Central Valley Meat Co. *and* United Farm Workers of America.[1] Cases 32–CA–17951, 32–CA–18099, and 32–CA–18462

April 28, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On October 16, 2001, Administrative Law Judge John J. McCarrick issued the attached decision. The Respondent filed exceptions, a supporting brief, and a brief in response to the General Counsel's and the Union's cross-exceptions. The General Counsel and the Union each filed cross-exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs, and has decided to adopt the judge's rulings, findings[2] and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.

We agree with the judge's findings and conclusions regarding most of the issues presented in this case. Because of our disposition of these issues, we find it unnecessary to rule on some of the judge's findings.

I. BACKGROUND

Central Valley Meat Co. (the Respondent) operates a slaughterhouse in Hanford, California, employing approximately 260 employees. In November 1999, the United Farm Workers of America (the Union) began organizing the Respondent's kill floor and boning department employees after kill floor employee Jose Sandoval contacted the Union.

II. PREVENTING SANDOVAL FROM WAITING IN PARKING LOT

In February 2000, Sandoval was waiting in the Respondent's parking lot, after his shift, for another employee to give him a ride home. The Respondent's security guard told Sandoval that he had to leave because he was talking to employees as they left the plant.

We adopt the judge's finding that the Respondent's refusal to permit Sandoval to wait in its parking lot violated Section 8(a)(1) of the Act. We base our finding on the disparate treatment of Sandoval, a known union supporter, compared to other employees. The evidence indicates that other employees were routinely permitted to wait in the Respondent's parking lot. Given our finding that the Respondent's no-access policy was discriminatorily applied, we find it unnecessary to reach the judge's finding that the policy itself violated Section 8(a)(1) of the Act.

Events of April 12, 2001

III. DISCHARGE OF SANDOVAL

Sandoval worked as the "cow knocker" on the kill floor.[3] He was required to "knock" the first cow at 7:10 a.m., which was his official starting time. In order to "knock" the first cow at this time, Sandoval had to punch in and begin his preparations 10–20 minutes earlier. He was not paid for this preparatory time.

The Respondent's practice of not paying employees for their preparatory time became an issue among the employees.[4] On April 8, Sandoval protested to Kill Floor Supervisor Angel Torres that he was not being paid properly, and requested a copy of his timecard. At a union meeting on April 11, Sandoval told the other employees that he was not being paid properly, i.e., for his necessary prep time before taking his place on the kill floor, and showed them his timecard. Other employees also complained that they were not being paid for all the time that they worked. The employees agreed that they would support Sandoval in this matter.

The next day, April 12, Sandoval did not punch in until 7:10 a.m., and did not "knock" the first cow until 7:13. Shortly thereafter, Kill Floor Supervisor Angel Torres came to Sandoval's workstation and told him that he was fired for reporting to his workstation late. Sandoval showed Torres his timecard and asserted that his official starting time was 7:10 a.m., and that he was not required to punch in until then. Torres reiterated that Sandoval was fired. Sandoval left his workstation and told employee David Vasquez, "Support me. Get justice. Let's go." Sandoval and Vasquez then walked through the plant, getting other employees to stop work and join their protest of Sandoval's discharge. Torres confronted

[1] We have amended the caption to reflect the disaffiliation of the United Farm Workers of America from the AFL–CIO effective January 4, 2006.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The "knocker" uses a device to stun each cow as it comes into the slaughterhouse.

[4] On August 11, eight employees, including Sandoval, Roberto Rivera, and Oscar Diaz filed a State lawsuit alleging that the Respondent required employees to work off the clock without pay. The record before us does not reflect the disposition of that case.

Sandoval, told him to get out, and told Vasquez that he was also fired.[5]

We agree with the judge's finding that Sandoval's discharge violated Section 8(a)(3) of the Act. The General Counsel established the necessary elements of union activity, knowledge, and animus toward employees' union activities. We do not find persuasive the Respondent's claim that it terminated Sandoval for holding up the start of production by 3 minutes, given that no other employee had ever been discharged for a similar infraction. Consequently, we find that Sandoval was discharged in retaliation for his union activities, in violation of Section 8(a)(3). Given that it would not affect the remedy, we find it unnecessary to reach the issue of whether the discharge independently violated Section 8(a)(1).

IV. THREATS TO DISCHARGE KILL FLOOR AND BONING ROOM EMPLOYEES

As the kill floor employees were walking out of the facility in support of Sandoval on April 12, Torres yelled at them that if they walked out the door, they would be fired. After the employees had left, Torres told Vasquez that he was "taking names and you are all fired."

We agree with the judge that these statements violated Section 8(a)(1) of the Act, as they were directed at the employees' protected activity.

We also adopt the judge's conclusion that Steve Coehlo's statements to the boning room employees after the kill floor employees walked out violated Section 8(a)(1) of the Act.[6] Coehlo told the employees that the kill floor employees who walked out had been fired, and that any of the boning room employees who walked out would also lose their jobs. He also stated that he had plenty of people to replace any employees who walked out, and that he did not care if they left. We find these statements to be clear threats of discharge in retaliation for employees' protected activity.

V. DISCHARGE OF KILL FLOOR AND BONING ROOM EMPLOYEES

We agree with the judge that the Respondent's discharge of the kill floor and boning room employees who walked out in protest of Sandoval's discharge on April 12, including Vasquez, violated Section 8(a)(1) of the Act. The employees in question were discharged in retaliation for their protected concerted activity. Because an 8(a)(3) finding would not add to the substantive remedy, we find it unnecessary to reach the issue of whether the discharges also violated Section 8(a)(3).[7]

VI. DISCHARGE OF RIVERA

We adopt the judge's finding that the discharge of Roberto Rivera violated Section 8(a)(1) and (3) of the Act. Rivera was a known union activist, and the Respondent had animus toward this activity. Although Rivera was allegedly discharged for failure to sanitize his cutting tools, numerous other employees received only written warnings for sanitation violations and were not discharged. In contrast, Rivera was discharged after receiving only verbal warnings. We agree with the judge that this disparate treatment indicates a discriminatory motive. The Respondent has not demonstrated that it would have discharged Rivera, absent his union activity.

VII. DIAZ' SCHEDULE CHANGE

Oscar Diaz worked as the tripe washer in the offal department. He attended union meetings, passed out authorization cards, and participated in the April 12 walkout. He was also one of the named plaintiffs in the State lawsuit mentioned in footnote 4, supra. On October 4, 2000, Diaz' start time was changed from 7:30 to 9:30 a.m. Varela told Diaz that his hours had been changed because he threw away a bucket of tracheas.

We agree with the judge that the General Counsel failed to meet his initial burden to establish that Oscar Diaz' schedule was changed for discriminatory reasons. Although Diaz engaged in union activity, that union activity ceased 6 months before the schedule change. We see an insufficient connection between this activity and the schedule change.[8]

VIII. THE 8(A)(1) THREATS

We adopt the judge's findings regarding the alleged threats to various employees made in violation of Section 8(a)(1), as detailed below.[9]

[5] Vasquez' discharge was not alleged as a separate violation. He is, however, included in the group of employees allegedly discharged for their walkout in protest of Sandoval's discharge.

[6] Chairman Battista finds it unnecessary to pass on this allegation because it is cumulative of other violations found and would not affect the remedy.

[7] In addition, given that it would not affect the remedy, we find it unnecessary to decide whether the strike was an economic or unfair labor practice strike, or to consider the validity of the Union's subsequent offer to return to work.

[8] The complaint does not allege that his participation in the State lawsuit was Sec. 7 activity for which a discharge might independently violate Sec. 8(a)(1).

[9] Regarding Boning Room Supervisor Fernando Fitchett's statements to employee Florentino Aguilar on April 15, we adopt the judge's finding that these statements violated Sec. 8(a)(1) of the Act. The credited testimony establishes that these statements were made. We adopt the judge's finding that the statements created an impression of futility. Chairman Battista notes that the Respondent has not contended that Fitchett's statements were protected under Sec. 8(c) of the Act. Contrary to his colleagues, Member Schaumber would reverse, finding instead that this violation is not supported by substantial record evidence.

Varela's Conversation with Vasquez

In March 2000, Offal Department Foreman Luis Varela asked union supporter David Vasquez: "How are your meetings? Where are they held at? What do they talk about?" Varela said that if the employees had a particular issue that they were dealing with, and if it was money they wanted, all they had to do was come to him and tell him of their needs, and he would go to the office and take care of it for them.

We adopt the judge's finding that Varela's remarks constituted interrogation and a promise to remedy employee grievances, and that Varela's question about how the meetings were going reasonably created the impression of surveillance.[10] Although Vasquez was an open union supporter and his sentiments regarding the Union were known, Varela's questions about the subject matter of union meetings reasonably created the impression that the employees' union activities were being watched. As the Board has stated, "[t]he Board does not require employees to attempt to keep their activities secret before an employer can be found to have created an unlawful impression of surveillance." *United Charter Service*, 306 NLRB 150, 151 (1992). Consequently, we find that Varela's remarks violated Section 8(a)(1) of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Central Valley Meat Co., Hanford, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Disciplining, discharging, or otherwise discriminating against its employees in retaliation for their union or protected concerted activities.

