

**Hudson Moving and Storage Company, Inc. and
Local 814, International Brotherhood of Team-
sters, AFL-CIO. Case 2-CA-28169**

February 11, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND
HIGGINS

On September 9 and October 3, 1996, Administrative Law Judge Howard Edelman issued the attached decision and erratum,¹ respectively. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering 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 briefs and has decided to affirm the judge's rulings, findings,² and conclusions, as amplified, and to adopt the recommended Order as modified and set forth in full below.³

The judge found, *inter alia*, that shortly after the Union's filing of an election petition on January 18, 1995,⁴ the Respondent ceased assigning work to 7 of its drivers and helpers⁵ who had signed union authorization cards, thereby effectively terminating them for their union activities.⁶ The Respondent's exceptions

¹The judge's erratum corrected his omission of five named discriminatees from the reinstatement and make-whole provisions of the recommended Order and notice. Upon the issuance of the erratum, the General Counsel withdrew the previously filed exceptions to those omissions.

²The 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.

We also find without merit the Respondent's allegations of bias on the part of the judge. On our full consideration of the record, we find no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated bias in his credibility resolutions, analysis, or discussion of the evidence.

³We shall modify the Order and notice in accordance with the judge's erratum and our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996). We shall further insert expunction language and narrow injunctive language that was omitted by the judge.

⁴All dates are in 1995.

⁵The credited testimony of Robert Carman, the Respondent's dispatcher until the latter part of January, reveals that his instructions were to give priority in daily work assignments to the eight names, including six of the seven discriminatees, that appeared highlighted on the *Hudson Manpower List*, in evidence as G.C. Exh. 12. Carman further testified that he also gave priority in work assignments to discriminatee James Key, whose name had been inadvertently omitted from that list.

⁶In so finding, the judge discredited and therefore rejected the Respondent's assertions that it discharged Francisco Lindao for insubordination, and that all the others had abandoned their jobs. Further-

contend, *inter alia*, that the judge erred because he failed to consider documentary evidence demonstrating that a downturn in business had resulted in fewer work opportunities for those individuals and also that some of them declined repeated offers of work.⁷ We find, based on our review of the entire record, that the Respondent's documentary evidence fails to substantiate its claims.

The documents introduced into evidence by the Respondent include: payroll records allegedly reflecting the seasonal fluctuations in the Respondent's volume of work; calendar pages and rosters purporting to show which employees were assigned to work on specific dates; and letters written to individual discriminatees reciting the dates on which they had declined offers of work. First, we find that the Respondent's payroll records, which show only payments made by checks, are of questionable value in determining whether, and to what extent, there was any diminution of business during the relevant period, in light of the credited evidence showing that some employees were paid by check, some in cash, and others part in cash and part by check. Moreover, neither the payroll records nor the roster and calendar pages probatively establish the amount or identity of job assignments. Owner Whitman admitted that there were numerous discrepancies in data between the roster and the calendar pages for the same date, and she was unable to produce substantiating evidence in the form of daily employee time-cards because they had been discarded on advice of her accountant.

Moreover, the Respondent's proposed interpretation of the documents is contradicted by the credited testimony of discriminatee Robert Williams, who lived across the street from the Respondent's facility. Williams testified that "he knew there was work, since he saw several trucks parked in front of the warehouse each morning, but the trucks left the warehouse with new workers in them."

Finally, we find that the Respondent's letters to Robert Carman and Kyle Anderson reciting dates in February that each had declined isolated offers of work do not undermine the judge's finding that the Respondent ceased making work assignments beginning in late January to seven of its nine core employees. The Respondent's alleged offers of work were made *after* the February 6 filing of the instant unfair labor practice charges and after Anderson and Carman had filed for unemployment compensation. Further, the Respondent's contention that Anderson and Carman aban-

more, he specifically credited testimony showing that the Respondent made references to union activities in responses to discriminatees' requests for work in late January and early February.

⁷Contrary to the additional implication in the Respondent's brief that these individuals indicated a lack of interest in their jobs, by failing to "shape" daily for work, Owner Ann Whitman testified, "No, it [ours] is not a shape facility."

done their jobs by declining offers of work was rejected by the judge in light of their credited testimony.

We accordingly affirm the judge's findings and his remedial Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Hudson Moving and Storage Company, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees concerning their membership in or activities on behalf of the Union.

(b) Conveying the impression to its employees that it would be futile to select the Union as their collective-bargaining representative because Respondent would not bargain in good faith with the Union.

(c) Threatening its employees with discharge or lay-off in order to discourage their membership in, or activities on behalf of, the Union.

(d) Threatening its employees to close its facility because of their membership in the Union, or their union activities.

(e) Threatening to eliminate an annual Christmas bonus because of the employees' membership in, or their activities on behalf of, the Union.

(f) Creating the impression that its employees' union activities were under surveillance.

(g) Discharging or laying off its employees because of their membership in, or activities on behalf of, the Union.

