

Septix Waste, Inc. and Union De Tronquistas De Puerto Rico, Local 901, IBT.¹ Cases 24–CA–9230 and 24–CA–9346

February 23, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

On December 17, 2003, Administrative Law Judge Karl H. Buschmann issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed an answering brief.

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

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

Introduction

The Respondent provides liquid waste disposal services to municipalities and private enterprises. The Respondent's eight service and maintenance employees were represented by the Union, Union De Tronquistas De Puerto Rico, Local 901, IBT, and covered by a collective-bargaining agreement. The agreement was effective from January 1, 1999, to December 31, 2004, but was largely ignored between 1999 and 2001. In January 2002,³ however, the unit employees renewed their interest in the Union after the Respondent experienced financial difficulties, requiring it to lay off Manager Isabellina Estrella. The allegations at issue arose from events contemporaneous with the unit employees' renewed interest in the Union.

The complaint alleged that the Respondent violated Section 8(a)(1) of the Act by interrogating its employees about their union activities, soliciting its employees to

gather signatures to decertify the Union, informing its employees that it would be futile to file grievances, threatening its employees with job loss, and telling its employees that they would be subject to more onerous working conditions or reprisals in retaliation for the Union's continued presence as their exclusive bargaining agent. The complaint also alleged that the Respondent violated Section 8(a)(3) of the Act by terminating the employment of Roberto Rentas and Hector Algarin because of their union activities, and Section 8(a)(5) of the Act by refusing to furnish the Union with relevant information. The judge found all the violations alleged, with two exceptions.⁴

We unanimously agree with the judge's findings that the Respondent violated Section 8(a)(3) by discharging Rentas and Section 8(a)(5) by refusing to provide relevant information to the Union, for the reasons stated by the judge. Chairman Battista and Member Liebman also agree with the judge's finding that the Respondent violated Section 8(a)(3) by discharging Algarin. (Member Schaumber separately dissents on this issue.) Chairman Battista, joined by Member Schaumber, however, reverse the judge's findings regarding the 8(a)(1) allegations because they were waived by a stipulation between the Union and the Respondent. (Member Liebman separately dissents on this issue.)

Dismissal of the 8(a)(1) Allegations⁵

In July, after the Union filed its initial unfair labor practice charges,⁶ the Union and the Respondent agreed to a stipulation. The stipulation stated, "[t]he Union by the present resigns all claims made or that could have been made to this date save for [the discharges of Rentas and Algarin, and a claim regarding wage negotiations]." After executing the stipulation, however, the Union filed an amended charge, which included additional 8(a)(1) allegations, all of which were based on facts in existence as of the date of the stipulation. The Respondent argued at the hearing that the Union waived the 8(a)(1) allegations by the stipulation, an argument the judge never addressed. We find merit in the Respondent's argument.

The Board has the discretion to determine whether or not to give effect to any waiver or settlement, pertinently including private agreements. See *Independent Stave*

¹ We have amended the caption to reflect the disaffiliation of the International Brotherhood of Teamsters from the AFL–CIO effective July 25, 2005.

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

The Respondent argued that the 8(a)(1) complaint allegations were time barred by Sec. 10(b). Chairman Battista and Member Schaumber find it unnecessary to pass on the 10(b) defense in light of their dismissal of the 8(a)(1) allegations based on their finding that they were waived by the stipulation of the Respondent and the Union, as discussed below.

³ Unless otherwise stated, all dates are in 2002.

⁴ The judge dismissed the 8(a)(1) interrogation allegation and implicitly dismissed the 8(a)(1) allegation regarding imposing more onerous terms of employment and/or stricter supervision. No exceptions were filed to these dismissals.

⁵ Member Liebman does not join in this section of the decision.

⁶ The initial charges included the 8(a)(1) harassment and threat of discharge allegations and the 8(a)(3) allegations regarding the discharges of Algarin and Rentas.

Co., 287 NLRB 740, 741 (1987).⁷ The Board's long-standing and well-established policy is to favor such private agreements because they advance the Act's purpose of encouraging industrial stability and the peaceful settlement of labor disputes.⁸ Indeed, the Board has noted that "if it could not dispose of the majority of cases without recourse to litigation, through informal mechanisms including settlements, the Board simply could not function effectively." *Id.*, citing *Poole Foundry & Machine Co. v. NLRB*, 192 F.2d 740, 742 (4th Cir. 1951), cert. denied 342 U.S. 954 (1952). This policy of encouraging the peaceful settlement of labor disputes can only be effective if the parties to agreements are not able to circumvent the agreements by later reviving those disputes. *Courier-Journal*, 342 NLRB 1148, 1149 (2004).

Here, the private parties voluntarily agreed to waive all claims that were raised or could have been raised as of the date of the stipulation, other than the claims regarding the discharges of Algarin and Rentas. Despite voluntarily agreeing to the stipulation, the Union effectively attempts to circumvent its terms by making the 8(a)(1) allegations at issue. Such conduct "cannot be squared with the salutary policy of affording finality to the informal settlement of [labor] disputes." *Courier-Journal*, *supra* at 1150. We therefore dismiss these allegations.

Our colleague argues that the settlement stipulation should not constitute grounds for dismissing the 8(a)(1) allegations involved herein because those allegations were not the subject of a charge at the time of the settlement. She also argues that the settlement does not pass muster under *Independent Stave*, *supra*. However, the General Counsel does not object to the settlement under the first of these grounds.⁹ In any event, that argument has no merit. The mere fact that charges had not been filed at the time of the settlement is not a reason to reject it. Where parties have a dispute, they may elect to resolve it. If they do so, they often agree, as here, not to file charges in the future concerning the settled matters. Given the Act's encouragement of private resolution of private disputes, we would not reject the settlement sim-

ply because the charges involved herein had not yet been filed at the time of the settlement.

As to *Independent Stave*, that case lists several factors to be considered. However, the General Counsel points to only one of them, viz. the fact that he was not a party to the settlement. To agree with this argument would be to convert that single factor into a controlling one. Indeed, it would give the General Counsel a veto power over settlements. It is the Board's duty to decide whether to honor a settlement.

Our colleague also relies on *KFMB Stations*, 343 NLRB 748 fn. 3 (2004); *Auto Bus, Inc.*, 293 NLRB 855, 856 (1989); and *Quinn Co.*, 273 NLRB 795, 799 (1984). Those cases are inapposite. They simply hold that the General Counsel's approval of a request to withdraw a charge, which request is based on a private party settlement, does not estop the General Counsel from later prosecuting those same matters under the aegis of a new charge. However, these cases do not resolve the separate issue of whether the Board should honor the settlement under *Independent Stave*.

We see no legal or policy basis for disregarding the parties' cooperative and voluntary resolution of their dispute as embodied in the stipulation. Moreover, we conclude, in our discretion, that the "purposes and policies of the Act" are best effectuated by giving effect to the stipulation. *Id.* at 741, quoting *National Biscuit Co.*, 83 NLRB 79, 80 (1949), *enfd.* 185 F.2d 123 (3d Cir. 1950). Accordingly, we find the 8(a)(1) allegations are covered by the stipulation and therefore waived by the Union; we thus reverse the judge and dismiss these complaint allegations.¹⁰

The 8(a)(3) Discharge of Hector Algarin¹¹

Algarin worked as a driver for the Respondent from June 2001 until his discharge on May 8. He was on good terms with his supervisors, and the record reflects no prior performance issues. Algarin engaged in various Section 7 activities in connection with the effort to revive interest in and support for the Union. He submitted a dues-checkoff card, and he and his coworkers regularly discussed the Union at weekly softball games. In January, he attended a meeting at former Supervisor Isabelino Estrella's home, where employees discussed the Union and elected Algarin as their spokesperson. Algarin's current supervisor, Porforio Rosario, attended this meeting.