(b) Threatening its employees with discharge for engaging in protected activity.

(c) Interrogating its employees about their union activities.

(d) Threatening its employees with plant closure, loss of jobs, discharge, or unspecified reprisals if they engage in union or other protected activity.

(e) Soliciting grievances or promising benefits to discourage union or other protected activity.

(f) Threatening its employees that support of the Union is futile.

(g) Prohibiting employees from waiting in the company parking lot to discourage union or other protected activity.

(h) Creating the impression that the union or other protected activities of its employees are under surveillance.

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

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

(a) Within 14 days from the date of this Order, offer Jose Sandoval, Roberto Rivera, and any other employee terminated for engaging in the work stoppage on April 12, 2000, full reinstatement to their former jobs, discharging if necessary any replacements hired since their terminations or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Jose Sandoval, Roberto Rivera, and any employee discharged for engaging in the work stoppage on April 12, 2000, whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Jose Sandoval, Roberto Rivera, and any other employee discharged for engaging in the work stoppage on April 12, 2000, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(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 the records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Hanford, California, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 32,

[10] Member Schaumber would dismiss the allegation that Varela's question unlawfully created the impression of surveillance. The test for determining whether an employer has unlawfully created an impression of surveillance is whether, under all the relevant circumstances, reasonable employees would assume from the statement in question that their union or other protected activities had been placed under surveillance. *Flexsteel Industries*, 311 NLRB 257 (1993). Vasquez was an open union supporter, and Varela did not imply any covert or surreptitious monitoring of employee activity. In this circumstance, Member Schaumber would not find the Respondent unlawfully created the impression of surveillance.

[11] 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."

after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 1, 1999.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not found.

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 discipline, discharge, or otherwise discriminate against our employees for supporting United Farm Workers of America, or any other union, or for engaging in other protected activities.

WE WILL NOT threaten our employees with discharge for engaging in protected activity.

WE WILL NOT interrogate our employees about their union activities.

WE WILL NOT threaten our employees with plant closure, loss of jobs, discharge, or unspecified reprisals if they engage in union or other protected activity.

WE WILL NOT solicit grievances or promise benefits to discourage union or other protected activity.

WE WILL NOT threaten our employees that support of the Union is futile.

WE WILL NOT prohibit employees from waiting in our company parking lot to discourage union or other protected activity.

WE WILL NOT create the impression that the union or other protected activities of our employees are under surveillance.

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

WE WILL, within 14 days from the date of the Board's order, offer Jose Sandoval, Roberto Rivera, and any other employee terminated for engaging in the work stoppage on April 12, 2000, full reinstatement to their former jobs, discharging if necessary any replacements hired since their terminations or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Jose Sandoval, Roberto Rivera, and any employee discharged for engaging in the work stoppage on April 12, 2000, whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's order, remove from our files any reference to the unlawful discharges of Jose Sandoval, Roberto Rivera, and any other employee discharged for engaging in the work stoppage on April 12, 2000, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

CENTRAL VALLEY MEAT CO.

Michelle M. Smith, Esq., for the General Counsel.
Richard Alaniz and *John F. O'Shea, Esqs. (Alaniz & Schraeder),* of Houston, Texas, for the Respondent.
Annabelle Cortez-Gonzalves, Esq., of Salinas, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN J. MCCARRICK, Administrative Law Judge. This case was tried in Hanford, California, on January 23–26, April 2–6, and June 4–6, 2001,[1] upon the General Counsel's amended consolidated complaint that was issued on January 2, 2001, and alleged that Respondent committed certain violations of Section

[1] All dates are in 2000, unless otherwise noted.

8(a)(1) and (3) of the National Labor Relations Act (the Act). At the hearing, counsel for the General Counsel moved to amend the complaint to add: paragraph 6(e) alleging that Respondent through Lawrence Coelho, on February 16, 2000, threatened to close the plant; paragraph 6(f) alleging that in March 2000, Respondent through Louis Varela, interrogated employees about union activities, created the impression that employees' union activities were under surveillance and solicited and promised to remedy grievances; paragraph 6(g) alleging that on or about April 12, 2000, through Steve Coelho and Fernando Fitchett, threatened boning room employees with job loss if they participated in protected concerted activities including an unfair labor practice strike; paragraph 6(h) alleging on or about April 12, 2000, through Angel Torres, threatened employees with unspecified reprisals because the employees engaged in protected concerted activities; and paragraph 6(i) alleging on a date in April 2000, through Fernando Fitchett, impliedly threatened employees that they would not be recalled to work if they continued to participate in protected concerted activities and told employees it would be futile to support the Union. Respondent opposed the amendments.

At the hearing I granted counsel for the General Counsel's motion to amend the complaint. Under Section 102.17 of the Board's Rules and Regulations complaint amendments may be permitted "upon such terms as may be deemed just." The amendments were related to the extant allegations of the complaint and were made sufficiently early in the trial to allow Respondent ample time to adduce evidence to rebut the allegations. Respondent filed a timely answer denying these allegations.

In her posthearing brief, counsel for the General Counsel seeks to amend the complaint to add additional allegations of 8(a)(1) conduct by Respondent. Counsel for the General Counsel alleges that on or about April 12 Respondent, through Steve Coelho, told employees that they should have resolved their dispute one-on-one with Respondent and that he failed to explain employees' recall rights. Counsel for the General Counsel argues these matters were fully litigated, therefore, the amendments should be permitted. Respondent opposes the amendments.

With respect to these amendments, I find that they were not fully litigated. There are no similar allegations in the complaint as amended and they come at a time when Respondent cannot rebut the allegations. Further, the predicate testimony for this allegation did not come from Respondent. I find, in the circumstances of this case, it would not be "just" to allow the posthearing amendments. *Sheet Metal Workers Local 91 (Schebler Co.),* 294 NLRB 766, 774–775 (1989).

Respondent denied it committed any violations of the Act.

Upon the record as a whole, including my observations of the witnesses, briefs, and arguments of counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a California corporation engaged in the slaughter and processing of cattle at its facility in Hanford, California, where it annually sold and shipped meat products valued in excess of $50,000 directly to customers outside the State of California. 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 United Farm Worker's of America, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ISSUES

There are many issues to resolve in this case including:

1. Was Jose Sandoval engaged in protected concerted and/or union activity when he refused to punch in until 7:10 a.m. on April 12?

2. Did Respondent violate Section 8(a)(1) and (3) of the Act in terminating/suspending Sandoval?

3. Was the work stoppage by kill floor and boning room employees an unfair labor practice strike?

4. Did Respondent violate Section 8(a)(1) and (3) of the Act by discharging the striking employees on April 12?

5. Did Respondent repudiate any unfair labor practices that may have occurred on April 12?

6. Did the striking employees make an unconditional offer to return to work?

7. Did Respondent violate Section 8(a)(1) and (3) of the Act by refusing to reinstate the striking employees?

8. Did Respondent violate Section 8(a)(1) and (3) of the Act by terminating Roberto Rivera?

9. Did Respondent violate Section 8(a)(1) and (3) of the Act by changing the schedule of Oscar Diaz?

10. Did Respondent violate Section 8(a)(1) of the Act by:

(a) Interrogating its employees about their union activity.

(b) Creating the impression of surveillance.

(c) Threatening its employees with termination, unspecified reprisals, and plant closure for engaging in union and/or protected concerted activity.

(d) Promising benefits and soliciting grievances.

(e) Threatening that employees would not be recalled.

(f) Prohibiting employees from waiting on the parking lot.

(g) Stating it would be futile to support the Union.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Background

1. Respondent's business

Respondent operates a slaughterhouse and employs about 260 employees who kill, dismember, and process cattle into meat and meat by-products. The meat is sold to companies that make hamburger for COSTCO warehouse stores, In 'N Out Burger, Jack in the Box, and Burger King fast food restaurants. It should be noted that many of Respondent's employees speak only Spanish and that while some employees speak some English, their primary spoken language is Spanish. Respondent is owned and operated by the Coelho family. Lawrence Coelho (L. Coelho) is Respondent's president. His sons Brian (B. Coelho) and Stephen (S. Coelho) are Respondent's plant manager and assistant plant manager. Until about early 2000 Neil Jones (N. Jones) was Respondent's assistant plant manager and supervisor of quality control. I find that N. Jones was a supervisor within the meaning of Section 2(11) of the Act and an

agent of Respondent within the meaning of Section 2(13) of the Act. Kevin Arnett (Arnett) is Respondent's office manager.

Respondent's operation is divided into two primary areas, the kill floor and the boning room. Approximately 85 employees in the kill floor slaughter and process 500–600 cows a day. About 120–130 employees in the boning room cut the cattle carcasses into portions according to customers' requirements. In addition, there are about 15 employees in sanitation or clean up, 10–12 maintenance employees, 7 employees in quality control, 3 sales employees, and 5 or 6 buyers. B. Coelho manages Respondent's facility and S. Coelho oversees day-to-day plant operations in both the kill floor and boning room. Angel Torres (Torres) is the supervisor in the kill floor. The kill floor is further divided into an offal department that consists of 25–30 employees who report to Foreman Luis Varela (Varela). The boning room employees are supervised by Fernando Fitchett. Jesus (Chuy) Lopez is a supervisor of about 20 employees in the grinding room.

