

Best Driver Resources and Samuel L. Collins. Case 12-CA-20556

March 13, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, HURTGEN, AND WALSH

On September 29, 2000, Administrative Law Judge William N. Cates issued the attached bench decision. The General Counsel filed an exception to the judge's recommended Order and notice to employees 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 exception and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.¹

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Best Driver Resources, Hialeah, 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.

"(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful denial of work of Carlos Alonso, Neal Collins, Sammie L. Collins, Israel Morejon, and Juan Odery, and within 3 days thereafter notify these employees in writing that this has been done, and that the unlawful denial of work will not be used against them in any way."

2. Substitute the attached notice (App. B) for that of the administrative law judge.

APPENDIX B

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

¹ There are no exceptions to the judge's unfair labor practice findings. The General Counsel has excepted to the judge's failure to include a provision in the recommended Order requiring that the Respondent expunge from the personnel files of the named discriminatees any reference to the Respondent's unlawful denial of work to them. The General Counsel asserts that an expunction requirement is necessary to protect the discriminatees, who are employees on strike against their employer, from further discrimination by the Respondent, a supplier of temporary labor, or by other employers from whom the discriminatees are likely to seek employment. We find merit in this unopposed exception and modify the Order and notice accordingly.

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 deny work to our employees because they engage in union and/or concerted protected activities.

WE WILL NOT inform our employees that they were denied work due to their affiliation, support, and activities on behalf of the Union.

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 make Carlos Alonso, Neal Collins, Sammie L. Collins, Israel Morejon, and Juan Odery whole for any loss of earnings and other benefits resulting from our denial of work to them less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful denial of work to Carlos Alonso, Neal Collins, Sammie L. Collins, Israel Morejon, and Juan Odery, and WE WILL, within 3 days thereafter, notify these employees in writing that this has been done, and that the unlawful denial of work will not be used against them in any way.

BEST DRIVER RESOURCES

Karen M. Thornton Esq., for the General Counsel.
Charlie Gutierrez, Representative, for the Company.

BENCH DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This is a denial of work case. At the close of trial in Miami, Florida, on September 19, 2000, I rendered a Bench Decision in favor of the General Counsel (Government) thereby finding a violation of 29 U.S.C. § 158(a)(1) and (3). This certification of that Bench Decision, along with the Order which appears below, triggers the time for filing an appeal (Exceptions) to the National Labor Relations Board (Board). I rendered the Bench Decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations.

For the reasons stated by me on the record at the close of trial, and by virtue of the prima facie case established by the Government, a case not credibly rebutted by Best Driver Resources (Company), I found the Company violated Section

8(a)(1) of the National Labor Relations Act, (the Act), when on December 6 and 7, 1999, it informed employees they were being denied work due to their affiliation, support, and activities on behalf of the Freight Drivers, Warehousemen and Helpers, Local Union 390, affiliated with International Brotherhood of Teamsters, AFL-CIO (Union). Additionally, I found the Company violated Section 8(a)(3) and (1) of the Act when, since on or about December 6, 1999, it denied work to employees Carlos Alonso, Neal Collins, Sammie Collins, Israel Morejon, and Juan Odery because they assisted and supported the Union and engaged in concerted activities, and to discourage its employees from engaging in these activities. I rejected the Company's specific contention it removed Sammie Collins and Neal Collins from the work project because of misstatements on their employment applications regarding prior criminal convictions. I also rejected the Company's contention that it was not unlawfully motivated in its actions toward any of the five named employees because such was not established by any credible evidence. *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

I certify the accuracy of the portion of the transcript, as corrected,¹ pages 209 to 235, containing my Bench Decision, and I attach a copy of that portion of the transcript, as corrected, as "Appendix A."

CONCLUSION OF LAW

Based on the record, I find the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; that it violated the Act in the particulars and for the reasons stated at trial and summarized above and that its violations have affected and, unless permanently enjoined, will continue to affect commerce within the meaning of Section 2(2) and (6) of the Act.

