

Johnson Distributorship, Inc., d/b/a Johnson Freightlines and Transport, Local Delivery and Sales Drivers, Warehousemen and Helpers, Construction, Mining, Motion Picture and Television Production, State of Arizona, Local Union No. 104, an affiliate of International Brotherhood of Teamsters, AFL-CIO. Case 28-CA-12932

July 14, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX
AND HIGGINS

On April 18, 1996, Administrative Law Judge Michael D. Stevenson issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations 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,¹ and conclusions and to adopt the rec-

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We note that at one point in his decision, the judge incorrectly stated that the Respondent had never laid off any employees for lack of work. The Respondent correctly notes that the Respondent had, in fact, laid off employees at its Albuquerque facility in December 1994. This error does not affect our decision for the following reasons. First, later in his decision, the judge correctly stated that there had been a layoff in Albuquerque. Moreover, the judge did not, as argued by the Respondent, rely on this misstatement or substitute his own business judgment for the Respondent's. Instead, the judge merely noted, and we agree, that it was suspect for the Respondent to have "laid off" the discriminatees in light of the following: (1) there had never before been any layoffs at the Phoenix terminal even though it had lost customers; (2) just days before the January layoff at the Phoenix terminal, the Respondent's new president, Eugene Myers, expressly promised employees that there would be no layoffs even though he knew that the Respondent would soon be losing some business; (3) at this same meeting, Myers referred to a tradition of not laying off employees due to lack of business; and (4) Myers predicted that additional freight would be moving into the Phoenix terminal by April.

Finally, we find no merit in the Respondent's argument that the General Counsel "bribed" witnesses by withholding their settlement checks until after they testified. Two of the original six discriminatees, David Hawkins and George Baldonado, entered into an out-of-Board settlement agreement with the Respondent the day before the hearings began. Three days later, when Hawkins and Baldonado testified, they had not received their settlement checks which had been provided to the Region. The Respondent alleges—without any supporting evidence—that the General Counsel intentionally withheld the checks so that the witnesses would testify favorably to the General Counsel's case. We find no merit to this argument. The testimony indicates that the normal procedure in the Region is that settlement checks are processed through the compliance officer. At the time the checks were received at the Regional

Office, through the date of the testimony of Hawkins and Baldonado, the compliance officer was out of the office. We note first that there is no evidence that either Hawkins or Baldonado was told that they would receive their checks only after they testified or unless they testified in a manner favorable to the General Counsel. Moreover, the Respondent offered no evidence of any material inconsistency between the affidavits given by Hawkins and Baldonado months before the hearing and their testimony at the hearing.

² We will modify the judge's recommended Order and notice in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Johnson Distributorship, Inc., d/b/a Johnson Freightlines, Phoenix, Arizona, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Cease and desist from
 - (a) Discharging employees in order to discourage union activities.
 - (b) Threatening employees with unspecified reprisals because of their union activities.
 - (c) 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) Within 14 days from the date of this Order, offer John Rollinger, John Ruiz, David Olivarez, and Donnie Belasco 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.

(b) Make John Rollinger, John Ruiz, David Olivarez, and Donnie Belasco whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of 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 facility in Phoenix, Arizona, copies of the at-

tached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. 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 January 25, 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.

³If 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 discharge employees because they engaged in protected concerted activity or activity on behalf of the Union.

WE WILL NOT threaten our employees with unspecified reprisals for supporting the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of our employees in the exercise of any of the above rights which are protected under the National Labor Relations Act.

WE WILL, within 14 days from the date of the Board's Order, offer John Rollinger, John Ruiz, David Olivarez, and Donnie Belasco 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 John Rollinger, John Ruiz, David Olivarez, and Donnie Belasco whole for any loss of earnings and other benefits resulting from their discharges, 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 John Rollinger, John Ruiz, David Olivarez, and Donnie Belasco, 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.

JOHNSON DISTRIBUTORSHIP, INC., D/B/A
JOHNSON FREIGHTLINES

Mitchell S. Rubin and Richard H. Smith, Esqs., for the General Counsel.

Phil B. Hammond and William Martin, Esqs., of Phoenix, Arizona, for the Respondent.

DECISION¹

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at Phoenix, Arizona, on May 23-25, June 13-16, and August 15-17, 1995,² pursuant to an amended complaint issued by the Regional Director for the National Labor Relations Board for Region 28 on April 4, 1995, and which is based on charges filed by Transport, Local Delivery and Sales Drivers, Warehousemen, and Helpers, Construction, Mining, Motion Pictures and Television Production, State of Arizona, Local Union No. 104, an affiliate of International Brotherhood of Teamsters, AFL-CIO (the Union) on January 25 and March 28, 1995 (amended charge). The complaint alleges that Johnson Distributorship, Inc. d/b/a Johnson Freightlines (Respondent) has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

¹The 10 volumes of transcript in this case are of exceptionally poor quality. This fact has resulted in 5-1/2 pages of proposed corrections from Respondent. Not to be outdone by the burden thrust on me by the poorly prepared transcript and by Respondent's motion, the General Counsel contests Respondent's motion on both procedural and substantive grounds. I deny the General Counsel's request to deny the motion on the grounds that it is untimely. As to the General Counsel's alternative motion objecting to certain proposed corrections, I sustain the objections as to: p. 351, L. 8; p. 761, L. 7; p. 1146, L. 16; p. 1150, L. 4, p. 1271, L. 9; p. 1279, L. 23; p. 2081, L. 12; p. 2310, L. 9 and p. 2534, L. 11.

In all other respects, Respondent's motion to correct the transcript is granted.

²All dates are in 1994 unless otherwise indicated.

Issues

Whether Respondent violated the Act by laying off/terminating its employees John Rollinger, John Ruiz, David Olivarez, and Donnie Belasco and by interrogating and/or threatening, one or more employees with respect to union-related matters.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent.

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits that it is an Arizona corporation engaged in the intrastate and interstate transportation of freight with a principal office and place of business located in Phoenix, Arizona. It further admits that during the past year ending January 25, 1995, in the course and conduct of its business it has derived gross revenue in excess of \$50,000 for the transportation of freight in interstate commerce under arrangements with, and as agent for, various common carriers, including Crescent Truck Lines, which operate between various States of the United States. Based on its operations described above, Respondent functions as an essential link in the transportation of freight in interstate commerce. Accordingly it admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that Transport, Local Delivery and Sales Drivers, Warehousemen, and Helpers, Construction, Mining, Motion Pictures and Television Production, State of Arizona, Local Union No. 104, an affiliate of International Brotherhood of Teamsters, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. Statement of the case

On January 20, 1995, at a 7 a.m. meeting on the docks, six union supporters were terminated by Respondent.³ As a result, charges were filed not only with the NLRB, but also with the EEOC. Prior to trial of the instant case, Respondent settled with two of the six terminated employees. This settlement with David Hawkins and George Baldonado encompassed both the NLRB charges and the EEOC charges. As to the remaining four alleged discriminatees, the EEOC charges are pending and as of August 16, 1995 (the ninth day of this hearing), had not been investigated by the EEOC nor had the Company submitted any written statement or position letter to the EEOC (Tr. 1980-1981). Notwithstanding

³During the hearing, the terms "lay-off" and "termination" were used interchangeably. I have chosen to use "termination" as more precisely reflecting what happened.

their prehearing settlement, both Hawkins and Baldonado testified as witnesses for the General Counsel, and I will review and evaluate their testimony as well as that of other witnesses in due course.

