

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

RIVER RANCH FRESH FOODS, LLC

and

Case 32-CA-19938

GENERAL TEAMSTERS, WAREHOUSEMEN
AND HELPERS UNION, LOCAL 890, IBT, AFL-CIO

On Behalf of the General Counsel,
Michelle Smith, Esq. Oakland, California.

On Behalf of the Charging Party,
Michael Nelson, Esq., Beeson, Tayer and Bodine,
Oakland, California.

On Behalf of Respondent,
Patrick Jordan, Esq. Jordan Law Group,
San Rafael, California.

DECISION

Statement of the Case

John J. McCarrick, Administrative Law Judge. This case was tried in Salinas, California, May 20-22, June 25-27, and August 13-15, 2003, upon General Counsel's Complaint¹ that alleged River Ranch Fresh Foods, LLC, (Respondent) violated Section 8(a)(1) and (3) of the Act by interrogating employees about the union activities of another employee, by creating the impression that union activities were under surveillance, by threatening an employee by saying that he could get into trouble for speaking with a union representative, by interrogating employees about their union sympathies, by threatening employees with loss of benefits, by threatening discipline for talking to union representatives and by discharging Jose Rocha, Eduardo Moran and Lorenzo Hernandez because of union or protected-concerted activities. Respondent timely denied any wrongdoing. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following:

¹ At the hearing General Counsel moved to amend the Complaint to allege at paragraph 5 that Ana Juarez Grijalva and Danny Jimenez were supervisors and agents within the meaning of the Act. I granted General Counsel's motion. Respondent admitted that Jimenez and Grijalva were agents of Respondent within the meaning of Section 2(13) of the Act but denied they were supervisors within the meaning of Section 2(11) of the Act.

Findings of Fact

I. Jurisdiction

5 Respondent, a Delaware corporation with an office and place of business in Salinas,
California (Respondent's facility), has been engaged in the cooling, processing and distribution
of produce grown by other entities. During the past 12 months, Respondent in conducting its
business operations sold and shipped goods valued in excess of \$50,000 directly to customers
located outside the State of California. Respondent admits and I find that it is an employer
10 engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the
General Teamsters, Warehousemen, and Helpers Union, Local 890, IBT, AFL-CIO (Union) is a
labor organization within the meaning of Section 2(5) of the Act.

II. The Issues

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

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a. Interrogating employees in May and late July 2002 about the union
activity of another employee?

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b. Creating the impression in May 2002 that employees' union activities were
being kept under surveillance?

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c. Threatening an employee with reprisal in May 2002 for talking to a Union
representative?

d. Threatening an employee with reprisal in June 2002 for talking to a Union
representative?

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e. Creating the impression that an employee's union activity was under
surveillance in June 2002?

f. Threatening an employee with a warning for talking to the Union in
June 2002?

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g. Threatening an employee with a warning for talking to a Union representative
in late June 2002?

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h. Threatening an employee with reprisal for talking to the Union in early
July 2002?

i. Threatening an employee with reprisal for talking to the Union and for talking
to employees about per diem in late July 2002?

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j. Interrogating employees on August 7 or 8, 2002, about the union activity of
another employee?

k. Threatening an employee on August 7 or 8, 2002 that the employee could get
himself into trouble for speaking with a Union representative?

l. Telling an employee on August 12, 2002 he could be disciplined for talking with the Union?

5 m. Interrogating employees on August 12, 2002 about their union sympathies?

n. Threatening employees on August 12, 2002 with loss of benefits because of their support for the Union?

10 2. Did Respondent violate Section 8(a)(1) and (3) of the Act by discharging Jose Rocha, Eduardo Moran and Lorenzo Hernandez because of their union or other protected-concerted activities?

15 III. Alleged Unfair Labor Practices

A. The Facts

1. Introduction

20 Respondent grows, washes, cuts and packages vegetables and lettuce at its facilities in Salinas and El Centro, California. Respondent began operating its business on June 19, 2002.² During the Spring of 2002, Respondent's owners purchased the assets of its predecessor, River Ranch Fresh Foods, Inc., (Inc.) a United Kingdom corporation. Respondent's owners were the senior managers at Inc. When Respondent commenced operations, it had the same facilities, managers, supervisors and employees as Inc. Respondent terminated all of Inc.'s employees and rehired all of them on about June 19. Respondent's supervisors and managers included
25 CEO Jim Lucas, Vice President of Logistics and Processing Dave Robinson (Robinson), Vice President of Human Relations Carolyn Humphrys (Humphrys), Production Manager George Bean (Bean), night shift supervisors Jorge Manriquez (Manriquez) and Daniel
30 Jimenez (Jimenez), day shift supervisor Oscar Rodriguez, Quality Assurance Manager Anne Pauly (Pauly), Maintenance Manager Gary Elk (Elk), and Maintenance Supervisor Juan Cardoso³ (Cardoso).

35 Cardoso supervises about eight technicians and eight mechanics that work two shifts. The first or day shift begins between 4:00-5:00 a.m. and ends between 1:00-3:00 p.m. The second or night shift begins between 1:00-3:00 p.m. and ends between 12:00-2:00 a.m. There were two lead mechanics in the maintenance department, Jose Rocha (Rocha) and Petronilo Solorzano (Solorzano).

40 Since July 30, 1993, the Union represented all full time and regular part-time production and maintenance employees employed by Inc. at its pre-cut vegetable processing plants in Salinas and El Centro, California, excluding harvesting employees, tube operators, product-haul truck drivers, outside clean-up employees, cooling and shipping dock employees, clerical employees, guards and supervisors as defined in the Act.). In addition, the Union and Inc.
45 were parties to a collective bargaining agreement⁴ effective July 1, 2000 to June 30, 2004.

² All dates refer to 2002 unless otherwise specified.

³ Respondent stipulated that Cardoso was both a supervisor and an agent of Respondent within the meaning of the Act. I also find he was a supervisor within the meaning of the Act, having the authority to hire, assign work and responsibly direct employees.

⁴ Respondent's Exhibit 6.

Respondent set the initial terms and conditions of employment for the workforce, including a probationary period of 60 days for mechanics and 90 days for all other employees including technicians. The collective bargaining agreement provided that a probationary
5 employee could be discharged for any reason.⁵

Respondent and the Union entered into negotiations for a successor collective bargaining agreement on about July 1. Respondent's bargaining team consisted of attorney Patrick Jordan (Jordan), Robinson and Humphrys. The Union negotiating team included Union
10 representatives Michael Johnston (Johnston), Crescencio Diaz (Diaz), Union President Frank Gallegos (Gallegos) and Francisco Reynoso (Reynoso).

