

Fritz Companies, Inc. and Fritz Air Freight (a/k/a Intertrans Corporation/Stair Cargo Services, Inc.) and Freight Drivers, Warehousemen and Helpers Local Union No. 390, affiliated with International Brotherhood of Teamsters, AFL-CIO and Juan C. Valdes and Israel Ramos and Lazaro Aleman and Aldo Gomis and Fernando Roca. Cases 12-CA-17713, 12-CA-17778 12-CA-17799 12-CA-18074, 12-CA-18232, 12-CA-18453-1, 12-CA-18453-2, 12-CA-18453-3, and 12-CA-18453-5

April 21, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On February 2, 1998, Administrative Law Judge Parzen Robertson issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions and briefs, and has decided to affirm the judge's rulings, findings,¹ and conclusions² consistent with the discussions below, and to adopt the recommended Order as modified.³

1. The judge found that on October 22, 1996, the Respondent engaged in discrimination in violation of Section 8(a)(3) and (1), and in unilateral changes in employment conditions in violation of Section 8(a)(5) and (1), when it laid off six prounion warehouse employees who had previously been truckdrivers for the Respondent. The Respondent excepts, inter alia, to the 8(a)(5) and (1) finding concerning these layoffs. It contends that the judge mistakenly found that the Respondent failed to provide notice and an opportunity to bargain regarding the layoffs. The Respondent argues that the Union in fact received notice and an opportunity to bargain on October 21, the day before the layoffs. The Respondent asserts that at this meeting the Union did not reply to the Respondent's layoff proposal in any significant way, but merely expressed its disagreement and asked that it be notified of the date of the layoffs. The Respondent sug-

gests, therefore, that the Union acquiesced or otherwise waived its bargaining rights in the matter, and that accordingly the Respondent was free to implement the layoffs lawfully on October 22.

We find no merit in this exception. The Respondent ignores the testimony of discriminatee Lazaro Aleman, which was credited by the judge concerning this incident. This, together with other evidence consistent with the credited testimony, provides a clear picture of the October 21 session, showing that the Union was presented with a fait accompli.

Aleman testified that there was very little discussion of the layoff issue at this meeting. The Respondent simply stated that the economic situation was poor and that layoffs in the warehouse were required. The Respondent further stated that the six former drivers would be laid off because they were the least senior warehouse employees according to "the list." After a very brief discussion of the matter, the Respondent specified the names of those to be laid off. Although it is apparent that the Union made clear its disagreement, there was no further discussion. The layoffs were implemented the next day.

Discriminatee Aldo Gomis, who was also at the meeting, corroborated Aleman's testimony. To further clarify the circumstances, we note that the testimony of David Curtis, the Respondent's attorney and negotiator, the testimony of the Respondent's human resources manager, Luis Puebla, and the Respondent's factual representations in its exceptions brief, establish that the Respondent explained to the Union on October 21 that its basis for calculating the six employees' seniority was the parties' "letter of understanding" of July 21, 1995. That agreement permitted the Respondent's truckdrivers to continue working as warehouse employees following the termination of the Respondent's trucking operation for business reasons in 1995. In context, it is apparent that this previous agreement was "the list" Aleman referred to in his testimony.

It is well established that upon appropriate notice of the employer's intention to change employment conditions, the union must timely request that the employer bargain over the matter. "However, if the notice is too short a time before implementation or because the employer has no intention of changing its mind, then the notice is nothing more than informing the union of a fait accompli." *Intersystems Design Corp.*, 278 NLRB 759 (1986), quoting *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982), *enfd.* 722 F.2d 1120 (3d Cir. 1983).

The record establishes that what occurred at the October 21 meeting was the Respondent's announcement that it had decided that layoffs would be carried out for economic reasons, and that six employees had been chosen pursuant to what the Respondent identified as the layoff-seniority provisions of the July 21, 1995 letter of understanding. This was not a bargaining proposal, but a

¹ The Respondent and the General Counsel have 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.

² No exceptions were filed to the judge's failure to address the complaint allegation that the Respondent refused to bargain over the effects of its decision to transfer bargaining unit work to a different location.

³ We will modify the Order to conform with the judge's recommended remedy, and to provide the conditional notice mailing as required in *Excel Container, Inc.*, 325 NLRB 17 (1997).

statement of what the Respondent considered itself contractually permitted to do by prior agreement. There is no indication that the Respondent intended to entertain counterproposals from the Union, or that it was otherwise open to a change of mind concerning an issue which, in its view, the parties had already resolved. Thus, the Respondent informed the Union of a fait accompli. That the Union did not respond other than to disagree is understandable in these circumstances—it would have been a futile gesture.⁴ In these circumstances, we find that the Union was not provided with timely notice and an opportunity to bargain regarding the layoff of these six employees.

We agree with the judge that the July 21, 1995 letter of understanding and the circumstances of its negotiation provide no basis in fact to justify the layoffs. That agreement does not address layoff procedures or the application of seniority as it may relate to layoffs in the warehouse. In light of the Respondent's presentation to the Union of a fait accompli on October 21 and the absence of any justification for the unilateral implementation of the layoffs, contractual or otherwise, we agree that the Respondent unilaterally laid off the six employees in violation of Section 8(a)(5) and (1).

2. The Respondent excepts to the judge's finding that it violated Section 8(a)(1) when its security agent showed discriminatee Aldo Gomis a security report relating that a supervisor had been overheard the day before encouraging an employee to attack Gomis physically. The Respondent argues that the judge did not establish a factual context indicating that this incident was related to Gomis' union activity. However, we note that the judge found elsewhere in his decision that the Respondent, through its security agents, unlawfully increased its surveillance of Gomis because of his union activities, beginning in December 1995 and ending when he was unlawfully discharged in October 1996. The "security report" incident occurred in January 1996, during this period of enhanced, unlawful surveillance of Gomis. Given this context, we find that the recording of the report threatening physical harm and its presentation to Gomis by the Respondent's security agent were related to his protected activity. Accordingly, we reject the Respondent's exception as lacking in merit, and we affirm the judge's finding of a violation.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Fritz

⁴ Given the discriminatory nature of the six layoffs, fully discussed in the judge's decision, it is inferable that the situation appeared futile to the Union for the additional reason that the layoffs seemed unlawfully motivated, and not amenable to good-faith bargaining. In this vein, we note that the Union filed unfair labor practice charges alleging that the Respondent's action violated Sec. 8(a)(3) on October 28, 6 days after the layoffs were effected.

Companies, Inc. and Fritz Air Freight, Miami, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly.

"(b) Make Juan Valdes, Fernando Roca, Jesus del Valle, Lazaro Aleman, Israel Ramos, Rafael Soto, and Aldo Gomis 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."

2. In the relettered paragraph 2(f), substitute the date "January 20, 1996" for "March 7, 1996."

3. Substitute the attached notice for that of the administrative law judge.

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 solicit our employees to physically harm an employee because of his support for the Union, Freight Drivers, Warehousemen and Helpers Local Union No. 390, affiliated with International Brotherhood of Teamsters, AFL-CIO.

WE WILL NOT coercively interrogate our employees about their union activity.

WE WILL NOT solicit our employees to sign a petition to decertify the Union.

WE WILL NOT promise any employee a supervisory position in exchange for that employee's signing a petition to decertify the Union.

WE WILL NOT promise any employee that we will support him or her if that employee signs a petition to decertify the Union.

WE WILL NOT threaten our employees that we will shut our doors if the employees do not get rid of the Union.

WE WILL NOT threaten our employees that union representation on behalf of employees is futile.

WE WILL NOT promise to deal with employees regarding grievances without union representation.

WE WILL NOT threaten our employees that they will miss out on opportunities and not gain benefits and become full time, because of the Union.

WE WILL NOT threaten our employees that we can not offer improved employee benefits because of the Union and the negotiation process.

WE WILL NOT threaten our employees that we will not sign a collective-bargaining contract with the Union.

WE WILL NOT threaten our employees that a union rally could cause the Company to lose business.

WE WILL NOT threaten our employees that they will never get a collective-bargaining agreement.

