2010 unless otherwise indicated.

5 employee Yerima Medero Ledesma (Ledesma) to be his agent for the purpose of making
 coercive statements to employees concerning the Union; on September 10, 2010, coercively
 telling an employee that he fired Union Committeeman Omar Carrion Rivera (Rivera) because
 he did not want people associated with the Union working in the plant; on September 10, 2010,
 10 soliciting Ledesma to be his agent for the purpose of conducting unlawful surveillance of
 employees' protected concerted activities and/or union activities; on September 14, 2010,
 through translator Kimberly Clark, threatening an employee with termination if he did not master
 a new job in a short amount of time, in retaliation for his protected concerted and/or union
 activities; in the end of September 2010, unlawfully creating the impression of surveillance and
 15 coercing employees by telling an employee that he had a list of union supporters in the "paws"
 and "live hang" departments; and in the end of September, 2010, unlawfully threatening an
 employee with termination along with the union supporters in the paws department if the
 employee continued to request to transfer there.

20 Paragraph 10 of the complaint alleges that the Respondent violated Section 8(a)(1) of the
 Act by the following conduct of its agent Ledesma: in August and September 2010, coercively
 telling employees that the Union did not do anything for the employees, that strikes were not
 effective and that employees should not go out on strike, and that there would not be a raise until
 the Union was no longer the employees- representative, and on September 10, 2010, engaging in
 surveillance of employees to discover their union activity.

25 Paragraph 11 alleges that the Respondent violated Section 8(a)(1) of the Act by the
 following conduct of debone department manager, Bernard Cooper: on September 2, 2010,
 coercively telling an employee that he could not visit the human resources office on his break
 and that he had to be in the break room during his breaks; on September 17, 2010, telling an
 30 employee, through translator Carlos Valladares, that he could not time the production lines, and
 that he had to be in the break room during his breaks; on September 17, 2010, threatening an
 employee, through translator Carlos Valladares, with unspecified adverse employment action if
 he protested not being allowed to time production lines.

35 Paragraph 12 of the complaint alleges that the Respondent violated Section 8(a)(3) and
 (1) of the Act by suspending its employees Rivera and Noe Vasquez Lozada (Lozada) on
 September 8, 2010, and terminating their employment on September 10, 2010.

40 Paragraph 13 of the complaint alleges that on September 14, 2010, the Respondent
 disciplined its employee Adolfo Jimenez in violation of Section 8(a)(3) and (1) of the Act.³

The Respondent's answer denied the material allegations of the complaint. On the entire
 record, including my observation of the demeanor of the witnesses⁴, and after considering the
 briefs timely filed by the parties, I make the following

³ On April 5, 2011, the Acting Regional Director for Region 8, on behalf of the National Labor
 Relations Board, filed petition for an injunction under Section 10(j) of the Act in the United States
 District Court, Northern District of Ohio, Eastern Division in Case 5:11-CV-679. On June 20, 2011,
 Judge David Dowd granted the Board's petition for 10(j) relief in its entirety.

⁴ In making the findings regarding the credibility of witnesses, I have considered their demeanor, the
 content of the testimony and the inherent probabilities based on the record as a whole. In some

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FINDINGS OF FACT

I. JURISDICTION

10 The Respondent, an Ohio corporation, is engaged in the business of processing chickens
at its facility in Winesburg, Ohio, where it annually sells and ships goods valued in excess of
\$50,000 directly to points located outside the State of Ohio. The Respondent admits, and I find,
that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of
the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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II. ALLEGED UNFAIR LABOR PRACTICES

Background

20 The Respondent operates poultry processing plants in Morgan and Goldsboro, North
Carolina, and Winesburg, Ohio. Its administrative offices are located in Troutman North
Carolina. The Respondent also operates two other facilities in Ohio, a feed mill in Massillon and
a hatchery in Strasburg.

25 This case involves only the processing plant in Winesburg, Ohio. On June 25, 2007, the
Union was certified as the bargaining representative of the production and maintenance
employees at that facility. There are approximate 475 employees in the unit. Since 2007 the
Respondent and the Union have met approximately 63 times to negotiate a collective-bargaining
agreement but as of the close of the hearing no agreement had been reached. In approximately
30 August 2008, unit employees engaged in a strike that lasted until April 2009. The Respondent
did not permanently replace any strikers during the strike.

The record reflects that in February 2010 approximately 82 percent of the Respondent's
unit employees were Hispanic with about 70 percent of that group being comprised of ethnic
35 Guatemalans. During the summer of 2010, the Respondent hired approximately 25 employees
from Miami, Florida. The vast majority of these employees were of Cuban descent. During
August and September 2010, unit employees engaged in a series of intermittent strikes lasting
from 1 to 3 days. These strikes occurred on August 11, 2010; August 20, 2010; August 31, 2010;
and September 10, 2010. Approximately 120 to 160 employees participated in each strike.
40 During the material time, Charles McDaniel has been the Respondent's vice president and
general manager of the Winesburg facility and Abel Acen has been the human resources
manager at that facility.

circumstances, I credited some, but not all, of what the witness said. I note, in this regard, that "nothing is more common in all kinds of judicial decisions than to believe some and not all" of the witness' testimony. *Jerry Ryce Builders*, 352 NLRB 1262, fn. 2 (2008), citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U. S. 474 (1951). See also *J. Shaw Associates, LLC* 349 NLRB 939, 939-940 (2007).

5 The Alleged Violations of Section 8(a)(1) of the Act

10 As noted above, paragraph 9 of the complaint alleges that several violations of Section 8(a) (1) were committed by the Respondent through Acen. Paragraph 10 alleges that the Respondent, through its agent Ledesma, committed violations of Section 8(a)(1). In support of these allegations, the Acting General Counsel relies primarily on the testimony of Ledesma, with some aspects of her testimony corroborated by former employee Armando Diaz and other witnesses. The Respondent relies primarily in the testimony of Acen, who denied all the allegations, with some aspects of his testimony being corroborated by other witnesses. I find neither Ledesma nor Acen to be entirely credible as both had deficiencies as a witness. Ledesma had a tendency to exaggerate and was prone to generalize at times. On the other hand, Acen was at times evasive and at other times testified in a manner that appeared to be designed to bolster the Respondent's defense. As I discuss the specific allegations of the complaint I will indicate why I credited one witness over another on a particular point.

20 Each party spent a significant amount of time and effort attempting to enhance the credibility of its own witnesses and to discredit the opposing party's witnesses. It is appropriate at the outset to resolve some of the issues raised regarding the credibility of Ledesma and Diaz. In this connection, the Respondent called Julian Hernandez Lopez (Lopez) and Edwin Diaz Sepulveda (Sepulveda) specifically to undermine the credibility of Ledesma and Diaz. 25 Sepulveda, a current employee of the Respondent, testified that on May 12, 2011, he was present at the home of one of the Respondent's former employees, José Casado. According to Sepulveda, Casado, Casado's wife, Diaz, and Nayda Coll, Diaz' wife, were all present. Sepulveda testified that Diaz told him that if he "wanted to get into the business of speaking bad about Abel, there was a percentage involved." When Sepulveda asked if it was \$100, Diaz allegedly responded that 30 he would give him \$7000-\$10,000. Diaz allegedly then stated that he wanted Sepulveda to say that Acen hired him to go into the Union to find out "what was said and if there was going to be a strike." (Tr. 930-932). Sepulveda testified that he reported this incident to Acen.

35 Diaz denied he was ever present at Casado's house and he specifically denied being there on May 12, 2011, and offering a bribe to Sepulveda to testify falsely regarding Acen. Diaz testified that he spent the majority of that day changing the oil on his car and produced a receipt from Wal-Mart dated May 12, 2011, establishing that he purchased oil, an oil filter and an air filter on that date. Diaz further testified that he has no social contact with Sepulveda. Coll corroborated the testimony of her husband in all material respects.

40 I credit the testimony of Diaz and Coll over that of Sepulveda. Sepulveda's claim is implausible as there is no ready explanation as to how Diaz had the kind of resources and the motive to attempt to bribe Sepulveda into testifying falsely that Acen committed a violation of Section 8(a)(1) of the Act.⁵ Moreover, Sepulveda's demeanor while testifying about this 45 allegation was not impressive.

Lopez is also a current employee of the Respondent. He testified that on May 15, 2011, he was present at Casado's house at approximately 7:30 p.m. when both Ledesma and Diaz arrived. According to Lopez, Diaz asked Mrs. Casado to convince her husband to give false

⁵ Neither José Casado nor his wife testified at the trial.

5 testimony and state that Acen asked him to infiltrate meetings of the union committee and report to him what was going on.

10 As noted above, both Diaz and Coll both testified that they had never been to the Casado home. Union Representative Timothy Mullins testified that he had dinner with Ledesma on May 15, 2011, in a restaurant located on the west side of Cleveland, Ohio and that Ledesma left the restaurant at approximately 7:30 p.m. to return to her hotel room in downtown Cleveland. I take administrative notice of the fact that the distance from the restaurant to New Philadelphia Ohio, where the Casado residence is located, is 92 miles and it would take approximately 1 hour and 32 minutes to drive that distance.⁶ I credit the testimony of Mullins as his testimony was detailed and plausible and his demeanor demonstrated certainty. Accordingly, I do not credit Lopez's claim that Ledesma was present at the Casado home at 7:30 p.m. on May 15, 2011. Because I find Lopez to be an entirely unreliable witness, I also do not credit his claim that Diaz attempted to solicit false testimony from Casado.

20 Turning to the specific allegations of the complaint, paragraph 9(A) of the complaint alleges that on or about August 11, 2010, Acen told an employee that he was going to get rid of employees who participated in strikes. Complaint paragraph 9(B) alleges that in the beginning of August 2010, Acen told an employee that he did not want new employees to live in either Dover or New Philadelphia because union supporters might convince the new employees to support the Union. Complaint paragraph 9(C) alleges that Acen solicited Ledesma to be his agent for purposes of making coercive statements to employees. Paragraph 10(A) alleges that Ledesma on multiple occasions in August 2010 and September 2010, made coercive statements to employees as an agent of the Respondent. In support of these allegations the Acting General Counsel relies on the testimony of Ledesma.

30 Ledesma testified that in the summer of 2010 she was living in Miami, Florida with her brother when they contacted an employment agency in Miami which informed them that the Respondent was hiring employees. After the initial contact with the employment agency, Ledesma spoke to Acen by phone around July 4. Acen informed Ledesma that she was hired and faxed documents to the employment agency in Miami for her and her brother to sign. Ledesma and her brother traveled from Miami to Canton Ohio by bus and arrived on July 21, 2010. According to Ledesma, Acen picked them up at the Canton bus terminal and took them to a hotel in Massillon, Ohio and informed them that the Respondent would pay for the first week at the hotel.

40 Ledesma stated that she began work for the Respondent on July 22 as a production worker on the processing line.⁷ Acen told her and some of the other newly hired employees who arrived from Florida that they could take breaks and lunch in the "small lunchroom", which is also referred to in the record as the "supervisors lunchroom" or the "training room."

⁶ Pursuant to permission I granted at the hearing, the applicable mapquest search was attached to the Acting General Counsel's brief as exhibit A.

⁷The Respondent terminated Ledesma for insubordination on November 2, 2010 (R. Exh. 23). I do not credit her testimony that she quit her employment that day after an argument with her supervisor and Acen about a work assignment. I find Acen's testimony that he discharged her to be more plausible under the circumstances and I therefore credit his testimony on this point.

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Near the end of her first week of work, Ledesma approached Acen and told him that she and her brother could not afford to stay at the motel and pay for it themselves. Acen told her that if she was going to look for a place to rent, he recommended that she look in Massillon. When she asked why, Acen replied that the majority of the employees lived in Dover and New Philadelphia and that is where the employees who belong to the Union lived and that if she moved there those employees were going to approach her and ask her to join the Union which he told her that she could not do (Tr. 381). Ledesma replied that since Acen had been there longer she would follow his advice. Ledesma and her brother found a rental property in Massillon.

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Ledesma testified that after she began her employment, she spoke to Acen on a daily basis in his office. In early August 2010, while at her workstation, she observed employees begin shouting. A supervisor approached her and told her to continue working and not pay any attention to those employees as they did not want to work and were going on strike. Later that day, she spoke to Acen in his office. She asked him what the strike was about and asked him why he permitted that conduct in the plant as it demonstrated a lack of respect. Acen responded there were "a lot of laws" in this country and he could not do anything but that he was going to "take them out one at a time." (Tr. 383-384.) Ledesma indicated that she and the other "Cubans" did not go on strike because they did not "have much time there" and were afraid of being fired (Tr. 385).

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According to Ledesma, at some point between the first and second strike in August 2010, Abel spoke to her about what to say to other employees in case there was another strike. When the next strike occurred, the striking employees first congregated in the employee lunchroom. Acen asked Ledesma, and two other nonstriking employees to speak to the striking employees. Ledesma testified that she spoke to the employees in the lunchroom and told them what Acen had prepared her to say. She told the striking employees to return back to work and, as long as they belonged to the Union, their salary was not going to increase (Tr. 386). Ledesma testified that she made the same statements to striking employees when the next strike occurred.

