Desert Pines Golf Club *and* Laborers' International Union of North America, Local 872, AFL–CIO. Case 28–CA–16347

June 7, 2001

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

DECISION AND ORDER

On February 15, 2001, Administrative Law Judge Thomas Michael Patton issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Charging Party filed a joinder in the General Counsel's exceptions and brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.[3]

In adopting the judge's finding that the Respondent did not violate Section 8(a)(3) and (1) when discharging employee Sergio De La Cruz, we find it unnecessary to pass on the judge's finding that the General Counsel failed to satisfy his threshold burden under *Wright Line,*[4] that the Respondent was motivated by anti-union considerations when it discharged De La Cruz. Thus, even assuming arguendo that the General Counsel met his threshold burden under *Wright Line*, we adopt the judge's finding that the Respondent has demonstrated that it would have discharged employee De La Cruz even in the absence of his protected activity.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge a modified below and orders that the Respondent, Desert Pines Golf Club, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Add the following as paragraph 1(d).

"(d) 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. Substitute the attached notice for that of the administrative law judge.

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

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

WE WILL NOT issue a warning notice to any employee because the employee supports Laborers' International Union of North America, Local 872, AFL–CIO, or any other labor organization.

WE WILL NOT limit lawful employee solicitation for a union during nonwork time, including before and after work, during breaktime and at lunchtime and we will not limit such solicitation during worktime in a discriminatory manner.

WE WILL NOT issue warnings to employees that create the impression that their union activities are under surveillance.

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

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful written warnings we gave to employees Ricardo Madrigal, Pedro Herrera, Roberto Padilla, and Sergio De La Cruz and, WE WILL, within 3 days thereafter, notify each employee in writing that this has been

[1] The General Counsel 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 adopting the judge's credibility findings, we find it unnecessary to rely on his discussions of adverse inferences to be drawn based on the failure of employees to testify about certain matters.

[2] There were no exceptions to the judge's conclusions that the Respondent violated Sec. 8(a)(3) and (1) of the Act by issuing warnings to employees Ricardo Madrigal, Pedro Herrera, Roberto Padilla, and Sergio De La Cruz; Sec. 8(a)(1) by impermissibly restricting the right of employees to solicit for the Union; and Sec. 8(a)(1) by creating the impression of surveillance of employees' union activities.

[3] We have modified the judge's recommended Order to correct the judge's inadvertent failure to include "narrow order" language, and we have modified the notice to comport with the modified Order.

[4] 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied 495 U.S. 989 (1982).

done and that the warnings will not be used against the employees in any way.

DESERT PINES GOLF CLUB

Ben Green, Att. for the General Counsel.
Daniel F. Fears, Att. of Irvine, California, for the Respondent.
David Rosenfeld, Att. of Oakland, California, for the Charging Party.[1]

DECISION

STATEMENT OF THE CASE

THOMAS MICHAEL PATTON, Administrative Law Judge. This case was heard at Las Vegas, Nevada, on September 26, 2000. Laborers' International Union of North America, Local 872, AFL–CIO (the Union) filed the charges. The initial charge was filed on February 24, 2000, and an amended charge was filed on April 28, 2000. The complaint issued on April 8, 2000, and alleges violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by Desert Pines Golf Club (the Employer or Respondent). The Employer denies any violation of the Act.[2]

The following findings are based on the entire record, including the posthearing briefs filed by the Employer and the General Counsel. In assessing credibility testimony contrary to my findings has not been credited, based upon a review of the entire record and consideration of the probabilities and the demeanor of the witnesses. See *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962).

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits facts showing that it meets the Board's jurisdictional standards and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The complaint and answer, as amended at the hearing, establish that the Employer is a partnership owned by a corporation registered and existing under the laws of the State of Nevada.

II. LABOR ORGANIZATION

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

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Evidence

1. Introduction

The Employer is engaged in operating an 18-hole golf course and attendant facilities in Las Vegas, Nevada. At relevant times the Employer had approximately 21 maintenance employees. Four maintenance employees were the objects of alleged conduct in violation of Section 8(a)(1) and (3) of the Act. The four employees were Ricardo Madrigal,[3] Pedro Herrera, Roberto Padilla, and Sergio De La Cruz. The maintenance employees work together on crews about once each week, but most of their work is on individually assigned tasks at various locations at the golf course. Because of days off, the daily complement of maintenance employees is about 19 employees.

