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

CEMEX CONSTRUCTION MATERIALS PACIFIC, LLC	
and	**28–CA–230115** **28–CA–235666**
INTERNATIONAL BROTHERHOOD OF TEAMSTERS	**28–CA–249413** **31–CA–237882** **31–CA–237894** **31–CA–238094** **31–CA–238239** **31–CA–238240**
CEMEX CONSTRUCTION MATERIALS PACIFIC, LLC	
Employer	
and	**28-RC-232059**
INTERNATIONAL BROTHERHOOD OF TEAMSTERS	
Petitioner	

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for the Respondent.

DECISION

STATEMENT OF THE CASE

JOHN T. GIANNOPOULOS, Administrative Law Judge. The issues involved in this matter stem from an organizing drive among certain Southern California and Las Vegas, Nevada based ready-mix drivers employed by Cemex Construction Materials Pacific, LLC (Respondent or Cemex) who sought to be represented in their workplace by the International Brotherhood of Teamsters (Teamsters or Union). An election was held on March 7, 2019 which the Union lost. The Teamsters filed multiple unfair labor practice charges relating to Respondent's conduct both before and after the election, along with objections to the election (Objections). Ultimately, a Consolidated Complaint and Notice of Hearing issued (Complaint), which was subsequently amended, alleging that Cemex committed multiple unfair labor practices. As part of the remedy for the Complaint allegations, the General Counsel asserts that a bargaining order is necessary as set forth in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), or in the alternative that certain additional remedies be ordered to ensure a fair second election can occur. On September 20, 2020 an Order issued consolidating the allegations contained in Union's Objections with those in the Complaint for hearing. This case was tried before me over a 24-day period between November 2020 and February 2021. Because of the compelling circumstances presented by ongoing Covid-19 pandemic, pursuant to a stipulation by the parties, the trial occurred via videoconference.

Based upon the entire record, including my observation of witness demeanor, and after considering the briefs filed by the General Counsel, the Union, and Respondent, I make the following findings of fact and conclusions of law.[1]

I. JURISDICTION AND LABOR ORGANIZATION

Respondent is a Delaware corporation that produces cement, ready-mix concrete, and aggregates, with operations in Southern California and Las Vegas, Nevada. In conducting its business operations, each year Respondent purchases goods and materials valued in excess of $50,000 directly from points located outside of Nevada and California. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the National Labor Relations Act (the Act or NLRA). Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act. Accordingly, I find that this dispute affects commerce and the National Labor Relations Board (NLRB or the Board) has jurisdiction pursuant to Section 10(a) of the Act.

II. FACTS

A. General Background

Respondent is a subsidiary of CEMEX, S.A.B. de CV, a multinational building materials company headquartered near Monterrey Mexico, whose stock is traded on the New York Stock

[1] Testimony contrary to my findings has been specifically considered and discredited. To the extent possible, and unless otherwise noted, witness demeanor was considered in making all credibility resolutions.

Exchange under the symbol CX.[2] For the year ending December 31, 2019, CEMEX, S.A.B. de CV had revenues of just over $13 billion and a gross profit of over $4.3 billion. The company has operations in North America, Central America, South America, Europe, the Caribbean, Asia, the Middle East, and Africa.

The facilities at issue in this matter involve Cemex's ready-mix plants in Las Vegas, Nevada and Southern California. Ready-mix concrete is a mixture of cement powder, stone, sand, and additives. See *Irving Ready-Mix, Inc.*, 357 NLRB 1272, 1275 (2011). The product is made on demand at batch plants where the proper proportions of material are measured and loaded into large hoppers. Each plant has a batchman, also referred to as a plant foreman, who is responsible for ensuring that the accurate portion of aggregate, cement, and additives are mixed into the delivery truck's drum. The batchman works in an office, and based upon on the specifications for each particular load, programs the information into a computer system which measure's the correct mixture. Ready-mix trucks pull underneath the hopper, sometimes referred to as the "plant," and the dry material is loaded into a large bubble-style drum on the back of the truck. The loaded truck then pulls out from underneath the plant, and the driver adds water to the load as specified in the customer's order. This process is referred to as slumping. The concrete slump measurement goes from 1 (very dry) to 10 (very wet) and gauges the moisture content in the concrete. Once the concrete is slumped, it needs to be delivered to the customer within 90 minutes.[3] (Tr. 105, 272, 282–283, 603, 1040, 1288, 2337, 2395, 2449; JX. 6)

On December 3, 2018, the Teamsters filed a petition to represent Cemex's Southern California and Las Vegas based ready-mix drivers. A hearing occurred in December 2018, and on February 20, 2019, the Regional Director for NLRB Region 28 ordered that an election be held on March 7, 2019 in the following unit of Respondent's employees (Unit):

> All full-time and regular part-time ready-mix drivers, plant operators II who regularly operate ready-mix trucks, and driver trainers employed by the Employer at its ready-mix facilities in Southern Nevada and Southern California, including its plants in Las Vegas, North Las Vegas, and Sloan, Nevada, and Compton, Corona, Escondido, Fontana, Highland, Hollywood, Irvine, Los Angeles, Moorpark, Oceanside, Orange, Oxnard, Perris, Rialto, San Diego, San Juan Capistrano, Santa Barbara, Santa Paula, Simi Valley, Temecula, and Walnut, California, excluding all other employees, batch men, yardmen, yardmen/laborers, plant maintenance employees, plant maintenance employees II, plant maintenance foremen, fleet mechanics, fleet mechanic foremen, mechanic foremen, senior driver trainers/safety champions, plant foremen, dispatchers, quality control

[2] See https://www.sec.gov/Archives/edgar/data/0001076378/000119312520126557/d863784d20f.htm (last accessed on December 10, 2021). For purposes of background information, I take administrative notice of form 20-F filed by CEMEX, S.A.B. de CV with the Securities and Exchange Commission on April 29, 2020. *Pacific Greyhound Lines*, 4 NLRB 520, 522 fn. 2 (1937) (Board takes judicial notice of facts stated in company's annual report filed with the Security and Exchange Commission); Fed. R. Evid. 201(b).

[3] Transcript citations are denoted by "Tr." with the appropriate page number. Citations to the General Counsel, Respondent, Union, Joint, and Administrative Law Judge exhibits are denoted by "GC," "R," "U," "JX," and "ALJ," respectively. Transcript and exhibit citations are intended as an aid only. Factual findings are based upon the entire record and may include parts of the record that are not specifically cited.

representatives, office clerical employees, professional employees, guards and supervisors as defined in the Act.

In substance, the Unit constitutes all of Respondent's ready-mix drivers in Southern California and Las Vegas, Nevada, including a limited number of drivers who also sometimes work as second/assistant batchmen. The voter list provided to the NLRB by Respondent contained a total of 373 drivers, of which 40 were based in Las Vegas, Nevada, and 333 were assigned to the various Cemex plants in Southern California. The election was held as scheduled and the ballots were tallied. The Union lost the election 166 to 179. (JX. 3, 9, 11)

On March 19, 2019, the Union filed its Objections to the election. Respondent filed a motion to dismiss which was denied by the Regional Director and the Board. The following Objections were consolidated by the Regional Director for a hearing with the Complaint's unfair labor practice allegations: (1) During the critical period, area manager Ryan Turner approached multiple employees at various work locations, threatening them with a loss of protection and benefits from the Employer in the event that they voted for the union. Similar statements were made by manager Lorenzo Ponce; (2) Cemex threatened the employees with closing of batch plants or other adverse consequences if they supported the union; (3) Cemex, through its agents, threatened employees with changes of job shifts in the event that they voted yes for the Union; (4) Cemex provided more favorable treatment to employees taking a Vote No stance from those supporting a Demand Your Worth stance by requiring employees who were demanding their worth to take off safety vests and remove signage with union logos or "Vote Yes" messages while allowing those with Vote No messages to keep items in their vehicles or on display while on work time; (5) Cemex allowed employees expressing a Vote No message to campaign for their position while on work time, while denying that same benefit to employees with a "Vote Yes" message; (6) Cemex held captive audience meetings excluding employees who had taken pro-union positions. This not only excluded alternative opinions, but required pro-Union employees to perform additional services while allowing anti-union employees to sit in Employer meetings while being provided refreshments on work time; (7) Cemex engaged in acts of surveillance of employees during the critical period; (8) Cemex increased the use of security at all locations during the critical period in attempts to intimidate employees; and (9) during the election, Cemex intimidated employees seeking to enter batch plants to vote by surrounding vehicles with eight to ten anti-union employees and managers before the employee could enter the polling area. With a few exceptions, the Union's objections correspond substantially with the unfair labor practice allegations contained in the Complaint. (GC. 1(x))

Sixteen ballots were challenged during the election and the Regional Director's Order directed a hearing on these ballots. However, the parties reached a stipulation regarding three of the ballots which, in turn, resulted in the challenges no longer being determinative and the issue was not further litigated during the hearing. The parties also stipulated that, despite the voter list, the Unit has a maximum of 366 drivers. (JX. 1, 12; Tr. 12, 1550–1551, 1749, 1992–1993)

B. Respondent's Operations

During the relevant time period, Bryan Forgey worked as Respondent's vice president and general manager overseeing the company's ready-mix business in Southern California and

Southern Nevada. Forgey remained in this position until March 2020, when he transitioned into a larger role within the company, overseeing mining aggregates in California. Forgey resigned in July 2020 and no longer works for Cemex. (Tr. 78–80, 139, 2005)

Cemex's various Southern California facilities are divided into five districts: Ventura County, Los Angeles County, Inland Empire, Orange County, and San Diego County. At all relevant times, each district was overseen by a plant superintendent, who in turn reported to an area manager. Respondent's chain of command ultimately funneled up to Forgey who was in charge of the entire operation. Jason Faulkner served as the plant superintendent for Ventura County, Andrew Burton was the plant superintendent overseeing Los Angeles County, Robert Nunez oversaw Orange County, Andrew Patino was the plant superintendent for the Inland Empire, and Jason Glass was in charge of San Diego County. Ryan Turner was the area manager overseeing the Inland Empire and San Diego County districts. The identities of the two other Southern California area managers are unclear from the record. During this time period Daryl Charlson also played a role in assisting the company's ready-mix business, particularly in Ventura County, although he was not directly employed in the ready-mix delivery operations. Charlson was Respondent's director of plant and fleet maintenance, overseeing the maintenance employees and their supervisors who were responsible for maintaining Respondent's plants and trucks in Southern California. Charlson reported directly to Forgey. Finally, human resources manager Iris Plascencia was responsible for overseeing the human resources functions for the Southern California ready-mix plants. Forgey, Charlson, and Plascencia, all worked out of Respondent's corporate office in Ontario, California. (Tr. 79–80, 91, 94–95, 361, 366–367, 402–403, 2245–2246, 2543, 2576–2577, 2892–2893, 2975; GC. 4; R. 8)

In the Las Vegas area, Respondent operates two plants full-time. The Sloan plant, located in the southern part of the city, and the Losee plant located in northern Las Vegas. At the time of the organizing drive and election, Estevan Dickson worked as the plant foreman overseeing both the Sloan and Losee plants; he was assisted by two other foreman, David Lockwood and Keith Wendall. Dickson reported to Stewart "Stu" Mate, the area operations manager. Mate, in turn, reported to Chris Hill, the general manager overseeing Cemex's Las Vegas area operations. Hill, who was the highest-ranking management official in Las Vegas, reported directly to Bryan Forgey. The various relevant supervisors and managers, including the full-time plant foremen/batchmen, are all admitted Section 2(11) supervisors. (Tr. 95–96, 312, 321, 562, 570–571, 2031, 2179, 2218, 2999, 3000, 3015–3016; GC. 1(s); R. 8; JX. 1)

C. The Union's Organizing Drive

Sometime in about 2017 the Union started organizing the ready-mix drivers working at Respondent's Las Vegas, Nevada plants. In December 2017 Cemex ready-mix drivers in Ventura County also reached out to the Teamsters about organizing their workplaces. The Union then decided to try and organize all of the Cemex ready-mix drivers in both Southern California and Las Vegas, Nevada. Teamsters international organizer Scott Williams was the Union's primary point man overseeing the organizing drive. Williams became involved with the Cemex campaign in about July 2017. Mike Hood worked on the organizing drive for the Union as a "lost time organizer," primarily focusing on the Las Vegas plants. Hood had previously worked for Cemex in Las Vegas as a ready-mix driver until about February 2018. He then went to work

for a unionized ready-mix company and took a leave of absence to work on the Cemex campaign. (Tr. 551–552, 560, 577–578, 918–921, 1793–1794)

As part of the organizing drive, the Union established a committee of drivers at the various plants and held bi-monthly conference calls to coordinate their organizing efforts. The Union broke up the geographic area up into six different "turfs" and had meetings with drivers at least once a month to address issues and gather information as to what was happening on the ground. The Union also started gathering authorization cards. (Tr. 921–925)

Union organizers would periodically speak with drivers at jobsites, after they had finished pouring out their concrete, and would also gather outside the different plants, along with off duty drivers, disseminating flyers, stickers, and other paraphernalia/information to workers. Also, the Teamsters had a communications specialist assigned to oversee the social media aspect of the campaign, which included a presence on YouTube and Facebook. The Union posted multiple photos and videos of various drivers who supported the union drive on these social media accounts, which were open to the public. (Tr. 119, 290–292, 321, 552, 569, 653, 664–665, 670, 827, 1100–1101, 1241, 1306, 1701–1702, 1907–1910; R. 4, 7, 14–18)

Sometime in about-mid October 2018 Respondent established a "steering committee" to oversee the company's response to the organizing drive. Members of the steering committee included Forgey, Tim Robertson (Cemex's national labor relations manager/vice president), Zach Allie (an in-house attorney for Cemex), Iris Plascencia, and an attorney from the law firm of Jackson Lewis. Forgey said that the goal of the steering committee was to understand why employees were looking to organize and to ensure they were fully educated on the facts and topics of what being union vs. remaining non-union would mean for them. In short, Forgey said Respondent did not understand why employees would need a union to represent them and one goal of the steering committee was to understand what concerns employees had that was leading them to want to unionize. (Tr. 81–84, 137; JX. 2, GC. 1)

The steering committee also reviewed all disciplines issued to employees during the organizing drive. Regarding discipline, Forgey testified that Respondent traditionally followed a formal progressive disciplinary process, with managers consulting with human resources, as well as the legal department if warranted. The steering committee became an additional step in this process, with the committee reviewing all formal disciplines, including documented verbal warnings, before they were issued. As of the date of the hearing in this matter, the steering committee was still in place. (Tr. 125, 138, 141, 2984)

At one point, the steering committee decided to hire labor relations consultants to assist the company. In October 2018 Respondent hired a company called Labor Relations Institute (LRI) in order to help Cemex communicate its message to employees against unionization and assist the company in its response to the organizing drive. The evidence shows that, between October 2018 and July 2019 Cemex paid LRI just over $1,136,000 for its services. (Tr. 82–83; GC. 25)

LRI, in turn, hired a group of independent consultants to work on the Cemex campaign, who were paid $3,000 per day (plus travel expenses) for their services. The lead consultant hired

by LRI was Amed Santana. The other primary consultants hired to work on the campaign included Michael Rosado and Johan Pena, and at one point as many as five consultants worked on the project. As the lead consultant, Santana said his role was to act as the liaison between Cemex and the other consultants to coordinate strategy. During the campaign the consultants held nightly conference calls to update each other on what was occurring, the material they were covering with drivers, and to manage their ongoing strategy. (Tr. 87–88, 1537, 2687, 2774–2775, 2809, 3046; GC. 25)

Soon after he was retained, Santana met with Forgey in October 2018 to discuss the campaign to keep Respondent's plants union-free. They also discussed the need to conduct training for supervisors and managers on the NLRA, and to make sure everyone understood what they could and could not do during the campaign. Cemex arranged for the consultants to conduct initial training with Respondent's supervisors and managers to teach them about the "do's and don'ts." The purpose of this training was to teach managers and supervisors that they cannot make threats, interrogate, or spy on employees, or make any promises to workers during the campaign. This was referred to by the acronym "TIPS." Cemex managers and supervisors were told, however, that they could discuss with employees facts, and express their opinions about unionization, along with discussing their personal experiences. This was referred to by the acronym "FOE."[4] (Tr. 2015–2016, 2389, 2764–2765, 3035–3037, 3061–3062)

After this training, Respondent asked the consultants to go into the field and meet with drivers at the different ready-mix plants. The consultants started meeting with employees at the various plants in late October 2018. The consultants held small group meetings with workers, either by themselves or with a company official, and also met with employees individually. At one point, Santana said that he was meeting with employees every day. A few days before the election, the consultants met with Cemex managers and supervisors at the Oxnard plant one last time to discuss the election process, how the officials should act during the election, and how to answer any employee questions about the election. Cemex safety champion Gus Aguilera also attended this meeting. (Tr. 82, 2110, 2016–2017, 2556–2557, 3047–3049, 3068–3069)

In addition to holding employee meetings, to combat the organizing drive the company also disseminated stickers, flyers, pamphlets, and letters to employees. Cemex also maintained its own social media/internet site to communicate with workers, and the company had a communications team monitoring the Union's social media pages. This team sent updates to Forgey and his superiors about what the Union was posting on social media. Forgey personally accessed the Union's Facebook page and watched at least one of their videos. (Tr. 118–121, 225–226, 363–364, 445, 2028–2029, 2032, 2059, 2091; R. 28)

In early March 2019, just before the election, Cemex showed all of its employees what was referred to as a "25th hour video." The company had two such videos, one for Southern California drivers featuring Forgey and one for Las Vegas drivers with Hill appearing as the presenter. The video shown to Southern California employees is just over 11 minutes long, and shows Forgey standing in a shop area in front of a ready-mix truck with a large "Vote No" banner covering the truck's front grill. Throughout the video Forgey addresses employees, speaking into the camera; at various points the video cuts away from Forgey to PowerPoint

[4] Respondent held refresher training on "TIPS" and "FOE" in December 2018. (R. 21; Tr. 2021)

slides that reinforce certain points made in the video. In Forgey's video, he tells employees, in part, that although the law does not allow him to make promises or discuss what may happen if the company wins the election, "I have heard you loud and clear throughout this process and you have my full attention," he also says that he "accept[s] responsibility for any challenges we may have experienced over the past few years" and highlights to employees the "strong track record of addressing the concerns you have brought to our attention" including a wage increase implemented in February 2018 that was "significantly higher than the market average." (Tr. 2040–2047) Forgey then asks employees to give him "a single year, just 12 months to earn your trust and show you what life at Cemex can be like without a union" and to further show employees how good the company can make the Southern California operation without a union. In the video, Forgey said that, if the company did not succeed, and employees decided life with the Teamsters would be better, they always have the right to bring the Union back in 12 months, but that he was confident that after a year the employees would be thankful they voted no and put their faith in the company instead of gambling with the Union. (Tr. 102–103, 140, 2034, 2040–2050, 2157–2158; R. 24–25)

Hill's video is substantially similar to Forgey's. Hill is shown standing in the same shop, with the same background, and he makes the same statements to employees as outlined above, except tailored to the Las Vegas drivers. However, in addition to highlighting the February 2018 wage increase that was significantly higher than the market average, Hill tells the Las Vegas drivers the company listened to employee concerns about the quality of their equipment, that it ordered new trucks, and made sure that additional new trucks were included in the budget for the upcoming years so that all of the drivers would eventually be driving new equipment. Hill further said that the company "listened to your feedback regarding the composition of our management team and we made the necessary changes to ensure we have effective and compassionate leadership in place at each plant."[5] (Tr. 2057)

Because of the uncertainty of the actual election date, the videos were recorded in December 2018, so they would be ready to show to employees just before the election. (Tr. 2034–2035, 2050, 2063) They were filmed on the same day, in California at the Fontana plant.

After the March 7, 2019 election, the Union took a step back to regroup. A few weeks later, the Teamsters once again started trying to talk with drivers on a regular basis and continued organizing. The Union also filed unfair labor practice charges and objections to the election. It

[5] In its Complaint, the government has not alleged that anything said in the videos constitute an unfair labor practice, nor has the Union alleged that the videos amounted to objectionable conduct. Compare *Desert Aggregates*, 340 NLRB 289, 290, 297–298 (2003), remedy and order modified 340 NLRB 1389 (2003) (Statement from employer's agent, who had spoken with employees to determine their concerns, that the union campaign had "rung bells all the way at the top" of the company and that workers should "give the company a year" and see what changes would be made constitutes a violation); *Lutheran Home of NW Indiana, Inc.*, 315 NLRB 103, 104 (1994) ("Objectionable conduct where employer said that he cannot make promises because that would be illegal but the company was "definitely looking into getting employees a pension."); and *Wake Electric Membership Corp.*, 338 NLRB 298, 306–307 (2002) (manager's statement that he was not making any promises "was mere verbiage, in light of his request that the employees give the Company 'another chance,' and his averment that the Company would 'work with' the employees.") with *Noah's New York Bagels, Inc.*, 324 NLRB 266, 267 (1997) (no violation where employer confessed it had neglected matters and asked for a second chance to make things better).

is against this backdrop that the allegations contained in the General Counsel's Complaint and the Union's Objections unfold. (Tr. 934; GC. 1)

III. 8(A)(1) ALLEGATIONS & THE UNION'S OBJECTIONS

A. Dickson's alleged July 2018 threats (Complaint Paragraph 5(a))

1. Background

a. Testimony of Ibrahim Rida

During the summer of 2018 Union flyers began circulating around the Sloan plant in Las Vegas explaining the benefits the Union was able to negotiate for employees at Nevada Ready Mix, a local company whose employees were unionized. Ibrahim Rida, a Sloan based driver who worked for Cemex from March 2018 through April 2020, testified that he had a conversation with Estevan Dickson in late July 2018 about these flyers, which were found in company trucks. Dickson was the Las Vegas plant foreman overseeing both the Sloan and Losee plants. (Tr. 311, 805–807, 2662–2663)

According to Rida, sometime towards the end of July 2018 he was in the Sloan plant office one afternoon with a coworker named Rodney Coleman. Along with being coworkers, Rida and Coleman were also friends. Rida testified that while they were in the office Dickson walked in with a piece of paper, slammed it on the desk, and said that he found it in a company truck. Dickson then started talking about the union, focused his attention on Rida, and said that "if the Company goes union, you will be fired," and that "if they don't fire you, they're just going to cut your hours and bring in guys from Florida." (Tr. 807) Rida asked Dickson why he was mad since the drivers only wanted to better themselves, and Dickson replied saying that he was just telling Rida what can happen. At this point, Rida testified that Coleman interjected, saying that Dickson was violating Rida's rights and could not be saying those things, but Dickson said he disagreed. The conversation then ended and Rida walked out. (Tr. 806–807, 823–827, 3121, 3133)

b. Testimony of Estevan Dickson

During his testimony, Dickson denied ever having a conversation with Rida where Coleman was present and the union was discussed. According to Dickson, he had two conversations with Rida where Coleman was present. The first occurred in about May 2018 involving a discipline issued to Rida where Coleman served as a witness. Regarding this conversation, Dickson said that an incident had occurred at a jobsite regarding a load of concrete Rida was delivering that the customer did not want to accept. Dickson testified that he went to the jobsite, calmed Rida down, and when they returned to the plant he issued Rida a discipline. Dickson said that Coleman served as a witness to the discipline and that during the meeting Coleman also explained to Rida about how to provide proper customer service. (Tr. 2180–2188, 2224–2225)

Dickson testified the second conversation occurred around June 2018, involving a jobsite incident where Rida allegedly dumped his remaining concrete in the wash out area, which is a designated area used by drivers to wash out their trucks. According to Dickson, in this meeting he explained to Rida what he had done wrong, along with Respondent's proper procedure for washing out and disposing of left over concrete. He then issued Rida another written discipline. Dickson said that Rida claimed he did not know the proper procedure, and during the meeting Coleman told Rida that he had learned about the procedure during training. These were the only two meetings Dickson said that he held with Rida at the Sloan plant in which Coleman was present. (Tr. 111, 329, 2185–2188)

c. Testimony of Rodney Coleman

As part of its defense, Respondent called Rodney Coleman as a witness. Coleman worked for Cemex as ready-mix driver, and since about February 2018 he also served as a "driver-trainer" for the company. Driver-trainers are paid an extra dollar per hour and train new drivers. (Tr. 1703, 2643, 2646, 2671–2672; JX. 2, pp. 212–213, 235, 249, 428; JX. 6)

Coleman testified he had a good relationship with Rida, and that he trained Rida as a new employee. According to Coleman, sometime around the beginning of May 2018 he was present for a disciplinary meeting between Rida and Dickson in the Sloan plant office. Coleman said the meeting was about a "pump situation" between Rida "and the pump guy" who was working for a customer. (Tr. 2648) During the meeting Dickson accused Rida of arguing with the pump guy, asked Rida what had occurred, and told him that his actions could get him fired. In reply, Rida explained that he was just trying to defend himself from the pump guy who had started yelling. Eventually Dickson gave Rida a disciple, which he signed. According to Coleman, the topic of the union was never discussed during this meeting. (Tr. 2648–2653, 2666, 2670–2671)

Coleman said that he also served as a witness during a second disciplinary meeting between Dickson and Rida in June 2018, involving an incident where Cemex was pouring concrete for a housing development with two crews that were separated by a brick wall. Rida was told that the customer no longer needed his concrete, and he washed out his truck. However, the crew on the other side of the wall apparently needed more concrete. Coleman said that, during this meeting Rida told Dickson he was being picked on, and that the customer had told him he was finished and did not need the concrete. Dickson told Rida that he was supposed to check with the other customer, on the other side of the brick wall, to make sure the other customer did not need any more concrete. According to Coleman, at one point during this meeting he told Dickson that he was "stepping on [Rida] as a person" because he was yelling while Rida was only trying to have a conversation with him regarding what occurred. (Tr. 2667) Coleman testified that the topic of the union was never discussed during this meeting and that Dickson ultimately suspended Rida for a few days. (Tr. 2653–2655, 2667)

According to Coleman, during the time period in question, he was not present during any conversations between Dickson and Rida in the Sloan office where the union was discussed. And Coleman could not recall any conversations with Dickson concerning union flyers. Coleman said that he did talk with Dickson about the union, but that these conversations were general in nature about the pros and cons of unionization, and that Dickson told him if the Union

won the election, employees would not be able to come directly to management anymore but instead would need to have the Union speak for them if they had any issues. (Tr. 2655, 2665)

2. Analysis

a. Respondent's claim that the underlying charge was withdrawn

In its brief, Cemex argues that the Board does not need to address this matter because the underlying charge supporting the allegation was withdrawn. Specifically, Respondent asserts that "[t]his allegation relates to Charge 28-CA-230115" and is "no longer viable and should be dismissed" because on March 11, 2020, the Regional Director "approved the withdrawal of all allegations in that charge asserting that CEMEX . . . threatened its employees with termination because they engaged in union activities." (Cemex Br. at 23) (underline added). However, Respondent never introduce into evidence the Regional Director's letter, or any other evidence, supporting this claim. And the Board's files show that Cemex's brief misstates the content of the Regional Director's March 11, 2020 letter.[6] The letter reads as follows:

> This is to advise that I have approved the withdrawal of the Section 8(a)(3) allegations of the charge that the Employer has discriminated against its employees by implementing a policy prohibiting its employees from wearing Union insignia during its organizing campaign, and has threatened its employees with termination because they engaged in union activities.
>
> All other portions of the charge remain pending and subject to further proceedings

On its face, the letter states that the Regional Director approved the withdrawal of the "Section 8(a)(3) allegations of the charge" but did not approve the withdrawal of "all of the allegations" as asserted by Respondent. The charge in question alleges that Respondent violated both Section 8(a)(1) and 8(a)(3) of the Act by implementing a policy prohibiting employees from wearing union insignias and threatening employees with termination because of their union activities. (GC. 1(a)). Because the Regional Director's letter only approved withdrawal of the charge's 8(a)(3) allegations, and specifically states that "[a]ll other portions of the charge remain pending and subject to further proceedings," Respondent's assertion is erroneous. Complaint paragraph 5(a) alleges an 8(a)(1) violation occurred, and is properly based upon the 8(a)(1) charge in Case 28-CA-230115 which remained "pending and subject to further proceedings," after the Regional Director's March 11, 2020 letter.

b. The Complaint allegation

Both Dickson and Coleman denied being present in the Sloan office for a conversation with Rida about the union during the time period in question. And both testified about formal

[6] I take administrative notice of the Regional Director's March 11, 2020 letter in Case 28-CA-230115, which all parties received during the underlying investigation. See *Lord Jim's*, 264 NLRB 1098, 1098 fn.1 (1982) (The Board may take judicial notice of its own files); *Registry of Interpreters for the Deaf, Inc.*, 370 NLRB No. 18, slip op at 4 fn. 11 (2020) (Board may take administrative notice of the procedural history of a case); *American Electric Power*, 362 NLRB 803, 804 (2015) (Board takes administrative notice of Regional Director's partial dismissal letter).

disciplinary meetings with Rida that occurred in May and June 2018. Rida, on the other hand, said the incident occurred in July 2018 and was unrelated to any of his disciplinary meetings.

In an effort to shed light on this discrepancy, and to detract from Coleman's credibility, Rida was recalled as a witness by the General Counsel on rebuttal and testified that Coleman was not present during the two disciplinary meetings. Rida claimed he had proof that Coleman was not at the second meeting saying he texted Coleman a copy of his discipline and spoke with him on the phone about what occurred immediately after the meeting. However, no phone records were introduced into evidence showing that such a call occurred, nor were copies of Rida's purported text messages introduced into the record. (Tr. 3127–3128, 3130–3132)

In a further effort to detract from Coleman's credibility, during his rebuttal testimony Rida denied that Coleman trained him when he was first hired, and further said that Coleman did not become a driver-trainer until after the March 2019 election. (Tr. 3122–3124) Even though the record shows that, whoever trains a new driver has to "sign-off" on the new driver's qualifications, no documentary evidence was introduced into evidence showing who actually trained Rida. Similarly, no records were introduced showing when Coleman became a driver-trainer, notwithstanding the fact his payroll records would have evidenced a $1.00 per hour pay increase because of the new assignment.

As more fully set forth in Section III(C)(2) below, I generally did not find Dickson to be a credible witness. That being said, based upon observing their respective testimonies, I have no reason to discredit Coleman or to somehow credit Rida over Coleman. Rida admitted that he and Coleman were friends, and there is no evidence to support a conclusion that Coleman was somehow hostile to Rida or the drivers' unionization efforts. In fact, Coleman signed a union authorization card. Because Coleman denied that the conversation occurred, I find the General Counsel has not shown that the statements attributed to Dickson were made, and I recommend this allegation be dismissed.

B. Dickson's alleged August 2018 threats at I-215 & Revere jobsite (Complaint Paragraph 5(b))

1. Background

a. Testimony of Ibrahim Rida

Rida testified that one day in August 2018 he was at a jobsite located near the cross streets of Revere and I-215 in North Las Vegas with a coworker named Chris Lauvao. While the two were parked waiting to deliver their respective loads, Rida walked to the back of his truck and was speaking with Lauvao. According to Rida, Dickson came up and started talking to them about the union stickers they were wearing on their hardhats and that were on their truck windows. Rida testified Dickson told them that, if they were caught with union stickers on their hardhats or on their trucks, they could get fired or written up. Rida said Dickson then started "going on" about the union saying, if the "company did go union, that a lot of us would get fired, hours would get cut, lose our vacations, and they're just going to bring guys from Florida." (Tr.

809) Rida further testified that the last thing Dickson said was "if you guys do get caught with the union stickers, you will be terminated." (Tr. 809) (Tr. 808–809, 813)

Later that day, Rida went to the washout area at the jobsite to clean his truck, and testified that he saw Dickson yelling at Mike Hood; Lauvao was also present. According to Rida, Dickson was yelling that Hood was not allowed on the jobsite, needed to leave, and he asked Hood "why are you doing this." Before Hood could respond Dickson said that Hood was only "doing this" because he had animosity towards the company. (810–813)

b. Testimony of Estevan Dickson

Dickson admitted having a conversation with a group of drivers, including Lauvao and Rida, about union stickers, but said it occurred sometime between the end of June and early August 2018 at a jobsite located at the intersection of "Blue Diamond and Valley View." Dickson said there were seven or eight trucks lined up and Mike Hood was also present talking to the Sloan plant drivers. One of the drivers told Dickson that Hood was asking them to put union stickers on their hardhats. Dickson said that he immediately called Stewart Mate, who said he would get back to Dickson about the matter. (Tr. 2188–2189, 2191, 2228)

Mate called Dickson back about 15 minutes later and said drivers were not allowed to wear stickers of any kind on their hardhats unless it was CEMEX approved. Dickson said that he then told the drivers present at the jobsite that they cannot wear stickers on their hardhats or have stickers on their trucks unless it was company approved. Out of the seven or eight drivers Dickson said were present, he could only remember the names of five specific drivers, which included Rida and Lauvao. Later that night, Dickson testified that Mate called him and said he had spoken with "Chris" and the attorneys and "from here on out, they can wear their stickers." (Tr. 2193) Dickson said that the next morning at the jobsite, when he caught a few of the drivers coming in he told them they could go ahead and wear whatever kind of stickers they wanted. Dickson said that afterwards, a majority of drivers, including Rida, wore union stickers on their hardhats. (Tr. 2190–2195, 2238)

Dickson also admitted having a conversation with Lauvao and Rida in August 2018 at the I-215 and Revere jobsite, but denied the conversation had anything to do with union stickers. When initially asked what he recalled about this conversation, Dickson said that he is "usually going up to the guys and seeing how they're doing, if their slumps are good, ready to pour out, stuff like that, see how they're doing." (Tr. 2195)

Because he answered about what he "usually" does, even though the question was very specific, I asked Dickson whether he actually remembered the conversation in question. Upon further examination from Respondent's counsel, Dickson said that he did, in fact, remember what happened and testified that he saw Lauvao and Rida in the staging area getting ready to unload and said to them "[j]ust hello, how you guys doing, how's your slump look, you guys ready to go, and having their chute, you're going to back up here, you're going to back up there," and he asked whether they were ready and prepared to go. (Tr. 2196)

Dickson denied saying anything to Rida and Lauvao about union stickers at the jobsite, or saying that they would be fired if they had a union sticker on their hardhat. According to Dickson, "at this point everyone was allowed to wear anything they wanted on their hardhat." He also denied telling Lauvao and Rida that drivers would get fired if the company "went union." (2197–2198)

Dickson further testified that he also spoke with Rida and Lauvao later that day at the washout area, because he thought they were taking longer than usual to wash out their trucks. However, when asked by Respondent's counsel what he said to Rida and Lauvao at the washout area, Dickson did not answer. Instead, he said that Rida and Lauvao were talking to Mike Hood. Dickson further said that, at one point he was alone with Hood at the jobsite and had a cordial conversation with him. Dickson testified he told Hood that he could speak with the drivers while they were staging, but asked him to let the drivers do their jobs and not delay them because they had to get back to the plant and get loaded again. Dickson denied telling Hood that he was not allowed to be on the jobsite, asking Hood why he was "doing this," or saying that Hood had animosity towards the company. (Tr. 2196, 2199–2201)

2. Analysis

Only two witnesses testified regarding this allegation, Rida and Dickson. As stated earlier, I did not find Dickson to be a credible witness and I do not believe that Dickson remembered what he specifically said to Rida and Lauvao in August 2018 at the I-215 and Revere jobsite. I find it significant that, when initially asked to describe the conversation, Dickson answered by saying what he "usually" says to drivers at jobsites. And, after I expressed skepticism about his answer, Dickson's recitation of what he allegedly said to Rida and Lauvao was almost verbatim the same thing he claimed that he told Lauvao and another driver, on a different occasion. (Tr. 2196, 2202) I do not find Dickson's testimony about either conversation credible.

Instead, I credit Rida's testimony that Dickson told Rida and Lauvao that if they were caught with union stickers on their hardhats or trucks they could get fired or written up. This statement is also consistent with what Dickson had been telling other drivers at different times regarding their ability to wear union stickers on their hats. Absent special circumstances, employees have the right to wear union buttons and insignia at work, and the curtailment of that right is a clear violation of the Act. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-803, 802 fn. 7 (1945). This right includes wearing union stickers on hardhats. *Northeast Industries Service Co., Inc.*, 320 NLRB 977, 977 fn. 1 (1996) (violation where supervisor threatened employees with discipline if they did not remove union stickers from their hardhats). Here, there is no evidence of any special circumstances, nor does Respondent make such a claim. Instead, the credited evidence shows that before union stickers became an issue, employees were allowed to wear various types of stickers on their hardhats without prohibition, including stickers for sports teams and vendors. (Tr. 385, 629, 687) Accordingly, by telling employees they could be written up or fired for having union stickers on their hardhats Dickson violated Section 8(a)(1) of the Act.[7]

[7] The issue of Respondent's trucks with stickers/signs is discussed in Section III(L) below.

I also find that Dickson violated Section 8(a)(1) by making various threats to Rida and Lauvao, including threats of termination and reduced hours or benefits if employees unionized. *Valerie Manor, Inc.*, 351 NLRB 1306, 1313 (2007) (telling employees that they would lose benefits, including vacation, if the "Union comes in" a violation); *Bancroft Manufacturing Co., Inc.,* 210 NLRB 1019, 1021 (1974) (supervisor's statement that employees "would lose their jobs or have their hours cut if the Union were voted in" constituted unlawful threats). As for Respondent's claim that these allegations should be dismissed because the "Region approved the withdrawal of all allegations" in the underlying charge in Case 28-CA-230115 (Cemex Br. at 28), as noted earlier this claim is simply untrue. Only the 8(a)(3) allegations in the charge were withdrawn, the 8(a)(1) claims remained intact.

The General Counsel further alleges that Rida's testimony about what Dickson said to Hood about "doing this" because he had animosity towards the company constitutes a violation. However, despite the fact Hood was called as a witness by the General Counsel, he was never asked about this incident. Hood was working for the Union as a lost-time organizer at the time, and the evidence shows that he was, in essence, the Union's lead organizer in Las Vegas. In this capacity it is a reasonable to assume that Hood's testimony would have been favorable to the General Counsel and the Union. Thus, the fact that Hood testified about other statements made by Dickson, but did not testify about this particular incident, warrants an inference that his testimony would not have corroborated Rida's regarding what Dickson said to Hood on the day in question. *Vista Del Sol Health Services, Inc.*, 363 NLRB No. 135, slip. op. at 14 (2016) (adverse inference is warranted by the unexpected failure of a favorable witness to testify regarding a factual question on which the witness is likely have knowledge) (citing *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977)). Under these circumstances, while I do not necessarily believe Dickson about what he told Hood that day, I cannot rely upon Rida's testimony about this matter and find that the General Counsel has not met his burden of proof to show a violation occurred. Therefore, I recommend that the allegation in Complaint paragraph 5(b)(2) be dismissed.

3. Respondent did not repudiate its prohibition on wearing stickers

Respondent asserts that Dickson repudiated his directive against wearing stickers in a timely and effective manner, citing *Passavant Memorial Hospital*, 237 NLRB 138 (1978). (Cemex. Br. at 29) The company asserts that it is therefore "illogical" to claim that, after repudiating his directive, Dickson would later tell employees they could not wear union stickers. Id. at 29, 37, 41.

However, as previously stated, I did not find Dickson to be credible. And I do not credit his testimony that, after telling drivers they could not wear stickers on their hardhats, he told a few unidentified drivers as they were coming in to the jobsite the next day that they could wear whatever stickers they wanted.

Moreover, even assuming that Dickson's testimony is true, and that he caught a few of the drivers coming in the next day and told them they could wear whatever stickers they wanted, this does not amount to a repudiation. There is no evidence that Dickson told the same seven or eight specific employees from the previous day that they were now allowed to wear stickers, or

that those specific employees otherwise learned that Dickson's initial prohibition on stickers was wrong. "[T]here must be adequate publication of the repudiation to the employees involved." *Service Employees Local 399 (City of Hope)*, 333 NLRB 1399, 1401 (2001). Here there was not. *Fresh & Easy Neighborhood Market Inc.*, 356 NLRB 588, 588 fn. 2 (2011) (no repudiation where employer did not unambiguously inform the employees in question that the employer "had been wrong and employees were free to talk about the union while on the sales floor.").

Also, the fact that Respondent continued telling employees to remove stickers from their hardhats further undermines any claim of repudiation. Id. (no repudiation where employer repeated the unlawful directive and made no further attempt at disavowing the unlawful comments). Not only did Dickson himself tell other employees to remove stickers from their hardhats, but other Cemex supervisors/agents did so as well. The evidence shows that, in early 2019, plant superintendent Andrew Burton told Los Angeles area drivers during a meeting that they needed to remove all the stickers from their hardhats, including union stickers, as they posed a safety hazard because the company could not tell if the hats were cracked or damaged, and employees might try to cover up the cracks with stickers.[8] (628–629, 661) And some drivers actually removed the stickers from their hats in response to this directive. (Tr. 623–624, 628–629) Burton also made the same directive to drivers via the CB radio. (Tr. 632–633). This evidence, which I credit, was not refuted by Respondent. Finally, the evidence shows that, during this same general time period, other Los Angeles area batchmen and assistant batchmen were telling drivers the same thing. (Tr. 634–635, 773–774, 1542–1549, 1554–1555, 1562) And, although many employees continued wearing union stickers, the fact they did so is not proof that other employees were coerced into not wearing them. See *Athens Services,* 370 NLRB No. 111, slip. op. at 11 (2021);[9] see also *National Steel & Shipbuilding Co. v. NLRB*, 156 F.3d 1268, 1272 (D.C. Cir. 1998) enforcing 324 NLRB 499 (1997) (the fact some employees were indifferent to the company's videotaping of union activity does not mean that the videotaping did not tend to coerce other employees). In sum, there was no effective repudiation by Respondent.

