NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

San Luis Trucking, Inc. and its alter ego Servicios Especializados Del Colorado, S.A. De C.V., and Factor Sales, Inc., all a single employer and/or joint employers *and* United Food and Commercial Workers Union, Local 99. Cases 28–CA–20387, 28–CA–20469, 28–CA–20559, 28–CA–20643, and 28–CA–20743

February 29, 2008

DECISION AND ORDER

BY MEMBERS LIEBMAN AND SCHAUMBER

On May 8, 2007, Administrative Law Judge Joseph Gontram issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief and a limited cross-exception, and the Respondent filed a reply.[1]

The National Labor Relations Board[2] has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[3] and conclusions as modified[4] and to adopt the recommended Order.[5]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Factor Sales, Inc. and San Luis Trucking, Inc., San Luis, Arizona, and Servicios Especializados Del Colorado, S.A. De C.V., their officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. February 29, 2008

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Johannes Lauterborn, Esq. and *Mara-Louise Anzalone, Esq.,* for the General Counsel.

Gerald Morales, Esq., Lisa Coulter, Esq., and *Scott Schwartz, Esq. (Snell & Wilmer),* of Phoenix, Arizona, for San Luis Trucking, Inc. and Factor Sales, Inc.

DECISION

STATEMENT OF THE CASE

JOSEPH GONTRAM, Administrative Law Judge. This case was tried in San Luis and Somerton, Arizona, on November 7–9, December 5–8, 2006, and January 9 and 10, 2007. United Food and Commercial Workers Union, Local 99 (the Union or the Charging Party) filed the charges and amended charges between July 22, 2005, and April 2, 2006. The consolidated complaint was issued July 31, 2006, and was amended September 19, 2006,[1] and at the start of the hearing (the complaint).

[1] The General Counsel contends that the Respondent's exceptions and supporting brief do not comply with the Board's Rules and Regulations and, thus, moves that these documents be stricken from the record. We have reviewed the Respondent's submissions, and we find that they substantially comply with the Board's Rules and Regulations. We therefore deny the General Counsel's motion.

[2] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Members Liebman and Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In addition, the Respondent alleges that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

Although we agree with the judge that the Respondent violated both Sec. 8(a)(1) and (5) by unilaterally prohibiting drivers from talking to mechanics, we need not rely on his finding that the prohibition was imposed for the purpose of restricting employees' Sec. 7 activity.

[4] The judge found that Respondent Factor Sales violated Sec. 8(a)(5) by unilaterally transferring a majority of its trucking work from San Luis Trucking (SLT), its wholly owned subsidiary, to Unified Western Grocers. The judge further found that the Respondent violated Sec. 8(a)(5) by constructively discharging SLT employees Quezada, Gonzales, and Sandoval, finding that the employees quit because their hours and pay were significantly reduced following the loss of bargaining unit work to Unified. We find that the 8(a)(5) finding related to the constructive discharge is duplicative of the 8(a)(5) finding related to the work transfer, and we therefore find it unnecessary to pass on the constructive-discharge 8(a)(5) violation. The General Counsel filed a limited cross-exception to the judge's apparent inadvertent failure to include and remedy the constructive-discharge 8(a)(5) violation in the conclusions of law, order, and notice. In light of our finding above, there is no need to modify the judge's conclusions of law, order, and notice, and we thus deny the General Counsel's cross-exception.

[5] At the compliance stage of the proceedings, the Respondent may introduce evidence that was not available prior to the unfair labor practice hearing, if any, to demonstrate that reopening SLT and restoring the business transferred to Unified Western Grocers on July 1, 2005, would be unduly burdensome. *St. Vincent Medical Center*, 349 NLRB No. 36, slip op. at 4 fn. 5 (2007); *Lear Siegler, Inc.*, 295 NLRB 857, 861–862 (1989).

[1] All dates are in 2006, unless otherwise indicated.

The events at issue in this case occurred after the Union won an election, on January 29, 2005, to represent the employees of San Luis Trucking, Inc. (San Luis Trucking or SLT) for collective-bargaining purposes. An election was initially held in July 2004. However, that election was set aside because of SLT's unlawful conduct in connection with the election.

The complaint alleges that SLT is the alter ego of Servicios Especializados Del Colorado, S.A. De C.V. (SEC) and Factor Sales, Inc. (Factor Sales), and that these three entities (the Respondents) are a single employer and are joint employers. The complaint alleges that the Respondents unlawfully interrogated their employees and prohibited their employee drivers from speaking to their employee mechanics, in violation of Section 8(a)(1) of the National Labor Relations Act (the Act). The complaint alleges that since approximately March 2005, and without notifying or bargaining with the Union, the Respondents have subcontracted bargaining unit work to third-party enterprises, have imposed more onerous and rigorous terms and conditions of employment on their employees, and have reduced the work hours of specified employees, resulting in the discharge of the employees, in violation of Section 8(a)(5), (3), and (1) of the Act. The complaint alleges that the Respondents, without notifying or bargaining with the Union, closed SLT because SLT's employees had elected to be represented by the Union, and to discourage other employees of the Respondents from seeking union representation, in violation of Section 8(a)(5), (3), and (1) of the Act. The complaint also alleges that the Respondents have refused to provide the Union with requested information relating to the closure of SLT and the alleged financial reason for the closure of SLT.

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

FINDINGS OF FACT

I. JURISDICTION

SLT, a corporation, is a trucking company that transports goods in interstate commerce, and maintains an office and facility in San Luis, Arizona. In conducting its business, SLT performed services valued in excess of $50,000 in States other than the State of Arizona during the year immediately preceding the filing of the complaint. Factor Sales, Inc., a corporation, is engaged in the retail sale of groceries and related products in various stores throughout the Yuma, Arizona area, and maintains an office and place of business in San Luis, Arizona. During the year immediately prior to the filing of the complaint, Factor Sales derived gross revenues in excess of $500,000, and purchased and received at its facilities goods valued in excess of $50,000 directly from points outside the State of Arizona. SLT and Factor Sales admit and I find that they are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act. SEC is a trucking company located in Mexico, and it transports goods between Mexico and the United States.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Subpoenaed Records Relating to the Charges and Issues

The complaint was issued on September 19 and listed a hearing date of October 17. On September 29, the General Counsel served subpoenas on SLT, Factor Sales, and SEC. The subpoenas called for the production of documents relating to the issues in this case. The subpoenaed documents were listed in separately numbered paragraphs and were further delineated according to the issues raised in the complaint. The Respondents filed petitions to revoke the subpoenas. SLT and Factor Sales also filed a motion to extend the date of the hearing because of the large number of subpoenaed documents, many of which were allegedly at SEC's facility in Mexico and would need to be translated. The Respondents' motion to continue the hearing date was granted and the hearing date was extended from October 17 until November 7.

By letter dated November 2, which was faxed to counsel, this administrative law judge notified counsel for the Respondents that, notwithstanding the petitions to revoke the subpoenas, the Respondents were required to bring the subpoenaed documents to the hearing, in accordance with the commands of the subpoenas, and that the documents must be produced in accordance with the separately numbered paragraphs in the subpoenas. This judge advised counsel that their petitions would be decided at the start of the hearing. See *McAllister Towing & Transportation Co*., 341 NLRB 394 (2004) (in which the judge, with Board approval, followed a similar procedure).

At the start of the hearing on November 7, the Respondents' petitions to revoke the subpoenas were denied. However, the Respondents did not produce any documents at the hearing as required by the subpoenas and by this judge's previous direction to the Respondents. Moreover, SEC did not enter an appearance at the hearing, in spite of the Respondents' representation in seeking a continuance of the hearing date of their need to examine and produce documents from SEC's facility in Mexico.

The Respondents contend that they produced the documents to the General Counsel the day before the start of the hearing. On November 6, at 1:30 p.m., the Respondents permitted attorneys for the General Counsel, together with an assistant, to come to the offices of SLT and Factor Sales to inspect documents. Armando Gonzalez, who represented himself as Factor Sales' supervisor of records, escorted Government counsel to a trailer in which 288 boxes of documents were stored. Gonzalez represented that these boxes contained records from June 2005 to the present. Gonzalez then escorted Government counsel to a Factor Sales warehouse that contained grocery goods for use in Factor Sales grocery operations. However, this warehouse also contained 36 pallets holding 60 boxes per pallet. Gonzalez represented that these boxes contained Factor Sales' records from 1998 to 2005. Gonzalez then escorted Government counsel to an SLT trailer, which contained 23 boxes of documents.

Respondents' counsel represented at the hearing that the documents in the warehouse were not documents responsive to the subpoenas, and that the Respondents "simply showed coun-

sel where all documents for the companies were maintained." (Tr. 22.)[2] With due respect to counsel, this representation is not credible. The Respondents provided no reason why they would display for Government counsel the location where they kept unsubpoenaed documents. Moreover, counsel's representation contradicts Gonzalez' representation that the warehouse documents included Factor Sales' records for 2004 and 2005. These were the very documents that were subpoenaed. Moreover, Gonzalez did not mention to the General Counsel when he displayed the thousands of boxes that the boxes were not relevant to the demands in the subpoenas and that he was displaying the boxes for Government counsel's general information.

Thus, the Respondents' alleged compliance with the subpoenas was to display 2471 boxes of documents to Government counsel in the afternoon on the day before the start of the hearing. This display did not include personnel records that had also been subpoenaed and that were contained in Factor Sales' human relations department. In addition, and despite Gonzalez' representation of the contents of the boxes, this display of stored boxes containing records would not have contained Factor Sales' records relating to its current operations. Nor did this display apparently include any records from SEC.

A person responding to a subpoena for documents shall produce the documents "as they are kept in the usual course of business or shall organize them to correspond with the categories in the demand." Fed.R.Civ.P. 45(d). This requirement is similar to the requirement on a party responding to a request to produce documents. A party, unless the court otherwise orders, "shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request." Fed.R.Civ.P. 34(b)(i).

The Respondents' contention that they complied with the subpoenas by making 2471 boxes of documents "available" to the General Counsel on the afternoon before the start of the hearing is inexplicably based on Federal Rule of Civil Procedure 34, which relates to a party's request for production of documents, rather than Federal Rule of Civil Procedure 45, which relates to subpoenas. Nevertheless, the wording of the two rules is virtually identical in relation to the party's (or person's) compliance obligation being limited to two options, viz., to produce the documents as they are kept in the usual course of business or to organize the documents in accordance with the request or demand.

The Respondents have made no showing that the documents in the 2471 boxes of documents that were kept in Factor Sales' trailer and warehouse were kept in the usual course of business. "As to the documents in storage, they are no longer kept in the 'usual course of business,' they are kept in the usual course of 'storage,' and the option granted by the first clause of Rule 34(b) no longer exists. That leaves the producing party with the obligation to 'organize and label' the documents to correspond to the document requests." *In re Sulfuric Acid Antitrust Litigation*, 231 F.R.D. 351, 363 (ND IL 2005). Moreover, 5 days before the start of the hearing in this case, this judge directed the Respondents to produce the documents at the hearing, consistent with the second clauses of Rule 34(b) and Rule 45(d)(1)(A), viz., in accordance with the document requests in the subpoenas.

The Respondents were served with the subpoenas approximately 5 weeks before the hearing date, which had been continued because of the Respondents' representation that they needed additional time to secure the documents. Accordingly, they had sufficient time in which to organize their documents in accordance with the requests in the subpoenas. In addition, when the Respondents appeared at the start of the hearing without any of the requested documents, they did not claim, nor do they presently claim, that they did not have sufficient time to comply with the subpoenas, or with the Federal Rules of Civil Procedure, or with this judge's direction.

The party producing documents has the burden to produce the documents requested rather than simply dumping large quantities of unrequested materials onto the requesting party along with the documents actually sought. *Rothman v. Emory University*, 123 F.3d 446, 455 (7th Cir. 1997); 8A Wright, Miller, & Marcus, Federal Practice and Procedure § 2213 (2006). The Respondents made no effort to separate requested materials from unrequested materials. They simply displayed to the Government 2471 boxes of stored documents, which presumably constitute all of the Respondents' documents in storage, and maintain that such a display conforms to the subpoenas' demands because, like the needle in the haystack, many or most of the subpoenaed documents must be somewhere in those 2471 boxes. Such actions do not constitute compliance with the subpoenas served on the Respondents.

The Respondents also contend that they did not produce any records at the hearing because they should not have been required to produce records until this judge ruled on their petitions to revoke. This claim is misplaced and disingenuous. The claim is misplaced because a subpoenaed party's petition to revoke does not automatically suspend or stay the commands of the subpoena. Moreover, if the Respondents were unsure of the continued viability of the subpoenas, they should have advised this judge or the General Counsel. They did not.

The Respondents' claim is disingenuous for the following reason. The Respondents' petitions to revoke were denied at the start of the hearing on November 7. The Respondents failed to produce any of the documents on November 7, in accordance with the subpoenas and as they had been directed by this judge, or at any time during that week. The hearing lasted until November 9, and then was continued until December 5. The Respondents failed to produce any of the subpoenaed documents on December 5 or at any time during the resumed hearing that week. On December 8, the hearing was again continued until January 9, 2007. Again, the Respondents failed to produce any of the subpoenaed documents on January 9 or at any time during the resumed hearing that week.

Thus, to claim that the Respondents felt or believed that they should not have to produce subpoenaed documents until after the judge ruled on their petitions to revoke, and that pursuant to this feeling or belief, the Respondents did not produce the documents, fails to account for the period of 2 months after the judge's ruling that the Respondents' petitions were denied. The Respondents could have and should have produced the subpoenaed documents at the start of the hearing. Their failure to

[2] References to the transcript of the hearing are designated as Tr.

comply with the subpoenas was compounded by their continued failure to comply with the subpoenas during the 2-month period after their petitions were denied, during which they steadfastly refused to produce the subpoenaed documents.

In addition, the subpoenas commanded the Respondents to produce documents at the hearing. The obligations imposed by the subpoenas do not depend on and are not lessened by the subpoenaed party filing a petition to revoke before the due date of the subpoenas. The Respondents do not cite any provision of law or authority that mitigates their obligations under these circumstances. The Respondents' filings of petitions to revoke do not and did not operate to stay or suspend their obligations pursuant to the subpoenas. The Respondents assumed the risk that their petitions to revoke would be denied, and they elected to refuse to obey the subpoenas at the start of the hearing and throughout the hearings, in spite of the subpoenas' commands, and this judge's written direction to the Respondents before the hearing, and the denial of their petitions to revoke at the start of the hearing.

The Respondents produced documents to the Board during the Board's investigation of this case, and they asserted in response to the trial subpoenas that they had already produced some of the documents demanded in the subpoenas. However, the General Counsel represented that it was not seeking any documents that had already been produced. Still, the Respondents refused to produce any documents at the hearing pursuant to the subpoenas. Accordingly, this judge ordered that the Respondents were prohibited from offering any documents into evidence that they had not turned over to the Board during its investigation.

Nevertheless, to force the Government to rely on the documents that the Respondents saw fit to produce during the investigation, while being denied the relevant documents lawfully subpoenaed for trial, places an unwarranted burden on the Government and casts doubt on the integrity and completeness of the documents that the Respondents had previously produced. These documents were offered, by the Government and the Respondents, and received into evidence during the hearing. The parties were advised at the hearing (Tr. 40) that, where appropriate, adverse inferences might be drawn and the parties should address the matter in their posthearing briefs, which they have done. *McAllister Towing & Transportation Co.*, 341 NLRB 394, 394 (2004); *Teamsters Local 776 (Pennsy Supply)*, 313 NLRB 1148, 1154 (1994); see *Auto Workers v. NLRB*, 459 F.2d 1329 (D.C. Cir. 1972).

I have determined that adverse inferences should be drawn in certain limited situations where relevant documents were subpoenaed, the documents would have assisted in resolving the factual issue in question, and the Respondents would likely have such documents. (The Respondents have not asserted that they do not possess the subpoenaed documents.) Such adverse inferences are addressed in connection with the respective factual findings to which the inferences relate.

B. Background

All facts found in this decision are based on the record as a whole and on my observation of the witnesses. The credibility resolutions have been made from a review of the entire testimonial record and exhibits with due regard for logic and probability, the demeanor of the witnesses, and the teaching of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404 (1962). Many witnesses testified during the two hearing sessions in this case, and it would be unproductive, inefficient, and confusing to address the testimony given by every witness concerning the factual matters covered in this decision. Nevertheless, it should be noted that as to those witnesses testifying in contradiction of the findings, their testimony has been discredited, either as having been in conflict with the testimony of reliable witnesses or because it was incredible and unworthy of belief or as more fully explained in the text. With respect to the testimony regarding what occurred at meetings or discussions with the Respondents' management, I have also taken into account the economic dependence of employees on employers, with awareness of an employee's attentiveness to intended implications of the employer's statements which might be more readily dismissed by a disinterested party. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

1. Factor Sales

For approximately the past 20 years, Factor Sales has operated grocery stores in the Yuma, Arizona area. Factor Sales currently operates nine stores, all of which are located within a 25-mile radius of Yuma. Factor Sales employs approximately 500 employees in its stores. The stores currently operate under the names of IGA, Del Sol, Factor Warehouse, King Market, and other names. (See, e.g., GC Exh. 19, title page.) Factor Sales previously operated stores under the name of Maxi. That store has reopened under the name of Factor Warehouse. Factor Sales also owns Factor Sales of Mexico, Inc., which operates several grocery stores in Mexico.

Victor Salcido is the majority shareholder of Factor Sales. The remaining two shareholders are Carmen Salcido, who is Victor Salcido's wife, and Rosa Maria Valencia, who is married to Victor Salcido's brother, Rosendo Valencia. The directors of Factor Sales are Victor Salcido and Jose Luis Mendoza, Victor Salcido's brother-in-law. The officers of Factor Sales are Victor Salcido, president, Jose Luis Mendoza, vice president and treasurer, and Carmen Salcido, secretary. SLT, discussed below, has the same directors and officers as Factor Sales.

Salcido owns and manages Factor Sales. Valencia is in charge of maintenance for the Factor Sales vehicles and the transportation of groceries between and among the stores. Salcido was careful to stress that Valencia did not hold a management position in Factor Sales. (E.g., Tr. 68, 1089.) However, that testimony is not credible. Valencia is Salcido's brother and close confidant. Valencia has been associated with Salcido, through family, business ownership and work, in the Factor Sales' businesses for over 20 years. Valencia holds management positions in each of Factor Sales' subsidiaries—SLT (general manager), SEC (general manager), and Factor Sales of Mexico (store coordinator, who is the person in charge of running all the stores). Valencia would often give directions to Factor Sales' in-house accountants and human resource officials. If Valencia did not have the title of manager in Factor Sales (and there is no credible evidence he did not), he func-

tioned as a manager. Indeed, in the management hierarchy of Factor Sales, Valencia was second only to Salcido.

