

Sanitary Fill Company and Humberto Garcia. Case
20-CA-27139

July 31, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND
HIGGINS

On January 3, 1997, Administrative Law Judge Earldean V.S. Robbins issued the attached decision. The General Counsel filed exceptions and a supporting brief and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Jill M. Hawken, Esq., for the General Counsel.
Richard J. Curiale, Esq. (McKenna & Cuneo), of San Francisco, California, for the Respondent.

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

We agree with the judge, for the reasons set out by her, that the Respondent never promised to promote rolloff driver Humberto Garcia to a long-haul driving position. As the judge found, the Respondent required long-haul drivers to have 2 years of experience before being hired, a requirement that the Respondent never waived and a requirement that Garcia did not meet. In excepting to the judge's finding that no promotion promise was made, the General Counsel relies, inter alia, on testimony by Ann Brady that, in response to an accusation by Garcia that Kenneth Stewart, the head of the Respondent's transportation department, was reneging on his promise to promote Garcia, Stewart had responded, "I know. But we gave it a shot, it's not going to work." In finding this exception without merit, we note that Brady, a long-haul driver who was present during the conversation between Garcia and Stewart in which these comments were made, also testified that immediately before Stewart's response set out above, there had been a discussion of the training program and safety issues and that Garcia had then stated, "You promised me this and now you change your mind." Viewed in this light, we find Stewart's response ambiguous as it could refer to Garcia's informal training program rather than, as the General Counsel asserts, to an alleged promise to hire Garcia. Accordingly, we find that Brady's testimony regarding Stewart's response does not support a finding that the Respondent promised to promote Garcia to a long-haul driving position.

DECISION

STATEMENT OF THE CASE

EARLDEAN V.S. ROBBINS, Administrative Law Judge. This case was heard before me in San Francisco, California, on October 31, 1996. The charge was filed by Humberto Garcia, an individual (Garcia), on February 19, 1996, and served on Sanitary Fill Company (the Respondent) on March 1, 1996. The complaint, which issued on June 28, 1996, alleges violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The principal issues are whether the Respondent unlawfully refused to continue training Garcia in the skills necessary to obtain a class A commercial driver's license and to promote him to a position driving class A vehicles in its long-haul division.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the posthearing briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material the Respondent, a corporation with an office and place of business in San Francisco, California, has been engaged in the recycling and transportation of garbage. During the 12-month period ending May 29, 1996, the Respondent, in the course and conduct of its business operations, derived gross revenues in excess of \$500,000 and purchased and received at its San Francisco, California facility, goods and materials valued in excess of \$50,000 directly from points outside the State of California.

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

II. LABOR ORGANIZATION

The complaint alleges, the parties stipulate, and I find that at all times material Sanitary Truck Drivers and Helpers Union, Local 350, International Brotherhood of Teamsters (the Union) has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

The Respondent employs two types of drivers in its recycling and transportation of garbage, both of which are represented by the Union in separate units. Long-haul drivers operate semitractor-trailer trucks (class A vehicles) in the transport of nonrecyclable garbage approximately 55 miles to the Altamont landfill. Rolloff drivers transport garbage principally from point to point within the Respondent's facility, using rolloff trucks (class B vehicles). The State Department of Motor Vehicles (DMV) requires long-haul drivers to have a class A commercial license. Rolloff drivers are only re-

quired to have a class B license. Kenneth Stewart, the Respondent's transportation manager, is head of the long-haul department. Rolloff drivers are supervised by Gary Ashbrook. Stewart and Ashbrook report to John Legnitto, the Respondent's assistant general manager. Legnitto reports to Ron Proto, the Respondent's general manager.