In March, the Respondent's president, Gary Santos, met individually with each of the service and mainte-

⁷ We note that while *Independent Stave Co.*, *supra*, involved a motion for summary judgment on unfair labor practice charges, which is not the case here, it is nonetheless relevant for the principles cited.

⁸ See *Red Coats, Inc.*, 328 NLRB 205, 207 fn. 20 (1999) (Board policy to give effect to unit stipulations in order to promote "harmony and stability of labor relations"); *American Pacific Pipe Co.*, 290 NLRB 623, 624 (1988) (Board deferred to a settlement agreement waiving backpay to encourage dispute resolution); *Retail Clerks Local 1364*, 240 NLRB 1127, 1128-1129 (1979) (Board found that a union's acting contrary to a mutual amnesty agreement ran counter to the basic policy of the Act to encourage the peaceful settlement of labor disputes).

⁹ Even our colleague acknowledges that the General Counsel did not argue that the settlement failed to cover the allegations at issue herein.

¹⁰ The 8(a)(5) allegation involved activities that occurred after execution of the stipulation. Thus, the Union did not waive the claim.

¹¹ Member Schaumber does not join in this section of the decision.

nance employees. During Santos' meeting with Algarin, Santos pointed out to Algarin what happened to Rentas, who had been unlawfully discharged for his prounion activities. Santos warned, "[H]e who played with fire got burned."¹²

Although Algarin received no disciplinary warnings during his early tenure with the Respondent,¹³ he was disciplined repeatedly after the employees renewed their support for the Union. Specifically, on February 25, Algarin received a warning for improperly using the company cellular phone by making unauthorized calls, conduct previously tolerated by the Respondent. On April 4, Algarin was suspended for failing to deliver two portable toilets to a client and damaging a hose. Again, however, Algarin had committed a similar infraction in the past, but was not disciplined. On May 3, Algarin received another warning for improperly using the company cellular phone. On May 6, Algarin received warnings for waiting an hour for a client after being told to wait no longer than 15 minutes and for failing to "report to his duties."¹⁴ Finally, on May 8, Algarin was discharged assertedly for providing additional services to a client without prior authorization. The additional services consisted of cleaning out grease traps at the specific request of the client's manager.

While the judge acknowledged that Algarin engaged in conduct contrary to certain of the Respondent's rules, the judge also found that the Respondent's discharge response was "highly suspect," both because of its timing and severity. He concluded that the General Counsel met his initial burden under *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), and that the Respondent did not meet its rebuttal burden. The Respondent excepted, arguing that the General Counsel failed to establish a prima facie case, and, alternatively, that the Respondent met its rebuttal burden by proving that it discharged other employees for misconduct similar to Algarin's.

Under *Wright Line*, the General Counsel must prove, by a preponderance of the evidence, that the employee's protected conduct was a substantial or motivating factor in the employer's adverse action. Once the General Counsel shows a discriminatory motive by proving the

employee's prounion activity, employer knowledge of the prounion activity, and animus against the employee's protected conduct, the burden of persuasion "shift[s] to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004). We find, like the judge, that the General Counsel met his initial burden, and that the Respondent failed to prove that it would have taken the same adverse action against Algarin absent his union activity.

First, the General Counsel showed that Algarin engaged in protected activity, including submitting a dues-checkoff card and attending a union meeting at which he was elected an employee spokesperson. Second, the Respondent's knowledge of Algarin's activities can be inferred from Supervisor Rosario's presence at the union meeting and the Respondent's receipt of Algarin's checkoff card. Finally, there is ample evidence of Respondent's antiunion animus. The Respondent unlawfully terminated employee Rentas for his concerted activities. Further, the 8(a)(1) solicitations and coercive statements found by the judge, while found by a majority of the Board to have been waived by the stipulation, nonetheless show animus. In particular, the ominous threat of the Respondent's president, Gary Santos, that Rentas played with fire and got burned, conveyed the Respondent's antipathy with chilling clarity. We therefore agree with the judge that the General Counsel satisfied his *Wright Line* burden.

The burden was then on the Respondent to show that Algarin would have been discharged in any event, even if he had not engaged in union activity. We find, contrary to our dissenting colleague, that the Respondent has failed to satisfy its burden. Our dissenting colleague argues that Algarin's disciplinary record justifies the discharge, specifically that Algarin's record was worse than those of others who were not discharged. In our view, the issue is not whether some conduct is "worse," in some moral sense, than other conduct. Rather, the issue is whether the Respondent has met its burden of showing that it would have discharged Algarin in the absence of Algarin's union activity. That burden has not been met. There is no evidence that the Respondent consistently and evenly applied its disciplinary rules. To the contrary, there is affirmative evidence of the Respondent's lack of consistency in regard to discharges.¹⁵

¹² The General Counsel alleged that Santos' statement was an 8(a)(1) violation. For the reasons discussed above, Chairman Battista and Member Schaumber find that the Union waived the right to pursue this claim. However, we find that the statement can be considered as background evidence of Respondent's antiunion animus.

¹³ The judge implicitly credited Algarin's testimony to this effect. There is no evidence to the contrary.

¹⁴ Although these disciplinary measures were taken after the renewal of the union campaign and Algarin's role in it, they are not alleged as unlawful.

¹⁵ Indeed, as our dissenting colleague recognizes, the record reveals that some employees have been discharged for acts of misconduct, but, inexplicably other employees were not discharged despite multiple acts of misconduct. Contrary to our dissenting colleague, we do not require an employer to rebut the General Counsel's prima facie case by adducing evidence that "at least one other employee [] was terminated for

Thus, it cannot be said, with any degree of reliability, that Algarin would have been discharged absent his union activity. And, the case for unlawful motive is substantial. The Respondent did not discharge Algarin for misconduct engaged in prior to his union activity; the Respondent warned Algarin that he could be “burned” if he “played with fire” (a reference to discriminatee Rentas); Algarin continued to engage in union activity after that warning; and the Respondent discharged him.

Our dissenting colleague cautions, on one hand, against impermissibly imposing the Board’s views of appropriate discipline, and on the other hand, does precisely that by suggesting that the disciplinary records of employees Zambrana and Pagan were comparable to Algarin’s. Our colleague misperceives the issue. We do not methodically count prior disciplinary records. Neither do we make any substantive judgments regarding the appropriate discipline in any given situation. We do not say that employees Zambrana and Pagan were properly discharged.¹⁶ We simply say that, in light of the prima facie case against the Respondent, we place the burden on the Respondent to show that it would have discharged Algarin even in the absence of his union activity.

Our dissenting colleague acknowledges that Algarin engaged in misconduct before the union campaign without being disciplined. He argues that “even if the Respondent had overlooked misconduct in the past, that does not forever insulate an employee from legitimate discipline.” Of course, we do not disagree with the proposition as stated. Obviously, if discipline is “legiti-

the exact same violations.” What is required is a showing that the employer has consistently and nondiscriminatorily applied its disciplinary rules. We have found that here the Respondent has not made the necessary showing.

¹⁶ In any case, we note that the offenses of other employees, who were discharged, are *different in kind* from those of Algarin. Zambrana failed twice to show up for work, without notice; Pagan failed to follow a job order to visit a client, and he was insubordinate. By contrast, Algarin never had a “no show,” and he was not even accused of insubordination.

Contrary to the assertion of our colleague, we do not eschew making comparisons of disciplinary records. Nor do we insist that the employer show that other employees were discharged for the “exact same conduct” as that of the discriminatee. We simply say that the Respondent has not shown that other employees were fired for engaging in similar misconduct as that of the discriminatee.

