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

CATSMO, LLC

and

ACELA HERRERA, an Individual — Case 03–CA–274827

MARBELLA HERRERA, an Individual — Case 03–CA–274855

Alicia Pender Stanley, Esq.,
for the General Counsel.
Thomas Koessl and *Ashleigh Stochel, Esqs.*,
for the Respondent.
Maureen Hussain, Esq.,
for the Charging Parties.

DECISION

GEOFFREY CARTER, Administrative Law Judge. The General Counsel asserts that in March 2021, Catsmo, LLC (Respondent) violated the National Labor Relations Act (the Act) by unlawfully discharging employees Acela and Marbella Herrera because they engaged in protected concerted activities. As explained in more detail below, I have determined that Respondent unlawfully discharged Acela and Marbella Herrera because they, along with other employees, protested the terms and conditions of employment at Respondent's facility.

STATEMENT OF THE CASE

This case was tried by videoconference on October 12, 2021.[1] Acela and Marbella Herrera filed the charges in Cases 03–CA–274827 and 03–CA–274855, respectively, on March 30, 2021.[2] On July 7, 2021, the General Counsel issued a consolidated complaint in which it alleged that Respondent violated Section 8(a)(1) of the Act by, on about March 8, 2021, discharging Acela and Marbella Herrera because they engaged in protected concerted activities (walking out of Respondent's facility in protest of unfair working conditions and writing a letter to Respondent to explain why they walked out and the changes they wished to see in the workplace). Respondent filed a timely answer denying the alleged violations in the consolidated complaint.

[1] None of the parties objected to conducting the trial by videoconference. (Tr. 8.)
[2] All dates are in 2021, unless otherwise indicated.

On the entire record,[3] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Charging Parties, and Respondent, I make the following

FINDINGS OF FACT[4]

I. JURISDICTION

Respondent, a corporation with an office and place of business in Wallkill, New York, manufactures and distributes smoked salmon. Annually, Respondent derives gross revenues in excess of $1 million and purchases and receives goods at its facility that are valued in excess of $5,000 and come directly from points outside the State of New York. Respondent admits, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

1. Respondent's business operations

As part of its business, Respondent brings in raw salmon and smokes it. Once the smoking process is completed, Respondent sells the salmon to wholesale (e.g., delis) and retail distribution businesses (e.g., grocery stores). Respondent generally sells entire fillets of smoked salmon to wholesale businesses and sells portioned and packaged smoked salmon to retail businesses (with packages generally weighing 4 ounces, 8 ounces, or 1 pound). (Tr. 17, 72, 154.)

By fall 2020, Respondent's employees in the retail department were working in two shifts. Day shift employees who handled small packages (around 8 employees) devoted most of their time to preparing the packages of salmon needed to fill orders from retail businesses. This work could include cutting and weighing salmon by hand, placing the salmon and any condiments into packages, and labeling the packages. The night shift (also referred to as the sanitation team or night crew), however, had two responsibilities. First, for around three hours, the night shift would continue preparing packages of salmon as needed to fill outstanding orders. Second, the night shift would sanitize the equipment in the retail department, a detailed process that took 4–5 hours. (Tr. 18, 35, 47–49, 60–61, 63–64, 72–73, 76–78, 94, 133–135, 137–138; Jt. Exhs. G–H (job descriptions of retail packers and sanitation workers); see also Tr. 63, 75–76, 79 (noting that Respondent created the night shift and its production and sanitation duties in about

[3] The transcripts and exhibits in this case generally are accurate. However, I hereby make the following corrections to the trial transcripts: p. 8, l. 12: "summonsed you hear" should be "assumed you're here"; p. 9, l. 22: "discriminate" should be "discriminatee"; and p. 21, l. 13: "ejection" should be "objection".

