

Rose Hills Mortuary L.P. d/b/a Rose Hills Company and Wholesale Delivery Drivers, Salespersons, Industrial & Allied Workers, Local 848 International Brotherhood of Teamsters, AFL-CIO.
Cases 21-CA-30208, 21-CA-30442, 21-CA-30609, and 21-CA-30624

September 22, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On April 22, 1997, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.¹

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,² and conclusions³ and to adopt the recommended Order as modified.⁴

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Rose Hills Mortuary L.P. d/b/a Rose Hills Company, Whittier, California, its officers, agents, successors, and as-

signs, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(c).

“Within 14 days from the date of this Order, remove from its files any reference to the discharges of John Quiroz and Michael Renteria, and John Quiroz’ July 12, 1994 and Michael Renteria’s March 16, 1995 suspensions and notify these employees in writing that this has done and that it will not use these discharges and suspensions against them in any way.”

Ariel Sotolongo, Esq., for the General Counsel.
Robert L. Murphy, Esq. (Stokes & Murphy), of San Diego, California, for the Respondent.
Florice Hoffman, Esq. (Wohlner Kaplon Phillips Young & Barsh), of Encino, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARY MILLER CRACRAFT, Administrative Law Judge. This case was tried in Los Angeles, California, on August 26-28, and thereafter on October 28, 1996. The charge in Case 21-CA-30208 was filed by Wholesale Delivery Drivers, Salespersons, Industrial & Allied Workers, Local 848 International Brotherhood of Teamsters, AFL-CIO (the Union) on August 5, 1994,¹ and amended October 26. The complaint issued December 9. The charge in Case 21-CA-30442 was filed by the Union on December 29 and amended April 25, 1996. The charge in Case 21-CA-30609 was filed by the Union on April 3, 1995. The charge in Case 21-CA-30624 was filed by the Union on April 7, 1995, and amended on April 25, 1996.² On April 29, 1996, an order consolidating these cases and a consolidated amended complaint issued. As amended at hearing, the consolidated amended complaint alleges that Rose Hills Mortuary L.P. d/b/a Rose Hills Company (the Respondent) committed one independent violation of Section 8(a)(1),³ violated Section 8(a)(1) and (3) by suspension and discharge of employees John Quiroz and Michael Renteria because they supported the Union, and violated Section 8(a)(1) and (5) by withdrawal of its last bargaining proposal after the Union notified the Respondent of its acceptance of that proposal and by subsequently withdrawing recognition.

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

¹ All dates are in 1994 unless otherwise indicated.

² The Respondent denied the filing and service of the charges and amended charges. The formal papers contain the charges, amended charges, and verified returns which indicate that they were filed and served as alleged in the complaint. Sec. 102.113 of the Board's Rules and Regulations provides that the verified return shall be proof of service. No evidence was presented indicating that the charges and amended charges were not filed and served as alleged. Accordingly, I find that the charges and amended charges were filed and served as set forth in the consolidated amended complaint.

³ A second allegation of violation of Sec. 8(a)(1) was withdrawn in counsel for the General Counsel's posthearing brief.

¹ The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

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

³ We note that there were no exceptions filed to the judge's dismissal of complaint allegations that the Respondent had violated Sec. 8(a)(5) and (1) of the Act.

⁴ In concluding that the Respondent violated Sec. 8(a)(3) and (1) of the National Labor Relations Act, the judge found that the General Counsel had sustained his "prima facie burden." The Board has traditionally described the General Counsel's initial burden of demonstrating discriminatory motivation as one of establishing a prima facie case. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The D.C. Circuit, however, has suggested that, in light of the Supreme Court's decision in *Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 276-278 (1994), the General Counsel's burden should be described as that of persuading "the Board that the employer acted out of antiunion animus." *Southwest Merchandising Corp. v. NLRB*, 53 F.3d 1334, 1339-1340 fn. 8 (1995). However, this change in phraseology does not represent a substantive change in the *Wright Line* analysis. See *Schaeff Inc. v. NLRB*, 113 F.3d 264, 266 fn. 5 (D.C. Cir. 1997), and *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). Therefore, the judge's use of the term "prima facie burden" in describing the General Counsel's burden here does not substantively affect her analysis or conclusions. See *The 3E Co.*, 322 NLRB 1058 (1997).

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

The Respondent is a corporation with an office and place of business in Whittier, California, and has been engaged in the operation of a mortuary and cemetery. Annually, the Respondent, in conducting its business operation, derives gross revenues in excess of \$500,000. Annually, the Respondent purchases and receives at its Whittier, California facility goods valued in excess of \$5000 directly from points outside the State of California. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Withdrawal of Bargaining Proposal and Recognition*

1. Facts

The facts are not in dispute. On December 20, 1993, the Union was certified as the exclusive collective-bargaining representative of the Respondent's park department employees. Bargaining began in February 1994. Seven to nine sessions were held. The parties reached impasse on June 24. At that session, the Respondent presented its final offer to the Union. Much of the language in the final offer had been tentatively agreed on. However, the proposal did not contain a union-security clause or pension provision, nor had there been any prior agreement on these issues although the Union had indicated it might sign an agreement without pension. In addition, there were blanks at some points in the proposal including eligibility for health and dental insurance, duration and termination of the contract, rates of pay and effective dates, and number of days' notice required before implementation of new job classifications. The Union was told that the blanks were due to clerical error. There was no time limitation placed on the final offer. The Union expressed misgivings about the proposal but agreed to put it to a ratification vote.