There is no evidence that the work assigned to Algarin is any more time sensitive than the work of other similarly situated employees. Thus, contrary to our dissenting colleague, we do not find that the nature of the Respondent’s business weighs differently with regard to Algarin than it does any other employee performing the same type of work. Similarly, we do not find that the “changing circumstances of the Respondent”—i.e., its asserted financial difficulties and resulting administrative and operational changes—excuse the Respondent’s failure to show that, whatever its rules and circumstances, it applied its rules with an even hand.

mate,” that is the end of the inquiry. However where, as here, no discipline has been meted out for offenses committed prior to the union campaign, and it is meted out for offenses after that campaign, that difference is relevant to the issue of whether Algarin’s disciplines and ultimately his discharge based on those disciplines are “legitimate.”

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Septix Waste, Inc., Ponce, Puerto Rico, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Omit paragraphs 1(b), (c), and (d), and reletter the remaining paragraph.

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

MEMBER LIEBMAN, dissenting in part.

In finding that the Union waived the independent 8(a)(1) allegations by the July 2002 stipulation, the majority fails to apply applicable precedent. Under that precedent, the Regional Director was free to issue a complaint alleging the independent 8(a)(1) violations.

The background to the stipulation is described in the majority opinion. The Regional Director was not a party to the stipulation; nor did she approve it. A settlement agreement reached between a charging party and a respondent resulting in the withdrawal of a charge is viewed by the Board as a private agreement that does not estop the Regional Director from proceeding on any new charges alleging the same conduct as the withdrawn charges. *Auto Bus, Inc.*, 293 NLRB 855, 856 (1989), is directly on point, unlike the cases cited by the majority. Accord: *KFMB Stations*, 343 NLRB 748 fn. 3 (2004); *Quinn Co.*, 273 NLRB 795, 799 (1984). At issue is the right of access to the Board; the Board should guard that jealously.¹

The majority incorrectly shifts the focus of analysis away from the right of access to the Board and the responsibility of the Board to act in the public interest,

¹ I do not believe that the stipulation clearly covers the 8(a)(1) allegations. The kind of conduct apparently covered (e.g., claims under the contract for overtime, supervisors doing unit work, reprimands for use of cellular phones) is of a different nature than the two complaint allegations of interference with union activity (i.e., soliciting employees to gather signatures to decertify the Union and threatening employees with loss of jobs if they engaged in union activity). A good argument can be made that the General Counsel should not be bound by a private stipulation unless the stipulation clearly and unambiguously covers the conduct in question. Because the General Counsel has not made this argument, I do not rely on it.

even in the face of non-Board private agreements. Instead, they inappropriately apply *Independent Stave Co.*, 287 NLRB 740 (1987). But that case applies only to private agreements that purport to resolve existing disputes that have become the subject of unfair labor practice charges or complaints. That is not the situation here. When the parties entered into their stipulation, the relevant 8(a)(1) issues (whether the Respondent solicited employees to gather signatures to decertify the Union, told the employees that it would be futile for them to file grievances under the contractual grievance procedure, and threatened employees with loss of jobs if they engaged in union activities) were not the subject of any unfair labor practice charges or complaints, and the stipulation did not purport to resolve these issues. Consequently, I disagree with the majority's reliance on *Independent Stave*.

Even if the stipulation could be considered an "agreement" covered by *Independent Stave*, the majority has not applied the principles of that case correctly. Under those principles, the Board is not required to defer to private settlement agreements simply because the parties have agreed to them. Instead, the Board must consider several factors in determining whether to defer, including: whether the charging parties, respondents, and any individual discriminatees have agreed to be bound, and the position of the General Counsel; whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement, and whether the respondent has a history of violating the Act or has breached any previous unfair labor practice settlements. *Independent Stave*, supra, 287 NLRB at 743. In this case, the majority has exercised its "discretion" to give effect to this stipulation, solely because it was a "cooperative and voluntary" agreement of the parties. This elevates one *Independent Stave* factor to primary status, and completely ignores the other factors that the Board is required to apply in determining whether giving effect to the agreement would effectuate the purposes and policies of the Act.

Having found that the complaint properly alleged the independent 8(a)(1) violations, I would also reject the Respondent's affirmative defense that Section 10(b) bars both of these 8(a)(1) allegations: namely, soliciting employees to gather signatures to decertify the Union and threatening employees with loss of jobs if they engaged in union activity. Both allegations are closely related to timely filed charges that the Respondent, inter alia, unlawfully harassed and threatened employees with discharge because they filed grievances under the collec-

tive-bargaining agreement, and unlawfully discharged Algarin and Rentas. See *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988); *Nickles Bakery of Indiana*, 296 NLRB 927, 928 (1989).

Having rejected both of the Respondent's affirmative defenses, I would affirm the judge's 8(a)(1) findings for the reasons he states.

MEMBER SCHAUMBER, dissenting in part.

I disagree with my colleagues' adoption of the judge's finding that the Respondent violated Section 8(a)(3) by discharging Hector Algarin. I find that the Respondent met its *Wright Line* rebuttal burden,¹ and proved by a preponderance of the evidence that Algarin would have been discharged for his admitted pattern of significant misconduct over a relatively brief period even absent his union activity.

The pertinent facts are not in dispute. Algarin drove for the Respondent from June 2001 to his discharge on May 8, 2002. His participation in union activities was far from notable, as conceded by the judge. Algarin submitted a dues-checkoff card, and attended a meeting at a former supervisor's home with the rest of the Respondent's drivers. Though he was designated at the meeting as an employee spokesperson, he never actually served in that capacity. Algarin, like a number of employees, participated in Friday evening softball games where the Union, among other topics, sometimes was discussed.

With that backdrop, it is undisputed that Algarin engaged in numerous acts of misconduct over a matter of months. First, on February 25, Algarin received a warning for unauthorized use of the company cellular phone. Second, on April 4, Algarin received a suspension for failing to deliver two portable toilets to a client and for damaging a hose. Third, on May 3, Algarin received another warning for misuse of the company cellular phone. Fourth, on May 6, Algarin received a warning for waiting an hour for a client, even though he knew that

¹ Under the Board's *Wright Line* analysis the General Counsel must prove by a preponderance of the evidence that antiunion animus (i.e., Sec. 7 animus) was a substantial or motivating factor in an employer's adverse employment action. It was with this understanding that the Supreme Court approved *Wright Line* as "at least permissible" under the Act. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 398 (1983) ("[An employer] does not violate the NLRA, however, if any anti-union animus that he might have entertained did not contribute at all to an otherwise lawful discharge for good cause."). Consistent therewith, the Board, administrative law judges and circuit courts of appeals have sometimes specifically delineated as a fourth element of the General Counsel's initial burden of proof under *Wright Line* proof of a causal nexus. I agree that identifying a causal nexus as a separate element under *Wright Line* is preferable, lest the burden of proof on this issue be misplaced.

the Respondent had an explicit rule requiring employees to wait no longer than 15 minutes for clients. Fifth, on the same day, Algarin received a warning for failing to report to his duties. Algarin denied none of these incidents, and none of the disciplinary measures imposed by the Respondent was alleged as an unfair labor practice. Finally, on May 8, the Respondent discharged Algarin after he provided unauthorized additional services to a client in contravention of a well-established policy, misconduct which prevented him from completing other service calls.