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The Acting General Counsel called Armando Diaz as a witness to corroborate portions of Ledesma's testimony. Diaz was also hired through an employment agency in Miami, Florida and is originally from Honduras. Diaz began work as a production worker on August 2, 2010. He was promoted to a position as training coordinator at the end of August 2010, and was terminated on November 26, 2010, for insubordination. He has testified that when he first began work, Acen told him that he would be welcome to have his lunch in the training room. According to Diaz, most of the employees that were hired in Florida ate lunch in the training room and not in the larger lunchroom that most employees used.

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Diaz testified that he observed employees engage in a strike shortly after he began working at the Respondent's facility, but that he never engaged in any of the strikes that occurred. According to Diaz, when the first strike occurred, Acen "told the people that came from Florida not to support the Union" and to go to the large employee lunchroom where the strikers were gathering and tell them not to walk out (Tr. 476).

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At the end of August or the beginning of September 2010, Diaz approached Acen with a proposal to implement a training program that would help employees avoid injuries. According

5 to Diaz, in a discussion with Acen regarding the training program on approximately September 10, Acen told him that "the purpose of bringing the workers from Florida was to replace the workers already there, the Guatemalans that were supporting the Union" because Acen wanted to get rid of the Union (Tr. 486).⁸

10 In defense of these allegations, Acen testified that he never met with Ledesma alone in his office. He also specifically denied that he ever told any employee not to look for apartments in Dover or New Philadelphia. Acen testified that he had never told employees that there would be no pay increases until the Union was gone and maintained that he never instructed Ledesma to speak on his behalf to other unit employees regarding the Union.

15 With respect to Acen's claim that he had never spoken to Ledesma alone in his office, the Respondent points to the testimony of the Respondent's human resources representative, Stephanie Ajanel, who testified that since Acen arrived at the plant in February 2010, the policy has been that two human resources representatives are always present when meeting with a unit employee. Ajanel also testified that she had never observed Ledesma meeting with Acen alone in his office.

20 Both Ajanel and the other human resources representative, Kimberly Clark, testified that employees going to Acen's office in the summer and fall of 2010 would have to go by their desks to go to Acen's office. A diagram prepared by Ajanel of the human resources office as it was configured in 2010 (GC Exh. 27) shows that there was a door leading from the main employee lunchroom into the human resources office that was located on the left side of the diagram. If an employee entered that door he or she would be in the human resources office. Acen's office was located on the right side of the diagram. To go to his office through the human resources office, one would have to pass by the desks of Ajanel and Clark. Ajanel also testified, however that there is another door to Acen's office. This door is also reflected on the right side of the diagram. This second door is located in the hallway that goes past the human resources office. There are windows in the human resources office by the desks of Ajanel and Clark that overlook this hallway. If an employee went down this hallway, he or she would go past the human resources office and arrive at the second door to Acen's office. Importantly, past this second door to Acen's office to the right, as one looks at the door, is the "training room" or "supervisor's lunchroom" where Diaz, Ledesma and some other employees took their lunch hour and breaks. Thus, if an employee was in the training room and went into Acen's office through the door from the hallway, the employee would not be observed by Clark or Ajanel.

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40 After considering all of the relevant circumstances, I find that Acen did meet with Ledesma in his office. The configuration of the Respondent's offices would permit such a

⁸ The Acting General Counsel did not allege in the complaint that any of the statements made by Acen that Diaz testified to, independently violated Section 8(a)(1) of the Act. Rather, the Acting General Counsel contends that the testimony of Diaz is supportive of the complaint allegations that Ledesma testified to since it establishes that Acen made similar statements to other employees. I indicated at the hearing that I would not consider as an independent unfair labor practice anything that was not specifically alleged in the complaint. Accordingly, as requested by the Acting General Counsel, I have only considered the testimony of Diaz as corroborative of that of Ledesma and I do not make any findings regarding whether the statements made to Diaz by Acen constitute independent unfair labor practices.

5 meeting to occur without being observed by Ajanel or Clark. As noted above, Diaz credibly testified that observed Ledesma meeting with Acen in his office, This is not surprising given that he also often took his lunch and breaks in the training room which is located near the door to Acen's office. I do not find, however, that Acen and Ledesma met daily, as Ledesma claimed in her trial testimony. Rather, I find that she spoke to him 2 or 3 times a week as she indicated in
10 her pretrial affidavit that was introduced into evidence by the Respondent (R. Exh. 11, p. 3). With respect to the remainder of Ledesma's testimony with respect to paragraphs 9 (A) (B) and (C) and paragraph 10 (A) of the complaint, her affidavit is consistent with her testimony.

15 Another factor convinces me that Ledesma was a confidant of Acen's and that they spoke frequently. Although Acen testified he did not speak of any personal matters involving his family with the employees of the Respondent, Ledesma 's testimony established that she knew Acen had a married daughter who lived in Cuba and the gender and approximate ages of his three other children. There is no credible evidence establishing how Ledesma would know such information unless Acen had told her. I find, after considering all the relevant circumstances,
20 Acen did have regular conversations with Ledesma in his office.

While Acen denied ever telling an employee where to live and claimed that he was not personally involved in helping Ledesma to find housing, he did not deny that he picked her and her brother up in Canton Ohio after they had arrived from Miami and took them to the motel that
25 the Respondent had arranged for them to stay in Massillon, Ohio. Since Acen was personally involved in Ledesma's housing situation at the outset, I find her testimony that he continued to speak with her about her housing situation to be more plausible than his denial that he had never done so, thus I credit her testimony on this point.

30 Accordingly, based on the credited testimony of Ledesma, as corroborated in certain respects by Diaz, I find that in the beginning of August 2010, Acen told Ledesma to look for apartments in Massillon because if she moved to the Dover/New Philadelphia area where the majority of the employees lived, she would be approached to join the Union, which, according to him, she could not do. In determining whether conduct violates Section 8 (a)(1) of the Act, the
35 Board applies the objective test of whether the conduct "reasonably tends to interfere with the free exercise of employee rights under the Act. *Tyson Foods, Inc.* 311 NLRB 552 (1993) citing *Hanes Hosiery*, 219 NLRB 338 (1975). Applying this standard, I find Acen's statement to Ledesma to look for apartments in Massillon because if she moved to the Dover/New Philadelphia area she would be approached to join the Union violates Section 8(a)(1) of the Act
40 as alleged in paragraph 9(B) of the complaint.

Crediting Ledesma, I find that on August 11, 2010, when Ledesma asked Acen why he tolerated employees going on strike, Acen responded that there were "a lot of laws" in this country and that he could not do anything, but that he will "take them out one at a time." It is
45 clear that through Acen's statement that he would remove employees who engaged in strikes one at a time, the Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 9 (B). *Penn Color Inc.*, 261 NLRB 395, 405 (1982).

I also credit Ledesma's testimony that after the first strike on August 11, Acen asked her
50 to speak to employees if there was another strike. Acen told her to urge the striking employees to return to work and to tell them as long as they belonged to the Union, their salary was not going

5 to increase. By Acen's solicitation of Ledesma to make statements discouraging other employees from supporting the Union, the Respondent violated Section 8(a)(1) of the Act. *Redwing Carriers*, 224 NLRB 530 (1976).

10 The Agency Status of Ledesma and the Alleged Coercive Statements Made by Her

Paragraph 8 of the complaint alleges that, during the material time, Ledesma was an agent of the Respondent within the meaning of Section 2(13) of the Act. Paragraph 10(A) of the complaint alleges that in August and September 2010, the Respondent violated Section 8(a)(1) by coercive statements that Ledesma made to employees. The Respondent contends that
 15 Ledesma was not its agent and therefore it is not responsible for any statements she may have made to employees.

Section 2(13) of the Act states :

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In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

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The Board and the courts have long held that in determining whether a person acts as an agent of another, the Board applies the common-law principles of agency. *Dr. Rico Perez Products*, 353 NLRB 453, 463 (2008); *NLRB v. Longshoreman (ILWU) Local 10 (Pacific Maritime Association)*, 283 F.2d 558, 563 (9th Cir. 1960) enfg. as modified 123 NLRB 559 (1959). Under the common-law rules of agency, an agency relationship can be established by
 30 vesting an agent with actual or apparent authority. Actual authority is "created by a principal's manifestation to an agent that, as reasonably understood by the agent, expresses the principal's assent that the agent takes action on the principal's behalf." *Restatement (Third) Of Agency, Section 3.01* "Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has
 35 authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." *Restatement (Third) of Agency, Section 2.03*.

The party asserting an individual acts as an agent must establish an agency relationship with regard to the specific conduct alleged to be unlawful. *Pan-Oston Co.*, 336 NLRB 305, 306
 40 (2001).

The Acting General Counsel principally contends in this case that Acen conferred upon Ledesma the actual authority to act as the Respondent's agent with respect to the matters alleged in paragraph 10 of the complaint.

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Based on the credited testimony of Ledesma, I find that Acen did, in fact, confer upon Ledesma actual authority to act as the Respondent's agent with respect to making statements to dissuade employees from engaging in a strike and claiming they would not receive a wage increase as long as they supported the Union. After the first strike that Ledesma had observed and discussed with Acen, he solicited Ledesma to make statements to employees should they go
 50 on strike again and also told her what to say in such a situation. When some employees again

5 engaged in strikes on August 20 and August 31, Acen directed Ledesma to go to the main
employee lunchroom and make the statements he had prepared for her. On both occasions
Ledesma told the striking employees to return to work because as long as they belonged to the
Union, their salary was not going to increase. In crediting Ledesma's testimony with regard to
10 her statements to the striking employees, I note that when she arrived to work at the plant at the
end of July she was unknowledgeable with regard to unions. When the first strike occurred on
August 11 she asked her then mentor Acen what the strike was about and asked him why he
permitted that conduct as it demonstrated a lack of respect. I find that it is entirely plausible that
Acen used Ledesma's allegiance to him as a basis to request her assistance in putting an end to
the partial strikes that the Respondent was experiencing at that time.

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In *Tyson Foods, Inc.*, 311 NLRB 522, (1993) the Board found that an employee
(Andrews) had both actual and apparent authority to be an agent of the employer with respect to
her circulation of a decertification petition. Regarding the actual authority of Andrews, the
evidence established that the employer solicited her to circulate the decertification petition and
20 she agreed to do so. Having solicited Andrews to circulate a decertification petition and assisting
her in her effort, the employer was found by the Board to be responsible for the circulation of the
petition and unfair labor practices that Andrews committed while so engaged. The Board noted
that there were two independent grounds to find that Andrews was an agent of the employer and
that she had both actual and apparent authority from management to solicit signatures for a
25 decertification petition. *Id.* at fn.2.

While the evidence in *Tyson Foods* established that both actual and apparent authority
were present, the Board's statement that there were two independent grounds to establish agency
clearly indicates that only one needs to be present for an agency relationship to be established.
30 Since I find that Acen gave Ledesma actual authority to act as spokesperson on behalf of the
Respondent and instructed her as to what to say, it is unnecessary to establish that she also had
apparent authority to act on the Respondent's behalf. Thus, I do not find persuasive the
Respondent's argument in its brief that Ledesma did not exhibit sufficient indicia to establish that
employees would reasonably believe that she was reflecting company policy and that she spoke
35 on behalf of management. This argument is only applicable when the issue involves whether an
employee has apparent authority.

With respect to the content of Ledesma's statements to employees, the Board has found a
supervisor's statement to employees that they would not get a pay raise until they got rid of the
40 union violated Section 8(a)(1) of the Act. *Southside Electric Cooperative, Inc.* 243 NLRB 390,
399 (1979). Accordingly, as alleged in paragraph 10(A) of the complaint I find that during the
August 20 and August 31, 2010, strikes, the Respondent, through its agent Ledesma, violated
Section 8 (a)(1) of the Act by telling employees that as long as they belonged to the Union their
salary would not increase.

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The September 10, 2010, Allegations Regarding Ledesma

Paragraph 9(D) of the complaint alleges that on September 10, 2010, Acen told an
employee that he fired Union Committeeman Rivera because he did not want people associated
50 with the Union working in the plant; paragraph 9(E) alleges that on the same date Acen solicited
Ledesma to be his agent for the purpose of conducting unlawful surveillance of employees

5 protected concerted and/or union activities; and paragraph 10(B) alleges that on that date Ledesma, as the Respondent's agent, engaged in the unlawful surveillance of employees' union activities.

10 The Acting General Counsel again relies on the testimony of Ledesma to support these allegations. Ledesma testified that on September 9 she had a dispute with her supervisor, William Sanchez, regarding a work assignment. According to Ledesma, Sanchez took her to Acen's office and Acen informed her that she was suspended for the day and to go home.⁹ According to Ledesma she left the plant around 9 a.m.(Tr. 438).

15 Ledesma testified she returned to the plant on September 10, 2010, at 8 a.m. and met with Acen. On direct examination, Ledesma testified that after the meeting she returned to work and, later in the morning, Acen told her that he wanted to see her in his office at lunchtime. When Ledesma arrived at Acen's office during her lunchbreak, he told her to forget what happened yesterday. Acen told her that she was not going to "lose the day" and that she should bring him
20 her timecard and he would give her the 8 hours. Ledesma testified she brought him her timecard and he signed it.¹⁰ When Acen initialed her timecard he asked Ledesma if she had been informed. When Ledesma asked about what, Acen asked her if she knew who Rivera was. Ledesma responded that he was the leader of the Union. Acen told her that he fired him because he was the leader of the Union.