In addition, the General Counsel subpoenaed Factor Sales' documents that would assist in determining Valencia's management position and functions. (GC Exh. 3, pars. 24, 89–97.) From the Respondents' failure to produce these documents, I infer that the documents would confirm that Valencia held a managerial position with Factor Sales. This inference supports the determination of Valencia's management position.

Valencia is the general manager of SLT. He testified that he spent approximately 80 percent of his time on SLT business and 20 percent of his time on Factor Sales business, during the time that SLT was operating. (Tr. 893.) Although these percentages correspond exactly to what Salcido's stated (Tr. 147), both testimonies fail to account for the time Valencia spent managing SEC and managing the stores for Factor Sales of Mexico. In considering their demeanor and the substance of their testimony, it is likely that Salcido and Valencia, brothers, business associates, and co-owners, had conferred before the hearing and had agreed, in general and in particular, on the substance of their respective testimonies. They faithfully followed this line, without regard to the importance of the testimony or its plausibility or accuracy. Salcido and Valencia did not have the demeanor or appearance of witnesses who were trying to be honest without regard to consequences. They were neither straightforward nor candid. Salcido and Valencia were not credible witnesses.

Assuming that Valencia spent 20 percent of his time doing work for Factor Sales, he performed this work from his office at SLT. Factor Sales sent him reports relating to his Factor Sales duties. Moreover, Factor Sales employees transported Factor Sales vehicles to SLT's facilities. These vehicles were stored at SLT's facilities, and they were maintained and repaired by SLT employees, all under the orders and oversight of Valencia.

2. San Luis Trucking

SLT is a wholly owned subsidiary of Factor Sales. Victor Salcido formed SLT in 1993 for the purpose of transporting merchandise for Factor Sales and for other companies. Victor Salcido is the president of SLT and has complete authority over the affairs of SLT. His brother, Rosendo Valencia, is SLT's manager and handles its day-to-day affairs. However, Salcido explained this apparent management structure by testifying, "I managed the business [SLT] through Rosendo Valencia." (Tr. 100.) Factor Sales comprised the majority of SLT's business. From early 2004 until July 2005, Factor Sales comprised approximately 80 percent of SLT's business.[3] Approximately 75 percent of this business consisted in transporting grocery goods from Unified Western Grocers (Unified) in Los Angeles to Factor Sales' stores and warehouse.

As an American corporation, SLT is able to transport goods within the United States, and from the border town of San Luis Rio Colorado, Mexico, into the United States. SLT is not permitted to transport goods from within Mexico to places within the United States, or visa versa.

Valencia manages SLT. His duties include supervising SLT's employees and assigning trips to the drivers. He discusses with Salcido all the important matters and decisions involving SLT's business operations. Valencia assigns San Luis drivers their routes. He is the single person responsible for obtaining business for SLT.

SLT's facilities are located in San Luis, Arizona, about a mile from Factor Sales' main offices. SLT's facilities, the land and buildings, are owned by Factor Sales. However, Factor Sales does not charge SLT any rent for the use of its property and there is no lease to designate the parties' respective duties and liabilities concerning the property and the use of the property. Salcido testified that he did not feel it was worth the trouble to charge and collect rent for SLT's use of the facilities, which includes offices, maintenance for the trucks, and parking for the many trucks. This testimony was not credible. The real reason that Factor Sales did not bother to collect rent from SLT was that the two companies were operated as one and there was not an arms'-length relationship between Factor Sales and SLT. Only in these circumstances is it reasonable to forego rental income because the funds remain with the same person, Salcido, without regard to any payment.

SLT transports grocery goods from the United States-Mexican border to Factor Sales stores, and between Phoenix, Arizona, Los Angeles, San Diego, and Oakland, California, to the Factor Sales warehouse and Factor Sales stores. SLT also transports grocery goods between Factor Sales stores. When SLT drivers deliver grocery goods to Factor Sales stores, the drivers are subject to directions and orders from Factor Sales store managers. The store managers order the drivers to help unload the trucks, to stock the merchandise in the stores, and to haul away trash from the stores. When SLT drivers deliver goods to the Factor Sales' warehouse, the drivers are subject to directions and orders from the warehouse manager. For example, the Factor Sales warehouse manager directs the drivers to move cartons of merchandise within the warehouse and to load the trailers.

SLT drivers perform other functions for Factor Sales, such as collecting shopping carts and hauling garbage from the stores. Factor Sales also maintains and regularly uses a workshop on SLT's site where Factor Sales' employees work to repair equipment used in the Factor Sales stores.

SLT does not have an accounting department. Factor Sales' accountants do all of the accounting for Factor Sales and for its subsidiaries, including SLT and SEC. Factor Sales' accounting staff members work at the San Luis facilities, sometimes several days a week. Nevertheless, SLT did employ a bookkeeper, Diana Tenorio.

In August 2003, Tenorio applied for accounting work at Factor Sales. She worked briefly as a cashier at a Factor Sales store, but resigned. She asked Iliana Murrieta, an employee in

[3] The credible testimony estimated the percentage at approximately 70 percent or more. During the contractual negotiations, SLT stated, through its attorney, that 80 percent of SLT's business was with Factor Sales. Of course, SLT and Factor Sales' financial records subpoenaed by the General Counsel would have been helpful, if not instrumental, in arriving at the actual percentage. Nevertheless, the testimony at the hearing and the foregoing admission are generally consistent with and support the above finding.

Factor Sales human resources department, to contact her if an accounting position became available. Murrieta called Tenorio in November 2003, and said that Factor Sales had an opening in SLT, one of Factor Sales' affiliates. Tenorio reported to Factor Sales' offices and was interviewed by Angelica Zamora, the head of Factor Sales' accounting department for the past 11 years. Zamora coordinates all the accounting for Factor Sales and its affiliates. Zamora hired Tenorio. Zamora introduced Tenorio to Valencia as Tenorio's immediate supervisor. Whenever Tenorio had questions regarding her responsibilities, she called Zamora for advice. Occasionally, Zamora also worked at SLT's offices.

Tenorio's responsibilities included sending invoices to customers who shipped goods with SLT or SEC. Customers would tell Tenorio to bill them from either SLT or SEC, without regard to the company that actually performed the service. Tenorio would then prepare the invoice on either SLT or SEC letterhead. The customers of SLT and SEC sent their payments to Tenorio at SLT's offices. Tenorio regularly sent the checks payable to SEC to SEC's accountant in Mexico. Tenorio was also responsible for collecting customers' outstanding accounts, and she followed the same procedure, including dunning letters, without regard to whether it was an SLT or an SEC bill.

Tenorio maintained SEC's financial records, including checks and invoices, at SLT's offices. Valencia approved expenses for SEC and SLT before payment. Zamora instructed Tenorio in late 2005 to stop submitting SEC's expenses to Factor Sales for payment and to compile a list of SEC's expenses that SLT had paid. The list was prepared, but SEC has not fully paid SLT for these expenses. SLT did not charge any interest on these payments or impose any terms of repayment on SEC. Moreover, although Tenorio stopped submitting SEC's expenses to Factor Sales for payment pursuant to Zamora's instructions, Tenorio continued to submit insurance bills for SLT's trucks to Factor Sales for payment. SLT closed in February 2006. When it closed, SEC still owed SLT approximately $60,000 to $70,000.

The diesel fuel expenses of the drivers for SLT and SEC were handled through a petty cash fund. Drivers reported their fuel expenses to Adela Vigil, SLT's dispatcher. If there was insufficient money in the petty cash fund, Vigil would bring the expenses to Tenorio. Tenorio would then prepare a check for cash or petty cash, which was taken to Zamora and Gonzalez for their signatures. The signed check was sent to Tenorio, who gave it to Vigil. Vigil then cashed the check at a Factor Sales store and replenished her petty cash fund with the proceeds. The Factor Sales store did not charge a fee for cashing the check.

As dispatcher, Vigil was responsible for assigning trips to SLT and SEC drivers, coordinating the drivers' trips, and handling their fuel expenses. The dispatcher also told drivers when to report for work and was authorized to issue written warnings to drivers who arrived late. Vigil also prepared shipping documents after receiving the necessary information from Valencia, or Valencia himself would prepare the shipping documents. The shipping documents were then taken to Tenorio to prepare an invoice to send to the customer.

Vigil left her job at SLT in May or June 2005, and was replaced by Raimundo Salcido. (The evidence fails to establish whether Raimundo Salcido is related to Victor Salcido.) Valencia then started a new procedure in which the dispatcher's duties were split between Raimundo Salcido, who was responsible for handling the SLT drivers, and Saul Rivera, formerly a driver for SEC, who would handle the SEC drivers.

Tenorio was not authorized to sign any checks. When paying the expenses for SLT and SEC, Tenorio first checked the balance in SLT's bank account. If there was a sufficient balance to cover the payments, she prepared checks and sent the checks to Factor Sales for signature by Salcido (alone) or Zamora and Armando Gonzalez (together). Gonzalez is the financial manager for Factor Sales. He supervises Factor Sales' financial division, including the accounting department. The signed checks were then returned to Tenorio who gave the checks to the SLT and SEC drivers or mailed the checks to out-of-town recipients. Occasionally, Gonzalez also worked at SLT's offices.

When the balance in SLT's bank account was not sufficient to cover SLT or SEC's expenses, Tenorio advised Valencia. Valencia then directed Tenorio to ask Zamora at Factor Sales for a loan, or Valencia would go directly to Factor Sales for the money. Zamora confirmed the amount needed and the urgency of the request, and then authorized the payment from Factor Sales to SLT. SLT generally repaid these advances in approximately 30 days. However, there were no loan documents and no terms to the loans. No interest was charged.

SLT also paid SEC's drivers for their trips in the United States by creating fictitious documents to give the appearance that the trips were done by a third party transportation company rather than by SEC. SLT drivers normally did these trips. However, when SEC drivers did trips for SLT, the SEC drivers completed logs of their trips and handed the logs to Valencia or Rivera. Valencia or Rivera then contacted Manuel Romero of MC Freight to create invoices that would reflect the amounts to be paid to the SEC drivers. Valencia or Rivera handed the invoices to Tenorio, who prepared checks for signatures by Factor Sales. When the signed checks were returned, Tenorio handed them to Romero and Rivera, and they, in turn, cashed the checks at a Factor Sales store. Rivera took the proceeds from the checks, returned to SLT's facilities, and paid the SEC drivers or gave the money to Valencia to pay the SEC drivers.

There is no evidence that Vigil participated in this scheme to hide and falsify the shipping information for SLT trips performed by SEC drivers. Moreover, the scheme was furthered by Valencia's splitting the dispatcher's duties between SLT and SEC. Accordingly, I conclude that the scheme was instituted by Valencia, in conjunction with Rivera, in approximately May or June 2005.[4]

[4] I realize that Romero's testimony on when the scheme started is unclear. (Tr. 284.) My conclusion that the scheme was instituted in approximately May or June 2005 is from the juxtaposition of Valencia's splitting the dispatcher's duties between SLT and SEC, and the placement of Rivera in the newly created dispatcher's position dealing with SEC drivers, both of which occurred in the May–June 2005 time period.

Factor Sales also lent money to SLT to purchase trucks. For example, in 2004, after Valencia had discussed the loan with Factor Sales' front office, Factor Sales loaned SLT $60,000 for the purchase of two trucks. SLT repaid the loan in approximately 4 months. There were no loan documents and no terms to the loan. No interest was charged. Factor Sales also lent money to SLT for SLT's legal expenses in fighting the Union's organizing campaign and election.

SLT does not have a human resources department. Instead, Factor Sales' human resources department handles SLT's personnel responsibilities. When employees apply for work at SLT, they report to Factor Sales offices where they obtain and complete applications and are interviewed by Factor Sales human resource officials. Indeed, when some employees, like Tenorio, apply for work at Factor Sales, they are interviewed by Factor Sales employees, but then are assigned a position at SLT. All of the applications for employment at SLT are on Factor Sales forms. When SLT applicants are hired, they are notified of their hiring by Factor Sales' human resources officials in letters or memoranda using Factor Sales letterhead.

In these letters or memoranda, Factor Sales notifies the new employee that (1) he (or she) is being hired by Factor Sales in its department or installation known as SLT; (2) he is required to follow Factor Sales' policies, but if he fails to do so, Factor Sales will terminate his employment; (3) he is directed to report to Valencia who will assign work hours and duties to the new employee; and (4) Factor Sales could change the new employee's department or store depending on Factor Sales' needs. The hiring letter then welcomes the new employee to the Factor Sales group.

New SLT employees are also required to sign a Factor Sales form promising to return to Factor Sales various items of clothing and equipment that Factor Sales issues to new employees, depending on the employees' jobs. SLT employees promise to return to Factor Sales the nametag and waist guard that Factor Sales issues to them for their employment. SLT employees also agree that Factor Sales will deduct from their final paychecks the cost of these items if the employees do not return the items to Factor Sales.

After being hired by Factor Sales, the new SLT employees attend orientation classes with other, new employees hired by Factor Sales to work in its stores or in its corporate offices. Factor Sales' human resources department employees conduct these orientation classes. New SLT employees also receive the same Spanish-language employee handbook that Factor employees receive. The handbook contains policies and directives, with the word "Factor" displayed at the top of each page, concerning personnel and labor relations matters such as absenteeism, inappropriate behavior, and security. The handbook distributed to SLT employees contained several additional pages relating to their responsibilities as drivers.

Factor Sales continued to monitor SLT employees' job performance throughout their employment. Factor Sales' human resources department counseled SLT employees on work rules and on individual work performance. Factor Sales also issued instructions to SLT employees on various aspects of their jobs. For example, Factor Sales issued instructions to SLT drivers that they were required to keep a detailed logbook, they should not drive trucks that had mechanical problems, and they should report any mechanical problems to the Factor Sales' human resources department.

Lourdes Salcido, the niece of Victor Salcido and the current manager of Factor Sales' human resources department, attested to the foregoing information concerning Factor Sales' human resources department instructions to SLT employees. However, she only admitted these facts because they were contained in memoranda issued by Factor Sales' human resources department. (E.g., GC Exh. 16.) She had previously testified that Factor Sales instructed SLT drivers on their job performance only if Valencia asked for help. (Tr. 221.) Lourdes Salcido's testimony was, at best, less than candid. In general, Lourdes Salcido did not testify in a forthright manner, and she was not a credible witness.

The personnel records for SLT employees are kept and maintained by Factor Sales in its human resources department. When Factor Sales sends letters or memoranda to SLT employees, it uses Factor Sales or SLT letterhead. The Respondents did not explain why Factor Sales employees signed documents on behalf of SLT or why documents to SLT employees were transmitted on Factor Sales documents.

SLT employees participate equally with Factor Sales employees in benefits and programs provided by Factor Sales to Factor Sales employees. For example, SLT employees are invited to Factor Sales' annual picnic and Christmas party. SLT employees receive discounts when making purchases at Factor Sales stores. SLT employees are eligible for loans from Factor Sales, just like Factor Sales employees. Factor Sales supervises these benefits and programs for SLT and Factor Sales employees.

SLT employees are also eligible for Factor Sales' employee-of-the-month awards, which award the winning employees cash and food vouchers at Factor Sales' stores. In July 2004, SLT driver Antonio Macias was named Factor Sales' employee-of-the-month, and his photograph was posted at Factor Sales' headquarters office and several of the stores. SLT mechanic Jose Vera was also awarded the Factor Sales' employee-of-the-month citation.

Factor Sales publishes a monthly newsletter titled *Factorizate*. *Factorizate* contains articles and news about Factor Sales, SLT, and SEC, and the employees of these Factor Sales companies. *Factorizate* is distributed to employees of Factor Sales, SLT, and SEC, as well as the Respondents' clients. SLT and SEC are listed on the title page of *Factorizate* as being a part of Factor Sales, no different than the grocery stores operated by Factor Sales. (E.g., GC Exh. 18–20.) Recipients of Factor Sales' employee-of-the-month award were profiled in *Factorizate*, including Macias and Vera. *Factorizate* publishes articles about all departments of Factor Sales, including personnel and accounting, and including SLT and SEC. *Factorizate* carries announcements of birthdays, promotions, and anniversaries of Factor Sales employees, including employees of SLT and SEC.

Factor Sales handles workers compensation and unemployment compensation matters for SLT employees. Factor Sales coordinates SLT employees' vacations, conducts exit interviews for SLT employees, and implements layoffs and discharges of SLT employees. Factor Sales also participated in the

bargaining sessions between SLT and the Union. Factor Sales was represented in those bargaining sessions by Glenda Moreno—who trains prospective managers of Factor Sales stores and who is Salcido's personal assistant and translator—and by Lourdes Salcido, the chief of Factor Sales' human resources department.

3. SEC

SEC is a company organized under the laws of Mexico and is based in San Luis Rio Colorado, Mexico, which is located across the border from San Luis, Arizona. Victor Salcido is the president of SEC and Rosendo Valencia is SEC's general manager. Salcido and Valencia are shareholders in SEC, and Salcido admits to being a "major" shareholder. However, in violation of the subpoenas, the Respondents produced no documentary evidence to establish the extent of their and Salcido's family's holdings.

Salcido holds approximately 58 percent of the shares of SEC in his name. (GC Exh. 1(xx), p. 2, fn. 1.) However, Salcido testified that he does not know the exact percentage of the shares of SEC that he owns. He also testified that he was not sure if his brother owned any shares. These statements are either true, which would tend to show that Salcido has complete authority over the affairs of SEC because the percentage of his and family members' ownership is not important to him. Or, the statements are false, and Salcido knows precisely the number of shares in his own name and the number of shares he has placed in the name or names of his family members.

Salcido was not a credible witness. He spoke very slowly and deliberately. He frequently evaded answering questions asked of him by the Government, and instead engaged in repeated statements on his recurrent themes of (1) disassociating himself from any involvement in or knowledge about the affairs of SLT, and (2) expounding that the reason he closed SLT in February 2006 had nothing to do with the Union's certification of SLT's employees in February 2005. Salcido was shown a proposed affidavit that the Board had sent to him during its investigation. Before admitting he had previously seen the affidavit (which he possessed and had kept for several months), he took an inordinately long time to review (although he could have been memorizing) every line of every page in the affidavit. Salcido slowly, carefully, and fastidiously corrected what he claimed were incorrect statements in the proposed affidavit, and the affidavit was then placed into the record. (Tr. 60–98.) Then, after the passage of a month and the opportunity to discuss the matter with his counsel and others, Salcido testified during the second resumed hearing that he had uncovered additional corrections to the affidavit. Salcido was not credible as a witness, and he was not credible in this testimony.

