

D&F Industries, Inc., and Staffing Services America, Inc. (“Olsten”) and United Food & Commercial Workers Union, Local 324, United Food & Commercial Workers International Union, AFL–CIO–CLC. Cases 21–CA–32952 and 21–CA–32973

July 14, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND WALSH

On August 9, 2000, Administrative Law Judge Bernard Litvack issued the attached decision. Respondent D&F, Respondent Olsten, and Charging Party Local 324 filed exceptions and supporting briefs; the General Counsel filed cross-exceptions, a supporting brief, and an answering brief; and D&F and Olsten filed answering 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 the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings,¹ and conclusions² only to the extent consistent with this Decision and Order.³ Specifically, contrary to the judge, we find that

¹ Respondent D&F 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.

² Respondent Olsten has excepted to the judge’s conclusion that it is liable for the unfair labor practices of D&F. We agree with the judge, for the reasons he discussed, that Olsten is liable for the discriminatory layoffs by D&F in accordance with *Capitol EMI Music*, 311 NLRB 997 (1993). As the judge found, Olsten’s on-site manager, Carmen Reyes, attended and participated in translating Chief Operating Officer Howard Simon’s speech to employees in which he, inter alia, stated that D&F would never deal with a third party, threatened plant closure, and impliedly threatened discharge in retaliation for the employees’ union activities. With this notice of D&F’s antiunion animus, Olsten was liable for carrying out the subsequent discriminatory layoffs directed by D&F. In addition, as a joint employer, Olsten is liable for the coercive conduct of D&F in violation of Sec. 8(a)(1). See, e.g., *Windmuller Electric*, 306 NLRB 664, 666 (1992).

In adopting the judge’s conclusion that Simon unlawfully threatened employees that if they went on strike they would be replaced, Chairman Battista relies on the context in which the remark was made, and specifically on Simon’s threat in the same speech that employees could go on strike but they were all going to be dismissed. Chairman Battista does not rely on Simon’s failure to provide a more complete explanation of the respective reinstatement rights of economic and unfair labor practice strikers.

³ We shall modify the judge’s recommended Order in accordance with our decisions in *Ferguson Electric Co.*, 335 NLRB 142 (2001);

Maria Paz-Vasquez and Rosa Jaramillo were agents of D&F; that certain unlawful conduct by them is therefore attributable to D&F; and that the July 7, 1998⁴ layoffs of employees Claudia Mayne, Abigail Reyes, Carolina Orozco, and Salud Soria, and the September 9 layoff of Maria Jaramillo violated Section 8(a)(1) and (3).

I. CONDUCT OF PAZ-VASQUEZ AND ROSA JARAMILLO

A. Facts

Paz-Vasquez and Rosa Jaramillo, at the time relevant to this proceeding, served as assistants to the packaging manager at D&F’s packaging facility on North Hariton Street in Orange, California.⁵ The management structure of the Hariton facility included Howard Simon, chief operating officer of Global Health Systems, D&F’s parent corporation; Pete Pescetti, D&F’s vice president of operations; Steve Posey, plant manager; and various department managers. Margarido (Lucho) Lopez served as manager of the packaging department, in which 140–150 employees worked in two shifts. On the first shift, two assistants to the packaging manager, Eduardo Cavallero and Rosa Jaramillo, reported directly to Lopez. On the second shift, a shift supervisor, initially Jose Perez and subsequently Olmedo Duque, reported to Lopez, and two assistants to the packaging manager, Navijio Vargas and Paz-Vasquez, were subordinate to the shift supervisor. Lopez testified that all of the assistants had the same duties and responsibilities. In addition, a line coordinator monitored production on each of the five production lines, and a lead person assigned the various line jobs to employees each day.⁶

As assistants to Packaging Manager Lopez, Paz-Vasquez and Rosa Jaramillo were responsible for ensuring both that the packaging process operated on schedule and that the employees worked productively. The judge

Indian Hills Care Center, 321 NLRB 144 (1996); and *Excel Container*, 325 NLRB 17 (1997).

We shall also substitute a new notice in accordance with our recent decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

⁴ All dates are 1998 unless otherwise indicated.

⁵ During the period relevant to this proceeding, D&F’s facilities, including the Hariton facility in Orange, California, and the Gene Autry facility in Anaheim, California, were staffed by D&F’s own employees and employees supplied by Olsten, working side-by-side. The judge found, and we agree, that D&F and Olsten were joint employers of the supplied employees, who represented approximately 40 to 50 percent of D&F’s total work force or about 200–245 employees. In adopting the judge’s conclusion, however, we do not rely on his characterization of D&F’s supervision of the supplied employees as minimal because, as the judge found, D&F assigned the employees to their daily jobs and monitored their performance of their duties and their compliance with D&F’s work rules.

⁶ In addition, Olsten maintained an on-site manager at D&F, Carmen Reyes, who hired the supplied employees and was involved in such matters as discipline, attendance, and benefits. She did not supervise the employees’ performance of their duties for D&F.

found that the assistants gave assignments to the line coordinators at the beginning of the shift and oversaw operations to make sure that the machines functioned properly, that production lines were adequately staffed and supplied, and that orders were filled appropriately. Camerina Calderon, whose testimony the judge credited, testified that in department meetings, Lopez told the employees “time after time” that Paz-Vasquez was their supervisor. In addition, Paz-Vasquez and Rosa Jaramillo observed employees to ensure that they did not talk excessively or spend too much time in the restroom. Paz-Vasquez and Rosa Jaramillo confronted employees concerning their misconduct in these matters, as well as tardiness, and reminded them of the Respondent’s rules. The assistants reported repeated infractions to Lopez. Lopez also routinely sought oral evaluations from the assistants concerning employee performance.

The assistants moved employees from one production line to another as needed to respond to staffing shortages or during product changes on a line. When Pescetti or Posey decided that overtime work was necessary, Lopez informed the assistants how many employees would be required, and the assistants would seek volunteers to stay after their shift. Paz-Vasquez and Rosa Jaramillo also authorized employees to leave work early or take time off in the case of an emergency or illness. On a day-to-day basis, the employees brought their work problems and complaints to the assistants, who would resolve them or convey them to Lopez.

According to the credited testimony of Calderon, on July 7, the day the Respondent laid off some of the packaging department employees, she overheard a conversation between Line Coordinator Luz Figueroa and Paz-Vasquez before the start of her shift. Figueroa asked Paz-Vasquez what had happened to her employees and stated that she needed them, and Paz-Vasquez answered that “they were never going to show because they were fired” and that “she had [let them go] by orders from upstairs” for signing union cards. Paz-Vasquez added that “that’s the way they all going to be leaving, all the ones who signed . . . union cards.”

The judge also found that Rosa Jaramillo telephoned Maria Jaramillo, her sister-in-law, in August and asked her whether she had joined the Union. Although Maria Jaramillo had signed an authorization card, she responded that she had not. Maria Jaramillo testified that Rosa Jaramillo said that, “Lucia Reyes had told her that she knew that I had joined up with the Union and that I had signed . . . a card.” Rosa Jaramillo added, “Lucho Lopez already knows that you joined up with the Union and he knows everything.”

B. Analysis

In determining whether an employee is an agent of an employer and thus whether his or her conduct is attributable to the employer, the Board applies common law agency principles. If the employee acted with the apparent authority of the employer with respect to the alleged unlawful conduct, the employer is responsible for the conduct. “Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question.”⁷ As the judge stated, the Board considers whether, under all the circumstances, the employee would reasonably believe that the alleged agent “was reflecting company policy and speaking and acting for management.”⁸ Section 2(13) states that “whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.”

The position and duties of the employee alleged to be an agent are relevant in determining agency status.⁹ Thus, an employee’s statement may be attributed to the employer if the employee is “held out as a conduit for transmitting information [from the employer] to the other employees.”¹⁰ The Board also considers whether the alleged agent’s statements or conduct were consistent with those of the employer.¹¹

Contrary to the judge, we find that Paz-Vasquez and Rosa Jaramillo were agents of D&F under Section 2(13) with respect to the coercive statements described above. As an integral function of their positions, Paz-Vasquez and Rosa Jaramillo served as conduits between management and the employees. On a daily basis, the Respondent relied on them to convey information and decisions pertaining to production and work rules to employees on the packaging lines. They informed line coordinators and employees of the products to be packaged on each shift. They moved employees from one line to another as needed due to staffing shortages or product changes. They administered the Respondent’s policies regarding overtime and time off for illness or emergencies. They enforced its rules concerning restroom time, talking, and tardiness. In all of these matters, the assistants spoke to employees as the representatives of management and the record shows that the employees perceived them as such.

⁷ *Cooper Industries*, 328 NLRB 145 (1999); see also *Pan-Oston Co.*, 336 NLRB 305, 306 (2001), and cases cited therein.

⁸ *Id.* (Citations omitted.)

⁹ *Pan-Oston*, supra at 306; *Jules V. Lane*, 262 NLRB 118, 119 (1982).

¹⁰ *Cooper Industries*, supra at 145; *Debber Electric*, 313 NLRB 1094, 1095 (1994).

¹¹ *Hausner Hard-Chrome of KY*, 326 NLRB 426, 428 (1998).

Moreover, Lopez repeatedly told employees that Paz-Vasquez was their supervisor.

D&F also relied on the assistants to report to Lopez pertinent information about employees. They informed him of repeated rules infractions and responded to his regular inquiries about employee performance. In addition, the assistants relayed to management employee problems and complaints.

In these circumstances, we conclude that employees had a reasonable basis to believe that the assistants' statements to them were based on knowledge and apparent authority from D&F. Specifically, employees would reasonably believe that Paz-Vasquez and Rosa Jaramillo spoke for management and reflected D&F's policies in their conversations with Figueroa and Maria Jaramillo, respectively. Figueroa, as well as Calderon, who overheard the conversation, had no reason to doubt that Paz-Vasquez knowledgeable and accurately reported that D&F fired the department employees because they had signed union cards, and that it intended to discharge other employees who also signed cards. In the same manner, Maria Jaramillo would reasonably believe that Rosa Jaramillo interrogated her on D&F's behalf as to whether she had signed an authorization card, and reflected management knowledge when she said that Lopez knew that she had signed a card. Each of these employees was accustomed to receiving authoritative information on both personnel policies and production matters from D&F through the assistants, and would reasonably view these conversations in light of that experience.

Moreover, the statements made by Paz-Vasquez and Rosa Jaramillo were consistent with other coercive statements and conduct by D&F. In late June or early July, Howard Simon, the chief operating officer of D&F's parent corporation, spoke to an audience of 60 to 75 second-shift employees. According to the testimony of Calderon, whom the judge credited, Simon told the employees that people who had signed cards "were going to be taken away from the plant." Simon's threat of discharge no doubt heightened the perceived reliability of Paz-Vasquez's explanation for the employees' absence from the plant less than 2 weeks later, as well as the seriousness of her own prediction that other employees who signed cards were "going to be leaving." Similarly, Rosa Jaramillo's interest in whether Maria Jaramillo had signed an authorization card and her statement that Lopez knew that she had done so were consistent with Simon's statements that he knew some employees were talking about union authorization cards, that D&F would not let the Union in, and that those who signed cards would be discharged. In view of these statements, which made clear Simon's animus and intent to retaliate against

employees who supported the Union, Maria Jaramillo would reasonably understand Rosa Jaramillo's questioning as an attempt to verify whether she was one of the Union's supporters and as a warning that D&F was aware of her union activity.

For the reasons discussed above, we conclude that Paz-Vasquez and Rosa Jaramillo acted as agents of D&F when they made the coercive statements to Figueroa and Maria Jaramillo, respectively.¹² Therefore, we conclude that D&F violated Section 8(a)(1) by interrogating employees regarding their union activities, creating the impression that those activities were under surveillance, and telling employees that other employees were fired because they signed union authorization cards.¹³

¹² *Great American Products*, 312 NLRB 962 (1993).

¹³ The complaint alleged that Paz-Vasquez and Rosa Jaramillo further violated Sec. 8(a)(1) by other interrogations, threats of discharge, and statements that the employees' support of the Union would be futile. We find it unnecessary to pass on these allegations, because they are cumulative with other violations found and would not affect the remedy.

In finding that Paz-Vasquez' statement that Orozco and Abigail Reyes had been fired for signing union authorization cards violated Sec. 8(a)(1), we find that this matter, although not alleged in the complaint, was closely connected to the subject matter of other complaint allegations, and was fully litigated at the hearing. See *Pergament United Sales*, 296 NLRB 333, 334 (1989), *enfd.* 920 F.2d 130 (2d Cir. 1990). Paz-Vasquez testified on behalf of the Respondent after Calderon's testimony had already raised the issue of this statement. In questioning Paz-Vasquez, moreover, Counsel for D&F treated the statement as an issue requiring rebuttal testimony in the same manner as the allegations contained in the complaint. After questioning Paz-Vasquez about the discharges of Orozco and Abigail Reyes, as to which Paz-Vasquez testified that she had no knowledge, Counsel for D&F elicited from Paz-Vasquez a sequence of general denials of the alleged violations of Sec. 8(a)(1) attributed to her. The seventh of nine such exchanges pertained to the statement raised in Calderon's testimony.

Q. Did you ever, at anytime, say that employees had been fired for signing union authorization cards?

A. No.

Paz-Vasquez' denial, if credited, would have precluded a finding of a violation of Sec. 8(a)(1) based on this statement. Under these circumstances, we find that the Respondent was on notice that the statement was an issue in the proceeding and treated it as such. Therefore, we find it appropriate to find the violation.

Chairman Battista would not find a separate violation based on Paz-Vasquez' statement because it was not alleged in the complaint. Moreover, counsel for the General Counsel never amended the complaint to include this allegation, even though, at the end of Calderon's testimony, the General Counsel amended the complaint to include allegations concerning other matters. Thus, D&F could reasonably believe that Calderon's testimony related to other matters, e.g., the 8(a)(3) allegations. That is, Calderon's testimony lends support to the allegation that Orozco and Reyes were fired for union activity. D&F, in defense of the 8(a)(3) allegation, would seek to contradict that testimony. Thus, the testimony and counter-testimony does not show that D&F was aware that it was being accused of an 8(a)(1) violation.

Pergament, cited by my colleagues, requires that matters be fully and fairly litigated. Due process requires that respondents be put on clear notice of all allegations against them in order to have the opportu-

II. LAYOFFS OF EMPLOYEES CLAUDIA MAYNE, ABIGAIL REYES, CAROLINA OROZCO, AND SALUD SORIA

A. *Facts*

D&F conducted a series of layoffs at the Hariton facility during the summer and early fall, based on a reduction in work. Simon testified that 90 percent of the work of D&F's packaging department was produced for one customer, Herbal Life International (Herbal Life). Under a newly negotiated contract, however, Herbal Life was obligated to offer D&F only 80 percent of its manufacturing needs, rather than a right of first refusal for all of its requirements. According to Simon, the resulting reduction of work caused D&F to reduce the number of temporary employees, i.e., those jointly employed by Olsten, in the packaging department. The record shows that 10 employees, including Orozco, Mayne, Soria, and Abigail Reyes, were laid off on July 7. In addition, D&F laid off 20 employees at Hariton in June; 9 in September, including Maria Jaramillo and Silvia Martinez;¹⁴ and 14 in October. Lopez and Plant Manager Posey decided which employees would be laid off. Lopez testified that he based his selections on employee performance, attendance, and seniority, relying on his own observations and his notes concerning comments he received from his assistants during the year. Posey did not testify at the hearing.

Orozco, Mayne, Soria, and Abigail Reyes all worked on the same packaging line on the second shift at the Hariton facility, with line coordinator Figueroa, and each had signed an authorization card for the Union. On July 7, Orozco and Mayne each received a telephone call at home from Olsten On-Site Manager Carmen Reyes. Carmen Reyes informed Orozco that she did not have a job any longer because "there was no more work" at the plant. Similarly, Carmen Reyes told Mayne "that she was sorry but that she had to lay me off . . . because the production had lessened." Soria and Abigail Reyes reported for work on July 7 and were instructed to go to Carmen Reyes' office. There, Carmen Reyes told Soria that "there was no more work for me any longer," and told Abigail Reyes that she was being laid off indefinitely.

As discussed above, when line coordinator Figueroa asked Paz-Vasquez what happened to her workers because she needed them to get to work, Paz-Vasquez responded that "they were never going to show because

nity to present an appropriate defense. In this case, Chairman Battista finds that D&F was not put on clear notice that Paz-Vasquez' statement was being attacked under Sec. 8(a)(1). Therefore, the finding of a violation is a denial of due process.

¹⁴ The layoff of Maria Jaramillo is discussed *infra*. The judge found, and we agree, that the layoff of Martinez was based on her union activities and thus violated Sec. 8(a)(1) and (3).

they were fired." Paz-Vasquez added that "she wanted to know how the Union was going to protect Abigail and Carolina" and that "that's the way they [sic] all going to be leaving, all the ones who signed them cards, them union cards." Moreover, Paz-Vasquez also stated that "she had let them go on orders from upstairs" for signing union cards.

B. *Analysis*

The General Counsel alleged that the Respondents selected Orozco, Abigail Reyes, Mayne, and Soria for lay-off because of their union activities, in violation of Section 8(a)(1) and (3).¹⁵ Applying *Wright Line*,¹⁶ the judge found that the General Counsel failed to satisfy his initial burden of showing that the Respondents' action was motivated by antiunion animus. Although he found that the record showed animus on the part of the D&F and union activities by the employees, the judge determined that the record did not demonstrate that D&F had knowledge or suspicions of the employees' activities. Specifically, the judge found that Paz-Vasquez' comment that Orozco and Abigail Reyes were fired for signing union cards was not attributable to D&F because she was neither a supervisor nor an agent. Because the record did not show that Paz-Vasquez was involved in the decisionmaking concerning the layoffs, the judge viewed her statement as opinion and self-aggrandizement.

We agree with the judge that the record amply demonstrates that Orozco, Abigail Reyes, Mayne, and Soria engaged in union activity and that D&F harbored animus against the Union. Contrary to the judge, however, we find that the record contains evidence that D&F knew of the employees' union activities.

As we found above, Paz-Vasquez was an agent of D&F and served as a conduit for information between packaging department employees and D&F management. We have also found that, in her capacity as an agent, Paz-Vasquez informed employees that Orozco and Abigail Reyes were fired and that she let them go "by orders from upstairs" for signing union cards. This statement, attributable to D&F, demonstrates that D&F had knowledge of Orozco and Abigail Reyes' union activities. We therefore find, contrary to the judge, that the General Counsel satisfied his initial burden of showing that the

¹⁵ The General Counsel does not allege that the layoffs in general were initiated by D&F for pretextual reasons. The Union excepts, however, to the judge's failure to consider such a "mass layoff" theory. We agree with the judge that the General Counsel did not pursue this theory. It is well established that the General Counsel's theory of the case is controlling, and that a charging party cannot enlarge on or change that theory. *Raley's*, 337 NLRB 719 (2002).

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

selection of Orozco and Abigail Reyes for layoff was motivated by antiunion animus.

Paz-Vasquez did not mention Mayne and Soria by name, as she did Orozco and Abigail Reyes. However, even without such direct evidence, we find that the General Counsel also satisfied his initial burden concerning these allegations, including that D&F had knowledge of their union activities.

It is well established that, in the absence of direct evidence, an employer's knowledge of an employee's union activities may be proven by circumstantial evidence from which a reasonable inference may be drawn. Such circumstances may include the employer's demonstrated knowledge of general union activities, the employer's demonstrated union animus, the timing of the discipline or discharge, and pretextual reasons for the discipline or discharge asserted by the employer.¹⁷

Based on these factors, we find that the record in this case warrants an inference of D&F's knowledge of the union activities of Mayne and Soria.

The judge found, and we agree, that D&F was well aware of the general union activity among its employees and that it harbored antiunion animus. Simon's speech to employees in late June or early July, in which, among other things, he threatened discharge and plant closure in retaliation for employee support of the Union, vividly illustrates his knowledge and animus regarding the organizing campaign. Mayne and Soria's layoffs occurred less than 2 weeks after Simon's speech and on the same day that Orozco and Abigail Reyes were laid off, according to Paz-Vasquez, for signing union cards. Finally, although D&F asserted that the layoffs of these and other employees were necessitated by decreased demand, it offered no rationale for selecting Mayne and Soria for layoff. Lopez decided which employees to layoff, along with Plant Manager Posey, who did not testify. Lopez testified that he had no problem with either employee. We find these circumstances sufficient to support an inference that D&F was aware of Mayne and Soria's union activities at the time of their selection for layoff. Therefore, we find that the General Counsel has satisfied his initial burden under *Wright Line* regarding these employees.¹⁸

¹⁷ *Pan-Oston*, supra, 336 NLRB at 308 (citations omitted). See also *Abbey's Transportation Services v. NLRB*, 837 F.2d 575, 579 (2d Cir. 1988).