25 On cross-examination, however, Ledesma's placement of the time of this alleged conversation was much different. On cross-examination, Ledesma testified that Acen asked her to bring him her timecard during the morning break. She further testified that she brought him the timecard at that time, which was approximately 9:20 a.m. and it was at that time that Acen
30 initialed her timecard and told her that he had fired Rivera because of his union activities.

Ledesma testified that while she was taking her lunchbreak in the supervisor's dining area, she was again asked to see Acen. She returned to his office where Acen told her that a strike may be pending because Rivera had been fired. He asked her to go outside the plant and
35 see what the employees who had gathered at the entrance to the plant with Union Representative Mullins were talking about. Ledesma went to the area of the plant entrance where Mullins, Rivera, and some other employees were gathered. As she approached them, they stopped talking and she then returned to Acen's office and reported to him that she had not heard anything because they stopped talking when she approached them.

40 Union Representative Mullins testified that he was present at the plant entrance at approximately noon on September 10, 2010, speaking to Rivera and other employees. A woman

⁹ GC Exh. 9 is a disciplinary counseling records dated September 9, 2010, signed by Ledesma. The document indicates:

Employee is being suspended for today pending investigation for being insubordinate. Employee is to return on 9/10/10 to the Human Resource Office to see Abel at 8:00.

On cross-examination, Ledesma claimed that Sanchez was not present when she signed the disciplinary counseling record (Tr. 437).

¹⁰ GC Exh. 11, Ledesma's timecard for Thursday, September 9, 2010, reflects that Acen initialed her timecard and wrote in 1600 (4 p.m.) and that she was paid for 7.67 hours for the day.

5 he later learned was Ledesma approached him but then stopped and turned away without saying anything.

10 The Respondent's witnesses had a much different version of the events of September 9 and 10. Ledesma's supervisor, William Sanchez, testified that shortly after Ledesma's afternoon break ended, she told him that she needed to go to the human resources office. When Ledesma had not returned after approximately 40 minutes, he went to the human resources office but did not find her there. Sanchez testified that he found her in the supervisors' lunchroom and instructed her to return to work. When Ledesma replied that she did not like being followed and refused Sanchez' order to return to work, Sanchez then told Ledesma to follow him to Acen's office. Following a meeting with Sanchez and Ledesma, Acen informed Ledesma that she was suspended for her conduct and ordered her to report to his office the next morning. (Tr. 879-15 882).

20 Acen also testified that Sanchez had come to the human resources office in the afternoon of September 9 looking for Ledesma. Afterwards both Sanchez and Ledesma came to Acen's office at approximately 3:45 p.m. and Sanchez reported to him that Ledesma had told him not to follow her when he found her in the supervisors' lunchroom and directed her to return to work. Acen then issued Ledesma the disciplinary counseling report noted above and suspended her for the rest of the day for insubordination. Acen testified that Ledesma left the plant at 4 p.m. but did not clock out, so he indicated on her card her time of departure as 4 p.m. and initialed the card. 25 He testified that Ledesma's normal ending time was approximately 6:15 p.m. and that Ledesma lost approximately 2 hours pay for September 9.

30 Consistent with the disciplinary counseling report that Ledesma had been issued, Acen testified that he met with Ledesma and Sanchez on September 8 at 8 a.m.. According to Sanchez, Ledesma apologized and said she would not leave her post without permission again. According to both Acen and Sanchez, the meeting lasted approximately 15 minutes and Sanchez and Ledesma then went to the production area. Acen denied that he spoke to Ledesma after her morning break on September 10. He further testified that he did not speak with her at her lunchbreak as he left the plant approximately 11 a.m. to take one of the Respondent's 35 representatives, Claudia Dellaion, to the airport and did not return to the plant after that as he had personal business to attend to.¹¹

40 When questioned as an adverse witness by counsel for the Acting General Counsel, Acen testified that on September 10 he was present at the meetings where employees Rivera and Lozada were informed of their terminations. He testified that Rivera was terminated between 9 a.m. and 9:30 a.m. and the meeting with Lozada followed shortly afterwards and that he was terminated at between 10:15 and 10:45 a.m. (Tr. 100-101)¹² In his direct testimony, Acen denied

¹¹ Kimberly Clark testified that at approximately 11:15 a.m. on September 10, Acen came to a meeting where Clark and Dellaion were giving training on a new timekeeping system, KRONOS, to get Dellaion to take her to the airport (Tr. 860).

¹² In support of its argument that Ledesma's version of the events that occurred on September 10 is not credible, the Respondent points to Rivera's testimony that he was informed of his discharge at 10 a.m. that morning (Tr. 226-227) and Clark's testimony that this meeting occurred at approximately 10 a.m.(Tr. 858-859).

5 that he had a private conversation with Ledesma on September 10 and he specifically denied that he told her to spy on Rivera and Mullins outside the plant.

10 When I consider all the relevant factors, I find that Ledesma's testimony regarding the events of September 9 and 10 is not sufficiently reliable to support findings of unfair labor practices. In the first instance, I note that there is a major inconsistency in Ledesma's direct testimony and her testimony on cross-examination. On direct examination she testified that at her lunchbreak on September 10, which occurred at approximately 11:50 a.m., Acen told her that he had fired Rivera, the "leader of the Union." On cross-examination, however Ledesma emphatically maintained that Acen told her about Rivera at her morning break which was at
15 approximately 9:20 a.m.

In addition to Ledesma's inconsistent testimony, however, I also rely on the inherent probabilities regarding the conflict in testimony between Ledesma and Acen, Sanchez, Clark, and Rivera. In this regard, I find that Rivera's termination meeting occurred between 9 a.m. and
20 10 a.m. Even if that meeting began at 9 a.m., I do not believe that Acen would have told Ledesma about Rivera's termination at approximately 9:20 a.m. With respect to Ledesma's direct examination testimony that the meeting with Acen occurred at her lunchbreak, the testimony of Acen, as corroborated by Clark establishes that he left the plant before them. Accordingly, since I do not credit Ledesma's testimony regarding the events of September 10, I find that Acen did
25 not tell Ledesma that he fired Rivera because he was "the leader of the Union" and that he did not solicit Ledesma to engage in surveillance of employees regarding a potential strike.¹³

I find Mullins to be a credible witness and thus conclude that Ledesma did approach him while he was at the plant gate with Rivera and other employees on September 10. However, I
30 find that she did this on her own volition and not because Acen asked her to do so. On the basis of the foregoing, I shall dismiss paragraph 9(D) and (E) and 10(B) of the complaint.

The Late September 2010 Complaint Allegations Involving Ledesma

35 Paragraphs 9 (G) and (H) of the complaint allege that at the end of September 2010, Acen created the impression of surveillance by telling an employee that he had a list of union supporters in the paws and live hang departments and threatened that he was going to get rid of the union supporters. Paragraph 9(I) alleges that at the end of September 2010, Acen threatened an employee with termination if the employee continued to request a transfer to the paws
40 department.

Ledesma was again the principal witness to support these allegations. Ledesma testified that in September 2010, her brother transferred to the live hang department. The hours in this department were from 5 a.m. to 4 p.m. As noted above, Ledesma's hours in the thigh department
45 were from 7 a.m. to approximately 6 p.m. Since Ledesma and her brother drove to work together, she arrived at work at 5 a.m. and waited for her shift to start. Her brother would then

¹³ Because I find Ledesma's testimony regarding the events of September 10 to be unreliable, I also do not credit her testimony regarding her suspension on September 9. Rather, I find the mutually corroborative testimony of Acen and Sanchez to be the more credible version of that event.

5 wait for her shift to end and at 6 p.m. They would then drive home together. Obviously, these schedules made for a very long day.

10 According to Ledesma, in late September 2010, she approached Acen and explained that she would like to have a transfer to the paws department so that she could work the same hours as her brother. Acen stated that he would not transfer her to that shift because those employees "belonged to the Union."¹⁴ Acen further stated that he was going to remove them "one by one" and asked her if she also wanted to be fired. Ledesma replied, "no" and said she would wait for a transfer. (Tr. 408.)

15 The fact that Ledesma was seeking a transfer to the paws department is corroborated by Sanchez. He testified that Ledesma asked him for such a transfer in September 2010, but he told her that she had to speak to Bernard Cooper, who possessed the authority to make such a transfer (Tr. 878).

20 Diaz testified that in November 2010, Acen told him he was going to transfer a trainer, José Otero, to the live hang department because there were only union supporters there. Acen stated that Otero had not participated in the strike and that he wanted to transfer him to that department to learn the work. Acen explained to Diaz that his reason for wanting to have Otero learn the job was to train other employees to do that work, as Acen had a concern that if the employees in the live hang department went on strike, they could stop all production at the plant.

25 Acen denied that he ever had a conversation with Ledesma about transferring her from the thigh department to the paws department. He specifically denied ever telling her that he would not transfer her to that department because union supporters worked there; that he wanted to terminate those employees and that he threatened her with termination if she persisted in seeking such a transfer (Tr. 991).

30 The inherent probabilities of the situation convince me that Ledesma testified accurately regarding this issue and I credit her testimony on this point. Her explanation for seeking the transfer is entirely plausible and the fact that she was seeking such a transfer is confirmed by Sanchez. Diaz credibly testified that Acen was concerned about the union supporters in the live hang department and the effect of production that would occur if they engaged in a strike. Moreover, Ledesma's testimony regarding these events demonstrated a certainty that I did not observe with respect to her testimony involving the events of September 9 and 10.

35 40 Another factor that I have considered in finding Ledesma's testimony regarding Acen's statements to her in late September 2010 to be credible is my belief that Acen felt that Ledesma betrayed his friendship and confidence in her to support him by her insubordinate conduct on September 9 that caused her brief suspension. I believe that Acen was sending a message to Ledesma not to overstep the bounds of their relationship and thus denied her request for a transfer in clear and unequivocal terms. On the basis of the foregoing, I find that the Respondent, through Acen, violated Section 8(a)(1) of the Act as alleged in paragraphs 9 (G) (H) and (I) of the complaint.¹⁵

¹⁴ Apparently both the live hang and paws departments work from 5 a.m. to 4 p.m.

¹⁵ I do not credit the testimony of current employee Juan Carlos Bueno Artola who the Respondent

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The Suspension and Termination of Lozada and Rivera

Facts

10 In paragraph 12 of the complaint, the Acting General Counsel alleges that the Respondent suspended Rivera and Lozada on September 8, 2010, and terminated them on September 10, 2010 because of their union and protected concerted activities.

15 Rivera began working for the Respondent in July 2003. He was an ardent union supporter and was active in a campaign to organize the Respondent's employees in 2007. In this regard, he signed an authorization card and afterwards went on home visits with Union Representative Mullins to solicit other employees to sign authorization cards. After the Union was certified as the bargaining representative in June 2007, he became one of the four employee members of the union committee which attended the bargaining sessions along with Mullins and other union
20 representatives. Rivera had attended approximately 45 bargaining meetings with that Respondent at the time of the trial. He participated in a 9-month strike lasted from approximately August 2008 to April 2009, and appeared daily on the picket line. In July 2010, he met with Acen as a *Weingarten* representative for employees who were faced with possible discipline. Rivera participated in the strikes that occurred in August 2010. The strike that occurred on August 20
25 and 21, was in protest of the suspension of five employees who had refused to perform newly assigned work. Rivera met with Acen, the then Plant Manager, Hemrick Edmunson, and Charles McDaniel, the general manager of the Respondent's Winesburg facility. At the time of his suspension on September 8, Rivera was assigned as a trainer on line 5. His duties involved training new employees and performing production work. He also performed the important duty

called to impugn the credibility of Ledesma. I find his testimony to be implausible. He testified that initially Ledesma made statements indicating she idolized Acen but that after she received her suspension in early September 2010, she told Artola that she was very angry with him and "she would not stop until she made dirt of Mr. Abel under her feet." (Tr. 950). I do not believe that after receiving the light penalty of 2 hours of loss of pay for her insubordinate behavior on September 9, Ledesma would have been so angered so as to make such a statement. I believe that but for her friendship with Acen, the penalty would have been much worse and that Ledesma realized she was let off lightly. I also note that Artola is active in encouraging employees to not support the union and his testimony demonstrated a bias against the union and its supporters. Thus, I credit Ledesma's denial that she did not make such statements to Artola. On the other hand, I do not credit Ledesma's testimony that she received a phone call from Padilla and Acen in January 2011, in which she was offered her job back. According to Ledesma, after Padilla called her, Acen got on the phone and said to her "forget everything that had happened in Case Farms and to come back to work." (Tr. 1059). I find it highly unlikely that after Ledesma's continued insubordinate behavior finally caused Acen to discharge her in November 2010, he would offer her a job again in January 2011, in order to dissuade her from testifying against the Respondent. Accordingly, I credit his denial of this event. I note, however, that this involves a collateral issue regarding the overall credibility of Ledesma and Acen. Ledesma struck me as an emotional person and I believe her testimony on this point was an attempt to respond to the attacks involving her credibility made by the Respondent. My disbelief of her testimony on this issue does not lead me to believe, however, that Ledesma did not testify truthfully regarding the matters on which I have credited her.