The Union conducted a ratification vote on June 27 or 28 and later informed the Respondent's attorney that the June 24 final offer was rejected and the Union would like to continue negotiations. The Respondent's attorney replied that he would talk with the Respondent.

No strike was called but the Union placed informational pickets around the park perimeter beginning July 16. The picketing continued steadily through September and sporadically in October. In mid to late September, the Union conducted another ratification vote based on the June 24 proposal. The proposal was accepted.⁴ However, the Respondent was not informed of the acceptance until November 29.⁵ On

⁴No further negotiations were conducted between June 24 and the date of the second ratification vote. However, the Union was informed about elimination of various positions as a result of layoff and was also informed about implementation of two of the provisions in the June 24 proposal: subcontracting and elimination of scheduled overtime.

⁵The Union attempted to reach the Respondent's attorney throughout this time. However, he was unavailable. There is no evidence

that date, the Union submitted to the Respondent's attorney two signed copies of the June 24 proposal. One copy contained the blanks and on the other copy the Union filled in the blanks with language based on its understanding of tentative agreements or the Respondent's proposals. The Union took the position that a complete contract had been reached. However, the General Counsel does not now contend that a contract had been reached at that time.

The Respondent's attorney wrote to the Union on November 29 stating that the Union's, "counterproposal contains a number of counterproposals to our proposal which have never been discussed or agreed upon." The letter concluded,

If you would like to return to the table to present additional proposals, I am ready, willing and able to do so; however, in light of the passage of time and your rejection of my June 24th proposal, that proposal must be withdrawn. We will simply have to try again to find a basis for an agreement.

The parties met again on December 20, the anniversary date of the certification. There is scant testimony regarding that meeting. The parties argued about whether a contract had been reached. Business Agent and organizer Manuel Valenzuela testified, "also I believe [the Respondent's attorney] mentioned that the . . . I'm not sure if I can recall that particular date if he brought up the decertification, but we . . . but basically it was his position or the employer's position for [the Respondent] that there was no longer . . . there was no need for us to continue a discussion at that point." No further meetings were held.

By letter of December 28 the Union was informed that the Respondent had received a petition signed by a majority of bargaining unit employees indicating that they no longer desired union representation. The Respondent also informed the Union that it understood that the petitioning employees had filed a decertification petition. The Respondent stated that it, "is no longer under a legal obligation to bargain with [the Union], and in fact is legally prohibited from doing so." There is no evidence of any taint of the petition by the Respondent.

2. Contentions

Relying by analogy on *Georgia Kraft Co.*, 258 NLRB 908, 911 (1981), *enfd.* 696 F.2d 931 (11th Cir. 1983), counsel for the General Counsel argues that the June 24 offer was not rendered void by either passage of time or a prior rejection under the circumstances here where the offer was not contingent, no time limit for acceptance was mentioned, and the Union was not notified prior to ratification that the offer was no longer valid. Accordingly, counsel for the General Counsel argues that once the Union accepted the offer, the parties were obligated to continue bargaining on the remaining issues rather than starting over at the beginning. Finally, counsel for the General Counsel, relying on *Columbia Portland Cement*, 303 NLRB 880, 882 (1991), *enfd.* 979 F.2d 460 (6th Cir. 1992), and *Guerdon Industries*, 218 NLRB 658 (1975), asserts that the Respondent may not rely on the employee petition to support its withdrawal of recognition be-

that the Respondent's attorney attempted to evade or stall the Union. Rather, it appears that he was simply unavailable.

cause the petition was attributable to the Respondent's unfair labor practices.

Relying on *Pittsburgh-Des Moines Corp. v. NLRB*, 663 F.2d 956, 960 (9th Cir. 1981), and *Anaheim Plastics*, 299 NLRB 79, 102 (1990), counsel for the Respondent claims the Respondent's withdrawal of its June 24 proposal was entirely reasonable in light of the months of impasse, weathering the picketing, and subsequent weakening of employee resolve. The Respondent also disagrees that the import of the last sentence in its attorney's November 29 letter, "We will simply have to try again to find a basis for an agreement" necessarily evidenced an intention to start from scratch. Moreover, the Respondent notes that at least with regard to the copy of the June 24 proposal which was returned with the blanks filled in, the Union varied the proposal and, in effect, made a counterproposal, rather than accepting the June 24 proposal on its face.

3. Analysis

It is well established that a contract proposal which contains no contingencies or time limitations for acceptance remains on the table unless explicitly withdrawn or unless circumstances arise that would reasonably lead the parties to conclude that the offer has been withdrawn. *Hydrologics, Inc.*, 293 NLRB 1060, 1063 (1989). As I understand the Respondent's argument, this is not a contested principle. The Respondent argues, rather, that assuming the June 24 proposal was still on the table and assuming that the Union accepted that proposal on November 29,⁶ the Respondent was nevertheless bargaining in good faith when it withdrew the proposal because circumstances had changed.

