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Onyx Waste Services, Inc. and International Brotherhood of Teamsters, Local 385, AFL-CIO. Cases 12-CA-22996, 12-CA-22999, 12-CA-23030, 12-CA-23042, 12-CA-23057, and 12-CA-23058

September 29, 2004

DECISION AND ORDER

BY MEMBERS LIEBMAN, WALSH, AND MEISBURG

On January 7, 2004, Administrative Law Judge George Carson II issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified.²

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We adopt the judge's finding that the Respondent discharged employee James Payne in violation of Sec. 8(a)(3) and (1) of the Act. We do not adopt the judge's alternative finding that the Respondent discriminatorily refused to hire Payne because that theory of a violation was not alleged in the complaint or litigated at the hearing.

Member Meisburg agrees with the affirmance of the judge's finding that James Payne was unlawfully terminated because of his union activities, but takes note of the special circumstances presented. Ordinarily an employer would not violate the Act by deciding to terminate an employee who had presented it with an ultimatum such as the one put forward by Payne. Here, however, the evidence establishes that the Respondent's decision to terminate Payne was not based on his ultimatum, but rather on the Respondent's antiunion animus. Specifically, the Respondent's actions, including Site Manager J. D. Smith's misrepresentations to Payne and uppermanagement's edict that Apopka Supervisor Charles Eduardo should not hire Payne, demonstrate that the Respondent was determined to block Payne's transfer efforts and thereby force his termination. Because the record supports the conclusion that this course of conduct by Respondent was fueled by antiunion animus and would not have occurred absent Payne's protected activity, Member Meisburg agrees with affirming the judge's finding of a violation.

² We shall substitute a new notice in accordance with *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Onyx Waste Services, Inc., Port Orange, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

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

Dated, Washington, D.C. September 29, 2004

Wilma B. Liebman,	Member
Dennis P. Walsh,	Member
Ronald Meisburg,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO
Form, join, or assist a union
Choose representatives to bargain with us on
your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting International Brotherhood of Teamsters, Local 385, AFL-CIO, or any other union.

WE WILL NOT create the impression that your union activities are under surveillance.

WE WILL NOT threaten you with discharge for talking about union meetings on company property or for supporting the Union.

WE WILL NOT interrogate you regarding your union activities.

WE WILL NOT promise and grant wage increases to you in order to discourage you from supporting the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, within 14 days from the date of the Board's Order, offer Bobby Cavetti Jr., Kenneth DeMarco, and James Payne full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Bobby Cavetti Jr., Kenneth DeMarco, and James Payne whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Bobby Cavetti Jr., Kenneth DeMarco, and James Payne, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

ONYX WASTE SERVICES, INC.

Thomas W. Brudney, Esq., for the General Counsel.

Frederick D. Payne and Bruce F. Mills, Esqs., for the Respondent.

Roger Allain, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in New Smyrna Beach, Florida, on October 27 and 28, 2003.¹ The consolidated complaint issued on July 30.² The complaint alleges various violations of Section 8(a)(1) of the National Labor Relations Act and the discharge of six employees because of their union activities in violation of Section 8(a)(3) of the Act. The Respondent's answer denies any violation of the Act. I find that the Respondent did violate Section 8(a)(1) of the Act and that the terminations of employees Bobby Cavetti Jr., Kenneth DeMarco, and James Payne violated Section 8(a)(3) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Onyx Waste Services, Inc. (the Company), is a Wisconsin corporation engaged in the business of providing solid waste and recyclables collection services to commercial and residential customers from its facilities at various locations in the United States, including its facilities in Port Orange and Apopka, Florida. The Company annually purchases and receives, at its Florida facilities, goods and materials valued in excess of \$50,000 directly from points located outside the State of Florida. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that International Brotherhood of Teamsters, Local 385, AFL-CIO, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

In September 2001, the Company began operating its Port Orange facility. The facility is supervised by Site Manager J. D. Smith, assisted by Route Supervisor Steve Smith. The Company employs 26 drivers and helpers at Port Orange. At all times relevant to this proceeding, the Company also operated a facility at Apopka, Florida. Port Orange is near Daytona Beach. Apopka is near Orlando. Driving time between the two facilities is approximately 1 hour, depending upon traffic. There is no site manager at Apopka. Daily operations are supervised by Route Supervisor Charles Eduardo. Eduardo reports to Central Florida Operations Manager James Fountain.

Employees at the Port Orange facility often gathered at the home of employee James Payne after work to play video games. On April 10, employees, including Kenneth Demarco, Anthony Oliva, Bobby Cavetti, Adrian Del Rio, and Shannon Malfitano, began discussing their working conditions and the possibility of joining a union. Payne was hesitant to do so because of the presence of employee Tom Wiley and Mike Hunter, a supervisor with another company. DeMarco told Payne that he had no problem with their presence, and the discussion continued. DeMarco advised employee Oliva to call an Onyx facility in New Jersey that he knew was organized to obtain the telephone number of the union representing the employees at that location. He correctly assumed that a representative of that union would put him in touch with a union representative in Florida.

On April 11, Organizer Robert Allain with Teamsters Local 385 contacted Oliva. Following a conversation, a meeting was scheduled for the following Saturday, April 19. Employees Oliva, DeMarco, Adrian Del Rio, and Shannon Malfitano attended the meeting and all signed union authorization cards. Following the meeting, Oliva presented union authorization cards to employees Payne and William Corrigan, and both signed the cards. Employee Bobby Cavetti Jr., signed an authorization card brought to him by DeMarco.

¹ All dates are in 2003 unless otherwise indicated.

² The charge in Case 12-CA-22996 was filed on May 6 and was amended on June 30. The charge in Case 12-CA-22999 was filed on May 8, the charge in Case 12-CA-23030 was filed on May 12, the charge in Case 12-CA-23042 was filed on May 19, and the charges in Cases 12-CA-23057 and 12-CA-23058 were filed on May 22.

B. The 8(a)(1) Allegations

1. Complaint paragraphs 5, 6, 7, and 8

On the morning of April 11, following the conversation regarding unionization at Payne's home on April 10, Site Manager J. D. Smith waved for Payne to come into his office. Payne did so. Smith stated that he was "hearing some bad things" and then stated, "I'm hearing you're holding union meetings at your house." He continued, noting that Payne should watch whom he was letting into his house, that "they" were getting him involved in something that he did not want to have anything to do with. Employee Payne replied, suggesting that he could stop the activity, he could "get those guys together." Smith replied, "No, We're going to take care of it."

Payne, who drove a recycling route, was regularly the first employee to return to the facility, arriving "anywhere from 11 [a.m.] to 12:30." On the following Monday, April 14, Smith again spoke with Payne in the office. On this occasion Smith informed Payne, "They have my bosses thinking that you are heading up the Union." Payne replied that he would take care of it.

On Thursday, April 17, at the monthly safety meeting, Site Manager Smith gave his regular safety presentation and then addressed the matter of the Union. Payne recalled that Smith stated that employees should not "talk bad about the Company." He continued, directing his comments to "you guys that's trying to head up the Union," and stated that anybody "discussing the Union on [company] property will be fired immediately, terminated out the gate." Lest any employee consider the foregoing to be an idle threat, Smith noted that he had had to fire his wife and rhetorically asked the employees "where the hell" they thought they stood.

