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

CON-WAY FREIGHT, Inc.

and

21–CA–135683
21–CA–140545
21–RC–136546

JAIME ROMERO,
an individual,

CON-WAY FREIGHT, Inc.

and

JUAN PLACENCIA,
an individual,

CON-WAY FREIGHT, Inc.,
Employer

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
LOCAL 63,
Petitioner

*Mathew J. Sollett,*
*Cecelia Valentine,*
for the General Counsel.
*Mark W. Robbins,*
*Gordon A. Letter,*
for the Respondent/Employer.
*Gena B. Burns,*
for the Charging Party.

# DECISION AND REPORT ON OBJECTIONS

## STATEMENT OF THE CASE

ELEANOR LAWS, Administrative Law Judge. This case was tried in Los Angeles, California, on July 27–31 and August 5–7, 2015.

Charging Party Jaime Romero (Romero) filed the original charge in Case 21–CA–135683 on August 28, 2014 and an amended charge on October 9. Charging Party Juan Placencia (Placencia) filed the original charge in Case 21–CA–140545 on November 6, and an amended charge on December 1. These charges were consolidated in a complaint the General Counsel issued on March 31, 2015. Con-Way Freight, Inc. (the Respondent or Company), filed a timely answer denying all material allegations.

On October 30, 2014, the Company filed objections to the conduct of the International Brotherhood of Teamsters, Local 63 (the Union) surrounding its employees' selection of the Union as their representative. On April 15, 2015, the Regional Director issued a report on challenged ballots and elections, and consolidated the objections Case, 21–RC–136546, with Cases 21–CA–135683 and 21–CA–140545.

The complaint alleges numerous violations of Section 8(a)(3), and (1) of the National Labor Relations Act (the Act) in connection with a union organizing campaign at the Respondent's Los Angeles, California, facility, commonly referred to as the ULX facility. The allegations include threats to employees, prohibitions on wearing union insignia, telling employees selecting the Union would be futile, and the suspensions and terminations of the respective Charging Parties.

Con-Way Freight's objections contend the Union engaged in threatening, intimidating, coercive, and abusive conduct which affected the results of the election.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent, and the Union, I make the following[1]

## FINDINGS OF FACT

### I. JURISDICTION

The Respondent, a corporation with a facility in Los Angeles, California, transports freight across North America. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] The Respondent filed an unopposed motion to correct the transcript, which is granted, and hereby admitted into the record as ALJ Exhibit 5. There are other errors as well. On page 867 "compelled to buy" should be "compelled by." Other typos are noted below.

## II. UNFAIR LABOR PRACTICES COMPLAINT – FACTS AND CONTENTIONS

### A. The Los Angeles Facility

This case concerns the Respondent's Los Angeles facility, commonly referred to as ULX. The ULX facility employs approximately 44 driver sales representatives (drivers). Some drivers perform local pickup and delivery (P&D). Others are line drivers, who transport freight over longer distances.

At all relevant times, Paul Styers (Styers) was the ULX service center manager and the highest ranking manager at the facility. Steve Roman (Roman) and Armando Rosado (Rosado) were freight operations supervisors, and Kevin Huner (Huner) served as human resources director for the western area.

### B. The Charging Parties

Charging Party Jaime Romero (Romero) worked for the Respondent from October 1990 until his suspension on August 20, 2014. He was terminated on September 3. Romero received a 10-year award for safety and a million mile safety award in 2010. Romero reported to Rosado. At the time of his termination he was a line driver. (Tr. 44–50.)[2]

Charging Party Juan Placencia (Placencia) worked for the Respondent from October 7, 2011, until his termination on October 7, 2014. Placencia worked as a P&D driver. (Tr. 163.)

### C. Early Organizing Efforts.

The Union began organizing efforts at ULX in 2009. The Union's lead organizer was Louie Diaz, who was assisted by Ernie Baraza, Robert Amaya, and Mark Moran, and other organizers employed by the Union. (Tr. 1570, 1575.)

Romero started speaking with coworkers in 2009.[3] He attended about 35 union meetings up until his termination and was the leader among employee organizers. The Respondent, through managers and supervisors including Styers, knew that Romero assisted the Union and engaged in concerted activity from 2009 until his termination. (Tr. 54, 63, 142.)

### D. Orientation Videos

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[2] Abbreviations used in this decision are as follows: "Tr." for transcript; "R Exh." for the Respondent's exhibit; "GC Exh." for the General Counsel's exhibit; "CP Exh." for Charging Party's exhibit; "GC Br." for the General Counsel's brief; "R Br." for the Respondent's brief, and "U Br" for the Union's brief. Although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited but rather are based my review and consideration of the entire record.

[3] The Union organizing efforts at ULX were part of a Teamsters' campaign to organize the Respondent across the nation. Joint Council 42 as well as Teamsters' Locals 952 and 63, were also involved.

During new employee orientation, employees view various videos. One concerns the Company's purchase of a union facility and depicts how the facility was shut down.[4] (Tr. 1234–1235.) Driver John Cabrera (Cabrera) described the video as depicting a union company Con-Way had purchased, a picket line, and the message that the union was no longer at Con-Way. (Tr. 515.)

After Placencia saw the video, Styers said Con-Way was a nonunion facility and if employees wanted to work there, that's how it would stay. (Tr. 155, 277.) Styers admitted he said Con-Way was union free, but denied stating that's how it would need to remain. (Tr. 1254, 1257.) When Placencia asked Styers what about the union he disliked, Styers said employees were treated fairly at Con-Way and stated "there's thuggery. There's all kinds of different things that go on in that type of environment . . ." (Tr. 1256–1257.) Styers told Placencia line drivers were the biggest crybabies in the Company, and to stay away them, especially Romero. (Tr. 158–163.)

During another video about the importance of sleep, a former employee referred to as "Chucky" was depicted. Styers commented that Chucky no longer worked for Con-Way because he talked about union activity. He and driver trainer Ramsey Robles laughed about it.[5] (Tr. 157–159.)

E. Union Organizing Efforts in 2013–2014

Placencia learned about the organizing campaign a couple months after he started working at ULX. He became involved in early 2013, talking to drivers about the union. A union organizing committee was formed, consisting of Romero, Placencia, and some other drivers. Romero began collecting authorization cards in December 2013, collecting a total of about 20–23 cards. Placencia collected 5 or 6 authorization cards from drivers in early 2014. (Tr. 172–179, 351.) Romero and Placencia also assisted drivers at the Respondent's Laredo, Texas facility.[6] (Tr. 177.)

F. Spring 2014

In March 2014, in the employee break room, Styers asked Romero why the employees were looking for third party representation, and mentioned Company was going to give them a raise. Romero responded that the union organizing wasn't about a raise but was about respect to the employees. Romero also said he knew he was being targeted and that any little thing he did would get him fired but that was okay with him.[7] (Tr. 57–59.)

[4] This video is referenced in a script Styers later read to employees, as discussed below. (R Exh. 13.)

[5] Styers denied making this comment, telling Placencia to stay away from Romero, and stating that if employees wanted to work at Con-Way it needed to remain union-free. These conflicts are resolved below. Though Robles testified for the Respondent, he was not asked about this incident.

[6] A representation election occurred at Respondent's Laredo facility on September 12, 2014. (Tr. 353.)

[7] Styers was asked whether this conversation occurred during the meeting where he read the script, and he denied it. (Tr. 1233–1235.) He was not asked about the earlier conversation in the break room.

In March–May 2014, Styers met with employees, either one-on-one or in groups of 2. He read aloud a script setting forth the Company's position about the Union. (R Exh. 13; Tr. 1222–1233.) Styers stated that union members and union officials both share a common fear of losing their jobs. He reiterated the Company's position that unionized companies will not be able to compete in transportation and logistics distribution industry due to excessive costs incurred by unionized companies. Styers stated that many Teamsters' organized businesses had gone out of business, and pointed to some examples from Con-Way. The script Styers' read further stated:

> The Teamsters like to advertise that they want to represent you in 'negotiations for better wages, hours, and working conditions.' What gets lost in their sales pitch is that Teamster representation is only the beginning of a **NEGOTIATION FOR EVERYTHING**. **YOU DON'T START WITH WHAT YOU ALREADY HAVE**. It is a clean sheet of paper negotiation that may result in improved wages, hours and working conditions; no changes; or that may result in lesser wages, hours, and working conditions.

(R Exh. 13, emphasis in original.)

Styers discussed that wages had been restored to pre-recession levels, and there had been wage increases and bonuses since. He pointed out the Teamsters negotiated 15 percent and 7 percent wage decrease at unionized facilities that had yet to be restored. Styers stated he wanted to ensure Con-Way remained an industry survivor rather than an industry statistic. Styers next mentioned that employees might be approached to sign an "innocent looking card" requesting Teamster representation. He warned that union representative might only provide only some of the facts, and urged employees to seek information from the Company. He warned that the cards are legally binding, and stated employees have the right not to choose the Union. The final paragraph noted that none of Con-Ways facilities were unionized, and the customers did not have to worry about strikes or other labor disputes. He added, "Our Account Executives can surely tell you just how important that message is." Styers concluded by stating, "Now more than than ever, it is important that we work together to remain competitive in a very competitive business. We are counting on the fact that the day will never come when our union-free message will change, and I hope you will help deliver that message to other Con-way employees. Thank you for your attention and for the good work you do, day in and day out. I am always available to discuss this and any other topic with you." (R Exh. 13.)

Styers' one-on-one meeting with Romero took place in Styers' office in May 2014. (Tr. 66–67, 119.)

G. Romero's August 2014 Accident and Termination

The Respondent's trucks are equipped with DriveCam, a recording device on a 30 second continuous loop. There are two lenses, one facing toward the driver and one facing away. If there is an accident or event, the driver triggers DriveCam and it saves the recording from 8 seconds before the trigger and 4 seconds after. DriveCam may also be triggered automatically by external events such as braking, a sharp steering wheel turn, or an accident. Every day, during

off peak hours, it downloads any events that are saved on it. DriveCam sends notifications to the Company if an event triggers DriveCam, but not if it is manually activated. (Tr. 1335–1337.)

In the event of an accident, breakdown, or other problem while on the road, drivers are to pull over in a safe place and call the Respondent's main dispatch, referred to as line haul. If a driver has an accident that is seen on DriveCam but not called in, the driver is instructed to call it in after the fact. (Tr. 1446.)

On August 15, 2014, Romero was driving a tractor-trailer from the ULX terminal to Blythe, California. He was about 10 minutes from the ULX facility, in the center lane of Highway 60 East. The passenger side mirror of Romero's truck, which extended out about 18 inches, made contact with the tractor-trailer in the lane to Romero's right. Romero activated Drive Cam and tried to get the other driver's attention. The other driver did not pull over. (Tr. 90.) Romero pulled over and called line haul to report the incident. He spoke with Tricia Plonte (Plonte), who described Romero's report as follows:

> SOS Description: Hit/Run V2 side swiped. V2 – tractor pulling a contained trailer, no other information. CWF damage – tractor #432-3575 – p/s mirror pushed forward, paint scuffed; No V2 damage. No injuries. DSR was traveling/b HWY 60 in the third lane (of six lanes) when V2 started to drift to the left. The d/s of V2's container trailer made contact with DSR's p/s mirror. V2 did not stop. DSR called police but they said he would have to go to police station to make a report.

(R Exh. 21.)

Romero called the California Highway Patrol and filed a report over the phone. (Tr. 92–93.) Romero continued to complete his work assignment, returning to the ULX facility at about 8:00 a.m. He filled out an accident report, with a diagram and a written description of what occurred. The written description stated:

> I was going on the number three lane, driving eastbound on 60 Freeway when a truck in the 4th lane passed by me hitting the rear view mirror on the passenger side. As a result, paint residue from the hit is visible. I flashed the headlights on the other driver; however, the driver of the other truck did not stop. He continued driving.

(GC Exh. 2.) There was no damage to the vehicle, and the accident was ruled non-preventable.

Romero was holding an iPod while he was driving.[8] He looked at for .5 second and pressed down on it once with his thumb, from -6.25 seconds to -5.75 seconds. From that point until the time of impact at -5 seconds to -4.5 seconds, Romero was looking forward. At the time of impact, the front wheels of the other vehicle were touching the left side of line separating the two lanes. (Jt. Exh. 1.)

