

**General Security Services Corporation and William I. Fadel. Case 8-CA-28064**

April 25, 1997

**DECISION AND ORDER**

BY CHAIRMAN GOULD AND MEMBERS FOX  
AND HIGGINS

On November 29, 1996, Administrative Law Judge Thomas R. Wilks issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party 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,<sup>1</sup> and conclusions and to adopt the recommended Order.

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, General Security Services Corporation, Bloomington, Minnesota, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

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

In adopting the judge's decision, we do not rely on his characterization of the Respondent's burden of proof in rebutting the General Counsel's prima facie case with respect to the Respondent's failure to reinstate court security officers Slader and Wright as requiring coherent, compelling, and convincing reasons. Rather, we find that the Respondent failed to establish its rebuttal by a preponderance of the evidence, as the judge correctly noted previously.

*Richard F. Mack, Esq.*, for the General Counsel.  
*Robert A. Boonin, Esq. (Butzel Long)*, of Detroit, Michigan,  
for the Respondent.  
*William I. Fadel, Esq. (Fadel & Beyer)*, of Cleveland, Ohio,  
for the Charging Party.

**DECISION**

**STATEMENT OF THE CASE**

THOMAS R. WILKS, Administrative Law Judge. This case was tried before me in Cleveland, Ohio, on July 18 and 19, 1996, pursuant to an unfair labor practice charge filed on March 1, 1996, by William I. Fadel against the Respondent, General Security Services Corporation, as amended on March 27, 1996, by the Regional Director for Region 8, alleging that Respondent violated Section 8(a)(1) and (3) of the Act by its refusal on February 8, 1996, to reinstate to their positions of employment as security officers, Thomas Slader and

William Wright, because of their union activities and other concerted protected activities; and violated Section 8(a)(1) and (4) of the Act, because they had filed charges and given testimony under the Act. The complaint also alleged that in October 1995, Respondent's agent and lead security officer, Oliver Hornung, at Respondent's Akron, Ohio work location, threatened an employee with discharge if he and other employees represented by the Union engaged in a strike.

Respondent filed a timely answer on April 8, 1996, which denied the commission of any unfair labor practices. It is Respondent's position that the alleged discriminatees were originally discharged at the request of Respondent's client, the United States Marshals Services, a Federal Government entity (USMS) because of that agency's conclusion that the two security officers had engaged in some unspecified misconduct during their activities in support of a strike conducted against Respondent by the United Government Security Officers of America, Local 56, United Government Security Officers of America International Union (the Union). That original discharge is not the subject of an unfair labor practice charge. Thereafter, USMS rescinded its discharge request, and Respondent's decision not to reinstate Slader and Williams is the subject of the 8(a)(3) allegations. Respondent's defense is that its decision not to reinstate the employees was not motivated by any of their union or other protected activities but was rather motivated by business considerations, *inter alia*, the offer of employment to replacement employees which was pending the required approval of USMS.

At the trial, the parties were given full opportunity to adduce relevant testimonial and documentary evidence and to argue orally. They also were afforded opportunity to submit posttrial briefs, which all three parties submitted and were received between September 6 and 9, 1996.

The briefs submitted by the parties fully delineate the facts and issues and, in form, approximate proposed findings of fact and conclusions. Portions of those briefs have been incorporated here, sometimes modified, particularly as to undisputed factual narration. However, all factual findings here are based on my independent evaluation of the record. Based on the entire record, the briefs, and my observation and evaluation of witnesses' demeanor, I make the following findings.

**I. BUSINESS OF THE RESPONDENT**

At all material times, Respondent, a Minnesota corporation with an office and principal place of business in Bloomington (Respondent's facility) has been engaged in providing security guard service to the United States Government, including such services to the U.S. Department of Justice, United Marshals Services at the Federal courthouses located in Cleveland, Toledo, Youngstown, Akron, and Canton, Ohio, all within the jurisdiction of the United States Sixth District Court for the Northern District of Ohio. Annually, and at all times material, Respondent, in conducting these business operations, has provided guard services to the United States Government valued in excess of \$50,000.

It is admitted, and I find that, at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## II. LABOR ORGANIZATION

It is admitted, and I find, that at all material times, the United Security Officers of America, Local 56, United Government Security Officers of America International Union (the Union) has been a labor organization within the meaning of Section 2(5) of the Act.

## III. ALLEGED UNFAIR LABOR PRACTICES

### A. Respondent's General Operations

Respondent is a security company which provides security services to various entities, including the Federal Government. Among the Federal agencies which it serves is the USMS. Under its contracts with the USMS, the Respondent is responsible for providing security at all of the Federal courthouses within 9 of the 12 judicial circuits across the United States. The security services include protecting the courthouse buildings and building perimeters, as well as the judges, court personnel, jurors, witnesses, attorneys, and others utilizing the Federal courthouses. The Respondent has been providing court security services within the Sixth Circuit Court of Appeals (which includes the northern district of Ohio) since the mid-1980s. The contract for those services was last renewed effective October 1, 1993.