Smith denied being aware of any union activity at the facility until May 9, when Organizer Allain sent a letter to the Company advising that employees were seeking to organize. He testified that he only informed employees that they could not have union meetings on company property, and he asserted that he regularly made that comment during safety meetings. He denied making any comment regarding terminating employees for discussing the Union. On cross-examination, after a recording that an employee had made of the April 17 safety meeting was played, Smith admitted that he had told employees that "[a]nybody caught talking about union meetings on company property" would be fired. Smith's assertion that he regularly advised employees that they could not hold union meetings on company property was incredible. His general denials of his conversations with employee Payne were unconvincing. The contradiction established by his admission of threatening to fire employees who discussed union meetings on company property undermines his assertion that he was unaware of employee union activity as early as April 11. I do not credit Site Manager J. D. Smith.

Following the safety meeting, as the drivers were "pre-tripping" (checking over) their trucks, a group of helpers, Anthony Oliva, Shannon Malfitano, Adrian Del Rio, Billy Corrigan, and Jared Doyle, gathered near the truck of driver Payne. As Payne was checking the oil, Site Manager Smith approached the group of helpers and stated, "What is this? What are you

having? A union meeting? Are you guys going to stab me in the back?" The employees responded, "No. This is not that."

The complaint, in paragraphs 5 and 6, alleges that the Respondent, on April 11 and 14, created the impression that employees' union activities were under surveillance and interrogated employees regarding their union activities. The Respondent, in its brief, argues that the foregoing and subsequent 8(a)(1) allegations of the complaint are unsupported by any timely filed charge. The Respondent appears to have overlooked the amended charge filed in Case 12-CA-22996, filed on June 30, that alleges instances of interrogation, various threats, creation of the impression of surveillance, and the promise of a wage increase. The Respondent's answer admits the receipt of that amended charge.

Payne credibly testified that Site Manager Smith approached him on April 11 regarding "hearing" that he was "holding union meetings" at his house and, without waiting for a reply, cautioned Payne regarding whom he let into his house. The cases cited by the Respondent, including *SKD Jonesville Division LP*, 340 NLRB No. 11 (2003), are inapposite. In those cases, the comments referred to open discussions relating to union activity or were directed to known union adherents who had engaged in union activity on company property. Smith's reference to Payne holding union meetings at his house, without identifying the source of his information, coupled with the admonition that Payne should "watch" who he was letting into his home, "reasonably suggested . . . that the Respondent was closely monitoring the degree and extent of their organizing efforts and activities." *United Charter Service*, 306 NLRB 150, 151 (1992). The foregoing statement created the impression that the employees' union activities were under surveillance and violated Section 8(a)(1) of the Act as alleged in complaint subparagraph 5(b).

A few days later, Smith again spoke to Payne and noted that "they" had his superiors believing that Payne was "heading up the Union." The import of the foregoing statement could not have been other than a reconfirmation that Payne's union activities continued to be monitored by the Respondent. In continuing to create the impression that employee union activities were under surveillance, the Respondent violated Section 8(a)(1) of the Act as alleged in subparagraph 6(b).

There is no evidence of any interrogation in either of the foregoing conversations, and I shall recommend that complaint subparagraphs 5(a) and 6(a) be dismissed.

There is no evidence of interrogation of any employee on April 15 as alleged in paragraph 7 of the complaint. The General Counsel argues that this allegation is established by Smith's asking the helpers if they were holding a union meeting; however, that incident occurred following the safety meeting of April 17. The alleged violations of the Act that occurred on April 17 are set out in paragraph 8 of the complaint.

Paragraph 8 of the complaint alleges that, on April 17, the Respondent threatened employees with discharge for engaging in union activities and informed them that they had to have the Respondent's permission to hold union meetings. Smith admitted that he stated that any employees who discussed union meetings on company property would be terminated. That prohibition, encompassing all company property at any time,

threatened termination for engaging in that union activity and, as alleged in subparagraph 8(a), violated the Act.

The encounter shortly after the safety meeting in which Smith inquired whether the helpers were having a union meeting does not establish a requirement that employees obtain permission before holding union meetings. The General Counsel argues that this constituted the incident of interrogation alleged in paragraph 7 to have occurred on April 15. I do not agree. Paragraph 8 of the complaint alleges the violations occurring on April 17. No incident of interrogation is alleged and no amendment was offered regarding April 17. The Respondent was never placed on notice that the evidence adduced in support of paragraph 8, conduct on April 17, would be argued as establishing the violation alleged in paragraph 7 as occurring on April 15. Smith was not questioned regarding the foregoing encounter, thus it was not fully litigated. Although discrepancies regarding dates are generally not sufficient to justify the dismissal of allegations, the foregoing circumstances cause me to agree with the Respondent's assertion in its brief that no evidence was offered establishing interrogation occurring on April 15. See *Siracusa Moving & Storage*, 290 NLRB 143 (1988). I shall recommend that paragraph 7 be dismissed. I shall also recommend that subparagraph 8(b) of the complaint regarding an alleged requirement for permission to hold union meetings be dismissed.

2. Complaint paragraphs 9, 10, and 11

On Tuesday, April 22, Smith asked employee Kenneth DeMarco if he was "trying to start a union." DeMarco replied that the only thing that he had done was to "show those guys how to get in touch with a union rep[resentative]." Smith told DeMarco "to get the hell out of his office."

The angry dismissal of DeMarco, after he truthfully replied to Site Manager Smith, followed Smith's reference on April 17 to "you guys that's trying to head up the Union" and his threat of termination for engaging in union activity on company property. The foregoing circumstances establish the coercive nature of Smith's interrogation of DeMarco. I find, as alleged in complaint paragraph 9, that the interrogation violated Section 8(a)(1) of the Act.

Employee Bobby Cavetti Jr. was terminated on Monday, April 28. The Company asserted that Cavetti was terminated for refusing to ride with driver Steve Pratt who had left Cavetti standing in the street. Following Cavetti's discharge, employee Oliva, the employee who had contacted the Union, had two conversations with Site Manager Smith. In the first, Cavetti requested a transfer to Apopka, explaining that he did not want "anymore of the problems" and that he did not want to be terminated. Smith replied that he could not transfer him "when the yard was having problems like the ones we were having." In a separate second conversation, Oliva approached Smith and stated that if Smith "wouldn't fire anyone else that I would drop the Union, that I would make sure that it would go away." Smith replied that "there was nothing he could do about it, [t]hat [Area Manager] Ron Tudor was already there Monday, and that he [Smith] was told to fire everyone involved." Smith did not deny either of the foregoing conversations.

