

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

HH3 TRUCKING, INC.

and

Case 33-CA-14374

INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, LOCAL 325

*Nicholas O. Ohanesian and  
Debra L. Stefanik, Esqs.,  
for the General Counsel.*

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for the Respondent.*

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for the Charging Party.*

**BENCH DECISION AND CERTIFICATION**

Ira Sandron, Administrative Law Judge. I heard this case on October 20 to 22 and December 2, 2003, in Rockford, Illinois. After the parties rested, I heard oral argument, and on December 3, 2003, issued a bench decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations, setting forth my findings of fact, conclusions of law, remedy, and recommended order. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.<sup>1</sup> The notice referenced in the order is attached as "Appendix B."

Dated, Washington, D.C January 20, 2004

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Ira Sandron  
Administrative Law Judge

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<sup>1</sup> The bench decision appears in uncorrected form at pages 867 through 923 of the transcript, for December 3, 2003. The final version, after correction of oral and transcriptional errors and minor editorial and other revisions not affecting substance, is attached as Appendix A to this Certification.

## APPENDIX A

This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations.

### Statement of the Case

Ira Sandron, Administrative Law Judge. This matter arises out of a complaint and notice of hearing (complaint) issued on September 23, 2003, against HH3 Trucking, Inc. (the Respondent), based on charges filed by International Brotherhood of Teamsters, Local 325 (the Union), on August 18, 2003.<sup>2</sup>

Pursuant to notice, I conducted a trial in Rockford, Illinois, on October 20 to 22 and December 2, at which all parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.

The General Counsel's witnesses were:

- 1) Thomas Streck – union business representative.
- 2) Joseph Lawrence Downey III, Arthur Johnson Jr., Dennis Tenner, and Keith Candley -- former drivers and alleged discriminatees.
- 3) Angelene Johnson – Arthur Johnson's wife.
- 4) Roger Buck – president of Corporate Services, Inc., a temporary employment agency used by the Respondent.
- 5) Gretchen Hudson – the Respondent's co-owner and president, under Section 611(c).
- 6) Keith R. Bradle – labor and truck superintendent of Rockford Blacktop, a major customer of the Respondent, as a rebuttal witness.

The Respondent called:

- 1) Gretchen Hudson.
- 2) William Hudson – the Respondent's co-owner and vice-president.
- 3) Irvin Jackson – of the Springfield Urban League.
- 4) Baltazar Davila and Patrick Nowling – owner-operators who contract with the Respondent.
- 5) Reggie Norris -- a driver for the Respondent through Attitudes Trucking, an owner-operator.

### Issues

1. Whether the Respondent, through both William and Gretchen Hudson, committed various independent violations of Section 8(a)(1) of the Act in the period from May through July.

2. Whether the Respondent violated Section 8(a)(3) and (1) by discharging Candley, Downey, Johnson, and Tenner because they engaged in activities on behalf of the Union.

3. Whether the Respondent violated Section 8(a)(3) and (1) by, on a certain but unknown date within 6 months preceding the filing of the charge, transferring work previously

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<sup>2</sup> All dates are in 2003 unless otherwise indicated.

performed by its employees to employees of Corporate Services.

4. Whether the Respondent violated Section 8(a)(5) and (1) by transferring work previously performed by its employees to employees of a temporary employment agency without providing the Union notice or an opportunity to bargain about the action and its effects.

5. Whether the Respondent violated Section 8(a)(5) and (1) by, since August 12, failing and refusing to recognize and bargain with the Union.

## Findings of Fact

### Credibility

Most of the witnesses I heard were more or less credible, based on my observations of their demeanor, plausibility of their testimony, and consistency of their testimony with other testimonial and/or documentary evidence. The exceptions were Arthur and Angelene Johnson, and the Hudsons. I will address the Hudsons now, and the Johnsons later.

For following reasons, I do not find Ms. Hudson's testimony reliable. Her demeanor during the first 3 days of trial reflected either disdain for the proceedings or lack of understanding of its seriousness, or both. Twice, I had to reprimand her on the record for laughing out loud during the testimony of General Counsel's witnesses.<sup>3</sup> Her attitude was further reflected in her admitted failure to provide to the General Counsel all documents clearly encompassed by the General Counsel's subpoena duces tecum.<sup>4</sup> Thus, although the subpoena broadly requested documents pertaining to the discharges of the four alleged discriminatees, including computerized data, she admitted that she did not provide existing computerized records and was evasive in explaining why she had not done so.<sup>5</sup> She also conceded that she maintained check carbons but had not produced them.<sup>6</sup> Moreover, late in the proceeding, the Respondent's counsel produced a document relating to the discharge of Tenner, which also was not earlier provided in compliance with the subpoena request.<sup>7</sup>

Ms. Hudson's testimony about her lack of documentation regarding the terminations of the four alleged discriminatees and other events in the case was not plausible for the owner of a business in today's world of regulations and laws. She testified that she has no personnel files for employees, no records of terminations of employees, no written employee policies, does not save phone bills or bills for parts purchases, and kept no memoranda of any telephone calls relevant to this proceeding.

Further damaging her credibility was the fact that her testimony concerning what Keith Bradle allegedly told her relevant to Tenner's discharge was directly contradicted by Bradle. Thus, she twice testified that Bradle told her that at the Elburn jobsite where Tenner was kicked off on August 6, an employee who was kicked off would not be allowed to return there.<sup>8</sup> However, Bradle testified, "I never said anything about discharging him or that Tenner was not allowed on Elburn or any other Rockford Blacktop jobsite. As far as I was concerned, he was

<sup>3</sup> See Tr. 324, 750.

<sup>4</sup> GC Exh. 4.

<sup>5</sup> See Tr. 270.

<sup>6</sup> Tr. 283.

<sup>7</sup> R's rejected Exh. 16.

<sup>8</sup> Tr. 716, 737.

never barred from that Rockford Blacktop site or any other site.”<sup>9</sup> Moreover, I credit Bradle’s testimony about what she communicated to him about Tenner, which evidences the Respondent’s bad faith in discharging him.

5 I also find portions of Ms. Hudson’s testimony highly implausible. Thus, she testified that after she told Johnson he was fired for not showing up, he “begged” her to talk to him and his wife about their marital problems, and when the Johnsons met the Hudsons the next morning for breakfast, nothing was discussed but their marital problems. Mr. Hudson testified similarly and, likewise, incredibly. In addition, Ms. Hudson’s testimony about the alleged great efforts  
10 she made to locate Johnson in the days following June 19 seems quite inconsistent with her subsequent readiness to fire him.

Finally, Ms. Hudson often seemed evasive in answering questions, particularly those posed by the General Counsel.

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As to Mr. Hudson, he was very tentative and uncertain during much of his testimony, weakening my confidence in it. For example, his response to whether he spoke to Johnson in May about the Union:<sup>10</sup>

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A: I think, yes.

Q: When was this conversation?

A: It could have been in the morning.

Q: And do you recall where this conversation was?

A: Probably at the Mobil service station.

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Or, when asked questions regarding Downey:<sup>11</sup>

Q: Do you recall meeting Mr. Downey later that day, at all?

A: I think, I might have met with him and asked him what happened to the truck.

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Q: Do you recall when you met with Mr. Downey later that day?

A: I met with Mr. Downey that evening, I think.

Mr. Hudson’s professed ignorance of certain matters was also incredible. When asked why Candley was discharged, he testified that his wife discharged Candley and that he did not know why.<sup>12</sup> When a husband and wife are the sole owners and operators of a small business,  
35 I cannot find this believable, particularly when Ms. Hudson testified that “We, basically, interchange all duties,” with the exception of her performing most of the computer work.<sup>13</sup>

40 Accordingly, I generally credit the testimony of other witnesses where it conflicted with that of the Hudsons.

#### Facts

45 Based on the entire record, including witness testimony, documents, stipulations, offers of proof, and closing arguments, I make the following findings of fact.

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<sup>9</sup> Tr. 746.

<sup>10</sup> Tr. 545.

<sup>11</sup> Tr. 526-27.

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<sup>12</sup> Tr. 592.

<sup>13</sup> Tr. 637.

5 It is uncontested that the Respondent is an employer and the Union a labor organization within the meaning of the Act and that the Respondent's sole owners and officers, Gretchen and William Hudson, are supervisors and agents of the Respondent under Sections 2(11) and 2(13) of the Act.<sup>14</sup>

10 The Respondent, an Illinois corporation with an office and place of business in Rockford, Illinois, is engaged in the business of hauling construction materials in dump trucks, either semis or regular tandem. The Hudsons have been in business for approximately 10 to 11 years and operate out of their home.

The Respondent has utilized three types of drivers:

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- 1) Employees driving the Respondent's trucks. At times relevant, they were paid \$15.00 an hour, with no payment for travel time or lunch or break times. There were about six such employees in June.
  - 2) Owner-operators who own their own trucks and contract with the Respondent. They drive under the HH3 banner.
  - 20 3) Employees of temporary services (i.e., Corp. Services), who drive HH3 vehicles. For these drivers, the Respondent pays \$15 an hour times a multiplier of 1.4 or 1.45, with the amount over \$15 going to the temporary agency.

25 Construction work is seasonal, so that there is only occasional need for drivers during the winter months. The construction season, depending on weather, is normally from April to June until October to December.

30 Union Business Representative Streck was at a Rockford Blacktop jobsite in early April, conducting a card check. Rockford Blacktop, as a signatory employer to the Northern Illinois Contractors Association (NICA), is obliged to make sure that its contractors are union compliant or signatory to a union agreement. There, Streck came across Mr. Hudson, who was driving an HH3 truck. Streck asked for his union dues receipt, and Hudson said he was a little behind on dues. Streck then called the local and found that Hudson was in arrears for over \$3,000. He told Hudson he would have to get his dues caught up and become compliant.

35 At the same jobsite a week or two later, Streck came across employee Mark Freeman. He asked Freeman for his dues receipt, to which Freeman responded that he was not a union member. Streck said he would have to be compliant, explained the benefits of being represented by the Union, and asked him to talk with other employees. Streck again saw him on April 20 or 21, at the Mobil gas station where HH3 drivers filled up in morning before going to their assigned jobs. Mr. Hudson also went there each morning to pay for the drivers' gas. 40 Streck further testified that while he was talking with the Respondent's employees about organizing, Hudson pulled up and saw them. I credit Streck over Hudson's denial that he ever saw Streck at the gas station.

45 Subsequently, Streck talked with employees Johnson, Candle, Downey, and Claude Smith, to whom he explained the benefits of working under a union contract and solicited them to sign authorization cards. As reflected by General Counsel's Exhibit 2, Johnson signed a card on June 3, and the others signed cards on June 23.

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<sup>14</sup> See R's Answer, GC Exh. 1(i).

On June 26, the Union filed an RC petition in Case 33-RC-4792. A pre-election hearing was held on July 9, at which the sole issue was whether the Respondent's drivers were independent contractors, as asserted by the Respondent, or employees within the meaning of the Act. On August 3, the Regional Director issued a decision and direction of election, in which he rejected the Respondent's assertion that these drivers were independent contractors and instead found them to be employees. He further found the following employees to constitute an appropriate unit for collective-bargaining purposes:

All full-time and regular part-time drivers employed by the Employer at its Rockford, Illinois facility. Excluding owner-operators, office clerical and professional employees, guards and supervisors as defined in the Act

The deadline for requesting review of this decision was August 19. The Respondent did not file such a request. Although the Respondent's answer raised as an affirmative defense the contention that Candley, Downey, Johnson, and Tenner were not "employees," the Respondent's counsel withdrew this affirmative defense during the hearing, and the Respondent does not now contest the status of such drivers as employees.<sup>15</sup> Nor does the Respondent dispute the appropriateness of the bargaining unit as found above by the Regional Director.<sup>16</sup>

On the morning of August 13, Streck was out checking cards at a Rockford Blacktop jobsite when he encountered HH3 driver Darnell McLin. McLin had no card, and Streck told him that he needed one. Later that morning, after being removed from the jobsite by the Rockford Blacktop job foreman, McLin came to the Union's office and said he wanted to buy a card. Streck responded that McLin could not do that; that Ms. Hudson had to come in and get things straightened out. That afternoon, Ms. Hudson called Streck and asked why he would not sell McLin a union card. Streck responded that he couldn't and that she would have to come in and sign an agreement. She replied that she had no employees, to which Streck responded that the NLRB had already determined they were employees, not independent contractors. Hudson replied that she had not had employees since 1992.

In the early summer, the Hudsons came to the union hall with drivers, to obtain cards for the drivers as owner-operators. Streck stated they could not do that.

At one point, the Hudsons also met with Streck at the union hall, along with representatives of civil rights groups, including the Urban League. Based on the evidence of record and the Respondent's counsel's offer of proof, I adhere to my ruling that said meeting was irrelevant to the issues presented before me under the National Labor Relations Act.

#### Discharge of Candley

Candley struck me as a candid witness. His credibility was strengthened by the consistency of his testimony on direct and cross-examination, and its consistency as to the events of June 30 with not only Tenner's account, but with Ms. Hudson's as well.

Candley was employed as a driver for the Respondent from about June 1 to June 30, when he was discharged. On June 13, at the yard, he had a cell phone conversation with Ms. Hudson about his need to call in regarding his assignments for the next day, which he had not

<sup>15</sup> Tr. 10.

<sup>16</sup> GC Exh. 1(i).

being doing. During this conversation, she stated that employees were going to attend a union meeting the next day, and before they signed anything, they should come to talk to her first. The following day, at the yard in the late morning, Ms. Hudson asked Candley if he was going to the union meeting, and he said no.

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On the morning of June 30, after Candley arrived at the Respondent's truck yard, Mr. Hudson called him over and asked if he had signed with the Union. Candley said yes. He then returned to his truck and told Tenner about his conversation with Hudson. Moments later, Hudson called Candley back and put Ms. Hudson on the phone. She asked Candley if he had signed a card, and he said yes. She stated that she had told him to come talk with her about it first, to which Candley responded that he did not remember that. She said that he was stupid and that since he had signed with the Union, he could no longer work for them. Candley stated that he was not the only one who signed. Ms. Hudson asked who else had signed. He told her that since she had fired him, he could not tell her. Candley went back to Tenner and stated that he had been fired for signing a union card. Tenner confirmed Candley's testimony about what Candley told him.

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As mentioned earlier, Mr. Hudson's professed ignorance of the reasons for Candley's discharge were not credible. Moreover, when asked what he knew of Ms. Hudson's conversation with Candley concerning the discharge, he answered, "My wife said, you cannot drive any more and that was it. That is all I recall."<sup>17</sup> I find it highly implausible that all that was said in a conversation in which an employee was told he was fired would have been one statement of five words made by the employer.

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Ms. Hudson testified that she had conversation with Candley, in which she told him there would be a meeting at the union hall the following Saturday, at which she would be present at Streck's behest. She placed the date as the Tuesday preceding June 30. It may have been a different meeting from the one Candley testified was on June 14, since clearly that meeting had no participation by the Hudsons. In any event, I credit Candley's account of his June 13 and 14 conversations with the Hudsons.

Ms. Hudson admittedly asked Candley on the morning of June 28, at the location where HH3 trucks were being washed, if he was going to the union meeting that day. He said no.

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In terms of her conversation with Candley on June 30, Ms. Hudson's version was not inconsistent with his. She admittedly began by asking him if he signed something with the Union. He said yes. She asked why. He said he wanted more benefits. She told him that he had signed a lease and did not have benefits. She further said that the Respondent did not provide benefits and if he wanted them, he would have to work somewhere else. I reiterate here that the Respondent does not now contest the employee status of its drivers.

#### Discharge of Downey

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Downey struck me as a credible witness. He appeared candid and not to make efforts to embellish or skew his testimony. For example, when asked on cross-examination if Mr. Hudson's voice was raised in a conversation they had about the Union, Downey readily answered, "No, he just asked me when the Union rep wanted and I . . . told him."<sup>18</sup> On cross-examination, other than regarding dates, Downey was consistent with his NLRB affidavit.

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<sup>17</sup> Tr. 556.

<sup>18</sup> Tr. 142.

Unless otherwise specified, what follows is Downey's credited account.

5 The week prior to June 23, Downey's first day as a driver for the Respondent, Hudson told him he was being hired. Downey asked Hudson if he was going to be permanent, and Hudson told him he would be driving a truck as long as he wanted.

10 On June 23, Downey was assigned to the Baxter landfill. There, he encountered Streck, who explained the benefits of union representation and asked him to sign an authorization card. Downey did so.

15 Shortly thereafter, Hudson called Downey on his cell phone and asked him what the union representative wanted. Downey replied that the representative wanted him to sign a card but that he had not had the time right then. Hudson told Downey "not to be talking to the Union representatives."<sup>19</sup>

20 That afternoon, Downey had trouble with the valve mechanism on his truck, so that he could not raise the box to dump load. He called Hudson and stated that he had tried doing everything he knew how to do, but it still would not operate. The Hudsons came out about an hour later. They tried other measures but similarly were unsuccessful. During this time, Ms. Hudson asked Downey what the union representative had said, and Downey reiterated what he had earlier told Hudson. Ms. Hudson then said, "Good . . . Don't be talking to the Union representative."<sup>20</sup> Hudson instructed Downey to take the truck to Phil's Garage, which he did.