The judge found that Algarin engaged in each act of misconduct identified by the Respondent. Further, while Algarin testified that he previously engaged in similar misconduct without being disciplined—testimony found significant by the judge and my colleagues—no evidence exists as to the nature of the alleged misconduct, its seriousness, and, most importantly, the Respondent’s knowledge of the infractions. Furthermore, even if the Respondent had overlooked misconduct in the past, this does not forever insulate an employee from legitimate discipline for repeated violations of established rules.² As appellate courts have cautioned, “the Act is not a shield for the incompetent even though the incompetent seeks immunity under the mantle of union membership or activity.” *Standard Products Co. v. NLRB*, 824 F.2d 291, 293 (4th Cir. 1987).

Here, Algarin admittedly engaged in a pattern of negligence and defiance of legitimate company rules, damaging and misusing property and jeopardizing the Respondent’s customer relations by failing to complete assignments and to report for work. Moreover, Algarin’s misconduct must be assessed in light of the nature of the work he performed and the changing circumstances of the Respondent.³ The Respondent’s business—liquid and solid waste removal—is time sensitive and frequently must be performed while the client’s operations are not open for business; thus adherence to schedules is a paramount concern. Also, Algarin’s misconduct occurred in circumstances which, as the judge noted, the Respondent was experiencing financial difficulties and

² My colleagues say that I acknowledge that Algarin “engaged in misconduct before the union campaign without being disciplined.” While I acknowledge Algarin’s testimony to that effect, I point out that there was no evidence that the alleged misconduct was similar, either in kind or frequency, to that for which he was discharged. More importantly, there is no evidence that the prior misconduct Algarin engaged in was made known to the Respondent.

³ Contrary to the majority’s characterization of my position, I do not find Algarin’s work more time sensitive than other similarly situated employees. Rather, I look at the nature of the Respondent’s business and changed circumstances in assessing whether the Respondent has met its burden of showing legitimate, nondiscriminatory reasons for its action against Algarin.

implementing administrative changes in order to cut costs and lower expenses. Finally, the Respondent’s discharge decision was not precipitous. The Respondent warned Algarin when he received an admonishment for not showing up for work—his fourth violation—that he would be terminated if there were any additional incidents.⁴

The majority and judge appear to gloss over the fact that other employees were discharged for misconduct similar to Algarin’s even *before* the employees’ renewed interest in the Union. For example, the Respondent discharged employee David Zambrana on April 10, 2000, after he was absent twice without giving notice, left a job undone, and received a suspension for misusing toll-booth tickets. Similarly, employee Victor Pagan was discharged on September 8, 1999, after failing to follow a day’s job order for client visits. Pagan was previously warned for being insubordinate, damaging a vehicle’s suction hose and side mirror, not calling in or following specific job order instructions, and not reporting a work injury. Consequently, the Respondent demonstrated that its discipline of Algarin was consistent with remedial practices that predated any renewed interest in the Union.⁵

My colleagues reason that, had the Respondent “consistently and evenly applied its disciplinary rules,” it might have shown that Algarin would have been discharged absent his union activity. I find this reasoning misses the point. The issue in this case is whether the Respondent disciplined Algarin for his admitted pattern of misconduct, which is lawful, or for his tepid participation in Section 7 activities, which would violate Section 8(a)(3). Even under *Wright Line*, the ultimate burden of proving a violation remains always on the General Counsel. See *Wright Line*, 251 NLRB 1083, 1088 fn. 11 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981) (“[T]his shifting of burdens does not undermine the established con-

⁴ Contrary to the majority, the Respondent’s failure to discipline Algarin in the past does not in any manner cast doubt on the legitimacy of its decision to discharge Algarin for repeated and conceded continuing misconduct.

⁵ My colleagues dispute my finding that the disciplinary records of Zambrana, Pagan, and Algarin were sufficiently similar to warrant comparison. They assert that in finding the disciplinary records “comparable,” I am impermissibly imposing the Board’s views of what is appropriate discipline and that they “do [not] make any substantive judgments regarding the appropriate discipline in any given situation.” Nor do I. The Respondent has submitted disciplinary records of Zambrana and Pagan, employees terminated prior to the commencement of the union organizing campaign for misconduct similar to Algarin’s, as evidence that it would have terminated Algarin without regard to his union activities. I simply agree that Zambrana’s and Pagan’s disciplinary records are sufficiently similar and comparable to Algarin’s to support the finding that the Respondent met its rebuttal burden of establishing it would have terminated Algarin in any event.

cept that the General Counsel must establish an unfair labor practice by a preponderance of the evidence”).

Here, the Respondent established beyond cavil that Algarin engaged in misconduct that violated established policies, damaged property and impaired its customer service, conduct any employer would be hard pressed to tolerate before taking action to protect itself. The Respondent also demonstrated that it had disciplined employees for similar infractions in the past. The fact that some other similar misconduct may have been tolerated without discipline does not dictate that *this* discipline was discriminatorily motivated. To repeat one appellate court’s admonition: in dual motive scenarios, the Board must articulate “an affirmative and persuasive reason why the employer rejected the good cause and chose a bad one.” *Standard Products*, supra, 824 F.2d at 292 (quoting *Firestone Tire & Rubber Co. v. NLRB*, 539 F.2d 1335, 1337 (4th Cir. 1976)). Neither the General Counsel nor my colleagues meet that burden.⁶

In sum, I find that in light of the rash of incidents of misconduct engaged in by Algarin, and the long recognized “right of employers to maintain discipline in their establishments,” *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945), the Respondent carried its burden of demonstrating that it would have discharged Algarin, despite his union activities. I would dismiss this allegation of the complaint.

⁶ It appears that my colleagues do not find that the Respondent engaged in disparate treatment. Regardless, I find that the Respondent proved that there were other employees who, although not exactly comparable to Algarin, also engaged in numerous acts of misconduct and were discharged. While some of the employees who engaged in misconduct were not discharged, the point is that where the differences are such that reasonable people can disagree, we must be cautious lest we impermissibly impose our views of what is appropriate under the circumstances. See, e.g., *Detroit Newspaper Agency v. NLRB*, No. 04-1366, -1403, 2006 WL 146125, at *8 (D.C. Cir. 2006) (“It is well recognized that an employer is free to lawfully run its business as it pleases.”) (internal quotations omitted); *Paramount Metal & Finishing Co.*, 225 NLRB 464, 465 (1976); *NLRB v. McGahey*, 233 F.2d 406, 413 (5th Cir. 1956) (“management is for management”).

The majority protests that it is not imposing its view of appropriate discipline on the Respondent, it is simply concluding that the Respondent did not meet its rebuttal burden. Since my colleagues eschew making comparisons of disciplinary records, they establish an impossible standard. Presumably, according to the majority, when an alleged discriminatee is discharged for multiple violations of an employer’s regulations committed over a period of time, the employer cannot meet its rebuttal burden unless it can show at least one other employee who was terminated for the exact same violations.

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT refuse to give the Union the information that it needs to represent you.

WE WILL NOT discharge or otherwise discriminate against you because of your support for Union de Tronquistas de Puerto Rico, Local 901, IBT, or any other labor organization.

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

WE WILL furnish the Union with the information it requested on July 8, 2002.

WE WILL, within 14 days of the Board’s Order, offer to Roberto Rentas and Hector Algarin full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Roberto Rentas and Hector Algarin whole for any loss of earnings and other benefits resulting from their discharges, less any interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board’s Order, remove from our files any reference to the unlawful discharges of Roberto Rentas and Hector Algarin, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that this personnel action will not be used against them in any way.

SEPTIX WASTE, INC.

Vanessa Garcia, Esq., for the General Counsel.
Jorge P. Sala, Esq., of Ponce, Puerto Rico, for the Respondent.