When the six discriminatees were terminated, they were given a certain reason why their services were no longer required. It turns out during the hearing that there were other reasons for the termination beyond those stated to the alleged discriminatees. To the extent Respondent concedes the existence of these inarticulated reasons, it claims there were good and sufficient reason why its official, Richard Slater, could not be candid with the six fired employees. The General Counsel contends that the existence of multiple reasons for discharge, one stated and others admitted but not stated, is suggestive of illicit motive under the Act. To understand the labyrinth of charge and countercharge suggested by this case, the reader must pay close attention for the facts are stranger than fiction.⁴

2. The Company

The facts begin routinely enough long before the events of January 20, 1995. In 1978, Russell Johnson, witness for Respondent, started the business in Flagstaff, Arizona, and in 1983, relocated the business to Phoenix. The parties stipulated that between January 1, and November 10, Johnson was the owner of all of Respondent's stock, president of Respondent and a statutory supervisor under the Act. Then on or about November 10, Johnson sold all of his stock to Yellow Corporation and resigned his position as president, chairman and member of Respondent's board of directors (Jt. Exh. 1).

Johnson did not completely sever his ties to the Company after November 10. Instead he entered into a "Consulting Agreement" (G.C. Exh. 15). In return for payment to him of unspecified fees on January 1, 1995, and on January 1, 1996, Johnson agreed to provide the new owners of "Respondent . . . general consulting services . . . in numerous areas, including, but not limited to, employee relations, personnel evaluations; customer contacts; operating and marketing strategy; and union avoidance" (p. 1).

In his direct testimony as Respondent's witness, Johnson explained that as to "union avoidance," he merely related to Frank Myers, Respondent's new president, the history of an unsuccessful union organizing attempt begun in early January. Then according to Johnson, Myers asked a few questions about the campaign, such as how Johnson had responded to the Union's efforts; Johnson answered by referring to some antiunion literature which Myers said he would transmit to Yellow Corporation headquarters in Kansas City, Missouri. Johnson denied any consultation about or even knowledge of the terminations of the six employees and Myers did not testify.

Prior to hearing, the parties entered into a written stipulation regarding the Union's organizing campaign. The highlights of the stipulation recite that the Union filed on January 31, a petition for an election which was then scheduled for March 18, for a unit of Respondent's drivers and dock workers. On March 15 the Union withdrew its petition. Finally the parties agreed that between January 1, 1990, and January 25,

⁴Byron, *Don Juan*, Canto XIV St. 101.

1995, the NLRB Region has no record of any unfair labor practice charges being filed against Respondent (Jt. Exh. 5).

On cross-examination, Johnson admitted waging a vigorous campaign against the Union. This consisted of literature and brochures distributed to employees, periodic meetings with supervisors at which a running tally was kept of suspected pro and con union supporters, and meetings with employees at which Johnson spoke and showed antiunion videos.

When negotiations with Yellow Corporation began in late September or early October, the Union was in the process of again attempting to organize Respondent's drivers and dock workers.⁵ Johnson testified that during negotiations with Yellow Corporation officials, he was asked by an unidentified Yellow Corporation negotiator, if the Company was still non-union and he said yes. Then Johnson was asked, "When was the last time there was any organization attempt?" Johnson answered there was one that prior spring and the Union took a withdrawal. According to Johnson nothing else was said about unions (Tr. 1768).

On January 18, 1995, Respondent changed its name to West-Ex, Inc. (G.C. Exh. 12.)

As noted above, Respondent engages in the business of shipping both intra and interstate freight. A clear overhead photograph of Respondent's premises was received into evidence (Jt. Exh. 2). This shows the long dock area running east to west, with the dock about 4 feet higher than the ground. At the west end of the dock, Respondent's two story office structure is visible. The exhibit also shows the area for employee parking and trailer storage. There are three gates into Respondent's premises running from the southwest (gate 1), middle (gate 2), and northeast (gate 3). Also admitted into evidence were a series of diagrams providing detail of the physical structures: The first of these shows the dispatch office and driver's lunchroom (G.C. Exh. 2); the next shows the terminal manager's office (on the second floor) with a window on one side located so that a person walking by could possibly see in (G.C. Exh. 3); finally, the last diagram shows the dock area divided up into spaces called doors where the trailers are loaded and unloaded, 1-30 on the south side and 31-60 on the north side (G.C. Exh. 4). This diagram is important for locating three places relevant to the facts of this case: first, a revolving security camera contained in a cylinder so that dock workers could not know where the camera was then focused (located between doors 12 and 41). The controls for the camera and the monitor (screen) and the taping equipment were all contained in the terminal manager's office. Under normal conditions, the camera surveys the dock area on a random basis and tapes what it sees. However, the system is equipped with a manual override capability, so that an operator in the manager's office can aim and focus the camera where desired, while preserving the scene on tape. More about this will follow.

The diagram (G.C. Exh. 4) also shows the dock desk between doors 17 and 46. This area is where much of the paperwork is done in connection with the loading and unloading of the freight, and the checking of the freight to ensure

⁵ During the hearing, Respondent took the position that the union activity of fall and winter was not a second organizing drive, but rather merely a continuation of union organizing activity which began several years before and had never ceased. In the context of this case, whether Respondent is right or wrong is not important.

the shipment is as described. A.M. Dock Foreman Glen Smiley and A.M. Dock Leadman Armando Figueroa spend much of their time at the dock desk.

Finally, at the opposite end of the dock from the dock desk is the overage, shortage, and damaged area (OS&D). Inherent in the freight shipping business are discrepancies between the shipping documents such as bills and manifests and the actual freight. Sometimes there is too much freight (an overage), sometimes too little (a shortage), and sometimes the freight is damaged. Any of these events require intervention by one or more OS&D clerks to final out, if possible, why the discrepancy occurred and to resolve the discrepancy in the fastest and least expensive method. Prior to termination, Belasco worked in the OS&D department along with George Simon who testified for Respondent.

In January 1995, approximately 130-135 employees worked for Respondent. The top official and Respondent's president is Frank Myers who is responsible to Wally Kettler, an official of Yellow Corporation who resides in California. Under Myers was Richard Slater, Respondent's regional manager. Slater started with Johnson in 1982 and in 1983 became vice president of the Company. When Yellow took over, his job title changed. In March 1995, Slater resigned from Respondent. When Slater resigned, he was replaced by Stephen Rustenburg, who currently holds the title of Phoenix terminal operations manager. He started with Johnson's in February 1992 as a dock supervisor and worked himself up to his current position. Both Slater and Rustenburg are key witnesses in the case, Slater claiming to have made the decision to terminate the alleged discriminatees based on information which, for the most part, was conveyed to him by Rustenburg. Both witnesses testified at length both for the General Counsel and Respondent. As noted above, Supervisor Smiley (Jt. Exh. 3) and leadman Figueroa, alleged by the General Counsel to be a statutory supervisor, also worked for Respondent.

As to the nonsupervisory employees, the parties stipulated that a number of persons were employed on the p.m. dock crew, but they played no direct role in this case. As to the day-shift (a.m.) dock workers beginning work at either 2 or 4 a.m., the parties stipulated to the following names in addition to the six terminated employees; Ray Rose, Carl Rivera, Mark Gorzen, Wendell Becker, Dwayne Barraza, Steve Krawiec (part-time employee), Jeff Williams, and Kenny Ball. In addition, two persons are employed as hostler (AKA goat) drivers (i.e., a special truck used to haul trailers around the yard and to and from the loading doors), Jesse Wayman and Reuben Murillo, the latter being the central figure in this case (Jt. Exh. 4).

3. The Union and certain prounion employees

According to the General Counsel's witness and alleged discriminatee, John Rollinger, he was hired by Respondent in December 1993, after having worked as a dock worker for about 15 years at Alfred M. Lewis Company, a company generally known within the Phoenix shipping industry as a union employer. In fact, Rollinger had been a union steward at Lewis for about 10 years. In that capacity, he worked with employee grievances, participated in contract talks, represented employees during disciplinary proceedings and engaged in similar activities. In January, Rollinger contacted a union official named Bagwell to begin an organizing drive

at Respondent. In that capacity, Rollinger distributed union authorization cards, distributed union literature, attended union meetings, and encouraged others to do the same, and generally talked to employees about the benefits of union representation. The record shows that Rollinger was the primary union in-house organizer for the campaign which ended when the Union withdrew its petition.