[8] Drivers commonly use Bluetooth devices and other wired listening devices. (Tr. 669.)

An email grouping entitled "ULX Safety Event Notification" includes Regional Safety Manager Don Andersen (Andersen), Director of Operations Mike Wattier (Wattier), Human Resources Generalist Dan Degener (Degener), and Styers. On August 16, Plonte sent an email to ULX Safety Event Notification stating Romero's accident was non-preventable. That same day, Wattier sent an email asking if there was any way to verify that the other vehicle had left its lane. Styers suggested having Andersen review the tape. (R Exh. 20.) Andersen did not know why Wattier was interested in this verification. (Tr. 1430.)

Andersen reviewed the DriveCam video and reported the second vehicle "never left there (sic) lane and came into ours, this is clearly seen." He noted that the other truck came close to Romero's truck while Romero drifted to the far right of his lane. He detailed the timeline of events, and sent it via email to Styers and Wattier, copied to Huner and Degener:

> 1. At -8.0 to seconds you can see an electronic device in his right hand
> 2. From -7.50 to -6.50 Jamie is looking out the driver's side window at the vehicle next to him
> 3. From -6.25 to -5.75 Jamie is seen looking down at the electronic device in his right hand
> 4. At -4.50 seconds it appears contact is made between him and the truck next to him on the right as you can see his hand holding the steering wheel moves in the down direction more then it normally should
> 5. At -3.75 to -3.50 Jaime looks at the camera to see if it went off
> 6. At -3.25 to -3.0 it appears he looks over to the mirror that was just hit
> 7. At -1.50 Jaime is seen switching the electronic device from his right hand into his left
> 8. At -1.25 to 0.0 Jaime is seen reaching for the event recorder to manually trigger it to capture this event
> 9. At 2.25 Jaime is seen trying to hide the electronic device from the event recorder that's in his left hand.

(R Exh. 20.) Andersen had reviewed the video about a dozen times before he sent this message, using the frame-by-frame technology.[9] (Tr. 1427.) Huner became aware of the incident when he received the email from Andersen. He also reviewed the DriveCam video. (Tr. 1459–1462.)

Andersen concluded the report was falsified because the second vehicle had not left its lane and Romero did not report that he was distracted by operating an electronic device while driving.[10] Andersen concluded the accident was preventable and had the ruling changed

[9] Andersen did not have the access to the sound graph when he reviewed the DriveCam footage; He first had it a week before the hearing. (Tr. 1428.) It therefore could not have played a role in Andersen's assessment of Romero's accident. Andersen testified for the first time at the hearing that at -7.25 seconds, a lane departure warning system installed in Romero's tractor-trailer was activated, resulting in a beeping sound. (Tr. 1369, 1371). This observation was not included in any of the correspondence leading up to Romero's termination and there is no evidence Andersen or anyone else relied on this in determining Romero was distracted and at fault prior to his termination. Moreover, at time of beep, -7.00, the graph shows very minimal change of the truck's position.

[10] For the first time at the hearing, Andersen stated his belief that Romero had left his lane and hit the other vehicle. (Tr. 1352.) This does not appear in any of the contemporaneous correspondence. (R Exhs.

accordingly. (Tr. 1352–1353; R Exhs. 21, 22.) The revised final ruling status report states that Romero was "seen with a cell phone in his right hand texting and from what I seen both trucks move toward each other and because of Jaime driving distracted he failed to react to the other truck coming close to his unit while at the same time Jaime is seen drifting to the far right of his lane then contact is made between both trucks." (R Exh. 22.)

Andersen sent an email to Styers later that afternoon stating, "I just looked at this again and he not only has an electronic device I believe is a cell phone, but he is actually texting using his thumb just for (sic) contact is made."[11] (R Exh. 20.)

On August 20, Romero met with Licon, Styers, and Andersen. Andersen read the accident report to Romero, showed Romero segments of the DriveCam video, and said he believed the accident was Romero's fault. Romero disagreed that he was distracted or at fault. (Tr. 102; Tr. 1236–1239.) Andersen then said Romero falsified his accident report because he failed to mention he had been distracted by a cell phone in his hand. Romero said he was not texting, he was just selecting a song. (Tr. 103, 1405.) Andersen informed Huner about the meeting. (R Exh. 23.)

Styers suspended Romero pending further investigation of the accident. (Tr. 137–138, 1240.) Licon asked Romero to provide a written statement. Romero submitted the following statement: "I'm being suspended for other reason this is being created to terminate me." (Tr. 103–104; GC Exh. 3.)

Styers prepared an out of service report (essentially a suspension), stating that Romero was distracted by texting on a cell phone, which led to the accident. He said Romero drifted to the far right side of his lane, causing contact between his truck and the other truck. Styers noted that Romero had failed to report that he was distracted, which was a falsification of his accident report. (R Exh. 14; Tr. 1242.) Romero was terminated effective September 3. (R Exh. 16.) Huner, who decides for all terminations, was the final decisionmaker. When asked why he did not implement progressive discipline, Huner stated, "There are certain policies within the Company that we regard as cardinal sins, and dishonesty/falsification is one of them."[12] (Tr. 1471.)

Styers completed an employee separation checklist in connection with Romero's termination. (Tr. 1317, GC Exh. 13.) He indicated that Romero did not work well with customers and other people.[13]

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20–23.)

[11] On cross examination, when asked why this detail was now included, Andersen stated he wanted to make sure this was conveyed because operation of a cell phone is against the law and Company policy. (Tr. 1353–1354.)

[12] According to Huner, had Romero admitted he had been distracted, a point would have been assessed for having a preventable accident and he would have received a coaching event with a driver coach. (Tr. 1464–1465.)

[13] At the hearing, Styers testified that Romero did not get along with all of his fellow employees, but could not name any employees with whom Romero did not get along. (Tr. 1318).

Between September 2011 and January 2013, Romero received four warnings from the company. Two were based on accidents, one for taking too long to connect a trailer, and another for failing to put a chock on a wheel. (Tr. 140; R Exhs. 15.)

H. September 2014

The Union filed a representation petition on September 11, 2014.

Soon after, Placencia told Rosado he was a union supporter. Rosado told him to stick to his guns and fight for what he believed in.[14] (Tr. 184, 516–517, 184.)

Around this same time period, Placencia and some employees wore blue lanyards with yellow letters depicting "Local 63." Placencia was in the process of getting work instructions from Roman when Styers approached, pointed to the lanyard, and asked Placencia what it was. After Placencia told Styers it was his lanyard, Styers told Placencia to take it off because it was against Company policy.[15] (Tr. 187–191.)

Placencia clocked out for his lunch break. Styers left the break room for a few minutes, then returned to tell Placencia he had not chocked his truck.[16] Placencia explained why the truck wasn't chocked, and then went to Licon's office. Placencia complained about the way Styers was treating him, and referenced the lanyard incident. Placencia said the "drama" occurring because of the campaign was unnecessary. Licon told Placencia he could wear a union button but not a lanyard. Styers walked into Licon's office and asked what Licon and Placencia were discussing. Placencia stated again that the "drama" between drivers and management was unnecessary. Styers responded, "You haven't seen nothing yet." Placencia replied, "What else can you do. You already harassed me. Are you going to fire me?" (Tr. 192–195.) Placencia continued to wear the lanyard up through his suspension and no manager or supervisor mentioned anything about it. (Tr. 335–336.)

The Respondent hired Cruz & Associates in response to the union drive. Labor Consultants Edward Echanique (Echanique) and Luis Camarena (Camarena) from Cruz & Associates provided services to the Respondent from September 23–October 21, 2014.[17] Shortly after they were hired, Camarena and Echanique held meetings and talked to employees one-on-one. (Tr. 632–634.) Camarena rode along with employees on their routes to answer questions starting the week of September 29. (Tr. 520–522, 632–634, 724–725, 783–784.) When they introduced themselves they said they were there on Con-Way's behalf, as representatives of Con-Way. (Tr. 737–739, 793.)

[14] Placencia recalled Rosado stating that there were "eyes on him." Resolution of what Rosado said in response is unnecessary because it is undisputed that Placencia informed Rosado of his support for the Union.

[15] Other drivers wore lanyards with sports team logos. (Tr. 196.)

[16] The transcript erroneously says "chalked" instead of "chocked."

[17] Echanique was at another Con-Way facility September 9–October 8. (Tr. 745.)

As part of their work at Con-Way, Camarena and Echanique assessed which employees were pro-union and which employees were anti-union. Employees were rated on a scale of 1–5, with a rating of 1 indicating pro-Company, and a rating of 5 being pro-Union. (Tr. 914–919.)

During the week of September 23, Placencia attended a meeting Camarena conducted. At least one other driver, Victor Rivas, was also present. (Tr. 197, 726.) Camarena spoke, and Echanique was in the room but remained silent. There are different versions of what occurred. I find no particular version entirely credible, and address my salient credibility findings in the context of my decision and analysis.

According to Placencia, Camarena said that if the Union won, they would start negotiations from zero. Camarena also said the company was not going to negotiate with the Union. Placencia said wages and benefits freeze during an election and if the employer didn't want to negotiate, a mediator would be brought in. (Tr. 202.) At that point, Camarena's demeanor changed, and other drivers spoke up and expressed that Camarena was there to talk them out of joining the union. (Tr. 283, 341.) Placencia discussed his parents coming to the country more than 50 years ago to better their lives and he was always taught to look out for other people. (Tr. 346–347.)

According to Echanique, Camarena conducted the meeting with Placencia and one other driver, Rivas. Echanique was present but did not speak. Camarena talked about the upcoming election. He said that under Section 7 of the Act, employees have the right to choose representation or not to choose representation. If they choose representation the company would have to negotiate in good faith. Employees could end up with more, less, or the same.[18] Placencia asked why anyone would vote for the union if things could go down. Placencia then talked about people dying to protect rights in our country and inquired about Camarena's military service. He also discussed immigrants and how they have suffered, and said people like Camarena are hired by the company to make sure people don't exercise their rights. Placencia became tearful and upset, and talked about the need to protect rights and how he had embedded this belief in his son. Rivas asked to be excused from the meeting and Camarena concluded the meeting. (Tr. 726–730.)

According to Camarena, the meeting was an introduction to labor relations. He discussed the Act and the election process. Camarena explained that during negotiations employees' wages and benefits could go up, down, or stay the same. He drew a diagram on a whiteboard depicting the Company and the Union at a bargaining table with arrows going back and forth between them. Placencia called Camarena a liar and said things could only stay the same or go up. Camarena corrected him utilizing the basic guide to the Act. (R Exh. 4.) Placencia said Camarena was wrong and became upset. He said no matter what, the employees were going to fight for their rights. He then went on a "rant" about immigrants fighting for their rights and the military. Placencia compared the employees' fight to organize to the soldiers' fight, and referenced bloodshed overseas. He was visibly upset and began to cry. Camarena encouraged

[18] According to Camarena and Echanique, Camarena never said negotiations would start from zero. (Tr. 731–732; 794.)

him to calm down, stated it was an election for representation, not life or death. At that point, Placencia got up and the meeting concluded. (Tr. 785–794.)

I. October 6

On October 6, Placencia asked Rosado if he was done for the day. Rosado was standing by Camarena, and a conversation between Placencia and Camarena ensued. There are different versions of what occurred. I address my salient credibility findings in the context of my decision and analysis.

According to Placencia, Camarena said, "Are you aware under Article 8, that the company does not have to negotiate with the Union?" Placencia said the Union did not look for them (meaning the employees), they looked for the Union. Placencia said the employees felt like battered wives. (Tr. 370.) He told Camarena they were not going to change their minds, they had done everything possible to try to communicate with management, and it wasn't about money. Camarena described himself as "the type of person that if you owe him money, that he will call you. If you ignore his calls, he will go down to your house and he said that he'll kick the door down, saying when I kick the door down, come up, push you to the ground, put his foot on your chest and then he said I'll stick a gun out, pull my .45, put it to your head and I'll get my money one way or the other." Placencia, described Camarena's bodily actions as pretending to kick the door down, push someone down, place his foot on the person's chest, grab the person by the hair, and reaching behind his back like he had a gun, pulling it out and pointing it to someone's head. Placencia asked Rosado if that was all, and he left. (Tr. 205–208.) He did not report feeling threatened to any supervisor. (Tr. 367.)