[4] Although I have included several citations in this decision to highlight particular testimony or exhibits in the evidentiary record, I emphasize that my findings and conclusions are not based solely on those specific citations, but rather are based on my review and consideration of the entire record for this case.

late fall 2019, or early 2020, after Respondent was shut down in 2019, after the Food and Drug Administration found listeria at the facility).)

2. Acela and Marbella Herrera

Marbella Herrera began working for Respondent in 2003, and by 2020 was generally seen as the lead employee in the retail department for the day shift. In connection with her informal status as the lead employee on the day shift, Respondent's managers communicated with Marbella Herrera directly about daily inventory, production orders that needed to be filled, other tasks that retail department employees on the day shift needed to complete, and (near the end of each day shift) what production work would be left for the night shift. (Tr. 17–18, 34–36, 73, 134–139.)

Acela Herrera began working for Respondent in 2011, and also worked on the day shift in the retail department. On occasions when Marbella Herrera was not at work, Acela Herrera typically stepped in as the employee that Respondent's managers would contact about inventory and production orders. (Tr. 18, 46–47, 73, 136, 150.)

Both Acela and Marbella Herrera have clean disciplinary records. However, in June 2017, Employee 1 (E1) asserted that Acela and Marbella Herrera (and their sister) were making verbal comments that made E1's job difficult and were holding back on production so E1 could not leave on time. Respondent did not take disciplinary action against the Herreras based on E1's complaint, but did offer E1 the opportunity to move to a job in a different building, which E1 accepted.[5] (Tr. 33, 58, 90; R. Exh. 8 (incident documentation form).) More generally, Respondent believed that Acela and Marbella Herrera tried to influence other employees to follow their lead. Marbella Herrera, in particular, was "known to try to recruit people to be on her side." (Tr. 125.)

B. November 13, 2020: The Packaging Machine Incident

In about October 2020, Respondent acquired and began using a retail packaging machine to skin, slice and portion salmon filets. The packaging machine accomplished these tasks more quickly than employees could when working manually, but Respondent generally used the machine when there was enough demand for salmon (usually one or two days a week; on other days, employees continued to work manually). The Herreras found working with the packaging machine to be tiring because the machine moved at a fast rate and it was difficult for employees to take breaks when the machine was running because that would slow the production process. (Tr. 66–67, 73–75, 97, 119–120, 127; see also Tr. 97–98 (noting that Respondent still needed the same number of people working in the retail department after acquiring the packaging machine).)

[5] To the extent that Respondent's witnesses testified that Acela and Marbella Herrera engaged in misconduct such as insubordination, bullying coworkers, manipulating inventory counts, slowing down their work to stay on the clock longer, or leaving more difficult salmon for the night shift, I give that testimony little weight. (See Tr. 86–91, 112, 115–119, 122, 148, 150–151.) Acela and Marbella Herrera deny engaging in such misconduct, and the only documented allegations are the June 2017 incident form discussed in this section and a November 2020 incident form discussed below. Perhaps more important, Respondent did not take any disciplinary action to address the alleged misconduct. (See Tr. 33, 41, 58, 64–65, 99–100, 123–124, 156–157.)

In November 2020, Respondent planned to run the packaging machine on back-to-back days in response to being busier in November and December. When floor manager Chavdar Chavdarov (on November 13) told employees in the retail department about the plan, Acela Herrera[6] expressed reluctance about working back-to-back days on the machine because that would be tiring. Acela Herrera also asked why only the day shift used the packaging machine and not also the night shift. Chavdarov texted vice president of operations Sebastian Theate about the issue and stated that employees were planning to call out on the two days that Respondent planned to run the packaging machine.[7] Ultimately, Respondent decided not to run the packaging machine on back-to-back days, and there is no evidence that any employees called out during this timeframe to avoid working on the packaging machine.[8] (Tr. 112–115, 148–149; R. Exh. 6 (pp. 2–3); R. Posttrial Br. at 5 (conceding that the Herreras did not call off work during the week of November 13).)