REMEDY

Having found the Company has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Company having discriminatorily denied work to employees Carlos Alonso, Neal Collins, Sammie L. Collins, Israel Morejon, and Juan Odery I shall recommend they, within 14 days from the date of this Order, be made whole for any loss of earnings or other benefits suffered as a result of the discrimination against them with interest. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and interest shall be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I have not recommended the Company be ordered to offer reinstatement or any other relief for the named individuals because the Government stipulated the project, from which the

¹ I have corrected the transcript pages containing my Bench Decision and the corrections are as reflected in attached "Appendix C" [omitted from publications].

named individuals were wrongfully denied work, was temporary in nature and for a fixed duration.²

On these findings of fact and conclusion of law and on the entire record, I issue the following recommended

ORDER

The Company, Best Driver Resources, Hialeah, Florida, its officers, agents, successors and assigns shall

1. Cease and desist from

(a) Denying work to its employees because they engaged in union or concerted activities for the purpose of collective bargaining or other mutual aid or protection, and/or in order to discourage employees from engaging in such union or concerted activities.

(b) Telling its employees they are being denied work due to their affiliation, support, and activities on behalf of the Union.

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

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

(a) Make Carlos Alonso, Neal Collins, Sammie L. Collins, Israel Morejon, and Juan Odery whole for any losses they may have suffered by reason of the Company's denying them work in the manner described above in the Remedy section.

(b) Preserve, and within 14 days of a request, make available to the Board or its agents, for its examination and copying, all payroll records, Social Security payment records, time cards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Regional Director of Region 12 of the National Labor Relations Board, post at its Hialeah, Florida, facility copies of the attached notice marked "Appendix B."³ Copies of the Notice, on forms provided by the Regional Director for Region 12 after being signed by the Company's authorized representative shall be posted by the Company and maintained for 60 consecutive days in conspicuous places, including all places where notices are customarily posted. Reasonable steps shall be taken 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 Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the Notice to Employees, to all employees employed by the Company at any time since December 6, 1999.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 12 of the National Labor Relations Board sworn certification of a responsible official on a

² The parties stipulated the project (hauling mail) was for the holiday season, specifically from December 5 to 23, 1999.

³ 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."

form provided by the Region attesting to the steps the Company has taken to comply

APPENDIX A
BENCH DECISION

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JUDGE CATES: On the record.

First I wish to thank the parties for the presentation of the evidence. If you reflect back over the trial, I have asked few questions and when the Presiding Judge does not have to ask many questions, that is an indication the parties have developed the evidence as fully as they wish to have it considered. For that I thank you.

Let me also state that it is a pleasure to be in Miami, Florida.

This is an unfair labor practice case prosecuted by the National Labor Relations Board's, hereinafter Board, General Counsel acting through the Regional Director for Region 12 of the Board, following an investigation by Region 12's staff.

The Regional Director for Region 12 of the Board issued a complaint and notice of hearing, hereinafter complaint, on April 28 2000 against Best Driver Resources, hereinafter Company, based on an unfair labor practice charge filed on December 16, 1999 and amended on February 17, 2000, by Sammie L. Collins, an individual, hereinafter Sammie Collins.

Specifically, it is alleged in the complaint that

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on or about December 6 and 7, 1999, the Company, by its dispatch manager, Guillermo Morales, also known as Willie, hereinafter referred to as Dispatch Manager Morales, telephonically informed employees they were being denied work due to their affiliation with Freight Drivers, Warehousemen and Helpers Local Union 390, affiliated with the International Brotherhood of Teamsters, AFL-CIO, hereinafter Union.

It is also alleged that since December 6, 1999 until December 23, 1999, the Company denied work to employees Carlos Alonso, Neil Collins, Sammie L. Collins, Israel Morejon and Juan Odery because they joined, supported or assisted the Union and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

And in order to discourage employees from engaging in such activities or other concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

It is alleged the Company's conduct violates Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, hereinafter Act.

It is stipulated that the time period involved herein is from December 5 to December 23, 1999 inclusive.

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In its answer to the complaint, as well as admissions and stipulations made at trial, the Company admits the Board's jurisdiction is properly invoked and the Union is a labor organization within the meaning of the Act.

The Company, however, denies violating the Act in any manner set forth in the complaint.

The Company is a corporation with an office and place of business located at Hialeah, Florida, where it is engaged in the business of providing drivers for enterprises engaged in the transportation of goods and materials.

During the twelve month period preceding the issuance of the complaint, a representative period, the Company, in conducting its business operations just described, derived gross revenues in excess of \$50,000 for the transportation of freight in interstate, under arrangements with and as agent for various common carriers, including Emery Worldwide Airlines, Inc., which enterprises are directly engaged in interstate commerce and which operate between various States of the United States.

