

**Central Plumbing Specialties, Inc. and Local 456,  
International Brotherhood of Teamsters, AFL–  
CIO.** Case 34–CA–8296

July 31, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN  
AND BARTLETT

On October 18, 1999, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed cross-exceptions and a brief in response to the Respondent's exceptions, and the Respondent filed an answering brief to the General Counsel's exceptions.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions only to the extent consistent with this Decision and Order.

Facts

The facts, as set forth more fully in the judge's decision, are as follows.

The Respondent operates a wholesale plumbing supplies business with facilities in Manhattan and Yonkers, New York. Seymour Frankel, now retired, was the original owner of the business, which is now being run by his sons Warren and Howard.<sup>2</sup>

Seymour came out of retirement to supervise the purchase and refurbishment of the Yonkers facility in 1996–1997. In the fall of 1996, an employee named Andrew Mackle contacted the Union about organizing the Respondent's employees in Yonkers.<sup>3</sup> After obtaining authorization cards, the Union filed a petition for an election on November 8, 1996. At some point in late 1996, Seymour asked Mackle if Mackle had secured an authorization card from an employee named Santosh. Seymour stated that, if Mackle had done so, Seymour was going to fire Santosh. In a separate discussion,

<sup>1</sup> 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.

<sup>2</sup> Howard Frankel runs the Manhattan facility and Warren Frankel runs the Yonkers facility.

<sup>3</sup> The Yonkers facility was being refurbished at this time. As noted below, it became operational in September 1997.

Seymour told Mackle, in the presence of Warren Frankel, that if Mackle was not happy with his deal, he should come to the owners and renegotiate the terms. Seymour then asked Mackle if he thought it was fair that the company should put all these other guys in the Union and pay that kind of money.<sup>4</sup>

The 1996 election petition was ultimately dismissed as prematurely filed.

The Yonkers facility serves as both a warehouse and a store, and became operational around September 1997. Working at the Yonkers facility are Warren Frankel, controller Barry Rosenblum, three clerical employees, one outside salesman, five people who primarily work at the counter, one driver who primarily stays in Yonkers (Celso Rodriguez, the alleged discriminatee), and Jose ("Bobby") Flores whom the judge found to be a supervisor.

In late 1997 or early 1998,<sup>5</sup> Mackle, who was no longer employed by the Respondent, contacted Rodriguez about trying again to organize the Respondent. Rodriguez and Mackle met sometime during February at a local diner with a union organizer and two other employees. Rodriguez arranged for another meeting to be held on February 25, in order to try to get some of the employees from the Manhattan facility involved in the organizing drive. Only two other employees attended this second meeting.

The next day, Rodriguez called Flores and told him he had a toothache and would not be at work that day. The following day, February 27, Rodriguez was terminated by Warren Frankel.<sup>6</sup> When Rodriguez told Warren that he was being terminated because he had attended a union meeting, Warren responded, "What meeting?" As he was preparing to leave the facility, Rodriguez saw Flores and told Flores that he had been fired because he had taken the previous day off. Flores told Rodriguez that the reason he (Rodriguez) had been terminated was because "these guys went behind his back and went to a union meeting." Later that day, Lorenzo Russell, another employee, asked Warren why Rodriguez had been terminated. Warren responded by stating that Rodriguez had not shown up for work the previous day when something needed to be delivered. When Russell asked if this had anything to do with the Union, Warren responded that it did not. Warren then stated, "I don't think it's fair for

<sup>4</sup> These statements, which were not alleged as 8(a)(1) violations, occurred outside the 10(b) period.

<sup>5</sup> All the following dates are 1998, unless stated otherwise.

<sup>6</sup> The Respondent terminated another driver, Dennis Politi, the same day. The General Counsel does not allege that Politi's termination violated the Act.

somebody else to come in here and try to run our business.”

On February 28, the Respondent interviewed for hire the brother of another employee. That person began work as a driver on March 1.

According to the testimony of Rosenblum, the decision to terminate Rodriguez was made as early as December of 1997. He testified that this decision was not acted on at that time because of the holiday season and the fact that the winter months were busy. He testified that the decision to terminate Rodriguez was based on, inter alia, his bad attendance, the Respondent’s suspicions that Rodriguez was involved in office thefts, the fact that he was not a good employee because he fooled around, and because he was illiterate.

#### THE JUDGE’S DECISION

The judge concluded that the General Counsel had established a prima facie case under *Wright Line*<sup>7</sup> that Rodriguez’ discharge violated Section 8(a)(3). The judge found that the Respondent harbored antiunion animus based on the statements made by Seymour Frankel to former employee Mackle in 1996, and the statement by Warren Frankel on February 27, 1998 to employee Russell, both discussed supra. He further found that the General Counsel had established knowledge of Rodriguez’ union activity based on the timing of the discharge, Flores’ comment to Rodriguez upon hearing of Rodriguez’ termination, and the assertedly pretextual reasons asserted for the discharge. The judge concluded that the Respondent did not meet its burden of showing that it would have terminated Rodriguez for reasons other than his protected activity.

The Respondent excepts to the judge’s findings and, for the reasons set forth below, we find merit in the Respondent’s exceptions.

#### ANALYSIS

Under the test set forth in *Wright Line*, supra, the General Counsel must initially establish union or protected activity, knowledge, animus, and adverse action. If the General Counsel makes this showing, the burden shifts to the Respondent to demonstrate that the same action would have taken place even absent any protected activity.