¹⁸ Contrary to his colleagues, Chairman Battista would not infer that D&F possessed knowledge of Mayne and Soria's union activities. He recognizes that the element of knowledge can be inferred from circumstantial evidence if direct evidence is lacking. However, knowledge is a separate element of the General Counsel's prima facie case. Where, as here, the finding is inferred from the other elements of the General Counsel's prima facie case, such finding essentially negates knowledge

The General Counsel having met the initial burden with respect to Orozco, Abigail Reyes, Mayne, and Soria, we next consider whether D&F has demonstrated that it would have selected these employees for layoff in the absence of their union activities. Lopez offered no basis for selecting Orozco, Mayne, or Soria for layoff. He testified that he selected Abigail Reyes for layoff because she worked more slowly than other employees. However, Lopez presented no explanation for this determination, except for a general statement that he had observed her. In addition, he admitted that he had never told anyone, including Abigail Reyes, that she worked too slowly, and had not followed the established policy of informing Olsten when one of its employees was not performing well.

In view of D&F's failure to show any reason for selecting Orozco, Mayne, and Soria for layoff, or to provide any support for Lopez' general assertion that Abigail Reyes worked more slowly than other employees, we find that D&F failed to demonstrate that it would have laid off these employees in the absence of their union activities. Therefore, we conclude that these layoffs violated Section 8(a)(1) and (3).

III. LAYOFF OF MARIA JARAMILLO

A. Facts

Maria Jaramillo worked on the first shift in the packaging department at the Hariton facility. She signed a union authorization card in mid-June, when a union agent visited her home. In August, as described above, Rosa Jaramillo telephoned her and asked whether she had signed a card. Even though Maria Jaramillo denied signing a card, Rosa Jaramillo went on to state that Lopez already knew that she had signed one and that he knew everything. On September 8, Maria Jaramillo was laid off with eight other employees, including discriminatee Martinez.¹⁹

as a separate element. Nor do the factors in *Pan-Oston* and *Abbey's Transportation* supply the requisite knowledge. Animus and timing are part of a prima facie case. General knowledge of union activity does not show knowledge of union activity of particular employees. Pretext is an ultimate conclusion in an 8(a)(3) case; it is not a factor showing the element of knowledge. Thus, Chairman Battista agrees with the judge that the General Counsel has failed to demonstrate knowledge, and thus to satisfy his initial burden under *Wright Line*. Therefore, he would adopt the judge's dismissal of the complaint allegations regarding the layoffs of Mayne and Soria.

Contrary to the suggestion of Chairman Battista, we find that knowledge here is not inferred wholly from the other elements of the General Counsel's initial burden, i.e., the employees' participation in union activity and the Respondent's animus toward such activities, but rather relies on the additional factors delineated in *Pan-Oston* and *Abbey's Transportation*, supra.

¹⁹ In finding that D&F violated Sec. 8(a)(1) and (3) by selecting Martinez for layoff, the judge found that, when Martinez handed Lopez

When Carmen Reyes telephoned Maria Jaramillo to inform her of her layoff, she told Maria Jaramillo that there was nothing wrong with her but that, according to Lopez, there was no more work. Carmen Reyes further said that she would get Maria Jaramillo a job with another company. Maria Jaramillo testified that when she was laid off, some employees with less seniority remained.

Lopez testified that he selected Maria Jaramillo for layoff because she spent too much time in the restroom and used bad language. He testified that there had been a “couple of incidents” when she used “offensive, bad language” to other employees, and that some employees had complained to him. He further testified that he investigated and heard her use foul language once near the lunch truck. With respect to the time she spent in the restroom, Lopez testified that he investigated and found that, when she went into the restroom, she spent 10 to 15 minutes there. However, Lopez never spoke with Maria Jaramillo about either problem. He testified that he told “someone from Olsten,” but could not recall whom, that an employee was using foul language. The judge found that Carmen Reyes did not corroborate his testimony. Although Lopez testified that he would not have fired Maria Jaramillo for the misconduct he cited, he noted on the layoff notice to Carmen Reyes that he did not want her back.

B. Analysis

The judge found, as he did regarding the four employees laid off on July 7, that the General Counsel failed to meet the initial burden under *Wright Line*, because the record did not show that D&F had knowledge of Maria Jaramillo’s union activities.²⁰ The judge found that Rosa Jaramillo telephoned Maria Jaramillo and warned her that Lopez knew that she signed a union authorization card. However, the judge further found that, because Rosa was neither a supervisor nor an agent of D&F, her statement was not attributable to D&F. Finally, the judge found that there was no evidence that Rosa Jaramillo was privy to D&F’s layoff decisions.

Contrary to the judge, we find that the record demonstrates D&F’s knowledge of Maria Jaramillo’s union activities. We have found that Rosa Jaramillo was an agent of D&F and that D&F was liable for her statement to Maria Jaramillo that Lopez knew that she had signed a union authorization card. We therefore find that the

an envelope containing a letter identifying her as a union supporter and said that she wanted to be known as a member of the Union, Lopez warned, “[do] you think that paper is going to help you in any way when they fire you . . . they are going to dismiss you for having dealings with the Union.”

²⁰ The judge found, and we agree, that Maria Jaramillo engaged in union activities and that D&F demonstrated antiunion animus.

General Counsel satisfied the initial burden under *Wright Line* to show that Maria Jaramillo’s layoff was motivated by antiunion animus.

Moreover, we find that D&F failed to show that it would have laid off Maria Jaramillo in the absence of her union activities. Lopez testified that he selected her for layoff because she used bad language and spent too much time in the restroom. However, he had never brought either issue to her attention. He testified that he had mentioned the problem of bad language to “someone at Olsten,” but Carmen Reyes did not corroborate his testimony. In fact, at the time of the layoff, she told Maria Jaramillo that there was nothing wrong with her.

We recognize that evidence of excessive time in the restroom or foul language, if credited, could provide a reasonable basis for selecting one employee over another for layoff. In this case, the evidence fails to persuade us that D&F based its decision on these factors. The only evidence regarding Maria Jaramillo’s alleged excessive time in the restroom was provided by Lopez, whose testimony the judge credited only where corroborated by Calderon. Here there was no such corroboration. The record does not indicate that Lopez viewed either of the problems he cited as particularly serious, since he did not bring them to Maria Jaramillo or Carmen Reyes’ attention and would not have discharged her because of them. Nonetheless, in the memo informing Carmen Reyes of Maria Jaramillo’s layoff, he noted that D&F did not want her back. Although this notation appears to contradict Lopez’ previous approach to her conduct problems, it is consistent with his threat to Martinez, who was laid off at the same time, that “they are going to dismiss you for having dealings with the Union.” It is also consistent with Rosa Jaramillo’s warning to her sister-in-law that Lopez knew she had signed an authorization card for the Union, and Simon’s statement that employees who supported the Union would be discharged. Based on these circumstances, we conclude that D&F selected Maria Jaramillo for layoff because of her union activities in violation of Section 8(a)(1) and (3).

ORDER

The Respondents, D&F Industries, Inc., Orange, California, and Staffing Services of America, Inc. (“Olsten”), Anaheim, California, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing employees that Respondent D&F would never deal with a third party, thereby warning employees that their support for the Union would be futile.

(b) Informing employees that the doors were open for them to work elsewhere if the Union was coming in,

thereby impliedly threatening employees with discharge because of their support for the Union.

(c) Threatening employees with discharge if they engaged in a strike against Respondent D&F.

(d) Without distinguishing between economic and unfair labor practice strikers and between permanent and temporary replacements, informing employees that they would be replaced if they engaged in a strike.

(e) Soliciting grievances from employees in order to induce them to cease supporting the Union.

(f) Promising benefits to employees in order to induce them to cease supporting the Union.

(g) Threatening to close the plant because of their employees' support for the Union.

(h) Threatening employees with discharge because they engaged in activities in support of the Union.

(i) Coercively interrogating employees concerning their union activities.

(j) Laying off employees because they engaged in activities in support of the Union.

(k) Creating the impression that the employees' union activities are under surveillance.

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

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

(a) Within 14 days from the date of this Order, offer Silvia Martinez, Jose Luis Rivera, Carolina Orozco, Abigail Reyes, Claudia Mayne, Salud Soria, and Maria Jaramillo immediate and full reinstatement to their former jobs or, if the jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges of employment previously enjoyed.

(b) Make Silvia Martinez, Jose Luis Rivera, Carolina Orozco, Abigail Reyes, Claudia Mayne, Salud Soria, and Maria Jaramillo whole for any loss of earnings and other benefits suffered as a result of their unlawful discriminatory conduct 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 their respective files any reference to the unlawful layoffs of employees Silvia Martinez, Jose Luis Rivera, Carolina Orozco, Abigail Reyes, Claudia Mayne, Salud Soria, and Maria Jaramillo and, within 3 days thereafter, notify each employee in writing that this has been done and that their unlawful layoffs 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 desig-

nated 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 backpay due under terms of this Order.

(e) Within 14 days after service by the Region, Respondent D&F shall post at its facilities in Anaheim and Anaheim Hills, California, and Respondent Olsten shall post at its office in Anaheim, California, copies of the attached notice, in Spanish and English, marked "Appendix."²¹ Copies of the notice, on forms provided by the Regional Director of Region 20, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents 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 Respondents 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, either Respondent has gone out of business or closed the facilities 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 June 1, 1998.

(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 each Respondent has taken to comply.

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

²¹ 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."

Choose not to engage in any of these protected activities.

WE WILL NOT inform you that D&F Industries, Inc. will never deal with a third party, thereby warning you that your support for United Food & Commercial Workers Union, Local 324, United Food & Commercial Workers International Union, AFL-CIO-CLC (the Union) would be futile.

WE WILL NOT inform you that the doors are open for you to work somewhere else if the Union comes in, thereby impliedly threatening you with discharge because of your support for the Union.

WE WILL NOT threaten you with discharge if you engage in a strike against D&F Industries, Inc.

WE WILL NOT, without distinguishing between economic and unfair labor practice strikers and between permanent and temporary replacements, inform you that you would be replaced if you engaged in a strike.

WE WILL NOT solicit grievances from you in order to induce you to cease supporting the Union.

WE WILL NOT promise benefits to our employees in order to induce you to cease supporting the Union.

WE WILL NOT threaten you with discharge because you engage in activities in support of the Union.

WE WILL NOT threaten you with plant closure because of your support for the Union.

WE WILL NOT coercively interrogate you concerning your union activities.

WE WILL NOT lay you off because you engaged in activities in support of the Union.

WE WILL NOT create the impression that your union activities 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 of the date of the Board's Order, offer Silvia Martinez, Jose Luis Rivera, Carolina Orozco, Abigail Reyes, Claudia Mayne, Salud Soria, and Maria Jaramillo full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

WE WILL make Silvia Martinez, Jose Luis Rivera, Carolina Orozco, Abigail Reyes, Claudia Mayne, Salud Soria, and Maria Jaramillo whole, with interest, for any loss of pay and benefits resulting from their unlawful layoffs, 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 layoffs of Silvia Martinez, Jose Luis Rivera, Carolina Orozco, Abigail Reyes, Claudia Mayne, Salud Soria, and Maria Jaramillo, and WE WILL, within 3 days thereafter,

notify each of you in writing that this has been done and that your unlawful layoffs will not be used against you in any way.

D&F INDUSTRIES, INC. AND STAFFING SERVICES AMERICA INC. ("OLSTEN")

Lisa E. McNeil, Esq., appearing on behalf of the General Counsel.

Thomas P. Burke, Esq. and *Richard Marques, Esq. (Brobeck, Phlegar and Harrison)*, of Los Angeles, California, appearing on behalf of D&F Industries, Inc.

Kim A. Leffert, Esq. and *Teresa A. Beaudet, Esq. (Mayer, Brown & Platt)*, of Chicago, Illinois, appearing on behalf of Staffing Services America (Olsten).

Krafchak, Esq. (Gilbert & Sackman), of Los Angeles, California, appearing on behalf of United Food & Commercial Workers Union, Local 324, United Food & Commercial Workers International Union, AFL-CIO, CLC.

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. United Food & Commercial Workers Union, Local 324, United Food & Commercial Workers International Union, AFL-CIO-CLC (the Union), filed an original and first, second, third, and fourth amended unfair labor practice charges in Case 21-CA-32952 on September 18, 28, October 13, 22, and November 24, 1998,¹ respectively, and the Union filed an original and first and second amended unfair labor practice charges in Case 21-CA-32973 on September 28, October 22, and November 24, 1998. Based on these unfair labor practice charges and after an investigation, on April 2, 1999, the Acting Regional Director for Region 21 of the National Labor Relations Board (the Board), issued a consolidated complaint, alleging that D&F Industries, Inc. and Staffing Services America, Inc. (Olsten), separately called Respondent D&F and Respondent Olsten and collectively called Respondents, acting as joint employers, engaged in acts and conduct violative of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).² Respondent D&F and Respondent Olsten each timely filed an answer, essentially denying the commission of the alleged unfair labor practices. Thereafter, based on a notice of hearing, a trial on the merits of the unfair labor practice allegations of the consolidated complaint was held before me in Los Angeles, California, on July 26 through 30, August 16, and 24, 1999. At the trial, each party was afforded the opportunity to fully delineate its fact and legal positions by examining and cross-examining witnesses, to offer into the record any relevant, supporting documentary evidence, to argue its legal positions orally, and to file posthearing briefs. The documents were filed by each party and have been carefully considered.³ Accordingly, based on the entire record, including the posthearing briefs and my ob-

¹ Unless otherwise stated, all events occurred during the year 1998.

² Interim Personnel was named in the consolidated complaint as a party-in-interest but was neither represented nor participated at the hearing.

³ Counsel for the General Counsel's motion to correct the transcript is granted.

servations of the testimonial demeanor of the several witnesses,⁴ I issue the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, Respondent D&F, a wholly owned subsidiary of Global Health Systems and a State of California corporation, with an office and principal place of business located on North Enterprise Street in Orange, California, a manufacturing plant located on Gene Autry Way in Anaheim, California (Gene Autry facility), and a packaging plant located on North Hariton Street in Orange, California (Hariton facility), has been engaged in business in the manufacture and sale of dietary food supplements. During the 12-month period immediately preceding the issuance of the instant consolidated complaint, which period is representative, in the normal course and conduct of its above-described business operations, Respondent D&F sold and shipped from its Orange, California facilities goods and products, valued in excess of \$50,000, directly to customers located outside the State of California. Respondent D&F admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all times material, Respondent Olsten, a State of Delaware corporation and a wholly owned subsidiary of Olsten corporation, with an office and place of business located in Anaheim, California, has been engaged in the business of providing temporary employees to employers, including Respondent D&F. During the calendar year ending December 31, 1998, which period is representative, in the normal course and conduct of its above-described business operations, Respondent Olsten performed services, valued in excess of \$50,000, in States other than the State of California. Respondent Olsten admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

⁴ During the course of the hearing, the witnesses were sequestered. In granting counsel for the General Counsel's motion, I asked all potential witnesses to stand and read for them and counsel from the Board's decision in *Greyhound Lines, Inc.*, 319 NLRB 554 (1995). Notwithstanding my clear instructions on sequestration, it came to my attention that, while at lunch, some of counsel for the General Counsel's witnesses, including some of the alleged discriminatees, may have discussed a witnesses' misidentification of one of Respondent D&F's management officials as a "Mr. Marconi." There is no record evidence that their discussion involved more than correcting this witnesses' error, and counsel for Respondent D&F was permitted some latitude in his cross-examination of witnesses and to recall witnesses for further cross-examination in order to ascertain the extent of the violation of the sequestration order. As I indicated at the outset of the hearing, I take sequestration very seriously and do not look lightly on violations of such an order. Further, as a trial judge, I am able to exercise broad discretionary authority in dealing with perceived violations of sequestration orders. The identity of Respondent D&F's management official, who spoke at plant meetings with employees, is not really at issue, and, after close scrutiny of the record, I can find no example, nor has counsel for Respondent D&F or counsel for Respondent Olsten cited any, of testimonial congruence sufficient to cause me to believe that witnesses collaborated on their respective testimony. Nevertheless, in assessing the credibility of some of the witnesses, I have taken into account the potential violation of my sequestration order.

II. LABOR ORGANIZATION

Respondents stipulated that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ISSUES

Based on the allegations of the consolidated complaint, the following issues arose and were the subjects of litigation during the instant trial:

1. Are Respondent D&F and Respondent Olsten joint employers of the temporary employees of Respondent Olsten who are working at Respondent D&F's Hariton and Gene Autry facilities?

2. Did Respondent D&F, through Howard Simon, violate Section 8(a)(1) of the Act by soliciting grievances from employees, informing employees that it would be futile for them to select the Union as their bargaining representative, threatening employees with job loss because of their support for the Union, threatening employees with layoffs because of their support for the Union, threatening employees with plant closure because of the Union, threatening employees with termination because of their support for the Union, and by promising benefits to employees in order to induce them to cease supporting the Union?

3. Did Respondent D&F, through Lucho Lopez, violate Section 8(a)(1) of the Act by threatening employees with termination because of their support for the Union and by interrogating employees as to their reasons for joining and supporting the Union?

4. Are Maria Paz-Vasquez and Maria Rosa Jaramillo, each classified as an assistant to the packaging manager, Lucho Lopez, supervisors of Respondent D&F within the meaning of Section 2(11) of the Act and its agents within the meaning of Section 2(13) of the Act?

5. Did Respondent D&F, through Maria Paz-Vasquez, violate Section 8(a)(1) of the Act by interrogating employees regarding whether union organizers had visited their homes, their union sympathies, their involvement with the Union, and whether they had executed authorization cards for the Union; by instructing employees not to sign union authorization cards; by threatening employees with termination if they sign union authorization cards; and by stating that employees had been terminated for signing authorization cards for the Union?

6. Did Respondent D&F, through Maria Rosa Jaramillo, called Rosa Jaramillo, violate Section 8(a)(1) of the Act by interrogating employees as to whether they had signed union authorization cards and by creating the impression in the minds of employees that Respondent D&F was engaging in surveillance of their union activities?

7. Did Respondent D&F violate Section 8(a)(1) and (3) of the Act by causing the layoffs of alleged discriminatees Claudia Mayne, Abigail Reyes, Carolina Orozco, Salud Soria, Jose Luis Rivera, Maria Jaramillo, and Silvia Martinez?

8. If found to constitute a joint employer, is Respondent Olsten vicariously liable for laying off the alleged discriminatees in violation of Section 8(a)(1) and (3) of the Act?

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Background and the Respondents' business relationship

The record establishes that Respondent D&F is a wholly owned subsidiary of Global Health Systems (GHS), a holding company; that, besides Respondent D&F, which manufactures dietary food supplements for the nutritional supplement industry, other wholly owned subsidiaries of GHS manufacture powder meal replacement drinks and distribute herbs and other raw materials for the dietary food supplement industry; that Howard Simon is the chief operating officer of GHS and responsible for operations at all GHS facilities; and that the plant managers at each of GHS's production facilities report to him as well as to other corporate officers. At all times material, through the fall of 1998, Respondent D&F operated a plant in Anaheim, California, the Gene Autry facility, at which its products were, and are, manufactured, and a 40,000 square foot facility in Orange, California, the Hariton facility,⁵ to which its new manufactured products were transported from the Gene Autry facility and which, according to Simon, was utilized "strictly" for packaging—"putting manufactured tablets and capsules into bottles and . . . labeling those finish[ed] goods."⁶ Pete Pescetti is Respondent D&F's vice president of operations and was directly responsible for operations at the Hariton and Gene Autry facilities. Steve Posey was the Hariton plant manager, reporting directly to Simon and Pescetti, and Sebastian Nevarez was the manufacturing manager at the Gene Autry facility. At the Hariton facility, the various department managers including the quality assurance manager, the quality control manager, the maintenance manager, the warehouse manager, and the packaging department manager reported directly to Plant Manager Posey. The record further establishes that Staffing Services America, Inc., Respondent Olsten, is a wholly owned subsidiary of the Olsten Corporation and is in the business of providing temporary employees, whom it employs, to other employers; that Respondent Olsten performed services for Respondent D&F from March 1993 through October 1998, during which time the former provided light industrial production employees, packers, material handlers, tablet inspectors, technical employees, and administrative personnel to Respondent D&F on a temporary basis, at its manufacturing and packaging facilities;⁷ that Carmen Reyes was the site manager for Respondent Olsten at Respondent D&F's facilities; and that Reyes maintained an office at the Hariton facility, at which she interviewed prospective employees and conducted most of Respondent Olsten's

⁵ In May 1999, Respondent D&F closed its Hariton facility and moved its packaging operations to a new facility, located in Anaheim Hills.