DECISION

STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. This case was tried before me on March 26 and 27, 2003, in San Juan, Puerto Rico, upon a complaint, dated September 30, 2002. The underlying charges were filed by the Union, De Tronquistas De Puerto Rico, Local 901, IBT–AFL–CIO (the Union), against Septix Waste, Inc. The complaint alleges that the Respondent, Septix Waste, Inc., violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act) as follows:

(1) Section 8(a)(1) for (a) interrogating its employees about their union activities, (b) soliciting its employees to gather signatures to decertify the Union, (c) informing its employees that it would be futile to file grievances, (d) threatening its employees with job loss, and (e) telling employees that they would be subject to more onerous working conditions, or reprisals in retaliation for the Union's presence as their exclusive bargaining agent.

(2) Section 8(a)(3) for terminating the employment of Roberto Rentas and Hector Algarin, because of their union activities.

(3) Section 8(a)(5) for refusing to furnish the Union with relevant information.

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Puerto Rico corporation, located in Ponce, Puerto Rico, is engaged in providing liquid waste disposal services to municipalities and private enterprises. With annual services in excess of \$50,000 to various facilities in Puerto Rico, the Respondent is admittedly an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Company's executives, Gary Santos, president, and Lymaris Pacheco, vice president, are admittedly supervisors and agents within the meaning of Section 2(11) and (13) of the Act.

The Union, Union De Tronquistas De Puerto Rico Local 901, IBT–AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

The Union has represented the Company's service and maintenance employees since 1964. The parties executed a collective-bargaining agreement, effective from January 1, 1999, to January 31, 2004.

II. THE UNFAIR LABOR PRACTICES

Septix Waste was formerly part of Ponce Waste, Inc., owned by Eric Santos, father of Gary Santos. Ponce Waste was in the business of processing of solid and liquid waste. On January 1, 1999, Gary Santos and Lymaris Pacheco acquired Septix Waste, which processed liquid waste. Santos served as presi-

dent and Pacheco was responsible for human resources and accounting. In addition to office and administrative personnel, Septix Waste operated with approximately eight employees as drivers and maintenance workers who were covered by a collective-bargaining agreement, effective January 1, 1999, to December 31, 2004. However, from 1999 to 2001, the contract was largely ignored and rarely enforced. That changed in January 2002.

In January 2002, the Company, experiencing financial difficulties, implemented administrative changes in order to cut costs and to lower expenses. The administrative changes, according to the Respondent, included the layoff of the highly paid manager of operations, Isabelino Estrella, on January 17, 2002. (R. Exh. 27.) On the same day, the Respondent informed the employees of Septix Waste about the financial situation at the Company and Estrellas' dismissal.

In January 2002, employees Roberto Rentas and Hector Algarin, who had befriended Estrella, met at his home with other employees to discuss the Union. Also in attendance was Porforio Rosario, who became a supervisor after Estrella's layoff. The employees agreed to become active in the Union. Rentas had contacted the Union and inquired whether the Union had a bargaining agreement with the Respondent. When the employees realized that they were covered by a collective-bargaining agreement, the Union became more active. In the words of the Respondent, "Less than three weeks later, and suddenly, and totally unexpected to the Company, the Union burst into the scene after a two year hiatus [and] unleashed a then apparently irrational, inexcusable and unwarranted offensive against unsuspecting Septix's management after two years of total silence." (R. Br. p. 6.)

For example, by letter of February 5, 2002, the Union accused Septix Waste with violating the collective-bargaining agreement by failing to comply with the dues-checkoff provision in the contract (R. Exh. 26). Jose Budet was designated on February 13, 2002, as the Union's representative for Septix Waste (R. Exh. 2). He filed several grievances by letter of February 27, 2002, and subsequently additional grievances (R. Exhs. 3, 5, 7, 13). Certain grievances were ultimately resolved (R. Exh. 15). The Union made a request for certain information on July 8, 2002 (GC Exh. 3). The Respondent denied the information request. At about this time, the Respondent discharged two employees, Roberto Rentas and Hector Algarin, ostensibly for misconduct. According to the General Counsel, the discharges were motivated by antiunion animus.

A. Violations of the Act Relating to Roberto Rentas

Rentas was employed as a driver at Septix Waste from 1999 until he was discharged on February 18, 2002 (GC Exh. 15). He earned \$5.52 an hour and was one of the few drivers able to drive a complicated truck with 14 shifts. He initially gathered all the information about the Union and then contacted the Union to find out more about the collective-bargaining agreement at Septix Waste and met with coworkers in November 2001. In January 2002, he attended the meeting at Estrella's home. All the drivers were in attendance. Porforio Rosario, who became a supervisor after Estrella's discharge, was also present at the meeting. Luiz Delia Perez, a representative from the Union,

was there to explain the union benefits and the collective-bargaining agreement generally. She gave the employees Jose Budet's telephone number so he, as the union representative, could help them organize. Porforio was a supervisor at the time of the meeting and Estrella was no longer employed with the Company. Porforio had been a driver before becoming a supervisor and was still on friendly terms with the other drivers. Rentas also recalled a meeting in November 2001 at the company gazebo, where Santos, Pacheco, Rosario, and the drivers were present. Santos discussed the local and the global economy. Santos also said that the collective-bargaining agreement would harm the employees more than help them.

Rentas credibly testified about a conversation with Santos on about February 5, 2002, in Estrella's office. Santos told Rentas that the Union had been inactive for 2 years and would not do anything for him now. According to Rentas, Santos said, "And then since he knows that the guys follow me [Rentas], he proposed to me that I get the Union out . . . He proposed to me to collect signatures from the guys, in order to get the Union out and; he was going to help me to do so." (Tr. 158.)

In his testimony Santos denied having had such a conversation. However, Santos' testimony was vague and unconvincing. For example, Santos said he was sure that he did not meet Rentas on either February 5 or 11, 2002, but he also said that he had an open-door policy, and that he frequently met with Rentas, but he was unable to remember any specific time he met Rentas. Considering the demeanor of the witnesses, I credit Rentas.

Rentas also testified about a comment Santos made on February 18, 2002, the day of his discharge. Pacheco, Santos, and Adalina Rosario spoke about how much the Company had helped him, and treated him well, and that he was a traitor. According to Rentas, Santos said, "He knows that I [Rentas] was the one who imposed the Union." (Tr. 174.)

At this meeting, Pacheco and Santos handed Rentas his dismissal notice, initialed by Pacheco (GC Exh. 15). The document explains at length his unexcused absence on February 14, 2002, and states, *inter alia*, as follows:

This is not the first time that you arrive [sic] late or are absent from work without prior notice, affecting the company operations, causing us great problems and inconveniences without our clients. It is for this reason and because of the infractions that you have been making, without thinking or considering the well being of the company, that effective today, your duties in Septix Waste, Inc., are terminated.

Pacheco's testimony recited the events on February 14, as well as Rentas' prior infractions, as reasons for Rentas' discharge.

