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**Igramo Enterprise, Inc. and Orce Frias and Gustavo Betancourth.**<sup>1</sup> Case 29–CA–27247 and 29–CA–27320

December 28, 2007

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS LIEBMAN, KIRSANOW, AND WALSH

The principal issue in this case concerns the employee status of the New Jersey drivers who work for the Respondent, Igramo Enterprise, Inc. (Igramo).<sup>2</sup> We affirm, for the reasons explained by the judge, the judge's finding that the drivers at issue here are employees and not independent contractors.<sup>3</sup> However, we reverse the judge

<sup>1</sup> We have amended the caption to reflect the correct spelling of the Respondent's and the Charging Parties' names.

<sup>2</sup> Administrative Law Judge Raymond P. Green issued his initial decision on September 15, 2006. Both the Respondent and the General Counsel filed exceptions and supporting briefs, and the Respondent filed an answering brief. On June 12, 2007, the Board remanded a portion of the case to the judge to make additional credibility determinations and factual findings on the issue of whether the Respondent unlawfully discharged driver Orce Frias for engaging in protected concerted activities. On June 29, 2007, the judge issued his supplemental decision. The General Counsel filed exceptions to the supplemental decision and a supporting brief, and the Respondent 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 initial and supplemental decisions and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Supplemental Decision and Order.

<sup>3</sup> We agree with the judge that, although there are some factors present that might support a finding of independent contractor status, they are outweighed by other factors establishing that the drivers are statutory employees. The two cases cited by Igramo to support its independent contractor argument, *Argix Direct, Inc.*, 343 NLRB 1017 (2004), and *St. Joseph News-Press*, 345 NLRB 474 (2005), are readily distinguishable. To begin with, in both of those cases the parties had written operating agreements that gave the individuals substantive control over the means and manner of performing their work and expressly indicated the parties' intentions to create an independent contractor relationship. Igramo, by contrast, has no written agreements or contracts with its drivers. And, unlike here, in *Argix*, the drivers could elect not to work, without penalty, and could thereby take on work for other companies; were assigned to general geographic areas with varying daily assignments and could increase their income by adding extra pickups; and independently controlled the order that deliveries were made within the broad window periods set up by the client customers. Additionally, several of the *Argix* drivers were incorporated as independent companies and/or owned several trucks and hired their own drivers; here, none of Igramo's New Jersey drivers are incorporated or employ other drivers. In *St. Joseph News-Press*, the newspaper carriers at issue had proprietary rights to purchase, sell and deliver newspapers that they bought at wholesale prices and sold at retail to customers in a geographic area; Igramo's drivers have no proprietary rights to their

and find, for the reasons that follow, that Igramo unlawfully discharged driver Orce Frias because of his protected concerted activities. Unless otherwise stated, we affirm the remainder of the judge's rulings, findings,<sup>4</sup> and conclusions.<sup>5</sup>

I.

Igramo is a courier company that has a contract with a laboratory to pick up and deliver laboratory specimens from various veterinary facilities. Orce Frias started working as a driver for Igramo in 2001.

In August 2005,<sup>6</sup> Frias joined several other drivers in signing a petition presented to Igramo's president, Grace Moya, requesting a pay increase to cover increased gasoline costs. Frias testified, without challenge, that during the following month he attempted on several occasions to reach Moya in order to arrange a follow-up meeting with the employees.<sup>7</sup> Although he was unsuccessful in reaching Moya, he did speak with Igramo managers, Gildardo Ortiz and Markles Rosado, and informed them of the purpose of his calls. As the judge further found, when a meeting finally took place on October 15, it was Frias who first welcomed Moya and attempted to introduce the

routes. The *St. Joseph News-Press* carriers could independently change the order of deliveries, disregard customer delivery requests and refuse to deliver to particular customers, and increase their income by soliciting new customers and/or delivering products for other companies while delivering papers. Igramo's drivers have no comparable authority or power.

Although Member Liebman dissented in *St. Joseph News-Press*, she agrees with her colleagues that this case is distinguishable on its facts.

<sup>4</sup> We affirm the judge's finding that Respondent Igramo violated Sec. 8(a)(1) of the Act by taking work away from employee Gustavo Betancourth because he engaged in protected concerted activities. In the absence of exceptions, we also affirm the judge's findings that Igramo unlawfully threatened employees with discharge, stated that those who were dissatisfied could find other work, and threatened plant closure.

We find it unnecessary to address the General Counsel's exception to the judge's failure to find that Igramo's president unlawfully threatened employees with "unspecified reprisals," since the remedy for such a violation would be encompassed by our attached Order.

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

<sup>5</sup> We shall revise the Order to include the Board's traditional remedy requiring Igramo to remove from its files all references to its unlawful conduct towards Betancourth and Frias and to inform them in writing that it has done so.

<sup>6</sup> Unless otherwise stated, all subsequent dates refer to 2005.

<sup>7</sup> Although the judge found that only Betancourth requested the meeting with Moya, Igramo admitted in its answer to the complaint that both "Frias and Betancourt [sic] requested a meeting with Moya to discuss an increase in the fees charged for services and the cost of gasoline and other issue."

subject of the meeting. At that point, Moya summarily cut him off and started talking directly to the whole group of employees (including Frias), who jointly expressed their desire for greater workplace benefits and questioned the assertion that they were independent contractors. In response, Moya told the employees that they could always get other jobs if they wanted employee status and benefits. Igramo's accountant also threatened that the business would likely close if the employees pressed such claims with the Department of Labor.

One week after this meeting, Moya fired Frias. Three days later, Moya unlawfully reassigned Betancourth's night route to another employee.<sup>8</sup> On at least two occasions in the next 6 weeks, Moya warned Betancourth that he and the other employees would lose their jobs if they continued to engage in protected concerted activities.

In his initial decision, the judge concluded that Igramo discharged Frias for cause and not because he engaged in protected activities. In his view, Igramo "reasonably could have made the decision that Frias was not performing his job properly and should be dismissed" because Frias failed to make two separate pickups in the previous month after having been warned several months earlier. Finding the judge's analysis insufficient under *Wright Line*,<sup>9</sup> we remanded this part of the case, requesting that the judge make additional findings needed to fully evaluate the General Counsel's arguments that animus toward Frias' protected activities was a contributing factor in his discharge, that Igramo's proffered defense was pretextual, and that Igramo failed to meet its rebuttal burden to establish that it *would* have discharged Frias even in the absence of his protected conduct and not just, as the judge found, that it "reasonably *could* have" done so (emphasis added).<sup>10</sup>

In his supplemental decision, the judge reaffirmed his finding that Frias was discharged for cause and not for

his protected activities, concluding that the evidence was "wholly lacking to show any reason why [Moya] would have wanted to retaliate against Frias who played no role in the October 15 discussions and who otherwise had no unique role in shaping the original employee demand regarding gasoline prices." He further opined that "even if I were persuaded (which I am not) that the General Counsel presented sufficient evidence to show that 'a' reason for Frias' discharge was because of his alleged protected concerted activity (or because the Respondent thought he had engaged in such activity), I would nevertheless find that the Respondent had, in fact, discharged him for reasons unrelated to those activities, but rather because of his failure to properly perform his job duties."<sup>11</sup>

## II.

We find the judge's supplemental decision, like his first, analytically flawed. In reaching the finding that Frias' discharge was not unlawfully motivated, the judge failed to give adequate consideration to the protected nature of Frias' activities (irrespective of whether Frias was a leader in those activities), to Igramo's contemporaneous 8(a)(1) violations, to the timing of the discharge, and to several countervailing facts that undermined Igramo's affirmative defense. Having reviewed the record, and giving due consideration to all the facts, we reverse and find a violation.

