

Trader Horn of New Jersey, Inc. and Robert Waxman and John Kurdziel. Cases 22-CA-19283 and 22-CA-19285

January 31, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND COHEN

On August 5, 1994, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief.

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 brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Trader Horn of New Jersey, Inc., Paramus, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹The judge, under the section of his decision entitled "The Discharges," inadvertently stated in the first paragraph that "Lucas denied any knowledge" of the union activity. Although it is clear that the judge meant to attribute the denial to Store Manager Bialek, we do not find that correction of this misstatement affects the judge's ultimate conclusions here.

Bert Dice-Goldberg, Esq., for the General Counsel.
George L. Schneider, Esq. (Lorber, Schneider, Nuzzi, Vichness & Bilinkas, Esqs.), of Fairfield, New Jersey, for the Respondent.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on a charge filed on June 23, 1993, in Case 22-CA-19283 by Robert Waxman, an individual, and a charge filed on June 24, 1993, in Case 22-CA-19285 by John Kurdziel, an individual, a complaint was issued against Trader Horn of New Jersey, Inc. (Respondent) on August 6, 1993.¹ The complaint alleges essentially that on June 16, Respondent discharged salespeople Mark Avrin, John Kurdziel, and Robert Waxman because they joined or assisted Local 1262, United Food and Commercial Workers Union, AFL-CIO (the Union), and engaged in concerted activities, and to discourage employees from engaging in such activities. Respondent's answer denied the material allegations of the complaint, and on February 8

¹All dates hereafter are in 1993 unless otherwise stated.

and 10 and March 18, 1994, a hearing was held before me in Newark, New Jersey.

On the evidence presented in this proceeding, and my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation having an office and place of business in Paramus, New Jersey, has been engaged in the retail sale of appliances and electronic products. During the past 12 months, Respondent derived gross revenues in excess of \$500,000, and during that time, it purchased goods and materials valued in excess of \$5000 directly from suppliers located outside New Jersey. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent's Structure and Hierarchy

Respondent operates a chain of 17 retail stores, selling household appliances, such as refrigerators and stoves, and electronic items such as televisions and stereo systems. It employs 400 people, of whom about 185 are salespeople, and the rest are cashiers and stockpersons.

Respondent's owner is Eddie Navlian. Its sales manager is John Kalainikas, who is responsible for the overall operation, performance, and profitability of all its stores. Joseph Lucas, who reports to Kalainikas, is Respondent's general manager. He is in charge of six stores, including the Route 17 Paramus store at issue here.² He visits that store at least once per week. Lucas is the immediate supervisor of Michael Bialek, the store manager of the Paramus store.

The Paramus store employs 25 full-time and part-time employees, including eight full-time salespeople. Bialek was alleged as a supervisor and agent of Respondent. Respondent admits that he has some supervisory responsibility, including hiring and firing stock clerks and cashiers, maintaining order in the store, ensuring that the employees under his supervision are performing their duties "most effectively and efficiently and working their proper hours, and ensuring that inventory is stocked to capacity, is clean, up to date and properly displayed." However, Respondent denies that it is responsible for Bialek's actions or words inasmuch as what he said or did was "anti-company," and because he is subject to the supervision of others, such as Kalainikas.

Bialek is the sole management person on duty on a daily basis at the Paramus store. When new hires were needed, he called Kalainikas, who placed an advertisement in the newspaper. Bialek then interviewed for hire part-time salespeople, and had the authority, which he exercised, of recommending their hire. He told Lucas of his decision regarding the hire of an individual. Although security checks were done on ap-

²References hereafter to events which occurred relate to the Route 17 Paramus store.

plicants prior to Bialek's notifying them of their hire, his recommendations for their hire were never overruled. He also had the authority, which he exercised, of hiring stock clerks and cashiers. Kalainikas interviewed and hired the full-time salespeople.

Bialek imposed discipline on the employees, which was verbal and informal. He possessed the authority, which he exercised, to discharge the part-time stock clerks and cashiers. In addition, his recommendations that two or three full-time salespeople be terminated were not overruled. However, his recommendation that a part-time stock clerk be fired was overruled as the stock clerk's father was a friend of Lucas.