In Respondent's slaughterhouse, cattle are moved from holding pens outside the kill floor into a pen called the knock box. Once in the knock box, the cow is stunned unconscious by an employee called the knocker. The stunned cow rolls into the pit area where it is shackled to a chain and hung by its rear leg. In the pit, the cow's throat is slit and it bleeds to death. There, the two front hooves are removed as is the udder. The cow next moves to the high bench, sometimes referred to in the record as the "hide bench." The high bench is literally an elevated platform where the cow's hide is removed and it is dissected. Here, butchers remove the hide, the legs, hooves, and open the cow's belly. The viscera of the cow's belly goes to the gutting table where these organs are cut into individual parts. The viscera and nonedible parts of the cow are processed by the offal department employees. The cow's carcass is cut into halves and washed before going to coolers where the meat hangs overnight. The next day the meat is brought into the boning room where it is trimmed by butchers into various cuts according to customers' orders.

2. The union organizing campaign

What occurred in the course of this case is the subject of considerable dispute. I have carefully considered the testimony of each witness and the probabilities as to what actually occurred. To the extent any witness' testimony is inconsistent with the facts I have found below, they are not credited. Among the factors I have considered in making my credibility findings are the general consistency of the stories told by Jose Sandoval and David Vasquez. Respondent contends that Sandoval and Vasquez told conflicting stories. The record does not support this allegation. In the context of a heated argument and walkout, I would expect variations in what witnesses observed. Sandoval and Vasquez' testimony is not cloned. While each man made statements the other did not, there were no contradictions in their testimony. Respondent misstates Vasquez' testimony about when an argument between Torres and Sandoval occurred on April 12. It is clear from Vasquez' testimony that he was not sure when this conversation took place. Vasquez testified in response to leading questions from Respondent's counsel:

> Q. And I believe you testified yesterday that this occurred approximately an hour, an hour and a half after your shift started, which would make it approximately 8:15, 8:45, is that correct?
>
> A. Around there. I didn't really look at the time, but I would say somewhere around there. Probably before, somewhere like that.

Respondent also misstates Vasquez and Sandovals' testimony concerning who Sandoval spoke with after the walkout on April 12 outside the building. Respondent represents that Vasquez testified Sandoval spoke only to S. Coelho in the break area outside the kill floor while Sandoval testified that he spoke only with B. Coelho. In fact, the record reveals Vasquez testified Sandoval spoke with S. Coelho and that Vasquez was never asked by Respondent on cross-examination if B. Coelho spoke with Sandoval. (Tr. 392–395.) Sandoval testified that S. Coelho spoke to him and 20 to 30 employees in the break area outside the kill floor and later he spoke with B. Coelho in the truck washing area. (Tr. 553–554, 562–563.)

There is a "ring of truth" to Sandoval and Vasquez' testimony in the context in which it occurred. Their stories unfold in the heat of an organizing campaign in which Respondent concedes it expected a strike to occur. Their accounts take place in a slaughterhouse peopled by men used to gore, blood and profanity. The heated exchanges, filled with profanity described by the General Counsel's witnesses are more believable than the calm, sanitized versions described by Respondent's witnesses, particularly Torres. Torres' testimony was particularly unbelievable. He denied that he reported Sandoval's union activity to management yet B. Coelho testified that he learned of employees' union activity from Torres. He denied that he swore at his employees but the testimony of other employees is replete with Torres' profanity. Jesus (Chuy) Lopez, Respondent's boning room supervisor, was a reluctant witness who had to be prodded to give a complete answer concerning what he said to employees as translator for S. Coelho. It should also be noted that the Coelhos relied on supervisors to translate their statements into Spanish. There is no doubt that the legal distinction between hiring permanent replacements for striking employees and being fired may have gotten lost in the translations

In November 1999, the Union began organizing Respondent's kill floor and boning department employees after Jose Sandoval (Sandoval), a kill floor employee, contacted the Union. Sandoval passed out authorization cards and spoke to Respondent's employees both at work and in the company parking lot.

In late 1999,[2] Sandoval met with B. Coelho, S. Coelho, and N. Jones in Respondent's office. At the meeting Sandoval complained about malfunctioning toilets at Respondent's facility. In response to Sandoval's complaints about working conditions, S. Coelho told Sandoval, "I'm tired to [sic] hear this shit here, and if you keep on agitating the people I'm going to fire

[2] Although Sandoval testified that this conversation occurred in early 2000, it had to occur in late 1999 since S. Coelho took a leave of absence from January through mid-March 2000.

you and a few other people over there on the kill floor."[3] Later, Sandoval wrote a note in Spanish to B. Coelho dated January 24. In the note Sandoval stated that he was organizing his coworkers to improve working conditions. Also in January, Sandoval said, in the presence of Luis Varela, it was time the employees, "called the Union for all the abuses or mistreatments we have gotten from the company or management."

In February 2000, Sandoval was waiting in Respondent's parking lot for another employee to give him a ride home. Respondent's security guard, Curtis Phelps (Phelps), told Sandoval that he had to leave because he was talking to employees as they were leaving the plant. Curtis said N. Jones told him that employees could not be waiting on the parking lot.

From late 1999 until April 12, union meetings were held every Tuesday and Thursday evening. Employees discussed issues involving wages, hours, and other terms and conditions of employment at these meetings. The employees who had been attending the organizing meetings appointed a committee of five employees, Santiago Perez, Florentino Aguilar, Sandoval, David Vasquez (Vasquez), and Jesus Rivera, to represent them in a meeting with Respondent.

On February 15 the committee met with B. Coelho and Arnett at Respondent's facility. The employees read a list of demands including, respect and dignity from supervisors and foremen, improvement of working conditions and recognition of the Union as their representative. While Respondent denies union recognition was mentioned at this meeting, the letter of February 16 the Union sent to Respondent signed by the five employees who attended the February 15 meeting removes any doubt that the Union made a demand for recognition.

On February 16, L Coelho held meetings with the kill floor and boning room employees to discuss sanitation. L. Coelho told kill floor employees through translator Torres that if they were not satisfied with working conditions he could close down the plant. He stated he had a lot of money to survive and employees would be fired. L. Coelho told boning room employees through translator Fitchett that he had a lot of money and he could close the plant and move away any time he wanted.[4]

In March, at the high bench Varela asked Vasquez, "How are your meetings? Where are they held at? What do they talk about? If we had a particular issue that we deal with, if it was money that we wanted. If it was, all we had to do is come to him and tell him of our needs, and he'll go to the office and he'll take care of it for us."

On April 8, Sandoval told Torres he was not being paid properly and requested a copy of his punchcard. The punchcard shows the employee's starting time and the time they punch in and out. On April 10, Torres gave Sandoval the punchcard. At the union meeting on April 11, Sandoval told fellow employees and the union representatives that the punchcard reflected he was not being paid for all of the time he worked. Sandoval's complaint was that in order to kill (knock) the first cow at his starting time of 7:10 a.m. he had to punch in several minutes earlier in order to get ready for work. He was not being paid for the time needed to prepare. Other employees at the meeting also complained that they were not being paid for all the time that they worked.[5] The employees agreed that they would support Sandoval in his dispute with Respondent.

B. The Events of April 12

On April 12, Sandoval, the cow knocker on the kill floor, did not punch in until 7:10 a.m. in protest of Respondent's pay policy. He did not kill the first cow until about 7:13 a.m. Torres came to Sandoval's workstation between 7:15 and 7:20 a.m. and told him, "You came to your station late. You're fired."[6] Sandoval had his punchcard in his hand and said it did not require him to punch in until 7:10 a.m. Torres responded, "I don't give a shit what the paper says. You're fired." Sandoval left his workstation and spoke with Vasquez. Sandoval said, "Support me. Get justice. Let's go." Sandoval, Vasquez, and other employees on the kill floor stopped work. Torres confronted Sandoval on the kill floor and said, "Get the fuck out of here or I'll fuck you up." Torres then turned to Vasquez, who had left his workstation to join Sandoval and said, "You're fired too." Torres told the employees who had stopped work that if they left they would be fired. Sandoval and about 30 other employees on the kill floor then went outside the building. A short time later S. Coelho arrived outside the kill floor. S. Coelho through Torres told the employees who had stopped work to get the fuck out; they would never need them again. Torres, translating for S. Coelho, said, "You are fired. If you do not want to work, I have plenty of beef packers I can bring in. This is my property. Get out." Torres later told Vasquez that he was, "taking names and you all are fired." This is not inconsistent with the testimony given by the Coelhos. L. Coelho admitted that on the morning of April 12 he told employees he could hire permanent replacements. B. Coelho told employees at meetings later in the day on April 12 in both the kill floor and in the boning room that replacements could be hired if they chose to join the strike. Interpreters translated the Coelhos' statements into Spanish for the employees, no doubt translating permanent replacement as "fired." (See fn. 4, supra.)

