

American Medical Waste Systems, Inc. and Eulogio Olivo

American Medical Waste Systems, Inc. and Local 813, International Brotherhood of Teamsters, AFL-CIO¹

American Medical Waste Systems, Inc. and Cruz Calderon. Cases 2-CA-23099, 2-CA-23148, 2-CA-23944, 2-CA-24745, 2-RC-20556, and 2-CA-23880

May 19, 1993

DECISION, ORDER, AND CERTIFICATION
OF RESULTS

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On November 3, 1992, Administrative Law Judge James F. Morton issued the attached decision. The General Counsel and the Respondent have each filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order.³

¹ The name of the Charging Party Union has been changed to reflect the new official name of the International Union.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The General Counsel has excepted to the judge's failure to make findings as to the specific dates on which 17 discriminatees were unlawfully discharged by the Respondent in 1989. We find merit to this exception, as the Respondent's payroll records and termination letters given to certain of the discriminatees by the Respondent establish that the discriminatees were terminated on the following dates: Juan Ruiz and Luis Cirino on October 6, 1989; Osbin Alvarado, Carlos Beltran, Cruz Calderon, Pedro Calderon, Gerardo Campos, Joseph Bailes, Gustavo Castillo, Edgardo Santiago (also known as Edgardo Santiago Ortiz), Juan Ortiz, and Julian Ortiz on October 10, 1989; Leonel Ortiz, Edy Chincilla, Carlos Juarez, and Raul Rosa on October 13, 1989, and Carlos Quinones on October 13, 1989. In this regard, we rely on the Respondent's own payroll records, referred to above, rather than Edgardo Santiago Ortiz' testimony that he was terminated on October 20, 1989. Likewise, we also find that, as the General Counsel contends and the Respondent's witness Russell Kruk concedes, employee Dennis Jankowski was discharged on October 26, 1990.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, American Medical Waste Systems, Inc., New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for Local 813, International Brotherhood of Teamsters, AFL-CIO and that it is not the exclusive representative of these bargaining unit employees.

³ We leave to the compliance stage of these proceedings the Respondent's contention in its brief that it has previously made valid offers of reinstatement to certain of the discriminatees in this case.

Polly Chill, Esq., for the General Counsel.

William H. Englander, Esq. and *Peter S. Albert, Esq.* (*William H. Englander, P.C.*), of Mineola, New York, for American Medical Waste Systems, Inc.

Michael S. Lieber, Esq., of New York City, for Local 813, International Brotherhood of Teamsters, AFL-CIO.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. The pleadings in the unfair labor practice cases captioned above, present issues as to whether American Medical Waste Systems, Inc. (the Respondent) engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The violations allegedly occurred in the course of three separate efforts by Local 813, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (the Union) to organize the Respondent's employees—the first in late 1988, the second in late 1989, and the third in late 1990. These cases were consolidated for hearing, along with related objections filed by the Union to the conduct of an election held on October 21, 1988, in Case 2-RC-20556.

More specifically, the issues in the consolidated cases are whether the Respondent, during the latter part of each of the years listed below, and in order to discourage its employees from supporting the Union,

1988

(a) threatened them with closing its facility, with loss of overtime, with disciplinary measures, and with surveillance of their Union activities.

(b) promised them bonuses, better work clothes, medical benefits, and improved working conditions.

(c) engaged in surveillance of their union activities.

(d) suspended, reprimanded, and later discharged an employee.

and whether these allegations, if proved, warrant setting aside the results of the October 21 election.

1989

- (a) coercively interrogated employees as to their union activities.
- (b) threatened employees with discharge.
- (c) solicited their signatures on a petition to revoke signed union cards.
- (d) discharged 17 employees.

1990

- (a) solicited grievances.
- (b) promised medical and dental benefits and a wage increase.
- (c) threatened to discharge employees.
- (d) coercively interrogated employees as to their union activities.
- (e) created the impression of surveillance of their union activities.
- (f) discharged an employee.

I have heard these cases in New York City on various days beginning on January 27, 1992, and ending on April 1, 1992. On the entire record,¹ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The Respondent picks up at hospitals, and transmits for disposal, medical waste. In its operations annually, it meets the Board's indirect outflow standard for the assertion of jurisdiction over nonretail enterprises. The Union is a labor organization as defined in the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent began operating in 1985. Its drivers pick up medical waste at hospitals and transport it to its transfer station at Randall Avenue in the Bronx, New York. There, the waste is removed, checked, and loaded for shipment to incinerators. Until late 1989, the Respondent also was engaged in transporting asbestos materials for disposal. Its employees have been unrepresented for purposes of collective bargaining. The Union has undertaken organizing efforts in 1988, 1989, and 1990.

B. The Alleged Violations in 1988 and the Related Objections to the Election

1. The employee meetings

The Union began campaigning during the summer of 1988. On August 30, it filed the petition in Case 2-RC-20556. On September 16, the Union and the Respondent signed a stipulation for a consent election among the approximately 22 employees in a unit consisting of all full-time and regular part-time chauffeurs and inside laborers. The election, held on October 21, resulted in a 18-3 vote against representation. The Union timely filed objections which paralleled the alleged unfair labor practices involved in Cases 2-CA-23099 and 2-CA-23148. Those allegations relate in part to coercive statements purportedly made by officials of the Respondent at three preelection meetings held with its employees.

The Respondent's president, Dina Alessandria Kruk, and its plant manager then, Harold Burris, held meetings in the fall of 1988 with employees to discuss the election scheduled to be held on October 21 in Case 2-RC-20556.