If sales people were not selling enough items, Bialek spoke with them, in an effort to improve their sales techniques. He trained employees as to new products and new directives from management. Bialek set the schedules for the employees, and had authority to grant time off if an employee needed to take a day off or had to exchange his workday off with another employee. These matters were resolved in the store. However, he needed approval from Lucas as to the granting of vacation time to the workers.

Each salesperson was assigned a section of the store to work in. Bialek made sure that each salesperson knew what his responsibilities were, and that he serviced his area correctly. Bialek checked the areas and if he observed an improper practice he told the employee to correct it.

Bialek directed the stock clerks to arrange the stock and to clean the store. Bialek also was responsible to ensure that merchandise was ordered and being received promptly, and that the sales staff was performing its job correctly.

Bialek receives medical and hospitalization benefits which other employees do not receive.

Based on the above evidence, it is clear that Bialek, the only management representative in a store having 25 employees, is a supervisor of Respondent within the meaning of the Act. He effectively recommends the hire of stock clerks, cashiers, and part-time salespeople, he discharged those employees, and effectively recommended the discharge of full-time salespeople. He set employees' schedules, granted time off, and trained the staff as to new techniques and new products. The Board has found that store managers exercising less authority are supervisors. *Colorfax Laboratories*, 248 NLRB 439 (1980); *Lipman's*, 227 NLRB 1436, 1437 (1977); *Jackson's Liquors*, 208 NLRB 807, 808 (1974).

I accordingly find and conclude that Bialek is a supervisor and agent of Respondent within the meaning of Section 2(11) of the Act, and that Respondent is responsible for his actions. Section 2(13) of the Act makes it clear that an "employer is bound by the acts and statements of its supervisors whether specifically authorized or not." *Dorothy Shamrock Coal Co.*, 279 NLRB 1298, 1299 (1986).

The Nascent Attempt at Union Organization

Mark Avrin, a salesperson, testified that employees were unhappy with a change in the commission structure which led to lower earnings, and with the fact that employees had no medical or other benefits. Avrin stated that in late 1992, or early 1993, he had at least six "surreptitious" conversations with four to six employees in the store concerning these problems. He had been employed by a competing company, Newmark & Lewis, which, at the time he worked there, had defeated an attempt at organization by the Union. He offered

to contact the Union, suggesting that perhaps the Union could help them.

In February 1993, Avrin called the Union. Union Agent Patrick Purcell offered to help, but said that he was busy with a supermarket strike at the time, but would call when he was available.

Waxman testified that in March 1993, he was solicited by his fellow employees regarding his views of the Union. Waxman told them that he was not interested, and had opposed the Union when he was employed at Newmark & Lewis.

By May 1993 apparently Purcell had not contacted Avrin. Avrin reported this to his colleagues, and fellow employee John Kurdziel offered to call the Union. In late May, an appointment was made with Purcell, which Purcell did not keep.

In June, Kurdziel spoke to another union representative, Marge Rhea, who suggested that he contact the employees in Respondent's other stores. Kurdziel stated that he spoke on nearly a daily basis with about six coworkers at the store regarding a proposed meeting with Rhea. Avrin stated that his conversation with Kurdziel concerning Rhea becoming involved was "very discreet." All his discussions with those employees took place in the store's loading area. Kurdziel also spoke to one "key" employee in each of two other stores that he formerly was employed in. Kurdziel told those two people about the plan to organize a union. He wanted to see if there was any interest in those stores in becoming represented by the Union. All of his discussions with those employees took place over the Respondent's tie line—a direct telephone line between the stores.

During the first week in June, Kurdziel arranged a meeting with Rhea for June 10, and spoke to his coworkers, and the two individuals in the other stores about that meeting. However, the employees were told that they had to work late on June 10, and thus canceled the meeting.

The meeting with Rhea was rescheduled for June 17. Kurdziel informed the same people about the new date. His last conversation with the other stores' employees was on June 14.