WE WILL NOT increase surveillance and videotape our employees' union activities.

WE WILL NOT warn, decrease the weekly hours of, or terminate our employees because of their union activities.

WE WILL NOT unilaterally terminate employees in the following appropriate bargaining unit without lawfully notifying and bargaining with the Union:

All full time cargo handlers/warehousemen, drivers, dispatchers, palletizers, carpentry employees, receivers and forklift drivers employed by us at our 9020 N.W. 12th Street, Miami, Florida facility; but excluding all other employees, office clerical employees, managerial employees, confidential employees, guards, and supervisors as defined in the Act.

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

WE WILL, within 14 days from the date of the Board's Order, offer Juan Valdes, Fernando Roca, Jesus del Valle, Lazaro Aleman, Israel Ramos, Rafael Soto, and Aldo Gomis 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 Juan Valdes, Fernando Roca, Jesus del Valle, Lazaro Aleman, Israel Ramos, Rafael Soto, and Aldo Gomis whole for any loss of earnings and other benefits resulting from their discharges and Valdes' reduction in work hours, 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 warning issued to Aldo Gomis, the unlawful reduction in hours affecting Juan Valdes, and the unlawful discharges of Fernando Roca, Jesus del Valle, Lazaro Aleman, Israel Ramos, Rafael Soto, and Gomis, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that none of these unlawful actions will be used against them in any way.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached concerning a

decision to terminate unit employees in the bargaining unit set forth above.

Fritz Companies, Inc. and Fritz Air Freight

Shelley Bryant-Plass, Esq., for the General Counsel.
David M. Curtis, Esq. and *Patrick Richter, Esq.*, of Dallas, Texas, for the Respondent.
Scott Weingarden, Esq., of Coral Gables, Florida, for the Charging Party.

DECISION

PARGEN ROBERTSON, Administrative law Judge. This hearing was held on from September 8 through 10, and September 29 and 30, 1997, in Miami, Florida. A consolidated complaint issued on June 26, 1997. The complaint was amended at the hearing on September 8, 1997.

All parties were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Respondent and the General Counsel filed briefs. On consideration of the entire record and the briefs, I make the following findings

I. JURISDICTION

Respondent admitted at the hearing that Fritz, a Delaware corporation, has been engaged in the business of freight forwarding at its warehouse facility located at 2970 N.W. 75th Avenue, Miami, Florida (building 1), and thereafter at 10000 N.W. 25th Street, Miami, Florida (new facility), and that Fritz Air, also known as Intertrans Corporation/Stair Cargo Services, Inc., a Texas corporation, has been engaged in the pickup, storage, and delivery of freight at its principal office and place of business at 9020 N.W. 12th Street, Miami, Florida (building 2), and thereafter at the new facility. During the past 12 months Fritz and Fritz Air, while engaged in their respective business operations each sold and shipped from its respective Florida facilities goods valued in excess of \$50,000 directly to points outside Florida; and each purchased and received at its respective Florida facilities goods valued in excess of \$50,000 directly from points outside Florida. At all material times, Fritz and Fritz Air have been employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admitted at the hearing that at all material times Fritz and Fritz Air have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have shared common premises and facilities; have interchanged personnel with each other; have held themselves out to the public as a single-integrated business enterprise and have codetermined the establishment of work rules, working hours, and employee compensation by which employees would operate. Respondent admitted that based on the operations described above, Fritz and Fritz Air constitute a single-integrated business enterprise and a single employer within the meaning of the Act.

Respondent admitted at the hearing that at all material times Fritz and Fritz Air have been parties to a business relationship which provides that Fritz Air is the agent for Fritz in connection with the business of forwarding freight received by Fritz in Miami, Florida; and Fritz and Fritz Air have been joint employers of the employees employed at building 2.

II. LABOR ORGANIZATION

Respondent admitted that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. SUPERVISORY ALLEGATIONS

Respondent admitted at the hearing that all the alleged supervisors are supervisors within the meaning of Section 2(11) but Respondent denied that five of those supervisors were Respondent's agents. Those five are Roberto Grandal, John Mandri, Manny Sanchez, Victor Suzrez, and Fernando Alizo. The admitted supervisors and agents are Lynn Fritz, Frank Gumina, and Luis Puebla.

IV. THE UNFAIR LABOR PRACTICE ALLEGATIONS

On June 13, 1994, the Union was certified as bargaining representative of the following employees of Respondent:

All full time cargo handlers/warehousemen, drivers, dispatchers, palletizers, carpentry employees, receivers and forklift drivers employed by Respondents at its 9020 N.W. 12th Street, Miami, Florida facility; but excluding all other employees, office clerical employees, managerial employees, confidential employees, guards and supervisors as defined in the Act.

The parties engaged in collective-bargaining negotiations. However, they have failed to reach final agreement.

A decertification petition was filed on February 28, 1996.

The General Counsel alleged that Respondent engaged in activity in violation of Section 8(a)(1), (3), and(5) of the Act.

A. Section 8(a)(1)

1. John Mandri

Respondent admitted that John Mandri was assistant manager of Fritz Air at material times and was a supervisor.

Aldo Gomis testified that he was shown a copy of an occurrence report prepared by security guard Uvelio Nunez. Gomis was shown the report on January 20, 1996, the day after it was prepared by Nunez. Nunez reported that he overheard a conversation between John Mandri and a temporary warehouse employee on January 19, 1996. Nunez quoted Mandri's comments in Spanish. Mandri's comments were translated at the hearing as follows:

Aldo is a person with two faces, and none of the two faces is a good one. What we have to do, all the employees of the warehouse, is to grab him outside at the parking lot and give him a good set of punches. That's the only thing that I could say and do.

As shown herein, Aldo Gomis was one of the most visible union supporters.

Conclusions

Credibility

Throughout the record some of the witnesses did not speak English fluently if at all. A translator was used on those occasions. As to this particular allegation, there was a translation on the record of a report that included some comments in Spanish.

The evidence regarding the comments by John Mandri on January 19, 1996, are not in dispute. I credit the testimony of Aldo Gomis. Gomis demonstrated good demeanor and the full record supported the bulk of his testimony.

Findings

Respondent admitted that at all material times it has maintained a contract with Burns International Security Services for security personnel who perform services at buildings 1 and 2 and that the Burns' security personnel have been acting on behalf of Respondent as its agents.

The report shown to employee Aldo Gomis was prepared by an admitted agent, security guard Uvelio Nunez. According to that report admitted Supervisor John Mandri, suggested to an employee named Saul that the employees should physically harm Gomis. Gomis was a well-known union supporter.

Respondent argued that the record failed to reveal the context in which the comments were made by John Mandri. However, the record does show that the report was shown to Gomis by a security guard. The security guards were agents of Respondent. It appears from the face of the report that Mandri was soliciting an employee to engage in physically harming Gomis.

Under the circumstances I am convinced that Aldo Gomis was physically threatened by an agent of Respondent because of his union activity. I find that the actions of Uvelio Nunez and John Mandri tend to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 and constitutes violation of Section 8(a)(1) of the Act. *M. K. Morse Co.*, 302 NLRB 924 (1991).

2. Roberto Grandal

Respondent admitted that Grandal was an assistant manager of Fritz Air at material times and was a supervisor even though it denied Grandal was its agent.

Kenny Perez worked for Fritz Companies in the warehouse beginning in 1991. Perez was an open union supporter from 1994. Perez was called in to Roberto Grandal's office. After having his recollection refreshed Perez testified that he was called into Grandal's office before his schedule was changed in April 1996. Grandal asked if Perez had a problem with what was going on with the Company and the Union. Perez explained that he was having money problems and he could not take this any more. He said that he was going to be leaving the Company.

Grandal asked if Perez would help him. He told Perez that he needed him to sign this petition stating that he wanted to go for another reelection to get the Union out of the Company. Grandal showed him the petition which stated in English and Spanish that the undersigned employees no longer wish to be represented by the Union. Perez refused to sign the petition.

