

SAIA Motor Freight, Inc. and Teamsters Local Union 886, affiliated with International Brotherhood of Teamsters, AFL-CIO, CLC. Case 17-CA-20294

August 7, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE,
AND WALSH

On September 11, 2000, Administrative Law Judge William N. Cates issued the attached bench decision. The Respondent filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions¹ and brief and has decided to affirm the judge's rulings, findings,² and conclusions as discussed below, and to adopt the recommended Order, except that the attached notice is substituted for that of the administrative law judge.³

1. The judge found that Dock Foreman Dale Barnhill was a statutory supervisor within the meaning of Section 2(11) of the Act. The Respondent disputes Barnhill's supervisory status and contends that his duties were merely routine and did not require the exercise of independent judgment. We find it unnecessary to pass on the judge's finding that Barnhill was a statutory supervisor because we find, for the following reasons, that the evidence is sufficient to establish that Barnhill was the Respondent's agent within the meaning of Section 2(13) of the Act.

It is a long-established policy and practice of the Board to apply the common law principles of the Agency. *Allegany Aggregates, Inc.*, 311 NLRB 1165 (1993). Under the doctrine of apparent authority, an agency relationship is established where a principal's manifestations to a third party supply a reasonable basis for the third party to believe that the principal has authorized the alleged agent to perform the acts in question. *Id.*; see generally *Dentech Corp.*, 294 NLRB 924, 925 (1989). Thus, in deter-

¹ No exceptions were filed to the judge's finding that the Respondent, by Vice President of Human Relations Reuben Gegenheimer, did not violate Sec. 8(a)(1) of the Act by threatening employees with closure of the facility and with discharge if they selected the Union as their collective-bargaining representative. Further, no exceptions were filed to the judge's finding that the Respondent did not violate Sec. 8(a)(3) and (1) of the Act by discharging employee Terry Anderson.

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

³ We shall issue a new notice to conform to the Order.

mining whether the actions by individuals towards employees are attributable to an employer, the test is whether "under all the circumstances, 'the employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management.'" *Waterbed World*, 286 NLRB 425, 426-427 (1987), supplemented by 289 NLRB 808 (1988), supplemented by 301 NLRB 589 (1991), *enfd.* 974 F.2d 1329 (1st Cir. 1992) (quoting *Einhorn Enterprises*, 279 NLRB 576 (1986), *enfd.* 843 F.2d 1507 (2d Cir. 1988), cert. denied sub nom. *Star Color Plate Service*, 488 U.S. 828 (1988)); see also *Victor's Cafe 52*, 321 NLRB 504, 513 (1996).

The credited testimony shows that Barnhill assigned and directed the employees' work, had authority to grant time off, took corrective disciplinary action, designated lunchbreak times, corrected time and attendance records, conducted employee meetings at which he discussed work-related matters, and attended supervisory or management meetings. In addition, the Respondent's terminal manager, Roger Atchley, told employees that Barnhill "was in control of the dock workers" and that if the employees had any job-related problems they should take them up with Barnhill.

Under these circumstances, we conclude that the Respondent placed Barnhill in a position where the employees would reasonably believe that he was speaking and acting on the Respondent's behalf. Thus, Barnhill was vested with apparent authority. Accordingly, we conclude that Barnhill is an agent of the Respondent within the meaning of Section 2(13) of the Act and that his conduct is therefore imputable to the Respondent. *United States Service Industries*, 319 NLRB 231 fn. 2 (1995), *enfd.* 107 F.3d 923 (D.C. Cir. 1997).

2. The judge found that the Respondent violated Section 8(a)(1) of the Act by interrogating its employees concerning their activities and the activities of their co-workers on behalf of the Union.⁴ For the reasons set forth below, we agree with the judge's finding that the Respondent interrogated the employees regarding their union activities in a manner that restrained, coerced, and interfered with their Section 7 rights guaranteed by the Act.

The Respondent is engaged in interstate transportation of freight at its Oklahoma City, Oklahoma facility. It is undisputed that in the summer of 1999,⁵ the Union com-

⁴ The judge also found, and we agree, that the Respondent violated Sec. 8(a)(1) of Act by creating the impression of surveillance of its employees' union activities and threatening them with discharge if they selected the Union as their exclusive collective-bargaining representative.

⁵ All dates are in 1999, unless stated otherwise.

menced an organizing campaign at the Respondent's facility. Union literature was distributed in the company parking lot and a union meeting was held at the Skyline Restaurant, a local trucker hangout, in early or mid-July.

The judge found that once it learned about the Union's organizing campaign, the Respondent and its agents coercively questioned the employees about their union activities at various times between July 26 and August 4. Specifically, on July 26, Dock Foreman Barnhill approached employee David Dubois while he was working in a trailer and asked, "[W]hat's this I hear about you holding a Union meeting at the Skyline Restaurant?" When Dubois answered that the meeting was just talk, Barnhill informed Dubois that he knew that employees Terry Anderson, Darrel Mosley, and Forrest Moore (also known as Goat) were present at the union meeting. Barnhill also told Dubois that the Union was going to cost Dubois his job.

