

APT Ambulance Service and International Association of EMTs and Paramedics, Case 31-CA-21363

June 9, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On January 13, 1997, Administrative Law Judge Timothy D. Nelson issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, 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, APT Ambulance Service, Los Angeles, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Ann L. Weinman, Esq., for the General Counsel.
John W. Harris, Esq., of Los Angeles, California, for the Respondent.

Sally F. LaMacchia and Harry F. Berman, Esqs., of Ventura, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

TIMOTHY D. NELSON, Administrative Law Judge. On September 12, 1995,¹ the Regional Director for Region 31, acting for the General Counsel of the National Labor Relations Board (the Board), issued a complaint and notice of hearing alleging that APT Ambulance Service (the Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).² The complaint followed the Regional Director's investigation of charges filed on June 22 by International Association of EMTs and Paramedics (the Union), shortly after the Union narrowly won a representation election conducted on June 15 among the Respondent's emer-

gency service employees.³ I heard the case in 4 days of trial in Los Angeles, California, from January 29 through February 1, 1996. All parties appeared through attorneys. Counsel for the General Counsel and counsel for the Respondent filed posttrial briefs.⁴

The complaint alleges more specifically that the Respondent committed roughly nine distinct acts of coercive misconduct under Section 8(a)(1) during the campaign leading to the June 15 election,⁵ and violated Section 8(a)(3) by "discharging" employee Joaquin Muñoz "on or about June 20." The Respondent admits in its answer that the Union is a labor organization within the meaning of Section 2(5) of the Act, and that the Board's jurisdiction is properly invoked,⁶ but it denies all alleged wrongdoing. Its principal defense to its alleged discharge of Muñoz is that Muñoz voluntarily "abandoned" his job after the election.

I will conclude on a disputed factual record that the Respondent's agents committed certain violations of Section 8(a)(1), substantially as alleged in the complaint, but that certain other 8(a)(1) counts in the complaint are without legal merit,⁷ even if the agent in question, Ralph Smith, did what the prosecution witnesses say he did. Concerning the 8(a)(3) count, I will conclude, after reviewing the unique circumstances of Muñoz' departure from employment on the heels of the regrettable exposure of his election ballot, that Muñoz did not "abandon" his job, but rather, that the Respondent, for reasons inextricably linked to the fact that Muñoz had cast the deciding ballot for the Union, used a variety of discriminatory and coercive devices to effectively discourage Muñoz from returning to work. And while it is debatable whether the Respondent's actions involved a simple discharge of Muñoz, or amounted instead to a "constructive" one, my legal conclusion would be the same in either case—that the Respondent's actions violated Section 8(a)(3) and (1) and require a reinstatement and backpay remedy.

³The Union filed its original charge on June 22, and amended it on June 27.

⁴Upon the General Counsel's unopposed motion, the deadline for receipt of briefs was extended to March 15, 1996.

⁵On the first day of trial, I granted the General Counsel's motion to amend the complaint to add counts alleging that a previously unnamed agent of the Respondent, Chris Jordan, coercively interrogated Muñoz on "June 20 [sic]" and unlawfully created the impression in the same transaction that the Respondent was engaging in "surveillance" of Muñoz' union sympathies or voting intentions.

⁶The Respondent admits, and I find, as follows: The Respondent is a California corporation which provides emergency transportation and associated medical care services within the Los Angeles metropolitan area. In the representative year's period before the complaint issued, the Respondent derived gross revenues exceeding \$500,000, and directly purchased and received from suppliers outside the State of California more than \$50,000 worth of goods or services. At all material times, the Respondent has been engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

⁷On the second day of trial, at the conclusion of the General Counsel's case-in-chief, I granted the Respondent's motion to dismiss par. 6(a) of the complaint for want of proof that Ralph Smith unlawfully interrogated employee Christopher Pech. I will not revisit that issue.

¹ All dates below are in 1995 unless I say otherwise.

² Sec. 8(a)(1) outlaws employer actions and statements that "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

Sec. 7 declares pertinently that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]"

In pertinent part, Sec. 8(a)(3) makes it unlawful for an employer to "discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization[.]"

FINDINGS AND CONCLUSIONS

I. OVERVIEW OF UNDISPUTED FACTS; INTRODUCTION TO MAIN ACTORS

The Respondent furnishes emergency and nonemergency ambulance and medical transportation services in Los Angeles county. Its main business and dispatch offices and vehicle storage and maintenance yard are located in the city of Los Angeles, on Crenshaw Boulevard, and it was at this Crenshaw base where all violations are alleged to have occurred.⁸ The Respondent is one of several related transportation service businesses operating under the umbrella name, "Smith & Sons." *Ralph Smith*, the owner of all these operations, functions as the chief executive of the Smith & Sons group. One of Ralph Smith's sons, *Reginald Smith*, is a vice president in charge of legal affairs and administration for the group, and he—not Ralph Smith—figured prominently in the postelection developments associated with Muñoz' departure. *Vance Smith*, Reginald's younger brother, is the Respondent's corporate president and is nominally in charge of its ambulance service operation. The Respondent's admitted supervisory hierarchy also includes *Chris Jordan*, who functions chiefly as the operations manager. All the above-named agents of the Respondent, except Reginald Smith, are alleged to have committed 8(a)(1) violations, all but one of which are alleged to have occurred before the June 15 election.

On April 28, following initial organizing contacts with some of the Respondent's employees, the Union filed a petition in Case 31-RC-72929 for a representation election in a unit of the Respondent's "emergency" personnel, i.e., its EMTs, paramedics, and emergency vehicle dispatchers.⁹ Soon after receiving the Union's petition, the Respondent retained Attorney *Ronald Klepetar*, and, on Klepetar's advice, also hired *Judy Castillo*, an employer labor relations consultant. During a period of roughly 2 to 3 weeks thereafter, Castillo counseled the Respondent concerning the "do's and don'ts" of employer campaign behavior, and also conducted campaign meetings with groups of the emergency employees. In these latter efforts, Castillo was assisted by the Respondent's bookkeeper, *Renita Willis*. Sometime in late May, the Respondent dispensed with Castillo's services, opting instead to do its own campaigning for the roughly 3 weeks remaining before the election. Castillo and another unnamed "consultant" (apparently referring, in fact, to bookkeeper Willis) are alleged to have committed unlawful interrogations during the period of Castillo's tenure as the Respondent's consultant.

On May 16, two of the Union's organizers, *Kenneth Cram* and *William Davis*, posted themselves for the better part of the day and early evening outside the gate entrance to the

⁸ The Respondent also operates a satellite station at another location on Crenshaw Boulevard, this one in the city of Hawthorne. The witnesses commonly referred to the main base as "Crenshaw" and to the satellite station as "Hawthorne," and I will adopt this usage.

⁹ After filing its April 28 petition in Case 31-RC-72929 for a representation election in the unit of emergency personnel, the Union filed a separate petition seeking an election in a unit of the Respondent's nonemergency personnel. The record is largely silent as to matters associated with the campaign in the nonemergency unit.

Respondent's Crenshaw base, where they handed out literature and business cards to the Respondent's ambulance drivers and attendants as they entered or left the premises on foot or in their vehicles. Ralph Smith is alleged to have committed multiple violations of Section 8(a)(1) during the May 16 visit of the Union's agents.

When the election was held on June 15, the results were initially inconclusive. The preliminary tally of unchallenged ballots showed 29 votes for the Union and 28 against, but 2 additional voters had been challenged by the Board agent who conducted the election, because the Respondent had not included their names on the voting eligibility list, and their ballots were thus placed in sealed envelopes. The sealed ballot cast by one of these challenged voters, *Joaquin Muñoz*, was opened and counted the next day, June 16, after the Respondent and the Union stipulated that he was eligible and that the other challenged voter was not. Muñoz' ballot contained a "Yes" vote, and his vote proved to be decisive in cementing the Union's victory and its entitlement to certification as the exclusive bargaining representative, which occurred in due course thereafter.¹⁰

The public exposure of Muñoz' ballot, regrettable in any circumstances, was uniquely embarrassing to Muñoz, for he had told his supervisor, Jordan, before the parties stipulated that his ballot could be opened, that he had cast a "No" vote. In fact, so exquisitely embarrassing to Muñoz was the prospect that his ballot would be opened that he decided at first that he had no choice but to quit, and communicated that sentiment to several friends and fellow employees. Moreover, after he was exposed as a "Yes" voter, Muñoz never returned to his job, and the Respondent notified him in writing on June 26 that he was being officially treated as having "abandoned [his] job."

The foregoing description omits certain intervening facts, many of which are also conceded by all parties but some of which are in dispute. Thus, everyone agrees that on June 20 and 21, at times when the Respondent admittedly had taken no steps to change Muñoz' status from that of an employee in good standing, Muñoz and/or the Union's attorney, *Sally LaMacchia*, indicated in at least three separate telephone conversations with the Respondent's agents, Jordan and Reginald Smith, that Muñoz was willing to return if the Respondent would have him. Although the witnesses disagree as to precisely how Jordan and/or Reginald Smith replied to these several initiatives, there is general agreement that Jordan rebuffed Muñoz' initial inquiry by taking the position that Muñoz had already quit, and that Smith took a similar position at first, but then agreed to reconsider, but only if he could resolve certain "issues" directly with Muñoz, principal among which were the related questions of Muñoz' "trustworthiness," and whether Smith would allow Muñoz to keep his current "position" as dispatcher in the light of Smith's lack of trust in Muñoz.

¹⁰ When Muñoz' ballot was counted, the corrected tally showed 30 votes for representation by the Union and 28 against. The Regional Director thereafter issued a certification of the Union's status as the 9(a) representative of the employees in the emergency unit.

II. ALLEGED PREELECTION VIOLATIONS

A. *Ralph Smith's Statements and Actions on May 16*¹¹

1. Alleged threat to Davis and Cram

Paragraph 6(d) of the complaint alleges that on May 16, Company Owner Ralph Smith (called Smith in the balance of this section) "verbally threatened a union representative in the presence of Respondent's employees." Union Agent Davis was the sole witness presented by the General Counsel to support this count.¹² Although Smith implicitly denied Davis' account,¹³ I found Davis' coherent and detailed description more convincing and, thus, I rely on Davis' version for the following findings: Around noontime on May 16, Davis approached an ambulance occupied by two uniformed emergency employees of the Respondent as the ambulance paused at the gate entrance to the Crenshaw base. When he neared the passenger's side, the passenger opened his window and Davis exchanged brief words with him and gave him a union business card. At about this point Smith came through the gate from inside the premises and waved and verbally urged the driver through the gate, stating to Davis as he did so that Davis should "get away from his ambulance and that if he 'stopped another ambulance,' [he would] 'get hurt.'" At this point, Cram, standing nearby, asked Smith if he was "threatening" Davis, and Smith replied that he had been "talking to" Davis. After the driver passed through the gate, Smith retired from the scene.