C. Dickson's statements to employees on August 22, 2018 at Tanglewood jobsite (Complaint Paragraph 5(c) & Union Objection #4)

1. Background

a. Testimony of Mike Hood

Mike Hood testified that on August 22, 2018 he heard from a driver that Cemex was working at a jobsite in North Las Vegas, involving a large housing subdivision called Tanglewood that was being built by the developer KB Homes. Sometime around mid-morning, Hood said that he positioned himself near the washout area of the jobsite where two Cemex ready-mix trucks were present, one belonging to Oscar Orozco and another belonging to Chris Lauvao. Orozco and Lauvao were standing across the other side of the washout area, about 10 to

[8] Any claim that Cemex had a legitimate safety concern is without any basis, as the evidence shows that during this same time period the company made available to employees large "Vote No" stickers for them to wear and company officials were wearing these, and other, stickers on their own hardhats. (Tr. 363–365; 1290–1294; U. 13–14, 16)

[9] Although this issue was not before the Board on exceptions, I find the Judge's analysis regarding this topic in *Athens Services*, 370 NLRB No. 111 (2021) as persuasive.

20 feet away from Hood, spraying down their trucks which were running. Hood and the drivers started discussing the organizing campaign. Shortly thereafter, Estevan Dickson arrived in a pickup truck, walked up to Hood, and the pair started talking. Hood said their conversation started with friendly small talk, but then Dickson started asking particulars about the organizing drive: how it was going; whether they were getting close to an election; and how many drivers were supporting the union. Hood did not reply to Dickson's questions. Dickson became frustrated at the lack of a response, and turned his attention towards Orozco and Lauvao. Hood testified that Dickson started speaking loudly and pointing his finger at the drivers telling them to not to speak to "these union guys" and to "take those damn stickers off your hat or you will be . . . written up or fired."[10] (Tr. 556–557) The drivers did not say anything in reply, but just stood there with their mouths open staring at Hood and Dickson. Because of their reactions, Hood believed the drivers wanted him to intervene, so he told Dickson "you can't say that." (Tr.. 557) Dickson then stormed off into the housing tract. After Dickson left, Hood told Orozco and Lauvao that Dickson was not allowed to say those things. Meanwhile, Hood said that he heard Dickson yelling again, this time from about 75 to 100 feet away, saying "don't talk to these union guys," "take that sticker off your hardhat" and that "if you vote for the Union, you're going to lose hours."[11] (Tr. 558–559) (Tr. 553–559, 601)

b. Testimony of Estevan Dickson

Dickson testified that Respondent was at the Tanglewood jobsite on a daily basis during this time frame, as it was a lengthy job. Anywhere from 5 to 10 Cemex trucks could be on the site at any one time, with two trucks pouring simultaneously if needed. Dickson said that he had multiple conversations with Hood throughout the campaign, that he and Hood were friends, and their conversations were cordial. According to Dickson, they did not talk about the union, but "it was more like how's your family doing, did you get a job, how are you doing, stuff like that." (Tr. 346) When asked what he talked to Hood about at the Tanglewood jobsite, Dickson said "same thing, how's your family doing, you know stuff like that, just certain things . . . . did you watch the game over the weekend and stuff like that." (Tr. 346–347) (327–328, 337)

During his initial testimony, Dickson admitted that he had a conversation with Hood at the Tanglewood jobsite in the presence of Cemex employees. However, when asked which specific employees were present, Dickson said "[w]hatever drivers were on the jobsite that day." (Tr. 337) Three months later, when called as a witness during Respondent's defense, Dickson testified that he remembered having a specific conversation with Lauvao and Orozco at the Tanglewood jobsite on August 22 in Hood's presence. Dickson said that both of the drivers were wearing union stickers at the time, and that when he arrived at the location they were both speaking with Hood. While Hood was standing nearby, Dickson testified that he had a short conversation with Lauvao and Orozco. Regarding the conversation, Dickson testifying as follows:

Q. Tell us about that conversation.

[10] In Hood's opinion, Dickson was speaking loud enough for the drivers to hear what was being said. (557–558)
[11] Hood said that it was a calm morning at the housing tract. That there was construction going on at the other end of the housing tract, but at his area it was wide open. Hood said that he did not have trouble hearing Dickson. (559)

> A. So the same thing, how are you guys doing, how's your slump going, you guys are prepared to go, you're going to stage here, you're going to stage there and unload here and there.
> Q. What did they say in return?
> A. Nothing. All right, yeah, we're ready to go. Slumps look good and stuff like that on our daily basis. [Tr. 2202]

Dickson denied telling Lauvao and Orozco that they should not be talking to the Union, and further denied telling them to remove stickers from their hats or they would be fired or written up. (Tr. 336–337, 2201–2205)

Dickson also denied asking Hood any questions about the organizing drive that day. When asked what he said to Hood, Dickson testified he said "[h]ey Mike, how you doing, you know, how are things going, how's the family?" (Tr. 2202) Dickson said that he also told Hood to "try not to keep the drivers from doing their job, let them do the job, you can talk to them whenever, but just not while they're working." (Tr. 2204) According to Dickson, Hood said he understood, and then walked away. (Tr. 2202–2206)

2. Analysis

No party called either Orozco or Lauvao to testify, even though they were still employed by Respondent at the time of the hearing.[12] Therefore, I am left with the testimonies of Hood and Dickson to determine what happened that day at the Tanglewood jobsite. Because I did not find Dickson to be a credible witness, I credit Hood as to what occurred.

Regarding Dickson, I found his testimony inconsistent and contradictory and believe he tried to tailor his testimony to what he thought best supported Respondent's position at any given time. For example, Dickson was initially called to testify by the General Counsel who, along with the Union, cross examined him as an adverse witness; Dickson's initial testimony occurred before Hood testified about the events in question. During his initial testimony, Dickson admitted to having a conversation with Hood at the Tanglewood jobsite in the presence of Cemex employees. But when asked which specific employees were present, Dickson did not identify Orozco and Lauvao, or anyone else. Instead he answered "[w]hatever employees were on the jobsite that day." (Tr. 337) Three months later, when called as a witness as part of Respondent's defense, well after Hood had testified, Dickson somehow not only recalled that it was Orozco and Lauvao that were present, but also remembered the date of the conversation and the specifics of what occurred. I do not believe that somehow Dickson regained his memory about what happened.

Dickson also contradicted himself on other matters regarding the Union or employee union activity. For example, he initially testified that he learned about the union organizing

[12] In its post-hearing brief, Respondent admits that both Lauvao and Orozco are still employed with Cemex, and faults the General Counsel and the Union for not calling either as witnesses. (Cemex Br., at pp. 30. 38, Attachment A pp. 4, 6). Because current employees cannot be considered predisposed to testify in one manner or another, and are equally available to all parties, taking an adverse inference because a particular party failed to call either Lauvao or Orozco as a witness is not warranted. *Schuff Steel*, 367 NLRB No. 76, slip op. at 6 (2019).

drive during the summer of 2018 when Hood, who had left Cemex and was working as a Union organizer, told him that the company was "going to go union." (Tr. 313–315) Three months later, when he testified as part of Respondent's defense, Dickson changed his answer and said that he learned about the Union's organizing drive from Stewart Mate, who told him in April 2018 that "the Union was trying to get into Cemex." (Tr. 2230) Dickson also testified that in around August 2018 Lauvao was wearing union stickers on his hardhat and continued to wear them until the March 7 election. (Tr. 2203–2205) However, Dickson had earlier testified that, after August 2018, he did not recall seeing Lauvao wearing any union stickers on his hardhat. (Tr. 2195–2197)

Dickson could not even consistently testify about when he moved from being the Las Vegas plant foreman, overseeing both the Losee and Sloan plants, to becoming a batchman in Phoenix, Arizona. During his initial testimony on November 10, 2020, Dickson said that he had been working as a batchman in Phoenix for "a year and a half" and that he was the Las Vegas plant foreman for "about 4 years" from April or March 2016 through sometime in 2019. (Tr. 311) This timeline would have put Dickson's departure from Las Vegas as occurring soon after March 2019, potentially raising the specter that his exit was somehow tied to the union election. However, when he testified again on January 21, 2021, Dickson changed his testimony, saying that he was the Las Vegas plant foreman from March 2015 "[u]ntil maybe 6 months ago," thereby removing any potential correlation between his departure and the election. (Tr. 2178–2179) In sum, I did not find Dickson to be a credible witness, and I do not credit any of his testimony in this matter unless it was independently corroborated by other credited evidence.

Therefore, the credited evidence shows that, while Dickson was speaking with Hood at the Tanglewood jobsite, he became frustrated that Hood would not answer his questions about the organizing drive. Dickson then turned to Orozco and Lauvao, who were both wearing Union stickers on their hardhats. Dickson pointed his finger at the two drivers and started speaking loudly to them saying that they were not to speak to "these union guys" and to "take those damn stickers" off their hats or they would be written up or fired. Hood then told Dickson that he "can't say that."

The credited evidence also shows that Orozco and Lauvao were close enough to hear Dickson's comments. Immediately before Dickson's statements, Hood had been having an ongoing conversation with the two drivers, who were standing in the same location, across the washout area, hosing down their trucks. And Hood's testimony that, although construction was occurring at the other end of the housing tract, the area where the conversation took place was "wide open" and that it was a "calm morning" was unrebutted. (Tr. 559) Accordingly, by telling Orozco and Lauvao to remove the union stickers from their hardhats, Dickson violated Section 8(a)(1) of the Act. *Northeast Industries Service Co., Inc.*, 320 NLRB at 977 fn. 1; see also *Pacific Bell Telephone Co.*, 362 NLRB 885, 910 (2015) (telling employees they could not wear union insignia violated Section 8(a)(1) of the Act).

Dickson's instruction to Orozco and Lauvao that they were not to speak to "these union guys" is similarly a violation. The evidence shows that, when Respondent's employees were at customer jobsites, either waiting in line to pour, or during the 10–15 minutes it takes to spray off their truck in the washout area, Cemex did not have any rules as to what drivers could, or could

not, do during this time other than the obligation to be responsible for the safety of the truck. Drivers were allowed to talk with other individuals during these times, including the consultants, so long as it was not affecting their work. (Tr. 110–112, 341–342, 1383–1384, 2502) Here, there is no credible evidence that Hood's discussions with Orozco and Lauvao in any way affected their work. Instead, the evidence shows that Hood spoke with the drivers while they were actively spraying down their trucks. Accordingly, Dickson's admonition that the drivers were not to speak to "these union guys" violated Section 8(a)(1) of the Act. *Evolution Mechanical Services., Inc.*, 360 NLRB 164, 173 (2014) (telling employees not to talk with union organizers if they came to the jobsite a violation); *Manon Electric, Inc.*, 321 NLRB 278, 290 (1996), enfd. 127 F.3d 34 (5th Cir. 1997) (table) (supervisor's statement that employees were not to talk to union organizers between 7:00 a.m. and 3:30 p.m. and anyone caught doing so would be fired a violation).

D. Dickson's conversation with Gary Collins in January 2019
(Complaint Paragraphs 5(d), 5(e) & Union Objections #2, #4)

1. Conversation at the Hydro Arch jobsite

a. Testimony of Gary Collins

Gary Collins worked as ready-mix driver assigned out of the Losee plant in Las Vegas. At the time of his testimony Collins had worked for Cemex for close to four years, and worked in the ready-mix industry for 31 years. Collins testified that on January 5, 2019 he was working at a jobsite called Hydro Arch in North Las Vegas when he had an interaction with Dickson about the union. According to Collins, he was pouring out his load of concrete when Dickson walked up to him and asked why he was wearing a Teamsters sticker that said "Demand Your Worth" on his hardhat. Dickson then said, "if you want the Union, why don't you just go to work at Nevada Ready-Mix." (Tr. 685) Collins replied asking why he should go to work somewhere else when he already had a job at Cemex. Dickson then asked Collins what the Union was going to offer. Collins said a lot, like benefits including medical and a pension. Dickson asked Collins "if I offer you $100, would you believe it?" In reply Collins said that it was up to Dickson if he wanted to offer him $100. Collins testified that during this conversation Dickson also told him that if the Union came in, Cemex "is just going to close their doors and take all their trucks to another state, because they don't want the Union." (Tr. 685–686) (Tr. 681–686, 699–700; GC. 8)

During cross-examination, Respondent questioned Collins about a hand-written note he made regarding his conversation with Dickson. Collins said that he drafted the note when he returned to the plant about 45 minutes after the conversation occurred. Respondent's counsel read Collins' written the statement into the record and a photograph of the document was also introduced into evidence. Collins's written statement reads as follows:

> On January 5th 2019 aprox. 9 am in the morning on a Hydro Arch job at Grand Teton & Alliante in North Las Vegas at a Shotcrete job Ast. Manager Estivan Dickson confronted me about having a Demand Your Worth Sticker (Union) whats the Union going to offer you I told him a lot pension, medical benefits he

> said if you want union go to Nevada Ready mix if I offered you $100 would you believe it I said that's up to you. I won't turn it down. He said they might just close they're doors. (GC. 31)

Collins signed the document, and at the bottom also wrote "Given to Mike Hood on 2/5/2019." Collins said he drafted the statement in a notebook he kept, and that he took notes on several occasions regarding conversations with management officials during the organizing drive. Collins further stated that he turned this note over to Hood when he saw him on February 5, 2019. (Tr. 697–698, 3106–3119; GC. 31)

b. Testimony of Estevan Dickson

Dickson testified about his January 5, 2019 conversation with Collins at the Hydro Arch jobsite, and denied Collins' version of events. Dickson denied saying anything about Cemex closing its doors or taking their trucks to another state if the Union won the election. He also denied saying anything about giving Collins $100. (Tr. 2211, 2214–2216)

According to Dickson, Collins was pouring out his load of concrete at the jobsite and was not wearing his hardhat or his glasses. Dickson said that he told Collins "Gary, grab your hardhat and your glasses, bud, you know better than that." (Tr. 2221–2222) Collins replied my bad, my bad, and then grabbed his glasses and put his hardhat on. Dickson testified that he then then left to speak with the customer and when he returned Collins was wearing his hardhat on the back of his head, with the face shield pointing straight out instead of covering his face. Dickson said that he then told Collins "you can't do that, bud, you got to wear your hardhat properly and cover your face." (Tr. 2212) Collins again said my bad, my bad. According to Dickson, Collins put his hardhat on properly and complained that he could not see out of the company's new face shield. Dickson told Collins that everyone had to wear the new face shield because it was company policy. (Tr. 2211–2212)

Dickson admitted that the pair discussed Nevada Ready-Mix, but said that Collins had commented about a couple of former Cemex drivers who had gone to work at Nevada Ready-Mix, saying there doing really well, had good benefits, and did not have to pay for insurance. Dickson said that Collins told him he was going to vote for the Union because he hoped Cemex drivers could get the same deal and that was why employees were supporting the union drive. In reply, Dickson testified that he told Collins to do his homework and study, that there were no guarantees or promises unless it was in writing, and to make sure what the Union was offering him was in writing. Dickson said that Collins told him he could not afford the company's insurance as it was too expensive to cover himself and his family. In reply, Dickson claims he told Collins that he also has children, has the same insurance plan as the drivers, that "it's pretty good, works out pretty well," and that it was not too expensive. (Tr. 2214 , 2217)

2. Conversation at the Losee yard

Collins testified that he had another interaction with Dickson regarding the Union sometime in early January 2019 while he was at the Losee plant fueling his truck. At the time, Collins had two Teamsters "Demand Your Worth" stickers on his hat. He testified that Dickson

drove up in a loader and started yelling at him to take the union stickers off of his hardhat. Collins said that Dickson then drove off, but a few minutes later came back and again told Collins to remove his union stickers. According to Collins, he continued fueling his truck and when he finished he sat in his mixer truck waiting to be loaded. Collins said that he had been waiting between 5 to 10 minutes when Dickson drove up a third time. This time Dickson got off of the loader; Collins, in turn, got out of his truck. Collins testified that, at this point Dickson started yelling, saying that he was serious and to "[t]ake them union stickers off your hardhat." (Tr. 684) Collins said that he took his hardhat off, peeled/scratched the stickers off of his hat, and threw them in the trash. Eventually Collins said that once again started wearing pro-union stickers on his hardhat, as the Union came around and passed out more stickers to the drivers. (Tr. 683–684; GC. 8)

As for his conversation with Collins at the Losee plant, Dickson testified that it involved the manner in which Collins wore his personal protective equipment, specifically his hardhat and glasses, and had nothing to do with the union. According to Dickson, he and Collins were at the fueling station and Collins was not wearing his hardhat. Dickson told Collins "you got to wear your PPE, bud. You know better than that, you got to wear your hardhat and your glasses." (Tr. 2208) Collins replied saying "I know, but I'm just getting fuel." (Tr. 2208) Dickson then said that employees were required to wear their PPE at all times, that the company had a big project coming up building a new casino/hotel called Circa, it was a zero-tolerance jobsite, and a job the company could not afford to lose. Dickson claimed this was a recurring issue with Collins, and he had spoken to him numerous times about properly wearing his PPE. Dickson denied telling Collins to remove stickers from his hardhat, denied leaving and then coming back to speak with Collins on different occasions, and further testified that he never saw Collins peel union stickers off his hat. (Tr. 2208–2211, 2220, 2237)

Regarding this hardhat, Collins admitted that he sometimes wore his hardhat tilted back. Collins said that that one time, but it is unclear when or where, Dickson told him that he had to wear his hardhat properly, grabbed his hat, moved it around on his head, said that he had to wear his hardhat "like this." He then told Collins that if he did not wear his hardhat "right" Dickson was going to get him kicked off the Hotel Circa job when it "starts up all the way." (Tr. 688)

3. Analysis

I credit Collins as to what occurred at the Losee yard and at the Hydro Arch jobsite. Collins was forthright in his testimony and I believe he strived to testify honestly as to what occurred. The same cannot be said about Dickson. Moreover, Collins was a current employee when he testified and was therefore testifying against his pecuniary interest. This further enhances Collins's credibility. *Flexsteel Industries*, 316 NLRB 745, 745 (1995).

Accordingly, I find that, at the Hydro Arts jobsite, Dickson asked Collins why he was wearing a union sticker on his hardhat then questioned why Collins just did not go to work at Nevada Ready-Mix if he wanted the union. When Collins asked why he should go to work elsewhere when he had a job at Cemex, Dickson asked Collins what the union was going to offer. In reply, Collins said that the union offered "a lot" like medical and pension benefits. Dickson said that, if the employees unionized, Cemex was going to close their doors, take their

trucks, and go to another state because they don't want the union. Finally, in relationship to their discussion of what the union had to offer, Dickson said "if I offer you $100, would you believe it?" Collins replied saying that it was up to Dickson as to whether he wanted to offer him $100.

Dickson's statement to Collins asking him why he just did not go to work at Nevada Ready-Mix if he wanted the union was an unlawful invitation to quit, as it came in response to the fact Collins was wearing union stickers on his hardhat. *McDaniel Ford, Inc.*, 322 NLRB 956, 956 fn.1 (1997) (telling employees that they should look for jobs someplace else if they are unhappy a violation); *Bell Burglar Alarms, Inc.*, 245 NLRB 990, 990 (1979) (asking employee why he did not quit if he was not happy a violation); *Jupiter Medical Center Pavilion*, 346 NLRB 650, 651 (2006) (telling employee "maybe this isn't the place for you . . . there are a lot of jobs out there" a violation).

Dickson's statement that Cemex was going to close their doors and take their trucks to another state if employees unionized because they do not want the union also constitutes a violation.[13] *Gibson Distributors*, 238 NLRB 491, 493 (1978) (telling employees that if they selected the union the company would close its doors and employees would lose their jobs a violation); *Ace Heating & Air Conditioning Co., Inc.*, 364 NLRB No. 22, slip op. at 2 -3 (2016) (statement from supervisor/agent that the owner wanted him to inform workers that the company would close its doors if they voted for the union a violation); *Reeves Southeastern Corp.*, 256 NLRB 574, 578 (1981) (violation where foreman threatened that the company would close the plant and move to another state of the union came in).[14]

Finally, I find that Dickson's questioning Collins about what the union has to offer constitutes an unlawful interrogation as the statement was accompanied by Dickson's other coercive threats. *Christie Electric Corp.*, 284 NLRB 740, 741 (1987). In *Christie Electric Corp.* the Board found an unlawful interrogation where a foreman showed a piece of campaign material to an open union supporter and asked "what he wanted from the union." Id. When the worker replied that employees might want higher wages, the foreman said that the company would not go for that, that the company president would do anything to keep the Union out and would not sign a contract. Id. In this context, the Board found an unlawful interrogation because the foreman's questions were accompanied by coercive threats. Id. I find that Dickson's conduct here is comparable to the foreman's conduct in *Christie Electric Corp.* and similarly find that an unlawful interrogation occurred.

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[13] Whether Dickson said Cemex "might just close the[ir] doors" as set forth in Collins's written statement, or said that Cemex was "just going to close their doors" as Collins testified, is immaterial as Dickson never provided any objective facts to support a probable conclusion beyond Respondent's control that a union election victory would cause the company to close. *Kmart Corp.*, 316 NLRB 1175, 1178 (1995) (telling employees that the company would have to think about closing the warehouse if company expenses went up because of a union victory was an unlawful threat as the statement was not based on any objective facts); *Metfab, Inc.*, 344 NLRB 215, 218 (2005) (shop foreman's statement that company "might have to shut its doors if the union prevailed in the election" a violation as it was not based on any objective facts).

[14] Regarding all of the 8(a)(1) allegations in this matter, I have considered the fact that Respondent provided "TIPS" and "FOE" campaign training to its supervisors and managers. However, simply providing training does not negate the finding of a violation based upon credible witnesses testimony of what occurred. *Goodyear Tire & Rubber Co.*, 273 NLRB 36, 40 (1984) (Respondent committed multiple violations, including threats to close the plant, despite manager's testimony that employer's supervision received extensive "TIPS" campaign training that they could not engage in treats, interrogation, promises, or spying).

In its post-hearing brief, the General Counsel asserts that Dickson offered Collins a bribe to quell his interest in the union when he asked whether Collins would believe him if he offered Collins $100. (GC. Br. at 63–64) However, this was no attempted bribe. It is clear from the context of the conversation that Dickson was trying to convey to Collins that he should not necessarily believe that employees would get better pension or medical benefits if they unionized. Therefore, I do not believe this statement constitutes a violation.

Regarding what occurred at the Losee yard, I credit Collins' testimony that Dickson told him to remove the union stickers on his hardhat three times, and that after the third time Collins peeled the stickers off his hat and threw them in the trash. Dickson's demand that Collins remove the stickers from his hardhat constitutes violation of Section 8(a)(1). *Pacific Bell Telephone Co.*, 362 NLRB at 910.

E. Alleged interrogation by Ryan Turner in January 2019 (Complaint Paragraph 5(f))

1. Background

a. Testimony of Richard Daunch

Richard Daunch is a Cemex ready-mix driver assigned to the Corona plant. At the time of his testimony Daunch had worked in this position, at the same location, for nearly 16 years. Daunch testified that on January 23, 2019, he was assigned to deadhead from Corona to the Perris plant. Deadheading is a term used in the industry to describe picking up an empty truck from one plant, and driving it to another plant where it will be loaded with product for delivery. (Tr. 156, 271–274, 282, 392)

Daunch picked up his truck at the Corona plant around 2:25 a.m. and arrived at the Perris plant about an hour later. When he arrived at the Perris plant, Daunch said that he pulled under the loading bay, loaded his truck with concrete, went to the washout area to slump his load, and then walked into the office to get his delivery ticket. At the time, Daunch was not wearing any stickers on his hardhat. Present in the office was Ryan Turner, the batch plant foreman named Daniel Becerra,[15] and a quality control employee who greeted Daunch by saying good morning. Turner then looked at Daunch and said "where's your 'Vote No' sticker? How come I don't see a 'Vote No' sticker on your hardhat?" (Tr. 275) Daunch paused, took his hat off, looked at both sides, and replied "that's because I don't have one on there." (Tr. 275) Daunch then told Turner that he was not putting any stickers on his hardhat. In reply, Turner told Daunch "well, I can get you one, if you like," and that Daunch said "no, thank you." (Tr. 275) (Tr. 274–275, 294–295)

According to Daunch, sometime in January 2019, after this incident, he attended an employee meeting at the Corona plant with one of the labor consultants, and he asked him

[15] During his testimony, Daunch could not remember Becerra's last name, and called him "Daniel the batch plant foreman." (Tr. 274) It was clear that Daunch was referring to Becerra, as Respondent's organizational charts shows that Becerra was the plant foreman for the Perris plant, and Turner testified that Becerra was one of the plant foremen he supervised. (Tr. 2250; GC. 4, 5; R. 8)

whether it was illegal for someone to ask where your Vote No sticker was. The consultant told Daunch that it was not legal, and asked for the name of the person who asked him this question. Daunch did not want to raise any issues, so he just said that it was not a big deal. (Tr. 279–280, 296–297)

b. Testimony of Ryan Turner

Ryan Turner testified that, as a member of management his stance was in line with the company's position: employees should vote no in the election. Turner assisted in the company's efforts to encourage employees to vote against the union, and as part of this effort the company obtained Vote No stickers and handed them out to the drivers "if they asked." (Tr. 363–364) Respondent's Vote No stickers were approximately 3 to 4 inches in diameter, said "VOTE NO" in bold black letters, with a red, white, and blue background and white stars. Turner, as directed by Bryan Forgey, picked up the stickers at the Ontario office and put a stack of stickers on the counters at each batch plant he supervised. (Tr. 363–364, 370–371, 885, 1290; U. 5, 13, 21)

Regarding the Perris plant, Turner said that he worked out of Perris batch plant office one or two days a week, and that it was not uncommon for drivers to come into the office and speak with him. Drivers need to enter the Perris batch office to get their delivery ticket, because the plant does not have pneumatic tube system like other facilities. Turner denied having any conversation with Daunch at the Perris plant about Vote No or Vote Yes stickers, and further said that he did not have any conversations with Daunch about stickers. Turner also testified that he never asked any drivers if they wanted a Vote No sticker, but said that if drivers wanted one they could ask him for a sticker. He said that he only handed out one sticker to a driver during the campaign. (Tr. 364–365, 374–376, 2251–2252)

2. Analysis

As to what occurred that day at the Perris plant office, I credit Daunch. I believe that Daunch, who had worked for Respondent for multiple years without any record of discipline, was straightforward with his testimony throughout the hearing and had no reason to fabricate what occurred. Moreover, as a current employee, Daunch was testifying against his pecuniary interest, which further bolsters his credibility. *Flexsteel Industries*, 316 NLRB at 745.

I didn't find Turner's denials credible. Turner was in control of the Vote No stickers for his area and was disseminating them to the plants he oversaw. At the time, there is no evidence that Turner knew Daunch was an active union supporter, and Daunch was not wearing any union stickers on his hardhat when he walked into the office that day. I believe that Turner was simply trying to be coy in attempting to uncover the level of Daunch's union support, when he asked why Daunch was not wearing a Vote No sticker and informing Daunch that he had Vote No stickers with him if he wanted one.

I also note that Respondent never called Becerra as a witness. As a Cemex plant foreman, and admitted Section 2(11) supervisor, Becerra's testimony was within Respondent's control, and Cemex offered no explanation as to why Becerra did not testify. As such, I find that had Becerra been called to testify, he would have testified adversely to Respondent's interests on

this issue. *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977) (Adverse inference against Respondent and crediting the General Counsel's witnesses was proper where Respondent offered no explanation as to why its supervisors did not testify at the hearing). *CSH Holdings, LLC*, 365 NLRB No. 68, slip op. at 5 fn. 15 (2017) (where employer failed to present testimony from managers it may be inferred that their testimony would have been adverse to the employer's interests on that issue, and the judge properly drew an adverse inference accordingly).

Under the circumstances presented, I find that Turner's actions constituted an unlawful interrogation. Turner was a high-level official asking why Daunch was not wearing a sticker supporting the company's position against unionization. The two had not been engaged in any discussions or small talk about the election before Turner's statements, there was no legitimate purpose for his questions other than to see what Daunch would say or find out whether he would take a Vote No sticker, and there were no assurances against reprisals. The Board has found violations arising from the manner in which anti-union paraphernalia is distributed when the employer puts a worker in a position to declare whether or not the employee has allegiance to the union. *Catalina Yachts*, 250 NLRB 283, 288 (1980), enfd. 679 F.2d 180 (9th Cir. 1982); *Kurz-Kasch, Inc.*, 239 NLRB 1044, 1044 (1978). This is what Turner was attempting to do with Daunch. Accordingly, I find that Turner's actions violated Section 8(a)(1) of the Act. *Teksid Aluminum Foundry*, 311 NLRB 711, 715 (1993) (the act of tendering an antiunion button to an employee, who neither asked for one nor gave any indication of where he stood relative to the election campaign, constituted an unlawful interrogation).

3. Evidentiary Issue

The General Counsel's brief asks that I reconsider a ruling made at trial and admit into evidence a document prepared by Daunch outlining this and other events; he drafted the document after the March 2019 election to present to the NLRB during the underlying investigation of this matter. Respondent objected to the hearsay nature of the document, which was placed in the rejected exhibit file. (GC. 32–Rejected; Tr. 3138–3139) The General Counsel asserts the document is admissible as a prior consistent statement, pursuant to Section 801(d)(1)(B) of the Federal Rules of Evidence. (GC. Br. at 7) However, a "prior consistent statement is admissible only if it was made before the witness had a motive to fabricate." *Breneman v. Kennecott Corp.*, 799 F.2d 470, 473 (9th Cir. 1986); *Tome v. United States*, 513 U.S. 150, 158–161, 167 (1995); *Walker v. MacFrugal's Bargains Closeouts*, No. CIV. A. 93-4135, 1995 WL 396315, at *2 (E.D. LA. 1995) (EEOC affidavit not admissible as a prior consistent statement as the EEOC complaint and supporting affidavit were a necessary predicate to have the case proceed to trial). "The Rule speaks of a party rebutting an alleged motive, not bolstering the veracity of the story told." *Tome*, 513 U.S. at 157–58.

Here, the General Counsel has not shown that Daunch's statement was made before he had any motive to fabricate, which presumably would have predated the filing of charges and/or objections to the election in this matter. If Daunch "had a motive to fabricate at trial, the [NLRB investigation] setting would have engendered the same motive." *MacFrugal's Bargains Closeouts*, 1995 WL 396315, at *2. Moreover, during Respondent's cross examination, the company did not imply that Daunch's trial testimony was a result of a recent fabrication.

"[I]mpeaching a witness by pointing to omissions in [his] prior accounts of a material fact is a far cry from charging [him] with 'recently fabricating' the facts." Id; *Thomas v. United States*, 41 F.3d 1109, 1119–20 (7th Cir. 1994) ("a charge of recent fabrication is a narrow subset of impeachment for credibility. One may impeach for lack of credibility without going so far as to charge recent fabrication."). And here there is no claim that Daunch's trial testimony was due to any "recent improper influence or motive." Fed. R. Evid. 801 (d)(1)(B)(i). I therefore reaffirm my ruling. Notwithstanding, as noted above, I have credited Daunch's testimony without relying upon the document.

F. Alleged surveillance of employees in January 2019
(Complaint paragraph 5(g) & Union Objection #7)

1. Background

Respondent's Inglewood plant has one gate that drivers use to enter and exit the plant. About two to three car lengths away from the gate is a set of railroad tracks; the tracks intersect a public road leading into the plant. In the weeks preceding the election Union organizers were outside the Inglewood plant, standing on the side of the road between the railroad tracks and the plant entrance talking to drivers or passing out flyers and other union information. On January 28, 2019, union organizer Scott Williams was outside the plant with Cemex employee Luis Hernandez. At some point during the day Cemex plant superintendent Robert Nunez and plant foreman Larry Ponce drove up to the gate and got out of their vehicles. Luis Hernandez and Robert Nunez testified as to what occurred that day. (Tr. 191, 1335; U. 12, R. 47)

a. Testimony of Luis Hernandez

At the time of the incident, Hernandez worked as a driver at the Inglewood plant, but was out on medical leave, and would assist the Union with the organizing drive.[16] Hernandez testified that he was at the Inglewood plant on January 28, 2018 with Williams, standing off to one side of the road, between the railroad tracks and the gate, which had a large "Vote No" sign affixed to one side of the fencing. Hernandez and Williams had with them a large poster board showing a comparison between the wages and benefits of the company's unionized Northern California drivers and Cemex's non-union Southern California drivers. As employees drove by the gate, they held up the poster showing the comparison to the drivers. Hernandez said that any conversations they had with drivers that day were short, lasting just a few seconds. (Tr. 1259–1260, 1334–1335; GC. 20)

At some point Robert Nunez drove by in his company truck. Nunez drove into the plant, turned around, parked his truck, got out and stood there watching Hernandez and Williams. Hernandez said that Nunez stood there by himself for about 20–30 minutes, waving to the ready-mix trucks as they were coming in and out of the plant. It appeared to Hernandez that, by waving to the drivers, Nunez was letting them know that he was standing there. According to Hernandez, after Nunez's arrival the ready-mix trucks no longer slowed down to look at the poster, but instead just drove past with the driver maybe giving Hernandez a nod. At some point,

[16] In June 2019 Hernandez left Cemex and went to work for the Union as an organizer on the Cemex campaign. (Tr. 1305, 1357)

while Nunez was standing there, Lorenzo Ponce pulled up in his personal car, parked to one side, and stood next to Nunez. After a little while, Hernandez testified that he walked up to the gate and started having a conversation with Ponce and Nunez about the benefits of unionization. Hernandez said that, as they were going back and forth debating the topic, Ponce said "just remember, the Company took care of you when you wanted to transfer to Vegas." (Tr. 1261) Hernandez asked what that had to do with anything, and Ponce replied "I'm just saying, you know, the Company took care of you. No questions asked."[17] (Tr. 1262) Hernandez said that this conversation lasted about 5 minutes. Then, Hernandez walked back to where Williams was standing, and Ponce and Nunez walked back towards Nunez's truck. Nunez and Ponce continued standing there waving at the trucks that were coming in and out of the plant, as they talked and watched what Williams and Hernandez were doing. (Tr. 1260–1263; GC. 20)

Hernandez, who had worked at the Inglewood plant for over four years, testified that it was not normal for Ponce and Nunez to stand by the gate for such a prolonged period of a time. Usually, if they needed to go to the gate for work reasons, it was just to see if any maintenance was needed. Hernandez testified that there were other occasions where he had conversations with Nunez near the gate entrance while he was helping the Union organizers between January 1, 2019 and the election, and that sometimes Nunez would ask him to not stop the trucks while they were loaded. However, Hernandez said that this was the only time that Nunez stood there and observed him for such a prolonged period of a time. And, while Hernandez was assisting with the organizing drive, this was the only time he saw Ponce stand at the front gate in that fashion. (Tr. 1258, 1263, 1356–1357)

Photographs of this incident taken by the Union were introduced into evidence which show Ponce and Nunez standing around, just inside the entrance/exit gate of the Inglewood plant, off to one side near Nunez's truck, while Ponce's car is at the other side of the gate. To enter/exit the plant drivers needed to drive between Nunez's truck on one side and Ponce's car on the other. While Ponce, Nunez, Williams, and Hernandez, were all standing in their respective positions, a Cemex driver who was on his way home pulled out of the plant, stopped, got out of his car to learn more about what was on the poster board, and also appears in the pictures. (Tr. 1265–1269; 2701–2702; GC. 20, U. 12, R. 47)

b. Nunez's Testimony

Nunez was the plant superintendent overseeing the Inglewood and Compton batch plants. Regarding the Inglewood plant, Nunez testified that in the runup to the election, Union organizers would stand outside the plant almost every day in an area between the plant gate and the railroad tracks. (191, 216) Nunez said that he had between 15–20 conversations with the Union organizers who were outside the plant during this period and that sometimes Ponce was with him. However, Nunez did not remember having any specific conversations with Hernandez. (Tr. 185, 189–193, 204, 216)

Nunez confirmed that both he and Ponce were in the pictures taken on January 28, and that they were both standing next to Nunez's work truck which was parked right next to the front

[17] Hernandez had transferred to Las Vegas in 2017, and then after about 10 months, he transferred back to the Inglewood plant. (Tr. 1262)

gate. When asked whether he was coming from somewhere else, drove through the entrance, and then parked at the gate, or was already inside the Inglewood plant and then up drove up to the gate, Nunez said that he could not remember. That being said, Nunez insisted that every time he responded to the gate it was because he received a call to go there, and that the only time he spoke with Union organizers was "when I was called for safety issues." (Tr. 214) Nunez said that whenever he had to go out to the front gate, instead of walking he would drive his truck to the gate and park it there. When asked why he would drive his truck to the gate, as opposed to walk there from the office which was 150 yards away, Nunez said that sometimes when he was done, he would leave and go elsewhere. Because he travels between plants and goes to different jobsites, Nunez testified that he drives in and out of Inglewood gate multiple times throughout the day. (Tr. 194, 214, Tr. 2700–2705; GC. 20)

Notwithstanding his testimony that the only time he went to the Inglewood front gate was when he received a call to go there, Nunez also testified that one of the reasons he would go to the front gate was because he saw Union organizers trying to block trucks or climb up on the truck steps to talk with drivers or hand them materials, and to "stop" them. (Tr. 213) Whenever he was at the front gate, Nunez testified that he would stay there between 10 to 20 minutes. Because Inglewood is a busy plant, Nunez said that whenever he was at the front gate speaking with the Union organizers, trucks would be passing, and that every time he sees a truck he waves to the driver. (Tr. 204, 213, 2700)

2. Analysis

Regarding Hernandez and Nunez, I believe that both were prone to exaggeration at times and provided testimony that was later contradicted by other testimony or evidence. For example, when asked if he would climb on the step of a ready-mix truck to talk to a driver, Hernandez answered "no. We're not allowed to climb up on the steps." (Tr. 1307) Yet a picture of him posing on the steps of a ready-mix truck while talking to a driver was introduced into evidence. (Tr. 1336–1337; RX. 14) As for Nunez, during points in his testimony he insisted that the only time he responded to the front gate was when he received a "call" to go there for some type of complaint or issue. (Tr. 214, 2700–2701) However, he then testified that he responded to the front gate because he personally witnessed Union organizers doing various things, such as blocking trucks or climbing up truck steps, and he would go over there to stop them, notwithstanding the fact the fact that the front gate was not visible from the batch plant office which was 150 yards away. (Tr. 213, 2733; U. 12)

On the whole, I believe that Hernandez's testimony was more credible that Nunez's at to what occurred that day. Along with the matters mentioned above, Nunez at times seemed nervous when testifying, particularly after he was shown the pictures that were taken that day by the Union. (Tr. 2703) Also, sometimes his answers went beyond the specific questions asked, as if he had memorized a story he wanted to tell, leading me to strike one of his answers from the record as being non-responsive. (Tr. 2703, 2699, 2711, 2754–2755) *Random Acquisitions, LLC*, 357 NLRB 303, 305, fn. 14 318 (2011) (answers that go far beyond counsel's questions and become a moving narrative detract from a witnesses credibility). Moreover, Nunez testified repeatedly that he did not remember what happened on the date in question, or why he was at the front gate. Therefore his sweeping statements that he never went to the front gate unless he was

responding to a complaint, or witnessed some sort of improper or unsafe acts, are not credible, as he admitted he had no idea why he responded to the front gate that day.

Accordingly, I find that the credible evidence, along with the inferences derived therefrom, show that on January 28 Hernandez and Williams were standing outside the Inglewood plant gate with a poster board comparing the wages and benefits of the union vs. non-union drivers, showing the board to drivers as they drove by, and briefly talking with drivers if they had any questions. At some point Nunez drove into the plant in his work truck, saw what was occurring, turned his truck around, parking at the front gate and stood there watching the Union organizers for a prolonged period of time. As drivers drove in and out of the plant, Nunez waved to them, to ensure the drivers saw him positioned at the gate.[18] At some point, Ponce pulled up in his personal car and parked it across from Nunez's truck; drivers had to drive between Ponce's car and Nunez's truck to enter the plant. Ponce joined Nunez in watching the Union organizers while Nunez waved to the drivers. Because of the slow speed of the trucks going in and out of the plant, and the proximity of Ponce and Nunez to the front gate, it would be easy to identify the employees driving in and out of the plant that day. Eventually Hernandez had a conversation with Ponce and Nunez that lasted about five minutes. During this conversation Ponce told Hernandez to remember that the company took care of him when he wanted to transfer to Las Vegas. In all Ponce and/or Nunez stood at the front gate watching and waving for about 20–30 minutes, which included the five-minute conversation with Hernandez. I also find that, while Nunez had responded to the front gate in the past, and spoken to the Union organizers before, he had never stood there for such a long period of time, and certainly not for 20–30 minutes just watching and waving with Ponce at this side.

It is well established that management officials may observe open and public union activity on or near the employer's premises, so long as such officials do not engage in behavior that is "out of the ordinary." *Arrow Automotive Industries*, 258 NLRB 860 (1981), enfd. 679 F2d 875 (4th Cir. 1982). The question here is whether the conduct of Nunez and Ponce, standing at the gate for between 20–30 minutes, watching and waving at the trucks as they drove by the Union organizers, was out of the ordinary.

In support of its case, the General Counsel cites *Partylite Worldwide, Inc.*, 344 NLRB 1342, 1343 (2005) where the Board found that the employer engaged in surveillance when, on three separate occasions, no less than eight high-ranking managers and supervisors stood at entrances to the employee parking lot watching the union give literature to employees as they entered and exited the parking lot during shift changes. In making its finding, the Board noted that the conduct of the company officials was surprising, and an unusual occurrence. Id. The Board also noted that the handbilling was occurring on a public roadway adjacent to the parking lot entrance, the management officials stood as close as possible to the handbilling, while still remaining on company property, and could identify the employees who passed by or took a handbill. Id. at 1343–1344. In support of its defense, Respondent cites *WestPac Electric, Inc.*, 321 NLRB 1322 (1996). In *WestPac Electric*, without comment the Board affirmed the judge who dismissed a surveillance allegation where the union agent met with employees openly and in

[18] Any claim by Respondent that Hernandez and Williams were interrupting the drivers' work are simply not credible. Because of the plant's layout, drivers needed to slow down, if not stop, to cross the railroad tracks. There is no credible evidence that either Hernandez or Williams interrupted the work of the drivers that day.

plain view of a supervisor. Id. at 1380. On one occasion the union agent met with employees right outside the supervisor's job trailer, and the supervisor walked into the group and demanded that the union agent leave. On another occasion, the union agent met with employees just outside the perimeter of the job site, sitting in an employee's car. The supervisor "paused more than once and briefly stood with hands on hips and looked in the direction of the group." Id. Based upon these facts, the judge dismissed he allegation, finding nothing that was "suspicious" or "untoward" that might suggest the supervisor was spying. Id.

