

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

GARDEN MANOR FARMS, INC.

and

Case Nos.: 2-CA-35335
2-CA-35350
2-CA-35377

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 342, AFL-CIO

*Ruth Weinreb, Esq., for the General Counsel.
Don Carmody, Esq., and Bryan Carmody, Esq.,
of Maya & Associates, for the Respondent.
Ronald A. Straci, Esq., for the Charging Party.*

DECISION

Statement of the Case

HOWARD EDELMAN, Administrative Law Judge. This case was tried on November 3 and 17, 2003, in New York, New York.

Based upon a series of unfair practice charges filed by United Food and Commercial Workers Union, Local 342, AFL-CIO, herein called the Union, against Garden Manor Farms, Inc., herein called Respondent, a complaint issued alleging violations of Sections 8(a)(1) and (3) of the Act.

Based upon the entire record in this case, including my observation of the witnesses, and briefs filed by Counsel for the General Counsel, and by Counsel for Respondent, I make the following findings of fact and conclusions of law.

Respondent owns and operates a meat distribution company at the Hunts Point Market in the Bronx, New York. Annually, Respondent purchases and receives meat and supplies valued in excess of \$50,000 from suppliers located outside the state of New York. It is admitted that Respondent is an employer engaged in commerce, within the meaning of Section 2(2), (6) and (7) of the Act.

Stanley Wilhelm, herein Wilhelm, has been the Respondent owner and President for the past six years. Rob Riccio, herein Riccio, is a Respondent manager and Wayne Perry, herein

Perry, is a Respondent supervisor. Prim is Respondent's sanitation supervisor. It is admitted that the above individuals are supervisors within Section 2(11) of the Act. In addition to conducting daily inspections of Respondent's facility and equipment, Prim cuts meat with the other butchers in Respondent's meat cutting department. Cesar Gomez, herein Gomez, is employed in Respondent's shipping operation, and acts as a Spanish interpreter when needed.

It is admitted that the Union, and Local 210, Production & Warehouse International Employee Union, herein called Local 210, are labor organizations within the meaning of Section 2(5) of the Act.

Respondent employs approximately 15-20 employees in its meat-cutting department. These employees consist of butchers, meat grinders, helpers and packers, collectively referred to as Respondent's meat cutting employees. The meat cutting employees, including the butchers, work Monday through Friday, 5:30 am to 12:30 pm. Their 30-minute lunch break, which occurs at approximately 9:00 am, is taken at a diner close to Respondent's facility.

Respondent's meat cutting room, in part, consists of two cutting tables where the butchers, including Prim, cut and prepare the meat. One table is approximately 15 feet long and 4 feet wide. There are approximately 6 butchers around this table. Each butcher works approximately 2-3 feet apart from one another.

On January 10, 2001, Respondent and Local 210, entered into a collective bargaining agreement. The agreement is effective from November 17, 2000 for a period of five years. The unit set forth in the contract covers all of Respondent's employees.

The record establishes clearly that the unit employees did not have dues deducted, nor did they pay dues to Local 210. They did not receive any of the benefits set forth in the Local 210 collective bargaining agreement including pension and welfare benefits and health coverage. The record also establishes that none of the unit employees were aware that Respondent had a collective bargaining agreement with Local 210.

On the other hand, the record clearly establishes that the only individuals covered, and receiving all the contract benefits, were Wilhelm, his son, and the remaining supervisory staff. They paid dues to Local 210.

Bolivar Hernandez became employed by Respondent in January 2003, as a butcher. Upon employment with Respondent, Hernandez, believing there was no union representing employees, discussed union representation with his fellow butchers and discovered that Respondent's butchers were not represented by any labor organization. In addition, Hernandez discovered that Respondent's butchers did not receive any employment benefits. During these conversations, Hernandez informed his co-workers about the benefits of being represented by Local 342.

