

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

TELCOM USA, INC.

and

Cases Nos. 1-CA-40938  
1-CA-41193

UNION OF NEEDLETRADES, INDUSTRIAL &  
TEXTILE EMPLOYEES, AFL-CIO, CLC

*Elizabeth A. Varro and Lucy E. Reyes, Esqs.*, for the General Counsel.  
*John F. Welsh and Brian Pezza, Esqs.*, of Boston, MA, for the Respondent.  
*David M. Prouty, Esq.*, of New York City, NY, for the Charging Party.

Decision

Statement of the Case

*David L. Evans, Administrative Law Judge.* This case under the National Labor Relations Act (the Act) was tried before me in Boston, Massachusetts, October 20-24, 2003. On May 15, 2003,<sup>1</sup> Union of Needletrades, Industrial & Textile Employees, AFL-CIO, CLC (herein called the Union), filed the charge in Case 1-CA-40938 against Telcom, USA, Inc. (the Respondent). On August 26, 2003, the Union filed the charge in Case 1-CA-41193 against the Respondent. The charges allege that the Respondent has committed unfair labor practices under the Act. After administrative investigation of the charges, the General Counsel of the National Labor Relations Board (the Board) issued a complaint alleging that the Respondent has violated Section 8(a)(3) and (1) of the Act by certain acts and conduct. The Respondent duly filed an answer admitting that this matter is properly before the Board but denying the commission of any unfair labor practices.

Upon the testimony<sup>2</sup> and exhibits entered at trial,<sup>3</sup> and after consideration of the briefs that have been filed, I make the following findings of fact and enter the following conclusions of law.

I. Jurisdiction and Labor Organization's Status

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<sup>1</sup> Unless otherwise indicated, all subsequently mentioned dates are between May 15, 2002, and May 14, 2003.

<sup>2</sup> Credibility resolutions are based on demeanor and any other factors that I may mention in the decision.

<sup>3</sup> Certain passages of the transcript have been electronically reproduced; some corrections to punctuation have been entered. Where I quote a witness who restarts an answer, and that restarting is meaningless, I sometimes eliminate without ellipses words that have become extraneous; e.g., "Doe said, I mean, he asked ..." becomes "Doe asked ...". When quoting exhibits, I have retained irregular capitalization, but I have sometimes corrected certain meaningless grammatical errors rather than use "(sic)." All bracketed entries have been made by me.

The complaint alleges, and the Respondent admits, that at all material times the Respondent, a corporation with places of business in Lawrence and Tewksbury, Massachusetts, and in Plaistow, New Hampshire, has been engaged in the manufacture and sale of plastic lawn and garden products. Annually, the Respondent, in conducting its business operations, purchases and receives goods valued in excess of \$50,000 directly from suppliers that are located at points outside Massachusetts. The Respondent also annually sells and ships products valued in excess of \$50,000 directly to purchasers that are located at points outside Massachusetts. Therefore, at all material times the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. As the Respondent further admits, the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. The Alleged Unfair Labor Practices

### A. Facts

#### 1. Background and basic contentions

The Respondent manufactures polyurethane planters and garden accessories such as vases, urns, birdbaths and dog houses. (In plant parlance, all such items are generically referred to as “pots.”) The Respondent’s principal office and only production facilities are at Lawrence. At Tewksbury, the Respondent maintains a warehouse and shipping facility. At Plaistow, the Respondent maintains a repackaging, storage and shipping facility. The garden-accessories business is seasonal, with the busiest season for production being during the winter months when retailers are ordering and stocking for spring sales. The Respondent’s slack time usually comes in late spring or early summer, and it has historically shut down all of its facilities for a 2-week period that begins about July 4. Employees earn one or 2 weeks’ vacation per year; the Respondent encourages them to take their vacations during part or all the summer shutdowns. Additionally during the slack periods of summer, employees are allowed to take “extended vacations” which are unpaid leave periods. Many (if not most) of the Respondent’s employees are foreign nationals (mostly from the Dominican Republic); some of those employees have used the extended vacations to visit their countries of origin.

In August 2002, the Union began an organizing drive among the Respondent’s production and maintenance employees at all 3 facilities. On October 7, in Case 1-RC-21561, the Union filed a petition with the Board seeking an election to determine if the employees desired to be represented by the Union as their collective-bargaining representative. On November 7, the Board conducted such an election. The official tally of ballots disclosed that, of approximately 106 eligible voters, 47 ballots were cast for such representation while 52 were cast against. (There were no challenged ballots.) The Union filed objections to conduct affecting the results of the election and, pursuant to a report of a Board hearing officer, the election was set aside.<sup>4</sup> A re-run election was scheduled for June 19; however, the conduct of that election was blocked by the instant charges.

The complaint alleges that, in violation of Section 8(a)(3), the Respondent, on or about March 18 and April 24, issued warning notices to employee Julio Trinidad. The complaint further alleges that, also in violation of Section 8(a)(3), the Respondent on April 25 suspended Trinidad for a period of one day. The theory of the complaint is that the Respondent took these actions against Trinidad because of his activities on behalf of the Union. Trinidad’s union activities included delivering to the Respondent’s president a demand by the Union for recognition and serving as the Union’s observer in the November 7 election. The Respondent contends that it warned and suspended Trinidad solely because of his chronic tardiness and absences.

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<sup>4</sup> The finding of the hearing officer’s report was that the Employer (the Respondent herein) had submitted (albeit inadvertently) an inaccurate eligibility list.

During the summer of 2001, the Respondent laid off 28 employees; during the summer of 2002, the Respondent laid off 4 employees. (No evidence about layoffs before 2001 was offered.) In May 2003, the Respondent laid off 41 employees. As originally issued, the complaint alleged that all 41 of the 2003 layoffs violated Section 8(a)(3). At trial, however, the General Counsel moved to amend the complaint to allege that the Respondent selected only 20 of the employees for layoff because of their known or suspected union memberships, sympathies or activities. Those 20 employees (the alleged discriminatees) were:

Eduvigis Almonte	Jesús Moret
Heriberta Almonte	José Ortíz
Maritza Arias	Meralis Pastrana
Martina Arias	Angel Rivera
Manuel Cerda	Gilberto Santiago
Rafael DeJesús	Julio Trinidad
Orlando Fuentes	Ramón Valentín
Orlando Jimenez	Carlos Vargas
Eugenio Mejía	Luis Vargas
Samuel Morales	Hilda Vasquez

The General Counsel does not contend that the Respondent followed seniority in prior layoffs, and the General Counsel does not contend that the Respondent was required to do so in this case. The General Counsel contends, however, that the Respondent accomplished its selections for the 2003 layoff by hiring about 40 new employees early in the year of 2003, and then, when the layoff was called for, retaining some newer employees, and some less desirable senior employees, in preference to superior employees who had previously demonstrated that they favored the Union (including Trinidad). The General Counsel further contends that, in previous years, when layoffs were called for, the Respondent solicited employees to take extended vacations before laying any employees off, but in 2003 the Respondent did not do so. The General Counsel contends that, by failing to follow its past practice of soliciting and granting extended vacations, the Respondent increased its opportunities to lay off those who favored the Union. The complaint does not allege any independent violations of Section 8(a)(1), but the General Counsel contends that certain acts and conduct, including statements by the Respondent's president, reflect animus toward the prounion activities of its employees.<sup>5</sup>

The Respondent argues, and I agree, that by amending the complaint to allege only 20 unlawful selections for layoff, the General Counsel, in essence, concedes that the Respondent needed to lay off 41 employees in 2003. The Respondent contends that its supervisors selected employees for layoff strictly according to their abilities. Employees who were known to be antiunion, as well as prounion, were selected for layoff, and many prounion employees were retained. The Respondent contends that, in the past, it had not actively solicited employees to take extended vacations, although it has sometimes allowed employees to take extended vacations when they requested it. The Respondent further contends that one of the 20 alleged discriminatees requested the layoff, and the Respondent denies knowledge of any prounion sympathies that 5 of the other alleged discriminatees may have had.

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<sup>5</sup> The General Counsel concedes that the alleged statements by the Respondent's president occurred outside the 6-month limitations period of Section 10(b) of the Act.

## 2. The production process and job classifications involved

The Respondent's production process begins with a powder-pulverizer (pulverizer) operating a machine that pumps plastic pellets from a silo into a container and grinds them to a designated consistencies. A powder mixer (also referred to as a turbo mixer, and both referred to herein as a mixer) transfers the powder into a large mixing device to combine the powder with appropriate pigments. A powder-preparer measures the (pulverized, mixed) powder for injection into molds. A machine-operator inserts the prepared amounts into aluminum molds and cooks each mold for the specified amount of time; after a mold has sufficiently cooled, a hard plastic pot results. Table-operators remove the pots, trim off any extraneous plastic, repair any minor blemishes, and then move the pots to a conveyor belt that goes to the Lawrence painting, packaging and shipping areas.

Pots requiring decorative finishes are sent to an area where painters apply the desired ornamentation. Both the painted and unpainted pots are then taken off the belt by order-preparers who stack the pots onto pallets. Material-handlers use fork trucks to transfer the pallets either to storage at the warehouse section of the Lawrence facility or to trucks to be shipped to either the Tewksbury or Plaistow facilities for packaging and shipping to customers.

At Tewksbury and Plaistow, pallets are unloaded by material-handlers who transport them to storage or to points where order-preparers package the pots according to customer specifications. After the orders are fully prepared, material-handlers return and load the completed orders on outgoing trucks for shipment to the Respondent's customers.

Prior to the 2001 layoff, the Lawrence employees worked on three shifts on five production lines. After the layoff, only the Respondent's 2 newer production lines (Line 4 and Line 5) remained in operation, but the 3-shift operation continued for production at Lawrence. Second-shifts and third-shifts at Plaistow and Tewksbury, however, were discontinued at the time of the 2003 layoffs. Also prior to the layoffs, at Lawrence, the Respondent utilized one pulverizer and one mixer per shift. Following the layoffs, however, only the pulverizer and mixer on the first shift were retained. Trinidad had been a mixer on the second shift, and he is one of the alleged discriminatees who was laid off, allegedly in violation of Section 8(a)(3).

### 3. Union activities of Trinidad and others; evidence of animus

During the campaign, the Union produced a pamphlet entitled "Face Book." The Face Book contained photographs of 32 employees who supported the Union. Joint Exhibit-1 lists the pictured employees according to who was, and who was not, laid off. Nineteen of the pictured employees were not laid off, and they are not alleged discriminatees.<sup>6</sup> Thirteen of the 20 alleged discriminatees are pictured in the Face Book; to wit: Eduvigis Almonte, Heriberta Almonte, Maritza Arias, Cerda, DeJesús, Jiminez, Mejía, Moret, Ortiz, Trinidad, Valentin, Carlos Vargas and Vasquez. The Respondent concedes that it knew of the prounion sympathies of those 13 employees at the time of their layoffs. (Although the Respondent admits knowledge of Vasquez' prounion sympathies, it contends that she asked to be laid off.) Alleged discriminatees Martina Arias and Morales wore prounion insignia at work before their layoffs, and the Respondent also admits knowledge of their prounion sympathies. The Respondent, however, denies knowledge of any prounion sympathies that may have been held by alleged discriminatees Fuentes, Pastrana, Rivera, Santiago, or Luis Vargas. None of those 5 alleged discriminatees testified, the General Counsel offered no evidence that they engaged in any union activities, and the General Counsel offered no evidence that the Respondent suspected them of engaging in union activities. The General Counsel nevertheless contends that Fuentes, Pastrana, Rivera, Santiago, and Luis Vargas were laid off as a part of the Respondent's effort to rid itself of Union sympathizers.

Richard Pantanella is the Respondent's president. On October 7, alleged discriminatee Trinidad presented a written Union demand for recognition to Pantanella. When Trinidad went to Pantanella's office to do so, he was accompanied by 4 other employees; to wit, employee Javier Fantauzzi (who did not appear in the Face Book and who was not laid off), alleged discriminatee Morales (who did not appear in the Face Book), and employees Adolpho Javier and Miguel Rosario (both of whom appear in the Face Book but neither of whom was laid off). Trinidad, like many of the Respondent's employees, speaks little English. On October 7, Morales served as translator when Trinidad presented the Union's demand for recognition to Pantanella. Through a translator, Trinidad was asked and he testified:

Q. What did you say at the meeting?

A. That I had come to him to deliver him this letter and ask him to recognize the union. ...

Q. What did Mr. Pantanella say?

A. [Morales told me that] Mr. Pantanella said that no unions will be coming in there, that he would move the Company to Haverhill, New Hampshire, but that no unions would come in there.

The Respondent once had an operation in Haverhill.

Morales was asked and he testified:

Q. What did Mr. Trinidad say?

A. Basically he said that we were coming on behalf of the Union and that we wanted for Mr. Pantanella to recognize the Union, and he didn't want to.

Q. What did Mr. Pantanella say?

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<sup>6</sup> Pedro Sanchez was one of the 19 pictured employees who was not laid off. On brief, the Respondent states that employee José Fantuazzi, who was not laid off, is pictured in the Face Book. The copy of Joint Exhibit 1 that was initialed by the lawyers at trial, however, lists Sanchez as an employee who is pictured in the Face Book and who was not laid off. The initialed exhibit does not list Fantuazzi. The difference is inconsequential, however, because the circumstances of Fantuazzi and Sanchez are ultimately the same; both were known Union adherents, and neither was laid off.

A. That he'd rather move the Company outside of the city or even outside of the state before accepting the Union in the Company.

Trinidad and Morales further testified that Pantanella asked the gathered employees to write down their names on a piece of paper, but the employees refused. Pantanella then made a telephone call, and Scott Watkins, the Respondent's human resources manager, appeared shortly thereafter. Pantanella showed Watkins the Union's demand letter and asked Watkins if he knew the names of the 5 gathered employees; Watkins replied that he did. Watkins then asked the employees why they wanted a union. No employee answered Watkins's question. Trinidad stated that the employees had come only to deliver the letter. The employees then left Pantanella's office. Pantanella did not testify; Watkins testified, but he did not deny this testimony by Trinidad and Morales; I found their testimony to be credible.

Trinidad served as one of 2 Union observers at the November 7 Board election. Trinidad testified, without contradiction, that he had duly informed his supervisor of his prospective absence for that purpose. The other Union observer at the Board election was alleged discriminatee Eduvigis Almonte. The hearing on the Union's objections to the November 7 election was conducted on December 9 and 10. The only employees who appeared for the Union at that hearing (the post-election hearing) were Trinidad and Almonte.

The Respondent conducts quarterly meetings of its employees and supervisors. Pantanella conducted the January 2003 meeting of the second-shift employees; supervisor José Camilo served as translator (again, many of the Respondent's employees are not fluent in English). Trinidad testified that during the meeting he addressed Pantanella and asked why the employees who had been laid off in 2001 and 2002 had not been recalled. Pantanella replied that they had not been recalled because they had been a "bad influence." On cross-examination, Trinidad acknowledged that, also during the January meeting, Pantanella told the employees that he did not care whether they voted for or against the union in any re-run of the November 7 Board election; Trinidad further acknowledged that Pantanella also stated that there would be no retaliation against the people who supported the Union.

Rosario (who, again, accompanied Trinidad to present the Union's demand for recognition to Pantanella on October 7) was still employed by the Respondent on its second shift at time of trial. Rosario testified that he also attended Pantanella's January meeting with the second shift. Rosario testified that Pantanella replied to Trinidad's question that "those people were a bad influence for the Company, that they had a negative impact on the Company and on the employees."