On November 16, chief financial officer Frederic Pothier filled out an incident documentation form about the packaging machine incident.[9] There is no evidence that Respondent notified the Herreras about the incident form or the allegations therein, nor is there any evidence that Respondent took any disciplinary action based on the packaging machine incident. (Tr. 87–88, 102; R. Exh. 6 (p. 1).)

C. March 1–5, 2021: The Large Order Incident

[6] Chavdarov's text messages about this incident refer to an employee by the name of "Chelis." (See R. Exh. 6 (p. 2).) That reference is to Acela Herrera. (See R. Exh. 6 (p. 1).)

[7] Acela Herrera denied threatening to call out when Respondent planned to run the packaging machine. (See Tr. 65, 67.) While her denial was credible, the fact remains that Chavdarov believed that employees were threatening to call out to avoid working on the machine on back-to-back days (as indicated by text messages that Chavdarov sent that same day). The factual findings here reflect those circumstances.

[8] Chavdarov and food safety/quality control/production manager Kaitlyn Mackey testified that there were other occasions when Respondent could not run the packaging machine because Acela and/or Marbella Herrera called out or refused to work the machine. I do not give any weight to that testimony. First, neither manager provided any dates or context for their testimony on these points. Second, Respondent did not document these alleged incidents or discipline the Herreras for them. (See Tr. 124–125, 148–149.) Based on those gaps in the evidence, I cannot conclude that the incidents occurred or, if so, whether Respondent took issue with the conduct at the time (as opposed to, say, being ok with an absence that was justified/excused).

[9] In the incident form, Pothier wrote that the Herreras "advised that they intended to call out two days rather than work so that there would be no one to operate the machine when needed and in turn 'screw' the company." (R. Exh. 6 (p. 1).) To the extent that the incident form suggests that the Herreras said something about trying to "screw the company," I do not give the form any weight. Pothier was not present when Chavdarov spoke with the Herreras, and the "screw the company" language appears to be a misinterpretation of the following statement in one of Chavdarov's test messages: "Hey I'm sorry to be the bearer of bad news but I'd rather you know of the possible sabotage and that they are planning to call out those two days rather than get screwed and have no people the day we run the machine." In short, it was Chavdarov who wanted Respondent to avoid getting "screwed" by not having enough employees to run the packaging machine due to call outs. (R. Exh. 6 (p. 3).)

1. March 1: Respondent receives a large salmon order

On about March 1, 2021, Respondent received a large order for retail packaged salmon that included (among other items) 1,000 1–pound packages of salmon. Both the day shift and the night shift worked on the order during the week, with a plan of completing the order by Friday, March 5, 2021. During the same timeframe, the retail packaging department continued to fulfill all other orders that were due during the week. (Tr. 18–19, 48–50, 60.)

2. March 4: day and night shift disagree about finishing the large order

As the day shift wrapped up its work on Thursday, March 4, Marbella Herrera noted that the large order was nearly complete, but needed 160 more 1-pound packages of salmon. Marbella Herrera advised night shift supervisor J.L. that the night shift should complete the order, but J.L. expressed reluctance about doing so because he believed the amount was too large. (Tr. 19–20, 50, 142; GC Exh. 2 (p. 1); see also Jt. Exh. D (description line 1 of incident report form).)

With the disagreement with the night shift unresolved, Marbella Herrera texted Mackey. The following text message conversation occurred:

M. Herrera: [Kaitlyn] we finish baja and highland and also 1 lbs. We are only missing 160 1 lbs natural.

Mackey: Ok. night crew is finishing?

M. Herrera: I told the night crew for them to [finish] those

Mackey: Thank you

M. Herrera: [But] you know how dramatic [J.L.] is he says [it's] a lot

Mackey: I will text him

M. Herrera: For them to do and that they have other things to do besides doing production

Mackey: 160? Is what is left right

M. Herrera: And their only job here in these company is for them to only wash and to do labels [ ]
Yes 160

Mackey: [Emoji of woman slapping palm to forehead]
I will text him
Thank you

M. Herrera: That we are responsible for doing all orders

Mackey: [J.L.] said that to you?