The complaint alleges, in paragraph 10, that the Respondent, on April 23, threatened employees with discharge and in paragraph 11 alleges a threat on April 28 to deny a transfer. Oliva's testimony places both of his conversations after Cavetti's discharge. Although no amendment to the April 23 date relating to a threat of discharge was offered, in this instance, unlike the discrepancies regarding April 15 and 17, there is no basis for an assertion of confusion on the part of the Respondent. "[A] discrepancy in dates, without more, [is] insufficient to find that a respondent has been prejudiced." *Parts Depot, Inc.*, 332 NLRB 733, 734 fn. 6 (2000), citing *Siracusa Moving & Storage*, supra. Oliva's testimony that Smith stated that he had been directed to "fire everyone involved" threatened employees with discharge for engaging in union activity in violation of Section 8(a)(1) of the Act.

Paragraph 11 alleges a threat to deny a transfer request on April 28. The evidence establishes that Oliva's request for a transfer was denied. There was no threat. The denial of a transfer to Oliva is not alleged in the complaint. As the General Counsel notes, an employer's reference to "problems" may be a "veiled reference to union activities," but it was Oliva who first used the word "problems." Oliva did not specify that the "problems" to which he was referring related to union activities or some other matter such as undesirable job assignments, i.e., working with Pratt. Smith, using the same term that Oliva used, stated that he could not transfer him when the yard was having "problems." The inherent ambiguities regarding the "problems" to which Oliva referred and the "problems" to which Smith's response referred fail to establish that the Respondent either refused or threatened to refuse to transfer employees because of their union activities. I shall recommend that this allegation be dismissed.

3. Paragraphs 13, 14, and 15

On May 5, several employees were absent from work. When employee James Payne reported to work, Site Manager Smith commented that he thought that Payne would have "been with your boys." I do not credit Smith's denial that he made the foregoing comment. The record does not reflect what reply, if any, Payne made.

On May 7, Payne complained to Site Manager Smith regarding a newly hired employee being paid at a higher rate that Payne was receiving. Smith attributed the new employee's rate to the specific job assignment that he had been given. Smith told Payne "let's walk," and they went to the back of the facility. Payne noted that Smith had been saying that the new employee would be transferred "for the last two or three weeks" but that Payne was "still seeing him in the same position." Smith told Payne to "hold on, . . . [t]here are pay scales coming for you guys that hung around." Payne testified that he understood the reference to the guys that "hung around" to refer to the remaining employees. In this same conversation, Smith advised Payne to "clean up" his tardiness, explaining that he did not want uppermanagement to have a reason to fire him. Payne stated that he "thought all of that was resolved." Smith replied, "I told you I was going to take care of it . . . but just clean your time [tardiness] up . . . [T]hey are still looking at

you, don't give them no reason." Smith did not deny the foregoing conversation.

On May 9, drivers at Port Orange were granted a \$3 per day wage increase retroactive to April 28 and most helpers received increases ranging from \$1.50 to \$2. Eastern Regional Vice President Richard Burke testified that the funds to provide a wage increase for employees in 2003 were approved in November 2002.³ Notwithstanding the inclusion of these funds in the budget, Burke testified that he instructed Ron Tudor, who had been appointed area manager for Central Florida on January 27, "to hold off on wage increases until he could get his hands around the operation and the understanding of whether they were warranted or not." When asked whether he knew if raises were implemented at the same time in all Florida locations, Burke testified that he did not know. Area Manager Tudor acknowledged that raises were given at all facilities he managed. When asked if he recalled when they were given, he answered, "No. Because they were given at various times. They weren't all given at the same time."

Smith testified that he asked Tudor to grant the Port Orange employees a wage increase on March 18. Upon receiving this request, Tudor testified that he told Smith to "get some stuff together and we'd sit down and talk about it." Despite testifying that he was aware that a pay increase had been budgeted, Tudor testified that he called "to see if it was budgeted." Tudor testified that he approved the wage increase, but could not recall when. He did not testify that he actually met with Smith and went through any "stuff" that Smith had gathered. Smith did not testify to gathering any "stuff." No documents reflecting the date of approval of the wage increase were produced. Neither Smith nor Tudor addressed the manner in which the amounts of the wage increases were determined. Smith acknowledged that he had sought wage increases from previous area managers, but no increases had been granted.

Paragraph 13 of the complaint alleges that the Respondent promised employees a wage increase in order to induce them to abandon their activities on behalf of the Union and threatened employees with discharge for engaging in union activities. Paragraph 14 alleges the granting of the wage increase on May 9 in order to induce employees to abandon the Union. The Respondent's brief, having overlooked the amended charge in Case 12-CA-22996, argues that none of the foregoing allegations are supported by a timely filed charge. The amended charge alleges the threat of discharge and promise of a wage increase. Although it does not allege the grant of the wage increase, I find that the allegation of the grant is predicated upon the same legal theory, to induce employees to abandon the Union, as the promise to grant the increase. The granting of the promised increase arises from the same factual circumstances and events as those alleged in the amended charge and is intricately related to the promise. *Redd-I Inc.*, 290 NLRB 1115, 1116 (1988). The issue of the wage increase was fully litigated.

Smith's admonition that Payne "clean up his tardiness," although couched in terms that suggested that Smith did not want Payne to give uppermanagement a reason to fire him, noted that

upper management was "still looking" at him and threatened that uppermanagement would seize upon whatever reason it could to discharge him because of his union activities. Smith's comments to Payne clearly promised a wage increase. The foregoing comments of Smith threatened termination because of Payne's union activities and promised a wage increase in an effort to induce employees from supporting the Union in violation of Section 8(a)(1).

The grant of benefits to employee in the midst of union organizational activity is not per se unlawful. The burden is upon the General Counsel to establish "by a preponderance of the evidence that employees would reasonably view the grant of benefits as an attempt to interfere with or coerce them in their choice on union representation." *Southgate Village*, 319 NLRB 916 (1995). In meeting that burden, the General Counsel may rely on an inference of improper motivation based on all the evidence and the failure of the Respondent to "establish a legitimate reason for the timing of the increase." *Holly Farms Corp.*, 311 NLRB 273, 274 (1993), enf. 48 F.3d 1362 (4th Cir. 1995). Employee Payne had, prior to May 7, spoken with Site Manager Smith regarding raises, but prior to the employee organization activity no raise had occurred, the employees "would never see it." In mid-April, Site Manager Smith threatened employees with termination for engaging in union activity. Following the termination of employee Cavetti on April 28, when employee Oliva spoke with Smith on April 30 regarding ceasing the organizational activity, Smith informed him that he had been directed "to fire everyone involved" with the Union. Thereafter, DeMarco was fired on May 2. On May 9, employees received a previously unannounced wage increase retroactive to April 28. Consistent with the reasoning of the Supreme Court, I find that the Respondent, having shown its fist, extended a "velvet glove" to its remaining employees, and they were "not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964).

The Respondent presented no basis for the amounts of the raises. Tudor supposedly requested Smith to "get some stuff together and we'd sit down and talk about it." Smith did not testify to doing so, and Tudor did not testify to any subsequent conversation with Smith. Although employees at the Respondent's other Florida locations received raises, Regional Manager Tudor could not recall when those raises were implemented. Whether Smith did request Tudor to grant raises on March 18 is immaterial. There is no probative evidence that Tudor took any action until late April, after organizational activity had begun. No documentation establishing the specific date that the increases for the employees at Port Orange were approved was presented. In short, the Respondent presented no probative evidence establishing any business justification for its action. In the absence of any evidence establishing a business justification for the Respondent's action, I find, as alleged in the complaint, that the justification for the wage increase was to dissuade the Respondent's remaining employees from supporting the Union in violation of Section 8(a)(1) of the Act.