Andy Wright is general manager of the facility and an admitted supervisor and agent under Section 2(11) and (13) of the Act. The maintenance employees work under the direct supervision of the maintenance superintendent. At the time of the hearing, Gary St. John was the maintenance superintendent. St. John began work at the golf course on February 10, 2000. St. John replaced former Maintenance Superintendent David Anderson, who had been discharged shortly before St. John began his employment. St. John and Anderson are admitted supervisors and agents under Section 2(11) and (13) of the Act during their periods of employment.

Personnel documents and the testimony of St. John show that as recently as January 1999 there was an assistant superintendent, Brian Haviland, who assisted the superintendent, prepared written employee appraisals, and conducted discussions regarding appraisals with employees. The evidence establishes that Haviland was a supervisor and agent under Section 2(11) and (13) of the Act. There is no evidence that there was an assistant superintendent at the time of the events alleged as violations.

It is alleged that the Employer violated Section 8(a)(1) and (3) of the Act by issuing warnings to Madrigal, Herrera, Padilla, and De La Cruz on November 2, 1999,[4] and by discharging De La Cruz on February 24, 2000. It is also alleged that the warnings created the impression of surveillance of employees' union activities and were a promulgation of an overly broad and discriminatory no-solicitation rule.

The witnesses were sequestered at the beginning of the hearing. De La Cruz was exempted as a person essential to the presentation of the General Counsel's case and he remained in the hearing room. Wright was exempted as a person essential to the presentation of the Employer's case and he remained in the hearing room. The witnesses at the hearing were employees Madrigal, Herrera, Padilla, De La Cruz, and Supervisor St. John.

2. Union activity by employees

Employee De La Cruz was hired by the Employer in April 1998 and worked as a maintenance employee. He was discharged on February 24, 2000. De La Cruz testified using a

[1] After the close of the hearing and prior to the last day for filing briefs, Attorney David Rosenfeld filed a document stating that he was entering an appearance and that he joined in the brief of GC Exh. GC-1 identifies Rosenfeld as attorney of record for the Charging Party prior to the opening of the hearing and he was served with the complaint and notice of hearing. No charging party representative entered an appearance at the hearing.

[2] At the hearing complaint par. 4 was amended to reflect that Gary St. John had the title of superintendent. The answer was amended to admit that the persons named in complaint par. 4 were supervisors and agents at the times they were employed by the Employer.

[3] Ricardo Madrigal stated in his testimony that his name was Ricardo Madrigal Padillo. Consistent with the complaint and the documentary evidence, he will be referred to as Ricardo Madrigal.

[4] Dates are 1999, unless otherwise indicated.

Spanish-English interpreter. He described a meeting conducted by the Union at a union hall in Las Vegas. He did not recall the date of the meeting, but when asked to make a ballpark estimate, he said it was about mid-October. Approximately 16 of the Employer's maintenance employees attended the meeting. The other employees present were not identified. An employee of the Union identified by De La Cruz as Connie or Consuela and an unnamed man conducted the union meeting. One of the union representatives told the employees that the Union would write a letter, presumably to the Employer, regarding the organizing activity and asked for four volunteers to organize the Employer's employees. De La Cruz said that he was the first to volunteer. He testified that Madrigal and Padilla also volunteered. In describing their volunteering at the meeting, De La Cruz stated that "it was Ricardo [Madrigal] who handed out the cards." There was no explication of the quoted statement and no other evidence of union cards being distributed. Because of the context of the testimony, I conclude that De La Cruz was indicating that union cards were distributed at the meeting and that Madrigal handed out the cards. There is no other evidence that Madrigal or others distributed cards. De La Cruz said that this was the second of two union meetings he had attended. There is no other evidence regarding an earlier meeting. De La Cruz said that he first heard of the Union around September or October.

