

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

TARAH ASPHALT PRODUCTS, INC.

and

Case 21-CA-35280

JOSE A. OJEDA, An Individual

Stephanie Cahn, Esq.,
for the General Counsel.
Raul E. Del Rio Jr., Esq., of
San Diego, CA, for the Respondent.

DECISION

Statement of the Case

Gregory Z. Meyerson, Administrative Law Judge. Pursuant to notice, I heard this case in El Centro, California on May 19 and 20, 2003. Jose A. Ojeda, an individual (Ojeda or Charging Party), filed an original and an amended unfair labor practice charge in this case on August 8, 2002,¹ and October 22, 2002, respectively. Based on that charge as amended, the Regional Director for Region 21 of the National Labor Relations Board (Board) issued a complaint on January 31, 2003. The complaint alleges that Tarah Asphalt Products, Inc. (Tarah, Respondent, or Employer)² violated Section 8(a)(1) of the National Labor Relations Act (Act). The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices.

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs.³ Based on the record, my consideration of the brief filed by counsel for the General Counsel, and my observation of the demeanor of the witnesses,⁴ I now make the following findings of fact and conclusions of law.

¹ All dates are in 2002 unless otherwise indicated.

² The Respondent's name appears as amended at the hearing.

³ Counsel for the Respondent did not file a post-hearing brief in this matter.

⁴ The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Manufacturing Company*, 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

Findings of Fact

I. Jurisdiction

5 The complaint alleges, the answer admits, and I find that the Respondent is a California
corporation, with an office and place of business at Calexico, California, where at all times
material herein it has been engaged in the wholesale distribution of asphalt products to
customers located in the States of Arizona, Nevada, Illinois and Texas, and in the Country of
10 Mexico. Further, I find that in conducting these business operations the Respondent annually
sells and transports from its Calexico, California place of business goods valued in excess of
\$50,000 directly to customers located outside the State of California, including the locations
previously mentioned.

15 Accordingly, I conclude that the Respondent is now, and at all times material has been,
an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Alleged Unfair Labor Practices

A. The Dispute

20 The complaint, which was amended at the hearing, alleges that on February 12 and 13,
certain of the Respondent's employees, including truck drivers David Hernandez, Jose A.
Ojeda, Esaul Castro, Richard Arredondo, and Jimmy Camacho, engaged in a strike in support
of a number of complaints, including the failure of the Respondent to pay its employees for time
25 spent waiting to take loads into Mexico. The complaint also alleges that on February 13 the
striking employees presented the Respondent with a petition setting forth their complaints,
including the Respondent's failure to pay for waiting time and failure to reimburse employees for
work-related telephone calls. Further, it is alleged that on February 12, Jorge Covarrubias, the
Respondent's plant manager, threatened employees with discharge for continuing with their
30 strike, and that between February 13 and 18 the Respondent terminated the five truck drivers
previously named. It is the contention of the General Counsel that the Respondent's actions
were taken in order to discourage employees from engaging in protected concerted activity in
violation of Section 8(a)(1) of the Act.

35 The Respondent denies that its actions were in any way intended to discourage its
employees from engaging in protected concerted activity. While the Respondent admits
terminating the five truck drivers on February 18, it takes the position that the terminations were
simply economically based reductions in force. According to the Respondent, these
40 terminations had been decided upon prior to the employees engaging in the strike. The
terminations were allegedly the result of poor economic conditions, and totally unrelated to any
concerted activity on the part of the employees.

B. The Facts

45 For the most part, the events leading up to the terminations of the five employees named
above are not in dispute. Jorge Covarrubias testified that he is the material control manager for
Tarah. According to Covarrubias, Tarah's principal office is located in Mexicali, Mexico, with
two other offices located, respectively, in Calexico and Palm Desert, California. In addition to its
office in Calexico, the Respondent also leases a lot at a separate location in the same city,
50 where its trucks are parked. This lot is referred to as Ortega parking.

Covarrubias testified that Tarah is affiliated with a Mexican company known as Zahori, which manufactures and markets roofing products and is based in Mexicali, Mexico. There is some common ownership between the two companies, and Tarah's principal office is located at the Zahori plant. Typically, Zahori purchases asphalt and related materials from suppliers
5 located in Arizona and California, which materials are then transported by Tarah from the suppliers to Zahori's plant in Mexicali. In this respect, Tarah is acting as a carrier for Zahori. In order to transport these materials, Tarah must maintain a fleet of trucks. Once the material has been transported to its plant, Zahori turns the raw material into finished roofing products. Zahori then sells the roofing products to Tarah, which in turn sells the products under its own name to
10 construction companies located primarily in the United States. Tarah uses its fleet of trucks to transport the roofing products to the purchasers' locations. Covarrubias is also an employee of Zahori.

At the time of the events in question, Tarah leased or rented its trucks from Ryder
15 Transportation Services. Russell Scott McKnight, formerly employed by Ryder as general manager, southern California, testified that Ryder leased or rented to Tarah a fleet of approximately 12 "three-axle tractors."⁵ Employed at that time to drive Tarah's trucks were 12 truck drivers. According to Covarrubias, of that number, one or two were designated as "on-call
20 drivers." These on call drivers were utilized when the regular drivers were not available, and would usually work approximately two days a week. The regular drivers had specific trucks assigned to them, generally for extended periods of time, and were considered full time employees.

Octavio Ochoa, a dispatcher for Tarah located at the Zahori plant, assigned drivers to
25 their routes for the following day. Typically, a driver would drive his truck from the Ortega parking lot in Calexico to the supplier located somewhere in California or Arizona, where the truck would be loaded with the raw materials. The driver would then transport the asphalt back to the Ortega lot. The following morning, at 8 a.m., he would go to the border crossing point, on what witnesses referred to as Highway 7, and wait for a messenger from Zahori to arrive and
30 provided the documents necessary to cross the border into Mexico. Without the necessary transportation documents, which showed the type of material being transported, its exact weight, and that fees had been paid, the driver would not be permitted by Mexican customs to cross the border. After entering Mexico, the driver would deliver his load to either the Zahori plant, or to some other location in Mexicali.

In addition to transporting asphalt and other raw materials, the drivers would also
35 occasionally be assigned to transport roofing products from the Zahori plant to construction companies located primarily in the United States. The drivers frequently referred to this product as "rolls," apparently because it consisted of rolls of roofing tarpaper. It is important to note that the drivers were not paid a salary or hourly wage. They were paid based on the number of
40 miles driven. The longer the trip, the more money they would earn. Also, the mileage rate was greater for transporting asphalt, which was considered a hazardous material, than for roofing products. (G.C. Exh. 3.)