Salcido testified so slowly and deliberately that he appeared to be befuddled and unable to understand the questions (from Government counsel, but not from his own attorney) or the proceedings, or both. Yet, Salcido owns and operates corporations, in the United States and Mexico, and a chain of grocery stores that employs approximately 500 people. He started two trucking companies, one in Mexico and one in the United States, that transport grocery items for his grocery stores, as well as goods for other companies. Salcido's befuddlement was entirely inconsistent with the entrepreneur and intelligent businessman the evidence shows him to be. Salcido's slow, meek, hesitating, and confused manner appeared to be contrived. He did not appear to be credible or interested in testifying truthfully. He appeared interested only in making sure his testimony did not hurt his position in this case, without regard to credibility or plausibility.

For example, it is not plausible that Salcido did not know the extent of his own ownership or the extent of the ownership of family members to whom Salcido had provided shares of ownership. Moreover, Salcido's professed general ignorance of SEC's affairs and ownership tracks his professed general ignorance of SLT's affairs. SLT was closely aligned with SEC in the transportation of grocery goods. And, as noted above, Salcido consistently testified in a manner that disassociated him from SLT.

Salcido also displayed a suspicious inability to remember events and circumstances that the owner of Factor Sales and the creator and effective owner of SLT would know. (E.g., Tr. 75, 81, 82, 84, 86, 89, 92, 93, 94, 95, 97, 121, 127, 130, 131, 135, to cite only the instances in his first day of testimony.) On the other hand, when Salcido was asked questions by his own attorney, he never failed to remember. (Tr. 1085, et seq.) Of course, Salcido's transformation into a person who was able to remember everything asked of him by the Respondents' attorney could also be attributed to careful trial preparation by the Respondents' attorney. However, even conceding that point, Salcido's demeanor throughout his testimony showed a person who was not forthright and was not credible. On balance, I conclude that Salcido is the real and effective owner of SEC and that he has complete authority over the affairs of SLT and SEC.

SEC was formed for the purpose of transporting goods between cities in Mexico, and from cities in Mexico to the United States border. SEC was eventually permitted to transport goods to destinations within the United States. Salcido and Valencia used SEC to transport goods among Factor Sales stores in Arizona, and from locations in Arizona and California to Factor Sales stores. No evidence was presented on whether SLT, an American corporation, possessed the same rights to transport goods within Mexico as SEC, a Mexican company, possessed to transport goods within the United States. Nevertheless, such evidence might not be particularly important, at least as far as the Respondents are concerned, because SLT and SEC are owned and controlled by the same person, Salcido, who could and did use either company to transport goods depending on Salcido's desires and interests.

Despite the initial purpose of SEC, its drivers were occasionally assigned trips within the United States, trips that normally were assigned to SLT drivers. Valencia was the general manager of SEC. His duties for SEC included supervising SEC's employees and assigning trips to the drivers. Because Valencia had the same position and performed the same functions for SLT, he had the authority to and did assign SLT trips to SEC drivers.

SEC leased its trucks from SLT. SLT had purchased these trucks for between $4000 and $100,000 each. SEC paid SLT $300 per month for each truck it leased from SLT. SEC did not

sign lease agreements for its leases of these trucks from SLT.[5] Thus, other than the amount of the monthly payment (which itself is not set forth in any document), there are no terms to SEC's lease of the trucks or any listing of the respective rights and obligations of SEC and SLT. SLT did not lease trucks to anyone else.

Despite the fact that SEC leased the trucks from SLT, when SLT registered the trucks with the State of Arizona, it claimed that SLT leased the trucks from SEC.

C. Representation Elections

In early 2004, the Union began to organize the employees of SLT and Factor Sales. When Salcido learned of the organizing efforts, he hired consultants to assist him in handling and responding to the campaign. The Union filed a representation petition to represent the employees of Factor Sales on June 28, 2004. One day later, the Union filed a petition to represent the employees of SLT.

An election was held in July 2004 for the employees of SLT, and the Union lost that election. A second election was held for the employees of SLT in January 2005.[6] The Union won that election and, on February 11, 2005, was certified as the exclusive collective-bargaining representative of SLT's employees in the following unit:

> All full-time and regular part-time truck drivers, mechanics, dispatcher, and accountant assistant employed by the Respondent San Luis Trucking; excluding all other employees, guards, and supervisors as defined in the Act.

On March 11 and 12, 2005, an election was held for the employees of Factor Sales. The Union lost that election. However, the hearing officer sustained an objection and recommended setting aside the election because he found that Factor Sales had engaged in objectionable conduct. On July 31, 2006, the Board overruled the objection and certified the results. *Factor Sales, Inc*., 347 NLRB No. 66 (2006).

Before the first election in July 2004, Salcido held a series of meetings with the employees of Factor Sales and SLT. SLT employees attended the first meeting, which was held approximately May 2004 in the Factor Sales offices.[7] Salcido cautioned the employees to be careful in deciding how to vote in the upcoming election because if the Union came in to SLT, he would close down SLT the same way he had closed down Maxi. Maxi is the name of a former grocery store owned and operated by Factor Sales.

Salcido held meetings with employees until the day before the first election, on which he held two meetings. Salcido also told the employees immediately before the election that he was going to close a B-Mart store, one of Factor Sales' stores. Salcido said that he regretted closing the store, but it was not producing.

One of the consultants who Salcido retained to deal with the organizing campaign and election was Michael Penn. On July 30, the day before the first election, Valencia took Ignacio Sandoval, an SLT driver, to the Factor Sales office in order to meet with Penn. Penn told Sandoval that the Union was no good and did not help anyone. Penn told Sandoval that Salcido had a lot of money and Salcido "could just pick up his marbles and go and rest." (Tr. 513.) Also, on the day before the election, Salcido sent a letter to all SLT employees in which he made veiled promises about improving the working conditions, and he urged the employees to vote against the Union.

These actions by Salcido are noteworthy not only for their bearing on Salcido's animus, but also on his credibility. Salcido gave the distinct impression in his testimony that it was immaterial to him whether the employees decided for or against being represented by a union. "I always said that whatever they [the employees] decided was fine." (Tr. 120.) This is a misrepresentation. Quite clearly, Salcido did not want the Union to represent his employees. He held meetings with his employees to persuade them to vote against the Union. He sent a letter to all employees urging them to vote against the Union. He utilized *Factorizate* to spread antiunion messages. The Respondents spent a considerable amount of money in legal fees and consulting fees to fight the Union's organizing campaign and the election. Yet, in the face of these actions, Salcido swore in the hearing that whatever the employees decided regarding union representation was fine with him. Salcido's testimony is not candid or credible.

D. Respondents' Actions After the Union was Certified to Represent SLT's Employees

1. Discipline and absence reports

When an SLT employee is absent from work or engages in misconduct, SLT prepares a report and places the report in the employee's file. The report is generally issued by Valencia, but occasionally is issued by the dispatcher.

The first such report issued by SLT is dated May 25, 2004, about 2 months before the first representation election. This report was an absence report and was issued to Jose Quezada, a driver. Quezada started working for SLT in 1998 and had never before received such a report.

Valencia testified that he had issued such reports in the past. However, he did not cite any instances and could not remember any other reports that he might have issued. The subpoenas

[5] Among the documents subpoenaed from the Respondents were documents relating to leases of equipment by SEC. (GC Exh. 7, pars. 7, 8, 17; GC Exh. 5, pars. 7, 8, 17.) The Respondents did not produce any such documents.

[6] The General Counsel asserts in its posthearing brief, "SLT engaged in objectionable conduct and ordered a rerun election. See *San Luis Trucking, Inc*., 28–RC–6291, December 29, 2004." (GC Posthearing Br. p. 16.) However, the General Counsel did not attach a copy of this decision to its brief or offer a copy of the decision at the hearing. (See GC Exh. 60, containing the Union's petition, the tally of the ballots in the first election in July 2004, and the tally and corrected tally of the ballots in the rerun election in February 2005. However, the reason the rerun election was ordered is not contained in the documents.) Moreover, I have been unable to access the decision on the Board's website. Accordingly, I am unable to determine why the rerun election was ordered.

[7] Salcido testified that he could not remember the number of meetings or where the meetings were held. (Tr. 116.) This failure of memory occurred in response to questions from the General Counsel. However, without regard to who asked the questions, the testimony is not credible.

requested copies of personnel files and discipline actions issued to employees since 2001. (GC Exhs. 3, 5, and 7, pars. 84 and 85.) I infer from the Respondents' failure to produce such documents that the documents do not exist.

The next time such reports were issued to SLT employees was in September 2004 (three discipline reports) and October 2004 (one absence report). These reports, which include the first discipline reports that SLT issued, were issued after the commencement of the Union's organizing campaign and during the period when the union's objections to the July 2004 election were pending. Of the reports issued in September, one was issued to Eduardo Siqueiros, who began working for SLT in 1994, and one was issued to Jesus Aguilera, who began working for SLT in 1997.[8] The October report was issued to Raimundo Salcido, who began working for SLT in 2004. Again, these employees had never before received such reports.

The next time absence or discipline reports were issued to SLT employees was on March 8, 2005, within 1 month of the Union's certification as representative of SLT's employees. Three reports were issued in March, four in April, four in June, one in July, seven in August, one in September, and two in November. These reports were issued to seven different employees who had worked at SLT since 1994 or later. These employees had never before received such reports. The Respondents did not notify the Union about their issuance of these reports or the increased number of reports.

Despite these reports, no disciplinary action was taken against any of the employees cited in the reports. Indeed, one employee, Antonio Macias, was issued five reports; another employee, Jorge Gonzalez, was issued five reports; and another employee, Blas Martinez, was issued four reports. However, no action, such as suspension or termination, was taken against Macias, Gonzalez, Martinez, or any other employee as a result of these reports.

The Respondents claim that on January 28, 2005, Factor Sales began taking photographs of damaged or disheveled merchandise that SLT drivers delivered to the Factor Sales warehouse. The Respondents claim that the pictures demonstrate the SLT drivers' poor performance. Pictures were taken on January 28, March 30, July 14, and August 27, 2005. Jorge Urrea, Factor Sales' warehouse manager, took most of the pictures. Urrea was the warehouse manager from about March 30, 2005, until November 2005. Antonio Ballesteros preceded Urrea and was the warehouse manager from 2003 until March 29, 2005.

Curiously, the only evidence of such poor performance as reflected in the photographs, even from the Respondents' witnesses, relates to the period immediately before and soon after the January 29 representation election that the Union won. Ballesteros testified that he had never experienced any problems with the condition of the goods delivered by SLT at the Factor Sales warehouse. Moreover, Ballesteros' testimony contradicts the Respondents' claim that SLT drivers delivered damaged goods on January 28, 2005, because Ballesteros was the warehouse manager until March 29, 2005, and he had never experienced problems with the condition of the goods.

Given Factor Sales' long history of no problems with the condition of goods delivered by SLT drivers, it is not credible that suddenly, and immediately before and soon after the union's election, the SLT drivers would start delivering goods in a damaged or disheveled condition. The Respondents' photographs of alleged damaged goods are not credible for this reason and this unlikely coincidence. In addition, the incredibility of the Respondents' claim regarding poor performance by SLT's drivers is enhanced by the testimony that no problems in the condition of goods had occurred during the time that some of the photographs were taken and by the absence of documentary evidence to show that Factor Sales took any action regarding such damaged goods.

Whether the photographs were staged, or reflect damage caused by other employees in Factor Sales' warehouse, or reflect merchandise delivered by some transportation company other than SLT, or have some other explanation, cannot be determined. Nevertheless, under all the circumstances, the credible evidence does not substantiate the claim that SLT drivers delivered damaged and disheveled merchandise to Factor Sales' warehouse.

Nevertheless, Ballesteros testified that during the period 2003 and 2004 SLT drivers continually arrived late and many times would deliver merchandise that should not have been delivered to Factor Sales. Ballesteros asserts that he told Valencia about these alleged continual problems. However, there is no evidence that Valencia ever took any action regarding these alleged problems. Valencia did not discipline the drivers or even speak to them about these problems. Nor is there any evidence that Salcido, the owner of Factor Sales, took any action regarding these alleged problems. Such a complete lack of response on the part of management and ownership to alleged problems, which supposedly occurred continually and over a substantial period, undermines the credibility of the claim. It must be remembered that these were deliveries to Factor Sales, which owned SLT. Surely, if any entity could and would make efforts to address or correct problems of this nature, it would be Factor Sales and Salcido. Yet nothing was done and there is no evidence that anything was ever attempted. Accordingly, I conclude that the SLT drivers did not deliver merchandise late or deliver the wrong merchandise to Factor Sales, or, if SLT did make such deliveries, that such deliveries were insignificant and were not a problem for Factor Sales.

2. Interrogations

After the Union won the election in January 2005 and was certified as the employees' representative, Valencia approached Quezada at SLT's facilities and asked Quezada what he thought about the Union and what was he going to do. Quezada replied that he just wanted to keep his job and move forward. Valencia asked Quezada similar questions, approximately on a weekly basis, until the end of Quezada's employment at SLT in July 2005. There is no evidence that Quezada had, at any time, disclosed to management his attitude toward the Union.

3. Rule on employees talking to each other

SLT employed two mechanics, Jose Vera and Jose Marquez. Vera had longer experience with SLT and functioned as Marquez' supervisor. Vera and Marquez maintained and re-

[8] The third report was issued to Armando Cruz. Cruz' hire date is unknown.

paired SLT's trucks and Factor Sales' equipment and vehicles. Vera was against the Union, and the Respondents' management knew he was against the Union. For example, Vera did not attend any union meetings during the organizing campaign; however, he did attend meetings held by Factor Sales. Factor Sales and Salcido held meetings during the organizing campaigns to urge the employees of Factor Sales and SLT to vote against the Union. Moreover, after SLT was closed, Factor Sales retained Vera to continue repairing Factor Sales' vehicles, similar to what Vera had done when he worked for SLT. In contrast to Vera, Marquez was not against the Union.

SLT's mechanics and drivers regularly speak to each other at SLT's facility. Indeed, they are required to communicate so that the drivers could explain any problems with the trucks that should be addressed or repaired by the mechanics. Prior to June 2005, SLT did not have any rules, policies, or instructions restricting discussions between SLT's mechanics and drivers.

In June 2005, Aguilera, a driver, spoke to Marquez at SLT's facility concerning problems that Aguilera had with a truck. After their conversation, Valencia told Marquez that he was not allowed to speak to the drivers unless Vera was present. Valencia told Aguilera that he was not allowed to speak with Marquez. Valencia told Aguilera that if Aguilera had a problem with any of the trucks, he should tell Valencia who would, in turn, tell the mechanics.

4. Contractual negotiations

In March, April, and May 2005, the Union, SLT, and Factor Sales met for the purpose of negotiating a collective-bargaining agreement, for a total of three meetings during this period. In the April meeting, SLT was represented by Barry Olsen, Esq. and Valencia. Moreno and Lourdes Salcido were present for Factor Sales. Paul Rubin, the secretary-treasurer of the Union, Martin Hernandez, a union organizer, and two SLT employees, Sigueiros and Aguilera, represented the Union.

Olsen started the meeting by stating that SLT was losing a great deal of money, which he blamed on competition from Mexico and an unexplained Supreme Court decision. Olsen did not mention the job performance of SLT drivers—such as late deliveries, cargo damaged in transit, or cargo delivered to the wrong location—as being a factor in SLT's losses. Indeed, these alleged problems were not mentioned at all. After the parties talked about, but did not agree on, a contract, Rubin asked Olsen if SLT would open its books because of Olsen's claim that SLT was losing money. Olsen replied, "possibly." (Tr. 300.)

The parties met again on May 26, 2005. Olsen represented SLT, and Moreno and Lourdes Salcido were again present for Factor Sales. Rubin, Nancy Mortazavi (a union representative), Aguilera, and Ignacio Sandoval, an SLT driver, represented the Union.

Olsen repeated his claim concerning SLT's poor financial condition. Again, Olsen mentioned nothing about the job performance of SLT's drivers as being a factor in SLT's claimed losses. Rubin questioned whether the financial data on which Olsen was relying was accurate or trustworthy. Rubin reminded Olsen that Factor Sales owned SLT, and those companies could structure their business dealings to assign all the profits from their dealings to Factor Sales, leaving SLT with a loss. Olsen did not respond to Rubin's question on the accuracy or trustworthiness of SLT's records regarding its claimed loss. Olsen said that SLT could not reasonably raise its prices because Factor Sales was then negotiating with Unified for a delivery price that was equal to the price being charged by SLT. Olsen claimed that he did not think SLT would be financially able to survive the summer of 2005.

Rubin said that the work hours of SLT's employees were rapidly decreasing, and that SLT's work was being subcontracted. Olsen replied that SEC and SLT had similar ownership, and that SEC was paying SLT a fee to use SLT's facilities and trucking permits. Olsen added that SEC was making deliveries to Factor Sales in the United States. Rubin then mentioned other companies to whom SLT was subcontracting work. These companies included Santa Fe Trucking, Gala Trucking, Valenzuela Trucking, San Luis Freight, and Royal Trucking. Moreno responded that she did not know these companies, except that Gala Trucking was actually San Luis Cooling. Olsen said he did not want to meet again with the Union until certain financial figures became available. In fact, the parties did not meet in another bargaining session.

On July 28, Rubin sent Olsen a letter requesting that SLT stop outsourcing work that was performed by bargaining unit members. Without denying that SLT had subcontracted bargaining unit work, Olsen asked Rubin to "please clarify the exact instances of 'outsourcing of work.'" (GC Exh. 28.) Olsen's request for this information was disingenuous. Olsen knew the outsourcing of work that Rubin described because Rubin had already told Olsen the names of companies, including SEC, to whom SLT had given bargaining unit work. Olsen did not deny that outsourcing was occurring and he did not need to be cited a particular instance of such outsourcing to know that SLT was subcontracting work. Olsen's response to Rubin's July 28 letter constitutes an admission by the Respondents that SLT was indeed subcontracting bargaining unit work.