In February 2003, Hernandez, on behalf of the other Respondent butchers, contacted Local 342 Director of Organizing, Joe Lopez, herein Lopez, to inquire about having Local 342 represent Respondent's meat cutting employees. A meeting with Local 342 representatives and Respondent's meat cutting employees was scheduled for late February 2003. Hernandez informed the butchers of this meeting while they were in Respondent's locker room and by telephone from his home. The Local 342 meeting was held during the employees' lunch break in a nearby diner where the butchers go during their breaks.

At the first Local 342 meeting, held in late February 2003, Lopez and Local 342 organizer, Rafael Castillo, herein Castillo, met with approximately 15 Respondent butchers and meat grinders, including Hernandez, Bappo and Jimenez. Lopez, the union representative, explained the process of union representation, including filling out union authorization cards and the benefits of having a union. All the employees, including Hernandez, signed Local 342 cards.

Another meeting with Local 342 was held the next day at the same diner. Hernandez notified the employees of this meeting from Respondent's facility and from home. Again, there were approximately 15 employees, including Hernandez, Bappo and Jimenez, present for this meeting.

There is some testimony that while the meeting was being held, Wilhelm and supervisor Perry came into the diner and sat near the meeting. He was able to observe his employees who were attending the meeting.

There is also testimony that Wilhelm and Perry were already seated at the diner when the Local 342 representative, Lopez, and Respondent's employees entered the diner.

I find that it is irrelevant who came first. There is no allegation of unlawful surveillance. However, the evidence does establish that this was the first time Respondent became aware of Local 342's organizing campaign, and the pro-union employees involved.

After a few minutes into the meeting, Lopez introduced himself to Wilhelm and Perry and advised them that the employees were having a union meeting and that their presence in the diner during the union meeting was unlawful. Wilhelm informed Lopez that he was not doing anything wrong by having a cup of coffee. Wilhelm and Perry stayed in the diner for ten to 15 minutes.

On February 26, 2003, Local 342 made a demand for recognition with respect to the butchers, meat grinders, packers and helpers and filed a representation petition with the National Labor Relations Board. The petitioned unit included the butchers, meat grinders, packers and helpers.¹

I find that the collective bargaining agreement was the "sweetheart" of "sweetheart" contracts. The owner, his son, and his supervisory staff got all the contract benefits. The employees got nothing. Given this situation, I find that when Wilhelm became aware of the Local 342 organizing campaign, he felt threatened with the possibility that he and his supervisors would lose their benefits, and Respondent might have to pay his employees increased wages, and pay for similar benefits that he and his supervisors previously enjoyed.

I further find that Local 210 given the facts described above, did not have a contractual right to represent the unit employees. I also find that since Local 210 did not have a contractual relationship with Respondent with respect to the meat cutting employees, Respondent's assistance to Local 210 constitutes animus ² and reflects very negatively on Wilhelm's

¹ As discussed at trial, an election was held. The ballots are currently impounded pending the Board's decision to Respondent's Request for Review.

² Although such conduct would constitute unlawful assistance under Section 8(a)(1) and (2) of the Act, the Complaint does not allege the 8(a)(2) violation. Counsel for the General Counsel contends that the Article XX proceeding, which addressed the representation of Respondent's

Continued

credibility.

On March 17, 2003, Gomez, Respondent's unofficial English-Spanish translator, told the butchers, including Bappo and Jimenez, that Wilhelm wanted the butchers to go to Respondent's office in order to meet with a delegate from Local 210. Prior to this meeting, the Respondent's butchers had never met a Local 210 delegate.

At this meeting, approximately 15-20 employees, including Bappo and Jimenez, met with Dominic Formisano, the Local 210 Secretary/Treasurer. There were no Respondent supervisors present for this meeting. A Local 210 interpreter translated Formisano's remarks to the butchers. At this meeting, Formisano described Local 210 and its medical benefits to the employees. Formisano also stated that he was surprised to learn that there were more than a couple of employees working for Respondent and that the butchers needed to sign Local 210 cards in order to receive benefits. The butchers present for the meeting did not sign Local 210 cards. Rather, they advised Formisano that they had to talk to Local 342.