On the morning of February 12, 2002, certain of the Respondent's truck drivers began to
45 arrive at the customary location on Highway 7 to await the appearance of the Zahori messenger with the transit papers that would allow them to enter Mexico. Eventually, seven of the Respondent's drivers had parked their trucks along the side of the road and were waiting for the messenger. These seven drivers were Jose Antonio Ojeda, Alberto Hernandez, Esaul Castro,
50

⁵ These are semi-trucks, containing sleeper berths.

David Madero, Juan Lopez, Jesus Garcia, and Ricardo Arredondo.⁶ As they waited for the messenger to arrive, the drivers began to talk among themselves, initially about personal matters, but ultimately about common problems that they were having with their employment. The most prominent matter discussed was the failure of the Respondent to pay the drivers adequate compensation for waiting time, when they were delayed at the border waiting for the messenger to arrive and provide them with the necessary papers to enter Mexico.⁷ A number of drivers testified that the papers frequently arrived late, some estimated as often as half the time. Another matter discussed was the need for the drivers to use their own cell phones when calling the Respondent on business related matters. The drivers were of the opinion that the Employer should be providing them with cell phones and paying for work related calls.

After discussed these and similar matters for some time, the assembled drivers agreed that if the documents did not arrive by 11 a.m., they would refuse to cross the border and, instead, would return to Ortega parking and park the trucks. David Hernandez, who had a cell phone, agreed to call the Respondent's dispatcher, and informed him of the drivers' decision at about 10:30 a.m. As the papers had still not arrived by 11 a.m., the drivers returned their trucks to the Ortega lot. They were joined there by three additional drivers, Alberto Hernandez, Jimmy Camacho and Armando Soqui. These three decided to join the protest after hearing why the other drivers were complaining. The ten drivers then decided that they wanted to have a meeting with Jorge Covarrubias to discuss a number of work related complaints, including the lack of adequate compensation for waiting time and the absence of cell phones.

At about that time, the Zahori messenger, Francisco "Paco" Romero arrived at Ortega parking with the transportation documents. However, the drivers refused to accept the documents and informed Romero that they wanted to speak with Covarrubias. Romero called the dispatcher and told him of the drivers demand, but the answer from the dispatcher was that Covarrubias was too busy to talk with the drivers, and that they should accept the documents and deliver the loads to Mexicali. The drivers discussed the matter among themselves, and decided that they would drive to the Zahori plant in Mexicali and approach Covarrubias in person with their concerns. The same 10 drivers proceeded to drive in their private vehicles to Mexicali, while the trucks remained at Ortega parking.

The drivers arrived at the Zahori plant unannounced at about noon, and asked for a meeting with Covarrubias. The drivers were directed to the plant conference room where they met with Covarrubias, dispatcher Octavio Ochoa and Javier Vasquez, assistant director of Zahori and a supervisor at Tarah. A number of the drivers testified credibly that Covarrubias seemed visibly angry and upset. He told them that this was not the way to solve their problems, and that they were running out of time in order to cross the border that day.⁸ Esaul Castro

⁶ At the time, the Respondent's 12 drivers were: David Hernandez, Jose Antonio Ojeda, Esaul Castro, Ricardo Arredondo, Jimmy Camacho, David Madero, Alberto Hernandez, Armando Soqui, Juan Lopez, Jesus Garcia, Rodolfo Avila, and Roberto Ruiz. Avila was the only driver that Jorge Covarrubias could identify as "on-call."

⁷ It was the Respondent's policy to pay a driver nothing for waiting up to three hours. However, if a driver waited from three to six hours, he was paid \$30, and after waiting six hours, a driver was paid \$50.

⁸ It was the testimony of a number of witnesses that United States Customs required that asphalt delivery trucks cross the border into Mexico by no later than 4 p.m., in order to be able to return to the United States while customs agents were still available to inspect the trucks. These regulations were intended to ensure that the trucks could not remain in Mexico long enough to tamper with the truck bodies and use them to transport contraband into this country.

testified that he told Covarrubias that, “we had all made a decision, that we were not going to cross the load if he would not listen to us.” According to Castro, the response from Covarrubias was “threatening” as he said that, “if I did not want to cross, that I was free to go home and to leave the truck keys.” Other drivers who were at the meeting supported Castro’s credible
5 testimony. In any event, there is really no dispute as to this matter since Covarrubias admitted that he told Castro, “You are free to leave, and if you choose that, just leave the keys.” However, he denied that he made this statement in a threatening manner. According to the drivers, Covarrubias continued to tell them that they needed to get the trucks and cross the border with the loads before the 4 p.m. deadline. He would not let the drivers explain their
10 concerns over working conditions, and he hastily left the meeting, which only lasted about 10 minutes.

Once they had returned to Ortega parking, the drivers continued to discuss their work related problems and Covarrubias’ refusal to listen to their complaints. They decided that they
15 would not cross the trucks into Mexico until Covarrubias genuinely listened to their complaints. The drivers asked the messenger from Zahori, who was still at Ortega parking, to inform Covarrubias of their decision, which he did by cell phone. However, Covarrubias still refused to meet with them. The drivers remained at Ortega parking refusing to deliver their loads to Mexico, and Covarrubias just as adamantly refused to meet with them. Finally, as it
20 approached 4 p.m., the drivers heard Covarrubias tell the messenger over his cell phone that he would meet with them the following day at 7 a.m. at the Ortega parking lot. By this time the drivers decided that it was too late in the day to cross the border, and that they should prepare for their meeting with Covarrubias. To this end, David Hernandez agreed to write down all their complaints and to prepare a “petition” that they could present to Covarrubias the following
25 morning. The drivers mentioned greater compensation for their trips, company provided cell phones, better communication with the dispatcher, compensation for time waiting to receive transportation documents, and medical insurance, among other matters. Finally, the drivers agreed to meet the following morning at a local Denny’s restaurant to view the petition before it was presented to Covarrubias.

30 The following morning, February 13, at about 6 a.m., the same ten drivers met at Denny’s, where David Hernandez gave each man a copy of the petition, which he had prepared on his home computer. The drivers reviewed the petition, which indicated it was from the “Tarah Truck Drivers,” and they were in agreement with its points. In general, the complaints
35 covered in the petition were the compensation paid for trips, poor communication with the dispatcher, and late delivery of the transportation documents. (See G.C. Exh. 4.⁹) Hernandez gave the petition to Jose Antonio Ojeda for delivery to Covarrubias.