The record shows that on February 14, 2002, Rentas did not report for work because of a leg injury. He had attempted to call the Company prior to his scheduled work at 4 a.m. He dialed the supervisors' numbers that were programmed on his cell phone, but he was unable to reach anyone. He finally left a message on Pacheco's voicemail. According to company policy, employees were supposed to call their supervisor and the office secretary who arrives at 7:30 a.m. At 7:40 a.m. he got

through to the office and spoke with Wilda Perez. He told her that he would not be in for work. He also informed her that he was going to see a doctor and will have a medical certificate at around noon that day. He was examined by a physician. The doctor's note states that Rentas would not return to work until February 19, 2002 (GC Exh. 14). Rentas delivered the doctor's excuse to the Company and personally handed the note to Pacheco. He also showed his injured leg to her. While on his way home from dropping off the note at the office, employee Katherine Troche, an employee of the Respondent, called him and instructed him to return to the office to drop off his cellular phone and his keys. However, he did not return until the next day, because he had driven a substantial distance away from the Company's location. When he returned on February 15, 2002, the following day, he returned his keys. He no longer had the phone, but he handed in a police claim number for the phone, because it had been stolen. On that same day, Santos told him to return on Monday, February 18, 2002, to meet with management. After being told about the meeting, Rentas called Union Representative Budet to express his concern that he might be fired. Budet promised him that he would call the Company to make an inquiry. Budet testified that both Santos and Pacheco assured him on the telephone that they would not fire Rentas. Nonetheless, when Rentas returned to the office on February 18, 2002, he received the dismissal notice. The letter contained Pacheco's initials and was given to him by her and Santos. Another employee, Rosario, was also present at the meeting. Rentas was questioned about being at the racetrack the night before his work. Pacheco and Santos expressed their disappointment of Rentas running an automobile at the Salinas Race Track until 9 or 9:30 p.m., on the night before his scheduled workday. During the meeting, Pacheco and Santos accused Rentas of being a traitor, because he was responsible for the union activity. Rentas responded to the discharge notice by letter of February 20, 2002, stating that he disagreed with the action taken (GC Exh. 16).

Rentas' disciplinary history dates back to March 14, 2000, when he was suspended for leaving a route unfinished because he had not fueled his truck (R. Exh. 36). On September 10, 2000, he received a warning for leaving a truck unattended after it had broken down (R. Exh. 39). On August 10, 2000, he received a warning for several reasons, including his improper use of the cell phone (R. Exh. 38). He was warned for being late by memorandum of November 30, 2000.

Rentas received warnings about his misuse of toll booth tickets on December 4, 2001, and February 15, 2002 (R. Exhs. 33, 35). On September 10, 2001, Rentas was disciplined for not emptying tow drum tanks. As a result, the Company had to incur the cost of having someone else substitute and complete the job (R. Exh. 42). Rentas received a warning for being late on December 28, 2001, and for his failure to call in a timely manner. On January 4, 2002, Rentas received a reminder for lateness (R. Exh. 34). On January 10, 2002, Rentas received a warning because he did not report to work and failed to notify the Company (R. Exh. 21). It is disputed whether or not he was supposed to report to work that day. Rentas testified that it was customary at Septix Waste for employees to have weekdays off after completing 32 hours of work. Rentas was paid for 32

hours that week even though he had worked a night route the night before (R. Exhs. 31, 33). Even though Rentas' disagreed with management about his duty to work on January 10, 2002, he signed the reprimand.

In sum, the record shows that Rentas had accumulated numerous absences or warnings during his last 2 years of employment, but that the Company had not discharged him until his absence on February 14, 2002.

The Respondent violated Section 8(a)(1) of the Act on February 5, 2002, during the conversation between Santos and Rentas in Estrella's office. I have credited Rentas' recollection of the events, and find that the Respondent unlawfully solicited its employee to gather signatures to decertify the Union. Santos, speaking about the failure of the Union to accomplish anything for the past 2 years suggested that "the guys fellow [sic] you [Rentas] . . . that I [Rentas] get the Union out" and that Santos would help him do so. It is well settled that an employer's efforts to solicit employees to persuade their fellow employees to abandon their allegiance to the Union violates Section 8(a)(1) of the Act. *Farah Supermarkets*, 228 NLRB 981, 988 (1977). I accordingly find that the Respondent violated Section 8(a)(1) of the Act.

The allegation in the complaint that the Respondent coercively interrogated its employee on February 18, 2002, during the meeting with Rentas, is not supported by the record. To be sure, Santos and Pacheco referred to Rentas as a traitor and Santos said that he knew that he was the one who "had imposed the union." However, this conduct might be considered objectionable under the Act, but it does not amount to an act of unlawful interrogation. I would accordingly dismiss this aspect of the complaint.

Considering the Respondent's unequivocal expression of anti-union sentiment, I find the Respondent's reasons for Rentas' discharge to be pretextual. Initially, the record shows that Rentas had taken the necessary steps to avoid an unexcused absence, he had attempted to call management prior to his 4 a.m. starting time. Although, the Respondent disputes Rentas' attempts to properly notify the Company, stating that an employee must notify the Company in advance of the scheduled working time, the Respondent concedes that Rentas called at 7:40 a.m. the operations secretary at the Company to report his absence. On the same day, Rentas submitted to the Respondent and delivered to Pacheco, personally, his medical statement that he was on sick leave until February 19, 2002. In addition, Rentas showed his leg to Pacheco to prove his incapacity to work. This was not an employee who carelessly failed to report for work, or one who intentionally ignored management's procedures. Even according to the Respondent's scenario, Rentas merely failed to call prior to his working time at 4 a.m., but he called the office secretary at about 7:30 a.m., he submitted a valid doctor's excuse on the same day and he showed his injured leg to Pacheco. Yet the Respondent uses this factual base and past infractions to rid itself of a skilled employee, one who could handle a complicated truck with 14 shifts. Under these circumstances, the record suggests a different motive, namely his union activity. To establish a prima facie of a violation of Section 8(a)(3) of the Act, the General Counsel must show that the employee was engaged in union activities, that the respon-

dent harbored animus or hostility towards those activities, and discharged the employee because of those activities. Respondent may defend by proving that it would have discharged the employee in any event, even in the absence of any protected activities. *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *Transportation Management Corp.*, 462 U.S. 393 (1983). Here, it is clear that Rentas was one of the instigators of the employees' renewed interest in the Union. Although the Respondent argues that not a scintilla of evidence exists of any union activity prior to February 5, 2002, when it received a letter by fax that it had violated the collective-bargaining agreement, Rentas credibly testified about his union efforts. He was the first among the employees to contact the Union to find out more about the contract. He and the employees, including Supervisors Estrella and Rosario, attended union meetings where they were briefed by a union representative. Rentas credibly testified that Santos spoke to him on February 5, 2002, soliciting his cooperation in getting rid of the Union. Rentas refused. Rentas also recalled a brief conversation with Santos on February 11, 2002, in the corporate office to discuss the concerns of Carlos Hernandez, an employee. During that exchange, Rentas openly revealed his union involvement and his intentions to file grievances. The record accordingly supports a finding of elements one and two under *Wright Line*, supra, that Rentas was engaged in union activities and that management was aware of it. Rentas was a leader in the employees' renewed interest in the union contract and the resurgence of the Union.

The third element that the employer's antiunion animus contributed to the decision to fire the employee has also been established. As stated, the Respondent unlawfully solicited Rentas' cooperation to decertify the Union. Significant were the observations made by management during the meeting on February 18, 2002, when Rentas was discharged. Santos stated that he was aware that Rentas was the one who "had imposed the Union." Rentas was called a traitor by management. Finally, the timing of the discharge, 7 days after these meetings, suggests a discriminatory motive. For these reasons, as well as the reasons discussed in the General Counsel's brief. I find that the third element has been satisfied.