Discussion and conclusion: In this instance, as well as in the golf club "brandishing" incident, *infra*, the General Counsel's theory of violation is that even though Smith's be-

havior was not directed at employees, it nevertheless had an unlawfully coercive effect on employees' rights. Although there is respectable basis in law for the General Counsel's "threat-by-proxy" theory,¹⁴ I judge that Smith's conduct as described by Davis was too ambiguous to trigger the application of this theory. Thus, Davis' account does not persuasively show that Smith uttered a "threat" to Davis, as opposed to a warning, however angrily delivered, that Davis could be injured if he tried to "stop" ambulances from entering and leaving the base. Accordingly, lacking any clear indication that Smith's statement was accompanied by other conduct that might suggest to employees witnessing the scene that Smith or some other agent of the Respondent would be the perpetrator of any "hurt" Davis might suffer, I will dismiss paragraph 6(d) of the complaint.

2. Alleged "brandishing" of a golf club at Cram

Paragraph 6(e) of the complaint alleges that in a separate incident, Smith "brandished a golf club in a threatening manner against a union representative in the presence of Respondent's employees." Only a few details are in dispute. Davis testified, in substance, that sometime in the midafternoon, Smith appeared in the parking area inside the gate, pulled a golf driver from his car trunk, and began taking practice swings with it. Although Davis recalled that Smith began by making ground strokes with the driver, he testified that, at one point, Smith made about "three or four" horizontal, baseball-type swings before resuming his ground strokes. Moreover, according to Davis, who was standing about 30 feet away from Smith, outside the gate, Smith made the baseball swings while looking at Cram, who was also positioned outside the gate, but only about 10 or 15 feet from Smith.¹⁵ Finally, although Davis testified that he was unaware of any employees being present during this incident,

¹¹ All incidents discussed in this section occurred during the day-long campaign visit of Union Agents Cram and Davis to the Respondent's Crenshaw base on May 16.

¹² Contrary to the Respondent's repeated urgings on brief, I will not draw an inference adverse to the General Counsel for its failure to call (former) Union Agent Cram as a witness, for the record will not permit me to find that Cram was in any sense under the Union's or the General Counsel's effective influence or control at the time of trial. (Indeed, Davis credibly testified in material substance that Cram was no longer in the Union's employ at the time of the trial, that he had been fired at some earlier point for alleged mishandling of union funds, and that his current whereabouts were unknown.) Much less could I find in the circumstances that Cram was "favorably disposed" to the Union's or to the General Counsel's case at the time of trial. Cf. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), reaffirming the "familiar rule . . . that when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." See also *Queen of the Valley Hospital*, 316 NLRB 721 fn. 1 (1995); *U.A.W. (Gyrodyn Co.) v. NLRB*, 459 F.2d 1329, 1336-1337 (D.C. Cir. 1972). Rather, in the known circumstances, I regard Cram as having been "equally available" to all parties; accordingly, no single party can legitimately suffer an adverse inference from its failure to call him as a witness.

¹³ Smith summarily denied having exchanged any words with Davis or Cram on May 16. He did recall, however, that at one point, he saw that the union agents were "stopping" ambulances at the gate, and he testified that this caused him to instruct one of his managers, Evans, to go to the gate and tell the union agents not to block the driveway. The Respondent did not call Evans as a witness, and I remain unconvinced by Smith's apparent attempt to inject an issue of mistaken identity into the case.

¹⁴ When employees see their employer assault or threaten to assault a union agent in the course of the agent's lawful activities, or when they learn that this has happened, they may reasonably fear similar treatment at their employer's hands for their own lawful union support or activities. Accordingly, such conduct by their employer, even though not visited directly on the employees, unlawfully interferes with, restrains, or coerces them in the exercise of Sec. 7 rights, and violates Sec. 8(a)(1). See, e.g., *Horton Automatics*, 289 NLRB 405, 410-411 (1988), and authority cited, involving an employer agent's "physical assault" on a union agent. See also, e.g., *Rainbow Garment Contracting*, 314 NLRB 929, 937 (1994) (handing visiting union agent a bullet; telling supervisor to get a gun; producing gun; puncturing union agents' car tires), and *Circuit Wise*, 309 NLRB 905, 910 (1992) (deliberately driving motorcycle unreasonably close to union organizer on picket line).

¹⁵ On cross-examination, Davis elaborated that Smith had swung the golf club for upwards of a "half hour," while he "walked around" the parking area immediately inside the street gate, and that his "three or four" baseball swings lasted for about a "minute." I regard both estimates as decidedly improbable, and treat them as exaggerations. I have a similar reaction to Davis' recollection for the first time on cross-examination that Smith's baseball swings brought the club head beyond the "plane of the gate," to within "two or three feet" of Cram. These latter details do not fit well with the balance of Davis' descriptions as to everyone's relative placement during the episode, and no other witness supported any such claim.

the Respondent developed evidence that at least two employees witnessed the scene.¹⁶

Describing the same events from a different perspective, Smith and employee Willis Roberson told a story which I do not find improbable, and which is harmonious with Davis' descriptions: In substance, Smith and Roberson testified that Smith removed his recently purchased "Big Bertha" model driver from his car trunk to show it to Roberson, a fellow golf enthusiast, and to Smith's son, Vance, who was standing nearby. In the course of showing off the driver, they say, Smith lectured his audience on some fine points of driving technique, using a certain ground stroke with his right shoulder dropped to illustrate how to avoid a slice in the drive, and then demonstrated by way of contrast that cuts in a drive were caused by a flatter kind of swing, which he illustrated with a series of baseball-type swipes at an imaginary ball. However, in the only distinct contradiction of Davis' account, both Ralph Smith and Roberson testified that Ralph was facing away from the gate area when he made the baseball swings.

Discussion and conclusion: The similar versions of the various persons who witnessed the events from different vantages are in material conflict only as to where Smith was looking and how close he was to Cram when he made the baseball swings with the driver. I have previously noted that Davis appears to have exaggerated Smith's proximity to Cram. I remain unpersuaded that Smith's baseball swings were in any sense "directed" at Cram. Davis' disputed testimony that Smith was looking at Cram when he made his baseball swings, even if true, would not be enough to persuade me that Smith was trying to send the union agents a threatening message. There is no other credible evidence that employees witnessing the event would see Smith's actions as a deliberate menacing of the agents.¹⁷ Thus, where the credible evidence does not favor the claim that Smith "brandished" the driver at Cram, I will dismiss paragraph 6(e) for want of proof of a "threat."

3. Alleged "order" to "Smitty"

Paragraph 6(b) of the complaint alleges that Smith "ordered certain of its employees not to speak with union representatives." The General Counsel relies on Davis' testimony concerning an alleged incident involving employee Keith Smith, whom Davis then knew only by his nickname, "Smitty."¹⁸ Davis recalled that sometime in the afternoon,

¹⁶ The Respondent's counsel elicited from employee Muñoz during cross-examination that Muñoz had indeed "witnessed" some features of the incident from inside the dispatch office, via a closed-circuit video security system which partially captured the scene at the gate and displayed it on a monitor in the dispatch office. Moreover, in presenting its counterversion of the incident, *infra*, the Respondent proved that another employee, Willis Roberson, was present during Ralph Smith's alleged menacing behavior with the golf club.

¹⁷ My judgment is not altered by Muñoz' demeanorally unconvincing, improbable, and contextually self-serving testimony on cross-examination that he subjectively perceived from his limited view of the incident on the dispatch office video monitor that Smith was trying to "intimidate" the union agents with his golf swings.

¹⁸ Keith Smith, a nonemergency vehicle driver, is unrelated to anyone in the Smith & Sons group.

Smitty *exited* the premises through the street gate and then walked toward Cram and asked him, "What's going on?" At this point, said Davis, Smith appeared (exactly where is in doubt from Davis' account) and called Smitty to his side, then "yelled" at him, "I told you to stay away from those guys."

Discussion and conclusion: Smith denied doing any such thing. More importantly, Smitty himself effectively neutralized Davis' account. Thus, called as the Respondent's witness, Smitty recalled only one brief encounter with the union agents, as he was *entering* the premises, in which he says he made only an informal gesture of acknowledgment to the agents as he passed them *en route* to the office. He recalls further that he saw Ralph Smith standing outside the office door as he entered, but denies that Ralph said anything to him then or thereafter about the presence of the union agents. While I was unimpressed with Ralph Smith's denials, Smitty testified with convincing clarity, and nothing in his manner or in his account of events would cause me to judge him less credible than Davis as to the incident in question. And where the conflicting accounts of Davis and Smitty are, at best, in equipoise in terms of their believability, I judge that the General Counsel failed to persuade by a preponderance of the credible evidence that Ralph Smith issued the allegedly coercive "order" to Smitty. Accordingly, I will dismiss paragraph 6(b) of the complaint.

4. Card tearing

Paragraph 6(c) of the complaint alleges that Smith "physically destroyed a union representative's business card in the presence of employees." This count is well supported by the credible and mutually harmonious accounts of (former) employee Bloom and Union Organizer Davis. Indeed, their accounts establish that Smith's actions were done not just in Bloom's "presence," but that Bloom himself was the target and victim of Smith's actions. Thus, relying mainly on Bloom, who was more directly involved than Davis, and rejecting Smith's denials, I find as follows: Sometime in the early evening, EMT Bloom returned to the base at the end of his shift and dropped off his ambulance. As he exited the premises on foot, either Davis or Cram or both handed him a business card. As Bloom took the card, Smith came running out from inside, shouting, "No, No, No!" Bloom continued to walk across the street to his car, but Smith soon caught up with him, shook his shoulder and said, "I want you to tear it up in their face." Bloom rebuffed this demand, whereupon Smith snatched the card from Bloom's hand and then walked away, tearing the card into shreds as he left.

Discussion and conclusion: Although the wording of the complaint suggests otherwise, we are not presented here with arguable threats to employees by "proxy," i.e., where a union agent is the nominal target of the employer's threatening behavior. Rather, we are presented here with Smith's naked and direct "interference" with Bloom's right to take, and then read, printed material from a union agent lawfully distributing the same. Accordingly, I conclude as a matter of law that when Smith both verbally and physically interfered with those rights, the Respondent violated Section 8(a)(1).

B. Miscellaneous

1. Alleged coercion by Vance Smith

a. Ordering Pech not to talk about the Union

Paragraph 7(a) of the complaint alleges that "on or about May 1," Vance Smith coercively told an employee to "keep his mouth shut each time he was observed speaking to other employees." Overlooking the syntactical confusion or the factual distortion in the wording of this count, I find that it is roughly supported by the testimony of former employee Christopher Pech, who testified, in substance, as follows: On an uncertain date in early May, Pech and other employees were standing in a hallway inside the Crenshaw office, talking about the Union's campaign and the Company's reactions to it. Pech commented during the conversation that one of the benefits of having a union would be that "Ralph Smith wouldn't be able to dick around with us anymore," and that the company management had "brought this on themselves." At about this point, Vance Smith emerged through a nearby French door and told Pech, "You'd better keep your f—king mouth shut; you've got a big mouth; we know you're for the Union." Vance Smith vaguely recalled that he had once told a group of workers to stop making noise in the hallway, but he denied that this incident had anything to do with the Union.