Under *Wright Line*, the General Counsel has the burden of proving by a preponderance of the evidence that an employee's protected conduct was a motivating factor in the adverse employment action. This burden is met by showing (1) that the employee was engaged in protected activity, (2) that the employer had knowledge of that activity, and (3) that the employer had animus towards such activity. Once this is accomplished, the burden of persuasion shifts to the employer to prove that it would have taken the same action even if the employee had not engaged in the protected conduct. *North Carolina Prisoner Legal Services*, 351 NLRB No. 30, slip op. at 4 (2007); *North Carolina License Plate Agency #18*, 346 NLRB No. 30, slip op. at 1 (2006), enfd. per curiam 243 Fed. Appx. 771 (4th Cir. 2007). Unlike the judge, we find that the General Counsel carried his initial burden.

<sup>8</sup> Betancourth previously drove a day route and a night route and was paid separately for each. Although he thereafter continued to drive his day route, the loss of the night route cost him \$135 weekly.

<sup>9</sup> 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

<sup>10</sup> Under *Wright Line*, "[a]n 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 activity." *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), petition for review denied 70 F.3d 863 (6th Cir. 1995), enfd. mem. 99 F.3d 1139 (6th Cir. 1996). Accord: *Weldon, Williams & Lick, Inc.*, 348 NLRB No. 45, slip op. at 5 (2006); *National Steel Supply, Inc.*, 344 NLRB 973, 974 (2005), enfd. 207 Fed. Appx. 9 (2d Cir. 2006). Nor is "[a] judge's personal belief that the employer's legitimate reason was sufficient to warrant the action taken . . . a substitute for evidence that the employer would have relied on this reason alone." *Hicks Oils & Hicksgas*, 293 NLRB 84, 85 (1989), enfd. 942 F.2d 1140 (7th Cir. 1991); *Delta Gas*, 282 NLRB 1315, 1317 (1987).

<sup>11</sup> On remand, the judge discredited Frias' testimony that Igramo's Supervisor Markles Rosado admitted that he was discharging Frias because Frias was considered a "leader of all this mess" (referring to the employees' concerted activities). The judge found the corroborating testimony of Betancourth to be "mistaken." We find it unnecessary to reach the General Counsel's exceptions to these findings because, as explained below, we conclude that the other record evidence is sufficient to establish unlawful motive without regard to whether this statement was made.

That Frias engaged in protected activity—by participating in the signing of the petition and by his presence at the October 15 meeting—and that Igramo was aware of that activity are not open to serious debate. Joining in the “presentment of grievances by a group of employees to their employer constitutes a concerted activity which [S]ection 7 of the Act was designed to protect.” *NLRB v. Sequoyah Mills, Inc.*, 409 F.2d 606 (10th Cir. 1969); see *Bethlehem Temple Learning Center*, 330 NLRB 1177, 1177–1178 (2000) (employee joint complaints to management and discussions about noncompete agreement protected); *Liberty Natural Products*, 314 NLRB 630 (1994), enfd. 73 F.3d 369 (9th Cir. 1995) (signing petition constitutes protected concerted activity).

As to animus, we find the unlawful threats to employees and the timing of Frias’ discharge sufficient to meet the General Counsel’s threshold burden under *Wright Line*. It is evident that Moya was disconcerted by the employees’ expanded demands at the October 15 meeting. As the judge found, the employees’ newly raised demands for additional benefits as well as the dispute over independent contractor status was what “tipped the apple cart” and raised Moya’s ire. Moya herself testified that she was “shock[ed] about everything they were telling me or they were asking me because I never expected this from them.” She responded by telling the employees that they could look for jobs elsewhere and warning that anyone signing the employee petition “would have drastic consequences.” She repeated these threats on at least two subsequent occasions. “Threats to eliminate the employees’ source of livelihood have a devastating and lingering effect on employees. . . . An inference may be drawn from the animus behind such threats, which the discharge would gratify, that the animus was the true reason for the discharge.” *Vico Products Co.*, 336 NLRB 583, 588 fn. 16 (2001) (quoting *Reno Hilton*, 320 NLRB 197, 209 (1995) (citations omitted)), enfd. 333 F.3d 198 (D.C. Cir. 2003).

It is also significant that Moya discharged Frias 1 week after the meeting where she and Carrera made unlawful threats, and 3 days before unlawfully retaliating against Betancourth. The timing of an employer’s action can be evidence of unlawful motive. See, e.g., *Howard’s Sheet Metal, Inc.*, 333 NLRB 361 (2001) (discriminatory discharge of another worker a factor to consider in weighing the contemporaneous discharge of a second coworker, who engaged at the same time in the same prounion activity); *Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004) (timing of layoffs the day after union rally and the same day union petition received indicates unlawful motivation); *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1124 (2002) (discharge of two employees a few days after

unlawful threats of job loss and interrogations found to be evidence of unlawful motive), enfd. 71 Fed. Appx. 441 (5th Cir. 2003).

In concluding that Frias’ discharge was not unlawfully motivated, the judge relied heavily on his finding that Frias played no role in the October 15 discussion and on his observation that other, more vocal, employees were not retaliated against. This reliance was misplaced. To begin with, the judge was incorrect in finding that Frias played no role in the October 15 meeting. It is undisputed that Frias was one of two employees (Betancourth being the other) who contacted management specifically to set up the meeting. And it was Frias who welcomed Moya to the meeting on behalf of all the employees and who attempted to explain its purpose, until Moya summarily cut him short.<sup>12</sup> If anything, we find it more likely that Igramo viewed Frias as an instigator and not just an extraneous bystander, as the judge found. We therefore reject the judge’s inference that Igramo had no reason to single out Frias for retaliation as opposed to other employees who spoke up at the meeting.

Moreover, contrary to the judge’s implication, it was not necessary for the General Counsel to show that Igramo held particular animus toward Frias. By threatening the group of employees with shutdown and job loss because of their protected activity, Igramo manifested its animus toward all of them, including Frias. See, e.g., *La Gloria Oil & Gas Co.*, supra at 1123–1124 (evidence that employer held “animus toward the Union . . . sufficient to support a finding that this animus played a role in the discharge”); *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1105 (2000) (General Counsel’s burden met where employer knew employee engaged in protected activity with other employees, exhibited animus towards activity, and discharged employee 2 days later); see also *Pan-Oston Co.*, 336 NLRB 305, 308 (2001); *Key Food*, 336 NLRB 111, 113 (2001); *Montgomery Ward & Co.*, 316 NLRB 1248, 1254 (1995), enfd. 97 F.3d 1448 (4th Cir. 1996).