5. Subcontracting

SLT subcontracted transportation work since approximately 2004. (Tr. 1338.) The companies that received the subcontracted work include MC Freight, M. Ruiz Trucking, and San Luis International Freight Services. The Respondents claim that subcontracting occurred only when SLT drivers were not available to do the work. The credible evidence does not support this claim. Vigil testified that when the SLT assigned driver was unable to make a trip, the trip would then be subcontracted. Accordingly, the credible evidence does not show that when the assigned SLT driver was unable to make a trip, Valencia or the dispatcher would first offer the trip to other SLT drivers before subcontracting the trip. (Tr. 1337–1338.)

While still on direct examination, Vigil later agreed that trips were not subcontracted if "there was an available driver at San Luis Trucking." (Tr. 1339.) However, this agreement is inconsistent with her previous testimony, and, more importantly, this "testimony" was given in response to a leading question from the Respondent's counsel. Under the circumstances, the later testimony of Vigil is ambiguous, is not credible, is inconsistent

with her previous testimony, and is substantially discounted because of the leading question.

Valencia also testified as follows in response to the following leading question from the Respondents' counsel: "Did you ever subcontract out work, sir, when you had a Driver that was available to do the work? No. First, it was my Drivers." (Tr. 1209.) Valencia was not a credible witness. His close relationship with Salcido, his managerial and ownership interests in the Respondents, his apparent bias throughout his time on the witness stand, and his demeanor support the conclusion that Valencia was not a credible witness. Moreover, Valencia's testimony, like Vigil's testimony on this same issue, is ambiguous, is not credible, and is substantially discounted because of the leading question.

Shortly after the election in January 2005, Quezada spoke to Raimundo Salcido about Valencia's attitude toward the workers before the election. Quezada said he had seen Valencia scold the workers, and Quezada believed that Valencia's attitude might have helped to push the workers toward the Union. Shortly after that conversation, Valencia called Quezada at home and said that Victor Salcido wanted to speak to Quezada. Salcido came to Quezada's residence, and they spoke in Salcido's car.

Salcido asked Quezada what he had said about Valencia's attitude, and Quezada told him. Salcido said he agreed with Quezada. Salcido then said that although the Union was already at SLT, Salcido would not allow the Union to remain there. Salcido said that he would rather close down the business or close down the trucks. Quezada replied that he already knew Salcido felt this way.

a. Unified

Unified is a cooperative that is owned by its member grocery stores. Unified sells and delivers grocery goods to its member stores. Factor Sales has been a member of Unified and has purchased grocery goods from Unified for over 20 years. However, Unified's transportation of goods to Factor Sales had been limited to refrigerated goods for one or two stores. Most of Factor Sales' remaining grocery goods were purchased from Unified and were transported by SLT.

At various times before March 2004, Unified made proposals to Factor Sales to increase Unified's transportation of grocery goods to Factor Sales and its stores in the Yuma area. However, Factor Sales accepted none of these proposals.

In approximately March 2004, Unified embarked on a marketing campaign to promote its transportation services to members of Unified who were located in Arizona. Unified's campaign was based on its plan to charge transportation rates as if Unified were located in Phoenix, even though Unified is actually located in Los Angeles. This marketing campaign was carried out over several days by four officials of Unified—Rodney Van Bebber, the senior vice president of distribution, Luis De La Mata, corporate vice president and president of the southern California division, Randy Delgado, director of sales, and Colette Pyce, Unified's Arizona representative. This Unified team spent a day in the Yuma, Arizona area and met with Salcido.

The Unified representatives met with Salcido in his Factor Sales office, and presented their proposal. Nevertheless, like the previous attempts by Unified to increase its transportation services to Factor Sales, this attempt in March 2004 was also unsuccessful. Salcido did not accept Unified's proposal.

In early 2005, close to the January election won by the Union, Salcido again met with Unified's representatives. Unified offered Factor Sales the same proposal that they had offered Factor Sales in March 2004. This time, and after having rejected all previous offers from Unified, Salcido accepted Unified's offer to transport grocery goods for all of Factor Sales' stores. Salcido decided to implement his decision on July 1, 2005.

The Respondents assert, in Salcido's testimony and in their posthearing brief, that Salcido's decision to replace SLT with Unified to transport Factor Sales' grocery goods was motivated by several factors. These factors were:

1. *Risk of loss from goods damaged in transit*. Unified assumed the risk of damage to goods during transit for goods that Unified transported, but not for goods transported by the customer.

This claim, insofar as Unified is concerned, is simply an acknowledgement that the company that transports goods assumes the risk of damage to the goods in transit. However, the Respondents assert that SLT and Factor Sales operated in a reverse and strange manner. The Respondents claim that SLT was not liable for the goods it damaged while transporting the goods to Factor Sales. Rather, Factor Sales incurred the loss. The Respondents enhance this implausible claim by asserting that SLT drivers often damaged goods, either in transit or when the SLT unloaded the goods at Factor Sales. This claim is not credible, both because Salcido was not a credible witness and because the claim is implausible.

It is difficult to imagine any business, let alone Factor Sales in dealings with its subsidiary, that would willingly and without compensation or consideration agree to be responsible for, and accept the loss from, goods damaged by another company. The Respondents produced no documents to support this claim, such as an agreement between Factor Sales and SLT setting forth the parties' rights and obligations. (See GC Exhs. 3 and 5, par. 8, requesting copies of agreements between Factor Sales and SLT.) In addition, and contrary to the Respondents' claim, Jorge Urrea, Factor Sales' warehouse manager in 2005, testified that SLT credited Factor Sales for damaged goods. (Tr. 1355–1356, 1363.)

Moreover, the Respondents' allegation that SLT drivers often damaged goods that they delivered to Factor Sales is not credible. The first "evidence" of damaged goods in this case is from pictures taken at the Factor Sales warehouse on January 28, 2005, 1 day before the rerun election. There is no credible evidence of grocery goods having been damaged in transit by SLT drivers before that date. Indeed, the evidence proves that, at least from 2003 until March 29, 2005, there were no problems with the condition of the goods delivered to Factor Sales. Moreover, as explained above, the Respondents' evidence of goods allegedly damaged by SLT drivers is not credible.

In addition, if SLT drivers had damaged goods in transit or in unloading the goods at Factor Sales, and especially if this

had often occurred, it is reasonable to expect some corroboration in Factor Sales' records and in the drivers' personnel records. However, there is no documentary corroboration of the Respondents' claim.

If SLT drivers had often damaged goods that were delivered to Factor Sales, it is also reasonable to expect Factor Sales to try to rectify the situation by negotiating a different agreement with SLT, or by insisting that the careless drivers be prohibited from delivering to Factor Sales, or by any number of other actions. Surely, the fact that Factor Sales owned SLT would give any such rectifying actions more attention, if not urgency, at SLT.

The testimony of the Respondents' witnesses concerning damaged goods and late deliveries by SLT drivers was not credible. For example, Antonio Ballesteros, Factor Sales' warehouse manager from 2003 to March 2005, testified that SLT continually delivered merchandise late. However, Ballesteros testified that over the more than 2 years he was the warehouse manager, no other company ever delivered merchandise late. Such a claim defies common sense. This implausible and incredible claim shows the extent of the bias exhibited by Factor Sales' current employees who testified at the hearing.

Also, the careful handling of shipped goods is something that could have been negotiated between SLT and the Union during the bargaining sessions for a contract. However, SLT did not mention this alleged factor when the parties met.

For all of these reasons, the evidence does not support the Respondents' claim that the risk of loss for damaged goods, and the alleged fact of goods damaged in transit by SLT drivers, were important or significant or motivating factors in Factor Sales' decision to replace SLT with Unified.

2. *Disposal of empty pallets*. Unified retrieved empty pallets, that it had used to deliver grocery goods to stores, and transported the pallets back to Los Angeles.

The "value" of this service is countered by Van Bebber's statement that Unified charges its customers for the round trip from Unified's warehouse to the customer's store because Unified, unlike SLT, only ships its own products. Unified does not ship goods for other companies. "[T]he customers down here are responsible for paying really what amounts to a round trip ticket, but they get value for that because while we're at the store, we'll pick up their empty pallets." (Tr. 432.) Essentially, the customer pays the same to have Unified transport the empty pallets back to Unified's warehouse as the customer pays to have Unified transport the grocery goods to the customer. On the other hand, and as Van Bebber explained, transportation companies, such as SLT, do not charge customers for a round trip because these companies transport goods in both directions.

Moreover, SLT drivers were subject to directions and orders from Factor Sales' store managers. Among other things, the store managers ordered SLT drivers to help unload the trucks and to dispose of trash. The store managers could similarly have directed the SLT drivers to remove pallets and other items from the stores. And, in any event, the disposal of pallets or any other items in Factor Sales stores and warehouse is something that could have been negotiated between SLT and the Union during bargaining for a contract, especially since Factor Sales was represented in the bargaining sessions between SLT and the Union. However, the Respondents did not mention this alleged factor when the parties met.

3. *Fees for less than full truckloads*. Unified charged by the quarter truckload. Thus, if a customer's order only comprised, for example, one-half a truckload, the customer was only charged for one-half a truckload rather than a full truckload.

This pricing structure might be beneficial to Factor Sales if Factor Sales had a significant number of less-than-full-truckload deliveries. However, there is no evidence that Factor Sales did have a significant number of such deliveries.

Moreover, SLT could have instituted this pricing structure or a similar pricing structure for deliveries to Factor Sales. Indeed, Factor Sales could have insisted on it. However, there is no evidence that SLT did institute such a pricing structure or even considered it. Again, if this pricing structure was a motivating reason for Factor Sales replacing SLT with Unified, it is reasonable to expect that Factor Sales and SLT would have discussed the pricing structure and attempted to implement it or a similar pricing structure. Their failure to do so tends to prove that Unified's pricing structure was not a significant or motivating reason for Factor Sales' decision to replace SLT with Unified.

4. *Unified is a cooperative and offers special prices to its members. Unified also conducts price comparisons*. The Respondents contend that Salcido's decision to replace SLT with Unified was motivated by Unified's policy of (1) providing special pricing to its members and (2) conducting price comparisons showing that the effect of Unified's prices on its customers was positive. (R. Posthearing Br. p. 24.) These claims appear to be another way of saying that Factor Sales' decision to replace SLT with Unified was based on cheaper prices; however, the Respondents specifically disavow any such contention.

Thus, these cost justifications devolve into the contention that Factor Sales' decision to replace SLT with Unified was motivated, in part, by the belief that Unified's prices, while not as low as SLT's prices, were monitored by Unified to insure that the prices were as low as Unified could make them. This is not a convincing reason to explain, must less justify, Factor Sales' decision to replace the transportation services provided by its subsidiary with the more expensive transportation services provided by Unified.

5. *More reliable delivery times*. The Respondents claim that Unified promised more reliable delivery times for their products than SLT. However, the evidence does not support the Respondents' claim that Unified promised more reliable delivery times. Van Bebber testified that Unified does not guarantee delivery time, but it offers delivery windows and "we strive to be within those windows." (Tr. 437.) Thus, Unified offered no greater assurance of on-time deliveries than SLT.

The Respondents claim that SLT delivered products late, and that SLT refused to improve their service. However, the Respondents failed to produce any corroborating, documentary evidence of this latter claim. Also, Factor Sales owned SLT, and Valencia was at all times under the control and authority of Salcido. SLT's alleged refusal to improve its service to Factor Sales is not credible.

Moreover, if on-time deliveries were a concern or priority of Factor Sales, and if SLT had delivered products late, there is no evidence that Factor Sales took any action against SLT for the alleged late deliveries or that Factor Sales directed or requested SLT to take any action against the truckdrivers who had delivered their products late. Also, there is no evidence that SLT independently took any action against such truckdrivers. This lack of evidence tends to show that on-time deliveries were not a priority, or even a concern (because deliveries, in fact, had been timely made by SLT) of Factor Sales.

Also, on-time deliveries are something that could have been negotiated between SLT and the Union during bargaining for a contract, especially because, as noted above, Factor Sales was represented in the bargaining sessions. However, the Respondents did not mention on-time deliveries during their negotiating sessions with the Union.

6. *Greater variety of products*. The Respondents contend that Salcido decided to replace SLT with Unified because "In Mr. Salcido's estimation, Unified Grocers offered a greater variety of product and more sales options." (R. Posthearing Br. p. 26.) But, there is no evidence that Unified's variety of goods was any greater in January 2005 (when Salcido and Unified met to agree on Unified's proposal), or on July 1, 2005 (when Factor Sales implemented its decision to replace SLT with Unified), than in 2004 or the other times when Unified met with Salcido and Salcido refused Unified's offer. The only thing that was different in 2005 was that the Union had won the election and represented SLT's workers.

Moreover, before July 2005, SLT had been transporting Unified's grocery goods to Factor Sales. Indeed, this transportation constituted most of SLT's business. The Respondents failed to explain why SLT could not or did not transport the same variety of Unified's goods as Unified delivered after July 2005.

7. *Factor Sales could cease purchasing from its competitors*. Before Factor Sales implemented its substitution of Unified for SLT on July 1, 2005, Factor Sales purchased some of its grocery goods from National Grocers. Factor Sales had purchased grocery goods from National Grocers since approximately 2003. Basha's owns National Grocers. Basha's also operates retail grocery stores. Salcido testified that he felt vulnerable making grocery purchases from National Grocers because Basha's was a competitor of Factor Sales, Basha's would know what he was purchasing, and Basha's could charge less for the same products.

Salcido's contention is undermined by at least four factors. First, the evidence does not establish that Basha's is a direct competitor of Factor Sales because it was not shown that Basha's operates grocery stores in the same markets (Yuma, Weldon, Somerton, and San Luis, Arizona) as Factor Sales.

Second, the Respondents failed to produce any documentary evidence showing the extent of Factor Sales' purchases from National Grocers. Thus, the evidence fails to establish whether Factor Sales' purchases from National Grocers were substantial enough to even be a concern, much less a motivating concern, to Salcido.

Third, Factor Sales had purchased grocery goods from National Grocers since approximately 2003, yet had rejected Unified's overtures from 2003 through 2004. If purchasing from National Grocers were truly a concern of Salcido's, he would likely have taken some correcting action before 2005. The only thing that was different in 2005 when Factor Sales accepted Unified's proposal was that the Union represented SLT's workers.

Fourth, the Respondents did not explain why or how Factor Sales' substitution of Unified for SLT allowed Factor Sales to stop purchasing from National Grocers, nor why Factor Sales could not have obtained from Unified, before July 2005, the goods it had previously been purchasing from National Grocers. In other words, Factor Sales could have stopped purchasing grocery goods from National Grocers at any time before July 2005, and, instead, could have purchased the same type of goods from Unified. Before July 2005, SLT would have transported these goods from Unified to Factor Sales, just as SLT was already transporting goods from National Grocers to Factor Sales. Besides, SLT was already transporting a substantial amount of goods from Unified. Thus, Factor Sales' decision to use Unified rather than SLT to transport its goods did not enable Factor Sales to cease purchasing from a competitor. Rather, the decision simply enabled Factor Sales to use Unified rather than SLT to transport its goods.

In September 2005, Salcido requested a meeting with Unified to discuss Unified's prices. The meeting was held in San Diego and was attended by Van Bebber, Salcido, and Moreno. Salcido requested the meeting because Unified was charging more to deliver grocery goods to Factor Sales than SLT had charged. Because the Union represented SLT's workers, Salcido was concerned that Unified's high prices would or could show that he decided to use Unified in order to avoid using SLT. Van Bebber convinced Salcido that Unified's services were sufficiently different from SLT's services that the comparison was inapt.

Factor Sales does not have a written contract with Unified or any obligation to use Unified for its transportation services. Thus, Factor Sales could end its relationship with Unified at any time and return to using SLT, or some other company, to provide transportation services.

The elimination of SLT's trips from Unified to Factor Sales' stores and warehouse after July 1, 2005 trips that had previously constituted the majority of SLT's business, had a predictable effect on SLT's business. The trips that were available to and were assigned to SLT's drivers decreased after the business was subcontracted to Unified. Sandoval and Jorge Gonzalez' income decreased, forcing them to quit. Gonzalez quit in July 2005 because his reduced income was insufficient to cover his bills. Sandoval quit in November 2005 because of his reduced income. Quezada quit in July 2005 after the number of his trips was reduced and after Raimundo Salcido told him that Quezada's trips would be cut in half. Quezada would not have been able to support his family if his trips were cut in half. Accordingly, he resigned.

6. Closure of SLT

SLT was formally closed on February 6, 2006. Salcido testified that he decided to close SLT in October 2005 because of SLT's continuing and mounting losses.

SLT's alleged losses are set forth in financial statements prepared by Factor Sales' accounting firm, Gray & Terkelsen, P.L.L.C. Gray & Terkelsen provides three levels of service to its clients—audit, review, and compilation, in decreasing order of verification. Compilation is essentially what it sounds like—the compilation of financial figures from books provided by the client, but without verifying the figures, auditing the books, or reviewing any backup or corroborating documents for such financial figures. The service provided by Gray & Terkelsen for Factor Sales and its subsidiaries was compilation, the service providing the least verification of the financial figures. As noted by Gray & Terkelsen in its cover letter to the financial statements, the accounting firm does not express an opinion or any other form of assurance on the financial statements.

According to the compilations provided by Gray & Terkelsen, Factor Sales and SLT reported net income in the following years:

Year[9]	*Factor Sales*	*San Luis Trucking*	*Exhibit*
2003	($584,835)	$138,174	R Exh. 9, SLT 010022 & 010035
2004	384,724	76,867	R Exh. 10, SLT 010042 & 010054
2005	101,088	(260,802)	R Exh. 11, SLT 010061 & 010067
2006	439,754	(402,482)	R Exh. 12, SLT 010807 & 010813

With respect to the figures for 2005 and 2006, Gray & Terkelsen added the following warning in its reports:

> Management has elected to omit substantially all of the disclosures required by generally accepted accounting principles. If the omitted disclosures were included in the financial statements, they might influence the user's conclusions about the Company's financial position, results of operations and cash flows.

(R. Exh. 11, SLT 010059; R. Exh. 12, SLT 010804.) These figures also disclose a curious, and unexplained, inverse relationship between the profits and losses, respectively, of Factor Sales and SLT. That is, and in general, Factor Sales losses accompanied SLT profits, and, Factor Sales profits accompanied SLT losses.