Again, Pantanella did not testify. Watkins and Camilo gave essentially identical testimony that Pantanella said no more to Trinidad than that the Respondent was a "performance" company and that employees who performed better were not laid off. Trinidad and Rosario impressed me favorably. Moreover, Rosario, being a current employee, had nothing to gain and much to lose by giving false testimony.<sup>7</sup> As well, I find it proper to draw an adverse inference against the Respondent for its failure to call Pantanella to testify on the point or explain why it did not call him.<sup>8</sup> I therefore credit Rosario's and Trinidad's testimonies and find that, at the January meeting, Trinidad asked Pantanella how employees had been selected for previous layoffs and why they had not been recalled, and I find that Pantanella replied that "those people were a bad influence for the Company, [and] they had a negative impact on the Company and on the employees."

<sup>7</sup> See *Federal Stainless Sink Division of Unarco Industries, Inc.*, 197 NLRB 489, 491 (1972) and cases cited therein.

<sup>8</sup> See *Property Resources Corp.*, 285 NLRB 1105, 1105 fn. 2 (1987), enfd. 863 F.2d 964 (D.C. Cir. 1988), where the Board explained that: "An adverse inference is properly drawn regarding any matter about which a witness is likely to have knowledge if a party fails to call that witness to support its position and the witness may reasonably be assumed to be favorably disposed to the party."

Also in January, Rafael Garcia applied for employment with the Respondent. Garcia was interviewed by Watkins. Watkins testified that he told each 2003 applicant about the status of the representation case and that the Respondent might become a “union shop within the future.” Garcia, however, testified that during his interview Watkins also asked him “what did I think about the Union.” Garcia testified that he replied that the Union was “not important” to him and that he was only interested in working. Garcia was hired, but he was laid off on May 5; Garcia, however, is not an alleged discriminatee. Watkins denied that he asked Garcia, or any other applicant, how he felt about the Union, but Garcia was a former employee with no apparent reason to lie under oath, and I found him credible.<sup>9</sup>

#### 4. Warning notices issued to, and suspension of, Trinidad

##### a. The General Counsel’s case-in-chief

The Respondent’s employee handbook contains a progressive disciplinary system for instances of absences and tardiness (or attendance violations, as I shall collectively call them). The first 2 steps of the Respondent’s disciplinary attendance system are:

1. Employee is absent or tardy from work five (5) times in a six-month period. Step [i.e., prescribed discipline]: Employee should receive a written warning from their supervisor stating this type of behavior is unacceptable.
2. Employee is absent or tardy once more in the next sixty (60) days following the written warning. Step: Employee is placed on a Performance Improvement Plan (PIP) and suspended for one (1) day.

Step 3 of the progressive disciplinary system is that an employee will be suspended for another day and given a final warning if he or she is absent or tardy on one more occasion during the 60-day period that is prescribed by Step 2. Step 4 is that an employee will be terminated if he or she is again absent or tardy during the period.

Trinidad testified that on March 18 second-shift production supervisor Alan Carter motioned for him to go to an office. In the office, when no one else was present, Carter said something to Trinidad in English, but Trinidad did not understand because there was no translator present. Carter also showed Trinidad a paper that Trinidad could not read because it was in English. Carter further indicated that Trinidad should sign the paper. Trinidad expressed to Carter, as best he could, that Carter should summons supervisor Camilo to act as translator, but Carter refused. Trinidad indicated that he would not sign the paper, and he left the office.

As a copy of a warning notice that Carter issued to Trinidad on March 18, the Respondent introduced a form that is prefaced by the boilerplate statement that:

This form is to be used by supervisors-managers as a means of documenting performance, attendance, or behavior problems that arise or begin to develop where the nature of the situation at that time does not warrant implementation of a Performance Improvement Plan (PIP). The form should be completed after the discussion with the employee has taken place. The supervisor/manager should be very specific since the contents of this form may become an important reference if the performance of the employee does not improve. [Underlining original.]

<sup>9</sup> The complaint does not allege that Watkins’ question to Garcia violated Section 8(a)(1), but upon that one question the General Counsel submits a request that the Board draw an inference that the Respondent conducted systematic interrogations of all employees. I have made the necessary credibility resolution, but I do not agree that the requested inference is proper.

Carter had written on the document, before asking Trinidad to sign it:

You have been Absent/Tardy at least five (5) times in the past 6 months, specifically the following dates: 11/7, 11/15, 12/30, 12/24, 12/25, 1/8-1/18, 2/17, 2/27, 3/4, 3/6.

In a following space for "Action to be taken," Carter had written:

If you are absent or tardy one (1) more time in the next sixty (60) days, you will be suspended for one (1) day and put on a PIP (Performance Improvement Program). You are not to be absent [or tardy?] between today's date and 5/18.

Trinidad testified, without contradiction, that Carter did not give him a copy of this warning notice.

Under the Respondent's disciplinary attendance system, an absence of 2 or more consecutive days for illness is counted as only one absence. Trinidad had claimed illness during the period of January 8 through 18.<sup>10</sup> Therefore, the March 18 warning notice was for 10 instances of absences or tardiness in 6 months.<sup>11</sup> November 7, again, was the date of the Board election at which Trinidad served as the Union's observer. On December 25, the Respondent's plant was closed. On March 6, Trinidad was involved in an automobile accident on the way to work, and he duly produced documentation to Carter to attest to that fact.

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<sup>10</sup> The Respondent investigated Trinidad's illness claim on the suspicion (reasonably founded, I find) that Trinidad was lying. The Respondent, however, found no evidence to dispute Trinidad's claim of illness.

<sup>11</sup> On brief, the Respondent relies on attendance records to assert that Trinidad was absent or tardy 16 times during the period; however, because Carter did not list any of the other occasions on the March 18 warning notice, he had apparently excused the other 6 instances before he composed the warning notice. Additionally, the Respondent's brief erroneously counts Trinidad's absence from January 8 through 18 as 2 chargeable periods of absence.

Trinidad was late for work on April 21. (Again, tardiness and absences have the same effect under the Respondent's disciplinary attendance system.) On April 24, in the office of James Kirkiles, the Respondent's warehouse manager, Trinidad met with Kirkiles, Carter and Neila Munoz. Munoz, who is a secretary/receptionist that works directly under Kirkiles, served as translator.<sup>12</sup> Trinidad testified that Kirkiles told him that on March 18 Carter had given him a warning notice and had told him that if he was late or had another absence he would be suspended for a day. Trinidad protested that he had not known that he had had a warning because no one had translated for him when he met with Carter on March 18. Kirkiles asked Carter if employee (and group leader) Robert Enrique had been present to translate. Carter replied that Enrique was there and that Enrique had translated. Trinidad, however, insisted that that was not true. The supervisors sent for Enrique. Trinidad further testified that, when Enrique arrived, he affirmed that he had served as translator at the March 18 meeting. Carter and Kirkiles thereafter handed Trinidad a "Performance Improvement Counseling Memorandum (PIP)" which recited that:

You were absent/tardy on 4/21/03. You already received a Written Warning for this. In order to restore your performance to an acceptable level, you will be suspended for one day on Fri. 4/25/03."

Trinidad signed the warning notice, and he served the suspension as directed. (Enrique did not testify.)

#### b. The Respondent's evidence on Trinidad's warning notices and suspension

Human Resources Manager Watkins testified that the Respondent's disciplinary attendance policy was a "no-fault" policy, meaning that, whether or not an employee has an excuse such as a physician's note, an absence, or an instance of tardiness, is counted against an employee. When asked if there were any exceptions so that an absence or instance of tardiness would not be counted against an employee even under the no-fault system, Watkins replied that the exceptions were on-the-job injuries, hospitalizations, pre-approved unpaid vacation time, and a death in the family. Watkins added, "and I'm sure there's other instances that the manager would bring to my attention." Citing this testimony by Watkins, the Respondent states on brief, p. 18: "Within the structure of the Policy and despite its generally 'no fault' character, supervisors have the authority to ignore certain absences or instances of tardiness, depending on the circumstances." For the proposition that individual supervisors have the authority to decide which attendance violations will count against an employee, the Respondent also cites the following testimony of Carter:

Q. Is there a protocol that you, that you follow in determining when an employee needs to be disciplined for attendance problems?

A. After five days, within a six month period, whether it be tardy or absent.

Q. Are there exceptions?

A. Yes.

Q. Can you list the exceptions, the things that would not count in those, the five days?

A. If somebody was to get in a car accident on their way to work, I would ... look at it as excused.

Q. Okay. Is that something that the Company has, has told you, or is that your own policy?

A. That's my own, nobody has ever said either way.

Q. Okay. So, you are left to interpret the attendance policy in the way that you think is appropriate for your employees?

A. So to speak, yes.

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<sup>12</sup> Trinidad misidentified the April 24 translator as Camilo; my finding that Munoz was the translator is based on the Respondent's testimony and the documentation.

As well, third-shift supervisor Efren Rodriguez testified that he may not count all otherwise unexcused attendance violations against employees because “on third shift it was an attendance problem. So, I would just use my judgement on that to [decide] if I would excuse it or not or write them up.”

When Carter was on direct examination, the Respondent’s counsel asked what he could remember of the March 18 meeting with Trinidad. Carter replied that he could remember “[o]nly the part that he refused to sign.” Then the Respondent’s counsel asked Carter twice if anyone else was present during the meeting; both times, Carter replied that he could not remember. That is, Carter did not dispute Trinidad’s testimony that, when Carter presented the March 18 warning notice to Trinidad, (a) no interpreter was present, (b) Trinidad asked for an interpreter, and (c) Carter refused. Further on direct examination, Carter testified that it had been a “mistake” for him to have included in the March 18 warning notice a reference to November 7 (when Trinidad had served as the Union’s observer at the Board election) and that it was another mistake to have included December 25 (when the plant was closed). On cross-examination, Carter further acknowledged that his including a reference to March 6 in the March 18 warning notice was also a mistake because he had known that Trinidad had been in an automobile accident on the way to work, and he does not count such instances of tardiness in disciplining employees. Carter did not offer any explanation for his 3 mistakes on the March 18 warning notice. Other than to correctly name Munoz as the translator, neither Carter nor Kirkiles disputed Trinidad’s account of the April 24 meeting in which Trinidad was issued the second warning notice and ordered to serve the April 25 suspension.

#### c. Evidence of disparate treatment of Trinidad

Supervisors keep their own records of employees’ attendance violations. Also, employees’ attendance and punctuality are recorded electronically and memorialized in documents called “punch details.” The punch details for employee José Tavares reflect that in 2002 he was tardy on May 2, 9, 21, and 22, June 3, July 22, August 5, 7, and 9, and September 11 and 18; Tavares was also absent on July 31. Tavares’ personnel file reflects that he received no discipline for these 12 attendance violations within a 6-month period. Tavares reported to Carter during that period. When asked to explain why Tavares had not been issued a warning notice for these attendance violations, Carter answered that the punch details do not show when an instance of tardiness or absence is excused and that he may have excused Tavares’s being tardy because Tavares had called on some of the occasions to report that he was delayed in traffic on the way to work. Carter then testified that he excuses employees when they are tardy because of traffic if they call in to report it. Carter did not remember if, in fact, any of Tavares’s tardiness events had occasioned such a call.

The punch details further reflect that Luis Vargas (an alleged discriminatee, but one for whom no union activity or allegiance was demonstrated by the General Counsel) was tardy 43 times and absent once during the period from March 1 through May 20, 2002. The Respondent did not discipline Vargas for any of these attendance violations. Camilo, Vargas’s supervisor during that period, testified that Vargas had an alcohol problem, but he did not testify that he had considered any of Vargas’s instances of tardiness to be excused for that reason.

Third-shift employee Amaury Veloz was absent or tardy, without being disciplined, 10 times between December 2002 and April 2003. Third-shift supervisor Rodriguez testified that Veloz’ attendance violations were not excused, but that the “third shift is really hard to get attendance and to have a full group of guys working. So like I said, I would do things differently.”

On June 16, 2002, Rodriguez issued to third-shift employee Juan Torres a warning notice for being absent or tardy on 5 dates within the prior 6 months. Torres had a good record thereafter until the period of September 8, 2002, through March 2, 2003. During that six-

month period, Torres was absent 8 times and tardy 6 times, but he was not issued a warning notice. The Respondent's counsel asked Rodriguez about how he came to issue the June 2002 warning notice to Torres, but Counsel did not ask Rodriguez why he decided not to warn Torres for his second round of attendance violations.

On brief, in response to this evidence of disparate treatment, the Respondent points to evidence that in 2003 it did issue a warning notices for 5 attendance violations to Tavares and to employee Adolfo Javier.<sup>13</sup> From January 6 through February 21, Tavares was tardy or absent 5 times. For those violations, Carter issued him a warning notice on March 27, as Tavares's personnel file indicates. The personnel file of Javier indicates that on March 4 Carter issued him a warning notice for being absent or tardy 5 times from January 3 through March 1.

## 5. The Respondent's selections for the 2003 layoff

### a. The General Counsel's evidence

#### (1) The General Counsel's witnesses

Alleged discriminatee Trinidad, who was hired by the Respondent on August 30, 1999, was working as a mixer on the second shift (2:30 p.m. until 10:30 p.m.) at the Lawrence facility when he was laid off on May 1. Trinidad testified that, "around May" in years prior to 2003, supervisors would come around and ask if employees wanted to take extended vacations. If the employees did, they were allowed to do so. Trinidad testified that in April 2003, however, with Camilo acting as translator, he asked Carter if he could take his vacation from May 16 until June 2. Carter replied that that would be "fine," and Carter filled out a form for Trinidad to sign. On May 1, Trinidad was called to Kirkiles's office where he met with Kirkiles, Watkins, Carter and Camilo (who again served as translator). Kirkiles told Trinidad that he was laid off because work was "a bit slow." Trinidad asked why he was being laid off since he was "the second one in seniority [on the] second shift." Trinidad testified that Kirkiles responded that "seniority didn't count there, and there was no such thing as seniority."

Alleged discriminatee Morales, who was hired by the Respondent on February 28, 2000, was working as a powder-preparer, on the first shift (from 6:30 a.m. until 2:30 p.m.) at the Lawrence facility when he was laid off on May 1. As mentioned above, Morales accompanied Trinidad when Trinidad delivered the Union's demand for recognition on October 7 to Pantanella. Morales testified that he learned about the layoff when Watkins told him that the Respondent was laying him off because "he didn't need me at that moment" because the Company was going through a financial crisis.

Alleged discriminatee Eduvigis Almonte, who was hired by the Respondent on March 25, 1999, was working as a material-handler at the Plaistow facility on the first shift when he was laid off on May 2. Almonte testified that he wore Union caps and T-shirts to work. As noted above, Almonte served as one of the Union's 2 observers at the November 7 election, and he appeared for the Union with Trinidad at the post-election hearing. Almonte's supervisor was Plaistow warehouse supervisor Jason Cadger. According to Almonte, in May of prior years supervisors gave employees forms to sign up for vacations and extended vacations. As Almonte explained: "Those forms were used for us to request vacation and the forms were ready if we wanted to request a vacation and also we had the chance to request extended vacation." Almonte testified that the forms were not passed out by supervisors in 2003. Almonte further testified that, when he was laid off on May 2, he knew of 5 other material-handlers who had been hired after him who were not being laid off. When Watkins told him that he was being laid off, Almonte ask why less senior employees were being retained. Watkins, according to Almonte, replied that the Respondent did not recognize seniority and that it was none of

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<sup>13</sup> The Respondent does not mention the June 16, 2002, warning notice to Torres.

Almonte's business anyway.

Alleged discriminatee Valentin, who was hired on June 21, 1999, was a powder-preparer under Rodriguez on the third shift when he was laid off on May 16. Valentin regularly wore pronoun insignia to work, and his picture appeared in the Union's Face Book. Valentin testified that in years prior to 2003, when work slowed as the summer was approaching, "The supervisor came with a list in May and he wanted to know who wanted an extended vacation; they offered extended vacations." In April 2003, however, Valentin (like Trinidad) took the initiative. Valentin approached Kirkiles to ask for an extended vacation. Valentin further testified that on May 16, when Kirkiles told him that he was being laid off, he asked Kirkiles why he was being laid off and junior employees were being retained; Kirkiles responded that seniority "didn't have any worth." Valentin further testified that he visited the Lawrence plant twice after he was laid off; each time he saw George Lopez doing the powder-preparer work that he had previously done. According to Valentin, before the layoff Lopez had no fixed job assignment.