⁶ The two facilities are three or four miles apart. According to Howard Simon, 75 percent of production at the Gene Autry facility is for Respondent D&F's main customer, Herbal Life International (HLI), and 25 percent is for other customers. Further, the product, which is produced for HLI, represents almost "90 percent" of what is packaged by Respondent D&F at the Hariton plant.

⁷ Apparently, commencing in October 1998, Interim Personnel became the supplier of temporary employees to Respondent D&F.

administrative and employee-related functions,⁸ and visited the Gene Autry facility two or three times a week.

The record reveals that, at each of Respondent D&F's facilities, in addition to the temporary workers, employed by Respondent Olsten, the former had its own employees performing various job functions.⁹ According to Howard Simon, at the Hariton facility, while Respondent Olsten's employees and Respondent D&F's employees often worked side-by-side, the latter's employees worked in "basically the more skilled positions, the lead and supervisory position[s]." Its employees were those who, "over the years over the [course] of [their] experience had gotten up to a certain level of proficiency." In contrast, Respondent Olsten's employees "were people who were generally newer to our facility or people who had been hired to fill openings as a result of fluctuations in the plant."¹⁰ Carmen Reyes testified that she normally became aware of available job openings through conversations with Respondent D&F's department managers, and . . . I may have, at any one time, five to twenty-five openings." With regard to Respondent Olsten's hiring procedures for individuals, who apply for work at Respondent D&F's facilities,¹¹ Reyes testified that she would "prescreen, evaluate, and place candidates to the various open positions [about which Respondent D&F informed her]. . . . Candidates would come into the office. There was generally set hours for me to accept applications. They would come in and apply. . . . and if I had a position open that would meet [the individual's] qualifications . . . I would present that candidate to a supervisor . . . and hopefully get an interview set up. . . . If [the opening was for] light industrial or packer positions I . . . directly place the person to an assignment after they've been

⁸ Apparently, Respondent Olsten provided support staff for Reyes at the Hariton facility.

⁹ During the average payroll period, Respondent Olsten's employees would comprise 40 to 50 percent of the work force at Respondent D&F's facilities or between 200 and 245 workers.

¹⁰ For example, according to Simon, on the packaging lines at the Hariton facility, "it would be safe to assume that the people who are operating the machinery, people who are adjusting the machinery, people who are directing other employees on the line, were D&F's employees. People who were doing . . . entry-level types of work were [Respondent Olsten's] employees."

The record establishes that such was not always the case. Thus, Carmen Reyes described Respondent Olsten's so-called "temp to hire" program pursuant to which if she placed a higher level employee or a supervisor with Respondent D&F, the individual remained Respondent Olsten's employee "just for payroll" purposes and, after 90 days, the individual would be hired by Respondent D&F. Two such individuals, Jose Perez and Olmedo Duque, were initially hired by Respondent Olsten and eventually hired by Respondent D&F as the second-shift packaging department supervisor. Further, it is clear that most of Respondent D&F's own full-time production employees had originally been employed by Respondent Olsten temporary employees. How long an individual remained the latter's employee before being hired by Respondent D&F would vary depending on the individual's skill level, performance, and attitude. According to Reyes, a department manager would inform her when Respondent D&F desired an individual's transfer to full-time status.

¹¹ Carmen Reyes testified that, given the number of walk-in applicants, advertising available positions at Respondent D&F's facilities was never required.

qualified. . . . For the production level employees they were standard positions that I placed on a regular basis. So, I pretty much knew what the basic guidelines were for all those.” Other jobs, “they would have to give me specific requirements for the job.” On hiring individuals, Reyes would provide a “verbal” orientation, generally telling them “that they were my employees. I was responsible for their payroll. If they had any injuries on the job they would need to report it to me. . . . If they had any problems out on the floor or with coworkers or with their jobs to notify me as well.” Reyes was clear that she would not instruct the temporary employees how to do their jobs, and Howard Simon testified that Respondent D&F’s personnel gave the temporary employees, employed by Respondent Olsten, their daily work assignments, job training, and work instructions and generally supervised their work.

Respondent Olsten was responsible for performing its own payroll functions for its temporary employees. To this end, Carmen Reyes would “collect timecards on a weekly basis and distribute payroll checks on a weekly basis as well.” However, while Respondent Olsten nominally paid its temporary employees for their work, according to Howard Simon, Respondent D&F, “set the rate at which [Respondent Olsten paid] for each type of job” and was the source of the funds out of which Respondent Olsten paid its employees’ wages.¹² Also, Respondent Olsten was responsible for any workplace injuries, suffered by its temporary employees, and Reyes “would have to investigate and report on each incident and also . . . was involved with the safety meetings that we did on a monthly basis.” On this latter point, according to Simon, Reyes was a standing member of Respondent D&F’s plant safety committees “and had been instrumental in posters and conducting meetings for the benefit of both sides.” With regard to the disciplining of Respondent Olsten’s temporary employees, the record discloses that, while its employees were required to abide by Respondent D&F’s employment policies, rules, and regulations, Respondent Olsten was responsible for all disciplinary actions, including warnings and suspensions, involving its employees, and Reyes testified that she had “the last authority” on any discipline involving Respondent Olsten’s employees. Thus, on her “periodic” visits to the shop floor, if she observed a Respondent Olsten employee engaging in misconduct, Reyes possessed authority to dispense immediate discipline. Otherwise, when Respondent D&F’s managers informed her of misconduct by one of Respondent Olsten’s employees, either accepting the report or after conducting an investigation, she was responsible for disciplining the worker. However, there is no dispute that Respondent D&F was authorized to request that Respondent Olsten discharge or lay off its temporary employees. In this regard, Margarido (Lucho) Lopez, the packaging manager, conceded that Carmen Reyes did not possess the right to suggest that an individual not be laid off, and Reyes admitted that she never questioned Respondent D&F’s rationale for requesting that a particular temporary employee be laid off or discharged. Finally, while temporary employees, employed by Respondent Olsten, were required to inform Reyes if they were

¹² Respondent Olsten charged Respondent D&F a set percentage of each temporary employee’s pay as its fee.

unable to report for work, they were required to seek permission of a Respondent D&F supervisor in order to leave work early.

2. The supervisory status of Maria Rosa Jaramillo and Maria Paz-Vasquez

The record establishes that, during the spring, summer, and fall of 1998, at Respondent D&F’s Hariton facility, depending on demand for its products, the total employee complement at the Hariton facility, including temporary Respondent Olsten and full-time Respondent D&F employees, was between 200 and 300 workers; that between 140 and 150 of the employees worked in the packaging department; that the packaging department operated with two daily work shifts (6 a.m. to 3 p.m. and 3:30 a.m. to midnight); and that Lucho Lopez, the packaging department manager,¹³ worked from 7:30 a.m. until 5:30 or 6 p.m. each day. During the above-time period, on the first shift, beneath Lopez in authority and reporting directly to him, were two individuals, each having the job title, assistant to the packaging manager—Eduardo Cavallero and Rosa Jaramillo, called Rosa Jaramillo. On the second shift during this time period, as he normally worked no more than 3 hours into the shift, beneath Lopez in authority were Second-Shift Supervisors Jose Perez and Olmedo Duque,¹⁴ and beneath them were two individuals, each having the job title, assistant to the packaging manager—Navijio Vargas and Maria Paz-Vasquez.¹⁵ The record further establishes that, in May 1998, on both work shifts, Respondent D&F maintained five packaging lines, each comprised of 13 to 15 Respondent Olsten temporary employees and Respondent D&F full-time employees. The packaging lines were 30 feet in length and 6 feet apart; on each line, employees operated a machine which feeds specified numbers of

¹³ Respondent D&F admits that Lopez is a supervisor within the meaning of Sec. 2(11) of the Act.

¹⁴ The record establishes that Jose Perez, who, unbeknownst to Respondent, was a union member on a leave of absence from his employer and with instructions to seek employment with Respondent D&F, was hired by Respondent Olsten to work at the former’s Gene Atry facility in September 1997. Promised more rapid advancement, he accepted Olsten’s offer of transfer to the Hariton facility in January 1998, and, within 2 months, while remaining in the employ of Respondent Olsten, he was promoted to the second-shift supervisor position in the packaging department. Because his leave of absence had ended, Perez left his supervisory position with Respondent D&F in early May, and, several weeks later, possibly as late as July, Duque was hired by Respondent Olsten and then appointed to the second-shift supervisor position by Respondent D&F.

Perez testified that, as second-shift supervisor, he was in charge of the packaging department during the second shift, that he was responsible for personal and production problems, and that “my job was to make sure that everything ran as good as it could and without any problems and if there was any problems . . . I would try and do the best to correct them.” Perez further testified that, while he was not authorized to hire, he did have authority to discipline employees. As to the latter point, Lucho Lopez admitted that he relied on Perez’ observations of employees in reaching layoff decisions.

¹⁵ During the time period between Perez’ departure from the Hariton facility and the hiring of Duque, Paz-Vasquez and Vargas were the highest ranking individuals working in the packaging department on the second shift after Lopez left the plant.

food supplement pills into bottles, a machine which inserts pieces of cotton on top of the pills in each bottle, a machine which places a cap on each bottle, a “video jet” machine which applies the lot number to the bottom of each bottle, a machine which seals the bottles, and a labeling machine. Other employees, on each line, are stationed along a conveyor belt, on which the bottles are placed for packing into boxes and a machine which stamps each box of pills. There is no dispute that, on each packaging line, besides the machine operators and other employees, there was a line coordinator, who was responsible for monitoring the production on his or her line and for filling out daily production reports, and a lead person, who assigned the various line jobs to the line’s employees each day. There is also no dispute that, although some work, such as operating the pill machine, requires more experience, the packaging line jobs are repetitive, “similar” on a daily basis, and interchangeable, and, other than requiring some concentration, are not particularly complicated. In this regard, line employees normally are rotated from job to job on a daily basis.

The consolidated complaint alleges that Rosa Jaramillo and Maria Paz-Vasquez are supervisors within the meaning of Section 2(11) of the Act and agents within the meaning of Section 2(13) of the Act.¹⁶ At the outset, Lucho Lopez testified that the four assistants to the packaging manager had exactly “the same” duties and responsibilities—“there is no difference.” In support of the consolidated complaint allegations, counsel for the General Counsel offered the respective testimony of the alleged discriminatees, a current employee and laid off employees, and Jose Perez. The latter, who stated that, prior to being promoted to the second-shift supervisor position in mid-February 1998, he had been a line coordinator on the first shift for a 2 or 3 week period, testified that, while Lucho Lopez spent most of his workday in the packaging department office¹⁷ and just 5 percent of his worktime on the production floor, his assistants spent up to 95 percent of their worktime on the shop floor and had authority over personnel matters and production. As to the latter, according to Perez, the assistants to Lopez were responsible for any problems resulting from tablet miscounts or shortages or from employees not properly performing their job duties. Also, during product changes on the packaging lines, a process which often necessitated “a new set up” and the reassignment of employees to other lines, the assistants to Lopez decided to which lines employees would be reassigned. Regarding the assistants’ authority in personnel matters, Perez testified that, while Lopez made the decisions to assign overtime work, Jaramillo and Cavallero “would decide who would work” on the dayshift and, on the second shift, Vargas and Paz-Vasquez “would decide which lines they were going to work, which people they were going to keep.”¹⁸ Perez further testi-

fied that, on the first shift, Rosa Jaramillo and Cavallero would confront employees, who seemed to be spending too much time in the restrooms and that, on one occasion, Paz-Vasquez advised him that she had permitted an employee to leave work early. Current packaging department employee, Camerina Calderon, who began working at the Hariton plant as a Respondent Olsten temporary employee but who, at the time of the hearing, was a full-time Respondent D&F employee, testified that she worked on the second shift during the summer of 1998, making boxes; that, on several occasions during second-shift packaging department employee meetings, Lucho Lopez told the assembled employees that Paz-Vasquez was their supervisor; that, on a daily basis, Paz-Vasquez would assign her to the line on which she would work; and that, prior to Olmedo Duque’s appointment as second-shift supervisor, Paz-Vasquez and Vargas performed his job duties.

Three former Respondent Olsten employees, who had been laid off from jobs in the packaging department at Respondent D&F’s Hariton plant, testified with regard to Rosa Jaramillo and Maria Paz-Vasquez. According to Marta DeLeon Ornelas, who did maintenance work for the packaging department on the dayshift, if supplies were needed, Rosa Jaramillo “would tell me to go where they were at and then I went to pick them up,” and “when she put me to do cleaning in maintenance she told me that I was going to clean lines, she said your lines are going to lines one, two, and three.” Abelina Garcia-Sosa, who worked on second shift testified, testified that Paz-Vasquez did not work on a packaging line; rather, “[S]he just went around supervising how we worked. That’s all . . . whenever she saw that there was a problem . . . she had to go and discuss it with Lucho to see what was up,” and “Lucho had to solve it.” Garcia-Sosa further testified that, whenever Carmen Reyes would send workers to Paz-Vasquez, the latter would give them their daily work assignments and that, while Paz-Vasquez would instruct the lead ladies as to what employees should do each day, “most of the time . . . we . . . did pretty much the same tasks.” Paula Pineda Camargo, a packaging department employee, testified that, on being hired by Respondent Olsten for work on the second shift, Carmen Reyes informed her that Paz-Vasquez would be her supervisor and that she “would train us, she could also lay us off and she could call more people in.” During cross-examination, asked if Olmedo Duque was her immediate supervisor, Camargo replied, “[W]e would always address Maria Paz, to him we almost never went . . . He was introduced to us as a manager.”¹⁹ Also, Paz-Vasquez “would police all of us” and, “if we had a problem we had to go to her about everything.”²⁰ Camargo added that Paz-Vasquez as

next day, and he “told Maria Paz and Vargas, we need to get this place spotless for tomorrow, you keep the people, whatever people you want.”

¹⁹ On this point, the witness was impeached by her pretrial affidavit in which she termed Duque her “immediate” supervisor.

²⁰ With regard to personnel matters, Camargo stated that her work was the same each day and that, while it was not necessary for anyone to instruct her as to her job on a daily basis, her lead lady “would just tell us where she was going to position us.”

¹⁶ While production employees began at a \$5.75-per-hour rate of pay and line coordinators were paid \$7 per hour, Jaramillo and Paz-Vasquez earned \$10.75 per hour.

¹⁷ This office was located just off the packaging department floor and had a large window through which Lopez was able to observe the workers on each packaging line.

¹⁸ During cross-examination, Perez conceded that Lopez assigned overtime on just one occasion while he was second-shift supervisor. The work was cleanup work, which Lucho wanted completed by the

signed overtime. “She told us that we were going to come to work Saturdays or that we could stay overtime each night and she picked the people to stay over. Asked during cross-examination, if overtime was worked on a volunteer basis, Camargo replied that Paz-Vasquez “would pick them out, she would tell them, you and you are going to stay.” Finally, as to discipline, Camargo stated that she once overheard Paz-Vasquez speaking to Garcia-Sosa. “She told her that she did not want to hear her talk so much at work or else she was going to lay her off.” Garcia-Sosa failed to corroborate Camargo on this point.

Turning to the respective testimony of four of the alleged discriminatees,²¹ each of whom worked in the packaging department at the Hariton facility, on the subject of Jaramillo’s and Paz-Vasquez’ supervisory status, Maria Jaramillo, testified that, when she was hired by Carmen Reyes for work at the Hariton plant, the latter told her to report to Rosa Jaramillo, her sister-in-law, on the first shift. According to Maria, Rosa Jaramillo performed no production work—“She just went from line to line to check on workers and to check the machines, to see if they were working properly.” She added that, while her lead lady gave her job assignments on a daily basis and Rosa Jaramillo never gave her work instructions, her sister-in-law did transfer her from one line to another, and she gave work instructions to the line coordinators. Abigail Reyes testified that, on the second shift, Paz-Vasquez was over the line coordinators and “supervised the lines and the people also. . . . She made sure that the people did their job right . . . and that we showed up.” She added that, on one occasion, Paz transferred her from one line to another. Likewise, Claudia Mayne, who worked on the second shift, testified that Paz-Vasquez was “the one who supervised the line.” Her job was “checking to see that the production came out right.” Carolina Orozco, who worked on the second shift, testified that Paz-Vasquez could assign people to certain jobs on different machines and could assign someone to perform your job if you were not doing it properly. Finally, Silvia Martinez, who also worked on the second shift, testified that her supervisor was Maria Paz-Vasquez; that Paz-Vasquez once gave her permission to leave work early when her daughter was ill; that she stayed and worked overtime “when they told me to;” and that Paz-Vasquez was the one who told her to do so.

Lucho Lopez testified that his assistants mainly have production rather than personnel responsibilities and that, even as to the former, the extent of their authority was minimal. In this regard, Jaramillo and Paz-Vasquez “are working on the line They just focus mainly on production, make sure that we’re . . . using the right components . . . the right label, the right cap.” Further, his assistants act merely as “support to the line coordinators when [the line coordinators] are not finding something, a number or an item And they start looking for

²¹ The record reveals that the seven alleged discriminatees were all Respondent Olsten temporary employees and that all, except Jose Luis Rivera, worked at Respondent D&F’s Hariton facility. Rivera worked at the Gene Atry facility.

that item.”²² Closely questioned regarding the seemingly inconsequential nature of his assistants’ job duties, Lopez averred, “Well, this is a person that has got experience. When you are missing bottles, they know how to handle those issues. When you are . . . missing any component on the line. They know the procedure.” During cross-examination, Lopez insisted that this was his assistants’ only role—“assisting the coordinators.” With regard to personnel matters, the tenor of Lopez’ testimony was that he was primarily responsible for observing the work of the packaging department personnel²³ and that his assistants’ responsibilities, in that area, were slight. Thus, according to Lopez, during most of the workday, “I am in and out from [the] production office to the lines,”²⁴ ensuring “that everything go right, and that everybody are busy, and we doing what we supposed to be doing.” In overseeing the packaging department employees, he is either patrolling the lines or peering out the large production office window at the production lines.²⁵ In contrast, Lopez testified, Jaramillo and Paz-Vasquez, each of whose focus is checking “the components or numbers,” have virtually no authority in personnel matters. Thus, they have no authority to hire, fire, lay off, suspend, or discipline employees. If a Respondent Olsten employee warrants discipline, “they’ll let me know first that there is a problem. We investigate the case. And we report it to Olsten to take care of it.”²⁶ Likewise, Jaramillo and Paz-Vasquez have no authority to grant time off, and, Lopez further testified, “if an employee had an emergency . . . they let me know that these people have left. Lopez does not consider this granting time off from work as “in case of emergency, [we] can not retain the employee.” Moreover, if not an emergency situation, such as a

²² Lopez maintained that, during the workday the line coordinators and the lead persons make sure their packaging lines have all necessary supplies and keep a daily packaging report “for whatever happens on the line.” Also, they are responsible for checking that the machinery is running properly and for reporting breakdowns.

²³ He was contradicted on this point by Howard Simon, who testified that “Lopez’ functions are primarily to take care of production planning. He will plan on what’s going to happen next, he maintains the production board, he monitors the activity on the lines, he sees how orders are finishing, so he’ll be planning. . . . he relies on [his assistants] to take care of the routine activities on the shop floor,” including making sure that the workers are working and that the machines are operation correctly.

²⁴ At one point, Lopez estimated that 70 percent of his time was spent in this manner; later, he raised his estimate to 75 percent of his time. In contrast, as stated above, Jose Perez estimated that Lopez spent 95 percent of his workday inside the production office.

²⁵ Lopez maintained that he was able to observe each of the packaging lines, as the first was no more than 5 feet from the window, with the remainder of the lines being 6 feet apart. While corroborating Lopez that he could see all the packaging lines through his office window, Paz-Vasquez stated that the first line was approximately 15 feet from his office.