Sometime during the same day, Barnhill also spoke to employee David Bussey about the Union. While Bussey was working, Barnhill approached him and after first stating that he could not ask the question, then inquired whether anyone had spoken to Bussey about the Union. He also asked Bussey if anyone had asked him about going to lunch on Friday. When Bussey asked why Barnhill wanted to know this information, Barnhill replied that "they're trying to get the Union in." The first week in August, Barnhill again questioned Bussey by asking him if he had heard any rumors. When Bussey asked what kind of rumors, Barnhill replied, "[Y]ou know."⁶

On or about August 3 or 4, Barnhill approached employee Eric Hawkins while he was working and asked what was going on and if Hawkins had attended a union meeting. Later that day, Terminal Manager Roger Atchley also asked Hawkins what was going on. Hawkins replied that he had no idea what Atchley was talking about. Atchley then asked Hawkins if he wanted to talk and Hawkins again responded that he did not know what Atchley was referring to.⁷

Based on credited testimony, the judge determined that the Respondent's questioning concerning the employees' union activities was coercive and constituted interrogation in violation of the Act. The judge also found that when Barnhill told Dubois that he knew about the union

meeting and which employees had attended the meeting, Barnhill created among the employees the impression of surveillance of their union activities. Further, the judge found that Barnhill threatened Dubois with discharge when he stated that the Union was going to cost Dubois his job.

The Board has held that an employer's questioning concerning an employee's union activity is unlawful when, under all the circumstances, the interrogation reasonably tends to restrain, coerce, or interfere with the rights guaranteed the employees under Section 7 of the Act. *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In applying the test, the Board considers the following factors: the background in which the questioning occurs, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and whether the employee involved was an open and active union supporter. *Kellwood Co.*, 299 NLRB 1026 (1990), enf. mem. 948 F.2d 1297 (11th Cir. 1991).

Applying these factors to Barnhill's interrogations of Dubois, Bussey, and Hawkins, we find, in agreement with the judge, that the interrogations were coercive. Barnhill, as the Respondent's agent, approached employees and interrogated them about their union activities despite the fact that there was no evidence that the employees had disclosed their union sympathies at that time. Barnhill also asked Bussey and Hawkins whether anyone had spoken to them about the Union and if they had attended any union meetings. We find that Barnhill's questions were not just a casual inquiry but were a pointed attempt to ascertain the extent of the employees' union activities and those of other employees. See, e.g., *Sea Breeze Health Care Center*, 331 NLRB 1131 (2000); *Cumberland Farms*, 307 NLRB 1479 (1992), enf. 984 F.2d 556 (1st Cir. 1993) ("the fact that the interrogators sought information about other employees and the organizing effort in general" supports a finding that the interrogation was unlawful).

The interrogation of Dubois was accompanied by an unlawful threat of reprisal as well as a statement that created the impression of surveillance. Thus, when Dubois confirmed that the union meeting had occurred, Barnhill immediately stated that the Union was going to cost Dubois his job. Barnhill also created an impression of surveillance of the employees' union activities when he told Dubois he knew which employees had attended the meeting. Where an interrogation is accompanied by a threat of reprisal or other violations of Section 8(a)(1) of the Act, there is no question as to the coercive effect

⁶ We find it unnecessary to pass on whether this comment constituted an additional unlawful interrogation because in light of our finding that Barnhill's other comments violated Sec. 8(a)(1) of the Act, such a finding would be cumulative and would not affect the Order.

⁷ We find it unnecessary to pass on whether Atchley's conduct violated Sec. 8(a)(1) of the Act. An additional interrogation finding based on Atchley's conduct would be cumulative and would not affect the Order.

of the inquiry. *Parts Depot, Inc.*, 332 NLRB (2000); *Kellwood*, supra at 1027.

We find that the Respondent's conduct was not an isolated incident. As stated above, Barnhill wasted no time attempting to elicit information about the Union and the employees' union involvement. Employee Dubois was questioned and threatened with a reprisal by Barnhill on July 26. Barnhill targeted Bussey and probed him for information about the Union on the same day. The following week, Barnhill asked Hawkins if he had attended a union meeting and "what was going on." We find that Barnhill's repeated requests for information without an explanation to the employees as to the purpose of the questioning amounted to coercive conduct.

In sum, we conclude that Barnhill's questioning clearly contained elements of coercion and interference. Considering all the circumstances, the questioning, coupled with the threat of reprisal and the impression of surveillance, created a coercive atmosphere that reasonably tended to interfere with the employees' statutory rights to engage in union activity. We find, therefore, in agreement with the judge, that the Respondent engaged in unlawful interrogation in violation of Section 8(a)(1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, SAIA Motor Freight, Inc., Oklahoma City, Oklahoma, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted 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

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 give our employees the impression their union activities are under surveillance by management.

WE WILL NOT coercively interrogate our employees concerning their activities and the activities of their co-workers on behalf of Teamsters Local Union 886, affiliated with International Brotherhood of Teamsters, AFL-CIO, CLC, or any other labor organization.

WE WILL NOT threaten you, through our supervisors, with discharge if you select the Union as your exclusive collective-bargaining representative.

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.

SAIA MOTOR FREIGHT, INC.

Mary Taves, Esq., for the General Counsel.

Charles Hollis, Esq., for the Company.

Eddie Landers, Union Representative, for the Union.

BENCH DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This is an interfering with employee rights and a wrongful discharge case. At the close of a 2-day trial in Oklahoma City, Oklahoma, on August 16, 2000, and after hearing oral argument by the Government and company counsel, I issued a Bench Decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations setting forth findings of fact and conclusions of law. This certification of that Bench Decision, along with the Order which appears below, triggers the time period for filing an appeal (exceptions) to the National Labor Relations Board (the Board).