The Respondent is correct in asserting that changed circumstances sometimes warrant withdrawal of a previously agreed-on proposal. Circumstances warranting such withdrawal include substantially changed circumstances as a result of successfully weathering a strike or changed circumstances due to passage of time.⁷

Impasse existed from June 24 to November 29. The Respondent implemented two proposals during this time with apparent acquiescence from the Union. Neither the Union nor the Respondent requested any further meetings during this time. The informational picketing subsided in October. The Respondent asserts that this evidenced a weakening of employee resolve. Because the picketing was by nonemployees, the cessation of the picketing appears to evidence only a weakening of union resolve. I am unable to conclude that this weakening of union resolve occurred because of employee disaffection or employee weakening of resolve or for some other reason. I can only conclude that union resolve had weakened.

Further evidence of weakening of union resolve is the second ratification vote held in September on an offer previously rejected and the subsequent communication on November 29 of employee ratification, about 3 weeks prior to

⁶I find that although the Union executed two copies of the June 24 proposal, one containing the blanks and one with the blanks filled in, the Union's intention was clear to accept the June 24 proposal. A cover letter stated inter alia, "please be advised that [the Union] hereby accepts the [the Respondent's] offer."

⁷See, e.g., *World Publishing Co.*, 220 NLRB 1065, 1072 (1975), enf. sub nom. *Typographical Union Local 190 v. NLRB*, 545 F.2d 1138 (8th Cir. 1976).

expiration of the certification year. From this evidence, it is possible to infer a weakening of employee resolve. Basically, then, the Respondent's bargaining position had been strengthened and the Union's weakened, during the time from June 24 to November 29.

In the final analysis, the last sentence of the Respondent's November 29 letter becomes crucial. "We will simply have to try again to find a basis for an agreement." If this sentence were construed as an actual invitation to start negotiations anew from scratch, such a position would indicate an intent to frustrate agreement and delay bargaining which, in my view, could not be supported by the change in relative bargaining strengths. However, if the last sentence is construed to mean merely that the parties must meet again and go through their prior tentative agreements to try to determine a basis for agreement, no intent to frustrate agreement or delay bargaining is evident. Literally, the sentence is susceptible of either interpretation.

In order to give meaning to the sentence, the Respondent's actions at the next bargaining session, held on December 20, would ordinarily shed light on the Respondent's intentions. If the Respondent insisted on starting over from scratch based on the change in relative bargaining position, an intent to frustrate bargaining and delay agreement until expiration of the certification year might be inferred. Unfortunately, as it happened, the Respondent was not put to the test at the December 20 meeting.

The uncontested evidence indicates the parties argued about whether a complete contract had been reached and the Respondent finally stated that there was no need to continue discussions at that point.⁸ There is no evidence regarding what would have happened if the Respondent had actually been requested by the Union to go through the June 24 proposal and discuss each of the items. Accordingly, I cannot construe the sentence of the November 29 letter as an invitation to bargain from scratch. Rather, I find that the sentence is compatible with good-faith bargaining. Further, I find that there is insufficient evidence from which to conclude that the Respondent's withdrawal of its June 24 "final" proposal following notification on November 29 of ratification of the proposal constituted bad-faith bargaining. Based on this conclusion, I also find no causal relationship⁹ between with-

⁸Valenzuela was uncertain whether the Respondent brought up the decertification on December 20 or at a later time. Although many of the signatures on the employee petition are dated December 20, others are dated December 22 and 23. It is unlikely that employee disaffection or decertification was discussed on December 20 because the uncontested facts indicate that the Respondent did not learn of the employee petition and the intention to file a decertification petition until December 28. Accordingly, I find that neither the employee petition nor the decertification petition was a basis for discontinuing discussions on December 20.

⁹After expiration of the certification year, an employer may withdraw recognition on the basis of evidence that the Union in fact no longer enjoys majority support or on the basis of a good-faith doubt of majority support based on objective considerations. Such withdrawal may occur only, "in a context free of unfair labor practices of the sort likely, under all the circumstances, to affect the union's status, cause employee disaffection, or improperly affect the bargaining relationship itself." *Lee Lumber & Building Material Corp.*, 322 NLRB 175 (1996). Absent a general refusal to recognize and bargain with the union, in which case a causal relationship is presumed, a causal relationship must be established between the unfair labor practice and employees disaffection. *Id.*

drawal of the June 24 proposal and the Respondent's subsequent withdrawal of recognition.

B. Suspensions and Discharges

1. Analytical framework

The consolidated complaint, as amended at trial, alleges that the Respondent suspended and discharged interment laborers John Quiroz and Michael Renteria because they supported the Union and engaged in concerted activities and to discourage employees from engaging in these activities. The complaint also alleges that Renteria was told at the time of his suspension that the Respondent knew he was one of the employees responsible for bringing in the Union and that he should resign his employment.

Section 8(a)(1) and (3) of the Act provide:

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization

In *Wright Line*,¹⁰ the Board outlined the burden and allocation of proof in cases which turn on the employer's motivation in taking personnel action against an employee as follows:

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

The Board has noted that use of the phrase "prima facie" case to describe the burden of the General Counsel does not substantively vary from use of the term, "burden of persuasion."¹¹ Accordingly,

the General Counsel bears the burden of demonstrating that the employer acted with discriminatory motive throughout the case. Although the Board labels the General Counsel's burden that of establishing a "prima facie" case, it has, in fact, traditionally required the General Counsel to sustain the burden of proving that the employer was motivated by anti-union animus.¹²