The parties stipulated that bargaining sessions occurred on July 1 and August 7. At the July 1 meeting, the Union raised inclusion of the technicians, cooler area employees and forklift
15 drivers in the bargaining unit. Robinson said he was not interested. Gallegos asked Robinson if Respondent would recognize the Union if they gathered cards to show that employees were interested. Robinson said that the employees in those departments did not want the Union.

Between bargaining sessions, on July 17 Robinson held a staff meeting with managers including Bean, Pauly and Elk in which he told them, "We have no union contract, so we do not
20 allow meetings with union shop stewards."⁶

By the end of the August 7 morning bargaining session the only remaining issue was whether the technicians should be included in the bargaining unit. When it became clear that
25 Respondent opposed the concept of including technicians in the bargaining unit, Johnston said they would accept Respondent's contract offer and file a unit clarification petition. Robinson replied, "In that case I'm withdrawing our offer for a collective bargaining agreement, and you can schedule some meetings and we'll start from scratch to negotiate something." Robinson left the room. When Robinson returned he said it was inappropriate for the Union to file a unit
30 clarification petition. He said that he had been talking to technicians and he did not believe that they wanted the Union. Robinson became angry and said he could kick himself in the ass for recognizing the Union. After Johnston told Robinson they had to recognize the Union, Robinson became angrier and said that he was never going to make this mistake again, that whatever contract they ended up with, he was going to make sure that when the contract expired he was
35 getting the Union out.⁷

Twenty minutes after the Union left, Humphrys, Robinson, Elk and Cardoso called a meeting with four technicians in Robinson's office to advise the technicians that the Union
40 wanted to represent them.

Later that day, Elk called technician Jeff Hudson (Hudson) into his office and told him that the Union was attempting to represent the technicians. Hudson said he did not want to be
45 in the Union and asked what he could do to keep the Union from representing them. Elk told him that a petition to that effect would have to be generated. Hudson said he would look into the matter.

⁵ Ibid, Article 5, Section 5.1.2 at page 8.

⁶ General Counsel's Exhibit 12, at page RO39 and transcript at page 950.

50 ⁷ Robinson admitted saying, "I will do everything I can to get rid of this Union." Transcript at page 854.

On August 8 Elk held a meeting with technicians during work time. With Cardoso translating, Elk told employees that, “the company wanted to know who were the ones that wanted the Union.” Elk said he thought that it was not necessary for the Union to defend them because they had good benefits. Elk also said that the technicians “could lose some benefits” if they had a union. Elk also said, “I’m not going to pay \$30 to Jose Rocha to defend me, if I have a mouth to defend myself.”⁸ Later that day, Cardoso called technicians to a meeting in his office during work time where Hudson told employees they had to fill out some paperwork so the Union would not bother them.

2. Eduardo Moran

Eduardo Moran (Moran) worked for both Respondent and Inc. as a mechanic in the maintenance department since April 2001. Moran’s supervisors were Cardoso and Elk. The maintenance department included both mechanics and technicians, however only mechanics are represented by the Union. During his job interview with Cardoso, Moran said that he had been a striker at his previous employer, Basic Foods. After he was hired, Moran’s duties with Respondent and Inc. included maintenance of equipment. Every six weeks Moran rotated between the first and second shifts. While on the second shift Moran reported to Solorzano.

In the Fall of 2001, Moran had conversations with both Cardoso and Elk where other mechanics were present. Moran told both Cardoso and Elk that the mechanics wanted training to improve their skills and wanted to discuss issues concerning the seasonal move to El Centro, including the amount of per diem Inc. provided.⁹ After these conversations, Inc. terminated Moran in October 2001 for failing to notify his supervisor about a one-week absence due to illness. Moran contends he notified Cardoso that he would be absent. The Union filed a grievance concerning Moran’s termination and as a result, Moran was reinstated.

On about June 6, Moran received a written offer of employment from Respondent.¹⁰ Ana Juarez¹¹ (Juarez), a human resources department employee, gave it to Moran. When Moran asked if the Union knew about the terms Respondent set in the employment offer, Juarez told Moran that the new administration said there was no Union and if you want to keep your job sign the paper work.

After June 6, Moran spoke to Union representatives several times at Respondent’s facility and learned that the Union was trying to organize Respondent’s technicians.

On June 18, at about 5:00 p.m., Moran told Elk that he would be absent for the rest of the night shift in order to see his doctor about his swollen knee. Moran told Elk he needed several days off and Elk gave his approval. On June 19, Moran faxed a doctor’s note¹² to

⁸ Both Elk and Felipe Jimenez denied Elk made these statements. I credit Hernandez’ version. Hernandez impressed me as a credible witness who was responsive to questions and exhibited no hostility, unlike Elk. Jimenez, a current employee of Respondent had an interest in providing favorable testimony for his employer.

⁹ Each year in about November Inc. shifted its operations and employees to El Centro, California for about five months. Inc. paid per diem to employees who traveled from Salinas to El Centro.

¹⁰ Respondent’s Exhibit 1.

¹¹ The parties stipulated that Juarez is an agent of Respondent within the meaning of the Act.

¹² General Counsel’s Exhibit 5(b).

Respondent and called both Cardoso and Elk's offices and left messages that he would be out until June 23 or 24 due to his gouty knee. Moran returned to work on June 23. On June 25 Elk gave Moran a written warning¹³ for failure to notify Respondent at least an hour before the start of his shift that he would be absent.

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In July and August Moran had conversations with employees about the Union. Cardoso admitted that he saw Moran talking to Union representatives in the cafeteria during Moran's lunch break in June, July and August. Further, Cardoso said he told Elk in June, July and August about Moran's union activities. According to Elk, Cardoso told him in July that Moran was going over his lunch period talking to Union representative Diaz. However, Cardoso denied that Moran was taking too much time talking to Union representatives. Cardoso told Elk that Moran was using too much time talking about the Union during work hours. However, Cardoso admitted that he often talked to employees during work time. Unlike production employees the mechanics often had down time when they had no maintenance calls. Elk admitted that in August he heard "scuttlebutt that Moran wanted to be the maintenance department shop steward. In July a machine operator named Omar told Moran that he heard the operators were trying to get rid of the Union. On about August 14, Omar and Moran had another conversation in Respondent's production area. Omar asked Moran if he would speak to the operators about the Union. Moran agreed to speak to the operators about his experience with the Union and the strike at Basic Foods. During this conversation, production supervisor, Danny Jimenez¹⁴, came within two feet of Moran and Omar two or three times. He was present for 10-15 seconds each time.

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Humphrys testified that the only reason Moran was fired was for talking too much. Between August 9 and 15 Elk called Humphrys to get permission to fire Moran and told her that while technically Moran was a good mechanic, he spent far too much time talking on the job. Elk gave contradictory testimony that Moran was not a good mechanic because he was not seeking out information from more experienced mechanics and was not reading instruction manuals.¹⁵ Elk also said that Moran did not know how to repair hoists. However, Cardoso said that by June Moran was no longer working on hoists. Moreover, Cardoso said he did not know Moran was having trouble repairing hoists until after August 16.