40 Approximately one hour later, the drivers met with Covarrubias, Ochoa, and Vasquez at Ortega parking. Ojeda presented the petition to Covarrubias, who accepted the document and began reviewing it point by point with the drivers. As Covarrubias went through the document, some of the drivers spoke up to discuss various points as well as related matters. Regarding financial issues, such as greater compensation, Covarrubias indicated that he could not
45 authorize the expenditure of funds and would need to discuss these matters with his superiors. However, on the matter of cell phones, the cost had recently been lowered and he felt that the Respondent might be able to provide the drivers with phones for business related calls. He also

50 ⁹ The petition is in evidence as a Spanish language document. However, the interpreter translated the document from Spanish into English on the record. Counsel for the General Counsel and counsel for the Respondent, who are both fluent in the Spanish language, had no objection to the translation.

felt it would be possible to establish better communication between the dispatcher and the drivers. Further, while the Respondent was not in a position to pay for medical insurance, it might be able to establish a group policy, which would allow the drivers to purchase their own insurance at a reduced rate. The drivers testified that in general this meeting went well, with
5 Covarrubias appearing to be less hostile than he had the day before. The meeting ended with Covarrubias indicating that they would get together the following Monday for further discussion on the drivers' complaints.

Following their meeting with Covarrubias, the drivers all made their deliveries to
10 Mexicali. David Hernandez called the dispatcher after his delivery to determine where his next trip was to be. Ochoa told him there was nothing else available that day, and the following day he was told the same thing. Jose Antonio Ojeda's experience was similar, with Ochoa informing him on the two days following the meeting that there was no work available. The same thing
15 happened to Esaul Castro and Richardo Arredondo, as Ochoa indicated to both men that there was no work available for the next two days. The drivers testified that while it was not unusual for there to be no work available on any given day, it was highly unusual for there to be no trips available for two consecutive days. The drivers contend that when asphalt deliveries were not available, the dispatcher would usually find a delivery of roofing products to give to an other
20 wise idle driver. As the drivers were only paid when making a trip, they would earn no income when not driving.

Also unusual was the request by Covarrubias that Hernandez, Ojeda, Castro, and
Arredondo turn in the keys to the trucks they had been driving. The dispatcher had spoken to
25 these four drivers and told them to come into the office in Mexicali on Friday in order to pick up their checks. Apparently, Friday was payday. When each driver arrived, he was told by Ochoa to speak with Covarrubias. Covarrubias in turn asked each driver for the keys to his assigned truck. As the keys to their assigned trucks normally remained with the drivers, they sensed that something was wrong. However, Covarrubias did not acknowledge to the drivers that there was
30 any problem. Instead, each driver was instructed to report to the Respondent's office in Calexico at a specific time on Monday.

The evidence is undisputed that on or about Monday, February 18, David Hernandez, Jose Antonio Ojeda, Esaul Castro, Ricardo Arredondo, and Jimmy Camacho each met
35 separately with Covarrubias, Ochoa, and Vasquez at the Respondent's office in Calexico. Further, it is undisputed that each driver was informed that he was being terminated because of an economic slowdown. Covarrubias presented each driver with a letter setting forth the Respondent's stated reason for his termination. (G.C. Exh. 5, & 7-10.) At that time, or a
subsequent date, the drivers were paid any monies still owed them.

It is the Respondent's position that the termination of the five drivers named above was
40 necessitated by a reduction in sales and a projection that sales would remain weak for a period of time. The Respondent's witnesses testified that sales for December 2001, January 2002, and February 2002 were significantly lower than average, and the indication in February 2002 was that this reduction in sales would continue for a period of time. According to Rene Ramirez,
45 Zahori plant manager, the sales of roofing products typically fluctuated throughout any calendar year. Financial records and other documents were offered in support of the Respondent's position. (Res. Exh. 7, 8, 11 & 12.) Jorge Covarrubias and Rene Ramirez testified about a meeting, which allegedly occurred on February 4, to discuss the economic problems both Tarah
and Zahori were having, and to arrive at a plan to reduce costs.

50

It is significant to note that according to Covarrubias, only he and Ramirez participated in this meeting. However, according to Ramirez, there were other managers at the meeting, including Ricardo Cabanillas, Zahori production superintendent, and possibly Sergio Gonzalez, Zahori quality control supervisor. After allegedly reviewing sales forecast documents, the Respondent's managers decided on a number of steps designed to save the two companies money. According to Covarrubias and Ramirez, two of those steps involved Tarah's operation. Specifically, an attempt was to be made with Ryder Transportation Services to "return" four of Tarah's fleet of leased trucks. Further, it was allegedly decided to eliminate five of Tarah's truck drivers. Both Covarrubias and Ramirez testified that the decision was left up to Covarrubias to determine which of the Respondent's drivers were to be terminated.

According to Covarrubias, he decided by the next morning which drivers to terminate. Admitted into evidence and dated February 6, 2002 was a document purported to be a memorandum from Covarrubias to Ramirez memorializing the action the managers had decided to take two days earlier to reduce costs for the two companies. Additionally, the memorandum contained the names of the five drivers Covarrubias alleges he had decided to terminate, the decision having just been made by him. The document closes with Covarrubias asking Ramirez for his comments. (Res. Exh. 9.¹⁰) Once again, it is significant to note that Ramirez testified that he could not recall the date on which he first saw this memorandum. Also, he indicated that he never responded to the memo, although it clearly asked for his comments.

As noted earlier, Russell McKnight, formerly employed by Ryder, testified about the Respondent's leased truck fleet. According to McKnight, Covarrubias first spoke with him in January 2002 concerning the possibility of returning trucks to Ryder because of the decline in business. Allegedly, Tarah wanted to return four vehicles to Ryder, and ultimately Ryder agreed to take back three trucks. According to McKnight, this decision was communicated to Tarah, "sometime probably the early part of February." The vehicles were actually returned to Ryder about February 16. (Res. Exh. 5.) This was the first time Tarah had returned trucks to Ryder. As McKnight left Ryder's employ about two months later, he was not aware of when Tarah may have sought to resume the lease of the three returned trucks.