²⁶ For example, according to Lopez, if a temporary employee is spending too much time in a restroom, Jaramillo or Paz-Vasquez reports the matter to him and, after investigating to determine if such is, in fact, what has occurred, he will report to Respondent Olsten that there is a problem. Lopez added that the same procedure would be used if the miscreant employee is a Respondent D&F employee—he would investigate and issue discipline if warranted.

doctor appointment, the employees . . . have to let [Posey and Lopez] know first,” and, if an Olsten employee, “I have to notify Olsten, too.” Further, according to Lopez, neither Jaramillo nor Paz-Vasquez has any authority to grant overtime to employees, and, in any event, overtime is strictly on a voluntary basis. If overtime work is required, Lopez must receive orders for such from the vice president of operations or the Hariton plant manager, and “we prefer the same people to work overtime the same people that is working all day long on those lines But if somebody can not stay for any reason . . . we ask for volunteers to work the overtime.” The responsibility of his assistants, Jaramillo and Paz-Vasquez, is to “make sure that we have enough people to work overtime,” but, if no one desires to remain and work overtime, “we don’t force the work. It is not mandatory to work.” Also, while testifying early in the trial that his assistants may switch employees from one line to another, Lopez later testified that he makes the decision that such will be done and leaves it to the line coordinators and lead personnel to select the people for transfer. As to the authority of Paz-Vasquez and Vargas after he left the plant each evening during the period preceding the appointment of Olmedo Duque as the second-shift supervisor, Lopez stated, “I try to take care of the whole thing. I leave everything set up for them I was still in charge;” that they were “not allowed to fix” anything; and that “they had my phone number and everything.” Finally, Lopez admitted that he has solicited oral personnel evaluations from Jaramillo and Paz-Vasquez. In this regard, after asserting that he does so only after an abnormal incident, Lopez was impeached by his pretrial affidavit w he stated, without qualification, that he routinely asks Paz-Vasquez and Jaramillo to verbally assess temporary and full-time employees.

Rosa Jaramillo and Maria Paz-Vasquez each essentially corroborated Perez’ description of the extent of their authority in personnel matters. Thus, each debased the extent of her authority over production and over personnel matters. According to the former, “I assigned the job duties to the line coordinators. I checked papers, components, stamps, expiration dates. I went to the lines to see if they needed help. And if they needed help, I would send it to them.”²⁷ Jaramillo denied having the authority to hire, fire, layoff, grant time off to employees, assign overtime, suspend, or discipline. With regard to the latter, if she observed an employee report late, she would ask why “and then I tell them that they should always be on time to work” and report the matter to Lucho Lopez. Jaramillo added that she was authorized to permit employees to leave early in emergency situations and that, while she would “ask [employees] who wants to stay for overtime,” Lucho Lopez would tell her how many employees are needed.²⁸ Also, Jaramillo denied authority

²⁷ Jaramillo conceded giving work orders, which she obtained from the computer, which was located in the production office and to which she had coded access, to the line coordinators.

²⁸ Jaramillo denied ever telling people to work overtime “because it is a voluntary thing.” One employee corroborated Jaramillo that such was voluntary. Thus, Camerina Calderon testified that she “sometimes” worked overtime during the summer of 1998 and that “when we’re at work and we finish the eight-hour day and then we hear that there is overtime because Maria Paz . . . asks us . . . if we wanted to

to transfer employees from one line to another. She stated that she continually asks the line coordinators if they need help, and that, if employees are missing, she asks Lucho Lopez “which line I could take that needed person . . . and he would tell me.” Finally, while denying that she evaluated the work performance of employees, stating “Lucho does,” Jaramillo conceded giving Lopez weekly verbal evaluations of employees, which are based on employees’ on-time records, their job performance, their behavior, and their bathroom time.

Likewise, Paz-Vasquez, who denied that her job title was assistant to Lopez,²⁹ testified that the line coordinators “take care of giving orders to the rest of the personnel as to what they are going to be doing that day” and the lead ladies “take care of placing the personnel in the different areas of work on the lines” and that her role merely entailed “mostly. . . helping with what they are doing.” Later, however, she conceded that she is in a position of authority over the line coordinators and lead ladies with regard to production. “We give reports of the work to be done to the line coordinators and we check all the lines to make sure that the work is coming out okay. . . . We go from line to line checking on the orders and making sure they are the correct ones because there could be mistakes.” Concerning her authority over personnel matters, Paz-Vasquez denied having authority to hire, fire, or to lay off.³⁰ Also, she had no authority to discipline except “when [employees] got there late.”³¹ Then, the line coordinators and the lead ladies would tell the employee to be on time, and, if the employee was repeatedly late, they would inform Paz-Vasquez, who would, in turn, tell Lucho Lopez.³² On the same point, corroborating and contradicting Jaramillo, Paz-Vasquez denied having authority to assign overtime, which is ordered by Lucho Lopez or Steve Posey. “I tell the line coordinators to take care of that to select the personnel because overtime is voluntary. So . . . not everybody can stay.” Further, she is not authorized to permit employees to leave early, but, if an emergency situation exists, permission is not required.³³ Also, depending on, if a worker is employed by

stay, do you want to stay for some OT?” She added, “They asked us individually.”

²⁹ On this point, she was contradicted by her pretrial affidavit w she swore that her job title was assistant to the packaging manager.

³⁰ Paz-Vasquez testified that she spends most of her time on the production floor and, contradicting Lopez, denied that he works on the floor—“He has his office and he is in his office.”

³¹ Paz-Vasquez contradicted herself during cross-examination, admitting authority to also discipline when employees are talking excessively. Thus, if employees are excessively talking, the line coordinators will tell them to stop, but “if they are doing that too much, [the line coordinators] come and tell me. . . . So, I go . . . and talk to [the employees] and tell them listen do not talk so much And, if they continue, . . . either Olmedo or Lucho go . . . and take care of it.”

³² Contradicting herself during cross-examination on the extent of her authority to discipline in such instances, Paz-Vasquez stated, “If [employees] have been coming late, I let them know. I tell them not to be coming late and not to forget the break time. Because the line coordinator comes and tells me when someone is being late.”

³³ On this point, she admitted that her authority was greater during the time period immediately prior to the hiring of Olmedo Duque. Thus, she was authorized to permit temporary employees to leave early

Respondent D&F or Respondent Olsten, he or she must call into his or her employer's office in order to request a day off from work.³⁴ Paz-Vasquez denied authority to move workers between the lines unless ordered her to do so by Lopez or the shift supervisor—"We cannot transfer them unless there's an order to do that." Moreover, as to who was the highest supervisory authority after Lopez left the plant during the period prior to Duque becoming the second-shift supervisor, she admitted, "It's me" and Vargas³⁵ and, during said time period, their authority was "the same" after Lopez left the plant.³⁶ Finally, Paz-Vasquez conceded that she has been asked for her evaluations of employees by Lopez.³⁷

While Lopez, Jaramillo, and Paz-Vasquez denied that the assistants to the packaging manager possessed authority to fire employees, counsel for the Charging Party offered evidence contradicting them on this point. Thus, a former Respondent Olsten temporary employee, Estaban Espinosa, who had been hired to work at the Respondent D&F Hariton facility in September 1997,³⁸ testified that, one day in November 1997, Paz-

in nonemergency situations as long as the workers notified Respondent Olsten.

³⁴ Testifying on rebuttal, Camerina Calderon contradicted Paz-Vasquez, stating, "I called Maria Paz . . . to let her know that I could not come to work" because of illness. And some other times I would tell Lucho. She recalled speaking to Paz-Vasquez on five such occasions, testifying that the latter always gave permission, saying "Get well," and never placed her on hold in order to consult with anyone.

³⁵ She testified that, if an "emergency" occurred, she was able to reach Lopez immediately.

³⁶ Paz-Vasquez was closely examined by counsel for the General Counsel regarding her authority to initial timecards during the period prior to the hiring of Duque. On this point, she testified that it was Vargas's responsibility to "take care of . . . checking the cards. He would make a report for Lucho about the bad cards and then Lucho would fix the cards." She specifically denied having the authority to initial timecards. However, when impeached by her pretrial affidavit in which she stated that, when Vargas was not present, she did initial timecards and that Lucho Lopez had given her the authority, which she exercised, to check timecards for accuracy, Paz-Vasquez denied possessing such authority, saying, "[W]e simply just collect [the time cards] but not to correct them and we just put them aside."

³⁷ Paz-Vasquez minimized this aspect of her work, asserting that line coordinators were also responsible for doing employee evaluations.

Jose Perez was uncontroverted that Paz-Vasquez and Vargas knew the Hariton facility's burglar alarm code and that each had the keys to the building and were responsible for locking it at the end of the night shift.

³⁸ Espinosa, who worked for Respondent until June 1999, testified that, for a 4- or 5-week period during his employment, at the Hariton plant, he was a line coordinator in the packaging department—3 or 4 weeks on the first shift and 1 week on the second shift. In that position, according to the witness, his job was "to maintain the pills in the machine, to make sure [it] had enough glue" and "to make sure that [the other employees] were working and that they had enough tables and seals and the date and the box count." Contrary to Paz-Vasquez, Espinosa denied, while working as a line coordinator, ever evaluating employees or filling out evaluation forms for employees on his line.

Espinosa testified that, on the first shift, Rosa Jaramillo and Eduardo Cavallero were responsible for ensuring that employees did not engage in excessive talking nor spend too much time in the restrooms and that, on the second shift, Paz-Vasquez and Vargas were given the responsibilities. Further, if workers were absent, "I would tell [Paz-Vasquez]

Vasquez fired him from his job. According to Espinosa, on that day, he reported for work 10 minutes late. "I was going to punch my card and [Paz-Vasquez] told me not to punch it. I asked her why shouldn't I punch in and she told me that I was fired." Thereon, with Paz-Vasquez trailing him, Espinosa went to Carmen Reyes's office. "I spoke with [Reyes] and she answered me that [Paz] didn't want me any more." Again, followed by Paz-Vasquez, the temporary employee went to Lucho Lopez' office and explained what had occurred. Lopez conferred with Paz-Vasquez and then told Espinosa that Paz-Vasquez had fired him "because I would be absent three days per week;" that he would investigate what had occurred; and that the employee should go home while he did so. Two days later, Espinosa returned to the Hariton facility, and Lopez told him "that he had investigated and that he was going to give me my job back but in his shift."³⁹ Lucho Lopez, who stated that Espinosa was a "material handler" on the second shift and who denied that the employee had ever been a line coordinator, testified that he, in fact, made the decision to transfer Espinosa to the first shift. "Mr. Espinosa . . . was having problems with his [attendance] and missing days. . . . Maria Paz brought it to my attention several times. . . . So, I start my investigation," checking the Respondent Olsten's files and noting Espinosa's tardiness and absences were a recurring pattern. That same day, Lopez decided that he should speak to Espinosa, but the latter was late for work again. The next day, Lopez instructed Paz-Vasquez "to tell him to come and see me. Cause I need to talk to him. . . . He come to me asking me why he got laid off. I say you're not laid off. Let's try to solve this problem. . . . I say why you missing days and getting . . . late all the time cause I want some accountability on your part. . . . we start talking why he was missing days and coming late . . . more than normal . . . and his side of it was that he got a lot of problems with his car, transportation, and he was living here in L.A. . . . I said I think if we switch you to first shift . . . you can make it on time. . . . He said that's not gonna be a problem I'm gonna fix my problems. And, I believe he took 1 or 2 days . . . and . . . after that we didn't have any problems." Maria Paz-Vasquez testified, during cross-examination, that Espinosa was a Respondent Olsten employee who regularly arrived at work late;

that I needed somebody at this or that machine and then she would go and get me the . . . people that I needed to fill in that spot." Finally, the assistants to Lopez were responsible for reminding workers to be on time for work. Finally, with regard to overtime, Espinosa corroborated Jaramillo and Paz-Vasquez as to what occurred when there was overtime to be worked—Paz-Vasquez would approach him and "she would tell me, stay to do some overtime if you decide to do it or not."

³⁹ Espinosa testified that Paz-Vasquez fired one other employee, a woman named Leticia. He testified that he knew this because Leticia worked on his packaging line and the employees on the line were aware that she was upset about having just been terminated by Carmen Reyes. That same day, according to Espinosa, Paz-Vasquez approached the packaging line, and employees asked her why Leticia had been fired. Paz-Vasquez replied that Leticia "was a woman with too many problems [and] was too friendly with the men." However, during cross-examination, Espinosa contradicted himself and admitted that it was Carmen Reyes and not Paz-Vasquez, who actually fired Leticia.

Espinosa further testified that, as a result of being sent home by Lopez for 2 days, he lost 2 day's pay.

that she reported Espinosa's continued tardiness to Lucho Lopez; that, one day, she took Espinosa to speak to Lopez, who was in the shipping and receiving area; and that, after speaking to Espinosa, Lopez sent him home and eventually transferred him to the day shift. She denied ever terminating Espinosa.

3. The Respondents' alleged unlawful acts and conduct

The record establishes that the Union commenced its organizing campaign amongst the Respondent Olsten temporary and Respondent D&F full-time employees, who were working at the latter's Hariton and Gene Autry facilities, in September 1997, that such continued through the spring of 1998, and that organizing activity was continuing at the time of the instant unfair labor practice trial. In support of its efforts, the Union sent Jose Perez, who was, in the Union's terminology, a special projects union representative (SPUR), and other individuals, including alleged discriminatee, Jose Luis Rivera, an organizer for the Union, to the two Respondent D&F facilities in order to seek employment.⁴⁰ According to Rick Eiden, the Union's director of organizing, unlike Perez, Rivera, who was hired by Respondent Olsten for work at Respondent D&F's Gene Autry plant, and the others were "salts" for the Union and were expected to engage in organizing on being hired. Eiden further testified that the Union's organizers began speaking to the two facilities' temporary and full-time employees and visiting their homes in December 1997 and January 1998 and continued doing so through the spring and summer of 1998.⁴¹ In this regard, alleged discriminatees Carolina Orozco, Claudia Mayne,⁴² and Abigail Reyes, who worked at the Hariton facility on the same packaging department line on the second shift, each testified that she was visited at her home and solicited to sign an authorization card by a union agent in January.⁴³ Also, alleged discriminatee, Salud Soria, who worked at the Hariton facility in the packaging department on the second shift, and former employees, Camargo and Garcia-Sosa, each testified that, in May, she was visited at home by an agent of the Union and solicited to execute an authorization card;⁴⁴ alleged discriminatee, Maria Jaramillo, testified that, in June, an agent of the Union came to her home and solicited her to execute an authorization card and that she did so; and alleged discriminatee, Silvia Martinez, who worked at the Hariton plant in the packaging department on the second shift, testified that, in August at her home, she signed an authorization card for the Un-

ion on being solicited to do so by an agent of the Union. Besides visits by union agents to the homes of workers at the Respondent D&F facilities, employees themselves aided the organizing campaign inside Respondent D&F's Hariton facility. As to this, Camerina Calderon testified that, after speaking to Mario Brito, she began speaking to her coworkers at the Hariton facility, including alleged discriminatees Reyes, Orozco, and Martinez, each of whom assisted the Union by giving her names and phone numbers of fellow employees "so that a representative of the Union could come by their houses and speak to them." Also, Orozco testified that, at the plant during work, she spoke to alleged discriminatees Martinez, Soria, Reyes, and Calderon about the Union, and Mayne testified that, in the plant, she spoke to Orozco and Reyes about the Union "at the work station."⁴⁵

Counsel for the General Counsel presented evidence that Respondent D&F was aware of the ongoing union organizing campaign, a fact which Respondent D&F concedes, and allegedly engaged in unlawful conduct in order to thwart it. In this regard, Paula Pineda Camargo testified that, although solicited,⁴⁶ she refused to execute an authorization card for the Union and, later that same day, informed Paz-Vasquez about the union solicitation. According to Camargo, "I asked her what was happening. I asked her where had they obtained my address for them to be coming to my house. I had one of Mario Brito's cards and she asked me to show the card to her, and I gave it to her and then she took the card to Lucho and then they got a copy of that."⁴⁷ Thereafter, counsel for the General Counsel contends, Paz-Vasquez, on behalf of Respondent, began interrogating and otherwise coercing the Respondent Olsten temporary employees, whom she supervised, regarding the Union. Thus, Camargo testified that, later in May, Paz-Vasquez approached her, "and she asked me what I thought of the Union. . . . I told her that the Union was good, that they help the workers, and then she asked me if the union people had talked bad about her and I told her, no." Paz-Vasquez replied that, "the union people were not going to be able to match them . . . because [the owners] had too much money . . . and they could buy the Union . . . and also had good attorneys." Likewise, Garcia-Sosa testified that, shortly after the union solicitation at her home in May, Paz-Vasquez "came to the line where we were all working" and "she just asked me if they had come to my house and I said, yes. After that she asked me if I had signed a card and I said, no." At the end of May, according to the witness, Paz-Vasquez again interrogated her in a different area of the Hariton facility. "She asked again, if I had signed a union card . . . I told her, no, that I hadn't. And then she said because if you did sign the card, then the following day, you're not going to have a job because they're going to fire you for that." While not specifically denying the above-described al-

⁴⁰ Rivera applied for work at the Gene Autry facility in May 1998 and was hired by Respondent Olsten for work there. Immediately on being hired he commenced organizing for the Union by speaking to employees and soliciting them to sign authorization cards inside the plant in various working areas and outside in the parking lot.

⁴¹ Apparently, unaware of the Union's organizing campaign and acting on her own volition, employee Camerina Calderon contacted the Union after witnessing a demonstration in support of it in June. She spoke to Mario Brito, an organizer for the Union. Subsequently, they met at her home, and she signed an authorization card.

⁴² According to Mayne, she first became aware of the Union's organizing campaign in December 1997.

⁴³ Each testified that she signed the proffered union authorization card on this occasion.

⁴⁴ According to Soria, while she refused to sign an authorization card at that time, she did so at a later date.

⁴⁵ Line coordinator, Luz Figueroa, testified that alleged discriminatees Mayne, Soria, Reyes, and Orozco worked together on her second-shift packaging line.

⁴⁶ The union agent, who visited her home was Mario Brito.

⁴⁷ Apparently, the card was a business card and not an authorization card.

legedly unlawful acts,⁴⁸ Paz-Vasquez conceded that Camargo spoke to her about the Union, and Lucho Lopez admitted that “four or five” employees approached him, complaining about union agents visiting their homes. At first, Lopez was only able to recall the name of one such employee, Marcus Cineceros, who believed that Respondent D&F had provided personal information about him to the Union, and later recalled the name of another complaining employee, Linda Ellis.

Howard Simon testified that he initially became aware of the Union’s organizing campaign in June 1998. Further, based on reports from managers that union representatives were visiting employees at their homes and that Respondent D&F employees were “upset” at such contacts by “strangers,” who were telling them that they had been sent by Respondent D&F, he concluded that he “had better meet with our people to give them the straight story on what was going on.” Therefore, one day in late June or early July, he went to the Hariton facility and gave separate speeches to employees on the day and evening shifts, and, a month later, he went to the Gene Autry facility and gave similar speeches. According to Simon, at the Hariton facility, 80 to 100 employees attended the day shift speech, and 60 to 75 employees attended the second-shift speech. With regard to the allegations of the consolidated complaint, which pertain to Simon’s speeches that day, the General Counsel’s evidence concerns purported unlawful comments, by him, to the second-shift employees. As to these, Abelina Garcia-Sosa testified that she attended the second-shift meeting and that Simon spoke in English with Lucho Lopez and Carmen Reyes⁴⁹ interpreting. At the outset, Simon held up a union authorization card and said that employees were complaining to him about union agents visiting their homes and asking them to sign cards. He then said he “knew that some other people were trying to come into the company and they didn’t want anybody else to be managing us” and asked the employees not to sign the cards as he could solve their problems, including their “benefits,” a “raise,” and becoming employed by Respondent D&F, just as easily as the Union could. He then mentioned that Reyes had applications, which the employees could complete in order to become Respondent D&F employees. Next, either translating Simon’s words or speaking for himself, Lucho Lopez announced that Respondent D&F was going to hire a teacher to teach English to the employees in order to help them advance at the plant. Finally, Simon “said whoever did not like working in the company, the doors were open for them to go and work somewhere else because if the Union was going to come in there, they could always lay them people off and get somebody else to relieve them.” At that point, Simon began taking questions from the employees, and Camerina Calderon asked why the employees were not being given better positions. Simon replied that the employees could not be given permanent positions and that he had to “study” the problem as he was new

with the company and needed to meet with the employees “to learn more about the problems.” Camerina Calderon testified that she was present at the second-shift employee meeting, at which Simon spoke, and that Lopez and Reyes translated his English into Spanish. According to Calderon, at the start, Simon announced that the plant would be moved to a different location, “and then he said that . . . he knew that some of the employees were going around talking about these cards and he pulled one of them out of his coat pocket and he showed it to all of us. And then he said that we were going to sign cards to give permission to the Union to represent us . . . but that was not good for us to give permission to some strangers. Because . . . by no way, no means was a union going to be able to get in. And also that Carmen’s office was antiunion and . . . [would] not . . . let the Union get [in] either.” Then, an employee asked what would happen because people already had signed cards, and Simon replied “that the people that had signed . . . cards were going to be taken away from the plant.” The same employee asked what if all employees had signed for the Union, and Simon replied “that if that were the case . . . we could go on strike but that we were all going to be dismissed. According to Calderon, she then raised her hand and asked questions regarding raises for employees, rates of pay, and employment by Respondent D&F, and Simon responded, saying he would “review” the matters and “come up with a good solution for us.”