For the reasons (including credibility determinations) stated by me on the record at the close of the trial, I found SAIA Motor Freight, Inc. (the Company) violated Section 8(a)(1) of the National Labor Relations Act (the Act) when in late July and early August 1999 it interrogated employees concerning their activities on behalf of the Teamsters Local Union 886, affiliated with International Brotherhood of Teamster, AFL-CIO, CLC (the Union), *Westwood Health Care Center*, 330 NLRB 935, 936 fn. 6. (2000), created the impression among its employees it engaged in surveillance of their union activities, *Link Mfg. Co.*, 281 NLRB 294 (1986), enf. mem. 840 F.2d 17 (6th Cir.), cert. denied 488 U.S. 854 (1998); and threatened employees with discharge if they selected the Union as their exclusive collective-bargaining representative.

Although I concluded the Government established antiunion sentiment as a substantial or motivating factor in the Company's decision to discharge its employee Terry W. Anderson, I further concluded the Company would have discharged him even if he had not engaged in protected activity. *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).

The evidence demonstrated the Company consistently discharged employees who accumulated 12 points under its established and published attendance policy. It was undisputed that prior to the advent of the Union, Anderson had accumulated eight attendance points pursuant to the Company's attendance policy. Anderson had been warned three times in writing about his attendance problems with the most recent warning being at his performance evaluation given on or about July 21, 1999. Anderson admittedly did not show for work or call in on August 14, 1999, and was given four attendance points as called for in the attendance policy. Thereafter, on August 17, 1999, he was discharged as a result of his accumulating 12 attendance points.

The Company established it had consistently given four attendance points any time an employee failed to show or call in for work. The evidence also established all employees on Anderson's shift, including Anderson, were required and knew they were required to report for work on August 14, 1999.

I rejected the Government's contention Anderson's discharge was unlawful because it took place 1 day after the Union demanded the Company recognize it as the employees' exclusive collective-bargaining representative. The Union also had earlier demanded recognition by the Company. I dismissed the complaint allegations related to Anderson's discharge.

I certify the accuracy of the portion of the transcript, as corrected,¹ pages 466 to 494, containing my Bench Decision, and I attach a copy of that portion of the transcript, as corrected, as "Appendix A."

CONCLUSIONS OF LAW

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 that 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.

I recommend the Company be ordered, within 14 days after service by the Region, to post an appropriate notice to employees, copies of which are attached as "Appendix B" for a period of 60 consecutive days in order that employees may be apprised of their rights under the Act and the Company's obligation to remedy its unfair labor practices.

On these conclusions of law, and on the entire record, I issue the following recommended²

¹ [Transcript pages have been noted and corrected.] I have corrected the transcript pages containing my decision and the corrections are as reflected in attached app. C. [Omitted from publication.]

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

ORDER

The Company, SAIA Motor Freight, Inc., Oklahoma City, Oklahoma, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Interrogating its employees concerning their activities and the activities of their coworkers on behalf of the Union.

(b) Creating the impression among its employees that their union activities are under surveillance.

(c) Threatening employees with discharge if they select the Union as their exclusive collective-bargaining representative

(d) 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) Within 14 days after service by the Regional Director for Region 17, post at its Oklahoma City, Oklahoma facility copies of the attached notice marked "Appendix B."³ Copies of the notice, on forms provided by the Regional Director for Region 17, 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 employees 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 on or at any time since July 26, 1999.

(b) 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 Company has taken to comply.

IT IS FURTHER ORDERED that the complaint be, and is, dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX A

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BENCH DECISION

JUDGE CATES: This is my decision in the matter of SAIA Motor Freight, Inc., Case 17-CA-20294.

First, I wish to thank the parties for their presentation of the evidence. Each are a credit to the party and interest they represent. In reflecting over the trial, I asked few, if any questions, which is an indication counsel developed the evidence fully and I thank you for doing so.

Board and all objections to them shall be deemed waived for all purposes.

³ If this order is enforced by a judgment of the 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."

May I also state that it has been a pleasure being in Oklahoma City, Oklahoma.

This is an unfair labor practice case prosecuted by the National Labor Relations Board's (hereinafter "Board"), General Counsel (hereinafter "government"), acting through the Regional Director for Region 17 of the Board following an investigation by Region 17's staff.

The Regional Director for Region 17 issued a Complaint and Notice of Hearing (hereinafter "Complaint") on February 23, 2000 against SAIA Motor Freight, Inc. (hereinafter "Company"), based on an unfair labor practice charge filed on August 24, 1999 and amended on September 23, 1999 by Teamster Local Union 886, affiliated with International Brotherhood of Teamsters, AFL-CIO, CLC (hereinafter "Union").

Certain facts in this case are admitted, stipulated, or not in dispute.

It is admitted the Company is a corporation with an office

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and place of business located in Oklahoma City, Oklahoma where it is engaged in the interstate transportation of freight. It is admitted that during the 12 month period ending August 31, 1999, a representative period, the Company in conducting its business operations derived gross revenues in excess of \$50,000.00 for the transportation of freight from the State of Oklahoma directly to points outside the State of Oklahoma.

The evidence establishes, the parties, and I find the Company is an employer engaged in commerce within the meaning of Section 2(2)(6) and (7) of the National Labor Relations Act, as amended (hereinafter "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.

It is alleged in the Complaint the parties admit and I find that Vice President of Human Resources Reuben Gegenheimer and terminal manager Roger Atchley are supervisors and agents of the Company within the meaning of Section 2(11) and 2(13) of the Act.

It is admitted the Company discharge its employee Terry W. Anderson (hereinafter "Anderson") on August 17, 1999.

Specific Complaint allegations that are contested are: that the Company acting through its representatives at various times between July 26, 1999 and August 4, 1999 interrogated employees concerning their activities on behalf of the Union;

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created the impression the Company was engaging in surveillance of its employees' activities on behalf of the Union; threatened employees with closure of the facility and discharge if they selected the Union as their collective bargaining representative.