Later that afternoon, Placencia prepared a statement,[19] which described the interaction. With regard to Camarena's response to Placencia commenting that the organizing drive was not about the money, Placencia wrote, "I am the type of guy if you owe me money, $1000, I will call you. If you ignore my calls I will go to your house, kick down the door and grab you by the head, put my foot on your chest with my 45 pointing at your head and I will get my money one way or the other." (GC Exh. 7.)

According to Camarena, Placencia approached him and said, "We're taking this shit nationwide."[20] Placencia asked who was selecting attendants at the meetings. He then went on a weird rant and said he and the rest of the guys felt like battered women. Placencia said Styers mistreated them like an abusive spouse and they were in this fight because of their families. In response, Camarena stated, "I told him that I—about my family, you know, and the fight as well. That I am willing to do anything for my three kids. I'll kick doors down and anything that I need to do to help my family." Camarena also said "That I was the type of person that could speak on my behalf, that I didn't believe in anyone representing me. And that I didn't believe that they needed any representation, that he could do it himself." They continued to talk about rights and

[19] The statement is missing the word "not" (Tr. 363.) Though Placencia testified he wrote the statement on October 6, he did not email it to himself until October 10.

[20] Camarena claimed to not know what Placencia was referring to with this comment. (Tr. 798.)

the union. The conversation ended by Camarena saying he would continue to give Placencia information to help him. (Tr. 797–804.)

According to Rosado, the conversation began with Placencia and Camarena making introductions. Placencia asked why he was not included in the LEAN meetings. Camarena said he was not in charge of who attended the meetings. The two discussed pros and cons on unionizing and debated. Camarena said everything would have to go to bargaining and there were no guarantees. When Camarena began discussing the Union's constitution, Placencia became "a little frustrated, a little taken aback, a little emotional" but "[t]he whole conversation was very professional." Placencia referred to himself as a battered wife and said he couldn't' take it anymore and that is why he and the employees had organized. Camarena said that as father, he would not let himself be a battered wife and he would take a stand for what he believes in, "fight his own fight, knock down doors if he has to. But he would not let himself be a battered wife." Camarena said he would support the union if it could guarantee certain benefits, but since it cannot, the union should not collect fees. He said that until the union could guarantee benefits, he would continue to expose it for what it really is. The conversation ended very amicably and professionally, and the two parties wished each other their best. During the conversation, Rosado was pulled away from time to time for a total of 7–8 minutes.[21] (Tr. 1106–1112.) At human resources' request, on October 9, Rosado made a statement about his observations of the conversation. (R Exh. 8; Tr. 1114.)

J. October 7

1. Background

After clocking in, the drivers report to the dispatch office to receive their assignments. The dispatch office is attached to the break room. Separating the rooms is a four-foot counter, on top of which sits a glass wall with two window openings, which splits the counter in half. Drivers communicate with dispatch through the two windows, which are at chest level. Around the corner from the dispatch counter there are three tables in the break room. It is not possible to see the entire break room from the dispatch office. (R Exh. 9; Tr. 1125–1126.)

During the relevant time period, Freight Operations Supervisor Roman and driver Sal Navarro (Navarro) sat in the dispatch office. Though classified as a driver, Navarro's primary duties were dispatch. (Tr. 622.) Facing the dispatch windows, Roman's workstation was to the left and Navarro's to the right. (R Exh. 9(a); Tr. 1125.)

On October 7, Navarro led two LEAN meetings in the morning. One went from 8:30–9:30, and the other from 9:30–10:30. The drivers who started their shifts at 10:30 attended the 9:30–10:30 LEAN meeting, which ran a little long.[22] Placencia and Cabrera were not invited to attend the LEAN meetings. (Tr. 635–639, 685.)

[21] Rosado did not see or hear Camarena talk or act in the manner Placencia described. (Tr. 1111.)

[22] Driver Elvis Martinez was at the LEAN meeting from 9:27 a.m. to 10:34 a.m. (Tr. 1527; R Exh. 28.)

2. The knife incident

Most drivers carry either a knife or box cutter because they sometimes have to break down pallets and cut shrink wrap. (Tr. 227–228; 534–536, 645, 1016–1017.)

Placencia and Cabrera both clocked into work at 10:30 on October 7 and entered the break room at about the same time. (Tr. 523, 579; R Exhs. 1, 2.) Placencia had been filling in for another driver on the Beverly Hills route, so he thought he would be driving that route again, but was not certain. (Tr. 457.)

What occurred next is the subject of much dispute.

According to Placencia and Cabrera, Placencia dumped his work items out of a small backpack onto the table in front of the dispatch office. Roman and Navarro were at their usual positions in the dispatch office. (Tr. 212, 523–525.) A couple of drivers, Elvis Martinez and Hector Sanchez, entered the break room after attending a LEAN meeting. (Tr. 454.) The drivers were joking about all the things Placencia carried in his little backpack.

Placencia asked Camarena if he wanted to go on a ride along, stating his route covered Hollywood and Beverly Hills so they could check out the celebrities. Cabrera asked Camarena if he wanted to go on a ride along with him, because his route covered Santa Monica and Malibu so they could check out the girls.[23] Camarena looked toward Placencia, who was holding his work knife,[24] and quoting from the movie Crocodile Dundee, said, "That's not a knife," gestured pulling a knife out from behind him, and said, "This is a knife. (Tr. 528.) Placencia responded, "That's not a knife, that's a machete." The exchange was done in a joking manner.[25] After this exchange, Navarro led a safety meeting for Cabrera and Placencia. (Tr. 217–224; 527–529, 649; GC Exhs. 6–7.) Cabrera and Placencia then proceeded to their work assignments. (Tr. 531.)

Navarro recalled coming upstairs from LEAN meetings a little after 10:30. He saw Placencia and Cabrera talking with Camarena about doing ride-alongs and touting their respective routes. The LEAN meeting Navarro had conducted had just ended, so there were others in the break room including Elvis Martinez, and drivers named Jermaine and Moe. Navarro was at his printer getting documents for the drivers when he heard Placencia, Cabrera, and Camarena laughing and being kind of loud. When Navarro turned around, he heard Camarena say "That's not a knife, this a knife," and saw him pretend to pull out a knife. Afterward, Navarro led a safety meeting for Placencia and Cabrera. (Tr. 639–642, 653.)

According to Camarena, he came to the dispatch office at around 10:00 or 10:15 the morning of October 7. Roman was assisting him to figure out who he could do ride-alongs with. Placencia came in and approached the dispatch counter. Placencia and Camarena greeted each

[23] Cabrera had been driving a route that included Santa Monica and Malibu. Camarena and Roman said there was no discussion about the route Placencia had or what routes would afford an opportunity to see celebrities. (Tr. 850–851, Tr. 1185–1186.) Camarena testified Cabrera did not ask for a ride-along. (Tr. 850–851.)

[24] The blade of Placencia's knife is approximately 4 inches. (GC Exh. 9.)

[25] Placencia said he did not point his knife at Camarena. (Tr. 222–223.)

other, and Placencia asked why Camarena was in the dispatch office. Camarena said he was doing ride-alongs to help answer any questions drivers might have. Placencia sarcastically said he had a lot of questions, and suggested Camarena ride along with him. Camarena declined, and Placencia persisted in asking him to ride along with him. Camarena told Placencia he would let him know in the future when he would ride with him. Placencia reached into his pocket, pulled out a knife, flipped open the blade. He looked down at it and said, "What, are you scared?" twice.[26] Camarena was overcome with shock and saw his wife and children flash before his eyes. He wasn't sure if Placencia was going to try to jump over the counter and stab him or try to throw his knife at him. Camarena said, "That's not a knife" reached behind his back pretending to pull out a knife and wave it forward, and said "This is a knife." He did this because he was scared and wanted to diffuse the moment. At that point, Placencia turned around and left. Camarena did not see anyone else in the break room.[27] He immediately looked over to Roman, and asked if he had heard that.[28] Roman said that he did. Camarena told Roman he was going to prepare a statement, and asked him to prepare one too. (Tr. 806–821.)

According to Roman, Placencia approached the window around 10:40–10:45 to receive his assignment. Right after that, Roman saw Cabrera leave the break room. Camarena then came into the dispatch area. Placencia was still at the dispatch window, and his backpack was on a table. Placencia asked about ride-alongs and repeatedly told Camarena he should ride with him. Placencia reached down his right side and pulled out a closed knife. He put his elbow on the counter and held it forward at a 45 degree angle toward Camarena. Placencia clicked the knife open and said, "Why don't you go with me? You don't have to be afraid. Nothing's going to happen."[29] He then closed the knife and opened it again and said the exact same words.[30] Camarena appeared shocked. He then made the "That's not a knife" statement and gestures. Placencia did not appear to be joking, and he was looking directly at Camarena. There was nobody else in the break room and nobody laughed. Cabrera then came back into the break room after the incident occurred. Camarena asked Roman about Placencia, wondering if he was going to come after him. Roman responded he wasn't sure, as he had never seen this happen before. (Tr. 1142–1163.) Camarena walked away before Placencia. (Tr. 1216–1217.)

3. Management's actions after knife incident

According to Camarena and Styers, Camarena went to Styers' office after the knife incident. Only the two of them were present. Camarena told Styers that Placencia had threatened him with a knife. Styers called Licon, who came into Styers' office and they discussed the incident. (Tr. 821–82.) After Camarena left, Styers called Roman on the phone and asked him to come to his office. At that point, Roman came and told Styers what had occurred. (Tr. 1263.)

[26] According to Styers, Camarena reported saying the way Placencia looked at him scared him. "Said it was the eyes." (Tr. 1262.) Navarro and Roman denied Placencia asked Camarena if he was scared. (Tr. 644, 1205.)

[27] He could not see who was on the other side of the break room because a wall impedes the view. (Tr. 913.)

[28] He referred to Roman as his supervisor. (Tr. 820.)

[29] Cabrera testified that Placencia did not make such a comment. (Tr. 530.)

[30] Camarena recalled that Placencia flipped his knife open just once. (Tr. 906.)

By Roman's account, following the knife incident, Roman went to Styers' office and told him what had occurred. Camarena then joined them and told Styers what had occurred. (Tr. 1163–1164.)

Styers called Kimball Hinds, human resources generalist. Hinds instructed Styers to get statements from Roman and Camarena, and to place Placencia out of service. (Tr. 1264–1265, 1269–1270.)

When Camarena left Styers' office, he went downstairs to the training room, which he used as his office. Camarena next called his wife and his employer, and said he felt scared and uncomfortable. He then prepared the following statement.

> At approximately 10:45a.m. on Tuesday October 7, 2014 I was threatened at knife point by driver Juan Placencia at the Conway ULX facility. I was behind the dispatching counter with supervisor Steve Roman when Mr. Placencia began to interrogate me regarding my scheduled ride a longs for the day. He wanted to know whom I was going to ride with and then began to say, "Why don't you ride with me?" He continued to say, "You really should ride with me." I began to get tired with his persistence and told him that in the coming days I would choose a day to ride with him. He did not like my answer as he was trying real hard to get me in his truck today. He then reached into his pocket and proceeded to open up a blade and stated "what are you scared?" He held the knife in his right hand as he looked back and forth between the knife and myself. He then folded the knife, smiled at me and put it back in his pocket and proceeded to walk away.
>
> This direct threat comes as no surprise as other drivers have recently been dealing with threats and violence as well. One driver just reported having the windshield of his vehicle smashed in two nights ago outside his home. I am a family man with three wonderful kids at home, at this time I have great concern over my wellbeing and getting home safely to my family. I cannot and will not tolerate being threatened with my life while on the job.

(R Exh. 5; Tr. 821–830.) After writing the statement, Camarena called his wife again and ate lunch. (Tr. 832–833.) He did not know where Placencia was at the time.[31] (Tr. 863.)

Roman sent Styers an email at 1:33 recounting what he saw.[32] (R Exh. 10.) At Styers' direction, he sent an amended statement at 5:16 p.m., stating there was nobody else in the room when the knife incident occurred.[33] (R Exh. 11; Tr. 1179–1180.)

[31] Camarena could not give a reason for why he stayed at facility. (Tr. 883).