5 of preparing the rotation list, which rotated employees on a production line to four different tasks throughout the day.

10 Lozado began working for the Respondent on February 26, 2008, as a production employee. He participated in a 9-month strike during 2008–2009. He also participated in all of the strikes that occurred in August 2010. On approximately August 20, 2010, together with another employee Adolfo Jimenez, he spoke to McDaniel regarding the five suspended employees and urged McDaniel to reconsider their suspensions.¹⁶

15 On August 31, 2010, Lozada and another employee, Arquelio Reyes, were working on line 5 when supervisor Adolfo Padilla directed both employees to work at another station, thigh deboning, on the same line. When both employees refuse to follow Padilla's order, Acen suspended both Lozada and Reyes for 5 days.¹⁷

20 After serving his suspension, Lozada returned to work on September 7. That morning Padilla approached Lozada while he was working on line 5 and told him he was going to be permanently transferred to line 2 (Tr. 606).¹⁸ Prior to speaking with Lozada, Padilla had received authorization from Bernard Cooper, the deboning manager, to permanently reassign Lozada from line 5 to line 2 and Reyes from line 5 to line 1 in order to fully staff those lines.

25 According to the credible testimony of José Angel Otero, the trainer on line 2, when Padilla and the Lozada arrived at line 2, Padilla told Otero, in the presence of Lozada, that Lozada's transfer to line 2 was permanent. According to Otero, Lozada told him after Padilla left, that he did not want to work on line 2 (Tr. 772).¹⁹

30 Lozada worked the remainder of September 7 on line 2 but on the morning of September 8 returned to line 5 and began working. Padilla testified that Lozada was needed to commence production on line 2 so he proceeded to line 5 to speak to him accompanied by Ayala and Cooper. When they arrived at Lozada's workstation on line 5, Padilla asked him why he had not

¹⁶ Jimenez testified that he attended a meeting with Lozada and McDaniel but recalled it was at the time of the first strike in August 2010. Lozada's testimony is more detailed and I find it is more reliable as to when the meeting occurred. The testimony of Lozada and Jimenez is mutually corroborative regarding the fact that they had a meeting with McDaniel to discuss issues involving one of the August 2010 strikes. I credit their testimony that Lozada was present at such a meeting over McDaniel's denial that he had ever met with Lozada.

¹⁷ The Acting General Counsel does not allege that this suspension of Lozada was unlawful.

¹⁸ Lozada testified that Padilla did not tell him how long he would be working on line 2 (Tr. 313). I credit Padilla over Lozada on this point. Padilla's testimony is corroborated by that of supervisor Ramon Ayala, who was present when Padilla spoke to Lozada (Tr. 679). In addition, I find it implausible that Padilla would not tell Lozada whether he was to work on line 2 for only the remainder of the day or permanently. However, I do not believe Padilla's testimony that he also informed Rivera of Lozada's permanent transfer on September 7. The manner in which the events of September 8 unfolded convinces me that Rivera had no prior knowledge of Lozada's transfer.

¹⁹ I credit Otero as he had no motivation to be untruthful regarding this issue. In addition I find his testimony plausible in that Padilla admitted in his testimony that working on line 2 was harder than line 5 "because it's not his line" (Tr. 314).

5 reported to line 2 that morning. After first ignoring Padilla, Lozada replied that line 5 was his line and he was not going to report to line 2.

10 Lozada testified that on the morning of September 8, he returned to line 5 because no one had told him he had been permanently assigned to line 2. According to Lozada, when Padilla arrived at his workstation on line 5 and asked him what he was doing on line 5, Lozada replied that he was working. Padilla then asked him why he was on line 5, when on the previous day he had been told he was to work on line 2. Lozada stated "you never said anything to me, that's why I'm on line 5" (Tr. 317). Rivera then approached them and asked "what's going on here." Padilla replied that he had told Lozada he was to work on line 2 permanently. Rivera responded he did not know why employees who knew how to work on line 5 were taken to other lines. Rivera said that if every line has its own trainer, he did not know why "they don't train their own people." Rivera then stated that he knew that Lozada had been suspended in August and asked Padilla "are you still pressuring him." Padilla replied no and then Padilla, Cooper, and Ayala left the area. Lozada testified that Rivera and three supervisors were behind him during the discussion between Rivera and Padilla and, since he continued to work, he could not see them, that he could hear them. On cross-examination, Lozada acknowledged that during the conversation between Rivera and Padilla, some employees began to shout "strike" and he also heard some employees bang their knives (Tr. 344-345).

25 Rivera testified that at approximately 8 a.m. on September 8, he was training an employee on line 5 when he observed Padilla speaking to Lozada. When Rivera arrived at Lozada's workstation, he heard Padilla tell Lozada that he had to go to line 2 and Lozada replied that line 5 was his line and he did not want to go (Tr. 214). Rivera then stepped between Padilla and Lozada and told Padilla that he could not take Lozada, as supervisors come to his line and take employees and the only thing that he has left are new employees.²⁰ According to Rivera, he then told Padilla that he was threatening Lozada; Padilla replied that he was not. Rivera then said that he had trained Lozada and that he was staying on line 5. Cooper then told Padilla "let's go" and the 3 supervisors left the area. Rivera testified that he was never closer than approximately 2 meters (6 1/2 feet) from Padilla during their conversation and that he did not have his deboning knife in his hand while he spoke.

Rivera's testimony is corroborated in all material respects by current employee Yasha Welesca Rivers Melendez (Melendez) who was called as a witness by the Acting General Counsel. According to Melendez, she was working on line 5 approximately 10 feet away from

²⁰ The Respondent's Winesburg facility has 5 deboning lines and a 6th line that is used exclusively for training. In order to meet customer demand lines, 1 through 4 run at 30 birds per minute. In order to maintain that line speed those lines have to be fully staffed. Since the Respondent's facility has a high absenteeism rate, as much as 30 percent on some days, the Respondent at times assigns trained employees from line 5 to lines 1-4 in order to fully staffed them with trained employees.

When experienced employees are taken from line 5, the remaining employees on line 5 have additional work to do to maintain line speed, although line 5 operates at a lower speed than the other lines because of lack of employees to fully staff that line and the experience level of the employees. In addition, as the trainer on line 5, the loss of experienced employees required Rivera to have to train a substantial number of new employees who had received only the most basic training on line 6. Rivera had raised these concerns with members of management during the summer of 2010 when line 5 was assigned a substantial number of new employees.

5 Lozada when Padilla approached him. Melendez heard Padilla tell Lozada that he had to go to
another line but Lozada told Padilla that he was not going because line 5 was his line (Tr. 1148–
1149). She also saw Rivera step between Padilla and Lozada and tell Padilla that Lozada was not
going to another line because line 5 was his line (Tr. 1149). According to Melendez, while
10 Rivera was speaking to Padilla, Rivera did not have anything in his hands and had his hands at
his waist during the conversation (Tr. 1141–1143). While Padilla and Rivera were speaking,
some of the employees in the immediate vicinity began shouting "strike". Padilla, Ayala, and
Cooper then left the area while Lozada continued to work on line 5. Melendez testified that she
was not friendly with Rivera outside of work and is not a member of the union committee.

15 The testimony of Padilla, Ayala, and Cooper varies significantly from that of Rivera and
Melendez regarding this incident. According to Padilla, when Rivera spoke to him regarding
Lozada's transfer, Rivera was yelling and shaking his finger in Padilla's face (Tr. 614.) Rivera
had his deboning knife in one hand and repeatedly shouted that Lozada was "going to stay here."
(Tr. 619.) Padilla further testified that while Rivera was speaking approximately 25 employees
20 began shouting and banging their deboning knives on the worktable and that production stopped.
Padilla also testified that employees began to gather around him. Cooper then asked Padilla to
leave the area with him and at that point the three supervisors left.

25 Ayala also testified that Rivera was shaking his finger in Padilla's face while they were
talking and that he had his deboning knife in his hand. Cooper testified that while he does not
speak Spanish, the language that Padilla and Rivera were conversing in that day, he observed
Rivera put his finger in Padilla's face and that he appeared angry.

30 Jose Angel Otero was also called as a witness by the Respondent regarding this incident.
Otero testified that during the discussion between Rivera and Padilla on September 8, he was
working on line 2. While he could see Rivera speaking to Padilla, he could not hear what they
were saying. During their discussion, about 20 to 25 employees began shouting and hit the
production line with their knives. On cross-examination, Otero denied that the employees were
shouting "huelga" (strike in Spanish) and maintained they were "just making a lot of noise and
35 banging their knives on the tables". (Tr. 779.)

To the extent that the testimony of Rivera and Melendez conflicts with that of Padilla,
Cooper, and Ayala regarding the incident between Padilla and Rivera, I credit Rivera and
Melendez. I was impressed by their demeanor and the fact that their testimony was consistent on
40 both direct and cross-examination. Of all the witnesses who testified regarding this incident, I
find Melendez to be the most believable. Although she appeared somewhat shy and reticent
because of the gravity of her role as a witness in this proceeding, she had an excellent
recollection of the events and her testimony was credible in all respects. As a current employee
who testified against the interest of her employer, it is unlikely that her testimony is false. The
45 Board has noted that when employees testify against the interest of their employer, they subject
themselves to possibilities of recrimination and the perils would be even greater if such
testimony was false. *Bloomington-Normal Seating Co.*, 339 NLRB 191, 193 (2003). See also
Flexisreel Industries, 316 NLRB 745 (1995); *Federal Stainless Sink Division*, 197 NLRB 49,
491 (1972).

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5 In contrast, the overly dramatic testimony of Padilla, Ayala, and Cooper appeared to be
contrived and, in my view, all three shaped their testimony in a way designed to bolster the
Respondent's defense. In addition to not being impressed by their demeanor while testifying
about the conversation between Padilla and Rivera and the improbable nature of their testimony,
10 there are other factors that I have considered in determining their testimony regarding this
incident is not reliable. I note that none of the statements taken during the Respondent's
investigation that were signed by Padilla (R. Exh. 15), Cooper (R. Exh. 18), and Ayala (R. Exh.
19) mentioned that Rivera was holding a deboning knife during this conversation. I have also
considered Ledesma's testimony that, a couple of days after Rivera was discharged, she was in
15 Acen's office with Padilla. According to Ledesma, when she asked why Rivera was fired, Acen
replied that he had an argument with Padilla. Acen then went on to tell Padilla that he had to say
"he feared for his life so that Omar wouldn't come back to the plant" (Tr. 1057). Padilla and
Rivera denied such a conversation took place. I credit Ledesma on this point as I find her
testimony plausible in light of Padilla's greatly exaggerated version of the conversation between
20 himself and Rivera.

On another of the many issues involving credibility raised by the parties, I credit the
testimony of Mullins and former employee and Union Committee Member Carmen Beltran
regarding statements made by Ayala at a union meeting held at a community center named Mi
Guate on February 8, 2011. According to Mullins, Ayala was present at this meeting and asked
25 Mullins if the Union could help him with a problem his girlfriend had at work. After discussing
this matter, Mullins asked Ayala if he was present when Rivera was fired. Ayala replied that he
was and that "Omar didn't do anything" (Tr. 1078). Beltran also testified that she was present at
this meeting and that Ayala told her Rivera was "innocent".²¹

30 Ayala, on cross-examination, denied that he had ever been to Mi Guate and testified he
had never told anyone that Rivera had not threatened Padilla (Tr. 714-715). When called as a
rebuttal witness, Ayala claimed that he had taken his girlfriend to the union meeting at Mi Guate
on February 11, 2008, and that he later picked her up, and that he had never gone into the
meeting.

35 I credit the testimony of Mullins and Beltran in respect to the statements regarding Rivera
made by Ayala at a union meeting held on February 11, 2008. I found the demeanor of these two
witnesses to be persuasive and their testimony had sufficient detail to be reliable. Ayala's
demeanor did not impress me and he gave conflicting testimony about whether he had ever been
40 to Mi Guate.

With regard to Lozada, I credit his testimony regarding the substance of the discussion
between Padilla and Rivera, as it is consistent with the testimony both Rivera and Melendez
made. However, I do not credit his testimony that Padilla did not inform him of the permanent
45 nature of his transfer because, as I have noted above, I find such testimony to be implausible
under all the circumstances. I have given little weight to Otero's testimony as he was not in a

²¹ Beltran further testified that Ayala told her that he knew that Acen had a plan to let go of the
representatives of the Union and other employees from Guatemala. I give no weight to this portion of
Beltran's testimony because it is unclear from her testimony whether this was something that Ayala heard
Acen say or whether this was Ayala's opinion of Acen's intentions.

5 position to hear what Rivera and Padilla were saying. In addition, he was unable to testify as to what employees were shouting during the exchange between Rivera and Padilla. His testimony did not have the specificity required to underlie specific findings.

10 After Cooper and Padilla left line 5 on September 8, Padilla reported the confrontation he had with Rivera to Acen then reported to McDaniel. McDaniel interviewed Padilla, Cooper, and Ayala regarding the incident. Acen interviewed Rivera and Lozada during the afternoon of September 8 and, pursuant to McDaniel's instructions, informed them they were suspended pending further investigation. Human resources assistant Clark was present during these interviews of Lozada and Rivera and Acen directed her to type her notes of the interviews.