Garcia has been employed by the Respondent as a rolloff driver for approximately 6 years. It is undisputed that Garcia indicated to Stewart his interest in becoming a long-haul driver and inquired as to what he needed to do to obtain a class A license. However, the specific timing of these requests is in dispute. According to Stewart, in April or May 1995,¹ Garcia requested assistance in his preparation for the class A license exam; but did not indicate his desire to become a long-haul driver with the Respondent until October or November. According to Garcia, both requests were made in October. It is also undisputed that Stewart gave Garcia copies of questions and answers from past class A driver's exams, and gave him permission to ride with, and to practice driving the Respondent's class A vehicles when accompanied by, a long-haul driver.

According to Garcia, in late October, he told Ashbrook he was applying for a long-haul position and asked Ashbrook to assist him. Ashbrook said he would speak to Stewart. The following day Garcia gave his completed application to Stewart. At which time Stewart said, "That's good, I'm glad you want to move up." Stewart further said John Legnitto had given him approval to hire more drivers soon. Thereafter, Garcia, on his own time and with Stewart's permission, rode with certain of the Respondent's long-haul drivers to become familiar with, and learn to drive class A vehicles.

According to Garcia, he had several conversations in November with Stewart and other members of management regarding the possibility of his hire as a long-haul driver. The first such conversation was before Thanksgiving. At that time, Stewart said the Respondent would help Garcia get his class A license and would provide him a truck and driver to use for his class A exam.² Stewart further said Garcia would have to practice and as soon as he was ready, the Respondent would hire him as a long-haul driver. Stewart said he had approval to hire four drivers, that he was going to hire three from the outside and Garcia would be the fourth. Garcia also testified that a few days prior to November 27, he went to Legnitto's office, introduced himself to Legnitto and said, "I came to see you because I want you to help me to get a job in the long-haul division." Legnitto replied, "Oh, I'm glad you came to see me. I like you guys to move up. Let me talk to Kenny Stewart."

For some reason unexplained by him, on November 27, Garcia made a series of contacts with management and union personnel regarding his becoming a long-haul driver. At about 3 a.m., according to Garcia, he asked Stewart, "Tell

me the truth, when are you going to hire me?" To which Stewart replied, "You are going to be hired after three other guys." At about 7 a.m., Garcia asked Stewart if it was okay to go with driver Jim Borg so he could get records of his training.³ Stewart said, "No!" in a raised voice.

At about 7:30 or 8 a.m., according to Garcia, he told Ashbrook that Stewart had promised to give him a job in the long-haul department. Ashbrook asked when. Garcia said he did not know. Ashbrook suggested that they find out and they went into Stewart's office. Garcia began the conversation by saying, "As you told me, Kenny, I was telling Gary that you're going to hire me and he wants to know when." Ashbrook made some inquiry as to when it would be. Stewart said, "I'm not going to touch Humberto until I finish with Darrell." Garcia testified that, by this, he understood Stewart to mean that he would be next after Darrell Jones, a shop employee who was also being trained in preparation for taking the class A license exam, finished his training and got his class A license. At some point thereafter during the conversation, in response to Ashbrook's question regarding when Garcia would be hired into the long-haul department, Stewart said it would be around March 1996.

About an hour later, according to Garcia, he went to Legnitto's office and told Legnitto, "John, I just want to let you know that Kenny told me that he was going to hire me after three guys." To which Legnitto replied, "Oh, that's good. Whenever you're ready he can put you to work." At about 10 a.m., according to Garcia, Stewart apologized regarding their earlier conversation and asked "what were you telling me about Jim Borg?" Garcia asked, "[I]s it okay if I go with him so I can have records of my training?" Stewart said, "Oh, let me think. Yeah, yeah, you can come. But come and see me in the morning."

Stewart admits he told Garcia that the Respondent would help him get his class A license and that he could use the Respondent's truck and driver to take the exam. However, he denies ever telling Garcia he would be hired as a long-haul driver in March, after three other guys, or any other specific time. Nor did he tell Garcia that he could apply for a long-haul position as soon as he obtained a class A license or became familiar with long-haul equipment. According to him, when Garcia asked if he could become a long-haul driver when he got his class A license, he told Garcia no, because he did not have any experience and spoke to him about the experience he needed. At some point in late October or early November he specifically told Garcia that he needed to have at least 2 years' experience before he could qualify as a long-haul driver and suggested that he could obtain this experience by taking a part-time job elsewhere.