The Respondents failed to explain the cause for this inverse relationship between the profits and losses of Factor Sales and SLT. However, three striking characteristics of Factor Sales' reported profits and losses are the following. First, Factor Sales is the 100-percent owner of SLT. Salcido owns Factor Sales and Salcido's brother manages SLT. Factor Sales handles all the accounting for SLT. Thus, Factor Sales could structure its accounting entries in order to assign greater income or losses to Factor Sales or SLT, as Factor Sales or Salcido saw fit. One example is an entry for legal expenses in the amount of $57,145, which was allegedly incurred by SLT in 2004 to fight the Union's organization drive. However, the Union attempted to organize Factor Sales' workers at the same time it attempted to organize SLT's workers. (The election for the Factor Sales' workers was held in March 2005.) Yet, there is no evidence that Factor Sales incurred any legal expense to fight the Union's organizing campaign at Factor Sales, despite the fact that there was equal, if not greater, motivation to fight the campaign at Factor Sales than SLT. Nevertheless, $57,145 in legal expenses, constituting a substantial portion of SLT's alleged loss in 2004, is attributed to SLT rather than Factor Sales.

Moreover, the Respondents assert that some unspecified Supreme Court case caused increased competition from companies in Mexico, resulting in SLT's loss of business to such companies. However, SLT's sales only decreased by $137,494 in 2005 ($2,057,396) from 2004 ($2,194,890), whereas SLT's expenses increased by $242,247 in 2005 ($2.317,016) from 2004 ($2,074,769). (R. Exh. 10, SLT 010054; R. Exh. 11, SLT 010067.) Thus, loss of business does not explain SLT's losses in 2005 as much as increased expenses. And, these expenses were controlled by, paid by, and posted in its books by Factor Sales.

In addition, Factor Sales or SLT could have assigned a greater number of SLT trips to SEC in 2005 than the evidence discloses. If such assignments had been made, they would more than account for the SLT's relatively small decrease in sales. Moreover, when such assignments are made, Salcido suffers no loss because the assignments are made from one controlled company to another. However, the Respondents failed to produce subpoenaed documents that were relevant to and could have proved or disproved such assignments.

Factor Sales or SLT could also have assigned regular SLT trips to Santa Fe Transport, a transportation company owned by Valencia. Both Salcido and Valencia owned competing transportation companies (SEC and Santa Fe Transport, respectively) that could have been used to siphon profits from, or increase expenses to, SLT. However, the Respondents failed to produce subpoenaed documents that could have proved or disproved such siphoning or improper expenses.

The second striking characteristic of the reported financial figures for Factor Sales and SLT is the lack of assurance provided by the accounting firm that compiled the figures and the corresponding lack of confidence that may be placed in such figures when attempting to determine the credibility of Salcido's claim that he closed SLT because of its continued and mounting losses.

Third, the Respondents failed to comply with the subpoenas and failed to produce subpoenaed documents that would have or could have substantiated or explained the reported income, expenses, profits, and losses, or on the other hand, refuted the reported figures.

Accordingly, I conclude that the Respondents have not proven, through credible and reliable evidence, that SLT suffered losses in 2005 and 2006, and have not proven that SLT was closed because of continued or mounting losses.

Effective July 1, 2005, Factor Sales subcontracted with Unified to transport grocery goods from Unified to Factor Sales stores and warehouse. SLT had previously performed these transportation services. Prior to July 1, Factor Sales represented approximately 80 percent of SLT's business. SLT continued to transport limited goods to Factor Sales' stores after July 1, such

[9] Yearly figures are for the fiscal year ending June 30.

as orange juice and milk, but the volume was small and could not support the continued existence of SLT.

Valencia stated that he tried to get business for SLT from companies located in Mexico. Valencia testified that he went to Mexico 3 days every week from May 2005 until SLT closed in his effort to generate additional business for SLT. This claim is not credible. First, SLT could not transport from inside Mexico, except for the border community. Second, even if Valencia's testimony was limited to the border community, 3 days a week, every week, for over 9 months, is an inordinately large amount of time for such limited prospects. Third, Valencia did not provide a single example of any business he obtained for SLT during these alleged, many visits.

Although Salcido closed SLT on February 6, 2006, no physical assets of SLT have been sold. SLT continues to park its trucks in the yard at its facility in San Luis, Arizona, the same facility SLT used when it was operating. Salcido closed SEC in approximately October 2006, within weeks of the start of the hearing in this case. At the time of its closure, SLT had approximately eight employees: Jesus Aguilera, Antonio Macias, Jose Marquez, Blas Martinez, Raymundo Salcido, Eduardo Siqueiros, Diana Tenorio, and Jose Vera.

7. Request for information

In the parties' April 2005 contractual, negotiation meeting, Olsen mentioned that SLT was suffering losses. The Union asked if SLT would open its books, and Olsen replied, "possibly." In the May meeting, Olsen again mentioned SLT's poor financial condition, and added that SLT might not be financially able to survive the summer of 2005. At the end of the meeting, Olsen refused to schedule another meeting until SLT received certain financial figures.

By letter dated October 19, 2005, Olsen notified the Union that the "owners" of SLT had decided to close the business. (GC Exh. 29.) Although Olsen mentioned alleged financial problems of SLT during the negotiating sessions with the Union in April and May 2005, the October 19 letter was the first time the Respondents told the Union of their decision to close SLT. After unsuccessful attempts at effects bargaining, the Union sent a letter dated December 22, 2005, to SLT requesting information as follows:

> You, representatives of San Luis Trucking and attorneys for San Luis Trucking have stated that it is the intention of San Luis Trucking to close its business. Those same individuals have stated that San Luis Trucking cannot afford to continue in business. Local 99 needs all of the information requested below regarding the stated intention to close San Luis Trucking.
>
> 1. Financial statements, including Profit and Loss Statements and Balance Sheets on a monthly, quarterly and annual basis from January 1, 2003 through November 30, 2005 for San Luis Trucking. If San Luis Trucking is on a fiscal year other than a calendar year basis, we request the same information for the fiscal years 2003, 2004 and 2005.
>
> 2. All documents showing gross income derived from delivery and any other services performed by San Luis Trucking for Factor Sales, Inc., including all of its stores known as Del Sol Markets, King Market Stores, MaxiMart Stores, IGA Warehouse Stores and Factor Warehouse, on a monthly basis from January 1, 2003 through November 30, 2005.
>
> 3. All documents showing gross income derived from delivery and any other services performed by San Luis Trucking for all other customers of San Luis Trucking on a monthly basis from January 1, 2003 through November 30, 2005.
>
> 4. All correspondence, memoranda, minutes of meetings of the Board of Directors and any other documents regarding the decision to close the business of San Luis Trucking and regarding any matter relating to the closure or potential closure of San Luis Trucking's business.
>
> 5. What is going to happen to all of the facilities and the equipment, including the trucks, of San Luis Trucking, if San Luis Trucking does go out of business?
>
> 6. What companies or individuals will be performing services formerly performed by San Luis Trucking for the various customers of San Luis Trucking, including Factor Sales, Inc. and all of its stores referred to in paragraph 2 above?
>
> 7. What is going to happen to the business licenses of San Luis Trucking?
>
> 8. What severance or other payments are going to be made to officers, directors and shareholders of San Luis Trucking if San Luis Trucking ceases its operations?
>
> 9. Is San Luis Trucking dissolving as a corporation?
>
> 10. Is any other entity going to obtain business licenses, property, leases or equipment, including trucks, of San Luis Trucking? If so, please furnish the name of each company or individual who is obtaining any of the above and describe what is being obtained by each such company.

(GC Exh. 32.) SLT received the Union's letter, but did not respond and did not provide any of the requested information.

III. ANALYSIS

A. Single Employer

The determination of whether two or more entities are sufficiently integrated to be deemed a single employer depends on all of the circumstances of the case. The inquiry focuses on whether the entities' total relationship reveals (1) centralized control of labor relations; (2) common management; (3) interrelation of operations; and (4) common ownership. *Broadcast Employees NABET Local 1264 v. Broadcast Service of Mobile, Inc*., 380 U.S. 255 (1965); *Flat Dog Productions, Inc.,* 347 NLRB No. 104 (2006). The first three factors are the most significant, and the first factor—centralized control of labor relations—is "of particular importance because it tends to demonstrate 'operational integration.'" *RBE Electronics of S.D., Inc*., 320 NLRB 80, 80 (1995); *Mercy Hospital of Buffalo*, 336 NLRB 1282, 1283–1284 (2001). However,

> No single factor in the single-employer inquiry is deemed controlling, nor do all of the factors need to be present in order to support a finding of single-employer status. "Rather,

> single-employer status depends on all the circumstances, and is characterized by the absence of the arm's-length relationship found between unintegrated entities."

Flat Dog Productions, Inc., 347 NLRB No. 104, slip op. at 2–3 (2006). "Stated otherwise, the fundamental inquiry is whether there exists overall control of critical matters at the policy level." *Emsing's Supermarket, Inc*., 284 NLRB 302, 302 (1987), enfd. 872 F.2d 1279 (7th Cir. 1989).

Centralized control of labor relations. Factor Sales handles all human resource matters for SLT and maintains all personnel and employment records for SLT employees. SLT does not have a human resources department. Factor Sales interviews applicants for SLT jobs. Factor Sales even assigns employees to SLT, such as Tenorio, who have not applied for a job at SLT. New employees for Factor Sales and SLT attend the same orientation class. Factor Sales notifies new SLT employees that Factor Sales has hired them, and that they are required to follow Factor Sales' policies or Factor Sales will terminate them. Factor Sales' employee handbook governs employee conduct at, and is issued to the employees of, Factor Sales and SLT. Factor Sales monitors SLT employees' job performance throughout their employment. Factor Sales handles workers compensation and unemployment compensation matters for SLT employees. Factor Sales coordinates SLT employees' vacations, conducts exit interviews for SLT employees, and implements layoffs and discharges of SLT employees. Factor Sales participated in the collective-bargaining sessions between SLT and the Union. Factor Sales provides SLT employees with the same or similar benefits that it provides to Factor Sales employees, such as participation in company parties and holidays, cashing of checks, eligibility for loans, and discounts at company stores. And, in its monthly newsletter *Factorizate*, Factor Sales covered and published articles about SLT employees in the same manner as it covered and published articles about Factor Sales employees. All of the circumstances of Factor Sales and SLT's operations demonstrate that Factor Sales centrally controlled the labor relations of the companies.

Valencia supervised all the employees of SLT and SEC. He also assigned the trips to SLT drivers and SEC drivers. He assigned trips within the United States to SEC drivers that would normally be assigned to SLT drivers. Moreover, among the SLT trips that Valencia assigned to SEC drivers were trips that Valencia concealed through the creation and approval of fictitious shipping documents that falsely stated the trips had been made by MC Freight.

Attempting to determine centralized control of SEC's labor relations is rendered more difficult by the fictitious records created by Valencia, coupled with the Respondents' failure to comply with the subpoenas. Nevertheless, the evidence permits the conclusion that the labor relations of SEC were controlled by SLT. Moreover, I draw an adverse inference that the Respondents' subpoenaed records, if they had been produced, would support the conclusions of centralized control of labor relations between Factor Sales and SLT, on the one hand, and SLT and SEC, on the other. *McAllister Towing & Transportation*, 341 NLRB 394 (2004); *Teamsters Local 776 (Pennsy Supply)*, 313 NLRB 1148, 1154 (1994).

Common management. Factor Sales and SLT have the same officers and directors, all of whom are related, and all of whom are related to Valencia, who is the general manager of SLT and SEC. Valencia is also the store coordinator for Factor Sales of Mexico and a manager at Factor Sales.

Common ownership. Factor Sales owns 100 percent of SLT. Salcido is the majority owner of Factor Sales and SEC. His family members own the remaining shares, including Valencia who is a shareholder of SEC.

Interrelation of operations. Factor Sales operates grocery stores, and SLT transported grocery goods to Factor Sales stores and the Factor Sales warehouse. When SLT drivers made deliveries to the stores, the Factor Sales' store managers had and exercised the authority to order the SLT drivers to undertake certain tasks, such as unloading the trucks and trash removal. SLT's dispatcher handled the trips for and the fuel expenses of SLT and SEC drivers. SLT's bookkeeper handled the shipping documents and invoices for SLT and SEC shipments. SEC drivers were assigned trips that should have been assigned to SLT drivers, although these assignments were concealed through the use of fictitious invoices from MC Freight.

Factor Sales' accounting department handled the accounting entries for Factor Sales and SLT. The same accounting firm prepared the tax returns and financial statements for Factor Sales and SLT. Zamora, the head of Factor Sales' accounting department, Gonzalez, the financial manager for Factor Sales, and Tere Lugo, an employee in Factor Sales' human resources department and the former head of that department, also worked at SLT's offices, at least occasionally.

Notwithstanding this evidence, a finding of single-employer status does not depend on a finding of interrelation of operations. *Flat Dog Productions, Inc.,* 347 NLRB No. 104; *Emsing's Supermarket, Inc*., 284 NLRB 302, 302 (1987), enfd. 872 F.2d 1279 (7th Cir. 1989).

Single-employer status is characterized by the absence of an "arm's-length relationship" between the nominally separate companies. The absence of an arm's-length relationship between Factor Sales and SLT is demonstrated by (1) Factor Sales allowing SLT to use SLT's facilities and yard without a lease and rent free, and (2) Factor Sales' recurrent loans to SLT—for payroll, working capital, and to purchase equipment—without documentation or interest. The failure of Factor Sales and SLT to document the loans and execute a lease is evidence that the companies did not operate at arm's length. *Denart Coal Co*., 315 NLRB 850, 852 (1994), enfd. 71 F.3d 486 (4th Cir. 1995).

Moreover, Salcido and Factor Sales maintained overall control of critical matters at the policy level for SLT. All expenses of SLT were paid over the signatures of Salcido or the joint signatures of two other Factor Sales managers. Factor Sales controlled the labor and personnel policies of SLT, as well as the accounting by SLT of its income and expenses. Factor Sales accounted for approximately 80 percent of SLT's business. Factor Sales participated in the collective-bargaining negotiations between SLT and the Union, even if those negotiations were used as a stalling tactic until SLT was closed.

SLT and SEC were trucking companies that operated primarily for the benefit of Factor Sales. The only difference in their

business purposes was that SLT was intended to operate in the United States and SEC was intended to operate in Mexico. However, in practice, these purposes were blurred with SEC handling trips within the United States.

Salcido and Factor Sales maintained control of critical matters at the policy level for SEC. Like SLT, SEC's expenses were paid by SLT over the signatures of Salcido or the joint signatures of two other Factor Sales managers. Moreover, SEC drivers were substituted for and interchanged with SLT drivers at the discretion of Valencia. Valencia not only freely exercised this discretion, but he also concealed his actions through fictitious documents.

In addition, when SLT's bank account was insufficient to cover SEC's expenses, Tenorio or Valencia would obtain the needed funds from Factor Sales. There is no evidence that such loans were documented. The failure of the Respondents to document the loans and execute a lease is evidence that the companies did not operate at arm's length. *Denart Coal Co*., supra. SEC leased all of its trucks from SLT for $300 per month per truck.

The interrelationship between SLT and SEC's operations is convincingly demonstrated by SLT's practice of offering customers the option of choosing whether to receive invoices from SLT or SEC. This option was given to customers without regard to the company that actually shipped the goods for the customer. After the customer told SLT, through Tenorio, the name of the company it wanted to receive an invoice from, SLT would prepare an invoice on the requested letterhead and send it to the customer. And, without regard to the invoice, the customers sent their payments to SLT. SLT and SEC also used the same person and procedure in collecting delinquent accounts.

The evidence in this record establishes the existence of the four single-employer factors for Factor Sales and SLT, as well as for SLT and SEC. In consideration of all the circumstances surrounding the ownership, operation, and control of Factor Sales, SLT, and SEC, the evidence demonstrates, and I conclude, that Factor Sales and SLT are single employers, and that SLT and SEC are single employers.

The General Counsel argues, alternatively, that SEC was the alter ego of SLT. SLT and SEC operated concurrently. SLT closed in February 2006, and SEC ceased delivering to the United States at the same time. SEC remained open in Mexico until approximately October 2006, within weeks of the start of the hearing in the present case. However, there is no evidence that SEC continued to operate in Mexico after SLT's closing. The alter ego doctrine is considered, in general, when one employer succeeds another. The single-employer doctrine is examined in the case of two ongoing businesses. *NLRB v. Hospital San Rafael, Inc*., 42 F.3d 45, 50 (1st Cir. 1994), cert. denied 516 U.S. 927 (1995). SLT and SEC were two ongoing businesses and are more appropriately considered under the single-employer doctrine.

B. Interrogations—Section 8(a)(1)

The test for determining whether an unlawful interrogation has occurred is whether, under all the circumstances, the alleged interrogation reasonably tends to restrain, coerce, or interfere with employees in the exercise of rights guaranteed by the Act. In making this determination, all of the surrounding circumstances must be considered. Either the words themselves or the context in which they are used must suggest an element of coercion or interference. *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Union Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Relevant circumstances include the background, the time, place, and method of the interrogation, the nature of the information sought, the personnel involved, the known position of the employer, whether the employee was given assurances that there would be no reprisals, whether a valid purpose for the interrogation was communicated to the employee, the truthfulness of the employee's response, and whether the employee is an open union adherent. *Performance Friction Corp*., 335 NLRB 1117 (2001), citing *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964); *Rossmore House*, supra; *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). These factors should not be applied mechanically, and the analysis does not require strict evaluation of each factor. *Medcare Associates, Inc*., 330 NLRB 935 (2000).

After the Union won the election in January 2005, Valencia questioned Quezada about his attitude concerning the Union. Valencia asked Quezada similar questions, approximately on a weekly basis, until the end of Quezada's employment at SLT in July 2005. There is no evidence that Quezada had, at any time, disclosed his attitude toward the Union.

These interrogations occurred at the workplace, by the general manager of the company, and to an employee who had not disclosed his attitude toward the Union. The questions solicited sensitive information, and no assurances were given. Quezada avoided answering the questions by replying that he just wanted to keep his job and move forward. In similar circumstances, the Board has found that interrogations seeking an employee's attitude about the union violated Section 8(a)(1) of the Act. *Pleasant Manor Living Center*, 324 NLRB 368 (1997). Under all of the circumstances, Valencia's questioning of Quezada was coercive and violated Section 8(a)(1) of the Act.

C. Promulgation of Rule Prohibiting Drivers from Speaking to Mechanics—Section 8(a)(1) and (5)

When an employer institutes work rules that are "likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement." *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enf. mem. 203 F.3d 52 (DC Cir. 1999). A rule prohibiting employees from talking to each other, without regard to working hours or the employees' own time, is unlawful. *Our Way, Inc*., 268 NLRB 394, 394 (1983). A work rule that is lawful on its face may still be unlawful when the rule is instituted in response to union activity. *City Market, Inc*., 340 NLRB 1260, 1260 (2003).