On an unknown date, De La Cruz signed an authorization card for the Union. The printed portion of the undated card is in English. De La Cruz stated that he has some understanding of English. De La Cruz testified that he had no recollection of when he signed the card and the record does not otherwise establish when the card was signed. The card was offered to show union activity by De La Cruz. The Employer objected, on the ground that there was no showing that the card was signed at a relevant time. The card was received, but with the reservation that the issue of relevance could be addressed in brief or oral argument. No other evidence was offered on this issue. In brief the General Counsel contends that the record establishes that the card was signed subsequent to De La Cruz learning of the Union. This is correct, however, the record does not demonstrate that the card was signed before February 24, 2000, when De La Cruz was fired.

Madrigal identified an authorization card for the Union printed in Spanish as having been signed and dated by him on September 23. This is the only evidence of union activity on a specific date.

Padilla testified in response to a leading question that he signed a union card and he claimed it was signed in October or November 1999, but no such card was produced at the hearing and no other details were furnished. Other than De La Cruz' testimony that Madrigal passed out cards at a union meeting, the record does not establish how or when De La Cruz, Madrigal, or Padilla might have received union cards. There is no evidence showing the source of the union cards entered into evidence, and the record does not disclose what De La Cruz, Madrigal, or Padilla did with the union cards after they were signed. There is no evidence that Herrera signed a card.

Madrigal, Herrera, and Padilla testified about other matters, but did not testify regarding union meetings, passing out union cards, or about any of the four employees volunteering to organize their fellow employees. Madrigal, Herrera, and Padilla testified and were released before De La Cruz was called. There is no evidence that the Union advised the Employer of organizing or of the identity of employee organizers. The record does not disclose when the organizing effort began.

A letter from the Employer's attorney to Region 28 during the investigation of the charge that was received as an admission states that the Employer learned of unspecified organizing efforts in late summer of 1999.

In summary, the evidence describing union activity prior to De La Cruz' discharge consists of Madrigal's identification of a union card he signed on September 23, the first day of fall; the Employer's admission that it was aware of union organizing in late summer of 1999; Herrera's unsubstantiated claim that he signed a union card in October or November; De La Cruz' testimony that he attended two union meetings; and De La Cruz' description of the second meeting, which he estimated was in mid-October 1999.

While I have concluded that there is no evidence that Padilla and De La Cruz signed cards prior to February 24, 2000, a different conclusion would not affect the ultimate decision since there is no evidence of employer knowledge of any union cards being signed.

The General Counsel stresses that the testimony of De La Cruz shows that he took a leadership role at the union meeting and that Madrigal, Herrera, and Padilla volunteered to act as his fellow union organizers. The General Counsel urges a finding that warnings issued to De La Cruz, Madrigal, Herrera, and Padilla on November 2, discussed later, establish a prima facie case that the warnings to all four, as well as the discharge of De La Cruz on February 24, 2000, violated Section 8(a)(1) and (3).

De La Cruz was an extraordinarily unpersuasive witness and I have found portions of his testimony to not be credible, even though not contradicted. The proposition that where testimony is not contradicted the trier has no right to refuse to accept it is an ancient fallacy. *NLRB v. Howell Chevrolet Co.,* 204 F.2d 79 (9th Cir. 1953), affd. 346 U.S. 482 (1953). Uncontroverted testimony cannot be dismissed or disregarded, however, without having sufficient reason. *Missouri Portland Cement Co. v. NLRB*, 965 F.2d 217, 222 (7th Cir. 1992). In addition to his unimpressive demeanor, much of De La Cruz' testimony is improbable when considered in the context of other facts established by the evidence. A portion of his testimony is also not accepted because of adverse inferences.

Madrigal, Herrera, and Padilla did not corroborate De La Cruz' testimony that they were at the union meeting or that the four of them volunteered to serve as the organizing committee. No union representative was called as a witness. This presents a question of whether adverse inferences should be drawn.