The Discharges

Bialek testified that in the afternoon of June 16, Lucas, Respondent's general manager, entered the store loudly complaining about the garbage strewn about behind the store. Bialek left the store with Lucas to explore the situation. When they were outside, Lucas explained that his mention of the garbage was a ruse to speak to Bialek out of the store. Lucas then asked Bialek if he knew anything about union activity "going on" in the store. Lucas denied any knowledge, and asked who Lucas thought was "involved."

Bialek further testified that Lucas said that he believed that Kurdziel, Avrin, and Waxman, some management personnel, and other stores were involved as well. Lucas added that he believed that Kurdziel was involved because of his unhappiness with the new commission and warranty sales structures. Lucas further said that he believed that Avrin and Waxman were involved because they came from Newmark & Lewis, which at the time that it closed was undergoing a unionization effort by the salespeople.

They then returned to the store, and at about 4:30 p.m. Lucas received a phone call. He told Bialek that the main

office told him that there would be a meeting “specifically about the union problem” that evening. Lucas did not testify.

About 8 p.m. that evening, Kalainikas and Lee Delamarca, Respondent’s director of security, came to the store. Kalainikas told Bialek that he was terminating Avrin, Robert Johnstone, Kurdziel, and Waxman. Bialek asked why they were being discharged, and Kalainikas replied, “inadequate performance.”

Kurdziel testified that Kalainikas told him that Respondent’s president, Navlian, was “not happy with your numbers” and that he was being terminated for that reason.

Waxman testified that Kalainikas told him that he was terminated. The reasons given were that he did not maintain his area, did not have “decent” productivity, and did not meet Respondent’s requirement that 5 percent of his gross sales be in sales of extended service or warranty contracts (contracts).

Avrin, who was not at work, was phoned at home by Kalainikas that evening. Avrin testified that Kalainikas told him that he was terminated because Respondent was not satisfied with his performance. Avrin asked if he could elaborate, and Kalainikas said he could not.

Johnstone was also discharged that evening. However, he was reinstated the next day. No charge alleging his discharge was filed.

Following the discharges, Kalainikas told Bialek to close the store for the evening, which he did. As they left, Kalainikas told Bialek that he (Bialek) was “part of the problem too,” and that he was being discharged because of inadequate performance. Bialek conceded that he became upset, but could not remember what he said. Kalainikas testified that Bialek came at him with his hands clenched and raised and threatened to kill Kalainikas and his family. Delamarco approached them, and Bialek shouted: “It’s not worth it, is it?” and then left. Kalainikas did not call the police or file a formal complaint.

Bialek testified that as he was entering his car to leave the area, Lucas was waiting for him. Lucas approached and told Bialek that he (Lucas) did “not want it to be this way,” that he tried to save Bialek’s job, but could not because Navlian and Kalainikas wanted him terminated.

The following day, June 17, Avrin and Kurdziel went to the store. Kurdziel testified that while they were there, Lucas asked them if they were aware of activities such as drug use or gambling in the store, or anything which could have caused the mass discharges the prior evening. Kurdziel responded that he knew of no reason. Avrin testified that Lucas told them that Navlian was upset because business was slow, and that Navlian “went crazy,” by discharging many employees from other stores. Lucas said he did not know why he took such action.

Also that day, Bialek met with Kalainikas and discussed the reasons for his termination. Bialek stated that he was told that Lucas was in the store that day, and reported that the merchandise did not have proper tags on them, the store was dirty, and products were not properly and most effectively displayed.

Waxman testified that, on June 18, he asked Lucas why he was discharged. Lucas replied that he knows nothing more than Waxman knows, adding “what were you fellows up to?”

Respondent’s Defenses

Respondent asserts that it had no knowledge of any union activity engaged in by anyone at the store, there has been no showing of any antiunion animus, and that Avrin, Kurdziel, and Waxman were discharged for cause. In its position letter, Respondent stated that Lucas spoke “in very general terms regarding a rumor he heard on one occasion regarding unspecified ‘union activity.’ He very briefly discussed the rumor with . . . Bialek, and sales persons John Kuba and John Post. They all responded saying they knew nothing about any ‘union activity.’” Nothing further on that issue was discussed with those persons or anyone else.