In June 2005, Valencia told Marquez, a mechanic, that he was not allowed to speak to the drivers unless Vera was present. Valencia also told Aguilera, a driver, that he was not allowed to speak with Marquez. Valencia's "rule" unlawfully infringes on the rights of employees to confer about terms and conditions of employment, and it is likely to have a chilling effect on Section 7 rights. Moreover, the "rule" was instituted while the Union and SLT were in the process of negotiating a

collective-bargaining agreement, and the "rule" was limited to drivers' discussions with Marquez, an unknown union advocate, without the presence of Vera, a known union adversary.

In addition, drivers were regularly required to speak with the mechanics so that any problems with the trucks could be properly addressed. The new rule substantially limited this necessary requirement of the drivers and mechanics' positions, and the Respondents have offered no justification for the rule. The timing and circumstances of the rule show that it was instituted in response to and as a deterrent to union activity. Accordingly, SLT's rule prohibiting Marquez from speaking to drivers unless in the presence of Vera, and Aguilera from speaking to Marquez, violates Section 8(a)(1) of the Act.

The Act requires an employer to bargain collectively with the representative of his employees with respect to terms and conditions of employment. An employer violates Section 8(a)(1) and (5) of the Act by unilaterally, materially, and substantially changing the employees' terms and conditions of employment. *Pepsi-Cola Bottling Co.*, 330 NLRB 900 (2000).

The new work rule imposed by Valencia in June 2005 regarding discussions between SLT drivers and a mechanic was unilaterally imposed and was a material and substantial change in the conditions of employment. Certainly, in a company where the drivers must speak to the mechanics for the good of the equipment and the safety of the drivers, the imposition of a work rule that limits such conversations to situations where an antiunion mechanic is present constitutes a substantial and material change in the terms and conditions of employment.

The Respondents argue that Valencia's goal in restricting conversations between drivers and one mechanic was not improper. This argument ignores the chilling effect of the rule and the rule's discrimination between the antiunion mechanic and the mechanic whose sympathies were unknown. The Respondents also argue that the restriction was imposed on Aguilera to prevent Aguilera from taking so much of Marquez' time. This claim is not credible and is rejected. There is no credible evidence that Aguilera had previously taken much of Marquez' time in discussing mechanical problems. Moreover, the discriminatory application of the rule and the circumstances surrounding the imposition of the rule demonstrate that the work rule was not imposed for this alleged purpose, but rather was imposed for the purpose of restricting employees' Section 7 activity.

SLT's rules prohibiting Marquez from speaking to drivers unless in the presence of Vera and prohibiting Aguilera from speaking to Marquez violate Section 8(a)(1) and (5) of the Act.

D. Increased Enforcement of Rules Because of Union Activity—Section 8(a)(1), (3), and (5)

An employer violates Section 8(a)(1) and (3) of the Act when it increases discipline of its employees or more strictly enforces its work rules in response to union activities. *Dynamics Corp. of America*, 286 NLRB 920, 921 (1987), enfd. 928 F.2d 609 (2d Cir. 1991). "If the General Counsel demonstrates that the pattern of discipline after the commencement of union activity deviated from the pattern prior to the start of union activity, a prima facie case of discriminatory motive is established requiring the Respondent to show that its increased discipline was motivated by considerations unrelated to its employees' union activities." *Jennie-O Foods, Inc.*, 301 NLRB 305, 311 (1991).

SLT started issuing discipline and absence reports to its employees after the Union's organizing campaign began. Moreover, the frequency of the discipline and absence reports dramatically increased after the Union won the election in January 2005. Accordingly, the General Counsel has established a prima facie case of discriminatory motive in the issuance and frequency of these reports.

The Respondents assert that SLT did not change its practice regarding absence and discipline reports after the Union won the election, but rather, SLT simply continued to apply its preexisting policy. In making this argument, the Respondents ignore the uncontradicted evidence that no such reports had been issued before the start of union activities and that the frequency of such reports substantially increased after the Union won the election. The Respondents' argument is rejected.

The Respondents also contend that the attendance and disciplinary matters addressed in the written warnings were meritorious, and therefore, SLT had a proper, nondiscriminatory reason for issuing the reports. At the hearing, the employees who were issued the reports explained why the factual bases for some of the reports were not true; however, the evidence establishes that SLT had a factual basis for issuing some, if not many, of the reports. Nevertheless, whether there were factual bases for issuing some or many of the reports is not the question; the question is why did the frequency of the attendance and disciplinary reports substantially increase after the Union won the election. The Respondents presented no credible evidence at the hearing to answer these questions or to meet their burden in overcoming the General Counsel's prima facie case. It may be that before the election none of SLT's drivers had been late, or absent, or engaged in poor performance to the same extent as they had after the Union won the election. But if that unlikely event were true, the Respondents, who would possess such information, had the burden of proving it. The Respondents failed to prove that SLT applied its policy on the issuance of disciplinary and attendance reports in the same manner before the Union won the election as it did after the Union won the election.

For the foregoing reasons, the Respondents unlawfully and discriminatorily increased the issuance of attendance and disciplinary reports to SLT drivers after the Union won the election in January 2005. These actions violate Section 8(a)(1) and (3) of the Act.

An employer's change in the enforcement of attendance and disciplinary rules represents a change in the employees' terms and conditions of employment. *Womac Industries, Inc.*, 238 NLRB 43, 43 (1978). Accordingly, the employer must bargain with the employees' representative before instituting such a change. *Hyatt Regency Memphis*, 296 NLRB 259, 263–264 (1989), enfd. mem. 944 F.2d 904 (6th Cir. 1991). SLT did not bargain with the Union before instituting changed and stricter enforcement of its rules regarding the issuance of attendance and disciplinary reports. Accordingly, SLT violated Section 8(a)(1) and (5) of the Act.

E. Subcontracting of SLT's Transportation Services to Unified—Section 8(a)(1) and (5)

An employer's decision to subcontract work performed by bargaining unit members is a mandatory subject of bargaining. *Fibreboard Paper Products v. NLRB*, 379 U.S. 203 (1964). On the other hand, an employer's economically based decision to close all or a portion of its business constitutes a change in the scope and direction of the business. Bargaining over such a management decision is not mandated unless "the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business." *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 679 (1981).

It is undisputed that the Respondents did not notify or attempt to bargain with the Union concerning their decision to use Unified instead of SLT to transport grocery goods for Factor Sales. It is also undisputed that the Respondents did not close SLT, or any other part of their business, when SLT's business was transferred to Unified in July 2005. The question is whether the Respondents' decision to use Unified rather than SLT to transport Factor Sales' grocery goods was a change in the scope and direction of the Respondents' business (and not subject to mandatory bargaining), or whether the decision was more akin to subcontracting the work performed by SLT's drivers (and, therefore, subject to mandatory bargaining). In resolving this question, consideration has been given to all of the circumstances in this record, including the following.

The Respondents' switch from SLT to Unified did not alter the basic operations of Factor Sales. Grocery goods were still transported from Unified to Factor Sales' stores and warehouse. See *Gaetano & Associates, Inc*., 344 NLRB 531, 533 (2005), enfd. 183 Fed. Appx. 17 (2d Cir. 2006). ("We find that the subcontracting at issue here involves carpentry [herein, transportation] work previously performed by unit employees and that the substitution of the subcontractor's employees for those of the Respondent did not alter the Respondent's enterprise.") The essential difference in the substitution of Unified for SLT was the identity of the drivers who transported those grocery goods. No capital investment was made by or contemplated by the Respondents in connection with its decision. See *Fibreboard Paper Products*, 379 U.S. at 213.

The Respondents have at all times maintained SLT's trucks "in a state ready for activation." *Finch, Pruyn & Co*., 349 NLRB No. 28, slip op. at 7 (2007). Although SLT formally shut down its operations in February 2006, SLT's trucks remain parked in the yard at SLT's facilities in San Luis, Arizona, facilities that Factor Sales has allowed SLT to use without cost. Moreover, Factor Sales has no written agreement with or formal commitment to do business with Unified in the future. Accordingly, the Respondents could easily return SLT to its former business of transporting grocery goods for Factor Sales.

The Respondents' decision to substitute Unified for SLT to transport grocery goods for Factor Sales was motivated, at least in part, by labor costs, which are amenable to collective bargaining. This is demonstrated by the Respondents' reliance on SLT's alleged losses as a reason for the transfer of SLT's business to Unified. *Dorsey Trailers, Inc*., 321 NLRB 616, 616–617 (1996), enf. denied 134 F.3d 125 (3d Cir. 1998); *Rock-Tenn Co.,* 319 NLRB 1139, 1139 fn. 2 (1995); *Furniture Renters of America, Inc*., 311 NLRB 749, 750 (1993), enf. denied 36 F.3d 1240 (3d Cir. 1994) ("labor costs were a factor in the subcontracting decision").

The Respondents' contend that their decision to use Unified in place of SLT was not based on labor costs. However, even if this contention were true, the Respondents' duty to bargain over the decision would remain. *Torrington Industries*, 307 NLRB 809, 810 (1992). Nevertheless, the Respondents' contention is belied by the evidence and by the Respondents' other contentions in this case. For example, the Respondents contend that a factor in their decision was work performance by SLT's drivers, such as damaged goods and late deliveries, and the promised work performance of Unified's drivers, such as returning pallets and assistance in keeping stores clean. (E.g., R. Posthearing Br. p. 46.) Alleged work performance is a cost of labor and is amenable to bargaining. Each of these matters relating to work performance could have been negotiated. See *Furniture Renters of America, Inc*., 311 NLRB at 750–751. Instead, neither SLT nor Factor Sales mentioned any of these factors when the parties met to negotiate a contract in the spring of 2005.

The Respondents' contention that the subcontracting of SLT's work to Unified was not based on labor costs is also undermined by the Respondents' reliance on SLT's alleged losses as a reason for the transfer of SLT's business to Unified. Certainly, labor costs are a factor, and often a predominant factor, in operating losses. To the extent that SLT actually incurred operating losses (which, as noted above, was not credibly proven by the Respondents), one of the components of such losses (viz., labor costs) is amenable to bargaining and could have been negotiated with the Union.

The Respondents' decision to substitute Unified for SLT to transport grocery goods for Factor Sales was not a decision to change the scope and direction of the Respondents' business. Essentially the same transportation of grocery goods to Factor Sales was made before and after July 2005.[10] The primary difference after July 2005 was that different drivers transported the grocery goods. Accordingly, and for all the foregoing reasons, the Respondents' substitution of Unified for SLT to transport Factor Sales' grocery goods more closely resembles the type of subcontracting found to be a mandatory subject of bargaining in *Fibreboard* than a change in the scope and direction of the employer's business found in *First National Maintenance Corp*. See also *Torrington Industries*, 307 NLRB at 811.

Moreover, the Respondents' bald assertion that bargaining would not have changed their decision to use Unified instead of SLT to transport Factor Sales' grocery goods is insufficient to establish that their decision to subcontract the transportation

[10] The only difference in the transportation of grocery goods involved Factor Sales' decision to stop purchasing from National Grocers. However, as noted above, the Respondents failed to produce evidence showing the extent or amount of business Factor Sales had previously done with National Grocers. The Respondents also failed to produce evidence showing that their decision to subcontract SLT's business to Unified caused or furthered their ability to cease purchasing from National Grocers.

was not a mandatory subject of bargaining. *Comar, Inc*., 349 NLRB No. 33, slip op. at 28 (2007) (and cases cited therein).

The Respondents' subcontracting of SLT's business to Unified is essentially the kind of subcontracting involved in *Fibreboard*. It is not necessary that the Respondents' subcontracting be the same as in *Fibreboard* for that court's analysis to apply. *Torrington Industries*, 307 NLRB at 810. Indeed, the Board has recognized that the Supreme Court implicitly used a balancing test in *Fibreboard*. *Torrington Industries*, 307 NLRB at 810, citing *Dubuque Packing Co*., 303 NLRB 386 (1991). The Respondents' decision to replace SLT with Unified to transport Unified's grocery goods involved the substitution of one group of workers for another to perform the same work at the same locations. In the circumstances of this case, "there is no need to apply any further tests in order to determine whether the decision is subject to the statutory duty to bargain. The Supreme Court has already determined that it is." *Torrington Industries*, 307 NLRB at 810.

Accordingly, the Respondents' decision to subcontract or transfer SLT's transportation business to Unified was not a change in the scope and direction of the Respondents' business. The decision was not a matter of core entrepreneurial concern and outside the scope of bargaining. Moreover, the decision was based, at least in part, on labor costs and performance that the Respondents could have bargained with the Union. Accordingly, and for all of these reasons, the Respondents' failure to notify the Union or bargain with it concerning the decision to subcontract SLT's work to Unified violates Section 8(a)(5) and (1) of the Act.

Alternatively, "it is well established that an employer's subcontracting decision cannot be a legitimate entrepreneurial decision exempt from bargaining when, as here, antiunion considerations are at the heart of the alleged fundamental change in the direction of the corporate enterprise." *Joy Recovery Technology Corp*., 320 NLRB 356, 357 fn. 3 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998). Thus, even if the Respondents' decision to subcontract SLT's transportation business to Unified were deemed to constitute a change in the scope and direction of the business, the decision would nevertheless be a subject of mandatory bargaining if it was motivated by antiunion considerations. The evidence demonstrates that the Respondents' decision to subcontract SLT's transportation business to Unified was motivated by and was in response to the union activities of SLT's drivers.[11] Accordingly, the Respondents' failure to notify the Union or bargain with it concerning the decision to subcontract SLT's work to Unified violates Section 8(a)(5) and (1) of the Act.

The General Counsel charges that the Respondents subcontracted unit work to "third-party enterprises" after approximately March 2005, and that the Respondents violated the Act by failing to afford the Union an opportunity to bargain over this mandatory subject of bargaining. (Complaint pars. 7(a), 8(a) and (b).) Putting aside the Respondents' subcontracting of unit work to Unified in July 2005, the Respondents had subcontracted to third-party enterprises since approximately 2004, and on a piecemeal basis, unit work that SLT's assigned drivers were, for various reasons, unable to perform.

The General Counsel bears the burden of showing, by a preponderance of the evidence, that allegedly unlawful subcontracting constituted a material and substantial change in the Respondents' practices. *Great Western Produce*, 299 NLRB 1004, 1009 fn. 2 (1990). There is, of course, no dispute that the Respondents' July 2005 subcontracting to Unified constituted a material and substantial change in the Respondents' practices. However, the General Counsel has failed to show that the Respondents' piecemeal subcontracting to other, third-party enterprises after March 2005 was substantially or materially different from the Respondents' piecemeal subcontracting before March 2005.

I realize that the Respondents' failure to comply with the General Counsel's subpoenas prevented the General Counsel from proving a substantial difference in subcontracting, other than to Unified, before and after March 2005. Accordingly, an adverse inference, that the difference in such subcontracting was substantial, could be appropriate. However, no such adverse inference is made. Where adverse inferences have been in this decision, the inferences supported and corroborated other evidence. With respect to the amount of subcontracting before and after March 2005, there is no other evidence establishing such amounts that would be corroborated by an adverse inference. Accordingly, an adverse inference is not made.

Accordingly, the Respondents did not violate Section 8(a)(5) and (1) of the Act by unilaterally continuing their piecemeal subcontracting (excluding the July 2005 subcontracting to Unified) after March 2005.

F. Subcontracting of SLT's Transportation Services—Section 8(a)(1) and (3)

An employer violates Section 8(a)(3) and (1) of the Act when it subcontracts bargaining unit work in response to union activity. *Gaetano & Associates Inc*., 344 NLRB 537 (2005), enfd. 183 Fed. Appx. 17 (2d Cir. 2006). Discriminatory subcontracting of work from a bargaining unit has "been found consistently to violate Section 8(a)(3) when motivated by antiunion animus." *Lear Siegler, Inc*., 295 NLRB 857, 860 (1989). The question in such cases is the employer's motivation, and accordingly, *Wright Line* guides the analysis. *Wright Line*, 251 NLRB 1083 (1980), enfd. 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). The General Counsel has the burden of proving by a preponderance of the evidence that antiunion sentiment was a motivating factor in the subtracting decision.

If the General Counsel satisfies his initial burden under *Wright Line*, the burden then shifts to the employer, in the nature of an affirmative defense, to demonstrate that the same action would have taken place even in the absence of the protected conduct. In meeting this burden, the employer cannot simply state a legitimate reason for the action taken, but rather must persuade by a preponderance of the evidence that it would have taken the same action in the absence of the protected activity. *T & J Trucking Co*., 316 NLRB 771, 771 (1995). Never-

[11] The unlawful motivation for the Respondents' decision to subcontract SLT's transportation business to Unified is also addressed in the next section.

theless, the employer's defense does not fail simply because not all of the evidence supports it, or even because some evidence tends to negate it. *Merrilat Industries*, 307 NLRB 1301, 1303 (1992). The ultimate burden of proving discrimination always remains with the General Counsel. *Wright Line*, supra.

Antiunion motivation may be established through direct or circumstantial evidence. An example of such circumstantial evidence includes the timing of the decision. "It is well settled that the timing of an employer's action in relation to known union activity can supply reliable and competent evidence of unlawful motivation." *Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004). In the present case, Factor Sales met with Unified and decided to subcontract its transportation work to Unified shortly after the Union won the election to represent SLT's workers. Moreover, Unified's proposal that Factor Sales accepted in January 2005 was the same proposal that Factor Sales had rejected in the spring of 2004. *See Lear Siegler, Inc*., 295 NLRB 857, 859 (1989) (where the Board noted that the conditions asserted by the Respondent for the transfer of unit work "existed months before the [] layoffs").

An employer's inconsistent explanations for its decision warrants an inference that the real reason for its decision is not among those asserted. *Gaetano & Associates Inc*., 344 NLRB at 534 fn. 18, citing *Zengel Bros*., 298 NLRB 203, 206 (1990). During the hearing and in its brief, the Respondents assert that the decision to use Unified for Factor Sales' transportation needs was due to several reasons, including the work performance of SLT's drivers, which resulted in damaged goods and late deliveries. However, neither SLT nor Factor Sales ever disciplined SLT's drivers for their alleged poor performances. Moreover, when Factor Sales and SLT met with the Union to attempt to negotiate a contract, the Respondents did not mention anything concerning the work performance of SLT's drivers.