I am also convinced that the Respondent has failed to show that Rentas would have been discharged even in the absence for union considerations. The record shows that the Employer tolerated past infractions far more serious, than the failure to report for work because of an illness. Moreover, the Respondent's reliance on the events of February 14, 2002, is certainly weak even considering the Company's references to past infractions. I accordingly reject any suggestion that Rentas would have suffered the same fate in the absence of his union support. Clearly, the Company's reasons for its action against Rentas were pretextual. This was accentuated by the Respondent's insistence that Rentas missed work on January 10, 2002, because he had attended a club and had been partying the night before. However, the record shows that Rentas had been assigned to the Searle route the night before. Searle was an important customer of the Company. Traditionally, drivers who are serving the Searle route on a particular night are not ex-

pected to report for work on the following day. That Rentas had been assigned this account was conceded by Santos. Nevertheless, the Respondent submits that Rentas had failed to work 40 hours during that week and submitted payroll and punch card documents in support. However, the notion that an employee was off work the day after the Searle account was not disproven. This provided yet another conjecture in the Respondent's attempt to justify its adverse action against Rentas. I therefore find that the Respondent violated Section 8(a)(1) and (3) of the Act.

*B. Violation of the Act Relating to the Discharge of
Hector Algarin*

Hector Algarin was employed as a driver for Septix Waste from June 2001 until his discharge on May 8, 2002. His work hours were from 3 a.m. to 4 p.m. for a wage of \$5.55 per hour. Algarin's duties included driving trucks, cleaning out grease traps and servicing portable toilets. Estrella was his supervisor until 2001 when Rosario became his supervisor after Estrella was dismissed. Algarin was on good terms with both supervisors.

He attended the January 2002 meeting at Estrella's home. He and the other employees played softball and would meet every Friday and also talk about the Union. He also took part in various other meetings held among the employees to encourage union involvement.

Algarin received a "warning" on February 25, 2002, signed by Lymaris Pacheco (GC Exh. 5). The warning was for using the company phone for personal calls.

In his testimony, Algarin admitted that he was not to call other drivers directly or to use the cellular phone to call home. Most of his calls were made to other employees (drivers) and one call to his home.

Algarin was suspended for an incident that occurred on April 2, 2002 (GC Exh. 6). He had failed to deliver two portable toilets to a client. His route sheet usually contains instructions about the service for each client. However, he only realized his error until he arrived at the client's location. He promptly called his supervisor, Rosario, to get instructions and was instructed to continue with his route. Another incident occurred with the next client, Buffalo Café, where he had to empty grease traps. He did not have the appropriate hose for the service, he therefore cut a longer hose of about 10.5 to 11 feet down to about 5 feet. Algarin submitted a written explanation to Wilda Perez stating that the truck was not properly equipped. Nevertheless, the Company charged him \$100.95 for the replacement of the hose. He also received a 5-day suspension. Algarin had broken a hose early in his employment but had not received a warning. On May 3, 2002, Algarin was disciplined again in writing for the misuse of his cellular phone.

Algarin received another warning for an incident on May 2, 2002, for waiting an hour at a supermarket in Caguas, a client that had been regarded as important by Gary Santos (GC Exh. 8). He had arrived at the client at 5 a.m. and waited until 6 a.m. Algarin knew that he was to wait for only 15 minutes. He also did not attempt to call the Company to inform that he was waiting. He arrived late for his next stop, Plaza Rio Honda, but was unable to service the next two customers. He called the com-

pany and spoke with Katherine Troche, secretary for operations, to explain what had happened. He received a warning, dated May 6, 2002, for this incident because he had been instructed not to wait for any customer for longer than 15 minutes.

The warning states, *inter alia* (GC Exh. 6):

ADMONISHMENT

On Thursday, May 2, 2002, you went to provide services to a trap in a supermarket in Caguas. You waited one hour for the store manager to arrive. As a result of this waiting period, you arrived late to your next client (Plaza Rio Hondo) and could not provide the service to the traps on two stores. As you well know, you have to arrive early to the Shopping Centers, because after a certain time services cannot be provided in any of the stores, because they are serving meals and the odor affects them.

At no time did you call your supervisor or Mr. Gary Santos, having all the telephones at your disposal to communicate that the manager of the supermarket had not arrived. When you arrived in the afternoon, you informed the Operations Assistant, Katherine Troche that you had to wait one hour because the manager was going to come in at 6:00 AM, by then your call was too late and at that time we could not resolve anything. You can wait for a client for no more than fifteen minutes and if you had to wait more, for whatever reasons, you must call any of us in order to authorize the waiting time, this is not something unknown to you.

On the same day, Algarin received another warning, which reads in part (GC Exh. 10):

ADMONISHMENT

Today, Monday, May 6, 2002, you did not report to your duties of the day. Your arrival time was at 3:00 AM and at no time did you call your supervisor or Mr. Gary Santos, having all the telephones and a cellular phone, which the company provided you, at your disposal to call. It was not until 7:20 AM when you called your Supervisor, Mr. Porfirio Rosario, in order to inform him that you had problems with your car and it did not turn on. That due to that reason you were not able to come to work.

On May 8, 2002, Algarin was discharged for an incident, which happened on the prior day. The Company's principal complaint was that Algarin while servicing a customer agreed to include additional work, which delayed his duties for the rest of his workday. The warning states, *inter alia*, as follows (GC Exh. 12):

DISCHARGE

On May 7, 2002, you were responsible for doing the cleaning of two small grease traps in a Bayamon supermarket. Then you were responsible for providing service to Las Catalinas Mall in Caguas. At 7:30 AM, you called Supervisor, Porfirio Rosario, and informed him that you had to do two additional traps in the supermarket, because the manager requested from you. In addition, you asked

him if you could enter Las Catalinas Mall since you were already heading there at that time. You arrived at Las Catalinas Mall at approximately 8:20 AM, and the guard did not allow you to enter to provide the service, because it was already too late.

The service order of the supermarket clearly indicated the cleaning service of only two grease traps. You provided service to two other traps without authorization, only because the manager requested it. You know that you have to call and request authorization to provide services that are not annotated in the order. You have a cellular phone that is provided to you by the Company with all the telephone numbers of the office, cellular and our home telephone numbers. The services coordination of the grease traps is done at the main offices of the supermarket, not with the store managers. For that reason, we have to bill them for those two additional traps and there is no guarantee that they are going to pay us.

We did not comply with the client of Las Catalinas mall because as a result of the two additional traps that you did in the supermarket, it took you more time that what was scheduled and arrived late to render the service at Las Catalinas mall. We must remind you that on Thursday, May 2, 2002, because you also arrived late we did not comply with Plaza Rio Hondo leaving two traps without being done, because you ran out of time. You know that this client you have to arrive before 7:00 AM.

With each written warning, the Respondent referred to disciplinary rules in the collective-bargaining agreement, which Algarin had violated. Moreover, the Respondent also sent copies of these written admonishments to the Union Representative Jose Budet.

In his testimony, Algarin attempted to rationalize his conduct and explain away his mistakes. However, in substance, the Respondent's documentation of Algarin's conduct appeared to be accurate.

For several reasons, I find the Respondent's conduct highly suspect. First, Algarin's trail of disciplinary warnings began after the renewed union activity among the employees, for he had not been disciplined during the first part of his tenure. Second, the principal reason for his discharge was his service on May 7, 2002, at the Las Catalinas Mall, for having complied with the customer's request to clean two additional traps. This caused his tardiness for the subsequent service calls. Again, his misconduct does not strike me as sufficiently severe to warrant a discharge. To be sure, this was a managerial decision, best evaluated by management. However, considered in the context of the Respondent's hostility to the Union's resurgence, as well as Respondent's careful efforts to notify the Union of each such occurrence and the Respondent's careful reference to the discipline rules in section 3.30 of the contract, the inference is that Respondent's reasons for the discharge was union related and pretextual.

Again, under the *Wright Line* test, the General Counsel must show first that Algarin engaged in union activity. In this regard, the record shows that Algarin was among the employees who submitted a dues-checkoff card (GC Exh. 2). Algarin also

attended the meetings in Estrella's home, which sparked the employees' renewal interest in the Union. Finally, Algarin was elected as the employee's spokesman or speaker for the group of employees although he did not fill that role. Carlos Baerga, another employee, was ultimately selected as the shop steward.