Jorge Covarrubias testified that in deciding which drivers to terminate, he did not rely on seniority with the Respondent, nor did he study the personnel records for the 12 drivers. Rather, he made what were largely subjective determinations based on his perceptions of the drivers' performances over the period of their employment with the Respondent. I would note that in general I was not impressed with Covarrubias' recitation of the reasons why he selected the five specific drivers. On cross-examination he seemed to be grasping for reasons to offer for his decisions, frequently shifting reasons as his explanations were challenged by counsel for the General Counsel. It appeared to me that he was literally making up new reasons as he went along.

According to Covarrubias, he selected Jimmy Camacho for discharge because he had seen him once "cut a curb" with his truck, which resulted in tire damage, and because Camacho had damaged a fence at the Zahori plant. Covarrubias allegedly felt that Camacho needed more experience in order to become a better driver. He admitted that he had not issued any written discipline to Camacho because of his alleged poor driving and the damage that had resulted from it. Also, the Respondent's willingness to rehire Camacho, the only one of the five

¹⁰ This is a Spanish language document, which the interpreter translated into English on the record. As there was no objection to the translation, the undersigned admitted the document into evidence.

drivers to ultimately be rehired, is rather inconsistent with Covarrubias' stated position that Camacho needed more driving experience. He was rehired on May 23, 2002. Certainly a three months absence could not have provided Camacho with enough "experience" to transform him from an allegedly poor driver, to one acceptable to the Respondent.

5

In the case of Jose Antonio Ojeda, Covarrubias testified on cross-examination that he was selected for termination because he was argumentative. As an example, Covarrubias indicated that Ojeda had once declined a trip he was assigned. He was issued a written reprimand and was denied two subsequent trips because of this incident. (Res. Exh. 2.¹¹) However, this occurred in November 2001, and apparently there were no other instances of written reprimands. Yet, despite the paucity of reprimands, Covarrubias decided to discharge Ojeda, who was one of the Respondents most senior drivers, having been employed since October 1997.

10

15

Regarding David Hernandez, he had first been employed by Tarah for two months in 1996, having voluntarily quit his employment. He returned to work for the Respondent in March 2000. According to Covarrubias, he selected Hernandez for discharge because he was always "complaining" about "everything." When asked by counsel for the General Counsel to be specific, Covarrubias mentioned Hernandez complaining about "pay, how we select or assign the trips," and problems with the performance of the trucks. It was apparent to me that, in other words, Covarrubias was referring to Hernandez complaining about working conditions. However, when pressed by counsel for the General Counsel, Covarrubias changed his story, testifying that Hernandez had refused trips. Still, he had to admit that he had never issued a written reprimand to Hernandez because of his alleged refusal to take trips. For the most part, Covarrubias seemed to be saying that he discharged Hernandez, because Hernandez was not "happy" working for Tarah. In my view, selecting a two year employee for discharge because he allegedly was unhappy is rather suspect, especially when the witness has testified that the employee complained about what are essentially working conditions.

20

25

30

Covarrubias testified that Esaul Castro was selected for termination because he "always put personal things" before his job. When asked for examples, Covarrubias mentioned Castro's request to take two weeks of leave for the birth of his child, and another request to take leave in order to assist his church. Castro was not issued a written reprimand for taking the leave, although Covarrubias insisted that permission to take the leave had never been granted. After being pressed by counsel for the General Counsel, Covarrubias changed his story and alleged that Castro's discharge was based on his insubordination. Still, the only insubordination he could recall was Castro's taking of leave without permission, for which no discipline was issued. Finally, Covarrubias seemed to be suggesting that one reason why Castro was selected for discharge, as well as the other four employees, was because of a lack of "enthusiasm."

35

40

According to Covarrubias, he chose Ricardo Arredondo for termination in part because Arredondo was one of the "newest" drivers. Of course, this was contrary to Covarrubias' earlier contention that seniority, or presumably a lack thereof, was not a factor he used in deciding who to terminate. Further, he testified that he fired Arredondo, because Arredondo would "always complain and complain" and was "not happy" with Tarah. When pressed on cross-examination to give examples of what matters Arredondo complained about, Covarrubias could

45

50

¹¹ The interpreter translated this Spanish language document into English on the record. Neither counsel objected to the translation.

only offer the testimony that, "... he was not satisfied with how much we pay, he was not satisfied with some other things." Again, this certainly sounds to me as if Covarrubias selected a truck driver for termination because that driver complained about matters that constituted working conditions.

5

At this point, it seems appropriate for the undersigned to comment on Covarrubias' credibility. In general, I found him not to be a credible witness. His testimony was frequently contradictory and inconsistent, as is demonstrated by his explanation of how he decided which five truck drivers to discharge. He seemed willing to exaggerate and embellish his testimony when it was offered in support of the Respondent's position. However, on cross-examination he was frequently unable to support that testimony. As I will point out later in this decision, I found his chronology of the events leading up to the terminations of the five employees to be inherently implausible. His demeanor, especially on cross-examination, gave me the impression of a witness with something to hide. In my view, his testimony did not have the "ring of authenticity" to it, and I believe him to be incredible.

15

It is the Respondent's position and the testimony of Covarrubias that business improved shortly after the drivers were terminated, requiring that additional drivers be hired. According to Covarrubias, in March or April the three trucks surrendered to Ryder were returned to Tarah. On April 27 and 28, and then again on August 5, the Respondent placed advertisements in "La Voz de la frontera" (The Voice of the frontier), a local Spanish language newspaper, seeking to hire truck drivers who were licensed in the United States to haul hazardous materials. (Jt. Exh. 1a & 1b, and G.C. Exh. 6.¹²) Covarrubias testified that on April 2 the Respondent hired truck driver Adrian Otero, and that some time after February, but he could not recall how much later, the Respondent hired drivers Ramon Gutierrez and Huberto Ramires. Also, as mentioned above, the Respondent rehired driver Jimmy Camacho on May 23. I would note that Covarrubias reluctantly gave this testimony on cross-examination. It was obvious to me that Covarrubias was not pleased with having to give this information, and it had to be "extracted" from him under pointed examination by counsel for the General Counsel.

