

Transportes Hispanos, Inc. and Local No. 142, International Brotherhood of Teamsters, AFL-CIO, CLC. Case 13-CA-38073

November 16, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS
LIEBMAN AND HURTGEN

On September 6, 2000, Administrative Law Judge Keltner W. Locke issued the attached bench decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering 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 and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified² and set forth in full below.

The judge found that Robin Gilliland was the Respondent's agent at the time she made recommendations regarding the hiring of employees who worked for the Respondent's predecessor employer. The Respondent excepts to the finding of agency. For the reasons set forth below, we agree with the judge that Gilliland was the Respondent's agent.³

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In affirming the judge's credibility findings with respect to the testimony of discriminatee, Blanca Jimenez, we do not rely on the judge's statement that Jimenez erroneously testified that she was active in the Union's organizing drive while employed by Great Way. Jimenez, in fact, testified that she did not participate in the organizing campaign at Great Way and that the Union had already successfully organized the company's employees by the time she began her employment there in 1997.

The judge inferred that Oscar Quigley's immediate supervisor, Robin Gilliland, knew of Quigley's union sympathies because he openly served as a union negotiator. The record additionally shows that Gilliland spoke to Quigley on three occasions regarding Quigley's union activities.

² We shall modify pars. 1(b), 2(a), 2(c), and 2(d) of the judge's recommended Order to provide the customary remedial language. In his decision, the judge observed that it appeared from the record that some of the discriminatees had been offered reinstatement, and the judge recommended that the Board order the Respondent to offer reinstatement to the discriminatees only to the extent that it has not already done so. We adopt the judge's recommendation and shall incorporate it in our Order.

³ The judge based his agency finding on the Respondent's answer to the complaint, which admitted the allegation that Gilliland was the Respondent's supervisor and agent "at all material times." The Respondent argues that it was not clear that the complaint allegation referred to the period of time before the Respondent hired Gilliland.

We find substantial evidence of an agency relationship before the Respondent formally hired Gilliland. The Respondent wanted to hire employees of its predecessor (Ryder Student Transportation Services, Inc.) to provide a smooth transition for its new operations. Gilliland was a supervisor for Ryder and was familiar with the employees. The Respondent's Owner, Henry Gardunio, and General Manager, Carmelo Oliveras, decided to give Gilliland sole discretion in determining which employees should be hired. Oliveras informed Gilliland that the Respondent wanted to hire all but four Ryder employees and for her to choose based on a set of general criteria. At a meeting with the Ryder employees, Oliveras distributed job applications and told them to return their completed applications to Gilliland.

Gilliland recommended that the four alleged discriminatees (Frank Heiser, Blanca Jimenez, Oscar Quigley, and Lynne Tolliver) not be hired by the Respondent. Neither Gardunio nor Oliveras conducted any interviews or independent investigation regarding the applicants. Rather, the Respondent's sole basis for determining who it would hire was Gilliland's recommendations. Within a few days after these recommendations were made, on August 20, 1999, the Respondent hired Gilliland to continue working in a position similar to the one that she held at Ryder.

We find, based on the above facts, that the Respondent vested Gilliland with actual authority to recommend the applicants whom the Respondent would hire. By delegating this authority to her, the Respondent made Gilliland its agent with respect to her hiring recommendations. See, e.g., *Weco Cleaning Specialists, Inc.*, 308 NLRB 310, 315 (1992) (finding that an agency relationship existed where the individual was authorized by the respondent to make hiring decisions despite his still being employed by the predecessor company).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Transportes Hispanos, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a). Discriminating against job applicants by refusing to hire them because they joined and assisted a union, engaged in protected concerted activities, or to discourage employees from engaging in such activities.

Given our findings below, it is unnecessary to pass on the judge's basis for finding agency.

(b). In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed 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, to the extent it has not already done so, offer Frank Heiser, Blanca Jimenez, Oscar Quigley, and Lynne Tolliver instatement to the positions for which they applied and which were denied to them on August 20, 1999, or, if those positions no longer exist, to substantially equivalent positions.

(b). Make Frank Heiser, Blanca Jimenez, Oscar Quigley, and Lynne Tolliver whole, with interest, for any loss of earnings and other benefits suffered as a result of the unlawful discrimination them.⁴

(c). Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire Frank Heiser, Blanca Jimenez, Oscar Quigley, and Lynne Tolliver, and within 3 days thereafter notify them in writing that this has been done and that the refusal to hire 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, including an electronic copy of such records if stored in electronic form, necessary or useful in analyzing 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 Chicago, Illinois, and at its jobsite at the LTV facility, copies of the attached notice marked "Appendix B."⁵ Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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 20, 1999.