Contrary to the judge and our dissenting colleague, we find that the General Counsel has not made that showing.<sup>8</sup> Admittedly, Rodriguez engaged in union activity,

<sup>7</sup> 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied 495 U.S. 989; *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399 (1983).

<sup>8</sup> Accordingly, we do not reach the issue of whether the Respondent rebutted the General Counsel’s case.

and was discharged. However, we find insufficient evidence to support any finding or inference that the Respondent either had knowledge of Rodriguez’ union activities, harbored antiunion animus toward him, or that any such animus played a role in his discharge. Thus, for the reasons set forth below, we do not find that Rodriguez’ discharge was discriminatorily motivated.

First, we find that the record does not support a finding that the Respondent harbored antiunion animus against Rodriguez. To establish antiunion animus on the part of Warren Frankel, the judge relied on two statements made by Seymour Frankel in 1996, discussed in detail, supra. As to the first statement, Seymour asked if Mackel had another employee, Santosh, fill out a union card and, if he had, said that would cost Santosh his job. We find that this statement does not support the proposition that the official who apparently made the decision to discharge Rodriguez, *Warren Frankel* (herein Warren), harbored antiunion animus towards Rodriguez. The statement was uttered more than 1 year before Rodriguez’ discharge. Further, it was made by Seymour Frankel who was no longer involved in the Respondent’s day-to-day operations when Rodriguez was terminated. Finally, Warren Frankel, who apparently made the decision to terminate Rodriguez was not present during the 1996 statement, nor is there any evidence that he was even aware that it had been made.

The second statement on which the judge relied was Seymour’s other statement in 1996, telling Mackel to renegotiate his deal if he was not happy and that it was not fair to put everyone in the union and “pay that kind of money.” In addition to the matters noted above, we find that this statement is too ambiguous to be construed as showing animus. See generally, *Hankins Lumber*, 316 NLRB 837, 846 (1995). At most, the statement is an opinion that representation by a union is unfair to employees and too expensive for the employer. Such a statement of opinion is protected by Section 8(c) and does not express antiunion animus. See *Fleming Co.*, 336 NLRB No. 15, slip op. at 28 (2001) (finding that employer’s expression of opposition to union was protected by Section 8(c) and did not express animus).<sup>9</sup>

We also find no support for the 8(a)(3) violation, in the exchange between Warren Frankel and employee Lorenzo Russell on the day that Rodriguez was dis-

<sup>9</sup> For these reasons, we need not reach the issue of whether any statement protected by Section 8(c) is excluded from being used as evidence of antiunion animus. However, Chairman Hurtgen notes that he has previously stated, in dissent, that a statement protected under Section 8(c) cannot be used as evidence of an unfair labor practice. *Ross Stores*, 329 NLRB 573, 576 (1990), enfd. denied on other grounds, 235 F.3d 669 (D.C. Cir. 2001). Thus, he disagrees with his dissenting colleague’s reliance on *Ross Stores*, id.

charged. Russell asked Warren why Rodriguez had been discharged and was told that it was because Rodriguez had not shown up for work the previous day when something had to be delivered. It was only when Russell asked Warren if the discharge had anything to do with the Union that Warren replied that it did not and commented that “I don’t think it’s fair for somebody else to come in here and try to run our business.” Thus, it was Russell who interjected the idea of the Union. Warren did not say that the Union played any role in Rodriguez’ discharge. His comment (that he did not want a third party to come into his business) was a response to Russell’s mention of the Union. The comment was an 8(c) opinion about unions. Thus, the comment does not establish antiunion animus with regard to the Rodriguez discharge. Indeed, Rodriguez admitted that when he had raised the Union at the time of his discharge and asked whether he was being discharged for attending a union meeting, Warren responded “What meeting?”

We disagree with our dissenting colleague’s argument that Warren’s statement to Russell, and Seymour Frankel’s statement to Mackle about “renegotiating his deal,” should be viewed as threats of retaliation against union activities merely because they portray union organization as “unfair.” Taken to its logical conclusion, this reasoning is so broad as to potentially engulf *any* statement by an employer that points out any negative aspects of union organization. Rather, we would find such statements to be expressions of opinion protected by Section 8(c) and, for the reasons discussed above, insufficient to prove antiunion animus.

As to the element of “knowledge,” we note that no evidence was presented that the Respondent possessed a general knowledge of employees’ union activities, let alone particularized knowledge of Rodriguez’ union activity. Further, Rodriguez’ union activities consisted solely of attending two union meetings in 1998, neither of which occurred on the Respondent’s premises. Rodriguez testified that, apart from Flores’ post-discharge comments, discussed below, Rodriguez had no reason to believe that the Respondent was aware that he had engaged in union activities. Indeed, when Rodriguez asked Warren Frankel if Rodriguez’ was discharged due to his attendance at a union meeting, Frankel’s immediate response was “What meeting”?

Our dissenting colleague asserts that even absent any direct evidence of Respondent’s knowledge of Rodriguez’ union activities, the Board should infer such knowledge based on the timing of his discharge. We disagree. Rodriguez was discharged immediately after missing a day of work, which absence was the contemporaneous reason given for his discharge. As set forth be-

low, we find that this reason was not pretextual. We base this finding on the record evidence, not on any facial acceptance of the Respondent’s explanation.

The only other possible evidence of knowledge and animus was Flores’ post-discharge statement to Rodriguez that Rodriguez was actually fired because he had gone to a union meeting. The judge found that Jose (“Bobby”) Flores was a supervisor and, as such, attributed this statement to the Respondent. In finding Flores a supervisor, the judge relied on the fact that Flores assigned warehouse employees their work, moved them from one activity to another, and was paid much more than the other warehouse employees. We disagree. For the reasons set forth below, we find that the General Counsel has not established Bobby Flores’ supervisory status.