After the kill floor employees left Respondent's facility, S. Coelho held a meeting with the boning room employees with Boning Room Supervisor Fitchett translating. S. Coelho said the kill floor employees, ". . . had every right to walk out. And he had the right to replace them with new people. And that if any of us were planning to walk out and join them, that we should think about our jobs and our families. Because if we walked out, we might lose our jobs, too." After speaking with the striking employees the boning room employees again met with S. Coelho. This time employee Sylvia Guereca translated. Santiago Carranza, a boning room employee, asked S. Coelho

[3] S. Coelho denied this conversation. For the reasons set forth, above, I credit Sandoval.

[4] L. Coelho's English language speeches were translated by his bilingual supervisors into Spanish. I credit the testimony of General Counsel's Spanish-speaking witnesses who testified that the Spanish language translations of Coelho's speeches occurred as set forth above.

[5] On August 11, eight employees, including Sandoval, Roberto Rivera, and Oscar Diaz filed a lawsuit in the Superior Court of the State of California for the County of Kings alleging, inter alia, that Respondent has required employees to work off the clock without pay.

[6] Both Sandoval and Torres are bilingual in Spanish and English.

to allow the kill floor employees to return to work. S. Coelho replied, "No, that those people were fired and that they no longer had a job in the company." Coelho repeated, ". . . to take care of our jobs and to think about our families, and whoever walked out would also lose their jobs." Coelho also said, ". . . he had a lot of people, enough people in Fresno to substitute each and every one of us, replace each and every one of us. And that he didn't care if we—if we left." Around 11 a.m., about 20–30 boning room employees decided to walk out in support of the kill floor employees. Fitchett spoke to the boning room employees before they walked off. Consistent with his earlier translation for S. Coelho he said, "Don't walk out. Don't be fools. If you walk out you will lose your jobs. The company can hire more people." Fitchett was not called as a witness.

C. The Offer to Return to Work

On April 12, Respondent began hiring permanent replacements for the striking kill floor and boning room employees. About 30 replacements were hired on April 12 and another 15–20 permanent replacements were hired on April 13. After Respondent began hiring replacements, in the afternoon of April 12 the Union made an unconditional offer to return to work on behalf of the striking workers. In an effort to return to work, at about 4:30 a.m. on April 13 the striking employees gathered at Respondent's plant gate. The waiting employees were addressed by S. Coelho through interpreter Jesus Lopez (Chuy), a supervisor in the boning room. S. Coelho told the employees that they had been fired and to get off the property or he would call the police.[7] Later, Chuy went out to the picket line to bring employee Mujia in to work but Chuy was told by a union official that, "Mujia could not come back to work unless everyone came back to work." Later on April 13, Respondent sent a letter to the Union that stated it did not believe the Union's unconditional offer to return to work was made in good faith and it would continue to hire permanent replacements for those employees who walked off the job.

Several strikers called Respondent's office on April 13 and were told to call back the next day. Later on April 13, S. Coelho gave a union official on the picket line a list of employees who could return to work. On April 14 and 15, a number of striking employees were returned to work from the picket line. Those employees who did not return to work on April 13 or 14 received letters from Respondent indicating that they had been permanently replaced as economic strikers and had been placed on a preferential hiring list. On May 2, strikers received a letter from Respondent indicating that there were jobs available. While many of the strikers have been returned to work, many returned to lower paying positions.

D. The Discharge of Roberto Rivera

Rivera worked for Respondent for over 13 years as a butcher on the kill floor, primarily on the high bench or in the pit. Rivera is Sandoval's nephew. Rivera attended many union meetings in the period before April 12. He also passed out union authorization cards in the Respondent's parking lot. On April 12, Rivera was working on the high bench and went on strike along with other kill floor employees the morning of April 12. Rivera returned to work on about April 15 and continued to work on the high bench or in the pit. Rivera was suspended on May 25 for poor work attendance and was told that further discipline could result in his termination. On August 11, Rivera and other employees filed a wage and hour lawsuit against Respondent in State Court. (See fn. 5.)

On August 20, Torres said he observed Rivera allowing beef carcases to touch each other on the line and verbally warned him.[8] On August 21, G. Jones and Torres saw Rivera fail to sanitize his hock cutter[9] on two different occasions and verbally warned him twice. On August 22, while B. Coelho was preparing to suspend Rivera, S. Coelho told his brother he saw Rivera not sanitizing his knife. Respondent suspended Rivera on August 22 for failing to sanitize his knife. A few hours after Rivera was suspended on August 22, Varela told kill floor employee Miguel Plascencia (Plascencia), "Rivera was told to fuck off. I would fire the whole bunch of gossip mongers. We are going to let go the whole bunch of gossip mongers. Be careful." The term "gossip mongers" or "troublemakers" was a term used by Varela to mean the Union. Respondent terminated Rivera on August 25 for failing to follow sanitary procedures on August 22 and on prior occasions. The termination letter stated that Rivera had been warned repeatedly about failing to follow sanitation rules.

E. Oscar Diaz' Schedule Change

Oscar Diaz (Diaz) was the tripe washer in the offal department for over 2 years. Diaz attended about half the union meetings before April 12. He also passed out union authorization cards and gave the signed cards he received to Sandoval. Diaz went out on strike with other kill floor employees on April 12 and returned to work on about April 15 as the tripe washer. He is one of the named plaintiffs in the lawsuit mention above in footnote 5. From December 27, 1998, to October 4, 2000 Diaz' timecards reflect he worked from 7:30 a.m. to as late as 8 p.m. and averaged about 10–11 hours of work per day. The timecards show that on October 4, Diaz' hours were changed. His start time was moved to 9:30 a.m and Diaz' hours worked decreased. Varela told Diaz that his hours were changed because L. Coelho said Diaz had thrown away a bucket of tracheas. Diaz denied this and Varela said, "I know but someone in the front office accused you." Diaz asked if he could alternate overtime days with Gustavo and Varela said, "Don't worry. Wait until the problem settles down and then you can alternate days with Gustavo as you did before to stay late."

S. Coelho said he had set up a system of staggered hours for tripe washers several years ago. One started 2 hours later than the other and stayed late to finish the washing. According to Varela, the two tripe washers were Diaz and Jose Luis Garcia (Garcia). Garcia started at 9:30 a.m. and worked late. Diaz started at 7:30 a.m. and finished about 2 hours before Garcia.

[7] I credit the testimony of General Counsel's witnesses regarding this conversation. Chuy was a reluctant witness. I had to prod him to answer counsel for the General Counsel's questions on cross-examination concerning this conversation. See Tr. 1140.

[8] It is interesting to note that August 20 was a Sunday, a day Respondent does not operate.

[9] The hock cutter is a pneumatic tool used to cut off the cow's limbs.

When Garcia quit, Varela had Diaz continue to start work at 7:30 a.m. and work late. The timecards reflect that Diaz worked from 7:30 a.m. to as late as 8 p.m. since December 27, 1998. According to Respondent, Varela was supposed to have changed Diaz' start time to 9:30 a.m. when Garcia quit but failed to do so. It was not until over 2 years later that Arnett noticed Diaz was working excess overtime. On September 8, Arnett sent a memo to B. Coelho noting Diaz was working overtime. It was not until October that B. Coelho, with the prodding of Arnett and L. Coelho, changed Diaz' hours to reduce overtime.

Analysis and Conclusions

IV. THE 8(A)(1) ALLEGATIONS

In the complaint and the amendments to the complaint at the hearing counsel for the General Counsel alleges that Respondent committed numerous 8(a)(1) violations.

A. In October 1999, Steven Coelho Threatens Sandoval and Others with Termination

At a meeting in late 1999, in response to Sandoval's complaints about working conditions, S. Coelho told Sandoval, "I'm tired to [sic] hear this shit here, and if you keep on agitating the people I'm going to fire you and a few other people over there on the kill floor."

The basic test for a violation of Section 8(a)(1) is whether under all the circumstances the employer's conduct reasonably tended to restrain, coerce, or interfere with employees' rights guaranteed by the Act. *Mediplex of Danbury,* 314 NLRB 470, 472 (1994). See, e.g., *Sunnyside Home Care Project,* 308 NLRB 346 fn. 1 (1992), citing *American Freightways Co.,* 124 NLRB 146, 147 (1959).

A threat of termination in retaliation for engaging in protected concerted activity is the ultimate threat an employer can convey to an employee. In this case, Coelho's threat to Sandoval was intended to restrain, coerce, and interfere with Coelho's employees' rights and violates Section 8(a)(1) of the Act. *Bestway Trucking, Inc.,* 310 NLRB 651, 671 (1993).

B. In January 2000, Curtis Phelps Prohibits Sandoval from Waiting in the Parking Lot

In February 2000, Sandoval was waiting in Respondent's parking lot for another employee to give him a ride home. Respondent's security guard, Curtis Phelps, told Sandoval that he had to leave because he was talking to employees as they were leaving the plant. Phelps said N. Jones told him that employees could not be waiting on the parking lot. Neither Phelps nor N. Jones testified at the hearing. However, L. Coelho said he implemented the antiloitering policy in December 1999 to prevent drinking on company premises. There is no evidence as to the substance of the policy, to whom it applied or whether it was ever reduced to writing. Based on Sandoval's credited testimony, I find that Phelps was acting as an agent of Respondent within the meaning of Section 2(13) of the Act.