It is also alleged the Company discharged its employee Terry W. Anderson on or about August 17, 1999 because he joined and assisted the Union and engaged in concerted activities

and to discourage employees from engaging in these activities.

It is alleged the Company's actions violate Section 8(a)(1) and (3) of the Act.

The Company denies having violated the Act in any manner alleged in the Complaint.

This case, as in most cases, requires that I make credibility resolutions. Stated differently, there are conflicts in the testimony. Some are minor differences, while others are more substantial.

I'm not unmindful that, when witnesses are recalling the same events, they will recall them in a slightly different manner, with each believing, and, perhaps, rightfully so, that they are truly recalling what occurred.

In arriving at my credibility resolutions, I carefully observed the witnesses as they testified and have utilized such in arriving at the facts herein.

I have also considered each witness' testimony in relation

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to other witnesses' testimony and in light of the exhibits herein.

If there is any evidence that might seem to contradict the credited facts or the facts that I rely on, I have not ignored such evidence, but, rather, have discredited it or rejected it as not being reliable or trustworthy.

I have considered the entire record in arriving at the facts herein.

The first issue that I find it necessary to resolve is the issue of whether dock foreman Dale Barnhill is a supervisor and agent of the Company within the meaning of the Act.

Let me briefly state what Section 2(11) of the Act says with respect to what constitutes a supervisor. Section 2(11) of the Act defines a supervisor as "any individual having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or responsibly to direct them or to adjust their grievances or to effectively recommend such action if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(3) of the Act excludes any individual employed as a supervisor from the definition of employee.

The Company herein, as indicated in the jurisdictional information, is a freight moving company. The terminal at which

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I am concerned is the terminal located in Oklahoma City, Oklahoma.

There is no question but what the terminal is or was at applicable times herein managed by terminal manager Atchley.

Terminal manager Atchley testified the Oklahoma City, Oklahoma facility employs between 59 and 62 employees. Terminal manager Atchley contended in his testimony that he was the only supervisor at the facility, which would make him supervising a work force of somewhere between 59 and 62 employees.

Employee Anderson testified that terminal manager Atchley told him and other employees that foreman Barnhill was in control of the dock workers.

According to Anderson, the dock workers were told that, if they had any job-related problems, to take them up with foreman Barnhill.

Anderson testified that foreman Barnhill gave the dock workers their job assignments and, in doing so, Barnhill told the dock workers which trucks to load or remove freight from and that Barnhill moved employees on the dock as needed.

Anderson testified that foreman Barnhill let you know if you did something wrong work-wise and told you how to correct it.

Anderson testified that foreman Barnhill corrected or changed, as pertinent, the dock workers' time and attendance

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records. Anderson explained that, if an employee clocked in wrong or was tardy, late, or even early, for that matter, that it was foreman Barnhill who noted the corrections on the time cards.

According to Anderson, foreman Barnhill could let dock workers go home early and that Barnhill had, in fact, on a few occasions allowed Anderson to go home early.

Anderson testified that Barnhill designated when lunch times would take place and that lunch times were unpaid for the employees.

Anderson testified that Barnhill carried keys to the Company facility and attended meetings that, at least, Anderson perceived as being supervisory meetings. I believe those meetings were conducted by terminal manager Atchley and those in attendance were Mr. Barnhill, Mr. May, and, perhaps, a Mr. Hunley or one other individual.

Anderson testified that Barnhill held employee meetings with the dock workers where he discussed work-related matters, such as when freight had been misloaded and about cleaning up around the facility.

According to Anderson, Barnhill did not, during the normal work week, perform a great deal of dock work, but, rather, stayed in the red house, a shed which was on the loading dock, where he took care of whatever matters needed be taken care of with respect to the movement of freight on the dock.

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It is undisputed that Barnhill is paid 75 cents per hour more than the dock workers.

Employee Mosley testified that he had been the dock foreman prior to Barnhill assuming that position and he discussed the duties that he, Mosley, had performed and that he believed and observed that Barnhill, likewise, performed.

Mosley testified that, if there were disciplinary problems with employees on the dock, that he spoke with them and, if necessary, took them to the terminal manager's office.

Mosley testified that he had recommended discipline for employees and gave a specific example involving a city driver that had, supposedly, been spending more time at a scuba shop than he believed was necessary and he recommended that corrective action be taken by the terminal manager. He gave other examples of where he had advised terminal manager Atchley of work infractions or disciplinary concerns that he had.

Barnhill, as well as Mosley, from time to time would make written comments regarding employee conduct and present those to terminal manager Atchley. General Counsel Exhibit 11 consisted of four such examples where foreman Barnhill had made written notations of actions of employees and presented

them to terminal manager Atchley, which documents were then placed in the personnel file of the concerned employee.

Mosley further testified that he attended management or supervisory meetings with terminal manager Atchley and that

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Barnhill had done likewise.

Employee Dubois testified that foreman Barnhill would make work assignments, that he would review the bills, the trays containing the work, and assign specific employees to perform specific tasks.

Dubois also testified that Barnhill worked very little, except when it was absolutely necessary and Dubois also referred to Barnhill making any corrections that needed be made to the time and attendance records, as well as time off for sickness or otherwise.

Employee Hawkins testified that Barnhill directed the work of those on the dock at the time he was there and that he took corrective disciplinary action. Hawkins gave an example of when he had slid a fork lift or in some manner impacted a customer's vehicle.

Employee Bussey testified that Barnhill assigned work and that there would be as many as 200 to 300 bills per day and that he moved employees around as necessary to take care of specific customers and that he designated lunch periods, which were not compensated.