(h) In any like or related manner interfering with, restraining, or coercing its 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) Within 14 days from the date of this Order, offer James Key, Francisco Lindao, Robert Carman, Robert Williams, Kyle Anderson, Danny Muniz, and Curtis Agnew full reinstatement to their former jobs or, if these jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

(b) Make James Key, Francisco Lindao, Robert Carman, Robert Williams, Kyle Anderson, Danny Muniz, and Curtis Agnew whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

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

(d) Preserve and, within 14 days of a request, 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.

(e) Within 14 days after service by the Region, post at its New York, New York facility copies of the attached notice marked "Appendix."⁸ 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 6, 1995.

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

⁸If 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.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate our employees concerning their membership in, or activities on behalf of, the Union.

WE WILL NOT convey the impression to our employees that it would be futile to select the Union as their collective-bargaining representative because we would not bargain in good faith with the Union.

WE WILL NOT threaten our employees with discharge or layoff in order to discourage their membership in, or activities on behalf of, the Union.

WE WILL NOT threaten our employee to close our facility because of their membership in, or their activities on behalf of, the Union.

WE WILL NOT threaten to eliminate an annual Christmas bonus because of the employees' membership in, or activities on behalf of, the Union.

WE WILL NOT create the impression that our employees' union activities were under surveillance.

WE WILL NOT discharge or lay off our employees because of their membership in, or activities on behalf of, the Union.

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, within 14 days from the date of the Board's Order, offer James Key, Francisco Lindao, Robert Carman, Robert Williams, Kyle Anderson, Danny Muniz, and Curtis Agnew full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make James Key, Francisco Lindao, Robert Carman, Robert Williams, Kyle Anderson, Danny Muniz, and Curtis Agnew whole for any loss of earnings and other benefits suffered resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the discharges of James Key, Francisco Lindao, Robert Carman, Robert Williams, Kyle Anderson, Danny Muniz, and Curtis Agnew, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

HUDSON MOVING AND STORAGE COMPANY, INC.

Terry A. Morgan, Esq. and Katherine Schwartz, Esq., for the General Counsel.

Allan B. Pearl, Esq. (Portnay, Messinger, Pearl & Associates), for the Respondent.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on February 20, 21, 22, and 28, 1996, in New York, New York. On February 6, 1995, Local 814, International Brotherhood of Teamsters, AFL-CIO (the Union) filed the charge in the instant case alleging Hudson Moving and Storage Company, Inc. (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Union filed the first amended charge in this matter on May 2, 1995. On May 25, 1996, the Regional Director for Region 2 issued a complaint and notice of hearing which alleges violations of Section 8(a)(1) and (3) of the Act.

On the entire record, including briefs filed by counsel for the General Counsel and for Respondent, and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

Respondent is a New York corporation with its office and place of business located in New York, New York, where it is engaged in the storage and transportation of goods. In the course and conduct of its operation, Respondent annually performs services in excess of \$50,000 to firms which in turn meet a direct inflow or outflow jurisdictional standard of the Board.

It is admitted, and I conclude, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

Ann Whitman is Respondent's president. She generally works at Respondent's warehouse Monday through Wednesday. On Thursday and Friday, Whitman runs the office from a location in Baltimore, Maryland. Elizabeth Lesman is then responsible for the general operations in New York. In addition, Respondent employs Nadia Pevzner as its office manager.

Respondent's employees are paid on a weekly basis for the work performed. Sometimes the pay is in cash, a paycheck, or a split of both.

With the exception of the office employees, Respondent's employees are either drivers or helpers—they are either licensed to drive trucks or they are assigned to help pack, crate, load, and unload trucks. The work schedules for these employees are made on a daily basis. Typically, the schedule for the day is made up in the early afternoon on the day before. Employees are instructed to contact Respondent around 4:30 p.m. each day to find out if they have been assigned to work for the next day. Whitman is directly involved in the preparation of the daily work schedules. Even on Thursdays and Fridays, Whitman reviews and revises schedules from her residence in Baltimore, Maryland. The operation is in the nature of a shapeup operation, generally employing the same group of employees.

In mid to late 1994, the drivers and helpers began to discuss the possibility of having the Union represent them. On January 13, 1995, the employees met with Union Vice President Paul Panepinto, at a McDonald's restaurant near the Respondent's warehouse. The meeting took place in the early morning prior to the start of the workday. Curtis Agnew, Kyle Anderson, Robert Carman, Joseph Edwards, James Key, Francisco Lindao, Danny Muniz, and Robert Williams attended this meeting. All of these employees signed union authorization cards and turned them over to Panepinto.

On January 18, Panepinto filed a petition for an election with Region 2 of the Board. A notice of hearing in this matter was served on Respondent, by certified mail on Monday, January 23. However, Whitman testified that she recalled receiving early notice of the matter by fax on either the preceding Thursday or Friday.