Under the Respondent's contracts with the USMS, court security services must be provided by court security officers (CSOs). While it is the Respondent's responsibility to employ the CSOs, each CSO's hiring is strictly controlled by the USMS. Applicants who pass an initial cursory background check by the Respondent are made a conditional offer subject to the Marshals' approval. Then a large package of clearance documents is sent to the USMS. Each individual offered by the Respondent to work as a CSO must satisfy the job qualifications imposed by the USMS, maintain a national security clearance authorization, and be a sworn deputy United States marshal. Holding the credentials of a deputy marshal and otherwise satisfying the USMS' qualifications are important to the government. Although a CSO may be a GSSC employee, the CSO wears the badge, uniform, and weapon of a deputy United States marshal and also possesses the full authority of a deputy United States marshal, including the authority to make arrests on behalf of the Federal Government. Any individual who cannot, at a minimum, satisfy these Federal security requirements cannot be assigned by the Respondent to work as a CSO under the contract.

In sum, the Respondent has no control over the issuance of the Marshal Services' credentials; the USMS has sole control. They are issued at the will of the USMS and may be terminated at the will of the USMS as well. The Respondent cannot require the USMS to issue the Federal authority attached to those credentials to individuals the USMS deems unfit for any reason. If the USMS withdraws a CSO's credentials, the CSO cannot continue to work under the contract in the courthouse. Among the means under which the USMS enforces its control over its credentials is the contractual rights it has to order the removal of CSOs from working under its service contracts. Under the contract, Respondent is to notify the CSO of the removal and the 10-day appeal period.

In addition to reserving considerable rights over who may work as a CSO under its contracts, the USMS also reserves the right to control the courts' overall security operations. For instance, the USMS controls CSO employment levels or "slots" at each location, what the hours of operation will be and what posts will be staffed. Each local marshal (and/or the local chief deputy marshal) is responsible for making these determinations and otherwise overseeing Respondent's operations.

Andrew Pierucki, Respondent's vice president, is responsible for all hiring and firing and serves as its liaison with USMS. He testified that Respondent's sources of employment are former law enforcement officers, many who are retired and of advanced maturity; and that because of constant turnover due to death, illness, or other incapacity, a ready pool of available potential CSOs is maintained by Respondent.

In the November through December 1995 period, Respondent employed about 26 CSOs at the Cleveland courthouse facilities. These included 16 full-time jobs (slots) and 5 shared jobs, i.e., 10 part-time employees. The Akron, Ohio staff included seven full-time slots and four shared slots during the same period which effectuated full staffing at both locations. Respondent's total national CSO level is about 2500 to 2600 officers.

Respondent handles the day-to-day personnel management and discipline of CSOs. The USMS has no disciplinary procedure for them. Robert Powell is Respondent's district supervisor for its entire northern Ohio district. He is headquartered at Cleveland. Subordinate to him at Cleveland is a lead court security officer, i.e., Officer Shilling. The Akron lead security officer and admitted supervisor is Oliver Hornung. Since 1987, Slader was a full-time CSO at Cleveland and, since 1993, Wright was a part-time CSO at Akron.

### B. Union and Other Protected Activities

On about February 13, 1995, Slader engaged in organizational activities on behalf of the Union by mailing to his northern Ohio district coworkers letters urging them to support the Union and to sign union representation authorization cards he had enclosed there. A week later, he engaged Powell in a discussion in Powell's office where Slader raised the subject of the Union by disclosing a copy of his solicitation letter. Slader testified that he and Powell were personal friends who played golf together, who were coffeebreak buddies and who attended each other's social functions. According to the uncontradicted testimony of Slader, the following discourse ensued. Powell said that "we" were wondering who had been "doing this." When Slader volunteered that he was responsible, Powell told him that he wished Slader had not made that disclosure to him. Slader asked why he should not. Powell said that the CSOs did not need union representation which would not be effective and would incur dues "for nothing." In direct examination, Slader testified that Powell then stated, "[Y]ou are going to be fired, you are going to get released," to which Slader expressed a contrary belief and protested the need for union representation. Powell then told him that he hoped the CSOs knew what they were doing. According to Slader's direct examination, he characterized this account of the conversations, "Basically, that is what it was."

In cross-examination, Slader undermined the reliability of his recollection. He admitted that the conversation was much more lengthy. He virtually conceded that Powell may have actually referred to the possibility that USMS might be the cause not of his discharge, but of a replacement in a context of which he was unsure but which admittedly incorporated some reference to the prospect of USMS cutting expenses. Finally, Slader admitted that Powell never did state that he would replace Slader.