2. Facts

The Respondent has a written progressive disciplinary policy providing for verbal warnings, written warnings, corrective suspension without pay, suspension pending investiga-

tion, and termination for cause due either to, "within the past 12 months the employee has received two (2) written warnings for performance or conduct deficiencies and a third deficiency occurs for which a written warning could be given," or gross misconduct. However, the written policy is not rigidly followed. Moreover, various supervisors interpret provisions of the policy differently than others. In all cases, the individual circumstances of the employee and the situation determine what, if any, disciplinary action will be taken. The Respondent's two park supervisors, Peter Ramirez¹³ and Tom Ramos, jointly supervise all interment laborers at the Respondent's cemetery. Ramirez and Ramos report to Alfred Patrìtti, vice president and park manager. Sandy Durko is the executive vice president and Jenny Phillips is director of human resources.

a. Suspension and discharge of Quiroz

John Quiroz was hired by the Respondent on April 1, 1985, and worked initially as a carpenter and painter. He became an interment laborer in 1986 or 1987. As an interment laborer, Quiroz was jointly supervised by Ramos and Ramirez. Quiroz' work included filling graves, finishing graves, and driving a "greens"¹⁴ truck. Quiroz was on leave of absence from September 20 through December 13, 1993, during the union organizational drive and election. However, he attended union meetings held at one of the park gates in plain view of management, he wore union pins which said, "I support Teamsters,"¹⁵ and he was present at the first negotiation session and was asked to participate on the union negotiation team.

Quiroz received a written warning on September 14, 1993, just prior to his leave of absence, for failure to replace sod on a grave, a part of the grave filling procedure. On May 30, Quiroz received a written warning from Ramirez for destruction of a vault lid. Quiroz received a third written warning within a 1-year period on July 12 for, "being deceitful to supervisors," and was suspended for 3 days. Quiroz returned to work on July 16. On July 20, Quiroz was suspended for 3 days for failure to complete his job assignment. Quiroz returned to work on July 26 and was discharged. There are numerous credibility conflicts regarding the incidents which led to the suspension and discharge.

The Vault Lid

Quiroz admits that he ran over and broke a vault lid on May 27. Quiroz testified that he tried to reach a supervisor by radio to report the incident because he did not see a supervisor in the immediate area. However, after approximately 15 minutes with no response, Quiroz drove to his next site while continuing to attempt to report the incident by radio.

¹³ Ramirez was promoted to park supervisor at a later time.

¹⁴ "Greens" refers to artificial turf used at an open gravesite to cover the dirt remaining at the site which will be used to fill the grave. "Greens" are typically distributed throughout the day by a greens truckdriver and then picked up by that driver at the end of each day.

¹⁵ In April 1994, Quiroz was asked by Patrìtti to remove his buttons. This was on the occasion of former President Nixon's burial. The request to remove the buttons is not alleged as a violation but is relied on by the General Counsel to show animus.

¹⁰ *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 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).

¹¹ *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996).

¹² *Southwest Merchandising Corp. v. NLRB*, 53 F.3d 1334, 1340 (D.C. Cir. 1995).

On the way to his next site, Quiroz' truck developed a flat tire. Quiroz saw Ramos and told him he had a flat tire and would like to talk to him. Ramos responded, "not right now." About 10 or 15 minutes later, according to Quiroz, Ramirez came to the truck. Quiroz told Ramirez he had run over a vault lid and had a flat tire. Ramirez left and shortly thereafter a mechanic reported to the scene and changed the tire. Nothing further happened that day.

On the other hand, Ramirez testified he heard no attempt by Quiroz to report running over the vault lid. However, he independently discovered the damage to the vault lid and while inspecting it, Ramirez heard a radio call from Quiroz reporting a flat tire. Ramirez had already determined that the tire tracks at the damage site were similar to the tracks that Quiroz' vehicle would make. Ramirez confronted Quiroz and asked Quiroz if he had run over the vault lid. Quiroz denied that he had. Ramirez sent for a mechanic to fix the tire. The mechanic found a vault lid wire in the tire and at that point Quiroz confessed that he had run over the lid.

Ramos denied that he spoke with Quiroz on the day of this incident. Rather, Ramos stated that he was on the other side of the lawn from the incident and that Quiroz could simply have walked over and spoken to him personally.

On May 30, Ramirez gave Quiroz a written warning which stated under details of the incident, "Destruction of company property: John ran over vault lid. This type of action will not be tolerated." According to Ramirez, other drivers, including Quiroz on a prior occasion, have run over and destroyed vault lids and not been given a written warning. The reason Ramirez testified he gave Quiroz a written warning for this incident was because he felt Quiroz had lied to him by not admitting that he ran over the vault lid until after the mechanic found the vault lid wire. However, Ramirez agreed that he failed to articulate this in the written warning.

I credit Quiroz that he attempted to radio to report the broken vault lid. I also find, based on the written warning, that the reason for the warning was destruction of company property rather than deceitfulness.

The Missing Greens

Quiroz drove a greens truck again on July 11. His duties included hauling artificial turf to temporarily cover the mound of dirt left at a gravesite after the grave has been dug. Some of the dirt is hauled away and the rest is left to fill the grave. The greens are placed over the remaining mound of dirt for appearances as well as to keep the dirt from blowing onto other areas. Each greens truck is equipped with nine sets of greens. Greens are not left out overnight due to theft problems. In addition, the greens drivers place chairs at the gravesite.