Bialek testified that he was not aware of any union activity at the store. He had no conversations with anyone concerning a union, and never saw any union-related documents at the store. Similarly, Kalainikas testified that in the period involved here, he was unaware of any union activity engaged in at the store. He stated that in the past he has heard rumors concerning unions and dissatisfied employees, but he took no action against or toward any employee as a result of such rumors. Kalainikas further stated that he had no knowledge of any conversation Lucas might have had with store personnel in which union activity was mentioned.

As set forth above, Respondent asserts that the three salespeople were discharged for cause. The General Counsel asserts that Respondent gave inconsistent and shifting reasons for discharging them.

Avrin

Avrin was employed by Respondent for 2 years. As set forth above, on June 16, Avrin was told by Kalainikas that Respondent was not satisfied with his performance.

In its position letter submitted in connection with the investigation of this case, Respondent stated that Avrin had a bad attitude toward his colleagues and toward customers, and possessed a “negative, anti-company attitude.” It stated that his “nasty demeanor” adversely affected his sales performance, and the sales efficiency of the store. Customers asked not to be helped by Avrin because of his attitude.

At the hearing, Kalainikas testified that Avrin was very nasty and curt with customers, and that if he did not “get his way” he would ignore them. He was grating, discourteous, and very negative with customers and to Respondent. He contributed to poor morale in the store.

Bialek testified that Avrin was a “little harder to manage” and had to be dealt with more differently than other salespeople. Bialek described Avrin as “very opinionated” and verbose, having a personality which is a “little grating.” He was an average salesperson. In 1993, of the eight full-time salespeople, he was fourth in merchandise sales, fifth in contracts, and fourth in total sales.

Avrin testified that he was never disciplined for his attitude or demeanor and, in May or June 1993, Respondent did not speak to him concerning such matters. He stated that during his tenure one customer sent a letter complaining about him, as to which Lucas told him that he had no problems with Avrin regarding customer complaints, so this letter must be from a “nut.”

Regarding his sales performance, Avrin further stated that Respondent continuously urges its salespeople to make more sales of merchandise and contracts. About 1 year prior to his

discharge, Avrin was told by Lucas to increase his sales of contracts. A couple of months before his discharge, at a meeting in the store, Bialek told the salespeople that anyone who did not meet the 5-percent quota of contracts would be terminated.

Kurdziel

As set forth above, Kurdziel was told by Kalainikas that Respondent was not happy with his "numbers."

In its position statement, Respondent stated that Kurdziel was "a good salesman with good potential," but due to a "significant alcohol problem" his personality was offensive and contributed to a discourteous attitude to customers on a regular basis.

At the hearing, Kalainikas testified that Kurdziel was terminated due to his drinking problem, attitude toward customers, and his failure to "turn over" a customer to the manager or another salesperson when he could not close a sale. Kalainikas stated that in 1993, he may have spoken to Kurdziel once about alcohol use.

Bialek described Kurdziel as one of the highest-producing salespeople. In 1993, of the eight full-time salespeople, Kurdziel was second in sales, third in contracts, and second in total sales. Kurdziel stated that he was complimented for his sales, and was always among the top 10 to 15 percent of sales writers in the entire Company. Bialek stated that when Kurdziel became employed in the store, he told him that he would be discharged if he drank on the job. Shortly thereafter, in the fall or summer of 1992, Bialek noticed that Kurdziel had alcohol on his breath, and he was warned. Bialek further stated that, thereafter, he had no problem with Kurdziel's drinking.

Kurdziel became employed by Respondent in 1986. During his tenure, he was not individually criticized for the amount of sales of merchandise or contracts.

Kurdziel conceded having a problem with alcohol. He was discharged in 1989 for alcoholism which played a part in an argument he had with a coworker. Following his discharge, he worked for another company for 3 months and requested reinstatement. He was reinstated in May 1990 with the warning that if a complaint was received about his drinking, he would be discharged. Kurdziel was suspended for 2 days in the fall of 1992 following an argument with a cashier. Following his discharge in 1989, he was not disciplined for drinking. Moreover, Kurdziel stated that he quit Respondent's employ in April 1993 because of the change in the commission structure. Lucas asked him to stay, saying that he was a good salesman, and that things would change for the better. Kurdziel agreed to stay.