25 That evening, Downey called the Hudsons. Ms. Hudson told him that the truck was fixed and for him to report to the same job the next day. Downey used the same truck the following day (June 24). In the mid-afternoon, the truck stopped running, as though it had run out of fuel. He testified that he believed he caught a rock coming across a creek, and it pulled the hub over and slid the elbow off the pipe. Downey checked the left tank and observed plenty of fuel. He called Hudson, who suggested he check other mechanisms. Downey and an HH3 owner-operator were not successful in getting the truck to start, and Downey again called Hudson. Hudson told him to ride back with other driver, and they would later get the truck.

30 When Downey returned to the yard, he talked with Hudson and the Respondent's mechanic, Jimmy (last name unknown). Downey told Jimmy what had happened. Jimmy responded that the truck should not have been put back into service because he had not finished making all the repairs.

35 That evening, Ms. Hudson told Downey that they did not need him the next day because Nowling was going to drive his own truck. Three days later (June 27), she called him early in the morning and said they needed him to drive that day because another driver had gotten hurt. That day, Downey went to a different jobsite, using a different truck (this one belonging to the Respondent). In the mid-afternoon, Downey heard bad vibrations in the truck as he was driving down the highway. He stopped and checked and saw that the needle bearings had come out of one of the cups in the U-joint. Another driver stopped and confirmed this as the problem. Downey waited for Ms. Hudson's brother, who worked on the same site that day. He looked at it and said to drive it back to the yard.

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50 <sup>19</sup> Tr. 109.

<sup>20</sup> Tr. 112-13.

When Downey arrived at the yard, Hudson and Jimmy were there. Hudson told Jimmy to get a U-joint and fix the truck. Downey stated that it was not his fault that something had gone wrong with his truck 3 days in a row, and both Hudson and Jimmy said no, it was not. Hudson did not deny giving Downey this response.

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That night, when Downey called Ms. Hudson about further driving, she stated they did not want him anymore, because every time he took out a truck, he tore it up. Downey responded that if they did not have junk, they would not have that problem. Ms. Hudson's version of this conversation was consistent with Downey's.

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All of Downey's contact was with the Hudsons. He was paid directly by them and had no direct contact with Nowling, the owner of the truck.

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The Respondent called Nowling. He appeared candid, and I credit his testimony. He has been an owner-operator for the Respondent since June 2002. Regarding the new valve control part needed for the truck Downey drove, the Respondent purchased it,<sup>21</sup> but the cost was deducted from what the Respondent paid Nowling. Prior to Downey's driving the truck on June 23, it had been parked at the yard for about 4 months but was regularly maintained. Nowling testified he is not a mechanic and could not say why the valve control needed to be repaired or whether the driver (Downey) caused the damage.

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Hudson's recollection of the events regarding Downey's problems with the trucks was somewhat sketchy, but he did recall that Downey called him about them on June 23, 24, and 27. Other than the dates of particular problems, Hudson's testimony in this area was not inconsistent with Downey's.

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The Hudsons conceded that they lacked the mechanical expertise to ascertain when caused the problems Downey had with the trucks. Neither their mechanic nor the garage mechanic was called as witnesses.

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Hudson testified that on June 27, he told Downey "he was pretty hard on trucks,"<sup>22</sup> to which Downey responded that the Respondent's trucks were junk. Significantly, when I asked Hudson why Downey was not called back to work, he responded that it was because Nowling came back to drive his own truck. Hudson said nothing at that point about Downey's problems with the two trucks. Hudson subsequently even took pains to make it clear that he had not earlier testified that Downey was not used anymore because he was hard on trucks.<sup>23</sup>

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The record reflects that Johnson was fired in June, for causing substantial damage (approximately \$3,000 - \$4,000) to a truck. He was rehired and subsequently repaid a portion, but not all, of the repair costs. Reggie Norris was an employee of the Respondent from April to October 2002, during which period he broke two trucks and on four occasions put trucks out of commission. The Hudsons told him that they could not afford to keep him. However, since June he has driven for the Respondent through Attitudes Trucking.

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<sup>21</sup> R. Exh. 7.

<sup>22</sup> Tr. 538.

<sup>23</sup> Tr. 605.

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## Discharge of Johnson

In contrast to Candley and Downey, Johnson and his wife were not fully credible. However, for reasons to be stated, I generally credit Johnson's versions of what was said in conversations he had with the Hudsons.

Johnson began working for the Respondent in approximately June 2002. He was off during the winter months and resumed work in April. On May 5, he was fueling up at the Mobil gas station used by the Respondent, when Mr. Hudson came up and said, "There is going to be some people approaching you with cards, don't sign the card."<sup>24</sup> Johnson asked why, and Hudson responded it was because the card was union.

As I previously set out, Hudson's testimony about this incident was sketchy and equivocal, as was much of his testimony. He was also tentative in recalling the substance of what said, saying, "I think Mr. Johnson mentioned the Union. . . . They had been on the job site or something and he said they wanted to talk to him or something. I think he said that. I am not sure—" <sup>25</sup> When I asked Hudson if he responded to what Johnson said, he answered, "I do not think so. . ." <sup>26</sup> I do not find credible Hudson's poor recall of a conversation that he had to have reasonably considered important at the time. In any event, his admittedly poor recall makes his testimony on the conversation unreliable.

Johnson testified that on approximately May 19 in the yard, before drivers took out their trucks, Ms. Hudson talked to them in a group. She told them not to sign union cards but to take them to her, and she would fix them up and take them to the Union. She also stated that the Union was just trying to shut the Respondent down and get the Respondent's money.

On about June 12, when Johnson arrived back late at the yard, Hudson asked him what had taken him so long. Johnson replied that he had worked 9-1/2 hours. Hudson then said, "You didn't stop at the Union and sign no (sic) card, did you?" <sup>27</sup> Johnson replied no.

It is not disputed that the Johnsons and the Hudsons had breakfast together on one occasion at Granny's Restaurant, but there is no agreement between the Johnsons and the Hudsons as to when it occurred vis-à-vis Johnson's termination, or what was said.

The Johnsons testified that the breakfast occurred on June 15 and was arranged and paid for by Ms. Hudson. Their accounts of what Ms. Hudson stated there were similar. Ms. Hudson said that she was going to give Johnson and Dennis (Tenner) a \$2 raise; for insurance purposes, Ms. Johnson recalled her explaining. Johnson recalled Ms. Hudson saying words to the effect that she was upset about employees signing authorization cards and that the Union was making it hard for minorities. According to both Mr. and Mrs. Johnson, Ms. Hudson also stated that anybody who signed a card would not have a job with HH3. I note here Ms. Hudson's admission that on June 30, after Candley told her he had signed a card, she said she could not use him anymore.

According to Ms. Hudson, Johnson called her on the afternoon of June 27. She asked what was up and where he had been. He replied he had been in detox for a few days. She told

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<sup>24</sup> Tr. 175.

<sup>25</sup> Tr. 546.

<sup>26</sup> Ibid.

<sup>27</sup> Tr. 184.

him he did not have a job because he had not shown up or called. According to Ms. Hudson, Johnson then “begged me to talk to him and his wife” about their marital problems.<sup>28</sup> She agreed, and they had breakfast the next day. Both Mr. and Mrs. Hudson testified that nothing was discussed at the breakfast other than the Johnsons’ marital problems and attending church together.

I credit the Johnsons’ version as to both the date and contents of the conversation. I note that although the Hudsons paid for the breakfast, they produced no documentation corroborating the date as occurring after June 27. Fundamentally, I find it strains credulity to believe that, after being told he was fired, Johnson would have “begged” Ms. Hudson to provide marital counseling to him and his wife. I also find it defies common sense to accept the Hudsons’ version that, although Johnson had just been fired the day before, absolutely nothing at all was said about his employment. Ms. Hudson’s testimony is particularly unbelievable when the record is wholly devoid of any evidence even remotely suggesting that at any time prior to the breakfast, she provided counseling of any kind to Johnson or any other employee.

Johnson’s last day of work was June 21. He and his wife’s testimony about what happened thereafter was not fully satisfactory, and neither was Ms. Hudson’s.

Johnson first testified that he learned on June 23 he was no longer a driver, when he went to the yard to see who driving the truck he had been driving. In connection with this answer, he said, “I was – hadn’t worked for a while,”<sup>29</sup> inconsistent with having worked only 2 days earlier. Drivers told him he been fired. Ms. Johnson corroborated his testimony about learning he was no longer a driver on June 23.

When asked when he next had direct contact with the Hudsons, Johnson replied July 2. According to Johnson, he went to ask why he was fired. Ms. Hudson told him it was because he had signed a card. Johnson said that he did not sign one, and left. I asked Johnson why he waited until July 2 to speak to her directly. His response was, “Well, I mean, I was – I had been looking for a job at that time, during that week, like I hadn’t had no (sic) luck so I went and I asked when was up.”<sup>30</sup> Ms. Hudson denied telling him that he was fired because he signed a union card.

Johnson’s testimony about making phone calls to the Hudsons after June 21 and before July 2 was vague and contradictory. At one point, he testified that he called on June 22 to inquire about work, that he may or may not have left a message, and that he showed up on June 23. Again, this contradicts his testimony that he had not worked for a while. Even more significantly, it was stipulated that there was nothing in his August 7 NLRB affidavit<sup>31</sup> about his calling in for work after June 21.

On cross-examination, Johnson’s testimony that there was a hiatus of almost 2 weeks between the time he learned he was fired (June 23) and the day he spoke with Ms. Hudson (July 2) was impeached by the statement in his NLRB affidavit that he went to see her on the same day he learned he was fired. He explained that this was a mistake in the affidavit, because he had not yet gone into detox,<sup>32</sup> but he offered nothing to suggest why the mistake

<sup>28</sup> Tr. 667.

<sup>29</sup> Tr. 189.

<sup>30</sup> Tr. 197.

<sup>31</sup> R. Exh. 5.

<sup>32</sup> GC Exh. 3, a letter from Rosecrance Regional Treatment Center dated August 21, states

Continued

was made.

Accordingly, I do not find that credible evidence supports a finding that Ms. Hudson told Johnson on July 2 that he was fired for union activity.

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Ms. Johnson testified that she had two or three conversations with Ms. Hudson after she learned on June 23 that her husband had been fired. The first, she initially said, was on the afternoon of June 23, when Ms. Hudson called and asked if Johnson had signed any type of card, and she said no, to her knowledge. I asked Ms. Johnson if she could remember anything else in the conversation, and she replied no. I find her testimony concerning this conversation unbelievable. First, if Johnson had already been fired, why would Ms. Hudson have called and inquired about his union activity? Even more unexplainable, here Ms. Johnson, according to her own testimony, had just learned from her husband that he had been fired, and yet she said nothing about this when Ms. Hudson called. Indeed, Ms. Johnson testified that her next conversation with Ms. Hudson occurred the following day (June 24), when she called Ms. Hudson and asked if there was any work for her husband. Yet, according to her testimony, she had said nothing on the subject the day before. Ms. Hudson said no, she had another man in the truck and could not take him out of it.

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Ms. Johnson testified she had a third conversation with Ms. Hudson, around June 29, when Johnson was in rehab. Ms. Hudson again asked whether Johnson had signed a card. According to Ms. Johnson, Ms. Hudson also asked if she knew where Johnson was, and she replied no. Again, if Johnson had already been fired on June 23, the question seems odd.

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On cross-examination, Ms. Johnson added further confusion to her earlier testimony. Thus, she testified that she did not talk to Ms. Hudson at all on June 23, the day her husband came back and said his truck was not there. Rather, she then said that her first conversation with Ms. Hudson occurred on June 24, the second on June 26, and the third on June 29 or 30, when Johnson was in rehab.

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Therefore, I do not find that credible evidence supports allegation 5(a)(viii) of the complaint alleging Ms. Hudson interrogated the wife of an employee.

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Ms. Hudson testified with regard to Johnson's termination, "We let him go. Well, he fired himself. He did not come back to work and did not call and did not show up for a week."<sup>33</sup> Thus, she testified that she spoke with him on the evening of June 19 and not again until June 27. On June 20, she called him at home to find out why he had not picked up his check, and left a message.

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On June 21, Ms. Johnson came in the evening to get the check. She told Ms. Hudson that she did not know where Johnson was. Ms. Hudson asked her to tell Johnson to call. The following Monday, Ms. Hudson left a message on Johnson's answering machine and also drove by his house. She called again on Tuesday, got no response, and hung up. On Tuesday evening, she called again. This time she spoke with his daughter, and asked to have Johnson call her. On June 27, Johnson called and, after being told he was fired, "begged" for her to provide marital counseling to him and his wife. I wonder how Ms. Hudson could have such a specific and detailed recollection of all of these events, when she testified she retained no phone records and had no memoranda, phone or otherwise, of anything pertinent to this

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that Johnson was in treatment there from June 29 through July 1.

<sup>33</sup> Tr. 658.

proceeding.

Tenner had a conversation with Hudson in the yard on the late afternoon of June 24. Tenner asked what had happened to Johnson. Hudson replied that Johnson had fired himself. Tenner asked what he meant, and Hudson answered, "Because he talked to the Union and he signed for representation for the Union."<sup>34</sup> He also told Tenner to "stay away from the white folks. They're out to hang us just like they did our forefathers. Meaning the Teamsters Local."<sup>35</sup> For reasons stated below, I credit Tenner's account.

#### 10 Discharge of Tenner

Tenner was somewhat emotional, and at times displayed anger, especially when Ms. Hudson laughed during his testimony, but he struck me as sincere and generally credible.

15 Tenner drove for the Respondent for approximately 2 years. The Hudsons knew he was in the Union at the time he was originally hired. He resumed work in the 2003 season in approximately February. In May, Tenner met Streck at a jobsite. There, they discussed organizing the Respondent's employees.

20 When Tenner returned to the yard at the end of the workday, he told the Hudsons that the union representative had been out on a jobsite. Hudson said he already knew because Arthur (Johnson) had already told them. Ms. Hudson then said, "You all stay away from them. If you sign anything . . . with the Union, we are not going to be able to use you."<sup>36</sup>

25 Hudson recalled a conversation with Tenner at the yard in May. He testified that Tenner told him that Candley and Johnson had signed cards and that he did not respond. He could recall nothing else being said. Hudson's testimony that Tenner made a statement that two employees had signed union cards, that he did not respond, and that nothing else was said, strikes me as implausible. Based on this, as well as Hudson's general lack of credibility, I credit  
30 Tenner's version of what was said.

Tenner was assigned to Rockford Blacktop's Elburn jobsite on August 6. He decided to take an unpaid 1/2-hour lunch break at noon. He candidly testified that Rockford Blacktop's leadman Ken (last name unknown) came over the CB and asked what he was doing. He  
35 replied, taking a lunch break. Ken responded that Tenner was the only one of 16 truck drivers taking such a break. Tenner said that they deserved a lunch break, and Ken said fine. Shortly thereafter, Brian Butts, Rockford Blacktop's foreman, came over the radio and asked Tenner if anything was wrong with his truck. Tenner said no, he was taking a lunch break. He then set his alarm and dozed off. After Tenner was awakened by the alarm, Ken came over and stated  
40 that he was being signed out for the rest of the day, meaning that he was being thrown off the jobsite.

Tenner returned to the Respondent's yard. The Hudsons were there. Ms. Hudson said that he'd done it now. He asked what she meant, and she replied that Rockford Blacktop did  
45 not want him back on any job and, because Rockford Blacktop was their main customer, she did not know what they would do with him. On this conversation, Ms. Hudson's version was similar to Tenner's. During her testimony, Ms. Hudson admitted that at the time she discharged

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50 <sup>34</sup> Tr. 311.

<sup>35</sup> Tr. 312.

<sup>36</sup> Tr. 308.

Tenner, she did not know for a fact whether he was permanently barred by Rockford Blacktop from working on any of its jobsites.

5 Tenner spoke with Rockford Blacktop Superintendent Bradle the following Monday, at Bradle's office. Bradle told Tenner that he (Bradle) did not tell Ms. Hudson that he did not want Tenner on that job or any other Rockford Blacktop job. That evening, Tenner went to the Hudsons. He told Hudson about his conversation with Bradle. When Ms. Hudson arrived, Tenner told her that Hudson could relate that conversation to her. As set out below, Hudson's account of what Tenner told him was not inconsistent with Tenner's testimony.

10 Two days later, Tenner called the Hudsons. He asked Ms. Hudson if he was going to get work, and she replied she had nothing for him. Tenner never again worked for the Respondent.