Grandal told Perez that if he was leaving why didn't he help Grandal by signing the petition. Grandal told Perez that, "that position you've been looking for as a supervisor can be granted to you if you sign the petition, and if you had any problems with the Union, or any employee that worked—that was with the Union in the company, that they would back me up a hundred percent, that the company would back me up a hundred percent." Grandal said the Company would not last another year if they kept on with the Union and that Lynn Fritz would not keep the Company running in Miami and would shut the doors down and forget about everything.

After his meeting with Grandal, Perez told Aldo Gomis about the meeting. He and Gomis went to Luis Puebla and told Puebla of the occurrence. Puebla denied knowing about what Grandal did but agreed that he would speak with Grandal.

Eduardo Felipe became a supervisor in September 1995. Felipe was cautioned by Roberto Grandal in the presence of

Victor Suarez. Grandal told Felipe that Felipe was giving the "Union guys so much overtime." Grandal said, "[W]e can't have it." Felipe was told to separate Aldo Gomis and Bengochea in order to prevent their having access to talk to employees.

Felipe testified that Grandal told him to separate employees if he saw more than two union supporters together.

Eduardo Felipe admitted that he threatened Marlon Solorzano that Solorzano was going to be fired if he did not support decertification of the Union. Solorzano asked to be placed on the 7 a.m. to 4 p.m. shift in exchange for signing the decertification petition and Felipe agreed. Felipe checked with Luis Puebla and Puebla said there was no problem with giving Solorzano the shift times requested.

After the Union's 1994 certification Aldo Gomis was selected to represent the employees in the plant. Gomis testified that employee Jesus del Valle asked him to speak with Luis Puebla regarding an April 26, 1996 change in work schedule. Gomis along with del Valle, Rubeen Gonzalez, and Larry Aleman met with Puebla, Tom Magill, Roberto Grandal, and Ramon Suarez. Gomis stated that he should have been contacted before the change in work schedule. Grandal told Gomis that he was nothing to del Valle to want to represent del Valle and that was a company and supervisory matter. Grandal said that Gomis was, "no one, you have to speak for yourself." He said that the work schedule change was not Gomis' problem.

Juan Valdes was a temporary employee assigned to Respondent. In 1996 before Respondent transferred him to the Gateway department on April 29, Roberto Grandal and employee Carlos Bello approached him. Bello asked if the Company gave Valdes a support vote who would he vote for. Valdes said that he would not vote for the Company because they had not given him any benefits. Grandal told Valdes to think about that because Valdes had a family and could miss out on an opportunity and that Valdes was not a full-time employee because they were having battles over the Union. Grandal told Valdes that if it was not for the Union, Valdes could have benefits and could be full time. Grandal said that the Union was going to disintegrate because the Union did not have money, but Fritz did.

Conclusions

Credibility

I credit the testimony of Kenny Perez, Eduardo Felipe, Aldo Gomis, and Juan Valdes in view of their demeanor and the full record. Respondent argued that Perez demonstrated poor recollection as to whether his conversation with Grandal occurred before or after his April 1996 schedule change and that Aldo Gomis also had to have his recollection refreshed. However, Perez' testimony was not rebutted. Roberto Grandal did not testify. I am unable to determine solely on a witness' need to have his recollection refreshed that that witness is untruthful.

Findings

The testimony of Perez showed that Respondent, through Roberto Grandal interrogated Perez. Even though Perez was known to support the Union, Grandal interrogated him as to his personal situation and how he viewed what was going on between the Company and the Union.

As to whether the interrogation tended to coerce employees, the evidence showed that Grandal interrogated Perez about union decertification. Kenny Perez was a known union advocate. The record illustrated that Respondent took a strong posi-

tion in opposition to the Union. The information sought by Grandal involved Perez' position regarding the decertification petition and whether Perez could be persuaded to support decertification. The record shows that Perez was truthful in his response to Grandal. There was no showing that Respondent had a valid purpose in seeking to determine how Perez stood on decertification. Grandal did not tell Perez why he needed the information and he did not assure Perez against reprisals. Perez was told that he could have a supervisory position if he supported decertification. Under the circumstances I find that Grandal's interrogation of Perez was a violation of Section 8(a)(1) of the Act. *Cooper Tire & Rubber Co. v. NLRB*, 957 F.2d 1245, 1255-1256 (5th Cir. 1992); *Baptist Medical Systems*, 288 NLRB 1160 (1988); *Southwire Co.*, 282 NLRB 916 (1982); *Rossmore House*, 269 NLRB 1176 (1984); *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). See also *NLRB v. McCulloch Environmental Services*, 5 F.3d 923 (5th Cir. 1993).

Grandal asked for Perez' help and for Perez to sign the decertification petition. Grandal promised Perez a supervisory position if Perez signed the petition and that Respondent would back Perez. He threatened Perez that the Company would not last another year with the Union and that the owner would not keep the Company in Miami and would shut the doors.

I find that as to Kenny Perez, Respondent engaged in interrogation; solicitation of employees to petition to decertify the Union; threatened plant closure; and promised promotion in exchange for its employee agreeing to sign a decertification petition. The record proved that on direction from Grandal, Eduardo Felipe threatened an employee with discharge and promised a shift change because of the employee's position regarding decertification of the Union. Grandal told Gomis that his representation of employee del Valle was futile by telling Gomis that he was no one and that del Valle had a problem involving the Company and supervisors. Grandal promised to deal with del Valle without union representation. Grandal told employee Valdes that Valdes could miss out on opportunities and not gain benefits and be full time because of the Union.

Those comments constitute action in violation of Section 8(a)(1) of the Act. *Rose Printing Co.*, 289 NLRB 252, 271 (1988); *Fountaine Body & Hoist Co.*, 302 NLRB 863 (1991); *Emery Worldwide*, 309 NLRB 185, 186 (1992); *Flexsteel Industries*, 311 NLRB 257 (1993); *Asarco, Inc.*, 316 NLRB 636 (1995); *Highland Yarn Mills*, 313 NLRB 193 (1993).

3. Lynn Fritz

Larry Aleman, Fernando Roca, Kenny Perez, and Aldo Gomis testified about Lynn Fritz addressing the employees in English. Supervisors Luis Puebla and Ramon Suarez assisted in translating into Spanish.

Aleman testified that Lynn Fritz held two employee meetings regarding the Union in 1995 and 1996. All the employees attended the meetings. Gomis testified that Fritz held one meeting on the same day in February 1996 that the Union held a rally outside building 2. Fritz told the building 2 employees they did not have benefits because there was a legal process with the Union and that he did not give them benefits because they were in a negotiation process. Gomis told Fritz that he believed in a contract. Fritz said that he could fire Gomis and that he could fire Puebla or Ramon. Gomis replied that would be a mistake and they wanted the Union so they could have security at work. Fritz said that the Company was not going to sign a contract. Fritz said that he does not forget his friends' faces and he does not forget his enemies' faces.

Kenny Perez testified that Lynn Fritz told the building 2 employees that he did not want the Union, that the warehouse employees didn't deserve any better than anybody else working for him and that he was not going to sign anything; he wasn't going to sign a contract.

Fernando Roca attended a Lynn Fritz meeting in building 2 in 1996 on the same day the Union held a meeting outside. All the warehouse employees attended. Fritz said that union rallies were dangerous because they could lose clients. Fritz promised that everything was going to be done legally and there would not be punishment because of the problems with the Union. Lynn Fritz said that he would not forget the ones that were faithful to him and that he would not forgive the ones that were not.

Conclusions

Credibility

As shown here I credit the testimony of Larry Aleman, Fernando Roca, Kenny Perez, and Aldo Gomis in view of their demeanor and the full record. Lynn Fritz did not testify. Respondent presented Rafael Ferro and Eric Machin in rebuttal. I was not impressed by the demeanor of either Ferro or Machin. Their testimony failed to demonstrate that either was fully aware of what occurred during the meetings held by Lynn Fritz.

Findings

The credited testimony proved that Lynn Fritz told the employees that their benefits could not be improved because of the Union and the negotiation process. Fritz told the employees that he was not going to sign a contract with the Union. He told them that he would not forget his friends or his enemies. That comment constitutes an implied promise of benefit and threat of harm because of the employees' support or opposition to the Company. Lynn Fritz threatened the employees that union rallies could cause Respondent to lose clients. Respondent offered no evidence to support that contention. Nothing illustrated that Respondent was in danger of losing business because of union rallies. I find that the above-mentioned comments by Lynn Fritz constitute violations of Section 8(a)(1).