Here, I find that the conduct of Nunez and Ponce is closer that which was found improper in *Partylite Worldwide, Inc.*, than what occurred in *WestPac Electric*, where the supervisor had only brief and passing encounters with the union organizers. Also, the Board considers a number of factors in determining whether an employer's observation of union activity occurring on or near an employer's premises is unlawful, including the duration of the observation, its frequency and timing, the employer's proximity to employees while observing them, the likelihood or actuality of trespass by nonemployees, whether there is a reasonable threat to the safety of employees or customers, the existence of demonstrated animus toward the protected conduct, and whether the employer has engaged in other coercive behavior during its observation or otherwise departed from its usual practice. See *Brown Transport Corp.*, 294 NLRB 969, 972 (1989). Considering these factors, I find that Ponce and Nunez engaged in unlawful surveillance. Both were stationed as close to the union organizers as possible, while still remaining on company property. They stayed there for an inordinately long period of time, which was a departure from their usual practice, while waving to the drivers to ensure they did not slow down or talk to the organizers. Based upon where they were standing, Ponce and Nunez could easily identify the employees driving by the organizers. There was no likelihood of trespass by the organizers, who were standing outside the plant on a public street, and there was no reasonable threat to the safety of anyone that day. Finally, as shown herein, the company has demonstrated an existence of animus to employee protected activity. Ultimately, Respondent's conduct had a clear and obvious tendency to interfere with the drivers' ability to view the union posterboard or interact with the organizers that day. "It is the tendency of Respondent's conduct to be coercive which determines the violation and not the actual effect." *Gainesville Manufacturing Co.*, 271 NLRB 1186, 1188 (1984). Accordingly, I find that the Respondent violated Section 8(a)(1) by engaging in unlawful surveillance as alleged.

Respondent's citation to *Metal Industries*, 251 NLRB 1523 (1980) is unavailing. (Cemex Br. at 61) There, the Board found management officials regularly stationed themselves in the parking lot at the end of the day to say goodbye to employees and answer questions. There is no such evidence here. Also unpersuasive is Respondent's citation to *Porta Systems Corp.*, 238 NLRB 192, 192 (1978), where no surveillance violation was found as the union organizers were talking to employees and passing out leaflets on company property. Here, the Union organizers were on public property. And, Respondent cannot rely on *Contempora Fabrics, Inc.*, because the surveillance allegation was not before the Board on exceptions. 344 NLRB 851, fn. 2 (2005). Even if it was, the facts in *Contempora Fabrics* were not analogous to what happened here. Id. at 865 (judge dismisses surveillance allegation where supervisors were not doing anything, or located somewhere, that was inconsistent with their normal responsibilities and where there was no evidence of employees engaged in lawful union activities at the time).

Finally, by waving to the drivers as they drove past the Teamster organizers, I find that Respondent also created an impression of surveillance. *Durham School Services, LP.*, 361 NLRB 393, 408, 410 (2014) (impression of surveillance where supervisor, whose conduct was out of the ordinary, stood by gate of facility for an extended period of time in front of the union table). *Peck, Inc.*, 269 NLRB 451, 459 (1984) (conduct of company president, who twice stared at union activist for 15–20 minutes "constituted actual surveillance/or creating the impression of surveillance.").

G. Alleged threats by Michael Rosado in Simi Valley meeting (Complaint Paragraph 5(h) & Union Objection #2)

In late January/early February 2019, Bryan Forgey and Michael Rosado held a series of meetings with Ventura County drivers at the Simi Valley and Oxnard plants. The meetings were designed to have Forgey speak directly with employees, as Rosado perceived that Forgey had a personal relationship with many of the workers. According to Respondent, the same information was presented at all of the meetings, but the flow differed depending upon the questions received from employees. (Tr. 2063, 2065, 2780–2781)

1. Facts

Complaint paragraph 5(h) alleges that consultant Michael Rosado threatened employees with the loss of benefits while speaking at the Simi Valley plant by saying that Cemex could close plants or move elsewhere and that voting for the union would damage employees' futures and the future of their families. In support of this allegation, the General Counsel relies solely upon the testimony of William Lucero, who worked as a ready-mix driver for Cemex from June 2017 through July 2020. According to Lucero, over the course of the organizing drive, he attended between five to seven meetings that Respondent had called to discuss the union drive with employees, including one that occurred on January 28, 2019. (Tr. 885)

Lucero testified that on January 28, he attended a meeting at the Simi Valley plant with about ten other drivers from both Moorpark and Simi Valley. Rosado and Forgey were present for Cemex. Lucero said that, during this meeting, and before Forgey entered the room, Rosado spoke to employees about the union. (Tr. 885–886) The government relies upon the following testimony from Lucero to support this allegation:

> Q: [By the General Counsel]: What do you recall Mr. Rosado telling you guys at the meeting?
>
> A. Well, every time we had a meeting and he was there, it was always just to talk down about the Union and why we should not vote for the Union, and how they were going to take our monies, and that, you know, all they -- that the Company can -- if we were to decide to go on strike, the Company can, you know, pick and choose who they wanted to come back, and who they didn't want, and -- but yeah, it was basically, they didn't -- it was always to talk down, for the Union.

> Q. So, you mentioned a strike, and them picking and choosing who to come back. Did he mention anything else during that meeting?
>
> A. Yeah, that if -- the Company can close down the plants, and open new ones, and -- yeah. I mean, like I said, this was a year back. And that it could really damage our future and our family, if we voted yes. (Tr. 887–888)

According to Lucero, at some point after Rosado made these comments, Lucero's brother asked Rosado why they "couldn't go union" since the Northern California employees were unionized. At this point, Rosado said "oh you can ask Brian Forgey." (Tr. 888) He then opened the door and Forgey stepped inside. Lucero said that, during the meeting, Forgey talked about his personal experience with a union, saying that when he was a union member he lost work hours which caused him to lose money. (Tr. 887–888, 906) (GC. Br., at 34–35):

On cross-examination, Lucero agreed with the leading questions posed to him by Respondent's counsel saying that, during the meeting Rosado told employees that if a strike occurs, the company has the ability to replace drivers who go on strike, when the strike ends anyone who has been replaced would go to a preferential recall list, and this means they would only be recalled back to work when their job opened back up. He further testified as follows:

> JUDGE GIANNOPOULOS: Did you know what that means? I mean, did he say that, or are you just, in your mind that's what you're thinking?
>
> THE WITNESS: No, well he said that it was basically whoever didn't want to cross, I guess, the line, they were sent home and just on a waiting call, to see if they can come back to work or not. (Tr. 907)

For his part, Rosado testified he held two meetings with Forgey and Ventura County employees before the election, sometime in late January or early February, one in Oxnard and one in Simi Valley. According to Rosado, during these meetings he never said Cemex could pick and choose who to rehire after a strike, never discussed plant closures, never said Cemex could close plants or open new plants if the union won the election, and never said that voting for the union would damage the future for employees or their families. (Tr. 2781–2782, 2802)

2. Analysis

Regarding the allegation in paragraph 5(h) I find Lucero's testimony was not sufficient to establish that Rosado threatened employees as alleged. While testifying, it appeared that Lucero had a hard time remembering what was specifically said during this meeting, and his testimony lacks context regarding the alleged statements. For example, when the General Counsel asked what Rosado said in the meeting, instead of limiting his answer to what occurred that day at Simi Valley, Lucero gave a generalized answer about what was being said "every time we had a meeting and he was there." (Tr. 887) And then, when he testified about the topic of the company opening/closing plants, and the damage to people's futures, Lucero appeared to qualify his answer by saying "I mean, like I said, this was a year back," and he provided no further context or background. (Tr. 887 – 888) Although multiple other employees were also present,

none were called to testify as to what was said at this meeting. While I believe Lucero heard somebody, somewhere, mention these topics,[19] I find that his testimony is too attenuated to establish by a preponderance of the evidence that Rosado made these statements at the Simi Valley plant as alleged. Accordingly, I recommend that this allegation be dismissed.

The testimony elicited by Respondent's counsel, through Lucero's cross examination, does show that during the meeting Rosado told employees that if a strike occurs, Cemex has the ability to replace drivers who go on strike, and when the strike ends, anyone who has been replaced would go on a preferential recall list. Of course, such a statement, without differentiating between an economic or an unfair labor practice strike is a misstatement of the law; unfair labor practice strikers who unconditionally offer to return to work are entitled to immediate reinstatement. *George Banta Co., Banta Div. v. NLRB*, 686 F.2d 10, 21 (D.C. Cir. 1982), amended sub nom. *George Banta Co. v. NLRB* (D.C. Cir. Aug. 13, 1982). Such statements have been found to violate Section 8(a)(1) of the Act. *NLRB v. Kentucky Tennessee Clay Co*., 179 Fed. Appx. 153, 161 (4th Cir. 2006) enforcing 343 NLRB 931, 936 (2004) (without differentiating between economic and unfair labor practice strike, it is a violation to tell employees that, in the event of a strike, they would be replaced if needed in order to meet the company's obligations to its customers). That being said, this matter was never raised by either the Union or the General Counsel.

H. Allegations involving statements made by Brian Forgey at Oxnard (Complaint Paragraph 5(i) & Objection #2)

When Forgey spoke to the Ventura County employees in late January/early February 2019, he did so without a script, and discussed various topics including his experiences with unions, employee rights under the NLRA, and material that Cemex had previously discussed with drivers. Complaint paragraph 5(i) involves what was said by Forgey during the Oxnard meeting. (Tr. 2782)

1. Testimony of Diana Ornelas

Diana Ornelas worked as a ready-mix driver for Cemex from April 23, 2018 until September 6, 2019, assigned to the Oxnard plant. Ornelas testified that, prior to the election, she attended a meeting that occurred on January 29, 2019 in the conference room at the Oxnard plant.[20] Ornelas, along with about five of her corkers, were present for the meeting which was conducted by Forgey and Rosado. (Tr. 970, 975)

According to Ornelas, the meeting started with just Rosado present for Cemex. Rosado introduced himself, said that he was hired by Cemex and was completely neutral. He told the drivers about his background working at a construction job in a union shop, said he had a good

[19] The issue of strikes and the specter that the union election could affect employees and their families for years was a theme that appeared in Respondent's campaign literature. (R. 23, 26, 30, 31) And, during at least one meeting, Forgey admitted talking to employees about the company's right to turn existing plants into satellites even if they unionized. (Tr. 2073–2074)

[20] Transcript page 970, line 12 should read "ready-mix driver" instead of "administrator" and transcript page 975, line 10 should read "2019" instead of "2018."

experience, and that he understood some of the workers had worked in a union setting before and wanted to vote "yes" which was fine. Ornelas said that Rosado showed the drivers a PowerPoint presentation highlighting facts the company wanted them to know about the Union, and said that whatever he and Forgey were going to tell them was true, because they legally cannot lie to the drivers. After Rosado spoke about his background and showed the PowerPoint, he let Forgey into the room. (Tr. 976)

Ornelas testified that Forgey entered, introduced himself as the vice president, and then discussed his background, having grown up in the Los Angeles area in a blue-collar neighborhood. According to Ornelas, at some point Forgey started talking about his past experiences having worked in a unionized setting and how it impacted him personally. Forgey told the group that, when he was a union member, the contract he worked under did not allow him to work outside his classification. Because of this, Forgey said that he lost a lot of hours and a lot of work because he had a job description and could not perform work outside of this job description. Forgey told the drivers that, if they unionized, the same thing would apply to them as well. They would get a job description and would not be able to perform any work outside the parameters of the job description. Forgey said that he can currently send drivers to work at other plants sometimes, or move trucks from one plant to another, but with a union those extra things would become part of a job description and they would not be able to do that anymore. Similarly, with a union, he said that if drivers asked him to go home early, or asked for a raise, he would not be able to do anything, because if he did that for one person he would have to do it for everyone. (Tr. 977–979, 1181–1182)

At one point during the meeting, according to Ornelas, Forgey referenced a wage increase that drivers were supposed to have already received. He told the drivers that they could not receive the raises they were supposed to get earlier that month "because of the Union, because of the process," and that he could not do anything for them because "his hands are legally tied until all this is over." (Tr. 977)

Ornelas further testified that during the meeting Forgey discussed the process of negotiations if employees unionized. She said Forgey told the drivers that he was always fighting for them, trying to get them new trucks and extra hours. However, he said that if the Union came in then all those things are up for negotiations. Forgey said negotiations could take days, weeks, months, or even a few years, and that Cemex did not have to agree to anything because they are a business so if the Union wanted to negotiate with him, was going to say no every time. Because Cemex is a business, Ornelas said Forgey told the drivers the company could close the plant down any time, for any reason. (Tr. 977–978, 1181)

Ornelas testified that during the meeting Forgey also discussed strikes, and gave an example of when he worked in a unionized setting in the 90's and the union called a strike. Forgey said that, instead of going on strike with his coworkers, he crossed the picket line and was able to work throughout the plant, fixing different things, and develop his skills. Forgey told the drivers that, when the strike ended, not all of his coworkers got to come back to work. And later, his coworkers went through an election process and kicked the union out after being unionized for three years. According to Ornelas, Forgey said that the same thing would happen if they unionized and went on strike. Cemex could pick and choose who could come back to

work and production continued as the company would find other people to get the job done. (Tr. 978)

Finally, Ornelas said Forgey told them that if they unionized the drivers were risking their relationship with their supervisor Jason Faulkner and the batchmen. And with a union in place, Forgey would not be able to do anything for the drivers. Forgey said three things could happen with a union: 1) things could get slightly better but the drivers would now be paying dues; 2) things remain the same but now the drivers would be paying dues; or 3) things get worse and the drivers would be paying dues. He said the only thing the drivers would be obligated to is the call to strike and paying dues. (Tr. 980–981; 1181)

Towards the end of the meeting, in the context of their discussion about the union organizing drive, Ornelas testified that she asked Forgey "what does Cemex have to lose?" Forgey did not answer. Instead, Forgey told Ornelas "well, Diana, you know, I ask you, what do you have to lose?" (Tr. 982) Ornelas said that Forgey seemed agitated by her question, and that his face turned red. (Tr. 982)

2. Testimony of Bryan Forgey

Regarding the meeting he and Rosado held at the Oxnard plant, Forgey said there were two meetings; half of the drivers were in one meeting and half in the other. Forgey said the plant superintendent Jason Faulkner may also have been in attendance. (Tr. 91–93)

Forgey testified that the issue of wage increases were discussed at the Oxnard meeting. For fiscal year 2018, workers were awarded wage increases in February 2018. The company had also budgeted employee wage increases for fiscal year 2019, but as of the date of the Oxnard meeting they had yet to be issued. Forgey originally testified that, during the meeting he said Cemex traditionally gave employees their annual cost of living increases in the first part of the year, but due to the election coming up in March, they "were in a status quo position" and the company was not "able to give out raises at that point for that reason." (Tr. 153) Two months after he originally testified, Forgey was called as a witness as part of Respondent's defense. This time, Forgey claimed that, during the Oxnard meeting, he told employees that Cemex typically gives increases in April each year, and that because of the election campaign they were in a status quo pending the election. (Tr. 153, 2065–2067)

Forgey said the topic of collective bargaining was also discussed during the Oxnard meeting. He denied telling employees he would not bargain with the Union, or that he would say no to everything. According to Forgey, he discussed with employees the collective-bargaining process, how it worked, and said that both sides had to agree in order for a contract to be reached. Forgey said he told employees that, with negotiations there are no guarantees, you could get more, you could get less, or it could stay the same. (Tr. 151–152, 2078)

Forgey also denied telling employees during the meeting that Cemex could legally close the Oxnard plant for any reason. (Tr. 2073) Instead, Forgey testified he discussed with employees management rights and told them that, even if they unionized, the company would still maintain the right to operate its businesses as it traditionally does and that some plants

would become satellites depending upon market demands. Regarding satellite plants, Forgey testified that "you turn plants on and off" depending upon the location of any particular job, moving work to plants that are closest to any specific job, and that plants that are "turned on and off like that" are referred to as satellite plants. (Tr. 2073–2074)

Forgey also denied telling employees that they would never be allowed to work outside their job classifications if Cemex unionized. Forgey testified that during the meeting he discussed his personal experiences with job classifications and the limitations he faced working under a union contract. Forgey told employees about being classified as a maintenance worker and volunteering for as many hours as he could receive. When the company he worked for was non-union, Forgey said he could work across all parts of the plant, wherever they needed hours and people. However, he told the workers that, once the company was under a union contract, if a job was available on the weekend but was not within the maintenance classification, he could not work that job. So, Forgey explained to employees that this was a challenge for him personally because he could not move around the plant and work in other classifications. (Tr. 2071–2072)

Forgey further testified that during his discussion with Oxnard employees he also discussed strikes. He denied saying that the company could pick and choose who to bring back after a strike. Instead, he said that strikes were discussed in a general sense and that he shared his personal experience in the industry, having crossed the picket line when he worked in a unionized setting, and then having to work with his union coworkers after the strike ended. As for returning to work after a strike, Forgey said he told the employees that, upon his experience, if a strike was called and employees went out on strike, after the strike was resolved, depending upon the level of operations, employees would be returned to work based upon "where they sat on the seniority list." (Tr. 2075–2077)

Finally, Forgey said that in the meeting they discussed the potential change that unionization would have on employees' relationship with management. Forgey testified that he discussed with employees the fact that, once they were under a collective-bargaining agreement, "their voice is now through the Union," and it is not going directly to the company. (Tr. 2072) Therefore, if the workers had things they needed, they would have to work through the CBA "or work through their delegate . . . on the Union side" which he said would be "an example of a change in our relationship." (2073)

3. Testimony of Michael Rosado

Rosado testified that during the Ventura County meetings, the topic of plant closures never came up. According to Rosado, during these meetings Forgey talked to employees about his past experience with unions, and talked about the NLRA so the drivers understood that "management has a play in this also." (Tr. 2782) Rosado said that the topic of negotiations was discussed, and that Forgey gave drivers "the overview on management" and "kind of piggybacking on" the obligation to bargain in good faith. (Tr. 2782) He said Forgey told employee that there are no guarantees, and that and employees could receive more, less, or things could stay the same. (2782–2783)

Rosado denied that Forgey told employees during these meetings that they risked damaging their relationship with supervisors and managers if they voted for the union. Instead, Rosado said Forgey discussed how the relationship between employees and management could be impacted if the Union won the election. According to Rosado, Forgey told employees that, "when you have a union shop . . . you have a shop steward" and there are certain protocols that have to take place. (Tr. 2802) Employees lose their ability to deal directly with their supervisor, one on one, without a shop steward involved. (Tr. 2803) And if things are not settled, employees have to call their union representatives to come in and they may have to file a grievance. (Tr. 2802–2803)

4. Analysis

Based upon the testimony I have credited, along with the reasonable inferences drawn therefrom, I find that during the Oxnard meeting Forgey described his personal experiences when he had previously worked under a union contract, but that he also linked those experiences with what would happen if the Cemex employees unionized. Therefore, I find that Forgey discussed having previously worked under a job description, telling employees that, before his old employer was unionized he could work all over the plant and develop his skills, but once the union came in he could no longer work outside his job classification, and as a result he lost work and hours. I find that Forgey then said that if the Cemex employees unionized they would be working under a job description which would define the types of jobs they could perform, and that extra things that drivers do now they would no longer be able to perform because they would be working under a job description. By telling employees that they would be working under a job description that limits their work opportunities, I find that Respondent violated Section 8(a)(1) of the Act. *National Micronetics, Inc.*, 277 NLRB 993, 1005–06 (1985) (violation where supervisors said there would be strict job classifications if the union came in and employees would not be able to switch from department to department a violation).

Forgey admitted he told the Oxnard workers that Cemex traditionally gives employees their annual cost of living increases during the first part of the year, but due to the election coming up in March, they "were in a status quo position" and were not "able to give out raises at that point for that reason."[21] (Tr. 153) By blaming the Union and the upcoming election for the fact that Cemex had not been able to give out raises, Respondent violated Section 8(a)(1) of the Act. *Pacific FM, Inc.*, 332 NLRB 771, 792 (2000); *Aluminum Casting & Engineering Co.*, 328 NLRB 8, 1–9 (1999), enfd. in pert. part 230 F.3d 286, 293 (7th Cir. 2000); *Federated Logistics & Operations*, 340 NLRB 255, 271 (2003). Any claim by Respondent that there can be no violation because Forgey was simply saying the raises would be deferred to avoid an appearance of election interference is without merit. There is no evidence Forgey told employees that the raises were being deferred to avoid an appearance of interference, nor did he tell employees that the delayed raises would be awarded regardless of whether employees voted for or against the union. See *NLRB v. Aluminum Casting & Engineering Co.*, 230 F.3d 286, 293 (7th Cir. 2000) (where employer advises employees that an expected raise is deferred pending the election to

[21] I credit Forgey's original testimony as to what he told employees about wage increases, as it was given spontaneously and without hesitation. As such, I find that Forgey did not say anything to drivers about raises typically being given in April. This was something he added to his testimony later in an effort to aid Respondent's defense, which I do not credit.

avoid the appearance of interference it must also convey the message that the raise will be awarded whether or not employees vote for the union).

I further find that, during the meeting Forgey described the collective bargaining process, said that everything was negotiable, told employees the company was not required to agree to any of the Union's demands, and that for a contract to be reached both Cemex and the Union had to agree. He also told employees that bargaining could take days, weeks, months, or years, that nothing was guaranteed in negotiations, and that three things could happen: things could get better, worse, or stay the same, but under all three scenarios the drivers will be paying dues and run the risk of being called out on strike.[22] Under these circumstances, where Forgey told employees that wage increases were "in a status quo position" due to the election, did not say that the company would issue the raises after the vote, and further said that in the event the union won the election that bargaining could take years, I find that Respondent also violated Section 8(a)(1) of the Act as these statements taken as a whole constitute an unlawful threat that wage increases would be frozen for possibly years if employees unionized. Compare *W. E. Carlson Corp.*, 346 NLRB 431, 440 (2006) (where employer had a practice of granting an annual wage increase, company's memorandum saying that if the union prevailed bargaining could last for months or years and during negotiations wages would be frozen constitutes a violation), with *Mantrose-Haeuser Co.,* 306 NLRB 377, 377– 78 (1992) (no violation where employer said wages and benefits are "typically" frozen during bargaining which can go on for months or years, where there was no statement benefits would be lost, and the company continued its practice of granting predetermined wage increases during the union election campaign); see also *Teksid Aluminum Foundry*, 311 NLRB 711, 711 fn. 2, 717 (1993) (telling employees that, should the union win, everything is frozen until an agreement is reached which could take years to negotiate constitutes a violation).

During the meeting, while discussing management rights, Forgey told employees that, even if they unionized, the company had management rights and would still maintain the right to turn plants into "satellites," meaning that Cemex could shift work from one plant to another, based upon the location of any particular job, thereby turning plants on and off as needed. I find that this statement conveyed the unmistakable impression that union representation would be a futility, and violated of Section 8(a)(1).[23] Cf. *Little Rock Downtowner, Inc.*, 143 NLRB 887, 890 (1963) (telling employees that management reserves the right to make decision as to what was best for workers and the union election would have no impact on the company's policy on wages and job changes a violation).

Forgey admitted that during the meeting he discussed the issue of strikes with Oxnard employees. The credible evidence shows that Forgey discussed strikes in a general sense and spoke about his personal experience having crossed a picket line. He also told employees that, if

[22] All of these talking points also appear in various other presentations that Respondent made to employees about bargaining. (R. 24, 25, 30, 31, 49, 51, 52, 61; Tr. 2039– 2047, 2051–2058)

[23] Forgey's description of satellite plants, turning plants on and off as needed and shifting work, implicates a transfer of work and does not involve a change in the scope or direction of the enterprise that would exempt the company from a bargaining obligation if unionized. See *Geiger Ready-Mix Co. of Kansas City, Inc.*, 315 NLRB 1021, 1023 (1994), enfd. in pert. part 87 F.3d 1363 (DC. Cir. 1996). Moreover, even if there would be no obligation to bargain over the decision itself, a unionized employer would be obligated to bargain over the effects of such a decision. *Comau, Inc.*, 364 NLRB No. 48, slip op. at 1–2 (2016).

they participated in a strike called by the union, after the strike was resolved, based upon the company's level of operations, striking employees would be returned to work according to their seniority because the collective bargaining agreement would have "a seniority status."[24] (Tr. 2077) By telling employees that, after a strike, they would return to work based upon the company's operations and their level of seniority, Forgey implied that employees with less seniority, such as Ornelas, would have to wait for an undefined period of time until they returned to work. I find this statement to be coercive and a violation of Section 8(a)(1). "It is settled law that unfair labor practice strikers are entitled to immediate reinstatement upon making an unconditional offer to return to work." *Amersig Graphics, Inc.*, 334 NLRB 880, 881 (2001). And economic strikers who unconditionally offer to return to work are entitled to immediate reinstatement unless the employer is able to show a legitimate and substantial business justification for not doing so. *Dino & Sons Realty Corp.*, 330 NLRB 680, 683 (2000), enfd. 37 Fed. Appx. 566 (2d Cir. 2002). Here, I find that during the meeting Forgey linked what he experienced in the past, to what Cemex employees would experience if they went on strike. By doing so he implied that, regardless of what was occurring at any particular time in the future, and notwithstanding the type of strike, less senior employees who went on strike would have to wait an indefinite period until they could return to work when the strike ended. Cf. *Teleflex Industrial Products, Inc.*, 166 NLRB 71, 78 (1967) (foreman's statements, which were based in part upon his past experiences elsewhere, implied unlawful reprisals in violation of Section 8(a)(1)).

Finally, the credited evidence shows Forgey told employees that unionization would change the relationship they had with management. He told employees that, once they were under a collective-bargaining agreement, they had to go through the Union instead of coming directly to management. Forgey said employees would lose their ability to deal directly with their supervisors. Instead, if drivers needed anything, they would have to work through the union contract/union representatives and could not come to directly to him as he would not be able to do anything for them. Therefore, Forgey said that if employees unionize, they were putting at risk the relationship they have with their supervisors and batchmen. In the context presented, and considering the other statements Forgey made during the meeting, I find that these statements also violate Section 8(a)(1) of the Act. *Economy Fire & Casualty Co.*, 264 NLRB 16, 20 (1982) (telling employees that, if they selected the union, they could not present their grievances or discuss their problems with management a violation). Here, because the drivers work closely with their respective batchmen and supervisors, and rely upon them for their job assignments, Forgey's statement about drivers risking their relationship with the supervisors and batchmen by working under a union contract, places "a Damoclean sword or cloud of threat over the employees for doing no more than the Act guarantees them the right to do free from such a sword of threat or cloud seeded with such employer interference, restraint, and coercion." *Storktowne Products, Inc.*, 169 NLRB 974, 979 (1968); see also *Tipton Electric Co.*, 242 NLRB 202, 206 (1979), enfd. 621 F.2d 890 (8th Cir. 1980) (telling employees if the union won they would lose their right to deal directly with management and their harmonious working conditions and personal relationships with management would be lost are violations of Section 8(a)(1)).

[24] I believe Ornelas misunderstood Forgey's muddled attempt to explain striker reinstatement rights when she testified Forgey said the company could pick and choose who would return to work when the strike ended. I also find that her testimony about Forgey telling drivers that Cemex was a business and could close down plants at any time for any reason was a summary of what Forgey said during the meeting about satellite plants.

I. Allegations involving alleged threats made by Juan Torres in February 2019 (Complaint Paragraph 5(k))[25]

1. Facts

Diana Ornelas testified that on February 21, 2019 she had a conversation with Juan Torres, the Oxnard plant foreman, in the batch office. Three other drivers were present. According to Ornelas, Torres called the four drivers into the office and had some pamphlets in his hand. She testified that Torres gave the pamphlets to everyone and said, "this was just something the Company wants you guys to have so you can hear both sides" and told them he was there to answer any of their questions. (Tr. 983) He then told the drivers that if a union "comes in, the Company could start sending people to Las Vegas to keep us busy if there's no work."[26] (983–984) Ornelas said that one of her coworkers asked if they could permanently relocate the drivers, and Torres replied "well, it's up to them." (Tr. 984) Ornelas then said that Torres told the workers "this is it" the meeting was over, it involved "just these pamphlets," and the four drivers could go home and would be paid for "show up time." (Tr. 984) When asked whether she had done any work that day before the meeting, Ornelas said she did not remember, and then speculated it might have been slow that day. Ornelas said that the conversation with Torres lasted "probably less than 10 minutes." (Tr. 983–985)

For his part, Torres admitted that he spoke with drivers about the election or the union in general, saying that sometimes they would bring up the topic of the union or the election and sometimes he would. When asked if there were instances when he would approach a driver and hand out a flyer or pamphlet about the election or the Union, Torres testified that "basically, we would just hand out flyers" to the drivers about their rights, how the union works, and the law. (Tr. 226) When asked how many flyers he handed out to drivers, Torres then testified the handouts were in the plant, that everyone had access to them, and he did not recall any instances of being in the Oxnard plant handing out flyers to drivers as it was Rosado who was handling the flyers. When asked if he could recall any conversations with drivers about any of the flyers, Torres answered that he would just post them in the office and tell the divers there was a new flyer in the office and to make sure they read it. Torres testified that he could not recall if there was in instance in February 2019 where employees showed up, there was no work, and instead he brought them into the office and gave them a pamphlet. Torres denied discussing the topic of working in Las Vegas with any of the drivers. (Tr. 225–228, 254)

2. Analysis

The General Counsel alleges that, during this conversation, Respondent threatened employees with reprisals if they unionized. However, under the circumstances presented, I find that the General Counsel has failed to meet his burden of proof to show that a violation occurred.

[25] In its brief, the General Counsel withdrew Complaint paragraphs 5(j) and 5(o). (GC. Br. at 6) Complaint paragraph 6(c) was withdrawn by the General Counsel at the hearing. (Tr. 1991)
[26] Transcript page 983, line 25 should read "union" instead of "unit."

It is undisputed that Respondent produced flyers and gave them to drivers about various topics involving the union organizing drive. These pamphlets were placed in plant offices and break rooms, or disseminated amongst employees at the various facilities. Indeed, Faulkner himself admitted handing these pamphlets out to drivers. (Tr. 445–446) As discussed below in Section IV(B)(1), I generally did not find Torres to be a credible witness. I therefore find that he had a conversation with Ornelas and three other drivers sometime in February 2019, gave them flyers that the company had produced about the union organizing drive, and mentioned that if there was no work the company could start sending people to Las Vegas to keep them busy. However, I believe there was more to this conversation than just the short statement the General Counsel elicited from Ornelas during her testimony.

Ornelas said the conversation with Torres was "probably less than 10 minutes" which implies the interaction between Torres and the drivers that was longer than the few words Ornelas attributed to Torres. The lack of context in this instance is important. In some cases a statement can constitute an illegal threat, based upon the context, while in other instances the statement, in a different context, is lawful. *Bandag, Inc.*, 225 NLRB 72, 83 (1976). Here, the statement attributed to Torres could have different interpretations, depending upon the specific context in which it was spoken. Torres could be reassuring drivers that the company would do anything in its power to make sure everyone was employed, and would even send them to Las Vegas if necessary, in the event there was no work in Southern California. On the other hand, Torres could be trying to frighten the drivers by saying a union would cause work to dry up and they would have to send people to Las Vegas if they wanted to work. Because of the lack of context and the ambiguous nature of the words attributed to Torres given the circumstances, I find the General Counsel has not met his burden of proof to show a violation occurred, and recommend the allegation in Complaint paragraph 5(k) be dismissed.

J. Allegations involving statements made by Jason Faulkner in February 2019 (Complaint Paragraph 5(l))

1. Diana Ornelas Testimony

After her interaction with Torres in the batch office on February 21, Ornelas testified that she walked outside with her coworkers. One of them left, and Ornelas stood there with the other two, Renee and Mario, talking about the pamphlet they had just received from Torres and "flipping through the pages." (Tr. 985) At this point, Ornelas said Faulkner appeared from around the corner and walked up to the drivers. According to Ornelas, the drivers told Faulkner they were talking about the pamphlet, and Mario asked Faulkner why they were not paid more, saying the drivers in San Diego received higher pay than the Oxnard drivers. Faulkner said, considering their education level, "you get paid pretty damn well" and the different pay scales made sense in light of the different costs associated with operating each plant. (Tr. 985–986) He then said that everyone has their place, and started giving examples of what different types of workers get paid, saying CEOs are needed, as are people who dig holes and scrub toilets, and they should all be proud of their jobs, notwithstanding what others might think. Faulkner went on to say that workers in Mexico make a dollar per day, but when they come to the United States and start working at McDonalds, that is an opportunity for them and they are content because it

is an opportunity they could be proud of, even though others might dismiss having a job working at McDonalds. (Tr. 984–986)

Ornelas further testified that during this conversation Faulkner said he had big plans for Ventura County, that he currently had lot of influence, and did not need the Union to find jobs.[27] Faulkner told the group that he had previously been involved with the Teamsters, and shared his experiences about how representation by the Teamster had impacted him. Ornelas said that Faulkner told the drivers he could currently take them to Moorpark and teach them to batch or teach them to drive a loader, but if the Union comes in it may strip him of that power. Ornelas also testified that Faulkner spoke about one employee who wanted to learn and grow with the company, and that Faulkner said he wanted to teach this employee, but with a union he was going to lose that power. At the end of the conversation Ornelas said that she put her hand out to shake Faulkner's hand. However, Faulkner would not shake Ornelas's hand and told her "when it starts digging into your pickets, it becomes personal." (Tr. 988) (Tr. 987–988, 1184)

2. Faulkner Testimony

As the Ventura County plant superintendent, Jason Faulkner oversaw all the batch pants in the area and supervised the individual plant foreman at each plant. Faulkner was a 10-year Cemex employee and before working at Cemex he worked at a unionized company called Vulcan Materials. (Tr. 442–443, 2381)

Regarding his conversation with Ornelas and her two coworkers, Faulkner testified that the three employees were in the parking lot when he approached them and asked if they had any questions. According to Faulkner, one of the drivers said they could not lose any pay or benefits if they unionized, and Faulkner replied saying that they could get less, the same, or more if it goes to negotiations. Faulkner also said that, during this conversation, one of the drivers asked him what would happen if they went on strike. Faulkner testified he said, "my past experience is the only thing that I can go off of," and explained to the drivers "what I recall is when there were strikes . . . the business continued . . . but I don't know exactly how that would look if a Union came in." (Tr. 451) Under cross examination by the Union's counsel, Faulkner admitted that when he had previously worked at Vulcan they did not have any strikes, and there is no evidence that Faulkner experienced any strikes when he was working at Cemex or anywhere else. (Tr. 450, 2419, 2488)

Faulkner admitted that he spoke to the three drivers about the opportunity for growth within the company in the context of the organizing drive, but denied saying that he might be stripped of the power to teach drivers how to batch or how to load if the Union won. Instead, Faulkner said that he discussed his experience at Vulcan. According to Faulkner, he told the drivers that at Vulcan, the job classification was "driver" and for someone to "to do a different task," it would be out of their job classification, or "something like that." (Tr. 2420) Faulkner denied telling the drivers they would never be able to work outside their classification if the Union won. Instead, what Faulkner said he told them was that, in a union environment, it is a classification system and to work a different position it would have to be within the union contract, laws, and rules. Finally, when asked how long his conversation with the three workers

[27] Transcript page 987, lines 1-2 should read "Ventura County" instead of "Ventura economy."

lasted, Faulkner answered "[n]ot even a minute, I believe, I think, it was shorter. I think the whole conversation was about three hours—less than probably five minutes." (Tr. 451) (Tr. 445, 449–451, 2420–2421)

3. Analysis

As to what occurred during the conversation between Faulkner and the three drivers in February 2019, I did not find Faulkner's recitation of events to be credible. His claim that what he told the drivers about strikes was based upon his past experience was not believable, as there is no evidence that he had any experiences with strikes. He also seemed unsure about the conversation itself, saying it lasted not even a minute, then said it was shorter than that, then said the whole conversation was about three hours, then said it was less than five minutes. Finally, Faulkner said that he took notes of this conversation, and that they were still in his possession, but no such notes were ever introduced into evidence. (Tr. 451–452) *UAW v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir. 1972) ("when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him"). Accordingly, I credit Ornelas's testimony over that of Faulkner's where the testimonies conflict.

As such, I find that the credible evidence, along with the reasonable inferences derived therefrom, shows that Faulkner walked up on Ornelas and her coworkers as they were talking about the pamphlet they received from Torres and asked if they had any questions. The four then engaged in a dialogue, discussing drivers' pay, pay in general for various types of workers in different industries, and strikes. Faulkner then told the employees that he had big plans for Ventura County, that he currently had a lot of influence, and did not need a union to find jobs. Faulkner told the drivers that he had previously been involved with the Teamsters and that when he worked at Vulcan the drivers had a specific job classification and could not perform tasks that were in other job classifications. Faulkner said that now, he could take the three drivers to Moorpark and teach them to batch or drive a loader, but if the Union came in it may strip him of that power because the union has a classification system. Faulkner then spoke about how he wanted to teach an employee who was eager to learn and grow with the company, and said he was going to lose that power if they unionized. At the end of the conversation, when Ornelas tried to shake Faulkner's hand, he would not shake it, and told her that it becomes personal when it starts digging into your pockets.

I find that Respondent violated Section 8(a)(1) of the Act when Faulkner told the drivers that: (1) if the Union comes in it might strip him of the ability to teach drivers to batch or drive a loader because the union has a classification system; and (2) he would lose the power to teach employees who want to learn and grow with the company if the drivers unionized. *National Micronetics, Inc.*, 277 NLRB 993, 1005–06 (1985) (supervisors statement that there would be strict job classifications if the union came in and employees would not be able to switch from department to department a violation). The fact that Faulkner couched one of these comments as saying it "may" happen does not negate the finding of a violation. *Daikichi Sushi*, 335 NLRB 622, 623-624 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). (that the employer's prediction of plant closure was couched as a possibility instead of a certainty was not a defense). Faulkner's prediction of what "may" happen was not based upon any objective facts. Indeed, the bargaining unit found appropriate in the Regional Director's Decision and Direction of Election

that issued on February 20, the day before this conversation occurred, included in the Unit drivers who occasionally drive loaders, and who sometimes work as secondary batchmen. (JX. 6). Id. (threat of plant closure a violation as it was not based on any objective facts); see also *Exelon Generation Co., LLC*, 347 NLRB 815, 830 (2006) (statement that, if the employees unionized, they would lose rotating schedules, flextime, and the ability to accept/reject overtime were not based on any objective facts and therefore constituted unlawful threats).

K. Prohibiting employees from talking to the union while on company time (Complaint Paragraph 5(m) & Union Objections #5, #7)

1. Testimony of Diana Ornelas

Diana Ornelas testified that, on February 25, 2019, she had a conversation with Jason Faulkner and Daryl Charlson in the Oxnard plant conference room where she was told that she could not speak to union organizers on company time. Fabian Leon was also present. (Tr. 1030–1031)

According to Ornelas, earlier that day she had returned to the Oxnard plant from a jobsite and parked her truck in line to reload with concrete. There were two trucks in front of her, so while she was waiting, Ornelas walked over to say hello to the two Teamsters organizers who were standing on the sidewalk outside the Oxnard plant. While she was speaking with the organizers, Juan Torres came out and told Ornelas she needed to wash and then park her truck. Ornelas said okay and walked back towards her truck. Torres walked with her and said that Ornelas cannot be "talking to those guys." (Tr. 1032) Ornelas said okay, and that she did not know. In response Torres again told her that she cannot be talking to them and that everybody knows it. Ornelas again said she did not know that she was not supposed to be speaking with the organizers, and testified that Torres told her "everybody saw you already." (Tr. 1032) Ornelas asked who Torres was referring to as everybody. Torres said himself, Charlson, Faulkner, as well as maybe Gus Aguilera and further said that they might want to speak with her. Ornelas asked if she was in trouble, and Torres replied "I don't know, maybe." (Tr. 1032, 1177–1178)

Ornelas was washing out her truck, standing next to Fabian Leon, when Faulkner approached and asked to see her in the office when she was done. Ornelas went to the office with Leon, where Faulkner and Charlson were waiting. During the meeting Charlson said they were going to be very clear about this, that Ornelas cannot be talking to people and the Union on company time. Ornelas responded by saying she did not know, that nobody had told her this before, and if she knew she would not have walked over to speak with the organizers. Ornelas apologized, and said that she would not do this again. Faulkner then told Ornelas that this was just a verbal warning. (Tr. 1031–1034, 1178–1179)

Prior to this conversation, Ornelas said her understanding was that drivers were allowed to eat lunch, get some water, go to the bathroom, talk to coworkers, or take a phone call, while waiting to be loaded. She said the company had never previously told her what a driver could not do while on standby. (Tr. 1060–1061)

2. Testimony of Daryl Charlson

Regarding this meeting Daryl Charlson testified he remembered the conversation vaguely. Charlson said that Faulkner was having a disciplinary meeting with Ornelas and he was asked to assist as a witness. According to Charlson he did not speak during the meeting, and it was Faulkner who spoke to Ornelas. (Tr. 404, 407–408, 2548)

Charlson said that he drove to the Oxnard plant that day from his office in Ontario for the meeting with Ornelas. According to Charlson, during the meeting Faulkner told Ornelas that the company knew she had been talking to union representatives and she should not be talking to them on "working time." (Tr. 405–406) Faulkner then told Ornelas if her truck was loaded with product, which was perishable, she should not stop at the gate and let someone step on her truck while it was running but instead should be delivering her load. Charlson said that Faulkner also repeated these instructions to Leon. According to Charlson, Ornelas responded by saying that she did not know what she did was wrong, as nobody had told her this before. Faulkner said that drivers had been informed about this in prior meetings, including the meetings with the consultants. Faulkner then told Ornelas that this was just a verbal warning. Charlson testified that he had never previously been involved in a discipline involving a driver speaking with non-employees during either company time or working time, and does not know of any other driver disciplined for these reasons. (Tr. 408) Charlson further said that, it was his understanding drivers were allowed to speak with union representatives during non-working time, meaning before work, during breaks, lunchtime, and after work. (Tr. 404–408, 2548–2549)

3. Testimony of Jason Faulkner

Regarding this incident, Falkner testified that he was in his office when Gus Aguilera and Juan Torres reported to him that Ornelas had stopped and was talking to union representatives at the plant gate. Faulkner said he walked out the back door and saw Ornelas's truck parked while she was speaking to the union organizers by the driveway. According to Faulkner, Ornelas's truck was empty at the time, as she was returning back to the plant. (Tr. 2400, 2499–2500)

Faulkner said he spoke to Ornelas, with both Charlson and Leon present, and told her she should not stop and talk to union representatives during working time. Faulkner denied telling Ornelas that she could not speak to union representatives at any time while she was at work. When asked whether the company had rules as to what a driver could or could not do while waiting to load at the plant, or waiting to discharge at a jobsite, the only thing Faulkner noted was that drivers were responsible for the safety of their vehicles. (Tr. 455, 2400, 2402, 2502)

Immediately after the meeting, Faulkner drafted a memo of what occurred during his discussion with Ornelas. The document reads as follows:

> Approx. 2:15 Diana was driving 5957 at the staging point in front of the Oxnard plant. Diana was reported by Safety Champion (Gus Aguliera) and Oxnard Plant Foreman (Juan Torres) sitting, talking to Union Organizer at the Oxnard location while on the company's time. I told Diana her that I needed to speak with her before she leaves, as she was washing out her mixer. She had finished washing

> out and at 2:41 she texts me asking if she could have a witness. Before I had read the text message she arrived at the Oxnard Office with Fabian Leon requesting him to be a witness. She asked if Fabian or Rudy could be a witness. I stated that this was a personnel matter and a witness was not needed, but Fabian could stay. I also had Daryl Charleston as a witness, which he stated "if I am being recorded I do not give consent.["] Which I Jason Faulkner also said I do not give consent to being recorded. I asked Diana that if she was informed that talking to a Union Organizer on Company time was prohibited. Diana stated that she was not told that its against company policy. I stated to Diana that I know that I have personally told her that its against company policy to speak with Union Organizers during work hours and that she was informed during meetings with the consultant. She stated again that she was not told. I then told her this is a Verbal Warning that she is not speak with Union Organizers and the Union Organizers cannot interfere with our operation conducting our business. I asked her if she understood and her reply was I do understand and wouldn't do anything that I wasn't supposed to if I knew it was wrong. I then turned to her requested witness Fabian Leon and asked do you understand as well. Fabian looking right at me replied yes, I do know that. I then stated once again this is a verbal warning. That was all the discussion.