15 On cross-examination, it was disclosed that in Tenner's NLRB affidavit, he did not specifically state that Bradle told him he had not told Ms. Hudson Tenner could not work on a Rockford Blacktop jobsite. However, Tenner did state in the affidavit that Bradle told him that he (Bradle) would speak to the Hudsons in Tenner's defense. I also note Hudson's testimony that following Tenner's discharge, Tenner came by the Respondent's home and stated that he 20 (Tenner) had talked to Rockford Blacktop and "everything was good with them."<sup>37</sup> In these circumstances, I do not find the discrepancy between Tenner's testimony and affidavit to constitute a damaging inconsistency.

25 It is clear from Tenner's own testimony, as well as that of drivers Davila and Norris, that taking a lunch break on site at the Elburn jobsite was unusual and frowned upon by Rockford Blacktop supervision. However, Bradle testified that Tenner's being thrown off the Elburn jobsite on August 6 did not bar him from returning to that jobsite or any other Rockford Blacktop jobsite.

30 Bradle also testified that Ms. Hudson came to his office one afternoon in early August. She stated that she was going to tell Tenner that Rockford Blacktop would not let him be used anymore and that was the reason for his discharge. Bradle responded that he did not care what she told Tenner, because he was not his concern.

35 In direct contradiction to Bradle's testimony, Ms. Hudson testified twice that Bradle told her Tenner could not return to the Elburn site. As previously stated, Ms. Hudson was not a credible witness. In contrast, Bradle appeared candid, and I have no reason to doubt the reliability of his testimony. Accordingly, I credit Bradle's account of what she told him.<sup>38</sup>

40 Both Mr. and Ms. Hudson testified about the reasons for Tenner's termination, giving somewhat different accounts. Hudson testified that Tenner was discharged because he went to sleep on the job and was constantly late. However, he could not say when Tenner started being late. After being shown certain time sheets,<sup>39</sup> Hudson then testified that Tenner was late on 45 July 17, 19, and 21, at Rockford Blacktop jobsites.

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<sup>37</sup> Tr. 564.

<sup>38</sup> Counsel for the Respondent rested on October 22 but later, during a telephone conference call, stated he wished to recall Ms. Hudson to rebut what Bradle said. I responded that such rebuttal testimony was unnecessary. I will assume she would have made a full denial, 50 which I would not have credited.

<sup>39</sup> R. Exh. 10.

Ms. Hudson added an additional reason for Tenner's discharge—he tore down a wire with the truck. She also described Tenner's alleged problem with lateness or timely attendance in considerably greater detail. Thus, she testified that she began talking to Tenner about his attendance problem in late June or early July. She testified, rather incredibly, that he suggested she call him each morning to wake him up, and that she did so "just about every morning . . . until the last day he worked with HH3. . ." <sup>40</sup> I note that even according to her own testimony, when she told Tenner he was being discharged on August 6, she referenced only the incident earlier that day and said mentioned nothing about tardiness or the torn-down wire.

In sum, the Hudsons' testimony regarding Tenner's termination was unbelievable, inconsistent, and directly contradicted by their customer.

#### Use of Temporary Services

I credit Tenner's testimony that on about July 23 or 24, he had a conversation with Ms. Hudson in the yard after he returned from a jobsite. He mentioned that there were a few new drivers. She replied that they were from Corporate Services, a temporary agency. He asked why. She replied, "Well, the U's always sticking their nose in our business. So, therefore, you guys will be able to get insurance and unemployment through Corporate Services . . . So they [will] stay away from us." <sup>41</sup> She also told Tenner that eventually he would have to go over to sign up with Corporate Services. He said that he would not. She then stated that eventually she was going to use all Corporate Services employees, and if he did not go over, they would not be able to use him.

Roger Buck, President of Corporate Services, Inc., testified that his company operates interstate and provides labor, primarily in the manufacturing sector. A customer sets the hourly pay rate for the employees provided by Corporate Services. Corporate Services normally multiplies this rate by 1.45 to arrive at the hourly rate it charges to a customer; however, if the customer has referred an employee, the multiplier is reduced to 1.4, to take into account less overhead for Corporate Services.

Respondent's Exhibit 11 shows that the Respondent used 2 drivers from Corporate Services during an 8-week period in October and November 2000. Respondent's Exhibit 12, prepared by Buck and transmitted to the Respondent on September 26, reflects that the Respondent used Corporate Services for labor once in 2001 (for 1 wk), never in 2002, and in 2003, for the following weeks:

May 19 and 26, and June 2 – one driver. The job order for this was taken from the Respondent on May 20.<sup>42</sup> Hudson testified that they were short one driver at the time.

August 11 to September 15 – one driver. The job order for this was taken on July 17.<sup>43</sup> This driver is Darnell McLin. It was stipulated that McLin was employed by the Respondent as a driver through August 20 and was an employee within the meaning of the Act. The parties further stipulated that from August 11 to the present, McLin has been employed by Corporate Services and assigned to work for the Respondent as a driver of one of its trucks. Ms. Hudson

<sup>40</sup> Tr. 680.

<sup>41</sup> Tr. 325-26.

<sup>42</sup> R. Exh. 6.

<sup>43</sup> GC. Exh. 5.

testified that McLin wanted to transfer to Corporate Services for unemployment insurance purposes. McLin was not called as a witness, and her testimony went uncontrovertd.

5 In sum, in 2003, Corporate Services has provided two drivers to the Respondent, at different times.

### Analysis And Conclusions

#### I. Independent Violations of Section 8(a)(1)

10 The complaint alleges in paragraph 5(a) that Ms. Hudson committed the following violations:

- 15 (i) May 19, impliedly threatened to close the business if employees selected the Union as their collective-bargaining representative.
- (ii) May 19, told employees not to sign union authorization cards.
- (iii) In May, told employees not to speak to union representatives.
- (iv) In May, threatened to discharge employees if they selected the Union as their collective-bargaining representative.

20 On about May 19, Ms. Hudson told Johnson not to sign union cards but to bring them to her and that the Union was just trying to shut the Respondent down and get the Respondent's money. In May, she told Tenner to stay away from the Union and that if employees signed anything, the Respondent would not be able to use them.

25 I find the above evidence sustains paragraphs 5(a)(i) through (iv).

- (v) June 15, promised employees a pay raise if they refrained from selecting the Union as their collective-bargaining representative.
- 30 (vi) June 15, threatened to discharge employees if they selected the Union as their collective-bargaining representative.
- (vii) June 15, told employees not to sign union authorization cards.

35 Although I had some problems with the credibility of the Johnsons in other areas, as far as the Granny's Restaurant breakfast was concerned, their testimony was far more plausible than the Hudsons'. Ms. Hudson's statement about giving a \$2 an hour pay raise was in context of her expressed displeasure over employees signing authorization cards, and I find it constituted an implicit promise of benefit for refraining from supporting the Union. Her statement that anybody who signed a card would not have a job constituted a clear threat of retaliation. She told Johnson not to sign a card.

40 Therefore, the evidence sustains paragraphs 5(a)(v) through (vii).

45 (viii) June 21, interrogated the wife of an employee concerning the employee's union activities.

I previously stated why Ms. Johnson's testimony about the conversation forming the basis for this allegation was not satisfactorily credible. Accordingly, I recommend dismissal of this allegation.

- 50 (ix) June 23, interrogated employees about their union activities.
- (x) June 23, told employees not to talk to union representatives.

Ms. Hudson asked Downey what the union representative had said to him and told him not to talk to the union representative. This evidence sustains allegations 5(a)(ix) and (x).

5 (xi) July 2, told employee Arthur Johnson he was fired for having engaged in union activities.

I previously stated my reasons for finding unsatisfactory Johnson's testimony about the conversation forming the basis for this allegation. Accordingly, I recommend the allegation be dismissed.

(xii) June 30, interrogated employees about their union activities.

(xiii) June 30, told Keith Candley he was fired for having engaged in union activities.

15 Ms, Hudson admittedly asked Candley if he signed a union card and told him he was being discharged for wanting union benefits. Accordingly, I sustain allegations 5(a)(xii) and (xiii).

(xiv) July 24, told employees that the employer would be subcontracting out bargaining unit work in retaliation for the employees' union activities.

20 (xv) July 24, threatened to discharge employees if they selected the Union as their collective-bargaining representative.

(xvi) July 24, informed employees that it would be futile to select the Union as their collective-bargaining representative.

25 Ms. Hudson told Tenner that the Respondent was using new drivers from Corporate Services because of the Union. She further stated that if he did not sign up with Corporate Services, the Respondent would not be able to use him. I find these statements sustain 5(a)(xiv) and xv. However, I do not find they support 5(a)(xvi) and therefore recommend dismissal of that allegation.

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The complaint in paragraph 5(b) alleges that Hudson committed the following violations

(i) May 5, told employees not to sign authorization cards.

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Hudson told Johnson that some people would approach with union cards and that Johnson should not sign a card. This evidence sustains paragraph 5(b)(i).

(ii) June 9, interrogated employees about their union activities.

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Hudson asked Tenner if he had stopped at the Union and signed an authorization card. I find this evidence sustains paragraph 5(b)(ii).

(iii) June 23, interrogated employees about their union activities.

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(iv) June 23, engaged in surveillance of employees engaged in union activities.

(v) June 23, told employees not to talk to union representatives.

Hudson called Downey on his cell phone, asked what the union representative wanted, and told Downey not to talk to the Union. This was interrogation and also an indirect way of soliciting information about Downey's union activities, as reflected by Downey's answer that the union representative wanted him to sign a card but that he had not had the time. This evidence sustains paragraph 5(b)(iii) and (v).

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As to the surveillance alleged in 5(b)(iv), the Respondent's knowledge of the Union's organizing drive, and employees participating therein, went back to early April, when Streck saw Hudson observing him speaking with employees. In May, Tenner told Hudson that Streck was soliciting employees to sign cards. In light of this, I cannot conclude that Hudson's statements to Downey established surveillance, and I recommend dismissal of paragraph 5(b)(iv).

(vi) June 30, interrogated employees about their union activities.

Hudson asked Candley if he had signed a union card. This sustains allegation 5(b)(vi).

## II. The Discharges

The General Counsel alleges that the Respondent violated Section 8(a)(3) and (1) by discharging Candley, Downey, Johnson, and Tenner, because of their union activity.

The framework for analysis in cases alleging discrimination against employees on account of union or other protected concerted activity is *Wright Line*, 251 NLRB 1083 (1980), enf'd., 662 F.2d 889 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982).

Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated an employer's adverse action. The General Counsel must show, either by direct or circumstantial evidence, that the employee engaged in protected conduct, the employer knew or suspected the employee engaged in such conduct, the employer harbored animus, and the employer took action because of such animus.

Direct evidence of an anti-union motive in discharge cases is often lacking and, for that reason, reliance on circumstantial evidence, and reasonable inferences deriving there from, is appropriate and often necessary. *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995); *NLRB v. Warren L. Rose Castings, Inc.*, 587 F.2d 1005, 1008 (9th Cir. 1978); *McGraw-Edison Co. v. NLRB*, 419 F.2d 67, 75-76 (8th Cir. 1969). Thus, "Illegal motive has been implied by a variety of factors such as 'coincidence in U activity and discrimination.' . . . 'general bias or hostility toward the union' . . . 'variance from the employer's normal employment routine' . . . and 'an implausible explanation used by the employer for its action' . . . . " *McGraw-Edison Co v. NLRB*, *ibid* at 75.

Under *Wright Line*, if the General Counsel establishes a prima facie case of discriminatory conduct, it meets its initial burden to persuade, by a preponderance of the evidence, that protected activity was a motivating factor in the employer's action. The burden of persuasion then shifts to the employer to show that it would have taken the same adverse even in absence of the employee's protected activity. *NLRB v. Transportation Corp.*, 462 US 393, 399-403 (1983); *Kamtech, Inc. v. NLRB*, 314 F.3d 800, 811 (6th Cir. 2002); *Oscar Serrano*, 332 NLRB No. 247 at p.7 (2000); *Best Plumbing Supply*, 310 NLRB 143 (1993). To meet this burden, "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Oscar Serrano*, *supra* at p. 7, citing *Roure Bertrand Deupont, Inc.*, 271 NLRB 443 (1984).

Although the Board cannot substitute its judgment for that of an employer and decide what would have constituted appropriate discipline, the Board does have the role of deciding

whether the employer's proffered reason for its action was the actual one, rather than a pretext to disguise anti-union motivation. *Detroit Paneling Systems, Inc.*, 330 NLRB No. 168 (2000); *Uniroyal Technology Corp. v. NLRB*, 151 F.3d 666, 670 (7th Cir. 1998).

5 A. General Counsel's Case

Three of the four alleged discriminates signed authorization cards, and Tenner was a known union member. Therefore, the element of union activity has been satisfied for all four employees. All four were discharged, making employer action clear.

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As to the knowledge element, Hudson testified that in May, Tenner told him that Johnson and Candley had signed union authorization cards, so direct employer knowledge of those employees' union activity has been admitted. As to Tenner, the Hudsons knew he was a union member at the time he was initially hired. Further, on July 24, after Ms. Hudson told Tenner that the Respondent was going to transfer all work to Corporate Services in order to avoid the Union, Tenner responded that he would not go through Corporate Services. I conclude that this amounted to an indirect statement of union support communicated to the Respondent.

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Finally, with respect to Downey, Hudson called him on his cell phone on June 23 and told him not to talk to union representatives, and Ms. Hudson made statements of the same import to Downey later that day. In these circumstances, it can be reasonably concluded that the Hudsons suspected Downey of being involved in union activity. Even in absence of specific evidence of employer knowledge, the small size of operation—two supervisors and six employees—leads to the inference of knowledge, particularly when there is no dispute that the Hudsons were aware by May that the Union was attempting to organize their employees.<sup>44</sup> Accordingly, I find that the knowledge element has been satisfied for all four employees.

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In terms of animus, I have found that the Respondent committed numerous independent violations of Section 8(a)(1), including explicit threats to discharge employees for signing union authorization cards or engaging in other union activity, going as far back as May. This, along with the timing of the discharges—three of the four alleged discriminatees were fired the same month (June) they signed authorization cards—raises a strong inference that anti-union animus was the motivating factor in the discharges. See *Masland Industries, Inc.*, 311 NLRB 184 (1993).

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I conclude, accordingly, that the General Counsel has established a prima facie case of unlawful discharge of all four employees. The burden of persuasion therefore shifts to the Respondent to show that they would have been discharged even in the absence of any union activity.

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B. The Respondent's Defenses

Candley

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The Respondent admittedly discharged Candley because he signed a union authorization card and wanted the benefits the Union offered. The Respondent has not averred any other reason for his discharge. Accordingly, Candley's discharge violated Section 8(a)(3) and (1).

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<sup>44</sup> Knowledge of an employee's union activity can be inferred from surrounding circumstances. *E. Mishan, Inc.*, 242 NLRB 1344 (1979).

## Downey

5 It is undisputed that Downey had mechanical problems with the two trucks he drove on the three days of his employment in June. However, the reasons for those problems remain completely conjectural as far as this record is concerned, and there is no hard evidence that they were caused by Downey. The Hudsons and Knowling conceded that they do not possess mechanic expertise and could not diagnose the cause of those problems.

10 Downey testified without controversion that on June 24, Jimmy, the Respondent's mechanic told him that Nowling's truck should not have been driven that day because he (Jimmy) had not finished repairing it the day before. Downey further testified without contradiction that on June 27, both Jimmy and Hudson expressed agreement that what had happened to the trucks was not Downey's fault. Neither Jimmy nor the mechanic at Phil's  
15 Garage were called as witnesses by the Respondent, and I draw an adverse inference from the Respondent's failure to do so. *Torbitt & Castleman, Inc.*, 320 NLRB 907, 910 n. 6 (1996), *affd.* on point, 123 F.3d 899, 907 (6th Cir. 1997).

20 The fact that the Hudsons used Downey on June 27 to drive their own vehicle must be considered to weigh heavily against any contention that they considered him responsible for the mechanic problems on Nowling's truck on June 23 and 24. Similarly, Hudson took pains on the record to make it clear that when he had earlier testified that he told Downey on June 27 that he (Downey) was hard on trucks, he did not say that Downey was not used anymore for that  
25 reason.

I conclude under all of these circumstances that the Respondent has failed to demonstrate that it would have discharged Downey in the absence of his union activity. Accordingly, his discharge violated Section 8(a)(3) and (1).

## Johnson

30 Johnson was a relatively long-term employee, having driven for the Respondent for more than one season. In June, he was discharged for causing \$3000 - \$4000 damage to a truck but was subsequently rehired and retained his employment, even though he did not fully  
35 reimburse the Respondent for the costs of the repairs.

40 Ms. Hudson's detailed testimony about the diligent efforts she took to track Johnson down after he did not appear for work, including driving by his house, was not believable in light of her lack of phone records or memoranda, and the readiness she demonstrated in discharging him for not coming to work (in contrast, he was previously rehired after causing several thousand dollars' damage to a truck). Similarly, her professed willingness to assist him in marriage counseling after she told him he was fired seems extremely improbable, again when the record contains not even a scintilla of evidence that she had ever counseled him or any  
45 other employees in the past. In sum, her testimony regarding the termination of Johnson was patently unreliable, and I do not credit it.