An adverse inference is available against the party with the burden of persuasion on an issue or against the party who is relying on the statements of an uncalled witness. *KBMS, Inc.,* 278 NLRB 826 (1986). See *Parts Depot, Inc.,* 332 NLRB No. 65 (2000); *Forsyth Electrical Co.,* 332 NLRB No. 68 (2000); *Van Dorn Plastic Machinery,* 265 NLRB 864 (1982).

The Board has made it clear that in Board hearings the proper inquiry in determining whether an adverse inference

may be drawn from a party's failure to call a potential witness is whether the witness may reasonably be assumed to be favorably disposed to that party. *Electrical Workers Local 3 (Teknion, Inc.)* 329 NLRB 337 (1999). An adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge and it may be inferred that the witness, if called, would have testified adversely to the party on that issue. The Board has rejected the rationale that if a witness is equally available to both the parties no adverse inference can be drawn if neither party calls him. *International Automatic Machines,* 285 NLRB 1122 (1987), enfd. 861 F.2d 720 (6th Cir. 1988); *Avondale Industries,* 329 NLRB 1064 (1999). Thus, although employees of a charged employer generally may be viewed as available to all parties, their status as employees does not prevent the drawing of an adverse inference from a party's failure to call an employee. Moreover, where it is alleged that such an employee has been discriminated against, the employee has characteristics of a party.[5]

An adverse inference is also appropriate where one party has access to evidence that is unavailable to the opposing party. See *Seafarers (American Barge Lines)*, 244 NLRB 641 (1979); *Southern Pride Catfish,* 331 NLRB 618 (2000). Here, De La Cruz testified that there were other employees at the union meeting. There is no evidence the Employer had information about the union meeting prior to the hearing and it is doubtful that the Employer could have lawfully taken the initiative to ascertain who was at the meeting and secure employee testimony to contradict De La Cruz' uncorroborated testimony. In contrast, the General Counsel had access to that information.

The failure to call a witness permits but does not require the drawing of an adverse inference. That determination depends upon the particular circumstances in each situation. In the present case an adverse inference is appropriate. It clearly would have been logical for the General Counsel to have had Madrigal, Herrera, Padilla, other employees who were at the meeting or a union representative testify regarding the union meeting where the four employees are claimed to have been made the members of an organizing committee and where it is claimed that De La Cruz took a lead role. This is especially true where there is no other evidence of open union activity and where it is contended that the active role by De La Cruz at that meeting is the reason he was discharged.

Here Madrigal, Herrera, Padilla, and De La Cruz are alleged to have been discriminated against. Their corroboration of De La Cruz would also have supported the claims of discrimination against them. There is no claim, nor does the record show, that Madrigal, Herrera, or Padilla were prejudiced against De La Cruz. Madrigal's confident and detailed testimony regarding a November 22 meeting with Anderson is central to the General Counsel's case. Madrigal, Herrera, and Padilla can be assumed to be favorably disposed generally to the case presented by the General Counsel, and would reasonably be assumed to be disposed to corroborate De La Cruz' testimony regarding the union meeting, if it were true. While Herrera did receive an annual merit raise on April 19, 2000, and Padilla received a promotion on the same date, this does not establish that they were thereby favorably disposed to the Employer. Moreover, even if it is assumed that they were favorably disposed to the Employer, Madrigal demonstrated a willingness to testify confidently, contrary to the interests of the Employer.

As the Charging Party, the Union is a party to the case and has stated that it joins the General Counsel's brief. Given the facts and circumstances, the Union must be deemed favorably disposed to the General Counsel's case, but no representative of the Union was called to corroborate De La Cruz.

The absence of corroboration of De La Cruz' testimony severely impacts on his credibility. I conclude that the absence of testimony by persons other than De La Cruz regarding the union meeting raises an inference that their testimony would be adverse. *Guardian Industries Corp.,* 319 NLRB 542 (1995). *International Automatic Machines,* supra. A different result is not warranted because the General Counsel called Madrigal, Herrera, and Padilla before De La Cruz testified. An adverse inference cannot be avoided by calling a witness to testify on other matters, but fail to have the witness corroborate a party's other witnesses. *Guardian Industries Corp.,* supra. This principle is especially pertinent in the present case, where Madrigal, Herrera, and Padilla were called and released before De La Cruz testified, thus not exposing them to possible questions about De La Cruz' claim that they shared with him a leadership role in organizing.