4. Luis Puebla

Luis Puebla worked for Fritz Companies from July 1, 1995, until April 12, 1997. He was the human resources manager. His immediate supervisor was Tom Magill, the general manager of warehouse and distribution. Puebla along with Magill were responsible for making decisions with respect to employee discipline. Puebla also assisted Magill in translating Spanish with the employees in the warehouse.

Eduardo Felipe became a supervisor in September 1995. Felipe testified that he attended regular supervisory meetings on Wednesdays. Felipe testified that he was reprimanded by Luis Puebla because he, as supervisor, talked to employee Eric Machin about Machin eating lunch early. Puebla told Felipe that he was disciplining Felipe because Machin was going to vote Company.

Eduardo Felipe testified that the supervisors including Santiago Ruiz, Manny Sanchez, Jose Ferro, Fernando Alizo, and Felipe met with Luis Puebla and Attorney Curtis from October 1996 through January or February 1997 and discussed whether specific employees were or were not union or company supporters. During those meetings each supervisor was assigned two or three employees to convince to vote for the Company. Felipe was assigned employees Kenny Perez, Salazar, and Mar-

lon Solorzano. Magill said during the meetings that Fritz would never sign a contract and that Fritz had invested \$22 million in a brand new building and wasn't going to bring in a union.

Eduardo Felipe admitted that he threatened Marlon Solorzano that Solorzano was going to be fired if he did not support decertification of the Union. Solorzano asked to be placed on the 7 a.m. to 4 p.m. shift in exchange for signing the decertification petition and Felipe agreed. Felipe checked with Luis Puebla and Puebla said there was no problem with giving Solorzano the shift times requested.

Armando Bengochea testified that Luis Puebla came to him in the receiving area around April 1996. Puebla asked how come Bengochea was with the Union and if they had brainwashed him. He asked what was Bengochea's motive for being with the Union. Bengochea replied that he was not going to betray his fellow workers. Puebla also came to Bengochea while he was talking on his radio and asked if Bengochea was talking politics about the Union. Bengochea denied that he was talking about the Union.

As shown below Israel Ramos testified that when he was terminated Luis Puebla told him that he was being laid off because Ramos' "work is slow, and also because you belong to the Union."

Luis Puebla denied threatening employees.

Conclusions

Credibility

I credit the testimony of Eduardo Felipe and Armando Bengochea because of their demeanor and the record evidence taken as a whole. I am not convinced that Israel Ramos was correct in his testimony that Luis Puebla threatened him that he was being laid off because of slow work and because he belonged to the Union. That comment was specifically denied by Puebla and none of the other terminated employees were told they were being laid off because of the Union. Others, especially Aldo Gomis, were shown to be more visible union supporters than Ramos.

Findings

The General Counsel argued that Bengochea's testimony proved that Puebla engaged in illegal interrogation (*Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985)). I rejected the General Counsel's offer of an affidavit of Estinolado Salado wherein Salado allegedly testified that Puebla threatened that Respondent was losing clients and the employees were losing benefits because of the Unions. *New Life Bakery*, 301 NLRB 421 (1991).

I also find that the General Counsel failed to prove that Puebla threatened Israel Ramos that Ramos was being laid off in part, because he belonged to the Union. I did not credit that testimony by Ramos.

I do find that Puebla unlawfully interrogated Bengochea about why he was with the Union. The record illustrated that Respondent took a strong position in opposition to the Union. The record shows that Bengochea was truthful in his response to Puebla. There was no showing that Respondent had a valid purpose in questioning Bengochea. Puebla did not tell him why he needed the information and he did not assure Bengochea against reprisals. The above convinces me that Puebla's questioning was coercive. *Bourne v. NLRB*, 322 F.2d 47 (2d Cir. 1964); *Cooper Tire & Rubber Co. v. NLRB*, 957 F.2d 1245, 1255-1256 (5th Cir. 1992); *Baptist Medical Systems*, 288

NLRB 1160 (1988); *Southwire Co.*, 282 NLRB 916 (1982); *Rossmore House*, 269 NLRB 1176 (1984); *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). See also *NLRB v. McCulloch Environmental Services*, 5 F.3d 923 (5th Cir. 1993).

5. Manny Sanchez

Larry Aleman testified that after returning from supervisors' meetings, supervisors, including Manny Sanchez, Sam Rios, Ruiz, and Alberto Ionaris, frequently told the employees to forget it, they would never get a contract between the Company and the Union.

Fernando Roca testified that he overheard a conversation between Supervisor Manny Sanchez and two employees in August 1996. The employees were Omero and Salado. Sanchez told the employees they were not going to sign the contract.

Israel Ramos testified that Manny Sanchez made comments about the Union following supervisors' meetings. Sanchez said it was very difficult for the Union to come in. After refreshing his memory with a prior affidavit Ramos testified that Sanchez said that they were never going to sign a contract from the Union.

Conclusions

Credibility

On the basis of the full record and their demeanor I credit the testimony of Larry Aleman and Fernando Roca. Although I do not fully credit the testimony of Israel Ramos I do credit his testimony here. The full record shows that Manny Sanchez told employees on more than one occasion that Respondent would not sign a contract with the Union. I do not credit Manny Sanchez' denial that he threatened employees that Respondent would not sign a contract. Sanchez' testimony in that regard was not clear. He admitted that he advised employees as to the status of contract negotiations including advising whether "a new contract that was ready to be signed or not to be signed."

Findings

I find that Manny Sanchez threatened employees that Respondent would not sign a collective-bargaining agreement with the Union and that constitutes a violation of Section 8(a)(1) of the Act. There was no evidence showing that Sanchez threatened employees with discharge. I recommend dismissal of that allegation.

B. Section 8(a)(3)

1. Security guards

a. Respondent increased security

Respondent admitted that at all material times it has maintained a contract with Burns International Security Services for security personnel who perform services at buildings 1 and 2 and that the Burns' security personnel have been acting on behalf of Respondent as its agents.

Aldo Gomis testified that security intensified at building 2 from December 1995 until he was discharged in October 1996. A security guard followed Gomis throughout the workday. Mr. Acebo the lieutenant of security, told Gomis, "Mr. Puebla has ordered me to check on you always."

Security guard Carlos Lizarraga had lunch with the shipping employees. On occasion Lizarraga placed a recorder on the table during lunch and the employees would shut up and not

discuss the Union. Aldo Gomis complained to management about the recorder.

Eduardo Felipe testified that the security guards limited Aldo Gomis from walking to areas of the facility because of Gomis' union affiliation. Felipe overheard a security guard tell Gomis that Gomis could not leave his department. According to Felipe, there were regularly five security guards. One was in receiving, two in shipping, a roaming guard, and a guard to protect Carlos Bello. Bello was the employee responsible for initiating the decertification petition. One guard named Roberto prevented Aldo Gomis from leaving the department.

Kenny Perez testified that the security guards closely monitored activity in receiving. Fernando Roca testified that a security captain named Carlos was responsible for watching Gomis. Carlos used a tape recorder and taped conversations during the lunch period.

Larry Aleman testified that he did not see security guards until after Fritz Companies took over and then the warehouse was filled with guards. There were two in shipping. One of the two moved around in other departments and ended up in shipping. Guards followed Aldo Gomis and took notes.

b. Respondent video taped employees' union activity

Larry Aleman attended a union rally involving Teamsters President Ron Carey and others. There is evidence showing that meeting occurred around February 1996. Aleman saw Carlos Lizarraga taking pictures of the rally with a video camera. Aldo Gomis saw Chief of Security Carlos Lizarraga taking pictures of the union rally. Lizarraga told Gomis that he was a newspaper reporter but the next day Lizarraga told Gomis that he was following Puebla's order. Kenny Perez and Israel Ramos testified that a security guard filmed the union rally with a video camera.

Respondent admitted that it video recorded the union rally but contended it was acting lawfully because the rally was held on Respondent's property.