20

25

30

The Respondent contends that once business improved, efforts were made to rehire the five discharged drivers. However, in my opinion, any such efforts were minimal, at best. Covarrubias testified that in late March he instructed Octavio Ochoa to contact the five drivers and determine whether they were interested in returning to work at Tarah. However, Covarrubias acknowledged that the Respondent did not send letters to the drivers at their last known addresses offering them reemployment. Instead, Ochoa allegedly attempted to make contact with the drivers by telephone. Ochoa testified that he tried calling each driver on more than one occasion, but he "didn't find any." According to Ochoa, the drivers "didn't answer the phones." He admitted that while he did talk with Antonio Ojeda's wife and asked her to have Ojeda call him, he did not indicate why he wanted to speak with Ojeda. His call was never returned. Apparently, the only driver he ultimately spoke to about returning to work for Tarah was Esaul Castro. Ochoa testified that Castro was interested in returning to Tarah, but Castro wanted to know "under what conditions" he would be returning. This was apparently a reference to working conditions, and Ochoa told Castro that he would have to ask Covarrubias and would call Ochoa back later. Ochoa actually spoke about Castro with Javier Vasquez, who told Ochoa that he (Vasquez) "would see what was going to happen." In any event, Ochoa did not reestablish contact with Castro.

35

40

45

50

¹² The interpreter translated these Spanish language advertisements into English on the record. There was no objection to the translation.

As was noted above, Jimmy Camacho returned to work at Tarah on May 23, allegedly after gaining more driving experience. However, as mentioned, only three months had passed since his termination. When counsel for the General Counsel questioned Covarrubias about the circumstances surrounding Camacho's termination and return to Tarah, Covarrubias became very defensive and indicated that it had all occurred a long time ago, and he did not remember what was said. However, in an effort to "refresh" his memory, counsel showed Covarrubias the affidavit that he had given to the Board during the investigation of the unfair labor practice charges. Ultimately, Covarrubias acknowledged that on February 18 when Covarrubias gave Camacho the termination letter, Camacho had said that he had been "happy working for [Tarah,]" and that he was "sorry" for participating in the "February 12 incident." However, Covarrubias continued to insist that the strike had nothing to do with the terminations, and that he had so informed Camacho.¹³

One final matter that should be noted before the facts section of this decision concludes is the status of four drivers at the time of the work stoppage on February 12. Those drivers are Rodolfo Avila, Roberto Ruiz, David Modero and Alberto Hernandez. There is no dispute that of the 12 truck drivers employed by the Respondent during the events in question, the only drivers who did not participate in the strike were Avila, who was an "on-call" driver, and Ruiz. While Modero and Alberto Hernandez participated in the strike, there was apparently some doubt among the Respondent's managers as to whether their participation was voluntary. Octavio Ochoa testified that during the work stoppage, Alberto Hernandez had told him by cell-phone that he wanted to deliver his load to Mexico, but that he could not get his truck out of the Ortega lot, because one of the drivers had the exit blocked with that driver's truck. Further, Ochoa testified that in a cell-phone conversation with the Zahori messenger, Francisco Cruz Romero, he had been told that only one driver had accepted the transit papers, that driver being David Modero. However, according to Ochoa, Romero informed him that Modero had returned the papers, because Modero did not want to have "problems" with the other drivers. As is already evident, the subsequent terminations did not include Avila, Ruiz, Modero, or Alberto Hernandez.

C. Analysis and Conclusions

It is undisputed that on February 12, the Respondent's truck drivers were engaged in a work stoppage related to their terms and conditions of employment. Ten of the Respondent's 12 drivers were refusing to work until they could discuss their concerns with the Respondent's principal manager. Their concerns included issues related to pay and other work related benefits. These striking employees were obviously engaged in protected concerted activity in its most basic form. The Board has traditionally held that, "the spontaneous banding together of employees in the form of a work stoppage as a manifestation of their disagreement with their employer's conduct is clearly protected activity." *Vic Tanny International, Inc.*, 232 NLRB 353 (1977) enfd. 662 F.2d 237 (6th Cir. 1980), citing *NLRB v. Washington Aluminum Company, Inc.*, 370 U.S. 9 (1962). Further, it is beyond question that the truck drivers were acting in "concert," as they collectively took action in refusing to drive their loads into Mexico and in preparing the petition of complaints for Covarrubias' review. *Meyers Industries*, 268 NLRB 493 (1984). This protected concerted activity continued on the following day, February 13, when the drivers presented their petition to Covarrubias.

¹³ Inadvertently included in the exhibit file in this case is the affidavit of Jorge Covarrubias, which had been marked for identification purposes as Respondent's Exhibit 10. While the document was marked and referred to by both attorneys, it was never offered as an exhibit nor admitted into evidence. As this document is not in evidence, the undersigned has in no way considered its contents in rendering a decision in this case.

Section 7 of the Act gives employees the right to engage in “concerted activities for the purpose of collective bargaining or other mutual aid or protection.” The right to strike, even without notice, is such a concerted activity. *Americorp*. 337 NLRB No. 99 (2002); *Bethany Medical Center*, 328 NLRB 1094 (1999), citing *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963). It is a long established principle that an employer infringes on the Section 7 rights of its employees and violates Section 8(a)(1) of the Act when it discharges its employees for engaging in protected concerted activity.

In *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989, the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of 8(a)(1) turning on employer motivation. First, the General Counsel must make a *prima facie* showing sufficient to support the inference that protected conduct was a “motivating factor” in the employer’s decision. This showing must be by a preponderance of the evidence. Then, upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The Board’s *Wright Line* test was approved by the United States Supreme Court in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983).

In the matter before me, I conclude that the General Counsel has made a *prima facie* showing that the five discharged employees’ protected concerted activity was a motivating factor in the Respondent’s decision to terminate them. In *Tracker Marine, L.L.C.*, 337 NLRB No. 94 (2002), the Board affirmed the administrative law judge who evaluated the question of the employer’s motivation under the framework established in *Wright Line*. Under that framework, the General Counsel must establish four elements by a preponderance of the evidence. First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that the respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a link, or nexus, between the employee’s protected activity and the adverse employment action. In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. See also *Kysor Industrial Corp.*, 309 NLRB 237 (1992). To rebut such a presumption, the respondent bears the burden of showing that the same action would have taken place even in the absence of the protected conduct. See also *Mano Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996); and *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991).

As I have indicated above, there is no doubt that in striking and petitioning their employer, David Hernandez, Jose Antonio Ojeda, Esaul Castro, Ricardo Arredondo and Jimmy Camacho were engaged in protected concerted activity. Of course, the facts establish that the Respondent was well aware of this activity. Throughout the course of the day on February 12, the Respondent was preoccupied with attempting to convince the drivers to abandon their work stoppage and make their scheduled deliveries in Mexico. Jorge Covarrubias reluctantly met with the ten striking drivers in Mexicali on February 12, and again the following day, February 13, in Calexico, when the drivers’ complaint petition was presented to him. Knowledge of the employees’ concerted activities cannot possibly be in dispute.