In August, Rollinger began his union organizing activities anew essentially repeating his efforts on behalf of the Union, but this time believing there would be greater acceptance of union representation than there had been earlier in the year.

Some of Rollinger's efforts on behalf of the Union were publicly expressed. For example, on one occasion during the earlier union campaign, Rollinger publicly challenged Johnson's assertion at an employee meeting that sometimes the union and the employer work against each other. In April, Rollinger wore a cap with a union logo in the presence of Johnson. During the same month, at Respondent's terminal, Rollinger and John Ruiz joined a union picket line for 15 minutes in the early morning hours.⁶ In testimony that was not contradicted, Rollinger testified he was observed by then Dock Foreman Ken Havermale, while walking picket. Finally, in August, Rollinger wore a Teamsters shirt to work, but Smiley told him that Johnson wouldn't like him wearing the shirt. So Rollinger wore the shirt inside out.

On or about November 22, according to Rollinger, he was called to Johnson's office where he was told by Johnson that Johnson had been getting feedback from the night crew that Rollinger had been trying to organize them. Then Johnson added that he had built the Company and if the Union ever came in, Johnson would close the gates and shut the place down. Rollinger allegedly responded that what he did on his own time was his own business. As the meeting ended, Johnson allegedly told Rollinger to think about it, because he wasn't going to put up with it any more.

According to Jaime Mendoza, the dock foreman for the night (p.m.) shift (1 p.m. to 3 or 4 a.m.), he talked to Rollinger one time in 1994 but he couldn't recall exactly when and Rollinger asked Mendoza how many guys were for the Union and Mendoza said, not many. This exchange happened when Rollinger came in for his shift at 2 a.m., before Mendoza had finished his shift. On cross-examination, Mendoza allowed as how he knew that most of the dock workers on Rollinger's a.m. crew were for the Union, and at some point he conveyed this to Johnson, but he couldn't recall when.

In resolving the credibility issue based on Johnson's flat out denial of any such conversation with Rollinger, I note that as of November 22, Johnson had sold his company to Yellow Corporation. Nevertheless, Johnson was still performing consulting duties for Respondent, and in considering all the surrounding facts and circumstances of this case, including the testimony of Mendoza—and not precluding the possibility that Rollinger may have erred as to the date of the conversation—I credit Rollinger and find that Johnson made the statements in question.

Another union supporter from the a.m. dock crew is General Counsel witness and alleged discriminatee David

Olivarez, who was hired by Respondent in February 1992. Like Rollinger, Olivarez signed one or more union authorization cards, attended union meetings, and generally supported the Union in his conversations. On the back of his personal vehicle which he drove to and from work during 1994, Olivarez affixed a bumper sticker reading, "America Works Best When We Say . . . Union Yes [✓]" (G.C. Exh. 25). This sticker was placed on the car in June and remained on the car for about 3 months.

Although as compared to Rollinger, Olivarez maintained a low profile—he never distributed cards to other employees, for example—Olivarez was a close associate of Rollinger's at work and frequently took breaks and lunch with him.

Still a third General Counsel witness and alleged discriminatee is John Ruiz. Ruiz was hired as a.m. shift dock worker in April 1993. Like Olivarez, he signed cards and attended meetings, and kept a pronoun bumper sticker on his car (G.C. Exh. 25), from January to March. Ruiz was also a close associate of Rollinger's at work. Unlike Olivarez, Ruiz passed out union cards—15 or more—to other employees. Between August and January 1995, Ruiz joined a group after work which met in Respondent's parking lot and talked about union-related matters for up to an hour. This group included Rollinger, Olivarez, Ray Rose (who is still employed by Respondent), and sometimes Hawkins, Baldonado, and Belasco.

In February, while taking a break, Ruiz had a conversation with Havermale who said that he had heard a union campaign was in progress and added if the Union is voted in, Russ Johnson would close the terminal down. Then he asked if Ruiz supported the Union and Ruiz said he did. About a week later, Havermale was on the docks and again asked Ruiz if he supported the Union.

The final alleged discriminatee to testify for the General Counsel is Donnie Belasco, who began working at Respondent in August 1993 as a dock worker a job which he held until July. Then he was assigned to work as OS&D, a job which was physically easier and more responsible than what he had been doing. He was given a pay raise shortly after starting in OS&D.

Belasco was active during both organizing efforts, signing cards, passing out several to other employees, and attending union meetings. In fact, Belasco testified that it was he and Rollinger who requested the Union to authorize a second attempt to organize Respondent's employees. Like Olivarez and Ruiz, Belasco was part of a group of employees who frequently associated with Rollinger. This group included Ray Rose and Jeff Williams who were also union supporters, but were not terminated on January 20.

4. The terminations on January 20, 1995

To recapitulate, as of December, Johnson had sold the Company but was continuing to work as a consultant and a union campaign had ended, but another was at full throttle due to the relentless organizing of Rollinger and the other discriminatees. Respondent's business was at a seasonal slump with many a.m. shift dock workers allowed on a daily basis to volunteer to go home early due to lack of work and on some occasions, a few a.m. shift dock workers were sent home early involuntarily. But there was a promise of more work in the new year just as had been true for all the time that Respondent had existed. In fact, Respondent had never

⁶ Apparently this picket line was based on Respondent's movement of struck freight, after the expiration of the master shipping agreement.

laid off an employee for lack of work during its entire existence. This record existed despite some severe business slumps in its history. In this context, on January 11, 1995, Myers called the a.m. dock workers and others, together for a meeting to convey new management's plans for the future.

a. Myers' meeting with employees

Myers talked optimistically about the Company's plans for the future, using a projector to show slides to the employees. He said different pay levels would be set depending on an employee's seniority and certain employees would be getting a pay raise. Then Myers referred to a Yellow Corporation terminal in Albuquerque which had recently experienced a layoff of about 15 dock workers due to a shortage of work but assured employees this would not happen in Phoenix. Myers continued to explain Yellow Corporation's plans for the future including the opening of several new terminals in California which by April 1995 would impact the Phoenix terminal by bringing in more business. Hawkins specifically asked Myers if there was any possibility of layoffs on Respondent's docks. Without equivocation, Myers assured Hawkins and the other employees that no layoff would occur, because Myers wanted experienced people working there so the freight wouldn't get fouled up. To further allay the fears of Hawkins and the others, Myers referred to a tradition at the terminal of never having laid off employees due to lack of freight business. Myers pledged to continue that tradition and again predicted that additional freight would be moving into the Phoenix terminal from California by April.

At the time Myers was giving unequivocal assurances to dock workers on January 11, 1995, he had known since December of the possibility of losing the business of Crescent Freight Lines, according to Slater. A little over a week after Myers' meeting with employees, six dock workers were terminated. I turn now to recite how this happened.

b. Reuben Murillo

Murillo was hired by Respondent as a truckdriver on May 9, during a hiatus in union activity.⁷ Within 2 days, Respondent officials discovered that although he had a driver's license, Murillo's driving record was too poor for him to continue as a driver. Instead of being terminated, Murillo was kept on as a night-shift dock worker at a payout of about \$1 per hour. Then on October 7, Murillo was given a job as a hostler driver, a job which requires a safe driver and a licensed driver to the extent the hostler moves trailers back and forth on nearby public streets. Murillo worked a shift beginning at 8 p.m. and usually ending about 6 a.m.