Legnitto admits that he had two conversations with Garcia regarding Garcia's desire to become a long-haul driver. According to him, the first such conversation was around the end of October or the beginning of November. Garcia expressed his desire to become a long-haul driver and asked whether Legnitto would consider him becoming one. Legnitto told Garcia he would be in favor of that but that Garcia needed to work with Stewart. Shortly thereafter, in a conversation with Stewart and Legnitto initiated by Garcia,

³ Apparently Borg was the one who actually scored a driver's performance. Although not absolutely clear from the record, it appears that he did testing of long-haul applicants.

¹ Unless otherwise indicated, all dates from April through December are in 1995, and from January through March are in 1996.

² The Respondent has no formal training program. However, it does update its drivers through an informal "ride-along" retraining program. It has also used this "ride-along" program to train its mechanics for insurance purposes. Similarly, the Respondent has no formal program for training current employees to become class A drivers. However, at the time involved, through the informal "ride-along" training program, it did assist certain employees in preparing for the class A license exam.

Garcia again expressed his desire to become a long-haul driver. Stewart told him the requirements to become a long-haul driver—a class A license, a clean driving record, and 2 or 3 years' experience. Garcia questioned the necessity for him, as a current employee of the Respondent, to meet the experience requirement. Legnitto told him the experience was one of the Respondent's requirements and suggested that Garcia work with Stewart to try to meet that requirement through part-time employment.⁴ Both Stewart and Legnitto deny ever agreeing to waive the 2 years' experience requirement. Ashbrook did not testify.

On the evening of November 27, Garcia telephoned Bob Morales, secretary-treasurer of the Union. According to Garcia, he told Morales that Stewart promised to provide him help to get his class A license and time to get experience; and that Stewart had further promised to hire him as a long-haul driver after hiring three other drivers. Morales asked if those three were current employees. Garcia said, "No." Morales said that was unfair, that he would write a letter to Legnitto to let him know not to play with Garcia, because in the past something similar had happened.

On November 22, 28, and 29, with Stewart's permission, Garcia rode with Borg. In connection with these trips, Borg prepared pretrip inspection score sheets, driver trainee status reports, and a driver's training manual for Garcia. The scores on these forms all indicated performance evaluations of satisfactory or above.

On November 27 at 6:28 p.m. Morales sent a letter to Legnitto via FAX, the body of which reads:

This is to advise you that we are pleased to hear that your company will be given [sic] member HUMBERTO GARCIA (Sanitary Fill Co.) the opportunity to train and become a long-haul driver.

I sincerely hope that you will convey this matter to your Operations Manager Mr. Gary Ashbrook and in order to expedite this training and help the above member become a good and productive driver for the above division.

It is important to expedite this transaction to give the above member a true opportunity and before that division hires drivers from outside who will by-pass his seniority in the division. It is my understanding that there are plans to hire additional drivers at this particular time. I only hope that it is a fact, that Humberto Garcia will be in his slot before any new employees are hired.

I think is very important to let the supervisors at the long-haul division know about this issue to avoid unfairness.

I am very encouraged by the fact that your company wants to train and hire from the pool of workers who are already working for your corporation. It makes a lot of sense.

I will appreciate it if you will write the above employee about your intentions. We had a prior problem with another employee who was promised a similar situation and the company denied him that right for a long time (three years) before they met their commitment.

Please advise as soon as you have an opportunity.

⁴ According to Legnitto, Stewart has a lot of contacts within the trucking industry.

It is undisputed that following receipt of this letter, Legnitto instructed Stewart to cease all training of employees to prepare for the class A license exam. According to Stewart, Legnitto said the training should be discontinued because he was concerned that it would set a precedent with the Union which would cause future problems. Legnitto testified that he received the impression from Morales' November 27 letter that Morales was saying he needed to hire Garcia and others from within, which would waive the 2-year experience requirement and restrict hiring from outside. According to him, this was never what was intended by the informal training program. It is also undisputed that the cessation of the informal training affected other employees as well as Garcia.