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Elk also testified that he had two conversations with Robinson about terminating Moran. The first conversation was the third week of July. Elk told Robinson there were two employees who might not make it through probation, Moran and Rocha. The second conversation was the morning of August 16. Elk told Robinson that Hernandez was not worth keeping because of his attitude, that Moran wasn't going to make it because of his no call-no show and because, "he hadn't proved himself above and beyond." Elk also said Rocha was a disappointment and wasn't meeting expectations. Elk said, "at that point the decision was made to, I guess, do

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¹³ General Counsel's Exhibit 5(a).

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¹⁴ Respondent admitted that Danny Jimenez is an agent but denied he is a supervisor within the meaning of the Act. Danny Jimenez is a Hayssen supervisor, responsible for 15 Hayssen machines and 140-150 employees. Five supervisors reported to Jimenez and he was in charge of the operation of the all the Hayssen machines for his shift. I find Danny Jimenez is a supervisor within the meaning of Section 2(11) and an agent within the meaning of Section 2(13) of the Act.

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¹⁵ Since Moran's primary language is Spanish and Elk speaks only English, it is hard to understand how Elk would have known if Moran asked more experienced mechanics questions in Spanish. Elk's assumption that Moran did not read technical manuals is speculation.

terminations that day in one fell swoop so that it wouldn't extend out and create panic amongst the maintenance department.”

On August 16, Elk told Moran that he was being fired for failing to successfully complete his probationary period.¹⁶ When Moran asked for a Union representative, an unknown man said he could not have a Union representative since there was no contract. Moran was escorted from Respondent's facility by the unknown man and Juarez. Moran said he received no other discipline and received no complaints from Respondent or Inc. about his work performance.

3. Lorenzo Hernandez

Lorenzo Hernandez (Hernandez), also known by the nickname “Scorpion”, worked for both Respondent and Inc. since 1994. Hernandez became a technician in about 1999. Hernandez' supervisors were Elk and Cardoso. Hernandez mainly serviced the Hayssen machines on the day shift in July and August.

In November 2001, Hernandez spoke with Cardoso after Moran had been fired. Cardoso told Hernandez that Moran had been fired and would not be back. Cardoso said “people who speak about politics won't last long at work.”

In May Hernandez had a conversation with Cardoso. With Rocha, Guzman and Rodriguez¹⁷ present, Cardoso asked how long Moran had been speaking with the Union representative. Cardoso said Moran is taking too many privileges and he could fuck him up. Hernandez replied that Moran was a Union leader. Cardoso said he isn't anything. Cardoso said I will wait a few minutes and that if he is there longer than his time for lunch, I will screw him up.¹⁸ A month later, while in the lunch room with Hernandez, Rocha, Rodriguez, Guzman and Salazar, Cardoso said Moran shouldn't have been talking to the Union representative during work time and if Moran took too long he would screw him.

In June Hernandez received an application for employment with Respondent from Juarez. At a June 19 meeting with maintenance employees Elk told the employees that Respondent was a new company and that they were all probationary employees for 90 days. When employees asked what probationary employees were, Elk said that they could be fired for any reason.

In June Hernandez spoke to three fellow technicians about organizing the Union. Hernandez said Moran thought it would be a good idea for the technicians to join the Union so it would not be so easy for Respondent to terminate them. The next day Hernandez told Moran

¹⁶ General Counsel's Exhibit 4.

¹⁷ I credit Hernandez' version of the facts. I found Hernandez a credible witness who gave responsive answers with specificity, detail and no hostility. Rodriguez, who denied Cardoso interrogated or threatened employees regarding Moran's union activities, was a reluctant witness who gave inconsistent answers, denying he spoke with Respondent's counsel before giving testimony, only later to admit he spoke with counsel. Rodriguez also denied that Cardoso said Moran was talking about the Union too much. Cardoso himself admitted he thought Moran was taking too much time talking about the Union and reported this to Elk.

¹⁸ Cardoso denied using profane language. However he essentially admitted telling employees not to talk to Union representatives or to talk about union or other protected concerted subjects during work time.

5 about his conversation with the technicians concerning joining the Union. Toward the end of June Hernandez talked to Moran and Rocha about the Union, per diem rates and other terms and conditions of employment at work. Hernandez was also present with other employees, including Rocha and Moran in a meeting with Robinson where employees asked for higher per diem rates.

10 In early August, Elk and Cardoso held a meeting during work time with the technicians. Cardoso translated for Elk who speaks little Spanish. Elk asked who wanted the Union. Elk said that he and Robinson did not think it was necessary for the Union to defend the technicians. He said Respondent had good benefits and the technicians could lose benefits with the Union. Elk said he would not pay Rocha \$30 to defend me if I have a mouth to defend myself. One technician said the Union had a lot of money. Elk then said electrician, Jeff Hudson (Hudson) will give you a paper to fill out so the Union won't bother you. Elk said this is a private meeting and I don't want the mechanics to find out.¹⁹

15 During work time about an hour later, Cardoso announced that there would be another meeting in his office. Several technicians were present with Cardoso and Hudson. Cardoso left the office and Hudson said he had a paper the technicians had to fill out so the Union won't bother you. Since the document was in English, it was not handed out.

20 A few days before Hernandez' termination on August 16, Cardoso asked Hernandez where Moran was because he was talking too much with the operators about the Union and that he was stirring up the water too much.

25 There was considerable testimony from Respondent's witnesses concerning Hernandez' attitude.

30 Danny Jimenez, the Hayssen night supervisor said that he complained to Elk and Cardoso that technicians failed to respond to maintenance calls from Hayssen operators. In June and July, Jimenez told Cardoso his operators complained about Hernandez' bad attitude. However, Jimenez said that after July Hernandez' performance improved.

35 Jorge Manriquez was also a night shift Hayssen supervisor. In June, July and August Manriquez complained to Bean about Hernandez' performance. Manriquez said Hernandez was hostile to his operators and that he received frequent complaints from the operators about Hernandez' abuse toward them. Several operators said they did not want to work with Hernandez.

40 Cardoso said that in June, July and August he received complaints from Danny Jimenez and Hayssen operators about Hernandez' abuse and reported these complaints to Elk.

45 Bean said that in June, July and August his shift supervisors, Danny Jimenez, Oscar Rodriguez and Jorge Manriquez complained about both Hernandez. They complained about Hernandez' hostile, aggressive attitude toward their Hayssen operators. Bean said he relayed these complaints to Elk.

50 ¹⁹ Elk denied asking who wanted the Union. I credit Hernandez' version of the facts. Elk was a hostile witness whose memory required frequent refreshing with leading questions and reference to various documents. Moreover, Cardoso did not corroborate Elk's version of the facts of the August meeting.