Faulkner shared the memo with Cemex's human resources department and with Charlson. The document was also placed into Ornelas's personnel file. (GC. 9, Tr. 456–457, 2403, 2406)

During its defense, Respondent's counsel asked Faulkner about the portion of the memo which said "company time" and Faulkner claimed that what he actually meant was "working time." (Tr. 2400) Faulkner said that the point of the conversation was to make Ornelas aware that she could speak to union representatives before her shift, on breaks, or after work, and that he explained this to her during their discussion. (Tr. 2401) During this same examination, Faulkner also testified that the memo was not considered a formal discipline, but instead was just a "coaching moment" and that the document itself was "just notes and a statement of what happened that was just put in her file." (Tr. 2403) Notwithstanding, during examination by the General Counsel, Faulkner admitted that during the meeting he gave Ornelas a verbal waring for talking to the union representatives. Finally, Faulkner said that he was not aware of any other drivers being disciplined for speaking with union representatives, or non-employees, on company time. (Tr. 455–457, 2400–2401, 2477)

4. Analysis

Prohibiting employees from conducting union related activities during "company time" while allowing them to do other non-work activities constitutes disparate treatment that interferes with employee Section 7 rights. Cf. *Industrial Wire Products, Inc.*, 317 NLRB 190, 190 (1995) (prohibiting employees from talking about the union on company time while allowing other discussions a violation). Also, admonishing employees against speaking to union representatives during "company time" violates Section 8(a)(1) because it is ambiguous and may confuse employees into believing that they cannot engage in union activity or solicitation from the time they come to work until the time they leave." *W.D. Manor Mechanical Contractors, Inc.*, 357

NLRB 1526, 1541 (2011). Likewise, an employer violations Section 8(a)(1) by telling employees they should not talk to union organizers. *Evolution Mechanical Services, Inc.*, 360 NLRB 164, 173 (2014). Finally, rules prohibiting employee solicitation during "working hours" are presumptively invalid as the term connotes periods from the beginning to the end of work shifts, which include the employee's own time. *Our Way, Inc.*, 268 NLRB 394–395 (1983).

Regarding what happened during the February 25 meeting, and the testimony by Charlson and Faulkner claiming that Faulkner told Ornelas that she could not speak to the Union during "working time," I do not find this testimony credible as it is contradicted by the written memo Faulkner drafted just minutes after the meeting ended. In the memo Faulkner states that he asked Ornelas if she knew that talking to union organizers on company time was prohibited, and then said that he had told her that it was against company policy to speak with union organizers during work hours. Also, a disciplinary chart from Respondent's records that includes this incident was introduced into evidence. This chart states Ornelas was informed in group meetings that talking to union representatives on "company time" was prohibited and was told this incident constituted a verbal warning. (GC. 17) The chart also says there was a "Memo to File" regarding this incident, showing that it was placed in Ornelas's personnel file. (GC. 17)

As such, faced with the admissions as to what occurred as set forth in Faulkner's memo and the disciplinary chart, I find that the testimonies of Charlson and Faulkner were manufactured, after the fact, in an effort aid Respondent's case. The same is true regarding Faulkner's claim that he told Ornelas during the meeting that she could speak with Union representatives before her shift, on breaks, or after work. None of this is included in the memo; it is not worthy of belief, and I find that it did not occur. Faulkner was simply trying to remanufacture what occurred, in order to try and meet the strictures of the law.

Accordingly, the credited evidence shows that, during the February 25 meeting, Faulkner asked Ornelas if she was informed that talking to union organizers on company time was prohibited. When Ornelas said that she did not know this was against company policy, Faulkner said that he had personally told her it was against company policy to speak with union organizers during work hours, and that she was also told this by the consultants. Faulkner told Ornelas that the meeting constituted a verbal warning, and that she was not to speak with the union organizers. He also asked if Leon understood the admonition, and when Leon confirmed that he understood, Faulkner again staid that this was a verbal warning.

By asking Ornelas if she knew that talking to union organizers on company time was prohibited, Respondent violated Section 8(a)(1) of the Act, as the term "company time" is ambiguous and leaves the impression that employees cannot engage in union activity from the time they come to work until they leave. *W.D. Manor Mechanical Contractors, Inc.*, 357 NLRB 1526, 1541 (2011); *BJ's Wholesale Club*, 297 NLRB 611, 612 (1990) (where a statement prohibiting employee solicitation during working hours is confusing or ambiguous, it is incumbent on the employer to show that it would permit solicitation during breaktime or other periods when employees are not actively at work). Moreover, there is ample evidence throughout the record that, while waiting to load at a plant or unload at a jobsite, drivers are allowed to talk to other people in the area, make phone calls, get coffee, go to the bathroom, or do anything, so long as they are ready when it is their turn to load/unload. This was specifically

confirmed by Brian Forgey and Ryan Turner. (Tr. 110–112, 377) And, during this same time period, Respondent was allowing the consultants to walk around the plants and jobsites to speak with drivers about the union when they had downtime. (Tr. 341–342, 2016) Therefore, Faulkner's prohibition about taking with union organizers on "company time" constituted disparate treatment that interfered with employee Section 7 rights. Cf. *Industrial Wire Products, Inc.*, 317 NLRB at 190.

In its brief, Respondent asserts that the allegations in paragraph 5(m)(2) and 5(m)(3) must be dismissed because there is no charge referencing unlawful directives prohibiting employees from speaking to the union or claiming that such directive were enforced. (Cemex Br., at 94) However, the charge in Case 31-CA-238240, filed on March 19, 2019, alleges, in part, that Cemex violated employee Section 7 rights by discriminating against employees for engaging in pro union activities. (GC. 1(m)) That is exactly what happened here. Faulkner's prohibition about taking with union organizers on "company time" constitutes disparate treatment that interferes with employee Section 7 rights, as employees were allowed to talk to other people, and about other subjects, during company time. And the prohibition was enforced against Ornelas by giving her a verbal warning. As such, the Complaint paragraphs in question are closely related to the allegations set forth in the March 19 charge, and are properly before me.

Further in violation of Section 8(a)(1) is Faulkner's statement that it was against company policy to speak with union organizers during work hours. *Our Way, Inc.*, 268 NLRB 394, 395 (1983), and his telling Ornelas that she was not to speak with the union organizers at all. *Evolution Mechanical Services, Inc.*, 360 NLRB 164, 173 (2014). Finally, Respondent's enforcement of the no talking rule against Ornelas also violated Section 8(a)(1) of the Act. *J.P. Stevens & Co., Inc.*, 240 NLRB 579 (1979) (enforcement of no talking rule against two union proponents to inhibit and harass them a violation of Section 8(a)(1)).

Citing *United Charter Service*, 306 NLRB 150 (1992) the General Counsel also claims that during the events of February 25 Respondent unlawfully created the impression that Ornelas's union activities were under surveillance. (GC. Br. at 82–83) However, the facts of *United Charter Service* do not support such a finding. In *United Charter Service* employees met at a local restaurant to discuss their workplace complaints and agreed to draft a petition setting forth various workplace demands and seeking recognition of a "Drivers Association" by their employer. The Board found the company's operations manager created the impression of surveillance when he told various employees that he had lots of friends, he knew about the meetings, knew about the petition, had already received the petition, and named some of the items that were in the petition. In finding a violation, the Board noted that the employees did not engage in their organizing activities openly on the company's premises, but instead met at a restaurant. Id. at 151. Moreover, the Board noted that even if it was common knowledge that employees were organizing, the manager's comments went beyond permissible limits, as he not only told workers that he knew they were organizing, but also went into detail about the extent of the activities and the specific topics they discussed at their meetings. Id. Here, there was nothing secret about Ornelas speaking with the union organizers, as it occurred in the open, just outside the front gate of the Oxnard plant, in plain view of everybody. And there is no evidence that anybody from Cemex commented to Ornelas about the specific topic of her discussion with

the union organizers that day. Accordingly, I recommend that the allegation in Complaint paragraph 5(m)(1) be dismissed.

L. Requiring drivers to remove "Vote Yes" signs in their trucks (Complaint Paragraph 5(n) & Union Objection #4)

1. Facts

Gilbert Deavila testified that, on February 25, 2019, he was sitting in his truck at the Hollywood plant when he heard plant foreman Steve Ronan tell him over the company radio to "take the sign down." (Tr. 840) Deavila had a 2-foot by 2-foot square sign that said "Vote Yes" in the rear window of his truck cab. The radio system broadcasts to all employees in the Los Angeles County area, so all the drivers monitoring that particular frequency would have heard this discussion. (Tr. 840, 859; U. 4)

Deavila testified that he saw another truck at the Hollywood plant that day with a "Vote No" sign, and said nobody ever radioed that particular driver to remove his "Vote No" sign. He also testified that he saw one truck with about six "Vote No" stickers, which were about three inches round, affixed to various parts of the truck. (Tr. 843–844, 872; R. 4)

Steve Ronan testified that he did not remember what type of sign Deavila had in the back of his truck, but said that he told Deavila to remove it because it was blocking his vision. Also, various Cemex officials testified that company policy prohibits having personal signs on/in the mixer trucks, regardless of the content. For example, Bryan Forgey testified that signs were not allowed, as they could affect the company's branding. And Robert Nunez testified the company always had a rule that personal stickers or signs were not allowed on company trucks. (Tr. 101, 103, 140, 164–167, 2707–2708)

Driver Paul Payan testified that his area manager, Andrew Burton, radioed everyone on the Los Angeles channel telling them to remove all sings that might be blocking a drivers' ability to look out their rear or side windows. Burton also told Payan personally to remove a "Vote Yes" sign in his truck as it was blocking his view and constituted a hazard. According to Payan, after Burton made the announcement, some employees complied and removed their signs, but some did not. Payan said that his supervisor Robert Rocho also radioed employees telling them to remove all banners from their rear windows because they posed a safety hazard. According to Payan, before the Union campaign, drivers did not put signs or banners in their back windows. Finally, driver and second batchman Garemy Jones testified that he displayed a "Vote No" sign in the back window of his mixer truck until Robert Nunez told him that it needed to be removed. Jones complied and removed the sign. (Tr. 637–639, 662–663, 2847–2850, 2867; U. 15)

2. Analysis

The credited evidence shows that, while Respondent generally had a policy frowning upon employees displaying personal stickers or signs on their trucks, or in their truck windows, it was not really an issue before the Union organizing drive. After the petition was filed, drivers started posting large "Vote Yes" and "Vote No" signs in their truck windows. These signs were

2-foot square and blocked anywhere from 1/3 to 1/4 of a truck's back window. They clearly obstructed a driver's view. (U. 4, U. 15; R. 7) In response, Respondent's managers and supervisors told drivers to remove all signs and stickers from their trucks because they posed a safety hazard. Given the multiple plants involved, and the number of drivers at each plant, it is not surprising that occasionally a truck appeared with a sign or sticker still in a window, even after management officials made generalized announcements to drivers that they needed to be removed. Because of the hazard posed by having signs and stickers in the windows, I believe that Respondent made a good faith effort to prohibit all signs and stickers which obstructed a driver's view and constituted a safety hazard, and not just those that supported the Union. Accordingly, I recommend the allegations in paragraph 5(n) be dismissed.

M. Alleged threats by Ryan Turner in February 2019
(Complaint Paragraph 5(p) & Union Objections #1, #2)

1. Testimony of Bernard Molina

Bernard Molina started working for Cemex as a driver in 1997. In about 2013 Molina was off for a year because he was sick and needed an organ transplant. After recovering, he returned to work with the assistance of Ryan Turner and the Cemex human resources office. During the Union's organizing drive and the election, Molina was working out of the Corona plant. At the time of his testimony, Molina was still employed by the company but was on disability leave. (Tr. 713–715)

Molina testified that sometime around the last week of February 2019 he was called into a "mini-meeting" early one morning before work; in the runup to the vote, Molina said the company held many of these types of meetings. According to Molina, about seven drivers were present that day along with the plant foreman Mike Carmody, plant superintendent Andrew Patino, manager Ryan Turner, and the consultant who was conducting at the meeting. During the meeting the consultant presented information to discourage employees from supporting the union. (Tr. 715–716, 743)

After the meeting ended, Molina said he went to the batch office to pick up his work schedule. Inside the batch office multiple people were talking amongst themselves as they were getting their schedules ready for the day. Specifically, Molina testified that Turner, Patino, Carmody, along with drivers Allen, Alex, Richard (Rick), and Chris were in the batch office. Molina said that a driver named Daryl was in the original meeting, but was not in the batch office as he was loading his truck. Molina described the batch office as being the size of a bedroom, with a counter separating the office area from another portion of the room that contained a refrigerator, coffee machine, water, and a bathroom. (Tr. 719–720, 745, 750)

Molina testified that after he entered the batch office Turner was standing a couple feet away from him and said that he did Molina a favor by letting him return to work after his medical leave. Turner then told Molina that he was now released from his "medical" and said he wanted Molina to vote against the Union because Turner would not be able to help him anymore if they "went Union." (Tr. 718) Molina testified that he did not know whether any of the other

drivers heard Turner's comments. Neither Carmody nor any of the other drivers present that day testified about what occurred. (Tr. 719–720, 745–746)

Molina further testified that, about five minutes later, as Turner was walking out of the room, he turned around and addressed the drivers. Molina could not remember Turner's exact words, but said that Turner let everybody know "that the favoritism and help he could give us would all stop . . . if we go union." (Tr. 721)

2. Testimony of Ryan Turner

Ryan Turner testified that, during the last week of February 2019 there was a 4:00 a.m. safety meeting at the Corona plant training room to let the drivers know where they were scheduled to vote, and how everybody was supposed to act on the day of the election. According to Turner, this meeting was focused on the safety aspect of what was going to happen on election day. Turner said that Molina was present during this meeting, along with drivers named Al, Daryl, Richard (Rick), Alejandro, and Hector. After the meeting, Turner testified that a group, including Molina, went to the office, where the drivers were asking about their assignments. Turner said that Carmody was getting the job assignment information for the drivers from the computer, and everyone was having generalized conversations or discussing their job assignments. Turner denied having a conversation with Molina that day regarding medical leave and denied telling Molina that he did him a favor by letting Molina return to work after his medical leave. He also denied telling Molina that, if he voted for the Union, Turner could not help him anymore and further denied saying that favors would stop if the company unionized. Turner admitted that he helped Molina return to work after his medical leave by serving as an intermediary between Molina and human resources. (Tr. 2253–2257)

3. Testimony of Andrew Patino

Patino testified that he remembered being present for a conversation at the Corona plant office between Molina and Turner sometime during the last week of February 2019, relating to Molina's medical leave, where Carmody was also present. That being said, Patino's subsequent testimony about what occurred during this meeting did not involve Molina's medical leave. (Tr. 2596)

Patino said that the conversation occurred after a meeting that took place at the plant. Regarding the meeting, Patino denied it was a safety meeting, but instead said the consultant was present and the meeting was scheduled by human resources. After the meeting, Patino said Molina came into the office where Patino, Turner, and Carmody were present along with drivers Alan, Alejandro, Daryl, and George. According to Patino, Molina asked what his schedule was going to be, and "we said we didn't have one." (Tr. 2596) Patino said Turner then looked at Molina and asked him how he was doing. Thereafter, Turner and Molina had a "friendly back-and-forth banter of everything: I'm doing good, thank you for asking, have a good day, that type of deal." (Tr. 2596) After their conversation, Molina asked Carmody for his schedule, but the drivers did not have a work schedule that day and they were only there for the meeting, so Carmody told Molina he could go home. At that point, Patino said that all the drivers left the office. Patino testified that he was standing about six feet away from Turner and Molina and

could hear their entire conversation. Patino denied that Turner said anything about doing Molina a favor by letting him return to work. (Tr. 2596–2597, 2609–2611)

4. Analysis

In reviewing the testimonies of Molina, Turner, and Patino, as to what occurred, it appears that the witnesses were discussing three separate incidents, as opposed to the same event. For example, Molina testified that his discussion with Turner occurred after a mini-meeting in late February where one of the consultants presented information to discourage employees from supporting the Union. Later, in the batch office where the conversation occurred, Molina said that along with Turner, Patino, and Carmody, drivers Allen, Alex, Richard (Rick) and Chris were present, while another driver named Daryl was outside loading his truck for delivery.

Turner on the other hand testified about interacting with drivers in the batch office after a safety-meeting where they discussed the safety aspects of what was going to happen on election day and the drivers were informed about the voting schedule. According to Turner, the drivers present in the meeting were Molina, Al, Daryl, Richard (Rick), Alejandro and Hector, and that a bunch of them then went to the batch office where Carmody was getting the job assignments for the drivers from the computer, they discussed their job assignments, and had generalized conversations. In his testimony, Turner does not place Patino as being in the batch office after the safety meeting.

Patino discussed a conversation between Molina and Turner where Turner asked Molina how he was doing, and they simply had some friendly banter back and forth. According to Patino, Molina along with drivers Alan, Alejandro, Daryl and George were present. During the batch office discussions, Patino said Molina asked Carmody about his work schedule for the day, but there was no work for the drivers, and they were only called into the plant for the meeting so the drivers left as they did not have any work scheduled for the day.

During their testimony about the batch office discussion, Molina, Turner, and Patino each have a different set of drivers present in the batch office during the discussion. Also, Patino testified about a discussion in the batch office on a day where the drivers were not scheduled to work, but immediately went home after the meeting, which conflicts with the testimony of both Molina and Turner. Finally, Molina testified his discussion with Turner occurred after a consultant meeting discouraging unionization, while Turner's discussion happened after a safety meeting involving the safety aspects of what was to occur on election day. I believe the evidence shows that Molina, Turner, and Patino, were testifying about three separate incidents that occurred in the batch office. Patino's testimony does not corroborate Turner's, as it was clear they were discussing two different events: Turner about a day where the drivers were given their job schedules by Carmody; and Patino about a day where there was no work scheduled for the drivers and they all went home after the initial meeting. While Respondent criticizes the General Counsel for failing to call any of the other drivers present in the batch office to support Molina's testimony (Cemex. Br. at 110), Respondent had access to, and could have called the drivers as witnesses as well, but chose not to. The failure to call any of the other rank-and-file employees that were present that day does not warrant an adverse inference, as employee witnesses cannot be reasonably expected to favor one party over the other, and are equally available to all the

parties in the proceeding. *Torbitt & Castleman, Inc.*, 320 NLRB 907, 910 fn. 6 (1996), enfd. in pert. part 123 F.3d 899, 907 (6th Cir. 1997). The same cannot be said however of the fact that Respondent did not call Carmody as a witness as he is an admitted supervisor and everyone testified that he was present during the conversation. *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977); *CSH Holdings, LLC*, 365 NLRB No. 68, slip op. at 5 fn. 15 (2017). Accordingly, I find that, had Carmody been called to testify, he would have testified adversely to Respondent's interests on this issue.

Therefore, under the circumstances presented, I find that sometime in late February 2019, after a meeting led by one of the consultants, Turner told Molina that he did him a favor by letting Molina return to work after his medical leave, and now that Molina was released from his "medical" he wanted Molina to vote against the Union because Turner would not be able to help him anymore if they "went Union." I find that Turner's comments to Molina violated Section 8(a)(1) of the Act. *Abouris, Inc.*, 244 NLRB 980, 982–83 (1979) (supervisor's statement that, if the union won the election she "couldn't help" the employees any further in meeting their production requirements was a violation of Section 8(a)(1)); *Steve Aloi Ford, Inc.*, 179 NLRB 229, 233 (1969) (employer's statement that the employees had it good, that the union would sever the relationship and there would be no more favors for employees violated Section 8(a)(1)). Cf. *Evergreen America Corp.*, 348 NLRB 178, 203 (2006), enfd. 531 F.3d 321 (2008) (supervisor's statement to employee that "he couldn't help [her] anymore" because of her role in leading the union campaign was an implied threat of reprisal); *Gulf States Manufacturers, Inc.*, 230 NLRB 558, 561 (1977) (even where the comments were not corroborated by the other employees present, supervisor's statement shortly after union election that he could not help employees anymore, and they had to go through their stewards and the union, interfered with employee Section 7 rights as the supervisor was withdrawing whatever assistance he provided in the past because employees had chosen to unionize).

Regarding the allegation in Complaint paragraph 5(p)(2), I recommend that it be dismissed. Molina admitted he could not remember what Turner actually said to the drivers as he was leaving, but instead was paraphrasing his impression of what Turner was saying. Therefore I find that the General Counsel has not met his burden to show a violation occurred.

N. Alleged threats made to Donald Shipp by Ryan Turner (Complaint Paragraphs 5(q), 5(r))

1. February 2019 Conversation in the Temecula Plant office

a. Testimony of Donald Shipp

Donald Shipp started working for Cemex in 2017 and was assigned to the Temecula plant. At the time of the organizing drive, Steven Latimer was the Temecula plant foreman and was Shipp's direct supervisor. Shipp testified that sometime in about early 2019 he requested a transfer from Temecula to the Perris plant. According to Shipp, he texted Ryan Turner asking for a transfer and Turner replied saying he would see about getting him one. Afterwards, Shipp submitted paperwork to Latimer requesting a transfer and then had a conversation with Turner about the matter during the last week of February 2019. According to Shipp, he was in the

Temecula plant office waiting for his truck to get loaded for a job. Present in the office were Shipp, Turner, and Latimer. Shipp testified that Turner said he heard Shipp had submitted a transfer request to the Perris plant and asked if he still wanted the transfer. Shipp said yes. Turner told Shipp he knew what to do, to vote against the Union, and Turner would give him the request. Shipp said okay. Turner then walked out of the office and Shipp went to work. (Tr. 756–760, 777)

Ship also testified that his request to transfer to the Perris plant was initially denied because the company did not have any vacancies for drivers. Later, Shipp was transferred to the Corona plant when Temecula shut down for a period of time due to an unknown reason. When the Temecula plant reopened, Shipp was given the opportunity to transfer back to Temecula and did so. (Tr. 791, 800–801)

b. Testimony of Ryan Turner

Regarding this conversation, Turner testified that a couple months earlier Shipp had asked to transfer to Perris and Turner told him to get a transfer slip from Latimer and then send the completed form to Turner. On the day in question, Turner said they were in the Temecula office, and Shipp asked if there was a chance he could get the transfer "right now." (Tr. 2257) Turner said there was no room to park any more trucks in the Perris yard at the time, so he could not transfer. At some unknown time after this conversation, Turner testified that he offered Shipp an opportunity to transfer to Perris, but that Shipp said he was happy in Temecula. Turner denied telling Shipp to vote against the Union if he wanted a transfer, and further denied discussing voting in the election with Shipp at any time. Turner said that Latimer was present in the office, but was not part of the conversation, as he was running the computer system loading Shipp's truck. Latimer did not testify, and at the time of the hearing was no longer working for Cemex as he had been laid off. (Tr. 2257–2259)

c. Analysis

I generally found Shipp to be a credible witness. I also note that, at the time of his testimony, Shipp was still employed by Cemex as a driver and was therefore testifying against his pecuniary interests; this further enhances his credibility. *Flexsteel Industries*, 316 NLRB at 745. Accordingly, I find that sometime in February 2019, Shipp was in the Temecula batch plant office and asked Turner about his transfer request to the Perris plant. Turner told Shipp that he could not transfer because there were currently no vacancies for drivers at Perris, but said that Shipp knew what to do, to vote against the Union and he would get the transfer request. Turner's statement connected a vote against the Union with granting Shipp's transfer request and therefore violated Section 8(a)(1). Cf. *Graham-Windham Services*, 312 NLRB 1199, 1207 (1993) (violation to connect a vote against the union with better conditions).

2. March 2019 conversation in the Perris yard

a. Testimony of Donald Shipp

Shipp testified that in early March 2019 he was at the Perris plant waiting to load. Shipp's truck was parked and he was standing in the yard. When questioned by the General Counsel, Shipp testified that Turner walked up to him and asked how things were going. Shipp said everything was going "pretty good" and asked Turner if it would be possible to get a new truck and a raise. Turner told Shipp to vote no "for the good of the Company" and said "we'll see what we can do as far as like getting a new truck and a raise." (Tr. 761) After the conversation ended, Shipp said that he saw Turner speaking to two other drivers who were ahead of him in line. During his testimony, Shipp said the conversation with Turner lasted about 10 minutes. However, in a pre-hearing affidavit he provided during the underlying investigation of this matter, Shipp said that the conversation lasted about one or two minutes. On cross examination by Respondent, Shipp testified that the process of awarding new trucks within Cemex is based upon plant seniority. He said that, typically a plant gets new trucks when one of the existing trucks has to be replaced because it falls out of compliance with California law. Then, the new truck is awarded to the most senior driver. (Tr. 760–762, 795, 798–799)

b. Testimony of Ryan Turner

Turner testified he was at the Perris plant in early March 2019 helping direct traffic for a large job the company had that day. Turner said about 20 drivers were in line, and that he spoke with the drivers, starting his conversation by inquiring as to how they were doing. (Tr. 2259–2260)

Turner said he asked Shipp how he was doing that day, and Shipp said that he felt great, was awake and was not having any issues. According to Turner, Shipp then asked about getting a new truck and Turner told him that he was a newer driver and to remember that trucks were distributed by seniority, after old trucks were taken out of service by the company. Turner said that Shipp also asked about getting a raise, and he told him the company follows a matrix and Shipp would get a raise on his anniversary date. According to Turner, that was all they talked about; he estimated their conversation could not have been longer than 5 to 10 minutes. Turner denied saying the words attributed to him by Shipp, and further denied talking to any of the other drivers in line about the union organizing campaign that day. (Tr. 2261–2262)

c. Analysis

Regarding the March 2019 conversation at the Perris plant, I credit Shipp that Turner told him to vote no for the good of the company. And, at one point during their conversation, Turner said that "we'll see what we can do" regarding a new truck and a raise. However, I also believe there was more to this conversation than what was elicited from Shipp during his examination from the General Counsel, as Ship testified that his conversation with Turner lasted about 10 minutes. While his pre-trial affidavit said that it only lasted one or two minutes, either way it was clearly a discussion that lasted longer than a few words.

I do not credit Turner's testimony that he did not speak to Shipp, or any of the other drivers that day, about the union organizing drive. The record shows that Cemex wanted employees to vote against the union, and Turner admitted that, as a member of management, he helped advance this position by encouraging employees to vote no. The evidence shows that Cemex had placed large signs at various plants encouraging drivers to Vote No, and Turner himself admitted distributing Vote No stickers to various plants for the workers to wear. Turner also admitted that, after Cemex found out about the organizing drive, he wanted to know what concerns drivers had so he could remedy them. (Tr. 362–363, 378–379; U. 13)

Turner's conversation with Shipp occurred less than a week before the election, and I simply do not believe that, given the opportunity to speak with multiple drivers just days before the election, Turner would not further advance the company's position and encourage drivers to vote against the union. Therefore, I find that the credited evidence, along with the reasonable inferences derived therefrom, show that Turner was at the Perris plant that day talking to the drivers while they were in line waiting to load, and that he asked Shipp to vote against the union for the good of the company. At some point during his conversation, after Shipp asked if it would be possible to get a new truck and a raise, Turner said "we'll see what we can do" but explained to Shipp that new trucks were distributed based on seniority, after old trucks are removed from the system, and told Shipp that he would get a raise on his anniversary date pursuant to the company's matrix. Accordingly, I find that the evidence does not support a finding that Turner connected his request that Shipp vote against the union for the good of the company with the potential of getting a new truck and/or a raise and recommend that this allegation be dismissed.

O. Alleged threats by Ryan Turner in March 2019
(Complaint Paragraph 5(s) & Union Objections #1, #3)

1. Testimony of Richard Daunch

On March 5, 2020 Richard Daunch was working at the Corona plant delivering concrete to various jobsites; his shift started at 4:00 a.m. At one point he parked his mixer truck under the batch plant to get a load of cement and walked into the office to pick up his delivery ticket. Present in the office was plant foreman Mike Carmody, area manager Andrew Patino, and Ryan Turner. Daunch testified that he and Carmody started talking about the job at hand when Turner started pounding on the desktop saying "hey, hey, hey." (Tr. 276–278) During a pause in his conversation with Carmody, Daunch said that he turned to Turner and told him "I have a name. My name is Rick. You should know my name by now; I've been working here for 15 years." (Tr. 277) According to Daunch, Turner said "I know your name; it's here on my phone." (Tr. 277) Daunch asked to see the phone, and Turner showed it to him and said "I have your name here with all these messages and paragraphs." (Tr. 277) Daunch told Turner that he hardly ever responded to his messages. Turner then told Daunch "don't forget to Vote No; remember all those favors I did for you, favors for getting you off early for gigs . . . do you remember . . . don't forget." (Tr. 277) Daunch, who said he was caught off guard by Turner's comments about gigs, did not respond. Instead, he got his delivery ticket and left. (Tr. 275–278)

Daunch testified that he plays in a band and needs to get off early a few weekends a month to attend his performances. Daunch said that, at times he has asked Turner for the time off, and sometimes he asks other company officials instead. According to Daunch, sometimes his time off requests are granted and sometimes they are not. (Tr. 277, 304–307)

2. Testimony of Ryan Turner

Turner admitted having a conversation with Daunch on March 5, but denied telling him to remember the favors Turner did by getting him off early for gigs and to vote no in the election. He further denied pounding on the desk to get Daunch's attention. When asked what he remembered telling Daunch that day, Turner said "[a]lways the same–same answer to every driver in the mornings, how are you doing, I ask them how everything's going at home. Sometimes I get replies from them and sometimes I don't." (Tr. 2263) Turner said that Patino and Carmody were present during his conversation with Daunch. (396, 2263, 2265, 2268)

Regarding Daunch's gigs, Turner said that Daunch occasionally played at a local club on Saturday nights and would request time off for his performances. According to Turner, Patino was the one who handled these time off requests. Turner said Daunch would always wait until Thursday or Friday to request leave, and sometimes the requests would be denied by Patino because they needed to be submitted 48 hours in advance. After Patino denied a request, Turner testified that Daunch would come to him and that he always granted the time off. Turner said that he had a good relationship with Daunch and had worked with him for about 16 years. (Tr. 2264–2266)

3. Testimony of Andrew Patino

Andrew Patino testified that he usually starts his day at the Corona plant, and therefore he would have been at the plant during the early morning of March 5 along with Carmody. Patino also testified that Turner was generally at the Corona office only once or twice a month, as he has a large area to cover. Patino was asked by Respondent's counsel whether he recalled the conversation on March 5 with Daunch being any different than a typical conversation with Daunch in the mornings, and Patino said no. Patino was then asked whether, during any conversation with Daunch on March 5, Turner pounded the desktop and said "hey" multiple times, and Patino said no. Patino denied that Turner said the words attributed to him by Daunch and testified that the conversation between the two was "just back-and-forth, normal discussion. How are you doing, that kind of small talk." (Tr. 2602) Patino said that, in his experience working with Turner and Daunch over the years, he has seen them interact, and that Turner had always been friendly and professional towards Daunch, saying "[t]hat's how a manger speaks to an employee." (Tr. 2602–2603) Notwithstanding, Patino said that he could not recall, and did not know, how frequently he saw Turner interacting with Daunch in the past. In fact, prior to March 5, Patino admitted that he only saw the two talking once or twice. Patino knew that Daunch was a musician and knew Daunch requested time off for gigs. However, Patino denied he was the person that Daunch would approach to request time off and said that he was not involved in the process whatsoever. Instead, Patino testified that Daunch would submit his time off request forms to Carmody who would then email them to dispatch. If the request was rejected, then Daunch could appeal to Turner. Patino said that it was Turner who explained the

time off request process to him, and he was not aware of Daunch ever having a time off request rejected and subsequently appealed to Turner. (Tr. 2599–2603, 2610–2612)

4. Analysis

As noted earlier in Section III (E), I found Daunch to be a credible witness. And the fact he was a current employee, and testifying against his pecuniary interest, bolsters his credibility. *Flexsteel Industries*, 316 NLRB at 745.

Watching Turner testify I was left with the impression that he really did not remember what he said to Daunch that day, and he was trying to adjust his testimony to support Respondent's defense. (Tr. 2263) For example, he denied making the statements attributed to him by Daunch, but when asked what he remembered saying to Daunch that day, Turner gave a generalized answer regarding what he purportedly says to every driver in the morning.

I similarly did not believe that Patino specifically remember what occurred on March 5, and note that when asked how he knew he was in the office that day, Patino said it was because he "usually" starts his day in the Corona office. I also believe Patino tried to tailor his answers to fit what he believed would assist Respondent's case. For example, when questioned by Respondent's counsel, Patino said that in his experience working with Turner and Daunch, he had seen them interact over the years and that their relationship was "friendly" and "professional," leaving the impression that he had seen the two speaking with each other on multiple occasions over their many years at the company. However, when pressed by the Union about how frequently he had actually seen Turner and Daunch interact with one another, Patino said he could not recall, and did not know, before finally admitting that, before March 5, he had only seen the two talking with each other "once or twice." I did not find Patino to be credible.

I also find the fact that Turner and Patino contradicted each other as to the process in which Daunch's leave requests were approved detracted from their credibility regarding this matter. Turner said that Daunch's leave requests were handled by Patino, and that he would get involved if Patino denied the request. Patino denied having anything to do with approving the leave requests whatsoever, said the requests were submitted to Carmody, who then forwarded them to dispatch, and further said this was the process that was explained to him by Turner.

As for Carmody, he did not testify, even though everyone admitted he was present. As a Cemex plant foreman, and admitted Section 2(11) supervisor, Carmody's testimony was within Respondent's control, and Cemex offered no explanation as to why he did not testify. As such, I find that, had Carmody been called to testify, he would have testified adversely to Respondent's interests on this issue. *Martin Luther King, Sr., Nursing Center*, 231 NLRB at 15 fn. 1.

Therefore, I credit Daunch's testimony as to what occurred on March 5 in the Corona batch plant office, and find that Turner violated Section 8(a)(1) of the Act by telling Daunch not to forget to vote no and to remember all the favors Turner did for Daunch in the past by approving his leave request to get off early for gigs. Turner's statement implied that these favors would end if the union was elected, and was therefore coercive. *Walker Color Graphics*, 227

NLRB 455, 465 (1976) (manager's admonishment to employee to "vote right" and telling him to remember the help that was extended to him when his wife had been sick was a violation).