Conclusions

Credibility

As shown herein I credit the testimony of Aldo Gomis, Eduardo Felipe, Kenny Perez, and Larry Aleman in view of their demeanor and the full record. That testimony showed that Respondent used as many as five security guards during one shift in building 2. To the extent their testimony conflicts I do not credit the testimony of site Supervisor Security Guard Clemente Acebo. Among other things Acebo testified that Aldo Gomis was never under special surveillance and that Burns assigned only four guards to each shift. Under cross-examination Acebo denied he had specific orders with respect to union demonstrations but he subsequently admitted that on one occasion there were three additional guards for a demonstration.

Findings

The evidence supported the allegation that Respondent increased security surveillance on union supporter Aldo Gomis and that Respondent by security guards, openly video photographed the February 1996 union rally. That videotaping of the rally occurred in view of the employees and tended to restrain and coerce their involvement in the union activity. *Waco, Inc.*, 273 NLRB 746, 747 (1984). Those actions constitute violation of Section 8(a)(1). Respondent failed to prove that it had a legitimate basis for its actions. I am unable to find a basis for the

additional contention that those actions also constitute violation of Section 8(a)(3).

c. Warned Aldo Gomis

The General Counsel alleged that Luis Puebla illegally issued a written warning to Aldo Gomis on May 20, 1996. The evidence illustrated that Gomis actually received two written warnings. One was dated May 20 and the other May 21. The May 21 warning, read:

At approximately 10:55 am on Tuesday May 21, 1996 you left your work without authorization to have a meeting in the parking lot with a representative of the Teamsters Union who was NOT authorized to be on our property.

Conclusions

Credibility

There are no material disputes regarding the facts. Luis Puebla admitted that he directed that Gomis be warned on May 21 on information he received from security guard Acebo that Gomis was seen outside talking to someone in a car that belonged to Union Agent Rudy Vidal. There was no conflicting evidence but that Gomis had actually gone outside to pick up asthma medication and I credit Gomis in that regard. There was no direct evidence showing that Rudy Vidal was present and I credit Gomis that he did not pick up the medication from Vidal.

Findings

As to whether Respondent illegally warned Gomis, I shall first consider whether the General Counsel proved through persuasive evidence that the Respondent acted out of antiumion animus. *Manno Electric*, 321 NLRB 278 fn. 12 (1996); *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Gomis was a visible union supporter from 1994. Aldo Gomis and Larry Aleman were observers for the Union during the election. Gomis was on the union negotiating team. As shown above several violations involved Aldo Gomis.

The record supports a determination of animus especially regarding the union activities of Gomis. Among other things, the record shows that Respondent solicited employees to physically harm Gomis because of his union activities.

As to the written warning issued to Gomis around May 21, 1996, there is evidence that Gomis did not engage in any activity which is customarily prohibited and that Gomis had received permission. The warning shows on its face that Gomis was accused of being involved with the Union.

Eduardo Felipe recalled that¹ he gave Gomis permission to go to a car and speak with someone. After Gomis went outside Luis Puebla came down and asked Felipe why Gomis went outside and if Gomis was talking to a union man named Rudy. Eduardo Felipe told Puebla that he had not seen Rudy. Puebla asked, “[H]e has permission?” Felipe replied, “[Y]es.”

Gomis testified that he went outside to pick up medication for his asthmatic condition.

It is not disputed that Aldo Gomis has an asthmatic condition. Eduardo Felipe testified that Gomis oftentimes complained about cigarette smoke. Larry Aleman testified that Aldo Gomis had asthma attacks and used a spray medication. Ale-

man recalled an occasion when Gomis did not have his medication and he phoned someone to bring it to him. Gomis went out to the parking lot to get the medication. Aleman did not recognize the automobile driver that brought the medication to Gomis but Aleman recognized that it was not Rudy Vidal. Aleman testified that he has oftentimes gone to his car without punching out and he has not been disciplined on those occasions. Other employees went to their cars and were not disciplined.

Fernando Roca saw Gomis go down the ramp to the parking lot. Gomis told Roca that he was going to look for some medicine. Gomis picked up an inhalation device from a person in the lot. Roca testified that the practice was that employees could leave without punching out after asking a supervisor.

I find that the General Counsel proved a prima facie case showing that Respondent was motivated to issue written warnings to Gomis because of his union support.

As to whether the record showed that Respondent would have disciplined Gomis in the absence of union activities, the May 21 written warning specifically mentions “meeting in the parking lot with a representative of the Teamsters Union.”

Moreover, Gomis’ supervisor, Eduardo Felipe, provided testimony which compromised any contention that Gomis would have been warned in the absence of union activity. Felipe testified that the supervisors were instructed to be strict with union supporters. He also testified that he gave Gomis permission to go outside on the occasion when Luis Puebla came down and asked if Gomis had gone outside to speak with Union Agent Rudy Vidal. Felipe told Puebla that he had given Gomis permission to go outside and that he had not seen Rudy Vidal. When Puebla and Ramon Suarez spoke with Gomis about the incident, Gomis denied that he met with Rudy Vidal. He told them that he had picked up medication from a family member.

Finally, the testimony of Roca, Aleman, and Felipe proved that Respondent did not normally discipline employees because they left their work station. In view of the full record I find that the evidence failed to prove that Respondent would have issued written warnings to Aldo Gomis in the absence of his union activities. I find that Respondent issued the warning to Gomis in violation of Section 8(a)(1) and (3).

d. Withdrew benefits from Juan C. Valdes by reducing his hours

Respondent’s records show that Juan Valdes’ work hours were changed from 40 to 24 hours a week on April 29, 1996.

Valdes was employed as a temporary employee along with Mario Perez. The company Valdes worked through was Personally Yours.

Juan Valdes supported the Union. He talked about the Union with other employees. As shown above before Valdes’ hours were reduced, Roberto Grandal and employee Carlos Bello approached Valdes. Bello asked if the Company gave Valdes a support vote who would he vote for. Valdes said that he would not vote for the Company because they had not given him any benefits. Grandal told Valdes to think about that because Valdes had a family and could miss out on an opportunity and that Valdes was not a full-time employee because they were having battles over the Union. Grandal told Valdes that if it was not for the Union, Valdes could have benefits and could be full time. Grandal said that the Union was going to disintegrate because the Union did not have money but Fritz did.

¹ Felipe actually recalled the incident occurred in April 1996. However, his complete testimony regarding the incident makes it clear that he was recalling the incident that resulted in the May 21 warning.

Around April 29 Fernando Alizo told Valdes that he was no longer needed. Valdes checked with Ramon Suarez. Suarez said that Valdes' schedule was changed and he would work only Thursday, Friday, and Saturday from that time. Valdes met with Luis Puebla and Puebla told him it was a company decision to change his hours. Puebla told Valdes that if he did not like it he could do whatever he wanted.

Conclusion

Credibility

There is no dispute but that Respondent reduced the hours per week of Juan Valdes on April 29, 1996. In view of demeanor and the record I credit the testimony of Juan Valdes regarding his conversations with Roberto Grandal. That testimony was not rebutted.

Findings

Again as in the case of Gomis' warnings, I shall first consider whether the General Counsel proved through persuasive evidence that the Respondent acted out of antiunion animus. *Manno Electric*, 321 NLRB 278 fn. 12 (1996); *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

The record proved Respondent's animus. Respondent was shown to have threatened employees including Valdes because of their support for the Union.

Here, the timing of Respondent's action coming soon after Roberto Grandal learned that Valdes supported the Union and threatened reprisals, tends to support a finding that Valdes' hours were reduced because of the Union. *Stor-Rite Metal Products*, 856 F.2d 957 (7th Cir. 1988).

Respondent argued that the reduction in Valdes' weekly work hours coincided with Respondent's loss of the PDVSA account and that Valdes was temporary and not in the bargaining unit. However, regardless of whether Valdes was in the bargaining unit he was an employee entitled to the protection of the Act.