Discussion and conclusion: Although Pech was not a model of clarity or conviction in certain features of his testimony, I found his portrayal of this incident far more convincing than Vance Smith's own counterversion.¹⁹ Pech's credited version adequately establishes that Vance Smith effectively ordered Pech not to give voice to prounion views. Such an order facially interferes with the exercise of employees' rights under Section 7, and it was not shown to have been issued pursuant to some valid, nondiscriminatory rule of general application against any kind of talking among employees. I thus conclude as a matter of law that by this order Vance Smith implicated the Respondent in a violation of Section 8(a)(1).

b. Interrogating Bloom about Pech's motives for union activity

Paragraphs 7(b) and (c) of the complaint allege that "on or about May 19," Vance Smith "interrogated an employee regarding union activity," and "made unspecified threats of retaliation" against "an employee." These counts apparently depend commonly on former employee Bloom's testimony concerning a single incident in the company lunchroom wherein Vance Smith questioned Bloom about employee Pech. Accepting Bloom's credibly delivered and coherent account, and rejecting Vance Smith's seemingly improvised and uncomfortably delivered counterversion,²⁰ I find as fol-

lows: Probably on or about May 19 (and definitely before the election, despite Bloom's uncertainty on this point from the witness stand),²¹ Vance Smith joined Bloom at a table in the lunchroom and soon turned the conversation to the subject of employee Pech's prounion activities. He asked Bloom, inter alia, why Pech was for the Union, and why he wanted to "run this company into the ground." Bloom uncomfortably sought to deflect these questions by claiming ignorance of Pech's activities or motivations. After hearing several such "I don't know's" from Bloom, Vance Smith said, "I'll remember that," and left the table.

Discussion and conclusion: We are instructed in *Rossmore House*, 269 NLRB 1176 (1984), *enfd. sub nom. Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), that mere "casual" questioning by a supervisor of an "open" union adherent about union-related matters will not alone justify the conclusion that the questioning violated Section 8(a)(1); rather, the Board requires that we take "all the circumstances" into account in deciding, "[w]hether . . . the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act."²² I note that Bloom was not shown to have been an "open" union adherent when Vance Smith questioned him about Pech. However, the legal significance of this fact is, at best, uncertain, in the light of the Board's more expansive application of the *Rossmore House* holding in *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985), even to situations where employees being questioned are *not* "open and active union supporters."²³

Attempting to accommodate these teachings, I judge in the light of the following particular circumstances that Vance Smith's questioning of Bloom was unlawfully coercive. First, Bloom was not shown to have been an "open" union adherent when Vance Smith questioned him. Second, his approach to Bloom and his inquiries about Pech do not appear to have been merely "casual," but were apparently intended both to gain insights about Pech and to impress on Bloom Vance Smith's own disapproval of Pech's union activities. Beyond that I note that in the face of Bloom's apparent unwillingness to discuss Pech, Vance Smith abruptly left the table with the parting words, "I'll remember that," coercively implying that Bloom's uncooperativeness would be held against him in the future. I thus conclude as a matter of law that Vance Smith further implicated the Respondent in violations of Section 8(a)(1) when he both questioned Bloom about Pech's union activities and motivations and when he implicitly threatened Bloom for his failure to be forthcoming on those subjects.

meanor when he delivered it, his explanation was not corroborated by any independent testimony concerning Pech's alleged paper-snatching the previous day.

²¹ I would rely on Bloom's recollection of the May 19 date as recorded in an affidavit he gave to a Board agent on June 5, roughly 10 days prior to the June 15 election.

²² 269 NLRB at 1177.

²³ Thus, the *Sunnyvale* majority declared that "an important additional purpose of the Board's decision in *Rossmore House* was to signal disapproval of a per se approach to allegedly unlawful interrogations in general, and to return to a case-by-case analysis which takes into account the circumstances surrounding an alleged interrogation and that does not ignore the reality of the workplace." 277 NLRB at 1217.

¹⁹ In crediting Pech over Vance Smith, I note further that Reginald Smith candidly described his younger brother, Vance, as a "hot-head," with a widely known tendency to make abusive or belittling remarks to company employees.

²⁰ Vance Smith admittedly had a conversation with Bloom about Pech, but he denied that it had anything to do with Pech's union activities. He recalled instead that his questioning of Bloom concerned only an alleged incident the previous day wherein Pech had supposedly snatched some paperwork from a dispatcher. In rejecting this explanation, I note that, apart from Vance's unpersuasive de-

2. Alleged interrogations by Castillo and/or by
"another consultant"

Paragraph 8 of the complaint alleges that "[o]n or about May 17," labor relations consultant Castillo "and another consultant [sic] whose name is unknown to the General Counsel, but is well known to the Respondent, interrogated an employee regarding union activity." This count relies again on the testimony of former employee Bloom, which, although somewhat generalized in character, and uncertain as to timing, stands uncontradicted on the record. Relying on the substance of Bloom's testimony in this regard, I find as follows: In the first few weeks of May, when Castillo was assisting the Respondent's preelection campaign efforts, Castillo, sometimes in the company of another woman (who, I find, was actually Company Bookkeeper Willis),²⁴ would regularly buttonhole Bloom and seek to engage him in impromptu discussions concerning the Union. Typically, these approaches would begin with a query as to what Bloom thought about the Union or how he intended to vote. Typically, Bloom would evade these inquiries by replying that he "like[d] to hear both sides." Sometimes, Castillo and/or Willis would try to keep the conversation going by asking if Bloom had any "questions."

Bloom's uncontradicted descriptions establish that Castillo and/or Willis did, in fact, repeatedly question him about his union sympathies and voting intentions. While one such inquiry might be dismissed as involving merely a noncoercive "conversation-opener,"²⁵ I find that such repeated inquiries, directed at an employee whose union sympathies were apparently unknown to the questioners, were unlawfully coercive, and violated Section 8(a)(1).

III. ALLEGED UNLAWFUL DISMISSAL OF MUÑOZ;
THE DETAILS

A. Background

Joaquin Muñoz was originally hired by the Respondent in March 1992 as an ambulance attendant. However, for some time before the election campaign began, he had assumed more-or-less regular duties as an emergency vehicle dispatcher in an office inside the Crenshaw headquarters. It appears from Reginald Smith's testimony that Muñoz' assignment to dispatching duties was linked to the Respondent's wish to keep Muñoz off the streets and out of harm's way after he had suffered a gunshot wound under uncertain circumstances and had undergone a week's hospitalization and a more extended convalescence. (The Respondent had also previously manifested a similar willingness to accommodate Muñoz when he had been unable to appear for work for other reasons, including an incarceration and a family medical emergency.)²⁶

²⁴Bloom assumed that the other woman involved in these incidents was an outside consultant, like Castillo herself. (The complaint appears to have embraced Bloom's assumption.) In fact, I find from Reginald Smith's testimony that Company Bookkeeper Willis functioned as Castillo's in-house liaison and assistant during Castillo's visits to the facility, and, therefore, that Bloom must have been referring, in fact, to Willis, when he spoke of the "other consultant."

²⁵Cf. *Rossmore House*, supra, and *Sunnyvale Medical Clinic*, supra.

²⁶Although the timing and surrounding circumstances are unclear, the Respondent admittedly had held Muñoz' job for him while he

There is no evidence that anyone had asked Muñoz during the preelection campaign either to oppose the Union or to support it, and he admittedly had kept to himself any thoughts he may have had regarding union representation. In fact, on this record, it appears that Muñoz had become something of a "forgotten man" during the campaign, both to the Respondent and to the Union.²⁷ All this changed on the morning of the election, however, as I describe next.

B. Events on June 15, Election Day²⁸

1. Morning

When Muñoz began his dispatching shift on the morning of Thursday, June 15, his fellow dispatcher, Percy Simpson, who was an outspoken opponent of the Union, told Muñoz that the Company had not included Muñoz' name on the voting eligibility list but that Simpson would ask Chris Jordan, the operations manager, if Muñoz could be allowed to vote anyway, because the Company "need[ed]" Muñoz' vote.²⁹ Simpson then went into Jordan's office, told him that Muñoz was a likely voter against the Union, and asked him why the company hadn't included Muñoz on the eligibility list. Jordan said that the omission was a mistake, and that Simpson should advise Muñoz he could vote. Simpson then returned to Muñoz and conveyed this message, adding that Muñoz should be sure to vote "No," because Simpson had "stuck his neck out" to get the Company to agree that Muñoz was eligible. Muñoz, in turn, assured Simpson that he would vote against the Union.

2. Afternoon

a. *The preliminary ballot count; the Respondent's reactions*

When Muñoz presented himself at the Crenshaw polling place after his lunchbreak, the Board agent, following standard procedures, challenged his ballot because his name was not on the eligibility list, but then permitted him to mark a ballot, which was then sealed in an envelope. Muñoz then re-

was in jail for an uncertain number of days. The Respondent had similarly accommodated Muñoz when he had taken a week from work to visit his hospitalized mother in Mexico.

²⁷A central indication of this is that the Respondent admittedly had neglected to include Muñoz' name on the required voting eligibility list it submitted to the Regional Director before the election, and the Union had not questioned this omission.

²⁸My findings as to the events on the morning of June 15 are based on Muñoz' own, essentially uncontradicted testimony, as supplemented by testimony of Operations Manager Jordan concerning his brief meeting with Simpson, *infra*. My findings concerning the afternoon and evening events borrow in part from uncontradicted features in Muñoz' accounts and in part from the harmonious supplementary accounts of both Jordan and Reginald Smith.

²⁹This reasonably implied that Simpson assumed that Muñoz would be a "No" voter, and I note that Muñoz admittedly said nothing at the time to disabuse Simpson of this assumption. In addition, I note that, although Simpson was not called to testify, Reginald Smith and Jordan both acknowledged to varying degrees that, before the election, Simpson had made clear to each of them his own opposition to the Union. Moreover, Jordan sketchily admitted that, shortly before the election, Simpson had advised Jordan of the likely voting intentions of many of the eligible voters—perhaps all of them—and had counted Muñoz as a "No" voter.

turned to his dispatching duties, still believing that his ballot—in fact, a “Yes” vote—would be kept secret even though segregated in a challenge envelope. He was soon to learn otherwise, however.

Sometime between 3:30 and 4 p.m., after the polls closed, the Board agent in charge of the election counted the unchallenged ballots in the presence of Company Attorney Klepetar and waiting Company Agents Reginald Smith and Jordan. (Crediting Reginald Smith, I find that union agents were not present at this point, having been delayed for reasons that are not clear but which perhaps relate to the fact that balloting was conducted not only at the Crenshaw headquarters, but also at the Hawthorne satellite base.) The Board agent announced that the Union’s nominal 29–28 victory margin was inconclusive because either or both of the two challenged ballots, if countable, could change the outcome. There followed a conference among the company officials and Klepetar during which they quickly persuaded themselves that Muñoz, believed by company agents to be a “No” voter,³⁰ was, indeed, eligible, and that his noninclusion on the eligibility list had traced from mere inadvertence. They further concluded that the other challenged voter, Rodriguez, was ineligible, because he had been hired after the eligibility cutoff date, and, therefore, that the challenge to his ballot was easily sustainable. Believing in the light of all this that Muñoz’ presumed “No” vote would be the only properly countable one, and, if counted, would result in a “tie” (meaning, practically, a union loss), the company agents decided they would stipulate to Muñoz’ voting eligibility (and to Rodriguez’ ineligibility). Dispatcher Simpson somehow became privy to these developments, including that Muñoz’ ballot would be counted, and that Rodriguez’ ballot would not be counted. And Simpson, himself confident that Muñoz had voted “No,” jubilantly began to chant, prematurely, “We won!”