The foregoing incident is not alleged to be violative of the Act as no timely filed charge was ever filed to cover it. Slader's testimony, although uncontradicted, is too muddled to premise a clear demonstration of Respondent animus as opposed to USMS antipathy to the Union, but it at least establishes Powell's knowledge of Slader's organizing efforts.

On May 4, 1995, the Union was certified by the Board as collective-bargaining representative for the CSOs within the northern district of Ohio pursuant to a Board-conducted election of which no evidence of Respondent interference was proffered. The Union also represents CSOs employed by Respondent at several other judicial districts throughout the country. Following the northern district certification, Slader was elected president of Local 56 and has held that position to date. As local union president, he communicated to the International union president his concerns about possible x-ray danger of the visitor inspection devices at the courthouses operated by the CSOs. In mid-July 1995, two OSHA investigators appeared at the Cleveland site and summoned the manager (Powell) and union representative (Slader) to a discussion. Before the encounter as they walked together to meet the investigators, Slader explained to Powell that the Union had requested the x-ray investigation. Powell "got a little excited" and raised his voice saying that OSHA had no right to conduct the investigation. When Powell confronted the OSHA investigators, he immediately proceeded to a telephone, placed a call to Chief Deputy Colster of the USMS and handed the telephone to an investigator. Slader testified that when Powell spoke on the telephone, "he was a little loud." At that point, the USMS intervened and thereafter Powell was not involved. The USMS told the investigators that they could not inspect the devices "until the [proper] paper work was [completed]." Ultimately, an OSHA inspection found the devices to be nonhazardous to the CSOs.

Collective bargaining with the Union throughout the late summer and early fall of 1995 failed to reach final agreements in the various units. The International union in late July directed strike authorization votes. Slader conducted a mail-ballot strike vote in the northern district which authorized a strike with an October 13 deadline. The first strike occurred at the Delaware unit in late October 1975. Some but not all, CSOs in St. Louis, northern Ohio, eastern Pennsylvania, and Denver, Colorado, joined the strike. The northern district CSOs in the core cities such as Cleveland and its suboffices commenced the strike on November 20. Akron followed 1 week later. The northern district strike had originally been scheduled for October 13 but was postponed. The nationwide strike ended on the afternoon of November 30, 1995, after an agreement had been reached with the International union at a meeting in Denver, Colorado, where "global" negotiations had transpired, i.e., there had been no specific reference to northern Ohio as a separate problem issue. About 100 CSOs had joined the strike and their return

was agreed on. No striker had been removed by Respondent for any strike activity.

Slader testified Powell's past practice was to distribute on Wednesday afternoon or Thursday the CSOs paychecks which arrived that day by Federal Express delivery. He testified that early distribution in advance of the official payday, Friday, had been done as a convenience to the CSOs. The payday following October 13 saw the paychecks not distributed until Friday itself. Slader accused Powell of spiteful retaliation because of the then-pending strike deadline. On October 20, Slader filed an unfair labor practice charge against Respondent in Case 8-CA-27780 alleging a discriminatory policy change motivated by the strike decision. The charge was withdrawn by Slader during the contract negotiations at the request of the International union president.

After the strike ended, Slader filed another charge in Case 8-CA-27913 alleging that Respondent failed to pay a CSO his holiday pay because of that employee's participation in the strike. The charge was informally resolved and the employee was paid for that holiday.

At Cleveland during the strike, Slader organized and directed the picketing of 20 strikers who distributed handbills to court employees and to others entering the court building, which identified the object of the strike activity. As a matter of courtesy, Slader communicated the intention to strike to the court's chief judge. At the Akron courthouse, only CSO Wright, of 11 CSOs, engaged in picketing during the first week. The fact that Wright was alone among the Akron contingent was noted by Akron lead court security officer Oliver Hornung who communicated that fact to Powell in Cleveland. It was through Wright's encouragement that other Akron CSOs eventually joined the picket line. Wright assigned strikers to their places on the picket line and also picketed.

### C. Alleged Threat by Hornung

Wright testified that after the strike vote in the first part of October, he had a conversation with Hornung in the court building lobby in Akron. According to Wright, Hornung initiated the conversation by telling Wright that he did not know why Wright was joining the Union or why a union was being formed; that there is nothing a union can do for him that hasn't already been done for the CSOs; and that if the CSOs did strike, they would be fired. Wright testified that he asked Hornung if he could quote him regarding the discharge but that Hornung immediately retracted the remark, saying "Oh, no, what I meant was you'll be replaced."

Hornung admitted having had a prestrike vote discussion with Wright wherein the prospect of a strike was discussed and wherein he did tell Hornung that if he did strike, he would be replaced for the duration of the strike. Specifically, he recalled that it was Wright who asked whether it meant that he would be fired and that Hornung answered, "No, it would be replacement for the duration of the strike." Hornung testified he had no other striker-replacement referenced discussions with Wright.<sup>1</sup>

<sup>1</sup> Wright testified to two conversations he had with Deputy U.S. Marshal Mike Campbell wherein Campbell quoted U.S. Marshal Troutman as threatening discharge for strike activity on one occasion and himself predicting discharge retaliation on another occasion.