The testimony of Juan Valdes shows that he was never told that his hours were being reduced because of loss of the PDVSA account or because of any business loss. Moreover, there was no evidence in the testimony of Respondent's witnesses to the effect that Valdes was ever told that his hours were reduced because of loss of business. Under the circumstances I find that the record does not support Respondent's contention as to why Valdes' hours were reduced. I find that Respondent failed to show that it would have reduced Valdes' hours of work in the absence of his union activities. I find that Respondent engaged in violation of Section 8(a)(1) and (3) of the Act by reducing Valdes' hours from 40 to 26 per week.

e. Discharge of Fernando Roca, Jesus del Valle, Lazaro Aleman, Israel Ramos, Rafael Soto, and Aldo Gomis

In view of the similarity between this 8(a)(3) allegation and the 8(a)(5) allegation regarding the layoff, I have considered this allegation below under Section 8(a)(5).

C. Section 8(a)(5)

1. Bargaining unit and relocation

Respondent admitted that the following constitutes an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b), and that Respondent relocated bar-

gaining unit employees to a building at 10000 N.W. 25th Street, Miami, Florida:

All full time cargo handlers/warehousemen, drivers, dispatchers, palletizers, carpentry employees, receivers and forklift drivers employed by Respondents at its 9020 N.W. 12th Street, Miami, Florida facility; but excluding all other employees, office clerical employees, managerial employees, confidential employees, guards and supervisors as defined in the Act.

Respondent admitted that the Union was certified as the exclusive collective-bargaining agent of the bargaining unit employees on June 13, 1994.

2. Unilaterally transferred work

The General Counsel alleged that Respondent unilaterally transferred work for OMC from building 2 to building 1.

On January 19, 1996 Respondent notified its employees of organizational changes including the following:

[I]n order to provide the additional room for growth that Xerox and OMC require, they will be moving to Bldg. #1 the weekend of the 20th and 21st of January. This move has been planned for some time and with the help of the Client Services group, will be accomplished on schedule. They will be moving into the area that is now occupied by WTDC and, in the future, will be called Warehouse #3

Respondent does not dispute the allegations that it moved its OMC operations from building 2 to building 1. Instead Respondent contends that at the time the decision was made to move, it was not a mandatory subject of bargaining because the move did not affect the terms and conditions of bargaining unit employees.

Clarence Lark served as president and business agent for the Local Union. He attended the negotiation meetings with Respondent that started around June 1994 and extended into November 1995. During negotiations the parties reached tentative agreement on most of the contract proposals except some monetary items.

After the June 1994 certification of the Union 9 or 10 negotiating sessions were held in 1994. Nine or 10 more sessions were held in 1995. Lark testified that the decision to transfer OMC work was not discussed with the Union. Assistant Business Agent Rudy Vidal testified that Respondent did not notify the Union of plans to transfer work for OMC from building 2 to building 1. Vidal testified that from a time after the Union was certified Respondent started hiring temporary employees for bargaining unit work in building 2. Around mid-1995 the temporary employee work force in building 2 had reached around 30 or 40.

Supervisor Eduardo Felipe testified to the effect that the job skills involved for the OMC account did not materially change when the work was transferred from building 2 to building 1. Felipe testified that temporary employees performed the same work as full-time employees in departments including deconsolidation.

Respondent witness Tom Magill was told by the managers of building 1 and building 2 around October 1995 that OMC was considering closing their Miramar facility and assigning their distribution work to Respondent. Before that time Respondent had handled only OMC freight forwarding at its building 2. OMC distribution would require substantially larger warehouse space than Respondent had available at building 2 or even

building 1. Around the same time Xerox was also involved in a change and Magill was directed by his supervisors to pursue getting the 50,000 square feet of warehouse space that was adjacent to building 1. The OMC work was transferred solely because of the customer's requirement for more space than Respondent had available at building 2. Magill testified that none of the bargaining unit employees in building 2 lost any hours, overtime or wages, nor were there layoffs or other harm to those employees because of the transfer of OMC work.

Conclusion

Credibility

There is no factual dispute but that Respondent unilaterally moved its OMC operation.

Findings

The General Counsel alleged that Respondent illegally moved its OMC operation without notice or bargaining with the Union. *Dubuque Packing Co.*,² 303 NLRB 386 (1991).

The credited evidence showed that Respondent moved its OMC operations to building 1 in January 1996. Eventually all that work and work from building 1 and building 2 was moved to the new facility.

Building 1 and building 2 are both located in West Dade County and are 5 miles apart. The record including the testimony of Eduardo Filipe and Tom Magill showed that the OMC work at building 1 was substantially the same as that work had been at building 2. However, Magill testified that the function of the building 1 OMC work was different than it had been at building 2. Building 2 work involved freight forwarding whereas the work after the transfer to building 1, involved distribution which is a much wider spectrum of operations. The move was necessitated by the need for additional warehouse space that was not available at building 2. The circumstances described herein would fall within the third category of management decisions described in *First National Maintenance*. That category involves decisions which have a direct impact on employment but have as their focus the economic profitability of the employing enterprise. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

Here unlike in *First National Maintenance* the employer did intend to move a portion of its operation elsewhere; the business decision in question was not akin to the decision whether to be in business at all and the decision was not based solely on the size of the management fee. Instead the decision was more along the lines of the decision considered in *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964). *Dubuque Packing Co.*, supra.

In *Dubuque Packing Co.*, the NLRB required an inquiry into (1) whether the employer had an intention to replace discharged employees or to move that operation elsewhere; (2) was the employer faced with a decision changing the scope and direction of the enterprise akin to the decision whether to be in business at all; and (3) whether the employer's decision was based solely on the size of the management fee or a desire to reduce labor costs.

Here Respondent's decision was concerned with whether to move its OMC operations from building 2 to building 1, a distance of 5 miles. The decision, as shown by Respondent's actions after the move, involved relocation of some of the bar-

gaining unit employees to an existing facility that did not include employees in the bargaining unit. Moreover, there was testimony that Respondent increased the number of temporary employees in its OMC operations. Temporary employees were not included in the bargaining unit.

There was no showing that Respondent faced a decision akin to the decision whether to be in business at all. In fact, there was evidence in the record showing that Respondent has continued in business even though OMC is no longer its customer.

As to the third criteria, the evidence illustrated that Respondent's decision was based on a need for additional warehouse space. The change in OMC work from freight forwarding to distribution when added to change in work for Xerox was estimated by Respondent to require an additional 50,000 square feet of space.

The General Counsel proved a prima facie case that Respondent's decision involved a relocation of unit work was unaccompanied by a basic change in the nature of Respondent's business operation.

Respondent agreed that it moved its OMC operations unilaterally but contended that move did not involve a mandatory subject of bargaining in that it did not have a significant impact on bargaining unit employees.

Respondent failed to establish "that the work performed at the new location varies significantly from the work performed at the former plant." It failed to establish that the work performed at the former plant was to be discontinued entirely and not moved to the new location. Respondent failed to establish that the employer's decision involved a change in the scope and direction of the enterprise. Nevertheless, Respondent satisfied the Board's requirement that it alternatively show that labor costs were not a factor in the decision. The record evidence was not disputed but that the sole reason for the move to building 1 was caused by the lack of sufficient warehouse space to accommodate the needs for the additional OMC distribution center. Labor costs were not a factor in the decision. *Dubuque Packing Co.*, supra.

I find that Respondent successfully produced evidence rebutting General Counsel's prima facie case. See also *Q-1 Motor Express, Inc.*, 323 NLRB 944 (1997); *Elliott Turbomachinery Co.*, 320 NLRB 141 (1995), where the Board found violations.

3. Laid-off employees including Fernando Roca, Jesus del Valle, Lazaro Aleman, Israel Ramos, Rafael Soto, Aldo Gomis, and others

The General Counsel alleged Respondent terminated employees Roca, Del Valle, Aleman, Ramos, Soto, Gomis, and others in violation of Section 8(a)(1), (3), and (5) of the Act.