That the Respondent took no action against other participants at the meeting (except for Betancourth) also is not outcome determinative, for “a discriminatory motive, otherwise established, is not disproved by an employer’s proof that it did not weed out all union adherents.” *Nachman Corp. v. NLRB*, 337 F.2d 421, 424 (7th Cir. 1964); see, e.g., *Clark & Wilkins Industries v. NLRB*, 887 F.2d 308, 316 fn. 19 (D.C. Cir. 1989), cert. denied 495 U.S. 934 (1990); *NLRB v. Centra, Inc.*, 954 F.2d 366, 374 (6th Cir. 1992). In any event, it is reasonable to in-

<sup>12</sup> Moya also testified that when she first met with the employees, she expressed concern about the meeting location, and that it was Frias who suggested and led everyone to an alternative location.

fer that Igramo ultimately set its sights on Frias because he was the only driver, other than Betancourth, who gave it a plausible-sounding excuse to act on its threats.<sup>13</sup>

The evidence discussed above fully meets the General Counsel's *Wright Line* burden to establish that Frias was engaged in protected activities, that Igramo was aware of his activities, and that Igramo held animus towards such activities. It became incumbent, then, on Igramo to establish by a preponderance of the evidence that Frias' discharge would have taken place even in the absence of his participation in protected conduct. E.g., *Metropolitan Transportation Services*, 351 NLRB No. 43, slip op. at 3 (2007), citing *Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443 (1984). To this end, Igramo's evidentiary burden is not met by "showing merely that [it] had a legitimate reason for its action." *Id.*

Igramo asserts that it discharged Frias solely because he failed to call in or to pick up lab specimens from Garden State Hospital on August 27 and October 14.<sup>14</sup> Although the General Counsel disputes whether these pickups were required, we find it unnecessary to reach that question. Even assuming that Frias improperly failed to make these pickups, the preponderance of the evidence does not support Igramo's contention that he would have been discharged for this reason alone.

To begin with, Igramo's supporting evidence is contradictory at best. Moya first testified that she decided to terminate Frias on October 22, the same day he was discharged by Rosado. When later asked why she waited a week to do so, she contradicted her earlier testimony, saying that she decided the matter on October 14, but waited a week to find a replacement driver. Still later, she testified that while she "didn't want to do it" (referring to the discharge), she felt she had no choice after the lab's representative, Jack Buckley, called and asked that something be done because he was tired of the missed pickups. Buckley's call, however, did not occur until sometime after October 15. Further, Buckley, whom the judge found to be a credible disinterested witness, testified that he never asked that the driver be sanctioned, let alone discharged.<sup>15</sup> Similarly, Moya testified that Buckley's principal concern was the missed pickups at Garden State Hospital, which Moya described as a "hot" or

"good" account and one she was concerned about losing. Buckley's testimony again contradicts hers. According to Buckley, the lab's main concern was not about the failed pickups at Garden State Hospital, which Buckley did not view as "a real big account," but rather about a purported refusal by Frias to do a pickup at Foster Hospital on October 15. On this point, however, Igramo's Supervisor Rosado admitted that Frias actually had made the October 15 pickup.

In light of these contradictions and inconsistencies, it is particularly telling that Moya never gave Frias any opportunity to defend himself, and made no apparent effort to confirm the relevant facts with Rosado or Ortiz before deciding to fire him. See *La Gloria*, supra, 337 NLRB at 1124 (abruptness of discharge and failure to give employees an opportunity to respond to allegations support inference of pretext); *Delta Gas*, supra, 282 NLRB at 1317 (same); *Service Technology Corp.*, 196 NLRB 1036, 1043 (1972) (same).

It is also relevant that Buckley testified that he called Igramo on other occasions to complain about problems with other routes and with "a lot of drivers . . . it's not just one, two or three."<sup>16</sup> Yet Igramo presented no evidence to show what, if any, standards or procedures it had in place to address poor work performance by drivers generally. Cf. *Bronco Wine Co.*, 256 NLRB 53, 54-55 (1981) (employer failed to present evidence as to the standards or procedures it applied in discharging employees for poor work performance).

The judge gave substantial weight to the fact that Frias was warned in March that he would be given "one more chance" and told that "the next time you're gone." We find the judge's emphasis unwarranted. When the "next time" occurred, Igramo did nothing. Thus, although both Moya and Rosado admittedly were aware that Frias failed to make the August 27 pickup,<sup>17</sup> there is no evidence that either even discussed following through on the March "last chance" warning. Nor is there any evidence, other than Moya's self-serving and contradictory statements, that Igramo had any intention of implementing the earlier discharge warning when, 6 weeks later, on October 14, Moya and Rosado learned that Frias had again failed to make a pickup. It was not until after Frias participated in the October 15 concerted activities that

<sup>13</sup> We do not view it as coincidental that Igramo similarly used the opportunity presented by Betancourth's complaint about the amount he was paid for the night route as a reason to unlawfully take away that route.

<sup>14</sup> The uncontested documentary evidence establishes that the initial pickup failure date was August 27, not September 26 as the judge found.

<sup>15</sup> Moya admits that she never actually spoke with Buckley about this matter. Geraldo Ortiz, who spoke with Buckley and was Frias' immediate supervisor, did not testify.

<sup>16</sup> Moya denied that these calls were made or that Igramo ever received complaints about any of its other drivers. The judge, while not addressing this evidentiary conflict, found Buckley to be a credible witness based on his demeanor. By contrast, he found the testimony of Moya concerning the October 15 meeting "not particularly reliable" and credited her only where her testimony was corroborated by Buckley. In the circumstances, we do not credit Moya's denial.

<sup>17</sup> Moya noted it in her office calendar that same day, and Rosado testified that he spoke with Frias about it at the time.

Igramo took any action. Cf. *Senior Citizens Coordinating Council of Co-Op City*, 330 NLRB 1100, 1106 fn. 19 (“delay in taking adverse action until after there is knowledge of [protected] activity evidences Respondent’s unlawful motivation”), quoting *Holsum Bakeries of Puerto Rico*, 320 NLRB 834, 837 (1996), affd. mem. 107 F.3d 922 (D.C. Cir. 1997), cert. denied 522 U.S. 817 (1997).

The General Counsel argues that Igramo’s reliance on the failed pickups is pretextual. In our view, the facts set forth above could support such a conclusion, but we need not resolve this question. For whether or not reliance on Frias’ failure to make the two pickups was pretextual, we conclude that Igramo failed to establish by a preponderance of the evidence that the two failed pickups at Garden State Hospital *alone* would have led to discharge even absent Frias’ participation in protected activities.<sup>18</sup> Accordingly, we find that Igramo violated Section 8(a)(1) of the Act by discharging Orce Frias because he engaged in protected concerted activities.

#### AMENDED REMEDY<sup>19</sup>

Having found that Igramo unlawfully discharged Orce Frias, it must offer him reinstatement to his former position and route, or if that position or route no longer exists, to a substantially equivalent position and route and make him whole for any loss of earnings or other benefits, computed on a quarterly basis, from the date of discharge to date of proper offer of reinstatement, less any 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).

#### ORDER

The National Labor Relations Board orders that the Respondent, Igramo Enterprise, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees, or telling them that they could resign, because of their protected concerted activities.

<sup>18</sup> As we explained in *Wright Line*, “we will not seek to quantitatively analyze the effect of the unlawful cause once it has been found. It is enough that the employees’ protected activities are causally related to the employer action which is the basis of the complaint. Whether that ‘cause’ was the straw that broke the camel’s back or a bullet between the eyes, if it were enough to determine events, it is enough to come within the proscription of the Act.” 251 NLRB at 1089 fn. 14; accord *Bronco Wine Co.*, supra, 256 NLRB at 54 fn. 8.

<sup>19</sup> We also correct the judge’s remedy with respect to Betancourth to reflect that the make-whole portion is to be computed from the date that he ceased doing his night route to the date of a proper offer of reinstatement of this route.