³ The transcript incorrectly spells Burke's name as "Birt." It is hereby corrected.

4. Complaint paragraphs 12 and 16

Employee Anthony Oliva did not work on May 5 or thereafter. In early May, he called Eastern Regional Vice President Richard Burke explaining that the employees were trying to start a union and that a few employees had been fired. Burke advised Oliva that he would look into it and see what he could do. In a subsequent conversation, several days later, Oliva testified that Burke asked him what would it take to end the Union. Oliva told him "if he would just reinstate the employees . . . we would leave it alone." There was no further contact between Oliva and Burke. The General Counsel acknowledges that Oliva was not an employee, but argues that his testimony corroborates that of Kenneth DeMarco who, as an alleged discriminatee, was an employee.

Employee Kenneth DeMarco was discharged on May 2. Following his termination, DeMarco called Burke telling him that he did not understand why he got fired for hitting a tree limb when other employees back trucks into cars and did not get fired and that he believed he was fired for trying to organize. DeMarco sent to Burke a copy of a compact disk recording of the April 17 safety meeting. Thereafter they spoke three or four times. On one occasion, Burke asked DeMarco "what would it take for us to make the union go away," whether the employees would settle for getting their jobs back. DeMarco answered that he could not answer for the other employees.

Burke acknowledged that he spoke with Oliva on more than one occasion, but denied that he mentioned the Union in any conversation, and he acknowledged that DeMarco sent him a letter and recording of the safety meeting which he forwarded to the corporate office in Wisconsin. He admitted that DeMarco "brought up issues" regarding union activity but that the company does not "normally have union activity in Florida," and that he "didn't take it serious[ly]." He denied asking what it would take to make the Union go away.

The complaint, in paragraphs 12 and 16, alleges that the Respondent solicited grievances from employees and impliedly promised to remedy them. Oliva was not an employee. DeMarco testified that Burke asked what it would take to end the union organizational campaign, but he reported no promise made by Burke. He acknowledged that, in a subsequent conversation, Burke informed him that his [DeMarco's] "firing was alright." There was no promise. I shall recommend that the foregoing allegations be dismissed.

C. The 8(a)(3) Allegations

1. Facts

(a) Bobby Cavetti Jr.

Employee Bobby Cavetti Jr. was terminated on April 28. As discussed above, Cavetti was in the group of helpers that Site Manager Smith had accused of engaging in a union meeting when they were talking together after the safety meeting on April 17 as the drivers were pre-tripping their trucks. On April 28, Cavetti was assigned to assist driver Stephen Pratt. There is no question that Pratt was the Company's slowest driver. Drivers are paid by the day; thus, timely completion of the route permits the driver and his assigned helper to leave work sooner.

Testimony reveals that several drivers, including Adrian Del Rio and Grady Wallace, were also concerned about Pratt's safety. Cavetti's un rebutted testimony that Pratt put cotton in his ears underscores this concern.

On April 28, when making a residential pickup, a bag of garbage fell out of the truck driven by Pratt. As helper Cavetti, who rode on the rear of the truck, was bending down to pick up the bag, Pratt began to drive off. Cavetti pressed the buzzer to alert Pratt that there was a problem. Pratt, who had cotton in his ears, did not stop. Nor did he check his rear view mirrors, which would have revealed that Cavetti was not on the truck, but was standing in the street. Cavetti yelled, but Pratt did not stop. The customer at whose residence this occurred permitted Cavetti to use her cell telephone. He called the facility and explained to Route Supervisor Steve Smith what had occurred. Approximately a half hour later, presumably as Pratt was continuing his route, Route Supervisor Steve Smith picked up Cavetti.

Cavetti told Smith that he considered Pratt to be unsafe since he "left me there when I was loading the truck and that I cannot work with the man no more because I felt like he wasn't paying attention to me." He added that he did not "want to get hurt or anything." He asked if he could be moved to a different truck. Route Supervisor Smith took Cavetti back to the facility where he met with Site Manager J. D. Smith. Cavetti repeated to Site Manager Smith that he "didn't want to work with the man [Pratt] because he was unsafe" and asked to be transferred to a different truck. Smith informed Cavetti that he was directing him to go back onto the truck to which he was assigned or he would be terminated. Cavetti refused, and Smith discharged him.

So far as the record shows, Pratt never reported that he had somehow lost his helper. Nor did he assert any problem in servicing his route without a helper. There is no evidence that he was disciplined in any manner for having left his helper. Pratt did not testify, thus I have no evidence regarding the manner in which he reacted when, at the stop he made after leaving Cavetti, he discovered that his helper was missing. So far as the record shows, he did not call in or make any attempt to return to his prior stop in order to retrieve Cavetti.

Site Manager Smith testified that he had no conversations with Cavetti relating to the Union and denied that he was aware that Cavetti supported the Union. He testified that he discharged Cavetti for refusing to ride as a helper on the truck with Stephen Pratt.

Employee Adrian Del Rio testified that he, like employee Cavetti, considered Pratt to be "an unsafe driver." He requested not to be assigned with him. After several months, this request was granted. Del Rio acknowledged that he never specifically refused a direct order to get on the truck with Pratt. Employee Grady Wallace also expressed that he did not want to work with Pratt, that he was "not a very good driver." He testified that, on one specific morning upon which he had been assigned to work with Pratt, he immediately went to Site Manager Smith and stated that he would not go with Pratt. "Before we started the route I told him I was not going with Steve Pratt." He was reassigned to a different truck. He was not disciplined.

Smith acknowledged that, on September 10, 2002, employee Thomas Wiley, in direct contradiction to Route Supervisor Steve Smith's instruction, waited for an hour for a cement truck to move so that he could make a specific pickup before continuing with his route. Wiley received a written warning for insubordination. On February 10, employee Jarad Doyle simply went home after working for one and a half hours. He received a written warning.

(b) Kenneth DeMarco

Employee Kenneth DeMarco has 27 years experience in waste management. He was terminated by the Company on August 27, 2002, when his license was suspended. Site Manager Smith had, upon the suspension of DeMarco's license, reassigned him as a helper, with a concomitant reduction in pay, but the area manager at that time, Douglas Miles, demanded that he be terminated. Thereafter, Site Manager Smith contacted DeMarco, asking him to return. DeMarco did so on February 26, 2003. Smith testified that he was rehired, subject to the Company's 90-day probationary period. DeMarco testified that he understood he had been reinstated. Notwithstanding his belief that he had been reinstated, DeMarco acknowledged that he was not receiving vacation benefits. He did not know whether he was receiving medical benefits.