15

After suspending Rivera and Lozada, Acen obtained written statements from Padilla, Cooper, Ayala, and Otero regarding the incident. Acen presented the four statements and the notes of the Rivera and Lozada interviews to McDaniel.

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McDaniel testified that he reviewed the statements of the three supervisors and Otero and the typewritten interviews of Rivera and Lozada. McDaniel testified without contradiction that he made the decision to terminate Rivera and Lozada. With respect to Rivera, Acen made no recommendation as to what discipline, if any, should be administered. McDaniel consulted with William Lovette the Respondent's president; Robert Barragan the Respondent's director of human resources; Kenneth Wilson, the Respondent's representative in collective-bargaining negotiations; and the Respondent's attorney. McDaniel testified that he discharged Rivera because of the threatening insubordinate manner in which he discussed Lozada's transfer with Padilla. He further testified that the most troubling aspect of Rivera's behavior was that it occurred on the production floor and that "it was almost a riot situation out there." (Tr. 796; 800-801.) McDaniel further testified discharging Rivera was a difficult decision because he had acted reasonably as the union committeeman and was a "good worker." (Tr. 800).

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McDaniel testified that he also made a decision to terminate Lozada because of his insubordination and refusal to accept assignments. McDaniel relied on both the suspension that Lozada received on August 31 for refusing to rotate to another workstation and his refusal to accept the transfer to line 2 on September 8.

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According to McDaniel, he made the decision to terminate Rivera approximately 8:30 a.m. on September 10. He then called Acen into his office and instructed him as to what to put on the termination notice. Rivera's disciplinary counseling record (GC Exh. 7) is dated September 10, and indicates he was terminated because of "Grossly disrespectful and intimidating conduct towards a supervisor." Lozada's disciplinary counseling record (GC Exh. 8) is also dated September 10 and indicates that he was terminated for "Failure to perform work as assigned and insubordination."

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Rivera was called to Acen's office at approximately 10 a.m. on September 10, where McDaniel, Acen, and Clark were present. According to Rivera's undisputed testimony, Acen told Rivera that the Respondent had investigated the incident on September 8, and determined that Rivera had threatened Padilla. Rivera protested saying he did not threaten him, Acen repeated that the investigation revealed that he had. McDaniel said he was sorry because he liked

5 Rivera but that he was dismissed. McDaniel then left and Rivera was given his termination notice by Acen. Lozada was then called into the office and given his termination notice.

Analysis

10 Rivera

The evidence is clear that Rivera was the most active union supporter in the plant. He was one of the four employee members of the Union's negotiating committee and had attended over 45 bargaining meetings. He had an active role in the 9-month strike against the Respondent in 2008-2009 and had met with management representatives regarding a variety of issues involving terms and conditions of employment.

15 It is also clear that the Respondent discharged Rivera because what it perceived to be his "grossly disrespectful and intimidating" conduct toward a supervisor with respect to his confrontation with Padilla on September 8.

The first question to be addressed in this case is whether Rivera was actively engaged in Section 7 activity when he discussed Lozada's transfer with Padilla. The Board has held that even when employees are actively engaged in exercising Section 7 rights, they can lose the protection of the act by engaging in opprobrious conduct. *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979). The Acting General Counsel contends that Rivera was, in fact, engaged in Section 7 activity while he was engaged in his discussion with Padilla. The Respondent contends that he was engaged solely in a personal protest by attempting to shift more of the burden of training new hires to other trainers, rather than engaging in any union or protected concerted activity during this discussion.

I find that the evidence supports the conclusion that Rivera was in fact engaged in Section 7 activity when he discussed Lozada's transfer with Padilla. When Rivera arrived at the discussion that was occurring between Lozada and Padilla, he immediately became aware that Padilla was telling Lozada to report to line 2 and that Lozada did not want to go, but Padilla was insisting that he do so. Rivera told Padilla that he could not take Lozada from line 5 because supervisors were always taking employees from his line and he was left with only new employees. When Padilla continued to insist that Lozada report to line 2, Rivera stated that he knew that Lozada had been suspended in August and that Padilla was threatening him. During the 3 to 5 minutes that Rivera and Padilla were discussing Lozada's transfer, some employees located nearby began to shout "strike" in Spanish. Cooper then told Padilla and Ayala that the supervisors should leave the area and they did so.

Rivera's actions demonstrate that he was acting as Lozada's representative during his discussions with Padilla regarding Lozada's transfer to line 2. Rivera was a union committeeman, the most active union supporter in the plant. On a number of occasions he had intervened with supervisors in an effort to represent the interest of unit employees regarding working conditions. In this regard, in late August 2010, he had met with a number of supervisors including McDaniel, in an effort to return 5 suspended employees to work. When he became involved in the discussion with Padilla regarding Lozada's transfer on September 8, he was aware of Lozada's recent suspension for refusing to rotate assignments and alleged that Padilla's directive

5 to Lozada was threatening. As a member of the Union's employee committee and the most active
union supporter in a facility, I find that Rivera's intervention in this matter was, in fact, union
activity. In this connection, I note that he had represented the Union's interest in many previous
meetings with supervisors regarding terms and conditions of employment. I also note that the
Board has held, with court approval, that the action of one employee espousing the cause of
10 another is protected concerted activity. *Chromalloy Gas Turbine Corp.* 331 NLRB 858 (2000);
Guardian Industries Corp., 319 NLRB 542, 549 (1995); *Wilson Trophy Co. v. NLRB*, 989 F.2d
1502 (8 Cir. 1993) enfg. 307 NLRB 509 (1992). I also note that the merits of the complaints
about the transfer of Lozada are not determinative of whether such conduct is protected. In this
regard, the Board has held that employee complaints about working conditions are protected
15 regardless of the merits of the particular complaint. *Skrl Die Casting, Inc.* 222 NLRB 85, 89
(1976).

The discussion between Rivera and Padilla involved a discussion of Lozada's line
assignment and the manner in which lines are staffed, both of which are clearly terms and
20 conditions of employment. The evidence establishes that the staffing of lines and line transfers
were matters of great concern to employees in the plant. In this regard, Lozada testified that he
viewed working on line 2 as somewhat more difficult than line 5 because of the differences in
some of the work that was performed (Tr. 314). Rivera testified that when a line is not fully
staffed "the product piles up" and the remaining employees have to perform more work (Tr.
25 290). The transfer of employees from line 5 was also a concern to Rivera personally because
removing experienced employees from line 5 made it difficult to maintain production while also
training a large number of new employees. The Board has clearly indicated that when an
employee engages in concerted activity, the fact that the employee also may have acted for
personal reasons does not detract from the concerted nature of the employee's conduct. *Circle K*
30 *Corp.*, 305 NLRB 932, 933 fn. 9 (1991); *Astro Tool & Die Corp.*, 320 NLRB 1157, 1161-1162
(1996). I do not agree with the Respondent's position that Rivera's discussion with Padilla was
purely an individual concern and an attempt to shift more of the training of new hires to other
lines and retain more experienced employees on line 5. When Rivera interceded with Padilla, he
was acting as Lozada's advocate in the matter, thus establishing that he was not pursuing solely
35 an individual concern. Accordingly, I find the cases relied on by the Respondent support of its
position, including *Media General Operations Inc., d/b/a. The Tampa Tribune*, 346 NLRB 369
(2006); *K-Mart Corp.*, 341 NLRB 702 (2004) and *Holling Press, Inc.* 343 NLRB 301, 302
(2004), to be distinguishable from the instant matter as those cases all involved employees who
were pursuing only personal complaints.

40 It is also apparent that when employees in the immediate vicinity of the conversation
between Padilla and Rivera regarding Lozada's transfer from line 5 overheard the discussion,
some of them began saying "strike" during the conversation. While there was no actual work
stoppage, the fact that employees began saying strike, establishes they were reflecting support
45 for the opposition of Rivera and Lozada to the transfer. The fact that these employees reflected
support for the position of Rivera and Lozada is further indication that Rivera was engaged in
concerted activity during his discussion with Padilla. I note that the Board has found that
concerted activity occurs when a second employee spontaneously joins with an individual
employee's protest. *Worldmark By Wyndham*, 356 NLRB No. 104 at sl. op. p.3 (2011).

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5 Since I have concluded that Rivera was, in fact engaged in union and protected concerted
 activity while discussing Lozada's transfer with Padilla, I must determine whether his conduct
 was such that it removed him from the protection of the Act. In *Atlantic Steel*, supra, the Board
 found that when an employee's discharge is based on conduct that occurred while the employee
 was engaging in union or concerted activity that is normally protected, opprobrious conduct will
 10 remove the employee from the protection of the Act. To determine whether the alleged
 misconduct is sufficient to remove employees from the Act's protection, the Board considers the
 following factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the
 nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an
 employer's unfair labor practices. *Id.* at 816. *Datwyler Rubber and Plastics Inc.*, 350 NLRB 669,
 15 670 (2007).²²

 With respect to the first factor, the discussion between Padilla, Lozada, and Rivera took
 place in the production area where other employees were present. As noted above, other
 employees expressed support for Padilla and Lozada by shouting "strike" during the
 20 conversation. While I find that work on the processing line did not stop, the brief disruption in
 the processing area establishes that the first factor weighs against Rivera's conduct being
 protected.

 The second factor, the subject matter of the conversation, weighs in favor of Rivera's
 25 conduct being protected. The discussion between Padilla and Rivera involved the transfer of
 Lozada and the staffing of lines, both of which are clearly terms and conditions of employment.
 As a union committeeman, Rivera had a vested interest in representing employees regarding
 what he perceived to be detrimental changes in terms and conditions of employment and had
 previous discussions with various members of management regarding the staffing of lines and
 30 transfers between the lines.

 With respect to the third factor, the nature of the employee's outburst, the credited
 testimony establishes that this factor also weighs in favor of Rivera's conduct being protected. In
 this regard it is undisputed that Rivera did not assault Rivera, make any threats, or use profanity.
 35 The credited testimony of Rivera and Melendez establishes that Rivera did not have his deboning
 knife in his hand and that he did not point his finger in Padilla's face. I also find that while some
 employee shouted "strike" during the conversation between Padilla and Rivera, employees
 continued to work and did not crowd around Padilla.²³ Rivera did challenge Padilla's directive

²² Both parties have also discussed in their briefs the applicability of the Supreme Court's decision in *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964) to the instant case. In *Burnup & Sims* the Court held that Section 8(a)(1) of the Act is violated if it is shown that a discharged employee was engaged in protected activity, that the employer had knowledge of the protected activity, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of the misconduct. *Id.* at 23. In this case, it is clear that Padilla and Rivera had a confrontation regarding Lozada's transfer. In my view, under these circumstances, the appropriate analysis is contained in *Atlantic Steel* and its progeny.

²³ Since I do not believe the testimony of Ayala, Padilla, and Cooper regarding what occurred during the discussion between Rivera and Padilla, I have given no weight to their testimony regarding their subjective impressions of this incident. I note, moreover, that in cases involving the application of the *Atlantic Steel* analysis, the Board has recently indicated that an objective test is applied to determine whether the alleged misconduct is sufficient to remove an employee from the protection of the Act and

5 that Lozada returned to line 2 on a permanent basis. While Rivera's conduct caused employees to consider engaging in a strike, a work stoppage did not occur and disruption of production was very brief, lasting no more than 3 to 5 minutes. Rivera's protest of Padilla's assignment was clearly impulsive in nature. The Act permits some leeway for impulsive behavior which must be balanced against an employer's right to maintain order and discipline. *Thor Power Tool Co.*, 148
 10 NLRB 1379, 1380 (1964), enfd. 351 F.2d 584 (7th Cir. 1965); *Beverly, Health & Rehabilitation Services*, 346 NLRB 1319, 1323 (2006); *American Steel Erectors, Inc.* 339 NLRB 1315, 1316 (2003). I find that Rivera's conduct in objecting to the reassignment of Lozada unaccompanied by profanity or threatening behavior did not interfere with the Respondent's legitimate right to maintain discipline and order. Accordingly, I also conclude that this factor favors the conduct of
 15 Rivera being protected.

In so concluding, I find that the instant case is distinguishable from the cases relied on by the Respondent in support of its position that the conduct of Rivera warranted discharge. For example, in *Daimler Chrysler*, 344 NLRB 1324 (2005), an employee approached a supervisor in
 20 an open area where other employees and supervisors worked and used sustained profanity in a loud ad hominem attack on a supervisor that other workers overheard. *Id.* at 1329-1330. The Board concluded that the employee's "sustained profanity in a work area would reasonably tend to affect workplace discipline by undermining the authority of the supervisor subject to his vituperative attack." *Id.* at 1329. Even though the employee was engaged in protected grievance
 25 investigation activity, his misconduct removed him from the protection of the Act. In *Marico Enterprises, Inc.*, 283 NLRB 726 (1987) an employee, Pauyo, was engaged in Section 7 activities during a conversation with a supervisor (Cohen). During the conversation, however, Pauyo began yelling, and making gestures imitating sexual intercourse. Employees on the shop floor began clapping and giving encouragement to Pauyo. Cohen requested Pauyo to leave the
 30 area because of the disturbance he was creating. Pauyo responded that Cohen would have to fire him before he would leave. When Pauyo refused to leave the area after two further requests, he was discharged. Under these circumstances, the Board found that Pauyo's extensive and abusive actions and refusal to leave the area unless fired removed him from the protection of the Act. Clearly, the manner in which Rivera lodged a protest to Lozada's transfer from line 5 was
 35 substantially different than the conduct of the employees in these cases.