[32] He did not recount Camarena's action of reaching for the fake knife and stating, "That's not a knife, this is a knife." Roman also opined that Placencia's actions were not done in a friendly manner, but were more of an intimidation or threat. (R Exh. 10.)

[33] Styers faxed both statements to Hinds. (R Exhs. 17–18, Tr. 1269.)

In an October 10 email to Huner, responding to the question of whether Placencia pointed the knife at Camarena, Roman stated, "No he did not point the knife at him, as he was talking with he pulled out the knife holding it in his hand and began telling him when he will go on a ride along with him, as Luis said he didn't know that is when Juan snapped the knife open and said don't worry nothing will happen to you, he did that same thing twice looking straight at him." (R Exh. 12.)

4. Placencia's Arrest and Termination

After Camarena and Placencia left the break room following the safety meeting, they went to their assigned trucks. Robert Salas, freight operations supervisor for inbound, approached them and asked if they knew the standard work instruction for loading a long box. Placencia broke down pallets with his knife so they would fit in his truck. (Tr. 531–534.)

Later that afternoon, Licon drove Camarena to the Newton police station to file a police report about the knife incident. (Tr. 833–836.) Camarena spoke with Officer Bell and made a report at 3:45 p.m. (Tr. 425; R Exh. 6.) Licon drove Camarena back to the ULX facility at about 4:00. Camarena gave Styers a copy of the police report and then went to his hotel room. (Tr. 846–847, 1272–1273.)

At 4:00 or 4:30, Styers asked Roman for Placencia's location. A little before 5:00, at Styers' request, Roman instructed Placencia to come back to the facility. (Tr. 1168–1169, 1277.) Placencia stopped at a strip mall about 2 miles from the ULX facility to take a lunch break.

Styers called the Newton Station so an officer could be present when Styers put Placencia out of service. (Tr. 1275.)

Officers in the field are contacted when somebody calls for service. (Tr. 420, 436.) At 5:30 p.m., Officer Mario Lagac received a call to report to the Respondent's ULX facility because there was a business dispute. Styers was the individual who had placed the call. (Tr. 376–378, 398–399.)

Officer Lagac and his partner, Officer Flores, reported to the ULX facility, and Styers told him there had been a verbal argument at approximately 11:00 a.m. Styers showed Lagac a copy of the police report. Lagac contacted the Newton Police Station and spoke with Officer Bell, who advised that a criminal reports investigation report had been completed. (Tr. 382.) Officer Bell relayed that Camarena had reported Placencia had pulled out a five-inch pocket knife, tapped it on his own chest, and said, "Are you in fear?" or "Are you scared?" (Tr. 378–384; GC Exh. 9.) Officers Lagac and Flores were then directed by their detective supervisor to arrest Placencia for criminal threats if he returned. (Tr. 385.) Had Styers not called the police station, Placencia would not have been arrested that day. (Tr. 437.)

After waiting for a while at ULX , Styers told the officers where Placencia's truck was parked and they proceeded to Placencia's location. (Tr. 385–386, 418–419.) Styers and Licon went with them so that Styers could retrieve the vehicle. (Tr. 1284.) At about 6:00, Wattier told

Roman the police needed him to go to identify Placencia.[34] Wattier drove Roman to the strip mall, and Roman identified Placencia and the knife. (Tr. 1171–1174.)

The police approached Placencia, took his knife, handcuffed him, and arrested him at 6:15 p.m. (Tr. 235–236, 387, 410. 418–419; 423–424, GC Exh. 9.) At Styers' request, the officers told Placencia he was placed out of service. (Tr. 1286; R Exh. 19.) Placencia was taken to jail where he remained until he was bailed out about 1:00 a.m. on October 8.

Though it was Officer Lagac's normal practice to contact the victim, he never spoke with Camarena. This is because Styers advised him that Camarena had already left work and could not be contacted since he resided out of town in Chula Vista.[35] (GC Exh. 9; Tr. 390–391, 405, 408–409.)

Placencia spoke with Huner on the phone. Huner instructed Placencia to write a statement. Placencia mentioned there were witnesses to the incident, and Huner said to get statements from them. (Tr. 247.) At Placencia's request, Martinez, Navarro, and Cabrera wrote statements.[36] (CP Exhs. 1–3; Tr. 544–546.)

Cabrera wrote his statement on October 8. That same day, he went to Styers' office and informed Styers and Licon that no threat was ever made, there were witnesses, and he was not going to stay quiet about it. (Tr. 547.) Styers explained that Con-Way had nothing to do with the incident, and it was between Placencia and Camarena. (Tr. 1293.) Huner contacted Cabrera and asked for a statement. Cabrera told him he had already provided one, and he emailed his October 8 statement to Huner. (Tr. 549–551.)

Placencia wrote a statement recounting his recollection of the events of October 7. He sent it, along with his statements about the events of October 6, to Huner on October 9 or 10. (Tr. 260.)

Placencia was terminated for violence in the workplace. As with all terminations in the Western area, Huner was the decisionmaker. (Tr. 1296–1297, 1482, 1503, 1541; R Exh. 29.) In a report created between October 13–15, Huner determined that the conversation began with lighthearted banter, but Cabrera left the room before the conversation turned threatening. Huner discredited employee statements because they were nearly identical in detail.[37] (R Exh. 30.) Though he claimed to believe Cabrera, Navarro, and Martinez were each dishonest in their respective statements, none of them were disciplined. (Tr. 564, 1548.)

The criminal case against Placencia was dismissed. (Tr. 263–264.)

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[34] Wattier was retired at the time of the hearing.

[35] Lagac thought Camarena was an employee of Con-Way based on what Styers had told him. (Tr. 409.)

[36] Navarro wrote his statement the same night Placencia called him and told him about his arrest, without talking to Cabrera or Martinez. He provided the statement to human resources. (Tr. 662–664.) Cabrera did not talk to Navarro or Martinez before making his statement. (Tr. 551.)

[37] Huner reported that Placencia provided all of the statements, but Navarro provided his own statement to Huner. (Tr. 664, 1528.)

## III. Decision and Analysis

### A. Witness Credibility

Many of the disputes at issue can be resolved only by assessing witness credibility. A credibility determination may rest on various factors, including "the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole." *Hills & Dales General Hospital*, 360 NLRB No. 70, slip op at 7 (2014), citing *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). In making credibility resolutions, it is well established that the trier of fact may believe some, but not all, of a witness's testimony. *NLRB v. Universal Camera Corp*., 179 F.2d 749 (2d Cir. 1950).

The Board has agreed that "when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d (6th Cir. 1988). This is particularly true where the witness is the Respondent's agent. *Roosevelt Memorial Medical Center,* 348 NLRB 1016, 1022 (2006). Moreover, an adverse inference is warranted by the unexpected failure of a witness to testify regarding a factual issue upon which the witness would likely have knowledge. See *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977) (adverse inference appropriate where no explanation as to why supervisors did not testify); *Flexsteel Industries*, 316 NLRB 745, 758 (1995) (failure to examine a favorable witness regarding factual issue upon which that witness would likely have knowledge gives rise to the "strongest possible adverse inference" regarding such fact).

Testimony from current employees tends to be particularly reliable because it goes against their pecuniary interests. *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304, 1304 fn. 2 (1961); *Gateway Transportation Co.*, 193 NLRB 47, 48 (1971); *Federal Stainless Sink Div. of Unarco Industries*, 197 NLRB 489, 491 (1972).

It is impossible to reconcile all of the different recollections of the witnesses for both sides. In evaluating the various different versions of events, I have fully reviewed the entire record and carefully observed the demeanor of all the witnesses. I have considered the apparent interests of the witnesses; the inherent probabilities in light of other events; corroboration or the lack of it; consistencies or inconsistencies within the testimony of each witness and between witnesses with similar apparent interests. See, e.g. *NLRB v. Walton Mfg. Co*., 369 U.S. 404, 408 (1962). Testimony in contradiction to my factual findings has been carefully considered but discredited. Where there is inconsistent evidence on a relevant point, my credibility findings are incorporated into my legal analysis below.

B. Alleged 8(a)(1) violations

Under Section 8(a)(1) of the Act, it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."

The basic test for a violation of Section 8(a)(1) is whether under all the circumstances the employer's conduct reasonably tended to restrain, coerce, or interfere with employees' rights guaranteed by the Section 7 of the Act. *Mediplex of Danbury*, 314 NLRB 470, 472, (1994); *Sunnyside Home Care Project*, 308 NLRB 346 fn. 1 (1992), citing *American Freightways Co*., 124 NLRB 146, 147(1959). Further, "It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed." *American. Tissue Corp*., 336 NLRB 435, 441 (2001) (citing *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946)).

1. Union insignia

Complaint paragraphs 6, 7(b), and 12 allege that the Respondent violated Section 8(a)(1) of the Act when Styers and Licon prohibited Placencia from wearing union insignia on or around September 15, 2014.

In *Republic Aviation Corp v. NLRB*, 324 U.S. 793, 801–803 (1945), the Supreme Court held that employees have a protected right to wear union buttons and other insignia at work. This right is balanced against the employer's right to maintain order, productivity, and discipline. The Board has struck this balance by permitting employers to prohibit employees from wearing union insignia where the employer proves that "special circumstances" exist. Id. at 797–798; see also *Boch Honda*, 362 NLRB No. 83, slip op. at 2 (2015); *Sam's Club*, 349 NLRB 1007, 1010 (2007); *Control Services*, 303 NLRB 481 (1991).

Placencia provided unrefuted testimony that Styers instructed him, on one occasion, to remove the lanyard bearing the Union's insignia. Placencia further testified that Licon told him he could wear a button with the Union's insignia, but not a lanyard. Licon did not testify at the hearing. Though Styers testified, he did not deny instructing Placencia to remove the lanyard.

The Respondent contends that any alleged violation should be dismissed as *de minimis*. The fact that the infraction only occurred on one occasion, however, does not render it *de minimis*. See *Regency at the Rodeway Inn,* 255 NLRB 961, 961-962 (1981); *Golub Corp*., 338 NLRB 515, 516, fn. 13 (2002). This is particularly true considering other violation of the Act that occurred during the organizing campaign, as discussed below. Based on the foregoing, I find the Respondent violated the Act as alleged.

2. Alleged threats

a. Styers' September 15 comment to Placencia

Complaint paragraphs 7(a) and 12 allege that on or around September 15, 2014, the Respondent threatened Placencia with unspecified reprisals because he supported the Union. More specifically, the allegation is that, in response to Placencia saying all the drama surrounding the union campaign was unnecessary, Styers responded, "You haven't seen nothing yet."[38]

In assessing whether a remark constitutes a threat, the appropriate test is "whether the remark can reasonably be interpreted by the employee as a threat." *Smithers Tire*, 308 NLRB 72 (1992). The actual intent of the speaker or the effect on the listener is immaterial. *Smithers Tire*, 308 NLRB 72 (1992); see also *Wyman-Gordon Co. v. NLRB*, 654 F.2d 134, 145 (1st Cir. 1981) (inquiry under Sec. 8(a)(1) is an objective one which examines whether the employer's actions would tend to coerce a reasonable employee). The "threats in question need not be explicit if the language used by the employer or his representative can reasonably by construed as threatening." *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 49 (9th Cir. 1970). The Board considers the totality of the circumstances in assessing the reasonable tendency of an ambiguous statement or a veiled threat to coerce. *KSM Industries*, 336 NLRB 133, 133 (2001).

Styers recalled the conversation at issue generally, but denied that he made the comment Placencia attributed to him. The only other individual to witness the conversation, Licon, did not testify. The General Counsel asks that I draw an inference that Licon would have testified in a manner unfavorable to the Respondent. Because Licon is the Respondent's agent and there was no explanation for his failure to testify at the hearing, I agree an inference is warranted. See *International Automated Machines*, supra; *Roosevelt Memorial Medical Center,* supra.