Therefore, I conclude that the Respondent has failed to meet its burden of persuasion of showing that Johnson would have been discharged for not showing up for work the week of June 23, had he not engaged in union activity. Accordingly, his discharge violated Section  
50 8(a)(3) and (1).

## Tenner

5 Hudson offered two reasons for why Tenner was discharged. – the incident on August 6 at the Elburn jobsite, and Tenner’s constantly being late. Ms. Hudson added an additional reason—he damaged a wire with his truck. A company’s shifting of reasons for discipline, which can encompass expansion, is frequently indicative of discriminatory motive. See, e.g., *Central Cartridge, Inc.*, 236 NLRB 1232, 1260 (1978).

10 As to Tenner’s lateness, Hudson at first could not recall when Tenner started having this problem. After he was shown time sheets, Hudson stated Tenner was late on July 17, 19, and 21. Ms. Hudson, in contrast, testified that she began talking to Tenner about his lateness problem in late June or early July. Her testimony that she thereafter called him almost every morning until the last day of his employment, to wake him up on time, was simply unbelievable. In any event, even fully crediting the Hudsons, there is nothing in the record suggesting that Tenner would have been terminated had the incident at Elburn not occurred on August 6.

20 Clearly, Rockford Blacktop supervision at Elburn was not pleased with Tenner’s taking a lunch break at the site that day, for which he was ejected from the site. However, the real issue is whether the Respondent has demonstrated that, as Ms. Hudson told Tenner, he was discharged because he could no longer be used at any Rockford Blacktop jobsites.

25 Ms. Hudson admitted that at the time she discharged Tenner, she did not know for a fact whether he was permanently barred by Rockford Blacktop from working on any of its jobsites. Her testimony that Bradle told her that Tenner would be barred from the Elburn jobsite was directly contradicted by Bradle. He testified unequivocally that he never told her that and, indeed, that as far as Rockford Blacktop was concerned, Tenner could return to Elburn or any other Rockford Blacktop jobsite. Ms. Hudson’s conversation with Bradle, in which she stated that she would tell Tenner he was discharged because he could no longer work on Rockford Blacktop sites, smacks of outright deceit and dishonesty.

30 I conclude that the Respondent manufactured a pretext to discharge Tenner and that the real reason was that he engaged in union activity. Accordingly, his termination violated Section 8(a)(3) and (1).

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## III. Transfer of Work

40 A. Whether within 6 months preceding the date of the filing of the charge (August 18), the Respondent transferred work previously performed by the Respondent’s employees to employees of Corporate Services, because the employees engaged in union activities, thereby violating Section 8(a)(3) and (1).

45 The record evidence does not bear out this allegation. Prior to August, only one individual from Corporate Services was used for 3 weeks, ending in early June and prior to the date of any of the discharges. As to McLin, who stopped being the Respondent’s employee and became an employee of Corporate Services on about August 11, Ms. Hudson testified that he transferred at his request for unemployment insurance purposes. McLin did not testify, and there is nothing on the record showing that his transfer was motivated by anti-union animus directed against him or other employees. Although I have concluded that the discharges of the four employees named in complaint were unlawful, I do not deem it appropriate to “bootstrap” this alleged violation solely on that basis. The fact that the Respondent committed a number of serious unfair labor practices does not ipso facto mean that every action it undertook during the

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same period automatically was unlawfully motivated and constituted an unfair labor practice.

Accordingly, I recommend dismissal of this allegation.

- 5 B. Whether the Respondent violated Section 8(a)(5) and (1) by transferring out unit work to Corporate Services, without affording the Union prior notice or an opportunity to bargain.

10 The Respondent has admitted that the bargaining unit set out in paragraph 7(a) of the complaint is appropriate. The evidence reflects that as of June 23, four out of six unit employees signed authorization cards, and thus a majority of bargaining unit employees designated the Union as their representative for collective-bargaining purposes as of that date. Accordingly, since June 23, the Union has been the exclusive collective-bargaining representative of unit employees under Section 9(a) of the Act.

15 McLin, previously an employee of the Respondent in the bargaining unit, switched in August to being a Corporate Services' employee assigned to work for the Respondent, after the Respondent referred him to Corporate Services.

20 It is well established that contracting out of work previously performed by bargaining unit employees, when bargaining unit employees were capable of continuing to perform that work, comes under "terms and conditions of employment" within the meaning of Section 8(d) of the Act. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964). In other words, replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under the same conditions is a mandatory subject of bargaining, over which an employer is required to provide the union with notice and an opportunity to bargain over the act and its effects. *Ibid* at 213; *Torrington Industries, Inc.*, 307 NLRB 809 (1992).

30 Here, the Union was never notified of McLin's transfer or given an opportunity to bargain over it. Accordingly, I conclude that the Respondent violated Section 8(a)(5) and (1) by transferring out unit work without affording the Union notice or an opportunity to bargain over the act or its effects.

- 35 C. Whether the Respondent failed and refused to bargain with the Union since August 12.

40 I conclude that when the Hudsons came to the Union's office on August 12, Streck made an oral request to bargain as the exclusive bargaining representative of unit employees. This followed the decision and direction of election issued August 3, which the Respondent never challenged. The Respondent has admitted that since August 12, it has failed and refused to recognize and bargain with the Union. As explained in the remedy section of this decision, I find this conduct constituted a violation of Section 8(a)(5) and (1) of the Act.

#### Conclusions of Law

- 45 1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.  
 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.  
 3. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section  
 50 8(a)(1) of the Act:

- i. interrogated employees about their union activities

ii. promised employees pay raise if they refrained from selecting the Union as their collective-bargaining representative.

iii. threatened to discharge employees if they selected the Union as their collective-bargaining representative.

5 iv. threatened implicitly to close the business if employees selected the Union as their collective-bargaining representative.

v. told employees not to sign union authorization cards.

vi. told employees not to speak to union representatives.

vii. told employees they were fired for having engaged in union activities.

10 viii. told employees that the Respondent would be subcontracting out bargaining unit work in retaliation for the employees' union activities.

4. By discharging Keith Candley, Joseph Downey III, Arthur Johnson Jr., and Dennis Tenner, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of Act and violated Section 8(a)(3) and (1) of the Act.

15 5. By transferring out unit work without notifying the Union or affording it an opportunity to bargain, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(5) and (1) of the Act.

## 20 Remedy

Having found that the Respondent 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.

25 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 the date of discharge to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. WITH Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

30 The General Counsel seeks an order requiring the Respondent to restore work being done by employees of the temporary agency to employees of the Respondent, as it existed prior to an unknown date within the 6 months predating the filing of the charge. As I previously stated, however, the record reflects that Corporate Services provided only one individual to the Respondent for 3 weeks in May-June, and since mid-August, has provided only one other person. This is not a situation in which all, most, or even a significant number of former employee drivers of the Respondent have been displaced by drivers provided by temporary services. Accordingly, such an order is not appropriate. In this regard, the General Counsel also requests that McLin be subject to an order of reinstatement. For reasons previously stated, I have not concluded that the evidence is sufficient to establish that his transfer was motivated by anti-union considerations directed either against him or the unit employees as a whole. Mere suspicion cannot substitute for evidence.

45 The General Counsel also seeks a bargaining order, on the basis that the Respondent's unfair labor practices were so serious and substantial in character that the possibility of erasing their effects and of conducting a fair election by the use of traditional remedies is slight, and because such remedy would best protect the interests of unit employees. The General Counsel seeks such an order retroactive to June 23, the date the Union achieved majority status.

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In *Gissel Packing Co.*,<sup>45</sup> the Supreme Court recognized two kinds of employer conduct that may warrant imposition of a bargaining order. Category 1 is “outrageous and pervasive unfair labor practices,” and category 2 is: “less pervasive practices which nonetheless still have a tendency to undermine majority strength and still impede the election processes.” A *Gissel* order is an extraordinary remedy; the preferred route is to provide traditional remedies for an employer’s unfair labor practices and to hold an election, wherever such remedies “may be sufficient to cleanse the atmosphere of the effects of the unlawful conduct.” *In re Desert Aggregates*, 340 NLRB No. 38 at p. 8 (2003), citing *Aqua Cool*, 332 NLRB 95, 97 (2000).

In determining whether a bargaining order is appropriate, the Board examines the seriousness of the violations and the pervasive nature of the conduct, considering such factors as the size of the unit, the extent of dissemination among employees, and the identities and positions of those who committed the unfair labor practices. *In re Cardinal Home Products, Inc.*, 338 NLRB No. 51 at p. 9 (2003), citing *Garvey Marine, Inc.*, 328 NLRB 991, 993 (1999), enfd., 345 F.3d 819 (D.C. Cir. 2001). Serious employer misconduct that is widespread and directly reaches all or a significant portion of unit employees supports a bargaining order. *Cardinal Home Products*, supra at 10.

Here, the Respondent discharged four out of six, or a majority, of unit employees. Both Mr. and Ms. Hudson, the Respondent’s sole owners and sole supervisors, over a 3-month period, made numerous statements constituting independent violations of Section 8(a)(1), including threats of plant closure and of discharge for union activity, to those four employees. The Respondent unlawfully transferred work out of the bargaining unit in August. Ms. Hudson trumped up a knowingly false pretext to discharge Tenner. In light of all of these circumstances, I conclude that the Respondent engaged in *Gissel* category 1 conduct that was outrageous and pervasive and that a normal remedy would be inadequate to assure that employees are able to participate in an election untainted by the effects of the Respondent’s unfair labor practices. Accordingly, I will include a *Gissel* bargaining order in my order.

As to retroactivity, in *Trading Port, Inc.*, 219 NLRB 298 (1975), the Board found appropriate a bargaining order retroactive to the date the union requested recognition and bargaining, when other unfair labor practices of the employer were individually remedied in the order. Recent decisions of the Board reaffirm retroactivity of the bargaining order to such date. See *Orland Park Motor Cars*, 333 NLRB 127, p. 6 at n. 7 (2001); *Debbie Reynolds Hotel, Inc.*, 332 NLRB No. 46 (2000).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>46</sup>

#### ORDER

The Respondent, HH3 Trucking, Inc., Rockford, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

<sup>45</sup> 395 U.S. 575 at 613-14 (1969).

<sup>46</sup> If no exceptions are filed as provided by Section 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) interrogating employees about their activities on behalf of International Brotherhood of Teamsters, Local 325 (the Union).

(b) promising employees a pay raise if they refrain from selecting the Union as their collective-bargaining representative.

5 (c) threatening to discharge employees if they select the Union as their collective-bargaining representative.

(d) threatening to close the business if employees select the Union as their collective-bargaining representative.

(e) telling employees not to sign union authorization cards.

10 (f) telling employees not to speak to union representatives.

(g) telling employees they were fired for having engaged in union activities.

(h) telling employees that the Respondent would be subcontracting out bargaining unit work in retaliation for the employees' union activities.

(i) discharging employees for their activities on behalf of the Union.

15 (j) transferring work out of the bargaining unit without notifying the Union and affording it an opportunity to bargain over the action and its effects.

(k) failing and refusing to bargain, on request, with the Unions the exclusive collective-bargaining representative of the employees in the unit described below in paragraph 2(e).

20 (l) in any manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed 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 Keith Candley, Joseph Downey III, Arthur Johnson Jr., and Dennis Tenner 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.

30 (b) make Keith Candley, Joseph Downey III, Arthur Johnson Jr., and Dennis Tenner 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, notify in writing Keith Candley, Joseph Downey III, Arthur Johnson Jr., and Dennis Tenner that the discharges will not be used against them in any way.

35 (d) on request, bargain with the Union as the exclusive representative of employees in the following appropriate unit, concerning terms and conditions of employment and, if an understanding is reached, embody that understanding in a signed agreement.

40 All full-time and regular part-time drivers employed by the Employer at its Rockford, Illinois facility. Excluding owner-operators, office clerical and professional employees, guards and supervisors as defined in the Act.

45 (e) 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.

50 (f) within 14 days after service by the Region, post at its facility in Rockford, Illinois, the notice attached as "Appendix B."

It is further ordered that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

This concludes my bench decision, issued December 3, 2003.

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**APPENDIX B**

**PROCEEDINGS**

JUDGE SANDRON: We're back on-the-record for the Bench Decision in this matter.  
The General Counsel attorneys are present.

Ms. Hudson, I understand that your attorneys are not going to be present today, is that correct?

MRS. HUDSON: Yes.

JUDGE SANDRON: And I also understand, Mr. Streck, that Mr. Pekay is not going to be present?

MR. STRECK: That's correct, Your Honor.

JUDGE SANDRON: All right. Then I will proceed with my Bench Decision momentarily.

I understand, Ms. Hudson, that you prefer the title Mrs., rather than Ms.?

MRS. HUDSON: Yes, sir.

JUDGE SANDRON: I will issue my Bench Decision at this time.

**BENCH DECISION**

**STATEMENT OF THE CASE**

Ira Sandron, Administrative Law Judge. This matter arises out of complaint & notice of hearing complaint, issued on September 23<sup>rd</sup>, 2003 against HH3 Trucking, Inc., Respondent, based on charges filed by International Brotherhood of Teamsters, Local 325, the Union, on August 18<sup>th</sup>, 2003.<sup>47</sup>

Pursuant to a notice, I conducted a trial in Rockford, Illinois on October 20<sup>th</sup> to October 22<sup>nd</sup>, and on December 2<sup>nd</sup>, at which all parties were afforded full opportunity to be heard, to examine and cross examine witnesses, and to introduce evidence.

**General Counsel's witnesses:**

1. Thomas Streck, Union business representative.
2. Joseph Lawrence Downey, III, Arthur Johnson, Jr., Dennis Tenner and Keith

Candley, former drivers and alleged discriminatees.

3. Angelene Johnson, Arthur Johnson's wife.

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4. Roger Buck, president, Corporate Services, Inc.

5. Gretchen Hudson, Respondent's co-owner and president, under Section 611(c).

6. Keith R. Braedle, labor and truck superintendent, Rockford Blacktop, as a rebuttal

10 witness.

Respondent called:

1. Gretchen Hudson.

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2. William Hudson, Respondent's co-owner and vice president.

3. Irvin Jackson of the Springfield Urban League.

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4. Baltazar Davila & Patrick Nowling, owner operators who contract with the Respondent.

5. Reggie Norris, a driver for Respondent through Attitudes Trucking, an owner operator.

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**ISSUES**

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<sup>47</sup> All dates are in 2003 unless otherwise indicated.

1. Whether Respondent, through both William Hudson and Gretchen Hudson, committed various independent violations of Section 8(a)(1) in the period from May to July.

5 2. Whether the Respondent violated Section 8(a)(3) and (1) by discharging Candley, Downey, Johnson and Tenner because they engaged in activities on behalf of the Union.

10 3. Whether Respondent violated Section 8(a)(3) and (1) by, on a certain but unknown date within six months preceding the filing of the charge, transferring work previously performed by its employees to employees of Corporate Services, a temporary employment agency.

15 4. Whether the Respondent violated Section 8(a)(5) and (1), by transferring work previously performed by its employees, to employees of temporary employment agency, without providing the Union notice or an opportunity to bargain about the action and its effects.

20 5. Whether the Respondent violated Section 8(a)(5) and (1) by, since August 12<sup>th</sup>, failing and refusing to recognize and bargain with the Union.

**FINDINGS OF FACT**

**CREDIBILITY**

25 Most witnesses I heard were more or less credible, based on my observations of their demeanor, plausibility of their testimony, and consistency of their testimony with other  
30 testimonial and/or documentary evidence. The exceptions were

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Arthur and Angelene Johnson and the Hudson's. I will address the Hudson's now, and the Johnson's later on.

5 For the following reasons, I do not find Mrs. Hudson's testimony reliable. Her  
demeanor during the first three days of the hearing reflected either disdain for the proceedings  
or lack of understanding of its seriousness, or both. Twice, I had to reprimand her on-the-record  
10 for laughing out loud during the testimony of General Counsel's witnesses.<sup>48</sup> Her attitude was  
further reflected in her admitted failure to provide to the General Counsel, all documents clearly  
encompassed by the General Counsel's subpoena duces tecum.<sup>49</sup> Thus, although the  
15 subpoena broadly requested documents pertaining to the discharges of the four alleged  
discriminatees, including computerized data, she admitted that she did not provide existing  
computerized records and was evasive in explaining why she had not done so.<sup>50</sup> She also  
20 conceded that she maintained check carbons, but had not produced them.<sup>51</sup> Moreover, late in  
the proceedings, the Respondent's counsel produced a document relating to the discharge of  
Tenner, which also was not earlier provided in compliance with the subpoena duces tecum.<sup>52</sup>

25 Mrs. Hudson's testimony about her lack of documentation regarding the termination of  
the four alleged discriminatees and other events in the case, was not plausible for an owner of a  
business in today's world of regulations and laws. She  
30 testified that she has no personnel files for employees, no

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48 Transcript 324, 750

49 General Counsel's Exhibit No. 4

50 See transcript 270.

51 See transcript 283

52 Respondent's rejected Exhibit No. 16.

records of terminations of employees, no written employee policies, does not save phone bills or bills for parts purchases, and kept no memoranda of any telephone calls relevant to this proceeding.