On November 29, after his practice session with Borg, Garcia went to Stewart's office to obtain permission to ride with Borg the following day. According to Garcia, Stewart began the conversation by saying, "[D]id you call the Union?" When Garcia answered in the affirmative, Stewart said, "Bob Morales sent a letter, a dirty letter, and John Legnitto is pissed off." Stewart then said, "John Legnitto told me to stop everything. You can no longer go with Jim Borg."

About a half hour later, Garcia spoke to John Legnitto. According to Garcia, he told Legnitto that Stewart had told him Legnitto was pissed off. Legnitto said, "Yes, I am." Garcia said, "Oh, I'm sorry, I didn't know this was going to happen." Legnitto replied, "Look Humberto, I was doing you a favor. But since Bob Morales put it in writing we have to go by the rules." Legnitto further said, "Look Humberto, Bob Morales is telling me in this letter—it's like if I give you a candy, Bob Morales is telling me you have to give a candy to all my members of this company. I don't have nothing against you, you show that you have talent to do the job. And if it was up to me, I will give you the job. But, I'm sorry, you are in the middle of this. But wait and see what happens."

In corroboration of Garcia's account, testimony was adduced from other employees as to similar statements made to them. Thus, Ricardo Lopez, an employee who was also receiving informal training on the Respondent's class A vehicles, testified that he had several conversations with Legnitto, Ashbrook, and Stewart in the fall of 1995. During one such conversation, Ashbrook told Lopez he had gotten the okay from Legnitto for Lopez to train for a class A license, and that a notice was going to be posted that anyone with a class B license could receive such training.⁵

A couple of days later, according to Lopez, he told Stewart that he had gotten the okay from Legnitto to get his class A license. Stewart said first he had to finish Darrell Jones' training. Stewart further said they were going to hire three new guys and that he would have more time with Lopez after he hired the three guys. Lopez indicated his dismay that the Respondent was hiring three new drivers and said he wanted to speak to Legnitto. Immediately thereafter, he did speak, to Legnitto, Ashbrook, and Stewart. Much of Lopez' account of this conversation must be disregarded because it is disjointed and impossible to know to whom certain statements should be ascribed. However, he testified with some

⁵ Such a notice was never posted. However, according to Garcia, it was Lopez' account of this conversation which motivated Garcia to request such training.

degree of clarity that he expressed his opinion that it was not right for the Respondent to hire three new drivers. Legnitto said they would need three drivers soon and reminded Lopez that the three drivers would have licenses and Lopez would not. Lopez said he was taking a big chance on switching departments, that he would be way down the list, fifth, since three new drivers were being hired and there was Garcia. Legnitto said there would be plenty of work for Lopez and Garcia—that a lot of guys would be retiring. He also mentioned something about needing them in March, but that Lopez would have to obtain his class A license first. Again, Lopez said he thought it was wrong for the Respondent to hire three new drivers and that he was no longer interested in the position.

Lopez also testified that, in mid-November, he had a conversation with Legnitto. According to his undenied testimony, he told Legnitto he heard that there was a letter written from the Union that mentioned his name. After checking the letter, Legnitto said only Garcia was mentioned. Legnitto then said, "I'm a businessman, I run the company. And the union, Morales, he works for you, he don't work for me, I run the company. And he's not going to tell me how to run my company. I have nothing against Humberto, but here I am, doing him a favor, letting him borrow the company's equipment, and here he goes to the union. I felt like he stabbed me in the back." On direct examination, Lopez also testified that no one from management ever told him one must have 2 years' experience to be hired as a long-haul driver. However, on cross-examination, he admitted that toward the end of this conversation, Legnitto said, "I have nothing against Humberto but the union is not going to tell me how to run my company. If he's going to work for this company he needs to have two years' experience."