Apparently while still waiting for the Union’s agents to arrive at the Crenshaw polling area, Klepetar advised the Board agent of the Respondent’s position that Muñoz was eligible and Rodriguez was not. The Board agent suggested that it might take a week, i.e., until “next Thursday,” before the Union might agree with the Respondent and arrangements might be made to open Muñoz’ sealed ballot. Company officials pressed for an earlier resolution, but it was apparently not until the next day that the Union agreed to stipulate to Muñoz’ eligibility, and to meet at the Regional Office the same day to sign the stipulation and observe the opening of Muñoz’ ballot.

b. Jordan meets with Muñoz and gets false assurance that Muñoz had voted “No”

At about 4 p.m., Jordan admittedly summoned Muñoz to his office. (Apparently, this occurred either while the events just described were about to conclude, or in their immediate aftermath.) Muñoz and Jordan have similar memories of the meeting,³¹ and from the harmonious features in their respective accounts, I find as follows: Jordan advised Muñoz of the current vote tally, and that Muñoz’ challenged ballot would

be decisive. Jordan then queried Muñoz in some manner as to how he had voted. (Although Jordan effectively conceded that he invited Muñoz to disclose how he had voted, he was vague as to how he had couched the invitation. If it mattered, I would find, relying on Muñoz, that Jordan told Muñoz that although he could not ask Muñoz how he had voted, Muñoz was free to tell him if he wished.) Responding to this invitation, Muñoz stated, falsely, that he had voted “No.” Jordan replied, in substance, that the Company had assumed that this was the case, and assured Muñoz that the Company would not resist the opening and counting of his ballot. Jordan also advised Muñoz, however, that the ballot-opening ceremonies might not occur until the following Thursday.

Jordan claimed from the witness stand that his only purpose in meeting with Muñoz was to let him know where things stood with the election. He did not explain, however, why Muñoz was singled out for such solicitude, and therefore his explanation has a hollow ring. Giving no weight to Jordan’s rationalization on this score, I infer from the timing and the surrounding circumstances that Jordan, probably dispatched by higher ups who wanted another peek at their hole card before committing themselves to stipulating to Muñoz’ voting eligibility, met with Muñoz precisely for the purpose of getting “confirmation” that Muñoz had, in fact, voted “No.”

Discussion and conclusions as to the legalities of this transaction: As previously noted, I permitted the General Counsel to amend the complaint at trial to allege that Jordan coercively interrogated “an employee” (i.e., Muñoz) on “June 20 [sic],” and unlawfully created the impression in the same transaction that the Respondent was engaging in “surveillance” of Muñoz’ voting intentions. While the amendment proved clearly to be in error insofar as it suggested that Jordan committed such misconduct on or about “June 20,”³² the incident itself was fully litigated. Accordingly, the discrepancy between date pleaded and date proved does not preclude deciding the legal merits of Jordan’s behavior. Addressing those merits, I regard the impression-of-surveillance theory of coercion as an unreasonably strained one in these particular circumstances,³³ and thus I reject it. But I have no trouble finding that when Jordan called Muñoz to his office and effectively asked him to disclose how he had voted, his inquiry coerced Muñoz in the exercise of a precious right under our statute—the right to keep his union sympathies in general, and his vote in particular, a secret

³² It is apparent from the General Counsel’s argument on brief that the “June 20” date identified in the General Counsel’s trial amendment was in error, and that this count is pinned, in fact, to Jordan’s postelection session with Muñoz on June 15.

³³ We are asked by the prosecution to suppose that, when Jordan told Muñoz that the company presumed he was a “No” voter, Muñoz would have reasonably inferred from this that company agents were “surveilling” employees’ union activities and voting intentions. But this supposition strikes me as an unreasonable one in the light of the undisputed events earlier that morning, in which Simpson had played an intermediary role between Muñoz and Jordan on the subject of Muñoz’ voting and his presumed voting intentions. Thus, in the known circumstances, it would have been decidedly irrational of Muñoz to have ignored Simpson as the obvious source for Jordan’s postelection statement that Muñoz was presumed to be a “No” voter, and to have somehow inferred, instead, that the Company had relied on some form of clandestine spying to glean this information.

³⁰ By this point, Reginald Smith had admittedly been told by Jordan that Simpson had told Jordan that Muñoz was a “No” voter.

³¹ They disagree as to whether or not dispatcher Simpson was present. I see no need to decide this point.

from his employer. Thus, I conclude as a matter of law that Jordan's questioning of Muñoz violated Section 8(a)(1).

As we shall see, the fact that Muñoz lied to Jordan about how he had voted loomed large not only in Muñoz' subsequent judgment that he could not remain in the Respondent's employ, but also in Reginald Smith's subsequent doubts about Muñoz' suitability for retention as a dispatcher. And because Muñoz' having lied seems to explain much about the subsequent behavior of all concerned parties, I judge it worthwhile to make supplementary comment about the transaction that resulted in Muñoz' fateful lie.

First, my conclusion that Jordan unlawfully questioned Muñoz is not altered by the fact that Jordan did not use a grammatically interrogative form to elicit a reply from Muñoz, but instead simply declared to Muñoz that he could disclose how he voted if he wished, and then waited for a reply. Jordan's use of this "indirect" device for getting information hardly rendered Muñoz' reply a "voluntary" one, for it still put Muñoz in the position of risking his employer's displeasure if he were to fail to respond. Moreover, as we know from our institutional experience with such familiar situations, when an employer unlawfully puts an employee who secretly favors union representation on the spot by inquiring about his or her union sympathies or activities, the employee, feeling obliged to reply, will often reply falsely, as Muñoz did, out of fear that disclosing the truth to the employer will impair the employee's job status, tenure, or opportunities for promotion. Neither does it affect my judgment in this instance that Jordan may have assumed when questioning Muñoz that the eventual disclosure of Muñoz' vote was inevitable. Muñoz apparently had not yet persuaded himself of this inevitability; otherwise we can assume he would have replied truthfully, no matter how uncomfortable such a disclosure might have been. And Muñoz' apparently desperate but understandable attempt to retain favor with his employer by replying falsely to Jordan's inquiry merely serves to underscore why our statute proscribes such inquiries by employers in the first place—they have a strong tendency to make employees fearful about exercising their rights to form, join, or assist labor organizations.

3. Evening

When Muñoz got home that evening, he called the Union's agent, Cram, and questioned Cram about where things stood regarding his sealed ballot. In this process, he somehow conveyed to Cram that he was thinking about quitting in the event his ballot were unsealed. Cram, apparently sensing from this that Muñoz was a "Yes" vote, sought confirmation by asking Muñoz elliptically if Ralph Smith would be "angry" about how he had voted. Muñoz confirmed that this would indeed be the case. Cram offered vague assurances that the Union would do what it could to avoid disclosure of Muñoz' ballot, but did not explain how this could be accomplished. He also urged Muñoz not to quit, no matter what happened.

C. Events on June 16

1. At work

Relying initially on Muñoz' undisputed and circumstantially probable account, I find as follows: At noon on Friday, June 16, Muñoz called Cram again, and this time learned that

the Union and the Respondent had now agreed to meet on the following "Thursday" with the Board agent to unseal Muñoz' ballot. (As detailed below, the meeting of the parties for this purpose actually took place that same afternoon, possibly as a result of a conference among the parties and the Board agent which occurred after Muñoz' noontime call to Cram.) Muñoz again told Cram that he planned to quit in that event. Cram cautioned Muñoz not to quit, advising instead that Muñoz should take a few days off and let the dust settle, then return to work.

Cram's confirmation that Muñoz' ballot would be opened could be expected to have been deeply upsetting to Muñoz. We are not required to speculate about Muñoz' likely mood, however, for there is undisputed evidence detailed below—in the form of tape recordings of a series of conversations on the afternoon of June 16 between Muñoz at his dispatcher's phone and other persons—which clearly shows that Muñoz at that point was not only frantic about the prospect of the unsealing of his ballot, but clearly had concluded that he had no option in the circumstances but to quit.³⁴

Thus, in the first of his tape-recorded conversations that afternoon, Muñoz called a friend, "Diane," at her own job, and advised her,

[I]'s going through . . . I have no choice anymore and . . . I need you to find a lawyer to put a lawsuit on this. I'm not coming back to work anymore . . . I don't want to fight 'em anymore for withholding it. I want to sue those people for disclosing my name and it's stressing me out . . . And for me having to leave, 'cause this is it. I can't ever come back.

Also, in the course of an official call with a fellow employee, "Matt," Muñoz declared that he would be coming to the satellite base in Hawthorne "to give my farewells to everyone." When Matt expressed disbelief, Muñoz replied, "Dude, I'm not lying. I can't stop what's going to happen and I can't be around for it." Matt then counseled, "Don't turn in your resignation yet." Muñoz replied, "Oh, No, No, No, No. I'm not going out like that."³⁵

Moreover, during a separate conversation with "Christina," another coworker, Muñoz revealed not just his flawed understanding of the current status of the election but that he had unique knowledge concerning the outcome. Thus, he advised Christina (erroneously) that the decisive, sealed ballot would be opened up on "Thursday," at which time "You guys are gonna find out who won." Christina then asked, "They [presumably referring to the company] don't know if

³⁴It also deserves immediate note, however, that Muñoz' routinely recorded statements on the dispatcher's phone, *infra*, were not known to the Respondent at any time before June 26, the date when the Respondent asserts that it reached the judgment that Muñoz had quit and thus declared in a telegram to him that he had "abandoned" his job. Indeed, it was apparently not until the Respondent began preparing for trial some 7 months later that someone decided to review the Company's dispatching tapes, and then discovered unequivocal evidence that, as of June 16, Muñoz subjectively intended not to return to work.

³⁵Muñoz acknowledged during examination from the bench that in uttering these final words he had not swerved from his belief that he could not remain working for the Respondent, and would have to "go out," but intended his final remarks to mean only that he would not "go out" by means of turning-in a formal resignation.

that one vote is for it or against it?" Muñoz replied, tantalizingly, "There's only one person that knows . . . the person that voted . . . and you guys are gonna be surprised." Picking up on this, Christina asked, "Really, you know already, huh?" Muñoz replied, "I absolutely know." Christina then asked, "Who's the vote for?" Muñoz replied, "I can't say, Christina, but I can only say it was nice working with all you guys." When Christina tried to pursue what Muñoz meant by these apparent farewell remarks, Muñoz said he couldn't talk further, but repeated, "[I]f I don't get to see you, goodbye and I'll see you around[.]" adding that he was "absolutely dead serious."

2. At the Regional Office

Muñoz clearly still believed during the above-described conversations on the afternoon of June 16 that the formalities of ballot opening would not take place until the following Thursday. In fact, however, the Respondent and the Union—each believing that it had Muñoz' vote—had agreed in the meantime to accelerate the process by meeting in the Board's Regional Office the same afternoon to sign a stipulation and open Muñoz' sealed ballot.