Burris, who was himself discharged in 1989, testified as a witness called by the General Counsel. Asked as to statements he and Dina Kruk made at the preelection meetings with employees, he stated in summary form that overtime would be cut and some employees would lose their jobs if the Union got in, that the Company *might* close, that the Respondent was working on getting health insurance benefits and that it would get the employees gloves and hard hats. Burris acknowledged that he is still angry with the Respondent for having discharged him. On his cross-examination, he testified that neither he nor Dina Kruk had said at that meeting that the Company *will* close.

Alleged discriminatee Eulogio Olivo testified that he translated into Spanish the talks given by Dina Kruk and Burris at the employee meetings. He related that Burris had said that the Company will close if the Union wins and that the Respondent was looking into medical insurance for the employees. He related also that Burris discussed bonuses. Olivo also testified that, when he himself complained at the meetings that employees did not have proper equipment, such as hard hats and work gloves, Burris said that the Respondent would do its best to provide those items. Olivo's pretrial affidavit recites that Dina Kruk had said at those meetings that she did not promise anything but would do everything possible to make things better.

Alleged discriminatee, Edgardo Santiago, testified that Dina Kruk and Burris stated at those meetings that they would close the Company and open it elsewhere under another name if the Union won, and that employees would lose their jobs. He testified that they also promised a raise in pay, holidays, and medical benefits, that Burris also stated at the second employee meeting that employees would lose overtime if the Union won and that, at the third meeting, Burris said they would lose their benefits. Santiago's prehearing affidavit recites that Dina Kruk had said at one of the meetings that, if the Union won, the Respondent would have to pay the Union \$1000 for each employee. The General Counsel did not offer testimony on that point.

¹ General Counsel's unopposed motion to correct the transcript is granted as the errors referred to therein are evident and the corrections sought are warranted.

Another alleged discriminatee, Pedro Calderon, testified for the General Counsel. He began working for the Respondent in 1987 and was discharged in 1989, a year after the meetings that are discussed now were held. Calderon did not testify as to the meetings in 1988.

The Respondent had sent letters to its employees prior to the election urging them to vote against representation. There are no allegedly coercive statements in those letters. Nor are any alleged as coercive.

Dina Kruk, the Respondent's president, testified that the statements she and Burris made at the 1988 employee meetings were in accordance with guidelines given them by labor counsel and by a consulting firm. In substance, her account is that their talks paralleled the comments which were contained in the campaign letters it sent to its employees. She noted too that the employees had been aware, prior to the advent of the Union, that the Respondent was looking into the matter of providing medical benefits. Corroborative documents thereon were placed in evidence. She testified, and furnished invoices, also as corroboration, that the Respondent had, long prior to the meetings, furnished work gloves and uniforms to employees.

I am not persuaded that the Respondent made unlawful threats or promises at the preelection employee meetings. In contrast to the detailed testimony Burris gave as to events in 1989, discussed *infra*, his account as to the three employee meetings in 1988 was too summary. I note too that General Counsel's brief urges that I not credit that part of Burris' testimony that failed to corroborate part of Olivo's account, i.e., that Burris had said the Company will close if the Union wins. Further, Calderon's failure to testify as to those meetings does not aid General Counsel in meeting the burden of proving the alleged violations. I note also that Olivo's affidavit indicates that no promises had been made at these meetings. As discussed further below, Olivo's account failed to impress me; also, his testimony that bonuses were promised seems to have come out of thin air. Santiago's testimony is suspect too as it appears that his account is exaggerated. He related that pay raises and holidays were promised and his affidavit contained a reference to a potential liability of the Respondent to the Union of \$1000 per employee—matters that are not alleged in the complaint.

The exaggerations, the contradictions, and the failure of corroboration in the accounts offered by General Counsel's witnesses suggest that they read coercive statements into remarks by Kruk and Burris in 1988 that were in fact akin to the campaign literature, which is within Section 8(c) of the Act. This I find that the allegation that at employee meetings in 1988, the Respondent made coercive statements, lacks merit.

2. Alleged surveillance and implied promise of benefit

The General Counsel contends that the Respondent engaged in surveillance of the union activities of its employees in 1988. In support thereof, the General Counsel cites testimony given during the course of the Respondent's cross-examination of former Plant Manager Burris. When asked if he had engaged in surveillance, he answered that he "watched them when they went to the corner from us." That response is too vague and inconclusive to establish that the Respondent engaged in unlawful surveillance of its employees activi-

ties in support of the Union. See *Multimatic Products*, 288 NLRB 1279 (1988).

The General Counsel also contends that the Respondent created the impression among its employees that it kept their union activities under surveillance. To that end, General Counsel relies on the testimony of alleged discriminatee Olivo that alleged supervisor, Norberto Henry, Olivo's brother-in-law, told him that Plant Manager Burris "had his eye on" Olivo and that he was told this after he had opened his mouth at the first employee meeting. As discussed in detail below, it appears that Burris was keeping an eye on Olivo's absences from work and his failure to give timely notice to the Respondent that he would not be able to report for work. The equivocal nature of the remark by Henry, in overall context, is insufficient to establish that the Respondent unlawfully gave Olivo the impression that any union activities he engaged in were being watched. For that matter, Olivo's account indicates that he did not take part in any union activities, at least in or around the Respondent's facility. I thus find no merit in this contention.