Based on its operations, as I have just described, the Company functions as an essential link in the transportation of freight in interstate commerce.

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The evidence establishes, the parties stipulate and I find, the Company is an Employer engage in commerce within the meaning of Section 2(2)(6) and (7) of the Act.

The evidence establishes, the parties admit and I find the Union is a labor organization within the meaning of Section 2(5) of the Act.

The parties admit and I find that Company President, Charles Gutierrez, Jr., and Dispatch Manager Morales are supervisors and agents of the Company within the meaning of Section 2(11) and 2(13) of the Act.

This is a case that is fact driven. I shall outline what I consider the essential facts to be. In arriving at credibility resolutions, I carefully observed the witnesses as they testified and I have utilized such in arriving at the facts herein.

I have also considered each witness' testimony in relation to other witnesses testimony and in light of the exhibits presented herein.

If there is any evidence that might seem to contradict the credited facts I set forth, I have not ignored such evidence, but rather have discredited or rejected it as not reliable or trustworthy. I have considered the entire record in arriving at the facts

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herein.

Having said that, some facts, especially the background facts are undisputed, admitted or are clearly established with uncontradicted evidence.

It is undisputed that truck drivers Alonso, Neil Collins, Sammie Collins, Morejon and Odery were, and continue to remain striking employees of Overnite Trucking. Each are experienced drivers who have worked for Overnite for an extended time.

The truck driving employees of Overnite at its south Florida location, where the five named individuals work, are represented by Teamster Local Union 390.

It is undisputed the represented truck driver employees of Overnite went on strike in October 1999, and remain on strike to the present.

The Overnite drivers on strike include the five employees named in the complaint herein. Each of the five individuals

named in the complaint herein, testified they needed to earn a living while on strike against Overnite.

Therefore, they actively sought interim employment elsewhere. It is in seeking this interim employment elsewhere that the five individuals made their contacts with the Company herein.

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Neil Collins testified he saw a flyer put out by the Company that they were seeking truck drivers. Neil Collins was the first of the five named individuals to seek employment with the Company herein.

Neil Collins testified he went to the Company's offices and applied for employment as a truck driver on October 29, 1999.

Neil Collins testified he spoke with Dispatch Manager Morales. According to Neil Collins, Dispatch Manager Morales told him the Company needed employees to work for Emery Worldwide Airlines.

Morales told Neil Collins the job would pay \$18 per hour and specifically told him what they would be doing for Emery Worldwide, which was mainly hauling mail for the United States Postal Service during the December 1999 holiday season.

Neil Collins testified he filled out a Company application as well as an application for the United States Postal Service.

According to Neil Collins, Dispatch Manager Morales told him he also needed a drug test, verification of his United States Department of Transportation physical, which Collins was to and did obtain for the Company.

District Manager Morales also told Neil Collins he

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needed a background check as well as a Florida motor vehicle report on his United States Department of Transportation driver's license before his application could be complete.

According to Neil Collins, Dispatch Manager Morales said he would do the background and motor vehicle registration investigations himself. However, it was left up to Neil Collins to obtain a drug test and verification of his medical condition.

Sammie Collins testified he applied for work with the Company as a truck driver on November 1, 1999. Sammie Collins testified Dispatch Manager Morales told him the Company was looking for drivers "for the reason to pull mail."

Sammie Collins testified he told Dispatch Manager Morales he was on strike at Overnite. Sammie Collins testified Dispatch Manager Morales responded, okay, that the Company needed drivers.

Sammie Collins testified to the same application process that his brother, Neil Collins, testified to.

Alonso testified he applied for work as a truck driver at the Company on November 3, 1999. Alonso testified he told Dispatch Manager Morales he was coming from Overnite and was looking for temporary work.

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Morales told Alonso, according to Alonso, that was okay, they were looking for experienced drivers. Alonso testified he filled out employment applications and was fingerprinted that same day.

Oderly testified he applied for work with the Company on November 4, 1999, and was interviewed by Dispatch Manager Morales.

Oderly informed Morales he was on strike from Overnite. Oderly was told the Company was looking for employees to haul mail for Emery Worldwide.

Morejon testified he applied for employment with the Company on November 9, 1999, and was interviewed by Dispatch Manager Morales.

Morejon filled out the employment applications and was told about the need for a drug test and other requirements.