Former Union President Clarence Lark, Business Agents Rudy Vidal and Gerry Pape, and member of the union negotiating committee Aldo Gomis all testified that Respondent proposed elimination of the trucking operations during negotiations in the summer of 1995. The Union opposed that proposal pointing out that the drivers were the strongest union supporters in the bargaining unit. Lark, Vidal, Pape, and Gomis testified that the Union insisted that if the driver positions were eliminated the drivers would be permitted to transfer to the warehouse with no loss of seniority. On the second day of 3 days of negotiations in July, Respondent agreed that the drivers would transfer into the warehouse without loss of seniority. There were also negotiations as to the pay the drivers would receive in the warehouse. The parties did not agree on the wages for the drivers after being transferred. The Union continued to insist

² *Dubuque Packing Co. (II)*, was cited by the General Counsel as 303 U.S. 386 (1991).

that the drivers retain the same wages and the Respondent would not agree. Respondent argued that the drivers should assume the wages of the warehouse department.

Respondent offered testimony of Tom Magill and David Curtis to the effect that the parties negotiations over termination of trucking operations resulted in a signed letter of understanding which was received in evidence as Respondent's Exhibit 1.

Respondent made a last and final contract proposal on September 21, 1995 (GC Exh. 15). The Union rejected Respondent's September 21 proposal. The parties have not reached agreement.

Fernando Roca testified that Supervisor Victor Suarez came to him at work on October 18, 1996, and said, "[O]n Monday, we are going to resolve this situation." Roca asked, "why, are they going to lay us off?" Suarez replied, "[W]ell, that's on the edge and . . ."

During October 21, 1996 negotiations Respondent announced that all the drivers would be laid off. Larry Aleman testified that layoffs were discussed during the last negotiating session around October 21, 1996, at the Marriott Hotel on Lincoln Road. Luis Puebla, Tom Magill, Patrick Richter, and David Curtis were there for Respondent. Mark Richard, Vince Hickman, Aldo Gomis, and Aleman were there for the Union. Puebla started the meeting by saying the Company was losing accounts and there would be a layoff of the drivers who came to the warehouse. Puebla named the drivers as including Aldo Gomis, Rafael Soto, Aleman, Jesus del Valle, Fernando Roca, and Israel Ramos. The drivers were laid off the next day.

Each of the laid-off employees were advised of their respective layoff at work on October 22. Fernando Roca testified about October 22. Ramon Suarez sent Roca to Roberto Grandal's office. Grandal, Luis Puebla, Tom Magill, and Victor Suarez were in the office. Puebla told Roca that it was necessary to lay off the drivers. Roca asked, "[A]ll the drivers?" Magill replied, "[Y]es, all the drivers." On October 22 Larry Aleman was told to report to Luis Puebla. He met with Puebla, Tom Magill, and Roberto Grandal in Ramon Suarez' office. Puebla told Aleman that he was being laid off.

Aldo Gomis and Israel Ramos also testified about being told they were laid off on October 22. Israel Ramos testified that Luis Puebla told him that he "had to give you layoff because work is slow, and also because you belong to the Union."

Roca testified that one of the former drivers, Tony Negrin, was not laid off. Eduardo Felipe testified without rebuttal that Negrin became a company supporter. Other employees including Aldo Gomis expressed displeasure with Negrin because he changed from supporting the Union to supporting the Company. The affidavit testimony of David Curtis (R. Exh. 6) shows that he learned after talking with Luis Puebla on March 1, 1996, that Aldo Gomis and Larry Aleman were harassing employees Santiago Gonzalez and Tony Negrin. As shown herein both Gomis and Aleman were known union supporters.

Larry Aleman and Aldo Gomis were the first elected employee representatives after the Union was certified in 1994. Aleman and Aldo Gomis were observers for the Union during the election. Aleman held one union meeting at his home and he attended the last two negotiating sessions between the Union and Respondent before his last workday of October 22, 1996. Aleman, Gomis, Roca, and Israel testified they each wore union clothing including T-shirts at work on Fridays which was casual day. They all discussed the Union during lunch and breaks.

Conclusions

Credibility

I am convinced on the basis of the full record that Tom Magill and David Curtis testified truthfully regarding the parties' agreement on elimination of Respondent's trucking operations. That agreement is in evidence as shown above. The agreement shows on its face that it was signed by Clarence Lark of the Union on July 21, 1995.

However, I find nothing in the agreement which supports Respondent's contention that that agreement provided that displaced trucker employees that elected to fill positions in the warehouse, could be selected for layoff on the basis of their warehouse, rather than company seniority.

The evidence that Respondent made a last and final offer on September 21 is not in dispute. I credit the above testimony of Fernando Roca, Larry Aleman, and Aldo Gomis. As shown above, I do not credit the testimony of Israel Ramos to the extent he testified that Luis Puebla told him that he was also being laid off because he belonged to the Union.

Findings

As to the 8(a)(3) allegations that Respondent illegally terminated Roca, Del Valle, Aleman, Ramos, Soto, and Gomis, I shall first consider whether the General Counsel proved through persuasive evidence that the Respondent acted out of antiunion animus. *Manno Electric*, 321 NLRB 278 fn. 12 (1996); *Wright Line*, 251 NLRB 1083 (1980), enf'd 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

As shown above the Union contended during negotiations that the drivers were their strongest supporters. That was supported by the record. Four of the six alleged discriminatees testified and all four testified without dispute they were involved in activities favoring the Union. Gomis, Aleman, Roca, and Ramos all signed cards, attended union meetings, and wore clothing at work which identified them as union supporters.

On the other hand Respondent retained employees that demonstrated opposition to the Union or support for decertification. One former truckdriver, Juan Negrin, was promoted to a supervisory position of October 7, 1996, and was not laid off. Negrin's former immediate supervisor, Eduardo Felipe, testified that Negrin switched from supporting the Union to supporting the Company. Other employees including Aldo Gomis expressed displeasure with Negrin because he changed from supporting the Union to supporting the Company. The affidavit testimony of David Curtis (R. Exh. 6) shows that he learned after talking with Luis Puebla on March 1, 1996, that Aldo Gomez and Larry Aleman were harassing employees Santiago Gonzalez and Negrin. As shown herein both Gomis and Aleman were known union supporters.

Other retained employees were known by Respondent to oppose the Union or support decertification. Irving Puig, Santiago Gonzalez, and Marlon Soloranzo were not laid off in October 1996. Their personnel files held by Respondent included copies of Puig's February 2, 1996, Gonzalez' February 27, 1996, and Soloranzo's February 26, 1996 signatures on the decertification petition. Eric Machin was retained. On June 14, 1994, Luis Puebla sent an e-mail requesting authority to extend prior service to Machin. In that e-mail Puebla made the comment that Machin is "an essential link in our efforts in regards to a new election."

As shown herein Respondent demonstrated its animus to the Union through comments including 8(a)(1) violations.

As shown above the full record including testimony and the agreement of the parties (R. Exh. 1) shows that Respondent agreed to transfer the drivers into the warehouse. The record also shows that the former drivers were discriminatorily selected for layoff over employees with less seniority. On the basis of the record I find that the General Counsel proved a prima facie case.

As shown above the complaint allegations include a contention that the layoffs constituted a violation of Section 8(a)(5) as well as Section 8(a)(3). I shall consider that allegation along with the query of whether the record showed that Respondent would have laid off the alleged discriminatees in the absence of Union activity.

Respondent contends that it decided to layoff 10 employees for business reasons and that the alleged discriminatees were selected pursuant to its July 21, 1995 letter of understanding with the Union.

Respondent argued that it decided to layoff the alleged discriminatees on the basis of their warehouse seniority as opposed to their company seniority.

Tom Magill testified that he managed the July 21 letter of agreement with the understanding that all temporary employees had less seniority than the displaced workers that were former truckers, and that the truckdrivers had less seniority than all of the other employees in the warehouse. He testified that he managed that basis of understanding because he sat through the negotiations and "had a clear understanding of what was negotiated and what was agreed to."

Luis Puebla admitted that he was not present during the negotiation session in which the July 21, 1995 letter of understanding was signed. Puebla testified that the decision to select former truckdrivers for layoff in October was based on the July 21, 1995 letter of understanding which, according to Puebla, provided that the former drivers were the less senior employees in the warehouse.