Based on this undisputed record evidence, I find that Local 210's appearance at Respondent's facility immediately after Local 342 began to organize Respondent's meat cutting employees was not a coincidence. Rather, Wilhelm, after obtaining knowledge of Local 342's organizing campaign, contacted Local 210 in an effort to defeat Local 342. He and his supervisors had a lot at stake.

After the March 17 meeting with Formisano, the employees met with Lopez during their break in order to tell him about the Local 210 meeting. Thereafter Lopez asked Wilhelm if he (Lopez) could speak to the Local 210 representative. Wilhelm explained that the Local 210 delegate was no longer present at Respondent's facility. Lopez then asked Wilhelm if Respondent would give him the same opportunity that was given to Local 210 and allow Local 342 to meet with Respondent's employees at Respondent's facility. Wilhelm denied Lopez' request.

Further evidence of Respondent animus is shown by Respondent's denial of access to Local 342. I find that Wilhelm's denial of this request additionally shows further animus toward Local 342 and that Respondent was intent on defeating Local 342's organizing campaign. Thus, I find Respondent's conduct as described above and below was clearly motivated by Respondent's intense animus against Local 342 and the employees who supported Local 342.

On March 18, 2003, as the butchers were getting ready to leave for the day, Wilhelm instructed the butchers to meet with Formisano again by the time clock. Wilhelm and all the meat cutting employees, including Hernandez, Bappo and Jimenez were present for this meeting. At this meeting, Formisano lifted a piece of paper in one hand and a stack of cards in the other and told the meat cutting employees that if they didn't sign Local 210 cards within seven days, they would be terminated. Formisano handed the piece of paper to Wilhelm. No employees signed Local 210 cards. Wilhelm told the employees, "it was the law." Wilhelm does not deny the testimony of General Counsel's witnesses.

Immediately after the meeting, Hernandez and Bappo met Lopez in front of Respondent's facility in order to inform him that Formisano told the employees that they would

meat cutting employees, resolved the unlawful assistance issue. Thus, General Counsel contended that she did not believe that further processing of the unlawful assistance matter was warranted.

be terminated in seven days, if they didn't sign Local 210 cards. Lopez approached Formisano and told him that his conduct was unlawful. Thereafter, Lopez met with Bappo, and a few other employees in front of Respondents facility. Hernandez and Jimenez were no longer at the facility. While Lopez was conducting this meeting with employees, Wilhelm approached the group and asked Lopez if he could speak to the employees. Lopez agreed to allow Wilhelm to speak to the employees. While holding an envelope in his hand, Wilhelm told the employees that the Local 210 delegate gave him this envelope and that if the meat cutting employees didn't sign Local 210 cards within seven days, he would have to fire them. Lopez told Wilhelm that he was wrong, that unions were supposed to protect their members and not hurt them. Again, Wilhelm does not deny the above statements.

I find that by condoning Formisano's threat that if the employees did not sign Local 210 cards within seven days they would be terminated, constitutes a threat of discharge by Respondent in violation of Section 8(a)(1). That it was Wilhelm's intention to threaten the unit employees is conclusively established by his direct threat of discharge made in the presence of Lopez that if the unit employees didn't sign Local 210 cards he would terminate them.³ I find this statement to be a threat of discharge in violation of Section 8(a)(1), *Baby Watson Cheesecake, supra*, citing *Jayar Metal Finishing Corp.*, 297 NLRB 603, 605 (1990).⁴

A few days after the mid March 2003 Local 210 meetings, Wilhelm approached Bappo, Jimenez, Caba, and Mario, in front of Respondent's facility and apologized to them for not putting them into Local 210. Wilhelm asked Bappo, Jimenez, Caba and Mario what they wanted, and if they wanted benefits or raises. Bappo told Wilhelm that they had to speak to Lopez from Local 342. Wilhelm denied making these statements. As set forth above and below, I do not find Wilhelm to be a credible witness.

I conclude that General Counsel witnesses Jimenez and Bappo are credible witnesses. I was impressed with their overall demeanor. Both witnesses were responsive to questions put to them on direct and cross-examination.