On August 16, Elk terminated Hernandez. The termination notice stated Hernandez was terminated for failure to meet the probationary period.²⁰ Before his termination, Hernandez had only one disciplinary action for being late in 2001.

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4. Jose Rocha

Jose Rocha (Rocha) worked for both Respondent and Inc. since 1991 as a mechanic. Rocha had been a lead mechanic for about two years. As lead mechanic, Rocha performed the most difficult jobs and trained employees. Rocha worked on the first shift from about 5:00 a.m. to 3:30 p.m. in June, July and August and his immediate supervisor was Cardoso. Cardoso said that by June he had removed most of Rocha's lead duties and Rocha was only repairing equipment.

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In late June Cardoso was in the maintenance shop with Rocha, Cardoso told Rocha to, "call it to Moran's attention because it was during company time and he could get a warning." Moran had just been talking to Union representative Crescencio Diaz. About a week later in early July when Moran was speaking to Union representatives in the cafeteria, Cardoso told Rocha to call it to Moran's attention he should not be talking to the Union. At the same time, Cardoso also told Rocha not to talk to the Union. In mid June in the maintenance shop with other mechanics present Cardoso told Rocha not to talk to the Union people because he could give Rocha a warning. In Cardoso's office in late July, Cardoso told Rocha not to talk too much to the Union.

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In late June, Rocha spoke to employees in the maintenance shop and in the lunchroom about the amount of per diem employees were getting for work in El Centro. In early July Rocha and four to six other employees, including Moran and Hernandez met with Respondent's vice president for operations, Robinson. Guillermo Salazar told Robinson the employees were not getting enough per diem. Robinson told the employees that they were on company time and to go back to work. In late July in the lunchroom Rocha and Moran were talking to operators about per diem rates. Cardoso told Rocha and Moran not to talk during work hours with operators about per diem. In early August Rocha spoke with Lupe Diaz, a supervisor in the production department. Rocha told Diaz that the employees were getting too little per diem. Diaz said that you will never compare to our per diem.

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In July mechanics complained that technicians were performing work normally done by mechanics. At a meeting in the maintenance shop with all technicians and mechanics present, Rocha complained to Cardoso that technicians were doing mechanic's work. When Cardoso denied that technicians were taking away work, Rocha replied that technicians were taking hours of work away from mechanics.

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Respondent contends that Rocha was fired because he did not respond to service calls, disregarded safety issues and was a bad example for other employees.

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In June, July and August Manriquez complained to Bean about Rocha's performance. Manriquez said his operators were complaining about Rocha's lack of timeliness in responding to their calls. Manriquez said he had to look for Rocha several times.

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²⁰ General Counsel's Exhibit 6.

Bean said that in June, July and August his shift supervisors, Danny Jimenez, Oscar Rodriguez and Jorge Manriquez complained about Rocha. They complained about Rocha's slow response to their service calls. Bean said he relayed these complaints to Elk.²¹

5 Pauly, Respondent's Quality Assurance Manager, testified that the washer/flume, a piece of equipment used to wash lettuce and vegetables, is a critical control point, i.e., a point in the process where a consumer of Respondent's product could be harmed. The flume trap in the washer is checked regularly to ensure that no foreign material has gotten into the product. When the washer/flume is serviced, old parts must be removed to prevent them from getting
10 into the product.

On June 21, washers were found in two bags of salad and the production lines were shut down for 30-35 minutes. More washers were found at the end of the flume. During her investigation of this incident, Pauly learned that Rocha had most recently worked on the flume.
15 When she confronted him, Rocha admitted he had worked on the flume and used washers like those found in the bags of salad. They went to the flume and found additional washers on the flume and on the floor. Rocha admitted he had not removed the loose washers from the flume.

In late July Pauly called Rocha because metal shards were found in the broccoli line.
20 Rocha said he was unable to assist because he was busy.²²

In August washers and a nut were found in room four where product is prepared. Pauly said that good manufacturing practice requirements (GMP), produced by the FDA, require that there be no foreign materials such as washers in the vicinity of product. These washers were
25 found within five feet of the product. According to Elk, unidentified mechanics told him Rocha left the washers on the floor when he replaced a railing. Elk told Pauly he had assigned Rocha to remove the railing. While Rocha admitted that he removed and repaired railings as part of his duties, he denied leaving any hardware in the production area. There is no evidence that Rocha ever received a written warning for during his probationary period.

30 On August 16, Respondent terminated Rocha for failure to meet his probationary period.²³

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40 ²¹ It is undisputed that during Rocha's probationary period in June, July and August Danny Jimenez, and Jorge Manriquez both worked the night shift while Rocha worked the day shift. Yet Jimenez' and Manriquez' testimony is consistent that they were complaining about Rocha's lack of diligence at night. Since Rocha and Hernandez worked the day shift during most of the probationary period, I find that Respondent's contention that these supervisors complained
45 about Rocha and Hernandez during their probationary period is dubious.

²² Rocha denied that Pauly asked his assistance in finding metal shards or that he refused to provide assistance. I credit Pauly's version of the facts. I found Pauly to be a credible witness who was responsive to questions, provided detailed answers and expressed no hostility. I found Rocha a non-responsive witness who had to be admonished to answer
50 questions. I found Rocha untruthful, particularly about receiving lockout training.

²³ General Counsel's Exhibit 9.

B. The Analysis

1. The 8(a)(1) Allegations

5 The Complaint sets forth four instances of 8(a)(1) conduct and in her brief Counsel for the General Counsel argues that there are seven additional examples of 8(a)(1) conduct that are not alleged in the Complaint.²⁴ The 8(a)(1) allegations discussed below in paragraphs a-d were contained in the Complaint.

10 a. On an unknown date in May and late July 2002, Cardoso interrogated employees about the Union activity of another employee.

15 In evaluating whether interrogation of employees concerning protected concerted activity violates Section 8(a)(1) of the Act, the Board has considered the totality of the circumstances. The Board considers whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act. *Westwood Health Care Center*, 330 NLRB No. 141, slip op. at page 7 (2000) See also *Rossmore House*, 269 NLRB 1176, 1178 fn 2 (1984).

20 In *Westwood Healthcare Center*, 330 NLRB No. 141 (2000) the Board discussed the test to determine whether interrogation is unlawful. The Board stated in *Westwood*,

25 We agree with our dissenting colleague that the applicable test for determining whether the questioning of an employee constitutes an unlawful interrogation is the totality-of-the-circumstances test adopted by the Board in *Rossmore House*, 269 NLRB 1176 (1984), *affd. sub nom. Hotel Employees Union Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), and adhered to by the Board for the past 15 years. [FN16] We also agree that in analyzing alleged interrogations under the *Rossmore House* test, it is appropriate to consider what have come to be known as "the Bourne factors," so named because they were first set out in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). Those factors are:

- 30 (1) The background, i.e. is there a history of employer hostility and discrimination?
- 35 (2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?
- (3) The identity of the questioner, i.e. how high was he in the company hierarchy?
- 40 (4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of unnatural formality?
- (5) Truthfulness of the reply.