Alleged discriminatee Hilda Vasquez, who was hired by the Respondent on January 7, 1999, had been on extended sick leave since April 8 when she was laid off on May 2. The Respondent's position on Vasquez' layoff is that Vasquez volunteered for the layoff. Before her layoff, Vasquez worked in the packing department at Plaistow under supervisor Rafael Soto. Vasquez appears in the Face Book, and she testified that she twice wore a Union cap to work. Vasquez testified that she took extended vacations in 2000, 2001 and 2002. When asked about how employees knew to apply for extended vacations, Vasquez, who testified through a translator, replied that Soto, "had already told us that whoever wanted to go on vacation had to fill out the forms and so then each one would go to him and say, 'Give me the papers.'"

About her layoff, Vasquez testified that Watkins called her at home and told her to come to the plant. (Again, at that time Vasquez was on extended sick leave.) When Vasquez arrived, she spoke to Watkins through "the secretary" who served as translator. Watkins told Vasquez that, "because the work had slowed down, he was going to give me a layoff." Vasquez testified that she replied "that it was fine because I had been out of work for a little more than a month." Watkins gave her some papers which, as Watkins explained it through the secretary, was "for the 401 check and for the [health insurance] plan." Vasquez flatly denied that she had previously asked to be laid off or that she volunteered to be laid off at that time.

Alleged discriminatee Maritza Arias, who was hired on November 11, 1999, was working in the packaging area of the Plaistow operation when she was laid off on May 2. Arias is pictured in the Face Book. When asked how extended vacations were handled in 2002, Arias testified that the supervisors "started giving out the forms for the vacations for whomever wanted to take a vacation they had to do it that way."

None of the other alleged discriminatees testified.

## (2) Written evaluations of the alleged discriminatees

The General Counsel introduced the personnel file of each of the 41 employees who were laid off in 2003. Annually, the Respondent provides to supervisors forms entitled "Employee Performance Appraisal." The form (referred to at the hearing as "the evaluation") consists of 2 sections. The first section of the evaluation form (untitled, but which I shall call the ratings section) is divided into the following seven areas (with the numbering system being my creation, not the Respondent's, and the capitalization being original): (1) Attendance and Punctuality, which is composed of 3 categories: (a) Works required days, (b) Reports to work on time, and (c) Returns from break on time; (2) Attitude, which is composed of 4 categories: (a) Exhibits a positive attitude, (b) Demonstrates dependability, (c) Interacts well with co-workers, and (d) Accepts correction from management in a positive manner; (3) Learning Ability, which

is composed of 2 categories: (a) Understands and applies instructions, and (b) Knows and applies Company policies and procedures; (4) Job Knowledge, which is composed of 3 categories: (a) Knows and understands the specific requirements of the job, (b) Displays the ability to perform the technical skills required by this job, and (c) Displays the ability to successfully teach and develop other employees; (5) Quality and Quantity of Work, which is composed of 3 categories: (a) Starts and completes assignments on time, (b) Uses proper work techniques to provide an expected volume of output, and (c) Work is accurate and requires minimal amount of direction; (6) Communication, which is composed of 2 categories: (a) Has the ability to effectively communicate with employees at all organizational levels, and (b) Communications are timely and intelligent when oral/written; and (7) Decision Making, which is composed of 2 categories: (a) Exercises good judgment when making decisions, and (b) Seeks approval and advice in situations outside level of expertise and authority.

The ratings section of the evaluation form utilizes a 1- to 5-point system. In the system, 1 is “Consistently performs at an unacceptable level”; 2 is “Performance is less than satisfactory. Performs some duties in an acceptable manner but requires substantial improvement to reach a satisfactory level”; 3 is “Consistently performs at a satisfactory level in all areas and meets job requirements”; 4 is “Consistently performs at a satisfactory level and frequently exceeds job requirements in some areas”; and 5 is “Consistently performs at an exceptional level and exceeds all job requirements.”

The second section of the evaluation form, entitled “Performance Summary,” calls for supervisory comments about the employee’s overall performance; it has areas designated “Main Strengths,” “Areas Needing Improvement,” and “Evaluator’s Summary.” The form reflects that each supervisor’s annual evaluations of employees are reviewed by an “Evaluator’s Manager” and by “Human Resources.”

Immediately below, I summarize the evaluations of the alleged discriminatees for whom the General Counsel has presented a *prima facie* case and for whose layoffs the Respondent has presented defenses that relate to their work histories. (That is, I omit the evaluations of Fuentes, Pastrana, Rivera, Santiago, and Luis Vargas for whom, as I subsequently find, the General Counsel did not present a *prima facie* case; I also omit the evaluations of Trinidad and Moret whose jobs, the Respondent contends, were abolished; and I omit the evaluations of Vasquez who the Respondent contends volunteered for layoff.) Not all 2003 evaluations had been performed by the time of the layoff. For the supervisors’ comments, where words are apparently missing and it is *not* clear what was intended, I have entered in brackets, with a question mark, what I believe to have been intended. Where the intention is clear to this finder-of-fact, I include no question mark in my bracketed entries. The last 2 evaluations that are contained in the personnel files (if there are 2) and other relevant contents of the files of the alleged discriminatees (including warning notices, if any) are summarized as follows:

(1) Eduvigis (“Uva”) Almonte (a material-handler who was hired on March 25, 1999, and who the Respondent contends was selected for layoff because of his attitude and mistakes): (a) On March 30, 2001, Bill Scholfield, warehouse supervisor, rated Almonte at 4s for all categories of all areas, except for a 5 in the Attitude category of “Accepts correction from management in a positive manner,” a 3 in the Job Knowledge category of “Displays the ability to successfully teach and develop other employees,” 3s in the Communication categories of “Has the ability to effectively communicate with employees at all organizational levels” and “Communications are timely and intelligent when oral/written,” and a 3 in the Decision Making category of “Exercises good judgment when making decisions.” In Almonte’s 2001 Performance Summary, at Main Strengths, Scholfield entered: “Works very well in all areas; Uva never complains when you need him to stay late or come in early.” At Areas Needing Improvement, Scholfield entered: “Communication: ‘Uva is going to school’ to improve his English speaking.” In Almonte’s 2001 Performance Summary, Scholfield wrote nothing in the space captioned Evaluator’s Summary. (b) On March 5, 2002, Scholfield completed a Performance Summary for Almonte, but there is

no 2002 ratings form for Almonte in his file. In Almonte's 2002 Performance Summary, at Main Strengths, Scholfield entered: "Has a positive attitude toward change. Applies himself. Will work at any facility." At Areas Needing Improvement, Scholfield entered: "Additional Training on [scanning equipment]; repeat English class." At Evaluator's Summary, Scholfield entered: "Eduvigis works very well with all supervisors and group leaders."

(2) Heriberta Almonte (an order-preparer who was hired on January 7, 1999, and who the Respondent contends was selected for layoff because she was a slow learner and slow worker): (a) On January 18, 2002, Scholfield rated Almonte at 3s in every category of every area, except for 4s in all categories of Attendance and Punctuality, 4s in the Attitude categories of "Exhibits a positive attitude" and "Demonstrates dependability," a 4 in the Quantity and Quality of Work category of "Work is accurate and requires minimal amount of direction," and a 4 in the Decision Making category of "Seeks approval and advice in situations outside level of expertise and authority." In Almonte's 2002 Performance Summary, at Main Strengths, Scholfield entered: "A very hard worker; willing to help co-workers; adjusts well with changes." At Areas Needing Improvement, Scholfield entered: "Learn pot label machine." At Evaluator's Summary, Scholfield entered: "Would like to see Heriberta become a backup for the pot label machine if Hilda's [Vasquez is?] out." (b) On January 8, 2003, packaging supervisor Edwin Montanez rated Almonte at 3s in every category, except for a 2 in the Job Knowledge category of "Displays the ability to successfully teach and develop other employees," 2s in both categories of Communication, and a 2 in the Decision Making category of "Exercises good judgment when making decisions," 4s in the Attendance and Punctuality categories of "Works required days" and "Reports to work on time," and 4s in the Attitude categories of "Exhibits a positive attitude," "Demonstrates dependability" and "Interacts well with co-workers." In Almonte's 2003 Performance Summary, at Main Strengths, Montanez entered: "Heriberta's main strength is her positive attitude about her job. For example, she is always on time, and when asked to work overtime she does not hesitate to work." Under Areas Needing Improvement, Montanez entered: "Needs to improve on her English." At Evaluator's Summary, Montanez entered "Heriberta is a good worker with a positive attitude."

(3) Maritza Arias (an order-preparer who was hired on November 10, 1999, and who the Respondent contends was selected for layoff because she was a slow worker and not a team player): (a) On November 12, 2001, supervisor Deborah Christophersen<sup>14</sup> rated Arias at 3 in all categories, except for a 2 in the Job knowledge category of "Displays the ability to successfully teach and develop other employees," a 2 in the Communication category of "Communications are timely and intelligent when oral/written," 4s in the Job Knowledge categories of "Knows and understands the specific requirements of the job" and "Displays the ability to perform the technical skills required by this job," and a 4 in the Quantity and Quality of Work category of "Uses proper work techniques to provide an expected volume of output." In Arias' 2001 Performance Summary, at Main Strengths, Christophersen entered: "Very capable of maintaining both box label machines without any assistance; knows the pallet setup for all customers; a quick learner; never complains when moved around on the line; keeps her work area clean." At Areas Needing Improvement, Christophersen entered: "Communicating with supervisors." At Evaluator's Summary, Christophersen entered: "Would like to see Maritza take English classes. She is a very quick learner and has a lot of potential but needs to be able to communicate with [her] supervisor." (b) On December 2, 2002, Montanez rated Arias at 3s in all categories, except for a 2 in the Attendance category of "Returns from breaks on time," a 2 in the Learning Ability category of "Understands and applies instructions," a 2 in the Job Knowledge category of "Displays the ability to successfully teach and develop other employees," 2s in both categories of Communication, and 2s in both categories of Decision Making. In Arias' 2002 Performance Summary, at Main Strengths, Montanez entered: "Maritza is a very hard worker and does what she needs to get the job done. Maritza also knows how to change over the

<sup>14</sup> Christophersen did not testify. A table of organization that the General Counsel placed in evidence indicates that Christophersen's position is "Distributor Order Logistics Supervisor."

label when she is asked.” At Areas Needing Improvement, Montanez entered: “Needs to improve on being more outspoken when she needs help.” At Evaluator’s Summary, Montanez entered: “Maritza is a good worker. Maritza also knows how to follow directions when given to her.”

(4) Martina Arias (a painter who was hired on December 3, 2001, and who the Respondent contends was selected for layoff because she was a slow worker): (a) On November 30, 2001, a supervisor whose name is illegible, rated Arias at 3s in all categories, except for 2s in the Attendance categories of “Reports to work on time” and “Returns from breaks on time,” a 2 in the Attitude category of “Demonstrates dependability,” 2s in the Quantity and Quality of Work categories of “Starts and completes assignments on time” and “Uses proper work techniques to provide an expected volume of output,” and a 2 in the Communication category of “Communications are timely and intelligent when oral/ written.” In Arias’ 2001 Performance Summary, at Main Strengths, the supervisor entered: “Martina has a good grasp on her job requirements for the various painting techniques. Martina has also displayed the ability to quickly learn new methods and to apply them.” At Areas Needing Improvement, the supervisor entered: “Martina has been spoken to on a couple of occasions regarding her output and punctuality. She has made efforts to improve in both areas.” At Evaluator’s Summary, the supervisor entered: “Martina has the ability to be a top performer if she applies herself. After conversations with the plant manager and myself she has demonstrated a willingness to improve.” (b) On November 30, 2002, Christophersen rated Arias at 3s in all categories, except for 2s in the Attendance and Punctuality categories of “Works required days” and “Returns from breaks on time,” a 2 in the Job Knowledge category of “Displays the ability to successfully teach and develop other employees,” 2s in the Quantity and Quality of Work categories of “Starts and completes assignments on time” and “Uses proper work techniques to provide an expected volume of output,” and a 2 in the Decision Making category of “Seeks approval and advice in situations outside level of expertise and authority.” In Arias’ 2002 Performance Summary, at Main Strengths, Christophersen entered: “Communicates well with peers.” At Areas Needing Improvement, Christophersen entered: “Increase painting speed; work on attendance.” At Evaluator’s Summary, Christophersen entered: “Needs to work on improving attendance; increase speed on painting; works slower than other painters.” (c) There is a warning notice dated May 21, 2001, for at least 5 attendance violations within 6 months in Arias’ file.

(5) Manuel Cerda (a powder-preparer who was hired on August 30, 1999, and who the Respondent contends was selected for layoff because of low productivity): (a) On August 3, 2001, Carter rated Cerda at 3s in all categories, except for 4s in 2 attendance categories. (b) On July 30, 2002, Carter rated Cerda at 3s in every category, except for a 2 the Communication category of “Has the ability to effectively communicate with employees at all organizational levels.” (c) The file does not contain any Performance Summaries for Cerda.

(6) Rafael DeJesús (a table operator who was hired on December 3, 2001, and who the Respondent contends was selected for layoff because of relatively low productivity): (a) On December 3, 2002, Camilo rated DeJesús at 3s in all categories. In DeJesús’s 2002 Performance Summary, at Main Strengths, Camilo entered: “Good table operator; good attitude and job knowledge; quality of work is good; doesn’t complain when given extra work.” At Areas Needing Improvement, Camilo entered: “Attendance has improved a lot. Needs to continue to improve. English needs to improve.” At Evaluator’s Summary, Camilo entered: “Rafael has turned around a lot from when he first started here. He works a lot faster and keeps his area clean all the time.” (b) On April 15 and August 20, 2002, DeJesús received warning notices for attendance violations.

(7) Orlando Jimenez (a machine-operator who was hired on September 26, 2000, and who the Respondent contends was selected for layoff because of poor attendance): (a) On August 22, 2001, Rodriguez rated Jimenez at 3s in all categories, except for a 4 in the Quantity and Quality of Work category of “Work is accurate and requires minimal amount of direction,” a 4 in the

Attendance and Punctuality category of “Returns from breaks on time,” and a 4 in the Attitude category of “Exhibits a positive attitude.” In Jimenez’ 2001 Performance Summary, at Main Strengths, Rodriguez entered: “Punctual; good attendance; good language skills; able to run all the lines.” At Areas Needing Improvement, Rodriguez entered: “Become more familiar with operation of lines.” At Evaluator’s Summary, Rodriguez entered: “Orlando is a very good worker. Always gives me 100%. I would like to have more men like him.” (b) On September 26, 2002, Rodriguez rated Jimenez at 3s in all categories, except for 4s in the Attitude categories of “Interacts well with co-workers” and “Accepts correction from management in a positive manner.” In Jimenez’ 2002 Performance Summary, at Main Strengths, Rodriguez entered: “Dependable; punctual; good attitude, runs all 5 lines.” At Areas Needing Improvement, Rodriguez entered: “Attendance needs to get better but not a problem.” At Evaluator’s Summary, Rodriguez entered: “Orlando Jimenez overall is a good worker and machine-operator.”