In *TeleTech Holdings, Inc.,* 333 NLRB 402, 405 (2001), the Board discussed the application of no-access rules and held:

> A no-access rule for off duty employees is valid only if it limits their access solely with respect to the interior of the plant premises and other working areas; it is clearly disseminated to all employees; and it applies to off duty employees seeking access to the plant for any purpose and not just those employees engaging in union activity. In addition, a rule denying off-duty employees access to parking lots, gates and other outside non-working areas is invalid unless sufficiently justified by business reasons. *Tri County Medical Center,* 222 NLRB 1089 (1979).

In this case, the no-loitering policy limited employee access beyond the interior of the plant and working areas, was not clearly disseminated to all employees and was only applied to Sandoval after he began distributing union authorization cards in the parking lot. That the rule was applied to Sandoval because of his union activity is shown in Phelps proffered reason for denying Sandoval access to the parking lot, i.e., he could not talk to employees as they were leaving the plant. The Respondent's lack of business justification is shown by the multitude of others who were allowed to remain on the parking lot including employees, employees' relatives and friends, and a catering truck. I find that Respondent's no-access rule violated Section 8(a)(1) of the Act.

C. On February 16, L. Coelho Threatens Plant Closure

On February 16, the day after employees made a demand for union recognition L Coelho held meetings with the kill floor and boning room employees to discuss sanitation. L. Coelho told kill floor employees through translator Torres that if they were not satisfied with working conditions he could close down the plant, he had a lot of money to survive and employees would be fired. L. Coelho told boning room employees through translator Fitchett that he had a lot of money, he could close the plant and move away any time he wanted.

In *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 617 (1969), the Supreme court noted that Section 8(a)(1) prohibits employer interference, restraint, or coercion of employees in the exercise of their rights to self-organization. An employer's threat to close a plant if the employees select the union as their collective-bargaining representative is a form of threatened reprisal and violates Section 8(a)(1) of the Act. See also *Kona 60 Minute Photo,* 277 NLRB 867 (1985); *Sertafilm, Inc.,* 267 NLRB 882 (1983). In the instant case, L. Coelho through his interpreters threatened plant closure the day after employees demanded union recognition. The timing of this threat suggests its purpose was to discourage employees' union activity and violated Section 8(a)(1) of the Act.

D. In March 2000, Varela Interrogates Vasquez about his Union Activity, Created the Impression of Surveillance, Solicited, and Promised to Remedy Grievances

As a preliminary matter, I must determine if Varela is a supervisor within the meaning of Section 2(11) of the Act. Counsel for the General Counsel argues that Varela is a supervisor within the meaning of Section 2(11) of the Act. Respondent denies Varela is a supervisor.

1. Varela's supervisory status

a. The law

Section 2(11) of the Act defines a supervisor as:

> Any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, discipline other employees, or responsibly to direct them, or to adjust their grievances or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is to be read in the disjunctive, as possession of any of the indicia enumerated above will establish supervisory status. *Chemical Solvents, Inc.,* 331 NLRB 706, 717 (2000); *Zimmerman Plumbing & Heating Co.,* 325 NLRB 106, 109 (1997).

The Board has found employees with duties similar to Varela were supervisors within the meaning of Section 2(11) of the Act. In *Donelson Packing Co.,* 220 NLRB 1043, 1051 (1975), the Board found a group leader of 25 employees at a meat packing company who transfered employees from one assigned task to another, received calls from employees who did not or could not report to work, regularly attended management meetings, and exercised a meaningful, if not dispositive, role in the recommendation of raises and disciplinary action was a supervisor within the meaning of Section 2(11) of the Act. In *Packerland Packing Co. of Texas,* 221 NLRB 1119, 1122 (1975), the Board found an "assistant foreman," who transferred respondent's 36 to 40 kill floor employees from job to job on the floor; who selected and assigned kill floor employees for early work and overtime and who used discretion in directing kill floor employees in their daily work, a supervisor within the meaning of Section 2(11) of the Act.

b. The analysis

Respondent contends that the only supervisor for over 80 kill floor employees is Torres. The record reflects this is not the case. As noted above, Varela manages 25–30 offal department employees. He regularly assigns them work. When replacements were hired on April 12 and 13, Varela assigned employees to workstations. Varela has issued employees written and verbal reprimands. On August 21, 1998, Varela issued a written reprimand to kill floor employee Jamie Ramirez regarding sanitation procedures and on November 13, 2000, he issued a written reprimand to kill floor employee Estrada for sanitation issues. B. Coelho admitted that Varela corrected problems in the offal area. Coelho's admission is supported by sanitation records that reflect Varela was told to corrrect noncompliance with sanitation procedures. Varela also ensures that employees clock in and out.

Like the supervisors in *Donelson* and *Packerland*, supra, I find that Varela possesses the indicia of a supervisor within the meaning of Section 2(11) of the Act. Varela assigns work and he ensures compliance with sanitation and efficient production in the offal department. In addition, he issues both verbal and written reprimands and responsibly directs the work in the offal department.

2. The interrogation

In March, at the high bench Varela asked Vasquez, "How are your meetings? Where are they held at? What do they talk about? If we had a particular issue that we deal with, if it was money that we wanted. If it was, all we had to do is come to him and tell him of our needs, and he'll go to the office and he'll take care of it for us."

a. The law

In *Westwood Healthcare Center,* 330 NLRB 935 (2000), the Board discussed the test to determine whether interrogation is unlawful. The Board stated in *Westwood,*

> We agree with our dissenting colleague that the applicable test for determining whether the questioning of an employee constitutes an unlawful interrogation is the totality-of-the-circumstances test adopted by the Board in *Rossmore House,* 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Union Local 11 v. NLRB,* 760 F.2d 1006 (9th Cir. 1985), and adhered to by the Board for the past 15 years. We also agree that in analyzing alleged interrogations under the *Rossmore House* test, it is appropriate to consider what have come to be known as "the Bourne factors," so named because they were first set out in *Bourne v. NLRB,* 332 F.2d 47, 48 (2d Cir. 1964). Those factors are:
>
> (1) The background, i.e. is there a history of employer hostility and discrimination?
> (2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?
> (3) The identity of the questioner, i.e. how high was he in the company hierarchy?
> (4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of unnatural formality?
> (5) Truthfulness of the reply.
>
> In analyzing whether interrogation of employees concerning protected concerted activity violates Section 8(a)(1) of the Act, the Board has considered the totality of the circumstances. In the final analysis, our task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act. [*Westwood Health Care Center,* 330 NLRB at 943. See also *Rossmore House,* 269 NLRB at 1178 fn 2. See *Cumberland Farms,* 307 NLRB 1479 (1992).]

b. The analysis

In this case, Vasquez' supervisor in the work area sought information at the heart of the Union's organizing campaign. Further, Varela indicated that Respondent would remedy employee grievances. This interrogation and promise of benefits occurred in the context of prior Respondent threats to fire employees for engaging in protected activity and threats to close the plant in the face of an organizing campaign. Varela's interrogation, solicitation, and promise to remedy grievances violated Section 8(a)(1) of the Act.

3. The impression of surveillance

In addition, the General Counsel contends that Varela's statement unlawfully created an impression of surveillance.

a. The law

The Board's test for determining whether an employer has created an impression of surveillance is whether the employee would reasonably assume from the statement in question that his union activities had been placed under surveillance. In *United Charter Service,* 306 NLRB 150 (1992), the Board held:

> The Board does not require employees to attempt to keep their activities secret before an employer can be found to have created an unlawful impression of surveillance. . . . Further, the Board does not require that an employer's words on their face reveal that the employer acquired its knowledge of the employee's activities by unlawful means. [Id. at 151.]

The Board further explained this rationale in *Flexsteel Industries,* 311 NLRB 257 (1993):

> The idea behind finding "an impression of surveillance" as a violation of Section 8(a)(1) of the Act is that employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways. [Id. at 257.]

b. The analysis

Varela's question about how the meetings were going reasonably created the impression that the employees' union meetings were under surveillance and violated Section 8(a)(1) of the Act.

E. April 12—Torres Threatens Employees with Unspecified Reprisal and Discharge if they Engage in a Work Stoppage

As kill floor employees were walking out of the Respondent's facility, Torres yelled at employees that if they walked through the door they would be fired. After employees had left the kill floor and were outside the building, Torres told Vasquez that he was, "taking names and you all are fired." Like the threat discussed in paragraph A, above, Torres' statements were intended to coerce and restrain Respondent's employees from engaging in union or protected concerted activity and violated Section 8(a)(1) of the Act. *Bestway Trucking, Inc.,* 310 NLRB 651, 671 (1993).