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

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 discriminate against job applicants by refusing to hire them because they joined and assisted a union, engaged in protected concerted activities, or to discourage employees from engaging in such activities.

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, to the extent we have not already done so, offer Frank Heiser, Blanca Jimenez, Oscar Quigley, and Lynne Tolliver instatement to the positions for which they applied and which were denied to them on August 20, 1999, or, if those positions no longer exist, to substantially equivalent positions.

WE WILL make Frank Heiser, Blanca Jimenez, Oscar Quigley, and Lynne Tolliver whole for any loss of earnings and other benefits suffered as a result of our unlawful discrimination against them, 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 refusal to hire Frank Heiser, Blanca Jimenez, Oscar Quigley, and Lynne Tolliver, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire will not be used against them in any way.

⁴ Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

⁵ 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."

Jeanette Schrand, Esq. and *Richard Kelliher-Paz, Esq.*, for the General Counsel.
Rex C. Denkmann, Esq. (Denkmann & Grabavoy), of Bolingbrook, Illinois, for the Respondent.
Larry Regan, for the Charging Party.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. I heard this case on July 26 and 27, 2000, in Chicago, Illinois. After the parties rested, I heard oral argument on July 27, 2000, and on July 28, 2000, issued a bench decision pursuant to Section 102.35(a)(1) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.¹ The conclusions of law, remedy, order, and notice provisions are set forth below.

CONCLUSIONS OF LAW

1. Respondent, Transportes Hispanos, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, Local No. 142, International Brotherhood of Teamsters, AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing to hire applicants Frank Heiser, Blanca Jimenez, Oscar Quigley, and Lynne Toliver, on or about August 20, 1999, Respondent discriminated in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) and affecting commerce within the meaning of Section 2(6) and (7) of the Act.

4. Respondent did not violate the Act in any other manner alleged in the complaint.

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, including posting the notice to employees attached hereto as Appendix B.

Further, to the extent that Respondent has not made bona fide offers of reinstatement to Frank Heiser, Blanca Jimenez, Oscar Quigley, and Lynne Toliver, I recommend that Respondent be ordered to offer them immediate reinstatement to the positions they would have been offered but for the unlawful discrimination against them. Additionally, I recommend that Respondent be ordered to make Frank Heiser, Blanca Jimenez, Oscar Quigley, and Lynne Toliver whole, with interest, for all losses they suffered because of its unlawful discrimination against them.

¹ The bench decision appears in uncorrected form at pages 377 through 406 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as Appendix A to this Certification.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended²

[Recommended Order omitted from publication.]

APPENDIX A

JUDGE LOCKE. This is a bench decision in the case of Transportes Hispanos, Inc., which I will call the Respondent, and Local No. 142, International Brotherhood of Teamsters, AFL-CIO, CLC, which I will call the "Charging Party" or the "Union." The case number is 13-CA-38073. This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations.

In this case, the government alleges that Respondent unlawfully refused to consider four applicants for employment, and refused to hire them, because of their union and concerted activities, and to discourage other employees from engaging in such activities. I find that the Respondent unlawfully refused to hire these individuals, but that Respondent did not unlawfully refuse to consider them for employment.

I will begin by summarizing the procedural history of this case, which began on September 14, 1999, when the Union filed its initial charge against Respondent. The Union amended this charge on September 20, 1999, October 15, 1999, December 1, 1999 and March 2, 2000.

After an investigation, the Regional Director of Region 13 of the National Labor Relations Board issued a

378

Complaint and Notice of Hearing on March 27, 2000. In doing so, the Regional Director acted for the General Counsel of the Board, whom I will refer to as the "General Counsel" or the "government."

On April 11, 2000, the Respondent filed a timely Answer to the Complaint. Based on the admissions in this Answer, I find that the General Counsel has proven the allegations raised in Complaint paragraphs I(a) through I(e), II(a), II(b), II(d), III, and IV.

On July 26 and 27, 2000, I heard this case in Chicago, Illinois. Also on July 27, 2000, counsel presented oral argument. I am issuing this bench decision on July 28, 2000.

Most of the events in this case took place at a steel mill complex called the LTV facility. At various times, different contractors have provided the service of picking up employees at the front gate and delivering them to their work areas. From December 1995 to August 1998, a contractor called Great Way provided this service. Then, from August 1998 to August 1999, Ryder Student Transportation Services, Inc. performed this function.

To be precise, Ryder was actually a subcontractor, performing work for an intermediary between itself and LTV. The intermediary was a company called Steve Wilson and Associates.