As discussed later, the four employees were given written warnings related to union organizing on a date not long after the union meeting described by De La Cruz. So little significance was attached to the warnings by the employees that three of them did not retain their copies of the warnings. There is no evidence that the warnings were brought to the attention of the Union at the time they were issued. This evidence is inconsistent with De La Cruz' description of the employees' role as the members of an organizing committee, who might reasonably be expected to promptly bring such warnings to the attention of the Union. This improbability casts further doubt on De La Cruz' account.

It seems improbable that De La Cruz would totally fabricate attending a union meeting where about 20 people were present. Moreover, when a union is attempting to organize employees, it is customary to hold organizing meetings with the employees. Accordingly, I credit De La Cruz' testimony that he attended union meetings on dates prior to his discharge. This is consistent with the admission of the Employer that there was organizing activity in late summer, as well as Madrigal's testimony that he signed a union card on September 23. In all other respects, I do not accept the testimony of De La Cruz regarding the union meeting.

There is no direct evidence that the Employer had knowledge of any union meetings or of any employee signing a union card. There is no direct evidence that any other person was aware that Madrigal or Padilla signed a union card. Other than De La Cruz' testimony regarding a union meeting, which has largely been rejected, there is no other record evidence describing any union activities by De La Cruz, Madrigal, Padilla, or Herrera. There is no basis for presuming that the Employer would have

[5] The special status of such employees is recognized in the rules governing the sequestration of witnesses. *Greyhound Lines*, 319 NLRB 554 (1995).

knowledge of union meetings under the "small plant doctrine." *Basin Frozen Foods,* 307 NLRB 1406 (1992). There is no evidence of union activity in the workplace that would support a presumption of knowledge of union activity. See *Montgomery Ward & Co.*, 316 NLRB 1248 (1995).

3. November 2 events

Madrigal testified as follows using a Spanish-English interpreter. He was employed as a maintenance employee at the time of the hearing. He has worked for the Employer since October 1997. He described an individual meeting he had with Superintendent Anderson on November 2. Madrigal recalled that the meeting occurred at lunchtime. The meeting took place in an office at the golf course. Another employee, Rosa Lopez, was present and served as a Spanish-English interpreter. The record establishes that Anderson was able to speak little or no Spanish. No one else was present.

Madrigal identified General Counsel's Exhibit 3 as being a copy of a document that he signed at the meeting. It is in English, but Madrigal testified that he could read English adequately to understand General Counsel's Exhibit 3. He identified a signature on the document as his. He said he requested and was given a copy of the document at the meeting. The document contains only the following:[6]

November 2, 1999

TO: Sergio Delacruz
Ricardo Madrigal
Roberto Padilla
Pedro Herrera

Upper management has received word that some of the maintenance personal has been getting harassed about the Union. Your names have come up as the trouble makers. If we hear of any more talk about making any other employees feel uncomfortable you will be terminated immediately.

This is your verbal and written warning on this matter. Please sign on the line given that you where informed of the serious of the matter.

[signature of Madrigal]_____
_____
_____
_____

Madrigal said he asked Anderson who was issuing the warning and was told that it came from higher-up. He asked if he had to sign the warning and was told that it was necessary to sign the document as proof that the warning had been given to the employees. Madrigal signed the warning. He requested and was given a photocopy of the warning. He was told that "[W]e were harassing the people or forcing the people to sign up with the union."