It is well established that the solicitation of grievances prior to an election raises an inference that an employer is making a promise to remedy them. Such an inference is rebuttable by the employer. *Health Management, Inc.*, 326 NLRB 801 (1998), citing *Uarco, Inc.*, 216 NLRB 1,2 (1974). It is similarly a violation of the Act for an employer to promise increased benefits during a pre-election period in order to discourage employees from supporting the union's campaign. *Waste Stream Management*, 315 NLRB 1088, 1089 (1994). In the instant matter, I conclude that Respondent unlawfully solicited grievances and made an implied promise of increased benefits to employees in order to encourage employees to cease their support of Local 342.

Based on the above credible evidence, I conclude that Respondent failed to rebut the inference of a promise to remedy any grievances as an alternative to Local 342 representation. In this regard, Wilhelm's promise that Respondent may grant increased wages and benefits strongly supports the inference. *Health Management Inc., supra*. I also find that there is a

³ Wilhelm testified that he believed his collective bargaining agreement with Local 210 was lawful and therefore he was merely enforcing the Local 210 contract. I simply reject Wilhelm's absurd contention. You violate the law by what you do or what you say.

⁴ Although, under *Baby Watson Cheesecake*, such a threat is also a violation of Section 8(a)(2) of the Act, the Complaint does not allege any Section 8(a)(2) allegation. As set forth above, the Section 8(a)(2) allegations were resolved through the Article XX proceedings.

strong connection between the solicitation of grievances and Respondent's desire to defeat the Union's organizing campaign. *Superior Emerald Park Landfill, LLC.*, 340 NLRB No. 54 (September 30, 2003). Accordingly, I conclude that such conduct is a clear violation of Section 8(a)(1).

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Immediately after Hernandez' discharge, described below, Respondent posted new work rules. Respondent never discussed these work rules with employees prior to posting the rules, nor had Respondent's employees seen the work rules prior to posting. The work rules, in part, prohibited fighting, insubordination, chronic lateness, and tampering with time cards.

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Counsel for General Counsel contends the establishment of these new work rules violates Section 8(a)(1) and (3). The 8(a)(3) allegation was not alleged in the complaint, nor was a motion made for such amendment during the trial. In her brief, Counsel for General Counsel moves to amend the complaint to include the 8(a)(3).

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I find the 8(a)(3) violation is solely based upon the above described rules. I grant General Counsel's motion since the issue raised by the amendment is closely connected to the subject matter of the allegation already set forth in the complaint and has clearly been fully litigated. *Meisner Electric, Inc.*, 316 NLRB 597 (1995).

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Counsel for the General Counsel contends that the posting of these new work rules was unlawful since the rules constitute a manifestation of Respondent's decision to implement a stricter work environment for employees who supported Local 342. *L.S.F. Transportation, Inc., a/k/a L.S.F. Trucking*, 330 NLRB 1054 (2000); *International Door*, 303 NLRB 582 (1991).

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The undisputed evidence shows that prior to mid April 2003, Respondent never had existing work rules like the ones posted after Respondent discharged Hernandez. In addition, the evidence shows that Respondent never posted these work rules or advised employees about these rules before Hernandez was discharged.

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Counsel for the General Counsel contends that the work rules posted in mid April 2003 were not pre-existing work rules that were contained in an employee handbook or established by verbal rules. Rather, the work rules were established immediately after the Union commenced its organizing campaign and immediately after Hernandez and the butchers began to show their support for the Union. I find the timing of the posting of these work rules shows that Respondent's decision to post the rules was discriminatorily motivated.

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I have concluded above that in retaliation against the Union and the employees who supported the Union, Respondent made unlawful threats of discharge, unlawful solicitation of grievances and as described below discharged and suspended Hernandez because he supported Local 342. Respondent continued its unlawful scheme to defeat Local 342 by posting the new work rules immediately after Hernandez was unlawfully discharged on April 9, 2003. The evidence set forth above, including the timing of the posting of the new work rules and the absence of any preexisting work rules clearly shows that the promulgation and posting of the written work rules was discriminatorily motivated as retaliation against the employees for supporting Local 342. Accordingly, I conclude Respondent's conduct was in violation of Section 8(a)(1) and (3) of the Act. *L.S.F. Transportation, Inc., a/k/a L.S.F. Trucking, supra.*; *International Door, supra.*; *Sevakis Industries, inc.*, 238 NLRB 309 (1978).