Olivo testified that, on September 10, after Henry had obtained the signatures of the employees on union authorization cards, he told Olivo and several other employees that the Union "was bad, that (they should be grateful to the Respondent for) having a job and that the Company won—I mean, the union won, I'm sorry, the Company might even close and it was bad to lose their job like that." Norberto Henry had been discharged in 1989 by the Respondent and did not testify.

I am not at all satisfied that Henry made the statement that Olivo attributed to him on September 10. Olivo professed to be surprised at Henry's antiunion comments soon after Henry had gotten employees to sign union authorization cards. Yet, and despite the fact that he and Henry had been friends since childhood, he apparently never asked Henry for an explanation. It is likely that he never asked for one because Henry never made the threat. I am unable to credit Olivo's account.² Accordingly, I find that the evidence is insufficient to support a finding that the Respondent, by Henry, threatened to close its facility to discourage support for the Union.

3. Alleged unlawful promise of benefit

The General Counsel's brief states that the Respondent had impliedly promised its employees that it would improve their working conditions, in order to undermine their support of the Union. In particular, the General Counsel referred to testimony by Olivo that Burris, after the first employee meeting, showed him some papers, and told him that they were

²It is thus unnecessary to determine whether Norberto was then a supervisor within the meaning of Sec. 2(11) of the Act. Were it necessary to do so, I should find that he was, inasmuch as he hired Olivo, as Burris referred Olivo to Henry to adjust a pay problem, as the Respondent's president urged the employees to support "Norberto (Henry) and Hank (Burris)" instead of the Union when she spoke to them the day before the election, noting that they were in charge of the plant.

In the event the Board were to find that the Objections have merit, and if it agreed that Henry was a supervisor, it may be appropriate to review the validity of the Union's showing of interest in Case 2-RC-20556 inasmuch as it appears Henry directly solicited the entire showing. Cf. *Sarah Newman Nursing Home*, 270 NLRB 663 fn. 2 (1984).

a rough draft of employee rules and regulations. That testimony is too nebulous to permit the inference to be drawn that the Respondent unlawfully promised better working conditions. Cf. *Hyatt Regency Memphis*, 296 NLRB 259, 269 (1989), where a general manager's preelection remarks asking employees to give him a chance to prove that a union is not needed was held to be nebulous and not unlawful.

4. Alleged unlawful suspensions of, warning to, and discharge of Eulogio Olivo and related allegations of coercion

The complaint alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by having twice suspended its employee Eulogio Olivo, by having issued a written reprimand to him, and later, by having discharged him on October 10, 1988—because he supported the Union and because he engaged in other activities protected by the Act. The complaint alleges that Burris and Norberto Henry engaged in independent coercive conduct. The Respondent asserts that it disciplined and discharged Olivo solely because of his repeated failure to give it timely notice that he would be absent from work. It denies that it coerced employees to reject the Union.

Olivo began working at the Respondent's Randall Avenue facility in July 1988. He was employed as a laborer.

Sometime after Olivo began work, Norberto Henry passed out authorization cards for the Union to all employees, telling them that they need a union for protection and that his, Henry's, brother is going to be fired. Olivo and all the other employees signed those cards. Olivo however did not attend any of the union meetings held thereafter and never discussed the Union while at the Randall Avenue facility. He testified that he did discuss the Union with his coworkers but away from the plant. His prehearing affidavit, however, recites that he "never expressed support for the Union." At the last preelection meeting the Respondent held with its employees, Olivo urged the Respondent's president to visit the plant more frequently so that management and the employees can work together. Olivo, as noted above, translated into Spanish, the statements at preelection meetings made by the Respondent's president and its then plant manager.

As to the allegation that the Respondent discriminated against Olivo because he engaged in activities, other than for the Union, which are protected by the Act, the General Counsel offered the following testimony. One activity consisted of Olivo having asked Burris, at the first employee meeting discussed above, for hard hats and work gloves. A second instance is referred to in Olivo's account that he once complained to Norberto Henry on behalf of a driver who was a brother-in-law of Olivo. Olivo testified that Henry just laughed at him when he complained that Henry's brother was driving a class 3 truck although not licensed to do so while Olivo's brother-in-law, who has a class 3 license was not driving a class 3 truck.

At one point in his testimony, Olivo referred to his "speaking out for a few of the employees that did not know English and were not able to defend themselves" and to his belief that the Respondent "thought that (he) was in some way giving the Union some boost inside the working place." The record in this case contains very little factual support for those observations by Olivo.

While the complaint alleges that Olivo was suspended twice, the evidence thereon is unclear. Olivo testified that, on

September 17, he was absent from work because he had to take his wife and daughter to a hospital. He related that he had previously told Norberto Henry that there would be times when he could not work because his wife suffered thyroid attacks and that Henry had told him not to worry about it. Nonetheless, according to Olivo, Henry told him, the day after he was absent, i.e., September 18, that he was suspended for 2 days.

General Counsel's brief notes that a warning (discussed further below) issued by the Respondent to Olivo referred to his absence on September 17. The General Counsel thus asserts that the day on which Olivo went to the hospital with his wife and daughter was probably September 12 and not September 17, as Olivo testified. There is no reference in that warning to Olivo's having been suspended.

The complaint alleges also that Olivo was unlawfully suspended on September 24, 26, and 27. On September 24, according to Olivo, he was unable, because he was so ill, to go to work or even to call in to notify the Respondent of his absence. As for September 26, Olivo related that he was absent from work that day but that his wife called the plant at 4 p.m. and no one answered the phone. (It appears that the workday starts at 7 a.m.). On September 27, according to Olivo, he was absent but had called Burris. In any event, his not having worked on September 24, 26, and 27 was not due to suspensions.