The question then becomes is Barnhill a supervisor within the meaning of the Act. In enacting Section 2(11) of the Act, congress emphasized its intention that only truly supervisory personnel vested with genuine management prerogatives should be considered supervisors and not straw bosses, lead men, set up

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men, and other minor supervisory employees. Senate Report No. 105 the 80th congress, first session, 4 (1947).

It is well settled that the burden of proving supervisory status rests on the party asserting that such status exists. *Ohio Masonic Home* 295 NLRB 373 (1989) and *Freeman Decorating Co.* 330 NLRB [1143] (2000).

Thus, any lack of evidence in the record is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities, Inc.* 329 NLRB [535] fn. 8 (1999).

In making determinations regarding supervisory status under 2(11) of the Act, the Board has a duty not to construe the statutory language too broadly, because an individual found to be a supervisor is denied employee rights protected under the Act.

Section 2(11) is to be read in the disjunctive and the possession of any one of the authorities listed in that section of the Act places the employee vested with such authority in the supervisory class. *Ohio Power Co. v. NLRB* 176 F2d 385, 387 (6th Cir. 1949) cert denied 338 U.S. 899 (1949).

The status of supervisor under the Act is determined by an individual's duties, not by his or her job title or classification. *New Fern Restorium, R-e-s-t-o-r-i-u-m, Co.* 175 NLRB 142 (1969) and *International Longshoremen's Association, v. Davis*, 476 U. S. 380, 286 n. 13 (1986).

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Section 2(11)'s disjunctive listing of supervisory indicia does not alter the essential conjunctive requirement that a supervisor must exercise independent judgment in performing the enumerated functions. *HS Lordships*, 274 NLRB 1167 (1985).

Regardless of the specific kind of supervisory authority at issue, its exercise must involve the use of true independent judgment in the employer's interest before such exercise of authority becomes that of a supervisor. The exercise of some authority in a merely routine, clerical, perfunctory, or sporadic manner does not elevate an employee to the supervisory ranks. The test must be the significance of his or her judgment and directions.

The mere fact that employees complain to a specific employee about working conditions is not an indicia of supervisory status if there's no evidence that the employee complained to was empowered to act on behalf of management in resolving such complaints.

Neither it is significant that employees report to a specific person when they're going to be absent, since the receipt of such reports in and of itself is no more than a clerical function.

The scheduling of overtime, vacations, and absences may be a supervisory function if it involves the use of independent judgment. However, if such tasks are carried out within relatively fixed parameters established by management, then

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their performance is routine and does not indicate supervisory status. *DICO, D-I-C-O, Tire, Inc.*, 330 NLRB [1252](2000).

The key then becomes is whether the functions performed by the individual that it is contended is a supervisor is done with independent judgment.

I am persuaded for a number of reasons that Barnhill qualifies as a Section 2(11) supervisor within the meaning of the Act.

First, if he does not qualify within the meaning of the Act, then you have a work force that during portions of the work shift or shifts is without any on site supervision. Terminal manager Atchley testified he was not at work during at all times the facility was operating.

I am persuaded that Barnhill made work assignments more than were just routine. He determined which trucks were to be handled in what particular order and he freely moved employees around as necessary.

Barnhill checked off and corrected time and attendance records for employees.

The employees were specifically told he was their supervisor.

Barnhill was paid more than the employees that worked on the dock and he did not during the regular work week perform other than a limited amount of work himself.

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Barnhill had the authority to grant time off, allowed employees to leave early, and designated lunch break times, which resulted in employees not being paid for the times that he designated as lunch times.

I am persuaded, though not in a sophisticated fashion, that Barnhill disciplined, corrected, and directed the employees on his shift.

I find that Barnhill is a supervisor within the meaning of Section 2(11) of the Act.

It is alleged at Paragraph 5(a) of the Complaint that foreman Barnhill interrogated employees concerning their activities and the activities of their coworkers on behalf of the Union. It is alleged that Barnhill did so on or about July 26th, 1999 and at various times thereafter up until and including August 4, 1999.

Employee Dubois testified that on July the 26th, 1999, while working in a trailer at the dock, foreman Barnhill asked "what's this I hear about you holding a Union meeting at the Skyline Restaurant?" "I know Goat was there." Dubois told foreman Barnhill that, if the Union presented a card to Goat, that Goat would sign it, as well as he, Dubois, would also sign it. According to Dubois, Barnhill told him it was going to end up costing you your job.

Employee Hawkins testified that dock foreman Barnhill on August 3 or 4, 1999 asked him if he had attended a Union meeting

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and what was going on. Barnhill even asked Hawkins, according to Hawkins, if the workers would get mad at him, Hawkins, for talking.

Hawkins testified at around the same time that Barnhill spoke with him terminal manager Atchley asked him what's going on. Hawkins replied he had no idea, to which Atchley responded do you want to talk to me. Hawkins told terminal manager Atchley he had no idea what he was talking about.

Employee Bussey testified foreman Barnhill spoke with him on the morning of July the 26th, 1999 while he was stacking freight. Barnhill told Bussey, according to Bussey, I can't ask you this. Then inquired has anyone come to you about the Union.

On that same date, Barnhill asked Bussey if anyone had asked him about going to lunch on Friday. Bussey testified he told Barnhill no, to which Barnhill responded they're trying to get the Union in.

Employee Bussey testified foreman Barnhill asked him during the first week in August if he had heard any rumors. Bussey asked what kind of rumors and Barnhill replied you know.

Foreman Barnhill denied making such comments as attributed to him by the employees in question. Terminal manager Atchley likewise denied engaging in the conversations attributed to him.