As already discussed, DeMarco acknowledged to Site Manager Smith on April 22 that it was he who had provided the information that put employees in touch with the Teamsters Union. Beginning on April 28, DeMarco was assigned to the route of employee who was on vacation. Initially he drove his truck. That truck was leaking hydraulic fluid, so much so that DeMarco had to have it filled on a daily basis. On Thursday, May 1, it ran out of fluid while DeMarco was driving his route. He returned to the facility to have the hydraulic fluid filled and then, according to his testimony, finished the route. Smith, in recounting the reasons that he fired DeMarco, stated that he "[r]an [the] truck out of hydraulic oil" and left nine pickups. DeMarco was not responsible for the leak of hydraulic fluid. DeMarco testified that, after having the hydraulic fluid refilled, he completed his route, and I credit his testimony. In view of the fact that DeMarco had the hydraulic fluid refilled at the facility, I am confident that, if had he not left the facility and completed his route, Smith would have spoken with him.

On Friday, May 2, DeMarco was assigned truck 7007, rather than the truck that had been leaking hydraulic fluid. DeMarco called Smith and "told him the truck was in real bad shape." Smith responded that the truck was "the only thing we have to work with," therefore, DeMarco "went on doing my route." The chief problem with the truck was that it did not have consistent air pressure, it "kept losing air." When attempting to empty a dumpster at Trailwoods Apartments, the truck DeMarco was driving lost all air pressure. DeMarco revved the motor to bring the air pressure up. He described what occurred next: "So I was sitting there revving up the motor to bring the air pressure up and it kicked in and the handle . . . went flying up. The can [dumpster] went up. It hit the branch. Broke it off."

DeMarco testified that he called in and reported what had occurred. Route Supervisor Steve Smith told him that he would send the cherry picker driver to come out and pick up the

branch. Route Supervisor Smith testified that he discovered the branch when checking the routes and that he called the cherry picker. Regardless of how management learned of the broken limb, there is no evidence of damage to the customer's property.

DeMarco returned to the facility. Site Manager J. D. Smith arrived shortly after DeMarco. He spoke with DeMarco stating, "You got in an accident during your 90 days." DeMarco responded, "What 90 days?" Smith said, "Go ahead and go."

DeMarco testified that the foregoing damage to the tree limb was the only incident of which he was aware after returning to work on February 26. Site Manager Smith testified that DeMarco had failed to call in to keep the office aware of his progress on his route on April 7, that he damaged a customer's pavement and lawn on April 29, and that he "[r]an [the] truck out of hydraulic oil" and left nine pickups on May 1. All of the foregoing incidents are written on the back of DeMarco's Attendance Controller sheet. Smith initially testified that, although he spoke with DeMarco regarding each of the foregoing events, they were verbal warnings and he "put them all together at the time of his termination." Thereafter Smith changed his testimony and asserted that, on each occasion he contemporaneously recorded the dereliction in DeMarco's presence. DeMarco credibly denied that any the foregoing purported derelictions were brought to his attention or recorded in his presence. He denied failing to call in or damaging a customer's property. Although Route Supervisor Steve Smith purportedly took pictures and made a report of that alleged damage, no documents reflecting this were contained in DeMarco's personnel file or produced pursuant to subpoena. DeMarco acknowledges having to have the defective truck filled with hydraulic fluid but denied failing to make any pickups. I find that the foregoing derelictions, none of which were contemporaneously brought to DeMarco's attention, are fabrications.

Smith admitted that he does not terminate every employee who has performance problems during their 90-day probationary period. Documentary evidence reveals that a number of employees have damaged the property of customers and been cited by law enforcement authorities for accidents without being terminated. On April 8, 2003, employee Alexa Dallaire was cited for sideswiping a Jaguar. She received a verbal warning. On November 16, 2001, employee John Carano received a written warning for failure to report an accident that had caused property damage. On November 21, 2001, employee Leonard Walsh damaged a door at a recycling center. He received a written warning. On January 14, 2003, he was cited for making an illegal left turn. No discipline was administered. On October 23, 2002, employee Johnny Edwards hit the awning overhead at a Shell gasoline station. Edwards received a verbal warning and retraining. On December 11, 2002, employee Ted Wilson damaged the centerboard of an overhang at an apartment complex. He received a written warning for a second preventable accident and retraining.

(c) Adrian Del Rio

Adrian Del Rio, a helper, received an arrest warrant from a court in Broward County, Florida, on May 2. It appears that he had failed to appear pursuant to a summons that he did not

receive. The record does not establish the nature of the legal proceeding. Upon receiving the arrest warrant, Del Rio testified that he called Site Manager Smith and asked what he should do and that Smith told him to “go and take care of it.” Del Rio, who does not own a car, went to Broward County by bus. After making inquiries on Monday and Tuesday, he learned that he needed to speak with one specific judge. He was not able to do so until Thursday, and the matter was resolved. He returned to Port Orange on Friday and, at the end of the day, appeared at the facility where he spoke with Site Manager Smith. Smith informed Del Rio that he was no longer employed, that he had not called in and was a “no call/no show.” Del Rio, although he had not been incarcerated, replied, “How am I supposed to call you if I’m supposed be locked up. I called you Friday night and I asked you what to do and you told me to go.” Smith did not respond directly, but, according to Del Rio, replied that others had also been fired including Shannon Malfitano “for being sick, not coming to work,” Anthony Oliva for walking out, Jared Doyle “for not coming to work,” and DeMarco for “knocking the tree limb down.” Smith then noted that he was “going to get rid of everybody before they get rid of me.”

The General Counsel introduced a payroll action form from Del Rio’s personnel file that bears the term “walk out.” Although initialed by Site Manager Smith, the document is undated.

Smith testified that Del Rio had not contacted him prior to going to Broward County, that he had no idea where he was. He testified that the walk out entry was made by the office clerical employee and that, although his initials appear on the document, that Del Rio, pursuant to company policy, was terminated after two consecutive “no call/no shows.”

(d) William Corrigan

On May 5, employee William (Billy) Corrigan was in Jacksonville, Florida, at least an hour and a half distant from Port Orange. Corrigan testified that he called in explaining that his hand was hurting. On cross-examination he admitted also stating that his mother was ill. Smith recalls that Corrigan only mentioned his mother.

Site Manager Smith explained, at the hearing, that May 5 was the beginning of “spring clean up” in Port Orange. It was a week in which attendance was mandatory, “no personal days, no vacation.” All absences needed to be documented. He acknowledged telling Corrigan, “Well, you know, it’s a mandatory week.” He testified that Corrigan hung up and did not call the following 2 days.

Corrigan testified to two versions of comments by Smith. He initially testified that Smith told him, “This is the number where I can be reached and if you don’t come in today, then don’t come back in.” Thereafter, Corrigan testified that Smith told him that “it was a mandatory two weeks” and that if he did not come in that day he “might as well not come in at all.” Corrigan denied knowing that the week beginning May 5 was “spring clean up.”

Corrigan’s initial testimony that Smith gave him a telephone number but then told him if he did not come in that day to not come in is illogical. From Jacksonville, Corrigan could not report on time, and he was talking to Smith on the telephone.