The complaint next alleges that Olivo was issued an unlawful written warning on September 30. On that day, Burris gave him a written "Warning Report" that stated that he had been absent on 8/20, 9/12, 9/20, 9/24, 9/26 and 9/27 without having called in. Olivo wrote on it his explanations noted above as to September 24, 26, and 27. As to the four earlier dates, Olivo testified that he did not offer a written excuse therefor as he had previously been told by Henry not to worry about his absences. The warning stated that the "next time," he will be fired.

On October 8, Olivo did not report for work because his wife was ill. He testified that he called the plant at noon and spoke with Henry who told him not to worry about it and to stay home as there is not enough work to do. Olivo's testimony, however, is that a week earlier, Henry had told him that he is no longer Olivo's supervisor and that he, Olivo, is to deal with Burris.

Olivo was discharged by Burris on the next workday. Burris told him that he was discharged because of his absenteeism.

As noted above, Henry also has been discharged and did not testify.

Burris, who also was discharged in 1989 and admittedly was hostile to the Respondent, also as discussed above, testified under subpoena for the Respondent. His testimony on other issues was clearly adverse to the Respondent's interests. Yet, as to Olivo, he related that Olivo's absences without calling in on time were the only reason for his discharge.

Olivo's activities for the Union were, at best, minimal. His testimony that he spoke up with the Respondent on behalf of his coworkers' work concerns was vague and conclusory. The reason given him for his discharge is hardly pretextual. His attempts to excuse his absences and his explanations as to his efforts to timely notify the Respondent of his absences are not convincing. His testimony on material points was contradictory. His demeanor disclosed a temperament dis-

posed more to argument than to providing factual responses. Burris' demeanor, on his advice on the other hand, in testifying that the warning to Olivo and his discharge were based solely on his attendance, was convincing.

I therefore find that the evidence is insufficient to sustain the complaint allegations that the Respondent discriminated against Olivo because he had engaged in union activities or other activities protected by the Act or that it engaged in any independent coercive acts.

5. The objections

Having found the evidence insufficient to establish that the Respondent engaged in the conduct alleged in the complaint as coercive of employees' Section 7 rights, I further find that the evidence thus does not sustain the objections which correspond to those same allegations.

C. Alleged Violations in 1989

The General Counsel contends that, in 1989, the Respondent discharged 17 employees in October in order to discourage support for the Union and that the Respondent engaged in independently coercive acts.

In about mid-September a union business agent began another organizing campaign among the Respondent's employees. He secured 37 signed authorization cards in a week's time. He had given these cards to one of the Respondent's employees who passed them out to his coworkers at lunchtime at the Respondent's premises.

The then plant manager, Burris, testified as follows as to ensuing events. His assistant, Roberto Henry, told him that union organizers were about. Burris telephoned James Alessandria, the father of the Respondent's president, Dina Alessandria Kruk, and met with him and the Respondent's president at the Respondent's corporate office in Hicksville, New York. There, James Alessandria told him to find out which employees had signed union cards and to get rid of them. Burris was aware that most of the employees had signed union cards so he devised a plan to subcontract out the asbestos removal operations in order to layoff the employees doing that work "as a warning to my people." Burris later met with the manager of the asbestos division, Sal Locassio, and informed him that he was going to lay off the asbestos workers, and some of the employees who worked on the medical waste. Burris asked a security employee about the union activity and was informed that an employee named Francisco had been handing out union cards. Burris met with Francisco and told him that, if he and his brother wanted to keep their jobs, he had to give Burris a list of the employees who signed union cards. Francisco replied that he could not do that. Burris then told Norberto Henry to talk with Francisco and he left. Henry and Francisco talked for 15 minutes. Henry then came out of the room with a list of the employees and said that Francisco furnished the names on it as those employees who had signed cards for the Union. Burris reviewed the list and then made up his own list of "people (he) could trust" and also a list of those who had signed cards for the Union and whom he "knew (he) could not change around." Burris instructed an employee named Frankie to make up a petition for the employees to sign which was to state that they did know what they were signing when they signed their union cards.

Burris told Frankie that the employees might be able to save their jobs if they signed the petition. Burris later mentioned to the Respondent's attorney his plan to have such a petition circulated and was advised that that petition was "no good." Burris also told him that "Jimmy," a reference to James Alessandria, had told him to lay off every employee who signed a union card. He was advised by the Respondent's counsel that they could not talk about that but that he should "review every employee and work it out that way." Nothing came of the petition. Burris later met with Locassio and made up a list of asbestos employees to be laid off. He instructed Locassio to notify the asbestos employees on that list that they were laid off. Burris also instructed Norberto Henry to lay off medical employees that he, Burris, had selected for layoff.

The pleadings disclose that 16 of the Respondent's employees were discharged between October 6 and 14, 1989. In addition, Edgar Santiago Ortiz testified that he was discharged on October 20. He received a letter from Respondent stating that he was discharged.

One of the discharged employees, Pedro Calderon, who had been the most senior employee, came to the plant to pick up his paycheck. He testified that Burris told him then that he had messed up by signing with the Union.

Burris testified that he had discussed none of the above actions with the Respondent's president, Dina Kruk, as he was following the orders given him by her father, James Alessandria.