Even without the adverse inference, however, I find Styers made the comment and it constituted a threat.[39] First, as the General Counsel notes, Styers did not testify about how what happened after Placencia's comment about the unnecessary drama. In addition, it is clear Styers was hostile to the organizing campaign. Admittedly, in response to Placencia asking him what he disliked about the union, Styer's responded that there was "thuggery" and "all kinds of different things that go on in that type of environment." I also find Styers told Placencia that Con-Way needed to remain a non-union facility. Styers admitted stating that Con-Way was union-free, and the context was the orientation video depicting a unionized facility closing down. Placencia's version is more in line with this context and it is consistent with the message Styers sent to employees when he read the script to them detailed above, in the Spring of 2014. (R Exh. 13.) Moreover, I find Styers commented that "Chucky" no longer worked for the Company because of his support for the union. Though Styers denied making this comment, Robles, who testified at the hearing and who Placencia recalled as being present, was not asked about it. The Respondent did not present evidence to negate that "Chucky" was depicted in the orientation

[38] This allegation was amended at the hearing; initially it alleged Licon made the threat.

[39] I note that neither Styers nor Placencia is a disinterested witness.

video about the importance of sleep. I find it highly implausible that Placencia would fabricate this specific video and the comments that accompanied it.

Against this backdrop, considering the totality of the circumstances, I find Styers' made the comment, "You haven't seen nothing yet," and it constituted a threat.

b. The September 23 meeting

Complaint paragraphs 8 and 12 allege that on or about September 23, the Respondent, by Luis Camarena, threatened employees with loss of wages and benefits if the Union won the election, and told employees the Respondent would not negotiate with the Union.[40]

As a threshold issue, I must determine whether Camarena was an agent of the Respondent while he performed labor consulting services there.

Section 2(13) of the Act states: "[i]n determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." In other words, an individual need not be actually authorized by the employer to take the actions at issue if it appears he or she possesses such authority. In determining whether an individual has apparent authority, the Board applies common law principles which it summarized in *Mastec North America, Inc.,* 356 NLRB No. 110, slip op. at pp. 1–2 (2011):

> Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe the principal has authorized the alleged agent to perform the acts in question. Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that his conduct is likely to create such a belief. [Citations and internal punctuation omitted.]

Moreover, under the common law of agency, a principal may be responsible for its agent's actions if the agent reasonably believed from the principal's manifestations to the agent that the principal wished the agent to undertake those actions. See Restatement 2d, Agency, § 33. The Board has found the question of whether the individual serves as a conduit of information to employees particularly useful in determining agency status. *A.D. Conner Inc.*, 357 NLRB No. 154 slip op. at 21, and cases cited therein; see also *Blankenship & Associates*, 306 NLRB 994, 1000 (1992), enfd. 999 F.2d 248 (7th Cir. 1993).

In the instant case, Camarena stated at the outset of the meeting at issue that he was present on Con-Way's behalf. It is undisputed his purpose was to serve as a conduit of information to the employees. I find, therefore, that Camarena was an agent of the Respondent within the meaning of Section 2(13) of the Act..

[40] The complaint alleges Echanique also engaged in these threats, but the evidence is clear that he was silent at the meeting where the alleged threats occurred.

With regard to the statement about loss of benefits, there is a dispute regarding what precisely Camarena said. According to Placencia, Camarena stated negotiations would start from zero. According to Camarena and Echanique, Camarena said negotiations could result in employees going up, going down, or staying the same. I find it likely the parties were prone to recall the points that solidified their respective positions, and that both comments were made. I credit Placencia's testimony that he challenged the comment about negotiations starting from zero by stating wages and benefits freeze during an election process. His testimony on this matter was certain and straightforward. I also find, however, that Camarena conveyed the various results that could occur as the result of bargaining. This testimony is consistent with what Camarena stated at another meeting with employees and is consistent with the scripted message Styers conveyed to employees during his previous meetings with them.

Though I have found Camarena to lack credibility generally for the reasons detailed below, I believe he never came right out and said Con-Way would not bargain with the Union. First, as noted directly above, Camarena's testimony is corroborated by Echanique and is consistent with what another driver was told in a similar meeting. It is also consistent with what Rosado recalled Camarena saying to Placencia on October 6. Though there was at least one other employee in the meeting, this employee was not called to testify.[41] I find it implausible that Camarena, who works as a labor consultant, would so blatantly state the Company would refuse to bargain. I do not doubt that Placencia, given his viewpoint about the Union and his clear skepticism of the labor consultants' information, took away the message that the Company would not be eager to bargain. The evidence, however, does not establish that Camarena explicitly said the Company would not bargain with the Union.

Turning to the "negotiation sill start from zero" comment, such statements are not a *per se* violation of the Act. In *Taylor-Dunn Mfg. Co*., 252 NLRB 799, 800 (1980), enfd. mem. 679 F.2d 900 (9th Cir. 1982), stated:

> It is well established that "bargaining from ground zero" or "bargaining from scratch" statements by employer representatives violate Section 8(a)(1) of the Act if, in context, they reasonably could be understood by employees as a threat of loss of existing benefits and leave employees with the impression that what they may ultimately receive depends upon what the union can induce the employer to restore. On the other hand, such statements are not violative of the Act when other communications make it clear that any reduction in wages or benefits will occur only as a result of the normal give and take of negotiations.

In *Coach and & Equipment Sales Corp*., 228 NLRB 440, 440–441 (1977), the Board emphasized that such statements must be read in context, noting that the "presence of contemporaneous threats or unfair labor practices is often a critical factor in determining whether there is a threatening color to the employer's remarks."

[41] It is undisputed that Victor Rivas was also present. His sympathies regarding unionization are unknown.

Because I have found Camarena never affirmatively said the Company would not negotiate, I find his comments that negotiation would "start from zero" came close to the line of constituting a threat, but did not cross it. I therefore recommend dismissal of this complaint allegation.

c. October 6

Complaint paragraphs 9 and 12 allege that on October 6, Camarena: (a) impliedly threatened Placencia with physical harm because he supported the Union, and (b) made statements implying support of the Union would be futile.

The conversation at issue is the subject of much dispute. Resolving every little inconsistency is unnecessary, and I therefore focus on the material disputes. The only disinterested witness is Rosado, who was present for most of the conversation.[42] I find Rosado to be credible, based on his straightforward demeanor along with the fact that he did not appear to embellish his testimony. He also strikes me as impartial based on the fact that his testimony does not wholly support either Placencia or Camarena. Where his testimony resolves a conflict between Placencia and Camarena, I credit it.

With regard to the allegation regarding the Union's futility, this stems from Placencia's testimony regarding what occurred immediately after Placencia approached Camarena and Rosado. According to Placencia, Camarena said that under Article 8 the Company does not have to negotiate with the Union. By Camarena's account, the conversation started by Placencia stating, "We're taking this shit nationwide." Rosado was present at the outset of the interaction, and his testimony contradicts both versions. By Rosado's account, the interaction began with introductory pleasantries, Camarena and Placencia discussed the pros and cons of unionization, and Camarena said negotiations came with no guarantees.[43] Rosado's testimony is credited, and I therefore recommend dismissal of complaint subparagraph 9(b).

With respect to the other relevant portion of the conversation, Rosado's recollection was that, in response to Placencia stating that the employees felt like battered wives, prompting their decision to seek representation, Camarena responded that he would not let himself be a battered wife, would "fight his own fight and knock down doors" if he had to. This is largely consistent with Camarena's recollection, and I find Camarena made such a comment.[44]

It is important to note, however, that though Rosado was present at the outset of the conversation, he was absent for about 7–8 minutes of its later portions. The question therefore

[42] Though Rosado is a supervisor, his feelings about the employees organizing is not a matter of record.

[43] Although Placencia and Camarena had met at the meeting in late September, there is no evidence that they interacted between the meeting and October 6, and therefore Rosado's recollection of introductory pleasantries is highly plausible, particularly considering the number of employee meetings Camarena conducted.

[44] Though Placencia did not reference this comment in his statement or his testimony, it is clear none of the witnesses recounted everything that transpired during the conversation, which Rosado recalled took place over the course of about 30 minutes.

remains as to whether, outside of Rosado's presence, Camarena also made the comments and gestures Placencia attributed to him in response to Placencia stating the union drive was not because of money. I resolve this conflict in Placencia's favor. First, and foremost, I find Camarena generally lacks credibility.[45] His repeated denials that he was present at the ULX facility to dissuade employees from choosing the Union were easily shown to lack credence. He denied his job was to stop unionization and he claimed not to understand that Con-Way did not want a union in place. (Tr. 896, 898.) The following exchange shows Camarena's evasiveness:

> Q Did Cruz & Associates give you any instructions on what you were supposed to do to address the Union organizing at Con-Way?
> . . .
>
> THE WITNESS: To inform the employees of their rights under the National Labor Relations Act.
> Q BY MR. RUTTEN: Anything else?
> A I'm there to provide information regarding the Act.
> Q And was it your understanding that you were to provide the information in a way to discourage unionization?
> A No.
> Q Do you believe that your employer is pleased when the result of your labor relations efforts result in unionization?
> A I believe we inform the employer at the time of hiring that we don't have a crystal ball to know what the outcome of an election can be. And that we will do our best to provide the most factual information to help employees make an informed decision, but we have nothing -- no power to know how everything can end up after an election?
> Q That wasn't my question. My question was, is your boss pleased when unionization occurs after your labor relations efforts?
> MR. LETTER: Objection. Vague as to who boss is.
> JUDGE LAWS: Sustained.
> Q BY MR. RUTTEN: Is Cruz & Associates pleased when they send you out on an assignment as a labor relations consultant and unionization occurs?
> A Yes.
> Q They're pleased when unionization occurs?
> A We lose. It happens. We don't win every time.

(Tr. 899–900.) Yet, when pressed, he admitted that it's "common knowledge when we're hired on to try to help a company, that their preference would be to continue to work directly with their employees." (Tr. 898.)

Similarly, when asked whether he got a sense of which employees were pro-union and which were anti-union, Camarena responded that he did not. When it became clear to him the Union was aware of the point system he used to evaluate employees' sympathies, he changed his testimony:

[45] That I believed he never said the Company would not bargain, I disbelieved most of the rest of his testimony regarding material disputes. See *NLRB v. Universal Camera Corp*., supra.

Q When you worked at Con-Way ULX, did you get a sense of which employees were pro-union and which employees were anti union?
A No.
Q You didn't? That wasn't part of your duties on this campaign?
A My duty is to inform them of their rights and to help them understand the process, yes.
Q So part of your duties weren't -- you didn't do a number system where you rated the employees on this campaign?
A We do sometimes.
Q But on this campaign, did you do that?
A Yes, we did.

(Tr. 914–915.) Even in light of this reluctant admission, Camarena still remained evasive:

Q Can you kind of describe how that rating system works?
[objection and ruling]
THE WITNESS: Yes, we gauge, you know, whether or not we believe that they're understanding the information.
Q BY MS. BURNS: Okay.
A And yes, we --
JUDGE LAWS: Understanding what information?
THE WITNESS: The Act.
JUDGE LAWS: So it's based on understanding the Act, not whether they're pro-union or anti-union?
THE WITNESS: Well, depending on how much they're understanding the info we believe then, you know, sometimes it affects their view.
JUDGE LAWS: I know, but I need you to listen to my question.
THE WITNESS: Okay.
JUDGE LAWS: Because you're saying two different things and I want to try to make sense of it.
THE WITNESS: Okay, ma'am.
JUDGE LAWS: You responded that you do assign a number based on whether they're pro-union or anti-union.
THE WITNESS: Yes.
JUDGE LAWS: But then you said you assign the number based on how much they understand the information you're giving them. So is that also true?
THE WITNESS: Yes, because when --
JUDGE LAWS: Now, hold on. Just yes.
THE WITNESS: Yes.
JUDGE LAWS: How do those two things relate to each other? Are there two numbers? One, this person understands the information, I'm going to give them this number and then another number for your assessment of where they fall with regard to support of the union, or is it one number?
THE WITNESS: It's one number.

(Tr. 915–917.)

I also find Camarena had a tendency to exaggerate and embellish when it served him. His attempt to paint Placencia as "mentally unstable" is not supported by objective evidence. No supervisor or coworker who worked with Placencia on a daily basis testified or insinuated that Placencia behaved in a manner warranting such a conclusion. Though Rosado observed Placencia become "a little emotional" during the October 6 exchange, he viewed the conversation as professional throughout. The record as a whole fails to support a conclusion that Placencia was an employee with emotional problems. Other examples of Camarena's tendency to exaggerate are discussed below in connection with Placencia's termination.