P. Security guards and Cemex officials blocking or intimidating voters (Complaint Paragraphs 5(t), 5(u) & Union Objections #7, #8, #9)

1. Background

In the buildup to the election, Cemex hired security guards which were dispatched to the various plants. Security guards were also deployed on March 7, 2019 to the specific plants that served as polling locations. Bryan Forgey testified that the steering committee was involved in the decision to hire and deploy the guards. The evidence shows that, before the union drive, the majority of batch plants at issue in this case did not have security guards present on a regular basis. While sometimes guards would be hired to patrol a certain plant if theft was occurring, it was not normal for security guards to be present at each of Respondent's batch plants.[28] The one plant that did have a regular security presence was Lytle Creek/Rialto, because the plant also had a large rock quarry on the property. But even there, the security guards were only present in the evening, and not during the day when the facility was operational. (Tr. 126–128, 1684)

The security guards hired during the organizing drive were dispatched to the various Cemex plants about two weeks before the election. Forgey testified the guards were hired to "protect our people, protect all the employees . . . and to protect the facilities." (Tr. 129) According to Forgey, Cemex was receiving "feedback from a lot of employees at the sites that they were becoming uncomfortable." (Tr. 129) Forgey said the company needed to create a safe environment for employees, because the management team had received complaints from employees "that they were uncomfortable as they were walking to their vehicles and other things." (Tr. 2103) That being said, the was a dearth of direct evidence that any of the drivers actually complained to management about these issues. And, when it was pointed out during cross-examination that all of the batch plants have employee parking lots located within the gates of the facilities, Forgey changed his testimony and denied that he ever said the company brought the security guards so employees could get to their cars. (Tr. 129, 144, 2103, 2156)

Regarding the guards, Forgey testified that they were flown in from out of state and were hired via a written agreement with a security company that specializes in providing security services for union campaigns, union elections, and "things of that nature." (Tr. 2104) The guards generally worked in teams of two and had vehicles they used to travel from plant to plant. They were unarmed but wore security uniforms and their cars had some sort of logo on the side. (Tr. 130–131, 596, 647, 1806, 1839, 2104)

According to Forgey, the guards were hired for each market area in both Las Vegas and Southern California, and they travelled to, and patrolled, the various plants depending upon which facility was "having a lot of action or activity" that "were making people feel uncomfortable" based on employee feedback. (Tr. 130–132) When asked what type of activity would make workers feel uncomfortable that would necessitate the dispatching of security guards to a particular plant, Forgey referred to employee concerns that union organizers were

[28] Transcript page 128, line 3 should read "organizing drive started" instead of "organizing strike started."

bothering them, and safety concerns about the union organizers, including their stopping Cemex trucks from going in and out of the plant. Forgey said that Cemex did not get involved in the guards' individual assignments, unless the company received a phone call that there was "a large group creating . . . challenges for us at a site." (Tr. 132) If the company received such a report, Forgey said that Cemex would call the senior leader for the security guards who would dispatch the guard teams accordingly. (Tr. 130–133)

On March 7, 2019, the day of the election, security guards were present at each facility that served as a polling location. Forgey testified that the guards were not given any special instructions on how to behave on election day. It appears the security guards stayed one more day, and by March 9 all the security guards were gone. Invoices from the security company were introduced into evidence for eight of the guards that were assigned to work on March 7, which state: "Security Coverage for Union Strike." (U. 22) The same security company that provided the guards on election day also installed a new security camera system at Respondent's Fontana plant about a year earlier. (Tr. 144, 133, 467, 1276, 2626–2627; R. 45, 46)

a. Testimony about what occurred at the Inglewood plant

As discussed earlier, the Inglewood plant has one gate employees use to enter and exit the facility. A set of railroad tracks, which are about two or three car lengths away from the gate, intersect the public road leading up to the entrance. In the weeks before the election, union organizers were outside the Inglewood plant standing between the railroad tracks and the plant entrance. On March 7, Respondent parked four ready-mix trucks outside the gate of the Inglewood plant. The trucks were parked in such a way that they blocked the area organizers had been using to pass out flyers, and they further blocked the ability of anyone to park on the side of the road leading up to the plant. However, the roadway itself was left unobstructed. (Tr. 198, 1271–1273, 1335, 2721, 2725; U. 12; R. 47)

There were two security guards on duty at the Inglewood plant on March 7. Robert Nunez was the highest-ranking management official present at Inglewood on election day and stationed himself under a tree just outside the plant, to the left of the gate entrance. He waved to employees as they entered the plant to vote. The two security guards were posted on the right side of the gate, just inside the entrance. To enter the plant on election day employees had to drive past the mixer trucks and between the security guards on one side of the gate and Nunez on the other.[29] Prior to the election, the Inglewood facility did not have security guards stationed at the plant. (Tr. 198, 202–203, 1276, 2706, 2727, 2748)

Driver Luis Hernandez served as an election observer at Inglewood and arrived to work that day at about 3:30 a.m. to prepare for the election that started at 4:00 a.m. When he arrived, Hernandez said he saw one security guard and was not allowed to enter the plant to park his car because as he was not on the clock. Because of the location of the mixer trucks outside the gate, Hernandez had to park down the road on a side street. He eventually was escorted into the plant by the NLRB agent running the election, along with Cemex management officials, a little before 4:00 a.m. (Tr. 1270–1275)

[29] Transcript page 2748, line 13 should read "drive between" instead of "decide between."

b. Testimony about what occurred at the Santa Paula plant

Jason Faulkner was at the Santa Paula plant on election day along with Robert Resendez, the Moorpark plant foreman/batchman, and Craig Thomas, who the drivers identified as a Cemex human resources manager. There were two security guards stationed at the gates of the Santa Paula plant on March 7. Prior to the election, the Santa Paula facility did not have security guards at the plant. (Tr. 459–466, 1222–1229, 1475, 1477, 1763, 1767, 1771)

Employees were not loading out of the Santa Paula plant on election day. Instead, drivers who were scheduled to vote there received instructions to start their day at the Santa Paula plant at 4:00 a.m., and after voting, the drivers were given individualized assignments which consisted of deadheading to other plants for their first load. (Tr. 1492, 1768–1769, 2427–2428, 2319, 2344)

The Santa Paula facility sits on a roughly rectangular piece of property, and there are two gates used to enter the facility, a west gate and an east gate, that are adjacent to a public street and located at the north end of the property. The batch plant, where ready-mix trucks are loaded with material, sits in the middle of the facility. Directly west of the batch plant, along the western property line, is the batch office where the voting occurred. The facility has two areas that are generally used for employee parking. One area is adjacent to the western fence line running from the batch plant office to just below the west gate. The other area is located near the east gate. In all, it appears that about 20 cars can fit in these parking areas. The ready-mix trucks assigned to the plant are normally parked in the southwest corner of the facility. (Tr. 1224–1225, 1483, 1488, 1767; U, 8; R. 38)

On election day, instead of being parked in the southwest corner of the facility, the plant's ready-mix trucks were parked single file along the west property line, running from the batch office to the west gate, taking up one of the areas employees use for parking. Also, on the morning of March 7, Faulkner used yellow caution-tape to rope off parts of the facility, creating a pathway for drivers to follow once they entered the plant. The caution-tape trail took drivers from the entrance to a newly created parking area, located in the middle of the facility just north of the batch plant. The pathway then steered employees to the batch office where the voting occurred. Faulkner said that he made this pathway so drivers knew exactly where to go. According to Faulkner, he was concerned because there was some aggregate and equipment in the area and also because people were pulling into the plant with their personal vehicles. That being said, employees pull into the plant every day with their personal vehicles, and it does not appear the aggregate or equipment present on March 7 was any different than what was located at the plant on any other day. Once an employee entered the gate, they had to follow the caution-tape pathway, which eventually led them to the polling area. (Tr. 462–466, 516–518, 1477–1478, 1482–1483, 1766–1767)

Faulkner testified that, before the polls opened, he instructed the security guards to only let employees into the facility one at a time, "one person in, one person out," saying he did not want congestion in the area. (Tr. 462, 2431) According to Faulkner, he changed these instructions after the pre-election conference, telling the guards they would not be doing "the

one-in/one-out thing." (Tr. 2431) He then assigned one guard to each gate, telling them to watch the traffic flow so it did not get congested. (Tr. 462, 2431)

The morning of the election, Faulkner, Resendez, and Thomas parked their personal pickup trucks on the street, just outside the plant's north fence line, between the west and east gates. Throughout the three remained in this area, usually sitting in one of the pickup trucks. Trees running along the fence line partially obscure the view from the street into the facility. (Tr. 1222, 1476, 1518–1519, 1768, 2319–2320, 2437–2439; R. 39)

At 3:30 a.m. on March 7, Cemex driver Jose Lira arrived and tried to pull into the facility to park, as he would on any normal workday. Lira usually arrives for work before his scheduled start time and had never previously had a problem entering the plant before his scheduled shift. However, when he tried to drive into the plant on March 7, one of the security guards told him that he could not enter the facility until 4:00 a.m. After being refused entry into the plant, Lira drove about a quarter mile down the street to an area the Union had set up with coffee, where some of his coworkers were also waiting. (Tr. 1221–1223, 1248)

At 4:00 a.m. a group of employees, which included Lira and his brother Jesus, drove back to the plant. When they arrived, one of the security guards told them that they could not enter the plant as a group, but had to enter one at a time. Lira said this was the first-time employees were ever told they could not enter the facility as a group. Notwithstanding, the employees ignored the guard's instructions and entered the facility as a group. Once inside the plant, Lira got in line and voted. After voting, the Lira brothers were standing with a group of about four or five other drivers when one of the security guards told them that they had to leave the facility. The drivers explained that they worked at the plant, and the guard left them alone. A little while after they voted, the drivers received instructions from the batchman for their first load of the day. Both Lira brothers were instructed to deadhead to Santa Barbara and they left the facility accordingly. (Tr. 1224–1226, 1250, 1252, 1764, 1769–1771, 1776)

c. Testimony about other facilities

Forgey testified that, on the day of the election, security guards were present at each facility that served as a polling location. This was confirmed by various other witnesses, as well as the invoices introduced into evidence. For example, Daryl Charlson, who was present at Oxnard on March 7, testified there were two security guards stationed at the facility that day. According to Charlson, he wanted to make sure only authorized people entered the plant, so he told the security guards to ask everyone whether they were a Cemex employee. Ornelas corroborated that there were two security guards at Oxnard on election day, said the plant does not regularly have security guards at the facility, and confirmed the guards were gone after the election. Other witnesses testified about seeing security guards on March 7 at the Corona plant, the Sloan plant, the Los Angeles plant, and at the Walnut plant. Other than the instances where employees were not allowed to enter the facilities before the polls opened at 4:00 a.m., there is no evidence that any employee was blocked or otherwise prevented from voting by the security guards, or anyone else, after the polls opened. (Tr. 144, 282, 597, 647, 728, 852, 1057, 1374–1375, 1589, 2559, 2587–2591)

Henry Hernandez, who voted at Lytle Creek/Rialto, testified that he had a conversation with one of the security guards present on March 7, as he was petting the guard's Doberman puppy. When he learned that Hernandez was regularly assigned out of the Fontana plant, the guard told Hernandez he had installed cameras at Fontana and that, along with video, "they can hear everything" the employees were saying. (Tr. 1686) The same guard told Hernandez "thank you for being good on the strike." (Tr. 1686) When Hernandez explained that employees were not on strike, but were voting on whether to unionize, the guard said that he was told it was for a strike. (Tr. 1686) Although Respondent disputed that the Fontana plant's camera system recorded audio, the statement made by the guard to Hernandez was unrebutted and I credit his testimony as to what was said.

2. Analysis

a. Complaint paragraph 5(t) and the Union's Objection #8

Complaint paragraph 5(t) alleges that on election day at the Inglewood plant, Respondent blocked and/or intimidated employees from using the plant entrance and voting area. The Union's Objection asserts that Respondent generally engaged in objectionable conduct on March 7 by increasing the use of security at the different locations during the critical period in order to intimidate employees.

As for the claim Respondent blocked employees at the Inglewood plant, I recommend the allegation be dismissed. The evidence shows that, although Luis Hernandez was originally told he could not enter the plant, he was eventually allowed to enter before the election started, and there is no evidence that this delay affected his ability to either vote or serve as an observer. Furthermore, there is no evidence that any other employee was blocked or prohibited from voting at the Inglewood plant or anywhere else for that matter.

Regarding the placement of ready-mix trucks outside the Inglewood plant, it is true that on the day of the election, Respondent parked it's trucks in what appears to be public areas that had generally been used by the Union to electioneer and distribute information during the campaign. However, there is no evidence that the trucks were unlawfully parked. Nor is there evidence that, despite the appearance of the trucks, the Union was prohibited from campaigning that day. Therefore, I find there is no violation regarding the parking of the mixer trucks. Cf. *Sea Breeze Health Care Ctr., Inc.*, 331 NLRB 1131, 1145 (2000) (employer did not engage in objectionable conduct by parking a truck on its property to block the view of a pro-union sign across the street and to reduce the noise from union supporters as any damage to the union's campaign was difficult to discern).

As for Nunez's presence just outside the gate of the plant, even though every employee had to drive past Nunez to enter the facility and vote, the polling location was inside the batch office, which was between 100 to 150 yards away from the gate, and Nunez was not within the line of site of employees as they entered the polling area. (Tr. 2705, 2732–2733, 2727–2728; U. 12; R. 47) This was not a situation where a management official had stationed himself just feet outside the door of a polling location. See *Performance Measurements Co., Inc.*, 149 NLRB 1451, 1453 (1964) (the presence of the employer's president just outside a door that employees

needed to pass in order to enter into the polling place constituted objectionable conduct). Accordingly, I find that Nunez's sitting outside the plant gate and waving to employees as they entered was not a violation. *J.P. Mascaro & Sons*, 345 NLRB 637, 638–639 (2005) (employer's president did not engage in objectionable conduct by standing outside the facility, saying good morning and shaking the hand of anyone who engaged with him, as he was not in a designated no electioneering zone, did not violate any of the Board Agent's instructions, had no direct view of the polling place, and there was no evidence the union complained to the Board Agent at a time when the agent may have been able to stop the activity).

Citing *Austal USA, LLC,* 349 NLRB 561 (2007) and *Beverly California Corp.*, 326 NLRB 232 (1998) the General Counsel asserts that Respondent's posting of guards at the plants, without a demonstrated need, constitutes unlawful intimidation. (GC. Br. 85–86) I believe both cases support the General Counsel's position.[30]

In *Austal USA*, on election day employees arrived at the facility to find a manager present at the gate with two uniform security guards wearing military style uniforms with sidearms. 349 NLRB 561, 561 fn.2, 576 (2007). Guards had never previously been present at the facility to control access, and there was no evidence presented by the employer that there had been any prior problem with unauthorized persons coming onto the property. The Board found that the unprecedented posting of guards and the requirement that employees identify themselves before entering had no purpose other than intimidation and constituted objectionable conduct. Id.

In *Beverly California Corp*, 26 NLRB 232 (1998), on the day of the election "the company posted guards at the facility entrances closest to the voting areas and required employees to show identification to use those entrances." *Beverly California Corp. v. NLRB*, 227 F.3d 817, 843 (7th Cir. 2000). The previous day the company held a mandatory employee meeting to discuss the Union and had guards posted at the facility entrances during the meeting. The employer tried to suggest that extra guards were needed, for the sake of the facility's patients, because the staff was away during these times. But it produced no evidence that it had any such concerns during times "when the union element was missing." Id. The Board found that the posting of guards, without justification for the show of force, served only to disparage the Union and its supporters.

Here, I believe that the evidence supports a finding that Respondent violated Section 8(a)(1) when, in an unprecedented move, it assigned security guards to patrol the various plants in the two weeks before the election, and further assigned guards to every polling location, including Inglewood and Santa Paula, on election day. Respondent had never previously assigned guards to patrol these facilities on a regular basis, had never before posted guards at the gates to control access to the plants, and did not show that there was any type of demonstrated need to do so. And at some of the facilities, the guards prevented employees from entering the

[30] The facts fully support a finding that the security guards were Respondent's agents under Section 2(13) of the Act, as the guards were performing their duties under apparent authority to act on behalf of Cemex, and stopped people from entering the property before certain specified times on election day. *Poly-America Inc. v. NLRB*, 260 F.3d 465, 483 (5th Cir. 2001) (security guards who were authorized to exclude people from property were the employer's agents regardless of whether they were specifically authorized to engage in any section 8(a)(1) prohibited activity).

plant early and were told to make sure everyone who entered was a Cemex employee, which was a departure from the company's normal practice.

When asked why the security guards were posted at the plants, Forgey said the company needed to create a safe environment for employees because they were receiving feedback that workers were uncomfortable as they were walking to their vehicles, among other things. However, when it was pointed out that the employees parked within the facilities, Forgey changed his testimony and denied saying that employees walking to their cars was a reason for having the guards. Forgey's testimony about why the company hired security guards is simply not credible. Similarly not credible were the far-fetched claims by Nunez that the union was threatening drivers and that one driver "got a death threat at his house." (Tr. 201) Nunez was not involved in the decision-making process to hire the security guards, and no such claims were ever raised by Forgey, or anyone else, who was actually involved in the decision to hire the guards.

I find it significant that, of the roughly 370 drivers eligible to vote in the election, not one employee testified that they were threatened or that their physical safety was otherwise put at risk by the union organizers/supporters. Indeed, the only driver who testified about an incident with the union organizers that was then reported to management was Garemy Jones. According to Jones, who also served as a second batchman, as he was leaving the Inglewood plant one day and saw through his rear-view mirror a union organizer giving him the middle-finger. However, even in that instance, it was Jones himself who further escalated the situation by confronting the organizer when he returned to the plant. (Tr. 2840–2844, 2874–2875, 2884, 3086–3090) Surely one instance of a reported middle-finger does not justify a roving patrol of security guards at all the plants two weeks before the election, and the posting of guards at each polling location on election day.

I also note the fact there was no documentary evidence introduced substantiating the company's purported reasons for hiring the security guards; this further detracts from Respondent's claims. *UAW*, 459 F.2d at 1336. Indeed, the only documents introduced into evidence were the invoices from the security company for some of the guards hired to patrol on March 7 which says "Security Coverage for Union Strike." (U. 22) Clearly Respondent wanted the guards present at the facility as a show of force and to deter employees and the union organizers from engaging in union activities. Accordingly, where there was no evidence of a threat, or that employees were at risk, Respondent's unprecedented hiring of security guards to patrol the facilities in the two weeks leading up to the election, and the posting of guards at each polling location, had no purpose other than to intimidate the Union and its supports in violation Section 8(a)(1) of the Act. *Beverly California Corp*, 326 NLRB 232 (1998); *Austal USA, LLC,* 349 NLRB 561 (2007).

b. Complaint paragraph 5(u) and the Union's Objection #7

Complaint paragraph 5(u) alleges that on election day at the Santa Paula plant, Respondent blocked or prevented employee from entering the plant and the voting area, instructed employees to enter the plant one at a time, and told them to leave when they finished voting. The Union also points to this incident in support of Objection #7 which claims

Respondent engaged in unlawful surveillance. I recommend these allegations be dismissed as I do not believe Respondent's conduct constituted a violation or rises to the level of objectionable conduct.

As for the presence of Faulkner, Resendez, and Thomas outside the plant on election day, all three were stationed far away from the batch plant office where the voting occurred. They did not have a direct line of site to the polling place, did not engage in electioneering, and did not violate any of the Board Agent's instructions. Their presence was neither objectionable nor did it constitute a violation of Section 8(a)(1). *J.P. Mascaro & Sons*, 345 NLRB at 638–639. While the positioning of the Santa Paula trucks, along with Faulkner's caution-tape pathway, was certainly strange, there is no evidence that either the trucks or the pathway prohibited employees from voting or otherwise inhibited their ability to engage in conduct protected by Section 7 of the Act. Id. at 639 (even though the employer's president was stationed outside the front door to the facility he had no way of knowing who was entering to vote and who was entering to perform job related duties or to get a snack and therefore did not engage in unlawful surveillance).

Regarding the allegation that employees were blocked or prevented from entering the voting area, there is no evidence that anyone was precluded from entering the batch plant office where the vote was occurring. While the security guards did tell some employees that they could only enter the plant one at a time, the evidence shows that the employees ignored these instructions, and entered the plant as a group without any repercussions. Similarly, even though a guard told some drivers that they needed to leave the facility after voting, when the drivers said they worked at the plant the guard left them alone and the drivers continued going about their business. Under these circumstances I recommend the allegations in complaint paragraph 5(u), and the related Objections to the election, be dismissed.

Q. Alleged surveillance at the Oxnard plant on election day
(Complaint Paragraph 5(v) & Union Objections #7, #8)

1. Facts

At Oxnard, the main gate is located on the west side of the facility towards the southern edge of the plant. There is a large rectangular covered structure, referred to as the production building, that is directly parallel to the main gate, running east to west. The production building takes up the bottom third of the property. The batch plant office is located inside the production building, as are large bins that store the sand, rock and other materials used in production. The batch plant, where the ready-mix trucks are loaded, is located outside the south wall of the production building. Conveyers move the production material from inside the production building to the batch plant. A road goes around the entire production building, which drivers use to access the batch plant after entering from the main gate. (Tr. 409, 2565–2566)

Approximately 150 feet directly north of the production building is the main office building that is used by sales representatives, managers, and clerical staff. Faulkner has his office in this building, which also contains a conference room, bathrooms, and a place where drivers can get coffee. On March 7, the election occurred in a conference room inside this building. Above the northwest corner of the production building, and diagonal to the main

office, is a parking area for employees. This parking lot can be accessed by turning left after entering the main gate, and it abuts the road circling the production building. From the parking lot, it is a short walk to the main office where the voting occurred. Directly to the east of the employee parking lot, between the main office and the production building, is a parking area for the company's the ready-mix trucks. (Tr. 405, 409, 412–413, 1188; R. 44; U. 6)

East of the production building, and across the northeast corner of the road circling the building, is a small rectangular stockpile of sand that is used for production. This sand stockpile is about 150 feet from the main office. Someone standing in the area of the sand stockpile could see what was occurring in the employee parking lot. However, there is not a direct line of site from the sand stockpile to the main office entrance. (Tr. 991, 1188, 2564–2565; R. 44)

On election day, Charlson participated in the pre-election conference held in the main office, along with representatives from the Union. Prior to the pre-election conference Charlson stationed the two security guards on opposing ends of the main office, one on the north side of the building and one on the south side. After the pre-election conference, Charlson told the guards to move over towards their car, which was parked near the main gate, to monitor who was entering the facility. Charlson told the guards to direct people in and out of the plant and to ask everyone entering whether they were Cemex employees to ensure that only company employees were voting. Charlson testified he also told the guards to stay in that area, and away from the main office, until notified otherwise. (Tr. 2557, 2569, 2586–2591)

During the election, the Union set up tents outside the facility, about 15 feet away from the main gate and 30 feet away from the security guards. Drivers had to pass both the Union tents and the security guards as they entered the plant. (Tr. 2567–2568)

The Oxnard plant was open on election day and drivers were delivering cement from the plant. After the pre-election conference, Charlson worked from inside the production building throughout the day. Charlson testified that he only left the building twice that day while voting was in session. Between 6:30–6:45 a.m. Charlson said that he walked around the production building with safety champion Gus Aguilera. At about halfway through the afternoon voting session Charlson said that he did another walk around the production building. Charlson said that he did these walks because the plant was in full production and he wanted to be sure that everything was running properly. Because he was inside the building most of the day, Charlson could not see what the security guards were actually doing while voting was taking place, other than the times when he walked around the facility. (Tr. 2560–2563, 2571–2572)

On the day of the election the polls opened at 4:00 a.m. Diana Ornelas testified that she arrived at Oxnard that day and saw the two security guards stationed in the employee parking lot. At some point after she voted, Ornelas saw one of the security guards with a coffee cup in his hand walking into the main office building. Ornelas immediately told a coworker what she saw, and asked if that was okay; the coworker did not know. Also that day, Ornelas was driving her ready-mix truck on the road that circles the production building and saw Charlson and Aguilera during one of their walks standing by the sand stockpile. (Tr. 988–989, 991, 1188, 1191; JX. 6)

2. Analysis

The General Counsel and Union assert that the security guard walking into the main office building, along with Charlson and Aguilera standing near the sand stockpile, support the allegation that Respondent engaged in unlawful surveillance as set forth in paragraph 5(v) of the Complaint, and the Union's Objection #7. However, because neither incident constitutes surveillance, I recommend these allegations be dismissed.

While Charlson and Aguilera could see who was walking towards, or even into, the main office building during their walk around the production building, they could not see into the actual polling location. Also, if they did see a driver entering the main office building, they had no way of knowing whether the driver was entering the building to vote, to use the restroom, or to get coffee. Under these circumstances, Charlson's conduct did not amount to unlawful surveillance. *J.P. Mascaro & Sons*, 345 NLRB at 638–639.

Similarly with the security guard, while he entered the main building, there is no evidence the guard entered the actual voting area. There is also no evidence that he entered an area designated as off limits by the Board Agent conducting the election, or that he even had a view of the conference room where the voting was taking place when he entered the building. And no evidence was presented that any voters were present inside the building when he entered. Accordingly, I recommend that this allegation also be dismissed. Id.; see also *Sea Breeze Health Care Center, Inc.*, 331 NLRB 1131, 1144–1145 (2000) (supervisors who accidently entered the voting area did not engage in objectionable conduct where they left immediately when asked to do so, and there were no voters present in the area when they entered).

R. Excluding pro-union employees from captive audience meetings (Union Objection #6)

1. Witness Testimony

Multiple witnesses testified about employees being excluded from Respondent's captive audience campaign meetings leading up to the election. Ryan Turner testified that certain drivers were not invited to these meetings because the company believed they were 100 percent for the union and did not want them interrupting the meetings. According to Turner, employees were paid to attend these meetings, which occurred during normal work hours, and the company served refreshments, like danishes or fruit. Turner said the pro-union employees who were not invited to these meetings were assigned to their normal work duties instead. (Tr. 2304–2306)

Bryan Forgey acknowledged that certain employees were not invited to these meetings or were asked to leave if they showed up. Forgey said the company did not want these drivers to attend because they were disruptive by not allowing Cemex to get its message out to other employees. When asked specifically how some of the excluded drivers were disruptive, Forgey said they tried "to stop the discussions from happening appropriately, allowing other employees to have their voices heard and their questions asked" and they were excluded so "other employees could get their questions asked and have an opportunity to participate." (Tr. 2114) Forgey identified Fabian Leon and Henry Hernandez as two of the drivers that were excluded

from these meetings, and acknowledged that all of the excluded drivers were union supporters. In fact, Forgey said he personally asked Leon to leave one of the meetings at Oxnard, telling Leon that he would be happy to meet with him personally instead. Forgey said the decision to exclude certain drivers from meetings was made by the steering committee. He also said the excluded drivers were assigned to perform other tasks instead of attending the meetings. (Tr. 150–152, 2114, 2132, 2146, 2153)

Consultant Michael Rosado testified that some of the drivers were excluded from meetings because they were disrespectful to him and intimidating other employees by not allowing them to "get any of the education." (2798–2799) Rosado claimed that some drivers were "basically holding the meeting hostage and wouldn't let me continue" or were loud and disruptive so he reported this back to management and they were excluded from future meetings. Rosado identified the Lira brothers and Leon as drivers who were specifically excluded from these meetings. Amed Santana testified that some drivers were excluded during the initial round of meetings because they were disruptive and rude, even after he told everyone to be respectful towards him and during the meetings. (Tr. 2798–2799, 2814, 2818–2820, 3056–3057)

Eric Najolia, a driver who was assigned to the Santa Paula plant, testified multiple meetings occurred where he was neither invited nor scheduled to attend, but which his coworkers attended. Najolia said sometimes these meetings occurred when he was not scheduled to work, or happened at a time when he was assigned to go to another plant. (Tr. 1463–1467)

Ibrahim Rida testified that he went to one company meeting about the union in Las Vegas and after he complained about the meeting he was not allowed to attend any other ones until the very last one. Rida testified that he lost money because of these meetings, claiming that they occurred before work and his coworkers were allowed to start work early to attend. Rida also said that sometimes he would be "washed out" earlier than some of his coworkers that were allowed to attend the meetings. (Tr. 811–813, 831–833)

Los Angeles driver Paul Payan testified about one meeting that occurred but he was not scheduled to attend. According to Payan, he asked Andrew Burton why he was not invited, and Burton told him that the consultants did not want him in the meetings. (Tr. 620–623)

Javier Luna, a driver at the Walnut plant, testified about one meeting he was unable to attend because the company had scheduled him to work out of the Fontana plant that day. Luna also testified about another time when he was scheduled to work at Fontana, and when he returned his truck to the Walnut facility he saw a table out with chips, sodas, and a barbecue grill, leading him to believe that food had been served at the Walnut plant that day. However, Luna testified that he could not recall if a barbecue actually took place. (Tr. 1597, 1603–1604)

Fabian Leon testified that he walked into one of the meetings at the Oxnard plant but was stopped by Forgey who told him he was not supposed to be in the meeting, and that Forgey would deal with him personally. Leon also testified about another time where a meeting occurred at Oxnard but Respondent scheduled him to work in Santa Barbara instead. (Tr. 1801–1804)

Fontana driver Henry Hernandez testified he was excluded from meetings at the Fontana plant, and when he tried to attend one meeting, batchman Charlie Mattes said he could not attend because upper management did not want him in the meeting. Other drivers who also testified about being excluded from campaign meetings included Diana Ornelas, Bernard Molina, Donald Shipp, William Lucero, Jesus Lira, and Jose Lira. (726–728, 771, 893–894, 1052–1057, 1231, 1246, 1678–1680, 1760)

2. The Credited Evidence

The credited evidence shows that, as the Union organizing drive progressed, Respondent created a list of certain employees that it perceived to be ardently pro-union, which included at least the following employees: Henry Hernandez, Leon, the Lira brothers, Lucero, Luna, Molina, Najolia, Ornelas, Payan, Rida, and Shipp. These, and perhaps other employees, were purposely excluded from Respondent's campaign meetings where Cemex presented its message to employees to vote against the union while serving them refreshments including pastries and fruit.

I do not credit the testimony from the consultants, or from Forgey, that drivers were excluded because they had been disruptive in any way. While Forgey and the consultants used the term "disruptive" to describe the actions of certain of the excluded drivers, this testimony was conclusory, self-serving, and unworthy of belief; no employee was ever disciplined for engaging in allegedly disruptive behavior during any of these meetings. Instead, I credit the testimony of Turner that certain employees were not invited to these meetings because the company believed that they were 100 percent for the union and therefore did not want them interrupting the meetings. Here, the "disruptive" behavior noted by Forgey and the consultants was simply a euphemism for the drivers' strong union support, and the company did not want these workers in the campaign meetings to counter Respondent's arguments that employees should vote against unionization. Cf. *Boddy Construction Co.*, 338 NLRB 1083 (2003) (Company believed employee was a "disruptive influence" because of his union activities and referring to him as an "instigator" was a euphemism for worker's pro-union sentiments).

I also believe that the credited evidence shows that employees who were excluded from the campaign meetings were either assigned to perform other work while the meetings occurred, or had their scheduled altered; nonetheless they were all assigned a full day's work. The credited evidence does not support a finding that the excluded employees lost work hours because they did not attend the campaign meetings.

While Rida, testified that his coworkers were allowed to start work earlier than he was, in order to attend these meetings, and that he sometimes was "washed out" earlier than his coworkers, his testimony was general in nature, and lacked specificity as to the dates of the meetings from which he was excluded. His testimony was also speculative as to how many hours his coworkers actually worked on the days in question, in comparison to his own work hours, as Rida did not testify that he actually reviewed the timecards of his coworkers or otherwise saw their paystubs. Moreover, nobody who actually attended any of Respondent's campaign meetings testified that they were given the benefit of working extra hours over and above their regular work schedule because of the meetings. And no payroll records were

introduced to show that employees who attended the campaign meetings worked more hours than Rida on the dates in question.

The Union asserts that Najolia's testimony shows that he lost work hours by being excluded from these meetings. (Union Br. at 51) However, a closer look at Najolia's testimony does not support this claim. When asked about how he determined that he was being excluded from Respondent's campaign meetings, Najolia testified about three different scenarios which led him to believe this was occurring: (1) he would be scheduled to work at a different plant while his coworkers were scheduled to attend a meeting; (2) a meeting would be scheduled for his coworkers at 5:00 a.m., while he would not be scheduled to start work until later in the day; or (3) a meeting would be scheduled for late in the day, while he was scheduled to work early in the day. While I credit Najolia that all three scenarios occurred, his testimony does not show that, on any given day, he was paid for fewer work hours than his colleagues who attended the campaign meetings. It only shows that Respondent scheduled him to work at different places, or at different times, on those dates. And, as with Rida, no documentary evidence was introduced to show that Najolia lost pay because he did not attend the campaign meetings. Therefore, I do not believe the credited evidence shows that employees who were excluded from Respondent's campaign meetings were denied work hours, in comparison to the employees who attended these meetings. (Tr. 1464–1467)

Finally, the evidence shows that Respondent served refreshments during these meetings, including fruit and pastries. While Javier Luna testified about a time when he returned to the Walnut plant and saw a table with chips, soda, and a barbeque grill, he could not recall whether a barbecue actually occurred that day. And nobody who attended any of Respondent's campaign meetings testified that they were provided with a free lunch or a barbecue as part of these meetings.

3. Analysis

The Board allows employers to exclude union supporters from meetings held during working time at which the employer expresses its opposition to unionization. *Delchamps, Inc.*, 244 NLRB 366, 367 (1979), enfd. 653 F.2d 225 (5th Cir. 1981) (collecting cases). However, in those situations, an employer may not deny pay and benefits to employees that were not invited to the meeting. Id. (violation where active and vocal pro-union employees were excluded from campaign meetings where free meals were served while other employees who were not on duty were allowed to clock in and get paid to attend these meetings); see also *Wimpey Minerals USA, Inc.*, 316 NLRB 803, 803 fn.1, 806 (1995) (violation where employees were paid to attend campaign meetings, but certain employees were excluded from these meetings and were not paid). *Saisa Motor Freight*, 333 NLRB 929, 931 (2001) (violation where employees lost pay because they were excluded from campaign meeting, but no violation regarding another group of employees who were also excluded but suffered no loss of income).

Here, I do not believe the credited evidence shows that the drivers who were excluded from the campaign meetings received any less work hours or otherwise received less pay. Thus, the fact Respondent merely excluded them from the meetings does not amount to objectionable conduct. *Saisa Motor Freight*, 333 NLRB at 931.

The employees who did attend the campaign meetings were served refreshments, such as fruit and pastries. Thus the question remains as to whether this constituted objectionable conduct, since the excluded employees were not served these refreshments while they were working. In support of its Objection, the Union cites *Desert Inn Country Club*, 282 NLRB 667 (1987), which involved a party given by a company to 168 non-striking employees about 3 months after a long and bitter strike had ended. Only employees who either did not strike, or who abandoned the strike, were invited to the party which included food, liquor, a live band, and dancing; the party cost the employer about $4,000. The Board found the party constituted a term and condition of employment and that by holding the party the employer independently violated both 8(a)(1) and 8(a)(3) of the Act. In defense of its actions, Cemex points to cases that support an employer's right to exclude known union supporters from campaign meetings and to another line of cases where the Board found no objectionable conduct had occurred were the employer provided all employees access to food or meals either just before, or during, the election. (Cemex Br. at 213-214)

Here, I do not find the refreshments served to employees attending the campaign meetings as comparable to the party described in *Desert Inn Country Club*, where food and liquor was served, employees danced to live music, and the party cost the employer $4,000. While there is no evidence as to the actual cost of the pastries and fruit served to Cemex drivers, it seems the associated cost would be minimal at best. As for Respondent's defense, I am cognizant that the Board in *Delchamps, Inc.*, found the judge erred by conflating two separate lines of cases, one allowing an employer to exclude union supporters from campaign meetings held during work time, and the other finding it is not per se objectionable conduct to provide free meals to employees at campaign meetings held during nonworking hours. 344 NLRB at 367. This is basically the argument advanced by Respondent. However, in *Delchamps, Inc.* the Board also noted that the judge "erred in failing to evaluate the fact that Respondent, as part of its policy regarding its luncheon and dinner meetings, permitted employees who were scheduled for off-days to clock in for the sole purpose of attending those meetings" which "granted employees attending the meetings an opportunity to be paid above their normal working hours, thereby affording a clear benefit to those employees." Id. Because the evidence here does not support a finding that employees attending the campaign meetings were paid above their normal working hours, or conversely that employees who did not attend the meetings received less pay, I recommend that the Union's Objection be dismissed.

S. Union Objection #2 involving threats

Objection #2 alleges that Respondent threatened employees with closing plants or other adverse consequences if they supported the Union. In further support of this Objection, the Union points to the following two incidents which are not alleged as unfair labor practices: (1) a meeting with employees at the Parris plant involving consultant Amed Santana; and (2) a discussion Forgey had with employees at the Temecula plant. (Union Br. at 11, 21)

1. Amed Santana threat of plant closure

a. Witness testimony

Alejandro Flores worked as a ready-mix driver at Cemex's Temecula plant from 2017 through mid-2019. Flores testified that he was in a meeting conducted at the Perris plant with Amed Santana and a number of other drivers on January 28, 2019. According to Flores, during the meeting Santana told employees that they were not going to be able to get anything done because they were just 400 drivers and Cemex was a multibillion-dollar company; Santana also said that even if they got a contract Cemex was just going to fight it. Because Cemex was so big and powerful, Santana asked the drivers "what are you guys going to do" saying that the drivers could lose everything in negotiations. (Tr. 1369–1370) Flores further said that Santana told the drivers that Cemex was much more than just a ready-mix operation, that it also sold aggregates and cement, and if they unionized Cemex can just stop doing ready-mix; Santana said that "if you push enough . . . they don't need that ready-mix part of the company." (Tr. 1370–1371) (Tr. 1364–1365; 1369–1371; 1414–1415)

During cross examination by Respondent, Flores testified that Santana discussed the collective bargaining process and told employees that, as a result of negotiations they could get more than they have now, less, or end up with the same. Flores further said that Santana used a PowerPoint during the meeting, and would usually follow the presentation unless there was a question asked that was not on the PowerPoint. According to Flores, it was in reply to a question from a driver that Santana referenced closing down the ready-mix operation if employees unionized. (Tr. 1406–1407, 1414–1415)

Amed Santana testified he was assigned to the Inland Empire during the campaign, which included the Perris plant among others, and that he conducted various trainings at these facilities, including training on the NLRA and collective bargaining. Santana said that he used PowerPoint presentations during these meetings, which he followed. According to Santana, he could not change the presentations themselves, which were created by LRI, but he did add verbal content to them based upon the questions asked by employees. (Tr. 3038, 3041, 3048, 3052–3054, 3065–3066; R. 49, R. 51)

On direct examination by Respondent's counsel, Santana denied ever discussing the relationship between Cemex's ready-mix division and the rest of the company's businesses. He denied saying that Cemex would close its ready-mix division if the Union won the election or saying that Cemex did not need the ready-mix division. He also denied saying that Cemex might close down the plants if the union won the election. When asked if anyone affiliated with Cemex ever told him that the company would consider getting out of the ready-mix business if the Union won, Santana answered "No, not to me." (Tr. 3057) As for what he told employees about wage increases if the union won the election, Santana said he told employees that they could end up with more pay, the same, or less. (Tr. 3057–3058)

Santana admitted that he discussed with employees the fact Cemex was a multibillion-dollar company, but denied he discussed this "in the context of negotiations." (Tr. 3058) At trial, Santana said he was surprised when he learned that Cemex was in sixty-nine countries, but

during his testimony he never explained the context in which he discussed the financial size of Cemex with the drivers. Instead, he just denied telling employees that, even if the union won the election, because Cemex was a multibillion-dollar company the drivers could lose everything they had during the negotiation process. He also denied saying anything about the size of Cemex impacting what would happen during negotiations. (Tr. 3058–3059)

During cross-examination, Santana testified that, while he had a general idea about where these meetings occurred, he was not 100 percent sure about their locations. He admitted that he could not testify about the dates the meetings happened, about the number of employees who attended, or the questions they asked. Santana also admitted that he was not exactly sure as to what was actually said during his NLRA and collective bargaining trainings. Notwithstanding these specific admissions, during redirect examination by Respondent's counsel, Santana changed his testimony and said that he did, in fact, remember what he communicated during these meetings and it was exactly what he testified to on direct examination. Despite the specific nature of the questions asked him during cross examination, upon his redirect by Respondent's counsel, Santana claimed that he was referring meetings held by other consultants when he testified on cross-examination that he was not exactly sure what was said during his NLRA and collective bargaining trainings. (Tr. 3062–3063, 3072)

b. Analysis

Regarding this incident, I generally credit Flores over Santana as to what was said. At times I found that Santana was evasive, wanting to speak in generalities rather than specifics, sometimes going beyond the question posed and/or answering specific questions by giving long narratives. His flip-flopping as to whether he actually remembered what was said during his NLRA and collective bargaining training sessions specifically undermined his credibility. During cross examination, when discussing the training he personally conducted, Santana said that he did not actually know specifically what was said in each training session. However, after prompting by Respondent on redirect, Santana changed his testimony. Santana was not credible.

I also find it significant that, regarding the topic of Cemex being a multibillion-dollar company, Santana never explained why, or in what context, he discussed this subject while meeting with the drivers. Other than using Cemex's size and financial strength to coerce and intimidate the employees, there is simply no explanation as to why this matter would even be a topic of conversation during meetings that were supposed to involve the NLRA and/or collective bargaining, particularly if Santana was supposed to be following the PowerPoint presentations. The financial size and strength Cemex is not included in either PowerPoint. (R. 49, R. 51)

Accordingly, I find that the credited evidence, along with the reasonable inferences derived therefrom, show that during a meeting at the Perris plant that was attended by Flores, Santana told employees that Cemex was a multibillion-dollar company and that if employees pushed enough and unionized, the company can close the ready-mix operation, as it did not need ready-mix part of its business mix. He also told employees that, because of Cemex's size, the drivers would not be able to achieve anything, in reference to the union. I find that this constitutes an unlawful threat to close the facility along with a threat of futility. Cf. *Alvin Metals Co.*, 212 NLRB 707, 710 (1974) (telling employees the plant would close and employees would

be fired if they did not stop pushing for the union a violation); *Jo-Del, Inc.*, 326 NLRB 296, 299 (1998) (indicating to employees that their support of the union in upcoming election would be futile and they would never achieve anything through collective-bargaining a violation). Accordingly, the Union's Objection #2 is sustained regarding this incident.

2. Bryan Forgey's comments to employees about boots

Cemex employees are required to wear six-inch lace up steel toe boots. The company has a contract with Red Wing Shoes and will pay for one pair of work boots per a year. Employees can choose from six different style of boots that Red Wing offers. The Union alleges that Forgey engaged in objectionable conduct when he told employees during meetings that boots and uniforms would be up for negotiations if the Teamsters won the election because California regulations require Cemex to provide boots to their workers, as they are considered personal protective equipment. (Tr. 2308–2309)

Forgey testified that, during a meeting with about 4 to 5 Temecula employees, he explained to them that boots and uniforms were economic benefits that would be up for bargaining as part of an economic package during negotiations if the Union won the election. Temecula employee Donald Shipp was present during the meeting, which he said occurred in January 2019, and testified that seven other drivers were also present when Forgey made these comments. Forgey admitted saying the same thing to drivers in other meetings at other locations. Amed Santana testified that he was present at two or three meetings where Forgey spoke to drivers at the Inland Empire plants. Santana said that, during these Inland Empire campaign meetings, Forgey discussed the topics of boots, uniforms, and coffee that was available at the plants, telling employees that everything would be part of negotiations, including boots and coffee, and the outcome was unpredictable. (Tr. 763, 2065, 2078–2080, 2128, 3048–3051)

California Labor Code Sections 6401 and 6403 require an employer to provide safety devices and safeguards to protect the life, safety, and health of employees. Cal. Lab. Code §6401, §6403 (West 2021). These sections have been interpreted to mean that an employer must pay for safety equipment required to protect employees from hazards they are exposed to at work. *Bendix Forest Prod. Corp. v. Div. of Occupational Saf. & Health*, 25 Cal. 3d 465, 470, 600 P.2d 1339, 1342 (1979) (Cal OSHA did not err in interpreting the law and standards to require the employer to bear the expense of providing protective gloves/mittens to workers). In a unionized setting, The Occupational Safety & Health Appeals Board of the California Department of Industrial Relations, has rejected an employer's argument that payment for appropriate footwear is subject to collective bargaining, finding instead that the employer was required to pay for the appropriate footwear protection for its employees. *In re Appeal of UPS Ground Freight Inc.*, 2017 WL 4585321. Therefore, by saying that the issue of safety boots would be subject to negotiations, when Cemex requires employees to wear safety boots for protection against workplace hazards, and where California regulations require that an employer like Cemex pay for appropriate footwear protection for its employees, I find that Respondent engaged in objectionable conduct as alleged in Objection #2.