² 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.

378

From the record, it is not clear whether the intermediary became dissatisfied with Ryder, but for whatever reason, Ryder's contract with the intermediary ended on August 19, 1999. The next day, Respondent began performing these transportation services under its agreement with the intermediary.

To run the buses, Respondent hired all but four of the drivers previously employed by Ryder and brought in drivers from other locations to complete its employee complement. Specifically, when it began operations in August 1999, Respondent did not hire Frank Heiser, Blanca Jimenez, Oscar Quigley, and Lynne Toliver.

The Complaint alleges that Respondent did not consider these four drivers for hire and refused to hire them because of their activities on behalf of the Union. The four job applicants engaged in such protected activities while they were employed by the two previous contractors.

When Great Way was providing the bus service at LTV, the Union successfully organized the drivers in 1996. After Ryder took over as the transportation contractor, the Union again successfully organized the drivers in 1999.

During the 1996 organizing drive, Frank Heiser distributed union literature, talked with employees about the Union and asked them to sign a petition showing their

380

support for the Union. During the 1999 Union campaign, Heiser signed and circulated a petition supporting the Union and wore a union hat and button.

Blanca Jimenez was a member of the Union's bargaining committee when it negotiated with Ryder in 1999. These negotiations occurred shortly before Respondent replaced Ryder as subcontractor.

Oscar Quigley distributed union literature during the 1999 organizing campaign. He also served on the Union's bargaining team during negotiations with Ryder.

Lynne Toliver signed a petition supporting the Union during the 1996 organizing drive. During the 1999 campaign, she asked employees to sign a petition supporting the Union and served as a union observer at the election. She was also a member of the Union's bargaining team in negotiations with Ryder.

After Respondent learned that it had obtained the subcontract to provide bus service at LTV, its General Manager, Carmelo Oliveras, took charge of the hiring process. Although, the complaint does not specifically allege that Oliveras was Respondent's supervisor and agent, based upon the record, I find this to be the case.

Respondent's President, Henry Gardunio, told Oliveras to hire all but four of the drivers working for

381

Ryder at the LTV site. He explained that he wanted to fill those four slots with drivers his company employed at other locations.

Gardunio instructed Oliveras to determine which four Ryder drivers were performing poorly and not to offer those individuals employment. Oliveras did not know any of the Ryder drivers personally, so he relied on the recommendations of the co-

ordinator Ryder had placed in charge of its LTV operations, Robin Gilliland. Gilliland knew the drivers well. Before Ryder obtained the contract, Gilliland had been the head coordinator for Great Way at the same site.

Gilliland also knew about the union activities of the four alleged discriminatees. At the hearing, various employees testified regarding statements Gilliland made which evinced her knowledge and disapproval of the employees' union activities. Gilliland did not testify and therefore, the statements attributed to her remain uncontradicted. I credit this uncontroverted testimony.

One of these witnesses, William Johnson, currently works for Respondent and is not an alleged discriminatee in the present case. Johnson testified that, during the 1999 organizing drive, Gilliland telephoned him at home and asked, "What's going on with this union bit?" During this phone call, Gilliland also asked Johnson if he

382

was going to a meeting at the union hall.

Johnson also described an incident in the parking lot at LTV, when Gilliland asked, "Is this a conspiracy about unions?" She also asked if the Union was going to cause them to lose their jobs.

Frank Heiser gave similar testimony. He recounted an incident in which he had gone to Johnson's bus to find out if Johnson had obtained some more baseball caps bearing the Union's insignia. Gilliland came to the bus and told them they were not going to have secret union meetings on the premises.

Further, Heiser testified that on one occasion, Gilliland had told him that Johnson had been "trying to start trouble and keeping the union thing stirred up" on the night shift. She told Heiser that if Johnson showed up, Heiser should call security and have Johnson removed.

Lynne Toliver credibly testified that Gilliland came up to her bus and asked about a piece of paper announcing a union meeting. Gilliland then said that she and Karen, a supervisor from the corporate office, would attend this meeting. However, they did not. Blanca Jimenez gave similar testimony.

Additionally, Jimenez testified that when she returned to work after being sick one day, Gilliland said that she knew Jimenez had been to a union meeting. For

383

reasons I will discuss, I am not confident about the testimony given by Jimenez. However, I credit this particular testimony for two reasons. First, Gilliland did not testify and therefore did not contradict it. Second, Gilliland's statement to Jimenez appears similar to other statements she made to other witnesses.