The meeting at the Board office began at about 4:30 p.m. and was attended by Cram for the Union, and by Reginald Smith, Jordan, and Attorney Klepetar for the Respondent. From Reginald Smith's undisputed account, I find as follows: The parties all signed a stipulation that Muñoz was an eligible voter and that his ballot should be unsealed and counted, but that Rodriguez was not eligible and his ballot should remain sealed. Muñoz' ballot was then unsealed and the company agents were, to say the least, "surprised" by Muñoz' "Yes" vote. Soon thereafter, Cram left the room briefly, then returned and asked to speak to Attorney Klepetar alone. After huddling with Cram, Klepetar reported back to Reginald Smith and Jordan that Cram had said that Muñoz feared for his life, that he would soon be taking a couple of days off, and that the Respondent could "anticipate that Muñoz would then resign." Reginald Smith and Jordan reacted with resentment that Muñoz would say he was afraid for his life, and they worried aloud that such statements left the Company in a position where it might be held liable for anything that might happen to Muñoz in the future.

3. Back at work

Muñoz was scheduled to work until 7 p.m. that day, but left at 6 p.m. when his night-shift counterpart arrived. He then went to the Hawthorne satellite base, where he learned for the first time from coworkers that his ballot had already been opened, and, accordingly, that the Union's election victory was now certain. Although not conceding that this was his purpose in visiting the Hawthorne base, Muñoz squirmingly admitted that he told his coworkers there that he was "thinking about quitting." However, given his tape-recorded statements earlier that afternoon, I doubt that he used any such tentative terms to describe his intentions when he spoke to his colleagues at Hawthorne; rather, I find that he went to the Hawthorne base precisely for the purpose of saying his unconditional goodbyes. Again, however, it deserves note that company agents were unaware that Muñoz had so declared his intentions to fellow workers. Rather, to the extent they believed that Muñoz would not be coming back,

they were relying on Klepetar's report of what Cram had said on that subject.

D. Communications Between and Among Key Players from June 18–21

1. Introduction

After departing on Friday afternoon, Muñoz was not due to return to work until the following Monday, June 19.³⁶ In fact, he never returned, but, as detailed below, in the period June 18–21, he had several telephone contacts with various company agents relating to his status and intentions. In addition, on or about June 20 or 21, Muñoz retained the Union's attorney, Sally LaMacchia, to serve as his own counsel, and La Macchia spoke to Reginald Smith on June 21, prior to Muñoz' final telephone contact with Reginald Smith the same day.

2. June 18 call in to dispatcher Meyers

On Sunday, June 18, at about 9:30 p.m., Muñoz called the dispatcher on duty, Emily Meyers, and falsely told her that he faced a family emergency possibly requiring him to leave town, and which would prevent him from coming in the next day, but that he would let his supervisor, Jordan, know later if he needed additional days off. Meyers noted this on her dispatching log, and Jordan admittedly became aware of this log entry on the morning of June 19 but did nothing about it. Reginald Smith (called "Smith" in the balance of this decision) claimed to have been unaware until days later that Muñoz had called in on Sunday evening,³⁷ but he was admittedly aware that Muñoz, though scheduled to work on Monday, June 19, and Tuesday, June 20, did not report for work on either of those days. Moreover, both Jordan and Smith concede that Muñoz' absence on Monday and Tuesday had not caused the Respondent to take any affirmative steps to ascertain Muñoz' whereabouts or intentions, much less to take any action against him. Rather, they made rather a point of insisting during the trial that, in their eyes, Muñoz' status as an employee was unaffected by his 2-day absence.³⁸

³⁶ I rely on Muñoz' credible testimony that when he left work on Friday, June 16, he was not due to return until Monday, June 19. The Respondent, relying on a work schedule for June (R. Exh. 1), contends somewhat inconclusively that Muñoz was, in fact, scheduled to work on one of the intervening weekend days. However, Jordan acknowledged, in substance, that employees commonly engaged in shift trades after the schedule was posted, and thus, I place little weight on the work schedule posted at the beginning of June as evidence of Muñoz' actual schedule during the period in question.

³⁷ Were it necessary, I would discredit this claim. Jordan was admittedly aware that Muñoz had reported his intended absence to the dispatcher on Sunday night, and Jordan must have seen Muñoz' call-in as a fulfillment of Cram's June 16 prediction (as reported to Jordan and Smith on June 16 by Klepetar) that Muñoz would probably take a couple of days off and would not return thereafter. In the circumstances, and given Smith's admitted belief, admittedly shared with Jordan, that Muñoz' situation was a highly "sensitive" one, I judge it highly unlikely that Jordan would not have immediately reported to Smith the news of Muñoz' Sunday night call-in to the dispatcher.

³⁸ Apparently seeking to explain their seeming equanimity in the face of Muñoz' absence for 2 days, both Jordan and Reginald Smith emphasized that it is the Respondent's policy to allow an employee

Continued

3. June 20 call in to Jordan

On the afternoon of Tuesday, July 20, Muñoz called the Respondent's Crenshaw offices and asked to speak to Jordan. When Jordan learned that Muñoz was waiting on the line, he so advised Smith, who then listened in surreptitiously on another line after Jordan picked up Muñoz' call. (Jordan and Smith each admittedly suspected that Muñoz was trying by this call to "set-up" the Company in some uncertain manner, and Smith offers this shared suspicion—and the "sensitive" nature of any issues relating to Muñoz' status—to explain why they both found it advisable to have Smith eavesdrop on the conversation.) Jordan and Smith gave essentially similar accounts of the ensuing conversation between Jordan and Muñoz, and, in the end, their common accounts are roughly similar to Muñoz' own version, although each of the three versions seems to have been tailored in self-serving ways. Taking all the known circumstances into account, I find, preliminarily, that both Muñoz and Jordan, each suspicious of the other's intentions, and each jockeying for superior position, were both being cautious in their choice of words and in their evasions of the other's probings, and that they were, in effect, fencing with one another.

With this overall interpretation of the motivational setting as my guide in resolving discrepancies among the accounts, I find as follows, and I reject any given version to the extent it contradicts these findings: Muñoz opened by asking what his "schedule" was.³⁹ Jordan did not reply directly, but rather, asked Muñoz why he was asking about the schedule. Muñoz asked again, "What's my schedule?" And Jordan again dodged with another query as to Muñoz' reason for asking, this time adding that the schedule had not "changed." (Smith, conceding from the witness stand that Jordan refused to reply directly to Muñoz' inquiries about the "schedule," further admitted that "Mr. Muñoz was being

to be absent for up to 3 days of scheduled work without calling in before he or she may be disciplined or terminated. Assuming, without deciding, that the Respondent has such a policy, I doubt that it fully accounts for the Respondent's relative indifference to Muñoz' absence on June 19 and 20. Rather, it further appears from their testimony that both Jordan and Reginald Smith saw Muñoz' absence on those days as consistent with Union Agent Cram's June 16 prediction, as transmitted to the Company via Attorney Klepetar, that Muñoz would probably take a couple of days off and would not return thereafter. And I infer that their belief that Muñoz would soon be voluntarily resigning—and their evident satisfaction with this predicted resolution—had as much to do with their willingness to "overlook" Muñoz' absence as did any company "policy" respecting absenteeism.

³⁹ Muñoz testified that he opened the conversation by declaring that he was "ready to return," and then asked what his schedule was. Jordan and Smith denied that Muñoz made any overt declaration of his readiness to return, but simply asked about his schedule. Considering that Muñoz had been unequivocal in telling friends on June 16 that he would not return (but at the same time, did not intend to "go out" by "resigning") and lacking any plausible evidence that he had undergone a wholesale change of heart in the meantime, I doubt that he made any direct statement that he was "ready to return." Rather, I infer that his inquiry about the "schedule" represented an attempt on his part to determine if the Respondent had *already* taken the choice from him by removing him from the schedule. I judge, nevertheless, that even if Muñoz only asked about his schedule, this was enough to signal to Jordan and Smith that Muñoz was asserting an interest in his job, even though they reasonably believed until then that Muñoz intended to resign.

evasive and vague, therefore, we were being evasive and vague.") Muñoz, plainly recognizing Jordan's evasions, said, "Don't f—k with me. What's my schedule." Jordan again asked why Muñoz was asking, but this time added that in any case, Muñoz' "union representative" had said that Muñoz had "resigned." Muñoz disputed this, but Jordan repeated that Muñoz' union representative had said otherwise and that Muñoz should take his queries to the Union. Muñoz, getting no straight answer to his question about the "schedule" and his position, if any, on it, and believing from Jordan's final remarks that the Company was already treating him as having quit, hung up the phone in frustration.

4. June 21: LaMacchia's and Muñoz' successive conversations with Smith

a. LaMacchia-Smith

Sometime later, perhaps not until the morning of June 21, Muñoz got in touch with the Union and reported his June 20 conversation with Jordan. He eventually conferred directly with the Union's staff attorney, LaMacchia, and authorized her to represent him in further dealings with the Respondent. LaMacchia then called the Respondent's office and left a message for Jordan inviting a return call. While she waited for the callback, she prepared a letter to Jordan summarizing her understanding of the recent facts. Before finishing this letter, however, Smith returned her call in the late afternoon, and she and Smith had a discussion concerning Muñoz' status.

Both LaMacchia and Smith testified similarly concerning the main elements of their June 21 discussion, but each recalled details the other did not mention. From the harmonious and undisputed features in each of their accounts, I find that the essence of their conversation was as follows: LaMacchia asked Smith if he would take Muñoz back. Smith replied that Muñoz' "union representative," Cram, had told Company Attorney Klepetar on June 16 that Muñoz intended to resign because he feared for his life, and, therefore, as far as Smith was concerned, Muñoz had "abandoned his job." LaMacchia argued that Cram had no authority to convey any such message, and that, in fact, Muñoz wanted to keep his job. Smith, apparently unpersuaded, repeated that Cram, as Muñoz' union representative, had said he was resigning, and that, consistent with Cram's statement, Muñoz had "abandoned his job" by not showing up for work for the past 2 days. When LaMacchia again declared that this wasn't the case and that Muñoz wanted his job, Smith took a different tack, saying that before he might reconsider Muñoz' status he "had some issues that [he] needed to address with Joaquin." He then voiced the fear that the Company might be held responsible if "something" were to "happen" to Muñoz on or off the job, and suggested further in this regard that perhaps Muñoz might be targeted for violence by one of the many antiunion employees who might be resentful that Muñoz had cast the decisive vote for the Union.⁴⁰ Smith fur-

⁴⁰ Smith recalled it this way:

I very passionately related to her [LaMacchia] that Mr. Muñoz had had some life threatening altercations in the past,* and that if he's put on the airways or out in the street that he's in fear of his life, if anything were to happen to [him] in retaliation for the 50 percent of the staff that expressed their desire not to have a union, what could I really do to protect him if something did

ther raised the "issue" of Muñoz' "trustworthiness" in the light of his having lied to Jordan about how he had voted, and suggested further in this regard that this issue would alone make it difficult to retain Muñoz in his current "position" as a dispatcher.⁴¹ LaMacchia, sensing from these remarks that Smith was backing away from his original position that Muñoz had already "abandoned his job," urged Smith to discuss these "issues" with Muñoz directly, and to "keep an open mind" pending such a parley. Smith agreed that he would do so, but said, in substance, that it was up to Muñoz to make the next move.⁴²

happen and I was concerned as to whether or not because his confidentiality had been exposed as to whether or not he would try to file a retaliatory workman's comp claim against us

*This was admittedly a reference to the fact, previously noted, that Muñoz had been a shooting victim. Moreover, as Smith elaborated from the witness stand, he believed from the shooting incident and from the fact of Muñoz' previous incarceration that Muñoz' overall lifestyle left him particularly vulnerable to injuries for which, regardless of the identity of the perpetrator or the circumstances, he might hold the Company responsible.