Quiroz and Ralph Pedoya, the other greens truckdriver that day, were working in close proximity and decided to split up greens pickups without regard to which of them had put the greens down. Quiroz, however, did not correct his paperwork to reflect this change. When Ramos arrived the next morning, he saw a set of greens with chairs at a gravesite. Ramos asked Pedoya if he had left the greens and he said he had not. Ramos then asked Quiroz who also said he had not. Quiroz later realized that the greens were his and tried to explain what had happened but was unable to do so. None of these facts are disputed.

On July 12, Ramos suspended Quiroz for 3 days for, "being deceitful to supervisors: John left greens overnight on commemoration lawn. He denied the greens were from his truck. This type of misconduct will not be tolerated. Third write-up within a year, John will be suspended for 3 days, pending investigation." Quiroz testified that Ramirez was present when Ramos suspended him and that Ramirez said, "This has got nothing to do with a third party in here." Quiroz also testified that Ramirez said because of the third party, we have to go by the book. Quiroz testified that he tried to explain how the mistake had happened but the supervisors did not want to hear it. Ramirez and Ramos specifically denied that Ramirez told Quiroz that because there was a third party involved, everything had to be done by the book.

I credit Quiroz' version of the events and find that he was told that because of the "third party," the Respondent must go by the book.

The Finishing Job

Quiroz returned from suspension on July 16. On July 19, Quiroz worked as a finisher.¹⁶ A finisher applies the sod on top of the filled grave, places the base and sets the marker, waters the sod and cleans the area and marker of any remaining dirt. Finally, the finisher places the flowers in an orderly fashion around the grave. Quiroz was able to finish 7 of his assigned 11 graves on July 19. Quiroz reported this to Ramos.

On July 20, Ramos performed a routine spot check of the prior day's work and noticed one of the graves Quiroz had been assigned the prior day was not finished properly. Ramos took pictures of the area. These pictures¹⁷ indicated that the flowers were scattered on nearby graves and not arranged neatly on the gravesite and the marker was not washed off. Ramos suspended Quiroz on July 20. The warning report states, "Failure to complete job assignment: John continues to fail to complete graves to finish assigned to him. Has failed to water and clean around graves. He will be suspended for three days pending investigation."

On July 26, Quiroz was called into the conference room. Present in addition to Ramos and Ramirez were Patriiti and Phillips. Ramos showed the pictures to Quiroz. According to Ramos, Quiroz initially denied that it was his work but later admitted that the gravesite was as he left it. Quiroz explained to Ramos that it had been a hot day and the heat had slowed him down. According to Quiroz, when Ramos showed him the pictures he explained that he did not look like one of his graves. Ramirez said, "this has nothing to do with what is going on in the park."¹⁸ Quiroz explained that the hose had

¹⁶According to Ramos, Quiroz requested the job of finisher because he had undergone a hernia operation.

¹⁷Although these pictures were admitted in evidence as G.C. Exhs. 14A, 14B, and 14C, they were unfortunately lost or misplaced before color duplicates could be given to the reporter. Accordingly, these exhibits are missing from the record in this case. Fortunately, witnesses described these exhibits and I have relied on the descriptions.

¹⁸Informational picketing began on July 16. Ramirez did not recall whether he was present at Quiroz' termination conference. He testified that he did not remember making any remark to Quiroz at any time in which he made a statement such as, "this has nothing to do with what is going on in the park."

been missing from his tractor and he had carried all the water by hand for six of the seven graves he completed on July 19. As to the seventh grave, Quiroz admitted he had not watered it due to the missing hose.

I generally credit Quiroz' version of the discharge conference although I note that Quiroz does not dispute that the grave could have been one of his and, in fact, he admits that he did not have water to clean up one of the graves that he finished. I find that by Ramirez' reference to "what is going on in the park" he was referring to the informational picketing which began on July 16.

b. *Suspension and discharge of Renteria*

Michael Renteria was hired on September 3, 1985, and discharged on March 17, 1995. He began his employment as a laborer and later worked as a dirt truckdriver and then as a backhoe operator. He was supervised by Ramos and Ramirez. Following the union victory in December 1993, Renteria wore several union pins to work. Ramirez told Renteria to take off the pins because they were not part of his uniform. Renteria complied. In February 1994, Renteria participated on the union negotiation team for the first bargaining session. Patriitti asked Renteria not to participate in further negotiations because the Respondent was understaffed at the time and needed him at work.¹⁹

On September 15, Renteria was suspended for 2-1/2 days for "misconduct with company equipment." Renteria was given an overall performance appraisal rating of below expectations for the period September 1993 to September 1994. An addendum to the appraisal states that Renteria had been warned and suspended for destruction of company equipment and that further infractions would result in termination. Renteria was issued a written warning in October 1994 for blocking traffic. Renteria did not sign the decertification petition that circulated in December. He was suspended on March 16, 1995, for improper grave filling procedures. On March 17, 1995, he was discharged.

Mechanical Difficulties

There are no credibility disputes regarding the operative facts involved in this warning. Renteria agreed that his job included checking the water and oil in any vehicle before he left the service yard. Renteria did this on a daily basis. On August 29, after checking the water and oil in the backhoe tractor he would operate that day, Renteria proceeded to his first assignment which was to dig a grave. When he completed digging the grave, the backhoe stopped running. Renteria heard a loud noise and saw smoke coming from the motor. He called a supervisor to report the incident. Renteria testified that he was not observing the temperature gauge while he dug the grave. Renteria agreed that if he had been observing it, he would have turned off the engine if he had seen the temperature gauge indicate overheating and that this might have saved the engine.