These statements by Gilliland show that she was aware that Heiser, Toliver, and Jimenez actively supported the Union. Additionally, I conclude that Gilliland knew about Quigley's involvement with the Union. There were only ten Ryder drivers at the LTV site, and Gilliland supervised all of them, including Quigley.

The facts in this case are rather different from those in *Bryant & Cooper Steakhouse*, 304 NLRB 750 (1991), in which the Board found the evidence insufficient to support an inference that the Employer knew about the employees' union activities.

The Board found that the employees had “made an effort to conceal virtually all their organizing efforts from management.” Therefore, it was not appropriate to infer Employer knowledge from the fact that the work force was small.

In the present case, however, Quigley’s service on the Union’s bargaining team made his support for the Union an open fact. At the time Quigley served as a union negotiator, Gilliland was his immediate supervisor. I

384

infer that she knew about his union sympathies.

General Manager Oliveras made the actual decisions regarding which Ryder employees to hire. However, he credibly testified that the sole basis for each hiring decision was Robin Gilliland’s report about the job applicant.

Specifically, he testified he did look at the employment records of the job applicants, but based the hiring decisions on Ms. Gilliland’s recommendations, “when she told me, ‘well these people here have poor records’ that was enough for me.” Oliveras further testified that by “poor records,” he meant records showing attendance problems, such as failure to report for work or tardiness.

However, the General Manager did not require Gilliland to make employment recommendations solely on the basis of the objective attendance records. Rather, he allowed her to take more subjective factors into account. Oliveras testified that he told Gilliland that she could consider whether an employee had a “poor attitude” because he wanted to make sure that the transition from Ryder to the Respondent was smooth.

From his testimony, I conclude that Oliveras did not want Gilliland to recommend hiring anyone who would be likely to “make waves” disturbing the smoothness of the startup period, and that he told Gilliland as much. Thus,

385

he empowered Gilliland to evaluate a job applicant’s attitude and potential for disruption.

Allowing Gilliland to consider a job applicant’s attitude opened the door at least to the possibility of unlawful discrimination. As stated in *James Julian Inc. of Delaware*, 325 NLRB No. 206 (July 15, 1998), “The Board has repeatedly found, with court approval, that, in a labor–relations context, company complaints about a ‘bad attitude’ are often euphemisms for pronounion sentiments.” If Ms. Gilliland understood the words “poor attitude” to embrace union sympathies, she may have allowed antiunion animus to taint her employment recommendations.

Gilliland thus had the leeway to add an unlawful factor to the other criteria applied during the assessment process. As I have previously discussed, the statements Gilliland made to various employees demonstrate both her hostility to the Union and her knowledge of the job applicants’ union activities. I find that she had such knowledge at the time she recommended to General Manager Oliveras that Heiser, Jimenez, Toliver, and Quigley not be hired.

General Manager Oliveras testified that Ms. Gilliland remained employed by Ryder when she made her employment recommendations to him before Respondent took over the bus operations, and that she did not begin her

386

position with Respondent until this startup date, August 20, 1999.

Therefore, I must determine whether her knowledge of the applicants’ union activities may be imputed to the Respondent. That depends on whether Ms. Gilliland was acting as Respondent’s agent at the time she made the employment recommendations.

Complaint Paragraph IV alleges, in part, that “at all material times” Robin Gilliland was Respondent’s supervisor within the meaning of Section 2(11) of the Act and its agent within the meaning of Section 2(13) of the Act. Respondent’s Answer admits this allegation.

Although, this complaint paragraph uses the phrase “at all material times,” it does not define this phrase more precisely. It does not allege, specifically, that Gilliland was Respondent’s agent and supervisor before Respondent began performing the bus services on August 20, 1999. However, I believe that the complaint, considered as a whole, makes such meaning clear.

Thus, Complaint Paragraph V describes the events which allegedly violated the Act, namely, that Respondent refused to consider and hire the four drivers. The times at which Respondent considered applicants and made its hiring decisions are certainly material. Indeed, if such times are not material to the complaint, it is difficult to imagine what time period would be material.

387

Therefore, I conclude that the complaint plainly alleges that Gilliland was Respondent’s supervisor and agent at the time she participated in the hiring decisions even though she did not start on Respondent’s payroll until later. Further, I find that Respondent has admitted this fact.

Because Ms. Gilliland was acting as Respondent’s agent at the time she recommended that the four alleged discriminatees not be hired, the knowledge she then possessed concerning their union activities should be imputed to the Respondent. See *Jim Walter Resources*, 324 NLRB 1231, 1232–23 (1997). The knowledge and animus of a supervisor making a report about an employee on which an Employer relies in making an adverse employment decision are imputable to the Employer.