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In *Wright Line*, 251 NLRB 1083 (1980), the Board established the test to determine whether or not protected activity was a motivating factor in an employee's discharge. Under *Wright Line*, the General Counsel must make a prima facie case proving (1) the existence of

protected activity; (2) knowledge of that activity by the employer; and (3) union animus. *Alleghney Ludlum Corp.*, 320 NLRB 484, 495 (1995). "Proof of these elements by the General Counsel warrants at least an inference that the employee's protected conduct was a motivating factor in the adverse personnel action and that a violation of the Act had occurred." *Id.* Once
 5 the General Counsel makes out its prima facie case, the employer must then rebut the evidence by showing that unlawful motivation played no part in its actions. *Id.* "The employer must introduce enough evidence to persuade the board that the challenged personnel action would have taken place regardless of the employee's protected activity and the employer's antiunion animus." *Id.* If the employer's evidence is insufficient or unpersuasive, the employer will not
 10 have met its *Wright Line* burden and a violation will be found. *Id.*

In the instant case, Counsel for the General Counsel contends that the evidence clearly shows that Respondent unlawfully discharged and suspended Hernandez because he
 15 supported and assisted the Union.

In January 2003, the company hired Hernandez as a butcher. Though Hernandez began his shift at Garden Manor at 5:00 a.m. each day, his shifts concluded at different times, ranging from 11:00 a.m. to 2:00 p.m. Hernandez thereafter worked without complaint until
 20 March 10.

Hernandez credibly testified that on March 10, 2003, Wilhelm approached him as he was leaving for the day and told him, in English, that he was fired since things were slow and because he (Hernandez) was giving information about Local 342 to employees. Wilhelm's
 25 statements to Hernandez were translated by Gomez.

Wilhelm testified that he terminated Hernandez on March 10, because he spat on the cutting room floor during two separate incidents, in defiance of the instruction of Prim, his
 30 supervisor.

I find Hernandez to be a credible witness. I was impressed with his overall demeanor. His testimony was detailed, and he was responsive to questions put to him on direct and cross-examination. I was not impressed with Prim's demeanor. His testimony, particularly on cross-examination was vague and evasive. Moreover, I find his credibility is questionable in view of
 35 the considerable benefits that he, as a supervisor, would lose if the Union were to replace Local 210 as the collective bargaining representative of the employees. Accordingly, I do not find Prim to be a credible witness. I do not find Wilhelm to be a credible witness. As set forth above, he would lose all his Local 210 contractual benefits. His blatant assistance to Local 210, the condoned and actual threats of discharge, and his promises of benefit to employees, also seriously affect his credibility. Wilhelm is simply not a credible witness. Accordingly, I credit
 40 Hernandez's testimony as to the facts of his March 10 discharge with Wilhelm.

Wilhelm's statement to Hernandez on March 10, 2003, also shows that Respondent had knowledge of Hernandez' activities on behalf of Local 342. Hernandez testified that on March
 45 10, 2003, Wilhelm told him that he was being fired because he was giving information about Local 342 to other employees and because business was slow. As set forth above, I have discredited Wilhelm and Prim.

I find that it is absolutely clear that Wilhelm had knowledge of Union activity of most of the employees, and that Hernandez was the most active supporter in favor of Local 342.
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I also find, as set forth above, that Wilhelm and his entire supervisory staff had intense animus against the Union, because if the Union became the representative of the meat cutting

department, Wilhelm and his supervisors would lose all their benefits as set forth and described above.

I conclude, Respondent's Union animus is clear.

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The timing of Hernandez's discharge is further evidence that his discharge was violative. In this connection, the Union demanded recognition on February 26, and on March 10 Hernandez was fired.