(b) Telling employees that if they send a wage complaint to the Department of Labor, the Company could be destroyed or go out of business.

(c) Taking away routes from employees and thereby reducing their earnings because of their protected concerted activity.

(d) Discharging employees because of their protected concerted activity.

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

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

(a) Within 14 days from the date of this Order, offer Gustavo Betancourth full reinstatement to all routes he had as of October 15, 2005.

(b) Make Gustavo Betancourth whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge’s decision.

(c) Within 14 days from the date of this Order, offer Orce Frias full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(d) Make Orce Frias whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the amended remedy section of this decision.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful removal of the night route from Gustavo Betancourth and to the unlawful discharge of Orce Frias, and within 3 days thereafter notify Frias and Betancourth, in writing, that this has been done and that Frias’ discharge and Betancourth’s loss of his night route will not be used against them in any way.

(f) 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.

(g) Within 14 days after service by the Region, post at its facilities in New York, New York, copies of the attached notice marked “Appendix.”<sup>20</sup> Copies of the no-

<sup>20</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judge-

tice, on forms provided by the Regional Director for Region 29, 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, or sold the business or the facilities involved herein, 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 October 15, 2005.

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

Dated, Washington, D.C. December 28, 2007

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Wilma B. Liebman, Member

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Peter N. Kirsanow, Member

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Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

\_\_\_\_\_  
ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

WE WILL NOT threaten our employees, or tell them that they could resign, because of their protected concerted activities.

WE WILL NOT tell our employees that if they send wage complaints to the Department of Labor, the Company could be destroyed or go out of business.

WE WILL NOT discharge employees, or take routes away from them and thereby reduce their earnings, because they join other employees in asking for increased wages and benefits.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Gustavo Betancourth full reinstatement to all routes he had as of October 15, 2005.

WE WILL, within 14 days from the date of the Board's Order, offer Orce Frias full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Gustavo Betancourth and Orce Frias whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any and all references to the unlawful removal of the night route from Gustavo Betancourth and to the unlawful discharge of Orce Frias, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that our unlawful conduct will not be used against them in any way.

IGRAMO ENTERPRISE, INC.

*Nancy K. Reibstein, Esq.*, for the General Counsel.

*David H. Singer, Esq.*, for the Respondent.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in New York on various days from March 21 to April 26, 2006. The charge in Case 29-CA-27247 was filed by Frias on October 31, 2005, and the charge in Case 29-CA-27320 was filed by Betancourth on December 13, 2005. The consolidated complaint was issued on January 26, 2006, and alleged as follows:

1. That on or about August 12, 2005, various employees including Frias and Betancourth sent a petition to the Respondent regarding a demand for a wage increase.

2. That in or about October 2005, Frias and Betancourth by telephone and in person, requested a meeting with Grace Moya, Respondent's owner, in order to discuss a wage increase and other benefits.

3. That on or about October 15, 2005, employees of the Respondent, including Frias and Betancourth, demanded a wage increase and other benefits in a meeting with Moya.

4. That in October 2005, and also on or about October 17, 2005, the Respondent by Moya (a) threatened employees with unspecified reprisals, (b) solicited employees to resign, and (c) threatened employees with discharge.

5. That on or about October 15, 2005, the Respondent by Pedro Carrera threatened employees with plant closure.

6. That on or about October 17, 2005, the Respondent, for discriminatory reasons, reduced Betancourth's work by taking away his evening route.

7. That on or about October 22, the Respondent, for discriminatory reasons, discharged Frias.

8. That on or about October 22, 2005, the Respondent by William Aspiazu, threatened employees with discharge because of their protected concerted activities.

9. That on or about November 30, 2005, the Respondent, by Moya, threatened employees with discharge because of their protected concerted activities.

10. That on or about December 5, 2005, the Respondent by Moya threatened employees with plant closure.

Apart from denying the substantive allegations of the complaint, the Respondent claims that the drivers who work for the Company are independent contractors and not employees.

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

#### FINDINGS OF FACT

##### I. JURISDICTION

The parties agree and I find that the Employer is engaged in commerce as defined in Section 2(6) and (7) of the Act.

##### II. THE STATUS OF THE DRIVERS

In *BKN, Inc.*, 333 NLRB 143 (2001), the Board listed a number of factors to be taken into account. These include: (a) The extent of control that the employing entity exercises over the details of work; (b) Whether or not the one employed is engaged in a distinct occupation or business; (c) The kind of occupation, including whether in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) The skill required in the particular occupation; (e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) The length of time for which the person is employed; (g) The method of payment, whether by the time or by the job; (h) Whether or not the work is part of the regular business of the employer; (i) Whether the parties believe they are creating the relation of master and servant; and (j) Whether the principal is or is not in business. [Restatement of the Law of 220 Agency 2d, pp. 485-486.] See also *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989).

In *Roadway Package System*, 326 NLRB 842 (1998), and *Dial-A-Mattress Operating Corp.*, 326 NLRB 884 (1998), the Board reconsidered its standards for determining if an individ-

ual is a employee within the meaning of Section 2(3) or an independent contractor. In *Roadway*, the Board stated:

[w]hile we recognize that the common-law agency test described by the Restatement ultimately assesses the amount or degree of control exercised by an employing entity over an individual, we find insufficient basis for the proposition that those factors which do not include the concept of "control" are insignificant when compared to those that do. Section 220(2) of the Restatement refers to 10 pertinent factors as "among others," thereby specifically permitting the consideration of other relevant factors as well, depending on the factual circumstances presented. . . . Thus, the common-law agency test encompasses a careful examination of all factors and not just those that involve a right of control. . . . To summarize, in determining the distinction between an employee and an independent contractor under Section 2(3) of the Act, we shall apply the common-law agency test and consider all the incidents of the individual's relationship to the employing entity.

I also note that the burden of proof lies with the party asserting that a person or persons are independent contractors. *BKN, Inc.*, supra at 144; *Community Bus Lines*, 351 NLRB No. 61 (2004).

The Respondent is 1 among about 12 small companies that are subcontractors to a company called Antech, which is located in Long Island. Antech is a division of a larger company that also owns animal hospitals, operates a laboratory that analyzes blood samples picked up from veterinarians and veterinary hospitals. Antech's geographic scope of operations runs from Rhode Island to Florida.

Many years ago Antech utilized its own employees to pick up these samples. But at some point about 10 to 12 years ago, Antech decided to outsource this work to people, some of who were its own drivers, who set up small courier companies. Ignacio Moya, the founder of Igramo, was originally a driver for Antech. Over time, he and another former Antech driver, Gildardo Ortiz, took over an expanding number of routes from Antech and started to hire a group of drivers to run these routes. Gildardo Ortiz, along with Ignacio Moya, were the two people who essentially ran this company.

At the time of these events (in 2005 and 2006), Ignacio Moya had passed away and the business was taken over by his wife, Grace Moya. She had no previous experience in this business and to a large extent she relied on Gildardo Ortiz and on her son and son-in-law, who also were in the business. Her son is William Aspiazu and her son-in-law is Markles Rosado.