Morejon testified he was told the pay would be \$18 per hour, hauling United States Postal Service mail at night for four to six weeks.

It is undisputed the five individuals named in the complaint were experienced truck drivers. It is also undisputed that Alonso, Neil Collins, Sammie Collins, Morejon and Oderly were instructed to and attended a meeting at the Ameri Suites Hotel, in or near Hialeah, Florida, on or about mid November, 1999.

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The meeting was conducted by representatives of Emery Worldwide.

The Company herein also had management representatives present at the meeting, namely Dispatch Manager Morales and Company President Gutierrez.

The Emery Worldwide representative explained to the drivers what they would be doing and told the some forty-five to sixty drivers present at the meeting, Emery wanted them to do a good job.

The five named individuals, as well as others, were photographed that evening. The meeting lasted approximately an hour and a half.

It is undisputed, and Alonso, Neil Collins, Sammie Collins, Morejon and Oderly each testified, they were notified by Dispatch Manager Morales on December 4th, 1999 they were to report for work with Emery Worldwide on December 5, 1999 at 9:00 p.m.

Each of the five individuals reported to work as instructed. The five were taken into the facility to the drivers room and given instructions on what was expected of them by Emery Worldwide supervisor Ted Suarez.

Emery supervisor Suarez told the five they were not to wear jackets, caps, beepers and/or cell phones while at work.

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Neil Collins, Alonso, Morejon, Oderly and Sammie Collins testified Dispatch Manager Morales had time cards for each of them, which they utilized.

Alonso testified he wore a white tee shirt with Overnite Freight written on it at the first day of work.

Morejon testified he wore a Local 390 Union tee shirt and hat when he reported for work at Emery on December 5, 1999.

Oderly testified he reported for work with Emery on December 5, 1999 wearing an Overnite jacket and cap, but after being told no hats or jackets were allowed, he left his in the cafeteria while he worked.

Sammie Collins testified that during the first day of work on December 5, 1999, Emery supervisor Suarez gave him a telephone number to call the next day to see which warehouse he would be working at.

Sammie Collins also testified the guy over the drivers in the work room came to him and wanted to know specifically who he, Sammie Collins, was.

Sammie Collins testified that later that work shift, after he returned from hauling mail, Emery supervisor Suarez told him not to call the number he had earlier given him, that Emery would call him.

According to Sammie Collins, Emery never thereafter

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called him.

Neil Collins testified he was told by the Emery supervisor on the first day of work, to report to work the following day at Emery's annex building.

Later that day, he was told not to report at the annex building, that there had been some changes, to wait for a call from Emery, which he said never came about.

Alonso testified Emery's supervisor told him during the work shift on the first day, on December 5, 1999, not to call in the next day, just to show up for work. Alonso testified near the end of the first day's shift, he was told Emery would call him.

Oderly testified he was told he would be called in after the first day, but he said no one called him.

Neil Collins testified that he waited until approximately 3:00 p.m. on December 5, 1999 for a call about his reporting time and place for the next day.

Neil Collins testified he never heard from Emery, so he telephoned Dispatch Manager Morales. According to Neil Collins, Dispatch Manager Morales said, the big guy over at Emery Worldwide did not want the Overnite guys in there any more, that Emery did not want it to seem like it was helping the Overnite drivers out.

Sammie Collins testified Dispatch Manager Morales

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told him, the big guy over at Emery Worldwide heard you guys from Overnite talking about a Union and strike, and Emery didn't want drivers from Overnite there.

According to Sammie Collins, Morales told him whatever the customer wanted, that was what the customer got, so they would not be working at Emery.

Alonso, who is the shop steward for the Overnite drivers at Overnite, testified Dispatch Manager Morales called him at about 5:00 p.m. on December 5 or 6, 1999 and told him, "You guys can't go to Emery no more. You tell the rest of the people."

Alonso testified Morales said they could not go back because the big guy from Emery didn't want anybody from Overnite and part of the Union.

Morejon testified Dispatch Manager Morales called him and said they could not go back to Emery because they messed up wearing Union attire.

Morejon testified Morales told him Emery had been through two Union elections and didn't want them wearing Union stuff.

Oderly testified he went back to work, but made sure no one from management saw him or recognized he was one of the five Overnite employees.