There is also no doubt that the five employees in question each sustained an adverse employment action. In the case of four of the five, Hernandez, Ojeda, Castro, and Arredondo, they received no further trip assignments, following the end of the strike on February 13. Without trips, they earned no income. Of course, on February 18, those four drivers, plus Camacho, were orally informed that they were being terminated and they were issued letters to that effect.

Regarding the question of whether there exists a link or nexus between the drivers' protected activity and their terminations by the Respondent, I believe that the evidence strongly establishes such a connection. To begin with, there is significant evidence of animus directed toward the drivers' protected activity by Jorge Covarrubias. The drivers credibly testified that when they first met with Covarrubias on February 12, he was visibly upset, appearing angry and hostile. He did not want to meet with the drivers to discuss their complaints, telling them that this was not the way to solve their problems. Covarrubias repeatedly informed the drivers that they must return to the trucks and drive them to Mexicali in order to make their scheduled deliveries. When it became apparent that Covarrubias was not going to discuss the drivers' grievances, Esaul Castro spoke up and said that the drivers had all agreed among themselves that unless their complaints were addressed, they would not drive the loads into Mexico. It is undisputed that at that point, Covarrubias responded by telling Castro that if he did not want to cross the load into Mexico that he was "free to go home and to leave the truck keys." Castro and other drivers testified that the remark was made in a threatening way. While Covarrubias does not deny making the statement, he denies that it was intended to threaten anyone. However, after again telling the drivers that they must bring the trucks over the border and make their deliveries, Covarrubias abruptly ended the meeting.

I am highly dubious of Covarrubias' contention that he did not intend to threaten anyone by his statement. The statement was made directly to Castro, but in front of all 10 drivers who were engaged in the work stoppage. Covarrubias was visibly upset, did not want to meet with the drivers, and repeatedly told them to cross the loads. Any reasonable person would have assumed that Covarrubias was issuing a warning to all the drivers that unless they abandoned their strike and returned to work, they would be fired. After all, what other assumption could be drawn from Covarrubias' comment. The Board has held that such a statement is "tantamount to a threat of discharge," and could reasonably tend to coerce employees in the exercise of their Section 7 rights. *Iowa Packing Company* 338 NLRB No. 176 (April 30, 2003).

Accordingly, I conclude that the statement made by Covarrubias on February 12 constitutes a violation of Section 8(a)(1) of the Act, as alleged in paragraph 5(b) of the complaint.¹⁴ As the statement was made by the Respondent's material control manager, an admitted supervisor and the drivers' principal superior, it also establishes animus on the part of the Respondent toward the striking drivers' protected activity.

In addition to the direct evidence of the Respondent's animus exhibited by Covarrubias, the timing of the terminations is highly suspect, and constitutes further evidence of animus. The Board has held that "timing" may be "persuasive evidence" establishing unlawful motivation. *Limestone Apparel Corp.* 255 NLRB 722, 736 (1981). Also see *Laidlaw Transit, Inc.*, 315 NLRB 79, 84 (1994). Immediately after the end of the strike on February 13, the Respondent denied Hernandez, Ojeda, Castro, and Arredondo any work. This was followed on February 18, with the formal discharge of the four named drivers, plus Camacho. Certainly, the discharges, coming literally within hours or days of their protected concerted activity, strongly support an inference of animus by the Respondent toward the drivers' protected activity.

The General Counsel, having met the burden of establishing that the Respondent's actions were motivated, at least in part, by animus toward the drivers' protected activity, the burden now shifts to the Respondent to show that it would have taken the same action absent the protected conduct. *Senior Citizens Coordinating Council of Riverbay Community*, 330

¹⁴ The complaint was amended at the hearing without objection to reflect certain additions, deletions and renumbering made by counsel for the General Counsel.

NLRB No.154 (2000); *Regal Recycling, Inc.*, 329 NLRB 355 (1999). The Respondent must persuade by a preponderance of the evidence. *Peter Vitalie Company, Inc.*, 310 NLRB 865, 871 (1993). The Respondent has failed to meet this burden.

5 It is the Respondent's position that the five drivers were terminated because of an economic reduction in force. Allegedly, the reduction in force was necessitated by a decline in sales, and a prediction that this decline would continue for some time. Jorge Covarrubias and Rene Ramirez testified at length about the sales decline and certain measures allegedly taken to reduce costs, including the lay-off of the five drivers. As I have already noted, I found
10 Covarrubias to be an incredible witness. While I cannot say that I found Ramirez to be incredible, his value as a witness must be questioned. When testifying about Tarah and Zahori's economic problems, Ramirez was frequently asked leading questions by his counsel, often over the objection of counsel for the General Counsel. Also, he was not able to recall certain significant dates, such as when he first saw the memorandum from Covarrubias
15 allegedly naming the five drivers selected for termination. Therefore, I am of the view that Ramirez' reliability as a witness for the Respondent is limited.

 It is difficult to evaluate the significance of the Respondent's decline in business during the winter of 2002. While the records in evidence do demonstrate a reduction in sales, it was
20 the testimony of Ramirez that sales tended to fluctuate during the course of any calendar year. The credible testimony of Russell McKnight established that Covarrubias discussed returning trucks to Ryder as early as January 2002. However, according to the documents in evidence (Res. Exh. 5.), the three trucks ultimately returned to Ryder were not transferred back until
25 February 16, which was 10 days after the decision was allegedly made selecting the drivers for termination. (Res. Exh. 9.) Also, while the sales forecast was allegedly poor, as early as March and April sales actually increased (Res. Exh. 11.), and the Respondent sought to hire additional drivers, despite discharging the five alleged discriminatees only two months earlier. Also, the undersigned is puzzled by the Respondent's contention that reducing the number of drivers by five would save money, since the drivers were not on salary and they only earned income when
30 actually driving. The Respondent could simply have reduced the number of trips assigned to the drivers, without terminating any of them, which would seem to satisfy the same goal of saving money. All the terminations did was to remove from the Respondent's facilities the presence of five drivers who had engaged in a strike. This, I suspect, is precisely what the Respondent wanted to do.