The General Counsel offered Murillo's Department of Motor Vehicles (DMV) record into evidence (G.C. Exh. 10). This nine-page document need not be belabored. It suffices to say that Murillo was given a job as a hostler driver when the Company was aware that he had speeding tickets, two convictions for DUI, and one conviction for driving without insurance. Effective 5 months before his testimony, Murillo driver's license had been suspended. Notwithstanding his suspended driver's license, Murillo drove himself to the hear-

ing and continued to perform his duties as a Hostler driver, occasionally driving on public streets around the terminal. His superior Rustenburg testified that he was unaware that Murillo's driver's license had been suspended and he had left orders that Murillo should not drive the hostler on the public streets. As this case continued, witnesses testified they had observed Murillo continue to drive the hostler on public streets. When it was Rustenburg's turn to return to the witness stand, he proclaimed that he would issue orders again that Murillo was not to drive the hostler on public streets.⁸

Murillo described himself as a born-again Christian and suggested this furnished the motivation for his selfless conveyance of information to Rustenburg regarding the alleged discriminatees, information I will recite below. But first, more about Murillo the person. He testified that he wore certain religious insignia on his clothing at work and read the bible during breaks. Most of Murillo's alleged religious activities at work escaped the attention of his coworkers. Instead, the General Counsel witnesses recall Murillo as a profane person somewhat solitary, who above all, hated the Union. Murillo's antipathy to the Teamsters Union in particular was based on his belief that he lost a prior job due to the failure of a Teamsters union representative to represent him in a proper way. All or most of the General Counsel's witnesses, including Hawkins in particular, who described contact with Murillo described him not just as opposed to the Union, but bitterly and profanely opposed to the Union. For this reason, I am skeptical of Murillo's testimony that on January 4, 1995, he was approached at work by union supporter Hawkins with a proposition.

According to Murillo, about 3 or 4 a.m., at the west end of the dock, Hawkins approached Murillo to ask him if he wanted to make some extra money. When Murillo said that he did, Hawkins said he'd get back to Murillo, which he did about 5 a.m. This time Hawkins had Baldonado with him and told Murillo that they wanted to start stealing merchandise off the dock. Hawkins explained that they were fed up with the Company, because they were not getting enough hours. With Hawkins and Baldonado allegedly expressing themselves to the born-again Christian, by using the "F" word repeatedly, Hawkins explained they needed someone to carry merchandise off the dock, someone who wouldn't be noticed.

Hawkins had started with the Company as a dock workers on November 7. Baldonado started in July. Both had signed cards for the Union and generally were favorably disposed to the Union though not organizers in the sense that Rollinger was. Baldonado had served 16 years in the U.S. Army and after discharge continued his military duties as a member of the Arizona National Guard. As a member of the Guard, Baldonado was activated the week of January 9, 1995, for duty in California providing relief to flood victims. When he and Hawkins denied under oath all of Murillo's allegations against them, I tended to believe them.

In any event, about 3 p.m. on January 4, 1995, Murillo related to Rustenburg, the information allegedly related by Hawkins and Baldonado. Rustenburg then took Murillo into

⁷ Murillo was hired after having served time in prison for beating up his then wife, because allegedly she had become pregnant by another man. The record does not show whether Respondent was aware of this background before Murillo was hired.

⁸ When Murillo's DMV record is measured against Respondent's policy on safety violations (G.C. Exh. 33), it is clear that Murillo was disqualified as a truckdriver. It is not so clear how Murillo qualified as a driver of the hostler.

Slater's office where he related his story to Slater and Myers. Rustenburg was directed to give Murillo his home phone number and keep in close touch with him, keeping Slater and Myers informed as the matter developed. In response to a later question from Kettler as to whether he would be willing to testify in court against Hawkins and Baldonado, Murillo hesitated indicating he was concerned about his safety and his family's, but he finally agreed to testify if necessary.

About 1 or 2 days later, Murillo testified he met with Hawkins and Baldonado again about 5 a.m. This time Hawkins related a plan to steal stereos, computers, or similar small electrical items and both Hawkins and Baldonado discussed generally how they could dispose of the items for cash. Another plan to steal liquor was abandoned. Again Murillo reported by telephone all of this alleged information to Rustenburg. Either at this meeting or at a subsequent one, Hawkins described to Murillo a secret signal, known but to the three conspirators to indicate items were ready for recovery by Murillo. A glove was to be placed on the northwest or northeast part of the dock denoting that the stolen items would be secreted near the 30 or 60 door, either on the dock corner or underneath a trailer. From here Murillo was to recover the items, carry them in the hostler to Baldonado's car, and place them in the unlocked car truck.

The General Counsel offered evidence challenging the plan on feasibility grounds as well as other grounds. This challenge prompted Respondent to offer a series of photographs demonstrating that apparently it was feasible for Murillo to transport items to Baldonado's trunk, i.e., that there was adequate room but barely so, for a driver and certain boxes of stolen items to fit in the cab of the hostler at the same time (R. Exhs. 12(a)-(h)), particularly at night time. I accept Respondent's theory, but note that there is no evidence that a secret signal ever occurred, or that Baldonado's trunk was unlocked in Respondent's parking lot and moreover Hawkins and Baldonado credibly denied everything.

On Friday night, January 6,⁹ according to Rustenburg, Murillo called him at his home to say the plot was thickening, more people were involved and their objective had changed. Again, this information had allegedly been conveyed to Murillo by Hawkins, this time at a meeting at Michelle's Bar, a popular spot where many of Respondent's employees went after work to have a drink and on Fridays, to cash their checks. More specifically, Murillo told Rustenburg that Hawkins had told him that Rollinger, Olivarez, Ruiz, and Belasco were now in on the caper and that they along with Hawkins and Baldonado planned to steal a truck from Respondent. Hawkins told Murillo that Rollinger, et al. had previously stolen other items off the docks such as Polo shirts and jackets. (Subsequent to receiving this information, Rustenburg made an exhaustive computerized search of Respondent's files and records but could find no evidence of any theft of Polo clothing from Respondent's docks. In fact, he could find no evidence of any Polo clothing even being shipped through Respondent's docks.)

Murillo continued to relate to Rustenburg other information allegedly received from Hawkins at Michelle's bar: Be-

lasco in OS&D could get the plotters anything they wanted. (Due to a system of checks and cross-checks with documents, due to Belasco working with one or more coworkers in OS&D, and due to Belasco's denial of participation in or knowledge of any thefts, this information is not reliable.) As to the truck, Murillo continued, Hawkins was looking for a driver either to take it to Mexico where it would be disposed of, or to drop it off locally to a "chop shop," where it would be dismantled for parts. In either case big money was involved. To facilitate the driver's theft, Hawkins talked of acquiring a Johnson's Freightlines shirt for the driver to use.

In his testimony Hawkins admitted being in Michelle's Bar from time to time but denied ever meeting Murillo there and denied all of the conversation attributed to him by Murillo.¹⁰

On the following Monday, Murillo testified he talked to Hawkins and Baldonado, the latter having returned from the National Guard duty and was told that a driver for the stolen truck had been found, so only a uniform shirt was needed. The very next day, Baldonado supposedly told Murillo that the theft was off as the people he knew were busy working on some other illegal venture.

Baldonado's return to work did not go unnoticed by Slater and Rustenburg who agreed that extra vigilance was in order. They noticed that Baldonado's car had been parked in a section of the parking lot somewhat distant from the office area. According to Murillo this was part of the plan to facilitate the theft of small electronic items. (In his testimony, Baldonado credibly testified that he parked where he did in order to avoid a Respondent driver with whom Baldonado had a dispute over an unpaid debt.) On Tuesday, January 17, 1995, Slater told Rustenburg to arrive at work on January 18 at 4 a.m., about 2 hours earlier than normal and operate the surveillance camera manually to obtain evidence of theft involving the six alleged discriminatees.

c. Events of January 18-23, 1995

During the approximate 3-hour taping during which Rustenburg focused primarily on Hawkins, Murillo made four trips from his hostler to make periodic reports to Rustenburg. First about 4:30 a.m., Murillo reported that Hawkins told him that the plan for the day was for Hawkins to steal a shipment of 9 mm hand guns from a shipment to Prescott, Arizona. Murillo told Rustenburg to focus the camera on the area between the 30 and 60 doors where the Prescott trailers were located and watch for the secret signal. Rustenburg did as he was told.