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Further the credible testimony of Hernandez that Wilhelm told him he was being fired because things were slow and that he was giving information to the Union, amounts to a verbal admission of a discharge in violation of Section 8(a)(1) and (3) of the Act. It is clear that Counsel for General Counsel has met its *Wright Line* burden.

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Respondent contends that Hernandez was fired because he spat on 2 occasions on the meat cutting floor, in violation of health regulations.

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At trial, Wilhelm testified that just prior to March 10, 2003, Prim informed him that Hernandez spat on the floor and used foul language when confronted by Prim about this conduct. Wilhelm testified that, based on this information, he decided to discharge Hernandez. Therefore, on March 10, 2003, Wilhelm testified that he told Hernandez that he was being discharged for spitting and for insubordination.

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Hernandez, however, categorically denied that Wilhelm, on March 10, 2003, told him he was being discharged for spitting. In fact, Hernandez stated that prior to March 14, 2003, Respondent never raised any spitting or insubordination incidents with him. Hernandez further denied spitting on the floor or telling Prim to go "screw yourself". Rather, Hernandez testified that he was a grown man who, based on years of professional experience and common sense, would never spit while working since he knew it was unsanitary, unlawful and unacceptable behavior for a butcher. In fact, all the butchers knew that spitting was unacceptable and unlawful behavior.

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Moreover, Hernandez' testimony was corroborated by other witnesses, Jimenez and Bappo who credibly testified that they never saw Hernandez spit on the floor and that they never heard Prim accuse Hernandez of spitting on the floor. Jimenez and Bappo worked at the same cutting table with Hernandez and Prim. They worked approximately 2 feet from each other around the cutting table. Hernandez worked next to Prim while Bappo worked in front of Hernandez. I find, given my credibility resolutions, and based on the close proximity of the butchers, Jimenez and Bappo would have seen Hernandez spit and would have heard Hernandez use foul language toward Prim. Jimenez and Bappo, however, categorically denied seeing Hernandez spit on the floor and denied hearing Prim accuse Hernandez of spitting on the floor. Thus, based on this consistent and credible testimony of General Counsel's witnesses, I conclude that Hernandez never spat on Respondent's floor or used foul language toward Prim.

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I find the proffered reasons for discharging Hernandez on March 10, 2003 were false and pretextual. Thus, the pretextual nature of Respondent's reasons for the discharge, the timing of Hernandez' discharge, which occurred immediately after the commencement of Local 342's organizing campaign and the Union's demand for recognition, the evidence of Respondent animus against Local 342, as discussed above and below, shows that Respondent discharged Hernandez because he supported and engaged in activities on behalf of Local 342.

In addition, Respondent's assistance to Local 210 is further evidence that Hernandez's discharge was discriminatorily motivated.

5 In this regard, the evidence establishes that immediately after the Unions' demand for recognition, Respondent arranged for Local 210 to meet with its employees to represent the butchers. At the time, Local 210 did not represent the butchers. Rather, Local 210 represented only Respondent's management staff and Gomez. However, the undisputed record shows that on March 17 and 18, 2003, Wilhelm instructed the butchers to meet with Formisano so that they could sign Local 210 union authorization cards. Prior to these visits in March 2003, Formisano had never been to Respondent's facility as the representative of the butchers.

10 Wilhelm further assisted Local 210 by denying Local 342 access to Respondent's facility. As discussed above, the undisputed record shows that Lopez, after Formisano met with the butchers in mid March 2003, requested that Respondent allow him to meet with the meat cutting employees at Respondent's facility. Wilhelm denied Lopez' request. I find that Respondent's denial of access to Local 342 and its assistance to Local 210 clearly shows that Respondent had hostility toward Local 342 and that Respondent wanted to defeat Local 342's organizing campaign. Therefore, Respondent engaged in retaliatory conduct against Local 342 and the employees, including Hernandez, who supported Local 342.