5 Further damaging her credibility, was the fact that her testimony concerning what Keith Braedle allegedly told her, relevant to Tenner's discharge, was directly contradicted by Braedle. Thus, she twice testified that Braedle told her that at the Elburn job site where Tenner was 10 kicked off on August 6<sup>th</sup>, an employee who was kicked off would not be allowed overtime return there.<sup>53</sup> However, Braedle testified, "I never said anything about discharging him or that Tenner was not allowed on Elburn or any other Rockford Blacktop job site. As far as I was concerned, 15 he was never barred from that Rockford Blacktop job site or any other site."<sup>54</sup> Moreover, I credit Braedle's testimony about what she said to him about Tenner's discharge, which evidences 20 Respondent's bad faith.

Although Mrs. Hudson testified on cross examination that at the time she discharged Candley on June 30<sup>th</sup>, she was not aware that the Union had filed a petition with the Board, her 25 testimony however, was contradicted by General Counsel's Exhibit No. 9, which establishes that on June 27<sup>th</sup>, Respondent received a faxed copy of the petition, along with a cover letter addressed to her from the National Labor Relations Board.

30 I also find portions of her testimony highly implausible. Thus, she testified that after she told Johnson he was fired for not showing up, "begged" her to talk to him and his wife about their marital problems, and that when the Johnson's later met with the Hudson's for breakfast, 35 nothing else was discussed but their marital problems. Mr. Hudson testified similarly, and likewise incredibly. In addition, Mrs. Hudson's testimony about the alleged great efforts she made to locate Johnson in the days following June 19<sup>th</sup>, seems quite inconsistent with her 40 subsequent readiness to fire him.

Finally, Mrs. Hudson often seemed evasive in answering questions, particularly those 45 posed by the General Counsel. As to Mr. Hudson, he was very tentative and uncertain during much of his testimony, weakening my confidence in it. For example, his response to whether he

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50 <sup>53</sup> See transcript 716, 737

<sup>54</sup> See transcript 746

spoke to Johnson in May about the Union.<sup>55</sup>

A. I think, yes.

Q. When was this conversation?

A. It could have been in the morning.

Q. And do you recall where this conversation was?

A. Probably at the Mobil service station.

Or, when asked questions regarding Downey,<sup>56</sup>

Q. Do you recall meeting Mr. Downey later that day at all?

A. I think, I might have met with him and asked him what happened to the truck.

Q. Do you recall when you met with Mr. Downey later that day?

A. I met with Mr. Downey that evening, I think.

Mr. Hudson's professed ignorance of certain matters was also incredible. When asked why Candley was discharged, he testified that his wife discharged Candley, and that he did not know why.<sup>57</sup>

When the husband and wife are sole owners and operators of a small business, I cannot find this believable, particularly when Mrs. Hudson testified that "We basically interchange all duties," with the exception of her doing most of the computer work.<sup>58</sup>

Accordingly, I generally credit the testimony of other witnesses where it conflicts with that of the Hudson's'.

### **FACTS**

Based on the entire record, including witness testimony, documents, stipulations, offers of proof and closing arguments of the parties, I make the following findings of fact.

It is uncontested that the Respondent is an Employer and the Union is a labor organization within the meaning of the Act, and that Respondent's sole owners and officers are Gretchen and William Hudson, who are supervisors and agents of the Respondent, under Sections 2(11) and 2(13).<sup>59</sup>

The Respondent is an Illinois corporation with an office and place of business in

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<sup>55</sup> See transcript 545.

<sup>56</sup> See transcript 526-27.

<sup>57</sup> See transcript 592.

<sup>58</sup> See transcript 637.

5 Rockford, Illinois, where it is engaged in the business of hauling construction materials and  
dump trucks, either semis or regular tandem. The Hudson's have been in business  
approximately 10 to 11 years, and operate out of their home with a truck yard located at a  
different location.

The Respondent has utilized three types of drivers:

10 1) Employees driving the Respondent's trucks at times relevant, they were paid  
\$15.00 an hour with no payment for travel time or lunch or break time. There were about six  
such employees in June of 2003.

15 2) Owner operator who own their own trucks and contract with the Respondent. They  
drive under the HHE banner.

20 3) Employees of temporary services, (i.e., Corporate Services, Inc.) who drive HH3  
vehicles. For these drivers, the Respondent pays \$15.00 an hour times the multiplier of 1.4 or  
1.45, the amounts over \$15.00 going to the temporary agency.

25 Construction work is seasonal, so that there is only an occasional need for drivers  
during winter months. The construction season, depending on the weather, is normally from  
April to June until October to December.

30 Business representative Streck was at a Rockford Blacktop job site in early April,  
conducting a card check. Rockford Blacktop, as a signatory Employer to the Northern Illinois  
Contractors Association, or NICA, is obliged to make sure that

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<sup>59</sup> See Respondent's answer, General Counsel's Exhibit No. 1(i).

its contractors are Union compliant or signatory to a Union agreement. While there, Streck came across Mr. Hudson, who was driving an HH3 truck. Streck asked for his Union dues and Hudson said that he was a little behind on them. Streck called the Local and found that Mr. Hudson was in arrears over \$3000.00. He told Hudson that he would have to get his dues caught up and become compliant.

At the same job site a week or two later, Streck came across HH3 employee Mark Freeman. He asked Freeman for his dues receipt, to which Freeman replied that he was not a Union member. Streck said that he would have to be compliant. Streck explained the benefits of being represented by the Union and asked him to talk with other employees. Streck saw him again on April 20<sup>th</sup> or 21<sup>st</sup>, at the Mobil gas station, where HH3 drivers filled up in the morning before going to their assigned job sites. Mr. Hudson also goes there daily, in the morning, to pay for the drivers' gas. Streck further testified that while he was talking with the Respondent's employees about organizing, Hudson pulled up and saw them. I credit Streck over Hudson's denial that he ever saw Streck at the gas station.

Subsequently, Streck talked with Johnson, Candley, Downy and Smith, to whom he explained the benefits of working under a Union contract, and solicited them to sign authorization cards.

As reflected by General Counsel's Exhibit No. 2, Johnson signed

and authorization card on June 3<sup>rd</sup>, and the others signed cards on June 23<sup>rd</sup>.

5 On June 26<sup>th</sup>, the Union filed an RC petition in Case  
33-RC-4792. A pre-election hearing was held on July 9<sup>th</sup>, at which the sole issue was whether  
Respondent's drivers were independent contractors as asserted by the Respondent, or  
employees, within the meaning of the Act. On August 3<sup>rd</sup>, the Regional Director issued a  
10 decision and direction of election, in which he rejected the Respondent's assertion that these  
drivers were independent contractors, and instead found them employees. He further found  
that the following employees constituted an appropriate unit for collective bargaining purposes.

15 All full time and regular part time drivers employed by the Employer at its Rockford,  
Illinois facility. Excluding owner operator, office clerical and professional employees, guards  
and supervisors, as defined in the Act.

20 The deadline for requesting review of this decision was August 19<sup>th</sup>. Respondent did  
not file a request for review. Although the Respondent's answer raised as an affirmative  
defense, the contention that Candley, Downey, Johnson and Tenner were not "employees,"  
25 Respondent's counsel withdrew this affirmative defense at the hearing, and does not now  
contest the status of drivers of HH3 vehicles as employees.<sup>60</sup> Nor does  
the Respondent contest the appropriateness of the bargaining unit as found by the Regional  
30 Director.<sup>61</sup>

35 On the morning of August 13<sup>th</sup>, Streck was out checking cards at a Rockford Blacktop  
job site when he encountered HH3 driver Darnell McLin. McLin had no card and Streck told him  
that he needed one. McLin was removed from the job site by the job foreman. Later that  
morning, McLin came to the Union's office, or Union Hall, and said that he wanted to buy a card.  
Streck responded that McLin could not do that, that Mrs. Hudson had to come in and get things  
40 straightened out. That afternoon, Mrs. Hudson called Streck. She asked why Streck would not  
sell McLin a Union card. Streck responded that he could not do that and that she would have to  
come in and sign an agreement. Mrs. Hudson replied that she had no employees, to which  
45 Streck responded that the NLRB had already determined they were employees, not  
independent contractors. She replied that she had not had employees since 1992.

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50 <sup>60</sup> See transcript 10.

<sup>61</sup> General Counsel's Exhibit No. 1(i)

In early summer, the Hudson's came to the Union Hall with drivers, to obtain a card for the drivers as owner operators. Streck stated that they could not do that.

5           At one point, the Hudson's also met with Streck at the Union, with representatives of  
civil rights groups, including the Urban League. Based on the evidence of record and the  
Respondent's counsel's offer of proof, I adhere to my ruling that said meeting was not relevant  
10 to issues presented before  
me under the National Labor Relations Act.

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**DISCHARGE OF CANDLEY**

5 Candley struck me as a candid witness. His credibility was strengthened by the consistency of his testimony on direct examination and cross examination and its consistency as to the events of June 3<sup>rd</sup>, not only with Tenner's but with Mrs. Hudson's account.

10 Candley was employed as a driver for the Respondent from about June 1<sup>st</sup> until June 30<sup>th</sup>, when he was discharged. On June 13<sup>th</sup>, at the yard, he had a cell phone conversation with Mrs. Hudson about his need to call in, regarding his assignments for the next day, which he had not been doing. During this conversation, she stated that employees were going to attend a  
15 Union meeting the next day, and before employees signed anything, they should come to talk to her first. The following day, in the late morning at the yard, Mrs. Hudson asked him if he was going to the Union meeting and he said no.

20 On June 30<sup>th</sup>, in the morning, after Candley arrived at the yard, Mr. Hudson called him over and asked him if he had signed with the Union. Candley said yes. Candley returned to his truck and told Tenner what he and Hudson had just said. Just moments later, Hudson called  
25 him back. Hudson put Mrs. Hudson on the phone. She asked Candley if he had signed a card, and he said yes. She stated that she had told him that she had told him to come talk with her about it first, to which Candley  
30 responded that he did not remember that. She said that he was

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stupid, and that since he had signed with the Union, he could no longer work for them. Candley said that he was not the only one who signed. She asked who else. He said that since she had fired him, he couldn't tell her. Candley went back to Tenner and stated that he had been fired for signing a Union card. Tenner confirmed Candley's testimony about what Candley told him.

As mentioned earlier, Mr. Hudson professed ignorance for the reasons for Candley's discharge was not credible. Moreover, when asked what he knew of Mrs. Hudson's conversation with Candley concerning discharge, he answered, "My wife said, you cannot drive anymore, and that was it. That's all I recall."<sup>62</sup> I find it highly implausible that all that was said in the conversation in which an employee was told he was fired, was one statement of five words, made by the Employer.

Mrs. Hudson testified that she had a conversation with Candley, in which she told him that there would be a meeting at the Union Hall the following Saturday, at which she would be present, at Streck's behest. She put the date of this meeting as the Tuesday preceding June 30<sup>th</sup>. It may have been a separate meeting from the one about which Candley testified, since clearly in the meeting that he said she talked about, there would be no participation by the Hudson's. In any event, I credit Candley's account of his June 13<sup>th</sup> and June 14<sup>th</sup> conversations with the Hudson's.

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<sup>62</sup> See transcript 556.

Mrs. Hudson admittedly asked Candley, on the morning of June 28<sup>th</sup>, at the location where the trucks were being washed, if he was going to the Union meeting that day, and he said no.

In terms of her conversation with Candley on June 30<sup>th</sup>, Mrs. Hudson's version was not inconsistent with his. She admittedly began by asking him if he signed something with the Union. He said yes. She asked why. He said he wanted more benefits. She told him that he had signed a lease and did not have benefits. She further said that Respondent did not provide benefits, and that if he wanted benefits, he would have to work somewhere else. I reiterate here, that the Regional Director subsequently determined that drivers such as Candley are employees, not independent contractors, and that this determination was not contested by the Respondent.

#### **DISCHARGE OF DOWNEY**

Downey struck me as a credible witness. He appeared candid and not to be making efforts to embellish or skew his testimony. For example, when asked on cross examination if Mr. Hudson's voice was raised in a conversation that they had about the Union, Downey readily answered, "No, he just asked me what the Union representative wanted, and I told him."<sup>63</sup> On cross examination, other than regarding dates, Downey was consistent with his NLRB affidavit. Unless otherwise specified, what follows is Downey's credited account.

The week prior to June 23<sup>rd</sup>, Downey's last day as a driver

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<sup>63</sup> See transcript 142.

for the Respondent, Mr. Hudson told him he was being hired. Downey asked Hudson if he was going to be permanent and Hudson told him he would be driving a truck as long as he wanted.

5 On June 23<sup>rd</sup>, Downey was assigned to the Baxter landfill. There, he encountered Streck. Streck explained the benefits of Union representation, and asked him to sign an authorization card, which Downey did.

10 Shortly thereafter, Mr. Hudson called Downey on his cell phone. Hudson asked him what the Union representative wanted and Downey replied that the representative wanted him to sign a card. Downey told Hudson that he had replied he did not have time right then. Hudson then told him, "not to be talking to the Union representatives."<sup>64</sup>

15 That afternoon, Downey had trouble with the valve mechanism on his truck, so that he could not raise the box to dump load. He called Hudson and stated that he had tried to do it, but had been unsuccessful, despite various efforts. The Hudson's came out about an hour later. They tried other measures but were still unsuccessful. During this time, Mrs. Hudson asked what the Union representative said, and Downey replied as he had earlier. She then said, 20 "Good. Don't be talking to the Union representatives."<sup>65</sup> Mr. Hudson instructed Downey to take the truck to Phil's Garage, which he did.

25 That evening, Downey called the Hudson's. Mrs. Hudson told him that the truck was fixed, and for him to report to the

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<sup>64</sup> See transcript 109.

<sup>65</sup> See transcript 112-13.

5 same job the next day. Downey used the same truck the following day, June 24<sup>th</sup>. In mid-  
afternoon, the truck stopped running, as though it had run out of fuel. He testified that he  
believed he caught a rock coming across the creek and that it pulled the hub over it and slid the  
10 elbow right off the pipe. Downey checked the left tank and observed plenty of fuel. He called  
Mr. Hudson, who suggested he check other mechanisms. Downey and an HH3 owner operator,  
were not successful in getting the truck to start. And Downey again called Hudson. Hudson  
15 told him to ride back with other drivers and they would get the truck later.

When Downey returned to the Respondent's yard, he talked with Hudson and the  
15 Respondent's mechanic, Jimmy. He told Jimmy what had happened. And Jimmy said the truck  
should not have been put back into service, because he was not finished doing everything that  
needed to be done on it.

20 That evening, Mrs. Hudson told Downey that they did not need him the next day,  
because Nowling was going to drive his own truck. Three days later, (June 27<sup>th</sup>), she called him  
early in the morning, and said that they needed him to drive that day because another driver  
25 had gotten hurt. That day, Downey went to a different job site, using a different truck, this one  
belonging to the Respondent. In the mid-afternoon, Downey heard a bad vibration in the truck,  
as he was going down the  
30 highway with the load. He stopped and checked, and saw that

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the needle bearings had come out of one of the cups in the U joint. Another driver stopped and confirmed this problem. Downey waited for Mrs. Hudson's brother, who was working on the same site that day. He looked at it, and said to drive it back to the yard.

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When Downey got back to the yard, Mr. Hudson and Jimmy were there. Hudson told Jimmy to get a U joint and fix the truck. Downey stated that it was not his fault that something had gone wrong with his truck three days in a row, and both Hudson and Jimmy said no, it wasn't. Hudson did not deny this.

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That night, when Downey called Mrs. Hudson about further driving, she stated that they did not want him anymore, because every time he took out a truck, he tore it up. Downey responded that if they did not have junk, they would not have that problem. Mrs. Hudson's version of this conversation was consistent with Downey's.

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All of Downey's contact was with the Hudson's. He was paid directly by the Hudson's, and had no direct contact with Nowling.

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Nowling was called by the Respondent. He appeared to be candid and I credited his testimony. He has been an owner operator for the Respondent since June 2002. The Respondent purchased the valve control part needed for the truck that Downey drove,<sup>66</sup> but the cost was deducted from Nowling's payment

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from the Respondent. The truck had been pared at the yard for

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<sup>66</sup> Respondent's Exhibit No. 7.

about four months before Downey drove it on June 23<sup>rd</sup>, but had been regularly maintained. Nowling testified that he is not a mechanic and cannot say why the valve control needed to be repaired or whether the driver, Downey, caused the damage.

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Mr. Hudson's recollection of the events of June 23<sup>rd</sup> to 27<sup>th</sup> regarding Downey, were somewhat sketchy. But he did recall that Downey called him on June 23<sup>rd</sup>, June 24<sup>th</sup> and June 27<sup>th</sup>, about problems Downey was having with his truck. Other than the dates of the particular problems, Hudson's testimony in this area was not inconsistent with Downey's. The Hudson's conceded they lacked mechanical expertise to ascertain what caused the problems Downey had with the trucks. Neither their mechanic nor the garage mechanic were called as witnesses.