Claudia Mayne testified that, at the second-shift meeting, Simon, with Lopez and Reyes translating his English into Spanish, “pulled out a union card and he said that several people within the company were signing these cards. And he wanted to come to an agreement with the people so that they would not continue signing . . . these cards because the Union was no good And if the company did not want the Union to get in there, they were not going to.” Carolina Orozco recalled that Simon, with Lopez and Reyes translating from English into Spanish, said, “that he had found out about a union card that was given to him and then he showed it to us. Then he said that the Union was already inside the factory and that they were distributing some cards. And he asked if any of us had asked for the Union to come in. Then, he said he didn’t want any strangers in the factory . . . and that we could solve our things as a family because the Union was going to take our money and . . . maybe they were going to close the factory and we were going to find ourselves without work and money. And that if we had any problems to address them to Carmen.” According to Orozco, Lopez then spoke on his own and said, “that if we did not like working there that the doors were wide open and we could go because there were a lot applications being filled out right behind us.” Finally, Orozco further testified, Howard spoke about things being solved for the employees, and “to get in touch with Carmen and with Lucho and to talk to them and that he was going to look into the personnel files of each of us to see what he could do for us to advance.” As to what Howard Simon said to the second-shift employees, Paula Pineda Camargo testified, “The new owner . . . said that he knew of somebody distributing union cards around and that he wasn’t afraid of the Union. He told us not to sign those cards. . . . please not to sign them.” Simon continued, saying that all the company wanted was “forty hours of work a week” from each

⁴⁸ Paz-Vasquez failed to specifically deny the testimony of either Camargo or Garcia-Sosa. However, she did generally deny what was attributed to her.

⁴⁹ According to Simon, he wanted Carmen Reyes to attend the meeting as the Respondent Olsten representative in order to “deal with any issues” involving the latter’s employees and to help in the translation.

employee and that “the union people were not going to be able to contend with him.” An employee asked why he had called the meeting if he was not afraid of the Union, and Simon replied by pulling a union card from a pocket and saying that he wasn’t afraid of the Union . . . that I can always change the company name, we would even go further away and I can always close this company . . . and the Union is not going to do anything to me.” Also, Simon said he just wanted to show them what they had to execute if they desired union representation. Likewise, Abigail Reyes recalled that Simon, with Lopez and Carmen Reyes translating into Spanish, began by showing “us a card and [saying] that . . . he had found out that the Union was trying to get in. . . . And that he did not want the Union to get in because they didn’t want any strangers since we all worked there as if we were a family.⁵⁰ He said that . . . there was going to be a better future and more benefits and everything was going to be better for all the workers there. And for us not to believe that people from the Union . . . and if we ever had a problem . . . just go to Lucho or to Carmen . . . and explain our complaints.”

Simon testified that, for his speeches to the Hariton plant employees,⁵¹ he utilized a multipage document, entitled *Maintaining Non-Union Status*, which had been given to him by Respondent Olsten’s lawyers, that, rather than reading from the document, he merely referred to it as “there were certain points that I wanted covered,”⁵² and that he spoke in English, with Lopez, Reyes, and Humberto Hernandez, the maintenance manager, translating into Spanish. According to Simon, he began each meeting by “displaying a blank unsigned union authorization card and saying that a number of employees had [complained to managers] about being contacted at home [by union agents who said they had been sent by the company] . . .” He then told the employees that he wanted to present the company’s position and explained that the purpose of the card was to [give] the Union the right to represent them in negotiations with the Company, that employees have the right to sign such cards and the right not to do so, and that “it was the employee’s decision.” Continuing, Simon told the employees they could not rely on promises from the Union, that the Company signed their paychecks and not the Union, and that the Union “makes its profits” from members’ union dues. Simon then discussed a possible election, saying, “that employees would be given an opportunity to vote for or against the Union.” He then told the employees that, if the Union was victorious in such an election, “there would be . . . a time for the Union to negotiate with the company for wages and benefits. And there was no obligation on the company to increase anything. That the company had an obligation to negotiate in good faith.” Then, he raised the subject of a possible strike, informing the employees that they would have to make a choice between honoring the

strike or crossing a picket line and that “if an insufficient number of employees come to work, the company would then have a choice of either suspending its operations during the strike or seek[ing] other workers to replace workers who are out on strike.”⁵³ Last, according to Simon, he spoke about communication between managers and employees, telling the employees “that the company did not really want to have a third party coming between us” and inviting them to go to their supervisors with any “concerns” or to human resources or, if Respondent Olsten, to Carmen Reyes. Thereafter, Simon further testified, he answered employees’ questions.⁵⁴ In this regard, he denied answering a question from a second-shift employee about English language training but recalled being asked a question about training employees who desired to earn more money and answering that “there are a number of jobs here that require at least a basic knowledge of the English language, reading and writing” and that “we have plans to offer English-as-a-second-language courses to our employees. And there were notices up, sign up sheets already up on the bulletin board.” Finally, during direct examination, Simon denied telling employees not to sign union cards or they could be terminated for supporting the Union. During cross-examination, Simon stated his belief that his interpreters confined themselves to translating his words into Spanish.

Three other witnesses testified in Respondent D&F’s behalf regarding Simon’s speech. Lucho Lopez stated that he recalled nothing about Simon’s remarks to either the first or the second-shift employees at the Hariton plant. However, he did manage to contradict Simon, denying that he interpreted for Simon during the second-shift meeting and stating that Simon only mentioned the Union after questions on the issue by employees, and he could not recall either Simon utilizing any printed material during either speech or Simon mentioning Respondent D&F’s options during a strike. Maria Paz-Vasquez, who denied interpreting for Simon during his second-shift speech or saying anything during the meeting with employees, recalled little of what Simon said but did remember “he didn’t say anything about any authorization cards or anything.” Carmen Reyes, who contradicted Lopez, stating that the latter did, in fact, interpret during Simon’s speech to the second-shift employees, and Paz-Vasquez, stating that, during the second-shift meeting, the latter spoke about her employment experience with Respondent D&F, corroborated Simon, testifying that, after introducing himself, the latter mentioned “being aware that employees have complained that there was some union representative going to peoples’ homes, and he held up a union . . . card to let employees know that they may be asked to sign

⁵⁰ Under questioning by counsel for the Union, regarding what Simon said while holding up the union authorization card, Reyes recalled him saying, “that we were going to be let go.”

⁵¹ Simon averred that he has had experience giving this type of speech to employees, having done so on two prior occasions to other employers’ employees.

⁵² Simon stated that the document was visible on the table behind which he spoke.

⁵³ Simon conceded failing to draw a distinction between temporary and permanent strike replacements.

Under questioning by the undersigned administrative law judge, Simon changed his testimony, stating that he explained to the employees a third-company option in the advent of a strike—“Well, the choices were that the company could suspend its operations while the strike was going on. . . . We could work with the reduced workforce . . . or three . . . to replace employees during the strike, it could go out and hire replacement workers.”

⁵⁴ Simon denied knowing or inquiring into the identities of any questioner at either the Hariton plant or the Gene Autry plant.

an authorization card. He [said] . . . that it was their right to sign or not sign a card.” He also said employees had the right not to speak to the union representatives and encouraged communication with the employees and that employees could speak to their supervisors or him if necessary. Reyes denied that Simon threatened any employee with termination or that he threatened to close the plant. On this latter point, she recalled that Simon “might have mentioned that we were going to be moving to a new location . . . a new site, to a bigger facility.”

There is no dispute that, pursuant to Respondent D&F’s directive, four of the alleged discriminatees (Claudia Mayne, Abigail Reyes, Carolina Orozco, and Salud Soria) were laid off by Respondent Olsten on July 7, 1998. As stated above, they worked during the second shift at Respondent D&F’s Hariton facility on the same packaging line, with Luz Figueroa as their line coordinator; they each engaged in activities in support of the Union; and they spoke with each other about the Union at the plant. Further, according to Reyes, on the day before the layoffs, she spoke to Camerina Calderon “at the line when we were getting set up to work on the line.” No one was listening, and Calderon “asked me how many workers from that line had signed up with the Union. And she told me to write them down and so I did. I wrote the names down on a piece of paper. And she reached backward . . . to receive the paper and I handed it to her.”⁵⁵ As to the layoffs, Orozco and Mayne each testified that, on July 7, Carmen Reyes telephoned her at home. According to Orozco, Carmen Reyes telephoned her and informed the alleged discriminatee she did not have a job any longer as “there was no more work [at the Hariton plant];” according to Mayne, Reyes telephoned her and “that she was sorry but that she had to lay me off . . . because the production had lessened.” Soria testified that, on July 7, she reported for work, was summoned to Reyes’s office, and informed by the latter “there was no more work for me any longer.” Likewise, Abigail Reyes testified that, on July 7, Carmen Reyes instructed the former to report to her office and told the alleged discriminatee she was being laid off “indefinitely.” While the ostensible reason for the layoffs of the above four individuals was a lack of work, Camerina Calderon testified that, subsequent to the layoffs but prior to the start of work that day, while on her way to obtain some necessary cardboard, as she passed by line 3, she overheard Paz-Vasquez and Figueroa speaking.⁵⁶ According to Calderon, “Lucy Figueroa asked Maria Paz what had happened to her workers . . . because she needed the people to get to work,” and “Maria Paz [replied] that they were never going to show because they were fired. . . and that she wanted to see how the Union was going to protect Abigail and Carolina.” Paz-Vasquez added that “she had [let them go] by orders from upstairs” for signing union cards. “And then she said, that’s the way they all going to be leaving, all the ones who signed . . . them union cards.” While generally denying such comments, Paz-Vasquez failed to specifically

⁵⁵ When asked if Calderon explained why she wanted to know which employees were in favor of the Union, Reyes, who initially denied knowing that Calderon was a union adherent, stated, “I . . . knew that she was already with the union people.” Also, Reyes denied placing her own name on the paper as “I knew that I had already signed. I did not deem it necessary.”

⁵⁶ According to Calderon, the machinery had not yet been started.

comments, Paz-Vasquez failed to specifically deny the above attributed conversation. Further, according to Calderon, 2 days later, feeling “guilty” over the layoffs of her coworkers, she approached Paz-Vasquez at the entrance to the employees’ cafeteria. Calderon had with her a letter in which she identified herself as the Union’s helper inside the Hariton facility, offered it to Paz-Vasquez, and requested that she take it to Lucho Lopez. Paz-Vasquez opened and read the letter and asked “why do you want to do this if you know we all like you here and we all respect you.” She added “that the company has a lot of money and . . . the Union is not going to get in” and “that we were going to find ourselves out of a job and without any help.” Continuing, Paz-Vasquez “told [Calderon], if you like, I’m going to pretend that I didn’t see any letter but you are not going to continue to do these things.” Notwithstanding what Paz-Vasquez told her, Calderon implored her to take the letter to Lopez. Paz-Vasquez agreed to do so, and Calderon observed her walking towards Lopez’ office.⁵⁷ Paz-Vasquez failed to specifically deny the occurrence or substance of this conversation.

Respondent D&F contends that the July 7 layoffs of Mayne, Soria, Reyes, and Orozco were incident to a series of four economic layoffs of temporary Respondent Olsten employees from its Hariton facility in May, July, September, and October 1998, and Respondent Olsten contends that it laid off the above-four alleged discriminatees based on Respondent D&F’s command to do so because of a lack of work. In these regards, Howard Simon testified that 70 percent of Global Health Science’s total business has been tied to contracts with Herbal Life International; that, pursuant to a contract, which expired in January 1998, GHS and a predecessor possessed a right of first refusal of all of HLI’s manufacturing requirements, which right meant, in effect, that GHS and its predecessor had been the sole manufacturer of HLI’s product, its “production department.” However, according to Simon, pursuant to the parties’ successor agreement, HLI became obligated to purchase only a minimum of 80 percent of its product needs from GHS and “the net manufacturing prices were reduced to [HLI] by an average of 10 percent.”⁵⁸ Moreover, Simon continued, due to economic problems in some of HLI’s markets, particularly in Asia and Russia, during 1998, GHS experienced a “fall off” in business of “over 20 percent” and made no shipments of HLI’s products to Russia for a 6-month period. Simon testified that, during the spring, summer, and fall months of 1998, “to compare it to the prior year, sales were down more than 20 percent. Part of that would be attributable to price decrease. But part of it certainly

⁵⁷ Lucho Lopez testified that, amongst the employees, the only union supporter, whom he knew, was Calderon because “she talked about it, especially with me.” He added that “the first time . . . she told me that she was a union supporter was “in July sometime. It was probably after the first layoff.” She told him “she was a union supporter. And my answer was . . . that was the individual decision whether to support or not.” Calderon failed to deny Lopez’ testimony.

⁵⁸ Simon conceded that it was hard for GHS to quantify whether the 80 percent figure represented a production decrease as “we didn’t always know . . . what [HLI’s] total requirements were. It was sort of a good faith kind of deal.”

was attributable to this loss of volume.” This is because “every item that we manufactured for [HLI] is bottled. Not every item we manufacture for other clients is bottled. We sell a number of items in bulk.” Therefore, according to Simon, given the reduced demand, “at some point in time we have to shut machines off” and layoffs became necessary; the decisions on who to lay off “would be made by Steve Posey and Lucho Lopez. They decide “what the manpower requirements are” at the Hariton plant “and then move accordingly.”⁵⁹ Simon testified that the total number of laid-off employees “was somewhere around 70 to 80 as I recall” and said, “[W]e have records to show what those numbers were. I’m not familiar with all the numbers. It’s my guess.”⁶⁰

With respect to the layoffs, Lucho Lopez, who stated that layoffs were frequent in the “early summer” when “it slows down,” corroborated Simon that there were layoffs of Respondent Olsten’s temporary employees in the packaging department during the summer of 1998. “The first layoff it was in July,” and “we tried to hold the people . . . until the work arrives. But it was not happening that way. And so we regularly start letting people go.” Lopez testified further that he was informed of the need to lay off employees by Pete Pescetti, who made the decision and who informed Posey and him. Pescetti “said we don’t have enough production for all the lines, that we need to shut . . . two to three lines,” and “he preferred to reduce second-shift first.”⁶¹ According to Lopez, the number of laid-off employees was to total between 30 and 45 employees, it was his task to decide which of the Respondent Olsten temporary workers would be laid off, and Pescetti afforded him just “two or three” days to implement the entire layoff. Given the short time for his selection process, Lopez spent 80 percent of his time on this project. In selecting the Respondent Olsten temporary employees, who were to be laid off, Lopez considered his notes on the temporary employees’ performance, attendance, and seniority over the prior “eight to nine months.”⁶² Of the four alleged discriminatees, who were laid off on or about July 7, Lopez had no specific recollection regarding Claudia Mayne and Carolina Orozco. He recalled that his decision as to Salud Soria was based on a lack of work and that, as to Abigail Reyes, originally recalling that she was laid off based on a lack of work, he later testified that she was selected for layoff due to a general “lack of work” and her “performance.”⁶³ Lopez could not recall ever speaking to Reyes about her job performance, and Respondent D&F offered no documentary evidence with regard to Lopez’ selection process.

⁵⁹ Respondent D&F offered no business records, supporting Simon’s testimony, into the record.

⁶⁰ None of the records was offered to corroborate Simon’s testimony concerning the number of layoffs.

⁶¹ It is not entirely clear, but I believe that two of the packaging lines on the second shift were to be closed. Moreover, as Lopez made clear, shutting a line did not necessarily mean that the people on that line would be among those laid off.

⁶² The basis of Lopez’ notes on employees’ production were the reports submitted to him by his assistants, including Rosa Jaramillo and Maria Paz-Vasquez.

⁶³ With regard to Reyes’ performance, Lopez stated, “Normally, she was slower than the rest of the personnel.”

Carmen Reyes confirmed that Respondent D&F requested that Respondent Olsten lay off some of its temporary workers at the Hariton facility during the summer of 1998. “Lucho Lopez would let me know that production was slowing down and that there would be the possibility of layoffs coming up . . . and he would usually give me a list of employees.” According to Reyes, Lopez would always inform her that the reason for the layoffs was “lack of work,” and her procedure was then to telephone each affected worker and inform him or her of the layoff. As proof of the layoffs, Respondent Olsten offered a series of four memoranda from itself to Respondent D&F, dated June 1, July 9, September 10, and October 6 respectively, setting forth the layoffs of approximately 48 of its temporary employees from the latter’s Hariton facility between June 1 and October 6. The records disclose that alleged discriminatees Reyes, Orozco, Soria, and Mayne were included in a group of nine Respondent Olsten temporary employees, who were laid off from the packaging department at Respondent D&F’s Hariton facility on or about July 7.⁶⁴

Alleged discriminatee, Maria Jaramillo, who worked on the first shift in the packaging department at the Hariton facility, testified that she initially became aware of the Union’s organizing campaign in mid-June when a union agent visited her home and solicited her to sign an authorization card. She did so. Subsequently, in August, “I was home, and [Rosa Jaramillo] called me by phone. . . . She asked me if I had joined the Union. And I told her, no. And she said that Lucia Reyes had told her that she knew that I had joined up with the Union and that I had signed . . . a card. . . . I told her I didn’t know where Lucia could have gotten this information when it is not true. And . . . she [replied that] . . . Lucho Lopez already knows that you joined up with the Union and he knows everything. He even knows that you signed . . . a card.”⁶⁵ Marta DeLeon Ornelas, who was a Respondent Olsten temporary employee at the Hariton facility, who worked during the day shift in the packaging department, and who was laid off on October 6, testified that she was away in Mexico and did not become aware of the Union’s organizing campaign until subsequent to her return on July 27. Shortly thereafter, according to Ornelas, she was working with a coworker, Arnelia Pacheco, when Rosa Jaramillo approached and “she asked me if I had signed a union card so I said that I had not signed anything, that I had not been informed because I had been in Mexico and I was just coming back to work. . . . She said not to sign anything, that it was not convenient for me, that it wasn’t good.”⁶⁶ Alleged discriminatee, Silvia Martinez, who worked on the second shift in the packaging department at the Hariton plant, testified that, on

⁶⁴ According to Respondent Olsten’s Exh. 2, those individuals laid off on or about July 7 were Manuel Perez, Rafael Goxion, Abigail Reyes, Carolina Orozco, Claudia Mayne, Salud Soria, Luz Alba, Maritza Sanchez, Patricia Soria, and Juana Villanueva.

⁶⁵ Rosa Jaramillo specifically denied interrogating Maria Jaramillo as to whether she signed an authorization card for the Union but failed to specifically deny the latter’s testimony regarding their telephone conversation.

⁶⁶ While generally denying having interrogated employees as to signing cards for the Union, Jaramillo failed to specifically deny this conversation.

August 5, a union agent visited her home and that she executed an authorization card for the Union during her meeting with the Union's agent. According to Martinez, after signing the card, she requested that the union agent give her a letter, stating that she was an "activist" on behalf of the Union. The agent did so, and Martinez took the document to the plant in the afternoon. As she was punching the timeclock, she saw Lucho Lopez and approached him. "I told Lucho that Maria Paz had reprimanded me and had told me that she did not want me, us, to help Camerina Calderon to make boxes." She then quoted Paz-Vasquez as saying, "Lucho says that he doesn't want you to help Camerina." To this, Lucho replied, "that he had not told Maria that." At this point, according to Martinez, she handed Lopez an envelope, in which she had placed the union agent's letter. While unable to recall whether Lopez opened the envelope and read the letter in front of her,⁶⁷ she did recall him asking what was in the envelope, and "I told him . . . that I was making myself known that I was a union activist." She added, "I told him that I wanted to be known as a member of the Union because I do want the Union in here because we don't have any protection of any source and we don't have help from nobody, and . . . I feel we need it. . . . He said why did you do it, out of vengeance, and I said no sir, not out of vengeance. . . . He said do you think that paper is going to help you in any way when they fire you. . . . they are going to dismiss you for having dealings with the Union, for doing that. . . . He asked me if I know that I was violating the policy of the company . . . because I had signed up with the Union."⁶⁸

There is no dispute that alleged discriminatees Jaramillo and Martinez were laid off on or about September 8 amongst a group of nine Respondent Olsten temporary employees, who were laid off from the packaging department at Respondent D&F's Hariton facility.⁶⁹ According to Jaramillo, a few days after her layoff, she went to the Hariton facility and had a brief conversation with Carmen Reyes during which she asked Reyes whether Respondent D&F had given Reyes a bad report on her. Reyes, who failed to deny this conversation, answered "no" and added, "[T]here's nothing wrong about you, there's no more work, you have been let go." Alleged discriminatee Martinez testified that the first word of her layoff came from someone named "Emmy," who informed Martinez that "they didn't have any more work for me there, that D&F did not want me to work there, that I could not go to work at D&F." Subsequently, according to Martinez, she spoke to Carmen Reyes, who told her the reason for the layoff was "that she had received orders from

⁶⁷ During cross-examination, Martinez stated that Lopez refused to take the letter from her and that she opened the envelope so that he could see the letter.