In 2006, the Respondent operated more than 30 routes. In the New York/New Jersey area, these routes were in Brooklyn, Manhattan, the Bronx, Westchester County, and New Jersey. In addition, the Respondent has routes in Philadelphia and Southeast Florida. For the routes in the New York/New Jersey area, these generally were done by a group of drivers who, with a couple of exceptions, drove an assigned route or routes. In the case of the Florida routes, the Respondent contracted with a driver located in Florida who operated under a corporate name and who, in turn, utilized a group of about 12 drivers to pick up samples on those routes. At the end of the day, the blood samples from Florida were air shipped to New Jersey where a

driver from Igramo would pick up the samples and drive them to Antech. In the case of the Philadelphia routes, these are operated in essentially the same manner as the Florida routes except that there are fewer of them. These routes have been contracted to a man named David Schaeffer who has set up his own little business and has hired a group of his own drivers who collect blood samples. He has eight routes with eight drivers. These samples are driven up to New Jersey each day and are then collected and driven to Antech by one of the Igramo drivers.

It should be noted that the drivers who are involved in this case, including the alleged discriminatees, do only that. They perform functions that are the essential part of the Respondent's business. They work exclusively for Igramo, on an at-will basis, and generally do so on a 5 or 6 days-per-week basis. There are no written contracts or any types of written documents such as a letter confirmation that memorializes the terms and conditions under which the drivers work. Many of the drivers have worked for Igramo for many years and therefore have longstanding exclusive relationships with the Respondent.

Because of the time constraints involved, drivers cannot offer their services to any other persons during the time that they perform services for Igramo. They simply drive along a predetermined course, pick up blood samples along the way and deliver them to a central point in New Jersey where they are aggregated and driven by another person to Antech's Long Island laboratory.

The routes are essentially determined by Antech and are based on geography and time. That is, when Antech makes a contract with a doctor or hospital, it arranges for a suitable time to pick up the samples in relation to that person's geographic location. The result is that Antech, and sometimes in conjunction with the Respondent, sets up a route by which a driver will go from point A to point B to point N over a predetermined route so that the driver will arrive at the time that Antech and its customer have arranged for the pick up. Although a driver may have some leeway in choosing one street over another, the basic route, in terms of the sequence of pickups and the times that the pickups have to be made, is not within the driver's control. Nor may a driver change the places or persons from whom he may make pickups. He can't drop a pickup or make arrangements with some else to make some kind of pick up or delivery to that person while on the route.

Antech is the entity that sells the service to doctors and hospitals. Neither Igramo nor its drivers have anything to do with this. If Antech contracts with a new doctor or if an animal hospital drops its services, Antech's traffic department, perhaps in conjunction with the people in Igramo's management, are the ones who will modify the routes. The drivers have absolutely no say in that process. In short, I cannot see how the drivers have any control over what they do or how they do it. And since what the drivers do is to simply drive along a predetermined route, one cannot say that this entails any degree of skill on their part. In a sense, this can be described as an outdoor assembly line.

There are, nevertheless, a small number of drivers who, over time, have made arrangements with Igramo to do multiple routes and who have hired other drivers to do the extra routes.

At one end of the spectrum would be Annabelle Jost, Grace Moya's sister, who has three routes, one of which she drives herself, one of which is driven by her husband and one of which is driven by a third person. Another example would be Danilo Garcia who has arranged with Igramo to do four routes and has ceased driving himself while hiring four other people to do these routes. (He makes a profit from the difference that he gets paid by Igramo for the routes and the amounts that he pays his drivers). At the other end of the spectrum are the two individuals such as David Schaeffer and the man in Florida who run their own little businesses with about 8 to 12 drivers. In effect, they are to Igramo as Igramo is to Antech. Under *Dial-Mattress Operating Corp.*, 326 NLRB 884, 1998, these four individuals might arguably be considered to be independent contractors as they operate what amounts to mini-businesses, where they hire their own employees to service the routes on a regular basis and can derive a profit from their use of others. In my opinion, however, the people found to be independent contractors in *Dial-Mattress Operating Corp.* operated far more independently than at least two of the four people mentioned above. They had a great deal more control over their own operations including the ability to refuse assignments and the ability to perform services for other companies.

But these are the exceptions. And in my opinion, the exceptions do not make the rule. For the vast majority of the drivers who perform services directly for Igramo, they are given routes that they drive by themselves and they are paid on a route basis. (They receive a certain amount per route.) They do not have any particular skills and they are not responsible for the employment of others. These drivers have no say as to where they go and when they are supposed to get there. And they have a minimal degree of discretion in how they are to get there. They have no ability to work for anyone else at any time that they provide services for Igramo and have no opportunity to increase their earnings by their own efforts. Moreover, the record shows that the arrangement between the Company and the drivers is entirely one sided, with the Company unilaterally establishing, without any negotiations, the compensation that the drivers receive. This was demonstrated when the drivers attempted, in the autumn of 2005, to change their compensation in light of increased gasoline prices. They were told by Moya that this was not possible.

The Respondent claims that all of the drivers have the authority to hire other drivers to operate their routes. But any reasonable view of the evidence shows only that when the unexceptional driver gets ill or wants to take a vacation, he or she can arrange for someone like a friend or relative to operate the route in the driver's absence. But even in that circumstance, the prospective replacement will be interviewed by Gildardo Ortiz and approved by him. The evidence shows that if a driver gets ill or needs to leave on a temporary basis and can't find someone to replace himself, then the two or three people who work in the Respondent's office will pick up the slack and drive the routes.

The Respondent showed that the drivers are paid on a route basis and not on a salaried or hourly basis. The drivers are given a 1099 tax form at the end of each year and no deductions are taken out for Federal or State income taxes. Nor are any

deductions made for Social Security or Medicare. Igramo does not make any payments to any State Unemployment agency and does not provide for Workers' Compensation Insurance. The drivers are paid for their routes and do not have any other employer paid benefits. All of the drivers own their own cars. They are responsible for purchasing gasoline, their own insurance and for making repairs to their vehicles. (Presumably they deduct these expenses from their income when they submit their tax filings.) If a driver, while making pickups, were to get into an accident and injure another person, there would be an interesting question as to who would be responsible for personal injuries. Apparently that hasn't happened yet.

The Respondent argues that all of the above demonstrates that the drivers in this case are independent contractors and not employees. But in my opinion, these factors fall short of establishing that they are not employees. To the extent that the Respondent has failed to make deductions for taxes, social security and has failed to make payments for workers' compensation or for unemployment insurance, this does not establish that these people are independent contractors. *Community Bus Lines*, 341 NLRB 474 (2004); *Houston Building Service*, 296 NLRB 808 (1989). In my view, it merely demonstrates that the Respondent is probably violating a substantial number of other Federal and State laws in the way it is treating persons who perform services exclusively for Igramo and who have no right of control over the ends or means of their work. See *Stanford Taxi*, 332 NLRB 1372, 1373 (2000); *Community Bus*, supra, *Houston Building*, supra, *Roadway Package System*, 326 NLRB 842, 848-855 (1998).

### III. THE ALLEGED UNFAIR LABOR PRACTICES

By the summer of 2005, gasoline prices had soared to new highs. As the price of gas was a major component in the cost of driving the routes, some of the drivers decided to ask Grace Moya for an increase to cover this additional cost. Among the people who were involved in the creation of a petition, were Gustavo Betancourth, Orce Frias, Jaime Alarcon, Jose Roa, Harold Gonzalez, Walter Barrera, and Annabelle Jost. The latter two individuals were Moya's brother-in-law and sister. The evidence also shows to my satisfaction, that Moya was not adverse to this petition and suggested to Harold Gonzalez (who actually wrote the document), that it also be sent to Antech, as that ultimately would be where any additional money would have to come from. Indeed, General Counsel Exhibit 5 shows that it was cc'd to Jack Buckley, the traffic manager for Antech.