Edgar Santiago Ortiz testified that the manager of the asbestos division, Locassio, had told him that the employees had made a mistake by signing union cards.

James Alessandria did not testify. He is the owner of several companies which have collective-bargaining agreements with the Union.

Dina Kruk testified as follows as to the Respondent's reason for discharging the 17 alleged discriminatees. The Respondent began operations in 1985. In 1988, she was its secretary-treasurer. She is now its president (the record does not disclose whom she succeeded). She runs the business by "numbers" from her office in Hicksville and visits the warehouse only a few times a month. Burris was in charge of that operation in 1989. When she observed, during the latter part of 1989, that payroll costs were going through the roof, she realized that there were too many unproductive employees and she instructed Burris to discharge the unproductive workers. She left it up to him to decide which employees were to be discharged. There is no documentation available to indicate that productivity had increased by reason of the layoff of the unproductive employees although, starting in 1990, the Respondent has records which can be used to calculate employee productivity. She noted, however, that total operating costs exceeded the normal percentage of gross sales. She sought to clarify the matter, stating that it was the percentage of the total of the salaries to the gross sales that was too high. She was unable to recall what the acceptable percentage should be but she related that it was clear to her that the salaries were increasing at a tremendous rate while sales were not.

Dina Kruk had initially been examined by the General Counsel as an adverse witness. She returned to the witness stand on the last day of the hearing for examination by the Respondent's counsel. She testified then as follows. Her fa-

ther told her in October 1989 that Burris had called him to report that there was a union campaign going on. She arranged to meet with Burris the next day and asked her father to be present. Burris told them that the men were signing union cards. She asked if he had gotten rid of the unproductive employees, a reference to her having instructed Burris, a month before, to lay off the unproductive employees. He said he had not. She knew he had not. Burris said that there was going to be a problem as those he would lay off as unproductive would be the same ones who signed union cards. They consulted the Respondent's attorney the next day and he advised Burris that he must document the unsatisfactory performance of each employee to be laid off. No documentation along those lines was submitted and no explanation was offered by the Respondent for its absence.

The Respondent placed in evidence payroll records and sales reports in support of Dina Kruk's testimony that she had determined that the percentage of payroll costs to sales volume was far too high and impelled her to tell Burris in early September to lay off the unproductive employees. In June and July, the percentage was 14 percent; in August, 15 percent. No percentages were offered as to prior months or years. In September, after the decision was made according to Dina Kruk's account, the percentage rose to 22 percent. It dropped to 16 percent in October when the 17 employees were discharged and continued to reduce until the last month for which figures were offered, February 1991, 7 percent. The General Counsel's brief notes that both the sales volume and the Respondent's sales force had increased substantially by February 1991.

Dina Kruk could not recall when the Respondent discontinued its asbestos operations, other than that it was sometime before 1990. No testimony was offered as to what part of its payroll costs were allocable to asbestos work or what part of gross sales was derived from asbestos operations.

Notwithstanding that Burris had been discharged by the Respondent in November 1989 for reasons unrelated to the union campaign and notwithstanding that he is still angry with the Respondent for having discharged him, I credit his testimony respecting the events in October. His account was quite vivid. He has a somewhat stolid personality which makes it unlikely that he could have made up so detailed a version. Further, Dina Kruk's account confirms major aspects of Burris' testimony. Thus, he did telephone her father to report the appearance of the Union. He did meet at the Respondent's office with her father and with her to give a report thereof. Dina Kruk's testimony that she asked him then, although she knew he had not, if he had laid off the unproductive employees as she had instructed him a month before, does not ring true. Nor does her testimony that the rise in percentage of labor costs to sales volume was so startling as to warrant an instruction to Burris in early September to effect a major lay off of employees. The percentage increased in August by 1 percent over the 14 percent for both June and July. If those percentages were appreciably lower in prior months, no evidence thereof was offered to prove that.

I credit also the uncontested testimony of Edgar Santiago that the Respondent's manager of its asbestos division, Locassio, told him when laying him off that the asbestos workers made a mistake in signing union cards.

The credited evidence discloses that the Union secured signatures from a large number of the Respondent's employ-

ees by the latter half of September, that the Respondent was aware of that activity, that it used coercive tactics to find out which of those employees signed union cards and it evaluated which of those employees could not be swayed to turn against the Union, that it laid off 17 employees patently to discourage support for the Union and made clear to them later that they had been discharged for having erred in signing union cards. The General Counsel thus has made out a prima facie showing that the Respondent, in discharging the 17 employees named in complaint, did so to undermine the Union's organizational effort. Under *Wright Line*, 251 NLRB 1083 (1980), the burden shifted to the Respondent to establish that, nonetheless, it would have discharged these employees for nondiscriminatory reasons. The evidence the Respondent has produced is unconvincing. Aside from the considerations discussed above as to the percentages the Respondent asserts it relied on, I note that the documents the Respondent produced, and those it did not, raise too many questions and require too many suppositions to justify a finding that it met its *Wright Line* burden. Nothing was offered by it to negate Burris' testimony that subcontracting was considered as a way to offset the last of the discharged employees. No testimony was given as to the impact on the labor costs and sales volume of the discontinuance in late 1989 of the asbestos operations.

Having found that the Respondent was motivated by antiunion considerations in discharging in October the 17 employees named in the complaint and having found that the Respondent has failed to meet its burden of showing that they would still have been discharged for nondiscriminatory reasons, I further find that the Respondent, in discharging these employees, was motivated to do so in order to discourage membership in, and support for, the Union.