When nothing of substance happened, Murillo came back to the office about 30 minutes later to say that Hawkins couldn't find the weapons. (In fact, there were no weapons being shipped to Prescott that day, but there was some boxes of empty metal magazines for automatic weapons (R. Exhs. 5 and 6).) However, Murillo assured Rustenburg that according to Hawkins, Rollinger knew where the weapons were in the Prescott trailer and he would locate them for Hawkins

⁹There is a discrepancy as to the dates of this phone call. Murillo puts the call on the following Friday, while Baldonado was on activity duty in California. Whether the call was made on January 6 or a week later is of little moment to this case.

¹⁰In finding Murillo to be a witness of doubtful credibility, I have considered the evidence provided by Respondent witness Debbie McRae, an office employee of Respondent's, and "roommate" of Murillo's. She had allowed Murillo use of her cellular phone and he made and received certain calls in connection with this case (Jt. Exh. 7). I find her testimony is entitled to little weight.

who would then give the secret signal for Murillo to pick up the stolen items.

After several more minutes of taping, Rustenburg still had no evidence of theft and Murillo again returned to the office, now for the third time. Murillo reported to Rustenburg, that Hawkins was getting anxious as the plan had not yet worked and the Prescott driver was expected soon. Moreover, said Murillo, another dock worker named Gorzen keeps hanging around and Hawkins believes Gorzen to be a "narc."

Finally, close to 7 a.m., Slater arrived and Rustenburg had no evidence of any theft. According to both Slater and Rustenburg, they observed Belasco walk by the office and look through the window at Rustenburg's taping. A few minutes later, Murillo made his fourth and final visit to Slater's office. This time Rustenburg had been joined not only by Slater, but by Smiley as well. In fact, Smiley had made several visits to Slater's office that morning for brief periods of time to watch the security camera monitor for any evidence of dock worker theft. Murillo told the men that he had heard Belasco tell some of the dock workers that they were being watched by the "eye in the sky" in Slater's office. Belasco denied walking by Slater's office, and denied making the statement attributed to him. However, Belasco is contradicted not just by Slater and Rustenburg, but by Smiley who testified he observed Belasco walk by Slater's office at the time in question. Moreover, dock worker Mark Gorzen testified for Respondent that he heard Belasco make the statement in question and later, Gorzen told Smiley, his supervisor and close associate, that Belasco made the statement in question. In this case I credit Respondent's witnesses. However, I cannot find that Belasco's statement was intended to warn Rollinger and the others that they should abandon their theft plan. Rather, I find it was made merely as a matter of common interest and out of curiosity.

Rustenburg discontinued the taping about 7 a.m., after Murillo's final visit. Rustenburg then summarized the results of the taping not seen by Slater, confessing that there was no hard evidence of theft. (Later Rustenburg confirmed with the customer in Prescott that no magazines were missing from the shipment, which could be attributable to Respondent. That is, there was a shortage but the customer attributed it to the manufacturer.) Rustenburg allowed that he was suspicious of certain scenes such as Hawkins spending too much time near the Prescott trailer and generally being in a place he had no business being. Rustenburg emphasized to Slater, however, that there was hard evidence of theft of (Company's) time. That is much of the tape showed five of the alleged discriminatees wasting time. Belasco does not appear on the tape because as an OS&D clerk, his place of business was on the opposite end of the dock from the Prescott trailers. Respondent does not contend that Belasco was involved in theft of time.

When Rustenburg played the tape for Slater allegedly showing some dock workers not working hard, Slater called them a bunch of "lazy slackers." He directed Rustenburg to tape again on January 19 from 4 a.m. to see if additional evidence could be obtained.¹¹

¹¹ Slater's order to tape again on January 19, 1995, is confusing. If Belasco told the dock workers that they were being observed on January 18 as I have found, then what was the point of repeating the taping when the dock workers might be on their guard.

In any event, Rustenburg did tape on January 19, but that tape was not offered into evidence. (Rustenburg's notes of the January 19 taping were admitted. G.C. Exh. 56.) Rustenburg said that only Hawkins was wasting time on that day. As to the tape of January 18, from about 4 to 7 a.m., that tape was received into evidence (Jt. Exh. 6). In examining the tape during the hearing, once when I ordered it be previewed for Hawkins, and again when it was narrated and orally annotated by Rustenburg, I noted the extreme poor quality of the tape with dark grainy textures showing shadowy figures around the various trailers. Any independent identification was rendered further doubtful because the dockworkers wore heavy clothing such as sweatshirts, some with hoods, and woolen caps to protect them from the cold weather. Rustenburg explained in his testimony that the poor quality of the tape occurred when the format was changed from that used by the security camera system to that shown on the monitor at hearing. Rustenburg further testified that as he was observing the monitor on January 18 as the taping was in progress, the picture was as clear as a television screen in anyone's home. Because Rustenburg had made notes during the taping (R. Exh. 42), when the picture was good, it seemed to me he was relying on these notes to give his narration, when the picture on the screen at hearing was simply not good enough to show me what Rustenburg said was happening. Because the clarity of Joint Exhibit 6 will not affect the final outcome of this case, I assume strictly for the sake of argument that the scenes depicted during hearing were as described by Rustenburg.

On the afternoon of January 19, Slater decided to terminate the six alleged discriminatees and informed Rustenburg that the six alleged discriminatees were to be laid off, because Crescent Shipping Company was ending its inbound freight, effective Monday, January 23, and on suspension of theft. So Slater decided to lay them off because they weren't needed after Monday anyway, according to Rustenburg (Tr. 969). Slater himself put the reasons somewhat differently:

J. STEVENSON: Q. With respect to these four, were they laid off because of insufficient work, because they were suspected of being involved in a theft, for a combination of reasons, or for some other reason? If someone said, why did you lay off these people, what would the answer be?

SLATER: A combination of reasons.

J. STEVENSON: Okay, and the combination was what?

SLATER: The main motivator was the theft. We felt we had a very serious problem that we had to address. The method which we did it, laying them off for lack of production and lack of work, we felt was the best way to handle a potential litigious situation as it turns out [Tr. 237].

Belasco was excluded from the combination of reasons, at least so far as Rustenburg was concerned. As to Belasco, the sole reason he was laid off was "the suspicion of theft, his part in that" (Tr. 1030-1031, 1052).

On Friday, January 20, Slater directed that the 12 or so a.m. dock workers, the 2 hostler drivers, and Figueroa and Smiley all assemble on the docks about 7 a.m. Slater then read a letter to the assembled workers and subsequently gave

a copy to the six alleged discriminatees as the others watched silently. The form letter for each discriminatee reads the same:

01/19/95

WE REGRET TO ADVISE YOU OF YOUR LAY OFF, EFFECTIVE 01/19/1995. AS YOU KNOW AND HAVE SEEN CRESCENT TRUCKLINES IS OPENING ITS OWN PHOENIX TERMINAL ON MONDAY, JANUARY 23, 1995. AS A RESULT, THE FREIGHT WE HAVE BEEN HAULING FOR CRESCENT WILL BE HANDLED BY ITS OWN DRIVERS.

WE HAVE NO IMMEDIATE PLANS TO EXPAND OUR PHOENIX OPERATIONS AND, THEREFORE, WE DO NOT EXPECT TO BE ABLE TO RECALL YOU IN THE FUTURE.

IF YOU ARE ENTITLED TO ANY ACCRUED BENEFITS, THEY WILL BE PAID TO YOU ON YOUR FINAL CHECK. THE COMPANY WILL NOT OPPOSE ANY VALID UNEMPLOYMENT COMPENSATION CLAIM. YOU WILL RECEIVE FURTHER INFORMATION ON ANY COBRA RIGHTS YOU MAY HAVE TO CONTINUE YOUR HEALTH INSURANCE.