⁶⁸ Lucho Lopez testified that there were "several times" when Martinez gave him envelopes, which contained notes, referring to doctor's appointments or appointments with her children's teachers at school. He specifically denied ever receiving a letter from her regarding her support for the Union or being aware of her support for the Union.

⁶⁹ According to Respondent Olsten's Exh. 3, those laid off on or about September 8 included first shift employees Juana Flores, Maria Jaramillo, Daniel Saravia, and Cezar Jimenez and second-shift employees Emilia Sanchez, Evangelina Median, Silvia Martinez, Julio Montes, and Norma Figueroa.

higher up that I had done something against the company." Reyes failed to deny this conversation.

Lucho Lopez made the decisions to layoff alleged discriminatees Jaramillo⁷⁰ and Martinez. With regard to the former, while initially testifying that Jaramillo was laid off because of lack of work, Lopez later testified that he selected Jaramillo for layoff because she was spending too much time in the restroom and using bad language and that said problems had continued unabated for "let's say five months."⁷¹ He further testified that "there had been "a couple of incidents" during which she had used "offensive, bad language" to fellow employees; that "people were complaining, a religious person . . . brought it to my attention;" that, while he was unable to recall the name of this worker, "several people" complained, including employee, Elena Bermudez. Lopez added that he personally investigated these complaints and heard her once "using foul language" by the lunch truck. As to spending excessive time in the restroom, Lucho Lopez insisted that "I investigated" [this assertion] and determined that Jaramillo would spend 10 to 15 minutes in the restroom whenever she visited the facility. With regard to whether he reported his problems with Maria Jaramillo to Carmen Reyes, when called as a witness by counsel for the General Counsel, Lopez testified, "I talked to Carmen about Maria. . . . talking too much time to go to the restroom;" when called as a witness by counsel for Respondent D&F, he was less certain, stating he could not recall the specific individual but he did tell someone from Olsten, "[W]e had a person that was using foul language." Finally, according to Lopez, he never approached Maria Jaramillo about her misbehavior⁷² and, notwithstanding the foregoing, Jaramillo was actually laid off because of "the lack of work." Rosa Jaramillo testified that she had no problems with Maria Jaramillo except "I did notice that she would curse a lot and use bad words with the other lady employees. . . . They told me that sometimes." In particular, according to Rosa, she heard Maria curse at work, yelling "bitch" and "whore" at other women. While she added that she informed Lopez about Maria's cursing, Lopez failed to corroborate her. Likewise, Carmen Reyes failed to corroborate Lucho Lopez with regard to reports to Respondent Olsten concerning Maria Jaramillo's misconduct.

Regarding Silvia Martinez, under direct examination by counsel for the General Counsel and, subsequently, by counsel for Respondent D&F, Lucho Lopez only mentioned lack of work as the reason for her layoff in September. However, during cross-examination by counsel for the General Counsel, when again asked the reason for her inclusion in the September

⁷⁰ Asked if he was required to layoff anyone at the time Maria Jaramillo was laid off, Lopez first answered, "No. . . . But production was slowing down. And so we laid people off regularly." Asked the same question moments later, Lopez responded, "Yes," saying Jaramillo was the worker whom he chose.

⁷¹ As I understand Lopez' testimony, Respondent D&F never fires anyone for cause—"when we have work . . . we never give a layoff to anybody." Thus, while Lopez maintained that he selected Jaramillo for layoff based on her excessive time in the restroom and her proclivity for using bad language, he would not have requested her termination by Respondent Olsten for those reasons.

⁷² She denied using bad language at work.

layoff, Lopez, for the first time, stated, “That was lack of work. . . . And attending.” As to Martinez’ purported absences, Lopez later explained, “almost every week she comes to me to ask for permission, directly to me” and “once every two weeks” she either would be absent or ask to leave early. He added that Martinez would always have doctors’ slips or notes from school concerning her children; that he would send these to Respondent Olsten as “we don’t keep documents;” and that he reported Martinez’ attendance problems to Respondent Olsten for any discipline. Neither Respondent D&F nor Respondent Olsten offered any documentary evidence supporting Lopez’ testimony, and Carmen Reyes failed to corroborate him as to receiving reports of Martinez’ attendance problems.⁷³

The remaining alleged discriminatee is Jose Luis Rivera, who began working for Respondent Olsten at Respondent D&F’s Gene Autry facility in May 1998. He worked on the second shift, processing pills and mixing powders. As stated above, while working at the Gene Autry facility, Rivera remained in the employ of the Union and was engaged in organizing for the Union at the Gene Autry facility. To this end, Rivera would speak to employees in the plant’s parking lot and, during working hours, in hallways and in the mop cleaning room about the Union. Further, according to Rivera, he solicited employees, in the parking lot, to execute authorization cards for the Union. Specifically, Rivera recalled the names of two individuals, Gilberto Garcia Estrada and Edwin Madrano, with whom he spoke about the Union “in the hallways,” and, according to Rivera, “sometimes they were together and sometimes they were not.” These conversations were always during worktime, were always loud “because there is a lot of noise there,” and could have been overheard by one of Rivera’s supervisors, who could have easily observed them while “walking around the hallways.” Also, Rivera attended Howard Simon’s speech to the second-shift employees at the Gene Autry facility in June and was just one of two employees who asked a question. According to Rivera, he mentioned an employee, who had injured his back and, subsequently, had been laid off, and “I asked them why they said that they wanted to fix that now that the Union was coming around, how come they didn’t take care of that before this happened.” He added that no other employee mentioned the Union at the meeting.

There is no dispute that Rivera was laid off from Respondent D&F’s Gene Autry facility on August 24. That morning, Carmen Reyes telephoned Rivera at home and, according to the alleged discriminatee, said “that she was going to be laying me off because of an adjustment in personnel.” He asked to speak to her in person and Reyes said she could be at the Gene Autry plant in the afternoon. Later in the day, Rivera did meet with Reyes in an office at the facility. Rivera testified, “She asked me why I had gone to the company when she had called on the phone to tell me that she was laying me off. . . . and I told her for her to remember that I had told her previously . . . that I

needed to see her in person.” Then, Rivera handed an envelope, with a letter inside, to Reyes. “She told me that she could not take that letter because [it] was directed to Mr. Marconi and that she was not Mr. Marconi.”⁷⁴ She added that he could mail the letter if he so desired. Rivera asked why she would not accept the letter if she was the person who had hired him.” Then, “she told me that she was not going to take it and that if I wanted to pass out some flyers about the Union to go outside and do it outside, that she didn’t want to see me in there.”⁷⁵

Respondent D&F offered no evidence regarding, or explanation for, the layoff of Rivera. Carmen Reyes testified on behalf of Respondent Olsten and stated that the first she knew of the layoff of Rivera was a telephone call from Sebastian Nevarez, the manufacturing manager for Respondent D&F, and he “let me know of two people by phone. He didn’t make a list for me.” As to the reason for Rivera’s layoff, Reyes initially blamed the layoff on “downsizing” at the Gene Autry facility and, moments later, explained it resulted from a “lack of production.” She recalled speaking to Rivera about his layoff and telling him “that the assignment had been ended I believe he asked about his check. And I told him the check would be available at the branch for him to pick up.” Subsequently, according to Reyes, she met with Rivera at the Gene Autry facility. “And, when I saw him there, I told him that his assignment had ended. There was no reason for him to be on site at the client’s address. He was an Olsten employee and he could go to the branch for any help. . . . He did attempt to give me an envelope,” but she refused to accept it because “it had Dick Marconi’s name on it” and “I didn’t feel comfortable accepting someone else’s mail.” Reyes denied saying anything to Rivera about flyers and was not aware of any union activities by any of the alleged discriminatees, including Rivera. Reyes recalled attending Howard Simon’s June speeches to employees at the Gene Autry facility but, while recalling that “one or two employees spoke,” had no recollection of Rivera asking a question. She added that she would not have recognized Rivera even if he had asked a question—“I have too many employees. I don’t recognize all of them.” Finally, Reyes identified General Counsel’s Exhibit 2 as a computer-generated assignment history form for Rivera, a type of form which is maintained by Respondent Olsten for all of its temporary employees. On Rivera’s form, as a reason for the end of his assignment to Respondent D&F, is the following comment—“becuz of attitude during meeting.” Reyes testified that her assistant, Elizabeth Escamilla was the individual who wrote the words on the form and that she obtained the information most “likely from me.” Given the wording on the document, Reyes conceded the above notation “appears” to be the reason for Rivera’s layoff.

B. Legal Analysis

Initially, I must decide whether, as alleged in the consolidated complaint, Respondent D&F and Respondent Olsten constituted joint employers of the Respondent Olsten temporary

⁷³ The record discloses that, subsequent to the Hariton facility layoffs in June, July, September, and October, Respondent D&F, later in October, began hiring temporary employees at the Hariton facility—from Interim, the successor to Respondent Olsten as the supplier of temporary employees to Respondent D&F.

⁷⁴ While the record is not entirely clear, Marconi apparently has an ownership interest in Respondent D&F.

⁷⁵ After his layoff from the Gene Autry facility, Respondent Olsten did find another job for Rivera at a company, called Brasstech, at which he worked for several months.

employees, who were working at Respondent D&F's Hariton and Gene Autry facilities during the spring, summer, and fall of 1998. In this regard, Board law is quite clear. In *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982), the court noted that, unlike the two nominally separate companies in a "single-employer" relationship, the "joint employer concept" does not require the existence of a single-integrated business enterprise. Rather, the latter concept "recognizes that the business entities involved are, in fact, separate but that they share or co-determine those matters governing the essential terms and conditions of employment." *Id.* at 1123. While, in *TLL, Inc.*, 271 NLRB 798 (1984), adopting the United States Court of Appeals for the Third Circuit's definition of a joint-employer relationship as its own, the Board embellished on it:

[In *Browning-Ferris Industries*] the court found that, where two separate entities share or codetermine those matters governing the essential terms and conditions of employment, they are to be considered joint employers for purposes of the Act. Further, we find that to establish such status, there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction.

In *Laerco Transportation*, 269 NLRB 324 (1984), the Board concluded that evidence of minimal and routine supervision of employees, limited dispute resolution authority, and the routine nature of work assignments was insufficient to establish a joint employer relationship. In contrast, in *Branch International Services*, 327 NLRB 209 (1998), the Board concluded that a company, which leased its entire workforce from a company, which was engaged in the business of leasing employees to other businesses, constituted the joint employer of said employees when the record evidence established that the former hired and directed the work of the leasing company's employees and utilized its own disciplinary system, "which made explicit provision for discharge." *Id.* at 11.

The record evidence discloses that Respondent Olsten hires its own employees, maintains all employment records, is responsible for workplace injuries to its employees, and is responsible for disciplining its own employees; that the work of the Respondent Olsten's temporary employees is of a routine and repetitive nature and employees must report absences to Carmen Reyes, and that Respondent D&F's supervision of the Respondent Olsten employees is minimal, consisting of assigning them to their daily jobs, pointing out violations of Respondent D&F's workplace rules, and ensuring that they are performing their assigned tasks. However, the record evidence also discloses that Respondent D&F determined the number of available temporary employee job vacancies to be filled by Respondent Olsten's hires; established the rates of pay for the latter's employees and provided the funds from which they were paid; decided when overtime was required and the number of temporary employees necessary for such work; and, apparently, was authorized to suspend Respondent Olsten's temporary employees from work. As to the latter point, Estaban Espinosa testified that he was sent home by Lucho Lopez while the latter investigated his putative termination by Paz-Vasquez and that he was not paid for the 2 days he was off work, and

Paz-Vasquez corroborated Espinosa that he was, in fact, sent home by Lopez. Moreover, of utmost significance to the joint employer issue, when necessary, Respondent D&F simply demanded that Respondent Olsten lay off or terminate temporary employees, determined the number of temporary employees to be laid off, and selected the affected workers. *Whitewood Maintenance Co.*, 292 NLRB 1159, 1162 (1989). In this latter regard, there is no record evidence that Respondent Olsten was authorized to question or, in fact, ever questioned Respondent D&F as to its decision to lay off or terminate employees or its selection of employees for layoff, and, at least with regard to the July, August, and September layoffs, at issue, the record evidence is that Carmen Reyes, Respondent Olsten's on-site manager, acted in a sycophantic manner, always honoring Respondent D&F's demands and never questioning Respondent D&F as to the number of individuals affected by the layoff, the individuals who were selected for layoff, or Respondent D&F's rationale for the layoffs. *Capitol EMI Music*, 311 NLRB 997, 998 (1993).⁷⁶ Contrary to counsel for Respondent D&F,⁷⁷ in the above circumstances, the conclusion is warranted that Respondent D&F participated meaningfully in the exercise of control over matters governing the terms and conditions of employment of Respondent Olsten's temporary employees, and, accordingly, I find that the General Counsel has established that, at all times material, Respondent D&F and Respondent Olsten constituted joint employers as alleged in the consolidated complaint. *Capitol EMI Music*, supra.

I turn next to whether Respondent D&F's assistants to the packaging manager at its Hariton facility, Rosa Jaramillo, and Maria Paz-Vasquez, are its supervisors within the meaning of Section 2(11) of the Act and its agents within the meaning of Section 2(13) of the Act. As to their status as statutory supervisors, I note, at the outset, that the burden of establishing that an individual is a supervisor within the meaning of Section 2(11) of the Act rests on the party—the General Counsel—who asserts supervisory status. *Hausner Hard-Chrome of Kentucky, Inc.*, 326 NLRB 426 (1998). Section 2(11) of the Act defines a supervisor as

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or to effectively recommend such action, if in connection with the

⁷⁶ Counsel for Respondent D&F argues that the laid-off employees remained employees of Respondent Olsten; however, this misses the point. Thus, each of the laid-off employees was severed from the work force at either the Hariton or Gene Autry facilities, with no prospect of returning to work at a Respondent D&F facility.

⁷⁷ Counsel rely on *Teamsters Local 776 (Pennsy Supply)*, 313 NLRB 1148 (1994); *TLL, Inc.*, supra; and *Laerco Transportation*, supra, as support for their contention that the limited and routine supervision of the Respondent Olsten temporary employees by Respondent D&F negates the existence of a joint-employer relationship. However, unlike the cited decisions, Respondent D&F's ability to dictate the discharge and layoff of Respondent Olsten's employees and the former's control over overtime for and the wage rates of the temporary employees establishes sufficient control over their terms and conditions of employment to support a joint-employer relationship.

foregoing the exercise of such authority is not of a routine or clerical nature but requires the use of independent judgment.

The statutory indicia quoted above are read in the disjunctive; as stated by the Board in *Great American Products*, 312 NLRB 962 (1993), “an individual may be deemed a supervisor within the meaning of [the above provision] if it is shown that he or she possesses the authority to engage in any one or more of the functions enumerated there and uses independent judgment in exercising such authority. Performance of those functions in a merely routine, clerical, perfunctory, or sporadic manner will not suffice.” By the foregoing, Congress meant to ensure that only individuals, who are vested with “genuine management prerogatives” are included within the definition, and “the Board must judge that the record proves that an alleged supervisor’s role was other than routine communication of instructions between management and employees without the exercise of any significant discretion.” *Id. Quadrex Environmental Co.*, 308 NLRB 101, 102 (1992). Finally, the Board has a duty not to construe the statutory language too broadly because the individual found to be a supervisor is denied the employee rights that are protected under the Act. *Azusa Ranch Market*, 321 NLRB 811, 812 (1996); *Hydro Conduit Corp.*, 254 NLRB 433, 437 (1981).

Contrary to the arguments of counsel for the General Counsel, I do not believe that, at any material time, either Rosa Jaramillo or Maria Paz-Vasquez possessed any of the indicia of supervisory status within the meaning of Section 2(11) of the Act. Thus, no witness testified, nor does the record disclose any evidence, that the assistants to Lucho Lopez were authorized, in the interest of Respondent D&F, to hire, suspend, lay-off, recall, promote, or reward employees, to adjust their grievances, or to recommend such actions. As to whether they were authorized to discharge, the only evidence that Lopez’ assistants possessed such authority came from Estaban Espinosa. As to this, it is clear that, on confronting Espinosa at Lopez’ instruction, Paz-Vasquez said something to cause the employee to believe that he had lost his job. Thus, Lopez himself admitted that, when Espinosa approached him, the employee asked why he had been laid off. However, notwithstanding whatever Paz-Vasquez may have said to Espinosa, it is clear that she did not, in fact, discharge him, for, by all accounts, Lopez disregarded his assistant’s assertion to Espinosa and, instead, suspended the employee pending his own investigation of Espinosa’s tardiness and absence problem. Accordingly, contrary to counsel for the General Counsel, I do not believe the record evidence warrants a finding that Jaramillo and Paz-Vasquez were empowered to discharge employees. With regard to their authority to responsibly direct the work of the packaging line employees at the Hariton facility and to transfer them between lines, the testimony of all witnesses establishes that the work performed by Respondent D&F’s own employees and by Respondent Olsten’s temporary employees on the packaging lines was repetitive, uncomplicated, and interchangeable and that, on a daily basis, the main functions of Respondent D&F’s assistants to the packaging manager, including Jaramillo and Paz-Vasquez, were to ensure that each packaging line had the proper packaging implements and necessary documents and

that the packaging process proceeded on schedule during the workday and to observe that the employees on the packaging lines were performing their assigned job duties in a productive manner. As to the former, the witnesses agree, and I find, that the assistants to the packaging manager gave packaging assignments and paperwork to the line coordinators at the start of each shift and, during the course of the shift observed that each packaging line’s machines were operating properly, that each line has a sufficient number of workers, and that orders are being filled properly. As to ensuring that packaging line employees are working in a productive manner, the record establishes that Lopez’ assistants observe that the employees are not talking excessively and not spending too much time in the restrooms. There is no question that, as employees testified, Jaramillo and Paz-Vasquez are authorized to select and shift employees from line to line when necessary. However, such assignments are dictated by shortages of employees on the lines rather than any assessment of employees’ ability to perform the work and Lopez, Jaramillo, and Paz-Vasquez were uncontested that any such transfers must be first be ordered by Lopez. As in *J. C. Brock Corp.*, 314 NLRB 157, 158, (1994), it appears that Respondent D&F’s packaging process was of a routine nature, with the employees generally needing little direction in performing their duties. Further, Jaramillo’s and Paz-Vasquez’ authority to transfer employees between lines and to ensure that employees perform their assigned job tasks were functions of “routine work judgment and not the type of independent judgment required of a statutory supervisor.” *Id.* Also, in my view, whatever authority Jaramillo and Paz-Vasquez possessed was derived from the necessity of completing work correctly and on schedule and did not involve their judgment of employees’ skill levels. In these circumstances, I do not believe that Jaramillo and Paz-Vasquez responsibly directed the work of the packaging line employees or used independent judgment in transferring employees between packaging lines.