His later testimony, with reference to the mandatory workweek, omitted the reference to the telephone number. I have not credited Smith’s testimony regarding when he became aware of employee union activity, nor have I credited his various denials regarding conversations with employees relating to the Union. Despite this, I do credit his recollection that his spontaneous response to Corrigan was to state, “Well, you know, it’s a mandatory week,” and that Corrigan hung up. He did not tell Corrigan that he was terminated.

If, as Corrigan testified, he was unaware of the mandatory workweek, logic suggests that he would have questioned Smith about that. The fact that he did not do so suggests that Corrigan was aware that it was a mandatory workweek and that he concluded that Smith’s statement, “Well, you know, it’s a mandatory week,” meant that, if he did not come in that day that he “might as well not come in at all.” Consistent with this conclusion, Corrigan assumed that he was terminated and did not call in or return.

The record contains two documents relating to Corrigan’s termination. An employee reprimand form dated May 8 and signed by Site Manager Smith reflects that Corrigan was terminated for no-call/no-show on May 6 and 7. The second document is an undated payroll action form initialed by Smith that reflects, “walk out-ncns [no call/no show].”

(e) Shannon Malfitano

Employee Shannon Malfitano did not testify. When called as an adverse witness, Site Manager Smith testified that Malfitano called in sick on May 5. He testified that he did not tell Malfitano that he was terminated. An undated payroll action form initialed by Smith reflects “walk out.” Smith testified that Malfitano was terminated for two consecutive days of “no call/no show” after he failed to call in on May 6 or 7.

(f) James Payne

The Company permitted Port Orange employees who wanted additional earnings to work at its Apopka facility, which had routes on Saturdays, when additional employees were needed at that location. The arrangement was quite informal. Employee James Payne explained that, when he wanted to work additional hours he would inform Site Manager Smith. On some occasions, Smith would tell Payne to call Apopka Route Supervisor Charles (Charley) Eduardo to see if he needed anyone. On other occasions, it appeared that Eduardo had already called Smith since he knew that Apopka needed drivers on Saturday. Prior to May, Payne had spoken with Route Supervisor Eduardo informally about the possibility of transferring to Apopka, noting that he and his girlfriend were thinking about moving to Orlando, which is near Apopka. On those occasions, Eduardo had replied, “[Y]eah, anytime.”

Payne, in early May, was upset that a new employee was receiving a higher rate of pay than he was. His girlfriend was nearing completion of school. On May 15, Payne called Eduardo asking him about positions and openings there. Eduardo told him that “he had recycling, rear-loaders, frontload and roll-offs,” that Payne could have his “pick of any position.” Payne asked, “Are you sure you have this for me?” Eduardo said, “Yes.” Upon receiving that response, Payne informed Eduardo

that he was "going to go in and ask for a transfer." Eduardo replied, "Okay. Give me a call back when you come up." Route Supervisor Eduardo admitted that Payne called him and requested a transfer. He places the date of the call as Tuesday, May 13, rather than Thursday, May 15. He recalls that Payne told him that he was moving to Orlando and asked if he had a position open could "he work for me." Eduardo admits that he said yes.

On Thursday, May 15, Payne approached Route Supervisor Steve Smith regarding a transfer. They were joined in the office by Site Supervisor J. D. Smith. Upon hearing Payne's request, Smith responded, "You want a transfer? I'll transfer your butt right out of here." Payne did not understand Smith's response to be a grant of his request, so he repeated "I need to get the transfer" and added "or we will make Friday my last day." Smith recalls that Payne stated, "Either I receive a transfer to Apopka tomorrow or tomorrow is my last day." Smith told Payne to talk to him in the morning.

According to Smith, he called Central Florida Operations Manager James Fountain, who is Eduardo's supervisor, and asked whether he had any positions available in Apopka. According to Smith, Fountain replied, "None at [sic] my knowledge." Smith acknowledged that he did not talk to Route Supervisor Charles Eduardo, explaining that Eduardo did not have the authority to approve transfers.

On the morning of May 16, Payne spoke with Site Manager Smith when he arrived at the facility. Smith told him, "We don't have anything over there for you." Payne asked, "Who did you talk to?" Smith repeated, "We don't have anything over there for you." Payne asked, "Did you talk to Charley [Eduardo]?" Smith replied that he had talked to Eduardo. Payne asked, "And Charley told you there's nothing available for me over there?" Smith answered "Yeah." Payne explained, "I just talked to Charley yesterday before I came in the office and he said he had all kinds of positions open for me." Smith responded, "Well, they don't have nothing for you. So maybe you might want to try back later." Payne said, "Okay. So do I go clock in?" Smith said, "No." Payne asked why not, and Smith replied, "We are going to go ahead and make it without you." Smith recalls that he said, "I accept your resignation," referring to Payne's comment the previous day. Payne denies that Smith made that statement. The foregoing conflict in testimony is immaterial. Payne was informed that he was no longer employed at Port Orange.

I find, contrary to Smith, that he called no one. He admitted that he did not call Eduardo, although I credit Payne that Smith told him that he had called Eduardo. Although Smith testified that he actually called Operations Manager James Fountain on Thursday, Eduardo credibly testified that on Friday, which would have been May 16, Fountain informed him that he had not been called by Smith. Furthermore, and of far more significance, Eduardo did not deny that positions were available.

Payne left the facility at Port Orange and called Eduardo, explaining that Smith claimed to have talked to him. Eduardo replied that no one had talked to him and that Payne could come over at that time. Payne, aware that there was "gridlock traffic" that time of day, asked if he could start on Monday. Eduardo agreed that would be acceptable. Eduardo denied sug-

gesting that Payne report on Friday. According to Eduardo, he informed Payne that he could not start him on Monday "because we got to get permission with your supervisor and contact my boss before you can start work." I do not credit that testimony in view of their next conversation which both agree occurred on Sunday.

On the afternoon of Friday, May 16, Payne returned to the Port Orange facility to pick up his check. When he did so, he was told to turn in his uniforms. Payne explained that he had talked to Eduardo and that Eduardo had told him to keep his uniforms. Site Manager J. D. Smith questioned Payne, saying, "[Y]ou got ahold of Charlie?" Payne replied that he had and was starting Monday morning. Route Supervisor Smith told Payne that he still had to turn in his uniforms. Site Manager J. D. Smith did not deny this conversation.

At some point during the weekend Darin Davis, Payne's cousin who works at Apopka, informed Payne that he had heard that Payne would not be starting at Apopka on Monday.

Upon hearing the foregoing Payne called Eduardo and asked if he was still starting "in the morning." Eduardo replied, "No. Something has come up." Eduardo asked what telephone Payne was using and Payne replied that he was on his home telephone, not a company cell telephone. Eduardo then explained that "Whatever you got going on over there at your job site I cannot bring you on board right now." Payne, noting that Eduardo had told him on Friday that he could come to work, asked why "all of a sudden I can't?" Eduardo replied, "My bosses are coming at me and they are telling me it's not in my best interest to hire you." Payne asked what he meant by that and Eduardo replied, "Whatever it is it's so big in upper management until they are threatening me with my job."