The credited testimony also establishes that the Respondent, by Plant Manager Burris, interrogated a security employee and another employee as to the Union's organizational effort. Under the totality of circumstances test set out in *Rossmore House*, 269 NLRB 1176 (1984), I find that those incidents of interrogation were unlawful. See *Cumberland Farms*, 307 NLRB 1479 (1992). Burris' instruction to an employee to prepare and circulate among the employees for their signatures an antiunion petition, under threat of job loss, also interfered with employee Section 7 rights, as did his threatening discharge to obtain the names of the employees who had signed union cards. See *Fontaine Body Co.*, 302 NLRB 863 (1991). Further, the statements by Burris and by Asbestos Manager Locassio to employees that they messed up and made a mistake in signing union cards, in context, constituted a warning that the Respondent would take reprisals against employees for supporting the Union. Cf. *Arrow Molded Plastics*, 243 NLRB 1211, 1218 (1979), where a plant superintendent's statement was held unlawful as it insinuated that an employer's union activity prejudiced an employee's promotion.

D. Alleged Violations in 1990

1. The contentions

The General Counsel contends that the Respondent's president made coercive remarks to employees, as to their union activities, at a meeting she held with them in late 1990 at the facility it operated then in Mt. Vernon, New York. The

complaint also alleges that the Respondent discharged a driver, Dennis Jankowski, because of his union activities, that the Respondent created the impression among its employees that their union activities were being kept under surveillance and that it engaged in other acts interfering with employee rights under Section 7 of the Act.

The Respondent denies that its president discussed the Union when meeting with the employees at Mt. Vernon. It denies that it engaged in any coercive conduct and avers that Jankowski's discharge was lawful.

2. Background

In March 1990, the Respondent moved its truck terminal from the Bronx to Mt. Vernon, New York.³ Jankowski began work for the Respondent as a driver at Mt. Vernon in March 1990. Russell Kruk, the husband of the Respondent's president, began working for the Respondent in June 1990 as vice president of operations; he was put in charge of the Mt. Vernon facility. In October, Mike Pero was transferred to Mt. Vernon to take over of the operations there.

3. Jankowski's union activities

In May 1990, Jankowski discussed with other employees at Mt. Vernon the idea of their joining a union. He called the president of another Teamsters Union, Local 456, which is not otherwise involved in this case. After having set up a meeting with that union, he passed out authorization cards for it and obtained signatures from 27 of the Mt. Vernon employees. Apparently it was towards the end of the summer of 1990 that Jankowski was informed by Local 456 that it had learned of the Union's organizational efforts in 1988 and 1989, as recounted above, and that it was withdrawing in favor of the Union. Jankowski thereupon undertook the task of distributing authorization cards among the Mt. Vernon employees on behalf of the Union. He testified that he had obtained signatures from about 10 of those employees by late October.

4. Dina Kruk's meeting with the Mt. Vernon employees

Jankowski testified that he was discharged on November 2, and that earlier that day, the Respondent's president had met with all the Mt. Vernon employees. Jankowski related that she said then that they had a legal right to retrieve any cards they signed for the Union and to rip them up. After then testifying that that was all he could recall as to what she had said, he was asked if medical benefits were discussed. He responded that Dina Kruk said that, if the employees were not happy with their medical coverage, they should let her know and that she would see "about improving the benefits or such as that."

Another driver at Mt. Vernon, Kirby Mack, testified as to Dina Kruk's remarks at an employee meeting. Although he testified, as discussed further below, in support of Jankowski's alleged discriminatory discharge, he did not place that meeting on the day of Jankowski's discharge. For that matter, he related that he could recall only that it took place when the weather was beginning to get a little cold. As to the substance of the meeting, Mack testified that Dina Kruk told the employees that they would be discharged for

supporting the Union, a threat never mentioned by Jankowski in his account. Mack did not corroborate Jankowski's testimony as to Dina Kruk's remarks about medical benefits.⁴ The General Counsel called a third Mt. Vernon driver, Michael Roper, as a witness in support of Jankowski's alleged discriminatory discharge. Roper did not testify as to any employee meeting there.

The Respondent's president and its other witnesses testified that there was a meeting of the employees and managers at Mt. Vernon in late 1990 and that that meeting had to do only with operational procedures and nothing to do with the Union.

In view of the varying accounts given by the General Counsel's witnesses and the lack of corroboration among those accounts, I find that the evidence is insufficient to sustain the complaint allegation that the Respondent's president made coercive statements at employee meetings in Mt. Vernon in 1990.

5. Jankowski's alleged discriminatory discharge, other allegedly coercive acts

The General Counsel contends that Jankowski was discharged because of his activities in support of the Union, as discussed above. The Respondent asserts that Russell Kruk made the decision to discharge him because of poor work performance.

According to Jankowski, he was assigned, on the last day he worked for the Respondent, to make pickups at 13 locations instead of the usual 3 to 7 pickups and, when he returned to the Mt. Vernon facility at the end of the workday, he was told by the terminal manager, Michael Piro, that his services were no longer needed. He asked Piro if his discharge had anything to do with the Union. Piro's only response, according to Jankowski, was to report that Jankowski's services were no longer needed. Piro did not testify. I credit Jankowski's uncontroverted account of his discussion with Piro.