Regarding the assignment of overtime work, I do not rely on the testimony of either Jose Perez or former employees, who testified that Lopez’ assistants select the workers, to whom overtime work shall be assigned. Rather, noting that Camerina Calderon, an honest and forthright witness, and Estaban Espinosa corroborate them on this point, I credit Lopez, Jaramillo, and Paz-Vasquez that either the vice president of operations or the Hariton plant manager notify Lopez when overtime work will be required; that, in turn, he informs his assistants as to how many employees will be needed; that such work is given on a strictly voluntary basis; and that, in such circumstances, the role of Lopez’ assistants is merely to inquire if employees desire to stay and work overtime. Accordingly, with regard to overtime, I believe that Jaramillo’s and Paz-Vasquez’ authority is routine and involves no independent judgment. Likewise, with regard to discipline, the record evidence establishes that the involvement of Lopez’ assistants, including Jaramillo and Paz-Vasquez, is routine and does not require any discretion. Thus, the record evidence is that they confront employees, who are violating work rules by spending more time than necessary in the restroom, talking excessively, or being tardy for work, and remind them of Respondent D&F’s rules in these regards; that Jaramillo and Paz-Vasquez

report continued violations of said rules to Lopez; that, as in the case of Estaban Espinosa, Lopez independently investigates such reports of continued rules violations and decides on the appropriate discipline; and that, if a Respondent Olsten temporary employee is involved, Lopez reports the matter to Carmen Reyes, who is responsible for imposing discipline. Next, while there is evidence that his assistants regularly submit appraisals of workers to Lopez, there is no evidence that such “meaningfully affect[ed] employees’ terms and conditions of employment.” *Hausner Hard-Chrome of Kentucky, Inc.*, supra at 1. Finally, regarding their authority to permit employees to leave work early or to permit employees to take time off, Lopez, Jaramillo, and Paz-Vasquez admitted that the assistants, including Jaramillo and Paz-Vasquez, are authorized to permit employees to leave early in case of emergencies, and alleged discriminatee, Silvia Martinez, testified that Paz-Vasquez once permitted her to leave early when her daughter became ill. In this same regard, while I credit Camerina Calderon that she telephoned to the Hariton facility and reported absences from work to the former on no less than five occasions, I note that said absences were occasioned by illness and that the permission, granted by Paz-Vasquez, was to “get well.” In these circumstances, the authority of Lopez’ assistants to permit employees to leave early or to grant permission to employees to be absent from work appears to be routine, requiring no independent judgment, and insufficient to confer supervisory status on these individuals. *Azusa Ranch Market*, 321 NLRB 811, 812 (1996); *Sears Roebuck & Co.*, 304 NLRB 193, 197 (1991). Based on the foregoing, I reiterate my view that neither Rosa Jaramillo nor Maria Paz-Vasquez possesses any of the indicia of supervisory status required by Section 2(11) of the act. *Hausner Hard-Chrome of Kentucky, Inc.*, supra; *J. C. Brock Corp.*, supra.⁷⁸ Therefore, neither was, at any material time, a supervisor, acting in the interests of Respondent D&F, within the meaning of the Act or was able to bind Respondent D&F by her statements, and I so find.

Notwithstanding the foregoing, counsel for the General Counsel argues that, by virtue of apparent authority, Jaramillo and Paz-Vasquez were, at all times material, agents of Respondent D&F within the meaning of Section 2(13) of the Act, with the latter thereby responsible for their statements. In this regard, in several cases, while concluding that individuals were

⁷⁸ I have considered the fact that, during the interim between Perez’ departure and Duque’s hiring, Paz-Vasquez and Navjio Vargas apparently were the highest ranking individuals in the packaging department after Lopez left the Hariton facility each evening. At the outset, the Board has held that the foregoing is not the type of responsibility necessary to compel a finding of supervisory status. *Azusa Ranch Market*, supra. Moreover, assuming Paz-Vasquez and Vargas did exercise real supervisory authority during the above period of time, the Board has held that such sporadic exercise of supervisory authority is insufficient to confer supervisory status under Sec. 2(11) of the Act. *Hexacom Corp.*, 313 NLRB 983, 984 (1994).

In the absence of evidence that either Jaramillo or Paz-Vasquez possessed any of the enumerated categories of supervisory authority in Sec. 2(11), the primary indicia of such status, there is no reason to consider the so-called secondary indicia, including employee-supervisor ratio, the possession of keys, or the like. *Hausner Hard-Chrome of Kentucky, Inc.*, supra at 2.

not supervisors within the meaning of Section 2(11) of the Act, the Board has applied common law agency principles in order to determine whether such individuals were agents of their employers, within the meaning of Section 2(13) of the Act, in the course of making particular statements or taking particular actions. *Hausner Hard-Chrome of Kentucky, Inc.*, supra at 3; *Southern Bag Corp.*, 315 NLRB 725 (1994); *Great American Products*, 312 NLRB 962, 963 (1993). One such principle is apparent authority, which “results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question.” *Hausner Hard-Chrome of Kentucky, Inc.*, supra; *Southern Bag*, supra; *Great American Products*, supra. The Board has long held that, under this doctrine, the test for determining whether an asserted supervisory employee is an agent of the employer is whether, under all the circumstances “the employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management.” *Waterbed World*, 286 NLRB 425, 426 (1987) (citations omitted). As stated in Section 2(13), when making the agency determination, “the question of whether the specific acts performed were actually authorized or subsequently ratified should not be controlling, and, under Board precedent, an employer may have an employee’s statements attributed to it if the employee is “held out as a conduit for transmitting information [from management] to other employees.” *Hausner Hard-Core of Kentucky, Inc.*, supra; *Great American Products*, supra.

While several individuals testified that Paz-Vasquez was introduced to them as their supervisor, that Lopez often referred to Paz-Vasquez as the packaging department employees’ supervisor, that, at one time, Paz-Vasquez and Vargas were the highest ranking individuals in the packaging department, and that Lopez’ assistants possessed several of the so-called secondary indicia of supervisory authority, these are not, in my view, controlling factors in determining the existence of apparent authority to make a particular statement. Rather, the sine qua non of such authority appears to be the holding out of the putative supervisor/agent, by the employer, as “being privy to management decisions or as speaking with management’s voice about . . . alleged unlawful matters or that employees perceived [the individual] as having such a role.” *Waterbed World*, supra at 427. Thus, in *Hausner Hard-Chrome of Kentucky, Inc.*, supra, while not finding him to be a supervisor, the Board found an employee to be an agent where employees looked to the individual to communicate instructions from management and to implement management policies. Also, in *Victor’s Cafe 52, Inc.*, 321 NLRB 504 fn. 1 (1996), while not finding supervisory status, the Board found an employee to be an agent as he was “the usual conduit for communicating management’s views and directives to employees, from the time of their hiring through their daily accomplishment of their tasks.” Further, in *Southern Bag Corp.*, supra, while finding that an individual was not a supervisor, the Board concluded that he was an agent as he held department meetings to discuss subjects including safety, housekeeping, quality control, and similar production matters, and, likewise, in *Great American Products*, supra, while finding him not to be a supervisor, the Board found an

employee to be an agent as employees looked to him for information regarding job assignments and production quotas. These four cases must be contrasted with the situations in *Waterbed World*, supra at 426–427, in which the Board concluded, notwithstanding that an individual initialed timecards and was referred to by management officials as a supervisor, he was not a statutory supervisor and, as no evidence existed that the respondent utilized the individual to convey its labor relations decisions, practices, or policies, he also was not an agent, and, in *Zack Co.*, 278 NLRB 958, 959 (1986), in which, as there existed no evidence that an individual responsibly directed work or that he was privy to management’s unlawful acts, the Board concluded that the individual was neither a statutory supervisor nor an agent. Likewise, as there is no record evidence that Lopez’ assistants, including Jaramillo and Paz-Vasquez, participated in management decisions, held employee meetings during which Respondent D&F policy matters were discussed, informed employees of decisions affecting their working conditions or terms and conditions of employment, or conveyed production-related decisions to the employees, I find no basis for concluding that the assistants to Lucho Lopez were held out, by Respondent D&F, as being privy to management decisions or as speaking with management’s voice or that employees reasonably could perceive them as acting in such roles. Therefore, contrary to counsel for the General Counsel, I do not believe that, at any time material, either Rosa Jaramillo or Maria Paz-Vasquez acted as Respondent D&F’s agent within the meaning of Section 2(13) of the Act so as to bind their employer through their statements to employees. *Waterbed World*, supra. Accordingly, I shall recommend dismissal of the allegations of paragraphs 8 and 10 of the consolidated complaint, which paragraphs pertain to alleged violations of Section 8(a)(1) of the Act committed by Paz-Vasquez and by Jaramillo.

I turn next to the late June or early July 1998 speech by Howard Simon to the second-shift employees at the Hariton facility and to the consolidated complaint allegations that Respondent D&F’s chief operating officer included several statements, violative of Section 8(a)(1) of the Act, in his remarks and note that any conclusions as to what Simon said are dependent on an analysis of the credibility of the several witnesses. In this regard, by her demeanor, the most impressive and trustworthy witness, and on whose testimony I place the greatest reliance, was current employee, Camerina Calderon. In contrast, neither the testimonial demeanor of Simon nor that of Carmen Reyes was that of an entirely candid witness, and each appeared to be testifying in a manner calculated to bolster his or her party’s legal position. Finally, while the other employee witnesses generally appeared to be testifying truthfully, some assertions were uncorroborated, and I shall rely on only those which were corroborated by Calderon or by other employees. Accordingly, relying on Calderon and Claudia Mayne, I find that, during his speech, Simon warned the employees that it was “not good” for them to give permission to “strangers” to represent them “because . . . by no way, no means was a union going to be able to get in. And also that Carmen’s office was antiunion and . . . [would] not . . . let the Union get [in] ei-

ther.”⁷⁹ I believe that Simon’s warning was susceptible of but one interpretation by the listening employees—that Respondent D&F would refuse to deal with a third party, acting on behalf of the employees, and that, therefore, their efforts to obtain representation by the Union would be doomed to failure. The Board has long held that an employer’s statements, which are intended to convey to employees the futility of support for a labor organization are coercive and violative of Section 8(a)(1) of the Act. Accordingly, Simon’s warning was clearly unlawful. *Wellstream Corp.*, 313 NLRB 698, 706 (1994); *Bestway Trucking*, 310 NLRB 651, 671 (1993); *Marcar Industrial Uniform Co.*, 306 NLRB 27, 28 (1992). Next, Abeline Garcia-Sosa and Carolina Orozco, each of whom I credit, corroborated each other that Simon warned the employees that either “whoever did not like working in the company, the doors were open for them to go and work somewhere else because if the Union was going to come in there” or “if we did not like working there . . . the doors were wide open and we could go because there were a lot of applications being filled out right behind us.” The Board has held that an employer’s suggestion to its employees, who are union adherents, that they should quit or seek employment elsewhere if dissatisfied with their terms and conditions of employment constitute “indirect” threats of discharge and are violative of Section 8(a)(1) of the Act. *Great Lakes Window, Inc.*, 319 NLRB 615, 620 (1995); *New Life Bakery*, 301 NLRB 421, 427 (1991). Likewise, vaguely worded comments to dissatisfied union supporters, such as they should be “out in the open market” or they should “move on elsewhere,” have been held to be implied threats of discharge, violative of Section 8(a)(1) of the Act. *Edy’s Grand Ice Cream, Inc.*, 323 NLRB 683, 697 (1997); *Harpercollins Publishers, Inc.*, 317 NLRB 168, 180 (1995); *Western Health Clinics*, 305 NLRB 400, 407 (1991). In my view, Simon’s above-quoted comment was in the identical vein and equally as coercive. Therefore, it, too, was violative of Section 8(a)(1) of the Act, and I so find. Also, relying on Orozco and Paula Pineda Camargo, who corroborated each other, I find that Simon warned the listening employees that Respondent D&F would “close the company” in order to prove he was not afraid of the Union or “close the factory” in order not to deal with “strangers.” Of course, threats, such as Simon’s, are “naturally” coercive and deter employee support for a labor organization and are, therefore, arrantly violative of Section 8(a)(1) of the Act. *Diversified Bank Installations*, 324 NLRB 457, 471 (1997); *Portsmouth Ambulance Service*, 323 NLRB 311, 319 (1997).⁸⁰

Further, with regard to Simon’s speech, I credit Calderon that, in response to an employee’s hypothetical question as to what would happen if all of the Respondents’ employees executed authorization cards for the Union, Simon responded “that if that were the case . . . we could go on strike but that we were all going to be dismissed. In this regard, Simon himself admit-

⁷⁹ Mayne similarly recalled Simon saying, “[I]f the company did not want the Union to get in there, they were not going to.”

⁸⁰ I distinguish this unlawful threat from Simon’s factual statement, corroborated by Calderon, that Respondent D&F was planning to move the plant to a different location. I believe Simon uttered both statements and so find.

ted telling the employees that, in the advent of a strike, Respondent had the choice of continuing operations or hiring replacements for the strikers. While I believe that it is entirely plausible that Simon spoke in terms of strike replacements, I also believe Calderon that his words were interpreted in the above-quoted manner by either Lucho Lopez or Carmen Reyes, both of whom, Respondents admitted, are their supervisors and agents. Accordingly, as interpreted, Simon's threat, that striking employees would be discharged, was a blatantly unlawful threat of discharge, violative of Section 8(a)(1) of the Act, and I so find. *Westpac Electric*, 321 NLRB 1322, 1363 (1996); *Caterair International*, 309 NLRB 869, 879 (1992). Assuming arguendo, that Calderon misunderstood Simon's words and, as interpreted, he, in fact, did speak about hiring replacements for strikers, I note that he failed to distinguish between economic and unfair labor practice strikers and between permanent and temporary replacements. Moreover, in context, Simon spoke about the consequences of a strike immediately after he impliedly threatened the discharge of union supporters. In these circumstances, unsophisticated employees were placed in the position of having to comprehend the nuances of an unfamiliar concept and may well have construed Simon's incomplete statement of the law, regarding strikes and the rights of strikers, as threatening further reprisals for their having supported the Union. Accordingly, Simon's admitted statement to the employees was coercive, and Respondent D&F acted in violation of Section 8(a)(1) of the Act. *Rankin & Rankin, Inc.*, 330 NLRB 1026 fn. 5 (2000); *Eagle Comtronics*, 263 NLRB 515, 516 (1982).

Also, with regard to Howard Simon's speech, I credit Calderon that an employee asked a question, regarding raises, and Simon replied, saying he would "review" the matter and "come up with a good solution for us." On this point, she was corroborated by Garcia-Sosa and Carolina Orozco. The former recalled Simon requesting that employees refrain from executing authorization cards for the Union as he could solve their problems as easily as the Union could and Lucho Lopez saying that Respondent D&F was going to hire an English teacher for the employees. Similarly, Orozco recalled Simon mentioning "that he was going to look into the personnel files of each of us to see what he could do for us to advance." On this same point, Simon admitted saying that the company did not want a "third party" coming between itself and the employees, inviting employees to go to their supervisors or to Carmen Reyes with any "concerns," and answering a question from an employee, who desired to earn a higher wage, stating "we have plans to offer English-as-a-second-language courses to our employees." As stated by the Board, in *Valley Community Services*, 314 NLRB 903, 904 (1994), "It is well established that when an employer, who has not previously had a practice of soliciting employee grievances or complaints, suddenly embarks on such a course during an organizational campaign, the Board may find that the employer is implicitly promising to correct those inequities discovered as a result of the inquiries, thereby leading employees to believe that the combined program of inquiry and correction will make collective action unnecessary." Simon admitted inviting Respondents' employees to go to their supervisors in order to express their "concerns," and I note that neither Re-

spondent D&F nor Respondent Olsten offered any evidence of a past practice of soliciting employees' problems or questions. *Capitol EMI Music*, supra at 1007. Accordingly, in agreement with counsel for the General Counsel, given the context of Simon's comment, I find that Simon, in violation of Section 8(a)(1) of the Act, solicited grievances from the listening employees. *Torbitt & Castleman, Inc.*, 320 NLRB 907, 909 (1996). Finally, while the unlawful solicitation of grievances is usually accompanied by the implied promise to correct them, the above credited testimony establishes that Simon, in fact, explicitly promised to remedy the concerns of Respondents' employees if they refrained from executing authorization cards in favor of the Union. Thus, he promised to solve the employees' problems, including higher wages, greater benefits, and swifter offers of employment by Respondent D&F, to review the subject of raises and come up with a favorable "solution" for the employees, and to review the employees' personnel files in order to help them advance with Respondent D&F. Further, Simon admitted informing the employees of the implementation of a new English-as-a-second-language program. In these circumstances, the conclusion is inevitable that, during his speech, Simon promised specific and unspecified benefits to the second-shift employees in order to discourage them from supporting the Union. Such conduct, during a Union's organizing campaign, is, of course, patently violative of Section 8(a)(1) of the Act. *Valley Community Services*, supra at 904; *Waste Management of Utah*, 310 NLRB 883, 888 (1993).

The next issue concerns the layoffs of Respondent Olsten temporary employees Claudia Mayne, Abigail Reyes, Carolina Orozco, and Salud Soria from Respondent D&F's Hariton facility on July 7, the layoffs of Respondent Olsten temporary employees Maria Jaramillo and Silvia Martinez on or about September 8 from Respondent D&F's Hariton facility, the layoff of Respondent Olsten temporary employee Jose Luis Rivera on August 24 from Respondent D & n F's Gene Autry facility, and the allegations of the consolidated complaint that Respondents violated Section 8(a)(1) and (3) of the Act in doing so. With regard to the alleged unlawful layoffs from Respondent D&F's Hariton facility, disavowing any contention that Respondents engaged in mass layoffs in order to disguise the layoffs of the alleged discriminatees, counsel for the General Counsel initially defined the General Counsel's theory, underlying the unlawful layoff allegations, in the following terms—that Reyes, Soria, Mayne, Orozco, Jaramillo, and Martinez "were hand picked for layoff . . . because of [their union activity]." Then, only after counsel for the Charging Party goaded her into doing so, counsel for the General Counsel somewhat vaguely advanced a possible alternate theory, which, in essence, questions the validity of Respondent D&F's defense, relating to its July and September layoffs as a whole.⁸¹ However, in her post-hearing brief, counsel concentrated on the selection process and

⁸¹ Counsel for the General Counsel hypothesized the following: "There was union activity knowledge animus and that simply the employer D&F failed to show why these employees were chosen for lay-off. . . . And it failed to show . . . a reason for their layoffs other than the fact of that there was this reported economic downturn. Additionally, after these employees were laid off, the employer continued in hiring other employees [both permanent and temporary]."

seemingly abandoned this alternate theory, failing to explicate exactly what said putative theory entailed or to advance any argument in support of it. But, picking up the cudgel, in his posthearing brief, counsel for the Charging Party announced that the Charging Party “will now argue the General Counsel’s second theory, leaving the first to General Counsel.”⁸² and asserted that the said alternate theory, which concerns the validity of the entire June and September layoffs, is that which was enunciated by the Board in *Electro-Voice, Inc.*, 320 NLRB 1094 (1996), and *Rainbow News 12*, 316 NLRB 52 (1995), and similar decisions. According to said theory, the Board will find violations of Section 8(a)(1) and (3) of the Act when employers take adverse actions against groups of employees, regardless of their individual sentiments towards union representation, in order to punish the employees as a group “to discourage union activity or in retaliation for the protected activity of some.” *Rainbow News 12*, supra at 67; *Mini-Togs, Inc.*, 304 NLRB 644, 648 (1991).

Assuming that said theory was, indeed, counsel for the General Counsel’s alternate theory, based on the entire record, I believe that an unlawful mass layoff theory is not viable in the context of the instant consolidated complaint, and that, in any event, it had been previously rejected by the General Counsel and, later, abandoned by counsel. Thus, in the cited cases and similar ones, all of the affected employees initially were alleged as discriminatees, by the General Counsel, and subsequently were found, by the Board, to have been unlawfully discriminated against and entitled to the standard remedies for a violation of Section 8(a)(1) and (3) of the Act. This was true whether all or just some of the individuals had, in fact, engaged in activities in support of the labor organization involved. Of course, the consolidated complaint alleges just six individuals as having been unlawfully laid off by Respondents from the Hariton facility. However, in the underlying original and amended unfair labor practice charges, besides the alleged discriminatees, eight of the employees, who were among those laid off in June or September 1998 from the Hariton facility, are alleged as having been laid off in retaliation for their support of the Union.⁸³ Yet, the General Counsel failed to allege any of them as an alleged discriminatee in the consolidated complaint. Clearly, the Regional Director for Region 21 must have concluded that no prima facie violations of Section 8(a)(1) and (3) of the Act could be established as to these eight employees and, in so concluding, presumably, also must have considered and rejected the unlawful mass discharge theory of *Electro-Voice, Inc.*, supra, and *Rainbow News 12*, supra. The latter must be true as, notwithstanding counsel for the General Counsel’s supposed support for an alternate theory, underlying

the 8(a)(1) and (3) violation allegations pertaining to the layoffs from the Hariton facility, she failed to seek to amend the consolidated complaint to allege the eight individuals, named in the unfair labor practice charges, as discriminatees. This is of critical import, for absent amendment, unlike in the above decisions, the limited 8(a)(1) and (3) allegations of the consolidated complaint do not support an alternate, mass discharge theory. Finally, given her silence in her post-hearing brief, notwithstanding the comment of counsel for the Charging Party, I believe counsel for the General Counsel abandoned any reliance on an alternate theory for the alleged unlawful layoffs.