The parties July 21, 1995 letter of understanding includes seven numbered paragraphs and includes an agreement for Respondent to discontinue its trucking operations effective July 22, 1995. The agreement also includes one reference to seniority:

2. Stair Cargo agrees in principle that it will not use temporary labor to the extent that such displaced workers are available, ready and qualified for work. This principle will be administered as follows:

A. Attached to this letter as "Exhibit A" is a list of positions currently filled by temporary workers. The Company will offer these positions to the displaced workers who have selected said positions on the basis of seniority.

There is no mention in the letter of agreement that former truckers will be treated differently from other warehouse employees as to layoffs once they have accepted a position in the warehouse.

Respondent argued in its brief that its consistent and historical bargaining position for purposes of layoff and recall is calculated on a departmental basis. David Curtis identified Respondent's Exhibit 5 as a 1995 Respondent collective-bargaining proposal on layoff and recall which provided that when "practical, the employee most recently hired, within that job classification, will be the first laid off." Curtis testified that

Respondent never changed its position on desiring to handle layoffs on the basis of job seniority.

I am unable to agree with Respondent. Absent agreement with the Union, there was no basis shown for Respondent to unilaterally implement its collective-bargaining proposal regarding selection for layoff. Even though Respondent allegedly made its final contract proposal on September 21, 1995, there was no showing that the parties had reached impasse at or before the October 1996 layoff. In fact Respondent made no argument that it ever reached impasse with the Union.

I find that the evidence failed to show that Respondent would have terminated the alleged discriminatees in the absence of Union activity and that action constitutes a violation of Section 8(a)(1) and (3) of the Act. The evidence also proved that Respondent laid off those employees without agreement with the Union and that its action was in violation of its July 1995 letter of understanding reached with the Union. Respondent took the action in October 1996 without prior notice or bargaining with the Union and without reaching impasse, in violation of Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Fritz Companies, Inc. and Fritz Air Freight is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Freight Drivers, Warehousemen and Helpers Local Union No. 390, affiliated with International Brotherhood of Teamsters AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent by soliciting its employees to physically harm an employee because of his support for the Union; by coercively interrogating its employees about their union activity; by soliciting its employees to sign a petition to decertify the Union; by promising its employee a supervisory position in exchange for the employee signing a petition to decertify the Union; by promising its employee that it will back him if he signs a petition to decertify the Union; by threatening its employee that Respondent will shut its doors if the employees do not get rid of the Union; by threatening its employees that union representation on behalf of employees is futile; by promising to deal with employees regarding grievances without union representation; by threatening its employees they will miss out on opportunities and not gain benefits and become full time, because of the Union; by telling its employees that it could not offer improved employee benefits because of the Union and the negotiation process; by threatening its employees that it will not sign a collective-bargaining contract with the Union; by telling its employees that union rallies could cause Respondent to lose business; by threatening its employees that they will never get a collective-bargaining agreement with it; and by increasing surveillance of its employees' union activities and videotaping those union activities; engaged in activity violative of Section 8(a)(1) of the Act.

4. Respondent by warning its employee Aldo Gomis; by reducing the hours of employee Juan Valdes and by terminating its employees Fernando Roca, Jesus del Valle, Lazaro Aleman, Israel Ramos, Rafael Soto, and Aldo Gomis, has engaged in activity in violation of Section 8(a)(1) and (3) of the Act.

5. Respondent, by refusing to bargain in good faith with Freight Drivers, Warehousemen and Helpers Local Union No. 390, affiliated with International Brotherhood of Teamsters AFL-CIO as the exclusive collective-bargaining representative

of its employees in the following appropriate bargaining unit by unilaterally terminating its employees Fernando Roca, Jesus del Valle, Lazaro Aleman, Israel Ramos, Rafael Soto, and Aldo Gomis, has engaged in activity in violation of Section 8(a)(1) and (5) of the Act:

All full time cargo handlers/warehousemen, drivers, dispatchers, palletizers, carpentry employees, receivers and forklift drivers employed by Respondents at its 9020 N.W. 12th Street, Miami, Florida facility; but excluding all other employees, office clerical employees, managerial employees, confidential employees, guards and supervisors as defined in the Act.

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

THE REMEDY

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

As I have found that Respondent has illegally terminated its employees Fernando Roca, Jesus del Valle, Lazaro Aleman, Israel Ramos, Rafael Soto, and Aldo Gomis, and illegally reduced the work hours of Juan Valdes, in violation of the Act, I shall order Respondent to give those employees immediate and full reinstatement to each person's former position or, if that position no longer exists, to a substantially equivalent position without prejudice to each employee's seniority and other rights and privileges. I order Respondent to make Juan Valdes, Fernando Roca, Jesus del Valle, Lazaro Aleman, Israel Ramos, Rafael Soto, and Aldo Gomis whole for all loss of earnings suffered as a result of the discrimination against them. Backpay shall be computed as described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I recommend that Respondent be ordered to expunge from its records any reference to the unlawful terminations and to the warning issued to Aldo Gomis and the reduction in hours to Juan Valdes and to give Valdes, Fernando Roca, Jesus del Valle, Lazaro Aleman, Israel Ramos, Rafael Soto, and Aldo Gomis written notice of such expunction and to inform all those employees that Respondent's unlawful conduct will not be used as a basis for further personnel actions.

On these findings of fact and conclusions of law and the entire record, I issue the following recommended³

ORDER

The Respondent, Fritz Companies, Inc. and Fritz Air Freight, Miami, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting its employees to physically harm an employee because of his support for the Union; coercively interrogating its employees about their union activity; soliciting its employees to sign a petition to decertify the Union; promising its em-

ployee a supervisory position in exchange for the employee signing a petition to decertify the Union; promising its employee that it will back him if he signs a petition to decertify the Union; threatening its employee that Respondent will shut its doors if the employees do not get rid of the Union; threatening its employees that union representation on behalf of employees is futile; promising to deal with employees regarding grievances without union representation; threatening its employees they will miss out on opportunities and not gain benefits and become full time, because of the Union; telling its employees that it could not offer improved employee benefits because of the Union and the negotiation process; threatening its employees that it will not sign a collective-bargaining contract with the Union; telling its employees that union rallies could cause Respondent to lose business; threatening its employees that they will never get a collective-bargaining agreement with it; and increasing surveillance of its employees' union activities and videotaping those union activities.

(b) Warning, reducing the weekly work hours, and terminating its employees because of their support of the Union.

(c) Failing and refusing to provide notice to and an opportunity to bargain collectively with Freight Drivers, Warehousemen and Helpers Local Union No. 390, affiliated with International Brotherhood of Teamsters AFL-CIO as the exclusive collective-bargaining representative of its employees in the following appropriate collective-bargaining unit by unilaterally terminating employees:

All full time cargo handlers/warehousemen, drivers, dispatchers, palletizers, carpentry employees, receivers and forklift drivers employed by Respondents at its 9020 N.W. 12th Street, Miami, Florida facility; but excluding all other employees, office clerical employees, managerial employees, confidential employees, guards and supervisors as defined in the Act.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of 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 of this Order, offer immediate and full reinstatement to Juan Valdes, Fernando Roca, Jesus del Valle, Lazaro Aleman, Israel Ramos, Rafael Soto, and Aldo Gomis to each of their former positions or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Within 14 days of this Order, remove from its files any reference to the warning issued to Aldo Gomis, the reduction in hours issued to Juan Valdes and the termination of Fernando Roca, Jesus del Valle, Lazaro Aleman, Israel Ramos, Rafael Soto, and Aldo Gomis, and notify all those employees that this has been done and that evidence of those disciplinary actions will not be used as a basis for future personnel actions.

(c) On request, bargain with Freight Drivers, Warehousemen and Helpers Local Union No. 390, affiliated with International Brotherhood of Teamsters AFL-CIO as the exclusive collective-bargaining representative of its employees in the above mentioned appropriate collective-bargaining unit over its decision to terminate unit employees, and to reduce to writing any agreement reached as a result of such bargaining.

³ 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.

(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, 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 Miami, Florida, copies of the attached notice.⁴ Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately

⁴ 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."

upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 7, 1996.

(g) Within 21 days after service by the Region, file with the Regional Director, Region 12, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.