I find Hornung to be the more certain, spontaneous, and convincing witness. I credit his version of the conversation as to the strike replacement reference. Accordingly, I find the complaint threat allegation, which is based on the foregoing conversation, to be without merit.

#### D. The Discharge of Slader and Wright

On December 18, 1995, by letter sent to Respondent's vice president, Andrew Pierucki, in Minneapolis, Minnesota, the USMS contracting officer of the Sixth Circuit, Deborah Skeldon, ordered the immediate removal of CSOs Wright and Slader. No prior written communication from the USMS regarding these employees and their removal had been received by anyone within the Company. The letter did not provide a substantive basis for the removals but merely cited several provisions of the CSO standards of conduct.

Pierucki, the Company's executive responsible for the court security contracts, claimed that he had no advance notice of the removal request.<sup>2</sup> Pierucki immediately complied with the USMS request. Slader and Wright were to be terminated purportedly because there were no other job openings to which Respondent could assign them.

On December 19, 1995, Pierucki prepared letters notifying these employees of the USMS' removal of their credentials and ability to work under the service contract, and he forwarded them to the Company's local manager responsible for operations in the northern district of Ohio, District Supervisor Powell, for personal issuance. The letters advised the employees of the USMS' order and the USMS' stated reasons for its actions. The letters also advised the employees of their right to respond to the USMS' decision in accordance with the applicable contractual procedure. Because the Respondent had no other operations in the area, he informed the employees that the removal order also necessitated their terminations of employment. Pierucki's letters, however, failed to provide the specific reason for their removals and simply reiterated the provisions cited in the USMS' letter but did not refer to any specific actions or failures to act on the part of Slader and Wright.

The termination letters were delivered personally to Wright on December 20, 1995, and Slader on December 21, 1995. When Powell and Hornung approached Wright with his letter of termination, Wright requested the presence of a union representative. Initially, Powell refused and angrily told Wright that "this is not a union matter." After repeated requests, Wright was finally afforded a union representative.

Pierucki thereafter advised the Union that the removal order had to be complied with and that the Respondent had absolutely no role in the action ordered by the USMS. In addition, other than what was contained in the USMS order, Pierucki advised the Union that the Respondent had no other

Campbell was not alleged to be an agent of Respondent, nor is there any evidence of agency

<sup>2</sup> One full-time Cleveland and one part-time Akron position openings were posted by Powell dated December 2, 1996. This was clearly an error. Powell identified the correct date of postings as December 2, 1995. I do not find his subsequent contrary testimony as to a January posting, elicited by grossly leading questions by Respondent's counsel, to be convincing. Moreover, there were two part-time positions open in Akron in January, not one. Accordingly, if Pierucki was not aware of the USMS intended action, Powell was, as there were no other openings at the time.

documents relating to the terminations nor did it have any information with regard to the terminations. Pierucki then provided the Union with a copy of the USMS order. Pierucki testified that he presumed that Slader and Wright had engaged in some strike activity that USMS found objectionable.

On December 21, 1995, the Union sent letters to Pierucki protesting Wright's and Slader's removals as discriminatory, submitted their respective responses—as requested by Pierucki—and asked for all information the Respondent had with regard to their terminations. On December 28, 1995, the Respondent received grievances from Wright and Slader with regard to their terminations. There being no contract ever reached with the Union, however, Pierucki refused on the grounds that there was no agreed-on written grievance procedure under which to process their grievances. Slader and Wright also sent to the Respondent new appeals of their terminations.

On January 3, 1996, in accordance with its service contract requirements, Pierucki forwarded to USMS the statements of Slader and Wright wherein, inter alia, they alleged discriminatory discharge because of their strike activities. Pierucki's covering letter reads as follows:

Enclosed, please find written statements from Thomas Slader and William Wright in which they challenge or otherwise appeal their respective removals as CSOs in the Northern District of Ohio. Due to the fact that the Company has not been apprised of the basis for these removal actions, we are unable to take any substantive positions in these matters. Should you provide us with sufficient information for us to independently evaluate the appropriateness of their removal, we will do so.

In any event, please be advised that the Company has not, nor would it, condone any retaliation proscribed by the National Labor Relations Act. As to the claims under Executive Order 12954, while we do not believe that the provisions of that order have in any way been implicated or are relevant to claims at issue, we also believe that the order (the enforcement of which is enjoined) will likely not survive the challenge currently pending in the Court of Appeals.