Ann Brady, a long-haul driver for the Respondent since January 1991, testified that she had two conversations with Stewart in November regarding Garcia. During the first conversation, in response to a comment by Brady regarding Garcia's training, Stewart said the Respondent was "going to give it a shot," that the Company wanted to hire from the inside. Toward the end of November, Brady entered Stewart's office as he and Garcia were engaged in a conversation. According to her, Stewart said he wanted her to witness the conversation, to explain to Garcia what it was like to be a long-haul driver. When she asked what the conversation was about, Garcia said Stewart was renegeing on his promise to give Garcia a job. There was some discussion about the training program and safety issues. Garcia said, "You promised me this and now you change your mind." Stewart said, "I know. But we gave it a shot, it's not going to work." As they continued to talk about safety issues, Stewart said, "I can't hire you in good conscience knowing that you might be out on the road." Garcia asked, "Why didn't you tell me this a month ago when I started my training?" Stewart replied, "Well, I didn't know at the time, you know, what the outcome would be. But, in good conscience, I can't do it now. If you want, you can go out and get your Class A license." At some point, Stewart said they could talk after Garcia had acquired 2 years' experience or approximately 2000 hours behind the wheel of the truck.

Stewart responded to Morales' letter by a letter dated November 30, the body of which reads:

This letter is to advise you that I have had serious discussions with John Legnitto over your letter concerning Humberto Garcia.

John is upset with the fact that you are trying to dictate what you want us to do. Sanitary Fill Company does not have a training program, and where does it say in the union contract that Humberto Garcia can transfer to Long Haul?

I was trying to help Humberto get better acquainted with the equipment so it would be easier to get his Class A license.

Sanitary Fill Company always hires drivers with the following:

- A. California Class A Drivers License
- B. Current DOT Medical Certification
- C. Minimum 2 Years Semi Tractor Trailer Experience
- D. Clean DMV Printout

The employees in Sanitary Fill Company Long Haul Division are professional drivers and do a very good job.

My advise [sic] to Humberto Garcia is to get all of the road time and experience he can and maybe some day Local 350 and Sanitary Fill Company can come up with an agreement to promote from within.

I would like to thank you for your concern in this matter.

Morales responded by letter addressed to Legnitto and dated December 5, the body of which reads:

This letter is to advise you that I am appalled after reading the letter sent to me by Ken Stewart in response to the letter which I sent you directly.

If I had known that Ken Stewart is in charge of answering your letters, I would have written him directly.

The only purpose of my letter concerning member Humberto Garcia was to establish as to what the understanding was when you talked to him about the semi-driver position. Nothing more!

It is too bad that your lack of labor relations does not allow you to see that all I was trying to do was to avoid a future problem concerning misunderstandings.

In no way, shape or form was I trying to dictate what you and your Company should do. For your information, after a telephone conversation with Ken Stewart concerning the same issue, he had a different understanding than what the member had after talking to you directly.

Hopefully, you will not deter from helping member Humberto Garcia in realizing his dream of becoming a long-haul driver. To do otherwise will be most unfair.

Legnitto denies that he was upset because Garcia went to the Union. However, according to him, he was upset at Morales' attempt to try to create a precedent which would restrict the Respondent from utilizing the requirements for the position to protect itself from possible liability. Stewart also denies being angry with Garcia because he went to the Union or that Legnitto ever gave him any indication that this played

any role in the decision to cease training Garcia and other employees in preparation for the class A exam.