I conclude that Robert Carman, Francisco Lindao, Robert Williams, Kyle Anderson, James Key, and Paul Panepinto called by counsel for the General Counsel are credible witnesses. They testified in a responsive and forthright manner. I was generally impressed with their demeanor although at times there were some inconsistencies, such inconsistencies were relatively minor. Their recollection of the 8(a)(1) conduct alleged was clear, consistent, and corroborative. I also conclude that their testimony as to the facts concerning their discharge was credible, notwithstanding various self-serving letters concerning the discharge of several employees, described above.

I conclude that Ann Whitman was not a credible witness. Whitman was constantly evasive and argumentative as to questions put to her by counsel for the General Counsel and by me. At times she simply avoided answering questions directly; as for example, her testimony concerning why she called the January 24 meeting. (Tr. 28-39.)

Whitman's demeanor was poor. She frequently displayed an angry look when questions were directed to her by counsel for the General Counsel and by me, and failed to establish eye contact when answering such questions. Rather she frequently looked at counsel for Respondent as if seeking some sign of approval when she answered questions.

The testimony of the discriminatees shows that on nearly every occasion when they had a conversation with Whitman in the office, Respondent's office manager, Nadia Pevzner, was present. Although Pevzner was still employed by Respondent at the time of this trial, Pevzner was not called to testify in this matter. It is clear that Pevzner holds a position of responsibility in Respondent's operations, and was available to Respondent as a witness. Accordingly, I conclude an adverse inference should be drawn against Respondent regarding its failure to call Pevzner as a witness in this matter as to conversations where she was present. See *Redwood Empire*, 296 NLRB 369, 384 fn. 83 (1989). See also *Robin Transportation*, 310 NLRB 411 (1993). I further conclude such inference further reflects Whitman's overall lack of any credibility.

Accordingly, wherever the testimony of Whitman conflicts with the testimony of the discriminatees, I credit the testimony of the discriminatees.

I also conclude that Wilbert Comacho, a current Respondent employee who testified on behalf of Respondent concerning an altercation between Whitman and discriminatee Lindao, is not a credible witness.

In this connection, Comacho testified that he was standing no more than 10 feet away from Whitman and Lindao during a heated conversation between them, but did not hear and, other times, could not recall what Whitman said, although he was able to recall in detail what Lindao said. I find such selective ability to recall unbelievable, especially in view of Respondent counsel's question to Comacho whether there was any reason why he didn't remember what Whitman said a few days earlier in her January 24 meeting with her employees, described above, when she was the principal speaker. His reply is revealing: "I hear and I can't remember." (Tr. 357-358.)

I was also unimpressed with Comacho's demeanor. He appeared eager as a current employee to testify in a manner favorable to Respondent's position.

Robert Carman credibly testified¹ that shortly after the employees signed the authorization cards, Whitman brought up the subject of the Union while in the office. Whitman was crying and upset about the matter and asked him why the employees wanted to form a union. She told Carman that she knew the identity of everyone who signed a card. Whitman then told Carman that he had "stabbed her in the back by not telling her the guys were forming a union." She asked him why he didn't alert her that the men were forming a union. Carman responded that the other employees hadn't told him of their organizing efforts until the day before the meeting at McDonald's. Whitman referred to the Union as Mafia-controlled and told him "she would never let the Mafia into her building." She told Carman that she had received a fax listing each employee who had signed a card. The only other person present in the office during this conversation was Nadia Pevzner who Respondent failed to call although she was currently employed by Respondent.

A few days later, Whitman had another conversation with Carman concerning the Union. Whitman told Carman that "she would close the warehouse down, go under a different name, and get all new employees before she joined the Union." Again Nadia Pevzner was the only other person present during this conversation and she failed to testify.

During the morning of Monday, January 23, when Francisco Lindao, a helper, was loading some boxes on a truck, Whitman called him into the office. She asked Lindao what was going on, about the guys joining a union. Lindao responded that the guys had gone together and talked about it, but hadn't decided anything. Whitman also asked him whose side he was on. Once again Pevzner was present in the office during this exchange. Whitman generally denied interrogating Lindao or any other employee concerning union activity.

That same afternoon, January 23, Robert Williams, a helper, was working a job for Respondent at Sotheby's. At about 4:30 p.m. that day, he telephoned Respondent's office to talk to Whitman about work for the next day. Whitman answered the telephone, and told Williams that she had some disturbing news about a union. She told him that she would never, ever, sign for the Union. Whitman told Williams that she felt very "betrayed." William's response was to change the subject. He asked if there was work for the next day. Whitman

¹The credibility of all witnesses is described in detail below. I have credited all the General Counsel's witnesses and discredited all of Respondent's witnesses.

told him that there was going to be a meeting for the workers at 7 a.m. the next day.