M. Herrera: Please [talk] to him and if they [don't finish] they will have to do them tomorrow when they get here
Yes

Mackey: Ok thank you

M. Herrera: And now he talking with all them I tell them to finish and he said not

Mackey: Do not argue with him[.] leave it alone please

(GC Exh. 2 (pp. 1–3); see also Tr. 20–23, 139–140, 143–144.)[10]

3. March 5: 4 day shift employees walk out over the large order dispute

When the day shift employees in the retail packaging department arrived at work in the morning on March 5, they checked inventory and found that the night shift did not finish the large order (110 1-pound packages of salmon were still needed). Marbella Herrera, together with the other employees on the day shift, notified Theate that the large order was not complete. When Theate stated that the day shift should finish the order, Marbella Herrera replied that she already spoke with Mackey and that Mackey would have the night shift work on the order. Marbella Herrera added that it was not fair that the day shift did most of the large order and that the night shift did not help finish the order. (Tr. 24–27, 36–37, 51–52, 62; GC Exh. 2 (pp. 3–4); see also Tr. 25–26, 51–52 (noting that after the day shift learned that the large order was not finished, the day shift did not work on that order and instead began doing prep work for orders that would be due the following week).)

After the exchange with Theate, Marbella Herrera texted Mackey an inventory report showing that 110 1-pound packages of salmon still needed to be prepared for the large order. When Mackey texted Marbella Herrera to ask if the day shift was preparing the missing packages as Theate instructed, Marbella Herrera responded that she wanted to talk to Mackey. (Tr. 27, 140–141; GC Exh. 2 (p. 4).)

When Mackey arrived on the production floor, she told the day shift that they had to work on the large order. Marbella Herrera responded that it was not fair because Mackey told the night shift to finish the order. After some back and forth along the same lines, Mackey told the day shift that they had to leave the facility if they were not going to work on the large order. Marbella and Acela Herrera then left the production area and punched out their time cards, as did

[10] The record is unclear on what, if anything, Mackey told J.L. about what the night shift should do about the large order on March 4. During trial, Mackey presented contradictory testimony on the point, as she testified that she did not communicate with J.L. any further on March 4, but also testified that she told J.L. that the night shift should produce as many 1-pound packages as they could before doing the sanitation work. (Compare Tr. 140 with Tr. 155 (discussing Jt. Exh. D).) I note that regardless of whatever instructions Mackey gave to J.L. about the large order, the fact remains that the day shift employees objected to the amount of work that the night shift contributed to finishing the large order.

two other employees (A.A. and R.C.C.). (Tr. 27–28, 39–40, 52–54, 62, 141–143, 154–155; Jt. Exh. D (incident report form, prepared by Mackey); see also Tr. 28, 44, 53 (noting that other day shift employees, with Acela Herrera translating from Spanish to English, also told Mackey that it was not fair that the night shift did not finish the large order).)

4. March 5: employees write and deliver a letter to Respondent about the large order dispute and other concerns about terms and conditions of employment

After gathering their personal items from their lockers, the 4 employees walking out (Acela Herrera, Marbella Herrera, A.A., and R.C.C.) went to a lunchroom in the facility. Once at that location, Marbella wrote a letter in Spanish to Theate and assistant to food safety/quality control/production manager Eric Camacho that stated as follows:

> We are leaving because [Mackey] said we should go home, just because we did not wish to finish the remainder of the order, 110 lbs. in total. We were working, [Mackey] came and told us to go away and leave the order in the table, to leave all packages unfinished. I, Marbella, told her there were only 160 lbs left and that I would talk to [J.L.] so they would finish the rest.
>
> [Mackey] told us the evening shift is focused on cleaning and sanitation, that they should not deal with small packages. We are the only ones facing demands when an order must be finished, and we are pressured for it. When we left on Thursday, March 4th, there were [160] lbs. left to do and we heard [J.L.] tell his team they were not going to work hard to finish the order, because [Mackey] did not tell them to finish it on that same day, 3/4/2021.
>
> Our demands are:
>
> Be fair when distributing orders between the morning and the evening teams. The morning team is the one charged with the most orders and we also must work with the machine, which is extremely tiring. We are tired because you always do the same thing to us. The evening shift never finished anything and we are the ones that must finish the orders. We face the brunt of all demands while they have it easy, and they are always boasting about how they just clean while we are in charge of production.
>
> We were never explained the meaning of PTO.[11] We demand to have our holidays back, as well as our sick leave. We also want a raise. If there is no money, why do we have so many orders to do? The evening team says they cannot demand more than what we do because we have seniority over them.

[11] Respondent changed its policy for paid time off (PTO) in February 2020. Under the new PTO policy, employees receive a payout for up to 40 hours of unused PTO each year, and forfeit any unused PTO in excess of 40 hours. Before the PTO policy change, employees received a payout for all unused PTO at the end of the year. (Tr. 81–83, 98–99, 153; R. Exh. 1 (pp. 5–6) (PTO policy as described in the February 2020 employee handbook).)

> We worked hard at the end of the year to receive our bonus, but it has been two years and we still have not received any annual bonus. This company does not know the value of their workers nor their sacrifices for work.

(Jt. Exh. F; see also Jt. Exh. E (copy of handwritten letter, signed by Acela Herrera, Marbella Herrera, A.A., R.C.C.; R.C.C. also signed the letter on behalf of S.M.M.C., who was not present but agreed to have her name on the letter); Tr. 28–30, 55, 59 (noting that the letter was addressed to Camacho and Theate because they both speak Spanish).) Marbella Herrera delivered the letter to Camacho before leaving the facility. (Tr. 29–30, 56, 108–109.)

D. March 8, 2021: Respondent Discharges Acela and Marbella Herrera

On March 6, Theate contacted Pothier about the large order dispute and the employee walkout. Theate also provided Pothier with a copy of the employees' March 5 letter, which Pothier sent to an official translator for translation from Spanish to English. The following day, March 7, chief executive officer Marcus Draxler, Pothier and Theate spoke by telephone. After discussing whether it was the right time to let go of any employees, Draxler, Pothier and Theate decided to terminate Acela and Marbella Herrera's employment. (Tr. 91–93, 95, 101, 107.)

When Acela and Marbella Herrera came to work in the morning on March 8, Camacho advised them that they needed to come to Pothier's office for a meeting. Pothier advised Acela and Marbella Herrera that Respondent was terminating their employment and provided each of them with a letter that stated as follows, in pertinent part:

> I regret to inform you that your employment with [Respondent] is terminated effective immediately. You are being dismissed for cause, specifically due to your refusal to follow instruction from company management this past Friday (03-05-2021) and in several other reported and documented cases in the past. Keep in mind that you signed a confidentiality agreement, which remains in effect. . . . Your final paycheck will be available on March 12, 2021 . . .

(Jt. Exhs. A–B; Tr. 17, 30–33, 46–47, 56–58, 93–94; see also Jt. Exh. C (incident documentation form about the March 8 meeting); Tr. 95 (noting that in the afternoon on March 8, Respondent received the official translation of the employees' March 5 letter), 96–97 (noting that Respondent did not terminate A.A. and R.C.C. for walking out on March 5, instead opting to give each of them a verbal warning).)

DISCUSSION AND ANALYSIS

A. Witness Credibility

A credibility determination may rely on a variety of 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. *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 860 (2014); see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (noting that an administrative law judge may draw an adverse inference from a party's failure to call a witness

who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Farm Fresh Co., Target One, LLC*, 361 NLRB at 860. My credibility findings are set forth above in the findings of fact for this decision.