This petition, as it deals with a request for an increase in pay, should be considered to be protected concerted activity within the meaning of Section 7 of the Act.

After sending the petition, Betancourth on several occasions, tried to set up a meeting with Moya to discuss the petition. In these conversations, Moya took the position that she could not give the drivers any raises because they were independent contractors and because she hadn't gotten any more money from Antech. Betancourth testified that during one conversation, Moya said that if the drivers were not satisfied, why didn't they just resign and leave the company. He also testified that Moya said that she had a Jewish lawyer and that the Labor Department couldn't touch her and that she was protected by God.

According to Betancourth, she said that if he kept it up, she was going to fire him.

On Saturday, October 15, 2005, a group of drivers held a meeting with Moya outside the A&R Hospital. Moya had asked Pedro Carrera, her accountant, to accompany her and speak to the drivers. Also in attendance were about 12 drivers, including Betancourth, Frias, Roa, Annabelle Jost, and Jaime Alarcon.

Betancourth testified that Frias welcomed Moya who said that they had to work with love; that they had to work together and if they did, everything would be resolved. Betancourth states that Roa, seconded by Jaime Alarcon, said that they were there because of the problem with the cost of gasoline. At some point, a letter (GC Exh. 11), apparently typed up in preparation for this meeting, was given to Moya. It is unclear who prepared this letter or who handed it to the Company.<sup>1</sup> In any event, there doesn't seem to be any dispute that it was tendered and that it read as follows:

The following issues are the ones we want to discuss in the meeting to be held on the day and at the time agreed by the parties.

1. Money increase for the high cost of gasoline
2. Pay for six (6) holidays
3. Vacations pay fifteen (15) days
4. Pay for canceled days due to snow
5. Sick days
6. Pay for the overcharge up to 20% or 30% for the gasoline when we work with snow
7. Pay tolls to drivers who use it
8. Pay for sample picked up at each on of the new hospitals
9. Recognize one payday as vehicle maintenance. In case of an accident, the company must pay rent a car charges
10. Show that drivers from other contractors earn \$1.50 per mile plus the pay of gasoline, plus the pay of tolls. This is the base to negotiate
11. Raises

Betancourth states that Moya responded by saying that the drivers could not get benefits because they were independent workers. According to Betancourth, Moya's sister, Annabelle Jost, said that they were not independent drivers to which Moya responded that if they wanted more money, they had to get part-time jobs. According to Betancourth, Moya's brother-in-law said that they couldn't work at any other jobs because there was not enough time to drive and do a second job. Betancourth testified that Moya introduced Carrera and said that he was the accountant and knew all about the Company's numbers. He states that Carrera said that the drivers were independent workers, that they had no legal rights to any benefits, and that the Company could give them nothing.

Betancourth testified that when Moya declared the meeting over, he spoke up and told her that they had come to the meeting to resolve a problem and that they shouldn't leave things

<sup>1</sup> Carrera testified that it was Betancourth who handed the petition to him.

the way they were. Betancourth testified that he told her: "We just want to get more money to be able to pay for the gasoline." Betancourth testified that he said that since the meeting had not resolved anything, they would be obliged to send the letter to the Department of Labor. At this point, according to Betancourth, Carrera got very agitated. Betancourth testified: "He came right into my face and said how could it be possible that you do this with us? If you people send this letter to the Department of Labor they'll close the company. Where's the gratitude you should show to the Company? The Company has maintained you for more than 10 years. They've filled your belly." At this point, according to Betancourth, Moya said: "Now I know what's happening. I have the petition. And we're going to meet. I'm going to call you one by one." Betancourth states that Moya said that "everyone who had signed that letter was going to have drastic consequences."

Orce Frias and Jose Roa testified about the October 15 meeting and for the most part, their testimony corroborated Betancourth. For example, Frias testified that when Moya wanted to end the meeting, it was Betancourth who said that he wanted to reach an agreement and that if no agreement could be reached, the drivers would send a letter to the Labor Department. Frias testified that the accountant jumped up and said: "How can you say that? You know that if the Labor Department comes to us, they'll destroy us." Similarly, Roa testified that when Betancourth said that he was going to send a letter to the Labor Department, the accountant said: "What are you going to do? You're going to destroy the company? Did you want to be out of a job? And everybody going to lose; you're going to lose everything and you no going to have no job at all."

Moya testified about the meeting and essentially denied that she or Carrera made any threats to the drivers. The Respondent, in a letter to the Region dated January 6, 2006, stated that after Moya explained to the drivers that they were independent contractors and that there was no method for paying for sick time, holidays, etc., because her fees were fixed by Antech. This letter also goes on to state that Moya, indicated that "the subcontractors were free to perform services with anyone else and if they wanted to, they could terminate their contract with Igramo Enterprise, Inc."

Carrera also testified about the meeting and similarly denied that he or Moya made any threats. He did recall, however, that Betancourth was "very pushy" at the meeting and that Betancourth did say that the drivers would go to the Department of Labor.

With respect to the October 15 meeting, there are two things that are apparent to me. First, except for a brief welcome by Frias, he did not have anything else to say at this meeting. The evidence shows that the principle people who spoke at the meeting for the drivers were Gustavo Betancourth, Jaime Alarcon, Jose Roa, Annabelle Jost, and Barrera. (The latter two being relatives of Moya.) Second, the evidence shows that although the meeting was originally set up to discuss gasoline prices and the possibility of getting additional compensation to make up for the cost increases, the driver's demands, to the surprise of Moya, were expanded to include a variety of other benefits, such as holiday pay, sick leave, etc.

In my opinion as long as the discussion centered on the gas price issue, this was not viewed with much alarm by Moya. There is, in fact, credible evidence to show that she was not averse to helping the drivers in this respect if she could get Antech to foot the bill. But it is also my opinion that when the discussion went off that point and started to be about providing various other employee benefits, this was viewed as more challenging. And when Betancourth said that the drivers would send a letter to the Department of Labor, this was viewed by Moya and Carrera as a crisis because, as expressed by Carrera, this could result in the destruction of the Company. In short, when Betancourth made the latter statement, I believe that Carrera, in effect, threatened that the Company would go out of business and that Moya said that if the drivers wanted these additional benefits [and therefore be construed as employees], they were free to leave the company. Inasmuch as the drivers, who were actually employees, had been paid by the Company as independent contractors and were not paid in accordance with various Federal and State laws, including the FLSA, the possibility of having the Department of Labor look into the relationship would be a substantial threat to the Company's method of doing business. It therefore is in my opinion that it is highly probable that it would have elicited the responses that were attributed to Moya and Carrera.<sup>2</sup> In this respect, I therefore credit the testimony of Frias, Betancourth and Roa.

According to Frias, Markles Rosado told him on October 22, 2005 that he was being fired. Frias states that when he asked why, Markles said that he was acting on behalf of Moya and that Alarcon had said that Frias was the leader of this mess. Frias states that after Betancourth arrived at the scene and said that the firing was not fair, the other person in the office, William Aspiazu, Moya's son, told Betancourth that he shouldn't talk and that he was next.

Betancourth also testifying about October 22, 2005, stated that he was in the office and overheard Rosado tell Frias that Moya had ordered that Frias be fired. Betancourth states that Rosado said that Frias was fired for being the leader of the problem and that he had made a mistake at one of the hospitals. According to Betancourth, when he intervened and asked why Frias was being fired, Aspiazu said; "you had better shut up because you're going to be next."