Pierucki testified that it was his objective to cause USMS to evaluate whether the NLRA had been violated. He testified that he was concerned about the removal action and wanted USMS to do the "right thing." Pierucki was unaware of any specific misconduct by Slader or Wright. However, he also assumed that Slader and Wright must have "done something wrong" and had "upset someone on a local basis" during the strike. Notwithstanding that assumption, he also admitted concern whether the removal action was proper under the NLRA.

Respondent was obliged by its contract with USMS to fill any staffing vacancy within no more than 30 days from the onset of that vacancy. This can be done, Pierucki admitted, by hiring new personnel or by increasing the work hours of part-time employees because the USMS, according to Pierucki, is concerned with man-hours and slots and not the total number of actual CSOs. Accordingly, Ronald Flowers, a part-time Cleveland CSO, was assigned extra duty to fill in for Slader and later assumed a full-time position. Pierucki

also decided to accommodate Cleveland CSO John Ryder's longstanding request to transfer to Akron to fill Wright's part-time position. Flowers' and Ryder's positions were to be filled by newly hired CSOs. Because of a staffing shortage in Cleveland, however, Ryder was retained there until he assumed Wright's part-time position on March 14, 1996.

On February 8, 1996, the USMS had communicated its written withdrawal of its removal orders of Slader and Wright prior to its approval of pending Respondent hiring requests of applicants Davis and Johnson for positions in Cleveland which did not occur until March. The USMS statement read as follows:

Dear Mr. Pierucki:

The United States Marshals Service received correspondence from Mr. Slader referencing his termination and that of William J. Wright as Court Security Officers (CSO) in the Northern District of Ohio.

After conducting an independent review of the matter and taking into consideration Executive Order 12954 (March 8, 1995), the Marshals Service will not object to Mr. Slader and Mr. Wright's re-employment as CSOs in the Northern District of Ohio.

Please contact me at (202) 307-9500 if you have any questions concerning this matter.

Sincerely

/s/Deborah E. Skeldon  
Contracting Officer

There is no evidence of any communication between Respondent and USMS during the period January 3 to February 8. Pierucki testified that he may have had a telephone conversation with Skeldon, but he has no recollection of it. Pierucki had been absent from his office and did not see the February 8 letter until February 15. Afterward, he telephoned Skeldon and asked for an explanation. Her only response was to direct him to put his request into written form. He did so by letter dated February 22, 1996.

Pierucki's letter to USMS of February 22 takes a drastic and remarkable change in tone and concern from his January 3 letter. In January, he was concerned that USMS might have violated the employees' rights under the Act and had thereby not done the "right thing" by removing them. Then he invited USMS to accept some input from him into the matter which apparently was in a state of appeal to USMS. But now in February, Pierucki's position was one of challenge to the merit of USMS' rescission of the removal. He protested not being privy to USMS' independent reviews. He went on to state:

we have serious concerns that the seeming reversal of the decision to order removal will be construed as improper actions having been taken by GSSC and/or USMS, and thereby not only inadvertently encourages the union's effort to impact the court security program, but also encourages the union to second guess both GSSC (which it apparently sees as its job) and the USMS (a tactic which we have been trying to discourage)! This decision may, therefore, have a dramatic effect on the ability of contractors to be able to constructively handle labor relations in the future.

Additionally, Pierucki went on to document the viability of Presidential Executive Order 12954 but, in any event, protested that the removal rescission pursuant to the Executive Order gives rise to a suggestion that Respondent violated it. He concluded as follows:

Finally, the statement that the United States Marshals Services "will not object" to the "re-employment" does not provide clear direction for us. We have conditionally hired some replacement employees and have promoted others to fill the positions vacated as a result of your direction to remove these CSOs. Is your letter a rescission of the removal, ie. are we to give preferential rights to these CSOs? Also, if reemployed, are they to be paid based on their prior service, or as new employees? We respectfully request a more clear course of action be made for us.

Suddenly now, Pierucki became concerned about abstract perceptions of wrongdoing. Certainly, since Respondent was purportedly in no way involved in the original decision, no stretch of reasoning could raise an inference as to its culpability as a consequence of the USMS rescission of its own decision. Previously, Pierucki was concerned about USMS substantively doing the "right thing" and not violating employees' rights. Now he apparently abandoned that concern in the interest of avoiding perceptions of USMS misconduct. The reference to the rescission of removal's impact on Respondent's relationship is revelatory of the heart of Pierucki's concern, as highlighted by his testimony as an adverse witness for the General Counsel.

Pierucki disclaimed any specific knowledge of the discharges' strike activities although he admitted awareness of Slader's position as president. He also had assumed that they had engaged in strike support activities that were either inappropriate or objectionable to someone on the local level. Pierucki denied having had any union animus or that the Union was perceived to be a thorn in his side. The February 22 letter and his testimony clearly reveals that he did indeed harbor animus toward the Union because of its efforts on behalf of the discharges to obtain a reversal of the removal order, and implicitly animus toward the precipitators of such action, i.e., the union president, Slader, and Wright.