(8) Eugeio Mejía (a machine-operator who was hired on December 12, 2000, and who the Respondent contends was selected for layoff because of tardy arrivals at work and tardy returns from breaks): (a) On December 19, 2001, Carter rated Mejía at 3s in all categories, except for a 4 in the Attendance and Punctuality category of “Reports to work on time.” In the Performance Summary, at Main Strengths, Carter entered: “Attendance is excellent; English is understandable; has run all machines.” At Areas Needing Improvement, Carter entered: “Would like [Mejía] to learn more about other aspects of operation.” At Evaluator’s Summary, Carter entered: “I feel that Eugenio is an excellent worker. He is always here and ready to work, no matter where it may be. Has run all machines, but [I] would like him to get better at them all.” (b) On December 12, 2002, Camilo rated Mejía at 3s in all categories. In the Performance Summary, at Main Strengths, Camilo entered: “Hard worker; knows all lines and powder area; good job quality; good attitude.” At Areas Needing Improvement, Camilo entered: “English needs improving; punctuality needs improving.” At Evaluator’s Summary, Camilo entered: “Eugenio is a very hard worker. He can be switched around with no problem because he knows how to run all lines. Needs to work on punctuality. Besides that, I have no complaints.” (c) On January 8 and August 22, 2002, Mejía received warning notices for work performance errors. On the latter occasion, he also received a one-day suspension.

(9) Samuel Morales (a powder-preparer who was hired on February 28, 2000, and who the Respondent contends was selected for layoff because he failed to follow directions and talked back to his supervisor): (a) On February 28, 2002, Camilo rated Morales at 3s in all categories. In the Performance Summary, at Main Strengths, Camilo entered: “Good attendance; dependable; can run [machines on all 5] lines.” At Areas Needing Improvement, Camilo entered: “Training in Turbo mixer in near future; training in pulverizer in near future. Work on attitude.” At Evaluator’s Summary, Camilo entered: “Samuel is an overall good worker. He knows what he is doing and he doesn’t complain when extra work is given.” (b) On March 17, 2003, Camilo rated Morales at 3s in all categories, except for 4s in the Attitude categories of “Demonstrates dependability,” “Interacts well with co-workers” and “Accepts correction from management in a positive manner,” at 4s in both categories of Learning Ability, and at 4s in the Quantity and Quality of Work categories of “Starts and completes assignments on time” and “Work is accurate and requires minimal amount of direction.” No 2003 Performance Summary is contained in the file. (c) On December 7 and August 21, 2000, February 21, 2001, November 18, 2002 and January 27, 2003, Morales received warning notices for leaving a machine early, creating scrap, attendance, attendance (again), and creating scrap (again), respectively.

(10) José Ortiz (a table-operator who was hired on November 28, 1999, and who the Respondent contends was selected for layoff because of less job merit than an employee who was retained): (a) On October 26, 2000, Rodriguez rated Ortiz at 3s in all categories. In Ortiz’ 2000 Performance Summary, at Main Strengths, Rodriguez entered: “Can always be counted on to help. Always does what he [is] asked to do. Knows the production very well. Always on time.” At Areas Needing Improvement, Rodriguez entered: “Learn to communicate better with people.”

At “Suggested Direction for Improvement” (which appeared only on the form used in 2000), Rodriguez entered: “Be more alert with pot inspection. Take more time to check them.” At Evaluator’s Summary, Rodriguez entered: “Overall José Ortiz is a very hard worker. I’m happy to have someone like that working for us.” (b) There is no 2001 evaluation in Ortiz’ file. (c) On November 27, 2002, Carter rated Ortiz at 3s in all categories, except for a 2 in the Attitude category of “Exhibits a positive attitude” and a 2 in the Communication category of “Has the ability to effectively communicate with employees at all organizational levels.” In Ortiz’ 2002 Performance Summary, at Main Strengths, Carter entered: “Attendance is good, so far, on second shift; works O.K. with fellow employees.” At Areas Needing Improvement, Carter entered: “English needs improvement. Complains a lot about small inconveniences in area.” At Evaluator’s Summary, Carter entered: “José is a good worker for the most part. Has only been on second shift [for a] short time, so can’t say over extended time [what time] will bring. But I hope he will be asset to my shift. Does a good job as pot remover, keeping area neat and clean.”

(11) Ramón Valentin (a powder-preparer who was hired on January 21, 1999, and who the Respondent contends was selected for layoff because he was unwilling to accept temporary assignments to other jobs): (a) On June 6, 2001, Carter rated Valentin at 3s in all categories, except for 4s in the Attendance and Punctuality categories of “Works required days” and “Reports to work on time,” 4s in the Attitude categories of “Demonstrates dependability,” “Interacts well with co-workers” and “Accepts correction from management in a positive manner,” 4s in the Job Knowledge categories of “Knows and understands the specific requirements of the job” and “Displays the ability to perform the technical skills required by this job,” and a 4 in the Quantity and Quality of Work category of “Starts and completes assignments on time.” In Valentin’s 2001 Performance Summary, at Main Strengths, Carter entered: “Attendance is very good. Knows how to run all machines along with pulverizer; works well with all employees.” At Areas Needing Improvement, Carter entered: “English could improve.” At Evaluator’s Summary, Carter entered: “I feel that Ramón is a valuable asset to my shift. I can always count on him to get the job done no matter what it is. Can run all machines, which is a great help in a bind. His English is getting better, especially his writing for reports. (b) On June 19, 2002, Carter rated Valentin at 3s in all categories, except for a 4 in the Attendance and Punctuality category of “Works required days,” a 4 in the Attitude category of “Demonstrates dependability,” a 4 in the Learning Ability category of “Understands and applies instructions,” a 4 in the Job Knowledge category of “Knows and understands the specific requirements of the job,” and 4s in the Quantity and Quality of Work categories of “Starts and completes assignments on time” and “Work is accurate and requires minimal amount of direction.” In Valentin’s 2002 Performance Summary, at Main Strengths, Carter entered: “Knows how to run all machines and all aspects of the powder area. English is improving greatly. Helps out wherever he can, mostly without being asked. GOOD ATTITUDE TOWARDS COMPANY.” (Capitalization is original.) At Areas Needing Improvement, Carter entered: “English still needs improvement.” At Evaluator’s Summary, Carter entered: “I feel that Ramón is a very valuable person on my shift because he has the skills and knowledge on all machines and powder area. His attendance is very good, hardly ever misses a day or is late for work.”

(12) Carlos Vargas (an order-preparer who worked as a janitor, who was hired on January 8, 2001, and who the Respondent contends was selected for layoff because he could not follow directions): (a) On January 17, 2002, warehouse supervisors Scholfield and Mark Pecci<sup>15</sup> jointly rated Vargas at 3s in all categories, except for a 2 in the Communication category of “Has the ability to effectively communicate with employees at all organizational levels,” a 4 in the Attendance and Punctuality category of “Works required days,” a 4 in the Attitude category of “Demonstrates dependability,” and a 4 in the Quantity and Quality of Work category of “Uses proper work techniques to provide an expected volume of output.” In the Performance Summary, at Main Strengths, Scholfield and Pecci entered: “Dependable—Always here—Works

<sup>15</sup> Pecci did not testify. The May 31, 2003, table of organization that the General Counsel introduced lists Pecci as “Production Scheduling Supervisor.”

overtime on demand. Efficient—wastes no time. Flexible—Does any job requested.” At Areas Needing Improvement, Scholfield and Pecci entered: “Communication—needs to improve his English skills.” At Evaluator’s Summary, Scholfield and Pecci entered: “Carlos is an excellent employee. He is flexible. Knows his job. Is willing to do whatever it takes to complete his tasks. Has consistently taken overtime when asked. He keeps himself busy at all times and exhibits an amazing work ethic.” (b) On February 20, 2003, Cadger rated Vargas at 4s for the Attendance and Punctuality categories of “Works required days” and “Reports to work on time,” and at 3 for the category of “Returns from breaks on time.” In the Attitude categories, Cadger rated Vargas at 4s for “Exhibits positive attitude” and “Interacts well with co-workers,” but at 2.5 for “Demonstrates dependability” and at 3 for “Accepts correction from management in a positive manner.” Cadger rated Vargas at 2s in both categories of Learning Ability, and Cadger rated Vargas at 2.5s for all 3 categories of Job Knowledge. At Quantity and Quality of Work, Cadger rated Vargas at 3 for “Starts and completes assignments on time,” but Cadger rated Vargas at 2.5s for both “Uses proper work techniques to provide an expected volume of output” and “Work is accurate and requires minimal amount of direction.” Cadger rated Vargas at 2s in both categories of Communication. In Decision Making, Cadger rated Vargas at 2.5 in “Exercises good judgment when making decisions,” and a 5 in “Seeks approval and advice in situations outside level of expertise and authority.” In the Performance Summary, at Main Strengths, Cadger entered: “Order preparation; corrugated recycling; making sure work area is clean and unobstructed.” At Areas Needing Improvement, Cadger entered: “Communication skills; following cleaning schedule set by supervisor; learning facility maintenance. Has difficulty remembering and following instructions.” At Evaluator’s Summary, Cadger entered: “Carlos is a very hard worker who tries his best at whatever the Company asks of him. He always looks for tasks to do and never complains about any job responsibilities handed to him. He needs to learn English to better himself and career.”

#### b. The Respondent’s evidence about selections for the 2003 layoff

It is undisputed that in the Northeast in 2003 harsh winter weather continued well into spring. Consequently, retailers’ re-stocking orders that the Respondent usually receives in March and April simply did not come. As a result of that diminution of business, the Respondent was required to lay off employees earlier than usual, and it was required to lay off more employees than it had in 2001 and 2002. Therefore, as noted, the General Counsel does not dispute that the Respondent was required to lay off 41 employees in May 2003; the General Counsel contends only that the Respondent’s selection of 20 of those employees violated the Act.

According to a table of organization that the General Counsel placed in evidence, manufacturing manager Kirkiles reports directly to Pantanella. Kirkiles testified that in April Pantanella telephoned him from Europe, where the Respondent’s parent corporation is located, and told him that, because business had declined, production would have to be reduced. Kirkiles testified that Pantanella specifically told him that production lines 1, 2 and 3 at Lawrence would have to be shut down and that the Respondent would thereafter perform production with the newer equipment on lines 4 and 5. Kirkiles testified that Pantanella left it to him to decide how to reduce the workforce (and, apparently, by what number). Kirkiles denied that Pantanella chose any employee for layoff. Kirkiles testified that he told his subordinates that lines 1, 2 and 3 would be closed on all 3 shifts and that the positions of the mixers and the pulverizers on the second and third shifts would be eliminated and that the mixers and pulverizers on the first shift would supply the (reduced) needs of all 3 shifts. Kirkiles further testified that he told his subordinate supervisors that there would be no “bumping” because “it would be very chaotic” and it would, in each case, make 2 employees unhappy, the one who lost his job and the one who would remain employed but at a lower rate of pay. Kirkiles testified that he accepted the choices made by his subordinate supervisors about which employees would be selected for layoff. Kirkiles testified that he met with each selected employee to explain his or her rights to insurance under COBRA, the right to withdraw his or her section 401(k) account

and the right to file for unemployment compensation which the Respondent would not contest.

(1) Layoffs at the warehouse operations of the Lawrence facility

Camilo was the first-shift production supervisor at Lawrence from July 2000 until April 21, 2003, when former third-shift production supervisor Rodriguez replaced him at that position. Camilo testified that he then became the “packing-shipping warehouse supervisor” at the Lawrence facility, still on the first shift.<sup>16</sup> Camilo testified that when Kirkiles told him of the need to conduct layoffs in 2003, Kirkiles told him to “try to keep ... not worst or best, it was just who was more productive, who put more of 100% on an everyday basis.” Camilo also acknowledged, however, that he considered length of service to be of value, and he did consider seniority when making his selections. (Camilo is the only supervisor who testified that he considered seniority when making selections for layoffs.)

Camilo testified that he selected the following alleged discriminatees to be laid off from the Lawrence warehouse operation for the following reasons: (1) Camilo testified that he selected Luis Vargas, an order-preparer, for layoff because of his attendance problems (which I have noted above). (2) Camilo testified that he selected Pastrana, a painter, for layoff because “she was kind of slow on the painting.” (3) Camilo testified that he selected Martina Arias, a painter, for layoff because “She was with the Company for a while, but she was just kind of slow in her painting. She was when she would want to be fast, she did it. And she just didn’t want to be fast any more.” (4) Camilo testified that he selected Jimenez for layoff because he had the worst attendance record of all 5 of the machine-operators under him. Camilo named the other 4 machine-operators as Ramón Santiago (whom Camilo selected for layoff because of his attitude, and who is not an alleged discriminatee), Cecilia Robels, José Ferrera and Arnesto Basquez. The Respondent did not offer the attendance records of Robels, Ferrera, Basquez or Ramón Santiago. (5) Camilo testified that Gilberto Santiago, a material-handler, was an “excellent employee” but also one with “attitude problems.” Santiago once argued with another employee; Camilo “talked to” both of them, but he did not issue a warning notice to either employee. (The other employee went unnamed.) Santiago would “a few times a week” rudely tell other employees to get out of his way when he was driving a forklift or a pallet jack, and “a little confrontation will start from there.” Camilo further testified that Santiago told him that he “was not with the Union,” and Camilo heard Santiago stating to his fellow employees that “he just didn’t want to have any part with it.”

(2) First-shift production layoffs at the Lawrence facility.

Efren Rodriguez has been the Respondent’s first shift production supervisor since April 21, 2003; for 3 years before that month, Rodriguez was the third-shift production supervisor. Rodriguez was succeeded as supervisor on the third shift by Dennis McCarthy. Rodriguez testified; McCarthy did not. Since McCarthy was a supervisor for only about a week before the layoffs began, Rodriguez testified that he helped McCarthy decided which ones to select; Rodriguez testified that Camilo, who had preceded Rodriguez as the first-shift production supervisor, did the same for Rodriguez. Rodriguez testified that, when selecting employees for layoff, he did not consider seniority because, “if you give the guy the proper training, a guy that’s been there for a year, to a guy that you give proper training, in a week or two can do the same job.”

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<sup>16</sup> The table of organization that the General Counsel placed in evidence indicates that Camilo’s position is “Paint, Pack and Ship Supervisor.”

Rodriguez testified that he selected the following alleged discriminatees to be laid off from the first-shift production operation for the following reasons: (1) Rodriguez testified that Mejía was a good machine-operator, but he was laid off because “he always walked in late ... either on a Friday [or] a Monday. ... He also used to go over on his breaks. I wrote him up on that, also.” Rodriguez also testified that he selected Mejía for layoff because “he was out a lot.” (2) Rodriguez testified that he selected Morales, a powder-preparer on the first shift, for layoff because: “He had a bad attitude. ... He always used to talk back, you know, disrespectful. And I would ask him to do something and he wouldn’t comply with it.” Rodriguez testified that Camilo had told him that Morales had a bad attitude and that, although Camilo did not tell him (Rodriguez) what he meant by the term, he had witnessed examples of Morales’s bad attitude himself. Rodriguez did not detail any of the incidents to which he may have been referring, and he admitted that he did not discipline Morales for such. (3) Rodriguez testified that DeJesús,<sup>17</sup> a table-operator on the first shift, was his “last choice” of employees to be laid off, “but the other guys were just better.” Rodriguez further testified that DeJesús had worked for him prior to the layoff when both were on the third shift. Rodriguez denied that he discussed DeJesús with Camilo. When asked if one month was enough time to appraise DeJesús’s work and compare it with the other table-operators, Rodriguez testified that when he had been a supervisor on the third shift he had had some opportunity to observe first-shift workers when the shifts overlapped. Rodriguez added that, before the layoff, he had discussed employees with Camilo at shift-changes, but he did not testify that Camilo had ever said that DeJesús was the inferior table-operator. (Camilo testified that he did not discuss DeJesús with Rodriguez.) Rodriguez testified that he gave DeJesús a warning notice for overstaying breaks, but he did not cite that fact as a reason for his selection of DeJesús for layoff. (4) Rodriguez first testified that he did not make the decision to lay off Valentin, a powder-preparer on the first shift, but that he did discuss Valentin with Camilo. Then Rodriguez testified that he made the decision to lay off Valentin without consulting with Camilo. Rodriguez then testified that he selected Valentin for layoff because he had a “poor attitude” and “complained a lot.” When asked for examples, Rodriguez replied, “When I went on first shift, because sometimes we would have to do different jobs, like powder, whatever, and he would have to do extra powder. So, he complained about that, and that was his job. He didn’t want to do that.” Rodriguez acknowledged that he did not discipline Valentin for this conduct, but he testified that that was because: “He would pout and stuff like that. He would get it done, though. Eventually, he would finish it.”