Though Placencia was clearly in favor of the Union, and like any witness with similar leanings would tend to view things with a pro-union lens, his testimony was clear and forthright, and lacked the evasive, slippery, and at times outright dishonest qualities Camarena's testimony exhibited. In addition, Placencia's account of Camarena pantomiming the actions of pretending to kick down a door, push someone to the ground, reach for a pretend gun, and point it, are similar to Camarena's admitted actions of reaching for and wielding a fake knife the following day.

Having resolved the conflicting testimony, I find Camarena's actions indicated a willingness to resort to physical violence to protect his interests. Given the fact that the petition for election had been recently filed, this conduct was reasonably construed as a threat. Accordingly, I find the General Counsel has met his burden that Camarena made an implied threat to Placencia, as alleged.

C. Section 8(a)(3) and (1) Allegations

1. Romero's suspension and termination.

Complaint allegations 10 and 13 allege the Respondent violated Section 8(a)(3) and (1) of the Act when it suspended and terminated Romero.

The General Counsel Contends that Romero was suspended and discharged because of his union activities. The Respondent contends it took these actions because Romero falsified an accident report. In cases involving dual motivation, the Board employs the test 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). To prove a violation under *Wright Line*, the General Counsel must make an initial showing "sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." 251 NLRB at 1089. If this is accomplished, the burden shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct." Id. The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, but must persuade, by a preponderance of the evidence, that the action would have taken place absent the protected activity. *Dentech Corp*., 294 NLRB 924, 956 (1989).

There is no question that Romero engaged in union activity and the Respondent knew about it. It is clear management knew not only that he engaged in union activities, but he was among the leaders of the ongoing campaign. The remaining question turns on the Respondent's motivation for suspending and terminating Romero.

A discriminatory motive or animus may be established by: (1) the timing of the employer's adverse action in relationship to the employee's protected activity; (2) the presence of other unfair labor practices, (3) statements and actions showing the employer's general and specific animus; (4) the disparate treatment of the discriminatees; (5) departure from past practice; and (6) evidence that an employer's proffered explanation for the adverse action is a pretext. See *Golden Day Schools v. NLRB*, 644 F.2d 834, 838 (9th Cir. 1981); *NLRB v. Rain-Ware, Inc*., 732 F.2d 1349, 1354 (7th Cir. 1984) (timing); *Mid-Mountain Foods, Inc*., 332 NLRB 251, 260 (2000), enfd. mem. 169 LRRM 2448 (4th Cir. 2001); *Richardson Bros. South*, 312 NLRB 534 (1993) (other unfair labor practices); *NLRB v. Vemco, Inc*., 989 F.2d 1468, 1473–1474 (6th Cir. 1993); *Affiliated Foods, Inc*., 328 NLRB 1107 (1999)(statements); *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999)(disparate treatment); *JAMCO,* 294 NLRB 896, 905 (1989), affd. mem. 927 F.2d 614 (11th Cir. 1991), cert. denied 502 U.S. 814 (1991) (departure from past practice); *Wright Line*, 251 NLRB at 1089; *Roadway Express*, 327 NLRB 25, 26 (1998) (disparate treatment).

It is very clear the Respondent has gone to great lengths to keep the Union out of its ULX facility. Among the evidence of the Respondent's animus are: (1) The video shown at new employee orientation depicting the closure of a union facility, (2) Styers' comments regarding the Company's need to stay union-free and his comments about "Chucky", detailed above, and (3) the conduct found to have violated Section 8(a)(1), above.[46]

The timing of Romero's termination is likewise suspicious. Management clearly knew the organizing campaign was gaining strength—Styers' scripted message to the employees in meetings during the spring of 2014 underscores this. Though Romeo had been written up for a few infractions, including accidents, between 2011 and January 2013, this very minor incident led to his termination in the weeks leading up to the petition being filed.

I find, therefore the General Counsel has established an inference that Romero's union activity was a motivating factor in the Respondent's decision to terminate his employment.

The Respondent must prove that Romero would have been suspended and terminated even absent his union activity. I find highly significant the lack of explanation as to why Wattier asked if there was any way to verify the other vehicle had left its lane, and why Styers suggested having Andersen review the tape. The very decision to inquire into this incident is suspicious, particularly considering Romero followed reporting protocols and there was no damage to the vehicle.

[46] Though some of this conduct occurred after Romero's termination, it nonetheless supports an inference of union animus.

Moreover, at its inception, the unexplained decision to look into Romero's report shows embellishment that continued and built over time. Significantly, Romero never reported that the other vehicle left its lane, so Wattier's initial request to verify that the other vehicle left its lane stands on faulty ground based on its substance as well as its unexplained origin. Indeed, though Romero did not have the benefit of reviewing DriveCam before making his report, his picture of the incident does not show the other vehicle crossing over the lane line, nor does his narrative make such a report. (GC Exh. 2.) The report he gave to Plonte likewise does not state the other vehicle left its lane. (R Exh. 21.) From the start, therefore, both the decision to look into Romero's report, and the misstatement of what Romero reported, lend a strong sense of untrustworthiness to the Respondent's actions.

The Respondent's embellishment of the situation is compounded by Andersen's testimony, for the first time at the hearing, that it appeared Romero crossed over his lane line and hit the other vehicle. This is not reflected in any of the documents contemporaneously explaining what occurred. It is likewise contradicted by evidence that there is no way to tell where in the lane Romero's vehicle was by looking at DriveCam. Finally, it does not square with Andersen's testimony that at -7.25 seconds, a lane departure warning system installed in Romero's tractor-trailer was activated, resulting in a beeping sound. No such beeping sound can be heard shortly before or at the time of impact at -4.50 seconds.

The Respondent's justification that Romero was distracted because he was texting on his cell phone is belied by a wealth of evidence. In Andersen's initial report, which was made after reviewing DriveCam frame-by-frame about a dozen times, he referred to an "electronic device" Romero was holding. Later, after reviewing the video again, he expressed his belief it was a cell phone. When asked why he reviewed the footage again to glean this fact, Andersen stated, "As time permitted, I went back after things had slowed down that day from taking calls, and I looked at this event again just to look at the details of it." (Tr. 1353.) In the final status ruling report, it states that in fact Romero was using a cell phone and texting, thus apparently transforming what was once purported to be Andersen's belief into a matter established fact. This "fact" was relied upon when Romero was put out of service and subsequently terminated. This strikes me as a convenient after-the-fact determination, particularly considering review of the DriveCam contradicts any notion Romero was texting, and it is completely impossible to discern from the video what type of device Romero was holding.[47] At the hearing, where the DriveCam was reviewed, Andersen scaled things back, and returned to stating that it "looked like he had his cell phone in his hand" and "his thumb was actually touching the screen" in one clip. (Tr. 1353.) Thus when it was clear the recording was being placed into the hearing record, the Respondent was no longer able to plausibly assert with certainty that Romero was texting on a cell phone.

Romero consistently stated he was holding an iPod.[48] I credit Romero's testimony in this regard because it is most consistent with what the DriveCam recording shows. The video clearly

[47] This was my observation both when the video was depicted on a large screen at the hearing, and in my repeated review of it on 24-inch computer screen, with any eye specifically focused on trying to determine what Romero was holding.

[48] Given how ubiquitous Apple products are in these times, the need to take judicial notice that an

depicts Romero pressed the device once with his thumb, consistent with the use of an iPod or similar mp3 player, inconsistent with the operation of a cell phone, and particularly inconsistent with the act of texting. Moreover, Romero's demeanor when testifying was consistent and straightforward.[49] Compared with the inconsistencies of the Respondent's assertions, detailed above, along with my own opportunity to view the DriveCam footage, Romero's account is easily credited.

The Respondent contends that when Andersen showed Romero the DriveCam video depicting him lowering the electronic device out of sight to hide it, he "really didn't argue that point." (Tr. 1407.) First, this does not show Romero had a cell phone. In addition, Romero voluntarily activated the DriveCam to record himself. Had he wanted to hide the fact that he was holding something, it is curious he would choose to record himself.

Turning to the Respondent's contention that falsification is a "cardinal sin" worthy of immediate termination, I find, for the reasons set forth above, that there was no falsification.[50] Romero did not affirmatively report that he was holding an iPod, but he was not asked if anything was in his hand. I credit Romero's testimony that he did not believe he had been distracted, and that is why he did not report he was distracted. His actions of turning on DriveCam and reporting the incident according to protocol belie that he was attempting to conceal anything. Moreover, as detailed below, the Respondent was faced with what it deemed to be false statements in connection with the termination of Placencia, yet the employees who made those statements were not terminated.

The Respondent presented evidence of other individuals terminated for allegedly similar infractions. Because I find there was no falsification, and I further find the Respondent knew this and manipulated the situation to trump up a disingenuous claim of falsification, I find Romero is not similarly situated to these other employees, and therefore any comparisons are unhelpful.

Based on the foregoing, I find the reason the Respondent offered for terminating Romero was a pretext to mask unlawful retaliation. I therefore find the General Counsel has sustained his burden to prove this complaint allegation.

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iPod is an mp3 player and not a phone seems akin to the need to take judicial notice that a radio is a device that plays music. There really can be no dispute.

[49] The word "knife" appears as a clear error on p. 103 of the transcript, and should read "iPod."

[50] The Respondent's Policy 541—Employee Conduct, states the following regarding falsification: "Falsification of Company Records/Dishonesty, For example, falsification of employment application or resume information, personnel records, medical history forms, insurance claims, payroll records, time cards, trip sheets, DOT logs, business expense reports, among others as well as making false/untrue statements to company management." It does not prescribe a specific form of discipline for falsification. (R Exh. 25.)

2. Placencia's arrest, suspension, and termination

Complaint paragraphs 11 and 13 allege that the Respondent violated Section 8(a)(3) and (1) of the act by filing criminal charges against Placencia resulting in his arrest, and suspending and terminating him because of his Union activities.

The General Counsel Contends that Placencia was arrested, suspended and discharged because of his union activities. The Respondent contends it took these actions because Placencia pulled a knife on Camarena and exhibited violence in the workplace. As such, the *Wright Line* framework applies.

Placencia had, by this time, identified himself to management as a union supporter and leader. Coupled with the 8(a)(1) violations and the evidence of animus set forth above, I find the General Counsel has established an inference of unlawful motivation. The Respondent, therefore must prove Placencia would have been arrested, suspended, and terminated even had he not engaged in protected activity.

In determining what actually occurred the morning of October 7, I note that many of the witnesses were asked to go back and recall highly specific details of that morning, essentially in real time. It is not realistic to expect witnesses to recall in such detail the minutiae of what, at the time, seemed like just any other morning at work. Resolving disputes over exactly where witnesses were standing and the other seemingly unending details of what various individuals did at precise moments that morning is neither helpful nor material.[51] I therefore resolve the material disputes.

For the reasons set forth above, I find Camarena lacks credibility. I credit Placencia's version of what occurred the morning of October 7 because it is more plausible and better corroborated.

First, I find Cabrera to be a very credible witness. He was resolute in his position that there was foul play in connection with Placencia's termination, he knew there were witnesses, and he was not going to sit idly by in the face of what he perceived as an injustice. As a current employee testifying against his own pecuniary interests, I find his testimony particularly reliable. I note that Cabrera's testimony is corroborated by Navarro, another current employee who I likewise find credible.

The Respondent relies on Roman's corroboration of Camarena's account to establish Placencia threatened Camarena. Roman's account is flawed, however. He admittedly could not see if there were other employees in the break room and he initially did not note the absence of other employees when he made his initial statement shortly after the events occurred. He then added that there were no other employees in the room when prompted by Styers. (R Exhs. 10, 11.) During his testimony, he said that Cabrera came back into the break room after the knife

[51] These details have not been overlooked; they just are not things I would expect witnesses to recall with a precise degree of certainty given how long ago the events occurred.

incident was over. Yet in his interview with Hinds, Roman said he could not be certain Cabrera was not still in the room. ( R Exh. 27.)