While I find that the Respondent committed contemporaneous unfair labor practices, there is no evidence that the unfair labor practices are related to or provoked Rivera to interject himself into the discussion between Lozada and Padilla and thus the fourth *Atlantic Steel* factor
 40 is neutral in this case.

After considering the *Atlantic Steel* factors I find that the first factor, the place of the discussion weighs against finding the conduct of Rivera to be protected, as his discussion with Padilla on the production floor could be heard by other employees and did cause a brief
 45 disruption of the processing line. With respect to the second factor, the discussion involved terms and conditions of employment and thus weighs in favor of Rivera's conduct being protected.

that subjective impressions regarding the conduct have no value. *Kiewit Power Construction Co.*, 305 NLRB No. 150 at sl. op. p. 4.

5 Factor three, the nature of the outburst, also weighs in favor of protection. While Rivera
 challenged Padilla with regard to whether Lozada's transfer was necessary or warranted, Rivera
 used no profanity and the credited testimony establishes he did not act in a threatening manner.
 The fourth factor is neutral as the unfair labor practices that the Respondent committed did not
 10 provoke Rivera's conduct. Accordingly after careful consideration of all the factors, I find that
 the two factors favoring protection outweigh the one factor that supports finding Rivera's
 conduct unprotected. I find therefore that by first suspending and then terminating Rivera for his
 conduct on September 8, the Respondent violated Section 8(a)(3) and (1) of the Act.

15 In a number of cases the Board has indicated that when an employee is discharged for
 conduct that occurred while the employee was engaged in Section 7 activities, it is not necessary
 to analyze the case under the Board's *Wright Line* doctrine.²⁴ *Kiewit Power Constr. Co.*, supra, at
 sl. op. p. 4; *Honda of America Manufacturing, Inc.* 334 NLRB 751, 753 (2001) and *Circle K*
Corp., 305 NLRB 932, 934 (1991). Since in this case the evidence is clear that Rivera was
 20 discharged for his conduct during his discussion with Padilla, during which he was involved in
 Section 7 activity, I will follow the Board's directive.

Lozada

25 As noted above, Lozada was a union supporter who participated in the 9-month strike
 from August 2008 until April 2009 and the strikes that occurred in August 2010. In addition,
 together with Union Committeeman, Adolfo Jimenez, he met with McDaniel on approximately
 August 23, 2010, to discuss the suspension of five employees for refusing to perform assigned
 work.

30 On August 31, 2010, Lozada and another employee, Arguelio Reyes, were working on
 line 5 when Padilla ordered them to move to another workstation (thigh deboning) on the same
 line. Lozada and Reyes refused to follow Padilla's order and both received a 5-day suspension
 which began on Wednesday, September 1, and ended on Tuesday, September 7.

35 When Lozada returned from his suspension on September 7, he reported to line 5, where
 he had been working since approximately July 2010. Padilla approached Lozada at his
 workstation and told him that he was going to be permanently assigned to line 2. Padilla escorted
 Lozada to line 2 and, in Lozada's presence, told Otero, the trainer on line 2, that Lozada's
 40 transfer to line 2 was permanent.

45 Lozada worked the remainder of September 7 on line 2 but, on the morning of September
 8, he returned to line 5 and began working. After Padilla became aware that Lozada was working
 on line 5 and not line 2, he went to Lozada's position on line 5, accompanied by Cooper and
 Ayala. When Padilla asked Lozada why he had not reported to line 2 that morning, Lozada
 replied that line 5 was his line and that he was not going to report to line 2. At that point Union
 Committeeman Rivera arrived and intervened in the conversation, contending that Lozada should
 stay on line 5. Lozada did not further participate in the conversation between Rivera and Padilla
 after Padilla arrived.

²⁴ 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981) cert. denied 455 U.S. 989 (1982).

5 On September 8, after Acen had interviewed Lozada regarding the circumstances of his refusal to report to line 2, he was suspended pending further investigation. McDaniel testified that he made the decision to terminate Lozada on September 10 because of his insubordination and refusal to accept assignments. The termination given to Lozada on September 10 indicated he was terminated for "Failure to perform work as assigned and insubordination."

10 The Acting General Counsel contends that Lozada's discharge violates Section 8(a)(3) and (1) of the Act pursuant to the Board's decision in *Wright Line*. The Respondent contends that Lozada's discharge is not unlawful pursuant to the *Wright Line* doctrine. The Respondent also contends that by continuing to work on line 5 and refusing to report to line 2, Lozada was
15 engaged in an unprotected partial strike and was subject to discharge on that basis pursuant to *Audubon Health Care Center*, 268 NLRB 135, 137 (1983) and *Vencare Ancillary Services v. NLRB*, 352 F.3d 318 (6th Cir. 2003) denying enf. 334 NLRB 965 (2001).²⁵

20 Applying the *Wright Line* standards, I find that Lozada's union activities set forth above were known to the Respondent. I find that the Respondent harbored animus toward its employees' union activities by virtue of the violations of Section 8(a)(1) it committed and its termination of Rivera in violation of Section 8(a)(3) and (1). It is clear that Lozada suffered an adverse employment action by virtue of his September 8, 2010 suspension and his September 10, 2010 discharge. Under *Wright Line* the Acting General Counsel has therefore established a prima
25 facie case and the burden shifts to the Respondent to establish that it would have discharged Lozada in the absence of his union activities.

30 As noted above, Lozada was informed he was discharged for "Failure to perform work as assigned and insubordination." McDaniel testified that he considered both Lozada's August 31 suspension and his actions on September 8 in making the decision to discharge him.

35 The Respondent's policy as expressed in the section of its current employee handbook entitled "Corrective Counseling and Action" indicates that insubordination and refusal to do assigned work are listed as "Group I" violations. According to the handbook, Group 1 violations "are considered very serious" and employees may be suspended, depending upon the severity and frequency of the violation, and progressive discipline or separation may result (GC Exh. 16.) It is clear that shortly after being suspended for refusing to perform a work assignment on August 31, Lozada, on the second day after returning from that suspension, again refused to perform a work assignment. The language of the Respondent's handbook clearly indicates that
40 discharge may be an appropriate penalty for such conduct.

²⁵ I do not agree with the Respondent's contention that Lozada's conduct on September 8 amounted to an unprotected partial strike. I note that in both cases relied on by the Respondent there was a concerted refusal to perform assigned work by a number of employees, while they continued to perform other work. In Lozada's case, when he initially refused to transfer to line 2 while continuing to work on line 5, it was his decision, and his decision alone, as Rivera had not yet arrived at the conversation between him and Padilla. In addition, only Lozada continued to work on line 5 and not report to line 2. No other employee engaged in such conduct. The concept of activity engaged in concert is critical to the formation of a strike. In this connection, Section 501 (2) of the Labor Management Relations Act provides:

The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees.

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With regard to the manner in which the Respondent has administered its policy, it suspended indefinitely 5 employees on August 23, 2010 for refusing to perform assigned work. The suspensions indicated that the employees could return to work when they agreed to perform the work as assigned. (R. Exhs. 26-30). After agreeing to perform the work as assigned, the employees returned to work after 5 days. On August 31, 2010, as described above, the Respondent suspended Lozada and Reyes for 5 days for refusing to perform assigned work. On December 8, 2009, the Respondent suspended employee David Berrios for 3 days for failing to perform assigned work and insubordination. The corrective action form issued to Berrios (R. Exh. 33) reflects the following:

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The employee refused to obey the Lead Person instructions on December 4, and December 5, 2009. The lead person asked him to go to work to Evisceration area and the employee refused the Lead Person instructions. The issue occurred in (sic) two different times. The employee must obey the supervisor and Lead person instructions. According with (sic) the employee Hand Book, the employee is suspended for 3 days for insubordination. If the employee is insubordinate again the employee could be termed (sic) for insubordination according with the employee handbook.

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On two occasions, the Respondent issued verbal warnings to employees who refused to accept a work assignment. On July 29, 2009 employee Josue Figueroa was issued a verbal warning for refusing to train on the leg deboning line in order to improve his performance. The warning further indicated that if the employee refused to obey the supervisor's instructions, the employee could be terminated, (GC Ex. 18). On September 9, 2009, employee Pedro Jimenez was issued a verbal warning for refusing to move to another department when a trainer asked him to do so. The warning indicated that another such incident would result in a suspension for insubordination. (GC Exh. 22).

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I note that Ledesma was discharged for insubordination on November 2, 2010 (R. Exh. 23) after first being suspended for engaging in insubordinate conduct. Diaz was also discharged for insubordination in November 2010. Since these actions occurred, however, after Lozada's discharge, I have given less weight to these discharges than the evidence of the Respondent's application of its disciplinary policy that occurred before Lozada's discharge.

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After considering the foregoing, I conclude that there is sufficient evidence to establish that the Respondent would have discharged Lozada regardless of his union activities. In the first instance, under the Respondent's existing policy, Group I violations, such as insubordination and a refusal to perform assigned work, can result in suspension or discharge. The Respondent has suspended a number of employees who have refused work assignments. In this respect, after first suspending Berrios for refusing a transfer, the Respondent clearly indicated to him that a second instance of such conduct could result in termination. The fact that the Respondent on two occasions issued an employee a verbal warning for a first offense for refusing to perform assigned work does not detract from the fact that in other situations, the Respondent has determined that suspension is an appropriate penalty for such conduct and indicated, in the Berrios incident, that a second occurrence could result in termination. In addition, the evidence

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5 establishes that the Respondent discharged Ledesma after a second act of insubordination and that Diaz was also discharged for insubordination.

10 In the instant case, Lozada refused Padilla's order that he report to line 2 on September 8, shortly after returning to work after being suspended for refusing to rotate to another position on the same line. His discharge for such conduct is consistent with the manner in which the Respondent has applied its disciplinary policy to such instances. Importantly, the Acting General Counsel has not produced any evidence that establishes that Lozada was treated disparately from other employees who engaged in conduct similar to his.

15 In *Septix Waste, Inc.*, 346 NLRB 494 (2006) the Board indicated that in order to establish a valid *Wright Line* defense, an employer must establish that it has applied its disciplinary rules regarding the conduct at issue consistently and evenly. I find that the Respondent has met this burden with respect to the application of its disciplinary rules regarding Lozada's conduct. Under the shifting burden analysis of *Wright Line*, the General Counsel must establish an unfair labor practice by a preponderance of the evidence. *Wright Line*, supra, at 1088, fn. 11. I find that this burden has not been met with respect to the discharge of Lozada. Accordingly, I conclude that the Respondent did not violate Section 8(a)(3) and (1) with respect to Lozada's discharge and I shall dismiss that allegation in the complaint.

25 The Allegations Involving Adolfo Jimenez

Background

30 Jimenez was hired by the Respondent on April 20, 2005 and worked in the deboning department for approximately 6 months. After that he worked in a variety of different departments until he was again assigned to the deboning department in May 2010. In December 2010, Jimenez was transferred to the live hang department and was working there at the time of the hearing.

35 Jimenez is a very strong supporter of the Union. He was involved in the initial organizing campaign and solicited other employees to sign authorization cards. He served as an observer for the Union at the election. He is an employee member of the union committee and has participated in the negotiations. He participated in the 9-month strike that ended in April 2009, and during that period participated in picketing at the Respondent's facility. He participated in the series a brief strikes that occurred in August and the September 10 strike that occurred after Rivera and Lozada were terminated. Jimenez and Lozada met with McDaniel in August 2010, regarding issues involving one of the strikes that occurred that month.

45 The September 2, 2010, 8(a)(1) Allegations

Paragraph 12(H) alleges that on September 2, 2010, the Respondent violated Section 8 (a)(1) of the Act when Cooper told an employee (Jimenez) that he could not visit the human resources office on his break and that he had to be in the break room during his breaks.

50 Jimenez testified that when he first started working for the Respondent, he was informed that if employees had questions they could go to the human resources office during breaks and

5 lunch. Consistent with these directions, Jimenez had gone to the human resources office many
times during breaks and lunch prior to September 2010. According to Jimenez, in early
September 2010, he went to Acen's office and knocked on the door. Cooper opened the door and
asked him what he was doing there. Jimenez responded that he had a message for Acen. Cooper
told him that he had no right to be there during his break and he should return to the break room.
10 At that point Acen arrived and Jimenez told him what Cooper had said. Acen told him that it was
"okay" to come to his office during breaks but that he did not have time to see him and that he
could come back on his lunch or break. Jimenez did not return that day but on a later day
returned to Acen's office to speak with him.

15 Cooper denied telling Jimenez on September 2, 2010, that he could not visit the human
resources office during his break. Acen also denied that he heard Cooper tell Jimenez that he
could not come to the human resources office on breaks or that Jimenez complained to him that
Cooper was not allowing him to come to the office during his break. Clark testified that she did
not recall seeing Jimenez outside Acen's office speaking to Cooper on September 2.