45 ²⁴ An unpled but fully litigated matter may support an unfair labor practice finding despite a lack of an allegation in the complaint. *Hi-Tech Cable Corp.*, 319 NLRB 280, (1995) *Meisner Electric, Inc.*, 316 NLRB 597 (1995); "It is well settled that the Board may find and remedy a violation even in the absence of a specific allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Pergament United States*, 296 NLRB 333, 334 (1989), *enfd* 920 F.2d 130 (2d Cir. (1990). Here the complaint alleges other violations of Sec. 8(a)(1), including interrogations and threats. The additional

50 allegations set forth in Counsel for the General Counsel's brief were fully litigated at the hearing.

5 In analyzing whether interrogation of employees concerning protected concerted activity violates Section 8(a)(1) of the Act, the Board has considered the totality of the circumstances. In the final analysis, our task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act. *Westwood Health Care Center*, 330 NLRB No. 141, slip op. at page 7 (2000) See also *Rossmore House*, 269 NLRB 1176, 1178 fn 2 (1984). See *Cumberland Farms*, 307 NLRB 1479 (1992).

10 The record reflects that in May Cardoso had a conversation with Hernandez with Rocha, Guzman and Rodriguez present. Cardoso asked how long Moran had been speaking with the Union representative. However, as discussed below, Cardoso's interrogation of Hernandez was part of a larger effort by Cardoso and Elk to discourage employees from discussion union and other protected concerted activity. Thus, there is evidence that Cardoso not only inquired about where Moran was but warned employees not to speak to the Union or about the Union during work or company time. Cardoso threatened Moran and Rocha with discipline for speaking with Union representatives. Elk also interrogated employees about their Union sympathies and threatened loss of benefits.

20 Respondent contends that Cardoso, in warning Moran and Rocha, was merely enforcing employer policy so that employees would be productive and not engage in non work related activity during working time. However, the evidence does not support this argument. There is evidence that other employees, including Cardoso, discussed non-work subjects on work time. In this regard, Respondent permitted Hudson to conduct a meeting on work time to discuss preventing the Union from representing technicians. It appears that only talking about the Union or to Union representatives was prohibited. Moreover, Cardoso's statement to Hernandez that Moran was, "talking with the operators about the Union too much and stirring up the waters" belies his true motive in limiting employees from talking about the Union.

30 Under all of the circumstances, noting the numerous instances of threats and interrogations, I find that Cardoso's May interrogation of employees about Moran's Union activity violated Section 8(a)(1) of the Act.

35 There is no evidence that Cardoso interrogated an employee about the Union activity of another employee in July and I will dismiss that portion of the Complaint.

40 b. On or about August 7 or 8, 2002, Cardoso interrogated employees about the Union activity of another employee and threatened that the employee could get himself into trouble for speaking with a Union representative.

45 There is no evidence that Cardoso interrogated employees about other employee's Union activities or threatened employees for speaking to the Union on or about August 7 or 8. I will dismiss this allegation of the complaint.

c. On or about August 12, 2002, Cardoso told an employee he could be disciplined for talking with the Union.

50 The basic test for a violation of Section 8(a)(1) is whether under all the circumstances the employer's conduct reasonably tended to restrain, coerce, or interfere with employees' rights guaranteed by the Act. *Mediplex of Danbury*, 314 NLRB 470, 472, (1994). See, e.g., *Sunnyside*

Home Care Project, 308 NLRB 346 fn. 1 (1992), citing *American Freightways Co.*, 124 NLRB 146, 147 (1959).

5 A few days before Hernandez' termination on August 16, Cardoso asked Hernandez where Moran was because he was talking too much with the operators about the Union and that he was stirring up the water too much. When viewed in the totality of the circumstances, the clear implication behind Cardoso's statement that Moran was talking too much to the operators about the Union and stirring up the water too much was a threat of reprisal. As such this statement would reasonably tend to restrain, coerce and interfere with both Moran and
10 Hernandez' Section 7 rights and violated Section 8(a)(1) of the Act.

d. On or about August 12, 2002, Elk interrogated employees about their Union sympathies and threatened them with loss of benefits because of their support for the Union.

15 In general, it is unlawful for an employer to inquire as to the union sentiments of its employees. *President Riverboat Casinos of Missouri*, 329 NLRB 77 (1999).

20 In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), when an employer makes a prediction as to what effects unionization may have on its company, such a prediction is lawful where it is "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization." *Gissel at 618*.

25 On August 8 Elk held a meeting with technicians during work time. With Cardoso translating, Elk told employees that, "the company wanted to know who were the ones that wanted the Union." Elk said he thought that it was not necessary for the Union to defend them because they had good benefits. Elk also said that the technicians "could lose some benefits" if they had a union. Elk also said, "I'm not going to pay \$30 to Jose Rocha to defend me, if I have
30 a mouth to defend myself."

Elk's interrogation of employees as to which employees, "wanted the Union" is coercive of employees' rights guaranteed by Section 7 of the Act. *President Riverboat Casinos of Missouri, supra*.

35 Under *Gissel*, it is the Respondent's burden to show that Elk's statement was justified by objective evidence. See, e.g., *Schaumburg Hyundai*, 318 NLRB 449, 450 (1995); see also *Zim's Foodliner, Inc. v. NLRB*, 495 F.2d 1131, 1137 (7th Cir, 1974) (finding that *Gissel* places a "severe burden" on employers seeking to justify predictions concerning the consequences of unionization). *Gissel* requires more than a mere belief to make such a prediction lawful, because "employees, who are particularly sensitive to rumors of plant closings, take such hints as coercive threats rather than honest forecasts." *Gissel at 619*. See also *Turner Shoe Co.*, 249 NLRB 144, 146 (1980).

45 In this case Elk's prediction that employees could lose some benefits if they had a union was not justified by any objective evidence beyond Elk's mere belief and was not protected speech but rather was designed to threaten and coerce employees so that they would not exercise their Section 7 rights. Both Elk's interrogation and threat that employees would lose benefits violated Section 8(a)(1) of the Act.

50 Paragraphs e through k involve the violations of Section 8(a)(1) of the Act alleged in Counsel for the General Counsel's brief and fully litigated at the hearing.

e. In May 2002, Cardoso threatened to “fuck up” Moran for talking to Union representative Reynoso.

5 During Cardoso’s May interrogation of Hernandez about Moran speaking with the Union, Cardoso said Moran is taking too many privileges and he could fuck him up.