F. On April 12, S. Coelho Threatens Boning Room Employees with Discharge if they Engage in the Work Stoppage

1. The law

Even in the context of economic strikers, the Board has stated that an employer may not threaten strikers with job loss. In *Larson Tool & Stamping Co.,* 296 NLRB 895 (1989), the Board found the following written statement violated Section 8(a)(1) of the Act:

> We agree with the hearing officer that the statement in the August 18 letter that during an economic strike "you could LOSE YOUR JOB TO A PERMANENT REPLACEMENT."
>
> . . . may be "fairly understood as a threat of reprisal" within the meaning of *Eagle Comtronics,* 263 NLRB at 515–1516 [(1982)]. A reference to loss of employment is not consistent with *Laidlaw Corp.,* 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1969)], which guarantees permanently replaced strikers, who have made unconditional offers to return to work, the right to full reinstatement when positions become available, and to be placed on a preferential hiring list if positions are not available. The employer's right to permanently replace economic strikers does not "entail an absolute loss of employment for those striking employees who are replaced." *Gino Morena, d/b/a Gino Morena Enterprises,* 287 NLRB 1327, 1328 (1988).
>
> The statement at issue goes significantly beyond statements found in such cases as *Eagle Comtronics,* supra, and *John W. Galbreath & Co.,* 288 NLRB 876, 877 (1988). In those cases, the respective employers did not tell employees, without any explanation, that they would lose their jobs as a consequence of a strike or permanent replacement. But that is expressly and unambiguously what the Employer has done here. [Footnote omitted.]

2. The analysis

After the kill floor employees left Respondent's facility, S. Coelho held a meeting with the boning room employees with Boning Room Supervisor Fitchett translating. Coelho said the kill floor employees, ". . . had every right to walk out. And he had the right to replace them with new people. And that if any of us were planning to walk out and join them, that we should think about our jobs and our families. Because if we walked out, we might lose our jobs, too." After speaking with the striking employees the boning room employees again met with S. Coelho. This time employee Sylvia Guereca translated. Santiago Carranza, a boning room employee, asked S. Coelho to allow the kill floor employees to return to work. Coelho replied, "No, that those people were fired and that they no longer had a job in the company." Coelho repeated, ". . . .to take care of our jobs and to think about our families, and whoever walked out would also lose their jobs." Coelho also said, "He had a lot of people, enough people in Fresno to substitute each and every one of us, replace each and every one of us. And that he didn't care if we —if we left."

The instant case involves not an economic strike but an unfair labor practice strike. Threatening unfair labor practice strikers with job loss as a consequence of a strike or by permanent replacements as was done here certainly conveys the message that they would be terminated and violates Section 8(a)(1) of the Act. *Larson Tool & Stamping Co.,* supra.

G. In April, Fitchett Threatens Employees that they Would not be Recalled to Work

In *Baddour, Inc.,* 303 NLRB 275, 275 (1991), the Board reaffirmed the principles set out in *Larson Tool & Stamping Co:*

> The judge found and we agree that the Respondent unlawfully threatened employees with job loss in the event of a strike. During its campaign speeches before the second election, the Respondent, inter alia, told employees without other explanation that "union strikers can lose their jobs" and that "you could end up losing your job by being replaced with a new permanent worker." The Board in *Larson Tool & Stamping Co.,* 296 NLRB 895 (1989), made it clear that employers cannot tell employees without explanation that they would lose their jobs as a consequence of a strike or permanent replacement. The phrase "lose your job" conveys to the ordinary employee the clear message that employment will be terminated. Further, if the employee is also told that his/her job will be lost because of replacement by a "permanent" worker, the message is reinforced. In these circumstances, where the single reference to permanent replacement is coupled with a threat of job loss, it is not reasonable to suppose that the ordinary employee will interpret the words to mean that he/she has a Laidlaw right to return to the job. [Footnote omitted.]

On April 12, around 11 a.m. about 20–30 boning room employees decided to walk out in support of the kill floor employees. Fitchett spoke to the boning room employees before they walked off. Consistent with his earlier translation for S. Coelho he said, "Don't walk out. Don't be fools. If you walk out you will lose your jobs. The company can hire more people."

Like the threat of reprisals made earlier by S. Coelho discussed above, Fitchett's statements threatened job loss to employees in the event they went on strike. Here, Fitchett repeats S. Coelho's threat to the boning room employees that if they join in the work stoppage they will lose their jobs to replacements. This threat to unfair labor practice strikers violates Section 8(a)(1) of the Act.

H. On April 15, Fitchett Told Aguilar he Would not be Recalled to Work and that it was Futile to Support the Union

1. The law

In *Reno Hilton Resort Corp.,* 319 NLRB 1154, 1155 (1995), the Board found an employer memo to employees violated Section 8(a)(1) of the Act. The memo stated, in pertinent part:

> That union can't do anything for you that you cannot do better for yourselves. The union would not benefit you in any way and could hurt you seriously.

In finding this statement of futility coercive the Board stated:

> The Board has held that although employers' warnings of "serious harm" that may befall employees who choose union representation are not unlawful in and of themselves, they may be unlawfully coercive if uttered in a context of other unfair labor practices that "impart a coercive overtone" to the statements. *Community Cash Stores,* 238 NLRB 265, 269 (1978), citing *Greensboro Hosiery Mills,* 162 NLRB 1275, 1276 (1967), enf. denied in relevant part 398 F.2d 414 (4th Cir. 1968). We find such a context here. The Respondent violated the Act repeatedly. Its unlawful acts included threatening an employee that the hotel would close before the Union could come in, stating that union supporters could be fired, promising to grant benefits if the Union was rejected, threatening to withhold or take away benefits if the Union was certified, granting benefits during the union organizing campaign, and indicating that it would reject any union demands in order to show how "stupid" unions are. The coercive effect of Hughes' memo is apparent when it is read against the backdrop of those unfair labor practices, which give both specificity and force to Hughes' otherwise vague assertions that the Union would not benefit employees, could hurt them seriously, and might jeopardize their jobs. [*Reno Hilton Resorts Corp.,* 319 NLRB at 1155.]

2. The analysis

On April 15, Aguilar went to Respondent's facility to pick up his paycheck where he met Fitchett. Fitchett said, "[C]ontinue doing what Santiago (boning room employee Santiago Carranza) said, and I could see that because of him I didn't have a job, and that the Union was no good and they wouldn't do anything for us." Fitchett's statement was made in the context of other unfair labor practices that created a coercive context. Like *Reno Hilton,* supra, Respondent herein had made threats of termination, plant closing, and promised benefits. I find that Fitchett's statement violated Section 8(a)(1) of the Act in stating it would be futile to support the Union and by threatening employees they would not be recalled to work due to union activity.

I. On August 22, Varela Threatens to Terminate Union Supporters

A few hours after Rivera was suspended on August 22, Varela told kill floor employee Miguel Plascencia (Plascencia), "Rivera was told to fuck off. I would fire the whole bunch of gossip mongers. We are going to let go the whole bunch of gossip mongers. Be careful."

In *Monfort of Colorado,* 298 NLRB 73, 84 (1990), the Board found a similar statement violated Section 8(a)(1) of the Act where it was clear that a reference to "troublemakers" was synonymous with union activists. In this case, the evidence establishes that the Spanish term "gossip monger" or "troublemaker" referred to union activists. The threat made to Plascencia was intended to threaten, coerce, and restrain him in violation of Section 8(a)(1) of the Act.

IV. THE TERMINATIONS AND SCHEDULE CHANGE

The General Counsel argues Respondent terminated Sandoval and Rivera and changed Diaz' work schedule because they engaged in union and protected concerted activity.

A. The Law

1. Union activity

Section 8(a)(3) of the Act prohibits employers from discriminating in regard to an employee's, "tenure of employment . . . to encourage or discourage membership in any labor organization."[10]

[10] 29 U.S.C. § 158(a)(3).

In 8(a)(3) cases, the employer's motivation is frequently in issue, therefore the Board applies a causation test to resolve such questions. *Wright Line,* 251 NLRB 1083, 1088 (1980). "The *Wright Line* test requires the General Counsel to make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated the employer's adverse action. The critical elements of discrimination cases are protected activity by the employees known to the employer and hostility toward the protected activity. Although not conclusive, timing is usually a significant element in finding a prima facie case of discrimination." *Western Plant Services,* 322 NLRB 183, 194 (1996).

2. Protected concerted activity

In order to find an employee's activities concerted they must be engaged in with or on the authority of other employees and not soley by and on behalf of the employee himself. The definition encompasses circumstances where an individual employee initiates or induces or prepares for group action as well as an individual employee who brings truly group concerns to the attention of management. In *Meyers Industries,* 268 NLRB 493, 497 (1984) (*Meyers I*), and *Meyers Industries,* 281 NLRB 882 (1986) (*Meyers II*), the Board defined when an individual engages in concerted activity for other mutual aid or protection. The Board in *Meyers I* stated,

> In general, to find an employee's activity to be "concerted," we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity. [*Meyers Industries,* 268 NLRB at 497.]

In *Meyers II,* the Board emphasized that its definition of concerted activity included individual activity where, "individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." 281 NLRB at 887.

Employees do not have to accept the individual's call for group action before the invitation itself is considered concerted. *Whittaker Corp.,* 289 NLRB 933, 934 (1988); *El Gran Combo,* 284 NLRB 1115 (1987). The Board in *Meyers II* held that, "the activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much 'concerted activity' as is ordinary group activity." *Owens-Corning Fiberglass Corp. v. NLRB,* 407 F.2d 1357, 1365 (4th Cir. 1969).