20 I credit Jimenez' testimony with respect to this incident. He testified in a detailed and
consistent manner with respect to these events on both direct and cross-examination. His
demeanor while testifying about this incident impressed me. In addition, I find it entirely
plausible that at a time of heightened tension in the plant after a series of short strikes in August
25 2010, that Cooper would react in the manner described by Jimenez when Jimenez arrived at
Acen's office. The denials of this conversation by Cooper and Acen were cursory and both
appeared to testify on this point in a way designed to support the Respondent's defense. Clark's
generalized testimony is not probative. Jimenez could easily have been there when she was not
present or the conversation may have occurred at the door to Acen's office which is not located
30 inside the human resources office.

Based on the credited testimony of Jimenez, I find that on September 2, 2010, Cooper
told Jimenez that he could not come to the human resources office during his breaks and he
should return to the break room. I find that the statement violates Section 8(a)(1) of the Act
35 because it tends to limit employee access to the human resources office in retaliation for union
activity that Jimenez and other employees engaged in.

I do not agree with the Respondent's contention that, even if Jimenez is credited
regarding this incident, Acen's statements to Jimenez repudiated the illegal conduct of Cooper
40 pursuant to the Board's decision in *Passavant Memorial Area Hospital*, 237 NLRB 138, 138-139
(1978). In *Passavant* the Board stated that under certain circumstances an employer may relieve
itself of liability for unlawful conduct by repudiating the conduct. To be effective the repudiation
must be "timely, unambiguous, specific in nature to the coercive conduct and free from other
proscribed illegal conduct." In addition, there must be adequate publication of the repudiation to
45 the employees involved and there must be no proscribed conduct on the employer's part after the
publication. As part of the repudiation, the employer should give assurances to employees that it
will not interfere with the exercise of their section 7 rights in the future. See also *Intermet
Stevensville*, 350 NLRB 1349, 1350, fn. 6, 1382-1383 (2007); *River's Bend Health*, 350 NLRB
184, 193 (2007). I find that, under all the circumstances, Acen's statement to Jimenez that he
50 could come to his office during breaks and lunch, does not sufficiently comport with the
standards of *Passavant* to eliminate the necessity of a remedial order and notice. As I have

5 indicated in this decision, in September 2010, the Respondent committed additional violations of
 Section 8(a)(1) and discharged Rivera in violation of Section 8(a)(3) and (1) of the Act. Thus, the
 attempted repudiation did not occur in atmosphere free from other proscribed illegal conduct.
 Under these circumstances, I believe that a remedial order and notice is necessary to safeguard
 employee rights under the Act.

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The September 14, 2010, Warning Issued to Jimenez

15 Paragraph 13(A) of the complaint alleges that on September 14, 2010, the Respondent
 disciplined Jimenez in violation of Section 8(a)(3) and (1) of the Act. As amended at the hearing,
 Paragraph 9(F) alleges that on the same date, Acen, through Clark, threatened an employee
 (Jimenez) with termination if he did not master a new job in a short amount of time, in retaliation
 for his protected concerted and/or union activities.

20 On September 14, 2010, Jimenez was working on line 5 and was rotated to the wing
 cutter position. According to Jimenez, Cooper approached him and took 5 wings and left without
 saying anything. Later, a supervisor summoned Jimenez to Acen's office. When Jimenez arrived
 at the office, Cooper, Acen, Carmen Beltran, and human resources assistant Stephanie Ajanel
 were present. Acen asked Jimenez why he could not cut wings. Jimenez replied that the job was
 25 new to him and he did not know how to cut wings.²⁶ Acen stated that Jimenez had been working
 for the Respondent for 6 years. When Jimenez repeated that wing cutting was a new job for him,
 Acen told him that if he could not learn it in 1 day he would be fired. Jimenez said that he could
 not learn the job but that he would try. Jimenez testified that Cooper then stated that Jimenez had
 no respect for the company. According to Jimenez, at that point Acen told Ajanel not to translate
 30 any more. Jimenez was given a warning written in English by Acen but Jimenez refused to sign
 it. Jimenez cannot read English.

The written verbal warning given to Jimenez (GC Exh. 12) indicates:

35 Improper work performance, including neglecting work! Employee is expected to
 improve work performance.²⁷

After the meeting, Jimenez returned to the production line and continued to work.

40 Cooper testified that on September 14, 2010, he observed Jimenez making improper wing
 cuts as he was leaving too much breast meat on the wings.²⁸ Cooper further testified that since he
 had previously trained Jimenez on wing cuts he was surprised to see such careless work.²⁹

²⁶ On cross-examination, Jimenez admitted that the wing cuts he made on September 14 was "bad work."

²⁷ The warning is dated September 15, 2010, but I credit Acen's testimony that the meeting occurred on September 14 and that he made an inadvertent error with respect to the date on the warning.

²⁸ The record establishes that employees performing wing cuts are instructed not to leave breast meat on the wings since breast meat sells for \$1.70 a pound and wings sell for \$.90 a pound.

²⁹ Cooper testified that on March 10, 2010, he had previously trained Jimenez on various procedures including wing cuts. At that time Cooper filled out a document entitled "Training Program" (R. Exh. 12)

5 According to Cooper on September 14, he again showed Jimenez how to cut wings properly. However, Jimenez continue to make improper wing cuts and at that point Cooper took the incorrectly cut wings to Acen.

10 Acen testified that at the September 14, 2010 disciplinary meeting with Jimenez, Kimberly Clark, not Stephanie Ajanel, was the human resources assistant present and that Clark translated the meeting for Jimenez. Acen testified he never directed Clark to stop translating during the meeting. Acen also denied telling Jimenez that if he did not learn how to cut wings in 2 or 3 days, he would be fired.

15 Clark testified that she was present at the September 14, 2010 meeting with Jimenez and acted as the translator. She also took notes at the meeting. Clark denied that Acen told Jimenez he would be fired if he did not learn how to perform wing cuts. According to Clark, Acen told Jimenez he would get additional training in cutting wings.³⁰

20 The record contains conflicting evidence regarding Jimenez' recent experience with wing cuts beyond the 2 training sessions he received on March 10 and September 14, 2010. Both Rivera and Jimenez testified that Jimenez had not worked at the wing cutter position on line 5 prior to September 14, 2010. In this connection, Rivera testified that Jimenez told him that he could not cut wings because he had a hand injury. I note, however, that Jimenez never testified
25 that a hand injury prevented him from cutting wings. The record establishes that there are 14 different positions on the deboning line and that normally an employee rotates between four positions a day pursuant to a schedule devised by the trainer on the line. There is no evidence to indicate that a hand injury would cause greater difficulty in performing wing cuts as opposed to the other tasks on the deboning line.

30 Padilla and Ayala both testified that they observed Jimenez cutting wings on line 5 prior to September 14. Otero, the trainer on line 2, also testified that he observed Jimenez cutting wings frequently.

35 I do not credit Rivera's testimony that he did not assign Jimenez to cut wings because of a hand injury because that assertion is not corroborated by Jimenez. Thus, if for some reason Jimenez was not assigned to cut wings as part of the normal rotation, there is no credible explanation in the record as to why that occurred. Accordingly, I credit the mutually corroborative testimony of Ayala and Padilla that they observed Jimenez cutting wings prior to

that contained Jimenez' signature. This document reflected various procedures Jimenez was trained on at that time. The document reflects that on March 10, Jimenez received 2 sessions of wing cutting training. While Jimenez admitted that he signed the document, he claimed that he did not receive training on wing cuts on that date but that Cooper merely observed him. I do not credit his testimony on this point as I find it implausible when I consider the record as a whole. Rather, I credit Cooper's testimony that Jimenez received extensive training on wing cuts on March 10, 2010. Jimenez admitted that he also received additional training on wing cuts from Rivera on September 10, 2010.

³⁰ A trainer was assigned to work with Jimenez on wing cuts later that day.

5 September 14. Otero's testimony, however, has little probative value because he was not in a position to observe the work of Jimenez with clarity from his position.

10 With respect to the events of the disciplinary meeting regarding Jimenez that occurred on September 14, 2010, I credit the mutually corroborative testimony of Cooper, Acen, and Clark over that of Jimenez. I do not find that Jimenez' recollection of that meeting is sufficiently precise to support specific findings of fact. In the first instance, Jimenez recalled that Ajanel was the human resources assistant present at the meeting, when clearly it was Clark. In addition, I did not find him to be forthcoming regarding the wing cutting training he received in March 2010. His attempt to diminish the training he received causes me to doubt his testimony surrounding
15 the circumstances of his warning.

20 Since I do not credit Jimenez' testimony with respect to the disciplinary meeting of September 14, 2010, I find that the Respondent did not, through Acen, threaten Jimenez with termination if he did not master the job of wing cutting in a short time. Accordingly, I shall dismiss paragraph 9F of the complaint.

25 Regarding the written verbal warning that Jimenez received on September 14, 2010, I find, consistent with the credibility resolutions noted above, that Cooper observed Jimenez making improper wing cuts on that date. Although Cooper had previously given Jimenez individual training on wing cuts on March 10, 2010, Cooper again showed him the proper manner in which to make those cuts on September 14. When Jimenez persisted in cutting the wings improperly, Cooper took the improperly cut wings to Acen who determined that a verbal written warning was appropriate discipline for Jimenez' improper work performance on that date. A verbal written warning is the first step in the Respondent's disciplinary process.
30

35 Applying the Board's *Wright Line* analysis to the warning given to Jimenez, he is one of the most active union supporters in the plant and his activity is well known to the Respondent. The unfair labor practices I have found here demonstrate that the Respondent harbors some animosity toward its employees who were supporters of the Union and the verbal written warning that Jimenez received is clearly an adverse employment action. Accordingly, the Acting General Counsel has established a prima facie case of discrimination with respect to the warning given to Jimenez on September 14, 2010.

40 With respect to the Respondent's defense, I first note that Jimenez admitted that the wing cuts he made on September 14 prior to receiving his warning were not done correctly. Jimenez had received individual training on performing wing cuts on March 10, 2010; he at least performed some wing cuts in his work on line 5 and was, by his own admission, given additional training by Rivera on September 10. Cooper gave additional instruction to Jimenez on September 14, which he failed to follow. Considering the record as a whole, I find that Jimenez had
45 sufficient training to properly perform the job of wing cutting on September 14, 2010.

50 The Respondent issued 15 verbal written warnings to other employees for poor performance from November 9, 2009 through September 2010. (R. Exhs. 35a - p). Some of these verbal written warnings were for conduct that is very similar to that Jimenez engaged in. For example, on September 21, 2010, an employee was given a verbal written warning for "Poor work performance. Employee is leaving bones when working on breast pulling station." (R. Exh.

5 35b). On May 4, 2010, an employee was given a verbal written warning for "Cannot keep up cutting tenders. This is unacceptable work performance and will not be tolerated." (R. Exh. 35h).
 10 On November 18, 2009, two employees were given verbal written warnings for "not cutting all the meat off the whole legs. This is unacceptable work performance and will not be tolerated." (R. Exhs. 35k and l). I find that the Respondent has demonstrated that it has a consistent policy
 15 of issuing verbal written warnings to employees for poor performance while they were engaged in conduct similar to that of Jimenez. The Acting General Counsel has produced no evidence of disparate treatment regarding the discipline issued to Jimenez. On the basis of the foregoing, I find that the Respondent has established that it would have issued a verbal written warning to Jimenez for his work performance on September 14, 2010, regardless of his union activities. It has therefore met its burden of establishing a valid *Wright Line* defense. Accordingly, I shall dismiss paragraph 13 of the complaint.

The Mid-September 2010 8(a)(1) Allegations Involving Jimenez

20 Paragraph 11(A) of the complaint alleges that on or about September 17, 2010, Cooper, through the Respondent supervisor and translator Carlos Valladares, coercively told an employee (Jimenez) that he could not time the production lines and that he had to be in the break room during his break in violation of Section 8(a)(1) of the Act.

25 Paragraph 11(B) alleges that on September 17, 2010, Cooper, through Valladares, threatened and employee (Jimenez) with unspecified adverse employment action if he protested not being allowed to time the production lines in violation of Section 8(a)(1).

30 Jimenez testified that since approximately 2007 he and other employees have timed the Respondent's production lines approximately 3 times a day.³¹ According to Jimenez, in mid-September 2010, while on a break at approximately 7:40 a.m., he decided to check the speed on line 3. The line was running at 36 chickens per minute. Jimenez reported this to a supervisor who had the line slowed down. At approximately 9:15 a.m., Jimenez was again on a break and went to check line 1. Cooper approached Jimenez and told him, in English, that he did not have the right to check lines during his break and that he should finish his break in the break room.
 35 Jimenez responded that he did have such a right. At that point, Cooper called over supervisor Carlos Valladares who interpreted for Cooper from English to Spanish. According to Jimenez, Valladares told him in Spanish that Cooper had said that "he cannot check, and one more word from me and he doesn't know what was going to happen."
 40

45 Cooper denied that he told Jimenez in mid-September 2010, that he could not time the speed of the line. Cooper testified that employees had the right to time the lines and that prior to October 2010, he observed Jimenez time the lines 5 times a day. Cooper also testified that he never used Valladares to translate for him because his English was not very good.³²

³¹ The Respondent's policy is that lines 1 through 4 should run at 30 chickens per minute. Line 5 runs somewhat slower because of chronic understaffing and inexperienced employees. Because of the mechanics of the conveyor belt on the production lines, the lines at times increase in speed without being directed to do so.