Secondly, the record shows that the Respondent knew of Algarin's union activity, as a result of his union dues checkoff, as well as his regular attendance at the employee gathering at Estrella's home. In attendance at those meetings was not only Estrella, a former supervisor, but also his successor, Rosario. I accordingly find, that Algarin was engaged in union activities and that management was aware of it.

The third element, that the Respondent harbored antiunion animus has already been established. The timing in the burst of disciplinary warnings issued to Algarin soon after the union activity is an indicator that the Respondent took the action because of the Union. For example, he had damaged a hose before while backing up his truck, he was not disciplined. He also made unauthorized calls on his cell phone without written reprimands. Clearly an inference can be drawn that the Respondent carefully crafted reprimands with references to the collective-bargaining agreement and with copies sent to the Union were the result of the Respondent's reaction to an employee suspected of being a union supporter.

Of significance in this connection is the Respondent's conduct in March 2002, when Santos met with each employee on a one-to-one basis. According to Algarin, the Respondent initially asked how Algarin was feeling. Santos then spoke about the discharge of Rentas and announced that henceforth everything was going to be handled as per the collective-bargaining agreement—that everything was going to be done in writing, on paper, I mean, admonishments, suspensions, dismissals, as far as being justified (Tr. 109). Santos also told him to see what had happened for [him] to take a look at what had happened to Roberto Rentas; that he who played with fire got burned (Tr. 111). Clearly Rentas' discharge served as an example to the employees. As alleged in the complaint, the Respondent threatened its employee with job loss for engaging in union activities. This independent violation of Section 8(a)(1) corroborates and supports a finding, that the General Counsel has made out a prima facie case of Section 8(a)(1) and (3).

The final element is whether the Respondent would have discharged this employee even in the absence of any union considerations.

At first blush, as argued by the Respondent, Algarin was not among the most outspoken union activists among the drivers. And it is also apparent that he received numerous warnings in such a relative short period of time. Algarin offered little or no explanation for some of his mistakes on the job. Considering the absence of any reprimands during Algarin's tenure prior to this union activity, the Respondent's hostility towards the employees' renewed interest in the union contract, as well as the Respondent's threat, it is clear to me that the Respondent has failed to prove a defense. For example, other employees were reprimanded for similar misconduct, but not discharged. The Respondent testified that German Gates received two warnings for calling 2-1/2 hours after his shift started, as well as a warning for not completing a service, but he is still employed at

Septix Waste. Another employee, Edwin Lopez, received two warnings for tardiness, a warning for leaving the yard late, and a suspension for unjustified absences all within a 4-month period. Pacheco testified that he is close to a discharge if he commits one more error.

Considering the unlawful threat and the discriminatory discharge, I conclude that the Respondent violated Section 8(a)(1) and (3) of the Act.

Another independent violation of Section 8(a)(1) was shown by the testimony of Hector Baerga, who functioned as a union delegate or shop steward in March 2002. He left his employment at the Company on May 8, 2002. During his discussion about grievances in March 2002 with Santos, the latter stated that the grievances were a waste of time. This statement insinuates that the filing of grievances under the union contract were futile. Such a statement is coercive according to Section 8(a)(1) of the Act.

C. The Request for Information

By letter of July 8, 2002, Jose Budet, union representative, requested the Respondent to provide the Union with the mailing address of six named employees (GC Exh. 4). The Respondent, stating that it had to protect the privacy of its employees, refused to furnish the requested information.

In resolving issues posed, the Board uses the balancing test of *Detroit Edison v. NLRB*, 440 U.S. 301 (1979). As the Board has explained,

An employer has a statutory obligation to provide requested information that is potentially relevant and will be of use to a union in fulfilling its responsibilities as the employees' exclusive bargaining representative.

....

A union's interest in relevant and necessary information, however, does not always predominate over other legitimate interests. . . . Thus, in dealing with union requests for relevant but assertedly confidential information possessed by an employer, the Board is required to balance a union's need for the information against any legitimate and substantial confidentiality interest established by the employer. [*GTE California, Inc.*, 324 NLRB 424, 426 (1997).]

Here, the information sought by the Union is relevant to its statutory obligation to represent all the unit employees and to inform them of the collective rights.

Clearly, the identity of unit employees, including their addresses and telephone numbers are presumptively valid. *Dyncorp/Dynair Services*, 322 NLRB 602 (1996). The Respondent's refusal to provide the information violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Septix Waste, Inc., Ponce, Puerto Rico, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Gary Santos and Lymaris Pacheco are supervisors and agents of Respondent within the meaning of Section 2(11) and (13), respectively.

3. Union de Tronquistas de Puerto Rico, Local 901, IBT,

AFL-CIO, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

4. The Union has been the exclusive collective-bargaining representative of the following unit:

INCLUDED: All the workers employed by the Company Septix Waste, Inc., including those in service and maintenance, at its places of business in Road #1, Km. 122.4, Calzada Ward of Mercedita, Puerto Rico and at its offices throughout the island of Puerto Rico, pursuant to Case #24-RC-7628, National Labor Relations Board.

EXCLUDED: All other clerical employees, managers, guards and supervisors as defined by the National Labor Relations Act.

This recognition has been embodied in a collective-bargaining agreement, which is effective from January 1, 1999, to December 31, 2004.

5. By failing or refusing to furnish the Union with the information requested by letter of July 8, 2002, namely the names, addresses and telephone numbers of six employees, the Respondent violated Section 8(a)(1) and (5) of the Act.

6. By soliciting its employees to gather signatures to decertify the Union, the Respondent violated Section 8(a)(1) of the Act.

7. By informing its employee that the filing of grievances would be futile, the Respondent violated Section 8(a)(1) of the Act.

8. By threatening its employee with the loss of jobs, the Respondent violated Section 8(a)(1) of the Act.

9. By discharging its employees Roberto Rentas and Hector Algarin, the Respondent violated Section 8(a)(1) and (3) of the Act.

10. The other allegations in the complaint have not been substantiated.

THE REMEDY

Having found that the Respondent has violated Section 8(a)(1), (3), and (5) of the Act, I recommend that it be required to cease and desist therefrom and from any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. Further, the Respondent shall be required to offer employees Roberto Rentas and Hector Algarin, immediate and full reinstatement to their former positions of employment and make them whole for any loss of wages and other benefits they may have suffered by reason of Respondent's discrimination against him in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition, the Respondent shall be required to post an appropriate notice, attached as an appendix. Having found that the Respondent refused to furnish the Union with relevant information, the Respondent must be ordered to provide the information.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹

¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the

ORDER

The Respondent, Septix Waste, Inc., Ponce, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Failing and refusing to furnish the Union with the relevant and necessary information.
 - (b) Soliciting its employees to decertify the Union.
 - (c) Informing its employees that the filing of grievances is futile.
 - (d) Threatening its employees with job loss because of their union support.
 - (e) Discharging its employees or otherwise discriminate against them because of their union support.
 - (f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them under Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the purposes of the Act.
 - (a) Furnish the Union with the information requested by the Union.
 - (b) Within 14 days from the date of this Order, offer Roberto Rentas and Hector Algarin full reinstatement to their former jobs or, if the jobs no longer exist, to substantially equivalent positions without prejudice to seniority or any other rights or privileges previously enjoyed. Make Roberto Rentas and Hector Algarin whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.
 - (c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

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

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

(e) Within 14 days after service by the Region, post at its facility in Ponce, Puerto Rico, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 5, 2002.

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

² If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."