10 In *Beverly Health and Rehabilitation Services, Inc.*, 335 NLRB 635 (2001), the Board found an employer’s statement that employees who supported the Union were “going to get screwed” was coercive of employees’ rights and violated Section 8(a)(1) of the Act. I find Cardoso’s statement, in the context of Moran speaking with the Union, that he could “fuck him up” was designed to chill Moran’s Section 7 rights and violated Section 8(a)(1) of the Act.

15 f. In May 2002, Cardoso created the impression that Moran’s Union activities were under surveillance.

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

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

The Board further explained:

30 The idea behind finding ‘an impression of surveillance’ as a violation of Section 8(a)(1) of the Act is that employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways. Citing *Flexsteel Industries*, 311 NLRB 257 (1993). *Tres Estrellas de Oro*, 329 NLRB No. 3, slip op. page 1 (1999).

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40 In the course of Cardoso’s May interrogation of Hernandez concerning Moran speaking with Union representatives, Cardoso said I will wait a few minutes and that if he is there longer than his time for lunch, I will screw him up. Cardoso’s clear implication to the employees was that he was going to wait and observe Moran’s Union activities. Such a statement would lead employees to reasonably believe that their and Moran’s Union activities were being observed and it violates Section 8(a)(1) of the Act.

45 g. In June Cardoso threatened Moran and created the impression that his Union activities were under surveillance by telling Hernandez that Moran shouldn’t be talking to the Union representative during work time and that if Moran took too long he was “screwed.”

50 In June, while in the lunchroom with Hernandez, Rocha, Rodriguez, Guzman and Salazar, Cardoso said Moran shouldn’t have been talking to the Union representative during work time and if Moran took too long he would screw him. Like the statement Cardoso made in May, this statement created the reasonable impression that Cardoso had been observing

Moran's conversations with the Union representative and that there would be adverse consequences. Both statements violated Section 8(a)(1) of the Act. *Beverly Health and Rehabilitation Services, Inc.*, 335 NLRB 635 (2001); *Tres Estrellas de Oro*, 329 NLRB No. 3, slip op. page 1 (1999).

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h. In June 2002, Cardoso threatened Rocha by telling him that he could get a warning for talking to the Union.

10 In mid-June Cardoso was in the maintenance shop with Rocha and other mechanics. Cardoso told the Rocha not to talk to the Union or he would issue a warning. An employer's threat of suspension for engaging in union activities violates the Act. *Bestway Trucking, Inc.*, 310 NLRB 651, 671 (1993); *Q-1 Motor Express*, 308 NLRB 1267, 1277 (1992). Cardoso's threat to issue Rocha a warning for talking to the Union was coercive of his rights guaranteed under the Act and violated Section 8(a)(1) of the Act.

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i. In late June, Cardoso threatened Moran by telling Rocha to talk to Moran about talking to Union representative Diaz during company time and telling him he could get a warning.

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The record In late June Cardoso was in the maintenance shop with Rocha, Cardoso told Rocha to call it to Moran's attention "because it was during company time and he could get a warning." Moran had just been talking to Union representative Crescencio Diaz.

25 Having found above that Cardoso had no legitimate basis for limiting Moran's conversations with Union representatives, since only Union contact was prohibited, Cardoso's statements violated Section 8(a)(1) of the Act. *Bestway Trucking, Inc.*, 310 NLRB 651, 671 (1993); *Q-1 Motor Express*, 308 NLRB 1267, 1277 (1992).

30 j. In early July Cardoso threatened Rocha by telling him not to talk to the Union.

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In early July when Moran was speaking to Union representatives in the cafeteria, Cardoso told Rocha to call it to Moran's attention he should not be talking to the Union. At the same time, Cardoso also told Rocha not to talk to the Union. Like the statements Cardoso made above in paragraph I, the threat to Rocha violated Section 8(a)(1) of the Act.

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k. In late July Cardoso threatened Rocha by telling him not to talk to the Union and not to talk so much about per diem.

40 In late July in the lunchroom Rocha and Moran were talking to operators about per diem rates. Cardoso told Rocha not to talk during work hours with operators about per diem. In Cardoso's office in late July, Cardoso told Rocha not to talk too much to the Union. Both of Cardoso's statements violated Section 8(a)(1) of the Act. Cardoso was attempting to limit Rocha's ability to exercise Section 7 rights. *Bestway Trucking, Inc.*, 310 NLRB 651, 671 (1993); *Q-1 Motor Express*, 308 NLRB 1267, 1277 (1992).

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3. The 8(a)(3) Allegations

50 General Counsel contends that Respondent terminated Moran, Hernandez and Rocha because they engaged in union activities. Respondent argues that it terminated Moran, Hernandez and Rocha because they failed to complete their probationary period successfully.

Section 8(a)(3) of the Act prohibits employers from discriminating in regard to an employee's, "tenure of employment . . . to encourage or discourage membership in any labor organization."²⁵

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

15 The General Counsel has the initial burden of establishing that union activity was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3) of the Act. Once General Counsel has established its *prima facie* case, the burden shifts to Respondent to show that it would have taken the disciplinary action in the absence of protected activity. *Wright Line*, *supra*.

20 The standard in evaluating the lawfulness of a discharge does not change simply because the person discharged is a probationary employee. While an employer has wide discretion in deciding to terminate a probationary employee, an employer may not fire such an employee for discriminatory reasons. *Phillips Petroleum Co.*, 339 NLRB No. 111, slip op at page 4, fn 19.

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a. Eduardo Moran

30 Moran engaged in union activities on behalf of the Union as well as other protected-concerted activity. After June 6, Moran spoke to Union representatives several times at Respondent's facility and learned that the Union was trying to organize Respondent's technicians. In July and August Moran had conversations with employees about the Union. In July a machine operator named Omar told Moran that he heard the operators were trying to get rid of the Union. On about August 14, Omar and Moran had another conversation in Respondent's production area. Omar asked Moran if he would speak to the operators about the Union. Moran agreed to speak to the operators about his experience with the Union and the strike at Basic Foods. In July Moran, Hernandez, and Rocha met with Robinson to discuss per diem rates in El Centro. Robinson said they were on company time, they were wasting their time and to get back to work.

40 Respondent was aware of Moran's Union and protected-concerted activity. In addition to his presence at the July meeting with Robinson where the employees tried to discuss per diem, Cardoso admitted that he saw Moran talking to Union representatives in the cafeteria during Moran's lunch break in June, July and August. Further, Cardoso said he told Elk in June, July and August about Moran's Union activities. According to Elk, Cardoso told him in July that Moran was going over his lunch period talking to Union representative Diaz. However, Cardoso denied that Moran was taking too much time talking to Union representatives. Cardoso told Elk that Moran was using too much time talking about the Union during work hours. Elk admitted that in August he heard "scuttlebutt" that Moran wanted to be the maintenance department shop steward. On about August 14, Omar and Moran had a conversation in Respondent's

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²⁵ 29 U.S.C. Section 158(a)(3).

production area. Omar asked Moran if he would speak to the operators about the Union. Moran agreed to speak to the operators about his experience with the Union and the strike at Basic Foods. During this conversation, production supervisor, Danny Jimenez came within two feet of Moran and Omar two or three times. He was present for 10-15 seconds each time.