On September 13, Renteria operated a dirt truck. After hauling dirt from several gravesites, the truck made a knocking noise. Renteria stopped the truck and reported the incident. On September 15, Renteria was suspended for 2-1/2 days. The suspension report stated in part,

¹⁹ Neither removal of the pins nor the request to cease participating in negotiations is alleged to be violative of the Act.

Misconduct with company equipment: On August 29 Mike did drive backhoe tractor with very little water, thus causing engine to malfunction and burn up. On September 12 Mike did bring in dirt truck with no oil pressure. For these infractions Mike will be suspended for 2 1/2 days for misconduct in dealing with company equipment. Any further infraction of this kind will result in termination from employment.

Blocking Traffic

According to Ramirez, he observed Renteria on October 18 at gate 6 blocking four or five cars trying to exit the park by parking his backhoe tractor in a manner which prohibited all access through the gate. Ramirez waited from 3 to 4 minutes. During that time he observed Renteria standing on the sidewalk talking with some people. On October 21, Ramirez and Ramos gave Renteria a written warning for blocking traffic. Renteria protested and Ramirez stated that Renteria had been turned in by an office employee who was stuck in traffic at the gate. According to Renteria, Ramirez also said, "this ain't coming from us. This is from Sandy Durko."

Renteria met with Durko and asked why he was getting written up if the Respondent had no proof.²⁰ Durko responded that Renteria had been turned in and the warning was appropriate. Durko told Renteria if he did not like his wages or working for the Respondent, he should find work elsewhere. Renteria also testified that Durko stated that Patriitti had told him that Renteria was one of the four or five employees who helped bring the Union into the Respondent. Durko denied this last statement although he agreed that he told Renteria if he did not like working for the Respondent, he should find other work.

I credit Renteria's account of his meeting with Durko. Renteria did not include all of the statements which he now attributes to Durko when Renteria testified in an unrelated deposition taken several months before this hearing. The Respondent argues that Renteria should be discredited because he omitted from that testimony the statement which he now attributes to Durko that Durko told him if he did not like his wages he should find other work and that Durko knew Renteria was one of the main union organizers. However, because Durko testified that he did recall telling Renteria that if he did not like working for the Respondent, he could find work elsewhere, I find it probable that Renteria's version is more accurate.

Improper Filling Procedures

On March 7, 1995, Ramirez reminded Renteria to use a T-tamp to place sand or dirt around the vault when filling a grave. On March 15, 1995, one of the graves which Renteria had filled was disinterred due to lack of a permit for the burial. Ramirez observed the disinterment and noticed there was no sand or dirt around the vault. There was simply a space. On March 16, 1995, Ramirez and Ramos suspended Renteria until noon the next day for using improper filling

²⁰ According to Renteria, he recalled being at gate 6 waiting for traffic to clear so he could turn onto the street. He recalled someone behind him honking and he recalled waiving to one of the picketers. However, he denied that he parked his tractor in such a way as to block traffic and he denied that he got off his tractor at any time while at the gate.

procedures. On March 17, 1995, Ramirez spoke to Renteria in the conference room in the presence of Phillips and asked Renteria why he had not used sand²¹ around the disinterred vault and T-tamped it. According to Ramirez, Renteria responded that he did not feel like it. At this point, Phillips and Ramirez decided to discharge Renteria. Patrilli arrived in the conference room after that decision was reached. An employment termination notice dated March 16, 1995, states that Renteria was discharged for refusal to follow supervisor's instructions.

According to Renteria, he suspected a suspension until noon the following day was indicative that he would be discharged. When he arrived in the conference room, Phillips, Patrilli, Ramirez, and Ramos were present. Ramirez told Renteria he was being discharged because he failed to use sand to fill the grave. Renteria did not try to provide an explanation because he felt the decision had already been made. I credit Renteria. The employment termination report was completed on March 16, 1995, and indicates that Renteria was discharged for failure to follow supervisor's instructions. This report does not mention the insubordination which allegedly occurred on the following day during the conference.

3. Contentions

Counsel for the General Counsel argues that a prima facie case has been made because the credible evidence supports a finding that both Quiroz and Renteria were engaged in union activity with the knowledge of the Respondent. Further, counsel for the General Counsel argues that animus is amply illustrated by the statement of Durko to Renteria that Durko knew Renteria was one of the persons responsible for bringing in the Union and if Renteria did not like working for the Respondent, he should leave. Counsel for the General Counsel also submits that animus is disclosed by Ramirez' statement to Quiroz that discipline had to be imposed by the book because there was now a third party present. Moreover, counsel for the General Counsel relies on evidence of disparate treatment and pretextual justification for imposing discipline as further evidence from which to infer animus. Finally, counsel for the General Counsel argues that due to the Respondent's extreme tolerance of other employees' infractions, the Respondent has clearly failed to show that Quiroz and Renteria would have been suspended and discharged in the absence of their protected activity.