If the General Counsel successfully presents a prima facie case of discrimination, the burden then shifts to the employer to persuade the trier of fact that the same adverse action would have occurred even in the absence of the employee's protected activity. *Western Plant Services,* supra. To meet this burden, "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Roure Bertrand Dupont, Inc.,* 271 NLRB 443 (1984).

B. The Analysis

1. The termination of Sandoval

a. The union activity

The General Counsel has established a prima facie case that Respondent terminated/suspended Sandoval for engaging in union activity. Sandoval was responsible for the Union's organizing campaign. Sandoval solicited authorization cards and attended union meetings. In January, Sandoval told Respondent in a letter he was organizing Respondent's employees. In February, Sandoval attended a meeting with B. Coelho where a demand for recognition of the Union was made. Both Sandoval's January letter and his presence at the February meeting put Respondent on notice of Sandoval's union activity. Further knowledge of Sandoval's union activity is established in January when Sandoval said it was time to bring in the Union in the presence of leadman Varela.[11] There is ample evidence of Respondent's animus toward Sandoval's union activities. In December 1999, after Sandoval complained about working conditions to S. Coelho, S. Coelho told Sandoval that if he, "continued telling people this shit and if I continue to hear it from you and others on the kill floor, you will be fired." After the February 15 meeting with B. Coelho where a demand for union recognition was made, L. Coelho called employee meetings and threatened plant closure. In February, Sandoval was told that he could not wait in Respondent's parking lot because he was talking to employees as they left work. Respondent terminated Sandoval on April 12 when Torres told Sandoval he was fired for being late. I find that the General Counsel has established a prima facie case that Respondent violated Section 8(a)(3) of the Act in terminating Sandoval.

b. The protected concerted activity

The General Counsel contends that Respondent also terminated Sandoval for his protected concerted activity.

In the days before the walkout on April 12, Sandoval had expressed concern to Torres that he was not being paid properly and requested his timecard. Sandoval brought the time card to the union meeting on April 11. He and several employees at the meeting complained they were not being paid for all the time they worked. The employees agreed Sandoval should punch in at 7:10 a.m., when Respondent began paying him. The employees further agreed they would support Sandoval if Respondent disciplined him for punching in at 7:10 a.m. On April 12, when Sandoval did not punch in until 7:10 a. m. and did not arrive at his workstation until 7:13 a.m., 3 minutes late, he was engaged in a concerted activity protected by Section 7 of the Act. *Cub Branch Mining,* 300 NLRB 57, 58 (1990).

Respondent was aware that Sandoval was protesting his working conditions when Torres fired him.[12] Sandoval waived

[11] See sec. I,D,1 for the discussion of Varela's supervisory status.

[12] It is clear that Sandoval was not suspended but fired by Torres. Torres did not mark the suspension box next to Sandoval's name on the absentee report for April 12.

his timecard at Torres and told him that it said he did not start work until 7:10 a.m. Moreover, just a few days earlier Sandoval asked Torres for a copy of his timecard because he felt he was not being paid properly. Sandoval was protesting not only his own conditions but he was also speaking for the employees similarly situated who attended the April 11 uion meeting. The ral Counsel has established a prima facie case that Torres' terminated Sandoval in violation of Section 8(a)(1) of the Act.

c. Respondent's defense

Respondent contends that even in the absence of Sandoval's union and protected concerted activity it would have suspended him. *Wright Line,* 251 NLRB 1083 (1980). Respondent maintains that Sandoval was suspended solely because he delayed the start of production by failing to report to his workstation in a timely manner. I find this defense to be pretextual.

Sandoval was only 3 minutes late in reporting to his workstation and there is no evidence Respondent fired another employee for such a minor infraction. Finally, there is no evidence that Respondent independently investigated Sandoval's conduct by asking him for his side of the story. The case Respondent cites in support of its defense is inapposite. In *Bali Blinds Midwest,* 292 NLRB 243 (1988), the respondent terminated an employee who was 1-minute late in conformance with its established practice for probationary employees and there was no evidence of animus directed toward the alleged discriminatee. Here the record is replete with Respondent's animus for Sandoval's union and protected concerted activity. No other employee was fired for reporting late. I find that by terminating Sandoval Respondent has violated both Section 8(a)(1) and (3) of the Act.

2. The termination of Rivera

a. Rivera's union and protected concerted activity

In addition to his termination on April 12 for engaging in the concerted work stoppage, the General Counsel argues that after his return to work on April 15 Rivera was suspended on August 22 and fired on August 25 due to his union and protected concerted activities. Rivera was active in the union organizing effort. It was commonly known that Rivera is Sandoval's nephew. Rivera distributed union authorization cards in Respondent's parking lot and attended many union meetings after work. He took part in the April 12 strike and was terminated with the other striking employees. Rivera is also a named plaintiff in the State wage and hour lawsuit filed on August 11 and served on Respondent August 17. Respondent was aware of both Rivera's union and protected concerted activity. Rivera's participation in both the strike and lawsuit is uncontroverted. Respondent's knowledge of and animus toward Rivera's union activity is belied by supervisor Varela's statement to Miguel Plascentia on August 22 that Rivera had been told to fuck off and he (Varela) would fire the whole bunch of gossip mongers or troublemakers, i.e., union supporters. I find that the General Counsel has established a prima facie case that Respondent fired Rivera due to his union and protected concerted activities. Under *Wright Line* the burden shifts to Respondent to show it would have terminated Rivera despite his union or protected concerted activity.

b. Respondent's defense

Respondent contends it fired Rivera, who Respondent employed for over 13 years, because he repeatedly violated Respondent's sanitation rules when he failed to sanitize his cutting tools on August 20, 21, and 22. Respondent's defense is pretextual since there is evidence of disparate treatment of Rivera compared to similarly situated employees. The evidence of record suggests that Respondent sporadically enforced its sanitation rules and only after repeated violations.

The Board and courts have long held that evidence of, "blatant disparity is sufficient to support a prima facie case of discrimination. *Fluor Daniel,* 304 NLRB 970, 970–971 (1991). See also *Great Dane Trailers, Inc.,* 373 U.S. 221 (1963); *New Otani Hotel & Garden,* 325 NLRB 928 fn 2 (1998). Several employees, including Rivera, Vasquez, and Plascentia, testified that they frequently failed to sanitize their knives in the presence of supervisors and quality control employees. The employees' testimony was corroborated by quality control supervisor Jones. None of these employees received disciplinary warnings prior to August 22.

Respondent's disciplinary records reflect other employees had more egregious rules violations than Rivera and were not discharged. Gerardo Tabera received 21 written warnings over a 4-year period, including 10 attendance and 8 sanitation warnings but remained on the job. Respondent issued Juan Saldana written warnings for failing to sanitize a cutting tool 3 days in a row, for being drunk on the job, and for not washing his apron and knife. Yet Saldana was never terminated. Manuel Amador was repeatedly warned in writing for attendance and was written up twice for not sanitizing a knife yet was not terminated. Porfirio Galvan was warned in writing seven times for attendance violations and three times for sanitation violations yet remained on the job. Elenin Cortez received three written warnings for attendance problems, one for drinking on company property and two for sanitation violations without termination. Jose Hernandez got a written warning for consistently failing to follow sanitation procedures. Jorge Ornelas was not fired despite refusing to follow a supervisor's order regarding sanitation. David Gutierrez received three written warnings for sanitation violations without suspension or termination despite other reprimands for drinking on company premises and being late to his workstation. Esteban Carranza was warned in writing four times for attendance problems. Carranza was suspended on November 9, 1999, for repeated sanitation violations but despite further written warnings for sanitation violations on November 12 and 29, 1999, and February 21, 2001, he remains on the job. On September 7, Angel Villamil was warned in writing for failure to sanitize his knife. On January 25, 2001, Villamil received another written warning for sanitation violations. A third written warning was issued to Villamil on February 23, 2001, for a sanitation violation. Villamil was neither suspended nor terminated.

By contrast, Rivera had received no written warnings for sanitation violations before his suspension on August 22 and his termination on August 25. His attendance record was no

worse than those that received no discipline. That his suspension and termination came only 5 days after Respondent learned he was a named plaintiff in a State lawsuit filed against them and after his union and protected concerted activities comes as no surprise. Moreover, despite the fact that Rivera was admittedly one of their best butchers, had never received a written sanitation warning, and had a recent work related hand injury, Respondent fired Rivera without asking Rivera if he had a valid reason for not following sanitation procedures. This further suggests a discriminatory motive on Respondent's part. *Denholme & Mohr, Inc.,* 292 NLRB 61, 67 (1988). I find that Respondent fired Rivera in violation of Section 8(a)(1) and (3) of the Act.

3. Diaz' schedule change

The General Counsel contends that Respondent altered Diaz' work schedule and reduced his hours on about September 17, 2000, and again on October 4, 2000, because of his union and protected concerted activity.

Diaz' union activity was limited to attending union meetings. Diaz participated in the April 12 strike and he was a named plaintiff in the State court wage and hour lawsuit filed against Respondent on August 11.