³² Valladares did not testify at the hearing.

5 Clark testified that in mid-September 2010, she recalled that Jimenez complained to her
about not being able to time the lines. She could not recall specifically if he was complaining
about Cooper but "it could have very well been Bernard, I don't recall 100%." (Tr. 866) Clark
recalled that Cooper was present during the conversation Jimenez had with her regarding this
10 issue. According to Clark, Cooper told Jimenez that he was allowed to time the lines and if there
was an issue with line speed to tell him and that Cooper would time the line with Jimenez and
make any necessary corrections. Clark testified she never recalled Cooper using Valladares as a
translator and also testified that Valladares' English was not very good.

15 It is undisputed that at a bargaining session held in late October 2010, Mullins raised the
problem of employees not being able to time the lines on their breaks. At this bargaining session,
the Respondent agreed that Jimenez and Carmen Beltran, another member of the union
committee, would be provided training on how the time line speeds and would be provided
stopwatches and additional breaks before and after lunch in order to check line speeds. From
early November 2010, until he transferred to the live hang department in December 2010,
20 Jimenez was afforded the opportunity to time the lines on the extra breaks.

I credit the testimony of Jimenez over that of Cooper regarding the events of mid
September 2010, when Jimenez attempted to time line 3. In addition to reliance on demeanor
considerations, I find that Jimenez' testimony is entirely plausible since this incident occurred
25 shortly after he engaged in yet another short strike on September 10. Under these circumstances
it is entirely plausible that a frustrated Cooper denied Jimenez an opportunity to time a
production line, given the fact that Cooper testified that, prior to this occasion, he observed
Jimenez timing the lines up to 5 times per day. In addition, the credibility of Jimenez is
enhanced by the fact that Clark recalled that he complained about not being able to time the lines
30 to her. Finally, Mullins raised the fact that employees were being denied the opportunity to time
lines at a bargaining session held in October. I doubt that Jimenez would have complained to
Clark or raised the issue with the Union if it had not occurred. The fact that Valladares may not
speak English very well does not dissuade me from crediting Jimenez' testimony on this issue.
Cooper was in the middle of a conversation with Jimenez when he decided to have the remainder
35 of it translated and most likely called the most available bilingual supervisor. In addition, the
information conveyed was simple in nature and would not require and accomplish translator.
Accordingly, I find that in mid -September 2010, Cooper through Valladares, told Jimenez that
he could not time line 3 on his break and should go to the break room. I also find that Cooper,
through Valladares, said he did not know what would happen to Jimenez if he said "one more
40 word" about checking the line. The Respondent had acquiesced in the right of employees to time
the production lines since approximately 2007. Clearly the speed of the line is a critically
important term and condition of employment given the fast-paced nature of the Respondent's
processing business. By restricting Jimenez from timing the line and ordering him to the break
room, the Respondent was interfering with the established right of employees to monitor this
45 important aspect of their working conditions. By such conduct, the Respondent, through Cooper,
violated Section 8(a)(1) of the Act. By making an unspecified threat of reprisal if Jimenez
persisted in claiming his right to time the line, the Respondent, through Cooper, further violated
Section 8(a)(1) of the Act .

50 The Respondent contends that even if I credit Jimenez' version of his mid-September
conversation with Cooper, a remedial order and notice are not warranted pursuant to the

5 *Passavant* standards. In this regard, the Respondent points first to Clark's testimony, which I
 credit, that when Jimenez complained to her about being denied an opportunity to time the lines,
 Cooper said that if Jimenez felt that there was an issue with respect to line speed to let him know
 and he would time the line with him and make the necessary corrections. The Respondent also
 10 points to the fact that in October, 2010, when Mullins raised the issue of employees not being
 able to time lines on their breaks, the Respondent agreed that Jimenez and Beltran would be
 given training on how to time line speeds, would be provided stopwatches, and be given an
 additional two breaks in order to check line speeds. The Respondent's action in this regard are
 salutary but are insufficient to comply fully with the *Passavant* standards since they occurred in
 the context of the commission of other unfair labor practices by the Respondent. Accordingly, I
 15 find that a remedial order and notice are necessary with respect to this matter in order to
 appropriately remedy the violation that occurred.

CONCLUSIONS OF LAW

20 1. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of
 the Act by:

25 (a) informing employees they should not live in certain cities because supporters of the
 Union would approach them to join the Union;

(b) informing employees that it was going to terminate employees who engage in strikes
 or other union and protected concerted activities;

30 (c) soliciting employees to be its' agent for the purpose of making statements to restrain
 or coerce employees in the exercise of their Section 7 rights;

(d) threatening employees that no wage increases will be granted as long as the Union is
 the employees' representative;

35 (e) creating the impression that it is engaging in surveillance of its employees union
 activities by keeping a list of union supporters;

40 (f) threatening employees with termination if they persist in seeking a transfer to a
 department populated with union supporters;

(g) informing employees that they cannot visit the human resources office or time
 production lines during their breaks in retaliation for their union or protected concerted
 activities;

45 (h) threatening employees with unspecified reprisals if they persisted in their right to time
 production lines during their break.

50 2. The Respondent has engaged in unfair labor practice in violation of Section 8(a)(3) and
 (1) of the Act by discharging Omar Carrion Rivera because he engaged in union and protected
 concerted activities in order to discourage employees from engaging in those activities.

5 3. The above unfair labor practices affect commerce within the meaning of Section 2(2),
(6) and (7) of the Act.

 4. The Respondent has not otherwise violated the Act.

10

REMEDY

 Having found that the Respondent has engaged in certain unfair labor practices, I shall
order it to cease and desist therefrom and to take certain affirmative action designed to effectuate
the policies of the Act.

15

 The Respondent, having discriminatorily discharged Omar Carrion Rivera, must offer
him reinstatement and make him whole for any loss of earnings and other benefits. Backpay shall
be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the
rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as
20 prescribed *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

 The Acting General Counsel seeks an order requiring that the notice in this case should
be posted in English, Spanish, Karen, and Burmese and read to the employees in those four
languages. (AGC's brief, pgs. 37-38)³³

25

 With respect to the request for the notice to be translated into the languages noted above,
the record establishes that the Respondent has an ethnically diverse work force at its Winesburg,
Ohio facility. In February 2010, 82 percent of the Respondent's work force was Hispanic, many
of whom did not speak fluent English. In this regard, 7 of the 8 employee witnesses called by the
30 Acting General Counsel required a Spanish translator. At the time the hearing was held, the
Respondent's work force had about 5 to 7 employees who speak the Karen language ³⁴and
approximately 10 employees were from Myanmar and apparently speak Burmese. In order to
best assure that employees understand the contents of the notice, I shall order it to be posted in
English, Spanish, Karen, and Burmese. This is consistent with the Board's policy of ordering
35 notices to be posted in multiple languages when there is an ethnically diverse work force. *New
England Confectionary Co.*, 356 NLRB No.68 at sl. op. p. 11 (2010); *Alstyle Apparel*, 351
NLRB 1287, 1288 (2007); *Water's Edge*, 293 NLRB 465 (1989).

35

 With respect to the request to have the notice read, the Board generally provides for such
40 a remedy in two situations. In the first, the evidence establishes that the unfair practices that have
been committed are pervasive and egregious such that a notice reading is necessary to dispel the
effects of such conduct. *Homer D. Bronson Co.*, 349 NLRB 512, 515 (2007); *Domsey Trading
Corp.*, 310 NLRB 777, 779-780' 813 (1993). While the Respondent's unfair labor practices in
this case are serious they not so egregious or pervasive that a notice reading in all four languages
45 is required. *Alstyle Apparel.*, supra, at 1288.

45

³³ In the complaint the Acting General Counsel also indicated that he was seeking an order requiring
the Respondent to read any notice that was issued in English, Spanish, and Karen.

³⁴ I take administrative notice that the Karen people are a Sino-Tibetan language speaking ethnic
group residing in Myanmar (formerly known as Burma) and Thailand. Wikipedia, 2011.

5 The Board also finds it appropriate to have a notice read when the evidence establishes
 that a significant number of the employees are illiterate. *Domsey Trading Co.*, supra, at 813.;
 10 *Marine Welding and Repair Works, Inc.*, 174 NLRB 661, 681 (1969); enf. 439. F.2d 395, 400
 (8th Cir. 1971). In the instant case the evidence establishes that 10 to 20 percent of the Hispanic
 employees are illiterate, even in Spanish. Accordingly, in order to ensure that these employees
 understand the contents of the notice, I shall order that a responsible official of the Respondent,
 or a Board Agent, shall read the notice in Spanish to employees assembled for that purpose.
 However, since there is no evidence indicating that the employees who are conversant in the
 three other languages are illiterate in those languages, I shall not order the notice be read in
 English, Karen, or Burmese.

15 On these findings of fact and conclusions of law and on the entire record, I issue the following
 recommended³⁵

ORDER

20 The Respondent, Case Farms Processing, Inc., Winesburg, Ohio its officers, agents,
 successors, and assigns, shall

25 1. Cease and desist from

- (a) Informing employees they should not live in certain cities because supporters of
 the Union would approach them to join it.
- (b) Informing employees that it was going to terminate employees who engage in
 30 strikes or other union protected concerted activities.
- (c) Soliciting employees to be its agent for the purpose of making statements to
 restrain or coerce employees in the exercise of their Section 7 rights.
- (d) Threatening employees that no wage increases will be granted so long as the
 35 Union is the employees' representative.
- (e) Creating the impression that it is engaging in surveillance of its employees'
 union activities by stating that it was keeping a list of union supporters.
- (f) Threatening employees with termination if they persist in seeking a transfer to a
 40 department populated with union supporters.
- (g) Informing employees that they cannot visit the human resources office or time
 45 production lines during their breaks in retaliation for their union or protected
 concerted activities.

³⁵ 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 (h) Threatening employees with unspecified reprisals if they persist in their right to time production lines.
- (i) Discharging employees because of their union or protected concerted activities.
- 10 (j) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights.

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

15 (a) Within 14 days from the date of the Board’s Order, offer Omar Carrion Rivera full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

20 (b) Make Omar Carrion Rivera whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

25 (c) Within 14 days from the date of the Board’s Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Rivera in writing, in English and Spanish, that this has been done and that the discharge will not be used against him in any way.

30 (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.

35 (e) Within 14 days after service by the Region, post at its facility in Winesburg, Ohio copies of the attached notice marked “Appendix”³⁶ in English, Spanish, Karen, and Burmese. Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent 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 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

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36 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.”

5 these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 1, 2010.

10 (f) Within 14 days after service by the Region, post at its facility in Winesburg, Ohio copies of the attached notice marked "Appendix"³⁷ in English, Spanish, Karen, and Burmese. Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices
15 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 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
20 these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 1, 2010.

25 (g) Convene, during working hours, employees for whom Spanish is their primary language and have a responsible official of the Respondent, fluent in Spanish, or a designee of the Regional Director of Region 8, read the notice in Spanish. The Regional Director for Region 8 shall be afforded a reasonable opportunity to provide for the attendance of a Board agent and additional translators of the Regional Director's choosing.

30 (h) 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.

35 (i) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., September 16, 2011.

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Mark Carissimi
Administrative Law Judge

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37 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 inform employees they should not live in certain cities because supporters of the United Food and Commercial Workers Union, Local No.880 (the Union) will approach them to join it.

WE WILL NOT tell employees that we are going to terminate employees who participate in strikes or other union and protected concerted activities.

WE WILL NOT solicit employees to be our agent for the purpose of making statements to restrain or coerce employees in the exercise of rights under the Act.

WE WILL NOT threaten employees that no wage increases will be granted as long as the Union is the employee's representative.

WE WILL NOT create the impression that we are engaging in surveillance of our employees union activities by stating that we are keeping a list of union supporters.

WE WILL NOT threaten employees with termination if they persist in seeking a transfer to a department populated with union supporters.

WE WILL NOT inform employees that they cannot visit the human resources office or time production lines during their breaks in retaliation for their union or protected concerted activities.

WE WILL NOT make unspecified threats of reprisal to employees if they persist in their right to time production lines.

WE WILL NOT discharge employees or otherwise discriminate against employees because they engaged in union or protected concerted activities.

WE WILL NOT in any like or related manner 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 the Board's Order, offer Omar Carrion Rivera full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make whole Omar Carrion Rivera for any loss of earnings and other benefits suffered as a result of our discrimination against him, with interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Rivera, and within 3 days thereafter notify him in writing, in Spanish and English, that this has been done and his discharge will not be used against him in any way.

CASE FARMS PROCESSING, 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.

1240 East 9th Street, Room 1695, Cleveland, OH 44199-2086

(216) 522-3715, Hours: 8:15 a.m. to 4:45 p.m.

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

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

COMPLIANCE OFFICER, (216) 522-3740.