Moreover, at least in the case of alleged discriminatee Jimenez, Respondent’s management had knowledge of her union activity from another source. General Manager Oliveras credibly testified that on one occasion, he asked Jimenez why she had been late to work. Jimenez replied that she was late because she had attended a union meeting. This conversation took place while Jimenez worked for Ryder. Oliveras knew that Jimenez had attended a union meeting at the time he decided not to hire her.

388

After receiving the recommendations from Ms. Gilliland, General Manager Oliveras took them to Respondent’s owner, Henry Gardunio. The complaint alleges and Respondent’s Answer admits that Mr. Gardunio is Respondent’s supervisor and agent.

Oliveras testified as follows: “I met with Mr. Gardunio and I explained to him that these were the people that Robin had

recommended that should not be hired based on their record performance, people that you know that she would prefer not, it would make it easier for her running a smooth operation. And I brought it to Mr. Gardunio and he agreed. He said 'Okay, fine, if that's your decision, that's fine with me.'"

Based on their credible testimony, I find that when they met on August 16, 1999, neither Oliveras nor Gardunio knew that the Union represented the drivers employed by Ryder and was involved in negotiations with that employer. However, from their testimony, I also infer that both Oliveras and Gardunio wanted to take over the LTV bus operation in a smooth transition and did not wish to hire anyone who might disrupt it.

Gilliland had recommended that Respondent not hire Heiser, Jimenez, Quigley, and Toliver. Oliveras agreed with these recommendations. However, Owner Gardunio, who is Hispanic, had second thoughts about denying employment

389

to Jimenez. Among all the applicants employed by Ryder, she alone was Hispanic. To Gardunio, it did not seem quite right for Transportes Hispanos to reject the one Hispanic applicant.

Jimenez was so concerned about her prospects for employment with the Respondent that she paid an unexpected visit to Owner Gardunio in his Chicago office. No one else was present during their discussion, which Jimenez described in the following testimony:

Q. What was said and by whom during this conversation?

A. I know that we talked about some of the employees that at that time, I did ask him if my name was one of those questionable persons and he said, yes, it was. Then he told me that he had asked Robin about me and she had told him that, yes, yes, I was involved in the Union but that some of their, you know, bigger supporters for the Union were Frank Heiser and William Johnson.

....

Q. What happened? What did you ask him?

A. I asked him . . . I asked him about the questionable persons on there. And that he also told me that, or shall I say that he asked me if there were any more hardcore union employees there and I told him no, that William Johnson had already been

390

terminated.

Q. Did he relay any story to you?

A. Oh, yeah. He wanted to give me an example of the reason they weren't really into the Union and he told me a story about some theater his father owned, in Illinois I believe he said, that it was, uh, the union shop. I know he explained to me that it over a switch. That his brother, I believe he said, was working in the projection room also with some union employee and the union employee did not show for work and I remember he said, that his father called the union and they told him that he could not touch that switch, that was a union job and he couldn't touch it. And I know he said they had to return everybody's money . . . he said that soon after that his father kind of got rid of the business.

Gardunio admitted that he told Jimenez about a problem his father had experienced while operating a theater, and his description of the theater incident is similar to that of Jimenez. However, Gardunio squarely denied that Robin Gilliland had told him that Jimenez was involved in the Union. Similarly, he denied saying that Gilliland had identified Heiser and Johnson as bigger supporters of the Union. Further, Gardunio denied asking Jimenez if there were any more hardcore union supporters.

391

In his testimony, Gardunio disclosed that at some point during his conversation with Jimenez, when he was discussing her attendance problems, she explained one instance of tardiness by saying that she had been at a union meeting, which prompted Gardunio to ask, "Is there something I should know?"

The statement by Jimenez, that she had attended a union meeting, concerned Gardunio enough that later, he called Steve Wilson, the contractor who had awarded Respondent the sub-contract to provide bus services at LTV. Gardunio asked Wilson about the presence of a Union. Wilson brushed off the inquiry by telling Gardunio that there had been talk about a Union for a long time, but "they never do nothing, so I would not worry about it."

For several reasons, I believe that Gardunio's testimony is more reliable than that of Jimenez. First, it impressed me that Gardunio freely admitted making statements which obviously could suggest that he harbored antiunion animus. Thus, he admitted telling Jimenez about his father's problem with a union. Additionally, he admitted that he would prefer having a nonunionized work force. Moreover, he described Jimenez' statement that she had attended a union meeting and his reaction to it. Such candid testimony indicates that Gardunio adhered to the truth even when it might be costly to do so.