20 I also find Wilhelm's unlawful threats of discharge and solicitation of grievances, as described in detail above, further emphasize Respondent's animus toward Local 342. Thus, based on the timing of Hernandez's discharge, Respondent's display of animus toward Local 342 and the pretextual nature of Respondent's reason for discharging Hernandez, and conclude that Respondent has failed to meet its *Wright Line* burden. Therefore, Respondent's decision to discharge Hernandez on March 10, 2003, was in violation of Section 8(a)(1) and (3) of the Act. *La Gloria Gas & Oil Company, supra; T & J Container Systems*, 316 NLRB 771 (1995).

30 The credible testimony of Hernandez shows that he returned to Respondent's facility on March 14, 2003, in order to pick up a paycheck. While at Respondent's facility, Wilhelm told him that he could have his job back if he signed a written document that stated that he was being suspended for one week because he spat on the floor and was insubordinate to Prim. At this meeting, Hernandez denied spitting on the floor and denied being insubordinate. In fact, Hernandez requested that Wilhelm show him proof of his alleged misconduct. Notwithstanding his denial, Hernandez agreed to sign the suspension letter in order to get his job back. Hernandez testified that he needed his job so that he could provide for his family.

40 I conclude that Respondent's decision to convert Hernandez' discharge to a suspension on March 14, 2003, was based on unlawful considerations. As described above there is no credible evidence that Hernandez did spit on the floor. I conclude the alleged spitting and insubordination incidents were a pretext to conceal the fact that antiunion animus was the true motivation behind Hernandez' March 10th discharge, since Respondent relied on the same incidents to discharge Hernandez. *La Gloria Oil and Gas Company, supra*. Accordingly, I conclude the suspension is a violation of Section 8(a)(1) and (3) of the Act.

45 On April 8, 2003, Hernandez credibly testified that he and Pascual Caba had a verbal argument while working. Hernandez was upset because Caba refused to help him lift a bucket on to the cutting table. Without any further incidents, Hernandez and Caba finished their workday, punched out and changed their clothes in Respondent's locker room. Hernandez credibly testified that when he left the inside of Respondent's facility, Caba was waiting for him just outside Respondent's facility near the steps leading to the parking lot. Caba, angry at the words exchanged inside Respondent's facility, punched Hernandez. Hernandez, in self defense

retaliated, and a brief fight ensued. Caba received a black eye. I find that Caba started the fight. Caba did not testify.

5 Respondent contends that, "Regardless of the time and location of the fight, the dispute arose inside the Garden Manor facility. Additionally, the dispute was related to their employment."

10 I reject Respondent's contention. As set forth above, the fist fight took place outside Respondent's facility. If one were to extend Respondent's contention, had the fight taken place at a nearby bus or subway stop, Respondent could claim that he could lawfully discharge both employees for fighting.

15 Given the intensity of Respondent's animus, his knowledge that Hernandez was the inside Local 342 organizer, the 8(a)(1) violations, the unlawful discharge and suspension of Hernandez, described above, and the timing of the discharge in relation to the March 10 discharge and the March 14 suspension, I conclude General Counsel has established a very strong and solid prima facie case and clearly met its *Wright Line* burden.

20 Since I have concluded that the fight between Caba and Hernandez took place outside Respondent's facility, and have rejected Respondent's contention that the fight was an extension of a work related argument, I conclude that Respondent has not met its *Wright Line* burden. Accordingly, I conclude that by discharging Hernandez, Respondent has violated Section 8(a)(1) and (3) of the Act.

25 Conclusions of Law

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

30 2. The Union, and Local 210 are labor organizations within the meaning of Section 2,(5) of the Act.

35 3. Respondent has violated Section 8(a)(1) by the acts set forth and described above and below.

4. Respondent has violated Section 8(a)(1) and (3) of the Act by discharging Bolivar Hernandez on March 10, suspending him on March 14, and discharging him on April 9, 2003.

40 5. Respondent violated Section 8(a)(1) and (3) by posting new work rules regarding employees conduct in retaliation against employees for supporting Local 342.

Remedy

45 Having found Respondent has committed violations of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist and take certain affirmative action designed to effectuate the polices of the Act.