A portion of the foregoing conversation was overheard by Payne's mother. She recalls hearing Eduardo state to Payne, "I was advised that it would be in my best interest not to hire you." The parties stipulated that the telephone bill of Payne's mother reflects that on May 18, at 6:19 p.m., a long distance telephone call lasting 5 minutes was made from her number.

Eduardo acknowledges receiving the telephone call from Payne on Sunday. According to Eduardo, Payne asked him why they would not give him a transfer and that he replied, "James, I don't know nothing about it." I credit the mutually corroborative testimony of Payne and his mother. Payne was told not to report to work on Monday because Eduardo had been informed that it would not be in his "best interest to hire" him.

On Monday, in order to assure that the Company did not treat him as a "no show," Payne went to Apopka. Eduardo informed Payne that he had talked with him "last night" and told him you that he could not put him on and that he could not talk to him at that time. Payne replied that he understood and left. Eduardo denied that Payne reported for work on Monday morning. I do not credit that testimony.

Payne returned to Port Orange and waited until Site Manager Smith returned to the office. Smith greeted him and asked why he was not in Apopka learning his new routes. Payne responded, asking, "What happened? I'm getting black balled." Smith replied, "[T]hat's strange." Payne, without repeating the Sunday telephone conversation with Eduardo, told Smith that Eduardo had told him that he could not "bring me aboard for

some reason.” Smith suggested that Payne call Area Manager Ron Tudor, and wrote down his telephone number. Payne then addressed Smith asking, “You don’t know what’s going on?” Smith replied, “Honestly? I think it’s got something to do with that Kenny DeMarco thing,” which Payne understood to be a reference to the employees’ union involvement.

Payne called the number Smith had given him. He asked the woman who answered the telephone to have Tudor call him, and left his telephone number. Thereafter, he left a message on an answering machine. Tudor never called. Operations Manager James Fountain did not testify.

2. Analysis and concluding findings

Wright Line, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), holds that, to establish a violation under Section 8(a)(3), the General Counsel is required to show by a preponderance of the evidence that animus against protected conduct was a motivating factor in the employer’s conduct. Once this showing has been made, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. To sustain his initial burden, the General Counsel must show (1) that the employee was engaged in protected activity, (2) that the employer was aware of the activity, and (3) that the activity was a substantial or motivating reason for the employer’s action.

All of the alleged discriminatees engaged in union activity. All except Corrigan had been at Payne’s house on April 10. On April 11, Site Manager J. D. Smith cautioned Payne regarding who he was permitting to enter his home. On April 17, Site Manager Smith accused helpers Cavetti, Corrigan, Del Rio, Malfitano, Oliva, and Doyle of engaging in a union meeting on company property. On April 22, DeMarco admitted to Smith that he had provided the information that put employees in touch with the Union. On April 28, Cavetti was fired. On May 2, DeMarco was fired. On May 5, Corrigan, Del Rio, Malfitano, Oliva, and Doyle were absent and Site Manager Smith commented to Payne that he thought Payne would be with “the rest of his boys.” I find that the Respondent was aware that Payne, DeMarco, Cavetti, Corrigan, Del Rio, and Malfitano, as well as Olivia and Doyle who are not alleged as discriminatees, were engaging in union activities.

The statements of Site Manager Smith that threatened and coerced employees in violation of Section 8(a)(1) of the Act establish animus towards employee union activity. Smith’s statement to Oliva that he had been directed “to fire everyone involved” establishes that employee union activity was a motivating factor in the termination of each of the alleged discriminatees. The General Counsel having established that union activity was a motivating factor in the Respondent’s actions, the burden shifts to the Respondent to demonstrate that the same action would have taken place even in the absence of the protected conduct.

The Respondent’s employee manual states that employees who do not call in or show up for work for two consecutive days will be terminated. The General Counsel, in his brief, notes that some documents reflecting such terminations reflect 3 days of no no-call/no-show and argues that this reflects in-

consistent application of the rule. Smith explained that, if the document was not filled out until the morning the third day and the employee had still not called in, that third failure might also be noted. There is no evidence of inconsistent application of the 2 day no-call/no-show rule. Employee Darin Davis, noted in the General Counsel’s brief as having tendered a doctor’s excuse on the second occasion of a single day no-call/no-show, did not have 2 consecutive days of no-call/no-show. Of the alleged discriminatees terminated for violation of the no call/no show rule, only Del Rio is shown to have had contact with the Respondent and that occurred after 4 days of no contact. The Respondent, although denying knowledge of union activity by Corrigan, Del Rio, and Malfitano, contends that all three employees were terminated for violation of this rule.

The General Counsel, noting the entry “walk out” on the payroll change form of each of those three employees, argues that they were terminated because the Respondent believed that they were engaging in protected concerted activity. The foregoing argument has no merit. The General Counsel presented no evidence of a concerted walkout. Notwithstanding the entry on the payroll change form, there is no evidence that the reference to “walk out” related to protected concerted activity rather than the contemporaneous quitting of employment by dissatisfied employees. The Respondent had no reason to believe that either Corrigan or Malfitano were engaged in a concerted walkout since both called in sick, and employee Del Rio testified that he had permission to be absent in order to take care of his legal problems in Broward County. The General Counsel did not question any employee regarding a purported concerted walkout. Former employees Oliva and Doyle, neither of whom appeared at work on May 5, are not alleged as discriminatees. Olivia testified, but the circumstances relating to his separation were not addressed. There is no evidence that the Respondent took any action whatsoever against any of the employees who did not appear at work on May 5 until they had failed to call in or show up for 2 consecutive days in violation of the Respondent’s work rules.

Employee Malfitano did not testify, thus Smith’s testimony that he called in sick on Monday, May 5, but did not call in or show up for work on Tuesday and Wednesday is uncontradicted. Smith testified that he did not tell Malfitano that he was fired on Monday and that he was terminated after he failed to call in or report pursuant to the no-call/no-show rule.

Del Rio admittedly did not call in from Broward County. Smith denied knowing that Del Rio was in Broward County taking care of a legal matter. Del Rio does not contend that Smith told him that he did not have to call in. He claims only that Smith only told him not to ignore the arrest warrant that he had received. Even if I credit Del Rio, Smith had no idea whether he had been incarcerated, and if so for how long, or whether matters were swiftly resolved and Del Rio would be returning on Tuesday. Del Rio was aware of the no-call/no-show rule, having been disciplined for several single day instances of no call/no show. Despite this, he did not call in.

Employee Corrigan did not call in on May 6 or 7. Although Smith reminded Corrigan, when he called in on May 5, that it was a mandatory workweek, I have found that he did not tell Corrigan, who was in Jacksonville, that if he did not come in

that day that he need not come in at all. Corrigan, who purportedly did not know about the mandatory workweek but did not ask Smith what he was referring to regarding a mandatory workweek, concluded that he was terminated, hung up, and thereafter did not call in. The Respondent was not responsible for Corrigan's erroneous conclusion that he had been fired.

I find that the Respondent has rebutted the General Counsel's prima facie case and established that employees Corrigan, Del Rio, and Malfitano would have been discharged even in the absence of their union activity. I shall recommend that the allegations relating to their terminations be dismissed.