I credit the testimony of employees Dubois, Hawkins, and Bussey as outlined because they testified with specificity and it appeared to me they were testifying truthfully.

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I was not impressed with the general denials of foreman Barnhill.

Thus, I find that foreman Barnhill and terminal manager Atchley interrogated employees concerning their Union activities and that Barnhill created among the employees the impres-

sion that the Company was engaging in surveillance of the employees' Union activities when he told Dubois about what he had heard about holding a Union meeting at the Skyline Restaurant and his reference to who was there, such as Goat. And, by the way, Goat, the record will reflect, was an older employee at the Company, who, based on certain testimony presented in this trial, preferred to be referred to as the old man or Goat. The individual's name was Forrest Moore.

I also find that, when foreman Barnhill told Dubois that it was going to end up costing him his job, that he threatened the employee with discharge because of his Union activities.

It is alleged at Paragraph 5(c)(i) and (ii) that Vice President of Human Relations Gegeheimer threatened employees with closure of the facility and threatened employees with discharge if they selected the Union as their collective bargaining representative.

In that respect, employee Mosley testified that the Vice President of Human Resources told the employees in a group meeting that the Company held in early August, 1999 in response to the Union organizing drive that the Union wasn't in SAIA's

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plans and that the Company could not survive being under a Union. According to employee Mosley, the Vice President of Human Resources also said that the Company could not afford the Union and added that, if the employees didn't sign a Union card, they would have a future at SAIA.

Employee Hawkins testified that the Vice President of Human Relations Gegeheimer stated that the Company was 100% against the Union and that for the employees not to let the Company be an example to other companies where the Union would take the employees' money and the doors to the employer would be shut.

Employee Anderson testified that Vice President of Human Resources Gegeheimer told the employees in the group that he attended that the Union couldn't do anything for the employees and that other companies had had to close their doors because of the Union. Anderson testified the Vice President of Human relations told the employees that, if the Company got a contract with the Union, the Company would not be able to survive and would have to shut their doors.

Employees Bussey, Dubois, and Mosley testified that Gegeheimer told the employees, if the employees didn't sign a card, they had a future with the Company.

Employee Gray testified that Gegeheimer told the employees in the group that he was in that they didn't need a Union, and shouldn't sign a Union card. Employee Gary testified that an

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office employee by the name of Ruth asked Gegeheimer if their jobs were at stake and that Gegeheimer responded yes and told the office employee that they would have to fight for their jobs.

Vice President of Human Relations Gegeheimer denied making any of the comments attributed to him by the employees, but, rather, presented a prepared text that he testified he followed during his presentation to the employees.

In reviewing the prepared text that Gegeheimer asserts he utilized in giving his presentation to the employees, I am persuaded that in reading it the employees who attended the meeting they may well have perceived or understood that Gegeheimer made the comments they attribute to him.

However, I am persuaded that, based on his testimony and what's contained in the document that he testified he utilized, that he did, in fact, read from the prepared statement. I discredit any testimony to the contrary and that, having read from that statement, I'm likewise persuaded that in any questions and answers that took place thereafter in the meetings that Gegeheimer conducted that he did not go beyond the framework of what was outlined in his prepared text and did not make the statements attributed to him by the employees in question. It is easy to understand how the employees perceived that such was said, but I am persuaded that a careful reading of the prepared text does not take itself beyond the permissible

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speech under 8(c) of the Act that a Company representative may engage in.

Thus, I shall dismiss Paragraph 5(c) of the Complaint in its entirety.

It is alleged at Paragraph 6 of the Complaint, and admitted by the Company, that it discharged its employee Anderson on August 17, 1999. It is further alleged in Paragraph 6 of the Complaint that the Company did so because Anderson joined, assisted, or engaged in Union activities or concerted activities with other employees and that the Company discharged him in order to discourage employees from engaging in either union or concerted activities.

Without discussing all of the testimony regarding the background of employee Anderson, it's undisputed that Anderson was a five year employee of the Company, that he was a dock worker, and that he had an excellent work record. His evaluations bear out that he was an excellent worker and, in fact, terminal manager Atchley testified that he was an excellent worker, except for an attendance problem that he had.

Anderson worked along with approximately five or six other employees under the supervision of Barnhill at applicable times herein.

It's undisputed that the Union commenced an organizing campaign at the Company here in the summer of 1999 and that Anderson was involved in that Union activity. In fact, Anderson

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testified that in early July, 1999 talk around the Company began to center on a Union organizing campaign, that Union literature was circulated in the parking lot, and that a dinner was held at the Skyline Restaurant, a local trucker hangout, in July of 1999.

Rumors and actual reports of that restaurant meeting made their way back to terminal manager Atchley, as well as foreman Barnhill.

Atchley acknowledged that he was told it involved the morning dock workers and, perhaps, a couple of city drivers. Foreman Barnhill testified he learned of Union activity and of

Anderson's specific involvement with it. Anderson testified he told terminal manager Atchley of Union activity rumors and that the rumors involved him and Atchley, according to Anderson, told Anderson that, if the rumors kept up, he, Atchley, might have to address them.

Anderson testified that the Union came up in his July evaluation with Atchley. In fact, employee Anderson testified that Atchley told him at that meeting that the Union didn't tell the employees everything, that the Company was the one that paid for retirement, and that the Union was not good for the employees.

Anderson testified he signed a Union card to seek more information from the Union and that he attended a Union meeting held in the first week in August at the Union hall, along with

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18 to 20 other employees.

Employee Anderson was given an evaluation or given an annual review in, perhaps, the middle of July, 1999 or, specifically, perhaps, on July the 21st, 1999, and in the evaluation he was rated in an acceptable manner, except for a comment that he had accumulated eight points under the attendance policy at the Company and, under the attendance policy at the Company, 12 points would result in a termination.