Frias testified that on October 23, he went to the office to plead with Moya for his job. He states that when he asked why he was fired, she replied that he made mistakes, that he didn't follow the company's rules and that he didn't do the work. According to Frias, he told Moya that he had been told the previous day that he had been fired because he was a leader and now he was being given a different reason. He states that he told her that he needed the job because his family depended on him and she replied: "You should have thought of that before."

According to Betancourth, on October 25, 2005, Moya told him that he no longer could give out supplies to the other driv-

<sup>2</sup> The evidence also shows that Roa, at the October 15 meeting, accused Moya of getting extra money from Antech to pay for the higher cost of gasoline, but not passing it along to the drivers. This also would be a good reason for her to be annoyed, but I note that Roa, who made the accusation, continued to be employed.

ers and that he was being taken off his night route. He testified that she said that all of us that were involved in this problem were going to suffer drastic consequences. Betancourth testified that Moya said: “That God and her Jewish lawyer protected her; that she wasn’t afraid because the Labor Department couldn’t do anything against her; and that if I didn’t want to work, to sign my resignation and leave the office.” With respect to the changes, Betancourth had previously taken out supplies to the drivers without being compensated for that service. He therefore suffered no harm as a result of that change. However, being taken off the night route cost him about \$135 per week.

Betancourth testified that on or about November 30, 2005, Moya called and asked why he was doing so much harm to Gildardo Ortiz (the principle company supervisor), by making a complaint against him. [Probably referring to the charge that was filed by Frias in Case 29–CA–27247]. Betancourth states that Moya said that if we kept doing this, she was going to be forced to fire us all. He states that he didn’t want to do any harm to Gildardo and that the complaint was not against him; it was against the Company.

According to Betancourth, he had another conversation with Moya on Monday, December 5, 2005, during which she said that if he kept making problems for the Company she was going to fire him. Betancourth states that she said that Jack Buckley (from Antech) was displeased and had said that they should get rid of him.<sup>3</sup> Betancourth testified that Moya repeated her praise of God and Jewish lawyers who she said would protect her from the Labor Department. He also states that Moya said that the drivers were independent workers; that she wasn’t going to give them anything; and that she preferred to lose the company or go bankrupt before giving them anything.

With respect to Betancourth, the Respondent asserts that it ceased having him deliver supplies to the other drivers because management believed that he had copied the other driver’s checks. Whether true or not, this doesn’t much matter as this aspect of Betancourth’s job was, according to his own testimony, voluntary and the elimination of this function was no detriment to him. I therefore do not think that this action amounted to a violation of the Act.

However, the elimination of a night route clearly was a detriment and cost Betancourth about \$135 per week. The Respondent contends that this route had been done by Harold Gonzalez about 5 months before and that Moya simply gave the route back to Gonzalez because Betancourth was constantly complaining that he wasn’t getting enough compensation for the route.

By the time of the October 15 meeting, Betancourth had been doing the route for a relatively long period of time. The elimination of this route and the concomitant reduction in his pay, took place soon after the October 15 meeting. It should be

<sup>3</sup> At this point, Frias had filed an unfair labor practice charge and Betancourth did not file a charge until December 13. In context, it seems that Betancourth and Moya were talking about the charge that Frias had filed and that her statement that Jack had said that the Respondent should get rid of “him” seems to refer to Frias and not Betancourth.

recalled that, a written list of demands had been presented at this meeting (GC Exh. 11), and Betancourth said that he intended to send a letter to the Department of Labor if there was no resolution. As this was, in my opinion, construed by the Company to mean that Betancourth intended to make a complaint to that agency about the driver’s pay, Moya and Carrera responded with alarm because this could upset the basic relationship where, in terms of their pay (and taxes), the Respondent had treated the drivers as if they were independent contractors.

In my opinion, Betancourth was engaged in protected concerted activity when, in the context of the October 15 meeting he stated that unless there was some resolution of the driver’s problems, he was going to send a letter to the Department of Labor. As it is my opinion that the credible evidence establishes that the Respondent took away a route because of Betancourth’s participation in and the statements he made at the October 15 meeting, I conclude that the Respondent has violated Section 8(a)(1) of the Act. *Kysor Industrial Corp.*, 309 NLRB 237 (1992).

Orce Frias’ case is different.

Other than signing the original August 12 petition, there is little evidence to suggest that Frias was a “leader” amongst the employees to get better wages and benefits. At the October 15 meeting, the drivers who spoke up were Betancourth, Roa, Alarcon, Jost, and Barrera. Frias had nothing to say.

On direct examination, Frias asserted that before his discharge he had never received any warnings from the Respondent. *This was not true.* On cross-examination he conceded that in March 2005, Moya had told him she was going to give him one more chance and that the “next time you’re gone.”

The credible evidence shows that in March 2005, Moya had been told that Frias had failed to make a call regarding a company on his route that was an “on call” pick-up and that as a result, he failed to pick up the blood samples. Moya testified that she told Frias that he was not doing his job and that she was giving him one last chance. This incident occurred well before there was any concerted activity amongst the drivers and this warning therefore could not have been motivated by any concerted protected activity on the part of Frias. According to Moya, she had decided to fire Frias at that time but changed her mind.

Jack Buckley, Antech’s traffic manager, testified that over a period of weeks in the latter part of 2005, he received about three or four calls that the driver of Route 76 was arriving too early for the pickups at two hospitals and that the driver had refused to return when asked to do so. Buckley states that after he received several of these calls, he called either Moya or Gildardo to have this situation fixed. In this regard, Buckley testified that he did not know who the driver was and couldn’t care less. He just wanted the problem fixed.

Moya testified that Gildardo Ortiz told her that he received a call from Buckley complaining about the failure to make pickups on Route 76. Realizing that the driver was Frias, she again decided to fire him.

Markles Rosado testified that he had received reports that Frias was not making pickups and that he was told that Buckley had spoken to Moya and told her that the problem had to be

fixed. Rosado testified that on October 23 or 24, he told Frias that he was being fired and did so in the presence of Betancourth. According to Rosado, he told Frias that the reason was because Frias was not making his pickups. He denied that he said anything about Frias being a leader or that he was being fired because of his concerted activity.

For his part, Frias denied that he refused to make the calls or that he failed to make the pickups.

Frias testified, however, that on or about September 26, 2005, Markles Rosado called him while he was on the road and asked if he had called the lab. Frias states that Rosado said that the guys were telling him that Frias had passed it by. According to Frias, he told Rosado that when he called, they said that they didn't have anything. He also states that when Rosado said that he had to return, he told Rosado that he was an hour away from the hospital and couldn't go back. This incident took place, according to Frias, several weeks before the October 15 meeting.

Frias also testified that on or about October 14, 2005 (the day before the meeting), Rosado again asked him if he had failed to pick up samples from one of his locations. According to Frias, Rosado told him to forget about it and that he (Rosado) would take care of the pickup.

Taken together, the testimony of Frias, Rosado, Moya, and Buckley shows that in March 2005, Frias was almost fired because of pickup problems along his route. The evidence also shows that before the October 15 meeting, where the demands for additional employee benefits and the threat to go to the Department of Labor caused the fan to be severely jostled, Frias had been involved in at least two more instances where he failed to pick up samples along his route and had been told of this by Rosado. Although Buckley did not testify that he insisted that the driver on Route 76 be fired, it is clear to me that given the past warning, Moya reasonably could have made the decision that Frias was not performing his job properly and should be dismissed.