IV. THE SUSPENSION OF DIANA ORNELAS

A. Facts

1. July 9 incident at the Hallin & Herrera jobsite

On July 10, 2019, Diana Ornelas was suspended pending investigation regarding an event that occurred the previous day. On July 9, Ornelas was assigned to deliver a load of concrete to a customer named Hallin & Herrera at a jobsite in Camarillo, California. According to Ornelas's testimony, along with a written statement she made that day, Ornelas had been at the Hallin & Herrera jobsite for about an hour when a tall man walked up to her in the washout area and asked if she was a driver; Ornelas said yes. The man said he was in charge of safety and asked Ornelas to put her truck into reverse so he could check the truck's backup lights and alarm. The man was wearing a generic hardhat and safety vest, without any badges, logos, or identification. He did not show Ornelas any kind of credentials. (Tr. 991–992, 996–997; GC. 18)

Ornelas had never before encountered such a request at a jobsite, and knew from her training that only a Cemex official or the California Highway Patrol was allowed to inspect her truck. Ornelas did not know who the individual was and told the man "okay, but excuse me who are you?" (GC. 18) The man said that he was in charge of safety at the site, but refused to give Ornelas his name or show her a badge or identification. Ornelas told the man she was uncomfortable and confused, as she had never previously encountered such a request, nor had she witnessed this happen to other drivers. Therefore, Ornelas asked to call her supervisor first, and she went into her truck and called Juan Torres. Ornelas told Torres what had occurred and Torres was similarly confused. He told Ornelas that he did not know what was going on, and said if the man came back and hassled her, Ornelas was to call him back. While Ornelas was in her truck she noticed that the man had walked away and told this to Torres. (Tr. 992–993, 1140–1142; GC. 18)

After Ornelas finished speaking with Torres, she exited her truck and continued washing out her chute, as she had finished pouring out her load of concrete. Soon after, the tall man returned along with another man who Ornelas assumed may have been the jobsite foreman. However, she did not know this for sure as the other man similarly did not have any type of identification and was only wearing generic clothing. The men asked Ornelas to put her truck in reverse so they could check the backup lights and alarm. Ornelas felt that she was being harassed and told them she had just finished speaking with her supervisor on the phone, that only the California Highway Patrol or a Cemex representative could inspect her truck, and she asked to see a badge or some sort of credentials. According to Ornelas both men got upset and became argumentative, with one of them saying, "don't tell me how to do my job."[31] (Tr. 994; GC. 18) Ornelas asked if they were harassing her because she was the only woman at the jobsite. One of the men denied this, and questioned whether Ornelas's backup alarm actually worked. Ornelas told them she had completed a pre-trip inspection before leaving the plant, and that her alarm did, in fact, work properly. She also told them that she had spoken to her supervisor who did not "even know who you guys are." (GC. 18) One of the men replied saying that he "rebuked" Ornelas in "Jesus's name." (GC. 18; Tr. 994) Ornelas told the man that she had rights, that he

[31] At various points when describing this incident, the transcript reads "she" when it should read "he." (Tr. 994)

never explained who he was, and that she felt uncomfortable. The men left, with one of them walking towards some other workers and complaining to them about what had just occurred. Ornelas went back to washing out her chute. (Tr. 993–997, 1143; GC. 18)

Fabian Leon was working as a Teamsters organizer on July 9. Earlier that day he had communicated with Ornelas and learned that she was on her way to a job; Leon followed her to the Hallin & Herrera jobsite in his car. Leon parked his car and waited for Ornelas outside the gate as he wanted to speak with her. At some point, while she was still at the jobsite, Ornelas spoke with Leon by phone and told him what had happened. After she spoke with Leon, Ornelas saw him speaking with the two men that had asked to inspect her backup lights and alarm. (Tr. 998, 1149–1150, 1808, 1843, 1896–1898)

According to Leon, while he was outside the jobsite waiting for Ornelas, at some point he spoke with a man who wanted to know what Leon was doing there. Leon told the person that he was with the Teamsters and was waiting to speak with one of the Cemex drivers, meaning Ornelas. (Tr. 1808–1809, 1840–1841, 1845–1846)

While Ornelas was still washing out her chute, two concrete workers who were nearby walked up to see if she was okay. They told Ornelas "we've had to deal with him all day," referring to the tall man who had originally asked to inspect her truck. (GC. 18) When Ornelas finished she returned to the Oxnard plant and spoke with Torres. Torres told Ornelas to write a statement about what occurred. Ornelas did so, and handed it to Torres. (Tr. 999–1000; GC. 18)

Juan Torres testified about his telephone conversation with Ornelas while she was at the Hallin & Herrera jobsite, saying Ornelas told him that somebody wanted to inspect her truck. Torres initially said that, during the call, neither he nor Ornelas knew the identity of the person, so he told her to try and find out who the man was and to call Torres back. However, Torres later testified that during the phone call, he told Ornelas to try and find out who the person was and to just comply with whatever the person asked her to do. Torres claimed during his testimony that, if a Cemex driver was working with someone at a jobsite, whoever that person is, the driver is supposed to "just comply with the guy's request" even if the driver did not know the identity of the person. (Tr. 232) He also said that he told Ornelas during the call that, if the man asking to inspect her truck needed any assistance, that she had Torres's phone number and the person could call Torres directly. When Ornelas returned to the plant, according to Torres's testimony, he told her that if she is working with someone who asks her to turn on the lights, there might be a safety reason why they are asking, "so just comply with it" and don't get into arguments with customers when it is a simple task like turning on your lights. (Tr. 233) (Tr. 229–234, 243)

Parts of Torres's trial testimony do not necessarily comport a written statement he made after the incident. (GC.7, 237–238) Torres's written statement, which is dated July 9, 2019, reads as follows:

> On July 9th 2019 Diana was at a jobsite for Hallin Herrera. She called me on my cellphone at 9:16 a.m. When I was talking to her she told me that one guy asked her if she could put her truck on reverse so he could check her reverse lights.

> Diana did not know who the guy was. When I asked her where the guy was she said that he had left saying he was going to talk to his supervisor. She mentioned that when she was talking to the guy she told him that he was not a CHP officer so he couldn't randomly inspect her truck and that he was also not a Cemex employee. At the moment I did not know who the guy was as Diana didn't know either I told her that if the guy showed up again to please call me to find out what the guy wanted. She never called me back again. When she was done pouring and washing out she called me on the radio where to repeat and told me that she was going to fuel up. When she arrived at the plant we had a brief talk about what happened at the job site. That's when she mentioned that the guy told her that he had something to do with safety. She told me that the guy got mad after Diana told him that he had no right to inspect her truck as he was not a CHP officer or work for Cemex.
>
> When she told him that the guy made an expression of madness and replied "yes I am," she then told him that she needed to see a badge or something that stated he was qualified to inspect trucks. She said that she told the guy that why he didn't inspect other trucks or it's just because she was a female driver and she didn't know what she was doing? Based on what Diana said the guy walked away and was telling stuff to the people tha[t] were there. She mentioned that some guy approached her and asked her if she was ok. That's all she said and I asked her if she could do a written statement which she did after she continued working.

It is unclear from the record why Torres drafted this statement, whether he did this on his own accord or someone asked him to do so. It is also unclear what, if anything, he did with this statement; although somehow it was eventually reviewed by Plascencia. Also, Torres testified that after this incident he was coached by Respondent on how to handle a situation if a driver called him with a similar matter. According to Torres, he was told by the company that, in the future, if someone approaches a driver with any kind of request, before denying the request, they are supposed to find out who the person is. (Tr. 231–232)

2. Respondent investigates the July 9 incident

During the week of July 9, Robert Resendez was filling in for Jason Faulkner, who was on vacation. Resendez testified that he first became aware of the incident involving Ornelas at the Hallin & Herrera jobsite when he received a phone call from Daryl Charlson telling him that one of his drivers was not following safety protocols. (Tr. 506–507, 532, 2321–2322)

According to the testimony provided by Charlson, he learned about the incident from Faulkner, who called him saying a safety manager for a company that had ordered concrete had asked Ornelas to put her truck in reverse so they could see her backup lights and alarm, but she refused to do so. Charlson also testified Faulkner told him that, after Ornelas left the jobsite, Faulkner received a call from Hallin & Herrera saying a union representative was at the jobsite saying he was representing Ornelas on behalf of the Union, and that the representative was Fabian Leon. According to Charlson, he told Faulkner "that's not the case" (Tr. 417), referring to the Union being able to represent Ornelas, and further said the drivers were not under a

collective-bargaining agreement and the company needed to make sure the workers, including Ornelas, knew that. Charlson said Faulkner then spoke with Iris Plascencia in Human Resources about the matter. (Tr. 414–417, 430)

Faulkner, on the other hand, testified that he first learned about the incident from Charlson, who either called him while he was on vacation or told him about it in person after he returned. Faulkner said that he reviewed the incident only after he returned from his vacation, and that it was either Charlson or Gus Aguilera who told him that there was a union organizer on site at the time of the incident. Faulkner testified that he did not personally investigate the incident, and that when he ultimately discussed the matter with human resources, he was relying upon the investigation that was already conducted by Aguilera, Resendez, and Charlson. (Tr. 469–470, 506–507, 529)

After learning about the incident, Resendez testified that he went to the Hallin & Herrera jobsite on July 9 to try and investigate "what was going on;" he took safety champion Gus Aguilera with him. (Tr. 2321) According to Resendez's testimony, when he arrived at the jobsite he spoke to a Hallin & Herrera employee who was in charge of telling drivers where to pour out their concrete, referring to him as a "chute man." (Tr. 2349–2350) Resendez said he learned from the chute man that Hallin & Herrera had a few mishaps that morning with backup alarms, so as a safety protocol they had a safety officer "checking our equipment," specifically the backup lights and alarms. (Tr. 2322–2323) According to Resendez, the chute man told him that when the safety officer asked Ornelas to put her truck in reverse, she asked to see a badge, questioned whether the individual was really a safety officer, and refused the request. After speaking with the chute man, Resendez spoke with two Hallin & Herrera job superintendents who told him that they had a random safety checkup that day, checking everyone's equipment on the jobsite for backup alarms and safety features, and that Ornelas did not follow what the safety officer told her to do. They also told Resendez that Ornelas said that she believed she was being singled out and harassed because she was a woman, so they did not want to "push it" anymore. (Tr. 2371) (Tr. 2321–2323, 2349–2350, 2368–2371)

When asked about the demeanor of the job superintendents, Resendez testified that they were upset, referencing safety. Resendez also said that the Hallin & Herrera representatives told him that there was a Union agent at the jobsite representing the Cemex drivers at the time of the incident. Resendez told them that Cemex was union free in Ventura County, but said the superintendents were unsure whether Resendez actually worked from Cemex so they asked him for identification. Resendez, who was wearing his company uniform, did not have any Cemex identification with him. (Tr. 2325–2327, 2343–2344, 2348)

Resendez further testified that, as soon as he waked off the jobsite, he went to his truck and started typing out a written statement of what occurred on his cell phone. When Resendez returned to the plant he added additional content to his statement. (R. 35) Resendez said it took him about 30-45 minutes to complete the statement as English is his second language and he is slow at typing. Resendez's written statement, which is dated July 9 and was placed into Ornelas's personnel file, reads as follows:

When I arrived at job #3378 Halling Herrera, Gus Aguilera and I talked to a guy named Ramiro Real. He stated that our Cemex driver arrived on the job and placed out two chutes. Halling Herrera EE Ramiro said that chutes would not be needed. That Cemex EE would be unloading in to a loader bucket. Safety personal arrived in the job side to do a random inspection on the equipment. Safety personal asked our Cemex EE to put the truck in to reverse because he wanted to check the back up alarm. Cemex EE then asked Hailing Herrera safety personal if he was "CHP" safety personal responded that he was not "CHP." Then Cemex EE did not compline with safety personals request. Safety Personal then proceeded to talk to the job superintended about Cemex EE not implying his request and that she would have to be asked to leave the job site. Then the safety personal proceeded to explain to her the situation and the job sites safety. He also reminded her that everyone's safety is his main priority including here's. Then Gus and I walked to the office where we meet two job superintendents who looked pretty upset at the situation. Once we let them know that we were CEMEX EE they asked for our business cards. I told them that at that moment I did not have a business card. One of the superintendents told use that they had already spoken to a Teamster representative who was there on a driver's behave. Gus replayed to them that Cemex is a UNION free company. I then said that I was sorry on what had just had happen and like Gus has said we are a UNION free company, and the only reason why we are there was because we care about our customers and the service our EE provide to them, and to resolve the issue for it won't happen in the future. I then apologized again for not having a business card and our driver's behavior. Then Gus asked if by any chance the Teamster Representative had a gray metallic blue Nissan car. Bothe replayed at the same time "YES", Gus then told them that he was an old EE of Cemex and that he has nothing to do with Cemex. By that time both superintendents understood that we are a UNION free company and started to talk to us about the accident. Both Job superintendents had the same story as Ramiro Real. With the exception that when the job superintendents went up to the Cemex EE and started to talk to her about safety, her first response was that he singled her out because she was a female and that she was feeling harassed. Then the job superintendent did not want any issues and walked away to talk to the other job superintendents. Meanwhile the second job superintended went up to the teamster representative Fabian Leon and asking who he was and why was he at the job site. Fabian Leon responded with, "I'm a Teamster Representative and I'm here on a driver behave". At that moment the second superintendents saw the first superintendents walked up to him. Then the second superintendents replayed to Fabian that he was going to be right back and proceeded to walk towards the first superintendents. when they both meet up he informed first superintendents that the guy was a teamster representative. Then they turned around too look at Fabian, by that point Fabian was driving out of the jobsite. Then I asked both job superintendents if I can get a written statement about what had just happened from them. They both agreed to email them to Gus and I. they confirmed by saying we will get them to you in 2-3 hrs. After waiting for more then 3 hrs. for the email I contacted the first job superintendents and he told me that he had contacted his superiors in Chicago and they had instructed

> him not to write anything until they get back to him because once they wright anything that becomes a legal document and they did not want to be involved in any Union conflicts. I then said that we are a union free company and the only reason I was asking for it was to improve our costumer service and to make sure this will never happen again to a costumer. Then he said as soon as he gets information from he's superiors he will send an email letting us know about the decision they have made. I thanked him for his corporation and apologized for what had happened with our driver.

After completing his statement, Resendez testified that he waited about 3 hours and then sent it to Charlson and Faulkner. There is no evidence that the Hallin & Herrera job superintendents ever submitted a written statement to Cemex as requested, nor is there evidence that they filed any type of formal complaint with Respondent about Ornelas. (Tr. 2330–2333, 2919)

While he was at the Hallin & Herrera jobsite, Resendez did not speak to the purported safety officer, whose name he did not know, and who apparently was no longer at the jobsite when he arrived. Resendez also did not know whether the person actually worked for Hallin & Herrera. As to how he knew that Fabian Leon was the Union agent at the jobsite, Resendez said his knowledge was based upon the description of Leon and his car that was provided to him by the Hallin & Herrera employees he spoke with. When asked why he wanted to know the identity of the Union representative, Resendez testified that "[t]he guys were upset, that Cemex is a union-free company then why is a union representative representing a driver?" (Tr. 2343) (Tr. 2341–2343, 2348, 2373)

A statement that Respondent says was written by safety champion Gus Aguilera about what occurred that day was also placed in Ornelas's personnel file. (Tr. 2922; GC. 58) The statement reads as follows:

> I Gus Aguilera spoke with foreman on job for Halling Herrera Order #3368. Foreman's name is Ramiro Real. He states that driver Diana truck 4156 arrived on job and placed out two chutes. Foreman Ramiro says the chutes are not going to be needed that she would be unloading into a loader bucket. Safety personnel arrived on job site to do random inspections on equipment. Safety officer had asked Diana to shift her truck into "reverse" so he can be able to hear back-up alarm. Diana then asked safety officer if he was "CHP." Safety officer said no. Diana did not comply with safety officer's request. Safety officer then informed superintendent that mixer driver did not want to comply and that she would be asked to leave the job site. Job site superintendent had gone over to talk to her about the situation and the safety of the entire job site. Superintendent Manny stated that it is his responsibility to assure the safety of all equipment and his workers. At this point Diana claims she was being harassed and singled out because she was a female. Union representation was on site according to superintendent Manny. The individual introduced himself as a Teamsters rep and stated that he was there on the drivers behalf. A few moments later he left. I Gus and Robert have talked to both superintendents to resolve this issue.

Although the statement was placed in Ornelas's personnel file, and was considered by Respondent in its decision to discipline Ornelas, the statement is undated. Aguilera did not testify in this matter, and no evidence was presented as to when this statement was written or that it was actually written by Aguilera.

3. Daryl Charlson meets with Diana Ornelas on July 10

a. Testimony of Diana Ornelas

Ornelas testified that on July 10 she arrived at work and went directly to the batch office where Daryl Charlson was present along with Juan Torres. According to Ornelas, she said hello to Charlson, and in reply Charlson asked whether Ornelas had called someone to represent her on July 9.[32] Ornelas said no, and inquired as to why Charlson was asking. He told her that somebody from Hallin & Herrera called saying that Ornelas had telephoned someone to represent her; Charlson then said he had to explain to Hallin & Herrera that the Cemex drivers were not represented by a union and do not have a contract. Charlson told Ornelas "because of that, we have to do an investigation now, so you need to park your truck . . . and go home." (Tr. 1002) Charlson told Ornelas that she was suspended pending investigation into the events that occurred the previous day. (Tr. 1001–1004, 1008, 1151)

Ornelas asked Charlson what Respondent was planning to investigate, saying that she had already submitted a written statement about the matter to the company. Charlson told her they needed to investigate how Ornelas handled the incident and how Resendez and Aguilera handled the matter. Ornelas told him that Resendez and Aguilera were not even at the jobsite, and Charlson said "yeah, but we had to send Gus [Aguilera] to the jobsite after they called in yesterday." (Tr. 1002)

At one point, Charlson told Ornelas that he did not understand why she did not just "show them your lights," and Ornelas said she did not do so "because I have rights." (Tr. 1002–1003) Charlson told her a second time that Ornelas should have just shown them her lights, and Ornelas again said that she had rights. At this point, Ornelas testified that Charlson started yelling at her profusely saying that she should have just complied. Ornelas thought that Charlson was trying to intimidate her and told him that she felt he was the type of "boss whose only concern is to just bring the hammer down." (Tr. 1003) Ornelas told Charlson she had rights, and that because of the way Cemex had been treating her, she believed the company was just asking to get sued. Charlson told Ornelas that she had the legal right to pursue whatever action she wanted and accused Ornelas of threatening him. Ornelas responded by saying she was not threatening Charlson personally, but that "you'll hear from my legal help." (Tr. 1003) (Tr. 1152)

Charlson told Ornelas not to get personal with him. She told Charlson that he had made things personal back in February when Ornelas's car was being repossessed at the jobsite in front of everyone. Ornelas said she was distressed that day, and told Charlson that he used the occasion to talk to her about his views regarding the union and to ask her to give the company

[32] Transcript page 1001, line 23 should read "Daryl Charlson" instead of "Dell Tovin (ph.)," and transcript page 1002, line 4 should read "Hallin & Herrera" instead of "Colin Hethera."

another chance.[33] During their conversation on July 10 Ornelas also told Charlson that she was new to the construction industry, and if it was normal for different people at jobsites to have the ability to require Cemex drivers perform certain commands, then it was the company's responsibility to have informed her of this. Charlson told Ornelas "we did show you that," but Ornelas denied having ever received such training. (Tr. 1004) (Tr. 1004–1007)

At some point during their back-and-forth that day, Ornelas testified that Charlson told her he was going to call human resources and the police if she did not leave the plant. She asked Charlson when she would return to work and he said that he did not know. Ornelas said that she eventually walked out of the office, because she was tired of Charlson yelling at her. According to Ornelas, Juan Torres was present for the meeting but did not say anything. (Tr. 1003–1004, 1008, 1150–1153)

b. Testimony of Daryl Charlson

Charlson testified that, because Faulkner was on vacation he spoke with human resources who asked him to go to the Oxnard plant and handle Ornelas's suspension. On July 10, Charlson met with Ornelas in the batch office sometime between 8:00–8:15 a.m. Charlson said Juan Torres was present for the entire meeting. (Tr. 415–418, 2549, 2554)

Charlson testified that during the meeting he told Ornelas to park her truck and go home and that because of the incident at the Hallin & Herrera jobsite he was going to have to perform an investigation. About halfway through the meeting, Charlson said that he asked Ornelas whether she had contacted the union while she was at the jobsite on July 9, and Ornelas denied doing so. According to Charlson, he asked Ornelas this question because Hallin & Herrera was upset and said there was a union representative at the jobsite saying he was representing a Cemex employee. Charlson told Ornelas that the customer had called saying somebody was at the jobsite representing her, and he asked Ornelas whether she understood that the company was not under a collective-bargaining agreement. He then told Ornelas she needed to call her supervisor if there was a problem and said he had to explain to the customer that the drivers were not represented by the Teamsters. (Tr. 418–420, 2550–2551)

Charlson also testified that during the meeting he and Ornelas got into an argument, and Ornelas said he was the type of boss that would bring the hammer down on drivers. She also brought up a time when Charlson asked Ornelas about a "Vote Yes" sign in her car, which was parked at the plant, while it was about to be repossessed. During the meeting Ornelas said she was going to get legal help and Charlson told her it was within her legal right to do so if she wanted. (Tr. 421)

Charlson further testified that, at one point during the meeting, after he told Ornelas she was suspended pending investigation, he asked her to leave the facility but she did not comply and instead asked what he was going to do if she did not leave. Charlson said he asked Ornelas a second time to leave, but that she again did not comply with his request. Instead, Ornelas said that she was going to sue the company. Charlson described Ornelas's demeanor at this point as upset and angry. Charlson said he had to ask Ornelas two more times to leave before she finally

[33] Transcript page 1005, line 9 should read "with the union" instead of "with the unit."

complied. According to Charlson, it took approximately 3 minutes from the time he first asked Ornelas to leave, until she finally left the plant. (Tr. 2552–2555)

At 9:43 a.m. that day Charlson drafted an email to Iris Plascencia about the meeting. The email reads as follows:

> I spoke to Diana Ornelas concerning the incident that happened on the Hallin/Herrera job with Juan Torres present. I let Diana know she was off work while we did a thorough investigation. My exact language was, she was off pending investigation. I reiterated this was part of the process. She became very upset and said it was the company's fault for not training her that someone other than a CEMEX employee could look at safety items on the truck. She became nasty and said I was the type of manager that wanted to lay the hammer down and that I do not care about employees. Diana really made it personal when she brought up the repossession of her car and all I cared about was her vote yes sticker in the window. I said it was a lie because I was very compassionate and asked her if she wanted me to call the sheriff and try and stop the repo and she said no. I asked if she needed a ride home and she said no. I asked why she did not call your supervisor for direction when a person asked to see if your back up alarm and rear working lights were operational and she said she did. Juan said he told her to find out who the people were that wanted to inspect the truck and call him back. Juan asked why she didn't call back once she knew who the inspector was? I asked if she called him a second time to clear up who was asking and she said they approached her again but she couldn't get to her phone. Her phone was in the cab. I asked her if she call the union and she responded no. I reminded her, we were not under an collective bargaining agreement and she needed to call her supervisor with any issues. She was going to update Juan in when she got back to the yard. She asked if I was trying to get the company sued and she was going to seek legal help. I told her that was her right but I would not argue with her. I told her she needed to get her personal things out of the truck and go home. She asked what are you going to do if I don't leave? I told her I would call H/R and the sheriff. She said this is ridicules and again said she will be suing. I had to ask her to leave three or four times. She parked her truck and let at approximately 8:20AM. The conversation lasted approximately five minutes. I also asked Juan Torres to write a statement of the conversation. (R. 43)

Charlson testified that he was not involved in the investigation of Ornelas regarding the Hallin & Herrera incident or in the decision to issue her a suspension. Notwithstanding, he still asked Ornelas if she called the union on July 10. When asked by the General Counsel during cross examination why Ornelas would not be allowed to call a union representative if she had an issue on a jobsite, Charlson answered that he did not know why, saying "I was waiting for–no, I have no–I don't know." (Tr. 2571) (421–422, 429, 2570–2571)

c. Testimony of Juan Torres

Regarding the July 10 meeting between Ornelas and Charlson, Torres testified that he was only present for part of the meeting. Torres said that when he walked into his office that day, Charlson and Ornelas were already talking. According to Torres, he did not participate in, or say anything during, the meeting. Instead, he just went about his batching duties, loading trucks. During his testimony, Torres said that he did not hear Charlson ask Ornelas if she contacted a union representative while she was at the jobsite and he further denied that the topic of the union came up at all while he was present. (Tr. 229, 235–236)

At 10:43 a.m. on July 10, Torres sent an email to Iris Plascencia and Charlson about the meeting. The email, which was ultimately placed in Ornelas's personnel file, reads as follows:

> On July 10th 2019 Daryl Charlson came into the batching office. The purpose of his visit was because he was going to refresh the yard guy on how to safely operate the loader. At 8:10 Diana Ornelas walked into the office after washing her truck. Daryl knew about the confrontation that happened on July 9th 2019 between Diana and a safety guy from Hallin & Herrera. The safety guy from that job site wanted to check if her truck's backup alarm and lights were working properly and she denied to show him because the guy wasn't a CHP officer so he did not had a right to inspect her truck. Daryl talked to Diana and he notified her that she was going to get suspended because their was an open investigation that needed to be resolved. She disagreed with the decision that was taken and she started questioning why she was getting suspended. Daryl told her that if someone at a jobsite asks her if they can check her truck she should comply because Cemex is a company with good safety standards and she did not dealt with the situation in a good way because she denied and did not try to comply with the guy at all. She got mad and told Daryl that he was the type of boss that just puts the hammer on the drivers. Daryl told her that when she called the plant I instructed her to call me back in case the guy showed up again to see what we could do to help him. She started raising her voice and lied at Daryl and told him that I never told her to call me back in case the guy showed up again to see what he wanted. I confronted her in front of Daryl and refreshed her memory about the conversation we had over the phone. After that she admitted to Daryl that I did tell her to call me back if the guy showed up again to see what we could do to help him but she never called me back because she was off the truck and her phone was inside the truck. She was really mad and told Daryl that she was going to sue him and the company. Daryl calmly replied to her that she was in her right to do so. Daryl instructed Diana get all her personal belongings and clock out. That's when Diana got more mad and asked Daryl "what if I don't do it?" Daryl replied "if you don't do it we'll call HR and law enforcement if necessary". Daryl instructed Diana to just get her personal belongings and leave the truck where it was. She got out of the office and did not listen and still got the truck and parked it herself. When she parked the truck she got on her car and just drove out she never stopped to clock out. She left the plant at 8:20am.

Torres did not testify about why he drafted this email or why he sent a copy of it to Plascencia and Charlson. (Tr. 2925–2926; R. 59)

4. Respondent's investigation after July 10

As part of the steering committee that was implemented during the organizing drive to investigate disciplinary actions, Iris Plascencia participated in the investigation of this incident and was also involved in the ultimate decision to suspend Ornelas. According to Plascencia, the investigation consisted of collecting and reviewing statements submitted by various individuals about what occurred. Plascencia testified that she reviewed the following written statements from Respondent's employees as part of the investigation: Resendez's July 9 written statement; the written statement from Gus Aguilera; Charlson's July 10 email; Juan Torres's July 10 email; and Ornelas's July 9 written statement. (Tr. 2912, 2219, 2922–2927, 2986; (GC. 18; R. 35, 43, 58, 59; R. 58)

Plascencia also reviewed a hand written statement from Ramino Real. Real is mentioned in the statements submitted by Resendez and Aguilera as someone they spoke with at the jobsite, and is the "chute man" for Hallin & Herrera that Resendez referred to during his testimony.[34] Real did not testify at trial, nor did anybody from Cemex testify that they personally solicited a statement from Real, or received one from him. According to Plascencia, Real's statement was sent to her by Faulkner, notwithstanding the fact Faulkner was on vacation at the time and testified that he did not personally participate in the investigation, but instead relied upon the investigation conducted by Aguilera, Resendez, and Charlson. The written statement was considered during Respondent's investigation and placed in Ornelas's personal file. The statement reads as follows:

> 4156 arrived to job site. Put on 2 chutes. The chutes were not needed and workers helped put chutes back in place. Safety personnel for "Premier" asked driver "Diana" to see if her reverse lights worked and the back up alarm were working. Diana then replied "Are you a CHP." Safety personnel–replied "no." Diana refused to show operating lights and alarm. (R. 57)

Plascencia said "4156" referred to Ornelas's truck number. She did not know why "Premier" was in quotes or what it referred to. (Tr. 529, 2913, 2915–2916, 2349–2350; R. 35, 57)

Although Plascencia said she reviewed Ornelas's July 9 statement, she never contacted Ornelas to ask what occurred during her meeting on July 10. Ornelas specifically emailed Plascencia on July 12, and copied union organizer Scott Williams on the email, asking to speak with her about what happened, and offering to answer whatever questions Plascencia might have. (GC. 19) Plascencia never replied to Ornelas. Instead, Plascencia relied solely upon the written statements from Torres and Charlson about what occurred on July 10. (Tr. 1013–1014, 2987; GC. 19)

[34] Respondent's brief confirms that Ramino Real was the "chute man" referred to by Resendez. (Cemex. Br. at 152).

5. Respondent's decides to suspend Ornelas without pay

Respondent ultimately decided to suspend Ornelas from July 10 to July 17 without pay. Plascencia testified the reason for Ornelas's suspension was because she: (1) failed to cooperate with the safety inspector at the Hallin & Herrera jobsite; and (2) became loud and argumentative when called into the office on July 10 and refused to leave when told she was being sent home pending investigation into the incident. (Tr. 2927–2928)

Plascencia drafted Ornelas's suspension notice on Respondent's standard Disciplinary Action Form, and a meeting was arranged on July 18 to present the suspension to Ornelas. The Disciplinary Action Form states that Ornelas was suspended without pay from July 10 to July 17 because of her conduct. There is a box on the form that states, "please indicate all prior warnings below." This box is supposed to contain all of the employee's prior disciplinary incidents. On Ornelas's form it only includes the suspension for this incident. In the section on the form that states "describe the performance problem or inappropriate behavior" Plascencia wrote the following:

> On July 9, 2019 you delivered a load of concrete to order 3368 for Hallin & Herrera in which you were asked to shift your truck in reverse to demonstrate backup alarm and lights were functional. You contacted plant foreman, Juan Torrez, upon your encounter with the jobsite safety officer asking for guidance, however, failed to call Juan back as he asked you to do so if the inspector returned. On July 10th, you were informed by Daryl Charlson of our investigation process and mentioned we would get back to you with our findings of the investigation. It was during this meeting that you became loud and argumentative with management. You were asked to go home several times and you refused to do so.

The form also contains a section that says, "describe the plan for corrective action, including expected improvement and timeframe." Here, Plascencia wrote:

> The use of abusive or threatening language toward fellow employees, supervisors, department heads, customers, third party contractors or Company officials shall not occur. Acting in an insubordinate manner towards any member of the management team, or refusing to cooperate with jobsite safety representatives or customers will not be tolerated.

The Disciplinary Action Form was provided to Faulkner, who signed the document. He then met with Ornelas on July 18 to issue her the discipline. Present during this meeting was Faulkner, Ornelas, and an individual from human resources named Zach Wise who also signed the discipline. Ornelas was presented with the document and signed the form but wrote on the document "I did nothing wrong. I'm signing under protest & duress." (GC. 10) (Tr. 471, 531, 1009–1010, 1156, 2908–2909, 2927)

B. Analysis

1. Witness credibility about what occurred.

I specifically credit Ornelas and Leon as to what happened at the Hallin & Herrera jobsite on July 9 regarding their interactions with the various individuals present that day. Their respective testimonies were unrebutted as neither the purported safety person, nor any Hallin & Herrera representatives testified.

To the extent there are conflicts between the testimonies of Torres, Charlson and Ornelas as to what occurred regarding this matter, I credit Ornelas. Torres simply was not a credible witness. His trial testimony conflicted with the various written statements he made about this incident on multiple occasions. And when pressed on at least one of those conflicts, he incredulously claimed that his memory was better when he testified (a year and five months later) as opposed to when he wrote his statement on the day of the incident. (Tr. 238–239)

Regarding Charlson, I found his testimony to be suspect in many respects, particularly regarding this event, including his testimony about how Cemex learned of the incident, and the ensuing investigation and suspension. For example, when questioned by the General Counsel, Charlson claimed that he first learned about the incident from Faulkner, who telephoned him on July 9 saying a customer's safety manager called saying Ornelas was asked to put her truck in reverse to see her backup lights and alarm but she refused, and that a union representative, who happened to be former Cemex employee Fabian Leon, was at the jobsite claiming to be representing Ornelas on behalf of the Union. Faulkner, on the other hand, also during questioning by General Counsel, testified that he first learned of the incident from Charlson, who either called while Faulkner was on vacation, or told him about it when Faulkner returned to work afterwards. Between the two, I do not believe Charlson; instead I credit Faulkner that he learned about the incident from Charlson. Faulkner was on vacation when the incident occurred, and I believe that Charlson was trying to disguise his involvement in the matter by claiming that he first heard about the incident from Faulkner.[35]

I also found Plascencia's testimony about this matter questionable in many respects. It appeared at times that Plascencia was more focused on making general statements regarding how Respondent's process was supposed to work, instead of what actually occurred. For example, when asked if she requested safety champion Gus Aguilera to write a statement about this incident, she testified "[t]ypically yes." (Tr. 2923) When pressed, she answered "yes." But then when asked if she specifically remembered asking Aguilera to write a statement, Plascencia said that she remembered asking Faulkner to speak with Aguilera about providing a statement. (Tr. 2923) That said, Faulkner testified that he was not involved in the investigation and that when he discussed the matter with human resources he relied upon the investigation already conducted by Aguilera, Resendez, and Charlson. Faulkner never testified that he asked Aguilera to provide

[35] Charlson also denied being present at the September 6 meeting when Ornelas was fired, but both Faulkner and Ornelas testified that he was, in fact, there. (Tr. 423, 472, 1023) And the evidence shows that Charlson signed the September 6 disciplines of other employees who were disciplined along with Ornelas for the same incident. (GC. 12; Tr. 484–485) Along with detracting from his credibility generally, Charlson's denial further supports a finding that he was trying to hide his involvement in the disciplines issued to Ornelas.

a written statement to Plascencia. And, although Respondent was relying in part upon Aguilera's written statement about what happened, he was never called as a witness.

2. The 8(a)(1) allegations regarding this incident

At the start of the July 10 meeting, after Ornelas walked into the batch office and said hello, Charlson asked Ornelas whether she called the union on July 9. Ornelas denied doing so, and asked Charlson why he was asking. Charlson told her that somebody from Hallin & Herrera called saying that Ornelas had telephoned someone to represent her and that he had to explain to the customer that Cemex drivers were not represented by the Union and do not have a union contract. Charlson then told Ornelas "because of that, we have to do an investigation now, so you need to park your truck . . . and go home." (Tr. 1002) In Complaint paragraph 5(w) The General Counsel alleges that Charlson's statements constitute an unlawful interrogation and threat. I agree.

The Board reviews a variety of factors to determine whether an unlawful interrogation occurred including: the general background; the nature of the information sought; the identity of the questioner; the place and method of the interrogation; the truthfulness of the reply; whether the employer had, or conveyed, a legitimate purpose for the questions; and whether assurances against reprisals were provided. See *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964); *RHCG Safety Corp.*, 365 NLRB No. 88 slip op. at 1-2 (2017). These factors, which are not mechanically applied, are "useful indicia that serve as a starting point for assessing the totality of the circumstances" to determine whether the questioning would "reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act." *Westwood Health Care Center*, 330 NLRB 935, 939–940 (2000).

Here, during the July 10 meeting Charlson asked Ornelas whether she had called the union the previous day, and applying these factors, I find that his question constituted an unlawful interrogation. Charlson was a high-level management employee and wanted to know specifically if Ornelas had contacted the union which, as set forth further below in Section IV(B)(4), I find to be conduct protected by Section 7 of the Act. Although Ornelas had, in fact, called a union representative that day, she denied doing so when asked by Charlson. And, while the conversation occurred in the batch office, which was an area that drivers visit daily, having Charlson present in the office was not normal. He and Ornelas were not friends and he was in the batch office to place Ornelas on suspension pending investigation. Finally, Charlson conveyed no valid reason for the question. Accordingly, under the totality of the circumstances, I find that Charlson's question constituted a coercive interrogation in violation of Section 8(a)(1) of the Act. *Soltech, Inc.*, 306 NLRB 269, 269 fn. 1, 273 (1992) (asking known union adherent if he knew who called the union was an unlawful interrogation); *Valley Slurry Seal Co.*, 343 NLRB 233, 244 (2004) (project superintendent's interrogated employee by asking if he had contacted the union or if the union had they contacted him).

I also find that Charlson's telling Ornelas the company now had to do an investigation because Hallin & Herrera called saying that Ornelas telephoned someone to represent her, and he

had to explain to them that Cemex drivers were not unionized, constituted an unlawful threat. Ornelas was suspended pending investigation into the incident, and Charlson directly tied the investigation into Ornelas calling the Union on July 9. Under these circumstances I find the statement would reasonably tend to coerce an employee who would think twice about call a union for assistance knowing they would be investigated for doing so. Cf. *Eastman Kodak Co.*, 194 NLRB 220, 223 (1971) (after attempting to ascertain who instigated the union movement, supervisor's statement that there would be a thorough investigation of employees' union activities and those involved would be fired constituted an unlawful threat).

3. Legal Standard involving the 8(a)(3) allegation

The Board applies the burden shifting analysis set forth 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), whenever an employer's motivation is at issue involving alleged violations of the Act. Under this framework, the General Counsel must prove by a preponderance of the evidence that employee protected activity was a motivating factor for the employer's actions. The elements required to support such a showing are union or other protected activity, knowledge of that activity, and animus on the part of the employer. See, e.g., *Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009). The evidence of animus must be sufficient to establish a causal relationship between the employee's protected activity and the employer's action against the employee. *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 8 (2019).

If the General Counsel makes this initial showing, the burden of persuasion shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even if the employee had not engaged in protected activity. *Consolidated Bus Transit*, 350 NLRB at 1066; see also *Ready Mixed Concrete Co. v. NLRB*, 81 F.3d 1546, 1550 (10th Cir. 1996) (by shifting the burden the employer's justification becomes an affirmative defense). An employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity. *Rhino Northwest, LLC*, 369 NLRB No. 25, slip op. at 3 (2020). (internal quotations and citations omitted). "In other words, a respondent must show that it *would* have taken the challenged adverse action in the absence of protected activity, not just that it *could* have done so." Id. (italics in the original) Where an employer's explanation is "pretextual, that determination constitutes a finding that the reasons advanced by the employer either did not exist or were not in fact relied upon." *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). And, where the "proffered non-discriminatory motivational explanation is false even in the absence of direct motivation the trier of fact may infer unlawful motivation." *Roadway Express*, 327 NLRB 25, 26 (1998). Finally, the Board has found that employee misconduct discovered during an investigation undertaken because of an employee's protected activity does not render an unlawful action lawful. *Kiddie, Inc.*, 294 NLRB 840, 840 fn. 3 (1989).

4. The General Counsel's prima facie case

The evidence shows that Ornelas was a known union activist from June 2018 until her discharge. Ornelas was a member of the Union's organizing committee, she wore union bracelets on her wrist, a union sticker on her hardhat, kept a union sign in her car that was parked inside the plant, spoke with union organizers outside the plant, and participated in meetings and conference calls with the Union. (Tr. 971–972)

The evidence further shows that, after taking a two-to-three-week break following the March 2019 election, the Union continued organizing Respondent's employees throughout the summer of 2019. For example, in May 2019 the Teamsters hired Leon as a full-time organizer and assigned him to the Cemex campaign. The Union continued having conference calls with workers, they tried talking to employees on a regular basis, and attempted to get them to testify during the investigation of the unfair labor practice charges. (Tr. 934–936, 941–942, 1343, 1413, 1524, 1781, 1792, 1843) Accordingly, I find that Leon's appearance outside of the Hallin & Herrera jobsite on July 9, because he wanted to speak with Ornelas, and his telling this to the Hallin & Herrera representatives, was in furtherance of the Union's organizing objectives. And, by telephoning Leon while she was still at the jobsite on July 9, Ornelas was engaged in activities protected by Section 7 of the Act. Cf. *Evolution Mechanical Services, Inc.*, 360 NLRB 164, 164 (2014) (Board comments that, under normal circumstances, a worker's providing information about an employer's operations to outsiders in the course of a union campaign is protected, as is disclosing the location of the employer's jobsites to aid the union's organizing campaign); *Stericycle, Inc.*, 357 NLRB 582, 583 (2011) (noting that union assistance in the form of education about legal rights "lies at the core of the union and other concerted activity" protected by the Act and "such protected forms of education and assistance . . . are often provided during an organizing drive" as "[u]nions are rarely in a position to identify violations of law or provide assistance until they are called into the workplace by employees seeking representation for purposes of collective bargaining."); *Charles H. Mccauley Assocs., Inc.*, 248 NLRB 346, 350 (1980) (Single employee who threatened to seek union assistance was engaged in protected conduct as "[a] threat to bring in a union must, itself, be deemed union activity.").

As for Respondent's knowledge of Ornelas's union activities, the company admits she was vocal union supporter. (Cemex. Br. 153) And the evidence shows company officials, at all levels, knew Ornelas was an avid union activist. (Tr. 118–119, 1131, 1169) Forgey himself testified that he knew Ornelas was a union supporter because he saw her appear in one of the video's on the Union's Facebook page. (Tr. 118–121) The evidence also shows that, by July 9, Respondent suspected that Ornelas had called the Union to the Hallin & Herrera jobsite. *Respond First Aid*, 299 NLRB 167, 169 fn. 13 (1990), enfd. mem. 940 F.2d 661 (6th Cir. 1991) ("The Board and the courts have long held that when the General Counsel proves an employer suspects alleged discriminatees of union activities, the knowledge requirement is satisfied."). Respondent's knowledge of Ornelas's union activities has been firmly established.

The record is replete with evidence of Respondent's anti-union animus, as shown by the numerous 8(a)(1) violations found herein. *Dynasteel Corp.*, 346 NLRB 86, 88 (2005) ("The Respondent's numerous 8(a)(1) violations provide evidence of its anti-union animus"). The evidence also shows that Respondent harbored animus against Ornelas's protected activity

specifically. For example, In February 2019, during a meeting involving Charlson and Faulkner, Respondent violated Section 8(a)(1) of the Act by giving Ornelas a verbal warning for speaking with union organizers on company time and telling her that she was not to speak with them. Also, during the early 2019 meeting at the Oxnard plant where Brian Forgey told employees their annual wage increase could not be given due to the upcoming union election, when Ornelas asked Forgey what Cemex had to lose regarding unionization, he replied saying "Diana, you know, I ask you, what do you have to lose?" In the context of the meeting, where various other threats were made to employees, I find this statement, made directly to Ornelas, evidences Respondent's animus against Ornelas's union activities. Finally, in the July 10 meeting, Charlson threatened and interrogated Ornelas.

Accordingly, I find the General Counsel has established a prima facie case that Ornelas's suspension was unlawfully motivated. Therefore, the burden of persuasion shifts to Respondent to show, by a preponderance of the evidence, that Ornelas would have been suspended notwithstanding her union activities.