WE APPRECIATE YOUR LOYAL SERVICE IN THE PAST AND ARE TRULY SORRY THAT THE LOSS OF THE CRESCENT ACCOUNT HAS MADE THIS STEP NECESSARY.

THANK YOU AND BEST OF LUCK IN THE FUTURE.

RICHARD SLATER
/s/ Richard Slater
REGIONAL MANAGER

[G.C. Exh. 5.]

On January 23, 1995, Ruiz, Olivarez, and Rollinger went to the terminal to pick up their final checks. While Rollinger waited in the breakroom, Rustenburg spoke privately with Ruiz and Olivarez and told them he had heard that Watkins Trucking Co., in Phoenix was looking to hire two good hard workers for the docks. Rustenburg gave the two men a phone number for Watkins and urged them to call, but neither Ruiz nor Olivarez ever did.

d. Security guards, FBI, and police

During late 1994, Respondent had hired a security guard service as a theft deterrent, but its service was not satisfactory and the service was discontinued before the year was over. Once Slater received the initial report of a theft ring in early January, he first contacted the FBI but they refused to become involved and referred Slater to the local police. (This is curious since Theft from Interstate Shipment (TFIS), 18 U.S.C §659 is a major part of the FBI's mission. See *U.S. v. Sinacola*, 476 F.2d 307 (7th Cir. 1973).)

Slater then attempted to contact the local police and eventually made contact with a Phoenix police detective by the name of Michelle Monaco who agreed to meet with Slater, Rustenburg, and Kettler at the terminal. Called as a Respondent witness, Monaco testified as to the results of the meeting. Rustenburg explained to Monaco what Murillo had told him of the theft plan then apparently involving only Hawkins and Baldonado. Monaco, an experienced police detective, listened as Rustenburg told his story and when Slater asked her to arrange a police stakeout or to provide a police undercover agent for the docks, Monaco allowed as while she could not provide the desired services, she knew of another police offi-

cer, a sergeant who specialized in sting operations. Monaco never found it necessary to interview Murillo nor even to prepare a police report, but she did testify that she thought Slater and Rustenburg were sincere in their desire for police involvement.

A few days later, another Phoenix police officer named Gibbons called Slater. After Slater explained the problem provided by Murillo's information, Gibbons too was unable to assist. The reason Gibbons provided Slater was fear of entrapment since Murillo was a participant in the crime. Since Gibbons did not testify, this alleged reason cannot be explored further.

On January 20 and again on January 23, at long last, Slater was finally able to procure a degree of law enforcement presence at Respondent's premises. To achieve this desired presence, Slater hired one uniformed off-duty police officer on each day to be present in plain view of the alleged discriminatees (and other employees), on the day they were terminated and on the day they picked up their final paychecks. For their presence for 3 hours on each day, the officers were paid \$75 (R. Exh. 16).

B. Analysis and Conclusions

1. Applicable Board law regarding unlawful discharge

The General Counsel has the initial burden of establishing a prima facie case sufficient to support an inference that union or other activity which is protected by the Act was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3). Once this is established, the burden shifts to Respondent to demonstrate that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. If Respondent goes forward with such evidence, the General Counsel "is further required to rebut the employer's asserted defense by demonstrating that the [alleged discrimination] would not have taken place in the absence of the employee[s] protected activities." *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). See also *Fluor Daniels, Inc.*, 304 NLRB 970 (1991). The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). "[A] finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

A prima facie case is made out where the General Counsel establishes union activity, employer knowledge, animus, and adverse action taken against those involved or suspected of involvement which has the effect of encouraging or discouraging union activity. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991). Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case; even without direct evidence. Evidence of suspicious timing, false reasons given in defense, and the failure to adequately investigate alleged misconduct all support such inferences. *Adco Electric*, 307 NLRB 1113, 1128 (1992), enfd. 6 F.3d 1110 (5th Cir. 1993); *Electronic Data Systems Corp.*, 305 NLRB

219 (1991); *Visador Co.*, 303 NLRB 1039, 1044 (1991); *Asociacion Hospital Del Maestro*, 291 NLRB 198, 204 (1988); and *Clinton Food 4 Less*, 288 NLRB 597, 598 (1988).

2. Discussion

I have little difficulty in finding that the General Counsel has established a prima facie case that the four alleged discriminatees were terminated for union or other protected reasons. Respondent's motive is a question of fact and as noted above, the Board may infer discriminatory motivation from either direct or circumstantial evidence. *NLRB v. Nueva Engineering, Inc.*, 761 F.2d 961, 967 (4th Cir. 1984).

In support of my conclusion that a prima facie case has been proven, I find first that Respondent has proffered shifting explanations for the terminations. This suggests pretextual reasons for discharge. *Atlantic Limousine*, 316 NLRB 822, 823 (1995). *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). To put it another way, when an employer vacillates in offering a rational and consistent account of its actions, an inference may be drawn that the real reason for its conduct is not among those asserted. *Zengel Bros.*, 298 NLRB 203, 206 (1990). The vacillating and shifting reasons even include Slater and Rustenburg contradicting each other as to the precise reason for the terminations, as recited above in "The Facts."

Respondent has offered three primary reasons to support the terminations. When a party's story keeps changing, it is perfectly appropriate for the finder of fact to conclude that none of the various versions are true. *Pace Industries*, 320 NLRB 661 fn. 5 (1996). In this case falsity is demonstrated not just by the multiplicity of reasons but by their failure of each reason to pass a test of rationality and common sense. Before examining each reason separately, I recite other suspicious circumstances in this case which cannot be ignored. First, no Respondent official ever conducted a fair investigation of Murillo's allegations nor of the alleged theft of time supposedly demonstrated by the tape. The Board has considered an Employer's failure to conduct a fair investigation and to give employees the opportunity to explain their actions before imposing disciplinary action to be significant factors in finding of discriminatory motivation. *Publishers Printing Co.*, 317 NLRB 933, 938 (1995). See also *U.S. Rubber Co. v. NLRB*, 384 F.2d 660, 662-663 (5th Cir. 1969); *Hickory Creek Nursing Home*, 295 NLRB 1144, 1159 (1989). The reason given by Slater for not talking to the alleged discriminatees about the theft of goods allegations was so that he could catch them in the act. However, that rationale rings false after January 19 when Slater had decided to fire them for another reason.

Not only was no investigation ever made, but the alleged discriminatees were never given warnings that their production was weak. (This omission indicates that production failure was only an issue on a single day.) Indeed no one in the case was even aware of what production was expected of dock workers. I note that Smiley testified that it had been his personal practice, if not the Employer's not to terminate an employee without first giving him a warning (Tr. 1877).

In sum, Rollinger was the primary union organizer and his termination under the circumstances in this case gives rise to an inference of violative discrimination. *Corolla Electric*, 317 NLRB 147, 152 (1995). Moreover, the delay in taking

adverse action until after there is knowledge of renewed union activity evidences Respondent's unlawful motivation. *Holsum Bakers of Puerto Rico*, 320 NLRB 834 (1996).¹²

I turn now to the three asserted reasons for the terminations.

a. Loss of Crescent Freight

I have recited above the letter read to Rollinger and the others on January 20, 1995, and I note that each of the alleged discriminatees was given a copy. The purported layoffs for shortage of work is suspect right from the start. If it was truly a layoff instead of a termination why did Respondent so forcefully close the door on rehire. This question is particularly appropriate in the instant case since once before Crescent discontinued use of Respondent's terminal. This occurred in 1992 or 1993 and lasted for 6 to 8 months. Then Crescent came back, same as before. The amount of business lost then was about the same as lost in January 1995. (See R. Exh. 14.) Although Respondent had no reason to know in 1992 or 1993 that Crescent would return, no one was laid off for lack of work, because that was an important custom and practice at Respondent.