Jankowski returned to the Mt. Vernon facility to pick up his paycheck from the Respondent's vice president, Russell Kruk. He testified that he asked Kruk then if Kruk would

⁴ Mack testified also that on frequent occasions he was approached by Plant Manager Piro and by the Respondent's president along with its vice president and that various coercive statements were made to him at those times. While his testimony thereon could not be said to be implausible, it was very disjointed and at times seemed to be an amalgam of what was said to him by the Respondent's officials on various indefinite occasions and what he understood from what other employees had said to him. It was also punctuated with his observations that he could not recall or was not sure. While I have elsewhere credited Mack's testimony as to a specific discussion he had with Piro concerning Jankowski's discharge, I hesitate to make findings that coercive statements were made to him at other specific instances. His testimony as to other occasions blended into a stream of consciousness of various implied warnings, overt threats, a bribe offer, interrogations, statements indicating the futility of joining the Union and more. While I hesitate to reject them outright, I am not persuaded that there were other specific instances when coercive statements were made to Mack. It appears, rather, that his recital of threats, promises etc., is an admixture of remarks he heard, from the Respondent, of what he may have inferred from remarks by the Respondent's officials which were lawful as 8(c) comments, and of what other employees relayed to him.

³ It brought the terminal back to the Bronx in 1991.

like to tell him exactly why he was discharged and that Kruk said that he would not.

Kruk's testimony is that he told Jankowski then that his discharge was due to his poor work performance and to his failure to heed advice after two previous discrepancies. (Those discrepancies are discussed in detail below.) I credit Jankowski's account as to this discussion. Kruk impressed me as one who was disinclined to deal directly with the drivers and I doubt that he would have offered to Jankowski the expansive response set out in his account. If he had, it is likely that the discussion would have continued with Jankowski asking for more specific data. Moreover, it appears that Kruk never even gave Piro his reason why Jankowski was discharged as the credited evidence is that Piro, when asked for the reason, told Jankowski twice only that his services were no longer needed.

Kirby Mack, an employee then at Mt. Vernon testified for the General Counsel that, while he was in Piro's office in December 1990, Piro told him that Jankowski had been "behind the Union, that Jankowski is gone and that it is time for (Mack) to come clean." Mack testified that he then told Piro that he can believe anything he wants to believe, and then left Piro's office. I credit Mack's uncontroverted testimony respecting that discussion.

I credit also the uncontradicted testimony of another driver, Michael Roper, that Piro had told him that Jankowski had been fired because of the Union and that, now that Jankowski is gone, things will be normal.

Russell Kruk testified as follows respecting the reason for Jankowski's discharge. In October, Piro came up to Mt. Vernon as terminal manager and this enabled Kruk to concentrate on administrative functions. He noticed then a record that the Respondent had received a summons from the State of New York's Department of Environmental Conservation (DEC) on March 22 based on Jankowski's have accepted for transport improperly labeled medical waste. The Respondent was fined \$500.⁵ Also among the Respondent's records was a written warning, termed employee warning, was issued to Jankowski as to that incident. (A copy of that warning was placed in evidence.)

Kruk's account as to the reason for Jankowski's discharge continues as follows. On April 20, Jankowski had been given a written warning for having backed his truck into a parked car. A copy of that warning was also placed in evidence. On October 11, he had transported 38 boxes of medical waste from St. Joseph's hospital but 34 of those boxes did not have that hospital's name on them, as is required by DEC regulations. On October 20, Jankowski transported 31 boxes of medical waste but he erroneously recorded that he had transported 38 boxes. Kruk warned Jankowski then that another error would result in his discharge. On Wednesday, October 24, Jankowski returned to the Mt. Vernon facility. His manifest sheet lacked a customer's signature, as required by DEC regulations. Kruk decided then that Jankowski should be discharged due to his repeated mistakes and also in view of his prior attendance record. Kruk instructed Piro to tell Jankowski on Friday, October 26, that he was discharged.

⁵The Respondent indicated at the hearing that it would furnish documentation to corroborate Kruk's testimony as to the fine. None was furnished. Jankowski had testified that he thought the fine was \$300.

The reason Friday was selected was that all the routes for the week had already been set up.

There is no evidence that Jankowski was given a written warning, i.e., an employee warning report, as to the errors on the manifests of October 11, 20, or 24. Jankowski's testimony, in substance, controverts Kruk's account as to an oral warning on October 20. Jankowski related that Piro was the only one who spoke to him about miscounting boxes, a reference to the March 22 incident, discussed above.

I am unable to credit Russell Kruk's testimony that he warned Jankowski on October 20 that he would be discharged if he made another mistake. Kruk testified that he concentrated on administrative matters. In that vein, he would likely have documented any final warning on an employee warning sheet but that was not done. Also, and as noted above, Kruk impressed me as one who would remain aloof from the drivers and I doubt that he would confront Jankowski with a final warning. Were one issued, Piro likely would have handled it. Also, Kruk's allusion to Jankowski's assertedly poor attendance record was not documented and seems to have been an afterthought. On this last point, I credit Jankowski's testimony that, on occasion he was, without incident, a few minutes late for work.

Jankowski's extensive activities on behalf of the Union, the failure of the Respondent to give him an answer as to his request for a reason for his discharge and the uncontroverted evidence that the terminal manager, Michael Piro, told two employees in effect that Jankowski was discharged because he supported the Union—all establish a prima facie showing that Jankowski's activities for the Union were a motivating factor in the Respondent's decision to discharge him. Under *Wright Line*, supra, the Respondent had the burden, then, of proving that, regardless, he would have been discharged for nondiscriminatory reasons. As noted above, the reason proffered by the Respondent for Jankowski's discharge have been found to be without merit.⁶ I thus conclude that Jankowski was discharged because of his union activities and to discourage the Respondent's employees from joining or assisting the Union.