### (3) Second-shift production layoffs at the Lawrence facility

Carter testified that he selected the following alleged discriminatees to be laid off from the second-shift production operation for the following reasons: (1-2) Carter testified that Kirkiles’s directive that the positions of the pulverizer and mixer on the second and third shifts be eliminated meant that Moret and Trinidad, who held the positions of pulverizer and mixer respectively, on the second shift would be laid off. Carter denied that Trinidad’s warning notices and suspension for attendance violations had anything to do with Trinidad’s layoff. Since Moret and Trinidad were laid off, only 2 mixes have been done on second shift, and they were done by group leader Robert Henriquez. Each mix required about 25 minutes. On cross-examination, Carter admitted that Trinidad could do any job on the second shift. (3) Carter testified that Kirkiles told him to lay off 2 machine-operators and 4 table-operators, but Kirkiles did not tell him anything else. Ultimately, however, on the second shift alleged discriminatee Cerda, a powder-preparer, was laid off as well as the 4 table operators and 2 machine-operators. Carter first testified that he did not select Cerda for layoff and that Cerda was laid off because his job as a powder-preparer was eliminated. Kirkiles, however, did not testify that any of the second shift powder-preparer positions had been eliminated, and the decision to lay off Cerda appears to have been one that Carter made on his own. Three other powder-preparers remained on the second shift after Cerda was laid off. Later in his testimony, Carter testified that Cerda was the only powder-preparer that he selected for layoff because he was too slow and had less

<sup>17</sup> At transcript, p. 494, and elsewhere, the prefix “De” is omitted from this alleged discriminatee’s name.

“productivity” than the powder-preparers who were retained. On cross-examination, Carter testified that he talked to Cerda about being slow, but he admitted that he consulted no records in deciding that Cerda had the lowest productivity of the powder-preparers. Carter testified that his “subjective observation” of Cerda and the other employees was the basis for his selection of Cerda for layoff.<sup>18</sup> (4) Carter testified that “the only factor” upon which he selected Jimenez, a machine-operator, for layoff was that, “He had the worst attendance of all my operators.” Carter acknowledged that Jimenez was a good worker. (5) Carter testified that he selected Ortiz for layoff because, although Ortiz was classified as a table-operator, he worked only as a parts-remover, there were 2 table-operators on the second shift who worked as parts-removers, and “we only needed one.” Later in his testimony, Carter testified that Ortiz “did not like change in the part-removing area. If they would change things around, put in a different skid, put in a different area, he would get very upset.” Carter testified that he orally counseled Ortiz, but he acknowledged that he did not document any of his problems with Ortiz.

#### (4) Third-shift production layoffs at the Lawrence facility

Again, the Respondent did not call McCarthy to testify, even though, at the time of layoff, McCarthy had replaced Rodriguez as third-shift production supervisor. Without objection, the Respondent asked Rodriguez to give the reasons that alleged discriminatee Fuentes, and others,<sup>19</sup> were laid off from the third shift. (1) Rodriguez first testified that alleged discriminatee Fuentes was laid off because he was a table-operator on Line 2 which was shut down; then Rodriguez testified that Fuentes was laid off because he had attendance problems.<sup>20</sup> Rodriguez testified that he did “talk to” Fuentes about his attendance, but Rodriguez acknowledged that he did not issue Fuentes a warning notice for attendance. (2) Rodriguez testified that alleged discriminatee Rivera, who was employed on the third shift, was a pulverizer and that that job, as well as the job of the mixer, was eliminated on the third shift, as well as on the second shift, as discussed above.

#### (5) Layoffs at the Plaistow facility

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<sup>18</sup> The transcript, p. 471, L. 16, is corrected to change “Soto” to “Cerda.”

<sup>19</sup> The transcript, p. 507, L. 3, is corrected to change “Amistica” to “Almestica.”

<sup>20</sup> The transcript, p. 508, L. 4, is corrected to change “(indiscernible)” to “for attendance.”

Cris Waller is the warehouse manager in charge of packaging and shipping operations at the Respondent's Plaistow and Tewksbury facilities. According to the table of organization that the General Counsel placed in evidence, Waller reports directly to Pantanella, as does Kirkiles. Waller testified that in early 2003, after the unusual decline in business was noticed, Pantanella asked him "to take a look at what we need for labor and compare our labor that we have on hand, and try to make some interpretation from that as far as what we need to have on hand for labor." Waller did not testify that Pantanella told him to lay off any particular number of employees, and he did not testify that he decided on a certain number. According to the documentary evidence, however, 7 employees were laid off from the Plaistow facility and one employee was laid off from the Tewksbury facility.<sup>21</sup> On April 28, Waller sent an e-mail to Plaistow warehouse supervisor Jason Cadger, Plaistow packaging supervisor Edwin Montanez, and Tewksbury supervisor Bill Scholfield. The e-mail listed alphabetically all of the employees who reported to those 3 supervisors as of that date, and it told the supervisors to reply by ranking the employees, "based on total performance, job knowledge, learning ability and attitude for the past year." Waller added: "Yes, it is to review potential layoff candidates."

Cadger returned Waller's e-mail listing the 10 employees who reported directly to him (best to worst): (1) José E. Vasquez, a known Union adherent<sup>22</sup> who was not subsequently laid off; (2) Orlando Alicea, who was not a known Union adherent and who was not laid off; (3) Luis Parra, a known Union adherent who was not laid off; (4) Ronny Nunez, a known Union adherent who was not laid off; (5) Daniel Airas, a known Union adherent who was not laid off; (6) Joe Thibideau, a temporary employee who was not a known Union adherent and who was laid off, but who is not an alleged discriminatee; (7) Pedro Sanchez, a known Union adherent who was not laid off; (8) Mike Driscoll, who was not a known Union adherent and who was not laid off; (9) Eduvigis Almonte, an alleged discriminatee who was a known Union adherent; and (10) Carlos Vargas, an alleged discriminatee who was a known Union adherent.

Montanez returned Waller's e-mail listing the 12 employees who reported directly to him (best to worst): (1) Gloria Diaz, a known Union adherent who was not subsequently laid off; (2) Roberto Arias, a known Union adherent who was not laid off; (3) Lucas Almonte, a known Union adherent who was not laid off; (4) Miguel Cintron, a known Union adherent who was not laid off; (5) Nancy Gracia, who was not a known Union adherent and who was not laid off; (6) Bridgett Beaulieu, who was not a known Union adherent and who was not laid off;<sup>23</sup> (7) Doug Wright, who was not a known Union adherent and who was not laid off; (8) Maria Vasquez, a known Union adherent who was not laid off; (9) Maritza Arias, an alleged discriminatee who was a known Union adherent; (10) Manuella Cortes, who had taken medical leave and never returned, who was not a known Union adherent, and who is not an alleged discriminatee; (11) Hilda Vasquez, an alleged discriminatee and known Union adherent who the Respondent contends volunteered for layoff; and (12) Heriberta Almonte, an alleged discriminatee who was a known Union adherent.

In an April 28 memo to Pantanella, Waller stated that Beaulieu and Gracia had been "brought to the first shift packaging as powder-preparers." Waller testified that, although the entire second shift at Plaistow was eliminated, and Beaulieu and Gracia had been employed there on the second shift only about 2 months, he decided not to lay off Beaulieu and Gracia because they had been employees of "star quality." Beaulieu and Gracia had been powder-

<sup>21</sup> Antonio Torres, the employee who was laid off from Tewksbury is not an alleged discriminatee, he was not mentioned in the testimony, and he is not mentioned by the General Counsel or the Respondent on brief.

<sup>22</sup> By "known Union adherent" I indicate those employees who were pictured in the Union's Face Book (which some supervisors admitted seeing before the layoffs), those employees whom supervisors admitted seeing wearing prounion insignia, or those employees who engaged in other overt union activities that are described infra.

<sup>23</sup> As discussed infra, Gracia and Beaulieu were transferred from the second shift to the first shift.

preparers on the second shift, and they continued to be employed as such on the first shift.

Waller testified that he discussed with Pantanella the rankings of employees by Cadger and Montanez (and Scholfield), but he did not recall if he discussed with Pantanella which employees would be laid off. Waller denied that Pantanella had any “input” into the process of selecting employees for layoff.

Montanez, the packaging supervisor at Plaistow, testified that Waller told him to rank the packaging employees according to attendance, the way “they perform their job,” and teamwork. Montanez denied that he considered seniority when he was making his listing. Montanez testified that he rated alleged discriminatees Maritza Arias, Hilda Vasquez, and Heriberta Almonte as 9<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup>, respectively, among the employees who reported to him, for the following reasons: (1) Montanez testified that he considered Arias to be a slow learner, and she had once deleted a computerized inventory label. Montanez testified that he spoke to Arias about that mistake and kept her away from label-making for a while, but he acknowledged that he later re-assigned Arias to the same job and the problem did not recur. Montanez testified that he listed Arias ninth among the employees who reported to him because of “[h]er ability, her inability, I should say, to be a team player. [A]lso. ... when it came down that we were like really busy, she was one of the slowest employees that I had.” (2) According to Montanez, Vasquez was absent from work more than any other of his subordinate employees. Montanez acknowledged that he did not follow the progressive disciplinary system for attendance violations with Vasquez and issue a warning notice to her, although he testified that he did speak to her about her absenteeism. Montanez further testified that one day while Vasquez was on extended medical leave, she came into the facility and:

She approached me and she said she wasn’t feeling good, that she just came out of the hospital, had an operation of some sort. And she said, “Eddie, I know that the layoffs are going to be coming soon, so please put me on the list.”

Montanez testified that he reported Vasquez’ request to Watkins (whose testimony on the point is discussed below). (3) Montanez testified that he rated Heriberta Almonte 12<sup>th</sup> among his subordinates because she was a “slow learner,” although she performed her job in “an acceptable way.” Montanez acknowledged that he never disciplined Almonte for failing to do her job. Montanez testified that he rated Almonte at a 2 on ability to teach others because she did not have the knowledge or ability to teach others. Montanez testified that he rated Almonte at a 2 on decision-making because: “when it comes to making decisions she wouldn’t make the right decision or she don’t have the judgment to make the decision.” When asked specifically why he ranked Almonte last among the packaging employees, Montanez testified: “Because the ability of not being able to communicate and as a team player, to work together with other employees. She wasn’t. ... [a] team player on the packaging line. For you to be able to work and get as much productivity out of the line, everyone has to be on the same page. ... Well, she wasn’t as fast as everyone else, to try to keep up with everyone else.”

Cadger, the warehouse supervisor at Plaistow, testified that he supervised alleged discriminatee Eduvigis Almonte for about a year and 2 months before selecting him for layoff. Almonte was a material-handler who was assigned to work in the packaging area of the Plaistow facility. Cadger testified that, although he never issued a warning notice to Almonte, he rated Almonte the ninth of his 10 subordinates, and selected him for layoff, for several reasons: his attitude, he occasionally refused to do jobs when asked (although he did not issue Almonte a warning notice for insubordination on such occasions), he made more mistakes than other employees (although Cadger did not keep track in any way of how many mistakes his subordinates made), and he had an incident with Montanez shortly before the layoff. Cadger was not present during the incident between Almonte and Montanez, but he testified that Montanez reported to him that there had been a confrontation over Almonte’s storing some product in an improper place in the packaging area; the report was that Almonte had yelled at

Montanez and told Montanez that Montanez was not his supervisor and that he (Almonte) did not have to listen to Montanez. Upon receiving this report, Cadger went to Almonte, bringing along Montanez as a translator. Cadger told Almonte to be sure to store items in their proper place and, if there was a question about where items should be stored, Almonte should see Cadger. Cadger testified that Almonte replied that he understood. Cadger did not testify that he mentioned anything that Almonte may have previously said to Montanez when he spoke to Almonte. Cadger further testified that he again spoke to Almonte about the matter, alone, a few days later. Cadger testified that he told Almonte that if he had "issues," he should contact Cadger because he (Cadger) was Almonte's supervisor. Cadger again testified that Almonte replied that he understood (even though no translator was present). Cadger also did not testify that Montanez, or Montanez' report, was mentioned in this second conversation with Almonte. On cross-examination, Cadger testified that he did not mention how Almonte had reportedly spoken to Montanez "because I wasn't there for the whole thing." Further on cross-examination, Cadger admitted that Almonte's placing items in the wrong place in the warehouse was not always Almonte's fault (because items occasionally got mislabeled). Cadger further acknowledged that other employees made the same mistakes that Almonte did, and he spoke to those other employees as he did to Almonte. Cadger further acknowledged that he could not specify when, or on what occasions, Almonte had been reluctant to go to the packaging line. Cadger further testified that on "a couple" of occasions, prior to the Montanez "incident," when Cadger would ask Almonte to go from being a material-handler to work on a packaging line, Almonte "seemed very upset about it," although Almonte would do as he was asked.

Cadger testified that he rated Carlos Vargas as his 10<sup>th</sup> subordinate, and selected him for layoff because Vargas worked as a janitor and: "He couldn't understand how to basically clean, which was his job at the time, to clean the warehouse. He had a problem understanding the chemicals to be used and what chemicals to be used. Also he had trouble following a cleaning schedule that I set up because he couldn't understand how to follow the job." Cadger allowed that Vargas got along with other employees and had no disciplinary problems. Cadger further testified that Pedro Sanchez replaced Vargas as the janitor. Sanchez, a former material-handler, was a known Union adherent who was pictured in the Union's Face Book.

As noted above, Hilda Vasquez was on extended medical leave before the 2003 layoff began, and Montanez testified that, during that leave, Vasquez approached him to ask to be laid off. Watkins testified that, after he received Montanez' report of Vasquez' request, he caused Nelia Munoz, his secretary and the Respondent's receptionist, to call Vasquez at home and he asked her to come to the Lawrence facility. When Vasquez arrived, Munoz acted as translator. Watkins testified:

I let Hilda know [that] I knew that she was already aware that there was a layoff going on. That she had gone and communicated her willingness to be laid off or her desire to be laid off to Edwin [Montanez]. And I wanted to go and make sure that that is the way that she felt. ...

She told me that yes, she had gone and talked to Edwin and did want a layoff and still did. ...

I told her that since she did, I wanted her to go and sign this form. And once she went and took the layoff, she could go and collect unemployment. ... I told her that, although it was a voluntary layoff, it was still a layoff and she would be eligible for unemployment.

Watkins testified that Munoz translated these remarks and further translated for Vasquez the document that he tendered to Vasquez, which document states:

I, Hilda Vasquez [printed], am requesting voluntary layoff from Telcom USA, Inc., as of the above date [May 2, 2003] for personal reasons. I understand that this means that my employment is ending at this time and Telcom USA, Inc., will not protest any unemployment claim that I make at the [Massachusetts] Division of Employment and

## Training.

Watkins identified Vasquez' signature on the statement. Munoz testified consistently with Watkins.