On the morning of January 24, Whitman held a meeting for all the employees at a nearby restaurant. She admitted that the event that triggered the calling of this meeting was the representation proceeding filed with the Board. The employees who attended include Curtis Agnew, Kyle Anderson, Wilberto Comacho, Robert T. Snyder, Joseph Edwards, Francisco Lindao, Danny Miniz, and Robert Williams. Robert Carman was not present since he was already at work as dispatcher.

Robert Williams credibly testified that Whitman started the meeting by telling the men that she had heard about the Union. She went on to say that she would "never, ever sign for the Union." She told the men, "I have news for you, I'll never, ever sign a union contract." She added that before she signed a union contract she would close the shop.

Francisco Lindao credibly testified that Whitman asked the men why they were doing this to her, why were they trying to join the Union. Whitman also told the workers that "she would rather close the doors than . . . have the a union shop." Lindao testified that Whitman was upset during the meeting.

Kyle Anderson testified that during this meeting Whitman wanted to know why the employees went to the Union behind her back. Anderson also testified that Whitman was upset about the employees signing with the Union.

During the course of this meeting, Lindao spoke up to Whitman telling her that the employees were looking for employment benefits. He told Whitman that they never got any sort of compensation for the work—no sick days, no holidays, and no overtime pay. She stopped Lindao and asked if he was the spokesman for everyone. Lindao told Whitman that he was speaking for all the employees when he raised the issues, but that everyone could speak out.

Curtis Agnew also spoke out at this meeting about how he wasn't getting enough work. Whitman recalls Agnew telling her that he was disappointed with his Christmas bonus. According to employee Williams' credible testimony, Whitman's response was that no one ever gave her anything, so there would be no more Christmas bonuses.

Williams then asked Whitman about overtime pay, and why the employees didn't get overtime when they worked a recent job at Columbia University. Whitman asked him why he didn't get work with Certified (another moving company), or from the union hall.

Kyle Anderson testified that after this meeting, while he was outside the warehouse with dispatcher Bobby Carman, Whitman told them that she would rather shut down her business than to join a union.

Shortly after this meeting on January 24, Kyle Anderson went to the office to check on work assignments. Whitman told him that she knew who signed cards to try to get into the Union. The only other person present during this conversation was Nadia Pevzner, who was not called by Respondent to testify.

Within days of this meeting, Respondent began terminating the employment of James Key, Curtis Agnew, Francisco Lindao, Robert Williams, Kyle Anderson, and Danny Muniz.

Analysis and Conclusions

Whitman testified that the moving and storage business was highly competitive and she operated on an "extremely thin markup in order to entice customers to use Hudson."

It is clear, and Whitman admitted, during her January 24 speech to the employees, that a union in the shop would render her unable to compete.

As set forth above, Carman credibly testified that several days before the January 24 meeting, described above, Whitman asked him why the employees wanted to join the Union, why he didn't tell her about such activities, and that she knew the identity of every employee who signed a card. I conclude that such statements constitute unlawful interrogation, *Dulak Corp.*, 307 NLRB 1138 (1992), and creating the impression of surveillance *Keystone Pretzel Bakery*, 242 NLRB 492 (1979), in violation of Section 8(a)(1) of the Act.

The creditable testimony above establishes that Whitman repeatedly made statements to her employees that their support for the Union was futile because she would never sign with the Union. On January 23, while she was speaking on the telephone with Robert Williams, Whitman told Williams that she would never sign for the Union. On another occasion, Whitman had a conversation with Carman in which she referred to the Union as Mafia-controlled and told him "she would never let the Mafia into her building." The Board has held such statements or similar statements to employees concerning collective bargaining conveys to the employees that their activities are futile. See *Hertz Corp.*, 316 NLRB 672 (1995).

At the January 24 meeting at Floridita's Restaurant, Whitman told employees that she would "never, ever sign for the Union . . . I have news for you, I'll never sign, I'll never ever sign a union contract."

In *Wellstream Corp.*, 313 NLRB 698 (1994), the Board held that similar employer statements made during an employee meeting were conveyed to the employees that their union activities were futile. See also *Marcar Industrial Uniform Co.*, 306 NLRB 27 (1992).

A few days later Whitman had another conversation with Carman concerning the Union. Whitman told Carman that "she would close the warehouse down, go under a different name, and get all new employees before she joined the Union."

Accordingly, I conclude that such statements establish that Respondent informed its employees that it would never sign a collective-bargaining agreement with the Union and that the employees' activities on behalf of the Union were futile, and that each such statement by Respondent violated Section 8(a)(1) of the Act.

The credible testimony of the General Counsel's witnesses established that during the January 24 meeting at Floridita's Restaurant, after telling the employees that she would never sign a contract with the Union, Whitman told the men that "she would rather close the doors than . . . have a union." Also, that after the meeting at Floridita's Restaurant, Whitman told employees Anderson and Carman that she would rather shut down her business than to join a union.