Accordingly, I shall only consider the original theory, underlying the instant allegations of discriminatory layoffs from the Hariton facility and the one from the Gene Autry facility, and that which was initially argued by counsel for the General Counsel during the trial and, later, in her posthearing brief. In this regard, there is no dispute as to the applicable legal standard. Thus, Board law in 8(a)(1) and (3) discharge and layoff cases is well settled. As recently explained by the Board in *Naomi Knitting Plant*, 328 NLRB 1279 (1999), in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989, (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), to set forth a violation under Section 8(a)(3) of the Act, the General Counsel is required to show by a preponderance of the evidence that antiunion animus was a motivating factor in the employer’s conduct. Once this showing has been made, the burden shifts to the employer to demonstrate that the same action would have taken place in the absence of or notwithstanding the employee’s union activities. To sustain his initial burden, that of persuading the Board that the employer acted out of antiunion animus, the General Counsel must show (1) that the employee was engaged in union activities; (2) that the employer was aware of or suspected the employee’s involvement in union activities; and (3) that the employee’s union activities were a substantial or motivating factor for the employer’s actions. Motive may be demonstrated by circumstantial evidence as well as by direct evidence and is a factual issue. *FPC Moldings, Inc.*, 314 NLRB 1169 (1994), enfg. 64 F.3d 935, 942 (4th Cir. 1995). Four points are relevant to the foregoing analytical approach. First, in concluding that the General Counsel has established a prima facie showing of unlawful animus, the Board will not “quantitatively analyze the effect of the unlawful motive. The existence of such is sufficient to make a discharge a violation of the Act.” *Wright Line*, supra at 1089 at fn. 4. Second, once the burden has shifted to the employer, the crucial inquiry is not whether the employer could have engaged in its alleged unlawful acts and conduct but, rather, whether the employer would have done so in the absence of the alleged discriminatee’s support for the Union. *Structural Composites Industries*, 304 NLRB 729 (1991); *Filene’s Basement Store*, 299 NLRB 183 (1990). Third, pretextual discharge cases should be viewed as those in which “the defense of business justification is wholly without merit” (*Wright Line*, supra at 1089 fn. 5), and the “burden shifting” analysis of *Wright Line* need not be utilized. *Arthur Young & Co.*, 291 NLRB 39 (1988). Finally, as to the latter point, “it is . . . well settled . . . that when a respondent’s stated motives for its actions are found to be false, the circum-

⁸² I don’t know whether this means that counsel for the General Counsel and counsel for the Charging Party discussed the matter and decided to divide their arguments or that, as counsel for the General Counsel was not serious in her contention or did not really mean to argue an alternate theory or did not fully contemplate what this alternate theory would entail, counsel for the Charging Party is “carrying the ball” for the General Counsel.

⁸³ These are Rafael Goxion, Patricia Soria, Juana Flores, Daniel Saravia, Cezar Jimenez, Evangelina Medina, Julio Montes, and Norma Figueroa.

stances warrant the inference that the true motive is an unlawful one that the respondent desires to conceal.” *Flour Daniel, Inc.*, 304 NLRB 970 (1991); *Shattuck Den Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966).

Succinctly put, based on the record evidence, I do not believe that counsel for the General Counsel satisfied her initial burden of proof and established that, in causing Respondent Olsten to lay off Mayne, Orozco, Soria, and Reyes, Respondent D&F was motivated by antiunion animus. Thus, while there is ample evidence that each of the above-named alleged discriminatees engaged in some activity in support of the Union, including signing authorization cards and speaking to coworkers about the Union, there is no record evidence, legally probative of Respondents’ knowledge or suspicions of the four laid-off employees’ support for the Union. Specifically, while Howard Simon and Lucho Lopez obviously were aware of the existence of the organizing campaign and while I credit the trustworthy testimony of Camerina Calderon, given my findings that, at no time material, Paz-Vasquez has been either a supervisor, within the meaning of Section 2(11) of the Act, or an agent, within the meaning of Section 2(13) of the Act, on behalf of Respondent D&F, I shall not attribute to Respondent D&F any of Paz-Vasquez’ comments to Luz Figueroa, overheard by Calderon, concerning her asserted firing of Abigail Reyes and Carolina Orozco for signing union cards based on orders from “upstairs.” Moreover, absent a scintilla of record evidence establishing that Paz-Vasquez was involved in or privy to the decision-making regarding the July 1998 layoffs, her comments to Figueroa must be taken as mere statements of personal opinion, bravado, and self-aggrandizement and are not to be afforded any weight. *Zack Co.*, supra. Other than the foregoing, there exists no other record evidence regarding Respondent D&F’s knowledge or suspicion of the above employees’ union activities or sentiments.⁸⁴ In the foregoing circumstances, notwithstanding the existence of general antiunion animus, as evidenced by the unlawful threats and comments of Howard Simon, I conclude that the General Counsel has failed its initial burden of establishing that the Respondents were unlawfully motivated in laying off Soria, Mayne, Reyes, and Orozco and shall recommend that the allegations of paragraph 7 of the consolidated complaint, which pertain to the said employees, be dismissed.

Likewise, I do not believe that counsel for the General Counsel has met its initial burden of proof of establishing that Respondent D&F was motivated by antiunion considerations in causing Respondent Olsten to lay off Maria Jaramillo. Thus, while the uncontroverted record evidence is that, by executing an authorization card, the alleged discriminatee engaged in activities in support of the Union, the only record evidence, pertaining to Respondent D&F’s knowledge or suspicions of her sympathies or activities in support of the Union, is found in

a conversation between Rosa Jaramillo and her, during which, after interrogating her as to whether she had joined the Union and informing her that another employee said she had signed a union authorization card, Rosa informed Maria that “Lucho Lopez already knows that you joined up with the Union and he knows everything. He even knows that you signed. . . . a card.” While Rosa Jaramillo denied the conversation, Maria Jaramillo was a far more impressive witness than her sister-in-law. However, notwithstanding that I credit Maria Jaramillo’s version of the conversation, given my prior findings that, at no time material, has Rosa Jaramillo acted as a supervisor, within the meaning of Section 2(11) of the Act, or an agent, within the meaning of Section 2(13) of the Act, on behalf of Respondent D&F, the latter was not responsible for, or bound by, Rosa Jaramillo’s remarks to her sister-in-law. Further, as with the statements of Maria Paz-Vasquez, absent any record evidence that Rosa Jaramillo was involved in, or privy to, Respondent D&F’s lay-off decisionmaking process, I must conclude that she engaged in utter hyperbole and fabrication while speaking to her sister-in-law and give no weight to her words as establishing Respondent D&F’s knowledge or suspicion of Maria Jaramillo’s support for the Union. *Zack Co.*, supra. As above, notwithstanding Respondent D&F’s general awareness of the Union’s organizing campaign, counsel for the General Counsel adduced no other evidence regarding Respondent D&F’s knowledge or suspicions of Maria Jaramillo’s union sentiments or activities. Therefore, notwithstanding the record evidence of general antiunion animus, I find that the General Counsel has failed to sustain its initial burden of proof—establishing that Maria Jaramillo’s union activities were a motivating factor, leading to her layoff by the Respondents, and I shall recommend that the allegations of paragraph 7 of the consolidated complaint, which pertain to Jaramillo’s layoff, be dismissed.

With regard to whether Respondent D&F was unlawfully motivated in causing Respondent Olsten to lay off alleged discriminatee Silvia Martinez, I believe that counsel for the General Counsel has met her initial burden of proof as to the layoff. Thus, I credit Martinez, who appeared to be an honest witness, that she signed an authorization card for the Union on August 4 and that she requested and received, from a union agent, a letter, naming her as a union activist. Further, crediting the straightforward Martinez over Lucho Lopez, who, in contrast, appeared to be significantly less candid, I find that, later in the day, Martinez confronted Lopez and handed him an envelope which contained the letter; that he asked what was in the envelope; that she “told him that [she] wanted to be known as a member of the Union because I . . . want the Union in here because we don’t have any protection of any source and we don’t have help from nobody;” that he asked if she was doing this “out of vengeance;” and that, after she denied his impudent and imprudent retort, Lopez warned “do you think that paper is going to help you in any way when they fire you . . . they are going to dismiss you for having dealings with the Union.” There can be no question, and I find, that the foregoing conversation conclusively establishes Respondent’s knowledge of Martinez’ support for the Union. What is more, the individual, who gained such knowledge, was the very same individual charged by Respondent D&F with selecting employees for

⁸⁴ I recognize that under a “mass discharge” theory, specific evidence of knowledge as to each alleged discriminatee’s union activities is not required. However, as I indicated above, I do not believe that the instant amended complaint is broad enough on which to base such a theory, and nor do I believe that such was ever the General Counsel’s theory underlying the Hariton plant layoffs.

layoff. Moreover, Lopez' latter comment was an incontrovertible warning to Martinez that her support for the Union would lead to her eventual dismissal by Respondents, and, as such, constituted a blatant threat of discharge to an employee for having engaged in union activities in violation of Section 8(a)(1) of the Act, and I so find. *Delta Mechanical, Inc.*, 323 NLRB 76, 78 (1997); *Dockendorf Electric*, 320 NLRB 4, 11 (1995). Given Lopez' threat of discharge for engaging in activities in support of the Union and the similar direct and implied threats of discharge, which I found were uttered by Howard Simon, the record is replete with evidence of Respondent D&F's unlawful animus towards supporters of the Union. Furthermore, Respondent D&F's unlawful animus is established by the sham nature of its defense regarding Martinez' selection for layoff. Initially, in this regard, I note that the individual, who selected Martinez for layoff, Lucho Lopez, was inconsistent as to the reason for her selection. Thus, when called as a witness by counsel for the General Counsel and, later, when testifying on behalf of Respondent D&F, Lopez mentioned only a lack of work as the reason for Martinez' layoff. Then, under cross-examination by counsel for the General Counsel, Lopez belatedly and inconsistently raised the alleged discriminatee's attendance problems as a factor in his selection of her for layoff. Further belying the frank nature of Lopez' latter defense was his assertion that, along with her numerous written absence requests, he reported Martinez' attendance problems to Carmen Reyes for discipline. However, neither counsel for Respondent D&F nor counsel for Respondent Olsten offered any documents supporting Lopez' testimony and Carmen Reyes failed to corroborate any aspect of his assertions. In these circumstances, I do not credit any aspect of his testimony regarding the selection of Martinez for layoff. Accordingly, the conclusion is warranted that Respondent D&F caused Respondent Olsten to lay off Silvia Martinez because of her support for the Union in violation of Section 8(a)(1) and (3) of the Act. Moreover, I believe that the General Counsel has established that, as the actual employer of the alleged discriminatee, Respondent Olsten was directly aware of the unlawful nature of Martinez' layoff. In this regard, Martinez was uncontroverted, and I find, that, subsequent to her layoff by Respondent Olsten, Carmen Reyes told her that the reason for her layoff was that she (Reyes) "had received orders from higher up that I had done something wrong against the company." The record warrants the inferences, which I draw, that the "something wrong" was Martinez' support for the Union and that Reyes knew it.

The remaining alleged discriminatee is Jose Luis Rivera, who, based on a demand from Respondent D&F's manufacturing manager to Carmen Reyes, was laid off, by Respondent Olsten, from Respondent D&F's Gene Autry facility on August 24. Utilizing the aforementioned *Wright Line*, supra, principles, I believe that counsel for the General Counsel has established a prima facie case that Rivera's support for the Union was the reason for his layoff. Thus, Rivera was uncontroverted, and I find, that, at all times while working at the Gene Autry facility, he was an agent of the Union and engaged in organizing activities. In this regard, he spoke about the Union with and solicited signed authorization cards from coworkers in the plant's parking lot and, during working hours, spoke to em-

ployees in hallways and in the mop cleaning room about the Union. Also, and of utmost importance, Rivera attended Howard Simon's speech to the second-shift employees at the Gene Autry facility, during which Carmen Reyes was present, and was the only employee, who mentioned the Union in a question to Simon. In my view, Rivera's question caused Respondent D&F to suspect his support for the Union, and the documentary evidence supports my conclusion. Thus, General Counsel's Exhibit 2, a computer-generated work history, which Respondent Olsten maintained on Rivera, bears the notation "becuz of attitude during meeting," as the reason for the end of his assignment to Respondent D&F, and Carmen Reyes admitted that the information "most likely" came from her. Without any contrary explanation in the record, the conclusions are warranted that the meeting, to which the document refers, was the employee meeting during which Howard Simon spoke to the second-shift employees at the Gene Autry plant and Rivera asked his question and that the word, "attitude," referred to his suspected support for the Union. With regard to motive, the record is replete with evidence of Respondent D&F's unlawful animus toward employees, who supported the Union, and, as set forth above, General Counsel's Exhibit 2 clearly establishes Rivera's "attitude" as the precipitating reason for his layoff. That Respondent D&F was motivated to rid itself of Rivera because of his suspected support for the Union is also seen by the meretricious nature of Respondents' defenses to the consolidated complaint allegations pertaining to Rivera's layoff. Thus, Respondent D&F failed to offer any evidence as to its reason for demanding Rivera's layoff, and, while Carmen Reyes maintained that her instructions for laying off Rivera came from Respondent D&F's manufacturing manager Nevarez and that such was based on Respondent D&F's "downsizing" at the Gene Autry facility, neither Respondent D&F nor Respondent Olsten called Nevarez as a corroborating witness, and Reyes contradicted herself, stating that the layoff resulted from a "lack of production." Finally, Reyes conceded that the notation on General Counsel's Exhibit 2 "appears" to be the actual reason for Rivera's layoff. Based on the foregoing, I find that Respondent D&F caused Respondent Olsten to lay off Jose Luis Rivera because of his suspected support for the Union in violation of Section 8(a)(1) and (3) of the Act. Finally, as with Martinez, in the above circumstances, I believe that counsel for the General Counsel has established that, in complying with Respondent D&F's demand that it lay off Rivera, Carmen Reyes, on behalf of Respondent Olsten, clearly was aware of Respondent D&F's underlying unlawful animus.

As a final issue, I must decide whether, as a joint employer, Respondent Olsten is jointly liable for Respondent D&F's unlawful acts and conduct. At the outset, in ascribing vicarious liability for the nonacting company in a joint-employer relationship, in which one employer supplies employees to work in the business of another, the seminal decision of the Board is *Capitol EMI Music*, 311 NLRB 997 (1993). As I have decided in the instant fact context, in *Capitol EMI Music*, the Board concluded that two employers, a company, which distributes recording products to retail establishments and intracompany facilities, and a company, which refers temporary employees, who are its employees, to clients, constituted joint employers of

said temporary employees and that the distribution company was unlawfully motivated in making a request to the employment agency to remove an employee. Noting that there are two types of joint employer relationships in such cases (the “traditional” type where each employer has a representative at the work site and share supervision of the employees and the relationship in which a company merely supplies workers to the co-employer and otherwise does not participate in their oversight), the Board determined that, in joint employer relationships such as, both employers are liable for a termination “only when the record permits the inference (1) that the nonacting joint employer knew or should have known that the other employer acted against the employees for unlawful reasons and (2) that the former has acquiesced in the unlawful action by failing to protest it or to exercise any contractual right it might possess to resist it.” As to burdens of proof, the Board concluded that the General Counsel sustains its initial burden by establishing the joint employer relationship and then showing that one has acted with unlawful animus. The burden then shifts to the non-acting party to show “that it neither knew, nor should have known, of the reason for the other employer’s action or that, if it knew, it took all measures within its power to resist the unlawful action.” *Id.* at 1000.

The record evidence compels findings that, as a joint employer, Respondent Olsten was aware of almost all of the unlawful acts and conduct committed by Respondent D&F, which I have found above; that, with knowledge of Respondent D&F’s unlawful animus, Respondent Olsten obediently followed the former’s instructions to lay off employees Martinez and Rivera; that, in the circumstances, Respondent D&F’s patent antiunion animus may be imputed to Respondent Olsten; and that Respondent Olsten is thereby vicariously liable for Respondent D&F’s above unfair labor practices. In this regard, not only did Respondent Olsten’s site manager, Carmen Reyes, maintain a daily presence at Respondent D&F’s Hariton and Gene Autry facilities but also she actively participated in the supervision of Respondent Olsten’s temporary employees, who were assigned to work at the two plants. Further, Reyes admittedly was present during Howard Simon’s speech to the second-shift employees at the Hariton facility and assisted in the translation of his remarks; therefore, I believe she clearly was aware of what Simon said and understood the substance of said remarks, including his unlawful threats and other coercive statements.⁸⁵ Moreover, I reiterate my belief that Reyes’ comment to Silvia Martinez, that she had done “something wrong,” which resulted in her layoff from Respondent D&F’s Hariton plant, was an oblique reference to the alleged discriminatee’s support for the Union. Likewise, I reiterate my conclusion, that, as Reyes conceded that she was most likely the source for the comment, “becuz of attitude during meeting,” which appears on Respondent Olsten’s employment history for Jose Luis Rivera, and that such “appears” to be the reason for the latter’s layoff from Respondent D&F’s Gene Autry facility, said reference refers to the Union-related question, which Rivera asked Howard Simon and which she heard. In the above circumstances, I am convinced that, acting on behalf of Respondent

Olsten, Carmen Reyes was acutely aware of Respondent D&F’s unlawful animus in demanding the layoffs of Martinez from its Hariton plant and Rivera from its Gene Autry facility and that, as there exists evidence that she was a complicit participant and no record evidence that she protested Respondent D&F’s actions, Reyes, on behalf of Respondent Olsten, acquiesced in the former’s perfidy. Accordingly, given their joint employer relationship, I believe that Respondent Olsten must be found vicariously liable for Respondent D&F’s discriminatory acts and conduct, and I so find.

CONCLUSIONS OF LAW

1. Respondent D&F is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent Olsten is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. At all times material, Respondent D&F and Respondent Olsten were joint employers of the temporary employees of Respondent Olsten working at Respondent D&F’s Hariton and Gene Autry facilities.

4. By informing employees that Respondent D&F would never deal with a third party, thereby warning employees that their support for the Union would be futile, Respondents engaged in acts and conduct violative of Section 8(a)(1) of the Act.

5. By informing employees that the doors were open for them to work somewhere else if the Union was coming in, thereby impliedly threatening employees with discharge because of their support for the Union, Respondents engaged in conduct violative of Section 8(a)(1) of the Act.

6. By threatening employees with discharge if they engaged in a strike against Respondent D&F, Respondents engaged in conduct violative of Section 8(a)(1) of the Act.

7. Without distinguishing between economic and unfair labor practice strikers and between permanent and temporary replacements, by informing employees that they would be replaced if they engaged in a strike, Respondents engaged in acts and conduct violative of Section 8(a)(1) of the Act.

8. By soliciting grievances from employees in order to induce them to cease supporting the Union, Respondents engaged in acts and conduct violative of Section 8(a)(1) of the Act.

9. By promising benefits to employees in order to induce them to cease supporting the Union, Respondents engaged in acts and conduct violative of Section 8(a)(1) of the Act.

10. By threatening employees with plant closure because of their support for the Union, Respondents engaged in acts and conduct violative of Section 8(a)(1) of the Act.

11. By threatening employees with discharge because they engaged in activities in support of the Union, Respondents engaged in acts and conduct violative of Section 8(a)(1) of the Act.

12. By laying off employees Silvia Martinez and Jose Luis Rivera because of their support for the Union, Respondents engaged in acts and conduct violative of Section 8(a)(1) and (3) of the Act.

13. The aforementioned unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

⁸⁵ To believe otherwise is nothing less than specious.

14. Unless set forth above, Respondents engaged in no other unfair labor practices.

REMEDY

I have found that Respondents engaged in serious unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. Therefore, I shall recommend that both be ordered to cease and desist therefrom and to take certain affirmative actions, which are designed to effectuate the policies of the Act. Accordingly, having found that Respondents unlawfully laid off temporary employees Martinez and Rivera, I shall recommend that Respondent D&F be ordered to reinstate them to their former positions of employment or, if the positions no longer exist, to substantially equivalent positions without prejudice to their seniority and other rights and privileges previously enjoyed⁸⁶ and that Respondents make each whole for

⁸⁶ Technically, Martinez was employed by Respondent Olsten at Respondent D&F's packaging facility and Rivera was employed by Respondent Olsten and Respondent D&F's Gene Autry facility. However, the record evidence is that Respondent Olsten has lost its contract to supply temporary employees to work for Respondent D&F. There-

any loss of earnings he or she may have suffered by reason of the discrimination against him or her. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I also shall recommend that Respondent D&F and Respondent Olsten be ordered to remove from their files any and all references to the layoffs of Martinez and Rivera and to notify each, in writing, that this has been done and that evidence of the discriminatory conduct will not be used as a basis for any future actions against either of them. Finally, I shall recommend that Respondent D&F and Respondent Olsten be ordered to post separate notices, in Spanish and English, detailing their promises.

[Recommended Order omitted from publication.]

fore, ordering Respondent Olsten to reinstate the two employees will be a useless endeavor if the purpose of reinstatement is to put each in his or her former position. Accordingly, I have placed the onus on Respondent D&F to do so in any manner necessary in order to effectuate reinstatement. This is entirely proper as the impetus for the layoffs of Martinez and Rivera came from Respondent D&F.