Cross-examination by the Charging Party attempted to get some clear-cut explanation for the change in the nature of Pierucki's concerns in the foregoing correspondence. Pierucki's responses, if not evasive, were at best circuitous and inconsistent. However, with a great deal of feeling and often vehemence, he described the relationship of the removal order rescission to Respondent's relationship with the Union. He explained that he had been talking directly with the International union "time after time, meeting after meeting, tentative agreement after tentative agreement to make them understand that we are the employer [and that] they should be dealing with us." Pierucki explained that he assumed that the Union bypassed Respondent and "tried to use a political method and political methods to get the people reinstated." He did not explain how the Union would have been effective by limiting its reinstatement efforts to Respondent who was not involved in the decision and had no subsequent input into the USMS reconsideration of it. Indeed, he ultimately admitted that it would have been fruitless for the Union to come to him because he had merely passed

on the union appeals to the USMS. Then he conceded that the Union did come to him with a grievance which he resisted on the grounds that no formal grievance procedure existed.

In further examination by the Charging Party, Pierucki was again asked why he thought there was any relationship between union activity and the removal order rescission decision. At this point, he answered nonresponsively and inaccurately: "Because they were being reinstated to positions that did not exist anymore." Counsel persisted with his question. This time Pierucki answered nonresponsively that the reversal was unprecedented. Again, the same question was asked. Finally, he answered that the Union was "trying to influence people," by corresponding to "senators and different people in the Marshals' Service that were not . . . what I consider the normal chain of appeal." He testified:

They went around and they talked about political things and executive orders that I did not feel applied. I felt that I was owed an explanation. That is the only assumption I could draw [sic] it certainly was not on the basis of what I forwarded to you [Charging Party Counsel] and they had given to me [sic]. It had to have been this other thing.

In further cross-examination, Pierucki testified:

The tactic was that of the Union to go around me. I did not employ tactics. I employed the face to face discussion with the president of the international [union] Jim [Vissar], "let's keep this professional, let's work, you with me. If you get too involved in this and you are going to damage this program, it is going to hurt everybody."

When questioned about his letter reference to reemployment having a dramatic effect on Respondent's ability to handle labor relations, Pierucki evasively asserted that he had no jobs available for the dischargees, i.e., the position Pierucki had taken in his initial testimony as to why Respondent did not reinstate Slader and Wright to their former positions on receipt of the USMS removal order rescission.

Later in examination by Respondent counsel, he explained the purpose of the February 22 letter first to avoid the appearance of culpability. Then he explained.

I was very concerned about the ramifications of this particular union that I am trying to get an agreement with. Even though there was a strike, we have relatively good relations with these folks. Trying to get a contract and trying to move forward.

All of a sudden, when the Marshals' Service does something, they set up an arrangement, a relationship with the Marshals' Service. I was concerned that both in this instance and in the future that once that relationship was established, I become nothing more than a payroll service, and that is not what I am contracted to do. I am supposed to be in charge of the employees, finding qualified applicants and bringing them in, disciplining them, if necessary, guiding them, motivating them, and keeping them interested so that I can perform my contract. It gets real fuzzy between the union thinking that the contract I had with the government is their

contract. That is my contract and my company's contract. There is another contract between my company and the union. My opinion or my philosophy is never the twain shall meet.

My problem was that these folks went to the political thing, that was pretty obvious when they started on about the presidential order. Even at the bargaining table, Jim Vissar and some of the folks said, well, you cannot do this and you cannot do that. I told them I did not think the presidential order even affected me.

Pierucki went on to testify that he was concerned about the new employees to whom he had already offered replacement positions and he wanted USMS to tell him if he was being ordered by them to reemploy Slader and Wright and to "kick the other guys out." He testified: "Maybe they had quit other jobs to come on board and I'd feel pretty bad on behalf of my company, to tell them [not] to come on board." Of course, it is not true that replacements actually had "come on board." By the foregoing testimony, it is evident that Pierucki did not even know the employment or other personal status of the applicants to whom he had offered "conditional" employment and who were still awaiting USMS final clearance, a condition which he elsewhere testified had taken as long as 6 months, and at times when applicants had lost interest and had obtained jobs elsewhere. Pierucki testified that he asked his assistant, Bob Devoe, if in fact Respondent had made commitments to replacements and was told that people were transferred around and "offers were out there." Pierucki conceded that the Respondent's offer to an applicant was tentatively conditioned on USMS approval, and he recognized that it involved no commitment from the applicant who was free to look elsewhere until final clearance. Yet, in his testimony, he insisted that such tentative offer incurred a moral obligation on Respondent. He admitted that USMS had no restrictions preventing Respondent from withdrawing its approval request and rescinding its offer prior to USMS clearance during the pending appeal of Slader and Wright. Pierucki testified that in the past there had been unspecified instances where CSOs had resigned from Respondent but later sought reinstatement but were relegated to the pool and were not allowed to bump new replacement applicants who had received tentative offers subject to USMS clearance. He conceded that the factual situation here involving USMS removal order rescission was unique and unprecedented. Furthermore, there is no evidence of any precedent where involuntary termination by Respondent was rescinded by the Respondent.