It is undisputed that Flores had no authority to hire or fire employees or to recommend such action or that he played any role in transferring, promoting, rewarding, suspending, laying off, recalling, or in adjusting grievances. Thus, Flores would be found to be a supervisor only if he used independent judgment assigning work and moving employees from one activity to another. However, the judge cites no evidence that Flores used any independent judgment in the exercise of these duties, nor does the record support such a conclusion. Rather, the evidence shows that Flores has worked for the Respondent or its predecessor business for many years. Flores worked mainly at the counter or in the warehouse. Concededly, Flores gave warehouse people their work assignments and moved them from one activity to another. Flores also told drivers which deliveries to make and instructed employees to unload trucks when deliveries were made. The evidence does not establish that these assignments and directions involved the use of independent judgment. At best, this evidence established that Flores was a lead person who, as an experienced employee, directed other employees in the performance of routine work. See, generally, *Necedah Screw Machine Products*, 323 NLRB 574, 577 (1997).

Nor do we find that the secondary indicia of supervisory status relied on by the judge—namely the fact that Flores received substantially higher pay and yearly bonuses than the other employees—establishes his supervisory status. Thus, secondary indicia of supervisory status are not dispositive “in the absence of evidence indicating the existence of any one of the primary indicia of such status.” *Billows Electric Supply of Northfield*, 311 NLRB 878 fn. 2 (1993). Because we find no primary

indicia of supervisory status, we decline to rely on Flores' higher salary and bonus to find he is a supervisor.<sup>10</sup>

Accordingly, because we find that Flores is not a supervisor, we will not impute his statements to the Respondent either to establish its knowledge of Rodriguez' union activities or its animus toward Rodriguez based on those activities. Thus, it is well settled that, where an individual is neither a supervisor nor an agent, the individual's knowledge of union activities and/or antiunion animus cannot be imputed to the employer.<sup>11</sup>

Finally, although our dissenting colleague concedes that Flores is not a supervisor, she nonetheless argues that because Flores—a non-supervisor, non-agent of the Respondent—had learned of the union meetings, the Respondent likely too was aware of them. There is no factual or legal support for this argument. The mere fact that an employee (Flores) knows of union activity, but does not actively participate in it, cannot serve as a basis for inferring that management likely also would have known of that activity.

Accordingly, we find that the General Counsel has failed to establish a prima facie case. Therefore, we dismiss the complaint.

#### ORDER

The complaint is dismissed.

MEMBER LIEBMAN, dissenting.

In finding the discharge of Celso Rodriguez lawful, the majority neglects the evidence, and the reasonable inferences to be drawn from it, that compel a different conclusion. Rodriguez, a driver for the Respondent, was fired shortly after engaging in union activity. He had never been disciplined before; indeed, he had received bonuses and pay raises. The Respondent told Rodriguez that he was being fired for missing work on a day that he was particularly needed. In contrast, Rodriguez was told by the colleague who assigned him work, Bobby Flores, that he was being fired for going to a union meeting. The Respondent's co-owner, Warren Frankel, denied to Rodriguez and another employee that union activity played any part in the discharge. But Frankel also asked the co-worker, rhetorically, if he thought it was fair for someone else to seek to run the Respondent's business. Based on these facts and others, I agree with the judge that the General Counsel has shown that union activity was a motivating factor in the discharge of Rodriguez and that

the Respondent, in turn, has failed to show that it would have fired Rodriguez anyway.<sup>1</sup>

#### A. Facts

The essential facts are as follows. In the fall of 1996, the Union attempted to organize the Respondent's employees. It obtained authorization cards and filed a petition with the Board in November 1996 for a representation election. Around that time, the Respondent's original owner, Seymour Frankel (Seymour) threatened union activist employee Andrew Mackle and employee Santosh<sup>2</sup> that Seymour would fire Santosh if Mackle had persuaded Santosh to sign a union authorization card. In a separate conversation at which Seymour's son, Warren Frankel (Warren, a co-owner of the Respondent), was present, Seymour told Mackle that if Mackle was not happy with his "deal," he should come to the Respondent's owners to possibly renegotiate things. Seymour then pointedly asked Mackle if he thought it was "fair" that the Respondent "should put all those other guys in the Union and pay that kind of money."<sup>3</sup>

Celso Rodriguez, a temporary employee of the Respondent who was paid \$5 per hour, was hired on a permanent basis in September 1997 as a local delivery driver, with an increase in pay to \$6.50 per hour. Shortly thereafter, in December 1997, he was given another raise in pay, to \$7.50 per hour, and also a bonus equivalent to about a week's pay. At that time, Warren told Rodriguez that he thought Rodriguez was doing "a good job," and that the Respondent wanted to keep Rodriguez as an employee.

Around the same time, late 1997 or early 1998,<sup>4</sup> Mackle (by then no longer employed by the Respondent) encountered Rodriguez, who told Mackle that he and the employees were still interested in "being in the Union." Rodriguez asked Mackle if he would still help them. Mackle set up a February meeting at the Seven Brothers Diner, up the street from the Respondent's Yonkers facility. The meeting was attended by Rodriguez, Mackle, employees Pete Wasiczko and Lorenzo Russell, and union organizer Eddie Doyle Jr. Doyle told the employees that they would have to sign union authorization cards to express an interest in being represented and to authorize the Union to represent them. The employees took the cards and told Doyle that they were going to talk with the Respondent's other employees to see how many cards

<sup>10</sup> Although the General Counsel additionally alleged that Flores was an agent of the Respondent, we find that the record fails to substantiate that claim. We also note that no party raises this issue on exceptions.