B. Did Respondent Violate the Act by Discharging Acela and Marbella Herrera?

1. Complaint allegations

The General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by, on about March 8, 2021, discharging Acela and Marbella Herrera because they engaged in protected concerted activities by walking out of Respondent's facility on March 5, 2021, in protest of unfair working conditions and writing a letter to Respondent about changes they wished to see in the workplace.

2. Applicable legal standard

Section 7 of the Act provides, among other things, that employees have the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection. Concerted activity to express concern about working conditions falls squarely within the Act's protection, unless the concerted activity is unlawful, violent, in breach of contract, or otherwise indefensible because it shows a disloyalty to the workers' employer that is unnecessary to carry on the workers' legitimate concerted activities. *N.L.R.B. v. Washington Aluminum Co.*, 370 US 9, 17 (1962); *Ohio Bell Telephone Co.*, 370 NLRB No. 29, slip op. at 2 (2020); *Amglo Kemlite Laboratories, Inc.*, 360 NLRB 319, 322 (2014) (noting that Section 7 of the Act applies equally to nonunion and union employees, and that "unrepresented employees are ordinarily engaged in protected concerted activity when they cease work to pressure their employer to improve their wages and working conditions"), enfd. 833 F.3d 824 (7th Cir. 2016).)

3. Analysis

The evidentiary record shows that on March 5, Acela and Marbella Herrera joined with other employees in the retail packaging department to protest to what they saw as an unfair division of labor between the day shift and the night shift in preparing smoked salmon for a large order.[12] When Respondent's managers demanded that the day shift employees either work on the

[12] The Herreras and additional employees raised additional concerns about working conditions in a letter they wrote to Respondent on March 5. (See FOF, Sec. II(C)(4).) Although the Herreras delivered the letter to Respondent a few hours after the walkout on March 5, the letter was a form of concerted activity because the Act protects concerted activities "whether they take place before, after, or at the same time such a demand [about working conditions] is made." *N.L.R.B. v. Washington Aluminum Co.*, 370 US at 14.

In any event, the employees' verbal assertion (just before the walkout) that the day shift was carrying an unfair share of the production workload was sufficient in and of itself to constitute protected concerted activity. For that reason, I need not rule on whether Respondent knew, or should have known, about the content of the employees' March 5 letter before Respondent decided to discharge the Herreras.

order or leave the facility, Acela and Marbella Herrera punched their time cards and left the facility along with two additional employees. Respondent discharged Acela and Marbella Herrera on March 8, citing their March 5 refusal to "follow instruction from company management." (See Findings of Fact (FOF), Sec. II(C)(3)–(4), (D).)

In a case where an employer disciplines or discharges an employee for conduct that is protected concerted activity (such as going on strike or engaging in a work stoppage), it is unnecessary to analyze the employer's motive for the discipline/discharge. I find that this is such a case because it is clear that Respondent discharged Acela and Marbella Herrera because of their March 5 protest and walkout.[13] The *Wright Line* framework therefore does not apply, as that framework is only appropriate in cases that turn on the employer's motive. *Ohio Bell Telephone Co.*, 370 NLRB No. 29, slip op. at 4–5 and fn. 26; *Matsu Corp. d/b/a Matsu Sushi Restaurant*, 368 NLRB No. 16, slip op. at 1 fn. 2 (2019), enfd. 819 Fed. Appx. 56 (2d Cir. 2020); *Atlantic Scaffolding Co.*, 356 NLRB 835, 838 (2011); *CGLM, Inc.*, 350 NLRB 974, 974 fn. 1 (2007), enfd. 280 Fed. Appx. (5th Cir. 2008).