The failure of Myers to testify and explain the departure from Respondent's custom and practice is a factor supporting the General Counsel's case. See *J.L.M., Inc. v. NLRB*, 31 F.3d 79 (2d Cir. 1994). Moreover, I draw an adverse inference generally from Myers' failure to testify, since he could reasonably be assumed to be favorably disposed to Respondent's case. *International Automated Machines*, 285 NLRB 1122, 1123 (1987). Compare *Queen of the Valley Hospital*, 316 NLRB 721 fn. 1 (1995). Myers' absence from the case is telling indeed since just a few days before January 20, 1995, he expressly promised Hawkins and the others that Phoenix terminal would not experience any layoffs. And he made this pledge knowing since December, according to Slater, that Crescent was considering discontinuing use of Respondent's facility.

In February 1995, after the layoffs supposedly due to reduced business, Respondent gave pay raises to current employees: clerical/managerial employees received a 4-percent raise and dock workers, depending on seniority received 10 to 30 percent! (Tr. 1670-1671.) Here again is more evidence to support the General Counsel's case.¹³ Notwithstanding the pay raises, and assuming for the sake of argument that Re-

¹²I note that Myers told Slater on one or more occasions that Rollinger and Olivarez had a "bad attitude." This characterization has been held by the Board to be a reference to employees' union activities. See *World Fashion*, 320 NLRB 922 (1996); *Virginia Metalcrafts, Inc.*, 158 NLRB 958, 962 (1966). But see *New York Telephone*, 300 NLRB 894 (1990).

¹³In rebuttal, the General Counsel called a part-time dock worker employee named Stephen Krawiec. On January 19, 1995, he called Smiley to receive "on call" instructions about reporting for work as had been his custom. Smiley told him that effective Monday, January 23, 1995, he should just report for work at 4 a.m. as Smiley expected Respondent's work to start picking up. Then in mid-February 1995 after Respondent learned of the charge filed in this case, Krawiec was given different instructions by Smiley per orders of Myers: Because of the lawsuit filed by the six former employees, Krawiec's hours were to be cut back and he was told to start calling in day by day. Smiley explained it just wouldn't look good to keep Krawiec working under the circumstances. I regard this testimony as evidence of a coverup.

spondent suffered some loss of business, which might justify a work force reduction, an employer violates the Act if it "discriminates because of union activity in the selection of those to be terminated." *NLRB v. Midwest Hanger Co.*, 474 F.2d 1155, 1158 (8th Cir. 1973), cert. denied 414 U.S. 823 (1973). The Act does not permit an employer to exploit worsening economic conditions to rid itself of union supporters. *NLRB v. Daniel Construction Co.*, 731 F.2d 191, 197 (4th Cir. 1984), nor, for that matter, suspected union supporters. *Turnbull Cone Baking Co.*, 271 NLRB 1320, 1355 (1984), and cases cited there.

b. Theft of time

Nothing in Respondent's so-called layoff notice alerted the terminated employees as to what role Rustenburg's taping on January 18 and 19 played in their discharge. On this record, I myself cannot say with certainty, what role, the alleged theft of time played. Of this I can be sure, the accusation is as baseless as any other. See *Dockendorf Electric*, 320 NLRB 4 (1995).

I have already remarked on the poor quality of the tape. I also note that the camera could not see into any of the trailers to see what work, if any, Rollinger and the others were doing. Other than the absence of Smiley for periodic visits to Slater's office to watch the taping, visits which totaled about an hour out of 3 hours, there was no other reasons for the alleged discriminatees to work differently than they always worked. Therefore, if they worked slowly on January 18 and 19, 1995, Respondent tolerated the pace in the past. If they worked more slowly than other dock employees on January 18 and 19, 1995, there is no evidence to prove it, since the camera was focused almost exclusively on Hawkins. In any event, if anyone worked too slowly, it was Hawkins who settled out of the case. No one ever told Rollinger and the others to work harder, nor told them if they didn't, they were subject to discipline. I do not necessarily doubt Rustenburg's testimony that several employees have been sent home for nonproductivity merely because Rustenburg could furnish no names, but I am more impressed by Smiley's "Shift Production Report" (G.C. Exh. 46) wherein he wrote at 1 p.m. on January 18, 1995, "Good Morning Over-All!" On the same report for the following day, Smiley made no comment at all (G.C. Exh. 47).

And again I note Rustenburg's referral of Olivarez and Ruiz to another job on January 23, 1995. This inconsistency further depreciates Respondent's case since it makes no sense to refer, as an act of kindness, two former employees supposedly suspected of theft or of loafing on the job. Of course, Rustenburg's act of charity cannot go unrecognized, yet it would have been higher virtue not have to terminated the employees in the first place.

Perhaps I have not yet dispelled every lingering doubt that the theft of time allegation is completely pretextual. Consider this additional evidence. Frequently, during the a.m. shift on the docks there were delays in the arrival of new trailers to be loaded or unloaded. As already noted, on occasion the shortage of work could be dealt with by asking for volunteers to go home early. However, often, particularly when an abundance of work was expected, but not yet arrived, dock workers were told "to go hide," that is, to spend time in an empty trailer, smoking cigarettes, or talking, while waiting for up to an hour, for additional trailers to arrive. When in

a trailer, the dock workers could not be seen by the surveillance camera, in case someone in the office might be monitoring their work. The dock workers knew this and so did the persons like leadman Figueroa or Dock Foreman Smiley, who would tell the dock workers to go hide or to make themselves scarce. In some cases, Figueroa himself would be in an empty trailer with the others! Smiley was usually more discrete in his orders to the dock workers, telling them to grab a "broom, sweep out a trailer, look busy." And if additional trailers had not yet arrived, then sweep out the trailer again.

The same philosophy reflected above was expressed in other ways. When only a few trailers remained to be loaded or unloaded, instead of the usual one or two dock workers, maybe four or five would work, but work slowly, just as Rollinger and the others were accused of doing on January 18, 1995. So, if the alleged discriminatees were working slowly on January 18, 1995, they were merely behaving in accord with past practice.

Before Rustenburg was promoted to his current position, he worked as a supervisor on Respondent's docks. Am I to believe that when he was recommending to Slater, that he didn't see any evidence of theft, but we can get them on theft of time, that Rustenburg was not aware of the custom and practice on Respondent's docks of allowing, even encouraging employees to go hide, or to work slowly while waiting for additional trailers.

c. Theft of goods

The case against Rollinger, et al., is based on a chain of evidence weaker than paper. Slater made the decision to terminate based primarily on what Rustenburg told him, Rustenburg's information in turn came from Murillo and Murillo's knowledge allegedly came primarily from Hawkins and Baldonado who allegedly incriminated Rollinger, et al. If Hawkins and Baldonado are out of the case due to their settlement and if Murillo has been found to be an incredible witness, the question of where these remaining facts leave Rollinger et al. is not hard to answer. The question is even easier to answer when I credit the denial of Hawkins and Baldonado that they said or did anything attributed to them by Murillo.

In rejecting this portion of Respondent's case, I freely admit Respondent's proof of an ongoing theft problem on its docks or on any docks, I suspect. For example, Respondent has proven that in the past, certain employees, who were caught with stolen items were terminated, that empty boxes have been found in and around the docks with their contents missing, and that on April 13, Respondent's concern about theft led to the issuance of a memo to employees reciting certain policies designed to minimize the opportunity for theft (G.C. Exh. 19). Respondent's concern was so great that it even offered a \$1000 reward for any information leading to a conviction for theft (G.C. Exh. 21). In that same memo to employees, dock workers were prohibited from leaving the docks during their shift. This apparently did not apply to Murillo who as we have seen on January 18 could come and go from his hostler as he pleased. Finally, I have already referred at some length to the security camera on the docks, and I mention now a second camera mounted on the building and focused on the main entrance to the premises, I have

also referred above to an abortive attempt to retain a security guard service as a theft deterrent.