The Board has long held that an employer's threats to shut down operations in the face of a union organizing drive are unlawful. See *Pincus Elevator & Electric Co.*, 308 NLRB 684 (1992). Although Whitman may have told the employees that she was in a very competitive business, her statements

regarding closing her shop were not made in conjunction with economic necessities, they were made in conjunction with a series of other threats and unlawful actions. Clearly, Whitman's statements of plant closure are threats meant to discourage the protected activities of her employees, and therefore violative of Section 8(a)(1) of the Act.

Accordingly, I conclude that Respondent made threats to its employees that Respondent would close the shop if the employees continued to engage in activities on behalf of the Union, and that such statements were violative of Section 8(a)(1).

Carman credibly testified that a few days after his initial conversation with Whitman described above, he had another conversation with her about the Union. During this conversation Whitman told Carman that "she would close the warehouse down, go under a different name, and get all new employees before she joined the Union."

I find such statement is a clear threat to discharge Respondent's employees if they continued their union activities in violation of Section 8(a)(1). See also *Weco Cleaning Specialists*, 308 NLRB 310 (1992).

It is clear that in prior years, Respondent's employees received Christmas bonuses. This is established by statements made during the January 24 meeting by employees Curtis Agnew and Robert Williams, and statements by Whitman. In this regard during the January 24, 1994 meeting at Floridita's, Curtis Agnew told Whitman that he was disappointed with his Christmas bonus. According to Whitman, her response was that she had worked for a company for 10 years and was never given 5 cents for a bonus, and then added that if she didn't have the bonus, it wouldn't cause such disappointment. Employee Williams credibly testified that Whitman's response to Agnew's statement was that no one ever gave her anything, so there would be no more Christmas bonuses.

I conclude Respondent threatened to discontinue its practice of giving Christmas bonuses because of the employees activities on behalf of the Union. Such threat was made during the January 24 meeting in which other 8(a)(1) statements discussed above and below were made. I find such threat is a violation of Section 8(a)(1). *Domsey Trading Corp.*, 310 NLRB 777 (1993).

It is clear to me that Respondent violated Section 8(a)(3) of the Act, which prohibits an employer from discharging or otherwise discriminating against an employee because of their activities on behalf of any labor organization. In order to establish such violation, the General Counsel must establish that a motivating factor in the employers unlawful action was the employees activities on behalf of such labor organization, or other protected concerted activities. Once such factor is established, the burden of proof then shifts to the employer to establish that such action would have taken place in the absence of such union or protected concerted activities. *Wright Line*, 251 NLRB 1083, 1089 (1980), enf.d. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996).

It is clear based on the evidence in this record that Respondent violated Section 8(a)(1) and (3) of the Act when it terminated the employment of James Key, Francisco Lindao, Curtis Agnew, Robert Carman, Robert Williams, Kyle Anderson, and Danny Muniz.

The General Counsel has established that the employees' union activities were a very strong motivating factor which caused their termination. The General Counsel relies on a mass discharge theory to establish the 8(a)(3) violations.

In *Davis Supermarkets*, 306 NLRB 426 (1992), the Board held that the employer unlawfully discharged six employees as part of a scheme to thwart the organizing drive. In its decision, the Board citing *ACTIV Industries*, 277 NLRB 356 fn. 3 (1985), held that the mass discharge of employees was unlawful and that the General Counsel was not required to show a specific correlation between each employee's union activity and his discharge. Instead the General Counsel's burden was to establish that the mass discharge was implemented to discourage union activity or in retaliation for the protected activity of some of the employees. See also *We Can, Inc.*, 315 NLRB 170 (1994), where the Board held that the mass discharge of employees within days of a petition for an election being filed was violative of the Act, regardless of the specific union activities engaged in by each of the discriminatees. The Board relied on the employer's knowledge of the union activity of at least some of its employees, the clear statements of union animus and threats made by the employer, as well as the nexus between the protected activity, the filing of the petition and the discharges.

In the instant case each of the discriminatees signed an authorization card for the Union on January 13. Those cards were submitted to the NLRB as a showing of interest in connection with a petition for election filed by the Union on January 18. The showing of interest required to file a petition for selection is at least 30 percent of the Employer's employees.

It is clear that there was very intense animus by Respondent in connection with the employees union activities. This is established by Respondent's 8(a)(1) violations which include threats to close the shop, to discharge employees, to discontinue Christmas bonuses, as well as unlawful interrogation.

The timing of the terminations also clearly supports the General Counsel's "mass discharge" theory.

The employees signed authorization cards on January 13, and the Union filed its election petition on January 18. Within a few days of this activity, Respondent began interrogating and threatening employees. Respondent also began its campaign of terminations at the same time. Within 2 weeks of their signing cards, the employment of all the discriminatees had been terminated in one way or another.

James Key's last day of work was January 19, 1995, 6 days after he signed the authorization card, and 1 day after the petition was filed. Despite his repeated attempts to get to work, he was never told that Respondent did not consider him to be a current employee. It was only on March 1, the day of the Union election that Whitman finally told him that he had "abandoned" his job.