Waxman

As set forth above, Kalainikas told Waxman that he was discharged because he did not maintain his area, did not have "decent" productivity, and did not meet Respondent's requirement that 5 percent of his gross sales be in sales of extended service or warranty contracts.

Respondent's statement of position states that Waxman failed to "turn over" his customers, his attitude toward customers was "indifferent and overall very negative," and he was a "chronic complainer" concerning company policies

and pay structure which caused the demoralization of the entire staff.

Bialek described Waxman as an average salesperson and an above average contract writer. He was seventh in merchandise sales, second in contract sales, and sixth in total sales. Bialek stated that Waxman always made sure that his area was clean and tagged and arranged properly. Bialek did not notice that Waxman had a negative or indifferent attitude, except when Waxman and the other salespeople were upset about Respondent's plan to reduce their commissions. Bialek further stated that Waxman made turnovers of customers when needed.

Waxman became employed by Respondent in September 1991. He stated that prior to his discharge, he received no complaints regarding his work area, attitude toward customers, sales production, or failure to turn over customers. About 4 to 6 weeks prior to his discharge, he was asked by Bialek to increase his sales of contracts. He stated that he frequently turned over customers, and did so to Lucas. On one such occasion, Lucas told him that he did such a good job with the customer that there was nothing left for Lucas to work with.

Waxman testified that he believed that he was discharged because Respondent thought that he was involved with the Union. However, following his discharge, he filed a charge with the EEOC alleging that he was discharged because of his age and religion.

The Termination of Bialek

Kalainikas, employed by Respondent for 13 years, could not recall an instance where half the full-time sales staff and the store's manager were discharged at one time. He stated that on occasion, two to three salespeople are discharged in 1 week, and then the manager is terminated, or a manager is discharged, and then two to three salespeople are separated. However, Kalainikas explained that such drastic action was necessary because Bialek could not "control the store," and described the situation on June 16 as a "condition, like an infection," "you just really had to clear it up." He described the store as in total disarray: merchandise tags were faded, curled, or missing; goods were very dusty and dirty, and had scratches and missing knobs; and the stockrooms were messy.

Kalainikas explained that the information he received concerning the store's condition was received from supervisors and customers. However, Bialek testified that Lucas, who was his immediate supervisor, and visits the store at least once per week, never complained to him about the store's condition. Occasionally, he told Bialek to take care of certain minor problems, such as a tag missing from a television, which was remedied immediately. Bialek denied that the store was in the condition described by Kalainikas.

Analysis and Discussion

The General Counsel's Case

Avrin and Kurdziel were active union supporters who made contact with the Union, and actively promoted it among their coworkers at the store. In addition, Kurdziel spoke to employees at Respondent's other stores concerning the Union. It is clear that their activities in behalf of the Union came to the knowledge of Respondent.

Respondent asserts that it had no knowledge that any of its employees were interested in the Union or engaged in any union activities at all. It correctly notes that no meetings had been held between its employees and the Union, and the employees received no literature concerning the Union.

However, Bialek's credited testimony quoting Lucas' June 16 remarks establishes that Respondent was aware that employees at the store were engaging in union activity. On that date, Lucas asked Bialek if he was aware that union activity was "going on" at the store, and identified Avrin, Kurdziel, and Waxman as those involved. It is clear that Respondent bore animus toward the Union as exemplified in Lucas' comment that there would be a meeting concerning the union "problem" that evening. Of course, that evening, the three people identified with the Union were discharged.

The fact that Waxman was opposed to the Union, and rebuffed his colleagues' attempts to interest him there, does not mean that a prima facie case has not been established. A prima facie case does not fall if Respondent was mistaken as to an employee's interest in the Union. If an employer suspects, but does not know for certain, that an employee has engaged in union activities, knowledge of his union activities has been established. *Respond First Aid*, 299 NLRB 167, 169 fn. 13 (1990). Here, Waxman was identified by Lucas as being one of the men involved with the Union.