According to Stewart, he was involved in the formulation of the policy setting forth the requirements which must be met by long-haul driver applicants. The policy was implemented sometime in late 1991. The rationale for the policy were insurance concerns and the fact that management had begun to look at safety a lot differently. Accordingly, they looked at what other companies were doing, taking into consideration the miles traveled and the weight transported.⁶ This survey disclosed that large companies were requiring 2 to 3 years' minimum experience, clean DMV driver's record, class A drivers license, and a good medical card. These requirements became the basis of the new hiring policy implemented by the Respondent. He also testified that in 1991, the Respondent advertised in a newspaper for applicants for long-haul driver positions. The minimum requirements listed in this ad included 2 to 3 years' experience. the Respondent has not advertised for long-haul driver applicants since then. He further testified that the 2-year experience requirement has never been waived and that he never agreed to waive the requirement for Garcia. There is no evidence to refute this claim that these requirements have never been waived.⁷

In early January 1996, at Garcia's request, he met with Stewart and Legnitto. During the course of this conversation, according to Garcia, Stewart told him the rules had changed and 2 years' experience was now required. Garcia asked, "How can I give you two years of experience if I'm already working here; it's very hard for me to get two years of experience." Legnitto responded, "Well, Humberto, there is nothing we can do. If you bring the two years experience you have the job." At some point, Garcia asked if he could see the policy. Stewart said he would show it to Garcia later.

During another conversation, the timing of which is unclear, Stewart did show Garcia a list of the same four requirements contained in Stewart's November 30 letter to Morales. However, according to Garcia, Stewart refused to give him a copy, stating that it was not ready, the logo had to be placed on it. Stewart denies telling Garcia that he wanted to put the requirements on letterhead before giving it to Garcia. Sometime in January 1996, after the January conversation with Stewart and Legnitto, Stewart's secretary instructed Garcia to go to the Human Resources office. Garcia did so, at which time he was given a copy of the long-haul driver requirements⁸ and a list of critical demands for the position of long-haul driver.

Following the November conversation between Garcia and Stewart, the Respondent did hire four long-haul drivers—one on December 18, two on January 15, and one on January 17.

⁶Respondent's drivers drive the maximum number of miles permitted in a 10-hour day, pulling the maximum allowable weight.

⁷I am not persuaded by evidence adduced by the General Counsel's to show that Rafael Medrano failed to meet these requirements. Stewart does admit that on February 6, 1995, as the result of a settlement agreement with the Union, Medrano was transferred from material handler to long-haul driver. Medrano obtained his class A license in 1990, and apparently has no experience as a class A driver in the United States. However, his application indicates 10 years' experience in Mexico driving class A type vehicles.

⁸According to Garcia, these requirements were set forth on the Respondent's letterhead, whereas, the requirements shown to him earlier by Stewart were on plain paper.

Garcia received his class A license in February after he had expended \$500 to rent trucks to use during his DMV exam. Garcia immediately informed Stewart, who congratulated him and told him he should find part-time work to gain experience.

Conclusions

The General Counsel contends that the Respondent terminated Garcia's training and refused to promote him to a promised position as long-haul driver because he discussed such training and promise of promotion with a union representative. the Respondent admits the termination of training and the refusal to promote, but denies any unlawful motivation. Rather, the Respondent claims that the training of Garcia and others ceased, not because Garcia spoke to Union Representative Morales, but because Legnitto reasonably perceived Morales' letter as an attempt to use the fact of such training to set a precedent requiring the Respondent to maintain a training program for any other employee who wished to become a long-haul driver. As to the refusal to promote Garcia to a long-haul driver position, the Respondent denies that it made any specific promise to do so, and contends that it refused to promote Garcia to such position, not because of his union activity, but because he failed to meet the job requirements.

Where, as here, an allegation of unlawful discrimination turns on employer motivation, the Board employs the following causation test. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. The essential elements of such a showing are union activity, employer knowledge of such activity, timing, and animus. Once this is established, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

As set forth above, the existence of union activity and knowledge is undisputed, and timing is undisputed as to the termination of training. Thus, Garcia did inform Morales that he had begun training and that the Respondent had promised to promote him to a position as long-haul driver. Within 1 day thereafter, the Respondent had knowledge of this union activity from Morales' November 27 letter, and Garcia's training was terminated within 1 day after receipt of the letter. To establish its prima facie case, the General Counsel relies principally on the testimony of Garcia, Lopez, and Brady as to alleged statements made by Stewart and Legnitto. Stewart and Legnitto deny the fact and/or the timing or context of many of these statements.