<sup>11</sup> See, e.g., *Emergency One*, 306 NLRB 800, 807 (1992).

<sup>1</sup> See generally *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

<sup>2</sup> The record does not reveal Santosh's full name.

<sup>3</sup> The representation petition was subsequently dismissed as having been prematurely filed.

<sup>4</sup> All the following dates are 1998, unless otherwise stated.

they could get signed. The next day, Rodriguez gave his signed union authorization card to Mackle.

Rodriguez arranged and attended another meeting of employees on February 25 in the Bronx to discuss unionization. Early the next morning, February 26, Rodriguez called Respondent warehouseman-counterpart Bobby Flores (one of whose duties was to assign work tasks to Rodriguez) and told him that he had a toothache and wanted to go to a dentist. Rodriguez did not come to work that day. The following morning, February 27, Warren discharged Rodriguez, assertedly because Rodriguez had not come to work the day before, when the Respondent particularly needed him to make deliveries. Rodriguez testified without contradiction that Warren told him that Warren and his brother Howard (another co-owner of the Respondent) had decided that they had to terminate Rodriguez for “the one day I didn’t show up; that they really needed me that day for delivery.” (Neither Warren nor Howard testified at the hearing.) As Rodriguez was preparing to leave the facility, Flores told him that the reason he had been fired was because “these guys went beyond [sic] his [i.e., Warren’s] back and went to a union meeting.” Later that day, Lorenzo Russell asked Warren why Rodriguez had been fired. Warren said it was because Rodriguez had not come to work the day before, when the Respondent needed him to make a particular delivery, and that Rodriguez’ reason for missing work was not good enough. Russell asked Warren if Rodriguez’ discharge had anything to do with the Union, and Warren said that it did not. Warren then told Russell that he did not think it was “fair” for “somebody else to come in here and try to run our business.”

The next day, February 28, the Respondent hired a new driver, who started working the following day.

#### B. Analysis and Conclusions

The General Counsel has the initial burden of establishing a case sufficient to support an inference that Rodriguez’ union activity was a motivating factor in the Respondent’s action against him. *Wright Line*, supra, 251 NLRB at 1089. The General Counsel can meet this burden by establishing that Rodriguez engaged in union activity, that the Respondent had knowledge of it, and that the Respondent had union animus.<sup>5</sup> For the reasons discussed below, I find that the General Counsel has met this burden.

##### 1. Knowledge of union activity

My colleagues and I agree that Rodriguez engaged in union activity. Contrary to my colleagues, however, I

<sup>5</sup> See *Columbian Distribution Services*, 320 NLRB 1068, 1070–1071 (1996) (complaint dismissed, no showing of union animus).

find that the record establishes that the Respondent knew about Rodriguez’ union activity.

The Board will infer employer knowledge of employee union activity where the circumstances reasonably warrant such a finding.<sup>6</sup> In particular, the Board has relied upon timing and the advancement of false reasons for a discharge as indicating employer knowledge of the employee’s union activity.<sup>7</sup> I find that (1) the timing of Rodriguez’ discharge (i.e., within a few weeks after the union meeting at the Seven Brothers Diner near the Respondent’s facility, and just 2 days after Rodriguez’ union-related meeting with two other employees in the Bronx), coupled with (2) the clearly pretextual reasons asserted by the Respondent for discharging Rodriguez (discussed below), satisfactorily shows that the Respondent had knowledge of Rodriguez’ union activity.<sup>8</sup>

Although the only reason given to Rodriguez at the time of his discharge was that he was absent from work on a day that the Respondent particularly needed him to make a delivery, Respondent controller Barry Rosenblum testified about a variety of post-facto reasons for why the Respondent discharged Rodriguez. One proffered reason was poor attendance. Yet the record shows that in January and February Rodriguez was absent on only two occasions, and that his attendance record was similar to those of the other employees. Rosenblum also testified that the Respondent suspected Rodriguez of dishonesty. But this asserted suspicion was based on several incidents that occurred *before* the Respondent hired Rodriguez as a permanent employee in September 1997—with a 30 percent raise in pay. Rosenblum also testified that the Respondent had actually decided to discharge Rodriguez as far back as December 1997, but that it ultimately refrained from doing so because of the upcoming holiday season and an anticipated busy period during the winter months. Not only is there no evidence to support Rosenblum’s assertion that the Respondent decided to discharge Rodriguez as far back as December 1997, but that assertion is also particularly hard to reconcile with the Respondent’s giving Rodriguez a year-end bonus of an additional week’s pay in December 1997,

<sup>6</sup> *North Atlantic Medical Services*, 329 NLRB 85 (1999), enfd. 237 F.3d 62 (1st Cir. 2001).

<sup>7</sup> *Matthews Industries*, 312 NLRB 75, 79 (1993), citing *Greco & Haines, Inc.*, 306 NLRB 634 (1992), and *Dr. Frederick Davidowitz, D.D.S.*, 277 NLRB 1046 (1985).