Tellingly, the fact that at 1:33 p.m. on October 7, Roman wrote he did not think the knife incident was done in a friendly manner but was more of an intimidation or threat shows it was written to dispel such a notion. (R Exh. 9.) Yet why would there be a need to dispel the notion that pointing a knife at someone was not done in a friendly manner unless the incident was arguably done in jest? At 1:33 p.m., Roman, who had seen the incident, would have no idea Placencia was going to make such a claim unless it was grounded in fact. In addition, Roman initially stated Placencia did not point the knife at Camarena. He attempted to explain this statement by testifying that he thought pointing the knife meant holding it straight out. (Tr. 1184–1185.) I do not credit this explanation, as it rings false and is contradicted by more reliable testimony.

Moreover, Roman's testimony that Navarro was not in the dispatch office when the incident occurred is unworthy of belief. It is contradicted by Navarro, who testified he heard the entire incident, saw the end of it, and described the atmosphere as light-hearted and joking. I accord high reliability to Navarro's testimony based on his open and forthcoming demeanor, and the fact that he is a current employee testifying against his pecuniary interests. Roman's testimony that Navarro left the dispatch office and came back in at 10:46 or 10:47 is contradicted by the weight of the evidence, and less plausible than Navarro's account. The Respondent contends that the other drivers could not have witnessed what occurred, because they had already left the break room and proceeded to their assigned routs. There is no dispute that Navarro generates the paperwork the drivers need for their routes. Yet, to explain Navarro's absence from the break room during the knife incident, Roman testified the drivers receive their paperwork any time between about 10:46 up to 11:30. (Tr. 1204.)

Turning to Camarena, in addition to his credibility problems detailed above, his purported fear of Placencia was grossly exaggerated. The manner in which he testified about the knife incident struck me as practiced and disingenuous. He said he felt fear for his wife and children during and after the knife incident, yet even crediting Camarena's account, Placencia never did anything to suggest Camarena's family was in danger. Moreover, Camarena delayed hours before contacting the police and never alerted authorities in his home town near San Diego about the threat. It also strikes me as unlikely Camarena really believed Placencia would jump over the counter and through the window and attack him, or throw his work knife at him. Camarena's overreaction coupled with the failure to notify authorities about what Camarena ostensibly perceived as a threat to his family, supports the conclusion that the incident did not occur as Camarena alleged.

Moreover, Camarena could offer no explanation as to why he waited more than four hours to file the police report. (Tr. 884.) He admittedly did not know where Placencia was when he went downstairs after the incident, called his wife, wrote his statement, and ate his lunch. When asked why he stayed at the facility, Camarena testified, "I just did." (Tr. 883.) This leads to the conclusion that Camarena was not in fear for his life because the incident did not occur as he alleged.

When it comes to a key element of Placencia's alleged threat of violence, Camarena and Roman's accounts differ. Camarena recalled Placencia stated, "What, are you scared?" twice, as he pointed the knife at him. Roman recalled Placencia stated, "Why don't you go with me? You don't have to be afraid. Nothing's going to happen." Camarena denied Placencia made such a comment. This inconsistency about a primary piece of the alleged threat points to pretext. There are also other inconsistencies between Camarena and Roman, including how many times Placencia opened the knife, and whether it was Placencia or Camarena who walked away from the incident.

Another anomaly stems from Huner's conclusion in the investigative report that the conversation started out as lighthearted banter, but the witnesses had left the room before the conversation turned threatening. Yet, by Camarena and Roman's accounts, the incident did not start out has lighthearted banter, but was marked from the outset by Placencia being aggressive, pushy, and sarcastic.

In addition, while I find the timing of events cannot be nailed down with precision, the disparity between Camarena and Roman regarding Camarena's arrival in the dispatch office is highly disparate. Camarena recalled going to the dispatch office at 10:00 or 10:15 to go over assignments with Roman. According to Roman, Camarena did not come into the dispatch area until after Placencia had approached the dispatch window.

The Respondent's failure to offer a legitimate explanation for discrediting the employee witnesses who corroborated Placencia's version of what occurred also points to pretext. Huner asserted that the employee and former employee witnesses could not be believed because their statements matched too closely. The record belies this, however, and it is readily apparent that the witness' testimony, while generally corroborative, is not exactly the same. None of the employees were disciplined despite having ostensibly committed the "cardinal sin" of falsification. This leads me to conclude that the statements were not false and the Respondent knew it.

The witness's presence in the break room at the time of the incident is further corroborated by the LEAN meetings that occurred the morning of October 7. The 9:30 meeting ended after 10:30, after which time employees proceeded to get their work assignments. This dovetails with the testimony that drivers witnessed the incident, and makes it highly improbable the attendees of the 9:30 meeting had received their assignments and cleared out of the break room by 10:30.

The Respondent contends that Huner also reviewed time records for Cabrera and Martinez, showing Cabrera clocked in at 10:30 a.m., and that Martinez swiped in his dock work code at 10:34 a.m., which supported Huner's conclusion they both had left the break room to handle their work assignments before the knife incident occurred. (R Exhs. 2, 28.) Placencia also clocked in at 10:30, however, and he was obviously in the break room when the knife incident occurred. Cabrera's clock-in time therefore lacks probative value. Moreover, this conclusion does not square with the version of Roman's account that has Cabrera coming back into the break room after the knife incident.

With regard to Martinez, Huner testified that at 10:34, his time card showed code 913, which is inbound dock. (Tr. 1502–1503.) Yet, on cross-examination Huner testified Martinez's time card indicated he was attending a meeting between 9:27 and 10:34. (Tr. 1527.) This is consistent with Navarro's testimony about the LEAN meeting running a few minutes late. It is undisputed employees left the LEAN meeting and went upstairs to get their assignments. Huner's attempt to establish Martinez was not present in the break room at the time of the incident therefore does not hold up.

There is also significant evidence the Respondent's managers seized on opportunities to paint Placencia in a negative light. Regarding the events of October 6, Huner testified that Rosado had communicated to him that the interaction between Placencia and Camarena the evening of October 6 "had elements to it that of an escalation type thing where it wasn't a totally amicable conversation."(Tr. 1486.) Yet Rosado viewed the conversation as "professional the whole time" and described it as "a spirited debate of sharing opinions" that ended amicably. Despite this, Huner attempted to paint a different picture, stating, "It then carried over into the next morning when Placencia came into work and addressed Mr. Camarena which was the event where the knife was pulled on Camarena and the threat of violence was made." (Tr. 1486.)

Finally, Placencia and the driver witness's account of what occurred is much more plausible. Camarena's actions of pretending to grab a knife from behind his back and mimicking the line from Crocodile Dundee fits with the multiple witness's description of lighthearted banter. Camarena's attempt to couch his actions as a frightened and shocked response made to diffuse a tense situation does not ring true.

The Respondent contends other employees who did not engage in union activity were terminated for similar infractions. Because I find there was no threat of violence, and I further find the Respondent knew this and manipulated the situation to fabricate a disingenuous claim of violence in the workplace, I find Placencia is not similarly situated to the other employees who were terminated for violating the Respondent's policies against violence in the workplace. For this reason, a comparative analysis is of no utility.

The Respondent argues at length that Camarena was not acting as the Respondent's agent when he filed the police report leading to Placencia's arrest. Unlike the Respondent's argument, however, my analysis is grounded in my findings that there was never a real threat and never a legitimate police report, and the Respondent knew it. Camarena's delay in making the police report, which occurred only after consultation with Styers and Licon, underscores this. Moreover, the Respondent ratified Camarena's actions by driving him to the police station, calling the police later that day to come to the facility because of a workplace dispute, and leading the police to Placencia's truck to facilitate his arrest. Office Lagac's testimony is clear that had Styers not initiated the call for service, Placencia would not have been arrested that day.

Other evidence casts considerable doubt on Styers' motivations for calling the police. When Officer Lagac asked Styers for Camarena's phone number so that he could interview him, Styers said Camarena was out of the area in Chula Vista where he resided, when in fact he had gone back to his hotel room. Moreover, neither Styers nor any other supervisor or manager has

explained why Placencia, who had supposedly made a violent threat with a knife in the morning, was permitted to work almost his entire shift before any action was taken.

The Respondent's attempts to disavow responsibility for Placencia's arrest are disingenuous. In short, I find Camarena was acting as an agent of the Respondent when he filed the police report. His actions set in motion a course of action, ratified by the Respondent's managers, culminating in Styers' call to the police. This led to Placencia's arrest and, in turn, his suspension and termination.

As to the Respondent's argument that Camarena's police report was protected by the First Amendment, this is easily resolved by two findings: (1) The police report was false; and (2) The police report was made with retaliatory motivation.

Based on the foregoing, I find the General Counsel has proved Placencia was terminated based on his union activity.

## IV. THE OBJECTIONS

### A. Background

After the petition for representation was filed Con-Way and the Union entered into a stipulated election agreement for an election to be conducted on October 23, 2014, which was approved on September 24, 2014. The employees included in the agreed-upon unit eligible to vote consisted of all full-time and regular part-time driver sales representatives and driver sales representative students employed by Con-way at its ULX facility. The election was conducted as scheduled. 22 votes were cast for the Union and 20 votes were cast against. Con-Way challenged the ballots of Romero and Placencia because that they had been terminated prior to the election. (GC Exh. 1(x).) Both parties filed objections to the election. On July 20, 2015, the Board approved of a stipulation between the Company and the Union whereby the Union agreed to withdraw its objections to the election. The parties also stipulated not to open or count Romero's or Placencia's ballots. The Board issued a Revised Tally of Ballots which finalized the vote count at 22 being cast in favor of the Union and twenty 20 cast against. (GC Ex. 1 (ab)).

The Regional Director set the following Objections for Hearing:

Objection No. 1

During the critical period, the Union and its representatives, agents and supporters engaged in threatening, intimidating, coercive and abusive conduct directed at the Employer's employees, supervisors, managers, consultants, and others, which threatened, intimidated, and coerced employees, placed them in reasonable fear for their safety, and placed them in reasonable fear of retaliation, retribution, and other reprisals if they did not support or vote for the Union in this election.

Objection No. 2

On the day of the election, the Union and its representatives, agents, and supporters threatened, intimidated, and coerced employees while they were on their way into the Employer's facility to vote in this election.[52]

Objection No. 3

Even if the conduct set forth in Objections 1 and 2, above, cannot be attributed to the Union or its agents, this conduct constituted improper third party conduct that, either singularly or cumulatively, destroyed the minimum laboratory conditions necessary for a free and fair election and interfered with the election result inasmuch as it constituted improper pressuring, threatening, coercion, and intimidation of eligible voters.

Objection No. 4

A general atmosphere of fear, coercion, and confusion was created during the critical period by the Union and its representatives, agents, or supporters, or by third parties, that interfered with the employees' ability to exercise a free, fair, and uncoerced choice in this election, and interfered with the conduct of the election and the election result.

Objection No. 5

The conduct set forth in Objections 1, 2, 3, and 4, above, either singularly or cumulatively, destroyed the minimum laboratory conditions necessary for a free and fair election, interfered with the employees' ability to exercise a free, fair, and uncoerced choice in this election, and interfered with the conduct of the election and the election result.

Objection No. 6

During the critical period, the Union and its representatives, agents and supporters engaged in additional improper or objectionable conduct that interfered with this election or rendered a free and fair election impossible.

More specifically, the alleged objectionable conduct consisted of: (1) Dissemination of Placencia's knifepoint threat the Camarena; (2) Receipt of silent calls by a unit employee who opposed the Union on his personal cell phone; (3) Employees, including Placencia, forming an intimidating gauntlet outside the entrance to Con-Way's facilities during the evening polling session; (4) Placencia contacting unit employees at home during the last few days before the election; (5) Styers' receipt of a threatening text message on his cell phone, about which unit employees became aware; (6) Receipt of a threatening text message by a unit employee; (7) Employees circulating comments about employees' cars at Con-way's Laredo, Texas facility being scratched before the NLRB election there on September 12, 2014; and (8) The Union posting objectionable message on its "Change Con-Way to Win" blog.

[52] This objection was withdrawn at the hearing. (Tr. 926.)

Some of the facts relevant to the objections case are intertwined with facts relevant to the unfair labor practices complaint, and are set forth above. Additional facts were adduced at the hearing and are set forth below in connection with the specific objections.

B. Objections Lacking Evidentiary Support

No evidence was presented that Styers received a threatening text. I therefore recommend overruling of any objections based on this allegation.[53] Likewise not evidence was adduced to support the allegation concerning rumors circulating at the ULX terminal regarding vandalized cars at the Company's Laredo, Texas facility. I therefore recommend overruling any objections based on this allegation.