392

Second, my observations of Gardunio when he testified lead me to believe that he was a reliable witness.

Although the demeanor of Ms. Jimenez did not raise any doubts in my mind about her testimony, some other factors did cause me concern. To some extent, Ms. Jimenez had a tendency to interject her opinion into her testimony. When opinion gets mixed with fact, it can sometimes be a source of distortion.

Additionally, Ms. Jimenez had clearly negative feelings about Ms. Gilliland. Considering that Gardunio ultimately supported Gilliland's recommendation not to hire Jimenez, the negative feelings towards Gilliland could expand to embrace Gardunio as well. Such feelings might also be a source of bias.

Further, another part of Ms. Jimenez' testimony raised some question about her memory. Specifically, she testified that she was active in the Union's organizing drive when she was employed by Great Way. However, that campaign took place in 1996 and Ms. Jimenez testified that she began work with Great Way in 1997.

For all these reasons, I believe that Gardunio's account of his meeting with Jimenez is more reliable. I credit it.

Based on this credited testimony, I find that

393

because of his discussion with Jimenez, Gardunio concluded that she would have difficulty working with Robin Gilliland, who was being hired to continue her work as head coordinator of the drivers. Gardunio told Jimenez that to have a smooth start-up, she would have to get along with Gilliland. "You're going to have to get along with her," he told Jimenez. "You sometimes will have to bite your tongue and sometimes you will have to go along with what your supervisor wants you to do."

Notwithstanding the possibility of friction between Jimenez and Gilliland, Gardunio told Jimenez that Respondent would offer her a job. However, Gardunio later changed his mind when he talked with his general manager.

When Gardunio told Oliveras about his decision to hire Jimenez, Oliveras responded that Gardunio was too soft. Oliveras said that if Jimenez already had told Gardunio to his face that she did not get along with Gilliland, then by hiring Jimenez, Gardunio was "only looking for problems."

Gardunio replied, "You know, you're right. I did put you in charge." He told Oliveras that he would like to see Jimenez employed because it looked bad for a Hispanic company not to hire the only Hispanic applicant. Nonetheless, Gardunio accepted the recommendation that Jimenez not be hired.

394

On August 20, 1999, the first day of Respondent's operation at LTV, Jimenez reported for work and learned that she would not have a job. Lynne Toliver also reported for work on that day and learned that Respondent would not employ her. Respondent notified Frank Heiser and Oscar Quigley by telephone that they would not be hired.

The complaint alleges two different acts of discrimination against the four drivers. Paragraph V(a) alleges that Respondent did not consider them for employment. Paragraph V(b) alleges that Respondent refused to hire them. I will examine these allegations separately.

As stated by the Board in *FES (A Division of Thermo Power)*, 331 NLRB No. 20 (May 11, 2000), to establish a discriminatory refusal to consider for employment, the General Counsel bears the burden of showing the following at the hearing on the merits: (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden will shift to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation. If the Respondent fails to meet its burden, then a violation of Section 8(a)(3) is established.

The evidence shows that Respondent did consider

395

the four alleged discriminatees for employment. Respondent's agent, Robin Gilliland, obtained and reviewed the attendance records of these employees and made recommendations, albeit negative ones, to General Manager Oliveras, who adopted her recommendations with the approval of the Respondent's owner.

I do not find that Respondent failed to consider these job applicants. Therefore, I recommend that the failure-to-consider allegation be dismissed.

In *FES (A Division of Thermo Power)*, the Board also established standards to be applied in analyzing allegations that an Employer unlawfully refused to hire a job applicant. The Board held that to establish a discriminatory refusal to hire, the General Counsel first must prove the following elements:

(1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct;

(2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and

396

(3) that antiunion animus contributed to the decision not to hire the applicants.

Once the government establishes these elements, the burden shifts to the Respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation.

Clearly, the government has established the first element. The record establishes without contradiction that Respondent was hiring drivers.

The evidence also establishes the second element. At the time Respondent was hiring, the four alleged discriminatees held similar positions with another company. Although Respondent has raised an issue concerning the attendance and punctuality of the alleged discriminatees, it has not contended that they lacked the necessary qualifications to drive a bus. I find that the General Counsel has proven that the alleged discriminatees had the necessary experience and training relevant to the jobs for which they applied.

Further, the General Counsel has proven the third element. In deciding whom to hire, General Manager Oliveras relied heavily on the recommendations of Coordinator Gilliland. Indeed, Oliveras testified that when Gilliland told him that the four job applicants had poor records, "that was good enough for me."