<sup>8</sup> As stated, I infer the Respondent’s knowledge of Rodriguez’ union activity based on the timing of Rodriguez’ discharge, coupled with the pretextual reasons asserted by the Respondent for the discharge—and not based on timing alone, as my colleagues seem to imply. My colleagues apparently accept at face value the Respondent’s claim that Rodriguez was discharged for missing work. As I will explain, I believe that this reason was simply a pretext.

coupled with yet another generous pay increase, this one 15 percent. Further, the Respondent claims that Rodriguez did not call in to say he would not be at work on February 26. The record establishes, however, that Rodriguez did call Flores early that morning.

Calling Flores was significant because the record also establishes that Flores assigns work tasks to warehouse employees, and, more particularly, that when Rodriguez was not making deliveries, it was Flores who assigned him tasks to keep the warehouse clean. Thus, while I agree with my colleagues that the record fails to establish that Flores was a statutory supervisor, I nevertheless find that, in light of Flores' role in assigning work to Rodriguez, the latter's notification to Flores on the morning of his absence belies the Respondent's claim that Rodriguez failed to notify the Respondent of his pending absence from work. Moreover, in any event, the record also establishes that other employees who were absent without having called in to notify the Respondent were nevertheless not discharged.

Because we cannot regard Flores as a supervisor or an agent for Respondent,<sup>9</sup> his remark about employees going behind the Respondent's back to attend a union meeting does not directly establish that the Respondent knew about Rodriguez' attendance at the union meetings earlier that month and two nights before his discharge. But Flores' remark is hardly irrelevant. It establishes that the union meetings had become known to persons other than those who attended them. Thus, Flores' knowledge of the meetings tends to suggest, at least in conjunction with the other evidence here, that Respondent's management officials had also found out about the meetings.<sup>10</sup> Given his self-interest, Warren Frankel's reported profession of ignorance—he did not testify—need not be given any weight.

Finally, the Respondent asserted that Rodriguez was not a very good employee, because he could not read and had a habit of fooling around in the warehouse. Yet Flores testified that that he never experienced any problems with Rodriguez. Indeed, Rodriguez' personnel record shows that he never received any disciplinary actions during his employment with the Respondent.

<sup>9</sup> I agree with my colleagues that the record fails to establish that Flores was a supervisor within the meaning of Sec. 2(11) of the Act. The judge made no finding with respect to Flores' status as an agent of the Respondent and there were no exceptions on that point.

<sup>10</sup> My colleagues disagree with me about this. I recognize that Flores' knowledge of Rodriguez' union activity is not tantamount to Respondent's knowledge. Flores' knowledge nevertheless does establish that such knowledge had spread beyond the immediate group of union supporters, and, to that extent at least, makes it more likely that such knowledge had also reached the Respondent's managers on the scene.

In light of these considerations, I would find that the timing of Rodriguez' discharge so soon after his attendance at the union meeting at the nearby diner and just 2 days after his union-related meeting with two other employees in the Bronx, coupled with clearly pretextual reasons asserted by the Respondent for discharging him, shows that the Respondent was aware of Rodriguez' union activity. Flores' statement to Rodriguez bolsters my view.

## 2. Union animus

In addition to finding that the Respondent was aware of Rodriguez' union activity, I would find that the statements of Seymour and Warren Frankel establish the Respondent's union animus. Seymour was the Respondent's original owner. He also had a continuing role in overseeing the setting-up of the Respondent's Yonkers facility in the months prior to Rodriguez' discharge. Seymour's first statement, that he was going to fire employee Santosh if he filled out a union authorization card, clearly establishes the Respondent's hostility towards union activity. His second statement, rhetorically asking Mackle if he thought it was *fair* that the Respondent should have to pay union scale wages to all of the employees, further shows the Respondent's opposition to the union activity.<sup>11</sup> Moreover, the union activity in which Rodriguez participated was a *revival* of the earlier union campaign, towards which the Respondent had expressed hostility. Further, as the judge found, Warren's statement to employee Russell immediately after Warren fired Rodriguez—that Warren did not think it was *fair* for somebody else to come in and try to run the Respondent's business—also shows the Respondent's union animus.

My colleagues would distinguish between Seymour's views and Warren's, but both strike me as indications of the same animus—not surprising, given the father-son relationship between the two men and the family-run nature of the Respondent's business.<sup>12</sup> For reasons al-

<sup>11</sup> The decisions cited by my colleagues do not compel a different conclusion on the facts here.

<sup>12</sup> In contrast to my colleagues, I regard none of these statements as lawful under Sec. 8(c). None can be considered just an expression of "views, argument, or opinion," in the Act's words. Rather, each statement, reasonably understood in context, communicated a threat of reprisal for union activity. Seymour's threat to fire Santosh was obvious. His rhetorical question to Mackle, in turn, conveys more than a view about the merits of unionization. By framing the issue as one of fairness, it clearly implies that support of union activity is illegitimate—and therefore properly subject to employer retaliation (which, in Seymour's apparent view, would be regarded as no more than resisting unfairness). This implicit meaning is even clearer in the case of Warren's statement to Russell, which essentially invited Russell to draw the connection between the unfairness of unionization and the discharge of Rodriguez. I reiterate that these statements, reasonably understood in

ready suggested, I am not persuaded by my colleagues' invocation of Warren's professed ignorance of the union meetings. Nor do I agree that Warren's comment to Russell, considered in context, simply communicated his lawful opinion about unionization. Warren was defending the discharge of Rodriguez, not seeking to persuade Russell to oppose unionization. It is clearly reasonable to infer, from what Warren said, that *because* he thought the union's intervention in the workplace was unfair, he also thought it was proper to discharge Rodriguez for union activity.