No evidence was presented that Placencia visited employees at home in the days preceding the election. I therefore recommend overruling any objections based on these factual assertions.

C. Employees' Discussions About the Knife Incident

The only other objection potentially related to Placencia is that the knife incident between him and Camarena was widely disseminated among drivers. I find it unnecessary to determine whether Placencia was an agent of the Union because I find there was no evidence that any of the conduct attributed to him occurred.

It is undisputed that after Placencia's arrest, the knife incident was widely discussed among drivers at the ULX facility.[54] For the reasons set forth in my analysis of the unfair labor practices complaint, I find Placencia never threatened Camarena with a knife. Placencia was not at work after October 7, so whatever scuttlebutt was circulating among the drivers was not of his making. There was no evidence presented that anyone from the Union circulated information about the knife incident. The incident was only fodder for employee gossip because the Company distorted it and used it to justify terminating Placencia.

Because the evidence shows Placencia never threatened Camarena with a knife, any objection based on this allegation lacks a factual foundation and recommend overruling it.

D. Change Con-Way to Win Blog

1. Facts

Some of the objections are based on the "Change Con-Way to Win" blog, which displayed pro-union, anti-management commentary. (R Exh. 7.) The blog's administrator

[53] Camarena briefly mentioned a text Styers purportedly received, but Styers did not testify about it and it was not otherwise authenticated.

[54] The record is replete with testimony that this was a common topic among drivers at the time.

controlled what was posted. The Union did not create and or manage the blog, the Teamsters logo appeared on it and Diaz was aware of it and visited it on a few occasions. (Tr. 1589, 1599.)

One entry, dated September 19, 2014, entitled "Outing The Rats at ULX" denigrates Styers and Robles for allegedly spreading lies about the Union. Driver Gerardo Lopez was sent a link to this post on his personal cell phone. The entry states:

> Paul Styers and his henchmen have done it again. They are out spreading lies about the union. Steyers' [sic] lead liar and master kiss-ass, Ramsy [sic] Robles are deceiving employees regarding the union. They are reaching into their bag of tricks and pulling out some of the most common lies. Stating that with a union in place, we would be paying for ABF and YRC pensions, that ABF and YRC drivers can come to Conway and dovetail into the roster with their company seniority. They need to be a little more original, these are old, tired, and frankly just lazy lies. We don't expect any less of Paul Styers, he is a known liar and bigot. He's not fit to be a manager with his dirty tricks. As for Ramsy [sic] Robles, he is a lazy employee that is only kept around because he does Steyers' [sic] dirty work. As we continue to push forward with our efforts we will be outing any employees that are knowingly lying about the union. If they can go around spreading lies, then they can proudly look at their names here and stand behind their words and actions. Out with the rats!

(R Exh. 7.) There were 82 comments regarding the post. Other comments on the blog were made by someone named "Jaime" and by other individuals identified only by first names or by pseudonyms.[55] Driver Clemente Fuentes was mentioned in a post as follows:

> Richard said. . .
>
> Clemente Fuentes from ulx, I thought you were a man you sorry ass punk.
>
> October 10, 2014 at 3:07 PM Jaime said. . .
> Clemente pay your child support that you're complaining about and don't be ignorant saying you will pay someone else's pension, you stupid fool.
>
> October 12, 2014 at 5:52 PM

(R. Exh. 7.)

Lopez initially perceived "outing the rats" entry as a threat, but his perception changed when he looked at the comments posted with it.[56] He showed the text message to Roman, but he did not make a record of it. Robles saw the "outing the rats" entry and thought on was that it was funny. It did not upset him. (Tr. 959.) Driver Clemente Fuentes' reaction to the website was it

[55] It has not been established that the "Jaime" who posted on the blog was Romero. He was not asked about the blog during his testimony.

[56] Employees were unsuccessful when they attempted to post comments contrary to the comments that appeared on the blog.

was a bunch of lies. (Tr. 988.) Driver Leonard Loya's reaction was that the blog was childish. (Tr. 1008.) Mario Cruz saw the entry and was curious to see whether his name was mentioned. He felt relieved that his name was not included. (Tr. 1033–1034.)

Victor Cruz was afraid his name would appear on the blog if he put up a fight. He thought somebody might hurt him or his family. He thought people were afraid to speak out because their names might appear on the blog. (Tr. 1057–1058, 1090.)

Viewing the "Change Con-Way to Win" blog did not cause any witness to change his mind about how he voted in the election. No witness heard of any other employee changing his or her mind about the election based on the blog.

2. Analysis

"The burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one. The objecting party must show, inter alia, that the conduct in question affected employees in the voting unit and had a reasonable tendency to affect the outcome of the election." *Delta Brands, Inc*., 344 NLRB 252, 253 (2005) (internal quotations omitted). The objecting party must prove that the specific conduct in question had a reasonable tendency to affect the outcome of the election. *Affiliated Computerizing Services*, 355 NLRB No. 163 (2010).

The Respondent has failed to establish that a union agent published the "Change Con-Way to Win" blog. I therefore find that the standards for evaluating conduct by a third party are applicable to objections based on the blog.

Where misconduct is attributable to a third party, the Board will overturn an election if the misconduct is "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Beaird-Poulan Division, Emerson Electric Co.*, 247 NLRB 1365, 1388 (1980); see also *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984). The Board applies an objective standard. See *Emerson Electric Co.*, supra; *Picoma Industries, Inc*., 296 NLRB 498, 499 (1989) In determining whether a threat is serious and likely to intimidate prospective voters, the Board evaluates not only the nature of the threat itself, but also: (1) whether the threat encompassed the entire bargaining unit; (2) whether reports of the threat were disseminated widely within the unit; (3) whether the person making the threat was capable of carrying it out, and (4) whether it is likely that the employees acted in fear of this person's capability of carrying out the threat; and (5) whether the threat was 'rejuvenated' at or near the time of the election." *Accubuilt, Inc*., 340 NLRB. 1337 (2003) (citing *Westwood Horizons*, supra). While the Board will pay particular attention to the fairness of close elections, the *Westwood Horizons* standard applies even where the election margin is narrow. Id.

While very critical of Styers and, to a slightly lesser extent Robles, there is insufficient evidence to prove the "Outing the Rats" entry, or any other part of the "Change Con-Way to Win" blog specifically had a reasonable tendency to influence the outcome of the election. The employees voluntarily chose to view the website. The "threat" implicated by the blog is that employees who made false statements about the Union would be named, or "outed." Although

the blog was viewed by many of the drivers, the statements in it lacked specificity regarding the election. While the comments were certainly derogatory and unkind, I find they did not instill fear in employees so as to render a free election impossible. Accordingly, I recommend any objection based on the "Change Con-Way to Win" blog be overruled.

E. The Phone Calls

After the election petition was filed, Robles received calls on his cell phone that were silent. The calls occurred 2 or 3 times a day for a couple of weeks. A number showed up but he never tried to find out who the caller was. (Tr. 963–965.) He did not feel scared or threatened by the calls. He told Styers about the calls. Styers did not ask for the number from which the calls originated, and he took no action. (Tr. 981–982, 1321.)

No evidence, aside from timing, ties the phone calls to the election, and there is nothing to establish who initiated the calls, despite the fact that a number showed up on Robles' phone. Had there been a reasonable perception of a threat by virtue of the calls, it is hard to believe Robles and Styers thought the best course was to take no steps to identify who was making that threat. In addition, the evidence regarding the calls is inconsistent. Styers thought it was Victor Cruz who received the calls. (Tr. 1321.) Loya testified the calls to Robles were obscenities. (Tr. 1015.)

For the foregoing reasons, I recommend overruling any objections based on the silent calls to Robles' cell phone.

## IV. CONCLUSIONS OF LAW

(1) By instructing employees not to wear union insignia, threatening employees for supporting the Union, filing criminal charges against an employee, suspending employees, and terminating employees because they supported the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

(2) The Respondent violated Section 8(a)(1) of the Act by instructing employee Juan Placencia not to wear union insignia and threatening him.

(3) The Respondent violated Section 8(a)(3) and (1) of the Act by filing criminal charges against employee Juan Placencia, suspending employees Jaime Romero and Juan Placencia, and terminating employees Juan Placencia and Jaime Romero because of their union activities and to discourage employees from supporting the Union.

## 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 action designed to effectuate the policies of the Act.

Having told an employee not to wear a lanyard bearing the Union's insignia, the Respondent shall be ordered to cease and desist from this action.

Having threatened an employee because of his support for the Union, the Respondent shall be ordered to cease and desist from this action.

Having unlawfully caused employee Juan Placencia to be arrested, the Respondent shall be ordered to cease and desist from this action.

Having unlawfully suspended and terminated Juan Placencia and Jaime Romero, the Respondent will be required to restore the status quo ante by rescinding their unlawful suspensions and terminations and removing all references to them from the Respondent's files.

The Respondent, having discriminatorily terminated Juan Placencia and Jaime Romero, must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay 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 No. 8 (2010). The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Latino Express, Inc*., 358 NLRB No. 94 (2012), reaffd. 361 NLRB No. 137 (2014); *Don Chavas, LLC, d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

The General Counsel seeks, as part of the remedy, that Placencia and Romero be reimbursed for search-for-work and work-related expenses, regardless of whether interim earnings are in excess of these expenses. The General Counsel is seeking a change in Board law, and the Board has declined to grant this remedy absent a full briefing by the affected parties. See *East Market Restaurant, Inc*., 362 NLRB No. 143, slip op. at 5 fn. 5 (2015). Accordingly, I decline to include the requested remedy in my recommended order.

The General Counsel has also requested a broad remedial order. Because of the Respondent's egregious misconduct, demonstrating a general disregard for the employees' fundamental rights, I find it necessary to issue a broad Order requiring the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

I will order that the employer post a notice in the usual manner, including electronically to the extent mandated in *J. Picini Flooring*, 356 NLRB No. 9, slip op. at 5–6 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[57]

[57] 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.

## ORDER

The Respondent, Con-Way Freight, Inc., Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) prohibiting employees from wearing union insignia;

(b) threatening employees because they support/supported the Union;

(c) causing the arrest of employees because they joined or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities;

(d) suspending employees because they joined or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities;

(e) terminating employees because they joined or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities;

(f) in any other manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative actions:

(a) Within 14 days from the date of the Board's Order, offer employees Jaime Romero and Juan Placencia immediate and full reinstatement to their former positions, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make employees Jaime Romero and Juan Placencia whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such

records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Los Angeles, California, copies of the attached notice marked "Appendix."[58] Copies of the notice, on forms provided by the Regional Director for Region 21, 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 places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 15, 2014.

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

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

Dated, Washington, D.C. November 5, 2015

Eleanor Laws
Administrative Law Judge

58 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."

## APPENDIX

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

**WE WILL NOT** do anything to prevent you from exercising these rights.

**WE WILL NOT** instruct you to remove lanyards or other items bearing the Union's insignia.

**WE WILL NOT** threaten you because of your support for the International Brotherhood of Teamsters, Local 63, or any other union.

**WE WILL NOT** suspend, discharge, or otherwise discriminate against any of you for supporting the International Brotherhood of Teamsters, Local 63, or any other union.

**WE WILL NOT** take actions to cause you to be arrested because of your support for the International Brotherhood of Teamsters, Local 63, or any other union.

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

**WE WILL**, within 14 days from the date of this Order, offer Juan Placencia and Jaime Romero full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

**WE WILL** make Juan Placencia and Jaime Romero whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest compounded daily.

**WE WILL** file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

**WE WILL** compensate Juan Placencia and Jaime Romero for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

**WE WILL**, within 14 days from the date of this Order, remove from our files any reference to the unlawful suspensions or discharges of Juan Placencia and Jaime Romero, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the suspensions and discharges will not be used against them in any way.

CON-WAY FREIGHT, Inc.

(Employer)

Dated _____ By _____

(Representative) (Title)

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

11150 West Olympic Boulevard, Suite 700
Los Angeles, California 90064-1824
Hours: 8:30 a.m. to 5 p.m.
310-235-7352

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/21-CA-135683 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, 310-235-7123.