Madrigal stated that an unidentified person or persons from the Union later came to his house and asked for a copy of his warning. The record does not disclose when the Union went to Madrigal's house. Madrigal stated that this was about the time meetings were being held at work, which he opined were organized by the Employer regarding unions, but no details were provided and there is no other evidence regarding any such meetings. Madrigal said he gave his copy of the warning to the Union and at some unspecified time the Union gave him a copy, but he could not locate his copy. On cross-examination he was asked when he last saw his copy and he could not recall. When asked at the September 26, 2000 hearing if it was months earlier that he had last seen the warning, he said he could not remember. When asked if he kept it in a special place where he kept important papers, he said it didn't seem important to him. He said he probably threw it away. The paper received as an exhibit appeared at that time to be a fresh photocopy. The record does not establish the source of the photocopy placed in evidence.[7]

Herrera was the second witness. A personnel document notes that Herrera understands and speaks English well. He testified as follows in English. In November, he met with Anderson where only he and Anderson were present. In substance, Herrera testified that Anderson told him that he had tried to force other employees to support the Union. Herrera said he was given a written warning concerning telling other employees to join the Union. When asked if it was typed or written, he replied it was written. He said he was given a copy, but that he threw the paper away. He further testified that he did not know what it said because he does not read. He was not asked to examine General Counsel's Exhibit 3. The record does not indicate whether he was required to sign the warning or whether any signature was on the warning he said he was given.

The third witness was Padilla, who testified as follows using a Spanish-English interpreter, although he stated that he normally speaks English at work. He described an individual meeting he had with Superintendent Anderson. Padilla stated that the meeting was in early November. This meeting took place in an office at the golf course. No one else was identified as being present. Padilla related that Anderson told him he was being given a warning because he was going around pressuring people to join the Union and that he received a copy of a written warning. He said that he mislaid or discarded the warning. Padilla testified that he signed the warning before he was given a copy. He identified General Counsel's Exhibit 3 as like the document Anderson gave him. He said General Counsel's 3 differed from the one he signed because it bears the signature of Madrigal.

De La Cruz was the final employee witness who testified as follows using a Spanish-English interpreter. He described a meeting he had with Anderson on November 2, in Anderson's office. De La Cruz related that he had gone in the lunchroom about 8:30 a.m. that morning after his first job on that day and had seen a notice that there would be an employee meeting at 9 or 9:30 a.m. He testified that lunchbreak was at 9:30 a.m.[8] De La Cruz stated that he, Padilla, Madrigal, and Herrera were

[6] The errors in spelling and grammar appear in the original.

[7] It is possible that the Union provided to the General Counsel the document received into evidence, however, the record does not permit a determination that this was the case.

[8] The workday began as early as 4:30 a.m.

taken into the office that morning. There is no other evidence regarding a meeting involving other employees that day.

De La Cruz testified, "When we were all gathered together there, I don't remember who spoke first, whether it was Ricardo [Madrigal] or Roberto Padilla." De La Cruz related that at some point he was called into Anderson's office, along with Herrera. De La Cruz testified that those present were Anderson, De La Cruz, Herrera, and Lopez. According to De La Cruz, Anderson held the paper and read it while Lopez translated. De La Cruz related that Anderson said they were talking a lot with the other employees of Desert Pine and that the big bosses had found out they were talking to the people and intimidating them to join the Union. De La Cruz related that at the conclusion of the meeting separate pieces of paper were shown to De La Cruz and Herrera that basically contained the warning they were given in the meeting. De La Cruz related that he and Herrera were told it was important that they sign the papers so that the bosses could see that they had spoken with them. De La Cruz identified the document given to Madrigal as being similar to those he and Herrera were required to sign, but did not purport to read it while on the stand. De La Cruz described repeated unsuccessful attempts to get a copy of the document he signed.

De La Cruz testified he asked Lopez for a copy at the time he signed the warning and she replied that it wasn't important, but she would give him a copy. He related that the following week he asked again for a copy and Lopez said it was no problem, but he never got a copy. He testified that he followed up several times with Lopez and was insistent, but he never received a copy. De La Cruz initially stated that he never asked Anderson for a copy of the warning because they "did not understand each other well because of the English." After it was pointed out that he had related remarks Anderson made to him in English in their second conversation on November 2 (discussed later), De La Cruz testified that, "I told David that I wanted a copy and he said that he had told Rosa to give it to me." De La Cruz did not place a time or location on this conversation. After it was pointed out that this was inconsistent with his earlier testimony, the following exchange occurred:

> Q. Perhaps it's my fault then. Did you ever indicate in any way that you wanted a copy of this warning from David Anderson?
>
> A. Well, no, I insisted a lot with Rosa because they had put her like in charge of employee relations and if there was something we didn't understand—or human resources. If there was something we didn't understand or something, if we had a problem, we were told to speak with her—

De La Cruz claimed that he understands the majority of English words, but that he does not know how to respond well in English.