#### CONCLUSION

For these reasons, I agree with the judge that the General Counsel has met his burden under *Wright Line* to establish a prima facie case that Rodriguez' discharge was unlawfully motivated. I also agree with the judge, particularly here in light of the Respondent's numerous asserted pretextual reasons for discharging Rodriguez, that the Respondent has not met its responsive burden under *Wright Line* of establishing that it would have discharged Rodriguez for reasons other than his union activity. I would therefore affirm the judge's conclusion that the Respondent discharged Rodriguez in violation of Section 8(a)(3) of the Act as alleged.

Margaret A. Lareau, Esq., for the General Counsel.  
Robert G. Landes, Esq., for the Respondent.

#### DECISION

##### STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried before me in Hartford, Connecticut, on July 7, 8, and 9, 1999. The charge and amended charge were filed on March 25, 1998, and April 23, 1999. The complaint, which was issued on April 27, 1999, essentially alleges that on February 28, 1998, for discriminatory reasons, the Respondent discharged its employee Celso Rodriguez.

On the entire record,<sup>1</sup> including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

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context, communicated a threat of reprisal for union activity. In light of this contextual basis for my finding, there is no basis for my colleagues' concern that my reasoning would "potentially engulf any statement by an employer that points out any negative aspects of union organization." Moreover, even if the three statements could be regarded as mere expressions of opinion, the Board's long-held position is that such statements can be used to demonstrate antiunion animus without transgressing Sec. 8(c). See *Ross Stores*, 329 NLRB 573, 576 (1999), *enfd.* in pertinent part 235 F.3d 669 (D.C. Cir. 2001); *Affiliated Foods*, 328 NLRB 1107 (1999).

<sup>1</sup> I hereby grant the Respondent's unopposed Motion to correct the transcript.

#### I. JURISDICTION

The parties agree and I find that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

#### II. ALLEGED UNFAIR LABOR PRACTICES

The Company is engaged in the wholesale plumbing supplies business. It has a store on Park Avenue in Manhattan and a warehouse/store in Yonkers, New York. The latter facility was purchased in or about 1996 and was refurbished in 1996-1997. The Yonkers facility became operational in or about September 1997.

The Company originally was the result of a split up of a partnership of two families and the original owner was Seymour Frankel (also called Frank), who is now retired, living in Florida and who has no financial interest in the business which is owned by his two sons, Howard and Warren. At the present time, Warren maintains his place of business at the Yonkers location and Howard works out of the Manhattan facility.

During the period of time when the Yonkers facility was being purchased, and in the period immediately thereafter, Seymour Frankel, although retired, came up to Yonkers to supervise the clean up, and setting up of this warehouse facility. He hired and supervised employees to do this work and there is no doubt that he acted in a managerial and/or supervisory capacity. Based on the record, I conclude that Seymour Frankel was at all relevant times, until he left for good for Florida, a supervisor and agent of the Company.

Initially, the Company hired a group of workers on a temporary basis to clean up and set up the warehouse. Among the people hired as temporary workers were Celso Rodriguez, Lorenzo Russell, and Andrew Mackle.

In the autumn of 1996, Mackle contacted the Union which, after obtaining authorization cards from some of the employees, including Celso Rodriguez, filed a petition for an election on November 8, 1996. Mackle was, at that time, the employee who was the active union supporter.

According to the uncontradicted testimony of Mackle, Seymour Frankel spoke to him in the warehouse and asked if he had made another employee named Santosh, fill out a union card. Mackle testified that Frankel said that if he (Mackle), did, then he cost Santosh his job because he was going to fire him. According to Mackle, he responded that he didn't think that was a good idea and that Frankel should consult his lawyer before doing anything. Mackle states that Santosh did not lose his job.

Mackle also testified that in 1996, Seymour Frankel called him upstairs to the office and in the presence of Warren Frankel told him that if he (Mackle) wasn't happy with his deal, he should come to the owners and possibly renegotiate things. According to Mackle, Seymour Frankel asked him if he thought it was fair that the Company should put all those other guys in the Union and pay that kind of money.

The petition was ultimately dismissed on the grounds that the Yonkers warehouse had not yet become operational and therefore it was prematurely filed.

Soon after the petition was dismissed, Mackle quit the job but remained in contact with the employees. His testimony regarding the above conversations with Seymour Frankel were not offered to prove that they constituted separate violations of the Act (they would be barred by Section 10(b) of the Act), but to demonstrate antiunion animus and a stated willingness to discharge employees if they chose to be represented by a union.

In or around September 1997, the Yonkers facility became operational, mainly as a warehouse but also as a store servicing the Westchester area. This is a facility consisting of about 35,000 square feet for the warehouse, 5000 square feet for a showroom and about 4000 square feet for office space. The office area is located on a second floor and is generally occupied by Warren Frankel, Barry Rosenblum, who is the controller and is conceded to be a supervisor and by three office clerical workers. Rosenblum testified that he does not spend all his time upstairs but makes a practice of going downstairs to the counter and warehouse areas several times a day.

Plumbing supplies are received at and warehoused at the Yonkers facility (the Manhattan store is about 600 square feet). The Company has two trucks and uses two drivers who deliver, on a daily basis, to the Manhattan location and to customers located in Manhattan, Brooklyn, Queens, and Long Island, New York. It also has a van which is used at the Yonkers facility to make local deliveries to its customers in the Bronx and Westchester.