397

Abundant evidence establishes that Gilliland made a number of different statements indicating that she harbored antiunion animus and that she knew the discriminatees actively supported the Union. Gilliland made some of these statements not long before she began considering applicants and making recommendations regarding their employment.

More specifically, Gilliland made some of these statements in the context of an organizing campaign the Union began in about March 1999. Gilliland's actions include interrupting a conversation between employees Johnson and Jimenez, asking them if this was a conspiracy about unions and also asking them if the Union was going to cause them to lose their jobs.

Arguably, the statements which Gilliland made while acting as a supervisor for Ryder might not accurately reflect the attitude she later brought to her work for Respondent. For exam-

ple, a company might impose such strict standards of behavior on its supervisors, and establish such serious consequences for breaking those standards, that even a supervisor who had zealously opposed unions while working for a previous employer would put aside that attitude when told to do so by his new employer. Similarly, it is possible that a previous foe of unions would experience a change of heart.

398

In this case, however, there is no evidence that Respondent had established or communicated any policies to discourage its supervisors from discriminatory conduct which violated the Act. Therefore, I cannot conclude that Gilliland had any reason to act differently as an agent of Respondent than she had acted as a Ryder supervisor.

Additionally, there is no evidence that Gilliland experienced any change of attitude about unions between the time she made the antiunion statements and the time she made the employment recommendations. Obviously, she would be most qualified to testify about it, but she did not appear. However, at the time of the hearing she still worked as one of Respondent's supervisors. It is very difficult to accept the suggestion that Respondent had no control over whether or not Gilliland appeared at the hearing.

Indeed, on the first day of the hearing, witnesses for the General Counsel testified concerning statements Gilliland had made which showed antiunion animus. When Respondent presented its evidence on the second day of hearing, it did not call Gilliland as a witness, and did not request a continuance in the hearing to secure her presence. In these circumstances, I cannot speculate that if she had testified, Gilliland would have denied making the antiunion statements attributed to her or

399

would have professed that her attitudes had changed before she began recommending which employees Respondent should hire, and which it should reject.

As already noted, General Manager Oliveras had told Gilliland specifically that she could take into account whether an employee had a "poor attitude" which could cause problems during the start-up period. Considering Gilliland's previous antiunion statements, the absence of any evidence suggesting that her opposition to unions had changed, and her mandate to take into account employee attitudes when recommending whom to hire, it appears almost certain that antiunion considerations entered into her analytical process and contributed to her recommendations not to hire the four drivers. I so find.

General Manager Oliveras, who made the hiring decisions, accepted Gilliland's recommendations and performed little, if any, independent review. Since antiunion animus contributed to Gilliland's recommendations, I find that it also contributed to the employment decisions which Oliveras made, with the owner's approval. Thus, the General Counsel has established the third necessary element.

Respondent may avoid a finding that it unlawfully discriminated against the four job applicants by showing that it would not have hired these applicants even in the

400

absence of their union activity or affiliation. However, I find that Respondent has not done so.

Respondent contends that it did not hire the four drivers because of their poor attendance and tardiness records. However, Respondent has presented no evidence comparing the attendance and tardiness of these four with that of the drivers it did hire.

Although Respondent did not introduce attendance records allowing a comparison between those it hired and those it did not, the General Counsel did introduce some attendance records. These records are too limited to allow a systematic comparison between the attendance problems of the applicants Respondent selected and the applicants it rejected. However, these records certainly do not establish that the four alleged discriminatees had any greater attendance problems than their colleagues.

Respondent bears the burden of proof on this issue. I conclude that Respondent has not carried this burden.

Respondent's decision not to hire Blanca Jimenez presents a further issue. Respondent's Owner was ready to hire Jimenez because she was the only Hispanic among the job applicants. Ultimately, the Owner allowed his manager to reject Jimenez after learning from Jimenez that she had problems getting along with the person who would be her

401

supervisor.

On its face, rejecting a job applicant because she might have a personality conflict with a supervisor does not appear to discriminate on the basis of union activity. To the contrary, it appears, at least superficially, to be a legitimate business reason which would justify the refusal to hire.

However, I believe that in this case, the question is more complicated than it might first appear. As the recommendation not to hire Jimenez went up the chain of command from Gilliland to Oliveras and then from Oliveras to Gardunio, different reasons entered into the decision-making process.

Initially, Gilliland recommended that Oliveras not hire Jimenez, and antiunion animus contributed to this recommendation. It appears that at first, General Manager Oliveras adopted Gilliland's recommendation without independently reviewing it. However, at some point, Oliveras did consider the merits of hiring Jimenez, and decided that her personality conflict with Gilliland posed a risk to a smooth start-up.