5

There is evidence of Respondent's anti union animus directed toward Moran by Cardoso. In May Cardoso had a conversation with Hernandez in which Cardoso asked how long Moran had been speaking with the Union representative. Cardoso said Moran is taking too many privileges and he could fuck him up. Hernandez replied that Moran was a Union leader. Cardoso said he isn't anything. Cardoso said I will wait a few minutes and that if he is there longer than his time for lunch, I will fuck him up. A month later, while in the lunch room with Hernandez, Rocha, Rodriguez, Guzman and Salazar, Cardoso said Moran shouldn't have been talking to the Union representative during work time and if Moran took too long he would screw him. A few days before his termination on August 16, Cardoso asked Hernandez where Moran was because he was talking too much with the operators about the Union and that he was stirring up the water too much.

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The timing of Moran's termination is also suspect as it occurred within weeks of his union activities that Respondent, through supervisors Elk and Cardoso, was well aware of.

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I find that General Counsel has established a prima facie case that Respondent terminated Moran because of his union and other protected concerted activity. The burden shifts to Respondent to establish it would have terminated Moran even in the absence of his union and other protected concerted activity.

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Respondent contends it fired Moran because he talked too much. Humphrys testified that the only reason Moran was fired was for talking too much. Between August 9 and 15 Elk called Humphrys to get permission to fire Moran and told her that while technically Moran was a good mechanic, he spent far too much time talking on the job. Elk gave contradictory testimony that Moran was not a good mechanic because he was not seeking out information from more experienced mechanics and was not reading instruction manuals. I have found this reason for firing Moran incredible. Elk also said that Moran did not know how to repair hoists. However, Cardoso said that by June, the start of the probationary period, Moran was no longer working on hoists. Moreover, Cardoso said he did not know Moran was having trouble repairing hoists until after August 16.

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Elk also testified that he had two conversations with Robinson about terminating Moran. The first conversation was the third week of July. Elk told Robinson there were two employees who might not make it through probation, Moran and Rocha. By this time both Elk and Cardoso were aware of Moran's Union activity and Cardoso had threatened Moran. The second conversation was the morning of August 16 after Elk had interrogated employees and after Robinson had expressed his animus toward the Union. It was not until August 16 that the decision was made to terminate Moran. The reasons for firing Moran proffered by Elk, that Moran wasn't going to make it because of his no call-no show and because, "he hadn't proved himself above and beyond," are inconsistent with the reasons given by Humphrys and are not supported by the evidence. Elk told Humphrys that Moran was a good worker, he just talked too much. I find that the reasons proffered by Respondent for Moran's termination are pretext and the reason Respondent he was fired Moran was because he talked to the Union and to employees about the Union, as the Respondent's witnesses have admitted. I find Respondent violated Section 8(a)(1) and (3) of the Act by terminating Moran.

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b. Lorenzo Hernandez

Hernandez also engaged in Union activity. In June Hernandez had a conversation with three fellow technicians about organizing the Union. Hernandez said Moran thought it would be a good idea for the technicians to join the Union so it would not be so easy for Respondent to terminate them. The next day Hernandez spoke to Moran about his conversation with the other technicians about joining the Union. After June 19 Hernandez talked to Moran and Rocha about the Union, per diem rates and other terms and conditions of employment at work. Hernandez was also present with other employees, including Rocha and Moran in a meeting with Robinson where employees asked for higher per diem rates.

There is no evidence that Respondent's was aware of Hernandez' Union activity. While Hernandez was present in early July at the meeting with Robinson where employees raised the issue of per diem, there is no evidence that Hernandez was an active participant or even spoke up during the meeting. Moreover, there is no evidence that Respondent harbored any animus toward Hernandez for his role in the meeting.

Knowledge of union or other protected-concerted activity is an essential element of General Counsel's prima facie case in establishing a violation of Section 8(a)(1) and (3) of the Act. *Western Plant*, 322 NLRB 183, 194 (1996). Counsel for the General Counsel argues knowledge should be inferred from discrediting Elk, from Hernandez' association with Moran at work and from Hernandez' failure to provide Cardoso with information about Moran's union activity. The discrediting of Elk's testimony cannot, without other evidence, establish facts essential to General Counsel's case. The mere fact that Hernandez associated with Moran or that Moran did not provide information to Cardoso about Moran likewise does not establish the essential element of employer knowledge of Hernandez' union or protected activity. *Pace Industries*, 320 NLRB 661 (1996). I do not find, in the absence of anti-union animus directed at Hernandez, that his participation in the early July meeting with Robinson was sufficient to establish that Hernandez' presence in that meeting supplied the reason for his discharge. I find that General Counsel has failed to establish a prima facie case that Respondent terminated Hernandez for engaging in union or protected-concerted activity and I will dismiss that portion of the Complaint.

c. Jose Rocha

Rocha too was engaged in Union activity. It is apparent that Rocha spoke with Union representatives at work because Cardoso told him to refrain from doing so. In early July when Moran was speaking to Union representatives in the cafeteria, Cardoso told Rocha to call it to Moran's attention he should not be talking to the Union. At the same time, Cardoso told Rocha not to talk to the Union. In mid June in the maintenance shop with other mechanics present Cardoso told Rocha not to talk to the Union people because he could give Rocha a warning. In Cardoso's office in late July, Cardoso told Rocha not to talk too much to the Union. Thus, by June Cardoso was aware of Rocha's Union activity and warned him not to speak to Union people. Elk's statement to the technicians on August 8 that, "I'm not going to pay \$30 to Jose Rocha to defend me, if I have a mouth to defend myself" is evidence of Respondent's knowledge of Rocha's Union activity or support for the Union.

In addition Rocha was engaged in protected activity. After June 19, Rocha spoke to employees in the maintenance shop and in the lunchroom about the amount of per diem employees were getting for work in El Centro. In early July Rocha and four to six other employees, including Moran and Hernandez met with Respondent's vice president for operations, Robinson. Guillermo Salazar told Robinson the employees were not getting enough

per diem. Robinson told the employees that they were on company time and to go back to work. In late July in the lunchroom Rocha and Moran were talking to operators about per diem rates. Cardoso told Rocha and Moran not to talk during work hours with operators about per diem. As of July Cardoso was also aware of Rocha's protected activity and told him to refrain from talking to employees.