In September 1997, when the Yonkers cleanup was more or less completed, the Company offered some of the temporary workers permanent jobs. These included Andrew Mackle, Lorenzo Russell, and Celso Rodriguez. Rodriguez, who is illiterate, was offered the job of doing the local driving. When he was not on the road, Rodriguez was assigned by Jose Flores to keep the warehouse clean.<sup>2</sup> At the time that he was hired on a permanent basis, Celso Rodriguez was given a raise from \$5 to \$6.50 per hour. According to Rosenblum, he told Rodriguez that he would have to be more serious about his job and not to fool around so much. Despite the fact that Celso Rodriguez cannot read, he does not seem to have had much trouble making deliveries and Jose Flores testified that this was because Rodriguez knew Yonkers like the back of his hand as he had lived there all his life.

Although the Yonkers facility is quite large, the number of people working there is quite small. In addition to Warren Frankel and Barry Rosenblum, the facility had, in September 1997, three office workers, one outside salesman, five people who mainly worked in the warehouse, two people who worked at the counter, one driver (Celso Rodriguez), who stayed in Yonkers all day and Jose Flores who is alleged to be the warehouse supervisor. In addition, there were two other drivers who came to Yonkers at the beginning of each day and drove to Manhattan where they usually remained for the rest of the day.

The parties dispute the status of Jose Flores who is also called Bobby. Flores is a long-term employee who was first employed by Seymour Frankel even before Central was created. He moved to Central when Seymour Frankel opened this

<sup>2</sup> Because he cannot read, Celso can't do other work in the warehouse such as put away supplies or pull parts for orders.

business and describes himself as very loyal to the family. (Seymour Frankel is a godfather to one of Flores' children.) He mainly works either at the counter or in the warehouse, but unlike the other workers he is paid on a salaried basis and earns \$75,000 per year which is slightly less than what is earned by Barry Rosenblum. He also receives annual bonuses which are far in excess of what the other hourly paid workers receive and these bonuses are comparable to those given to Rosenblum.

There is no dispute that Flores does not have the power to hire or fire employees or to recommend such actions. There is no evidence that he has responsibilities for disciplining employees or that he plays any role in promoting, rewarding, suspending, laying off, recalling employees, or in adjusting grievances.<sup>3</sup> On the other hand, the credible testimony of Celso Rodriguez and Lorenzo Russell was that he assigned the warehouse people their work and that he could move them from one activity to another. They testified that he directed the unloading of trucks and directed the warehouse employees as to where to put merchandise upon arrival. Flores testified that he is responsible for training new employees after they are hired.

While the evidence regarding his status is decidedly ambiguous, I shall conclude that Flores is a statutory supervisor. Although it may be argued that his role vis-à-vis the other warehouse employees is routine, the large disparity in his pay compared to the other employees argues to the contrary; indicating that this is an employee who, notwithstanding his long and loyal association with the Frankel family, was not paid a relatively large sum of money for doing routine functions.

The Company produced some testimony that in 1997, mostly before September, there was a series of losses and break-ins and that management suspected Celso Rodriguez of being responsible for at least some of these incidents. Although denying that he was responsible, Rodriguez acknowledged that he was in fact under suspicion. But as it never was shown that he was responsible, no action was taken against him. Indeed, notwithstanding these incidents, he was taken on as a permanent employee in September 1997 with a \$1.50 per hour raise and on December 23, 1997 was given another \$1 raise to \$7.50 per hour. He also, like the rest of the employees, received a Christmas bonus worth about the equivalent of a week's wages.

At some point in late 1997 or early 1998, Mackle, who no longer was employed by the Company, met Celso Rodriguez and had a conversation with him about trying again to organize the shop. A meeting was set up at a local diner which was attended by a union representative, Mackle, Celso Rodriguez, Pete Wasiczko, and Lorenzo Russell. This meeting appears to have taken place at some time during February 1998.

After the first meeting, Rodriguez spoke to union representative Doyle on the phone and another meeting was arranged for Wednesday evening, February 25, 1998. The purpose of this meeting was to try to get some of the Manhattan employees to attend and to this end, Pete Wasiczko invited some of those

<sup>3</sup> Regarding discipline, the General Counsel produced evidence of only one instance where on one occasion, Lorenzo Russell was sent home because he arrived late for work on a Saturday. Flores also testified that on the occasion when Russell asked him about a raise, he did not in fact, relay that request to the owners.

employees. The meeting was arranged to take place at a topless bar in the Bronx and the only employees who showed up were Pete Wasiczko, Celso Rodriguez, and another employee named Eugene. I doubt that all that much happened at this meeting given the poor attendance and the other distractions. According to Rodriguez, the other two had some drinks but he did not.

According to Rodriguez, on the following morning, he had a toothache and called in before the starting time and told Flores that he wanted to go to a dentist. He states that Flores said OK. In this regard, Lorenzo Russell testified that on February 26, he asked Flores where Rodriguez was and that Flores said that he had called in that morning. Russell also testified that on February 26, Warren Frankel had to go down to Manhattan because two of the employees there had not shown up for work.

On the morning of February 27, 1998, Rodriguez was told by Warren Frankel that he was fired. According to Rodriguez, when he asserted that he was being fired because he attended a union meeting, Warren Frankel said, "what meeting?" Rodriguez credibly testified that when he left the office he went downstairs and before leaving told Flores that he had just been fired because he had taken the day off whereupon Flores said that this wasn't the reason; that these guys went behind his back and went to a union meeting. Rodriguez asserts that Flores asked him who was there but that he refused to tell. According to Rodriguez, Flores said he would see what he could do, but never called him.