1. The termination of Garcia's training

The General Counsel seeks to establish animus through statements made to Garcia and Lopez shortly after the Respondent received Morales' November 27 letter. Thus, the General Counsel argues, on November 29, Stewart told Garcia that Morales had sent a "dirty" letter, that Legnitto was "pissed off" and had told Stewart to "stop everything." A few minutes later, Legnitto admitted to Garcia that he was, in fact, "pissed off," that Morales had put it in writing so

the Respondent had to go by the rules. Legnitto further said he had nothing against Garcia, but Morales was saying that if the Respondent gave a "candy" to Garcia, it would have to give a "candy" to everyone. Similarly, Legnitto told Lopez that Morales was not going to tell him how to run his company, that he had nothing against Garcia, but he felt that Garcia had "stabbed him in the back."

Since Stewart and Legnitto do not deny making these statements which indicate some degree of hostility, I conclude that the General Counsel has made a showing sufficient to support an inference that protected conduct was a motivating factor in the Respondent's decision. However, I credit Legnitto's testimony that the training was terminated because Morales' letter led him to believe that Morales intended to claim this training as a precedent requiring the Respondent to maintain such a training program in the future. In so doing, I have thoroughly considered, and reject, the General Counsel's contention that termination of the training was an overreaction which belies the Respondent's alleged concern and that the Respondent could have clarified the matter simply by sending the Union a letter of clarification. In this regard, I conclude that the Respondent's reaction was not so unreasonable as to support an inference that it was pretextual. This is particularly true in view of the undenied testimony that most of the grievances filed by Morales are based on past practice.

I also note that the training of other employees similarly situated was also terminated and that Legnitto's testimony is corroborated by Stewart and is buttressed by Garcia's testimony that Legnitto told him Morales was saying that if the Respondent gave a "candy" to Garcia, it would have to give a "candy" to everyone. Garcia also testified that, by the "candy" comment, he understood Legnitto to mean that if he helped Garcia, Legnitto would have to help anyone who came after Garcia. Garcia further testified that he believed this to be the reason Legnitto ordered his training terminated.

I, therefore, conclude that the termination of Garcia's training was not in retaliation for Garcia going to the Union but, rather, was motivated by Legnitto's perception of Morales' intent as expressed in the November 27 letter. I further conclude that the Respondent would have ceased Garcia's training even if Garcia had not been the source of the Union's information. Accordingly, I find that the Respondent did not violate Section 8(a)(3) and (1) of the Act by terminating Garcia's training.

2. The refusal to promote Garcia to a long-haul driver position

As to the refusal to promote Garcia to a long-haul driver position, the critical question is whether the Respondent made a definite commitment to hire Garcia. Pertinent to this is whether the Respondent ever told Garcia, prior to receiving the November 27 Morales letter, that he needed 2 years' experience in order to be promoted to a long-haul driver position. Thus, credibility resolutions are critical. To establish his prima facie case the General Counsel relies primarily on the testimony of Garcia that, (1) Stewart said the Respondent would hire him as a long-haul driver as soon as he was ready, that he had approval to hire four drivers, and would hire three from the outside with Garcia as the fourth; (2) Stewart said Garcia would be hired "after three other guys" and also said he would be hired "around March;" (3)

Legnitto said whenever Garcia was ready, Stewart could put him to work; and (4) that, prior to the November 27 letter neither Stewart nor Legnitto ever told him that the long-haul driver position required 2 years' experience.