Respondent's animus toward Rocha's Union and protected activities was supplied by Cardoso's warnings to Rocha to stop engaging in them as well as Elk's statement to technicians on August 8 that made reference to Rocha.

I find that General Counsel has established a prima facie case that Respondent terminated Rocha for engaging in Union and protected-concerted activities. The burden shifts to Respondent to show it would have fired Rocha in the absence of his Union or protected-concerted activity.

Respondent contends it terminated Rocha for not responding to calls, his disregard of safety issues, his lack of urgency and the poor example he set for others.

While I am dubious about the complaints lodged against Rocha for his failure to timely respond to service calls by supervisors Jimenez and Manriquez since they worked the night shift and Rocha worked the day shift in June, July and August, Respondent had valid grievances against Rocha for disregard of safety concerns.

Rocha admits that on June 21, while working on the flume he failed to remove loose washers. Later washers were found in two bags of salad, causing a shut down of the production lines for 30-35 minutes. This was a serious breach of safety considerations since the flume is a critical control point, i.e., a point in the process where a consumer of Respondent's product could be harmed. Pauly spoke to Rocha about her safety concerns. Rocha admits that Adelina Izquierdo, a quality assurance employee, found the washers in the shaker and told him not to let it happen again.

In late July Rocha demonstrated his lack of concern for the safety of the consuming public when he refused to assist Pauly because metal shards were found in the broccoli line. Pauly reported her displeasure with Rocha to Elk.

In August, about ten days before he was terminated, Rocha admitted he was working on a railing in room four where product is prepared when washers and a nut were found on the floor in the vicinity of the railing. This too was a serious breach of safety rules as good manufacturing practice regulations (GMP), produced by the FDA, require that there be no foreign materials such as washers in the vicinity of product. These washers were found within five feet of the product. Pauly again complained to Elk that Rocha needed to understand her concerns.

These three incidents, standing alone provided Respondent with sufficient justification for terminating Rocha.

Counsel for the General Counsel contends that Respondent's evidence regarding the safety issues was fabricated. However, I have credited the testimony of Pauly, whose observations form the basis for Respondent's decision to terminate Rocha. Moreover, Rocha admitted leaving the washers on the flume and admitted he was responsible for the railings in room 4.

In addition, General Counsel takes the position that Respondent should have provided Rocha with written warnings. By failing to follow its established disciplinary practice with respect to Rocha, General Counsel contends Respondent demonstrated disparate treatment of Rocha and showed its true purpose was to terminate him for engaging in Union or protected-concerted activity.

Respondent contends that during the probationary period no warnings were necessary since Respondent did not have to provide just cause for discharge.

I am mindful that an employer need not act with perfect consistency or justice in administering its business, and that I am not free to substitute my own for valid, even if seemingly harsh business judgments. *Denholme and Mohr, Inc.*, 292 NLRB 61 (1988). As has been frequently pointed out, management may discharge for good reason, a bad reason, or no reason at all. *Great Plains Beef Co.*, 241 NLRB 948 (1979).

There is no dispute that all of Respondent's employees, including Rocha, were subject to a period of probation in June, July and August. Under *Spruce Up*²⁶ Respondent, as a successor employer, set initial terms and conditions of employment, including a period of probation for all employees. Under the collective bargaining agreement with the Union, Respondent could terminate a probationary employee for any non-discriminatory reason. While there are numerous examples that supervisors continued to provide warnings during the probationary period, there is no evidence that this was required by Respondent. As Respondent argues, it had no reason to document discipline during probation since any non-discriminatory cause was sufficient to terminate an employee. During the probationary period Respondent likewise had no reason to provide progressive discipline since any individual valid cause was sufficient to terminate an employee. I conclude that Respondent's failure to warn Rocha for his safety lapses does not demonstrate disparate treatment indicative of an unlawful motive but rather is consistent with Rocha's probationary period. *Pace Industries*, 320 NLRB 661 (1996). I find that Respondent has established that it would have terminated Rocha despite his union or protected-concerted activity. I will dismiss this portion of the Complaint.

Conclusions of Law

1. By terminating Eduardo Moran on August 16, 2002 Respondent River Ranch Fresh Foods, LLC has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

2. By interrogating employees about the union activity of another employee, by threatening an employee with discipline for talking to a Union representative, by interrogating employees about their union sympathies, by threatening employees with loss of benefits if they supported the Union and by creating the impression that an employee's union activities were under surveillance Respondent River Ranch Fresh Foods, LLC violated Section 8(a)(1) and Section 2(6) and (7) of the Act.

3. Respondent River Ranch Fresh Foods, LLC has not otherwise violated Section 8(a)(1), or (3) of the Act, as alleged in the Complaint.

²⁶ *Spruce Up Corp.*, 209 NLRB 194 (1974)

Remedy

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

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

15 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁷

ORDER

20 The Respondent, River Ranch Fresh Foods, LLC, Salinas, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

- 25 a. Discharging or otherwise discriminating against any employee for supporting General Teamsters, Warehousemen, and Helpers Union, Local 890, IBT, AFL-CIO or any other union.
- b. Coercively interrogating any employee about their union support or others union activities.
- 30 c. Telling employees that they cannot talk about the union or with union agents during working hours.
- d. Threatening employees with loss of benefits if they support the union.
- 35 e. Creating the impression that employees' union activities are under surveillance.
- f. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

- 40 a. Within 14 days from the date of this Order, offer Eduardo Moran full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.
- 45

50 ²⁷ 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.

b. Make Eduardo Moran whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

5 c. Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Eduardo Moran, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

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

e. Within 14 days after service by the Region, post at its facility in Salinas, California copies of the attached notice marked “Appendix”²⁸ in both the English and Spanish languages. Copies of the notice, on forms provided by the Regional
20 Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or
25 covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 1, 2002.

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

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

40 Dated, San Francisco, California, January 8, 2004.

45 _____
John J. McCarrick
Administrative Law Judge

50 _____
²⁸ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading “POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD” shall read “POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.”

APPENDIX

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT discharge or otherwise discriminate against any of you for supporting General Teamsters, Warehousemen, and Helpers Union, Local 890, IBT, AFL-CIO or any other union.

WE WILL NOT coercively question you about your union support or activities or the union support or activities of your co-workers.

We WILL NOT tell employees that they cannot talk about the union or with union agents during working hours.

WE WILL NOT threaten employees with loss of benefits if they support the union.

WE WILL NOT create the impression that employees' 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 from the date of the Board's Order, offer Eduardo Moran full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Eduardo Moran whole for any loss of earnings and other benefits resulting from his discharge, 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 discharge of Eduardo Moran, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

RIVER RANCH FRESH FOODS, LLC

(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.

1301 Clay Street, Federal Building, Room 300N, Oakland, CA 94612-5211
(510) 637-3300, Hours: 8:30 a.m. to 5 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, (510) 637-3270.