Francisco Lindao, the only employee actually fired by Respondent was discharged on January 31, just 2 weeks after he signed his authorization card and 1 week after he told Whitman that he supported the Union because he wanted paid sick time and vacation time.

Curtis Agnew, allegedly "abandoned" his job on January 26, 2 days after he spoke out at Respondent's meeting at Floridita's Restaurant and told Whitman that he wanted more work assignments.

Robert Carman was never assigned work after February 1. He was effectively terminated only a few weeks after Whitman told him that he had betrayed her by not telling her about the union activities of the other employees.

Robert Williams was not assigned work after January 1995. When he continued to ask for work, he was told by Whitman that she could never trust him again because he started the Union.

Kyle Anderson was told that he "slit his own throat" when he signed the union card. He was not assigned work after January 1995.

Danny Muniz was terminated after January 1995. He attended that union meeting and signed an authorization card and attended Whitman's meeting on January 23.

Respondent contends that Lindao was discharged on January 31, because of insubordination. Lindao went into Whitman's office to complain about being passed over on helper work. Respondent contends that during a heated conversation with Whitman over the work assignment, Lindao called her a "f—king bitch" and kept pointing his finger in her face. Such contention is based on the testimony of Whitman and Comacho, who I have concluded are incredible witnesses. Although Nadia Pevzner was present during this conversation, she was not called by Respondent to testify. Lindao, testified he was angry and did point his finger at Whitman during his conversation with her. However, Lindao testified that he usually gestures with his hands when he speaks. Whitman did not appear to me to be a woman easily intimidated. Lindao credibly testified that only after Whitman fired him did he turn and leave the office, and as he was leaving, called Whitman a "bitch."

In addition, the discharge letter issued to Lindao, by Whitman states only that he engaged in finger pointing. There is no mention in this letter of any inappropriate language being used by Lindao prior to his discharge. Yet at hearing, Respondent was careful to elicit testimony from both Whitman and Comacho regarding Lindao's calling Whitman a "f—king bitch" before he was fired. I find such shiffling defenses supports a finding that the real reason for the discharge was Lindao's union activity. Had he called her a "f—king bitch" during their conversation, I am certain it would have been included in the discharge letter.

Robert Williams was hired by Respondent as a helper in January 1994. Prior to January 1994, Williams had extensive experience in the moving and storage business. As a helper for Respondent, he packed and unpacked goods, loaded and unloaded trucks, and packed goods in the warehouse, give the drivers a hand, pack, and build overseas containers for shipments.

Williams was a member of the Union and shaped various union jobs in addition to shaping Respondent. Respondent was aware of this.

Williams was present at the union meeting and signed a union card. On the week of January 24, Williams worked a union job. He did not get any work assignments after that time from Respondent although he was available for work, and appeared at the warehouse in the mornings to see if he would be assigned work. Williams credibly testified that he knew there was work, since he saw several trucks parked in front of the warehouse each morning, but the trucks left the warehouse with new workers on them.

On Monday morning, February 6, Williams went to the warehouse office looking for work. Whitman was in the office with bookkeeper Nadia Pevzner. Pevzner was present for the entire conversation. When Williams asked about work, Whitman's response to Williams was that there was no work. Williams asked why he wasn't getting any work. Whitman told him "you brought the Union in here on me, and you expect for that to just go away? You got a lot to learn. There is, you know, you got a lot to learn." Whitman told Williams that she felt he was harrasing her. Williams asked her if she was firing him. She did not reply to this question.

On Tuesday, February 7, Williams returned to the warehouse to buy some moving boxes, and to pick up his weekly wages. Again Williams asked Whitman about work. Again he was told there was none for him. He returned to the office later that afternoon to pick up a warning letter that Whitman had issued to him because of the alleged insubordinate manner of Williams' conversation with Whitman, described on February 6.

I conclude the warning letter was discriminatorily motivated, in view of Whitman's 8(a)(1) conduct described above, and in view of her antiunion statements to Williams during that February 6 meeting. There is nothing in the testimony of either Whitman or Williams which indicates any kind of insubordination.

After January 24, although he frequently telephoned the office or appeared in person seeking work, Williams not offered work.²

I conclude that in view of the extensive 8(a)(1) conduct, the animus displayed toward Williams on February 6, and the discriminatorily motivated warning letter, Respondent had no intention of giving Williams further work and that Respondent has not met its *Wright Line* burden. I therefore conclude that Williams employment was discriminatorily terminated after January 24, in violation of Section 8(a)(1) and (3) of the Act.

James Key was hired by Respondent on March 1994 as a helper. Key attended the January 13 union meeting and signed a union card.

Key credibly testified that on or about January 19, 1995, he was assigned warehouse work. He was usually assigned to help the drivers. He also spoke to Whitman and complained about his work assignment that day. Whitman told him if he didn't like the work she would give it to someone else. In response to Whitman's position, Key punched out for the day. However, thereafter Key repeatedly called Respondent for further work but was unsuccessful. Therefore, on February 14 he went to Respondent's facility and spoke to Whitman. Whitman told him business was slow and there was no work for him.