The Respondent does not dispute that its supervisory personnel were aware of the prounion sentiments of Quiroz and Renteria. The Respondent further concedes that Quiroz and Renteria were told to remove union pins. Discounting the statements Quiroz attributed to Ramirez regarding "going by the book" and a "third party in the park," as enigmatic phrases, the Respondent suggests that Renteria's testimony regarding his conversation with Durko should not be credited. The Respondent notes that there are no other allegations or evidence of surveillance, interrogation, threats, or any of the other conduct usually associated with antiunion animus and further points to evidence that other employees who were more vocal union supporters continue their employment

²¹ Apparently the Respondent's policy required that sand be used in the immediate space around the vault except when it was raining. On those days, dirt was used.

with the Respondent. Finally, the Respondent asserts that both Quiroz and Renteria had poor work records and both committed demonstrably dischargeable offenses.

4. Analysis

Union activity and knowledge of that activity are conceded. The credible evidence indicates that Quiroz' and Renteria's suspensions and discharges were motivated at least in part by their union activity. Although the evidence of animus, as the Respondent notes, is not overwhelming, I find sufficient evidence of animus to sustain the General Counsel's prima facie burden. Both Quiroz and Renteria were asked to remove their union buttons. Durko told Renteria if he did not like working for the Respondent he could find other work and Durko stated he had been told that Renteria was one of four or five main union advocates. Ramirez told Quiroz that because of a "third party," by which I find he meant the Union, the Respondent must go by the book now. The Respondent admitted that, in general, discipline was imposed on an individual basis in light of the employee and the circumstances of the situation. There is some evidence which indicates that in other situations, the Respondent did not impose discipline even though in excess of two written warnings were received by other employees within a 1-year period.²² Finally, the evidence that Quiroz and Renteria were suspended and discharged because of their union activity is augmented by the variation in explanation between Ramirez' testimony about the reason for Quiroz' written warning (failure to admit destruction of company property) and the written warning itself (destruction of company property). Similarly at variance is Ramirez' testimony regarding the reason for discharge of Renteria (insubordination) and the documentation of the termination (refusal to follow supervisor's instructions). Such shifting reasons strengthen the inference that the true reason for the terminations were union activity. Accordingly, I conclude that a preponderance of the credible evidence indicates that Quiroz' and Renteria's union activity was a motivating reason for their suspensions and terminations.

The Respondent's burden is to show by a preponderance of the evidence that it would have taken the same action even in the absence of the employees' union activity. Neither employee was exemplary. However, both were long-term employees. Quiroz was given a written warning on April 8, 1992, for "driving backhoe tractor through service: after repeated verbal warnings to all employees, John did drive his tractor through a service which had just arrived. He could have used an alternate route." He was given another warning on September 14, 1993, for "failure to complete all required

²² The evidence of disparate treatment, which is set out in detail infra, involved personal and potentially embarrassing details of various employees' marriage and home life. Accordingly, I have not identified these employees by name. Employee A's warnings are contained in G.C. Exh. 28; employee B, G.C. Exh. 29; employee C, G.C. Exh. 30; and employee D, G.C. Exh. 31. Employee A received three warnings within a 1-year period and was not suspended or terminated. Employee B received four warnings on two different occasions within a 1-year period and was not suspended or terminated. Employee C received three written warnings within a 1-year period and was not suspended or terminated. Employee D received four written warnings within a 1-year period and was not suspended or terminated.

steps in backfill process, namely replacing sod on graves.' Both of these written warnings were received prior to the advent of union activity.

Following the certification of the Union and Quiroz' appearance at the negotiation table, Quiroz was given a written warning for destroying the vault lid even though other employees had done the same thing and, by the Respondent's admission, had not been disciplined. As to Quiroz' second postcertification warning, Quiroz admitted that he left the greens out and admitted that he initially denied they were his. Finally, as to the finishing job, the reason the Respondent claims it discharged Quiroz, Quiroz admits that he did not have a hose to clean the gravesite. Although he said the pictures did not look like his work, he did not specifically deny that it might be his work. I find that even in the absence of his union activity, Quiroz would have received written warnings for both the missing greens (July 12) and failure to complete the gravesite finishing job (July 20). The July 20 warning would have been Quiroz' third in a 1-year period.

Accordingly, Quiroz would have received three written warnings within a 1-year period regardless of his union activity. However, this does not necessarily mean that he would have been suspended or terminated. The Respondent's policies were administered on an individual basis. It was not until the Union was certified that the Respondent decided to "go by the book."

Renteria received a written warning on May 8, 1989, for improper grave filling; a written warning on April 22, 1991, for excessive absenteeism; a written warning on October 15, 1991, for excessive speed; a written warning January 26, 1993, for dumping dirt in an unauthorized area; a written warning for reckless driving on February 24, 1993; and a written warning on September 14, 1993, for failure to complete the grave filling process by placing sod on a grave. Thereafter, on September 15, 1994, Renteria was suspended for 2-1/2 days due to the mechanical damage to company equipment. Renteria admitted the damage to the tractor might have been avoided. He received a written warning for blocking traffic on October 21, 1994. I have found, based on credibility, that he did not block traffic and that this written warning was attributable to Renteria's union activity. Finally, in March 1995, Renteria was suspended and discharged for failure to follow supervisor's instructions to use a T-tamp.

However, even assuming that Renteria failed to properly utilize the T-tamp, a warning for this offense would have been only his second in a 1-year period. Moreover, even assuming that none of the three warnings was motivated by union animus, the Respondent's treatment of Renteria and Quiroz differed from its treatment of other employees.