The Employer questions whether General Counsel's Exhibit 3 is a "legitimate" company document. The Employer did not object to receipt of the document into evidence. In its posthearing brief the Employer acknowledges that Madrigal identified General Counsel's Exhibit 3 as the document Anderson gave him on November 2. The Employer does not contend that the foundation was insufficient for receipt of General Counsel's Exhibit 3 or that the document was altered after it left Madrigal's control.

The Employer argues that it is inherently improbable that a sophisticated employer with a settled review process and standardized forms for disciplinary actions and performance evaluations would issue an unsigned warning containing what the Employer characterizes as amateurish language. This argument is insufficient alone to rebut Madrigal's testimony, because it assumes that General Counsel's Exhibit 3 would necessarily have been drafted by and issued upon the instructions of upper management. This assumption is not warranted. Anderson could have drafted and issued the warning on his own initiative based upon the Employer's conceded knowledge of union organizing in late summer. There is no evidence suggesting that Anderson was a person with skills in either labor relations or in the preparation of documents like General Counsel's Exhibit 3. If Anderson drafted General Counsel's Exhibit 3, it is not inherently improbable that he would have had an unsophisticated approach to opposing union organizing. The layout of the document does not warrant a different conclusion. St. John testified that Lopez did clerical work for him. She may well have been available to do clerical work for his predecessor, and could have prepared General Counsel's Exhibit 3 for Anderson, after he drafted the language.

The Employer also points to the testimony of St. John that the personnel files of employees, which he reviewed in early February 2000, did not reflect any November 2 discipline of Madrigal, Herrera, Padilla, or De La Cruz and that he had never seen General Counsel's Exhibit 3. St. John's testimony on this issue was credibly offered and not inherently improbable. While it would be reasonable to expect that warnings would be included in the personnel files of affected employees, this does not establish that General Counsel's Exhibit 3 was not in other company files, that St. John's superiors had never seen the warning or that the document was not in personnel files prior to their being made available to St. John. No evidence was presented on these issues. The Employer admitted knowledge of an organizing effort in late summer.[9] Thus, the testimony of St. John is not necessarily inconsistent with Anderson issuing the warnings described by the employees.

The Employer contends that the testimony of Herrera, Padilla, and De La Cruz regarding the written warnings they claimed to have received was so contradictory and inherently unbelievable as to compel a conclusion that Madrigal's testimony was not credible. Madrigal's testimony is the keystone of the evidence regarding the November events. The Employer stresses the failure of the General Counsel to produce copies of the warnings for three of the employees.

The General Counsel argues that in resolving what occurred at the meetings the employees had with Anderson, an adverse inference should be drawn because the Employer did not call Lopez. For the reasons discussed later, the record is inadequate to establish that Lopez is a person who may be reasonably be assumed to be favorably disposed to the Employer. Neverthe-

[9] The Employer's position statement to Region 28, GC Exh. 12, represented that management issued instructions regarding union organizing.

less, even assuming that the General Counsel's contention regarding Lopez' status is correct, a resort to adverse inferences would not be warranted. The testimony of Madrigal and De La Cruz regarding the meetings where Lopez was present has been credited, except for the conflict between De La Cruz and Herrera as to whether they met separately or together with Anderson. It was not the obligation of the Employer to resolve this conflict between Herrera and De La Cruz.

The General Counsel does not urge that any adverse inferences should be drawn regarding any other issues because the Employer did not call Lopez. Nevertheless, the arguments advanced by the General Counsel will be addressed in detail because the question of other adverse inferences relating to Lopez may be raised on a review of this decision.

The General Counsel argues that an adverse inference should be drawn based upon the proposition that when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. The General Counsel relies on *Bridgestone/Firestone, Inc*., 332 NLRB No. 56 (2000); *Grimmway Farms*, 314 NLRB 73 (1994); and *International Automatic Machines*, 285 NLRB 1122 (1987), enfd. 861 F.2d 720 (6th Cir. 1988). The evidence is insufficient to establish that Lopez is such a witness.