On the basis of the record as a whole, I conclude that the Respondent's discharge of Moya was for cause and that it was not motivated by any protected concerted activity on his part or on the part of other employees. I therefore recommend that this aspect of the case be dismissed.<sup>4</sup>

#### CONCLUSIONS OF LAW

1. By threatening employees with discharge or by telling them that they could resign, because of their protected concerted activities, the Respondent has violated Section 8(a)(1) of the Act.<sup>5</sup>

<sup>4</sup> Buckley, as far as I can see, had no particular reason to shape his testimony to protect Igramo which is merely 1 of 12 courier companies that work for Antech. Based on his demeanor, I thought that he was a credible witness. As the testimony of Moya and Rosado was essentially consistent with Buckley's testimony regarding the events leading up to Frias' discharge, I shall also credit their testimony in this respect even though I think that the testimony of Moya was not particularly reliable in relation to the October 15 meeting.

<sup>5</sup> Gustavo Betancourth testified that he had several conversations with Grace Moya where she made threats of discharge. In my opinion, Betancourth conflated some of these conversations. Therefore, al-

2. By telling employees that if they sent a wage complaint to the Department of Labor, the Company could be destroyed or go out of business, the Respondent violated Section 8(a)(1) of the Act.<sup>6</sup>

3. By taking a route away from Gustavo Betancourth and thereby reducing his earnings, because of his protected concerted activity, the Respondent violated Section 8(a)(1) of the Act.

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

5. The Respondent has not violated the Act in any other manner encompassed by the complaint.

#### REMEDY

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

As I have concluded that the Respondent illegally took away a route from Gustavo Betancourth, it must offer this route back to him, or if that route no longer exists, a substantially similar route, and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of such refusal 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).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>7</sup>

#### ORDER

The Respondent, Igramo Enterprise Inc., New York, New York, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Threatening employees with discharge or by telling them that they could resign, because of their protected concerted activities.

(b) Telling employees that if they send a wage complaint to the Department of Labor, the Company could be destroyed or go out of business.

(c) Taking away routes from employees and thereby reducing their earnings because of their protected concerted activity.

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

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

though I credit his assertion regarding the threats, I think that it is highly likely that this occurred after and not before the October 15, 2005 meeting.

<sup>6</sup> Since Carrera, the Company's accountant was brought to the October 15 meeting by Moya and was asked by her to speak to the drivers, I conclude that he was an agent for the Company with respect to those statements he made at the meeting.

<sup>7</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Within 14 days from the date of this Order, offer Gustavo Betancourth full reinstatement to all routes he had as of October 15, 2005 and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision.

(b) 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.

(c) Within 14 days after service by the Region, post at its facilities in New York, New York, copies of the attached notice marked "Appendix."<sup>8</sup> Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent Employer's authorized representative, shall be posted by the Respondent Employer immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent Employer 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 Employer has gone out of business or closed the facility involved in these proceedings, or sold the business or the facilities involved herein, the Respondent Employer shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since October 15, 2005.

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

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

Dated, Washington, D.C. September 15, 2006

#### 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 the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize  
To form, join, or assist any union

<sup>8</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

To bargain collectively through representatives of their own choice  
To act together for other mutual aid or protection  
To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten our employees with discharge or by telling them that they could resign, because of their protected concerted activities.

WE WILL NOT tell our employees that if they send wage complaints to the Department of Labor, the Company could be destroyed or go out of business.

WE WILL NOT take routes away from employees and thereby reduce their earnings because of their protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the rights guaranteed to them by Section 7 of the Act.

WE WILL offer Gustavo Betancourth full reinstatement to all routes he had as of October 15, 2005 and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

IGRAMO ENTERPRISE, INC.

*Nancy Reibstein, Esq.*, for the General Counsel.

*David Singer, Esq.*, for the Respondent.

#### SUPPLEMENTAL DECISION

RAYMOND P. GREEN, Administrative Law Judge. I issued a Decision in this case on September 15, 2006. By Order dated June 12, 2007, the Board remanded this case to me to make further findings and to issue a Supplemental Decision.

Orce Frias testified that on October 22, 2005, Markles Rosado told him that he was fired on orders from Grace Moya and stated in substance, that he had learned from employee Alarcon that Frias was the "leader of all this mess."<sup>1</sup>

On this particular point, I do not credit Frias. For one thing, I have already concluded that Frias was an unreliable witness because he falsely denied that he had received any warnings in the past. (In fact, he had been told in March 2005 that he was being given one last chance.)<sup>2</sup> For another, the statement attributed to Rosado is not really probable because the evidence does not show that Frias was the leader of the employees in trying to get better wages and benefits. Nor did the evidence show that Frias had anything of substance to say at the meeting on October 15, 2005, which was, in my opinion, the triggering event in relation to the discriminatory actions taken against Gustavo Betancourth.

In my decision I had concluded that the original efforts by the employees to obtain reimbursement for higher gasoline prices was not viewed unfavorably by Moya. My conclusion

<sup>1</sup> This was corroborated by Betancourth who testified that he overheard the conversation between Markles and Frias. I think he is mistaken about this. He testified that he also heard Markles say that Frias was being fired because of a mistake he had made at one of the hospitals.

<sup>2</sup> In my opinion, the receipt of what amounted to a final warning is not the kind of thing one would easily forget.

was that the thing that tipped the apple cart was when certain drivers, on October 15, 2005, raised the ante by making demands on other issues and when Betancourth threatened to go to the Department of Labor if the new demands were not met. (At this meeting, Frias did not have anything to say about these issues.)

Thus, while the evidence pointed to the likelihood that Moya retaliated against Betancourth because of his role in the October 15 meeting; more specifically his threat to go to the Department of Labor, the evidence was wholly lacking to show any reason why she would have wanted to retaliate against Frias who played no role in the October 15 discussions and who otherwise had no unique role in shaping the original employee demand regarding gasoline prices. (Also, the evidence did not show that Frias had anything to do with the preparation of General Counsel Exhibit 11, which was a second petition setting forth the new demands. This document seems to have been presented to the Respondent by Betancourth).

In my opinion, the Respondent discharged Frias, not because of any protected concerted activity on his part, but because he missed pickups on his route. One of these incidents occurred around September 26, and the other occurred on or about Octo-

ber 14, 2005. (The day before the meeting). The credited testimony of Jack Buckley, Antech's traffic manager, shows that the Respondent's only customer was concerned about these missed pickups and that he conveyed his concern to the Respondent. Considering the fact that Frias had received what amounted to a final warning back in March 2005, I conclude that the Respondent discharged him for reasons wholly apart from any protected activity that he may have engaged in.

In short, even if I were persuaded (which I am not), that the General Counsel had presented sufficient evidence to show that "a" reason for Frias' discharge was because of his alleged protected concerted activity (or because the Respondent thought he had engaged in such activity), I would nevertheless find that the Respondent had, in fact, discharged him for reasons unrelated to those activities, but rather because of his failure to properly perform his job duties.

Accordingly, I reaffirm my original decision to dismiss the allegations of the complaint insofar as they alleged that Frias was illegally discharged because of his protected, concerted activities.

Dated, Washington, D.C. June 29, 2007