Contrary to the General Counsel's assertion, Diaz' schedule was not changed on September 17. Diaz' timecards reflect no change in his hours on or after September 17. However, the time cards establish that Diaz' hours were changed on October 4 when his starting time was moved from 7:30 to 9:30 a.m. The effect of this change was to reduce Diaz' workday by 2 hours.

The General Counsel has failed to establish a prima facie case that Respondent discriminated against Diaz due to his protected concerted or union activity. The General Counsel has not proved the elements of knowledge, animus[13] or timing in alleging Diaz' union activity was the cause of his schedule change. In addition, both animus and timing are absent with respect to Diaz' protected concerted activity.

There is no dispute that Respondent was aware Diaz participated in the strike and was a member of the State lawsuit. However, there is no evidence Respondent was hostile to Diaz' union or protected concerted activity. Further, the timing of Diaz' schedule change suggests Respondent was not motivated by Diaz' union or protected concerted activity. Respondent changed Diaz' schedule over 6 months after his union activity, 6 months after he engaged in the strike, and 2 months after Diaz filed the wage and hour lawsuit. *Geo V. Hamilton, Inc.,* 289 NLRB 1335, 1340–1341 (1988) (employee's participation on union negotiating team found, "too remote in time to be linked to" his layoff 11 months later); *Irving Tanning Co.,* 273 NLRB 6, 8 (1984) (termination of known union supporter 5 months after an unsuccessful organizing drive is insufficient affirmative proof of unlawful motive); *Qualitex, Inc.,* 237 NLRB 1341, 1344 (1978) (no showing that antiunion animus tainted the discharge of an active union supporter over 4 months after the election despite the employer's vigorous union opposition.) In the absence of employer knowledge of Diaz' union activity, animus, or adverse timing, I find that the General Counsel has failed to establish the Respondent changed Diaz' schedule as a result of his union or protected concerted activity. I will dismiss that portion of the complaint.

[13] Diaz received more overtime than most of Respondent's employees up to October 4.

V. THE APRIL 12 WORK STOPPAGE

It has long been held if an unfair labor practice is a contributing cause of a strike, then, as a matter of law, the strike must be considered an unfair labor practice strike. The burden is on the Respondent to show that the strike would have occurred even if it had not committed the unfair labor practices. *Wilkie Metal Products, Inc.,* 333 NLRB 603 (2001), citing *Larand Leisurelines, Inc. v. NLRB,* 523 F.2d 814, 820 (6th Cir. 1975). After Torres fired Sandoval, Sandoval told his coworkers he had been fired and asked them to support him. Shortly thereafter about 15 kill floor employees walked off the job to protest Sandoval's termination. Later that day, after learning Sandoval and other kill floor employees had been fired, 20–30 boning room employees also joined the strike. Sandoval's unlawful termination was the motivating factor behind the strike, thus, the strike was an unfair labor practice strike from its inception.

Respondent contends that the strike was motivated solely by economic considerations. However, there is no evidence Respondent repudiated the underlying unfair labor practice thereby converting the unfair labor practice strike to an economic strike. *Gibson Greetings,* 310 NLRB 1286, 1289 (1993). Moreover, there is no evidence that the striking employees were motivated by anything other than Sandoval's termination.

VI. TERMINATION OF THE KILL FLOOR AND BONING ROOM EMPLOYEES

When the kill floor and boning room employees walked off the job on April 12 to protest Respondent's termination of Sandoval, they were engaged in concerted activity protected by Section 7 of the Act. Firing strikers engaged in protected activity violates Section 8(a)(1) of the Act. *NLRB v. Washington Aluminum Co.,* 370 U.S. 9 (1962); *Robbins Engineering,* 311 NLRB 1079 (1993); *Bethany Medial Center,* 328 NLRB 1094 (1999).

It is clear that Respondent fired not only Sandoval but also the employees who walked out with him. Contemporaneous with the work stoppage, Torres told the kill floor employees that if they left they would be fired. S. Coelho confirmed what Torres had said and Torres again told employees he was taking names of employees who had walked out to make sure they were fired. S. Coelho and Fitchett both told boning room employees they would lose their jobs if they walked off. When the boning room employees joined the striking kill floor employees in the afternoon on April 12, they could reasonably believe they had been terminated for joining the strike. *Ridgeway Trucking Co.,* 243 NLRB 1048 (1979); *Flat Dog Productions,* 331 NLRB 1571 (2000). Any ambiguity created by Respondent through use of translators or use of legal terminology must fall on Respondent. *Flat Dog Productions,* supra. Respondent violated Section 8(a)(1) of the Act when it terminated its kill floor and boning room employees engaged in the concerted work stoppage commencing April 12.

The General Counsel also contends that the kill floor and boning room employees were terminated for engaging in an unfair labor practice strike in violation of Section 8(a)(3) of the Act. The cases cited by counsel for the General Counsel in support of this proposition all involve strikers engaged in union activity. *Flat Dog Productions,* supra; *Caterpillar, Inc.,* 322 NLRB 690, 694 (1996); *G&C Packing Co.,* 298 NLRB 573, 576 (1990). Simply engaging in an unfair labor practice strike does not confer the protection of Section 8(a)(3) of the Act. This strike had nothing to do with employees' union organizing activity. In this case, the striking employees who walked out in support of Sandoval were not at that time engaged in a union but rather a protected concerted activity. Respondent was clearly motivated by the strikers' concerted activity in firing them rather than their union activity. Respondent made no threats or other statements that reflected antiunion animus at a time proximate to the work stoppage. I find that the strikers were not discharged in violation of Section 8(a)(3) of the Act and I will dismiss that portion of the complaint.

VII. THE OFFER TO RETURN TO WORK

A. The Law

The Board has held that an employer must reinstate unfair labor practice strikers to their former positions after they make an unconditional offer to return to work. *Boydston Electric, Inc.,* 331 NLRB 194 (2000); *Nichols County Health Care Center, Inc.,* 331 NLRB 970 (2000); *Mauka, Inc.,* 327 NLRB 148 (1999); *Detroit Newspapers,* 326 NLRB 700 (1998); *Caterpillar, Inc.,* 322 NLRB 690 (1996). However, employees discharged in violation of Section 8(a)(1) or (3) of the Act have no obligation to make an offer to return to work. The backpay period for discharged strikers begins with the date of discharge. There is no requirement that the discharged strikers must request reinstatement to start the back pay period. *Abilities & Goodwill Co.,* 241 NLRB 27 (1979); enf. denied 612 F.2d 6 (6th Cir. 1979); *Lyon & Ryan Ford,* 246 NLRB 1 (1979); enf. granted 647 F.2d 745 (7th Cir. 1981); cert. denied 454 U.S. 894 (1981); *Dino & Sons Realty Corp.*, 330 NLRB 680, 687 (2000),. In *Abilities & Goodwill, Inc.,* supra, the Board, in explaining why a request for reinstatement was superfluous stated:

> Indeed, such a request, in all likelihood, would fall upon deaf ears when one considers that the employer had just fired the employee. In this connection, the Board has frequently said that it will not require a person to perform a futile act . . . suggests the inequity of requiring discharged strikers to request reinstatement, for the fact of discharge itself clearly impresses upon the employees that their services are no longer desired and that a request to return would be a useless gesture.

B. The Analysis

In this case, Respondent terminated all striking employees and relieved them of any obligation to make an offer of reinstatement. Moreover, the strikers, through the Union's letter of April 12, did offer to return to work. Respondent contends that the offer was not unconditional but was conditioned upon the Union's demand of April 13 for reinstatement of all strikers. Respondent reliance on *Times Herald Printing Co.,* 221 NLRB 225 (1975), is misplaced since Respondent's employees were not economic strikers but unfair labor practice strikers, all of whom were entitled at minimum to immediate and full reinstatement. Since Respondent was obligated to reinstate the strikers from the time they were terminated, ultimately it is immaterial whether or not they made an offer to return to work. Respondent's obligation to reinstate and make the strikers whole runs until they have been offered reinstatement to their former positions.

CONCLUSIONS OF LAW

1. By terminating Jose Sandoval on April 12, 2000, by terminating and refusing to reinstate the employees who engaged in a work stoppage on April 12, 2000, and by suspending/terminating Roberto Rivera on August 25, 2000, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

2. By interrogating its employees about their union activity, by creating the impression of surveillance, by threatening employees with termination and plant closure, by promising benefits and soliciting grievances, by threatening that employees would not be recalled to work, by prohibiting employees from waiting on the parking lot, and by telling employees it would be futile to support the Union, Respondent violated Section 8(a)(1) and Section 2(6) and (7) of the Act.

3. Respondent has not otherwise violated Section 8(a)(1) and (3) of the Act as alleged in the complaint.

REMEDY

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

The Respondent having discriminatorily discharged employees, it must offer them reinstatement, discharging if necessary any replacements hired since their terminations, and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

Respondent shall be required to expunge any and all references to its unlawful terminations/suspensions of Jose Sandoval, Roberto Rivera, and any employees who engaged in the work stoppage of April 12, 2000, from its files and notify those employees in writing that this has been done and that these unlawful discharges/suspensions will not be the basis for any adverse action against them in the future. *Sterling Sugars, Inc.,* 261 NLRB 472 (1982).

[Recommended Order omitted from publication.]