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Hudson testified that on June 27<sup>th</sup> he told Downey, "he was pretty hard on trucks,"<sup>67</sup> to which Downey responded that Respondent's trucks were junk. Significantly, when I asked Hudson why Downey was not called back to work, he responded that it was because Nowling came back to drive his own truck. Hudson said nothing at that point, about Downey's problems with the two trucks. Hudson subsequently even took pains to make it clear that he had not earlier testified that Downey was not used anymore because he was hard on trucks.<sup>68</sup>

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The record reflects that Johnson was fired in June 2003, for causing substantial damage, approximately \$3000.00 to \$4000.00, to a truck. He was rehired and subsequently repaid

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<sup>67</sup> See transcript 538.

<sup>68</sup> See transcript 605.

part of the repair costs, but not all. Reggie Norris worked as an employee of Respondent from April until October of 2002, during which time he broke two trucks and put trucks out of commission four times. The Hudson's told him that they could not afford to keep him. Since  
5 June 2003, he had driven for Respondent through Attitudes Trucking.

### **DISCHARGE OF JOHNSON**

10 Johnson and his wife, in contrast to Candley and Downey, were not fully credible witnesses. However, for reasons to be stated, I generally credit the Johnson's' versions about what was said in conversations they had with the Hudson's.

15 Johnson began working for Respondent in approximately June of 2002. He was off during winter months and resumed work in April of 2003. On May 5<sup>th</sup>, he was filling up at a Mobil gas station used by Respondent, when Mr. Hudson came up and said, "There is going to  
20 be some people approaching you with Union cares. Don't sign the card."<sup>69</sup> Johnson asked why, and Hudson responded because the card was Union. According to Johnson, Hudson then went to talk to other drivers.

25 As I previously set out, Mr. Hudson's testimony about this incident was sketchy and equivocal, as was much of his testimony. He was also tentative in recalling the substance of what was said, saying, "I think Mr. Johnson mentioned the Union. They had been on the job  
30 site or something and he said that they wanted to talk to him or something. I think he said that. I'm not sure."<sup>70</sup> When I asked Mr. Hudson if he responded to what Johnson said, he answered, "I do not think so..."<sup>71</sup> I do not  
35 find credible, Hudson's poor recall of a conversation that he had to have reasonably considered important at the time. In any event, his admittedly poor recall makes his testimony on conversations unreliable.

40 Johnson testified that on approximately May 19<sup>th</sup>, in the yard, before the drivers took out their trucks, Mrs. Hudson talked to them in a group. Candley and Tenner were among those present. She told them not to sign, but to take the card and bring it to her and she would fix the  
45 cards up and take them down to the Union. She also stated that the Union was just trying to shut the Respondent down and get the Respondent's money.

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50 <sup>69</sup> See transcript 175.

<sup>70</sup> See transcript 546.

ON about June 12<sup>th</sup>, Johnson arrived back late at the yard. Mr. Hudson asked him what had taken him so long. And Johnson replied that it he had worked nine and a half hours.

5 Hudson then asked, "You didn't stop at the Union and sign no (sic) card, did you?"<sup>72</sup> Johnson replied no.

10 It is not disputed that the Johnson's and the Hudson's had breakfast on one occasion at Granny's Restaurant. But there is no agreement between the Johnson's and the Hudson's on when it occurred, vis-à-vis, Johnson's termination, or what was said.

15 Johnson and his wife testified that the breakfast was on June 15<sup>th</sup>. It was arranged for and paid by Mrs. Hudson. Their testimony about what Mrs. Hudson stated was similar. Mrs. Hudson stated that she was going to give Johnson and Dennis (Tenner) a \$2.00 raise for insurance purposes. Ms. Johnson recalled her saying that it was for the insurance purposes.

20 Johnson recalled Mrs. Hudson saying words to the effect that she was upset about employees signing authorization cards and that he responded that he would not sign and that Mrs. Hudson also said that the Union was making it hard for minorities. According to both Johnson and his

25 wife, Mrs. Hudson also said that anybody that signed a card would not have a job with HH3. I note here, Mrs. Hudson's admission that on June 30<sup>th</sup>, after Candley told her that he signed a card, she said she could not use him anymore.

30 In contrast, Mrs. Hudson testified that Johnson called her on June 27<sup>th</sup>, in the afternoon, at her house. She asked what was up, where he had been. He said that he had been in detox for a few days. She told him he did not have a job because he had not shown up or called.

35 According to Mrs. Hudson, Johnson then "begged me to talk to him and his wife," about their marital problems. She agreed, and they had breakfast the following day.<sup>73</sup> Both Mrs. Hudson and Mr. Hudson testified that nothing was discussed at the breakfast other than Johnson's'

40 marital problems and them going to church together.

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50 <sup>71</sup> Ibid.

<sup>72</sup> See transcript 184.

<sup>73</sup> See transcript 667.

I credit the Johnson's' version as to both date and contents of the conversation. I note that although the Hudson's paid for the breakfast, they produced no documentation corroborating the date as being after June 27<sup>th</sup>. Fundamentally, I find it strains credulity to believe that after being told he was fired, Johnson would have "begged" Mrs. Hudson to provide marital counseling to him and his wife. I also find that it defies common sense to accept the Hudson's' version that although Johnson had just been fired, nothing at all was said about his employment at breakfast the following day. Mrs. Hudson's testimony was particularly unbelievable when nothing in the record even remotely suggested at any time prior to the breakfast, she provided Johnson or any other employee with counseling of any kind.

Johnson's last day of work was June 21<sup>st</sup>. He and his wife's testimony about what happened thereafter, was not fully satisfactory and neither was Mrs. Hudson's.

Johnson first testified that he learned on June 23<sup>rd</sup> that he was no longer a driver when he went to the yard to see who was driving the truck he had been driving. In connection with this answer he said, "I was --- hadn't worked for awhile,"<sup>74</sup> inconsistent with having worked only two days earlier. Drivers told him that he had been fired. And Ms. Johnson corroborated his testimony about learning he was no longer a driver on June 23<sup>rd</sup>.

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<sup>74</sup> See transcript 189.

When asked when he next had direct contact with the Hudson's, Johnson replied July 2<sup>nd</sup>. According to Johnson, he went to ask why he was fired. Mrs. Hudson told him it was because he had signed the card. Johnson said he did not sign one, and left. I asked Johnson why he waited until July 2<sup>nd</sup> to speak to her directly. Johnson responded, "Well, I mean, I was -- I had been looking for a job at that time, during that week, like I hadn't no (sic) luck so I went and I asked what was up."<sup>75</sup> Mrs. Hudson denied telling he was fired because he had signed a Union card.

Johnson's testimony about making phone calls to the Hudson's after June 21<sup>st</sup> and before July 2<sup>nd</sup>, was vague and lacking in specificity. At one point, he testified that he called on June 22<sup>nd</sup> to inquire about work, that he may or may not have left a message, and that he showed up on June 23<sup>rd</sup>. Again, this contradicts his testimony that he had not worked for awhile. Even more significantly, it was stipulated that there was nothing in his August 7<sup>th</sup>, 2003 affidavit to NLRB about his calling in for work after June 21<sup>st</sup>.<sup>76</sup>

On cross examination, Johnson's testimony that there was a hiatus of almost two weeks by the time he learned he was fired, (June 23<sup>rd</sup>), and the day he spoke with Mrs. Hudson (July 2<sup>nd</sup>), was impeached by his statement in his NLRB affidavit, that he went to see her on the same day. He explained this as being a mistake in his affidavit, because he had not yet gone into detox.<sup>77</sup>

Accordingly, I do not find credible evidence supports a finding that Mrs. Hudson told Johnson on July 2<sup>nd</sup>, that he was fired for Union activity.

Ms. Johnson testified that she had two or three conversations with Mrs. Hudson after she learned on June 23<sup>rd</sup>, that Johnson had been fired. The first, she initially said, was on the afternoon of June 23<sup>rd</sup>, when Mrs. Hudson called and asked if Johnson had signed any type of card or anything, and she said no, to her knowledge. I asked Ms. Johnson if she could remember anything else in the conversation and she replied no. I find her testimony concerning this conversation, unbelievable. First, if Johnson had already been fired, why would Mrs. Hudson call and inquire about his Union activity? Even more unexplainable, here Ms. Johnson,

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<sup>75</sup> See transcript 197.

<sup>76</sup> Respondent's Exhibit No. 5.

<sup>77</sup> General Counsel's Exhibit No. 3, a letter from Rosecrance Regional Treatment Center dated 8/21/03, states that Johnson was in treatment from June 29<sup>th</sup> through July 1<sup>st</sup>.

according to her own testimony, had just learned from her husband that he had been fired, and yet she said nothing about his when Mrs. Hudson called. Indeed, Ms. Johnson testified that her next conversation with Mrs. Hudson occurred the following day, on June 24<sup>th</sup>, when she called  
5 Mrs. Hudson and asked if there was any work for her husband. Yet, according to her testimony, she had not said anything about the subject the day before. Mrs. Hudson said no, she had  
10 another man in the truck and could not take him out of it.

Ms. Johnson said she had a third conversation with Mrs.

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5 Hudson around June 29<sup>th</sup>, when Johnson was in rehab. Mrs. Hudson again asked whether  
Johnson had signed a card. According to Ms. Johnson, Mrs. Hudson also asked if she knew  
where Johnson was, and she replied no. Again, if Johnson had already been fired on June 23<sup>rd</sup>,  
as alleged in the complaint, the question seems odd.

10 On cross examination, Ms. Johnson added further confusion to her earlier testimony.  
She testified that she did not talk to Mrs. Hudson at all on June 23<sup>rd</sup>, the day her husband came  
back and said his truck was not there. Rather, she said that her first conversation with Mrs.  
Hudson occurred on June 24<sup>th</sup>, with the second two days later (June 26<sup>th</sup>) and a third on June  
15 29<sup>th</sup> or June 30<sup>th</sup>, when Johnson was in Rosecrance.

Truck, I do not find credible evidence supports allegation 5(a)(8) relating to Mrs.  
Hudson's alleged interrogating the wife of an employee.

20 Mrs. Hudson testified with regard to Johnson's termination, "We let him go. Well, he  
fired himself. He did not come back to work and did not call and did not show up for a week."<sup>78</sup>  
Thus, she testified that she spoke with him on the evening of June 19<sup>th</sup>, and not again until June  
25 27<sup>th</sup>. On June 20<sup>th</sup>, she called him at home to find out why he had not picked up his check. She  
left a message.

30 ON June 21<sup>st</sup>, Ms. Johnson came in the evening to get his  
check. She told Mrs. Hudson she did not know where Johnson

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<sup>78</sup> See transcript 658.

5 was. Mrs. Hudson asked her to tell Johnson to call. The following Monday, Mrs. Hudson left  
the message the Johnson's' answering machine, and also drove by the Johnson's' house. She  
called again on Tuesday, got no response, and hung up. On Tuesday evening she called again.  
This time, she spoke with Johnson's daughter and asked to have Johnson call her. On June  
27<sup>th</sup>, Johnson called, and after being told he was fired, "begged" for her to provide marital  
10 counseling to him and his wife. I wonder how Mrs. Hudson could have had such a specific  
recall of all of these events when she testified she retained no phone records and had no  
memoranda, phone or otherwise, of anything pertinent to this proceeding.

15 Tenner had a conversation with Mr. Hudson in the yard on June 24<sup>th</sup>, international he  
late afternoon. Tenner asked what happened to Johnson. Hudson replied that Johnson had  
fired himself. Tenner asked what he meant, and Hudson answered, "Because he talked to the  
20 Union and he signed for representation for the Union."<sup>79</sup> He also told Tenner to "stay away from  
the white folks. They're out to hang us just like they did our forefathers," meaning the  
Teamsters Local."<sup>80</sup> I credit Tenner's account.

#### 25 DISCHARGE OF TENNER

Tenner was somewhat emotional, and at times displayed anger, especially when Mrs.  
Hudson laughed during his  
30 testimony. But he struck me as sincere and he was generally

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<sup>79</sup> See transcript 311.

<sup>80</sup> See transcript 312.

credible.

5 Tenner drove for the Respondent for approximately two years. He resumed work in the 2003 season, approximately February. The Hudson's knew that he was in the Union at the time he was originally hired.

10 Tenner met Streck at a job site in May at about noon. They discussed organizing Respondent's employees. When he returned to the yard at the end of the work day, he told the Hudson's that the Union representative had been there on the job site. Mr. Hudson said he already knew, because Arthur (Johnson) had already told them. Mrs. Hudson then said, "You  
15 all stay away from them. If you sign anything with the Union, we are not going to be able to use you."<sup>81</sup>

20 Mr. Hudson recalled the conversation with Tenner in May, in the yard. He testified that Tenner told him that Candley and Johnson had signed cards, and that he did not respond. He could recall nothing else being said. Hudson's testimony that Tenner made one statement that two employees signed cards, that he did not respond, and that nothing else was said, strikes me  
25 as suspiciously limited. Based on this, as well as Mr. Hudson's general lack of credibility, I credit Tenner's version of what was said.

30 Tenner was assigned to the Rockford Blacktop's Elburn job site on August 6<sup>th</sup>. He decided to take an unpaid half hour lunch break at noon. He candidly testified that Rockford

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<sup>81</sup> See transcript 308.

Blacktop lead man Ken, last name not known, over the CB, asked him what he was doing. He replied he was taking a lunch break. Ken replied that Tenner was only one of 16 trucks taking such a lunch break. Tenner stated that they deserved a lunch break. And Ken said fine.

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Shortly thereafter, responsible foreman Brian Butts, came over the radio and asked Tenner if anything was wrong with his truck. Tenner said no, that he was taking a lunch break. After the conversation, Tenner set his alarm for 12:28 p.m. and dosed off. He was awakened by the alarm at 12:28. At that time, Ken came over and stated that Tenner was being signed out for the rest of the day, meaning he was being thrown off the job site.

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Tenner returned to Respondent's truck yard. The Hudson's were there. Mrs. Hudson stated that he had done it now. He asked what she meant. She replied that Rockford Blacktop did not want him back on any job, and that because Rockford Blacktop was their main customer, she did not know what they would do with him. Tenner never worked for the Respondent after August 6<sup>th</sup>. On this conversation, Mrs. Hudson's version was similar to Tenner's.

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Tenner spoke with Braedle the following Monday at Braedle's office. Braedle told Tenner that he did not tell Mrs. Hudson that he did not want Tenner on that job or any other Rockford Blacktop job. That evening, Tenner went to the

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Hudson's. He spoke with Mr. Hudson in the yard, and told him

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of his conversation with Braedle. When Mrs. Hudson arrived, Tenner told her that Mr. Hudson could relate what he, Tenner, had said. Two days later, Tenner called the Hudson's. He asked Mrs. Hudson if he was going back to work. And she replied she had nothing for him.

On cross examination, it was disclosed that in Tenner's affidavit, he did not state that Braedle denied telling Mrs. Hudson that Tenner could not work on an Rockford Blacktop job site. But Tenner did state in his affidavit that Braedle told him that he, Braedle, would speak to the Hudson's in Tenner's defense. I also note Mr. Hudson's testimony that following Tenner's discharge, Tenner came by the Respondent's home and stated that he, (Tenner), had talked to Rockford Blacktop and "everything was good with them."<sup>82</sup> I do not find the discrepancy between testimony and affidavit, to constitute a damaging inconsistency.

It is clear from Tenner's own testimony, as well as that of Davila and Norris, that taking lunch breaks on the site at the Elburn job site was unusual and frowned upon.

Braedle's testimony about Rockford Blacktop's not prohibiting Tenner from returning to the Elburn job site or any other Rockford Blacktop job site after August 6<sup>th</sup> was previously described. To summarize it here, Braedle stated that Tenner's being thrown off the Elburn job site did not bar him from that job site or any other job site after August 6<sup>th</sup>, as far as

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<sup>82</sup> See transcript 564.

Rockford Blacktop was concerned.

Braedle also testified that Mrs. Hudson came to his office in early August, in the afternoon. She told him that she was going to tell Tenner that Rockford Blacktop would not let him be used anymore, and that was the reason for his discharge. Braedle told her that he did not care what she told him, that it was not his concern. As noted earlier, Mrs. Hudson testified twice that Braedle told her that Tenner could not return to the Elburn site. And she also testified that she called him on August 6<sup>th</sup>, about what happened with Tenner. Very conveniently, she could not remember his response at the time.

Her lack of recall of his response is highly suspicious, when she later fired Tenner that day, because he was presumably barred permanently from all Rockford Blacktop sites. For this and a myriad of other reasons already stated, Mrs. Hudson was not a credible witness. In contrast, Braedle appeared candid and I have no reason to doubt the reliability of his testimony. Accordingly, I credit Braedle's account of what she told him.<sup>83</sup>

Both Mr. and Mrs. Hudson testified about Tenner's termination. Mr. Hudson testified that Tenner was discharged because he went to sleep on the job and was constantly late. However, he could not say when Tenner started being late. Later, when shown certain time sheets,<sup>84</sup> he then testified that Tenner was late on July 17<sup>th</sup>, 19<sup>th</sup> and 21<sup>st</sup>, at Rockford Blacktop job sites.