On the same day, in the late afternoon, the Company also fired one of the other drivers, Dennis Politi. Although the original charge alleged that both discharges were unlawful, the allegation regarding Politi's discharge was not pursued apparently because the Region concluded that the evidence did not support a contention that Politi had been fired for unlawful reasons. In the case of Politi, it appears that this person, a retired bus driver, had some difficulty with the physical aspects of the job and that on February 27, while out on a run, he could not deliver some merchandise because he was unable to get it off the truck without assistance.

At the end of the day on February 27, 1998, Lorenzo Russell went up to the office to speak to Warren Frankel. Russell testified that he asked Warren what had happened and was told that it was none of his business. Russell also testified that as he was about to leave, Warren said that since he asked, Celso did not report to work, that he needed him to deliver a tub and that his excuse was not good enough. According to Russell, when he asked if this had anything to do with the Union, Warren responded that it did not. At this point, according to Russell, Warren then said, in an emotional manner; "I don't think its fair for somebody else to come in here and try to run our business." As Warren Frankel did not testify, this was not denied.

On Friday, February 28, 1998, the Company interviewed the brother of the other driver and this person, Anthony Rodriguez, began to work as a driver on March 1, 1998.

Neither Warren Frankel nor Howard Frankel testified in this proceeding, although Rosenblum stated that it was their decision to discharge Celso Rodriguez. Thus, although Rosenblum was the person called to assert the Company's reasons for the discharge, he himself although privy to some of the discussions, was not the person who made the decision.

Rosenblum gave a variety a reasons why Celso Rodriguez was discharged. One was that his attendance was poor. But the record shows that in January and February 1998, he was out on two occasions and his record of attendance was not much different from other employees. Another reason asserted was that the Company had reasonable suspicions regarding his honesty based on various incidents that occurred for the most part before Celso Rodriguez was made into a permanent employee with a substantial increase in pay. Rosenblum asserted that the Company had decided to discharge Rodriguez as far back as December 1997, but held off because of the holiday season and the fact that the winter months were busy. If that is the case, it is hard for me to reconcile this assertion with the fact that the Company gave Rodriguez a \$1 per hour raise on or about December 1997. Moreover, if such a "decision" was made, it was a decision without any implementation date as the evidence does not indicate that anyone from management decided to discharge Celso until, at the very earliest, February 26, which is both the day after he and a couple of other employees got together in the Bronx and the day after he did not come into work. The Company asserts that Celso was a no-call no-show on February 26, but the credible evidence is that he did call in on the morning of February 26 and spoke to Flores.<sup>4</sup>

It is asserted that Rodriguez was not a very good employee because he couldn't read and because he had a habit of fooling around while at the warehouse. Yet Flores testified that he never had a problem with Rodriguez regarding deliveries and his personnel file shows that Rodriguez, unlike some other employees, received no warnings or other disciplinary actions during his tenure of employment.

As to the timing of the decision, the Company, through Rosenblum, asserted that the level of business slowed down substantially from February to March 1998. Nevertheless, this followed a very good February and the figures for March were not yet in when the decision to discharge Celso Rodriguez and Dennis Politi was made. Moreover, even though the sales of the Company were lower in March than in February, I note that having let go of Politi and Celso Rodriguez, the Company immediately hired one replacement driver (Anthony Rodriguez), and this indicates to me that management felt (as of February 27), that at most, a net reduction of one driver was sufficient to meet its expected business needs for the forthcoming month.

In my opinion the General Counsel has made out a prima facie case under *Wright Line*, 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert denied 495 U.S. 989 (1982). That is, I think that the General Counsel has produced evidence showing antiunion animus by the Company as evidenced by statements made by Seymour and Warren Frankel and has sufficiently demonstrated that management had knowledge of union activities occurring during the period immediately preceding the discharge. This is shown by the timing of the discharge and in part by what appears to me to be the pretextual reasons asserted for the discharge. *Greco & Haines*, 306 NLRB 634 (1992); *Marx-Haar Clothing Co.*, 211 NLRB 350, 350 (1974). As it my opinion that the Respondent has not met

<sup>4</sup> Moreover there is documentary evidence that other employees who were out without calling in, were not discharged.

its burden of showing that it would have discharged Celso Rodriguez for reasons other than his protected or union activity, I conclude that it violated Section 8(a)(1) and (5) of the Act.

#### CONCLUSIONS OF LAW

1. By discharging Celso Rodriguez because of his activities on behalf of Local 456, International Brotherhood of Teamsters, AFL-CIO, the Respondent has violated Section 8(a)(1) and (3) of the Act.

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

#### REMEDY

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

The Respondent having discriminatorily discharged Celso Rodriguez, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of his discharge to the date of his reinstatement or a valid reinstatement offer, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The General Counsel asks that the Board revise a portion of its standard remedy to require that the Respondent, instead of making available to the Board or its agents copies of various records to determine the amount of backpay, provide copies of such records at the office designated by the Board or its agents and to provide the originals, if requested. Additionally, the General Counsel asks that the Board require the Respondent to provide an electronic copy of such records, if stored in electronic form.

The first requested modification seems reasonable to me as it would be a minimal burden on the party found to be the wrongdoer and would greatly assist in the efficiency of the Regional Office in analyzing data necessary for backpay calculations. The requirement that on request, the original records be provided for examination and copying obviously makes sense for verification purposes. The second request is also eminently reasonable because more and more recordkeeping is being kept in electronic databases and information in such form, with the use of appropriate software, is more useful and more easily analyzed than when perused from old-fashioned paper records.

[Recommended Order omitted from publication]