The Respondents assert other reasons in support of their decision to subcontract SLT's work to Unified. These reasons are listed above under the subheading II,D,5, "Respondents' actions after the Union was certified to represent SLT's employees—Subcontracting." As detailed above, these reasons are not credible and do not support the Respondents' decision to subcontract to Unified. Moreover, two of the reasons—fees for less than full truckloads and Unified's price comparisons and special prices to its members—are concerned only with the cost of and fees for Unified's service. However, the Respondents disavow selecting Unified because of lower costs. (R. Posthearing Br. p. 25, fn. 3.)[12] Thus, the Respondents base their decision, in part, on the claim that Unified's fees, while more than SLT's, could even have been more expensive. This contrived reason is not credible or supportable and is rejected.

The direct evidence of antiunion motivation includes Salcido's statements in May 2004 to SLT and Factor Sales' employees. These statements, during a meeting presided over by Salcido while the Union was attempting to organize the Respondents' employees, cautioned employees on how they would vote in the upcoming election for the Union because if the Union came in to SLT, Salcido would close down SLT the same way he had closed down one of his other stores. In addition, the Respondents retained a labor consultant who made a similar threat to an employee by stating that Salcido had a lot of money and could close the Company. After the January 2005 election, Salcido told an SLT employee that although the Union was already at SLT, Salcido would not allow the Union to remain there. Salcido said that he would rather close down the business or close down the trucks. In July 2005, Salcido carried out his threat to close down SLT's trucks when he subcontracted the delivery of Factor Sales' grocery goods to Unified. In February 2006, he carried out his threat to close SLT.

Salcido's motive for subcontracting the delivery of Factor Sales grocery goods is displayed in the San Diego meeting with Unified that Salcido held in September 2005. Salcido requested the meeting because the Union represented SLT's employees, and Salcido was concerned that Unified's high prices would disclose that he decided to use Unified in order to avoid using SLT. Although the Unified representatives assured Salcido that comparing SLT's prices with Unified's price's was inapt, the more important point is the reason Salcido called the meeting. Salcido did not want his subcontracting decision to "appear" as if he was trying to avoid the Union. Moreover, that Unified representatives had to tell Salcido, 3 months after Unified replaced SLT in transporting Factor Sales' grocery goods, the alleged differences in the services provided by Unified over SLT shows that these differences were not a motivating factor in Salcido's decision to subcontract SLT's work to Unified.

The Respondents subcontracted SLT's work to Unified because of and in response to the union activities of SLT's workers. In addition, the Respondents have not shown that this subcontracting decision would have been made in the absence of such protected activities. Accordingly, the Respondents violated Section 8(a)(3) and (1) of the Act.

The General Counsel also charges that the Respondents violated Section 8(a)(3) and (1) of the Act by subcontracting unit work to third-party enterprises after March 2005. (Complaint, pars. 7(a), 10.) To the extent this allegation involves the Respondents' piecemeal subcontracting to companies other than Unified, the evidence fails to disclose whether such subcontracting substantially changed after March 2005 from the Respondents' subcontracting practice before March 2005. Accordingly, this charge, insofar as it relates to subcontracting other than the July 2005 subcontracting to Unified, should be dismissed.

G. Constructive Discharges of Quezada, Gonzalez, and Sandoval—Section 8(a)(1), (3), and (5)

To establish a constructive discharge, two elements must be proven. First, the Respondents imposed a burden on the employee, or allowed the burden to prevail, which causes and is intended to cause a change in working conditions so difficult or unpleasant as to force the employee to resign; and second, the burden was imposed because of the employee's union activities. *Bolivar Tee's Mfg. Co*., 334 NLRB 1145 (2001), enfd. 61

[12] The Respondents do not allege or rely on lower costs or fees of Unified for the subcontracting decision. Moreover, the Respondents failed to produce subpoenaed documents relating to such costs and fees. Accordingly, I conclude that Unified's fees are more than the fees that SLT had charged to Factor Sales.

Fed. Appx. 711 (DC Cir. 2003). The withdrawal of job assignments, with its concomitant decrease in pay, is a sufficient burden to force an employee to resign. *Ellis Toyota*, 266 NLRB 442 (1983).

Sandoval, Gonzalez, and Quezada resigned their jobs at SLT because of the decreased number of trips and the resulting decrease in income after July 1, 2005. Gonzalez and Quezada resigned in July 2005, and Sandoval resigned in November 2005. The decrease in trips assigned to SLT's drivers resulted from the Respondents' subcontracting of unit work to Unified in July 2005. This subcontracted work had comprised the majority of SLT's business. Thus, the Respondent's were aware that subcontracting this work would cut the number of trips and income of SLT drivers by 50 percent or more. Moreover, this calamitous drop in SLT's business was consistent with, and in furtherance of, Salcido's threats to shut down SLT's trucks and shut down SLT's business if the Union came into SLT.

As discussed above, the Respondents subcontracted SLT's bargaining unit work because of and in response to the employees' union activities. The Respondents intended to close SLT after the Union won the election in January 2005. After the election, Salcido promptly resurrected and agreed to Unified's year-old and previously rejected proposal. The subcontracting of the unit work was the prelude to the Respondents' central goal of closing SLT. The Respondents intended to reduce the income of SLT's employees, which would cause the employees to resign, all of which was in furtherance of the Respondents' intent to close SLT. *See Lear Siegler, Inc*., 295 NLRB 857 (1989). Accordingly, the Respondents constructively discharged Sandoval, Gonzalez, and Quezada in violation of Section 8(a)(3) and (1) of the Act.

As set forth in Section III,D above, the Respondents violated Section 8(a)(5) and (1) of the Act by unilaterally subcontracting unit work to Unified without notifying the Union or affording the Union an opportunity to bargain. And, as set forth in the present section, this unlawful action was done with the intent to reduce the employees' income and force the employees to resign. Sandoval, Gonzalez, and Quezada resigned because of the decrease in their trips and income after SLT's transportation business was subcontracted to Unified. Accordingly, the Respondents constructively discharged Sandoval, Gonzalez, and Quezada in violation of Section 8(a)(5) and (1) of the Act. *Borden, Inc*., 308 NLRB 113, 114–115 (1992).

The Respondents contend that Quezada resigned because of what he thought might happen to SLT's business in the future, and, therefore, he did not resign because of an existing burden placed on him by the Respondents. However, Quezada, like Gonzalez, resigned in July 2005, after the Respondents subcontracted SLT's unit work to Unified. Also, Raimundo Salcido told Quezada that Quezada's income would be reduced by 50 percent, and this statement precipitated Quezada's resignation.

The test for determining whether an employee is an agent of the employer is whether, under all of the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management. *Waterbed World*, 286 NLRB 425, 426–427 (1987), enfd. 974 F.2d 1329 (1st Cir. 1992). Thus, this test is satisfied when the employee is held out as a conduit for transmitting information from management to other employees. *Cooper Industries*, 328 NLRB 145 (1999). Among other relevant circumstances are (1) the position and duties of the employee, and the context in which the action occurred, *Jules V. Lane*, 262 NLRB 118, 119 (1982); (2) whether the conduct is related to the duties of the employee, *Hausner Hard-Chrome of KY, Inc*., 326 NLRB 426 (1998); and (3) whether the conduct was consistent with other statements or actions of the employer. Id. at 428. Section 2(13) of the Act provides that "whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

As a dispatcher, Raimundo Salcido assigned trips to the drivers, coordinated the drivers' trips, instructed the drivers when to report for work, and issued written warnings to drivers who arrived late for work. His statement to Quezada that Quezada's income would be reduced by 50 percent was made after the Respondents had subcontracted unit work to Unified, and his statement related to Quezada's duties because the statement concerned Quezada's future trips and income. Under all the circumstances, Raimundo Salcido was acting as the Respondents' agent when he told Quezada that Quezada's income would be reduced by 50 percent. Accordingly, Quezada could and did reasonably rely on Raimundo Salcido's statement in deciding that he could not continue working for SLT with a 50-percent reduction in income.

The Respondents argue that the record does not contain adequate evidence to support the General Counsel's claim that Sandoval, Gonzalez, and Quezada's hours were reduced. Sandoval, Gonzalez, and Quezada testified that their hours were reduced, and corroborative evidence is not necessary because their testimony is credible. Moreover, the Respondents failed to provide the subpoenaed, documentary evidence relating to the hours of these employees (GC Exh. 5, par. 77), and I infer that such documentary evidence would support the testimony of these employees. Also, Sandoval, Gonzalez, and Quezada's testimony concerning their loss of income is consistent with and supported by SLT's loss of work to Unified on and after July 1, 2005.

The Respondents also claim that the record does not contain adequate evidence to support the claim that the reduction in hours of SLT's drivers was caused by subcontracting. This contention ignores the Respondents' subcontracting of unit work to Unified on July 1, 2005, unit work that had constituted the majority of SLT's business. If the reduction in hours of SLT's drivers was caused by some other reason and not by the subcontracting of work to Unified, the Respondents failed to prove the existence and causal effect of this other reason.

H. SLT's Closure—Section 8(a)(5) and (1)

First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981), involved an employer that provided maintenance services for commercial customers. The employer terminated its maintenance contract with a third party (Greenpark Care Center) solely for economic reasons involving a dispute over its contractual fee. The terminated contract resulted in the loss of unit jobs at Greenpark. The question before the Court was whether the employer was obligated to bargain over its decision to terminate its contract with Greenpark. The Court adopted a

balancing test, in which the benefit to the collective-bargaining process is weighed against the burden placed on the conduct of the business, and held that an employer has no obligation to bargain over a decision to close a portion of its business solely for economic reasons. *First National Maintenance Corp. v. NLRB*, 452 U.S. at 679, 686.

The Respondents contend that their decision to close SLT was a "partial closing," and therefore not a mandatory subject of bargaining. *First National Maintenance Corp*. does not support such a broad proposition. The Supreme Court's holding did not apply to any and all "partial closings." The court explained the limits of its holding to the specific facts of that case, including (1) the employer had no intention to move the discontinued operation elsewhere; (2) the employer was motivated solely by economic considerations involving its fee with the customer, a matter over which the union had no control; and (3) the union was not selected as the bargaining representative until well after the employer's dispute with the customer arose. *First National Maintenance Corp. v. NLRB*, 452 U.S. at 687–688. These facts do not exist in the present case.

In the present case, the Respondents (1) moved the closed operation elsewhere by subcontracting it to Unified; (2) were not motivated solely by economic considerations; and (3) the Union was selected as the bargaining representative before the Respondents made their decision to subcontract transportation services to Unified and before the Respondents decided to close SLT.

In *First National Maintenance Corp*., the Court's balancing test was struck in favor of the employer, in part, because of the Court's view of the union's purpose in seeking bargaining. "The union's practical purpose in participating, however, will be largely uniform: it will seek to delay or halt the closing." 452 U.S. at 681. However, in the present case, the Respondents themselves delayed implementing their decision to close SLT. The decision to close SLT was first announced on October 19, 2005, but SLT was not closed until February 6, 2006. There was more than sufficient time to bargain about the Respondents' decision to close SLT, and the Respondents' delay in carrying out its decision mitigates, if not nullifies, the Court's presumption of the union's purpose in seeking a delay.

The Respondents label their decision to close SLT "a basic change in operations . . . related to the very core of the business, i.e., the decision of whether to be in business or to not be in business." (R. Posthearing Br. p. 38.) However, the Respondents fail to provide any explanation or analysis for these labels. The decision to close SLT emanated from the Respondents' decision to use Unified to transport Unified's goods to Factor Sales rather than SLT, and this decision was not a basic change in operations related to the core of the Respondents' business. Rather, this decision related to which company was going to transport Unified's grocery goods to Factor Sales, Unified or SLT. In turn, this decision was motivated, at least in part, by labor costs and union animus.

The Respondents contend that the decision to close SLT removed the Respondents from the trucking business, and accordingly, the decision changed the Respondents' basic operating structure. (R. Posthearing Br. pp. 40–41.) However, the premise for that contention simply restates the Respondents' decision, viz., the Respondents' decided to close SLT, after having eliminated SLT's business. Merely removing the employer from the operational aspects of a business is not sufficient to remove the requirement to bargain concerning the decision. If it were sufficient, many or most subcontracting decisions would not be subject to mandatory bargaining, contrary to *Fibreboard Paper Products v. NLRB*, 379 U.S. 203 (1964). See *Torrington Industries*, 307 NLRB at 810.

The Respondents rely on *NLRB v. Adams Dairy, Inc*., 350 F.2d 108 (8th Cir. 1965), for the contention that their decision to use Unified rather than SLT was not a mandatory subject of bargaining. In *Adams Dairy, Inc*., the dairy was in the business of processing and selling milk and other dairy products. Driver-salesmen employees (the bargaining unit) and independent contractors handled the dairy's sales. The independent contractors bought the products from the dairy for resale to retailers. The driver-salesmen were paid a commission on each unit they sold. The use of driver-salesmen placed the dairy at a competitive disadvantage. The dairy changed its distribution system, without notice to the union, to include only independent contractors and to eliminate the driver-salesmen. The Board held that the employer's change in its distribution system was a mandatory subject of bargaining and that the dairy violated Section 8(a)(5) and (1) of the Act by failing to bargain concerning that decision.

The Eighth Circuit held that the decision was not a mandatory subject of bargaining. The court stated:

> In Adams Dairy there is a change in basic operating procedure in that the dairy liquidated that part of its business handling distribution of milk products. Unlike the situation in Fibreboard, there was a change in the capital structure of Adams Dairy which resulted in a partial liquidation and a recoup of capital investment.

350 F.2d at 111. The present Respondents did not change their basic operating procedure when they contracted with Unified to deliver grocery goods to Factor Sales. Before and after this decision was effected in July 2005, the Respondents paid a fee to transport its grocery goods from Unified to Factor Sales. Before July 2005, the fee was paid to SLT, and after July 2005, the fee was paid to Unified. Also, the Respondents did not liquidate any part of SLT's business, while the dairy did liquidate the company vehicles used by the driver-salesmen and sold the vehicles to the new independent contractors "in a partial liquidation and a recoup of capital investment." *NLRB v. Adams Dairy, Inc*., 350 F.2d at 110. Moreover, the court relied on the absence of union animus in the dairy's decision to change its distribution system. 350 F.2d at 113; see *NLRB v. Adams Dairy, Inc*., 322 F.2d 553, 557–559 (8th Cir. 1963); *NLRB v. Drapery Mfg. Co*., 425 F.2d 1026, 1027 (8th Cir. 1970). However, the present Respondents' decision to close SLT was motivated by union animus. Accordingly, *NLRB v. Adams Dairy, Inc*. is inapposite to the present case.

The Respondents also rely on *NLRB v. Drapery Mfg. Co*., 425 F.2d 1026. In that case, the owners of the parent company acquired ownership of the employer for the purpose of having the employer do work that the parent company had previously subcontracted to a third party. The employer suffered increas-

ing losses and was closed for economic reasons. After a previous decision in which the parent company and the employer were held to be a single employer, the Board held that the employer violated Section 8(a)(5) of the Act by failing to bargain over the decision to close. The Eighth Circuit distinguished *Fibreboard Paper Products* and relied on *Adams Dairy, Inc*. in holding that the Respondents' decision to close the employer did not require bargaining. *Drapery Mfg. Co*. is inapposite because of the following operative facts in that case, which are absent in the present case: (1) the capital structure of Drapery was changed when Drapery's machinery was dismantled and removed from the premises; and (2) the decision to close Drapery was motivated solely by economic losses, not union animus.

Accordingly, the Respondents' decision to close SLT was a mandatory subject of bargaining, and the Respondents violated Section 8(a)(5) and (1) of the Act by unilaterally making that decision without bargaining with the Union.

I. SLT's Closure—Section 8(a)(3) and (1)

SLT's closure is inexorably associated with the Respondents' decision to subcontract or transfer SLT's transportation business to Unified. SLT's closure followed its loss of business to Unified just as surely as night follows day. (Valencia testified that he spent many days looking for business in Mexico, but Valencia was not a credible witness, and this testimony in particular was incredible and implausible. In any event, there is no evidence that SLT obtained any additional or new business after its business had been transferred to Unified.) Moreover, SLT's closure was the intent and goal for the Respondents' transfer of SLT's business to Unified. Accordingly, the same considerations analyzed in the Respondents' motivation to subcontract SLT's business to Unified apply equally to the Respondents' decision to close SLT.

An employer may close his entire business for any reason, even a discriminatory reason, without violating the Act. *Textile Workers v. Darlington Mfg Co*., 380 U.S. 263, 273–274 (1965). In *Darlington*, the Court ruled that an employer may terminate its entire business for any reason, even antiunion animus, without violating the Act. In that case, the employer ceased operations entirely at the affected plant and sold all the plant's machinery and equipment at auction. In the present case, the Respondents have ceased operating SLT, but they have not sold any of SLT's trucks or equipment, all of which remain at SLT's facilities in San Luis, Arizona, just as when SLT was operating. In addition, the Respondents' transfer of the bargaining unit work to Unified was done without a written contract with Unified that would obligate the Respondents to continue using Unified in the future. Thus, the Respondents are able restart SLT's operations at any time and for any reason. Accordingly, *Darlington* does not insulate the Respondents' decision to close SLT from the prohibitions or commands of Section 8 of the Act. See also *Lear Siegler, Inc*., 295 NLRB at 860.

"[A] partial closing is an unfair labor practice under § 8(a)(3) if motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing would likely have that effect." *Textile Workers v. Darlington Mfg Co*., 380 U.S. at 275:

> If the persons exercising control over a plant that is being closed for antiunion reasons (1) have an interest in another business, whether or not affiliated with or engaged in the same line of commercial activity as the closed plant, of sufficient substantiality to give promise of their reaping a benefit from the discouragement of unionization in that business; (2) act to close their plant with the purpose of producing such a result; and (3) occupy a relationship to the other business which makes it realistically foreseeable that its employees will fear that such business will also be closed down if they persist in organizational activities, we think that an unfair labor practice has been made out.

380 U.S. at 275–276. Salcido has an interest in a business other than SLT in which he could benefit from the discouragement of unionization in that business. Salcido is the owner of Factor Sales, and the Union was attempting to organize Factor Sales simultaneously with SLT. The number of employees at Factor Sales is substantially greater than the number at SLT, and the organizing effort was longer lasting at Factor Sales. The election at Factor Sales was held in March 2005, only 2 months after the election at SLT. Although the Union did not win the election at Factor Sales, the NLRB hearing officer recommended sustaining an objection and setting aside the election. On appeal of the hearing officer's recommended decision, the Board overruled the objection and certified the results of the election. However, the Board's decision was not issued until July 31, 2006. Accordingly, the hearing officer's recommended decision was pending throughout the period that Salcido subcontracted SLT's unit work in July 2005 and closed SLT in February 2006.