5. Respondent has not rebutted the General Counsel's case

Based on the record evidence, I find that Respondent has not rebutted the General Counsel's prima facie case. The evidence does not show that Respondent would have suspended Ornelas absent her activities protected by Section 7 of the Act.

a. Decision to investigate Ornelas

Plascencia testified that, one of the reasons for Ornelas's suspension was because she failed to comply with the jobsite safety officer, and in its brief Respondent argues this created a "significant customer service dispute." (Cemex. Br. at 17) However, I find it noteworthy that, before Charlson ordered Resendez to the jobsite on July 9 to investigate what was going on, there is no credited evidence that anyone from Hallin & Herrera contacted Respondent to complain that Ornelas somehow provided bad customer service by refusing to put her truck in reverse. No Cemex representative testified that Hallin & Herrera contacted them directly to complain about Ornelas's conduct, and there was no documented complaint filed by them. Indeed, after Resendez asked the Hallin & Herrera job superintendents to submit written statements to Cemex about what occurred, they never did so. *Gates & Sons Barbeque of Missouri, Inc.*, 361 NLRB 563, 566 (2014) (Lack of documentary evidence showing any actual customer complaints support finding that employer's action was for discriminatory reasons, and not because of customer complaints). Moreover, the two Hallin & Herrera representatives told Resendez that, once Ornelas said she was being singled out and harassed because she was a woman, they did not want to "push it" anymore. (Tr. 2371) Notwithstanding, Cemex kept pushing the matter.

The credited evidence, along with the reasonable inferences derived therefrom, show that Respondent launched its investigation into Ornelas primarily because it suspected she had called the union on July 9, the fact Leon was present at the jobsite that day speaking with Hallin & Herrera saying he was there to represent a driver, and that Hallin & Herrera was distressed that the union was at the jobsite. Charlson was clearly upset when he learned that the union was at

the jobsite, saying that the company needed to make sure employees, including Ornelas, knew they were not covered by a union contract. Charlson was the one who told Resendez to go to the jobsite, and while at the jobsite, both Resendez and Aguilera kept telling the Hallin & Herrera superintendents that Cemex was "UNION free." (R. 35) They also seemed focused on trying to uncover the identity of the union agent that was at the jobsite, asking about the make and model of his car, and finally deducing that it was Leon, based upon the descriptions provided to them. And, when asked why he wanted to know the identity of the union agent, Resendez testified that "[t]he guys were upset, that Cemex is a union-free company then why is a union representative representing a driver."[36] (Tr. 2343)

Also supporting a finding that the investigation into Ornelas's conduct on July 9 was motivated by Respondent's anti-union animus is the fact that, the first question Charlson asked Ornelas on July 10 was whether she had called the union the previous day. And when she denied doing so, he told her that somebody from Hallin & Herrera called saying Ornelas had telephoned someone to represent her, that he had to explain to them Cemex drivers were not represented by the Union nor did they have a union contract, and "because of that, we have to now do an investigation." (Tr. 1002) Employee "misconduct discovered during an investigation undertaken because of an employee's protected activity does not render a [discipline] lawful." *Kidde, Inc.*, 294 NLRB at 840 fn. 3. "Such bad faith by an employer cannot create good cause for the [discipline] of an employee." *Supershuttle of Orange County, Inc.*, 339 NLRB 1 (2003). Such is the case here regarding Ornelas's suspension.

b. Respondent's investigation

Along with the decision to investigate Ornelas, the investigation into the matters advanced by Respondent as the reasons for her suspension also evidences pretext. Plascencia testified that Ornelas was suspended for two reasons: (1) she failed to cooperate with jobsite safety inspector; and (2) she became loud and argumentative with Charlson and refused to leave the office when told she was being suspended pending investigation into the incident. (Tr. 2927–2928, 2987) Regarding Ornelas's conduct in the office on July 10, Plascencia reviewed the written statements provided by Charlson and Torres. However, Respondent never asked Ornelas about what occurred in the office on July 10; the company did not even ask her to submit a written statement about what happened. "A one sided investigation into employee misconduct supplies evidence that the disciplinary action was triggered by unlawful motive." *NLRB v. Esco Elevators, Inc.*, 736 F.2d 295, 299 n. 5 (5th Cir. 1984). See also *Lucky Cab Co.*, 360 NLRB 271, 274 fn. 13 (2014) (denying discharged employees the opportunity to explain their alleged misconduct is evidence of pretext); *Alstyle Apparel*, 351 NLRB 1287, 1288 (2007) (decision to discharge employees before giving them an opportunity to explain the allegations against them supports a finding the discharges were discriminatorily motivated and not based upon a reasonable belief of misconduct). I find that especially true here. Ornelas emailed Plascencia on July 12, asking to speak with her and answer any questions she might have, but Plascencia ignored the request.[37] The fact Plascencia never followed-up with Ornelas after receiving her

[36] I credit Resendez's original answer that this is why he wanted to know the identity of the union agent. (Tr. 2343)
[37] I credit Ornelas's testimony that she never received a response from Plascencia regarding her July 12 email. (Tr. 1013–1014) I do not credit Plascencia's testimony that she "believe[d]" she "briefly" discussed the Hallin & Herrera incident with Ornelas over the phone, as I find her testimony was simply an afterthought in an attempt to

July 12 email leads me to the conclusion that Respondent was not interested in whether Ornelas was at fault for what occurred at the jobsite on July 9 or in the office on July 10, but instead was looking for a reason to discipline Ornelas because of her protected activities and the fact that Leon was at the jobsite speaking with Hallin & Herrera employees and claiming to represent Ornelas.

Also, the evidence shows that Plascencia did not know the identity of one of the people who had submitted a written statement to Cemex. Plascencia testified that, as part of her investigation, she collected and reviewed the written statements from Aguilera, "the management group," Ornelas, and "the safety inspector at the jobsite." (Tr. 2912) However, there is no evidence that the jobsite safety inspector ever provided a written statement, or that anyone from Cemex even spoke with him. Plascencia did review the statement provided by Ramino Real, however he was only the "chute man" whose job it was to direct the drivers as to where to pour out their concrete that day. And, all Rivera said in his statement was that "safety personnel" for an entity called "Premier" asked to see if Ornelas's backup alarm and reverse lights worked; she asked the person if he was with the California Highway Patrol ("CHP") and after the Premier safety personnel said no—Ornelas refused to comply with the request. Plascencia did not know what organization "Premier" represented, nor is there any evidence as to why someone from "Premier" would have authority to inspect Ornelas's backup alarm/lights. I believe the fact that, when assessing whether Ornelas was at fault for what occurred, Plascencia did nothing to determine whether Ornelas was correct when she said the individuals at the jobsite never identified themselves as safety representatives, along with her ignorance as to the identity of the Premier employee who asked to inspect Ornelas's truck, and her claim that she reviewed a written statement from the "safety inspector at the jobsite" when no such statement exists, further supports a finding that the true reason for the discipline was for discriminatory purposes, specifically the fact that the Union was at the jobsite that day and Respondent suspected that Ornelas had called them.

c. Shifting reasons for the suspension

I also find that Respondent provided different reasons for Ornelas's suspension, which further supports a finding of pretext. As noted above, at trial Plascencia said Ornelas was suspended for two reasons: (1) failing to comply with the jobsite safety inspector; and (2) because of her conduct during the July 10 meeting with Charlson. However, in the written discipline presented to Ornelas on July 18, in the section of the document that asks for the company to "describe the performance problem or inappropriate behavior," the fact that Ornelas failed to comply with the "jobsite safety inspector" is not mentioned. Instead the two reasons for Ornelas's suspension set forth in the disciplinary document are: (1) failing to call Juan Torres "back as he asked you to do so if the inspector returned," and (2) her conduct during the July 10 meeting. (GC. 10) During her trial testimony Plascencia never mentioned Ornelas's failing to call Torres back as a reason for her discipline; neither did Faulkner. I find this inconsistency further supports a finding of pretext. See *NLRB vs. RELCO Locomotives*, 734 F.3d 764, 782 (8th

bolster Respondent's case. (Tr. 2994) There were no notes or other documentary evidence that this conversation occurred, and when originally asked what she did during her investigation into the matter, Plascencia did not mention speaking with Ornelas over the telephone. Instead Plascencia said that she only collected and reviewed written statements. (Tr. 2912)

Cir. 2013) (employer's shifting explanations for why it discharged an employee evinced unlawful motivation); *MCPc Inc.*, 367 NLRB No. 137, slip op. at 4 (2019) (shifting reasons for discharge are evidence of pretext).

Based upon the foregoing, I find that Respondent has not rebutted the General Counsel's prima facie case. Accordingly, by suspending Ornelas because she engaged in Section 7 protected union activities, Respondent violated Section 8(a)(1) and (3) of the Act.

V. THE DISCHARGE OF DIANA ORNELAS

A. Facts

1. Oxnard drivers deadhead to Moorpark

On Saturday August 31, 2019 a group of six Oxnard based drivers were scheduled to start their day at the Moorpark plant, instead of at Oxnard. Their starting times were staggered between 5:20 a.m. to 6:29 a.m. The six drivers included Diana Ornelas, Vladimir Ambriz, Agapito Rivera, Rene Vasquez, Daniel Gonzalez, and Oscar Guardado. Depending upon the circumstances, sometimes Cemex will ask a driver to deadhead to another plant to start their workday. However, on this day the six drivers were scheduled to report to the Moorpark plant directly in their personal cars, instead of deadheading there in their work trucks. (Tr. 487, 511, 1015–1018, 1096–1098, 1164–1165, 1198–1199) (GC. 27; R. 13)

The drivers were upset and thought that it was unfair they had to use their personal vehicles, and pay for their own gas, to drive to Moorpark, instead of deadheading to Moorpark from Oxnard in their assigned trucks. Depending upon traffic, it takes between 40 minutes to an hour to drive from Oxnard to Moorpark. Therefore, on August 31 five of the drivers, everyone except Guardado, decided to meet at the Oxnard plant and deadhead to Moorpark in their work trucks. The five drivers met at Oxnard early in the morning, before their scheduled clock-in times, discussed their plan, clocked-in, and then drove their Oxnard ready-mix trucks to the Moorpark plant one-by-one in order of seniority. Guardado did not participate in the plan, and drove his personal car to Moorpark as per his schedule. (Tr. 483–484, 510, 1016–1019, 1095, 1167–1168)

The road that leads to the Moorpark plant is restricted; commercial vehicles are prohibited from using the road before 6:00 a.m. and after 6:00 p.m. So when the five Oxnard drivers arrived at Moorpark, they waited at the bottom of the road until 6:00 a.m. and then drove into the plant one-by-one. Robert Resendez was working as the batchman at Moorpark that day and saw the drivers come into the plant and line up to get loaded. Three of the drivers were supposed to start before 6:00 a.m. and were therefore late for their scheduled load times. Ornelas and Vasquez arrived at Moorpark before their scheduled load times and loaded their trucks on time. (Tr. 509–510, 1019–1020, 1168; GC. 27; R. 13)

All five drivers were disciplined for deadheading to Moorpark. And the drivers who arrived at Moorpark after their scheduled start times received an additional discipline for an attendance violation. The evidence shows that: Ambriz received a one-day suspension for

deadheading and a verbal warning for attendance because he arrived 18 minutes late; Rivera received a one-day suspension for deadheading and a verbal warning for attendance because he arrived 12 minutes late; Gonzalez received a three-day suspension for deadheading and a verbal warning for attendance because he arrived 39 minutes late; Vasquez received a one-day suspension for deadheading; and Ornelas, who arrived before her scheduled start time and therefore was not late, was fired for deadheading to Moorpark. (Tr. 482–483, 1020, 2948; GC. 11, 12, 27)

2. Decision to discharge Ornelas

a. Testimony of Brian Forgey

Brian Forgey testified about his role in Ornelas's termination. Regarding the mechanics of the decision-making process, Forgey said that the steering committee reviewed all employee disciplines, and "would collectively make the decision and move forward . . . if we felt it was a lawful move." (Tr. 112) Forgey said that, while the steering committee reviewed and discussed the decision to fire Ornelas, ultimately he was the final decisionmaker for the termination. (Tr. 113–114, 124)

As for why Ornelas was discharged, Forgey said that while he could not remember all the specifics because of the passage of time, "there were multiple violations of performance. We had performance issues with her." (Tr. 114–115) Specifically, Forgey said that two incidents stood out regarding the decision to fire Ornelas: (1) "she stopped to get fuel when it was very clear that . . . they were to do that when they were unloaded;" and (2) "her refusing to cooperate with an OSHA inspector on a jobsite in regards to safety issues, or safety questions he had." (Tr. 115)

Forgey said that, when Ornelas was terminated, Cemex had already met with her several times about her performance and had given her "a lot of opportunities" by this point. (Tr. 122) Forgey also said that he believed Respondent "had an agreement with her that was kind of [a]. . . [l]ast chance kind of agreement" giving her one more opportunity to pick up her performance. (Tr. 122–123) Regarding the Moorpark incident, and why Ornelas was the only driver fired, Forgey said that he believed she was the only one fired because it happened after her "last chance agreement" and after Respondent "had given her plenty of opportunities to turn around her performance." (Tr. 123) After the termination decision was made, Forgey said the responsibility to inform Ornelas about her discharge fell to the human resources department, which typically drafts the termination letters. (Tr. 118)

b. Testimony of Iris Plascencia

Plascencia was the one who drafted Ornelas's termination letter. When asked why Ornelas was discharged, Plascencia testified that it was because Respondent gave Ornelas "several opportunities in the course of two months" and during this time she had a total of three performance issues: the Hallin & Herrera incident; an incident where Ornelas did not receive any discipline but where she "backed up into the Oxnard plant;" and the unauthorized deadheading to Moorpark on August 31, which Plascencia characterized as Ornelas being "blatantly insubordinate." (Tr. 2946–2947; GC. 11)

Plascencia testified that she was at home on August 31, as it was a Saturday, when she received a call from Faulkner who told her what had occurred. Plascencia said that Faulkner was reaching out for guidance on how to handle the matter, and she told him to start gathering facts so they could assess the matter on Monday. As to why none of the other drivers were discharged, even though they all deadheaded without permission on August 31, Plascencia said that the other drivers were not terminated because their performance record did not warrant termination. (Tr. 2945, 2948, 2967–2968)

c. Testimony of Jason Faulkner

Regarding his role in the decision to discharge Ornelas, Faulkner testified that his role was to review and evaluate the investigative documentation, the disciplinary history, speak to different parties, and present this information to human resources as the company has a progressive disciplinary policy with certain steps and procedures. While Faulkner said that he did not know who made the final decision to fire Ornelas, he testified that he knew the reasons why she was fired. According to Faulkner, Ornelas was discharged because of "many issues, different work performance issues. There's incidents, there's accidents, there's safety issues, there's work performance issues. There was conduct issues. There's quite a few things that were involved." (Tr. 477) When asked how he knew these items were considered by the person making the final decision to fire Ornelas, Faulkner said it was because "I commit that information to them," meaning human resources. (Tr. 478) (Tr. 472–475, 477–478)

On Tuesday, September 3, Faulkner sent an email to Plascencia, Forgey, and Charlson with a summary of what had occurred, the employees involved, the times they had clocked in at Oxnard, their scheduled start times at Moorpark, and their actual arrival times in Moorpark. In the email Faulkner said that he was "looking at a couple ways of addressing this," including Policy/Procedures and/or Attendance policy," and asked for advice on how to handle the matter. Forgey replied to the group email that same day saying, "would also depend on how call outs were scheduled." (GC. 27) According to Faulkner, Plascencia was the one who told him to fire Ornelas and someone in Human Resources drafted the termination letter which he signed. (Tr. 476–477, 481; GC. 11)

3. Ornelas is fired on September 6

Ornelas went to work the morning of September 6 and found a group of union organizers, including Fabian Leon and Scott Williams, on the sidewalk outside the Oxnard plant. Before clocking in for the day Ornelas walked over to the organizers to say hello. She then clocked in, pre-tripped her truck, and completed her paperwork. As she was doing this, Ornelas saw Faulkner drive into the plant, give a dirty look to the organizers, and make a call on his cell phone. Faulkner then walked into the plant, but walked out soon after and drove past the union organizers again as he left. (Tr. 1021–1022)

At the end of her workday, Ornelas clocked out and was ready to go home when she was stopped by Juan Torres who asked her to go to the conference room to speak with Faulkner. Ornelas walked to the conference room where she found Faulkner waiting with Charlson.

Faulkner handed Ornelas her termination letter and told Ornelas to follow along as he read the letter out loud. The letter, which is signed by Faulkner, reads in pertinent part as follows:

> This letter is to advise you that we have completed our investigation into the happenings on August 31, 2019, in which you were instructed to commence work at 6:29 AM in Moorpark and you did not follow directions. You took it upon yourself to arrive to the Oxnard plant instead and head to Moorpark.
>
> You were suspended on July 10th for insubordination and your actions on August 31st further demonstrates your unwillingness to improve and meet the Company's expectations.
>
> Following a thorough investigation into the events of August 31st, along with an overall review of your performance record, the Company has concluded that your employment with CEMEX is hereby separated, effective today, September 6, 2019.

After Faulkner finished reading the letter, Ornelas said okay and then walked out. She turned in her keys, phone, and tablet to Torres, walked to her car and drove out of the plant. (Tr. 472, 481, 1021–1023, 1171–1172; GC. 11)

As Ornelas drove out of the plant she saw driver Daniel Gonzalez who waved her down. Ornelas stopped and told him that she had been terminated. Ornelas then drove to a park down the road from the plant, where a group of about five Cemex drivers had been meeting; she told her coworkers at the park that she had been fired. Ornelas also texted about 13 Cemex drivers from the Oxnard, Santa Barbara, Simi Valley, and Santa Paula plants, who were on a group chat list, about her termination. She then told Scott Williams at the Union about it as well. (Tr. 1023–1024, 1027–1029, 1107)

B. Analysis

1. The General Counsel's prima facie case

Based upon the same factors discussed above regarding her suspension, the General Counsel has presented sufficient evidence of a prima facie case that Ornelas's discharge was unlawfully motivated. Accordingly, Respondent bears the burden of persuasion to show that it would have discharged Ornelas absent her Section 7 protected conduct. *Consolidated Bus Transit*, 350 NLRB at 1066. Because the five Oxnard based drivers decided to take their trucks and deadhead to Moorpark without authorization, Respondent would have been within its right to fire all five drivers. But here, Ornelas was the only one fired, while the other drivers were suspended. An employer cannot simply present a legitimate reason for its actions. *Rhino Northwest, LLC*, 369 NLRB No. 25, slip op. at 3 (2020). Instead, Cemex must show by a preponderance of the evidence that it would have fired Ornelas notwithstanding her protected activity. For the reasons set forth below, I find Respondent has not done so.

2. Cemex's reliance upon Ornelas's July suspension as a reason for her discharge

Both Forgey and Plascencia referred to the Hallin & Herrera incident as one of the reasons for Ornelas's discharge. However, as set forth above, I have found that Ornelas's July 2019 suspension was unlawful. When an employer "disciplines an employee based on prior discipline that was unlawful, any further and progressive discipline based in whole or in part thereon must itself be unlawful." *The Hays Corp.*, 334 NLRB 48, 50 (2001); *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 787 (8th Cir. 2013) ("An adverse employment decision is unlawful if it relies upon and results from a previous unlawful action."). Because Ornelas's termination was based, in part, upon her July 2019 suspension, which was found to be unlawful, her discharge is similarly unlawful.

The same is true to the extent Respondent relied upon Ornelas's February 2019 discipline for talking with Union representatives as one of the reasons for her discharge. Faulkner's memo regarding this incident was placed in Ornelas's personnel file, and Faulkner testified that Ornelas was fired in part because she had many incidents and performance issues, which he researched and forwarded to human resources. It is reasonable therefore to presume that this discipline was also one of the "multiple violations of performance" that Forgey referenced as a reason for her discharge, as his memo was placed in Ornelas's personnel file and the discipline appears on her disciplinary chart.

3. Disparate treatment supports a finding that Ornelas's discharge was unlawful

Respondent's disparate treatment of Ornelas is evidence that her termination was unlawfully motivated. *Constellium Rolled Prod. Ravenswood, LLC*, 371 NLRB No. 16, slip op. at 4 (2021) (respondent's blatant disparate treatment forecloses the company from establishing its *Wright Line* defense that it would have fired employee absent his protected conduct); *Apex Linen Service, Inc.*, 370 NLRB No. 75, slip op. at 20 (2021) (disparate treatment shows unlawful motive). Five employees participated in the unauthorized deadheading to Moorpark, but only Ornelas was discharged; the others were suspended. While Respondent argues that Ornelas's actions warranted discharge because of her prior disciplinary record, in comparison to the other four drivers, a review of the record shows that is not so.[38]

Although I have found that the Ornelas's suspension for the Hallin & Herrera incident was unlawful, assuming that a discipline was warranted for the July 9 incident, the record shows that Ornelas's unauthorized deadheading to Moorpark would have only been the second performance-based discipline on Ornelas's record during the 12-month period preceding August 31, 2019. The July 9 incident would have been her first and the August 31 incident her second. Plascencia specifically testified that prior disciplines only stay on an employee's record for 12 months. (Tr. 2895, 2981–2982). The evidence shows that other drivers who only had two

[38] The fact that Cemex may have believed some of the other drivers who deadheaded to Moorpark were also union supporters, but were not fired, is not relevant in the analysis of whether Ornelas's discharge was unlawfully motivated. An employer's failure to discharge all union supporters "does not disprove the fact that an employee's discharge is based upon an unlawful discriminatory motive." *NLRB v. Challenge-Cook Bros. of Ohio*, 374 F.2d 147, 152 (6th Cir. 1967); See also *George A. Tomasso Construction Corp.*, 316 NLRB 738, 742 (1995).

performance-based disciplines on their record, and who deadheaded without authorization, were not fired, while Ornelas was terminated.

For example, Agapito Rivera was suspended because he deadheaded to Moorpark on August 31, and the record shows that he engaged in the exact same conduct six weeks later, this time deadheading to the Santa Barbara plant without authorization and arriving over an hour late. (GC. 13) For his second unauthorized deadheading violation, within six weeks after he was suspended for deadheading to Moorpark, Rivera received another suspension, even though Plascencia characterized unauthorized deadheading as blatant insubordination. (Tr. 488, 2977; GC. 13) The fact that Rivera received two suspensions for unauthorized deadheading while Ornelas was discharged the first time she deadheaded without approval is evidence of disparate treatment.

While Respondent argues that Ornelas also received a verbal warning by Faulkner on August 31, 2018, for failing to have her mixer drum turning at full speed resulting in half the load being spilled onto the ground, the preceding 12-month period for Ornelas's August 31, 2019 incident would have started on September 1, 2018, one day after the August 31, 2018 mixer-drum event. Moreover, the evidence shows that Ornelas was never issued a written discipline for what occurred. (Tr. 2906; R. 56) Although Plascencia claimed that Faulkner spoke with Ornelas, giving her an oral verbal warning for the incident, she was not present during their discussion and her testimony is nothing more than self-serving hearsay which is not worthy of credit. Moreover, Plascencia acknowledged that, with roughly 400 drivers, it is a fairly common occurrence for loads of concrete to be thrown away due to driver mistakes. (Tr. 2909) Also, I find it significant that, despite being called by a witness by Respondent, and his extensive testimony, Faulkner was never questioned about this incident or about whether he disciplined Ornelas for what occurred. Therefore I find that, had Faulkner testified about the matter, his testimony would not have supported Respondent's claim that Ornelas received an oral verbal warning because of this incident. *CSH Holdings, LLC*, 365 NLRB No. 68, slip op. at 5 fn. 15 (2017) (where employer failed to present testimony from managers it may be inferred that their testimony would have been adverse to the employer's interests on that issue, and the judge properly drew an adverse inference accordingly). And, because Plascencia testified that she relied upon this incident in determining whether discharge was appropriate (Tr. 2906–2907), this is further evidence of pretext. See *Lord Industries, Inc.*, 207 NLRB 419, 422 (1973) (failure to present discharged employees with copies of written disciplines or tell them that it was contained in their personnel files supports finding of pretext). *Toll Manufacturing Co.*, 341 NLRB 832, 833, 847 (2004) (judge correctly relied on employer's failure to notify worker of warnings as further evidence of unlawful motivation).

Finally, even assuming that Ornelas had been issued two other valid disciplines in the 12-month period before she deadheaded to Moorpark, the evidence shows that driver Daniel Gonzalez also had two performance-based disciplines on his record before he deadheaded to Moorpark with the others, but he was not fired. Gonzalez received a verbal warning on June 1, 2019 for running out of fuel on his way to Simi Valley, causing a one-hour delay in the delivery, and also received a one-day suspension for an incident on June 8, 2019 for severe damage to his truck's tank and electrical system caused by his inattentiveness. Notwithstanding these two previous disciplines, for deadheading to Moorpark Gonzalez received another suspension while

Ornelas was discharged. Accordingly, I find the fact that other drivers who deadheaded to Moorpark on August 31 were suspended, while Ornelas was discharged, is evidence of Respondent's unlawful motive.

4. The reason advanced by Forgey for firing Ornelas is evidence of unlawful motive

Forgey testified that he was the final decisionmaker for the termination and that Ornelas was discharged because of Cemex "had issues with her" and "there were multiple violations of performance. We had performance issues with her." (Tr. 114–115) Specifically, Forgey said that two incidents stood out regarding the decision to fire Ornelas: (1) her stopping to get fuel, instead of fueling up while she was unloaded, and (2) "her refusing to cooperate with an OSHA inspector on a jobsite in regards to safety issues, or safety questions he had." (Tr. 115) According to Forgey, when Ornelas was terminated Cemex had met with her several times, had given her "a lot of opportunities" and the company "had an agreement with her that was kind of [a]. . . [l]ast chance kind of agreement" giving her one more opportunity to pick up her performance. (Tr. 122) Regarding the Moorpark incident, and why Ornelas was the only driver terminated, Forgey said he believed she was the only one fired because it happened after her "last chance agreement" and after Respondent "had given her plenty of opportunities to turn around her performance." (Tr. 123)

Several factors point to Forgey's explanation as being nothing more than pretext. First, there is no credible evidence that Ornelas was given a last chance agreement, or that she violated such an agreement. The evidence shows that Respondent's last chance/return to work agreements are in writing and signed by both the employee and Respondent. (GC. 15) No such agreement was ever introduced into evidence for Ornelas, and she denied ever being offered such an agreement, let alone signing one. (Tr. 1030) Furthermore, Ornelas's termination letter does not mention the existence of any such agreement.[39] (GC. 11) There is also no evidence that Ornelas ever refused to cooperate with an OSHA inspector, as stated by Forgey. Clearly Forgey was referring to the Hallin & Herrera incident. However, it involved someone working for a third-party contractor named "Premier" which Forgey inflated in his testimony to being an OSHA government regulator. I find that Forgey's hyperbole, when the describing this incident, which he relied upon to terminate Ornelas, is further as evidence pretext. *Continental Pet Technologies*, 291 NLRB 290, 308 (1988) (employer's exaggeration of incident, in support of its decision to discharge employee, "is a makeweight added as a pretext to exaggerate the effect" of the employee's conduct.); *United Parcel Service of Ohio*, 321 NLRB 300, 311–312 (1996) (witness's hyperbole detracts from credibility and supports a finding of pretext).

As for Forgey mentioning the incident involving Ornelas stopping for fuel as a reason for her discharge, the record shows that Ornelas was never disciplined for this incident. Respondent's relying upon conduct for which Ornelas was never disciplined is evidence of unlawful motive. *Lord Industries, Inc.*, 207 NLRB at 422; *Toll Manufacturing Co.*, 341 NLRB at 833, 847; *Conley Trucking*, 349 NLRB 308, 324 (2007) (Respondent developed a pretext by "cull[ing] its manager's memory for incidents and shortcomings that could offer a post hoc and legitimate rationale for [employee's] discharge."). Regarding this incident, Ornelas testified that

[39] When Daniel Gonzalez was eventually fired, his termination letter specifically stated that he breached his last chance/return to work agreement. (GC. 15)

she was running out of fuel and called the plant foreman/batchman to inform him that she was not going to be able to make it the jobsite and had no choice but to stop for fuel. (Tr. 1127, 1199–1200) I credit Ornelas's testimony, as it was not rebutted by the Oxnard plant foreman/batchman. Ornelas followed the exact process that Faulkner said drivers are supposed to follow if they find themselves in an emergency situation without fuel. Specifically, Faulkner testified that "if there is an emergency . . . they would contact their plant foreman and let them know that they were going to be stopping." (Tr. 2506) Relying upon an incident in which Ornelas followed Respondent's protocols as a reason to terminate her employment is evidence of unlawful motive.

5. Plascencia's testimony about why Ornelas was fired supports a finding of pretext

Plascencia was the one who drafted Ornelas's termination letter. When asked why Ornelas was discharged, Plascencia testified that it was because Respondent gave Ornelas "several opportunities in the course of two months" and during that time Ornelas had a total of three performance issues: the Hallin & Herrera incident; an incident where Ornelas did not receive any discipline but she "backed up into the Oxnard plant;" and the unauthorized deadheading to Moorpark on August 31, which Plascencia characterized as Ornelas being "blatantly insubordinate." (Tr. 2946–2947; GC. 11)

As with Forgey, Plascencia said that, in deciding to discharge Ornelas, Respondent relied upon an incident for which Ornelas was never disciplined, backing into the Oxnard plant. This is evidence of pretext. *Lord Industries, Inc.*, 207 NLRB at 422; *Toll Manufacturing Co.*, 341 NLRB at 833, 847. And, since it was mentioned by Plascencia as a reason for her discharge, a further review of the incident is warranted.

Respondent's mixer-trucks have a set of two "booster" tires located at the back of the truck, one on each side. These tires are attached to a mechanism that lifts the tires up and down as needed. When the booster tires are down, they lengthening the truck's wheelbase and act as an extra set of tires for stability. When they are not in use, the booster tires are lifted up and rest at the top rear of the mixer-truck's drum. When the trucks are at the bath plant, the booster tires are not in use, and are in the up position. (Tr. 1157; R. 14; U. 19–20)

Ornelas testified that sometime in mid-August 2019, she was backing around the corner of the Oxnard plant office and one of her booster tires scraped a steel beam. Ornelas did not realize that she had hit anything. Juan Torres came out of the office and asked if she had hit the steel beam and Ornelas said no, not realizing that her tire had hit the beam. Torres asked her to lower the booster tires and showed Ornelas a scrape on one of the tires. He also showed Ornelas a scrape on the steel beam which is located on the side of the plant. Torres called a fleet mechanic to inspect Ornelas's booster tire and an incident report was filed. The incident report contains a picture showing scuff marks on the booster tire and what looks to be rubber marks on a steel beam. Neither Torres nor the fleet mechanic testified about this incident. And there was no credible evidence presented that Respondent had to change the booster tire, that Ornelas's truck was otherwise taken out of service, or that any repair work was needed on the steel beam. Ornelas was not given a formal discipline for what occurred. Instead she was coached about

being aware of her surroundings and was scheduled for refresher driver training with a safety champion. (Tr. 1158–1159, 1161, 2934–2935; R. 12)

During the hearing, Respondent tried to introduce an email about this incident through Plascencia, and have her explain why Ornelas was not disciplined. However, the document Respondent attempted to introduce into evidence was incomplete. The email originally contained a statement about the incident, as an attachment, from someone who Plascencia described as a plant foreman named Mike/Michael, but Respondent never offered that statement into evidence. Nor did Respondent ask that the exhibit be put into the rejected exhibit file. (2933–2937)

In its brief, Respondent compared this incident to one where Daniel Gonzalez was disciplined because he damaged his booster fender while backing under the plant to be loaded, causing the "downing of his truck," in support of the company's claim that Ornelas committed three serious acts of misconduct in less than two months, thereby warranting her discharge. (GC. 14) (Cemex. Br. 158, 161, 163) However, there is no credible evidence that Ornelas's truck had to be taken out of service, that repair work was needed on the steel beam, or that the booster tire needed to be replaced. Although the picture quality on the incident report is poor, it appears that the rubber/tire marks on the steel beam and the scrape on the booster tire are merely cosmetic. And while Plascencia testified that Ornelas's tire needed to be replaced, I find this testimony self-serving and not credible. (Tr. 2932–2933) Plascencia was not present at the time of the incident, there is no evidence that she actually looked at the tire, no documentary evidence was introduced showing that the tire was actually replaced, and this testimony was elicited as part of an incomplete exhibit that was never introduced into evidence. I also find it noteworthy that Respondent did not call Torres as a witness about this incident, or introduce into evidence the complete email with the statement from the person Plascencia described as a plant foreman. This is especially noteworthy because Plascencia identified this incident as one of the reasons supporting Ornelas's discharge. Because Torres is an admitted supervisor, and the email with the statement was in Respondent's possession and control, I take an adverse inference that this evidence would not have corroborated Plascencia's testimony about the incident, or Respondent's position as to the consequences of what occurred. *CSH Holdings, LLC*, 365 NLRB No. 68, slip op. at 5 fn. 15 (2017); *People's Transportation Services*, 276 NLRB 169, 223 (1985) (noting that the adverse inference rule does not require "a subpoena frame of reference" but is triggered by an adequate showing that relevant evidence is in existence and in control of one party but that evidence has been withheld).

In short, Ornelas was never disciplined over the booster tire incident and I find the reason no discipline was issued is because none was warranted. I also find it noteworthy that this incident is not specifically listed in Ornelas's termination letter as a reason for her discharge. As with Forgey's testimony about the "fuel incident" it appears that Respondent developed a pretext by "cull[ing] its manager's memory for incidents and shortcomings that could offer a post hoc and legitimate rationale for [Ornelas's] discharge." *Conley Trucking*, 349 NLRB at 324. Respondent's relying upon an incident in which no formal discipline was issued is simply evidence of Cemex's unlawful motive regarding its decision to fire Ornelas.

6. Other incidents where no discipline was issued

Just as both Plascencia and Forgey relied upon incidents where no discipline was issued to justify Ornelas's discharge, in its brief Respondent points to yet more undisciplined incidents to argue that no violation occurred because Ornelas displayed a lengthy pattern of "policy violations, poor performance, and insubordinate misconduct during her employment that was inconsistent with behavior expected by a Cemex employee." (Cemex. Br. at 16–17).

However, upon closer examination, these incidents are suspect as well. For example, in its brief Respondent points to an August 28, 2018 incident where a Chevy Tahoe collided with Ornelas's truck, claiming that Ornelas failed to yield. (Cemex Br. at 163) However, it was the Chevy Tahoe that failed to yield. The evidence shows that Ornelas had her turn signal on and was trying to merge when the Chevy Tahoe attempted to pass Ornelas's truck while she was merging, causing the Tahoe's right-side mirror to hit the back ladder of Ornelas's truck. This was hardly an incident for which Ornelas was at fault. And again, no discipline was ever issued to Ornelas. (Tr. 1118–1120; GC. 17)

Respondent also claims that Ornelas "[r]eported to the wrong jobsite because she failed to look at the delivery address listed on the order invoice;" as another incident of misconduct that demonstrates her discharge was for "repeatedly violating Cemex's policies and procedures." (Cemex Br. at 162) This claim involves load of concrete Ornelas delivered to a company called Clover Construction on June 28, 2019. (R. 41) It was only after Ornelas was suspended pending investigation for what happened at the Hallin & Herrera jobsite that Resendez reported this incident to Faulkner, who in turn reported it to Plascencia. (R. 41) However, as with the other events for which no discipline was issued, the record evidence shows that no misconduct occurred.

While Respondent claimed that Ornelas went to the wrong address at the wrong jobsite, the evidence shows that the delivery ticket did not contain an address, but instead listed the cross streets closest to the location of the project. And the project name listed on the delivery ticket simply said, "Various Porter Ranch." (R. 41) Faulkner admitted there was no address on the delivery ticket because the jobsite did not have a physical street address as it was a new construction project and they "were actually building the location." (Tr. 2456–2457) Clover Construction had two different new construction projects in the area, which were up the street from each other. Ornelas was not told there were two jobs going on at this location by the batchman, which was against the normal practice when two projects are occurring in the same location. Once she reached the area, realizing there was a problem, Ornelas called a coworker who was delivering the first load of concrete to the project, and he told Ornelas there were two jobs going on in the area. Ornelas drove down the block to the correct location and arrived while her coworker was still in the process of pouring out his load of concrete. Ornelas was on time, the customer was not impacted whatsoever, and she was not disciplined for the incident. (Tr. 1069–1070, 2452–2453, 2457, 2461; R. 41)

Rather than supporting Respondent's defense that Ornelas engaged in a pattern of misconduct, I find that these incidents show that Respondent's supervisors and managers were closely watching Ornelas and forwarding any incident whatsoever to their superiors trying to

find a misstep that would subject her to further discipline. This is additional evidence of pretext. Cf. *Station Casinos, LLC*, 358 NLRB 1556, 1559 (2012) (supervisor's unsuccessful attempt to discriminatorily discipline employee based on the pretext of poor work performance evidence of animus).

"The Act protects both stellar and poor employees, and those in between, from unlawfully motivated discharge." *Conley Trucking*, 349 NLRB 308, 324 (2007), enfd. 520 F.3d 629 (6th Cir. 2008) Regarding Ornelas, I find that Respondent has not met its burden to show, by a preponderance of the evidence, that she would have been terminated notwithstanding her union activities protected by Section 7 of the Act. Accordingly, I find that Respondent violated Section 8(a)(1) and (3) of the Act by discharging Ornelas on September 6, 2019.

VI. REQUEST FOR A BARGAINING ORDER

Violations of the Act or objectionable conduct that occur during the critical election period "a fortiori" warrant setting aside an election unless the conduct is "so de minimis" that it is "virtually impossible to conclude" the actions could have affected the results. *Airstream, Inc.*, 304 NLRB 151, 152 (1991) (internal quotations omitted). Here, the unfair labor practices and objectionable conduct that occurred between the filing of the petition on December 3, 2018 and the March 7, 2019 election are hardly de minimis. Multiple violations occurred, including threats, surveillance, and interrogation, some of which were committed by high level management officials. Respondent's conduct certainly warrants setting aside the election. The question remains as to whether a *Gissel* bargaining order is warranted as argued by the General Counsel and the Union. In determining whether a bargaining order is warranted, Cemex's "course of misconduct, both before and after the election" must be reviewed to determine whether the holding of a fair election in the future is possible or instead whether the "employees wishes are better gauged by old card majorities than by new elections." *Overnite Transportation Co.*, 329 NLRB 990, 990 (1999); see also *Alumbaugh Coal Corp.*, 247 NLRB 895, 914 fn. 41 (1980), enfd. in pert. part 635 F.2d 1380 (8th Cir. 1980) (In determining whether a Gissel bargaining order is appropriate, the Board reviews all the unfair labor practices committed by the respondent, not just those committed during the critical period.).

A. The Board's authority to issue bargaining orders

In *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 596–597 (1969), the Supreme Court reaffirmed a principle that had been in place "[a]lmost from the inception of the Act, . . . that a union did not have to be certified as a winner of a Board election to invoke a bargaining obligation" and that majority status could be established by other means, including by the "possession of cards signed by a majority of employees authorizing the union to represent them for collective bargaining purposes." *Gissel* involved a review of four different cases from two different Circuit Courts. Three cases arose from the Fourth Circuit, *NLRB v. Gissel Packing Co.*, 398 F.2d 336 (4th Cir. 1968); *NLRB v. Heck's, Inc.*, 398 F.2d 337 (4th Cir. 1968); and *General Steel Products v. NLRB*, 398 F.2d 339 (4th Cir. 1968), along with one case from the First Circuit, *NLRB v. Sinclair Co.*, 397 F.2d 157 (1st Cir. 1968). In each case the Board had issued a bargaining order based upon valid authorization cards collected by the union. *Gissel*, 395 U.S. at 583–584, 587–589.

Regarding the cases arising out of the Fourth Circuit, the Board found all three employers had engaged in various 8(a)(1) violations: in *Gissel* for interrogating employees, threatening them with discharge, and promising benefits; in *Heck's* for interrogation, threats, creating the appearance of surveillance, and offering benefits; and in *General Steel*, for interrogation and threats of reprisals, including the threat of discharge. Id. at 583. Additionally, in *Gissel* and *Heck's* the company had wrongfully discharged employees (two in *Gissel* and one in *Heck's*). In *Sinclair Co.*, which arose out of the First Circuit, the Board found that the employer threatened employees in violation of Section 8(a)(1) of the Act by telling them the company could close the plant or transfer operations, with the resulting loss of employment, if they unionized. Id. at 588–589. In *Gissel* and *Heck's* an election was never held, while in *General Steel* and *Sinclair Co.*, the election was held but won by the employer. Id. at 581–582, 589. The First Circuit enforced the Board's issuance of a bargaining order, but the Fourth Circuit did not, taking the position that the 1947 Taft-Hartley amendments to the Act withdrew authority from the Board to order an employer to bargain on the basis of a card majority. Id. at 585, 589–590.

In *Gissel,* the Supreme Court reviewed the Board's treatment of authorization cards in three separate phases, "from its early practice" up to the position of the Board in in oral arguments before the Court. Id. at 592. The Supreme Court noted that the "traditional approach utilized by the Board for many years has been known as the *Joy Silk* doctrine." Id. (citing *Joy Silk Mills, Inc.*, 85 NLRB 1263 (1949), enfd. 185 F.2d. 732 (1950)). Under this doctrine, when a union claimed representation based upon a majority of authorization cards an employer could lawfully refuse to bargain "if he had a 'good faith doubt' as to the union's majority status; instead of bargaining, he could insist that the union seek an election in order to test out his doubts." Id. Under *Joy Silk*, the Board could issue a bargaining order if the employer lacked a good faith doubt based upon: (1) independent unfair labor practices, showing that the employer was simply seeking time to dissipate the union's majority; or (2) when the employer had come forward with no reasons for entertaining any doubt of the union's majority. Id. at 592–593. Eventually, the Board modified the *Joy Silk* doctrine, as described in *Aaron Brothers*, 158 NLRB 1077 (1966), by shifting the burden to the General Counsel to show the employer's bad faith. In this phase of the Board's approach to the use of authorization cards, the employer no longer needed to come forward with reasons for rejecting a bargaining demand and not every unfair labor practice automatically resulted in a finding of bad faith. Instead "the Board implied that it would find bad faith only if the unfair labor practice was serious enough to have a tendency to dissipate the union's majority." *Gissel,* 395 U.S. at 592. Finally, at oral argument before the Supreme Court in *Gissel*, the "Board announced . . . that it had virtually abandoned the *Joy Silk* doctrine altogether." Id. at 594. Instead, the Board told the Court that an employer's good faith doubt as to majority support was "largely irrelevant and the key to the issuance of a bargaining order is the commission of serious unfair labor practices that interfere with the election process and tend to preclude the holding of a fair election." Id.