In its defense, Respondent contends that the Herreras did not engage in protected concerted activity because they were attempting to pick and choose their work assignments. (See R. Posttrial Br. at 17–18.) I am not persuaded by that argument. In essence, Respondent maintains that the Herreras were being unreasonable in objecting to the day shift having more production work than the night shift, which also had to complete a 4–5 hour sanitation routine. It has long been settled, however, that "the reasonableness of workers' decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not." *N.L.R.B. v. Washington Aluminum Co.*, 370 US at 16. Simply put, the Act protected the Herreras concerted protest about the day shift having to carry too much of the burden of producing salmon for the large order, regardless of the merits of their concerns.[14]

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[13] The termination letters explicitly state that Respondent discharged the Herreras because of the March 5 dispute. To the extent that the letters state that the discharges were also based on "several other reported and documented cases in the past" where the Herreras refused to follow instructions, I do not find that claim to be supported by the evidence. (See FOF, Sec. II(A)(2), (B) (discussing one incident report from June 2017, and another from November 2020, neither of which led to any disciplinary action, and noting that both Acela and Marbella Herrera had clean disciplinary records).)

Even if the *Wright Line* framework applies, however, I note that I would still find that Respondent unlawfully discharged Acela and Marbella Herrera. See *General Motors LLC*, 369 NLRB No. 127, slip op. at 2 (2020) (describing the *Wright Line* framework). First, the General Counsel made an initial showing of discrimination (i.e., the General Counsel demonstrated that the Herreras engaged in protected concerted activities on March 5, Respondent knew about the activities, and Respondent had animus against the activities, as demonstrated by the fact that Respondent cited the March 5 dispute as the basis for discharging the Herreras). Second, Respondent did not prove an affirmative defense that it would have discharged the Herreras even in the absence of their protected concerted activities. Indeed, since Respondent tolerated whatever misconduct the Herreras allegedly engaged in before March 5, Respondent cannot now say that same misconduct warranted discharge. Those facts establish that the Herreras discharges were unlawful under the *Wright Line* framework.

[14] As an aside, I note that Mackey seemed comfortable with Marbella Herrera's assertion, on March 4, that the night shift should finish the remaining 160 1-pound packages needed for the large salmon order. (See FOF, Sec. II(C)(2) (text messages between Marbella Herrera and Mackey).) In any event, as I have noted, the Act protects the Herreras concerted activities on March 5 regardless of the merits of their position about the division of labor between the day shift and night shift.

Respondent also contends that the Herreras' March 5 walkout was an unprotected partial strike. (See R. Posttrial Br. at 18.) That argument also fails. An unprotected partial strike occurs when employees refuse to perform some of their duties while remaining on the job and continuing to perform other duties. Such a partial work stoppage is indefensible because it constitutes an attempt by employees to set their own terms and conditions of employment while remaining on the job. See *Ohio Bell Telephone Co.*, 370 NLRB No. 29, slip op. at 3–4. The problem with Respondent's partial strike argument is that the employees who participated in the walkout did not seek to remain on the job while performing only selected job duties. To the contrary, when Respondent (lawfully) presented the protesting employees with the choice of either working as directed or leaving the premises, 4 employees (including Acela and Marbella Herrera) punched their time cards and left the premises after writing their demand letter. Under those circumstances, the March 5 protest remained protected, and essentially evolved into an impromptu strike. See id. at 4 (finding no partial strike because no employee refused to work as instructed while remaining on the job).

In sum, I find that the evidentiary record clearly establishes that Respondent discharged Acela and Marbella Herrera on March 8, 2021, because they engaged in protected concerted activities on March 5, 2021 (by protesting the terms and conditions of employment at Respondent's facility). Because the Herreras' protected concerted activities did not lose the protection of the Act and no other defenses apply, I find that their discharges violated Section 8(a)(1) as alleged in the complaint.

CONCLUSIONS OF LAW

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

2. Respondent violated Section 8(a)(1) of the Act by, on March 8, 2021, discharging Acela and Marbella Herrera because they engaged in protected concerted activities.