None of this proof even remotely justifies the terminations in this case. Admittedly not all of the discharged employees were as active in supporting the Union as Rollinger. However, where, as here, the discriminatory motivation for a mass discharge is clear, it is not necessary to establish the union activity of each discharged employee. *Davis Supermarkets*, 306 NLRB 426 (1992), *enfd.* in relevant part 2 F.3d 1162 (D.C. Cir. 1993). Here, those discharged were all associates of Rollinger, and it is reasonable to assume that Respondent, at least, suspected them of union-related activities and desired to take action to scotch the lawful measures of the employees before they progressed too far toward fruition. *NLRB v. Jamestown Sterling Corp.*, 211 F.2d 725, 726 (2d Cir. 1954)—to “so extinguish seeds, it would have no need to uproot sprouts.” *Ethan Allen, Inc. v. NLRB*, 513 F.2d 706, 708 (1st Cir. 1975).

In finding that Respondent succeeded in sending a message to employees, I note the procedures for announcing the so-called layoffs. First, it was important to have the other employees present, rather than to call in those selected for layoffs to a private meeting in the office. Then, a patently false reason was given to the employees, all or most of whom had heard Myers promise Hawkins a few days before, that there would be no layoffs, and all or most of whom knew that Rollinger was the primary in-house union organizer. Nor can I ignore the police presence. Yes, the other employees heard the message loud and clear.

A few remaining minor points need to be disposed of. It is true that not all of Rollinger's associates and/or union supporters were laid off. For example, Jeff Williams and Ray Rose survived. However, it is well established that a discriminatory motive, otherwise established, is not disproved, by an employer's proof that it did not weed out all union adherents. *Publishers Printing Co.*, 317 NLRB 933, 937 (1995); citing *Nachman Corp. v. NLRB*, 337 F.2d 421, 424 (7th Cir. 1964).

Respondent introduced evidence that Rollinger and a few other alleged discriminatees had a disciplinary record. For example, the evidence shows that on one occasion Smiley told Rollinger, Olivarez, Ruiz, and Williams to begin reporting for work at midnight rather than 2 a.m. After a few days or weeks, this group, apparently led by Rollinger unilaterally changed their shift back to 2 a.m. They were written up for this infraction and told if they did it again they'd be terminated. Then they were permitted to remain on the 2 a.m. shift.¹⁴ These resulting letters of reprimand now cannot be found in any of the personnel files, but I find that all four named above received these letters. Olivarez was also written up by Figueroa on January 13, 1994, for missing work without a valid excuse (G.C. Exh. 16(a)). Belasco didn't receive a scheduled raise in pay because he had a problem getting to work on time. All of this history shares a common denominator. None of it was ever alleged on January 20 to be a factor in the so-called layoffs. The mere existence of valid grounds for discharge is no defense to an unfair labor practice if such grounds were a pretext and not the moving

cause. *Handicabs, Inc.*, 318 NLRB 890, 890-891 (1995); *Centre Property Management*, 277 NLRB 1376 (1985).

Before concluding this segment, I assume for the sake of argument that Respondent may contend that Slater and Rustenburg were fooled by Murillo's prevarications and that some kind of defense should flow from this argument. I would reject any such claim. At best, Slater, Rustenburg, and Myers were recklessly indifferent to the truth or falsity of the information provided by Murillo. Respondent's officials made a place at the table for Murillo and made him one of their own. They should not be heard now to disavow Murillo after the damage to livelihood and perhaps reputations has been done.

In sum, I find overwhelming evidence that Rollinger, Olivarez, Ruiz, and Belasco were terminated in violation of the Act and I will recommend an appropriate remedy below.

3. 8(a)(1) allegations

I have found above that on November 22, Johnson made the statements attributed to him by Rollinger. At the time the statements were made, Johnson no longer had any ownership interest in Respondent. However, as noted above, he had been retained as a consultant. The General Counsel contends that Johnson was also an agent of Respondent as of November 22. The test for agency is, whether, under all the circumstances, an employer would reasonably believe that the alleged agent was reflecting company policy and speaking for management. *Reno Hilton*, 319 NLRB 1154 (1995). Moreover, labor consultants such as Johnson are agents of an employer when these consultants engage in unfair labor practices. *Id.* I find that Johnson was merely exercising his “union avoidance” duties at the time he spoke to Rollinger. I also find that there is no evidence to suggest Rollinger or any other dock worker knew as of November 22, that Johnson no longer owned the Company. In sum, I find that Johnson was an agent of Respondent as of November 22 with full apparent authority to bind the Company and to commit unfair labor practices on behalf of the Company.

In *Waco, Inc.*, 273 NLRB 746, 748 (1984), the Board stated,

It is too well settled to brook dispute that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not depend on an employer's motive nor on the successful effect of the coercion. Rather, the illegality of an employer's conduct is determined by whether the conduct can reasonably be said to have a tendency to interfere with the free exercise of employee rights under the Act. [Citing *Daniel Construction Co.*, 264 NLRB 569 (1982).]

I find that Respondent violated Section 8(a)(1) of the Act by Johnson's statement to Rollinger that Johnson had been getting feedback from the night crew that Rollinger had been trying to organize them. Then Johnson threatened to shut the place down if the Union came in, and finally Johnson told Rollinger to think about it, because Johnson wasn't going to put up with it anymore. I find that these statements, ending with unspecified reprisals, violated Section 8(a)(1) of the Act. See *Reno Hilton*, supra at 1154; *Emergency One*, 306 NLRB 800, 806 (1992).

¹⁴The reason given by Rollinger for this unilateral change is not important, and I decline to recite it here.

CONCLUSIONS OF LAW¹⁵

1. The Respondent, Johnson Distributorship, Inc. d/b/a Johnson Freightlines, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Transport, Local Delivery and Sales Drivers, Warehousemen and Helpers, Construction, Mining, Motion Picture and Television Production, State of Arizona, Local Union No. 104, an affiliate of International Brotherhood of Teamsters, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging John Rollinger, John Ruiz, David Olivarez, and Donnie Belasco because of their activities on behalf of the Union, Respondent violated Section 8(a)(3) and (1) of the Act.

4. By threatening an employee with unspecified reprisals because of his union activities through its agent, Johnson, Respondent has violated Section 8(a)(1) of the Act.

5. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

¹⁵It has been alleged in this case that for all times material, leadman Figueroa is a statutory supervisor. Because I am unable to conclude that whether Figueroa is or is not a statutory supervisor will affect either the 8(a)(3) or (1) allegation, both of which are supported by substantial evidence, I am unwilling to engage in a purely academic exercise.

REMEDY

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

I shall recommend that Respondent offer John Rollinger, John Ruiz, David Olivarez, and Donnie Belasco full and immediate reinstatement to the positions they would have held but for their unlawful discharges. If their jobs no longer exist, Rollinger, Ruiz, Olivarez, and Belasco are to be reinstated to substantially equivalent positions, without prejudice to their seniority or other rights and privileges. Further, Respondent shall be directed to make Rollinger, Ruiz, Olivarez, and Belasco whole for any and all loss of earnings and other rights, benefits, and privileges of employment they may have suffered by reason of Respondent's discrimination against them, with interest. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See also *Florida Steel Corp.*, 231 NLRB 651 (1971), and *Isis Plumbing Co.*, 139 NLRB 716 (1962).

Respondent shall also be required to expunge any and all references to the unlawful discharges of Rollinger, Ruiz, Olivarez, and Belasco from their files and notify them in writing that this has been done and that the unlawful discharges will not be the basis for any adverse action against them in the future. *Sterling Sugars*, 261 NLRB 472 (1982).

[Recommended Order omitted from publication.]