⁴¹ Thus, Smith testified,

We went further into it to deal with the issue of trustworthiness and my feelings with regard to what Joaquin's position was with regard to the company, seeing that he chose to lie for no good reason, no one put him in a position that he had to lie.

JUDGE NELSON: What lie were you referring to?

THE WITNESS: With regard to his vote.

(Smith later appeared to try to obscure this answer through embellishments and digressions relating to other features of Muñoz' behavior that purportedly aroused his own mistrust. Nevertheless, I regard his just-quoted reply as his most candid and least calculated answer to the central question, "What lie were you referring to?")

Moreover, Smith recalled that,

I did express my concerns to her that Joaquin's position in dispatch was a tenuous one for the company because of the issue of trust at this particular point. We discussed money, if money were given to him whether or not I would be able to believe if the money turned up missing that he didn't take it and the sensitive nature of the control that he had in dispatch that I needed his complete trust in.

⁴² Smith testified that he told LaMacchia that the "front door is open" to Muñoz, and explained that he intended by this to mean that Muñoz still had his job and only had to walk through the door to claim it. LaMacchia disputed that Smith made any such unequivocally positive statement in referring to Muñoz' status in the eyes of the Company at the moment; rather, she testified that the only indication Smith gave that the Company might be willing to waver from its current position that Muñoz had "abandoned his job" was in Smith's ultimate agreement to talk again with Muñoz and to keep an "open mind." On this point, I would credit LaMacchia, who impressed me as doing her best to recall without overstatement how the conversation went. Smith, by contrast, although in many other respects an impressively conscientious and thoughtful witness, seemed here to be imposing a certain spin on his recollection of the conversation, one designed to fit with the Respondent's current litigation position that Muñoz alone bears all responsibility for never reappearing for work after June 16. Moreover, simply as a matter of probability in the light of known surrounding circumstances, I could not find that any "door-is-open" remark Smith may have made to LaMacchia was intended by him—or understood by LaMacchia—as an unconditional declaration that Muñoz would be permitted to return to his job as a dispatcher. Rather, considering especially that Smith admittedly had voiced concern about company liability if anything should "happen" to Muñoz, and had raised the

LaMacchia then called Muñoz and brought him up-to-date, informing him in the process that Smith was willing to take a call from Muñoz, but warning him also that Smith still had unresolved concerns about Muñoz' trustworthiness and his suitability to continue as a dispatcher.

b. Muñoz-Smith conversation; the differing versions

Within minutes after hearing from LaMacchia, Muñoz called Smith directly,⁴³ and they had a conversation which each recalled quite differently, even though, as I show next, they agree on many of its elements.

Muñoz' version of the conversation suggests that it was relatively brief, even perfunctory. His version is roughly as follows: He opened by telling Smith that he had been advised by the Union's lawyer to ask for his job back. Smith responded by saying that the Company could no longer "trust" him, because he was a "liar," who had cost the Company "four thousand dollars" in legal fees to deal with his challenged ballot. Smith added that a lot of employees were mad at Muñoz, and the Company didn't want to be blamed if he got hurt. In the same vein Smith also raised the matter of his own ability to trust Muñoz if "receipts were missing." At some uncertain point (as Muñoz belatedly acknowledged), Muñoz told Smith that he was prepared to return the next day at "10 a.m.," whereupon Smith replied that Muñoz had "abandoned" his job.⁴⁴ This reply, says Muñoz, caused him to believe that the Respondent was still maintaining that he had no job, and thus, that any further attempt on his part to pursue reinstatement would be a futility. And this conclusion, says Muñoz, caused him not to return the next day, nor thereafter.

Smith's version, largely set forth in a single narration, is more detailed, and I will find that in most respects it is a more contextually plausible account than Muñoz' in the light of known antecedent events. Smith's spontaneous narrative recollection, parts of which I have highlighted for later reference, is as follows:

Well, he [Muñoz] started out by saying, "They told me to give you a call." And I'm like, "Well, Joaquin,

issue of Muñoz' "trustworthiness" as yet another potential obstacle to his returning—especially to his job as a dispatcher—I find that any such "open-door" remark was simply intended by Smith to convey his willingness to accept a call from Muñoz before deciding whether or not to accept him back, and, if so, to what position.

⁴³ I credit Smith's specific recollection that Muñoz' followup call came within 10 minutes or so of the conclusion of his discussion with LaMacchia. I further find, consistent with Smith's account, that when Smith took Muñoz' call, he did not have in hand a set of written, confirmatory messages from LaMacchia (R. Exh. 2) which she faxed to Smith still later in the day, at about 5:30 p.m., and which Smith did not see until the following morning, June 22.

⁴⁴ Muñoz did not spontaneously report this latter exchange (more precisely, his offer to return the next morning) when questioned during the General Counsel's case-in-chief. Rather, he said only that Smith had declared that Muñoz had "abandoned" his job. It was only when recalled to the witness stand for rebuttal purposes, after Smith had testified, *inter alia*, that Muñoz had said he would return at 10 a.m. the next day, that Muñoz conceded this, saying, however, that Smith greeted this offer with the statement that he had abandoned his job. What remains unclear from Muñoz' account as thus revised is *when* in the course of the conversation Muñoz said he would return at 10 a.m. the next day.

what's up? What's going on?" And he said, "Well, what's my schedule? What's going on with it?" And I said, "Now, I don't know what this issue with scheduling is. Your schedule hasn't changed. It was my understanding that Ms. LaMacchia spoke with you, so you certainly know where I am." And he got a little bit hostile and saying, you know, "Just cut the crap and let's get down to it." And I said, "Well, Joaquin, your union representative indicated that you resigned. He also indicated you weren't coming to work on two days, Monday and Tuesday, and you didn't. So why shouldn't I regard what he said as the truth?" [Muñoz then said,] "I never resigned. I never resigned." And I said, "Well, then why haven't you come to work?" And he paused for a minute and he said, "Well, I had family problems." And I said, "Well, Joaquin, how do you plan to have family problems?" And he said, "What are you talking about?" I said, "Well, your union representative let me know on Friday before Monday and Tuesday ever got here that you were not going to be showing up for work. So how could he know on Friday that you were going to have family problems on Monday and Tuesday?" And there was a long pause and then he said, "Well, I called in on Sunday to say that I wasn't coming in." And I said, "Oh, you did?" And, you know, I told him, I said, "Well, I wasn't aware of that." I said, "Okay. All right. I accept that. But nevertheless, it doesn't undo my problem that I have with your union representative knowing more about what you're planning to do regarding your employment than your employer does. How could he know before the company knew?" And he got angry with me, saying, "Well, you know, I had family problems and that's just it. I'm calling to find out about my schedule right now." I said, "Wait a minute, Joaquin. We can't just run past what's happened here. The issue is your union representative has represented something that has happened and he indicated that you were going to resign, now you're calling me about a schedule that hasn't changed. What is going on?" [Then Muñoz said,] "Well, I don't know what you guys are doing. You're jerking me around," Joaquin is saying, "And I'm sick of this. Either I'm going to work or not." And I said, "Well, Joaquin, you know your schedule hasn't changed, I know the schedule hasn't changed. The front door is open. You have to make the decision whether or not you're coming through it." [Muñoz replied,] "Well, I'm not coming down there for me to walk through the door so you can fire me." And I said, "Well, Joaquin, that's a decision that you have to make." [Then Muñoz said,] "Well, Ms. LaMacchia already told me you don't trust me and all." And I said, "Well, now, Joaquin, let's take into consideration everything that's happened." And without going back through the whole thing again, I related the same things to him that I related to Ms. LaMacchia and when I got to the issue of money and dispatch and what not, he blew a fuse and started hollering and screaming at me and I just let him blow off his steam and we got back around to he had the ball in his hand, if he wanted his job, he needed to come in and claim it, he knows his schedule and there's nothing else I can say. [Then

Muñoz said,] "Well, you're just setting me up, you want to get me down there and embarrass me and let me walk through the door so you can fire me." And I said, "Well, Joaquin, if that's the position you're taking, you're putting your job in jeopardy by not coming here to claim it. Now, if you come to work, the minute you step over the threshold *then the ball is in my court and if I fire you then I have to take responsibility for that.* If you don't show up for work, you know three days, no call, no show, you're out of here. Now, you make the decision on what you're going to do." And he was quiet for a minute. He made mention again of the schedule and I said, "Joaquin, I'm not going to go into that with you. Your schedule has not changed and there's really not anything else that I can say to you. *If you come to work, we'll deal with what your position is going to be from there. If you don't come to work, you know I'm going to consider that you abandoned your job.*" And he told me I was full of BS and hung up and I never talked to him again.

c. *Supplemental and concluding findings regarding the Muñoz-Smith conversation*

As I have indicated, what Smith recalled here of the conversation strikes me in most respects as a more plausible version than the disjointed and seemingly truncated one offered by Muñoz. Indeed, I judge that Smith's version comes far closer than Muñoz' does to capturing the nature and tone of most of the exchanges. Nevertheless, as I discuss next, I do not accept Smith's account as set forth above as a complete rendition, much less as a completely reliable one insofar as it may suggest that Muñoz' failure to appear for work thereafter evidenced his "voluntary" decision to "abandon his job."

First, were it important to the outcome, I would credit Muñoz when he recalls that Smith made a rather specific reference to Muñoz' having "lied" about how he had voted, and complained in that connection that Muñoz' lie had cost the Company a lot of money in legal fees. I reason that Smith admittedly made much of Muñoz' lie about his vote in his conversation with LaMacchia, and likewise admittedly told her that the "issue" of Muñoz' trustworthiness was one that he needed to address directly with Muñoz. Accordingly, even though Smith's account contains no direct admission that he made a reference to Muñoz' "lie," or to the legal "costs" that Muñoz' lie had allegedly caused the Company to incur, I deem it probable that he did so, using the terms that Muñoz recalled.

Second, for essentially similar reasons of probability, I find, consistent with Muñoz' account, that Smith effectively warned Muñoz that if he returned he might "get hurt," and specifically cited the Company's fear of being held responsible for any such injury as an independent basis for questioning Muñoz' suitability for retention. And here, a set of supplemental points deserve emphasis: We know from Smith's various admissions noted above and below that he feared that antiunion employees might seek violent revenge against Muñoz for his key vote for the Union; thus, it is clearly probable that he communicated this fear of retaliation by antiunion workers to Muñoz, even though Muñoz did not recall him being that specific. Beyond that, it must be ob-

served that when Smith invoked such a fear to Muñoz as a basis for questioning his suitability for retention, Muñoz would reasonably interpret this as a "prediction"—indeed a threat—that his own safety would be at risk if he were to return; moreover, a threat which Smith seemed to be ratifying by interposing it as a basis for his own doubt about permitting Muñoz to return.