3. The unfair labor practices stated in conclusion of law 2, above, affect commerce within the meaning of Section 2(6), and (7), of the Act.

REMEDY

Having found that 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.

Regarding Respondent's violation of Section 8(a)(1) of the Act through its discharges of Acela and Marbella Herrera, I shall require Respondent to reinstate Acela and Marbella Herrera to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges they would have enjoyed absent the discrimination against them. Respondent must also make Acela and Marbella Herrera whole for any loss of earnings and other benefits. The make whole remedy shall be computed in accordance with *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest at the

rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). Respondent shall also be required to expunge from its files any references to its unlawful decisions discharge Acela and Marbella Herrera, and within 3 days of thereafter shall notify them that this has been done and that the unlawful decisions will not be used against them in any way.

In accordance with *King Soopers, Inc.*, 364 NLRB 1153 (2016), enfd. in pertinent part 859 F.3d 23 (D.C. Cir. 2017), Respondent shall compensate Acela and Marbella Herrera for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB 101 (2014), Respondent shall compensate Acela and Marbella Herrera for the adverse tax consequences, if any, of receiving a lump-sum backpay award. In addition, in accordance with *AdvoServ of New Jersey, Inc.,* 363 NLRB 1324 (2016) and *Cascades Containerboard Packaging–Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021), Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order (or such additional time as the Regional Director may allow for good cause shown), file with the Regional Director for Region 3: a report allocating backpay to the appropriate calendar year(s); and a copy of each backpay recipient's corresponding W–2 form(s) reflecting the backpay award. The Regional Director will then assume responsibility for transmitting the report and form(s) to the Social Security Administration at the appropriate time and in the appropriate manner.

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

ORDER

Respondent, Catsmo, LLC, Wallkill, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they engage in protected concerted activities.

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

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

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

(a) Within 14 days from the date of this order, reinstate Acela and Marbella Herrera to their former jobs or, if those no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges they would have enjoyed absent the discrimination against them.

(b) Make Acela and Marbella Herrera whole for any loss of earnings or benefits they may have suffered as a result of the discrimination against them, plus daily compounded interest, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any references to the unlawful decisions to discharge Acela and Marbella Herrera and, within 3 days thereafter, notify them in writing that this has been done and that the unlawful decisions will not be used against them in any way.

(d) Compensate Acela and Marbella Herrera for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a report allocating the backpay awards to the appropriate calendar year(s) and a copy of the corresponding W–2 forms reflecting the backpay award.

(e) 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.

(f) Within 14 days after service by the Region, post at its facility in Wallkill, New York, a copy of the attached notice marked "Appendix" in both English and Spanish.[16] Copies of the notice, on forms provided by the Regional Director for Region 3, 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

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

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."

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 March 8, 2021.

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

Dated, Washington, D.C., December 22, 2021.

Geoffrey Carter
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT discharge employees because they engage in protected concerted activities.

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

WE WILL reinstate Acela and Marbella Herrera to their former jobs or, if those no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges they would have enjoyed absent our discrimination against them.

WE WILL make Acela and Marbella Herrera whole for any and all loss of earnings and other benefits incurred as a result of our unlawful decisions to discharge them.

WE WILL remove from our files any references to our unlawful decisions to discharge Acela and Marbella Herrera and, within 3 days thereafter, notify them in writing that this has been done and that the unlawful decisions will not be used against them in any way.

WE WILL compensate Acela and Marbella Herrera for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 3, within 21 days of the date that the amount of backpay is fixed, either by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a report allocating the backpay awards to the appropriate calendar year(s) for each employee and a copy of the corresponding W–2 forms reflecting the backpay award.

CATSMO, LLC
(Employer)

Dated _____ By _____
(Representative) (Title)

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

Niagara Center Building, 130 S. Elmwood Avenue, Suite 630, Buffalo, NY 14202-2465
(716) 551-4931, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/03-CA-274827 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 (518) 419-6669.