Mrs. Hudson added an additional reason for his discharge --- he tore down a wire with a truck. She also described Tenner's alleged problem with lateness or timely attendance in considerably more detail. Thus, she testified that she began talking to Tenner about his attendance problem in late June or the first part of July. She testified, rather incredibly, that he suggested that she call him in the morning to wake him up, and she did that "just about every morning until the last day he worked with HH3."<sup>85</sup> I note that even according to her own testimony, when she told Tenner he was being discharged, she referenced only the incident that day, and said nothing about tardiness or torn down wire.

In sum, the Hudson's' testimony regarding Tenner's termination or discharge, was

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<sup>83</sup> Counsel for the Respondent rested on 10/22 but later stated he wanted to recall Mrs. Hudson to rebut what Braedle said. I have found it unnecessary. I will assume she would have made a full denial, which I would not have credited.

<sup>84</sup> Respondent's Exhibit No. 10.

<sup>85</sup> See transcript 680.

unbelievable, inconsistent and directly contradicted by their customer.

**USE OF TEMPORARY SERVICES**

5 I credit Tenner's testimony that on or about July 23<sup>rd</sup> or July 24<sup>th</sup>, he had a conversation  
with Mrs. Hudson in the yard, when he returned from a job site. He mentioned there were a few  
new drivers. She replied they were from Corporate Services, a temporary agency. He asked,  
10 "Why?" She replied, "Well, the Union is always sticking their nose in our business. So  
therefore, you guys will be able to get insurance and unemployment through Corporate  
Services. So they will stay away from us."<sup>86</sup> She also told Tenner that eventually, he would

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<sup>86</sup> See transcript 325-326.

have to go over to sign up with Corporate Services. He said he wouldn't. She stated that eventually she was going to use all Corporate Services employees and if he did not go over, they were not going to be able to use him.

5 Roger Buck, president of Corporate Services, Inc., testified that Corporate Services operates interstate, and provides labor primarily in the manufacturing sector. The customer sets the hourly pay rate for employees provided to him by Corporate Services. Corporate Services 10 normally multiplies its rate by 1.45 to arrive at an hourly charge to the customer. However, if the customer has referred an employee to Corporate Services, the multiplier is reduced to 1.4, since there is normally less overhead involved for Corporate Services. 15

Respondent's Exhibit No. 11 shows that the Respondent used Corporate Services for eight weeks in October and November 2000, for one or two employees. Respondent's Exhibit 20 No. 12, prepared by Buck and transmitted to the Respondent on September 26<sup>th</sup>, reflects that the Respondent used Corporate Services for labor one time in 2001 for one week, never in 2002 and in 2003 for the following weeks:

25 May 19<sup>th</sup>, May 26<sup>th</sup> and June 2<sup>nd</sup>, one driver. The job order for this was taken from Respondent on May 20<sup>th</sup>.<sup>87</sup> Mr. Hudson testified that they were short one driver at the time.

30 August 11<sup>th</sup> to September 15<sup>th</sup>, one driver. The job order for this was taken on July 17<sup>th</sup>.<sup>88</sup> This driver is Darnell McLin.

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50 <sup>87</sup> Respondent's Exhibit No. 6.

<sup>88</sup> General Counsel's Exhibit No. 5.

5 It was stipulated that McLin was employed as a driver for the Respondent through August 20<sup>th</sup>  
and was an employee within the meaning of the Act. It was further stipulated that from August  
11<sup>th</sup> to present, McLin has been employed by Corporate Services and assigned to work for the  
Respondent as a driver of one of the Respondent's trucks. Mrs. Hudson testified that McLin  
wanted a transfer to Corporate Services for unemployment insurance purposes. McLin was not  
10 called as a witness, and her testimony went uncontroverted.

Thus, in 2003, Corporate Services has provided two drivers to Respondent at different  
times.

### 15 **ANALYSIS & CONCLUSIONS**

#### **INDEPENDENT VIOLATIONS OF SECTION 8(a)(1).**

The complaint alleges in 5(a), that on or about the following dates, Mrs. Hudson, at the  
20 Respondent's facility unless otherwise specified:

1) May 19<sup>th</sup>, impliedly threatened to close the business if employees selected the Union  
as their collective bargaining representative;

25 2) On or about May 19<sup>th</sup>, told employees not to sign Union authorization cards;

3) On or about May 3<sup>rd</sup>, told employees not to speak to Union representatives; and

4) In May 2003, threatened to discharge employees if they  
30 selected the Union as their collective bargaining

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representative.

5 On or about May 19<sup>th</sup>, Mrs. Hudson told Johnson not to sign a Union card, but to bring it to her, and that the Union was just trying to shut the Respondent down and get the Respondent's money. In May, Mrs. Hudson told Tenner to stay away from the Union and that if employees sign anything, the Respondent would not be able to use them.

10 I find that evidence sustains Paragraphs 5(a)(1) through (4).

The complaint also alleges in Paragraph 5(a)(5), that:

15 5) On June 15<sup>th</sup>, at Granny's Restaurant, Mrs. Hudson promised employees pay raises if they refrained from selecting the Union as their collective bargaining representative;

6) Threatened to discharge employees if they selected the Union as their collective bargaining representative; and

20 7) Told employees not to sign Union authorization cards.

Although I had some problems with the credibility of the Johnson's in other areas, as far as the breakfast was concerned, their testimony was far more plausible than the Hudson's'.

25 Mrs. Hudson's statement about giving a \$2.00 an hour pay raise, was in the context of her expressed displeasure over employees signing auth cards. I find it constituted an implicit promise of benefit for refraining from Union support. Her statement that anybody who signed a card would not have a

30 job, constituted a clear threat of retaliation. Accordingly, I

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find that allegations 5(a)(5), (6) and (7) have been sustained.

5 Allegation 5(a)(8) is that on June 21<sup>st</sup>, Mrs. Hudson interrogated the wife of an employee concerning the employee's Union activities. I previously stated why Ms. Johnson's testimony about this conversation formed the basis for this allegation as not satisfactorily credible. Accordingly, I find that Paragraph 5(a)(8) has not been sustained.

10 Paragraph 5(a)(9) alleges that Mrs. Hudson, on about June 23<sup>rd</sup>, interrogated employees about their Union activity.

15 And (10) alleges that on about that same date, she told employees not to talk to Union representatives.

Mrs. Hudson asked Downey what the Union representative had said, and told him not to talk to a Union representative. I find allegations (9) and (10) have been sustained.

20 (a)(11) alleges that on or about July 2<sup>nd</sup>, Mrs. Hudson told employee Arthur Johnson that he was fired for having engaged in Union activities.

25 As I previously stated, Mr. Johnson's testimony about the conversation forming the basis for this allegation, was not satisfactorily credible. I found that this allegation has not been sustained.

30 (a)(12) and (13) allege that on June 30<sup>th</sup>, Mrs. Hudson interrogated employees about their Union activities, and told Keith Candley that he was fired for having engaged in Union activities.

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Mrs. Hudson admittedly asked Candley if he signed a Union card, and told him he was being discharged for wanting Union benefits. I find that allegations (12) and (13) have been sustained.

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(14) On July 24<sup>th</sup>, told employees that the Employer would e subpoena contracting bargaining unit work in retaliation for the employees' Union activities; and

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15) On that same date, threatened to discharge employees if they selected the Union as their collective bargaining representative.

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16) also alleges that on that same date, Mrs. Hudson informed employees that it would be futile to select the Union as their collective bargaining representative.

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Mrs. Hudson told Tenner that the Respondent was using new drivers from Corporate Services because of the Union. She also stated that if he did not sign up with Corporate Services, Respondent would not be able to use him. I find these statements sustain allegations (14) and (15). However, I do not find that they support (16).

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As to Mr. Hudson, Paragraph 5(b)(1) alleges that on May 5<sup>th</sup>, at a specified Mobil gas station, he told employees not to sign authorization cards.

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The evidence reflects that Hudson told Johnson that there would be some people approaching with Union cards, and that Johnson should not sign a card. I find allegation (b)(1)

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sustained.

5 (b)(2) alleges that Mr. Hudson, on about June 9<sup>th</sup>, interrogated employees about their Union activities. Hudson asked Tenner if he had stopped at the Union and signed an authorization card. This sustains allegation (b)(2).

10 Allegations (3), (4) and (5) relate to one individual, Mr. Downey, who was at a specified landfill on June 23<sup>rd</sup>. (3) alleges that Mr. Hudson interrogated employees about their Union activity. (4) alleges that he engaged in surveillance of employees engaged in Union activities; and (5) alleges that by cell phone, he told employees not to talk to Union representatives.

15 Mr. Hudson called Downey on his cell phone, asked what the Union representative wanted, and told Downey not to talk to the Union. This was interrogation, and also an indirect way of soliciting information about Downey's Union activities, as reflected by Downey's answer  
20 that the Union representative wanted him to sign a card, but that he did not have the time right then, to do it. I find that allegations (3), (5) have been sustained.

25 With regard to (4), alleging surveillance of employees engaged in Union activity, the evidence reflects that the Respondent's knowledge of the Union's organizing drive, and employee participation therein, went back to April. Streck saw Hudson observing him in early April, when Streck was talking  
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with employees. In light of this, I find that Hudson's question to Downey about what the Union representative wanted, did not amount to surveillance, or give me an impression thereof. I do not sustain allegation (b)(4).

Finally, allegation (b)(4) alleges that on about June 30<sup>th</sup>, Mr. Hudson interrogated employees about their Union activities. I find this allegation sustained by Candley's testimony that Hudson asked him if he had signed a Union card on that date.

### **THE DISCHARGES**

The General Counsel alleges that the Respondent violated Section 8(a)(3) and (1) by discharging Candley, Downey, Johnson and Tenner, because of their Union activity.

The framework for analysis in cases alleging discrimination against employees on account of Union or other protected activity is Wright Line, 251 NLRB 1083 (1980) enfd, 662 F.2d 889 (1<sup>st</sup> Cir. 1981), cert. denied, 455 U.S. 989 (1982).

Under Wright Line, the General Counsel must make a prima facie showing sufficiently to support inference that employees' protected conduct motivated the Employer's adverse action. The General Counsel must show either by direct or circumstantial evidence, that an employee engaged in protected conduct, that the Employer knew or suspected that the employee was engaged in such conduct, that the Employer harbored animus, and that the Employer took the action because of such animus.

Direct evidence of anti-union motive in discharge cases is often lacking. For that reason, reliance on circumstantial evidence and reasonable inferences deriving therefrom is appropriate and often necessary. *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995); *NLRB v. Warren L. Rose Castings, Inc.*, 587 F.2d 1005, 1008 (9<sup>th</sup> Cir. 1978); *McGraw-Edison Co. v. NLRB*, 419 F.2d 67, 75-76 (8<sup>th</sup> Cir. 1969.) Thus, “Illegal motive has been implied by a variety of factors such as coincidence in Union activity and discrimination, general bias or hostility toward the Union, variance from the Employer’s normal employment routine, and an implausible explanation used by the Employer for its action.” *McGraw-Edison Co. v. NLRB*, *ibid* at 75.

Under *Wright Line*, if the General Counsel establishes a *prima facie* case of discriminatory conduct, it meets its initial burden to persuade by a preponderance of the evidence, that protected activity was the motivating factor in the Employer’s action. Burden of persuasion then shifts to the Employer, to show that it would have taken the same adverse action even in the absence of the employees’ protected activity. *NLRB v. Transportation Corp.*, 462 US 393, 399-403 (1983); *Kamtech, Inc. v. NLRB*, 314 F.3d 800, 811 (6<sup>th</sup> Cir. 2002); *Oscar Serrano*, 332 NLRB No. 247 at page 7 (2000); *Best Plumbing Supply*, 310 NLRB 143 (1993). To meet this burden “an Employer cannot simply present a legitimate reason for its

action, but must persuade by a preponderance of the evidence, that the same action would have been taken, even in the absence of the protected conduct.” Oscar Serrano, *supra* at p.7, citing *Roure Bertrand Deupont, Inc.*, 271 NLRB 443 (1984).

Although the Board cannot substitute its judgment for that of the Employer, and decide what would have constituted appropriate discipline, the Board does have the role of deciding whether the Employer’s proffered reasons for its action was the actual one, rather than pretext to disguise anti-Union motivation. *Detroit Paneling Systems, Inc.*, 330 NLRB No. 168(2000); *Uniroyal Technology Corp. v. NLRB*, 151 F.3d 666, 670 (7<sup>th</sup> Cir. 1998).

A. General Counsel’s Case

All three alleged discriminatees signed authorization cards, and Tenner was a known Union member, so the element of Union activity is satisfied for all of them. All four were discharged, making the Employer action clear.

As to the knowledge element, Mr. Hudson testified that in May, Tenner told him that Johnson and Candley had signed Union authorization cards, so direct Employer knowledge of those employees’ Union activities is admitted. As to Tenner, he was a known Union member at the time he was initially hired, and on July 24<sup>th</sup>, after Mrs. Hudson told him that the Respondent was going to transfer all work to Corporate Services to avoid the Union, he responded that he would not go through Corporate

Services. I conclude this amounted to an indirect statement of Union support communicated to the Respondent.

5           Finally, with respect to Downey, Mr. Hudson called him on his cell phone on June 23<sup>rd</sup>,  
and told him not to talk to Union representatives. Mrs. Hudson made the same statement to  
Downey, later that day. In these circumstances, it can be reasonably concluded that the  
10       Respondent suspected Downey of being involved in Union activity. Even in the absence of  
specific knowledge, the size of the operation, two supervisors and six employees, leads to the  
inference of knowledge, particularly when there is no dispute that the Hudson's were aware  
15       since May, that the Union was attempting to organize their employees.<sup>89</sup>

          I have found that the Respondent committed numerous violations of Section 8(a)(1),  
including explicit threats to discharge employees for signing Union authorization cards or  
20       engaging in other Union activity, going back as far as May. Along with the timing of the  
discharges, three of the four were fired the same month (June) they signed authorization cards,  
raises a strong inference that anti Union animus was a motivating factor in the discharge. See  
25       Masland Industries, Inc., 311 NLRB 184 (1993).

          I conclude, accordingly, that the General Counsel has established a prima facie case of  
unlawful discharge of all

30       four employees. The burden of persuasion therefore shifts to

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<sup>89</sup> Knowledge of an employee's Union activity can be inferred from surrounding circumstances. E. Mishan, Inc., 242 NLRB 1344 (1979.)

the Respondent, to show that these employees would have been discharge, even in the absence of any Union activity.

5 B. Respondent's Defenses

CANDLEY

10 The Respondent admittedly discharged Candley because he signed a Union card and wanted the benefits the Union offered. The Respondent has not averred there was any other reason for his discharge.

Therefore, his discharge violated Section 8(a)(3) and (1).

15 DOWNEY

20 It is undisputed that Downey had mechanical problems with the two trucks that he drove on his three days of employment in June. However, the reasons for those problems remain a mystery as far as this record is concerned. There is no evidence that they were caused by Downey. The Hudson's and Nowling conceded that they did not possess mechanical expertise, and could not diagnose the cause of those problems.

25 Downey testified without controversion, that on June 24<sup>th</sup>, Respondent's mechanic, Jimmy, told him that Nowling's truck should not have been driven that day because he (Jimmy) had not finished repairing it the day before. Downey further testified without contradiction, that  
30 on June 27<sup>th</sup>, both Jimmy and Mr. Hudson expressed agreement when he said that what happened to  
the trucks wasn't his fault. Neither Jimmy nor the mechanic at

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Phil's Garage, were called by the Respondent's witnesses. I draw an adverse inference from Respondent's failure to do so. *Torbitt & Castleman, Inc.*, 320 NLRB 907, 910 n. 6(1996), *affd.* On point, 123 F.3d 899, 907 (6<sup>th</sup> Cir. '97).

5           The fact that the Respondent used Downey on June 27<sup>th</sup> to drive their own vehicle, must be considered to weigh heavily against any claim that they considered him responsible for the mechanical problems on Nowling's truck on June 23<sup>rd</sup> and June 24<sup>th</sup>. Moreover, I consider it significant that Mr. Hudson took pains on-the-record, to make clear that when he had earlier testified that he told Downey on June 27<sup>th</sup> that he (Downey) was hard on trucks, he did not say that Downey was not used any more for that reason.

10           I conclude under all of these circumstances, that Respondent has failed to demonstrate that it would have discharged Downey in the absence of his Union activities. Accordingly, his discharge violated Section 8(a)(3) and (1).

#### JOHNSON

15           Johnson was a relatively long employee, having driven for the Respondent for more than one season. In June of 2003, he was discharged for causing \$3000.00 to \$4000.00 damage to a truck, but was subsequently rehired and retained his employment, even though he did not reimburse the Respondent for all of the costs of the repair.