35 While I have some doubt about the significance of the Respondent's sales decline in the winter of 2002, for purposes of this decision, I will accept the Respondent's contention that there was at least some decline in sales, and a legitimate need by the Respondent to reduce costs. However, I am by no means convinced that the five drivers who were terminated were selected
40 because of legitimate business considerations. To begin with, I do not believe that the memorandum from Covarrubias to Ramirez dated February 6 (Res. Exh. 9.) is what it purports to be. Ramirez was rather "hazy" about dates. He was lead by Respondent's counsel to testify that his meeting with Covarrubias to discuss reducing costs occurred on February 4, however, on cross-examination he placed the date as February 6, and then on re-direct examination he
45 was lead back to February 4. Also, he identified two participants for this meeting that Covarrubias could not recall being in attendance. A rather surprising discrepancy for a meeting with the importance this meeting allegedly held. In any event, Ramirez also testified that he could not recall when he first saw the memorandum dated February 6, which Covarrubias had allegedly prepared memorializing the meeting. Further, he did not explain why he did not
50 respond to the memo, which ended with a request for his comments. (Res. Exh. 9.) This, of course, was the memo where Covarrubias allegedly first indicated the names of the five drivers he had selected for termination.

I am of the view that this memo was either fabricated in its entirety, or, at a minimum, the names of the five drivers were added “after the fact” in an effort to establish that Covarrubias made the selections before the drivers engaged in protected activity. Having found Covarrubias to be incredible, I do not accept his testimony regarding the date he prepared the memo, nor do I accept the date he allegedly selected the five drivers for termination. The fact that Ramirez testified that he could not recall when he first saw the purported memo, and did not explain his failure to respond to it, further convinces me that the memo is either a total fabrication, or the names of the drivers were added after their terminations in order to furnish support for the Respondent’s economic defense. It simply makes no sense that Covarrubias decided on February 5 or 6 which drivers to terminate, but waited until February 18 to inform them of their terminations. There would have been no logical reason to wait almost two weeks to break the news to the drivers. It appears much more logical that the event which precipitated the selection of the drivers for termination was not some arbitrary alleged meeting to discuss reduction of costs but, rather, the drivers’ protected activity. That protected activity, which occurred on February 12 and 13, resulted in the immediate failure of the Respondent to assign any work to four of the drivers, and the formal termination of all five drivers on February 18, only 5 days later.

The reasons given by Covarrubias for having selected the specific five drivers who were terminated are, in my view, totally specious. They are almost entirely subjective, requiring that the benefit of the doubt be given to Covarrubias. However, I have found him to be incredible, and not deserving of the benefit of the doubt. Further, the circumstances surrounding the selection process do not support Covarrubias. As was noted above, by his own admission, Covarrubias’ displeasure with certain of the discriminatees was in part based on their “complaints” about what were clearly working conditions. Also, while Covarrubias testified about various alleged problems with the performance of the drivers’ work, there was only one instance where a written disciplinary warning was issued to one of the drivers. (Res. Exh. 2.) Certainly, no evidence was offered as would establish any objective basis for concluding that the discriminatees were not as productive as the other drivers.

As noted earlier, there were 12 drivers employed at the time of the events in question. Of that number, two, Rodolfo Avila and Roberto Ruiz, did not participate in the strike or the presentation of the petition. Neither driver was selected for lay-off. This is even more suspect when it is considered that Avila was at the time the “on-call” driver, which category of driver Covarrubias had testified would normally be the first to be laid off. However, Covarrubias never explained why Avila was not among those drivers terminated. Two other drivers not selected for discharge were David Modero and Alberto Hernandez. As was explained in detail above, the Respondent was of the belief that both men had been reluctant participants in the strike, becoming involved involuntarily only in an effort to avoid problems with the other drivers. In my view, it seems more likely than not that what spared these four drivers from termination was simply Covarrubias’ perception that they had either not been strike participants or that they had not participated willingly.

In a further effort to bolster its economic defense, the Respondent contends that once the economic situation improved and it again needed drivers, it made efforts to contact the five discharged drivers and determine whether they were interested in returning to Tarah’s employ. Ochoa’s attempts to contact the discriminatees has been set forth in detail above. I would characterize those efforts as “half hearted,” at best. Ochoa admitted that letters were never sent to the drivers’ last known addresses informing them of the Respondent’s interest in rehiring them. Had the Respondent really been interested in returning the drivers to their former jobs, sending letters would have clearly been the most practical way to proceed. Even when calling, Ochoas’ efforts were very limited as he told any relative who answered the phone to have the

driver call him, but did not indicate the purpose of the call. The only discharged driver who he spoke to directly, Esaul Castro, was willing to return, but wanted to know “under what conditions.” This driver, who had apparently brought up the subject of working conditions, did not even get a return call from Ochoa. Frankly, it is hard for the undersigned to believe that the Respondent even offered these efforts as an alleged “good faith” attempt to reemploy the five discharged drivers.

The only one of the five drivers ultimately rehired was Jimmy Camacho, who returned on May 23. While the circumstances surrounding his return to Tarah are uncertain, it is fairly obvious that Covarrubias considered Camacho as having “repented” from his past behavior in supporting the strike. Covarrubias reluctantly testified that on February 18, when Covarrubias gave Camacho his letter of termination, Camacho told Covarrubias that he was “sorry” for having participated in the strike. I strongly suspect that the reason why Camacho, who was allegedly selected for termination because of a lack of experience, was the only one of the five discriminatees to be rehired was because he was the only one to have apologized for participating in the strike.

The Respondent’s economic defense further suffers by reason of its actions following the terminations. As has been mentioned, the Respondent placed advertisements in a local Spanish language newspaper on several weekends in April and in August seeking drivers. Further, it did in fact hire three replacement drivers. Covarrubias testified that Adrian Otero was hired on April 2, and Ramon Gutierrez and Huberto Ramirez were hired sometime after the terminations, although he was not more specific. Yet, the Respondent was allegedly unable to get in contact with any of the dischargees, except perhaps with Jimmy Camacho, who was ultimately rehired on May 23.¹⁵

Based on the above, I am of the belief that Covarrubias’ stated explanations for selecting the five drivers in question for discharge were merely a pretext. The reasons given appear largely trivial. Accordingly, I conclude the Respondent has failed to rebut the General Counsel’s *prima facie* case by any standard of evidence. It is, therefore, appropriate to infer that the Respondent’s true motive was unlawful, that being because of the five drivers’ protected concerted activity. *Williams Contracting, Inc.*, 309 NLRB 433 (1992); *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enfd.*, 705 F.2d 799 (6th Cir. 1982); *Shattuck Denn Mining Corp. v. NLRB*, 326 F.2d 466, 470 (9th Cir. 1966).