Oderly testified he worked in that manner for two weeks after the December 5, 1999 first day and

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thereafter quit because he couldn't take it any more. He said he was afraid he would be discovered and Emery would, "throw me out."

Alonso testified that after Oderly returned to work that he, Alonso, waited two days and went back to work at the Company, but at a different location.

Alonso testified the day that he went back, he spoke with Dispatch Manager Morales on the telephone and Morales told him, don't say you're from Overnite.

According to Alonso, they discussed that Oderly was doing the same thing and Morales said, don't say you're from Overnite.

Dispatch Manager Morales testified he was responsible for all the things that go into hiring employees. Morales explained that his Company provided drivers to various freight hauling companies.

Morales explained he processed all applications, obtained background reports and motor vehicle driving reports, as well as reviewing and processing medical examination records to see that such were timely and current and to ensure that drug tests were taken.

Morales testified he tried to review all records and make sure any employee sent to any Employer, such as Emery Worldwide, were clean.

Dispatch Manager Morales testified his Company was

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looking for as many good drivers as they could find in October and November 1999.

Morales explained drivers were needed to work for Emery Worldwide, which had a contract with the United States Postal Service, to haul mail during the holiday season.

Morales explained it was temporary work during December, but it paid \$18 per hour, whereas his Company normally only paid drivers \$10 per hour.

Morales testified he told each of the five drivers at issue herein, as well as all other driver applicants, that his Company had ongoing work other than the Emery work, but that it only paid \$10 per hour.

Dispatch Manager Morales testified he was responsible for, among other things, keeping the time and attendance cards for the employees of his Company.

Dispatch Manager Morales testified he did not, in the Emery Worldwide case, supply the time cards directly to the employees working at Emery, but rather, gave the time cards to Emery supervisor Suarez to hand out.

Dispatch Manager Morales testified he was never told by Emery Worldwide that they did not want any employees wearing Union attire.

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Morales testified he did not have an opportunity to review Neil Collins and/or Sammie Collins background records until Monday, December 6th, 1999. Morales testified he noticed problems in their background at that time.

Morales testified he had to let Sammie Collins go from employment with Emery, because Sammie Collins had indicated on his application he had no prior criminal convictions when, in fact, that wasn't true.

Dispatch Manager Morales testified he telephoned Sammie Collins that date and left a message on his answering machine that he needed to see him, that there was a problem with his background records.

Dispatch Manager Morales testified he spoke with Sammie Collins the next day and told him they could not have him back on the Emery job because of his background.

Morales testified Sammie Collins became belligerent on the telephone and hung up. Sammie Collins testified on rebuttal that no such conversation or message ever took place or happened.

Dispatch Manager Morales testified he attempted to call and later spoke with Neil Collins. Morales explained he told Neil Collins he needed to speak with him, but because of the nature of the problem with his

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background information, he did not want to talk with him over the telephone.

Neil Collins testified on rebuttal that no such conversation took place.

Dispatch Manager Morales testified he spoke with Morejon and Morejon told him he couldn't work at Emery Worldwide any more, that he was working for his uncle at the Miami Airport operating a Super Shuttle, and was making good money from tips.

On rebuttal, Morejon denied telling Morales what Morales attributed to him.

Dispatch Manager Morales testified it made no difference whether the drivers wore Union attire or were for a Union, that the Company simply needed experienced drivers with a clean background.

Morales testified the wearing of Union apparel and/or being Union played no part in any action taken in this case.

As is clear from the record, there is some credibility resolutions that need be made. In that regard, I credit the drivers because they gave, for the greater part, mutually corroborative testimony. They impressed me as attempting to tell the truth as best they could recall it.

In addition to demeanor, there are a number of

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factors with respect to Dispatch Manager Morales' testimony that caused me to question it and look closer at it.

For example, Dispatch Manager Morales testified he tried to do a good and conscientious job in processing all applications. That testimony runs in conflict with the documentation presented herein.

For example, it appears that the background reports on each of the individuals in question, were run within a day or so of the individual making application for employment.

Yet, Morales would have it believed that he did not have an opportunity to review such reports until, for example, the Collins' brothers had already been sent to work for Emery Worldwide.

I'm persuaded that Dispatch Manager Morales is a conscientious employee in management for the Company herein.

With that in mind, I'm persuaded he reviewed the applications, including the background material earlier than he is willing to admit doing and that he found no information in the background reports, specifically on the Collins' brothers, that would have precluded them from working for the Company in any of their clients, specifically the United States Postal Service.