Owner Gardunio had been prepared to override the decision by Oliveras and hire Jimenez anyway, but he changed his mind after meeting with Jimenez. In this meeting, he learned both that Jimenez had a personality

402

conflict with the individual who would be her supervisor and also that Jimenez had engaged in union activity.

The fact that Gardunio knew about Jimenez' union activity at the time he affirmed the decision not to hire her raises the possibility that the union activity contributed to the ultimate decision to reject her application for employment. Even though I have credited Gardunio's testimony over that of Jimenez, I still

find it difficult to accept that Gardunio, having learned about the union activity, made a decision about hiring Jimenez without taking this activity into account.

Gardunio admitted telling Jimenez about the problem his father had with a union, and also admitted that if he could have his preference, his employees would not be represented by a union. Therefore, I must conclude that to some extent, knowledge of Jimenez' union activity contributed to Gardunio's decision to reject her application for employment.

The evidence supports this conclusion without even considering the source of the personality conflict between Gilliland, a rather outspoken opponent of the Union, and Jimenez, an equally vocal adherent of the Union. Of course, to the extent that an ostensible personality conflict really concerns opposing opinions about unionization, it could hardly constitute a lawful and

403

nondiscriminatory reason justifying a refusal to hire. However, I need not delve into the nature of the personality conflict between Gilliland and Jimenez, because I have concluded that Jimenez' union activity, known to Gardunio, contributed to his decision that Jimenez not be hired.

Gardunio's testimony supports this conclusion. Specifically, he testified that he instructed Oliveras to make sure that the start-up was smooth and trouble free. His testimony also shows that Gardunio associated unions with the opposite. He admitted telling Jimenez about an incident in which union insistence on a work rule disrupted his father's business.

The fact that Gardunio even told Jimenez about this incident signifies that at some level, Gardunio continued to associate a union with trouble or at least the possibility of trouble. At this point, just before the new operation began, Gardunio wanted to minimize the possibility of trouble and had focused his general manager's attention on the importance of making a smooth transition. Considering the importance Gardunio attached to avoiding trouble, and considering the mental association he made between a union and the possibility of a disruption, it is difficult to believe that Gardunio simply ignored, or even could bring himself to ignore, Jimenez'

404

union activity.

Some affirmative evidence might demonstrate that, for reasons unrelated to her union sympathies, Gardunio would have rejected Jimenez in any event, but the record contains no such evidence. To the contrary, the record shows that before Gardunio learned about her union activity, he favored hiring Jimenez because she was Hispanic. The fact that Jimenez did not get along well with Gilliland certainly may have weighed

against her, but the evidence does not persuade me that this factor alone would have outweighed Gardunio's desire to hire the one Hispanic applicant. Therefore, I find that Respondent has not carried its burden of showing that it would have rejected the employment application of Jimenez even if she had not engaged in union activity.

In sum, I find that the government has proven that about August 20, 1999, Respondent refused to hire Frank Heiser, Blanca Jimenez, Oscar Quigley, and Lynne Toliver, because these employees joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities. Additionally, I conclude that this refusal to hire violated Section 8(a)(3) and (1) of the Act, and further conclude that these four applicants would have been hired but for the unlawful discrimination against them on or about August

405

20, 1999.

Having concluded that Respondent violated the Act by refusing to hire the named discriminatees on August 20, 1999, I recommend that the Board order Respondent to cease and desist from this unlawful activity and make the discriminatees whole, with interest, for the unlawful discrimination against them. Additionally, I recommend that the Board order Respondent to post a Notice to Employees.

The remedy for a refusal-to-hire violation also includes an order that Respondent offer reinstatement to the applicants it unlawfully rejected for employment. From the record, it appears that Respondent already has offered reinstatement to some of the discriminatees, and currently employs Frank Heiser and Blanca Jimenez. I recommend that the Board order the Respondent to offer reinstatement to the discriminatees only to the extent that Respondent has not already made a bona fide offer to instate each discriminatee to the position unlawfully denied, or, if that position no longer exists, to a substantially equivalent position.

When the transcript of this proceeding has been prepared, I will issue a Certification which attaches as an appendix the portion of the transcript reporting this bench decision. This Certification also will include provisions

406

relating to the recommended Order and Notice to Employees. When that Certification is served upon the parties, the time period for filing an appeal will begin to run.

I sincerely thank counsel for the professionalism and civility they demonstrated throughout the hearing. The hearing is closed.