Employees who were not active union adherents were not strictly subjected to the policies set forth in the progressive disciplinary policy. For instance, employee D received a written warning on February 24, 1993, for reckless driving; three written warnings on June 1, August 10, and November 15, 1993, for failure to notify supervisor of absence; and, prior to May 1994, he ran over a vault lid and damaged it but did not receive a written warning for this. Employee D was not suspended or discharged when he received the August 10 warning or the November 10 warning. However, both of these warnings were his third in a 1-year period. Ramos explained that employee D's commute to work was

70 miles in each direction. In addition, employee D's mother had developed severe depression on the death of his father in 1993 so sometimes it was necessary for employee D to stay home with her. Based on these considerations, the Respondent had not imposed harsher discipline.

Similarly, employee C received a written warning on September 14, 1993, for failure to complete all steps in the grave filling process; a written warning on November 17, 1993, for poor performance including breaking vaults; a written warning on June 2, 1994, for poor work performance; and a written warning on November 26, 1994, for unsafe driving. Employee C was not suspended or discharged on June 2, 1994, when he received his third warning in a 1-year period. Ramos explained that employee C was in the process of obtaining a divorce and his wife abandoned their children so employee C stayed at home and began drinking. He has since improved. The Respondent did not suspend or discharge employee C due to these problems.

Employee B received written warnings for excessive absenteeism on July 25, 1990, and May 18 and November 5, 1991. He was not suspended or terminated on November 5, 1991, although this constituted his third warning within a 1-year period. Further, employee B received a written warning on December 31, 1991, for failure to seal a marble niche front; and a written warning on January 23, 1992, for excessive absenteeism. On neither occasion was he suspended or discharged although these warnings constituted a third and fourth warning within a 1-year period.

Then on February 25, 1993, employee B received a written warning for excessive absenteeism; on September 15, 1993, he received a written warning for failure to perform assigned duties which stated it was a final written warning; and on November 4, 1993, he was given a letter stating that an investigation strongly suggested that employee B had been consuming alcoholic beverages on the Respondent's premises. On January 20, 1994, employee B was given a written warning for placing a cremation in the wrong location. Employee B was not suspended or discharged. Finally, on January 6, 1995, when employee B received a written warning for failure to perform job duties, he was warned that any further occurrence will result in suspension. Ramos explained that employee B was married to a woman with an addiction and she did not come home sometimes so employee B would stay at home with the children. After he divorced her, his Vietnam War posttraumatic syndrome caused him to be unable to sleep alone so he missed more work. He has now received help and has remarried and has no attendance problems.

Employee A received a written warning on September 14, 1993, for failure to complete all required steps in grave filling process; on October 7, 1993, for failure to dig a grave on time; and on February 11, 1994, for disposal of hazardous waste on company property. He was not disciplined or discharged although the February 11, 1994 warning was his third in 6 months. Ramos explained that employee A was not suspended or terminated because the third warning had nothing to do with employee A's work performance. Moreover, employee A's second warning occurred after he had been robbed at gun point. He had become nervous and started drinking. The Respondent was unaware of this trauma until the second warning was given.

The evidence indicates that the Respondent had no uniform system of progressive discipline and, in fact, amply illustrates that other employees were treated differently than Quiroz and Renteria. Although Ramos provided explanations for the Respondent's leniency in those cases, it was unclear at what point in the disciplinary process the Respondent was informed of these employees' situations. Ramos admitted these employees had been evasive in letting the Respondent know of their difficulties. Ramos, in addition, noted that Quiroz and Renteria were distinguishable from the others based on their noncaring attitudes. Neither of these employees' individual cases was taken into account when discipline was decided on. I conclude, therefore, that but for their union activity, Quiroz and Renteria would not have been suspended and discharged. Accordingly, I find that the Respondent violated Section 8(a)(1) and (3) of the Act by suspending and terminating Quiroz and Renteria.

CONCLUSIONS OF LAW

1. By informing an employee that he was a known union advocate and he should resign his employment, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By suspending and terminating employees John Quiroz and Michael Renteria, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent discriminatorily suspended and discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²³

ORDER

The Respondent, Rose Hills Mortuary L.P. d/b/a Rose Hills Company, Whittier, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing an employee that he was a known union advocate and he should resign his employment.

(b) Suspending and discharging or otherwise discriminating against any employee for supporting Wholesale Delivery Drivers, Salespersons, Industrial & Allied Workers, Local

²³ 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.

848 International Brotherhood of Teamsters, AFL-CIO or any other union.

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

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

(a) Within 14 days from the date of this Order, offer John Quiroz and Michael Renteria full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make John Quiroz and Michael Renteria whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

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

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Whittier, California, copies of the attached notice marked "Appendix."²⁴ Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the 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 August 5, 1994.

(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 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.

²⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

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

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 inform an employee that he was a known union advocate and he should resign his employment.

WE WILL NOT suspend or discharge or otherwise discriminate against any of you for supporting Wholesale Delivery Drivers, Salespersons, Industrial & Allied Workers, Local

848 International Brotherhood of Teamsters, AFL-CIO or any other union.

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

WE WILL, within 14 days from the date of the Board's Order, offer John Quiroz and Michael Renteria full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make John Quiroz and Michael Renteria whole for any loss of earnings and other benefits resulting from their suspensions and discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspensions and discharges of John Quiroz and Michael Renteria, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the suspensions and discharges will not be used against them in any way.

ROSE HILLS MORTUARY L.P. D/B/A ROSE
HILLS COMPANY