The General Counsel further argues that Garcia's testimony is corroborated by Lopez' testimony that (1) Legnitto said there would be plenty of work for Lopez and Garcia and then said something about needing them in March; and (2) no one in management ever told him long-haul drivers were required to have 2 years' experience. Similarly corroborative of Garcia, the General Counsel contends, is Brady's testimony that (1) Stewart told her the Respondent wanted to hire from within; (2) she got the impression from Stewart that whether Garcia was promoted to long-haul driver would depend on how well he did in his driving; (3) in response to Garcia's accusation that Stewart was reneging on his promise to promote Garcia, Stewart said, "We gave it a shot, it's not going to work;" and (4) in response to Garcia's inquiry as to why Stewart had not mentioned safety concerns earlier, Stewart said he didn't know at the time what the outcome would be, but in good conscience he could not do it now, and also said that Garcia needed 2 years' experience. Finally, The General Counsel argues that the 2-year requirement either does not exist or is waived whenever the Respondent wishes. In support thereof, the General Counsel argues that neither Medrano nor Brady met this requirement at the time of their hire.

I credit Stewart's testimony that a policy requiring long-haul driver applicants to have 2 years' experience was instituted by the Respondent in late 1991 and has been followed since then. Stewart impressed me as an honest, reliable witness who was endeavoring to tell the truth. Further, there is no persuasive evidence that this policy has not been followed. In this regard, contrary to the General Counsel, I find no particular significance in the fact that human resources listed the requirements on letterhead whereas the list in Stewart's office was on plain paper. These four requirements, only 22 words, are so simple and so basic that I would not find it particularly significant even if they had never been reduced to writing. As to the hire of Brady and Medrano, Brady was hired before the policy was implemented. Medrano's transfer to a long-haul driver position resulted from a settlement agreement with the Union; and he had 10 years' experience in Mexico driving class A type vehicles.

In view of this requirement, which has been maintained for 5 years, and the significant underlying public safety and liability concerns, I find it incredible that Stewart would have promised to promote Garcia prior to his acquiring the requisite experience or that the Respondent would have permitted it. I also find suspect Garcia's account of the statements made to him. Thus, he does not claim simply that Stewart promised to promote him to long-haul driver as soon as he obtained his class A license. Rather, he claims that Stewart made an unqualified promise to hire him at a specific time—in March, or after three drivers from outside were hired. Neither Stewart nor Garcia could have been sure even that Garcia would have obtained his class A license, a legal requirement, by March or by the time that the Respondent needed to hire a fourth driver. Indeed, Garcia had not obtained his license at the time a fourth driver was hired.

Further, the testimony of Lopez and Brady does not fully corroborate Garcia in this regard. Brady does not contend

that she was actually told that Garcia would be hired. Rather, she testified only that it was her impression that Garcia's promotion would depend on how well he did in his driving. Lopez' testimony regarding hiring three drivers from outside was simply that Stewart told him that after these three drivers were hired, Stewart would have more time with Lopez. Also, Lopez did not impress me as a reliable witness. Further, as noted above, his account of conversations was sometimes incoherent. His testimony was also sometimes inconsistent. Thus, on direct examination, he testified that no one from management ever told him one must have 2 years' experience to be hired as a long-haul driver. However, on cross-examination, he admitted that Legnitto told him in November that if Garcia was going to work for the Respondent he needed to have 2 years' experience.

Accordingly, I do not credit Garcia that either Stewart or Legnitto promised to promote him to a long-haul driver position in March or after three other drivers were hired. Rather, I credit Stewart and Legnitto that no such promise was made, that Garcia was not promoted to a long-haul driver position because he did not have the requisite experience, and that he was notified of this requirement prior to the receipt of the November 27 letter. I therefore conclude that the General

Counsel has failed to establish a prima facie case that the Respondent refused to promote Garcia to a long-haul driver position because of his union activities. However, even assuming arguendo that a prima facie case was established, I conclude that the Respondent has met its burden of establishing that it would have refused to promote Garcia even if he had not been the source of the Union's information. Accordingly, I find that the Respondent did not violate Section 8(a)(3) and (1) of the Act by refusing to promote Garcia to a long-haul driver position.

CONCLUSIONS OF LAW

1. The Respondent, Sanitary Fill Company, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Sanitary Truck Drivers and Helpers Union, Local 350, International Brotherhood of Teamsters, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not engaged in the unfair labor practices alleged in the complaint.

ORDER

The complaint is dismissed in its entirety.