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Furthermore, it appears a conscientious review of Neil Collins background report would reflect that he was never convicted of any crime.

Sammie Collins' conviction, for which he was placed on probation for petty larceny, occurred in October 1974.

I note the security clearance screening instructions provided to the Company herein, which were used by Dispatch Manager Morales in considering applications for drivers for the United States Postal Service, only asked about convictions in the past five years.

I'm persuaded that when Dispatch Manager Morales reviewed Sammie Collins' conviction, he noted that the conviction took place some twenty-five years ago.

I conclude simply that Dispatch Manager Morales found nothing in Sammie Collins' background that would preclude his employment.

Thus, I find for Morales to testify otherwise is not being forthright on his part. I am persuaded that the five drivers' testimony was reasonable and truthful and I shall rely on it.

With that in mind, did the Company, as alleged in the complaint, violate Section 8(a)(1) of the Act on or about December 6 and 7, through Dispatch Manager

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Morales? I am persuaded such violation occurred.

Neil Collins testified, for example, that Morales told him, the big guy over at Emery Worldwide did not want the Overnite guys in there any more, that Emery did not want it to seem like it was helping the Overnite drivers out.

Furthermore, Dispatch Manager Morales told Alonso, you guys can't go to Emery any more, and that Emery didn't want anybody from Overnite and part of the Union.

Furthermore, Morejon testified Dispatch Manager Morales told him the five could not go back to Emery because they messed up wearing Union attire.

Morejon testified Morales told him Emery had been through two Union elections and didn't want them wearing Union stuff.

I am fully persuaded those comments by Dispatch Manager Morales to the employees indicated constitutes a violation of Section 8(a)(1) of the Act, as alleged in the complaint, in that

Dispatch Manager Morales was telling the employees they were being denied work due to their affiliation with the Union.

There are certain legal principles that must be applied in determining whether the Company violated the Act when it denied work to the five individuals named

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in the complaint.

In *Wright Line*, 25 NLRB 1083 (1980) enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.* 462 U.S. 3939 (1983), the Board set forth its causation test for cases alleging violations of the Act that turn, as does the case herein, on Employer motivation.

First, the Government must persuade the Board that anti Union sentiment was a substantial or motivating factor in the challenged Employer conduct.

Once this is established, the burden then shifts to the Employer to prove its affirmative defense that it would have taken the same action, even if its employees had not engaged in protected activity. See *Manno Electric, Inc.* 321 NLRB 278 fn. 12 (1996).

How does the Government establish its burden? Government counsel must demonstrate by a preponderance of evidence:

One, that the employees were engaged in protected activity.

Two, the Employer was aware of that activity.

Three, that the activity or the worker's Union affiliation was a substantial or motivating reason for the Employer's action.

And four, there was a causal connection between the

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Employer's animus and its denial of work decision.

The Government may meet its *Wright Line* burden with evidence short of direct evidence of motivation. That is, inferential evidence arising from a variety of circumstances such as Union animus, timing or pretext may sustain the Government's burden.

Furthermore, it may be found that where an Employer's proffered, non discriminatory motivational explanation is false, even in the absence of direct evidence of motivation, the trier of fact may infer unlawful motivation.

Shattuck Denn Mining Corp v. NLRB 362 F. 2d 466, at 470 (9th Cir. 1966).

Fluor Daniel, Inc. 304 NLRB 970 (1991).

Motivation of Union animus may be inferred from the record as a whole where an Employer's proffered explanation is implausible or a combination of factors circumstantially support such an inference.

Union-Tribune Pub. Co. v. NLRB 1 F.3d 486, 490-492 (7th Cir. 1993).

Direct evidence of Union animus is not required to support such an inference.

NLRB v. So-White Freight Lines, Inc. 969 F.2d 401 (7th Cir. 1992.)

Did the Government in this case establish a showing

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that the Company's actions were motivated, at least in part, by the protected conduct of the employees at issue herein? I'm persuaded the Government met its initial burden.

Did the employees herein have Union activity? The answer is yes. The employees were on strike at Overnite. That fact was made known to the Company herein and that was learned by and known to Emery Worldwide.

How did the Company herein know of the Union affiliation and activity of the employees? At least three of them testified they told Dispatch Manager Morales of their being on strike at Overnite.