However, on proffering to Respondent's counsel the foregoing testimony regarding what Pierucki claimed was a commitment to new job applicants which precluding openings for the dischargees, Pierucki appended it with the following explanation:

I guess my major concern was, though, the establishing of the relationship and how that would affect long term professional obligation of this company to perform services for the government. I did not think it was appropriate. The Union knows that.

Thus Pierucki came full circle back to the Union's conduct on behalf of the discriminatees as the "major concern," i.e., basis for his decision to resist their reinstatement.

On some prodding from counsel for Respondent, and after a temporary memory "black out," Pierucki testified unconvincingly that, yes, indeed, as counsel suggested, there was another concern, i.e., the rate of pay for reinstated, transferred, or newly hired employees that might impact on his contractual obligation to USMS as to cost of services allowable. It is not clear how a reversion to status quo would have caused a serious problem, particularly if USMS caused it.

On March 25, 1996, the USMS, by its General Counsel, conveyed its "clarification" letter in response to Pierucki's February 8 letter. That response stated as follows:

As you are aware, under the terms of the contract you are performing in the Sixth Circuit, the USMS may request that GSSC remove any employee from performing services for the USMS if the individual has not complied with the standards of conduct set forth in Section C of the contract. The USMS requested that GSSC remove Mr. Slader and Mr. Wright under this contract provision. The USMS did not request that GSSC dismiss these individuals from their employment.

As we indicated in our correspondence of February 8, a review of the circumstances surrounding the USMS removal request, including Executive Order 12954, prompted a withdrawal of the request. Whether GSSC chooses to staff these individuals on our contract is a matter to be resolved by GSSC.

Thereafter, Slader and Wright were not reinstated to their former positions but were relegated to the pool of applicants who await future openings. Slader, a former full-time CSO, was subsequently hired to fill a part-time opening. Flowers had been formally promoted to full-time CSO on January 22, 1996, in replacement of Slader and he remained in that position. Ryder, who had already resided nearer to Akron than Cleveland, entered on duty at Akron on March 14. Thomas Davis did not commence employment as Flower's part-time replacement until March 6, 1996.

Pierucki testified that the decision not to reinstate Slader and Wright, but rather to honor his "commitment" to their replacements, was his decision alone, without consultation with Powell or Hornung or anyone else, and was unrelated to any prior union activity of which he was aware.

There is no explanation as to why Pierucki did not exercise other options pending the USMS review of the discharges' appeals. As USMS reminded Pierucki, it did not demand their dismissal from employment. There were no other open positions for Slader and Wright, but there is no explanation for the failure to consider the obvious option of suspending them pending the USMS appeal review and filling in their work hours with expanded work of the other part-time CSOs, as was initially done with Flowers. There is no evidence that such distribution of work was impossible or otherwise inconvenient. There is no evidence of the necessity to formally promote Flowers to Slader's full-time position in January prior to receiving a response from USMS to Pierucki's offer of input into the review. There is no evidence as to the actual employment status of Davis and Johnson on February 8, i.e., whether they were unemployed, retired, or employed elsewhere pending USMS clearance. There is no evidence that Davis and Johnson possessed any particular skills, experience, or urgent needs that warranted

Pierucki's decision to offer them immediate permanent positions.

#### E. Analysis

The General Counsel has the burden of proving that protected activity was at least a partial motivating factor in the Employer's adverse employment decision. Having done so, the burden then shifts to the Respondent to show that lawful reasons necessarily would have caused that decision. *Wright Line*, 251 NLRB 1083 (1980); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 fn. 7 (1983).

As cited by the General Counsel, the Board recently explained in the allotted *Wright Line* burden of proof in *W. F. Bolin Co.*, 311 NLRB 1118 (1993). In that case, the Board stated:

First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected conduct.

In order to rebut the prima facie case, the Respondent must demonstrate that it would have laid off [the discriminatees] in the absence of their protected activities. To establish its defense, the Respondent has the burden of presenting an "affirmative defense in which the employer must demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." [Citation omitted, 311 NLRB at 1119.]

The *Wright Line* burden of proof imposed on the General Counsel may be sustained with evidence short of direct evidence of motivation, i.e., inferential evidence arising from a variety of circumstances, i.e., union animus, timing, pretext, etc. Furthermore, it may be found that where the Respondent's proffered nondiscriminatory motivational explanation is false, even in the absence of direct evidence of motivation, the trier of fact may infer unlawful motivation. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Abbey's Transportation Services v. NLRB*, 837 F.2d 575, 579 (2d Cir. 1988); *Rain Ware, Inc.*, 735 F.2d 1349, 1354 (7th Cir. 1984); *Williams Contracting*, 309 NLRB 433 (1992); *Fluor Daniel, Inc.*, 304 NLRB 970 (1991).