Further, Lucas' question to Waxman shortly after his discharge, "[W]hat were you fellows up to?" adds support to a finding that they were involved in some conduct detrimental to Respondent which caused their termination.

The manner and timing of discharges of employees permit an inference that the Respondent knew that the dischargees had engaged in union activity. *Knoxville Distribution Co.*, 298 NLRB 688 fn. 1, 696 (1990), where the Board found a violation in the simultaneity of the discharges of three employees for unrelated reasons 1 day before a union meeting. Such a coincidence in time between Respondent's knowledge of its employees union activities and their discharges is strong evidence of an unlawful motive for their discharges. "Timing alone may be sufficient to establish that antiunion animus was a motivating factor in a discharge decision." *Sawyer of NAPA*, 300 NLRB 131, 150 (1990).

Here, the manner and timing of the discharges lends strong support to the General Counsel's prima facie case. The discharges occurred after an aborted first meeting with the Union, and a round of discussions setting up a new date, and 1 day before the rescheduled meeting was to be held. In addition, on the same day that the three employees were identified as being involved with the Union, they were discharged in a summary manner.

Based on the above, and the discussion, infra, of Respondent's reasons for the discharges, I find that the General Counsel has established a prima facie showing that the union activities of Avrin and Kurdziel, and the believed union activities of Waxman were motivating factors in their discharges by Respondent. *Wright Line*, 251 NLRB 1083 (1950).

Having found a prima facie case for unlawful motivation in the discharges of Avrin, Kurdziel, and Waxman, the burden shifts to Respondent to prove that it would have discharged them even in the absence of their union activities. *Wright Line*, supra. I find that Respondent has not carried its burden.

Regarding Avrin, as set forth above, he was told at discharge that Respondent was not satisfied with his performance. Respondent also maintained that his attitude was bad, and he was nasty to customers. Although Bialek conceded that he was a little grating; nevertheless, he was not warned about his personality, and the only customer complaint cited was a letter from someone who Lucas termed a "nut." Accordingly, Respondent tolerated Avrin's personality until he engaged in activities in behalf of the Union.

As to Kurdziel, the reason given at his discharge, that Respondent was not happy with his numbers, was clearly erroneous. He was one of the top producers. Additional reasons, that Kurdziel had a problem with alcohol, did not seem to be a serious situation at the time of his discharge. Although he had been discharged for alcoholism in 1989, he was reinstated after 3 months with a warning of immediate discharge if he drank on the job. Thereafter, he was warned once for drinking, but not disciplined. Respondent was anxious to keep Kurdziel in its employ, successfully urging him to remain employed by it after he quit for 1 day only 2 months before his discharge. Apparently, Respondent was satisfied with Kurdziel's performance, and overlooked his prior drinking difficulties, until he became interested in the Union. *Churchill's Supermarkets*, 285 NLRB 138, 156 (1987).

With respect to Waxman, Kalainikas told him at his discharge that he was being fired for less than adequate productivity, failure to sell a sufficient amount of contracts, and not maintaining his area. Waxman was second in the sale of contracts, and there was no evidence that he did not maintain his area. He was seventh in sales in 1993, but John Kuba, who was not discharged, was eighth. Kalainikas gave unconvincing evidence at hearing regarding specific instances of Waxman not turning over customers in the past, finally conceding that such instances could not be attributed to Waxman and also admitting that the one instance in which he allegedly observed such malfeasance was after he had decided to discharge him.

The fact that Waxman filed charges with the EEOC alleging other reasons for his discharge does not detract from his testimony that he believed that he was discharged for union activities. An employee cannot be held to know the real reason for his discharge. That is for the Board to decide.

Respondent argues that its lack of discriminatory motivation in discharging Avrin, Kurdziel, and Waxman is demonstrated by the facts that other employees who were engaged in union activities, as testified by Avrin and Kurdziel, were not discharged, and that Johnstone, as to whom there was no evidence that he engaged in such activities, was discharged. Respondent thus argues that it did not single out Avrin, Kurdziel, and Waxman for discriminatory treatment.