Morales acknowledged that they were on strike at Overnite and responded that his Company was looking for good and experienced drivers, and they would fill that requirement.

How did Emery Worldwide know that the employees were affiliated with the Union and, in particular, with Overnite? Because of the apparel of certain of the individuals who reported for work.

Also, as a result of a conversation between the Emery Worldwide supervisor and Sammie Collins in which it was specifically asked what Collins' name was.

One of the five individuals wore a

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Union tee shirt and cap. Another wore a jacket and cap from Overnite.

Did the activity of these five employees on behalf of the Union constitute a substantial or motivating reason for the action that was taken against them?

Again, the answer is yes because, as Dispatch Manager Morales told at least three of the individuals, Emery Worldwide did not want it to appear that their Company was supporting the drivers of Overnite, who were on strike.

As Morales also told one of the five employees, Emery Worldwide had been through two Union elections and they did not want the Overnite drivers in there talking about the Union and that stuff.

Is there animus present in this case? Yes, the animus comes from the statements that I have found to violate Section 8(a)(1) of the Act, that Dispatch Manager Morales made to certain of the five employees herein.

There is clearly a causal connection between the Employer's animus and its denial of work decision. The Company herein may have felt that it was caught between the rock and a hard place, that Emery did not want these individuals and did not want them for an unlawful reason.

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But the Company herein acquiesced in the request of Emery Worldwide and removed or denied work to the five individuals named.

Did the Company establish that it would have taken the same action it did in the absence of any protected conduct on the part of the five individuals at issue herein?

First the Company says that it withdrew Sammie Collins from the project because he had misstated information on his application, and that he had a prior criminal record.

I find that the Company's reliance on that, to the extent that it could rely on it, to be pretextual. The Company was operating under specific guidelines provided to it that the Postal Service was interested in a thorough evaluation of any employees that might be driving trucks hauling United States mail.

The United States Postal Service indicated it was interested only in any criminal records during the previous five years.

Sammie Collins' criminal record was approximately twenty-five years old. Therefore, it did not fall under the exclusion category that the United States Postal Service had established.

Furthermore, I'm fully persuaded that Dispatch

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Manager Morales thoroughly investigated these employee applicants, and that he knew of the background information on the employees, specifically Sammie Collins, and that he knew that it was not a disqualifying impediment to his employment.

Therefore, I'm persuaded the Company simply seized upon that after the fact.

With respect to Neil Collins, the background check on Neil Collins indicates that he had no criminal conviction. Therefore, reliance could not have been placed on his criminal background to preclude him from work.

It is clear that the five Overnite employees were removed from the job because they were Overnite employees who were on strike against Overnite, and because they wore clothing for Overnite and/or the Union.

It is no defense to the Company to state that it employed other employees of Overnite. There is no showing that Emery Worldwide was aware of the Overnite status and/or Union affiliation of the other individuals.

I find that in the Company denying work to the five individuals named in the complaint, it violated Section 8(a)(3) and (1) of the Act.

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Having found the Company has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Company, having discriminatorily denied work to employees Alonso, Neil Collins, Sammie Collins, Morejon and Odery, I shall recommend they be made whole for any loss of earnings or other benefits suffered as a result of the discrimination against them with interest.

Back pay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and interest shall be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I shall not order any further employment by this Company for the five named individuals, because the Government does not seek any reinstatement as the job in question was for a temporary, fixed period of duration, namely from December 5, 1999 to December 23, 1999, inclusive.

When the Court Reporting service serves on me a copy of the transcript and exhibits, which they will do not later than ten days from now, I will certify those pages of the transcript that constitute my decision.

I will attach thereto an order and a notice. The order will set forth certain matters that the Company

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is directed to do, and there will be a notice to employees that is to be posted at the Company for sixty days.

When I certify my Bench Decision to the Board, it is my understanding that it is from that period forward that the appeals period starts for the appealing of my decision to the Board and/or the Courts, should any party seek to appeal the matter.

That is my understanding of the rules and regulations. However, be governed by the Board's rules and regulations in any further action related to this case, rather than relying on my understanding of what the rules constitute.

Let me say that it has been a pleasure to be in Miami, Florida.

Madam Court Reporter, I thank you for transcribing the proceeding.

And with this, the trial is closed.

(Whereupon, at 12:20 p.m., the trial in the above-entitled matter was closed.)