The Respondent argues that employee Bobby Cavetti, Jr., was terminated for his refusal to return to his assigned route which was the truck driven by employee Steve Pratt. Uncontradicted testimony by employee Grady Wallace establishes that he, like Cavetti, refused to ride with Pratt and that he not only was not terminated, he was not even disciplined. He was assigned to a different truck. The Respondent, without addressing its treatment of Wallace, argues that Cavetti refused to return to his assigned route. I find the foregoing argument has no weight whatsoever since Pratt continued his route without making any attempt to retrieve Cavetti, never reported that he had left his helper on the street, and was not disciplined for any of the foregoing actions. Pratt was obviously unconcerned that he had lost his helper, thus the continued absence of Cavetti was no different from an operational standpoint than employee Wiley, in direct contradiction to Route Supervisor Steve Smith's instruction, waiting for a cement truck to move or employee Doyle going home without notice after working only one and a half hours. Both of those employees received only written warnings. I do not credit Smith's testimony that he determined to discharge Cavetti for insubordination after he refused to return to the truck of a driver who had cotton in his ears, who had not confirmed where his helper was when leaving the pickup, who had not returned to pick him up, and who had not even reported the incident. I find that the Respondent terminated Cavetti pursuant to Area Manager Tudor's direction to "fire all that were involved." The Respondent has not established that Cavetti would have been terminated in the absence of his union activity.

The Respondent contends that DeMarco was terminated for failing to call in on April 7, damaging a customer's pavement and lawn on April 29, running his truck out of hydraulic fluid and leaving 9 pickups on May 1, and knocking down a tree limb on May 2. I have found that the purported derelictions by DeMarco prior to May 2 were fabricated and, contrary to Smith's revised testimony, were not contemporaneously recorded in DeMarco's presence. On May 1, DeMarco did have the defective truck that he had been assigned filled with hydraulic fluid, but he made all of his pickups. The only flaw in DeMarco's performance was the breaking of a tree limb when a different defective truck to which he had been assigned suddenly regained air pressure. So far as this record shows, and as reflected by the various incidents noted in the factual discussion relating to DeMarco, the Respondent has never terminated an employee for a single accident. Smith, pursuant to the direction to "fire all that were involved," terminated Demarco who had admitted to him that he had provided the information regarding

how to contact a union representative. The Respondent has not established that Demarco would have been terminated in the absence of his union activity.

The Respondent argues that Payne resigned and that it accepted his resignation. Payne admits stating that, if he did not receive a transfer "we will make Friday my last day." He did so only after assuring that there were positions available at Apopka and that Route Supervisor Eduardo was offering him a job. Smith, having been given a resignation from the individual who had been conducting union meetings in his home, did nothing. The following morning, after untruthfully informing Payne that he had called Charley Eduardo and that no positions were available, he accepted Payne's resignation.

As discussed above, Payne disputed Smith's assertion that there were no positions available at Apopka and, after leaving the facility, contacted Eduardo with whom he agreed that he would report on Monday. Unfortunately for his continued employment, Payne conveyed that information to Smith when he picked up his check on Friday afternoon. I need not speculate regarding what telephone calls may have been made between Smith and various managers of the Respondent. It is clear that, as a result of that contact, Payne learned on Sunday that Eduardo was not going to put him to work on Monday because it was not "in his best interest" to do so. Site Manager Smith did not deny speaking with Payne on Monday morning and stating that he thought that the failure of the Respondent to hire Payne at Apopka had "something to do with that Kenny DeMarco thing."

Payne, on Friday morning, requested that he be allowed to clock in. Smith refused. Smith's confirmation that Payne said "tomorrow is my last day" establishes his intention to work on Friday. The Respondent's failure to permit Payne to work on Friday, May 16, violated the Act.

I agree with the General Counsel, on the basis of the evidence presented, that Smith, by failing to approve Payne's transfer, effectively discharged him. The Respondent's brief simply argues that Payne resigned and that the Respondent accepted his resignation. Lest there be any contention that Payne's failure to have continued his employment with the Respondent was unrelated to his union activity, I find, pursuant to the criteria set out in *FES*, 331 NLRB 9, 12 (2000), that the Respondent had positions available and had concrete plans to hire Payne at Apopka as stated by Eduardo to Payne on either May 13 or 15 and that Payne was fully qualified for several positions having worked at the Apopka facility on Saturdays. The failure to hire him was directly attributable to antiunion animus. In their Sunday telephone conversation, Eduardo informed Payne he could not put him to work because of "[w]hatever you got going on over there at your job site." On Monday, Smith confirmed to Payne that his failure to have been hired at Apopka was related to "that Kenny DeMarco thing," in other words, to Payne's involvement with the Union. Whether considered as a discharge, a refusal to transfer, or a refusal to hire, the Respondent's failure to continue Payne's employment was in retaliation for his union activity and violated the Act.

I find, as alleged in the complaint, that employees Cavetti, DeMarco, and Payne were discharged because of their union activities in violation of Section 8(a)(3) of the Act.

CONCLUSIONS OF LAW

1. By creating the impression that employees' union activities were under surveillance, threatening employees with discharge for talking about the Union on company property, interrogating employees regarding their union activities, threatening employees with discharge for engaging in union activities, promising employees a wage increase in order to dissuade them from supporting the Union, and granting employees a wage increase in order to dissuade them from supporting the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By discharging Bobby Cavetti Jr., Kenneth DeMarco, and James Payne because of their union activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and 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 employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, 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 Respondent must also post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, Onyx Waste Services, Port Orange, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting International Brotherhood of Teamsters, Local 385, AFL-CIO, or any other union.

(b) Creating the impression that employees' union activities are under surveillance.

(c) Threatening employees with discharge for talking about union meetings on company property.

(d) Interrogating employees regarding their union activities.

(e) Threatening employees with discharge because of their support for the Union.

(f) Promising employees a wage increase and granting a wage increase in order to dissuade employees from supporting the Union

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the 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 from the date of this Order, offer Bobby Cavetti Jr., Kenneth DeMarco, and James Payne full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Bobby Cavetti Jr., Kenneth DeMarco, and James Payne whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Port Orange, Florida, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 11, 2003.

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

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

Dated, Washington, D.C. January 7, 2004

APPENDIX

NOTICE TO EMPLOYEES

⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting International Brotherhood of Teamsters, Local 385, AFL-CIO, or any other union.

WE WILL NOT create the impression that your union activities are under surveillance.

WE WILL NOT threaten you with discharge for talking about union meetings on company property or for supporting the Union.

WE WILL NOT interrogate you regarding their union activities.

WE WILL NOT promise and grant wage increases to you in order to discourage you from supporting the Union.

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

WE WILL, within 14 days of the Board's Order, offer Bobby Cavetti Jr., Kenneth DeMarco, and James Payne full reinstatement to their former jobs or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Bobby Cavetti Jr., Kenneth DeMarco, and James Payne whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Bobby Cavetti Jr., Kenneth DeMarco, and James Payne, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

ONYX WASTE SERVICES