20           Mrs. Hudson's alleged diligent efforts to track Johnson

5 down after he did not appear for work, including driving by his house, were not believable in light  
of her lack of phone records or memoranda and the readiness she demonstrated in discharging  
him. Similarly, her professed willingness to assist him in marriage counseling after she told him  
he was fired, seems extremely improbable, again with the record containing not even a scintilla  
of evidence that she had ever counseled him or any other employees in the past.

10 I conclude that Johnson would not have been discharge for not showing up for work the  
week of June 23<sup>rd</sup>, other than because he engaged in Union activities. Accordingly, his  
discharge violated Section 8(a)(3) and (1) of the Act.

15 TENNER

20 Mr. Hudson gave two reasons why Tenner was discharged, the incident of August 6<sup>th</sup> at  
the Elburn job site and his constantly being late. Mrs. Hudson added an additional reason. He  
damaged a wire with his truck. A Company's shifting of reasons for discipline, which can  
encompass expansion, is frequently indicative of discriminatory motive. See, e.g., Central  
Cartridge, Inc., 236 NLRB 1232, 1260 (1978).

25 As to Tenner's lateness, Mr. Hudson at first could not recall when Tenner started being  
late. After he was shown time sheets, he stated that Tenner was late on July 17<sup>th</sup>, 19<sup>th</sup> and 21<sup>st</sup>.  
Mrs. Hudson, on the other hand, testified that she began  
30 talking to Tenner about his lateness problem in late June or

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early July. Her testimony that she called him almost every morning from that point on, until the last day of his employment to wake him up, was simply unbelievable. In any event, even fully crediting the Hudson's, there is nothing in the record suggesting that Tenner would have been terminated, had not the incident on August 6<sup>th</sup> occurred.

It is obvious from the record that Rockford Blacktop supervision at the Elburn job site was not pleased with Tenner's taking a lunch break at the site, for which he was ejected that day. However, the real issue is whether the Respondent has demonstrated that as Mrs. Hudson told Tenner, he was discharged because he could no longer be used at any Rockford Blacktop job sites.

Mrs. Hudson herself admitted, that at the time she discharged Tenner, she did not know for a fact whether he was permanently barred by Rockford Blacktop from working on any of its job sites. Her testimony that Braedle at Rockford Blacktop told her that Tenner would be barred from the Elburn job site was directly contradicted by Braedle, who testified that he never told her that. Indeed, that as far as Rockford Blacktop was concerned, Tenner could return to Elburn or any other Rockford Blacktop job site. Mrs. Hudson's conversation with Braedle, in which she stated that she would tell Tenner that he was discharged because he could no longer work on Rockford Blacktop job sites, which was not true, smacks of outright

deceit and dishonesty.

I conclude that the Respondent manufactured a pretext to discharge Tenner, and that the real reason was solely that he engaged in Union activities. Accordingly, his termination  
5 violated Section 8(a)(3) and (1) of the Act.

**TRANSFER OF WORK**

A. Whether within six months preceding the date of the filing of the charge (August 18<sup>th</sup>,  
10 2003), the Respondent transferred work previously performed by the Respondent's employees to employees of Corporate Services, because employees engaged in Union activities.

The record evidence does not bear out this allegation. Prior to August, only one  
15 individual from Corporate Services was used for three weeks, ending in early June, prior to the date of any of the discharges. As to McLin, who stopped being an employee of the Respondent, and became an employee of Corporate Services on about August 11<sup>th</sup>, Mrs.  
20 Hudson testified that he transferred at his request for employment insurance purposes. He did not testify. And there is nothing on the record showing that his transfer was motivated by any  
25 anti-Union animus directed against him, or other employees. Although I have concluded that the discharges of the four employees named in the complaint were unlawful, I do not consider it appropriate to "bootstrap" this alleged violation  
30 solely on that basis. The fact that the Respondent committed a

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number of serious unfair labor practices does not ipso facto mean that every action it undertook during the same period automatically was unlawfully motivated and constituted an unfair labor practice.

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B. Whether the Respondent violated Section 8(a)(5) by transferring work out of the bargaining unit without prior notice of affording the Union the opportunity to bargain.

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Respondent admitted that the bargaining unit set out in Paragraph 8(a) is appropriate. The evidence reflects that as of June 23<sup>rd</sup>, at least four out of six employees signed authorization cards and thus a majority of bargaining unit employees designated the Union as their representative for collective bargaining purposes as of that date. Accordingly, since June 15 23<sup>rd</sup>, the Union has been the exclusive collective bargaining representative of the unit employees under Section 9(a) of the Act. McLin, previously an employee of the Respondent in the bargaining unit, switched to being a Corporate Services employee assigned to work for the Employer in August, after the Respondent referred him to Corporate Services.

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It is well established that contracting out work previously performed by bargaining unit employees, when bargaining unit employees are capable of continuing to perform that work, comes under "terms and conditions of employment" within the meaning of Section 8(d) of the Act. Fibreboard

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Paper Products Corp. v. NLRB, 379 U.W. 203 (1964). In other words, replacement of employees in an existing bargaining unit with those of an independent contractor, to do the same work under the same conditions, is a mandatory subject of bargaining over which an Employer is required to provide the Union with notice and an opportunity to bargain over the action and its effects. Ibid at 213; Torrington Industries, Inc., 307 NLRB 809 (1992).

Here, the Union was never notified of this transfer or given the opportunity to bargain over it. Accordingly, I conclude that the Respondent violated Section 8(a)(5) and (1), by transferring out unit work without affording the Union notice, or the opportunity to bargain over the action or its effects.

C. Whether the Respondent failed and refused to bargain since August 12<sup>th</sup>.

I conclude that when the Hudson's came to the Union office on August 12<sup>th</sup>, Streck made an oral request to bargain as the exclusive collective bargaining representative of the unit employees. This followed the decision and direction of election issued August 3<sup>rd</sup>, to which the Respondent never filed exceptions. The Respondent has admitted that since August 12<sup>th</sup>, it has failed and refused to recognize and bargain with the Union as the exclusive collective bargaining representative of the unit employees.

**CONCLUSIONS OF LAW**

1) The Respondent is an Employer engaged in commerce within the meaning of  
Section 2(2), (6) and (7) of the Act.

2) The Union is a labor organization within the meaning of Section 2(5) of the Act.

3) By the following conduct, Respondent has engaged in unfair labor practices affecting  
commerce within the meaning of Section 2(6) and (7) of the Act, and violated Section 8(a)(1) of  
the Act.

1. Interrogated employees about their Union activities.

2. Promised employees pay raises if they refrained from selecting the Union as their  
collective bargaining representative.

3. Threatened to discharge employees if they selected the Union as their collective  
bargaining representative.

4. Threatened implicitly to close business if the employees selected the Union as their  
collective bargaining representative.

5. Told employees not to sign Union authorization cards

6. Told employees not to speak to Union representatives.

7. Told employees they were fired for having engaged in Union activity.

8. Told employees that the Respondent would be subcontracting bargaining unit work in  
retaliation for  
employees' Union activities.

4) By discharging Keith Candley, Joseph Downey, III, Arthur Johnson, Jr., and Dennis  
Tenner, the Respondent had engaged in unfair labor practices affecting commerce within the  
meaning of Section 2(6) and (7) of the Act, and violated Section 8(a)(3) and (1) of the Act.

5) By transferring out unit work without notifying the Union or affording it an opportunity  
to bargain, the Respondent has engaged in unfair labor practices affecting commerce within the  
meaning of Sections 2(6) and (7) of the act, and violated Section 8(a)(5) and (1) of the Act.

**REMEDY**

Having found that the Respondent 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 any other benefits, computed  
on a quarterly basis, from the date of discharge to the 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).

General Counsel seeks an order requiring the Respondent  
to restore work being done by employees of the temporary

agency, to employees of the Respondent, as it existed prior to an unknown date within six months, predating the filing of the charges. AS I previously stated, however, the record reflects that Corporate Services provided one individual to the Respondent for three weeks in May to  
5 June, and since mid August has provided only one individual. This is not a situation which all, most, or even a significant number of former employee drivers of the Respondent have been  
10 displaced by drivers provided by temporary services. Accordingly, such an order is not warranted.

In this regard, the General Counsel also requests that McLin be subject to an order of  
15 reinstatement. For reasons previously stated, I have not concluded that the evidence is sufficient to establish that his transfer was motivated by anti-Union considerations, either directed against him or at the unit as a whole. Suspicion cannot substitute for evidence.

The General Counsel also seeks a bargaining order on the basis that the Respondent's  
20 unfair labor practices were so serious and substantial in character, that the possibility of erasing the effects of those unfair labor practices, and of conducting a fair election by use of traditional  
25 remedies, is slight, and because such remedy would best protect the interests of the unit employees. The General Counsel seeks a bargaining order retroactive to June 23<sup>rd</sup>, the date the Union  
30 achieved majority status.

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5 In *Gissel Packing Co.*, the Supreme Court recognized two kinds of conduct that may warrant position of a bargaining order. Category one: "outrageous and pervasive unfair labor practices." Category two: "less pervasive practices, which nonetheless still have a tendency to  
10 undermine majority strength and still impede the election processes." 395 U.S. 576 at 613-14(1969). A Gissel order is an extraordinary remedy. The preferred route is to provide traditional remedies for an Employer's unfair labor practices, and to hold an election, wherever such remedies "may be sufficient to cleanse the atmosphere of the effects of unlawful conduct." In re *Desert Aggregates*, 340 NLRB No. 38 at p.8(2003), citing *Aqua Cool*, 332 NLRB 95, 97(2000).  
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In determining whether a bargaining order is appropriate, the Board examines the seriousness of the violations and the pervasive nature of the conduct, considering such factors  
20 as the size of the unit, the extent or dissemination among employees, and the identity and position of the individuals committing the unfair labor practices. In re *Cardinal Home Products, Inc.*, 338 NLRB No. 154 at p.9 (2003), citing *Garvey Marine, Inc.*, 328 NLRB 991, 993(1999),  
25 enfd, 345 F.3d 819 (DC Cir. 2001). Serious Employer misconduct that is widespread and directly reaches all or a significant portion of unit employees supports a bargaining order. *Cardinal Home Products*, supra at  
30 10.

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5 Here, the Respondent discharged four out of six, or a majority of unit employees. Both  
Mr. and Mrs. Hudson are the Respondent sole owners and sole supervisors, and over a three  
month period, made numerous statements constituting independent violations of Section  
8(a)(1), including threats of plant closure and of discharge for Union activity to those four  
10 employees. The Respondent unlawfully transferred work out of the bargaining unit in August.  
Mrs. Hudson trumped up a knowingly false pretext to discharge Tenner. In light of all of these  
circumstances, I conclude that the Respondent engaged in Gissel category one conduct that  
was outrageous and pervasive and that a normal remedy would be inadequate to assure that  
15 the employees are able to participate in an election untainted by the effects of the Respondent's  
unfair labor practices. Accordingly, I will include a Gissel bargaining order in my order, as well  
as a broad cease and desist order.

20 Although the General Counsel requests that the bargaining order be retroactive to June  
23<sup>rd</sup>, in *Trading Port, Inc.*, 219 NLRB 298 (1975), cited by the General Counsel, the Board found  
appropriate, a bargaining order retroactive to the date that the Union requested bargaining.  
25 Recent decisions of the Board reflect that retroactivity to the date that the Union requested  
recognition is appropriate in *re Orland Park Motor Cars*, 333  
NLRB 127, p.6 at n.7(2001); *Debbie Reynolds Hotel, Inc.*, 332

NLRB No. 46(2000).

Therefore, I find that the bargaining order should be retroactive to August 12<sup>th</sup>, the date that the Union requested recognition and bargaining.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>90</sup>

**ORDER**

The Respondent, HH3 Trucking, Inc., Rockford, Illinois, its officers, agents, successors and assigns, shall:

1) Cease and desist from:

(a) interrogating employees about their activities on behalf of the International Brotherhood of Teamsters, Local 325 (the Union).

(b) promising employees pay raise if they refrain from selecting the Union as their collective bargaining representative.

(c) threatening to discharge employees if they select the Union as their collective bargaining representative.

(d) threatening to close the business if employees select the Union as their collective bargaining representative.

(e) telling employees not to sign Union authorization cards.

(f) telling employees not to speak to Union representatives.

(g) telling employees they were fired for having engaged in Union activity.

(h) telling employees that the Respondent would be subcontracting bargaining unit work in retaliation for the employees' Union activities.

(i) discharging employees for their activities on behalf of the Union.

(j) transferring work out of the bargaining unit, without notifying the Union and affording it an opportunity to bargain.

(k) failing and refusing to bargain with the Union as the exclusive bargaining representative of the employees in the unit described below in Paragraph 2(e).

(l) in any other manner, interfering with, restraining or coercing employees in

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<sup>90</sup> If no exceptions are filed as provided by Section 102.46 of the Board's rules and regulations, the findings, conclusions \* recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be

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exercise of the rights guaranteed by Section 7 of the Act.

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

5 (a) within 14 days from the date of this Order, offer Keith Candley, Joseph  
Downey, III, Arthur Johnson, Jr., and Dennis Tenner full reinstatement to their former jobs or, if  
those jobs no longer exist, to substantially equivalent positions without prejudice to their  
10 seniority or any other rights or privileges previously enjoyed.

(b) make Keith Candley, Joseph Downey, III, Arthur  
15 Johnson, Jr. and Dennis Tenner whole for any loss of earnings

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deemed waived for all purposes.

and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

5 (c) within 14 days from the date of the Board's Order, notify in writing, Keith  
Candley, Joseph Downey, III, Arthur Johnson, Jr., and Dennis Tenner, that the discharges will  
not be used against them in any way.

10 (e) on request, bargain with the Union as exclusive representative of the  
employees in the following appropriate unit, concerning terms and conditions of employment  
and if an understanding is reached, embody that understanding in assigned agreement.

15 All full time and regular part time drivers employed by the Employer at its Rockford,  
Illinois facility. Excluding owner operator, office clerical and professional employees, guards  
and supervisors as defined in the Act.

20 (f) Preserve and within 14 days of a request for such additional time as the 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, time cards, personnel records and  
25 reports, and all other records, including an electronic copy of such records if stored in electronic  
form, necessary to analyze the amount of back pay due under the terms of this Order.

(g) within 14 days after service by the Region, post

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at its facility in Rockford, Illinois, a notice all employees that will be provided to the parties, along with those pages of the transcript that I will certify as constituting my decision.

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

This concludes my bench decision issued December 3<sup>rd</sup>, 2003.

10 Is there anything else? Actually, we don't have representatives of two of the parties present. So I think that at this point, it would be most appropriate to consider the hearing closed.

15 (Whereupon, the hearing in the above-mentioned matter, was closed at 2:30 p.m.)

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## APPENDIX C

### 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 interrogate you about your activities on behalf of International Brotherhood of Teamsters, International 325 (the Union), or any other labor organization.

WE WILL NOT promise you pay raises if you refrain from selecting the Union as your collective-bargaining representative.

WE WILL NOT threaten to discharge you if you select the Union as your collective-bargaining representative.

WE WILL NOT threaten to close our business if you select the Union as your collective-bargaining representative.

WE WILL NOT tell you not to sign union authorization cards.

WE WILL NOT tell you not to speak to union representatives.

WE WILL NOT tell you that you have been fired for having engaged in union activities.

WE WILL NOT tell you that we will subcontract out your work in retaliation for your union activities.

WE WILL NOT discharge you for your activities on behalf of the Union.

WE WILL NOT transfer your work to temporary agencies without notifying the Union and giving it an opportunity to bargain.

WE WILL NOT fail and refuse to bargain with the Union as your collective-bargaining representative.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of your rights guaranteed by the National Labor Relations Act.

WE WILL within 14 days from the date of the Board's Order, offer Keith Candley, Joseph Downey III, Arthur Johnson Jr., and Dennis Tenner 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.

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WE WILL make Keith Candley, Joseph Downey III, Arthur Johnson Jr., and Dennis Tenner whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

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WE WILL, within 14 days from the date of the Board's Order, notify in writing Keith Candley, Joseph Downey III, Arthur Johnson Jr., and Dennis Tenner that the discharges will not be used against them in any way.

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WE WILL, on request, bargain with the Union as the exclusive representative of employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody that understanding in a signed agreement.

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All full-time and regular part-time drivers employed by the Employer at its Rockford, Illinois facility. Excluding owner-operators, office clerical and professional employees, guards and supervisors as defined in the Act.

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WE WILL preserve and within 14 days of a request, or such additional times 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 and reports, 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.

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H H 3 TRUCKING, INC.

(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

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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 Office set forth below. You may also obtain information from the Board's website: [www.nlrb.gov](http://www.nlrb.gov).  
300 Hamilton Boulevard, Suite 200, Peoria, Illinois 61602-1246,  
Telephone (309) 671-7068.

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**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 OFFICE'S COMPLIANCE OFFICER, (309) 671-7085.

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