Moreover, Salcido was well aware of the risks of a second election because the first election at SLT in July 2004, which was lost by the Union, was set aside and a second election was held in January 2005, which was won by the Union. Thus, the closure of SLT after their employees had voted for the Union would have a substantial chilling effect on the Factor Sales employees' efforts and desire to be represented by a union, especially with the prospect of a second election at Factor Sales as there had been at SLT.

The relationships between Factor Sales, SLT, and the employees of those companies, were interrelated, and it was realistically foreseeable that Factor Sales' employees would fear that Factor Sales would be closed down if they persisted in their organizational activities. SLT drivers often worked with Factor Sales employees because SLT drivers were subordinate to Factor Sales' store managers. The store managers ordered the drivers to unload grocery goods, stock the goods, and dispose of trash from the stores. Moreover, Factor Sales' monthly bulletin, *Factorizate*, treated Factor Sales and SLT's employees in the same manner. SLT was treated like a department of Factor Sales, and employees of Factor Sales and SLT were equally entitled to fringe benefits provided by Factor Sales to its employees, such as loans, credit at stores, performance awards, and social events sponsored by Factor Sales. The likelihood that Factor Sales employees would be intimidated by Factor

Sales' closing of SLT is heightened by Salcido's threat in May 2004 to SLT employees at Factor Sales' offices that if the union came into SLT he would close SLT like he had closed Maxi, a Factor Sales store.

The remaining consideration is whether the Respondents' motivation in closing SLT was to chill unionism among the employees of Factor Sales. As noted above, motivation may be established through direct or circumstantial evidence. In addition, "the incidence of one such directly causative antiunion motive strengthen[s] the probability of a second antiunion purpose-i.e., the 'chilling' of remaining employees in the exercise of their Section 7 rights." *George Lithograph Co*., 204 NLRB 431, 431 (1973) (citing *Darlington Mfg. Co*., 165 NLRB 1074, 1083 (1967)). As discussed above, the Respondents' closure of SLT was done in conjunction with the subcontracting of SLT's transportation business and pursuant to the Respondents' plan to close SLT because of the employees' election of the Union.

Among the additional factors that may reveal and prove the proscribed "chilling" motivation are "contemporaneous union activity at the employer's remaining facilities, geographic proximity of the employer's facilities to the closed operation, the likelihood that employees will learn of the circumstances surrounding the employer's unlawful conduct through employee interchange or contact, and, of course, representations made by the employer's officials and supervisors to the other employees." *Bruce Duncan Co*., 233 NLRB 1243, 1243 (1977).

There was contemporaneous union activity at Factor Sales and at SLT throughout the time period in this case. Factor Sales and SLT are located in the same geographic area of Yuma County, and both have their main offices in San Luis, Arizona. There is a strong likelihood that Factor Sales' employees would learn of the circumstances surrounding the Respondents' closing of SLT. And, during the union's organizing drive, Salcido specifically threatened SLT employees, during a meeting at Factor Sales' offices, to close SLT like he had previously closed one of the stores operated by Factor Sales. All of the circumstances in this case, including the foregoing direct and circumstantial evidence, demonstrates that the Respondents' closure of SLT was intended to chill unionism among Factor Sales' employees. Accordingly, the Respondents' closure of SLT violated Section 8(a)(3) and (1) of the Act.

The Respondents contend that SLT was closed because it was suffering financial losses. However, SLT's alleged financial losses have not been proven in this case, due in part to (1) the unreliability of the financial statements produced by the Respondents; (2) the failure of the Respondents to produce financial and other corroborating documents pursuant to the General Counsel's subpoenas; and (3) the method by which the Respondents maintain their records even if the records had been produced, including the fact that Factor Sales controls all of SLT's finances and keeps all of SLT's records.

Thus, Factor Sales could change the income and expenses of SLT to make SLT appear unprofitable without regard to Factor Sales' actual operations. And, the willingness of the Respondents to create such false losses is evidenced by Valencia's creation of false invoices at SLT relating to trips taken by SEC drivers. Moreover, the Respondents' contention that SLT was closed because of financial losses is undercut by their payment of higher fees to Unified to transport the goods previously transported by SLT. Financial considerations did not cause or guide the decision to close SLT.

The Respondents contention that SLT was closed because of financial losses is also rejected for the reasons set forth in this decision, including the Respondents failed to prove through credible and reliable evidence the losses allegedly suffered by SLT, and the Respondents transferred the bargaining unit work for a higher cost than they had previously paid to SLT. See *Service Merchandise Co*., 278 NLRB 185, 187 (1986) ("the Respondent's claim of economic considerations as being its impetus in the change to contract carriage is refuted [] by its apparent disinterest in a precise and actual cost comparison . . ."), overruled in part on other grounds, *Lear Sigler, Inc*., 295 NLRB at 861 fn. 24.

The Respondents' reason for closing SLT is false and pretextual because the reason has not been proven and because the Respondents did not rely on the reason to close SLT. Accordingly, there is no need to further address the alleged reason because a finding of pretext "leave[s] intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp*., 255 NLRB 722, 722 (1981). The Respondents' closure of SLT violated Section 8(a)(3) and (1) of the Act.

In *First National Maintenance Corp*., 452 U.S. at 682, the Supreme Court, citing *Darlington Co*., stated that "[u]nder § 8(a)(3) the Board may inquire into the motivations behind a partial closing. An employer may not simply shut down part of its business and mask its desire to weaken and circumvent the union by labeling its decision 'purely economic.' Even a valid economic decision to partially close a company may violate Section 8(a)(3) of the Act if the shutdown is used to inhibit union activity in the employer's related business. *Purolator Armored, Inc. v. NLRB*, 764 F.2d 1423, 1429–1430 (11th Cir. 1985), affg. 268 NLRB 1268 (1984) (citing *Weather Tamer, Inc. v. NLRB*, 676 F.2d 488, 493 (11th Cir. 1982). Thus, even if the Respondents had closed SLT for valid economic reasons, the closure was caused by, and was used to inhibit, union activity at Factor Sales, another business owned by the Respondents. Accordingly, the Respondents' closure of SLT violated Section 8(a)(3) and (1) of the Act.

J. Request for Information—Section 8(a)(5) and (1)

Under Section 8(a)(5) and (1) of the Act, an employer is obligated to furnish to a union, on request, information that is relevant and necessary to the union's role as the exclusive bargaining representative of unit employees. *NLRB v. Acme Industrial Co*., 385 U.S. 432 (1967). The employer must furnish the requested information in a timely manner absent a valid defense. *Woodland Clinic*, 331 NLRB 735, 736–737 (2000).

On December 22, 2005, the Union sent a letter to the Respondents requesting information concerning the Respondents intention to close SLT. The Respondents received the Union's letter, but did not respond and did not provide any of the requested information.

The Respondents do not claim that the requested information is irrelevant to their decision to close SLT. Indeed, the Union's request explicitly refers to the closure decision, and the re-

quested information is certainly relevant to that decision. Rather, the Respondents contend that they are not required to provide the requested information to the Union because they are not obligated to bargain concerning their decision to close SLT. The Respondents have not proven this defense. As set forth above, the Respondents are obligated to bargain concerning their decision to close SLT.

A union's statutorily protected right to information that is relevant and necessary to the union's role as the exclusive bargaining representative of unit employees can be waived only in express terms and not by implication, and the waiver must be in clear and unmistakable language. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983); *United Technologies Corp*., 274 NLRB 504, 507 (1985).

The Respondents contend that the Union waived its right to inspect the requested information because the Union had not previously formally requested the financial information, and had failed to request the financial information during the negotiating sessions with SLT and Factor Sales. Thus, the Respondents contend that the Union's actions constitute a waiver by implication. Whether the Union's conduct could possibly be construed as an implied waiver need not be answered because the Supreme Court and the Board have rejected the Respondents' waiver by implication argument. *Metropolitan Edison Co. v. NLRB*, supra; *United Technologies Corp*., supra.

Accordingly, the Respondents are obligated to provide the Union with the information requested on December 22, 2005, and their failure to do so is a violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondents, San Luis Trucking, Inc. (SLT) and Factor Sales, Inc. (Factor Sales), are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Factor Sales and SLT are single employers, and SLT and Servicios Especializados Del Colorado, S.A. De C.V. (SEC) are single employers.

3. The Respondents, Factor Sales, SLT, and SEC, are jointly and severally liable for the unfair labor practices found in this proceeding.

4. The United Food and Commercial Workers Union, Local 99 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

5. The Union is the exclusive representative of the following employees of the Respondents, which constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time truck drivers, mechanics, dispatcher, and accountant assistant employed by the Respondent San Luis Trucking; excluding all other employees, guards, and supervisors as defined in the Act.

6. The Respondents violated Section 8(a)(1) of the Act by unlawfully interrogating an employee about the employee's position concerning the Union.

7. The Respondents violated Section 8(a)(1) of the Act by instituting a work rule that prohibited an SLT mechanic from speaking to an SLT driver without the presence of an antiunion employee.

8. The Respondents violated Section 8(a)(5) and (1) of the Act by instituting a work rule relating to conversations among employees without bargaining with the Union.

9. The Respondents violated Section 8(a)(3) and (1) of the Act by unlawfully enforcing their work rules more strictly in response to union activities.

10. The Respondents violated Section 8(a)(5) and (1) of the Act by more strictly enforcing their disciplinary and attendance rules without bargaining with the Union.

11. The Respondents violated Section 8(a)(5) and (1) of the Act by subcontracting the transportation business of SLT without bargaining with the Union.

12. The Respondents violated Section 8(a)(3) and (1) of the Act by unlawfully subcontracting the transportation business of SLT because of the union activities of SLT's employees.

13. The Respondents violated Section 8(a)(3) and (1) of the Act by unlawfully constructively discharging its employees, Ignacio Sandoval, Jorge Gonzalez, and Jose Quezada.

14. The Respondents violated Section 8(a)(5) and (1) of the Act by unilaterally closing SLT without bargaining with the Union.

15. The Respondents violated Section 8(a)(3) and (1) of the Act by unlawfully closing SLT in order to influence the union activities of their employees at Factor Sales.

16. The Respondents violated Section 8(a)(5) and (1) of the Act because the Respondents failed and refused to bargain in good faith with the Union as the exclusive bargaining representative of their employees in the above appropriate unit by refusing to provide the Union with the information requested by the Union in the Union's letter dated December 22, 2005.

17. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

Having found that the Respondents unlawfully transferred the major portion of SLT's business to Unified Western Grocers (Unified), and later closed SLT and laid off its employees, I shall recommend that the Respondents be ordered to restore the status quo ante by reopening SLT, restoring the transferred business to SLT, and reinstating the employees. I shall further recommend that restoration of the status quo ante shall revert to no later than June 30, 2005, before the unlawful transfer of SLT's business. This is in accord with established Board policy that in cases involving discriminatory conduct, the wrongdoer should bear the responsibility and hardships for the unlawful action, rather than the innocent victims. *Mashkin Freight Lines, Inc*., 272 NLRB 427, 428 (1984). Accordingly, restoration of the status quo ante is a necessary remedy unless the Respondents prove that restoration would be unduly burdensome. *Fibreboard Paper Products*, 379 U.S. at 216; *Lear Sigler, Inc*., 295 NLRB at 861.

The Respondents offered no evidence on the remedy issue of whether reopening SLT would be unduly burdensome. Nevertheless, the evidence in this case establishes that there would be no or very little capital outlay in reopening SLT. The Respondents did not sell any of SLT's trucks or equipment when SLT closed, all of which remains at SLT's facilities. *Joy Recovery Technology Corp*., 320 NLRB 356, 357 fn. 4 (1995). Moreover, the Respondents could easily restore to SLT the business they had unlawfully transferred to Unified because that business belongs to and is under the control of Factor Sales.

The Respondents contend that SLT operated at a loss in 2005 and 2006, and that the loss was increasing. However, the financial statements offered by the Respondents to show such losses were not reliable. Moreover, the Respondents failed to produce documents pursuant to subpoenas served on them that could have supported or refuted their financial contentions. In accordance with all of the circumstances, including fictitious records and the control of SLT's finances and recordkeeping by Factor Sales, the Respondents have failed to prove that SLT suffered operating losses in 2005 and 2006. Finally, the evidence shows that Factor Sales pays more to Unified for the transportation of its grocery goods than Factor Sales paid to SLT. Accordingly, the evidence does not show that reopening SLT would cause any hardship, let alone an undue hardship, on the Respondents.

Having found that the Respondents unlawfully discharged SLT employees Ignacio Sandoval, Jorge Gonzalez, and Jose Quezada, the Respondents must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that the Respondents unlawfully closed SLT resulting in the layoffs of SLT employees, Jesus Aguilera, Antonio Macias, Jose Marquez, Blas Martinez, Raymundo Salcido, Eduardo Siqueiros, Diana Tenorio, and Jose Vera, the Respondents must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, supra., plus interest as computed in *New Horizons for the Retarded*, supra.

Having found that the Respondents have unlawfully refused to provide relevant information requested by the Union, the Respondents will be directed to turn over to the Union the requested information described in this decision and which is set forth in the Union's letter to Victor Salcido of SLT, and dated December 22, 2005.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

[13] 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.

ORDER

The Respondents, San Luis Trucking, Inc. (SLT), Factor Sales, Inc. (Factor Sales), San Luis, Arizona, and Servicios Especializados Del Colorado, S.A. De C.V. (SEC), their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees concerning their position or support for unions.

(b) Instituting work rules preventing employees from speaking with each other.

(c) Unilaterally instituting work rules concerning employee conduct without bargaining with the Union.

(d) Enforcing work rules more strictly against employees in response to the employees' union activities.

(e) Unilaterally enforcing work rules more strictly without bargaining with the Union.

(f) Unilaterally transferring or subcontracting the transportation business of SLT without bargaining with the Union, other than sporadic and individualized subcontracting of the type that SLT did before July 2005.

(g) Transferring or subcontracting the transportation business of SLT because of the union activities of SLT's employees.

(h) Constructively discharging or otherwise discriminating against any employees because of their union activity and support.

(i) Unilaterally closing SLT without bargaining with the Union.

(j) Closing SLT in order to influence employees in their support for a union at any of the Respondents businesses.

(k) Failing and refusing to bargain in good faith with the Union as the exclusive bargaining representative of SLT's employees by refusing to provide the Union with the information requested by the Union, and which is set forth in the Union's letter to SLT dated December 22, 2005.

(l) 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) Rescind the work rule preventing SLT mechanics from speaking to SLT drivers without the presence of an antiunion employee.

(b) Rescind the work rule preventing SLT employees from speaking with each other.

(c) Remove from the Respondents' files any reference to the attendance or conduct of SLT employees during the period March 8 to November 2005.

(d) Restore to SLT the business that the Respondents transferred to Unified Grocers on July 1, 2005.

(e) Reopen SLT and restore SLT to its status on June 30, 2005.

(f) Provide and give to the Union all of the information requested by the Union in its letter of December 22, 2005, and as set forth in this decision.

(g) Within 14 days from the date of the Board's Order, offer Ignacio Sandoval, Jorge Gonzalez, Jose Quezada, Jesus Aguilera, Antonio Macias, Jose Marquez, Blas Martinez, Raymundo Salcido, Eduardo Siqueiros, Diana Tenorio, and Jose Vera 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.

(h) Make Ignacio Sandoval, Jorge Gonzalez, Jose Quezada, Jesus Aguilera, Antonio Macias, Jose Marquez, Blas Martinez, Raymundo Salcido, Eduardo Siqueiros, Diana Tenorio, and Jose Vera whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(i) Within 14 days from the date of the Board's Order, remove from the Respondents' 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.

(j) 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.

(k) Within 14 days after service by the Region, post at its facility in San Luis, Arizona, copies of the attached notice marked "Appendix"[14] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 28, 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 January 2005.

(l) 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. , May 8, 2007

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 coercively question you about your union support or activities.

WE WILL NOT institute rules prohibiting employees from talking to each other without the presence of an antiunion employee.

WE WILL NOT institute rules prohibiting employees from talking to each other.

WE WILL NOT enforce work rules more strictly in response to union activities.

WE WILL NOT institute work rules without bargaining with the Union.

WE WILL NOT enforce work rules more strictly without bargaining with the Union.

WE WILL NOT transfer or subcontract the transportation business of San Luis Trucking without bargaining with the Union, other than sporadic and individualized subcontracting of the type that we did before July 2005.

WE WILL NOT transfer or subcontract the transportation business of San Luis Trucking because of the union activities of San Luis Trucking's employees.

WE WILL NOT constructively discharge or otherwise discriminate against any employees because of their union activity and support.

WE WILL NOT close San Luis Trucking without bargaining with the Union.

WE WILL NOT close San Luis Trucking in order to influence employees in their support for a union at any of our businesses.

WE WILL NOT fail and refuse to bargain in good faith with the Union as the exclusive bargaining representative of San Luis Trucking's employees by refusing to provide the Union with the information requested by the Union.

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

WE WILL rescind the work rule preventing San Luis Trucking mechanics from speaking to San Luis Trucking drivers without the presence of an antiunion employee.

WE WILL rescind the work rule preventing San Luis Trucking employees from speaking with each other.

WE WILL remove from our files any reference to the attendance or conduct of San Luis Trucking employees during the period March 8 to November 2005.

WE WILL restore to San Luis Trucking the business that we transferred to Unified Western Grocers on July 1, 2005.

WE WILL reopen San Luis Trucking and restore San Luis Trucking to its status on June 30, 2005.

[14] 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."

WE WILL provide and give to the Union all of the information requested by the Union.

WE WILL within 14 days from the date of the Board's Order, offer Ignacio Sandoval, Jorge Gonzalez, Jose Quezada, Jesus Aguilera, Antonio Macias, Jose Marquez, Blas Martinez, Raymundo Salcido, Eduardo Siqueiros, Diana Tenorio, and Jose Vera 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 Ignacio Sandoval, Jorge Gonzalez, Jose Quezada, Jesus Aguilera, Antonio Macias, Jose Marquez, Blas Martinez, Raymundo Salcido, Eduardo Siqueiros, Diana Tenorio, and Jose Vera whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges, 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.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Ignacio Sandoval, Jorge Gonzalez, Jose Quezada, Jesus Aguilera, Antonio Macias, Jose Marquez, Blas Martinez, Raymundo Salcido, Eduardo Siqueiros, Diana Tenorio, and Jose Vera, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

SAN LUIS TRUCKING, INC.

FACTOR SALES, INC.

SERVICIOS ESPECIALIZADOS DEL COLORADO, S.A. DE C.V.