Ultimately, the Supreme Court rejected the contention that the 1947 Taft Hartley amendments precluded a union from establishing a bargaining obligation through means other than a Board election, including authorization cards. *Gissel,* 395 U.S. at 595–596. While a Board election is the "most commonly traveled route for a union to obtain recognition" and is generally the preferred method of ascertaining majority support, the Court noted that a "union is

not limited to a Board election" to establish a bargaining obligation. Id. at 596, 602. Indeed, the Court remarked that it was recognized almost from the inception of the Act that "a union did not have to be certified as the winner of a Board election to invoke a bargaining obligation; it could establish majority status by other means" including through cards signed by a majority of employees. Id. at 596–597. The *Gissel* Court confirmed that "[w]e have consistently accepted this interpretation of the Wagner Act and the present Act, particularly as to the use of authorization cards. Id. (citing *NLRB v. Bradford Dyeing Assn.*, 310 U.S. 318, 339–340 (1940); *Franks Bros. Co. v. NLRB*, 321 U.S. 702 (1944); *United Mine Workers v. Arkansas Flooring Co.*, 351 U.S. 62 (1956)).

Regarding a union's majority status, the Supreme Court stated that it has long held the Board can issue a bargaining order, even without first requiring the union to show that it has been able to maintain its majority status. *Gissel,* 395 U.S. at 610 (citing *NLRB v. Katz*, 369 U.S. 736, 748, n 16 (1962); *NLRB v. P. Lorillard Co.*, 314 U.S. 512 (1942)). And this authority extends to situations where the union once possessed a card majority but only represents "a minority of employees when the bargaining order is entered." Id. (citing *Franks Bros. Co. v. NLRB*, 321 U.S. 702 (1944)). The Court noted that even the Fourth Circuit acknowledged the Board's policy of imposing a bargaining order without looking into the union's majority status "in 'exceptional' cases marked by 'outrageous' and 'pervasive' unfair labor practices," describing such situations as "Category I" cases. Id. at 613–614. Therefore, the *Gissel* Court remarked that the only effect of its holding was to approve the Board's use of a "bargaining order in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes," and where the union, at one point, had a majority; these are known generally as Category II cases. Id. at 614; see also *Research Federal Credit Union*, 327 NLRB 1051, fn. 3 (1999) (Board describes "Category I" and "Category II" cases under *Gissel*). In fashioning a remedy for Category II cases, the Supreme Court noted that "the Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future." Id. If the possibility of erasing the effects of the past practices, and ensuring a fair election through the use of traditional remedies is slight, and "employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue." Id. at 614–615.

The *Gissel* Court affirmed the judgement of the First Circuit, approving the bargaining order in *NLRB v. Sinclair Oil*, and reversed the Fourth Circuit's decisions in *NLRB v. Gissel Packing Co.*, *NLRB v. Heck's, Inc.*, and *General Steel Products v. NLRB*, "insofar as they decline enforcement of the Board's orders to bargain" and remanded those cases with directions "to remand to the Board for further proceedings." Id. at 620. On remand, the Board found the unfair labor practices in *Gissel*, *Heck's*, and *General Steel* sufficient to warrant a bargaining order. *Gissel Packing Co.*, 180 NLRB 54 (1969); *Heck's Inc.*, 180 NLRB 430 (1969); *General Steel Products, Inc.*, 180 NLRB 56 (1969). On appeal, the Fourth Circuit further remanded *General Steel* back to the Board for a hearing on intervening events, including events which were not relevant at the time of the original hearing, but which now had become relevant under the Supreme Court's decision in *Gissel*. *General Steel Products, Inc. v. NLRB*, 445 F.2d 1350, 1355–1356 (4th Cir. 1971). Upon remand, the Board found that a bargaining order was no longer warranted, and ordered a new election, as the ownership and top management of the

company had completely changed, there was virtually a complete turnover among the operating supervisors, and "an almost completely new complement" of employees. *General Steel Products, Inc.*, 199 NLRB 859–860 (1972).

B. The Union's card majority

Here, to prove that a majority of employees had authorized the Teamsters to bargain on their behalf, the General Counsel relies upon authorization cards signed by the Las Vegas and Southern California drivers.[40] (GC. 16) These cards were signed in October and November 2018, and are "single purpose cards, stating clearly and unambiguously" that the signer designates the union as his or her representative." *Gissel Packing Co.*, 395 U.S. at 606.

The parties stipulated that 97 authorization cards contained the authentic signatures of the named employees. For 72 of the cards, the General Counsel presented testimony from employees who either signed a card, or who solicited a coworkers signature on a card and watched them sign it. Finally, I compared employee signatures on 58 authorization cards with comparator signatures on W-4 forms from Respondent's business records and determined the comparator evidence was sufficient to establish that 38 of these cards were signed by the employee in question.[41] *Traction Wholesale Center Co., Inc.*, 328 NLRB 1058, 1059 (1999), enfd. 216 F.3d 92, 105 (DC. Cir. 2000) ("A Board judge . . may authenticate an authorization card by comparing the card signature with an authenticated specimen."). In total, the evidence shows that, by the end of November 2018, the Union possessed authorization cards from at least 207 of Respondent's 366 Unit employees. This is equivalent to 57% of the Unit and well over the 184 cards needed to establish a majority.[42] (Tr. 1204, 1385–1390, 1495–1500, 1624- 1631, 1708–1710, 1429–1435, 1309, 1565–1569, 1810–1825, 1916–1922; JX. 12; GC. 16, 28; ALJ. 5)

C. Severity of Cemex's violations

In determining whether Respondent's unfair labor practices preclude a fair election from occurring in the future, and warrant a bargaining order, I note that Respondent has committed various hallmark violations. Hallmark violations generally include the threat of plant closure, threat of job loss, the grant of benefits, and the demotion or discharge of union adherents. *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 213 (2d Cir. 1980). These violations can justify a finding, without extensive explanation, that they will have a lasting negative and coercive effect on the workforce and remain in the memory of employees for a long time. Id; see also *NLRB v. General Wood Preserving Co.*, 905 F.2d 803, 822 (4th Cir. 1990). Here, the hallmark violations include Ornelas's discharge, along with the threats of job loss and plant closure by Dickson and Santana. The violations committed by Cemex are at least as severe, if not more severe, than those found warranting a bargaining order in the cases that made up *NLRB v. Gissel Packing Co.,*

[40] All parties have analyzed the facts presented under a *Gissel* Category II standard. (GC. Br. at 97–99; Union Br. at 65–74; Cemex Br. at 171–187)

[41] At hearing I ruled that 39 cards matched the comparator evidence. But, the card for J. Estrada was already part of the parties' stipulation as being authentic, and is therefore not counted as part of the signature review. (JX. 12)

[42] While Ibrahim Rida told the 11 drivers from whom he solicited authorization cards that they were for a "vote," this does preclude those cards from being included, as he did not say that securing an election was the "only" purpose for the cards. *Duthler, Ben, Inc.*, 157 NLRB 69, 80 (1966), enfd. 395 F.2d 28 (6th Cir. 1968). Even if they were excluded, the remaining 196 cards possessed by the Union still constitutes a majority (54%) of the Unit.

395 U.S. 575 (1969). For example, the Court in *Gissel* affirmed the First Circuit's bargaining order in *NLRB v. Sinclair Co.*, 397 F.2d 157 (1st Cir. 1968), where the employer violated Section 8(a)(1) by threatening employees that, if they unionized, the plant would possibly close and production transferred, with the resulting loss of employment. See *Sinclair Co.*, 164 NLRB 261 (1967). Also, on remand, a bargaining order issued in *Gissel Packing Co.* 180 NLRB 54 (1969), where the employer interrogated employees, threatened them with discharge, promised benefits, and fired two union supporters. And, a bargaining order also issued in *Heck's Inc.*, 180 NLRB 430 (1969), where the violations included interrogation, threats, creating the appearance of surveillance, offering benefits for opposing the Union, and discharging one union supporter.

Regarding the types of violations that support a bargaining order, an early commentator analyzing *Gissel* and its progeny summarized it best by saying "[i]f during the course of an organizing campaign the employer commits compound unfair labor practices (i.e., multiple violations of § 8(a) (1) or a combination of §§ 8(a) (1) and (3) violations), and if there are no substantial mitigating factors, the Board will issue an order requiring the employer to bargain with the union upon request." Daniel M. Carson, *The Gissel Doctrine: When a Bargaining Order Will Issue*, 41 FORDHAM L. REV. 85, 114 (1972). Here, the unlawful discharge of Ornelas, the threats of job loss and plant closure, along with the other unfair labor practices committed by Cemex, are certainly severe enough to warrant a bargaining order. The only question is whether substantial mitigating factors exist that render a bargaining order unnecessary.

D. Mitigating factors.

1. Passage of time

Respondent argues that the passage of time since the unfair labor practices were committed would make a bargaining order unenforceable. (Cemex. Br. at 185) However, "the Board's established practice is to evaluate the appropriateness of a *Gissel* bargaining order as of the time that the unfair labor practices occurred; changed circumstances following the commission of the violations are generally not considered. *Milum Textile Services Co.*, 357 NLRB 2047, 2056 (2011).

Also, the time line here is not necessarily unusual, as Courts have enforced bargaining orders where a comparable time lag has occurred. For example, the Board issued a bargaining order *Evergreen America Corp.*, which was enforced by the Fourth Circuit, even though four years had elapsed since the commission of the employer's unfair labor practices. 348 NLRB 178, 182 (2006), enfd. 531 F. 321 (4th Cir. 2008). In *NLRB v. Intersweet Inc.*, 125 F.3d 1064, 1069 (7th Cir. 1997), the Seventh Circuit enforced a bargaining order even though three years had passed since the unfair labor practices occurred and the Board's order issued. And in *Parts Depot, Inc. v. NLRB*, 24 Fed. Appx. 1 (D.C. Cir. 2001) the DC Circuit enforced a bargaining order when the unfair labor practices occurred six years before the Board issued its order. Here, less than three years have passed since Respondent discharged Ornelas. Also, at least part of the delay in this matter can be attributed to the COVID-19 pandemic, as the Complaint issued on April 30, 2020, at a time when live hearings were cancelled for a number of months while the Board transitioned to videoconference hearings due to the compelling circumstances caused by the pandemic. Finally, the Ninth Circuit, which covers both California and Nevada, does not

consider changed circumstances or the passage of time, noting that adhering to this standard "prevents employers from intentionally prolonging Board proceedings in order to frustrate the issuance of bargaining orders." *NLRB v. Bakers of Paris, Inc.*, 929 F.2d 1427, 1448 (9th Cir. 1991). The passage of time, while regrettable, "does not detract from the necessity for restoring the status quo ante regarding the employees' desires for union representation that the Respondent dissipated through unfair labor practices." *Cogburn Healthcare Center, Inc.*, 342 NLRB 98, 99 (2004) (internal quotation omitted). Accordingly, I find that the passage of time does not mitigate against the issuance of a bargaining order.

2. Employee turnover

Respondent asserts that employee turnover renders a bargaining order inappropriate. According to Cemex, of the 366 eligible voters, only 265 remained employed by the company at the time of hearing. Also, Respondent claims that, since the election, the company has hired additional drivers so that the bargaining unit has now increased to 397 drivers. (Cemex. Br. at 185–186)

However, as previously noted, the Board assesses the necessity of a bargaining order as of the time of the respondent's unfair labor practices, and has not considered subsequent employee turnover as a factor, as doing so would "reward, rather than deter, an employer who engaged in unlawful conduct during an organizing campaign." *Electro-Voice, Inc.*, 321 NLRB 444, 444 (1996). And it seems that the Supreme Court has long ago endorsed the Board's approach. *Franks Brothers Co. v. NLRB*, 321 U.S. 702, 703 (1944). In *Frank Brothers*, 45 of the employer's 80 clothing factory employees designated the union as their bargaining representative, and the Board issued a bargaining order. The employer argued the bargaining order was improper, because 13 of the union's supporters had been replaced with new employees, leaving the union with only 31 supporters, which was less than a majority. The Board concluded the Union's lack of majority was not determinative regarding the proper remedy, and this finding was affirmed by the Supreme Court which noted that the "Board's study of this problem has led it to conclude that . . . a requirement that union membership be kept intact during delays incident to hearings would result in permitting employers to profit from their own wrongful refusal to bargain." Id. at 704. "And, 'It is for the Board not the courts to determine how the effect of prior unfair labor practices may be expunged.'" Id. (quoting *Machinists v. NLRB,* 311 U.S. 72, 82 (1940)). Employee turnover does not mitigate against the issuance of a bargaining order.

Notwithstanding, even considering Cemex's arguments about employee turnover, the Board presumes that newly hired employees will support the union in the same ratio as the employees they replace. *Alexander Linn Hospital Association*, 288 NLRB 103, 108 (1988) (citing *Laystrom Manufacturing Co.*, 151 NLRB 1482 (1965); *Mimbres Memorial Hospital*, , 342 NLRB 398, 403 (2004); see also *Glover Bottled Gas Corp.*, 292 NLRB 873, 886 (1989) (Board finds "no reason to believe that as a result of the unit expanding, a majority of employees no longer wished to be represented by the Union."). There is no reason this presumption should be any different because employees expressed their desire to be represented by a union through authorization cards. *Gissel Packing Co.*, 395 U.S. at 579 (legitimate authorization cards obtained from a majority of employees serves as a valid alternate route to majority status). And this

presumption has not been rebutted by Respondent. Applying the presumption here, of the 132 newly hired employees, it can be presumed that 57% (75 employees) would support the Union. A review of the employee list submitted by Respondent shows that, of the 397 drivers listed, 143 had originally signed valid authorization cards. (R. 54) Therefore, it can be presumed that 218 employees (143 existing employees and 75 new employees), which is a majority of the expanded Unit, still support the Union.

3. Management turnover

I find that management turnover does not mitigate against the issuance of a bargaining order. It is true that Forgey no longer works for Cemex, and Dickson has moved to Arizona. However, Turner, Nunez, Ponce, Faulkner, and Charlson all continue to work for Respondent, as does Plascencia. The ownership of the company has not changed, the general management structure is still in place, and the majority of the various plant foreman/batchmen are still employed by the company. Moreover, Plascencia still oversees human resources and the "steering committee" controlling Cemex's response to the organizing drive is still in place, albeit without Forgey. This is not a situation, as was in *General Steel Products, Inc.*, 199 NLRB 859, 867 (1972), where changed circumstances mitigated against issuing a bargaining order because the ownership of the company had completely changed, all the top management had changed, virtually all operating supervisors were replaced, and almost all the employees were new.

4. Dissemination

The extent of dissemination of the unfair labor practices throughout the bargaining unit is a is a factor to consider in determining whether a bargaining order is appropriate. *Cardinal Home Products, Inc.*, 338 NLRB 1004, 1010–11 (2003) ("The Board considers the extent of the dissemination of serious unfair labor practices to employees not personally affected by them, in determining whether the unlawful conduct created a 'legacy of coercion' that was likely to have poisoned the atmosphere in which any new election would take place."). Respondent argues that the alleged unfair labor practices herein were not disseminated beyond a small number of drivers involved in each incident, and because of the size and scope of the Unit, a bargaining order is unwarranted. The Union and the General Counsel on the other hand claim that the unfair labor practices, particularly Respondent's threats and Ornelas's discharge, were disseminated widely.

(a) Dissemination of the 8(a)(1) violations

The evidence shows that, at the time of the election, Respondent had around 325 drivers based in Southern California and about 40 in Nevada. Other than the appearance of the security guards during the election timeframe, which affected every employee in Southern California and Nevada, the unfair labor practices pertaining to employees in Nevada involve the various threats made by Dickson, and his directives that employees remove their union stickers. Dickson's threats that employees would be fired, and Cemex would close the business if they unionized, are very serious violations. That being said, these violations occurred during conversations between Dickson and either one or two other employees. There is limited evidence that these violations were disseminated to other drivers in Las Vegas, and no evidence that Southern California drivers were aware of them.

As for the violations occurring in Southern California, the number of employees affected was certainly greater than what occurred in Las Vegas. But again, other than the security guards stationed at the plants, none of the violations involved all of the Southern California drivers.

The most serious 8(a)(1) violations occurring in Southern California include: (1) Forgey's statements to Oxnard employees about, among other things, Cemex not being able to give out wage increases because of the union, along with management being able to open and close plants at will even if employees unionized; and (2) Santana's threats that Cemex can close its ready-mix operations if employees voted in the union. It appears that all of Oxnard's fourteen drivers heard Forgey's threats, as he testified that he held two meetings for Oxnard drivers with half of the employees in each meeting. That being said, there is little evidence that these statements were disseminated to employees outside of Oxnard.

Regarding the threats made by Santana during a meeting with employees at the Perris plant, it is unclear exactly how many employees were present during this meeting. Flores, who was assigned to work out of the Temecula plant, testified that "a lot of drivers" were present, but could not specifically remember how many. (Tr. 1370) As for Santana, he testified that he conducted meetings throughout the Inland Empire during the campaign, and specifically mentioned group meetings with employees in Fontana, Perris, and maybe Lytle Creek/Rialto. (Tr. 3037-38, 3063)

The voter list shows that a total of 84 drivers were assigned to the following six plants in the Inland Empire: Corona (7 drivers); Temecula (11 drivers); Perris (20 drivers); Fontana (11 drivers); Redlands (14 drivers); and Lytle Creek/Rialto (21 drivers). The management structure for the Inland Empire at the time had Andrew Patino serving as the plant superintendent overseeing the Corona, Temecula, and Perris plants in the South, and Gary Garcia as the plant superintendent overseeing the Fontana, Redlands, and Lytle Creek/Rialto in the North. (Tr. 273, 2594, 2247; JX. 9)

Because Flores, who was a Temecula based driver, attended a meeting at the Perris plant where "a lot of drivers" were present, along with the management structure at the time, with Inland Empire drivers split into North and South plants, I believe it is reasonable to presume that at least the 11 Temecula and 20 Perris drivers were dispatched to attend the meeting where Santana made his threats, and most likely the 7 Corona drivers were there as well. Again, however, there is little evidence that Santana's threats were disseminated to other employees outside of the three Inland Empire South plants.

(b) Dissemination of Ornelas's discharge

Regarding Ornelas, the voting list shows that 39 drivers were assigned to the Ventura County plants: Moorpark (9 drivers); Simi Valley (7 drivers); Santa Paula (5 drivers); Santa Barbara (4 drivers); and Oxnard (14 drivers). Certainly the 14 Oxnard drivers knew about Ornelas's discharge as she worked with them every day. And, because these drivers would deadhead to the other Ventura County plants, along with the fact that Ornelas was the only female driver in Ventura County, I believe the evidence supports a finding that her discharge was

known throughout the Ventura County plants. The fact that Ornelas told a group chat of 13 drivers, who worked out of the Oxnard, Santa Barbara, Santa Paula, and Simi Valley plants about her firing, and also told another group of drivers at a nearby park about her discharge, further supports this finding. (Tr. 1208–1210; JX. 9)

There is also evidence that at least some drivers at plants outside of Ventura County likely learned about Ornelas's discharge. For example, Scott Williams testified that he told about 20–25 drivers about Ornelas's termination, and said that just about every driver he spoke with asked him about Ornelas getting fired. (Tr. 927–928; 938–940). That being said, the evidence is limited regarding the dissemination of her discharge to the other Southern California districts and virtually nonexistent regarding drivers in Las Vegas knowing about her discharge.

5. The appropriate remedy

Respondent argues that a bargaining order is unwarranted, as it is an "extraordinary remedy." (Cemex. Br. at 170–171) However, Cemex committed extraordinary violations. Firing an employee is the "capital punishment of the workplace" and has "a long lasting coercive impact on the workforce" sharply demonstrating the employer's power over employees. *White Plains Lincoln Mercury*, 288 NLRB 1133, 1140 (1988). The Board has long held that an unlawful discharge "is one of the most flagrant and severe acts an employer can take to dissuade employees" from unionizing. *Groves Truck & Trailer*, 281 NLRB 1194, 1196 (1986). Similarly, "[t]hreats to eliminate the employees' source of livelihood have a devastating and lingering effect on employees, an effect that most effectively can be remedied by an order to bargain." *White Plains Lincoln Mercury*, 288 NLRB at 1140. Extraordinary violations occurred here; nobody should lose their job, or fear losing their job, simply because they want a union in their workplace.

Ultimately however, the fact the unfair labor practices did not affect a substantial percentage of the overall Unit weighs against the imposition of a bargaining order.[43] Cf. *Cogburn Health Center*, 335 NLRB 1397, 1399 (2001) (the possibility of holding a fair election decreases when a substantial percentage of employees in the bargaining unit are directly affected by an employer's serious unfair labor practices). Other than the security guards patrolling the plants, the vast majority of the 40 Las Vegas drivers were not impacted by Respondent's unfair labor practices, which consisted of Dickson's statements to a handful of drivers. The same is true regarding the approximately 49 drivers working in San Diego County and the 58 drivers in Orange County, who do not appear to have been substantially impacted by Respondent's unlawful conduct. And, while surveillance occurred at the Inglewood plant on one occasion, it is unclear exactly how many of Inglewood's 39 drivers were directly affected, and no evidence that this violation was widely disseminated to the approximately 63 drivers working in the other Los Angeles County plants. Also militating against a bargaining order is the lack of evidence that Ornelas's discharge was disseminated to employees in Las Vegas, or that the threats made by

[43] Regarding unfair labor practices affecting the entire Unit, I am mindful of the statements made in the 25th hour videos, particularly what was said by Hill to Las Vegas drivers, and the context in which these statements were made. See footnote 5, supra. (citing *Desert Aggregates*, 340 NLRB 289 (2003); *Lutheran Home of NW Indiana, Inc.*, 315 NLRB 103 (1994); and *Wake Electric Membership Corp.*, 338 NLRB 298 (2002)). However, neither the General Counsel nor the Union point to these statements as supporting a *Gissel* remedy.

Santana and Forgey were disseminated to employees outside of Ventura County or the Inland Empire. Cf. *Cardinal Home Products, Inc.*, 338 NLRB at 1010. Accordingly, I decline to recommend that a *Gissel* bargaining order issue.

Instead, because Cemex's "unfair labor practices are such that they are likely to have a continuing coercive effect on the free exercise by employees of their Section 7 rights long after the violations have occurred," I recommend that additional remedial action be ordered to "dissipate as much as possible the lingering atmosphere of fear created by Respondent's unlawful conduct and to insure" employees will "be able to voice a free choice" when a re-run election occurs. *Haddon House Food Products, Inc.,* 242 NLRB 1057, 1058–59 (1979) enfd. in pert. part, 640 F.2d 392 (D.C. Cir. 1981), cert. denied 454 U.S. 827 (1981). Specifically, I recommend that, in addition to the posting of the redial notice to employees, and as further set forth in the Order section of this decision, Cemex shall: (1) convene a meeting at its various facilities where the notice shall be read aloud to all drivers in the Unit by a Board Agent, or if Respondent desires by a responsible management official in the presence of a Board Agent, and in the presence of a representative of the Union, if they wish to attend; (2) upon request, grant the Union reasonable access to company bulletin boards and all places where notices to employees are customarily posted; (3) upon request, grant the Union reasonable access to Respondent's plants in nonwork areas during employees' nonwork time; (4) supply the Union, upon request made within 1 year of the date of the Board's Decision and Order, the names and addresses of its current employees in the Unit; (5) give notice of, and equal time and facilities for the Union to respond to, any address made by Respondent (or its agents) to its employees on the question of union representation; and (6) afford the Union the right to deliver a 30-minute speech to employees on working time prior to any Board election that is scheduled in which the Union is a participant. Provisions (2), (3), (5), and (6), shall apply for a period of 2 years from the date of the posting of the notice provided by the Order herein or until the Regional Director has issued an appropriate certification following a fair and free election, whichever comes first. Id. at 1060.

Finally, Respondent's assertion that special remedies, like union access to employees and bulletin boards, are punitive is misplaced. (Cemex. Br. at 187–188) Indeed, regarding union access, the Second Circuit has said that providing a union with access to employees is a "traditional remedy," noting that where an employer's misconduct has tainted a prior union election by adversely affecting the employees' freedom of choice, the "traditional remedy" is to "(1) vacation the election, (2) enjoin the employer from engaging in such misbehavior," (3) require the employer to post "contrition notices" to "employees disavowing any future interference," and (4) direct the employer "to give union representatives reasonable access to the employees." *Jamaica Towing, Inc.*, 632 F.2d at 212. Here, the remedies ordered are not punitive but remedial and made to "dissipate the lingering coercive effects created by Respondent's unfair labor practices and to aid in creating an atmosphere free of restraint and coercion so that we will be able to conduct a new election in which we can place some confidence." *United Dairy Farmers Co-Op. Association*, 242 NLRB 1026, 1029 (1979); see also *Teamsters Local 115 v. NLRB*, 640 F.2d 392, 400 (D.C. Cir. 1981).

CONCLUSIONS OF LAW

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

2. The International Brotherhood of Teamsters (Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees constitute an appropriate unit for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> INCLUDED: All full-time and regular part-time ready-mix drivers, plant operators II who regularly operate ready-mix trucks, and driver trainers employed by CEMEX Construction Materials Pacific, LLC at its ready-mix facilities in Southern California and Southern Nevada, including its plants in Las Vegas, Nevada and Compton, Corona, Escondido, Fontana, Hollywood, Irvine, Inglewood, Los Angeles, Moorpark, Oceanside, Orange, Oxnard, Perris, Rialto, Redlands, San Diego, San Juan Capistrano, Santa Barbara, Santa Paula, Simi Valley, Temecula, and Walnut, California.
>
> EXCLUDED: All plant foremen, batchmen, dispatchers, yardmen, senior driver trainers/safety champions, fleet mechanics (I and II), plant maintenance (I and II), quality control representatives, office clerical employees, professional employees, guards and supervisors as defined by the Act.[44]

4. By engaging in the following conduct, Respondent has violated Section 8(a)(1) of the Act:

(a) Threatening employees that they could be disciplined or fired for having union stickers on their hardhats;

(b) Threatening employees with termination, reduced hours, or loss of benefits, if they unionized;

(c) Instructing employees to remove union stickers from their hardhats;

(d) Instructing employees to not speak with union representatives;

(e) Threatening employees by inviting them to quit because they engaged in union activities;

(f) Threatening employees with plant closure if they unionized;

[44] At the hearing the Union and Respondent stipulated to this unit description, which makes minor corrections to the wording of the unit found appropriate by the Regional Director in Case 28-RC-232059 but does not add or subtract from the unit any job classifications, plant locations, or employees eligible to vote. (JX. 12) The General Counsel has adopted the parties' stipulation as to the wording of the appropriate unit. (GC. Br. at 95–96)

(g) Threatening employees by telling them it would be futile to unionize;

(h) Interrogating employees about their union activities;

(i) Engaging in surveillance of employee union activities;

(j) Creating the impression that employee union activities are under surveillance;

(k) Threatening employees by telling them that their work opportunities will be limited if they unionized;

(l) Blaming the union for delayed wage increases;

(m) Threatening employees by telling them that wage increases would possibly be frozen for years if they unionized;

(n) Threatening employees by implying that employees who participate in a strike are not entitled to immediate reinstatement upon their unconditional offer to return to work, regardless of the type of strike or circumstances;

(o) Threatening employees that, if they unionized, they would lose their harmonious relationship with management, lose their right to speak directly with management concerning work-related problems, and lose the ability to have management help them;

(p) Threatening employees by telling them they would not be able to learn new skills and their ability to grow with the company would be curtailed if they unionized;

(q) Prohibiting employees from speaking with union organizers;

(r) Disciplining employees for violating the prohibition against speaking with union organizers;

(s) Promising employees benefits, including a requested transfer, if they voted against the union;

(t) Threatening employees by implying they would no longer be able to get off work early if they unionized

(u) Posting security guards at facilities in the weeks leading up to the election, and on election day, to intimidate employees because they engaged in union activities;

5. By suspending and discharging Diana Ornelas because she engaged in union activities protected by Section 7 of the Act Respondent has violated Section 8(a)(3) of the Act.

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

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act. Having found that Respondent violated Sections 8(a)(1) and (3) of the Act by suspending and discharging Diana Ornelas, I shall order Respondent to reinstate her and make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her.

Respondent shall compensate Diana Ornelas for any adverse tax consequences of receiving a lump–sum backpay award in accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB 101 (2014). Respondent shall also compensate Diana Ornelas for her search–for–work and interim employment expenses regardless of whether those expenses exceed interim earnings. *King Soopers, Inc.,* 364 NLRB No. 93 (2016). Backpay, search–for–work, and interim employment expenses, shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In accordance with *AdvoServ of New Jersey, Inc.,* 363 NLRB No. 143 (2016), Respondent shall also file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board Order, a report allocating the backpay awards to the appropriate calendar years. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration. In addition, pursuant to *Cascades Containerboard Packaging–Niagara*, 370 NLRB No. 76 (2021), Respondent must file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed either by agreement or Board Order or such additional time as the Regional Director may allow for good cause shown, a copy of Diana Ornelas's corresponding W-2 form(s) reflecting the backpay award.

The Respondent shall also be required to expunge from its files any references to the unlawful discipline, suspension, and discharge issued to Diana Ornelas and notify her and the Regional Director of Region 28, in writing, that this has been done and that these unlawful employment actions will not be used against her in any way. The Respondent shall also post the attached notice in accordance with *J. Picini Flooring*, 356 NLRB 11 (2010) and *Durham School Services*, 360 NLRB 694 (2014).

Finally, because Respondent's unfair labor practices are such that they are likely to have a continuing coercive effect on the free exercise by employees of their Section 7 rights long after the violations have occurred, Respondent shall be required to undertake additional remedial actions designed to dissipate as much as possible the lingering atmosphere of fear created by its

unlawful conduct and to insure that if the question of union representation is placed before employees in the future they will be able to voice a free choice. To achieve these ends, in addition to posting copies of the attached notice at its Southern California and Las Vegas, Nevada plants, Respondent shall be required to: (a) Convene during working time all employees at its Southern California and Las Vegas, Nevada plants, by shifts or otherwise, and have the contents of the attached notice marked as "Appendix" read to the assembled employees by a Board Agent, or if Respondent desires by a reasonable management official in the presence of a Board Agent, and in the presence of a representative of the Union if they wish to attend; (b) Upon request of the Union made within 1 year of the issuance of the Order herein, make available to the Union without delay a list of names and addresses of all employees employed at the time of the request; (c) Immediately upon request of the Union, for a period of 2 years from the date on which the aforesaid notice is posted, grant the Union and its representatives reasonable access to the plant bulletin boards and all places where notices to employees are customarily posted; (d) Immediately upon request of the Union, for a period of 2 years from the date on which the aforesaid notice is posted, permit a reasonable number of Union representatives access for reasonable periods of time to nonwork areas, including but not limited to, lunch rooms, cafeterias, rest areas, break rooms, and parking lots, within its Southern California and Las Vegas, Nevada plants so that the Union may present its views on unionization to the employees, orally and in writing, in such areas during changes of shifts, breaks, mealtimes, or other nonwork periods; (e) In the event that during a period of 2 years following the date on which the aforesaid notice is posted, any manager, supervisor, or agent of Respondent convenes any group of employees assigned to Respondent's Southern California or Las Vegas, Nevada, plants and addresses them on the question of union representation, give the Union reasonable notice thereof and afford two Union representatives a reasonable opportunity to be present at such speech and, upon request, give one of them equal time and facilities to address the employees on the question of union representation; and (f) In any election which the Board may schedule involving Respondent's Southern California and Las Vegas, Nevada, plants within a period of 2 years following the date on which the aforesaid notice is posted and in which the Union is a participant, permit, upon request by the Union, at least two Union representatives reasonable access to the plant(s) and appropriate facilities to deliver a 30-minute speech to employees on working time, the date thereof to be not more than 10 working days but not less than 48 hours prior to any such election.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[45]

ORDER

Respondent Cemex Construction Materials Pacific, LLC, its officers, agents, successors, and assigns, shall:

1. Cease and desist from

[45] 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.

(a) Threatening employees that they could be disciplined or fired for having union stickers on their hardhats;
(b) Threatening employees with termination, reduced hours, or loss of benefits, if they unionized;
(c) Instructing employees to remove union stickers from their hardhats;
(d) Instructing employees not to speak with union representatives;
(e) Threatening employees by inviting them to quit because they engaged in union activities;
(f) Threatening employees with plant closure if they unionized;
(g) Threatening employees by telling them it would be futile to unionize;
(h) Interrogating employees about their union activities;
(i) Engaging in surveillance of employee union activities;
(j) Creating the impression that employee union activities are under surveillance;
(k) Threatening employees by telling them their work opportunities will be limited if they unionized;
(l) Blaming the union for delayed wage increases;
(m) Threatening employees by telling them wage increases would possibly be frozen for years if they unionized;
(n) Threatening employees by implying that employees who are participate in a strike are not entitled to immediate reinstatement upon their unconditional offer to return to work, regardless of the type of strike or circumstances;
(o) Threatening employees that, if they unionized, they would lose their harmonious relationship with management, lose their right to speak directly with management concerning work-related problems, and lose the ability to have management help them;
(p) Threatening employees by telling them they would not be able to learn new skills and their ability to grow with the company would be curtailed if they unionized;
(q) Prohibiting employees from speaking with union organizers;
(r) Disciplining employees for violating the prohibition against speaking with union organizers;
(s) Promising employees benefits, including a requested transfer, if they voted against the union;
(t) Threatening employees by implying they would no longer be able to get off work early if they unionized;
(u) Posting security guards at facilities in the weeks leading up to the election, and on election day, to intimidate employees because they engaged in union activities;
(v) Suspending, and discharging employees, or otherwise discriminating against them, for engaging in union activities protected by Section 7 of the Act.
(w) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

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

(a) Within 14 days from the date of this Order, offer Diana Ornelas full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make whole Diana Ornelas for any loss of earnings and other benefits suffered as a result of the unlawful suspension, discharge, and discrimination against her, including any search-for-work and interim employment expenses, in the manner set forth in the Remedy section of this decision.

(c) Compensate Diana Ornelas for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board Order, a report allocating the backpay award to the appropriate calendar years for Diana Ornelas.

(d) File with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed either by agreement or Board Order or such additional time as the Regional Director may allow for good cause shown, a copy of Diana Ornelas's corresponding W-2 form(s) reflecting the backpay award.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline, suspension, and discharge issued to Diana Ornelas, and within 3 days thereafter notify her and the Regional Director for Region 28, in writing, that this has been done and that the discipline, suspension, and discharge will not be used against her in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director for Region 28 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.

(g) Within 14 days after service by the Region, post at its facilities in Southern California and Las Vegas, Nevada copies of the attached notice marked "Appendix."[46] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all

[46] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

places where notices to employees are customarily posted.[47] In addition to physical posting of paper notices, the notices shall be distributed electronically to all current employees and former employees employed by the Respondent at any time since August 1, 2018, by means including email, posting on an intranet or an internet site, and/or other electronic means if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Convene during working time all employees at its Southern California and Las Vegas, Nevada plants, by shift or otherwise, and have the contents of the attached notice marked as "Appendix" read to the assembled employees by a Board Agent, or if Respondent desires by a reasonable management official in the presence of a Board Agent, and in the presence of a representative of the Union if they wish to attend.

(i) Upon request of the Union made within 1 year of the issuance of the Order herein, make available to the Union without delay a list of names and addresses of all employees employed at the time of the request.

(j) Immediately upon request of the Union, for a period of 2 years from the date on which the aforesaid notice is posted, grant the Union and its representatives reasonable access to the plant bulletin boards and all places where notices to employees are customarily posted.

(k) Immediately upon request of the Union, for a period of 2 years from the date on which the aforesaid notice is posted, permit a reasonable number of Union representatives access for reasonable periods of time to nonwork areas, including but not limited to, lunch rooms, cafeterias, rest areas, break rooms, and parking lots, within its Southern California and Las Vegas, Nevada plants so that the Union may present its views on unionization to the employees, orally and in writing, in such areas during changes of shifts, breaks, mealtimes, or other nonwork periods.

(l) In the event that during a period of 2 years following the date on which the aforesaid notice is posted, any manager, supervisor, or agent of Respondent convenes any group of employees assigned to Respondent's Southern California or Las Vegas, Nevada, plants and addresses them on the question of union representation, give the Union reasonable notice thereof and afford two Union representatives a reasonable opportunity to be present at such speech and, upon request, give one of them equal time and facilities to address the employees on the question of union representation.

(m) In any election which the Board may schedule involving Respondent's Southern California and Las Vegas, Nevada, plants within a period of 2

[47] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means, and to the reading of the notice to employees.

years following the date on which the aforesaid notice is posted and in which the Union is a participant, permit, upon request by the Union, at least two Union representatives reasonable access to the plant(s) and appropriate facilities to deliver a 30-minute speech to employees on working time, the date thereof to be not more than 10 working days but not less than 48 hours prior to any such election.[48]

(n) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS ALSO ORDERED that the Complaint and the Union's Objections are dismissed insofar as they allege violations of the Act, or objectionable conduct, not specifically found.

IT IS FURTHER ORDERED that the election is set aside and Case 28-RC-232059 is severed from Cases 28-CA-230115, et al. and remanded to the Regional Director to conduct a second election when he deems the circumstances permit a free choice.

Dated, Washington, D.C. December 16, 2021

John T. Giannopoulos
Administrative Law Judge

[48] Subparagraphs (j), (k), (l), and (m) herein shall be applicable only so long as the Regional Director has not issued an appropriate certification following a free and fair election.

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 a representative to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with discipline or discharge for wearing union stickers on your hardhat, or instruct you to remove those stickers.

WE WILL NOT threaten you with termination, reduced work hours, loss of benefits, or limited work opportunities, if you vote to be represented by the International Brotherhood of Teamsters (Union), or any other labor organization, for the purposes of collective bargaining.

WE WILL NOT prohibit you from speaking with union organizers, tell you not to speak with them, or discipline you for doing so.

WE WILL NOT will not threaten you by inviting you to quit your job because you engaged in union activities or tell you that voting for the Union, or any other labor organization, would be futile.

WE WILL NOT threaten to close our plants and facilities if employees vote to unionize.

WE WILL NOT coercively interrogate you about your union activities

WE WILL NOT engage in surveillance of your union activities or create the impression that those activities are under surveillance.

WE WILL NOT blame the Union, or employee efforts to unionize, for delayed wage increases, or threaten you that wage increases would possibly be frozen for years if you vote to unionize.

WE WILL NOT threaten you by implying that if you participate in a strike you are not entitled to immediate reinstatement upon your unconditional offer to return to work, regardless of the type of strike or circumstances.

WE WILL NOT threaten you by saying that your harmonious relationship with management will be put at risk, that you will not be able to speak directly with management about your work-related problems, or that you will lose the ability to have management help you, if you vote for the Union, or any other labor organization.

WE WILL NOT will not threaten you by saying you will be unable to learn new skills or that your ability to grow with the company will be curtailed if you vote to unionize.

WE WILL NOT promise you benefits, including a requested transfer, if you vote against the Union, or any other labor organization.

WE WILL NOT threaten you by implying you will no longer be able to get off work early if you vote to unionize.

WE WILL NOT post security guards at our facilities in order to intimidate employees because they engaged in union activities.

WE WILL NOT suspend or discharge you because of your union support or because you engaged in union activities.

WE WILL, within 14 days from the date of the Board's Order, offer Diana Ornelas full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Diana Ornelas whole for any loss of earnings and other benefits resulting from the discrimination against her, less any net interim earnings, plus interest, and WE WILL also make her whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Diana Ornelas for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and we will file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board Order, a report allocating the backpay award to the appropriate calendar years.

WE WILL file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed either by agreement or Board Order or such additional time as the Regional Director may allow for good cause shown, a copy of Diana Ornelas's corresponding W-2 form(s) reflecting the backpay award.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful discipline, suspension, and discharge issued to Diana Ornelas, and WE WILL, within 3 days thereafter, notify her in writing, that this has been done and that these unlawful employment actions will not be used against her in any way.

WE WILL read this notice to all our employees, or have an agent of the National Labor Relations Board do so.

WE WILL, upon request of the Union made within 1 year of the Board's Decision and Order, make available to the Union a list of names and addresses of all our employees currently employed.

WE WILL, immediately upon request of the Union, grant the Union and its representatives reasonable access to our bulletin boards and all places where notices to employees are customarily posted.

WE WILL, immediately upon request of the Union, grant the Union and its representatives reasonable access to our plants in nonwork areas during employees' nonwork time in order that the Union may present its views on unionization to employees, orally and in writing, in such areas during changes of shift, breaks, mealtimes, or other nonwork periods.

WE WILL, if we gather together any group of our employees and speak to them on the question of union representation, give the Union reasonable notice and give two Union representatives a reasonable opportunity to be present at such speech and, on request, give one of them equal time and facilities to also speak to you on the question of union representation.

WE WILL, in any election which the Board may schedule and in which the Union is a participant, permit, upon request by the Union, at least two Union representatives reasonable access to the plant(s) and appropriate facilities to speak to you for 30 minutes on working time, not more than 10 working days, but not less than 48 hours, prior to the election.

WE WILL, apply the four paragraphs immediately preceding this one for a period of 2 years from the date of posting of this notice, or until the Regional Director of the National Labor Relations Board certifies the results of a fair and free election, whichever comes first.

Our employees have the right to join the International Brotherhood of Teamsters, or any other labor organization, or to refrain from doing so.

Cemex Construction Materials Pacific LLC
(Employer)

Dated _____ By _____
(Representative) (Title)

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

300 Las Vegas Boulevard South; Suite 2-901
Las Vegas, NV 89101-5800
(702) 388-6416, Hours: 8:30 a.m. to 5:00 p.m.

11500 West Olympic Blvd; Suite 600
Los Angeles, CA 90064-1753
(310) 235-7352, Hours: 8:30 a.m. to 5:00 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-230115 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940

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 at (702) 388-6416 or (310) 235-7352.