50 With respect to the discharge, suspension and discharge of Bolivar Hernandez, I shall recommend that he be offered unconditional reinstatement to his former position of employment, or if such position no longer exists, to a substantially equivalent position of employment without prejudice to his seniority or other rights previously enjoyed by him. I shall further recommend that Hernandez be made whole for any loss of earnings, or other benefits

suffered as a result of his discharge, suspension, and discharge from the dates of such action until the date a valid offer of reinstatement, as defined by the Board is made by Respondent. Back pay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950) with interest as prescribed by *New Horizons for the Retarded*, 283 NLRB 1173 (1987). With respect
5 to the discharge on March 10, the suspension on March 14, and the discharge on April 9, 2003 Respondent must be ordered to remove from his personnel file any reference to such action, and to notify him that such personnel action will not be used against him in any way.

I shall also recommend that the Respondent remove the new work rules posted on April
10 9, 2003 by Respondent regarding employee conduct.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended ⁵

15 ORDER

The Respondent, Garden Manor Farms, Inc., its officers, successors, and assigns, shall

1. Cease and desist from

20 (a) Threatening its employees with discharge if they do not sign a Union authorization for Local 210, Production & Warehouse International Employees Union, herein called Local 210.

25 (b) Soliciting grievances and making implied promises of improved benefits in order to encourage employees to cease their support for United Food and Commercial Workers Union, Local 342, AFL-CIO, herein called Local 342.

30 (c) From suspending and discharging employees because they support Local 342, or any other labor organization.

(d) From posting new work rules in retaliation of the employees' support for Local 342.

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

35 (a) Within 14 days of this Order make an unconditional offer of reinstatement to Bolivar Hernandez to his former position of employment, or if such position no longer exists, to a substantially equivalent position of employment without prejudice to his seniority or other rights and privileges previously enjoyed.

40 (b) Within 14 days of this Order, make Hernandez whole in the manner set forth in the Remedy section of this Decision, from the date of his initial discharge, on March 10, 2003, until an unconditional offer of reinstatement is made.

45 (c) Within 14 days of this Order expunge from the personal files of Hernandez, any reference to unlawful discharge, and/or suspension, and notify him in writing that this has been done.

50 ⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

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(e) Within 14 days of this Order, remove the work rules posted at Respondent's facility on April 9, 2003.

(f) Within 14 days after service by the Region, post at its principal place of business located at 355 Food Center Drive, Bronx, New York copies of the attached notice marked "Appendix." ⁶ Copies of the notice, on forms provided by the Regional Director for Region 2 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

Dated, Washington, D.C.

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HOWARD EDELMAN
Administrative Law Judge

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⁶ 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."

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APPENDIX
NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT threaten our employees with discharge if they do not sign a Union authorization for Local 210, Production & Warehouse International Employees Union, herein called Local 210.

WE WILL NOT solicit grievances or make implied promises of improved benefits in order to encourage our employees to cease their support for United Food and Commercial Workers Union, Local 342, AFL-CIO, herein called Local 342.

WE WILL NOT suspend or discharge our employees because they support Local 342, or any other labor organization.

WE WILL NOT post new work rules in retaliation of our employees' support for Local 342.

WE WILL within 14 days of this Order make an unconditional offer of reinstatement to Bolivar Hernandez to his former position of employment, or if such position no longer exists, to a substantially equivalent position of employment without prejudice to his seniority or other rights and privileges previously enjoyed.

WE WILL within 14 days of this Order, make Hernandez whole in the manner set forth in the Remedy section of this Decision, from the date of his initial discharge, on March 10, 2003, until an unconditional offer of reinstatement is made.

WE WILL within 14 days of this Order expunge from the personal files of Hernandez, any reference to unlawful discharge, and/or suspension, and notify him in writing that this has been done.

GARDEN MANOR FARMS, INC.

(Employer)

Dated _____

By _____

(Representative)

(Title)

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

26 Federal Plaza, Federal Building, Room 3614, New York, NY 10278-0104

(212) 264-0300, Hours: 8:45 a.m. to 5:15 p.m.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (212) 264-0346.