As to those who engaged in union activities but were not discharged, an inference may be drawn that Respondent was not aware of their activities. Such an inference is warranted here, where the three individuals who were identified as having been involved with the Union were discharged immediately and summarily.

As to Johnstone, it is clear that Respondent realized its mistake in discharging him. It reinstated him the day following his termination. The fact that the person who was not identified as being involved with the Union was discharged and immediately reinstated, while those who were believed to be engaged in union activities were discharged and re-

mained discharged, establishes that Respondent sought to discriminate against those who engaged in union activities. Kalainikas' explanation that Johnstone was reinstated because he was the only one who asked for his job back, and expressed a desire to meet Respondent's standards, does not explain why the others could not have been spoken to and asked to do the same.

As set forth above, Respondent's reasons for the discharges of the three employees given them at discharge varied from the reasons set forth in its position statement and at hearing. "When an employer vacillates in offering a consistent explanation for its actions, an inference is warranted that the real reason for its actions is not among those asserted." *Robin Transportation*, 310 NLRB 411, 417 (1993).

Rather than supporting Respondent's case, its dismissal of Bialek detracts from it. Lucas told Bialek that it was believed that some management was involved in union activities at the store. Kalainikas testified that Bialek was discharged because he could not "control" the store, and that the conditions at the store were like an "infection" which must be cleared up. It is thus clear that Respondent held Bialek responsible for his employees' interest in the Union, and their dissemination of such interest to other stores. The summary dismissal of Bialek, a 13-year employee who was promoted consistently, demonstrates that Respondent was aware of its employees' union activities, bore animus toward them for engaging in such activities, and toward its supervisor for not preventing or stopping such activity.

For the above reasons, I find and conclude that Respondent has not met its burden of proving that it would have discharged Avrin, Kurdziel, and Waxman in the absence of their union activities. *Wright Line*, supra.

CONCLUSIONS OF LAW

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

2. Local 1262, United Food and Commercial Workers Union, Local 1262, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Mark Avrin, John Kurdziel, and Robert Waxman, Respondent violated Section 8(a)(3) and (1) of the Act.

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

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that Respondent offer reinstatement to Mark Avrin, John Kurdziel, and Robert Waxman to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority and any other rights and privileges enjoyed, and to make each of them whole for any loss of earnings and benefits suffered because of their unlawful discharges, less any net interim earnings, to be computed in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 233 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondent, Trader Horn of New Jersey, Inc., Paramus, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees in order to discourage them from joining or supporting Local 1262, United Food and Commercial Workers Union, AFL-CIO or because its employees engaged in activities protected by Section 7 of the Act.

(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.

(a) Offer to Mark Avrin, John Kurdziel, and Robert Waxman immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make each of them whole, with interest, for any loss of earnings and benefits each of them may have suffered as a result of its unlawful discharges of them on June 16, 1993, as set forth in the remedy section of this decision.

(b) Remove from its files any memoranda, records, or other references to the unlawful discharges of Mark Avrin, John Kurdziel, and Robert Waxman, as set forth above, and notify each of them, in writing, that this has been done and that the discharges will 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 back pay due under the terms of this Order.

(d) Post at its facility copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 22, 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.

³If 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.

⁴If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or otherwise discriminate against our employees in order to discourage them from joining or supporting Local 1262, United Food and Commercial Workers Union, AFL-CIO or because our employees engage in activities protected by Section 7 of the Act.

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

WE WILL offer to Mark Avrin, John Kurdziel, and Robert Waxman, immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make each of them whole, with interest, for any loss of earnings and benefits each of them may have suffered as a result of our unlawful discharges of them on June 16, 1993.

WE WILL remove from our files any memoranda, records, or other references to the unlawful discharges of Mark Avrin, John Kurdziel, and Robert Waxman, as set forth above, and notify each of them, in writing, that this has been done and that the discharges will not be used against them in any way.

TRADER HORN OF NEW JERSEY, INC.