### B. Analysis and Conclusions

The complaint alleges that the Respondent violated Section 8(a)(3) and (1) by issuing warning notices to Trinidad on March 18 and April 24, by suspending Trinidad on April 25, and by selecting 20 employees (including Trinidad) for layoff in May, all in order to discourage the union activities of its employees. The law that determines the disposition of such allegations of discrimination is stated in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). The General Counsel has the initial burden of establishing a *prima facie* case sufficient to support an inference that union activity that is protected by the Act was a motivating factor in an employer's action that is alleged to constitute discrimination in violation of Section 8(a)(1) or (3). Once this is established, the burden shifts to the Respondent to demonstrate that the alleged discriminatory conduct "would have taken place even in the absence of the protected conduct." *Wright Line* at 1089. To meet its burden under *Wright Line* in disciplinary cases, it is not enough for an employer to show that an employee engaged in misconduct for which the employee *could have* been discharged or otherwise disciplined. As the Board has emphasized, the employer must demonstrate that it "*would have*" discharged, or otherwise disciplined, the employee for the misconduct in question. *Structural Composites Industries*, 304 NLRB 729, 730 (1991) (emphasis original). Such evidentiary demonstration must be by a preponderance of the evidence,<sup>24</sup> and, if it is not, a violation will be found. Although the defense of disciplinary infractions may not be asserted in layoff cases, the principles of *Wright Line* apply to cases of alleged discriminatory layoffs, as well.<sup>25</sup>

The first issue in deciding if the General Counsel has presented an *prima facie* case under *Wright Line* is whether the General Counsel has proved that the Respondent bore animus, or antipathy, toward the union activities of its employees. As I have found, on October 7, 2002, when Trinidad, Morales and 3 other employees presented the Union's October 7 demand for recognition to Pantanella, the Respondent's president, Pantanella replied that before he would accept a union he would move the Respondent's operations to Haverhill, New Hampshire, or some other out-of-state location. A threat to close or move an operation in order to thwart a union organizational attempt is a *per se* violation of Section 8(a)(1),<sup>26</sup> and it the plainest expression of animus sufficient to support an inference that an unlawful motive is behind disciplinary actions toward known union adherents. Further evidence of Pantanella's animus toward the employees' union activities is disclosed by his asking those who had presented the October 7 demand for recognition to write their names on a sheet of paper. There was no legitimate reason for that request; Pantanella could only have made it in order to facilitate future recriminations or in order to convey to the gathered employees the impression that future recriminations for their union activities should be expected. Moreover, Pantanella reinforced the threat by asking Watkins, after Watkins had arrived at the office, if he knew the identities of the employees who had presented the demand.

Further evidence of Pantanella's animus toward the Respondent's employees' union activities is found in his January 2003 statement that employees who had been laid off in 2001 and 2002 had been laid off because they were a "bad influence" on the Company and the other employees. The employees faced seasonal layoffs every year, and they necessarily knew that another one was coming in 2003. The employees also knew that the Respondent was in the

<sup>24</sup> *Wright Line*, 251 NLRB at 1087; *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984).

<sup>25</sup> See, for example, *The American Coal Company*, 337 NLRB No. 164 (2002).

<sup>26</sup> See *Mid-South Drywall Co., Inc.*, 339 NLRB No. 70, *fn.* 6 (2003).

midst of a organizational attempt which it vehemently opposed.<sup>27</sup> In such a context, Pantanella's telling employees that layoff selections had been made on the basis of the influences that the laid-off employees had exerted was a clear message that "the same thing could happen to you." I therefore find that Pantanella's January remark was another expression of the Respondent's unlawful animus.

The Respondent argues, generally, that no violation of Section 8(a)(3) can be found herein because the only evidence of animus lies in the conduct of Pantanella and because Pantanella did not, himself, make any of the decisions to lay off, warn or suspend any of the alleged discriminatees. It is true that the General Counsel did not show that Pantanella was directly involved in the discipline of Trinidad or show that Pantanella was involved in the selection of Trinidad or other alleged discriminatees for the 2003 layoff. Pantanella, however, is the Respondent's chief executive, and animus is decidedly a top-down phenomenon. If the boss has expressed animus of such a degree that he would move a plant rather than recognize a union, it is more than likely that the subordinate supervisors bear that expression in mind as they approach their subsequent personnel decisions. I therefore reject the Respondent's contention (for which it cites no authority) that the General Counsel must prove that a supervisor who has made a questioned disciplinary decision has, himself, expressed unlawful animus before a Section 8(a)(3) violation may be found.

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<sup>27</sup> Absent evidence to the contrary, the Board presumes dissemination of such serious threats as Pantanella's October 7 threat of plant closure or removal. *Spring Industries*, 332 NLRB 40 (2000).

As well, evidence of animus specifically toward the union activities of Trinidad lies in the fact that the warning notice of March 18 included a reference to Trinidad's absence of November 7, 2003. That was the day that Trinidad served as the Union's observer at the Board election, and Carter admitted that the notes that he reviewed to draft the warning notice so indicated. Carter (in response to a leading question) testified that his listing of Trinidad's November 7 absence in the March 18 warning notice was "a mistake," but he did not venture the slightest suggestion of how he could have innocently made the mistake when his own notes showed that Trinidad was absent for a protected reason.<sup>28</sup> The only possible explanation is that Carter knew exactly what he was doing; he meant to punish Trinidad, at least in part, for his protected activity of acting as the Union's observer at the Board election. The March 18 warning notice, therefore, is documentary evidence that the Respondent held a degree of animus towards its employees' protected union activities sufficient to support an inference that discipline of known Union adherents was unlawfully motivated.

### 1. Trinidad's warning notices and suspension

Animus having been established, and the knowledge of Trinidad's union activities being undisputed, *Wright Line* requires that the Respondent come forward with evidence that it would have issued the warning notices to Trinidad, and that it would have suspended Trinidad, even absent those activities.

The Respondent first argues that it has shown that it would have issued the March 18 warning notice, even absent Trinidad's known union activities, because Trinidad was indisputably absent or tardy without justification on 7 of the 10 dates that Carter cited in the warning notice.<sup>29</sup> The Respondent argues that the March 18 warning notice is therefore validated because Trinidad violated the Respondent's established disciplinary rule that employees should not be late or absent more than 4 times within a 6-month period or they will receive a warning notice. The Respondent further argues that it cannot be held to have discriminated against Trinidad because it showed that, during 2002, Carter issued warning notices to 2 other employees, each of whom had only the minimum of 5 attendance violations during 6-month periods, not the 7 attendance violations that I have found that Trinidad had committed within a six-month period.<sup>30</sup>

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<sup>28</sup> See *Lincoln Park Subacute and Rehabilitation Center*, 336 NLRB 891 (2001), supplementing 333 NLRB No. 136 (2001) (warning notice for absence to serve as observer at Board election violative where employee had complied with the employer's requirement of giving advance notice, as Trinidad did in this case).

<sup>29</sup> Again, the Respondent acknowledges the invalidity of Carter's including in the warning notice the reference to Trinidad's absence of November 7 (when Trinidad served as a union observer at the Board election), his absence of December 25 (when the plant was closed), and his tardiness of March 6 (when Trinidad was involved in an automobile accident while on the way to work).

<sup>30</sup> Again, the Respondent contends that Trinidad committed as many as 16 attendance violations; however, see footnote 11.

In making these arguments, the Respondent ignores the substantial evidence of disparate treatment that the General Counsel has presented. The Respondent's records show that during six-month periods of the year prior to the issuance of Trinidad's March 18 warning notice, Tavares was absent or tardy 12 times without receiving a warning notice, Veloz was absent or tardy 14 times without receiving a warning notice, Torres was absent or tardy 10 times (during his second round of 2003 attendance violations) without receiving a warning notice, and Luis Vargas was absent or tardy 44 times without receiving a warning notice. On brief, the Respondent argues, as Carter did in his testimony, that these records should count for nothing because the employees could have been excused by their supervisors for some reason such as drunkenness (like Vargas) or traffic jams (like Tavares), and the records would not so reflect. In advancing this argument, the Respondent would place upon the General Counsel the burden of proving that the attendance violations of Tavares, Torres, Veloz and Vargas were not excused for good reason. Under *Wright Line*, however, the burden was not upon the General Counsel to disprove any possible nondiscriminatory explanation for the disparities of the treatment of Trinidad and other employees.<sup>31</sup> The burden was on the Respondent to show that the records of excessive absenteeism and tardiness of Tavares, Torres, Vargas and Veloz should be disregarded because their incidents of absenteeism and tardiness, the numbers of which exceeded 4 within 6-month periods, had actually been excused for reasons that were contemplated by the Respondent's disciplinary attendance policy. The Respondent did not attempt to prove that any of the attendance violations of Tavares, Torres, Vargas and Veloz had, in fact, been excused for the reasons that were postulated by Carter, Camilo and Rodriguez. But even if Carter, Camilo and Rodriguez had testified that specific dates of absenteeism or tardiness by Tavares, Torres, Vargas, or Veloz had been excused for drunkenness, traffic jams, staffing problems or the like,<sup>32</sup> Human Resources Manager Watkins testified that the only exceptions to the Respondent's "no-fault" disciplinary attendance policy were on-the-job injuries, hospitalizations, pre-approved unpaid vacation time, a death in the family, and "other instances that the manager would bring to my attention." Neither Carter, nor Camilo, nor Rodriguez testified that they brought to Watkins's attention the theoretical excuses that they advanced for the attendance violations of Tavares, Torres, Vargas and Veloz.

Finally, the fact that the Respondent issued warning notices to Tavares and Javier for their 2003 attendance violations does not, as the Respondent argues, meaningfully detract from the impact of the evidence of discrimination that is demonstrated by the General Counsel's proof that 4 employees who had greater attendance violations than Trinidad went without punishment. Even though others may have been disciplined for fewer attendance violations than those which Trinidad committed, "[t]he Respondent must prove that the instances of disparate treatment shown by the General Counsel were so few as to be an anomalous or insignificant departure from a general[ly] consistent past practice."<sup>33</sup> The 2 cases alluded to by the Respondent hardly prove such a practice, and they hardly prove that the failures to punish Torres, Vargas, Veloz and Tavares (in 2002) constituted only insignificant anomalies to some such practice.

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<sup>31</sup> As stated in *Avondale Industries, Inc.*, 329 NLRB 1064, 1066 (1999), "Indeed, the Respondent argues, in contravention of the *Wright Line* standard, that the General Counsel must always bear the burden of disproving any possible nondiscriminatory explanation for the disparity."

<sup>32</sup> Rodriguez' intimation that he did not issue a warning notice to Veloz because of third-shift staffing problems is belied by the above-noted fact that in 2002 he issued a warning notice to third-shift employee Torres for attendance violations.

<sup>33</sup> *Avondale Industries, Inc.*, 329 NLRB 1064, 1066 (1999).

I credit Trinidad's testimony that he could not understand what Carter was saying in English on March 18. I further credit Trinidad's testimony that no interpreter was present to tell Trinidad what Carter and the March 18 notice meant,<sup>34</sup> even though Trinidad asked that Camilo or a translator be summonsed.<sup>35</sup> I also credit Trinidad's undisputed testimony that Carter did not give him a copy of the March 18 warning notice so that Trinidad could later find out what Carter had intended. And I do not agree with the Respondent that Trinidad could have divined what Carter had intended because Trinidad had received 2 warning notices in the past; the prior warning notices were not for attendance, and, even if they had been, Trinidad could not have divined that he was being specifically warned against being "absent [or tardy?] between today's date and 5/18." I further note that the boilerplate of the March 18 warning notice plainly states that, "The form should be completed after the discussion with the employee has taken place." (Emphasis original.) The Respondent therefore violated its own progressive disciplinary system by Carter's completing the form, and demanding that Trinidad sign it, before he (intelligibly) discussed it with Trinidad. The apparent reason for Carter's refusal to discuss the attendance problem with Trinidad beforehand, and the apparent reason for Carter's refusal to provide Trinidad with an interpreter on March 18 (as the Respondent did on April 24), were that the Respondent wanted Trinidad to commit another attendance violation for which he could be punished. And the apparent reason for that desire lies in the Respondent's animus toward Trinidad's protected union activities that included presenting the Union's demand for recognition on October 7, serving as the Union's observer at the Board election of November 7 and appearing for the Union at the post-election hearing on December 9 and 10.<sup>36</sup> But assuming that Trinidad knew exactly what Carter had intended on March 18, and further assuming that the Respondent had afforded Trinidad the full benefits of its progressive disciplinary system, the disparate treatment that the General Counsel has proved requires the finding of a violation in the Respondent's issuance of the March 18 warning notice to Trinidad.<sup>37</sup>

In summary, given the context of the animus that has been established, under *Wright Line* the Respondent was required to show that it would have issued to Trinidad the March 18 warning notice, even absent Trinidad's known union activities. The Respondent has showed that Trinidad was late or absent 7 times within a 6-month period, and the Respondent has showed that it has a rule against employees having any more than 4 such attendance violations. Nevertheless, the General Counsel has showed that 4 other employees with worse records went unpunished. The Respondent's failure to show why Trinidad was punished and the others were not is a failure to meet its *Wright Line* burden of proving by a preponderance of the evidence that it would have issued the March 18 warning notice to Trinidad even absent his known union activities. I therefore find and conclude that by the issuance of that notice the Respondent

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<sup>34</sup> I found absolutely incredible Carter's claimed lack of memory when his lawyer asked him *twice* if anyone else was present on March 18. Carter knew perfectly well that there was no third person (a translator) present when he issued the March 18 warning notice to Trinidad.

<sup>35</sup> Munoz and Trinidad testified that during the April 24 meeting, Enrique stated that he had translated for Carter and Trinidad on March 18. Enrique, however, did not testify, and the hearsay testimony of Munoz (and Trinidad) is not to be credited against Trinidad's sworn, and otherwise undisputed, testimony that Enrique was not present.

<sup>36</sup> In a context of animus, an employer's failure to follow its established disciplinary procedure fortifies an inference of discriminatory motivation. See *e.g. Ingles Markets, Inc.*, 322 NLRB 122, 125, (1996); *Florida Tile Co.*, 300 NLRB 739, 741 (1990), *enfd* 946 F.2d 1547 (11th Cir. 1991).

<sup>37</sup> If Carter had followed the Respondent's established progressive disciplinary system for attendance violations, Trinidad could have pointed out before the March 18 warning notice was drafted that at least his absence from work on Christmas Day should not be held against him.

violated Section 8(a)(3), as alleged.

As the Respondent predicated both Trinidad's April 24 warning notice and Trinidad's April 25 suspension upon Trinidad's having been issued the warning notice of March 18, and as I have found and concluded that the Respondent violated Section 8(a)(3) by the issuance of the March 18 warning notice, it necessarily follows that the April 24 warning notice and the April 25 suspension violated Section 8(a)(3), as well.<sup>38</sup>

## 2. The selections for layoff

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<sup>38</sup> See *Teledyne Advanced Materials*, 332 NLRB No. 53 (2000) (*Wright Line* burden is not met when basis of alleged unlawful discipline includes a violative warning notice).

It is first to be noted that the credible evidence does not support General Counsel's contention that before 2003 the Respondent had a practice of soliciting employees to take extended vacations along with the summer shutdowns. At best, as shown by the testimony of Vasquez and Maritza Arias, when the slack summer seasons approached, supervisors advised employees that it was time to indicate their vacation plans; at that time, the employees indicated on the Respondent's preprinted forms that they wished to take unpaid, as well as paid, time off. Moreover, even if the General Counsel had proved the contention that the Respondent had previously solicited employees to take extended vacations, there is no support for a conclusion that there were fewer layoffs in the past because the Respondent had done so. In 2002, there were only 4 employees laid off; this is too small a number for comparison on any basis. In 2001, there were 28 layoffs; this is a comparable number to the 41 layoffs in 2003, but there is no evidence that there were fewer employees laid off in 2001 than 2003 because the Respondent solicited extended vacations before determining the number to be laid off. Also, the 2003 layoffs were permanent.<sup>39</sup> Perhaps the unpaid vacations that some employees may have taken could have shortened a temporary layoff, but they would not have prevented any of the permanent layoffs. Finally, by withdrawing the allegation that the entire 2003 layoff was unlawfully motivated, the General Counsel has conceded that the Respondent needed to lay off 41 employees. The argument that there would have been fewer 2003 layoffs if the Respondent had first solicited extended vacations is nothing more than a reassertion of the withdrawn complaint allegation that there were more than 20 unlawful layoffs.