I have credited the testimony of former drivers, Mack and Roper that Piro in essence informed them that Jankowski's discharge was due to his support for the Union and that Piro also had asked Mack to "come clean." I also credit Mack's testimony that Piro told him that the Respondent knew that he and Jankowski were behind the union activities and that Piro declined to tell him how they knew that. By these statements of Piro, the Respondent has engaged in coercive interrogation of employees as to their support of the Union and has created the impression among them that it has engaged in surveillance of their union activities.

CONCLUSIONS OF LAW

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

⁶Further, the Respondent offered no evidence that it discharged Jankowski consistent with an established policy. Rather, the General Counsel showed that other drivers, who made errors on their manifests, were nonetheless given good performance ratings and it would appear, from Jankowski's uncontested testimony that Piro repeatedly praised his work, that Jankowski would also have gotten a good rating, but for his unlawful discharge.

2. The Union is a labor organization as defined in Section 2(5) of the Act.

3. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by having

(a) Threatened its employees with discharge in order to discourage them from supporting the Union.

(b) Coercively interrogated them as to their activities in support of the Union.

(c) Solicited employees to prepare and circulate a petition for employees to sign and thereby renounce their support for the Union.

(d) Impliedly warned employees that reprisals would be taken against them, by telling them that discharged employees made a mistake in having signed union cards.

(e) Created the impression among its employees that it kept under surveillance their union activities.

(f) Engaged in the conduct described in paragraph 4 below.

4. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act by having discharged 17 employees in 1989 and 1 employee in 1990 in order to discourage support among its employees for the Union.

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

6. The Respondent did not engage in any unfair labor practice alleged in the complaint not found to have merit.

7. The objections filed in Case 2-RC-20556 to the election held therein on October 21, 1988, are without merit.

THE REMEDY

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

The Respondent having discriminatorily discharged 18 employees, I find it necessary to order it to offer them full reinstatement⁷ with backpay computed as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The notice to employees to be posted and the letters to be sent the discriminatees should be in English and in Spanish.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

ORDER

The Respondent, American Medical Waste Systems, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees to discourage support for the Union.

⁷ Colloquy between counsel at the hearing indicates that some of these employees may have received valid offers of reinstatement. If it is ascertained at the compliance stage that some discriminatees received valid offers, the Respondent need not send offers to those individuals.

⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Threatening its employees with discharge in order to discourage them from supporting Local 813, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (the Union).

(c) Coercively interrogating them as to their activities in support of the Union.

(d) Soliciting employees to prepare and circulate a petition for employees to sign and thereby renounce their support for the Union.

(e) Impliedly warning employees that reprisals would be taken against them, by telling them that discharged employees made a mistake in having signed union cards.

(f) Creating the impression among its employees that it kept under surveillance their union activities.

(g) 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.

(a) Offer each of the following employees immediate and full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for their lost earnings in the manner set forth in the remedy section of the decision.

Juan Ruiz	Gustavo Castillo
Luis Cirino	Edgardo Santiago Ortiz
Joseph Bailes	Juan C. Ortiz
Osbin Alvarado	Julian Ortiz
Carlos Beltran	Leonel Ortiz
Cruz Calderon	Edy Chincilla
Pedro Calderon	Carlos B. Juarez
Gerardo Campos	Carlos Quinonez
Raul Rosa	Dennis Jankowski

(b) Remove from its files any reference to the above discharges and notify these employees in writing that this has been done and that their discharges shall not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Bronx, New York facility copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

⁹ 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."

IT IS ALSO ORDERED that those unfair labor practices alleged in the complaint, to which merit has not been found, are dismissed.

The objections to the conduct of the election held in Case 2-RC-20556 are dismissed.¹⁰

¹⁰In the event the Board's Order confirms this dismissal of the objections, a Certificate of Results should issue that the Union did not receive a majority of the valid votes cast.

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge any of our employees in order to discourage support for Local 813, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union).

WE WILL NOT threaten our employees with discharge in order to discourage them from supporting the Union.

WE WILL NOT coercively interrogate our employees as to their activities in support of the Union.

WE WILL NOT solicit employees to prepare and circulate a petition for them to sign and thereby renounce their support for the Union.

WE WILL NOT in any way warn our employees that reprisals will be taken against them for supporting the Union.

WE WILL NOT create the impression among our employees that we are keeping their union activities under surveillance.

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

WE WILL offer each of the following employees their jobs back and pay them, with interest, for all earnings they lost as a result of our having unlawfully discharged them.

- | | |
|----------------|------------------------|
| Juan Ruiz | Gustavo Castillo |
| Luis Cirino | Edgardo Santiago Ortiz |
| Joseph Bailes | Juan C. Ortiz |
| Osbin Alvarado | Julian Ortiz |
| Carlos Beltran | Leonel Ortiz |
| Cruz Calderon | Edy Chincilla |
| Pedro Calderon | Carlos B. Juarez |
| Gerardo Campos | Carlos Quinonez |
| Raul Rosa | Dennis Jankowski |

WE WILL remove from our files any reference to the discharge of each of these 18 employees and WE WILL notify each in writing that we have removed any such reference and that we shall not use the discharges against them in any way.

AMERICAN MEDICAL WASTE SYSTEMS, INC.