Whitman testified that anybody who walks out and tells her he is not going to do the work is quitting his job.

Whitman never notified Key he was terminated. Moreover, it was she who told him on January 19 that he could leave if he didn't like his assignment that day.

² Williams testified that he was in attendance when the challenged ballots were opened and counted on the morning of May 2. At that time, Whitman offered him work in the warehouse. Williams accepted the offer, and worked for approximately 90 minutes doing work in the warehouse. However, although he was available for work after that time, he was not offered any. Once again, he was told there was no work, that business was slow.

In view of Respondent's 8(a)(1) violations, the timing of his alleged quitting his job and her failure to send him a termination letter, I conclude Respondent has failed to meet its *Wright Line* burden, and I conclude that Respondent violated Section 8(a)(1) and (3) by terminating the employment of Key.

Robert Carman began working for Respondent as a helper on or about mid-April 1994. On October 1994 he became a dispatcher.

Carman credibly testified that sometime, a few days, after he signed his union card Whitman began to criticize his paperwork. Whitman would tell him it wasn't done properly and would "scream" and "yell" at him. As a result of such conduct by Whitman, Carman told her he wanted to work again as a helper.

Carman continued to work as a dispatcher until the last week in January. On January 28 he began working as a helper.

After February 1, Carman called Whitman to ask if there was work on the trucks for helpers and for the first time she informed him that because of a disability noted on his military discharge form she couldn't send him out on the trucks without a note from his doctor. He complied with her request and, on February 8, faxed a note from a physical therapist at the Veteran's Administration which stated that he was capable of doing the work of a helper. When Carman called Whitman to tell her that he was faxing the note, Whitman told him to check back on February 9 to see if there was any work.

On February 9, and on each of the following days, Carman called Respondent about work. Each time he called she would tell him that there was no work. On about February 12, Whitman told him that there would be no work for the rest of the month. Carman then filed for unemployment compensation on February 13.

On February 21, a little over a week later, Elizabeth Lesman called Carman and told him that there was work for the following day. Because Carman had already accepted an offer for a job interview, he was unable to accept the offer. Carman told Lesman that he would be available to work in the future. Carman then received a letter saying that he had refused work on February 21. Carman got a call from Whitman on February 22, offering him work for February 24. Carman turned this offer down because he had an appointment to provide his affidavit to the Board agent investigating the Union's unfair labor practice. He told Whitman he was unable to work on that day because he had "an appointment" and asked her if she was just offering him a couple of hours of work to avoid having to pay unemployment compensation. Whitman's response was that he was refusing work. Carman then received a letter stating that he had refused work for February 24. Carman continued to call Respondent and was repeatedly told by Whitman and Lesman that there was no work available. Respondent used the two letters at the unemployment insurance compensation hearing regarding Carman's claim. Carman did not work for Respondent after February 1, 1995.

Respondent appears to contend that Carman abandoned his job by not accepting the February 21 and 24 referrals.

I conclude that Whitman's yelling and screaming at Carman following her knowledge of the union petition and Carman's union activities on its behalf were in large part moti-

vated by such union activities. The same is true as to her demand that he get a doctor's letter concerning his knee. In fact, the credible testimony of Carman establishes that Whitman was aware of his knee problem as early as October 1994.

In view of these considerations, and in view of the 8(a)(1) conduct discussed above, much of which was directed to Carman, and in view of the timing, I conclude that Respondent failed to establish abandonment, and thus failed to meet its *Wright Line* burden. I therefore conclude that Carman's termination was in violation of Section 8(a)(1) and (3) of the Act.

Kyle Anderson worked as a driver for Respondent from December 1993 until February 1995. He was at the union meeting on January 13, and signed an authorization card for the Union.

Sometime in early February, after Respondent's January 24 meeting, Anderson went into the office to find out about getting some work. At that time, Whitman told Anderson that there was no work, and he should keep calling in. However, despite his frequent inquiries about work, after early February, Anderson was not assigned to any regular work.

On about February 22, Anderson received a letter from Respondent stating that Respondent had been trying to contract him regarding employment, but that he was not responding.

In response to this self-serving letter, which I do not credit, Anderson credibly testified that he called Whitman to find out what her letter was all about. Whitman then told him that once he "signed the Union card we cut our throats."

Several days after the above conversation with Whitman, Anderson again called Respondent for work and spoke to Elizabeth Lesman who told him Whitman asked her to tell Anderson to stop calling for work.

Respondent introduced two other self-serving letters offering work on March 30 and on May 1. There is no proof that these letters were sent, or that Whitman made further efforts to employ Anderson.