Regarding the allegations that 20 employees were unlawfully selected for layoff in 2003, I find and conclude:

(1-5) *Fuentes, Pastrana, Rivera, Santiago, and Luis Vargas*. I find that the General Counsel did not establish *prima facie* cases of discrimination with respect to these 5 employees because there was no evidence that the Respondent had knowledge of any union activities or sympathies on their part. In fact, there was no evidence that Fuentes, Pastrana, Rivera, Santiago, or Luis Vargas had engaged in any union activities or that they had held any sympathies for the Union before their layoffs. And there is no evidence that the Respondent suspected those 5 employees of engaging in union activities or holding pronion sympathies.<sup>40</sup>

On brief, the General Counsel cites several cases to argue that the Respondent should be deemed to have suspected Fuentes, Pastrana, Rivera, Santiago, and Luis Vargas of pronion sympathies, even if the employees had no pronion sympathies and even if there is no evidence that the Respondent actually suspected them of having pronion sympathies. In support of this argument, however, the General Counsel cites only cases in which the Board found that the employers possessed objective evidence that reasonably would have caused them to suspect that alleged discriminatees had possessed pronion sympathies. In *BMD Sportswear Corp.*, 283 NLRB 142 (1987), the employer laid off 7 employees, and the General Counsel alleged that all 7 were alleged discriminatees. The administrative law judge dismissed the complaint as to 2 of the alleged discriminatees, Mejia and Paredes, because he found that the General Counsel had adduced no evidence that the Respondent actually knew of those individuals' union sympathies. The Board reversed the rulings on Mejia and Paredes noting that the employer had failed to advance justification for any layoff, and it relied on a finding by the judge that a supervisor had observed Mejia and Paredes taking lunch with known union advocates who themselves were

<sup>39</sup> This was demonstrated by the Respondent's asking each laid-off employee if he or she wanted to withdraw his or her 401(k) contribution, telling them to seek unemployment insurance benefits which the Respondent would not oppose, and instructing them on how to continue with some health insurance under COBRA.

<sup>40</sup> In fact, Camilo testified that Santiago told him that he opposed the Union. Camilo further testified that he heard Santiago telling other employees the same thing. The General Counsel did not call Santiago in rebuttal to deny this testimony, and she does not suggest on brief why this testimony should be ignored.

unlawfully laid off. In this case, the General Counsel has conceded that the Respondent was economically required to lay off 41 employees by withdrawing the allegation of the complaint that the entire layoff was motivated by antiunion considerations. Moreover, there is nothing upon which to base a finding that the Respondent suspected Fuentes, Pastrana, Rivera, Santiago, or Luis Vargas of possessing prounion sympathies, such as their associating with known Union adherents, as did Mejía and Paredes in *BMD Sportswear*. Similarly, in *General Iron Corp.*, 218 NLRB 770, 778 (1975), affd. mem. 538 F.2d 312 (2d Cir. 1976), all of the alleged discriminatees engaged in the activity of signing authorization cards and the layoffs occurred shortly thereafter. The Board found that an inference of knowledge was warranted because of the small size of the plant (25 employees) where the card-distributions had taken place and because of the employer's complete failure to prove the necessity for the layoff of *any* employees. *Hunter Douglas, Inc.*, 277 NLRB 1179 (1985), enfd. 804 F.2d 808 (3d Cir. 1986), did involve the layoff of some employees who had no union activities, but they were on the employer's second shift, and the General Counsel proved that the employer believed that that shift was "the focus of union activity," and the judge found that the General Counsel had proved that the manager told his subordinates "to rid the second shift of its 'union teeth.'" Finally, *Johnson Distributorship, Inc.*, 323 NLRB 1213 (1997), was a case of a mass discharge, not a generally justified layoff, and the employer justified none of the discharges. As well, the discriminatees in *Johnson Distributorship* who were not shown to have engaged in union activities themselves were known by the employer to be close associates of those who did engage in union activities, and the inference of suspicion of their prounion sympathies was held to be warranted.

As well, it is to be noted that, among the 41 employees who were laid off in May, there were many employees other than Fuentes, Pastrana, Rivera, Santiago, and Luis Vargas who engaged in no union activities. Consistent application of the General Counsel's mass-discharge theory would require that all of the other nonunion employees be named as alleged discriminatees. The General Counsel, however, suggests no reason why Fuentes, Pastrana, Rivera, Santiago, and Luis Vargas were included in the complaint and the other nonunion employees were not. It appears, therefore, that the General Counsel has arbitrarily selected Fuentes, Pastrana, Rivera, Santiago, and Luis Vargas for inclusion in the complaint. I shall therefore recommend dismissal of the complaint as it refers to the layoffs of Fuentes, Pastrana, Rivera, Santiago, and Luis Vargas.

(6) *Hilda Vasquez*. I found Montanez, Watkins and Munoz fully credible in their testimonies that Vasquez volunteered for the layoff, and on that basis I shall recommend dismissal of the complaint as it pertains to the layoff of Vasquez.

(7-8) *Julio Trinidad and Jesús Moret*. The General Counsel has presented an especially strong *prima facie* case for the allegation that Trinidad was selected for layoff because of his union activities. Trinidad presented the Union's demand for recognition to Pantanella on October 7, he was one of the Union's 2 observers at the November 7 Board election, he appeared in the Union's Face Book, and he was one of the 2 employees who appeared for the Union at the post-election hearing. Also, Trinidad was, as I have found, issued 2 warning notices and suspended in violation of Section 8(a)(3). Because Moret's picture appeared in the Face Book, and the Respondent does not deny knowledge of his prounion sympathies, a *prima facie* case has been presented for him, as well. To meet its *Wright Line* burden of answering the *prima facie* cases for Trinidad and Moret by demonstrating by a preponderance of the evidence that it would have laid those employees off even absent their known prounion sympathies, the Respondent adduced Kirkiles's testimony that, when the layoff was required, he decided to operate the pulverizing and mixing functions only on the first shift, and that is why the second shift and third shift pulverizers and mixers were selected for layoff.

Before the layoff, the Respondent had one pulverizer and one mixer on each of 3 shifts. On the first shift, Alex Rodriguez, who was not shown to be prounion, was the pulverizer and

Fantuazzi, who accompanied Trinidad when he delivered the October 7 demand for recognition to Pantanella, was the mixer. On the second shift, Moret was the pulverizer and Trinidad was the mixer. On the third shift, Rivera, who is an alleged discriminatee but who was not shown to be prounion, was the pulverizer and Jorge Santiago, who was not shown to be prounion, was the mixer. Therefore, pursuant to the Respondent's decision to retain only the pulverizer and mixer on the first shift, it retained one prounion employee and one nonunion employee on that shift, it laid off the prounion pulverizer and prounion mixer on the second shift, and it laid off the nonunion pulverizer and nonunion mixer on the third shift. The numbers do not indicate a discriminatory approach.

The General Counsel acknowledges that the positions of Trinidad and Moret were "undisputedly eliminated."<sup>41</sup> The General Counsel contends, however, that the Respondent "could have transferred" Moret and Trinidad to other shifts, just as it transferred "Nancy Gracia and Bridgett Beaulieu, two antiunion packaging employees who were transferred to the first shift when their shift was eliminated."<sup>42</sup>

On cross-examination, Waller testified that he never saw Gracia and Beaulieu wear Union T-shirts, but the General Counsel's assertion that Gracia and Beaulieu were "antiunion" is simply unsupported.<sup>43</sup> Moreover, Gracia and Beaulieu were not production employees under Kirkiles, as were the pulverizers and mixers such as Trinidad and Moret; Gracia and Beaulieu were packaging employees under Waller. Kirkiles was not subordinate to Waller; Kirkiles, as well as Waller, reported directly to Pantanella. Therefore, there is no reason to conclude that, just because Waller allowed inter-shift transfers, Kirkiles was required to do so also. And even if the Respondent was required to transfer production employees between shifts, there is no reason to conclude that it was required to transfer employees between jobs. Beaulieu and Gracia were transferred between shifts, not jobs. They remained packaging employees. Therefore, if the Respondent had transferred mixer Trinidad to the first shift, it would have been only to displace prounion mixer Fantuazzi. This is because, as the General Counsel concedes, the Respondent abolished the positions of all mixers (and pulverizers) except those on the first shift. Trinidad was shown to be a stronger prounion employee than Fantuazzi, but, at best, there is only a suspicion that the Respondent, in order to justify the layoff of Trinidad, created its plan of (1) terminating the positions of pulverizer and mixer on the second and third shifts and (2) disallowing bumping in production,<sup>44</sup> all in order to lay off one Union adherent (Trinidad) and not another (Fantuazzi). Certainly, the General Counsel does not contend that there was any illogic in the Respondent's continuing to operate the pulverizing and mixing operations only on one shift, and the General Counsel does not contend that there was any illogic in the Respondent's choosing the first shift to do so.

Therefore, although I have found that Trinidad engaged in extensive union activities, and even though I have found that the Respondent responded to those activities with unlawful expressions of animus and discrimination against other prounion employees, I am constrained to conclude that the Respondent has shown by a preponderance of the evidence that it would have laid off Trinidad and Moret even absent their known union activities. I shall therefore recommend dismissal of the complaint as it pertains to the layoffs of Trinidad and Moret.

(9-10) *Eduvigis Almonte and Carlos Vargas*. Almonte was, with Trinidad, one of the 2 Union observers at the Board election, and he was one of the 2 employees, again with Trinidad, who appeared for the Union at the post-election hearing. His picture appeared in the Union's Face Book. Vargas' picture also appeared in the Face Book. Knowledge of their prounion

<sup>41</sup> Brief, p. 45.

<sup>42</sup> *Id.*

<sup>43</sup> The 5 alleged discriminatees whose cases I have recommended for dismissal because of lack of knowledge never wore Union T-shirts, either; certainly the General Counsel does not contend that they were antiunion.

<sup>44</sup> The General Counsel contends that the Respondent allowed utility worker George Lopez to transfer to a pot-remover job in production. This is not accurate; as a utility worker, Lopez did a variety of jobs before the layoff, presumably including pot-removing.

sympathies having been demonstrated, and animus having been shown, the Respondent was required to demonstrate why it selected Almonte and Vargas for layoff.

Waller testified that he selected Almonte and Vargas because Cadger had rated them as the lowest among the material-handlers at the Plaistow facility. Cadger listed the 10 material-handlers who reported to him, with Almonte and Vargas, respectively, being the last two. And Almonte and Vargas were the only 2 Plaistow material-handlers laid off.

Cadger testified that he rated Almonte his ninth among his 10 material-handlers because of his attitude and because of mistakes that he made. The Respondent did not offer any of the personnel files of the employees who were not laid off, but among the 41 employees who were selected for layoff, Scholfield's 2001 evaluation of Almonte was the best of the lot. Scholfield rated Almonte at 4 in every category except one category of Job Knowledge, and a 5 in one Attitude category. Moreover, in 2002, Scholfield did not perform ratings for Almonte, but he noted in the Performance Summary that Almonte "Has a positive attitude toward change" and "[a]ppplies himself." Cadger, without giving supporting examples, testified that Almonte initially refused assignments, although Almonte would eventually do them. Cadger conceded, however, that he never issued to Almonte a warning notice for such conduct<sup>45</sup> and, without evidentiary support, I do not credit Cadger's testimony that Almonte had such a practice. Moreover, Cadger did not testify that other material-handlers always did what they were told immediately. Similarly, Cadger testified that Almonte made more mistakes than other material-handlers, but he gave no examples, other than one incident of placing materials in the wrong area of the warehouse. Cadger admitted that other employees did the same thing without being disciplined. (Probably employees who made that mistake were not disciplined because mis-placements were not always the fault of the employees, as Cadger admitted.) Cadger further testified that he selected Almonte for layoff because of a report that he received from Montanez about a confrontation between Almonte and Montanez, in which confrontation Almonte yelled at Montanez and questioned his authority. The first thing to be noted about Cadger's testimony about the confrontation is that it was absolute hearsay, as I ruled at trial.<sup>46</sup> Montanez testified, but he did not testify about any confrontation between himself and Almonte, much less that Almonte yelled at him and questioned his authority. If Montanez had been offended by such conduct of Almonte, Montanez would have issued discipline to Almonte, and Montanez would have testified about the event at trial.<sup>47</sup> Finally, Almonte admitted on cross-examination that the confrontation occurred, but he credibly denied that he had yelled at Montanez or questioned his authority. None of the reasons that the Respondent assigns for the selection of Almonte for layoff being credible, it must be concluded that the Respondent has failed to demonstrate by a preponderance of the evidence that it would have selected Almonte for layoff even absent his known prounion sympathies. Having therefore failed to meet its *Wright Line* burden, the Respondent must be held to have selected Almonte for layoff in violation of Section 8(a)(3).

The Respondent's position that Carlos Vargas was selected for layoff because he was a slow learner is clearly corroborated by the most recent evaluation in Vargas' personnel file. Although the 2002 evaluation rated Vargas at acceptable levels in all categories except communications, Cadger's 2003 evaluation rated Vargas at 2s and 2.5s in most categories that involved job

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<sup>45</sup> The Respondent has a progressive disciplinary system for such offenses, as well as the one for attendance violations.

<sup>46</sup> At Tr. 540, LL. 13-14, when the General Counsel had objected to Cadger's hearsay, I plainly stated: "Overruled. I'll receive it for the report. It's not going to prove the substance of the report, of course."

<sup>47</sup> I draw an adverse inference against the Respondent for failing to ask Montanez about conduct of Almonte, on the report of which the Respondent so heavily relies.

understanding. In this posture of the case, I accept, and credit, Cadger's testimony that he selected Vargas for layoff solely because Vargas could not do the janitorial work to which he was assigned. Moreover, Vargas was replaced by known Union adherent Pedro Sanchez,<sup>48</sup> and that factor hardly bespeaks of discrimination on the basis of Union allegiance. In these circumstances, I find that the Respondent has demonstrated that it would have selected Vargas for layoff even absent his known prounion sympathies. Accordingly, I shall recommend dismissal of the allegations that Vargas was selected for layoff in violation of Section 8(a)(3).

(11) *Heriberta Almonte*. This alleged discriminatee was a known Union adherent who had been employed by the Respondent since 1999. Montanez rated Almonte last out of the 12 powder-preparers who reported to him at the Plaistow warehouse. When asked why he did so, Montanez replied, "Because the ability of not being able to communicate and as a team player, to work together with other employees. She wasn't. ... [a] team player on the packaging line. For you to be able to work and get as much productivity out of the line, everyone has to be on the same page. ... Well, she wasn't as fast as everyone else, to try to keep up with everyone else." Montanez offered no specifics to support these criticisms. Moreover, those criticisms are contradicted, to a significant extent, by the written evaluations of Almonte that are in evidence. In 2002, Scholfield gave Almonte the superior rating of 4 for having a positive attitude, demonstrating dependability, and performing her work with a minimal amount of direction. Scholfield further noted that Almonte "adjusts well with changes." And in 2003 Montanez rated Almonte at 4 for exhibiting a positive attitude, demonstrating dependability and interacting well with co-workers. Montanez concluded his commentary about Almonte with "Heriberta is a good worker with a positive attitude." Such comments are radically inconsistent with Montanez' testimony that Almonte was not a "team player" and was too slow. I therefore do not credit Montanez' testimony, and I find that the Respondent has not proved by a preponderance of the evidence that it would have selected Almonte for layoff even absent her known prounion sympathies. I therefore conclude that the Respondent selected Almonte for layoff in violation of Section 8(a)(3).

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<sup>48</sup> See footnote 6. Also, discriminatee Eduvigis Almonte testified that Sanchez wore Union T-shirts to work.