Third, Smith's version as quoted, *supra*, omits an element he added later in his testimony—that Muñoz had said at some point in the conversation that he intended to return the next day at "10:00." However, in these supplemental recollections, Smith never clarified when it was during the conversation that Muñoz said this and, as previously noted, Muñoz own acknowledgment that he made such a statement is likewise vague as to the timing. With the record in this posture, I have no basis for doubting that Muñoz made some such reference, but I deem it likely that Muñoz' offer to return the next day occurred near the beginning of the conversation, and in no sense reflected the "final understanding" of the parties when they concluded the conversation. I reason that both of their versions could plausibly accommodate the notion that Muñoz said early on that he was prepared to return the next morning, and that Smith was the party who deflected this offer by insisting that other "issues" then prominent in his mind be addressed first—most notably, the issue of Muñoz' "trustworthiness" in the light of his "lie" about his vote, and the related issue of which "position" Muñoz might be allowed to occupy in the light of his perceived untrustworthiness. By contrast, it would be difficult to imagine, especially under Smith's version, how Muñoz could have made some such offer at the end of their conversation, by which point, from Smith's account, Muñoz was becoming increasingly irascible and suspicious, and therefore seemingly in no mood to promise to come in the next day, absent an assurance from Smith (which Smith pointedly withheld) that he would be allowed to keep his job. Indeed, Smith's version clearly suggests that Smith, at least, was unwilling at the end stage to assure Muñoz that he would *not* be fired, much less that he would be allowed to keep his dispatching "position." Instead, as the highlighted portions of Smith's account, *supra*, clearly indicate, Smith refused to address either point unless Muñoz were first to show up *in person* to "claim his job." Considering all this, I conclude that any offer by Muñoz to return the next day was made early in the conversation, but became overshadowed by Smith's admitted determination to await Muñoz' physical appearance at the office before getting into any details of Muñoz' "schedule," or his particular future job assignment, if any.

Finally, and related to these latter observations, it deserves emphasis that Smith, on the afternoon of June 21, admittedly had "ambivalent feelings" regarding the matter of Muñoz' return to work; indeed, he admittedly had not decided *whether* Muñoz would be permitted to retain his job as a dispatcher and he admittedly communicated these same doubts to Muñoz. Thus, as previously noted, Smith recalled that in his conversation with LaMacchia,

I did express my concerns to her that Joaquin's position in dispatch was a tenuous one for the company because of the issue of trust at this particular time.

He further explained in this regard,

My mind was circling around how am I going to replace him in a position that's going to be fair to him and not put the company in a position where he couldn't [sic] do any more harm.⁴⁵ That's where my mind was.

And Smith admittedly communicated these doubts not only to LaMacchia, but to Muñoz in the final conversation. Thus, he testified:

[P]erhaps [it] would not end up with him back in dispatch, which I had discussed with Ms. LaMacchia, it may not be in the company's best interests to put him back into the dispatch office. *And I subsequently made the same statement to Joaquin.* So my mind was circling around all of these things where because of the individual that I knew him as at that moment had come into play, I was concerned about the company. [Emphasis added.]

In addition, Smith was asked by counsel for the General Counsel, "Was it your intention to place Joaquin somewhere other than dispatch?" And Smith replied, "I had not made that decision at any point. I indicated to Ms. LaMacchia *and to Joaquin* that I would deal with that when he came to work." (Emphasis added.)

E. Aftermath

The next morning, June 22, Muñoz did not appear, but Smith received and reviewed a letter from LaMacchia which she had actually transmitted at about 5:30 p.m. the previous day. LaMacchia had also included in the fax transmission as an attachment to her letter to Smith a copy of what she termed a "draft letter" addressed to Jordan, i.e., the one she had begun preparing on June 21 before being interrupted by Smith's return of her previous call to Jordan. Her covering letter to Smith implies—and I find, even though her own testimony is unclear on the point—that LaMacchia by then had received a report from Muñoz about his own conversation with Smith.⁴⁶ Among other things, LaMacchia stated in that letter,

⁴⁵This "any more harm" phrase plainly implies that Smith believed that Muñoz had already "harmed" the company somehow. But it remains uncertain from Smith's testimony exactly what it was that Muñoz did that "harmed" the Company, and it is equally uncertain what the supposed "harm" was. In context, it appears that Smith would have me find that Muñoz' lie about his vote was the misdeed Smith had in mind. But if so, it is hard to see how his lie alone could be said to have caused "harm" to the Company. (Are we to suppose that if Muñoz had actually voted "No," but then had told the Company that he had voted "Yes," that the Respondent, on discovering this lie after the opening of his sealed ballot, would have accused Muñoz of having "harmed the company" by his lie? The suggestion seems absurd in the known circumstances.) By contrast, it is far easier on the overall record to infer, as I do, that it was the decisive role Muñoz' vote played in occasioning the unwanted certification of the Union that was the "harm" Smith was referring to in this passage.

⁴⁶See R. Exh. 2, letter to Smith, third paragraph, second sentence, stating, "I am keenly aware of some of your concerns, expressed to me in our conversation, *and also to me by Joaquin* [sic] *following his conversation with you.*" (Emphasis added.)

It is now 4:45 p.m. and I have talked with Juakin [sic]. Apparently he has still not been fired, has not resigned, and has continued to express his desire to be included in the schedule and carry on his work at APT.

LaMacchia said further that she intended to meet in Los Angeles with Muñoz the next day (i.e., June 22) but that, "In the meantime, we seem to be at an impasse concerning [Joaquin]." Then, noting that she was "keenly aware of some of your concerns," LaMacchia said:

I would appreciate an opportunity to meet and discuss these concerns in grater [sic] depth than this format allows. For example, I understand you feel that [Joaquin's] trustworthiness has been placed into issue as a result of last weeks events. I request that you also consider his three and [a] half successful years in the service of APT when evaluating the facts.

I hope that my desire to meet and discuss [Joaquin's] future at APT can be accommodated. Thank you again for your time. I can be reached at my office directly or through voice mail, and, if the latter, will return your call as soon as possible. I look forward to hearing from you.

Smith did not reply to this final overture by LaMacchia. Rather, after reading it on the morning of June 22, Smith allowed 3 more full days to pass (the June 23, 24, and 25) during which Muñoz never crossed the threshold to the company premises, and then caused a telegram to be sent to Muñoz at 11:30 a.m. on June 26, which said, pertinently,

As of 10:00 a.m. 6/26/95 you have abandoned your job. Please return all company issued items immediately.

On the same date, June 26, the Respondent also separately dispatched a certified letter to Muñoz, advising him of his "COBRA" rights respecting continuation of medical benefits after termination of employment. These communications were clearly intended by the Respondent as formal declarations that Muñoz no longer had a job with the Respondent. (In this regard, Smith confirmed that employees are not requested to return equipment items they have been previously issued until they have been terminated.) Moreover, Smith explained the more than 3-day passage of time before the company treated Muñoz as a job-abandoner in terms of a company policy under which employees are not treated as terminated for no-shows until they have failed to appear for 3 successive scheduled days of work without calling in. Indeed, Smith eventually insisted that if Muñoz had presented himself for work at any point before the start of his scheduled shift at 10 a.m. on June 26, he would have been allowed to "claim his job." While it may be that Smith was being punctilious in thus observing such an alleged company policy, there remain grounds in the record for finding that, in fact, the Respondent had written off Muñoz as a job-abandoner as early as June 22. Thus, I find that someone in the Company had at least jumped the gun by transmitting a message to Muñoz via certified mail on June 22 requesting him to "return all items" listed on his "Personal Equipment Sign Off List."⁴⁷ And this, in turn, tends to contradict Smith's at-

⁴⁷ See G.C. Exh. 4, especially the envelope in which the quoted message was delivered to Muñoz, showing that it was originally

tempt to suggest that the Respondent would have felt itself bound to receive Muñoz back into the fold if only he had reported back to work at any time before 10 o'clock on the morning of June 26.

F. Concluding Analyses; Remedy

Some preliminary deadwood clearing is necessary to expose what I think is the principal legal issue presented by this case, namely: Did the Respondent, motivated at least in part by Muñoz' protected activity of having voted for the Union, take steps to interfere with Muñoz' right (as I shall find) to resume his job as dispatcher once he had indicated that he wanted to return? Thus, although the parties imply otherwise by the majority of their arguments on brief, I don't think this case turns in the end on whether Muñoz' departure from employment is best characterized as a "quit," or a "discharge." Neither do I believe that it would help much to illuminate the ultimate issue to decide such questions of characterization. For one thing, the record provides a reasonable basis for applying either label. Thus, on the one hand, it may favor the General Counsel's "discharge" claim that Jordan told Muñoz on June 20 that he had "abandoned" his job," and that the Respondent was admittedly the party who ultimately took the affirmative steps that formally perfected Muñoz' severance from his job for alleged "abandonment" (i.e., the June 26 telegram and the separate "COBRA rights" letter of the same date to Muñoz, supra). Similarly, but on the other hand, it may favor the Respondent's position that, as of June 16, Muñoz was himself clearly resigned to the view that he would have to leave the Company's employ, and that he never returned to work thereafter. But this is equally superficial because, even though the Respondent had good reason as of June 16 to believe (based on Attorney Klepetar's report of Cram's statement regarding Muñoz' intentions) that Muñoz was bent on never returning to work, the Respondent soon received ever clearer indications in the series of telephone calls on June 20-21 between and among Muñoz, Jordan, LaMacchia, and Smith that Muñoz wanted his job if the Company would have him. Admittedly, however, even this objection does not make it idle to characterize Muñoz' subsequent behavior as a "quit," for, as I have found, even after receiving an "invitation" of sorts on June 21 from Smith to appear and "claim his job" the next day, Muñoz nevertheless failed thereafter to cross the threshold for that purpose. Therefore, Muñoz could be said to have "quit" after June 21 in the sense of failing to respond to Smith's invitation, and thus consciously waiving the opportunity to fully test his status by actually reporting for work and waiting to see what the Respondent might do with him.

The sterility of the "quit/discharge" dichotomy is thus fairly obvious: Either label might be appropriate, but neither label contributes meaningfully to answering a more fundamental set of questions: Who had what rights and what du-

postmarked on June 22 on a postage machine admittedly used later by the Respondent to post a different certified letter to him (G.C. Exh. 5, dated June 26, setting forth Muñoz' "COBRA" rights). Moreover, my finding that G.C. Exh. 4 is authentic as to date of transmission and that an agent of the Respondent was its author is not altered by Reginald Smith's claim, however true, that such a transmission was highly irregular in terms of the way the Respondent normally does business.

ties under our statute at any given moment from June 20 onward? And it is by focusing on such questions that I reach these summary conclusions, which I explain further below: From June 20 onward, Muñoz had all the important rights on his side and the Respondent bore all the important duties; and the Respondent violated or defaulted on them, first by telling Muñoz and/or his attorney, in effect, that the "door" was "closed" to Muñoz because he had *already* "abandoned his job"; next, by imposing unlawfully discriminatory conditions on any reconsideration of this position.

My reasons for emphasizing June 20 as the appropriate starting date for analyzing the parties' respective rights and duties may also be obvious: Muñoz called Jordan on June 20 and plainly indicated by his question about the "schedule" that he wanted to know his job status in the eyes of his employer. And it's worth pausing to note that, at that point, Muñoz enjoyed no statutory "right" to be told that he still had his job, for if the Respondent, applying whatever absentee policy it may have had in a nondiscriminatory way, had by then decided to fire Muñoz for his absences to that point, that decision could hardly be faulted, particularly where the Respondent had been given good reason to believe from Attorney Klepetar's report of Cram's prediction on June 16 that Muñoz fully intended never to return. Put another way, the only duty the Respondent owed Muñoz under the Act when he called Jordan on June 20 with an inquiry about his status was to tell him the truth—more precisely, not to mislead him about his status or otherwise toy with him for unlawfully discriminatory reasons.