In view of Respondent's 8(a)(1) conduct, the timing of the refusal to offer work, and Whitman's telling statement to Anderson that when he signed a union card he "slit our throats," and my credibility resolution as to Whitman and her self-serving documents, I conclude the Respondent has failed to meet its *Wright Line* burden, and that Respondent terminated Anderson in violation of Section 8(a)(1) and (3) of the Act.

Daniel Muniz worked as a driver for Respondent. However, during the period he was employed by Respondent, he was also employed by a food delivery company on a part-time basis. Respondent was aware of such employment. In order to work his job as a food delivery driver, Muniz needed to leave work at 4 p.m. on Monday, Tuesday, and Wednesday. Respondent had no problem with this work limitation.

Muniz attended the union meeting where he signed a union card.

Muniz did not testify during the course of the instant trial. Whitman testified that she did not decline to offer Muniz work after January 23. Rather, Muniz simply did not call seeking further work. Respondent therefore contends that he abandoned his job.

Respondent further contends that since Whitman's testimony was not rebutted, it must be credited. Respondent contention is without merit. The Board has long held that the un rebutted testimony of a witness whose credibility was generally found to be unreliable and not credible need not be credited. *General Teamsters Local 959 (Northland Maintenance)*, 248 NLRB 693, 698 (1980).

I do not credit Whitman's testimony concerning Muniz. As set forth above, I found Whitman to be a totally incredible witness. Further, of seven alleged discriminatees set forth in the complaint, Respondent contends that all of them, except Lindao, abandoned their job in one way or another.

As set forth above, I have specifically found that Key, Williams, Carman, and Anderson did not abandon their employment, but were discriminatorily terminated.

It is not believable to me that six of seven employees who signed union cards seeking union representation and job improvements, and giving every indication of seeking continued employment would all abandon their jobs within a month from the date of the receipt of the Union's petition for an election. Thus, given the timing of this alleged abandonment, the union activity of Muniz, and the 8(a)(1) violations by the Respondent, I conclude that Respondent, as to Muniz, has not met its *Wright Line* burden, and I further conclude that the Respondent terminated Muniz' in violation of Section 8(a)(1) and (3) of the Act.

Curtis Agnew was employed as a helper by Respondent. He attended the union meeting and signed a union card. Agnew did not testify during the trial of this case. Agnew was present during the January 24 meeting conducted by Whitman with the employees, as set forth and described above. The credible testimony of employees who attended the meeting establishes that during the meeting Agnew spoke up and complained about working conditions and expressed his support for the Union.

Whitman testified that on January 23 and 26 Agnew was scheduled to work but failed to show. Whitman then sent him a letter on January 31 stating that he had abandoned his job. Carman credibly testified that it was not uncommon for an employee not to show up for work and that for the period of time he worked as a dispatcher he was not aware of any employee discharged for this reason.

For the same reasons that I concluded Muniz was discriminatorily terminated, I conclude Agnew was also discriminatorily terminated. Accordingly, I find that by terminating Agnew, Respondent violated Section 8(a)(1) and (3) of the Act. I conclude that under the General Counsel's mass discharge theory, or considering each discharge separately, the employees were terminated because of their membership in or activities on behalf of the Union, in violation of Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Respondent is, and has been at all times material, an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating its employees concerning their membership in or activities on behalf of the Union, Respondent violated Section 8(a)(1) of the Act.

4. By conveying the impression to its employees that it would be futile to select the Union as their collective-bargaining representative because Respondent would not bargain in good faith with the Union, Respondent discouraged its employees membership in or activities on behalf of the Union in violation of Section 8(a)(1) of the Act.

5. By threatening its employees with discharge or replacement in order to discourage their membership in activities on behalf of the Union, Respondent violated Section 8(a)(1) of the Act.

6. By threatening its employees to close its facility because of their union activities, Respondent violated Section 8(a)(1) of the Act.

7. By threatening to eliminate an annual Christmas bonus because of the employees union activities, Respondent violated Section 8(a)(1) of the Act.

8. By creating the impression that its employees union activities were under surveillance, Respondent violated Section 8(a)(1) of the Act.

9. By discharging James Key, Francisco Lindao, Robert Carman, Robert Williams, Kyle Anderson, Danny Muniz, and Curtis Agnew because of their activities on behalf of the Union, Respondent violated Section 8(a)(1) and (3) of the Act.

REMEDY

Because I have found that the Respondent discriminatorily discharged the above-named employees, I shall recommend Respondent offer them each reinstatement and make them whole for any loss of earnings and other benefits from the date of discharge to the date of proper offer of reinstatement less any net interim earnings in the manner set forth below.

Backpay for the above-named employees shall be computed in accordance with the formula approved in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1183 (1987); see also *Florida Steel Corp.*, 231 NLRB 651 (1977).

I shall also recommend Respondent expunge from its records any reference to their discharge and to inform them that Respondent's unlawful conduct will not be used as a basis for further personnel action concerning them. See *Sterling Sugars*, 261 NLRB 472 (1982).

[Recommended Order omitted from publication.]