The issue in this case is whether Respondent's decision not to reinstate Slader and Wright was unlawfully motivated. The original discharge decision is not in issue. Respondent argues that Pierucki's decision was made without knowledge and animus of their strike related union activities. It is not necessary to make any inference that Powell, who was aware of those activities and who reported to Pierucki the status of the strike, also reported the prominent activities of Slader and Wright as well as Wright's other protected activities. It is sufficient to find that by his own testimony, Pierucki was well aware that they had been active in the strike and had assumed that they engaged in some strike related activities that may have offended unknown persons on a local basis, in some unspecified manner which may have yet been protected under the Act. He was also most keenly aware that

they had sought the assistance of the Union in pressing their appeal to USMS.

Further, it is not necessary to impute any prior union animus of Powell and Hornung to Respondent. Pierucki's own testimony established not only his animus but revealed that at least "the major reason," if not sole reason, for his decision not to reinstate them was because of the Union's activities on their behalf, which they instigated and supported by their appeals, their union membership and strike activities and Slader's union presidency. An adverse employment decision based on a union's activities on behalf of adversely affected employees manifestly discouraged union activities and union membership.

I conclude that the General Counsel has at the very least proven that Pierucki's decision not to reinstate Slader and Wright was in major part unlawfully motivated. Based on Pierucki's inconsistent, evasive and self-destructive testimony, I would further conclude that the other reasons proffered were pretextual and that this was not a mixed motivation decision.

In any event, assuming that the General Counsel has only proven partial unlawful motivation, I conclude that the Respondent failed to meet its *Wright Line* burden with a preponderance of evidence that the same action would have taken place even in the absence of the protected conduct. Pierucki's claim of commitment to the replacement employees was revealed to be specious. Neither employee nor applicant was committed to anything during the pendency of USMS approval, which might very well have taken months to obtain. If Pierucki had not obtained USMS approval of Davis and Johnson within the obligatory time limits, he most certainly would have had to fill those man-hours previously performed by Slader and Wright. He would have then done what he could have done while waiting for the USMS appeal decision or at least a USMS response to his January letter before offering jobs to the replacements, i.e., expanded temporary use of existing part-time and even full-time CSOs. Respondent failed to prove the necessity of offering permanent jobs to the replacements and the necessity of permanently confirming Flowers in a full-time position at that time. It failed to prove that it was committed to do so with coherent, compelling and convincing reasons. Accordingly, I find that Respondent violated Section 8(a)(1) and (3) of the Act by refusing to reinstate Slader and Wright to their former positions on USMS' withdrawal of objections to their employment at its Cleveland and Akron facilities on and after February 8, 1996.

Although it might be argued that the futility of Respondent's proffered reasons for nonreinstatement of the employees gives rise to an inference of unlawful motivation based on animus to their other union and protected activities, and Slader's filing of charges and giving testimony under the Act, I find it unnecessary to resolve that issue because the remedial order would be the same.<sup>3</sup> Moreover, evidence of animus prior to the USMS appeals is arguably insufficient to support such inference. Accordingly, I make no finding as to those additional allegations.

<sup>3</sup> There is no evidence of Wright's filing charges or giving testimony nor evidence of animus to such conduct by Slader.

#### CONCLUSIONS OF LAW

1. As found above, Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

2. As found above, Respondent has violated Section 8(a)(1) and (3) of the Act and, further, I find such violations affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that the Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act. Having found that Respondent unlawfully refused to reinstate Thomas Slader and William Wright to their former positions on and after February 8, 1996, I recommend that it be ordered to offer them immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits computed on a quarterly basis from the date of refusal of reinstatement to the date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>4</sup>

#### ORDER

The Respondent, General Security Services Corporation, Bloomington, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to reinstate Thomas Slader and William Wright to their former positions because of their union activities or because of the Union's activities on their behalf.

(b) In any other 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 Thomas Slader and William Wright full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them 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.

(b) Within 14 days after service by the Region, post at its Cleveland and Akron, Ohio facilities copies of the attached

<sup>4</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

notice marked "Appendix."<sup>5</sup> Copies of the notice, on forms provided by the Regional Director for Region 8, 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 March 1, 1996.

(c) 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.

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<sup>5</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

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

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

WE WILL NOT refuse to reinstate Thomas Slader and William Wright to their former positions because of their union activities or because of the Union's activities on their behalf.

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

WE WILL, within 14 days from the date of this Order, offer Thomas Slader and William Wright full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make Thomas Slader and Wright whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

GENERAL SECURITY SERVICES CORPORATION