Clearly, however, Jordan's replies to Muñoz' inquiry were not merely "evasive and vague" as to Muñoz' status (as the eavesdropping Smith conceded), but they were essentially false insofar as they implied that he had already lost his job in the Respondent's eyes by "abandoning" it. That they were false statements cannot be disputed, for both Jordan and Smith now concede (indeed, they insist) that the Respondent had not, in fact, decided as of June 20 to terminate Muñoz or otherwise adversely change Muñoz' status from that which he previously enjoyed.⁴⁸ Accordingly, I conclude that not only did the Respondent owe a statutory duty in the circumstances not to mislead Muñoz about actual status as an employee, but violated that duty by doing just that, and by otherwise responding to Muñoz' inquiry with evasive and vague replies, seemingly calculated to shift to Muñoz and/or his "union representative" the onus for its purported (but in fact, nonexistent) decision to treat him as a job-abandoner.

Admittedly, by the conclusion of LaMacchia's June 21 conversation with Smith, the latter had given signs that he would reconsider the purported decision that Muñoz had already lost his job. But it is equally clear that Smith, admittedly in doubt about Muñoz' suitability for retention in the light of his lie about his vote, and his supposed vulnerability

to violence at the hands of antiunion employees because of his vote, communicated these doubts both to LaMacchia and to Muñoz himself. And again, it's worth returning to the question of who had what rights and what duties as of June 21. Clearly, by then, the Respondent had taken no steps to separate Muñoz from his job, and Muñoz had taken reasonable steps to signal his willingness to return to it. And seen that way, it follows that Muñoz had a plain statutory "right" to return, and that the Respondent had a corresponding duty to allow him to return, without additional conditions or other interference linked to any protected activity he had previously engaged in.

Again it is clear, however, that Smith defaulted in the Respondent's duty as it stood on June 21, for he interposed conditions on Muñoz' possible return that were plainly and inextricably linked to his protected act of having cast the ballot that brought the Union in.⁴⁹ Thus, he told both LaMacchia and Muñoz, in substance, that the price for any consideration of possible reinstatement of Muñoz to his job as a dispatcher would be that Muñoz must somehow prove to Smith's satisfaction that he was worthy of Smith's "trust" in the light of his having lied about his vote. And he further suggested that even if Muñoz were somehow able to satisfy this newly imposed condition, this might not be enough, given his purported fear that Muñoz' vote for the Union might make him the target of violence at the hands of employees who did not appreciate the Union's advent. Finally, although I have credited Smith that he did, in fact, invite Muñoz to walk through the door the next day, I repeat that he also quickly and pointedly refused Muñoz' request for assurance that he would not be fired once he crossed the threshold. Instead, he merely emphasized the tentative and conditional nature of his invitation by repeating that Muñoz must show up in person at the workplace before Smith might declare whether or not he would be allowed to work and, if so, in what capacity.

In the foregoing circumstances, the Respondent cannot be heard to say that Muñoz "quit" his job in any "voluntary" sense when the Respondent itself, violating statutory duties owed to Muñoz on and after June 20, treated him not as a current employee with unconditional rights to resume his position as a dispatcher, but rather, as a currently unemployed job supplicant, who must jump through more hoops before being given serious consideration for a job. Smith clearly

⁴⁸I recognize that Smith emphasized Muñoz' lie about his vote—and not his vote itself—as a basis for insisting that Muñoz must reestablish himself as a trustworthy employee before he might be returned to his dispatching job or any other job. I have already explained (*infra* fn. 45) why I cannot accept that the Muñoz "lie," alone, could adequately explain Smith's admitted belief that Muñoz had "harmed" the Company. I simply observe here that even if Smith was, in fact, subjectively more concerned about the lie than the vote about which Muñoz had lied the distinction is essentially meaningless as a statutory matter; for not only were the vote and the lie inseparably related, but the lie would not have taken place if the Respondent had not unlawfully inquired in the first instance about the vote. Moreover, if an employer could lawfully discharge an employee for having lied in response to an unlawful interrogation about his union sympathies or activities, the rights of employees under Sec. 7 would be rendered largely nugatory. To avoid such gutting of the Act's protections, therefore, the employee's "lie" in such circumstances must be regarded as itself falling within the protective penumbra of Sec. 7.

⁴⁹Indeed, given the Respondent's insistence that, as a matter of established policy, it would take no such adverse action until an employee were guilty of three successive days of no-shows without calling in, the Respondent clearly would have violated this policy if it had made any decision on or before June 20 to terminate Muñoz for his less than 3 days of missed work to that point; and this violation of its own admitted policy would easily have invited the inference that the Respondent was operating from unlawful, ulterior motives. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

would make no promises to reinstate Muñoz to his job, but instead threw in his way a variety of vague and/or discriminatory conditions that he must satisfy before Smith might make any such judgment. Muñoz cannot be faulted for interpreting these various hemmings and hawings and implied threats of violence or firing or reassignment to a different job as a clear signal that his employer was not willing to forgive and forget his supposed "sins" in having voted for the Union and then lying about it, or, at least, as a clear signal that he would have to "pay" for those sins by accepting whatever changes in position or further conditions Smith might choose to impose. And in these circumstances, the Board will not be distracted by claims that the employee "quit" without further testing of the Respondent's good faith; rather, the Board will simply "construe" the employer's actions as a "discharge," even if the employee may well have "quit," in preference to submitting himself to further punishment for protected activity.⁵⁰

In the end, as I see it, all that really matters to the statutory analysis are these facts: As of Muñoz' June 20 call to Smith, the Respondent admittedly regarded Muñoz as a current employee, despite his failure to appear for work that day or the preceding one. Nevertheless, Jordan (with the eavesdropping Smith's obvious condonation) evaded Muñoz' inquiries about his status and eventually made statements clearly suggesting, contrary to fact, that Muñoz had already lost his job by "abandoning" it. Smith, in his June 21 conversations with LaMacchia and Muñoz, never effectively disavowed Jordan's false message; rather, without making any statements of his own that genuinely contradicted Jordan's message, Smith merely imposed conditions on any reconsideration of Muñoz' status—that he physically present himself at work (and this even though Smith had already voiced his professed fear to both LaMacchia and Muñoz that Muñoz could suffer violent retribution at the hands of resentful antiunion workers), and, once having thus presented himself, that he further demonstrate in some uncertain manner that he was now worthy of Smith's "trust."

By these actions, the Respondent placed obstacles and hurdles in Muñoz' path to resumed employment that an employer has no right to impose on a current employee in Muñoz' shoes—or, more precisely, under *Wright Line*, that an employer may not lawfully impose when a "motivating factor" for such action is the employee's "protected activity."⁵¹ And here, for reasons noted previously, there can be no doubt that Muñoz' having cast a decisive ballot for the Union was either a direct motivating factor for Smith's imposing of conditions, or was so inescapably linked to Smith's motives that it makes no statutory difference.

Accordingly, the General Counsel clearly made what the *Wright Line* Board called a "prima facie showing sufficient to support the inference that protected conduct [by Muñoz] was a 'motivating factor' in the [Respondent's] decision[s]" first to tell Muñoz, in substance, that he had already lost his job, and second, to impose conditions on any reconsideration

of Muñoz' status. It thus fell to the Respondent to "demonstrate" that it would have given the same treatment to Muñoz even if he had never voted for the Union.⁵² The Respondent never made any serious effort to satisfy this burden; rather, it appears to have rested finally on the legally unsupportable notion that Muñoz' lie about his vote was enough to legitimize the imposition of these conditions, and, therefore, that the legal onus shifted to Muñoz to satisfy these conditions or be charged anew with job abandonment.

Contrary to the Respondent, however, I conclude as a matter of law that the Respondent, having discriminatorily caused Muñoz to believe that he had already lost his job, and could only regain some manner of employment by satisfying further discriminatory conditions, bears the legal onus for Muñoz' nonappearance and separation from employment thereafter, and owes him the customary remedy—a prompt offer of reinstatement to his former position, and backpay, with interest, for any loss in wages or benefits he may have suffered as a consequence of the Respondent's unlawful acts.⁵³

And in the light of the foregoing, and the entire record, this is my recommended⁵⁴

ORDER

The Respondent, APT Ambulance Service, Los Angeles, California, its officers, agents, successors, and assigns, shall,

1. Cease and desist from

(a) Interrogating employees about their own union sympathies or activities or those of other employees, or about how they intend to vote or have voted in a Board election.

(b) Implying to employees that their unresponsiveness to any such interrogations will work to their employment disadvantage in the future.

(c) Instructing employees not to give voice to pronoun views to their fellow workers.

(d) Instructing employees to refuse to accept printed material from a union agent lawfully distributing the same, or to tear up any such materials they might receive.

(e) Snatching such materials from employees hands and tearing them up.

(f) Retaliating against employees for engaging in protected activities by discharging them or by discouraging them from resuming their job after a permitted absence, including by telling them falsely that they have been terminated for their permitted absence, or by imposing conditions on their resumption of work.

⁵² *Wright Line*, supra at 1088.

⁵³ The Respondent's backpay obligation shall be computed on a quarterly basis from June 21, 1995, the date Muñoz told Smith he was prepared to resume work, to the date the Respondent makes proper offer of unconditional reinstatement to him, but shall be reduced by any of his net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and shall include interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

⁵⁴ 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.

⁵⁰ See generally *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976). See also, e.g., *Reno Hilton*, 282 NLRB 819, 836 (1987).

⁵¹ *Wright Line*, 251 NLRB 1083, 1088 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See also *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), affirming *Wright Line* tests.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Joaquin Muñoz full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Joaquin Muñoz whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful termination of Joaquin Muñoz and notify him in writing that this has been done and that his termination will not be used against him 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 Los Angeles and Crenshaw operating bases copies of the attached notice marked "Appendix."⁵⁵ Copies of the notice, on forms provided by the Regional Director for Region 31, 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 June 22, 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

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 or otherwise discriminate against employees for supporting International Association of EMTs and Paramedics or any other union.

WE WILL NOT interrogate employees about their own union sympathies or activities or those of other employees, or about how they intend to vote or have voted in a Board election.

WE WILL NOT tell or imply to employees that their unresponsiveness to such interrogations will work to their employment disadvantage in the future.

WE WILL NOT instruct employees not to give voice to pronoun views to their fellow workers.

WE WILL NOT instruct employees to refuse to accept printed material from a union agent lawfully distributing the same, or to tear up any such materials they might receive.

WE WILL NOT snatch such materials from employees' hands and tear them up.

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

WE WILL, within 14 days from the date of the Board's Order, offer Joaquin Muñoz full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges he previously enjoyed.

WE WILL make Joaquin Muñoz whole for any loss of earnings and other benefits he suffered as a result of our discrimination against him, less 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 unlawful termination of Joaquin Muñoz, and will notify him in writing that this has been done and that his termination will not be used against him in any way.

APT AMBULANCE SERVICE

⁵⁵ 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."