The evidence establishes that the Respondent’s unlawful terminations of Hernandez, Ojeda, Castro, and Arredondo effectively occurred on February 13, following the end of the strike, as the Respondent ceased assigning them driving duties to perform, and over the course of the next two days retrieved the keys to the drivers’ assigned trucks. The terminations were made “official” on February 18, when the Respondent, through Covarrubias, orally informed the four named drivers, plus Camacho, that they were terminated, and memorialized the actions by issuing letters of termination to the five drivers.

¹⁵ Camacho, who at the time of the hearing was apparently employed by the Respondent, was the only one of the alleged discriminatees not to testify. Accordingly, the circumstances surrounding his return to the Respondent’s employ are somewhat unclear.

In summary, I find and conclude that the General Counsel has established a *prima facie* case, and that the Respondent has failed to rebut that evidence. Accordingly, I find that the Respondent has violated Section 8(a)(1) of the Act by discharging David Hernandez, Jose Antonio Ojeda, Esaul Castro, Ricardo Arredondo, and Jimmy Camacho as alleged in paragraph 5(d), (e) and (f) of the complaint.¹⁶

Conclusions of Law

1. The Respondent, Tarah Asphalt Products, is an employer engaged in commerce within the meaning of section 2(2), (6) and (7) of the Act.

2. The Respondent, through its managers and supervisors, violated Section 8(a)(1) of the Act by threatening employees with discharge if they continued to engage in a strike; and by terminating employees David Hernandez, Jose Antonio Ojeda, Esaul Castro, Ricardo Arredondo and Jimmy Camacho because they engaged in a strike, prepared a list of complaints about their terms and conditions of employment, and engaged in other protected concerted activities.

3. The above 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 its employees David Hernandez, Jose Antonio Ojeda, Esaul Castro, Ricardo Arredondo and Jimmy Camacho, my recommended order requires the Respondent to offer them immediate reinstatement to their former positions, displacing if necessary any replacements, or if their positions no longer exist, to substantially equivalent positions, without loss of seniority and other privileges. My recommended order further requires the Respondent to make Hernandez, Ojeda, Castro, Arredondo and Camacho¹⁷ whole for any loss of earnings and other benefits, computed on a quarterly basis from date of their effective discharges to date the Respondent makes a proper offer of reinstatement to them, 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 recommended order further requires the Respondent to expunge from its records any references to the discharges of Hernandez, Ojeda, Castro, Arredondo and Camacho, and to provide them with written notice of such expunction, and inform them that the unlawful conduct will not be used as a basis for further personnel actions against them. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982). Finally, the Respondent shall be required to post and mail a notice that assures the employees that it will respect their rights under the Act.

¹⁶ While paragraph 5(d) of the complaint does not specifically name Ricardo Arredondo, the evidence did establish that starting February 13, he was assigned no further trips to drive, effectively terminating him as of that date.

¹⁷ If it becomes necessary, the circumstances surrounding the return of Jimmy Camacho to the Respondent's employ can be determined during the compliance staged of this matter.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁸

ORDER

5

The Respondent, Tarah Asphalt Products, its officers, agents, successors, and assigns, shall

10

1. Cease and desist from:

(a) Threatening its employees with discharge for engaging in a strike, or other protected concerted activity;

15

(b) Discharging, denying work assignments to, or otherwise discriminating against any of its employees for engaging in a strike, or for preparing a list of complaints concerning their terms and conditions of employment, or for any other protected concerted activity; and

20

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

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

25

(a) Within 14 days from the date of this Order, offer David Hernandez, Jose Antonio Ojeda, Esaul Castro, Ricardo Arredondo and Jimmy Camacho 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;

30

(b) Make David Hernandez, Jose Antonio Ojeda, Esaul Castro, Ricardo Arredondo and Jimmy Camacho 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 this decision;

35

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of David Hernandez, Jose Antonio Ojeda, Esaul Castro, Ricardo Arredondo and Jimmy Camacho, and within 3 days thereafter notify the five employees in writing that this has been done and that the discharges will not be used against them in any way;

40

(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;

45

50

¹⁸ 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 (e) Within 14 days after service by the Region, post at its office in Calexico, California
copies of the attached notice (in both English and Spanish) marked "Appendix."¹⁹ Copies of the
notice, on forms provided by the Regional Director for Region 21, 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. The Respondent shall also duplicate and mail, at its own expense, a copy of the
signed notice to all current employees and former employees employed by the Respondent at
10 any time since February 12, 2002;²⁰ and

15 (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.

Dated at San Francisco, California on July 18, 2003.

20
25
30
35
40

Gregory Z. Meyerson
Administrative Law Judge

¹⁹ If this Order is enforced by a Judgment of the United States Court of Appeals, the words
in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD"
shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF
45 APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

²⁰ The Respondent's truck drivers are rarely present at its Calexico, California office, and the
lot rented at Ortega parking is not suited for the posting of notices. While the drivers do spend
time on a regular basis at the Respondent's office in Mexicali, Mexico, the undersigned,
obviously, has no authority to order the posting of a notice at a facility located in the Republic of
50 Mexico, a sovereign, foreign country. Accordingly, I have ordered the Respondent to both post
the notice at its Calexico office and mail copies of the notice to current and former employees.

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 do anything that interferes with these rights. Specifically:

WE WILL NOT threaten you with discharge for engaging in a strike or other action, which you take together with other employees, related to your wages, hours, or other terms and conditions of employment.

WE WILL NOT discharge you, deny you work assignments, or otherwise discriminate against you, because you engage in a strike, or protest with other employees about your wages, hours or other terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal Labor Law.

WE WILL, within 14 days from the date of the Board's Order, offer David Hernandez, Jose Antonio Ojeda, Esaul Castro, Ricardo Arredondo and Jimmy Camacho 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 David Hernandez, Jose Antonio Ojeda, Esaul Castro, Ricardo Arredondo and Jimmy Camacho 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 David Hernandez, Jose Antonio Ojeda, Esaul Castro, Ricardo Arredondo and Jimmy Camacho, 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.

TARAH ASPHALT PRODUCTS

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

888 South Figueroa Street, 9th Floor, Los Angeles CA 90017-5449

(213) 894-5200, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (213) 894-5229.