(12) *Maritza Arias*. This alleged discriminatee was a known Union adherent who had been employed by the Respondent since 1999. Montanez testified that he rated Arias the 9<sup>th</sup> of the 12 powder-preparers who reported to him, and thereby selected her for layoff,<sup>49</sup> because she was not a “team player” and “she was one of the slowest employees that I had.” Montanez further testified that he considered Arias to be a slow learner because she once mistakenly deleted a computerized inventory label. It is more than probable that any employee will make at least one mistake in 4 years. Moreover, Montanez did not discipline Arias for the mistake at the time, and, although Montanez reassigned Arias to another job at the time, he thereafter returned her to the job where she had made the mistake, and Montanez thereafter had no problems with Arias’s being on that job. Additionally, the evaluations in evidence do not support Montanez’ criticisms of Arias. In 2001, Christophersen rated Arias at 4 knowing the requirements of her job and displaying the ability to perform with the technical skills that the job requires. Christophersen also rated Arias at 4 for the volume of work that she did. Christophersen further commented that Arias was “[v]ery capable” and a “quick learner.” In 2002, Montanez gave Arias lower ratings, but he nevertheless commented that “Maritza is a very hard worker and does what she needs to get the job done. ... Maritza is a good worker. Maritza also knows how to follow directions when given to her.” Other than the one mistake that Arias made in 2003, Montanez made no suggestion of how her performance deteriorated since his 2002 evaluation. I therefore discredit Montanez, and I find that the defense of inferior workmanship by Arias, like the vague and meaningless “team player” defense, is unsupported. The Respondent has therefore failed to demonstrate that it would have selected Arias for layoff even absent her known prounion sympathies. I therefore conclude that the Respondent selected Arias for layoff in violation of Section 8(a) (3).

(13) *Martina Arias*. This alleged discriminatee was a known Union adherent and also had been employed since 1999. She received no discipline during her employment, but her supervisors consistently criticized her for slow performance, and slow performance was the reason that Camilo assigned for selecting Arias for layoff. The defense being fully supported by the documentary evidence, I credit Camilo and find that the Respondent has demonstrated by a preponderance of the evidence that it would have laid off Arias, even absent her known prounion sympathies. I shall therefore recommend the dismissal of the complaint as it pertains to Arias.

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<sup>49</sup> Again, Montanez rated alleged discriminatee Hilda Vasquez 11th, but I have agreed with the Respondent that Vasquez volunteered for layoff. Montanez rated Manuella Cortes 10th, but Cortes was discharged (and is not an alleged discriminatee).

(14) *Samuel Morales*. This alleged discriminatee was one of the 4 employees who accompanied Trinidad when Trinidad presented the Union's demand for recognition to Pantanella on October 7. Rodriguez testified that he selected Morales for layoff because "[h]e had a bad attitude. ... He always used to talk back, you know, disrespectful. And I would ask him to do something and he wouldn't comply with it." Rodriguez had been Morales's supervisor since April 21, or 7 work days, when Morales was laid off on May 1. Morales was never disciplined, and it is simply incredible that Morales "always" talked back to Rodriguez. It is further incredible that Morales would ever refuse to comply with Rodriguez' instructions without Rodriguez' disciplining Morales in some way. I further do not believe Rodriguez' testimony that Camilo told him that Morales had had a bad attitude when Morales worked under his supervision. Camilo did not testify to such; moreover, as late as February 17, Camilo had rated Morales with 4s in many categories of Morales's evaluation, including 3 of the 4 attitude categories.<sup>50</sup> This lack of corroboration for, and even contradiction of, Rodriguez' generalized, unspecific testimony about why he chose Morales for layoff causes me to discredit Rodriguez. The Respondent having come forward with no other evidence to meet the General Counsel's *prima facie* case for Morales, it must be found, as I do, that the Respondent has failed to demonstrate by a preponderance of the evidence that it would have selected Morales for layoff even absent his known prounion sympathies. And it therefore must be concluded that by laying of Morales on May 1 the Respondent violated Section 8(a)(3).

(15) *Ramón Valentin*. This alleged discriminatee was a known Union adherent who was laid off on May 16. Rodriguez vacillated about whether he did, or did not, make the decision to lay off Valentin. After he decided to lay off Valentin, Rodriguez testified that he did so because Valentin had a "poor attitude," and he "complained a lot," and he would "pout" before doing some jobs. This generalized testimony by Rodriguez was unimpressive. Moreover, Rodriguez did not discipline Valentin during the approximate month that he supervised him, and Valentin's evaluations over the previous years had been consistently positive, especially in attitude matters. In the 2001 and 2002 evaluations of Valentin, Carter consistently rated Valentin with the superior rating of 4 for matters of attitude. In 2001, Carter further commented that Valentin "works well with all employees," and in 2002 Carter commented that Valentin had a "GOOD ATTITUDE TOWARDS COMPANY." (Again, the capitalization is original.) Finally, Rodriguez testified that, although he did not discipline Valentin for his attitude, he did speak to Valentin about his attitude. Valentin, however, credibly denied that any supervisor ever spoke to him about his attitude. For these reasons, I discredit Rodriguez, and I find that the Respondent has not shown by a preponderance of the evidence that it would have laid off Valentin even absent his known prounion sympathies. Accordingly, I conclude that by laying off Valentin the Respondent violated Section 8(a)(3).

(16) *Eugenio Mejía*. This alleged discriminatee was also a known Union adherent who was laid off on May 16. Rodriguez testified that, during the month that he supervised Mejía, he was chronically tardy, and "he was out a lot." Rodriguez' testimony was fully corroborated by the Respondent's records. Mejía was tardy or absent (again, equivalent attendance violations under the Respondent's system) 15 times between January 23 and the date of his layoff. The General Counsel makes no argument why this record of attendance violations is not a sufficient defense under *Wright Line* for the allegation of discrimination against Mejía, and I find that it is. I therefore shall recommend dismissal of the complaint as it pertains to Mejía.

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<sup>50</sup> In 2002, Camilo indicated on Morales's evaluation that he needed to "Work on attitude." Camilo's 2003 evaluation obviously indicates that Morales had done so.

(17) *Rafael DeJesús*. This alleged discriminatee was also a known Union adherent who was laid off on May 16. Rodriguez had no criticism of DeJesús; Rodriguez simply testified that the other table-operators under his supervision were just “better.” In 2002, Camilo had given DeJesús consistently favorable ratings, and the Respondent did not introduce the evaluations or ratings of those employees who were supposedly “better” than DeJesús. Rodriguez’ bare statement of his subjective opinion is not a *Wright Line* defense. If it were, any unlawfully discriminating employer could defeat any union organizational attempt by selecting known Union adherents for layoff or discharge, or by otherwise discriminating against known Union adherents, and then at trial rest upon such vague, uncorroborated, generalized and conclusional statements of subjective opinions as that which the Respondent has offered with Rodriguez’ testimony about DeJesús.<sup>51</sup> As Rodriguez’ subjective evaluations of his subordinates’ comparative worth is all that the Respondent has advanced as a defense to the *prima facie* case that the General Counsel has presented for DeJesús, I find that it has not demonstrated by a preponderance of the evidence that it would have selected DeJesús for layoff even absent his known prounion sympathies. Accordingly, I conclude that by laying off DeJesús the Respondent has violated Section 8(a)(3).

(18) *Manuel Cerda*. This alleged discriminatee was a known Union adherent who was laid off on May 2. Carter at first testified that Kirkiles had told him only to lay off 4 table-operators and 2 machine-operators and that he did not select Cerda, a powder-preparer, for layoff. Apparently then sensing that an explanation for Cerda’s layoff was necessary, and apparently sensing that he was going to have to give it, Carter came up with the explanation that Cerda’s position was eliminated. Then, further sensing that that answer would not withstand scrutiny, Carter ventured that Cerda had been too slow a worker. On cross-examination, Carter admitted that there were no records to support his testimony that Cerda was a slow worker, and he acknowledged that his appraisal depended on his “subjective observation” of Cerda. Again, such subjective appraisals, alone, cannot constitute a *Wright Line* defense.<sup>52</sup> Even if they could, however, Carter’s apparent groping for excuses to terminate Cerda rendered him incredible, especially in view of the generally favorable ratings that Carter had given Cerda for the previous 2 years. As the Respondent has advanced no other justification for the selection of Cerda for layoff, it must be found that the Respondent has failed to demonstrate that it would have selected him even absent his known prounion sympathies. Accordingly, I conclude that by laying off Cerda the Respondent has violated Section 8(a)(3).

(19) *Orlando Jimenez*. This alleged discriminatee was a known Union adherent who was laid off on May 1. Camilo testified that he selected Jimenez for layoff because he had the worst attendance record of all 5 of the machine-operators under him. Camilo named the other 4 machine-operators, but the Respondent did not introduce their attendance records. Therefore, Camilo’s stated basis for selecting Jimenez is not corroborated, and it presumably would have been if those records would have supported the stated reason for the layoff of Jimenez. I draw

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<sup>51</sup> See *Waterbury Hotel Management, etc.*, 333 NLRB No. 60 (2001), where the Board affirmed the holding by Judge Wallace H. Nations which was based, in significant part, upon the reasoning that “Having set up a [hiring] system in which subjective impressions of screeners and interviewers were the basis for determining who got hired, rather than establishing objective criteria based on normal criteria such as skills and experience, work history, attendance, and similar criteria, Respondent has made it virtually impossible for it to establish a *Wright Line* defense.” See also: *Martech MDI*, 331 NLRB 487 (2000) (“vague and uncorroborated” criticisms of employees who had been selected for layoff not a defense under *Wright Line*); *WestPac Electric, Inc.*, 321 NLRB 1322 (1996) (“generalized” testimony in response to a refusal-to-hire allegation not a defense); and *Advance Transportation Company*, 299 NLRB 900 (1990) (“conclusional” testimony not a defense).

<sup>52</sup> *Id.*

an adverse inference against the Respondent for failing to produce those records. I further find relevant Rodriguez' statement on Jimenez' 2001 evaluation that Jimenez had "good attendance," and I find relevant Rodriguez' 2002 statement that Jimenez' attendance was "not a problem." I therefore discredit Carter, and I find that the Respondent has not come forward with probative evidence that it would have laid off Jimenez even absent his known prounion sympathies. Accordingly, I conclude that by laying off Jimenez the Respondent has violated Section 8(a)(3).

(20) *José Ortiz*. This alleged discriminatee was also a known Union adherent who was laid off on May 1. Carter testified that the Respondent only needed one pot-remover on the second shift, Romulo Javier was a "better" pot-remover, and Javier did not have the attitude problems that Ortiz did. Carter's testimony that Ortiz had attitude problems is at least corroborated by the 2002 evaluation that Carter completed for Ortiz. In that evaluation, Carter rated Ortiz at an inferior 2 in the Attitude category of "Exhibits a positive attitude." In the 2002 commentary, Carter entered: "Complains a lot about small inconveniences in area." In the Evaluator's Summary, Carter entered: "José is a good worker for the most part." At best, Carter appeared to be damning Ortiz with faint praise. In this posture of the case, I find that the evidence preponderates in favor of the finding that the Respondent would have selected Ortiz for layoff, instead of Javier, even absent Ortiz' known prounion sympathies. I shall therefore recommend dismissal of the complaint as it pertains to Ortiz.

In summary, I find and conclude that the Respondent violated Section 8(a)(3) by selecting the following employees for layoff in May 2003: Eduvigis Almonte, Heriberta Almonte, Maritza Arias, Manuel Cerda, Rafael DeJesús, Orlando Jimenez, Samuel Morales, and Ramón Valentin. I further find and conclude that the Respondent has not otherwise violated the Act as alleged in the complaint.

#### The remedy

Having found that the Respondent unlawfully warned and suspended Julio Trinidad, and having found that the Respondent unlawfully selected Eduvigis Almonte, Heriberta Almonte, Maritza Arias, Manuel Cerda, Rafael DeJesús, Orlando Jimenez, Samuel Morales, and Ramón Valentin for layoff, I shall order it to cease and desist from such conduct and to take certain additional affirmative actions designed to effectuate the policies of the Act. Specifically, I shall order the Respondent to offer Eduvigis Almonte, Heriberta Almonte, Arias, Cerda, DeJesús, Jimenez, Morales, and Valentin full reinstatement to their former jobs and to make them whole for any loss of earnings or other benefits that they have suffered as a result of the discrimination against them. The Respondent shall further be require to Julio Trinidad whole for any loss of earnings or other benefits that he has suffered as a result of his unlawful suspension on April 25, 2003. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also be required to remove from its files any and all references to the warning notices that it issued to Trinidad on March 18 and April 24, 2003, and to remove from its files any and all references to the suspension of Trinidad on April 25, 2003, and the Respondent shall be required to remove from its files all references to the 2003 layoffs of Eduvigis Almonte, Heriberta Almonte, Arias, Cerda, DeJesús, Jimenez, Morales, and Valentin. The Respondent shall also be required to notify those employees in writing that this has been done.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>53</sup>

#### ORDER

<sup>53</sup> 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.

The National Labor Relations Board orders that the Respondent, Telcom, USA, Inc., of Lawrence, Massachusetts, Tewksbury Massachusetts, and Plaistow, New Hampshire, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing warning notices to its employees, suspending them, selecting them for layoff , or otherwise discriminating against its employees because of their protected union activities.

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

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

(a) Within 14 days from the date of this Order, offer Eduvigis Almonte, Heriberta Almonte, Maritza Arias, Manuel Cerda, Rafael DeJesús, Orlando Jimenez, Samuel Morales, and Ramón Valentin full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges that they previously enjoyed.

(b) Make Julio Trinidad, Eduvigis Almonte, Heriberta Almonte, Maritza Arias, Manuel Cerda, Rafael DeJesús, Orlando Jimenez, Samuel Morales, and Ramón Valentin whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any references to the March 18 and April 24, 2003, warning notices that the Respondent issued to Julio Trinidad, any reference to the April 25, 2003, suspension of Trinidad, and any reference to the May 2003 layoffs of Eduvigis Almonte, Heriberta Almonte, Maritza Arias, Manuel Cerda, Rafael DeJesús, Orlando Jimenez, Samuel Morales, and Ramón Valentin, and within 3 days thereafter notify those employees in writing that this has been done and that their layoffs, warning notices or suspensions will not be used against them in any way.

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

(e) Within 14 days after service by the Region, post at its facilities in Lawrence, Massachusetts, Tewksbury, Massachusetts, and Plaistow, New Hampshire, copies of the attached notice marked "Appendix."<sup>54</sup> Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 1, 2003, the date of the first unfair labor practice found herein.

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<sup>54</sup> 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."

(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 had taken to comply.

Dated, Washington, D.C.

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David L. Evans  
Administrative Law Judge

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 issue warning notices to you, suspend you, select you for layoff, or otherwise discriminate against you because of your membership in, or protected activities on behalf of, **Union of Needletrades, Industrial & Textile Employees, AFL-CIO, CLC.**

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

WE WILL, within 14 days of the Board's Order, offer Eduvigis Almonte, Heriberta Almonte, Maritza Arias, Manuel Cerda, Rafael DeJesús, Orlando Jimenez, Samuel Morales, and Ramón Valentin immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges that they previously enjoyed and WE WILL make those employees whole for any loss of earnings and other benefits resulting from our discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days of the Board's Order, make Julio Trinidad whole for any losses of pay or other benefits that he suffered because of his unlawful suspension on April 25, 2003.

WE WILL, within 14 days of the Board's Order, remove from our files any references to the March 18 and April 24, 2003, warning notices that we issued to Julio Trinidad, the April 25, 2003, suspension that we imposed on Julio Trinidad, and the May 2003 layoffs of Eduvigis Almonte, Heriberta Almonte, Maritza Arias, Manuel Cerda, Rafael DeJesús, Orlando Jimenez, Samuel Morales, and Ramón Valentin, and WE WILL, within 3 days thereafter, notify those employees in writing that this has been done and that their warning notices, suspension or layoffs will not be used against them in any way.

TELCOM USA, INC.

Date \_\_\_\_\_ 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 of the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

10 Causeway Street, Boston Federal Building, Room 601, Boston, MA 02222-1072  
(617) 565-6700, Hours of Operation: 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, (312) 886-3036.