The critical facts and, perhaps, the most essential facts of this case start coming into play on or about August the 13th, 1999, which was on a Friday.

Thursday and Friday of that week, which would have been August the 12th and August the 13th, 1999, Anderson had been scheduled to be on vacation during those two days, but it appears an employee by the name of Hawkins was either sick or injured, and it doesn't make any difference for the outcome of this case. Whatever Hawkins' reasons were for being absent from work, foreman Barnhill solicited and obtained Anderson's consent to forego his vacation on Thursday, August 12th, and Friday, August 13, 1999 and work in the place of the sick or injured employee.

Anderson testified he had hoped to be out of the city on Thursday, August 13, Friday—correction—Thursday, August 12, Friday, August 13, Saturday, August 14, Sunday, August 15, and return to work at his normally scheduled time on Monday,

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August the 16th, 1999.

He, however, returned to work on August 12 and August 13 and, during the work day of August, foreman Barnhill notified the dock employees that he was going to need employees to work on Saturday, August the 14th, 1999.

Barnhill was seeking volunteers, as was his normal procedure. When work was performed on a Saturday, the foreman would attempt to have employees volunteer to work, but, if volunteer employees, to include city drivers, did not provide enough employees to perform the necessary work, then the employees were drafted or it was mandatory that they work.

On Friday, August the 13th, foreman Barnhill was having some difficulty obtaining any city drivers to assist and/or enough of the dock workers themselves to volunteer so that he

called a meeting of his employees and told them that there was work on Saturday that would have to be performed and that he needed volunteers, and, eventually, volunteers came forward, either freely or not so freely. At least one employee testified he felt like he was going to have to work anyway, so he went ahead and volunteered, which may not have been as freely as one would want a volunteer. And it came down to two employees from which Barnhill needed, at least, one volunteer. One of those two employees was Anderson and the other was an employee, Dubois.

Anderson protested at the meetings that were held with

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foreman Barnhill and the other employees that he had worked previous Saturdays, that he had already given up two days of vacation, and that he was not going to work on Saturday. Dubois, either in jest or with true meaning, started saying that he was not going to work, either.

So foreman Barnhill told them to work it out among themselves, go to the restroom, clean up, work it out among themselves, and, if no one volunteered sufficient to supply the last individual that he needed on the job on Saturday, August the 14, 1999, he would make work mandatory and everyone would be required to report.

Anderson still did not want to report to work on Saturday and did not, in fact, report for work on Saturday.

But on Friday, August the 13th, 1999, Dubois asked foreman Barnhill to speak with Anderson again about coming in to work on Saturday, August the 14th, because Anderson was not taking him seriously. Dubois testified that he went to foreman Barnhill and told him, "Dale, tell Anderson to come into work, he's not taking you seriously." Dubois testified that Barnhill shrugged his shoulders.

Barnhill testified that he made it clear that, if there were no volunteers, that everyone would report to work on Saturday, August the 14th, 1999.

All did report to work except Anderson and Anderson, it is admitted, did not call in nor show up.

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Terminal manager Atchley testified that on Saturday, August the 14th, he received a telephone call from a customer that the customer needed an extra trailer on which to place freight. Terminal manager Atchley testified he called the terminal to inquire of whether there was a trailer that could be taken to the customer and that was the purpose of his telephone call.

While he was making that telephone call, foreman Barnhill told him that he had a little situation there, that everyone was to report to work, mandatory on the Saturday work, because he couldn't get a sufficient number of volunteers, and that Anderson had not reported for work, nor had he called in. Terminal manager Atchley wanted to know if it had been conveyed to Anderson that he was to report to work.

Terminal manager Atchley testified, as did other employees who testified, that he asked each of those employees who reported for work that day if they understood that they had to come to work on Saturday and each said they did.

Specifically, employee Dubois was asked if he understood he had to report to work, that it was mandatory, and he said yes. He also was asked did Anderson understand that work was mandatory and Dubois replied yes.

Terminal manager Atchley testified that he then investigated the matter and determined that, with Anderson's previous eight accumulated points on attendance under the

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attendance policy of the Company and an award of four points for a no call/no show, that Anderson then accumulated 12 points and, as such, under the attendance policy, it called for the termination of Anderson.

Terminal manager Atchley testified he discussed the matter with the Vice President of Human Resources in Atlanta, Mr. Gegenheimer, that a careful review was made of Anderson's attendance record, and that he was terminated on August the 17th, 1999 as a result of having accumulated twelve points under the attendance policy.

Those are essentially the facts that we must now decide the case on.

The legal standards regarding the termination of Anderson are as follows. In *Wright Line*, W-r-i-g-h-t, L-i-n-e, 251 NLRB 1083 (1980) enfd. 662 F2d 899 (1st Cir. 1981) cert denied 455 U. S. 989 (1982); approved in *NLRB v. Transportation Management Corp.* 462 U. S. 393 (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 or decision. 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 employee had not engaged in protected activity.

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(See *Manno Electric, Inc.* 321 NLRB 278 fn. 12 (1996))

How does the government establish its burden? Counsel for the General Counsel must demonstrate by a preponderance of the evidence: 1. that the employee was engaged in protected activity; 2. that the employer was aware of the activity; 3. that the activity or the worker's union affiliation was a substantial or motivating reason for the employer's action; and 4. there was a causal connection between the employer's animus and its discharge decision.

The government may meet its *Wright Line* burden with evidence short of direct evidence of motivation. That is, inferential evidence rising 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*, S-h-a-t-t-u-c-k, [Denn] Deen, D-e-e-n, *Mining Corp. v. NLRB* 362 F2d 466, at 46 (9th Cir. 1996); *Flour 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 im-

plausible or a combination of factors circumstantially support such an inference. Direct evidence of union animus is not required to support such an inference.

In the present case did Anderson engage in protected

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activity? Yes, he did. He engaged in union activities. The company knew or, at least, perceived that he was involved in those activities.

How did the company know that he was involved in these activities? Well, a number of ways. First, foreman Barnhill testified that the rumors that came back to him about the union meeting at the Skyline Restaurant in Oklahoma City, Oklahoma involved dock workers, including Anderson. Anderson spoke with both foreman Barnhill and terminal manager Atchley about his union activities. So there is no question that Anderson and others had union activity and that the company was aware of it.

Does the company have anti-union animus? Or, stated differently, has the government demonstrated anti-union animus in this case?

Anti-union animus has been demonstrated by foreman Barnhill's interrogation, impression of surveillance, and of the threat of discharge. Animus on the company's part is also demonstrated by the testimony of employee Mosley when he testified regarding attempts to help an individual from his church with employment with the company. Mosley testified that terminal manager Atchley told him the company wouldn't have anything to do with an employee with a union background. Employee Gray testified that, when he was interviewed for a job in 1995, terminal manager Atchley told him he didn't like unions and didn't want anyone associated with a union.

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I'm persuaded that animus has been demonstrated.

Is there a causal connection sufficient to find that the government established a *prima facie* case. I'm persuaded that the government has established a *prima facie* case.

In addition to the matters I have just discussed, the timing of the discharge of Anderson in that it followed shortly after the August 3, 1999 demand of the Union that the Company recognize them and one day after a second demand was made by the Union in writing that the Company recognize the Union as their bargaining representative.

So I am persuaded the government made a *prima facie* showing in this case.

Has the Company demonstrated that it would have taken the same action even if Anderson had not engaged in any concerted protected activity?

I'm persuaded the Company has made such a showing.

The Company discharged Anderson pursuant to its attendance policy, which was established in writing and which the employees were fully aware of, including employee Anderson. Anderson, I am persuaded, knew that he was to report for work on Saturday or that work was mandatory on Saturday and that he elected, for whatever reasons, not to report. I am persuaded that Anderson and Dubois were strong-willed employees and that Dubois, as was testified to by a witness herein, indicated

that he was not going to volunteer simply because Anderson had said he was not

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going to work on Saturday.

Now the fact that Anderson had given up his vacation on Thursday and Friday and worked for the Company is commendable. Did the Company cut him any slack because he had done so? No. Would a more humane policy have been to cut him some? Perhaps. But that's not my job to address whether the Company acts in any particular manner as long as it does not act unlawful under the National Labor Relations Act.

The indication that the timing was critical in this case is greatly diminished by the following factors. Anderson had accumulated eight attendance points before the union activity took place. To establish some sort of conspiracy on the part of the Company to rid itself of Anderson by giving him four points for not showing on Saturday as a result of the Union making a demand that they recognize them is too far-fetched for me to buy. The Company would, to have been engaged in some sort of conspiracy to get rid of Anderson in the manner that it did, would have had to schedule work on Saturday knowing that Anderson would reject the work and knowing that Anderson would not call in and knowing that he would be awarded points for that.

I don't know if terminal manager Atchley would have been informed of Anderson's absence had terminal manager Atchley not called in on Saturday regarding a trailer to be delivered to some other customer. There simply are too many circumstances here

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that would have to all fall in place for the Company to have some anti-union motive to have discharged Anderson on the 17th.

The Company established that no other employee who had a no call/no show that had not been awarded four points. Stated differently, every employee that there is any record of that gave a no call/no show was awarded four points.

Anderson knew that he had an attendance problem because he had been warned in writing on March 1, 1999 that he had eight points and that it was critical. He was also notified again in writing on May 14, 1999 that, as of May 10, 1999, he had

accumulated eight points and an employee receiving twelve points would be subject to termination. His attendance at his evaluation on or about July the 21st was discussed and he was again reminded that he had eight points. And there's no question that Anderson knew that, if you had a no call/no show, that you would be subject to a four point assessment and that the original eight he had accumulated with the four would warrant his discharge, and he was discharged.

I'm persuaded that there's no showing of disparate treatment here. The individuals that the government would attempt to show were treated differently the evidence does not bear her out.

Ashlock was discharged for a no call/no show. Although the Company attempted to locate him to find out his status, it was because he continued in successive days not to call or show.

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I find that distinguishable from the case herein. And it's clear that employees Brandon Jackson and Eric Hawkins were given four point assessments for no call and no show.

Accordingly, I find that the Company has established that it would have discharged Anderson even in the absence of any protected or union conduct on his part and I shall dismiss the Complaint with respect to Paragraph 6(a) and (b).

I shall certify my bench decision to the parties on receipt of the transcript and it's my understanding the court reporter will provide me the transcript within ten days of the close of the trial. At that time, I will certify those pages of the transcript that constitute my decision and serve it on the parties and the Board.

It is my understanding that any appeal period or any taking of exceptions to my decision runs from that time period, but, please, follow the Board's Rules and Regulations rather than relying on my understanding of the Rules and Regulations.

When I certify my decision to the Board, I will attach thereto a Notice to remedy the interrogation, impression of surveillance, and threat of discharge that I found in the case herein and I shall order that the Company post that notice for a period of 60 days. I shall attach that Notice to my certification of the decision.

Again, I thank each of you for your presentation and this hearing is closed.