Bridgestone/Firestone, supra, and *International Automated Machines,* supra, are inapposite, since in those situations the persons against whom an adverse inference was drawn were, unlike Lopez, management officials (a district manager and a production manager) who were supervisors and agents under Section 2(11) and (13) of the Act.

In *Grimmway,* supra, the Board upheld an administrative law judge who drew an adverse inference where the evidence did not establish that a nontestifying witness, Revira, was a supervisor or agent, but several witnesses had offered uncontradicted testimony that they were told that Rivera was a supervisor. Thus there was evidence of apparent agency. According to other uncontradicted testimony, Rivera had an office in a plant consisting mostly of line employees and a manager chose Rivera to interpret for him on an extremely important labor relations matter. The only similarity of the pertinent facts in *Grimmway* to the present case is evidence that Lopez served as an interpreter for Anderson, a first-level supervisor, when he delivered to De La Cruz and Madrigal previously prepared written warnings.

The General Counsel stresses that Lopez signed two Immigration and Naturalization forms as "human resources director." This use of this title on two routine INS forms is insufficient to establish that Lopez possessed the authority normally associated with a human resources director. The evidence establishes that Lopez was present in the November meetings with Madrigal and De La Cruz only as an interpreter. If she had been present as a "human resources director," with the duties ordinarily associated with that title, it would be reasonable to expect the she would have also been present when warnings were issued to Herrera and Padilla. As discussed elsewhere, the credited evidence does not show that she was present when Anderson met with either Herrera or Padilla. Thus, the evidence does not establish that the title was used on the INS form for any reason other than to indicate that an authorized person signed the forms.

A different conclusion is not warranted by a claim by De La Cruz on cross-examination that a Mr. Walters told employees at a meeting that Lopez had been put in charge of employee relations or human resources because she was bilingual and that Walters said that he was an owner. I inquired of the General Counsel whether the status of Walters would be an issue and was told that it would not. No further evidence was developed regarding Walters' purported remarks. Moreover, as discussed below, De La Cruz was not a reliable witness and his unsupported and volunteered testimony concerning Walters was not credibly offered.

Madrigal testified that the employees considered Lopez to be a secretary and that she was at the meeting only as an interpreter. The record discloses no other person in the Employer's organization, other than Herrera and Padilla, who were bilingual. Lopez has not been alleged to be a supervisor or agent under Section 2(11) and (13) of the Act and the General Counsel has not urged such a finding. There is no evidence that she was a supervisor. The evidence is insufficient to conclude that she was an agent and that issue was not fully litigated.

In view of all the foregoing, the record evidence does not establish that Lopez may reasonably be assumed to be favorably disposed to the Employer and no adverse inference would be warranted because the Employer did not call her as a witness.

Consistent with established case law, the General Counsel has not urged that an adverse inference should be drawn against the Employer because Anderson, a former supervisor, was not called as a witness. *Levingston Shipbuilding Co.,* 249 NLRB 1 (1980) (no adverse inference from company's failure to call former supervisor). Compare, e.g., *Martin Luther King, Sr. Nursing Center*, 231 NLRB 15 (1977), and *Earle Industries*, 260 NLRB 1128 (1982) (adverse inference from company's failure to call current supervisor).

While the evidence regarding General Counsel's Exhibit 3 is sketchy, the record is adequate to permit a decision. The events described by Madrigal are not inherently improbable and his testimony was credibly offered. I conclude that Madrigal met with Anderson and Lopez and was given a written warning on November 2, and General Counsel's Exhibit 3 is a photocopy of that warning. I also credit his testimony regarding the substance of what Anderson told him on November 2, which is consistent with General Counsel's Exhibit 3.

Padilla testified using an interpreter, although he stated that he normally uses English at work. There is no evidence and no contention that because of a language barrier he would not be able to identify General Counsel's Exhibit 3 as being like the paper Anderson gave him (apparently without Madrigal's signature) and required him to sign. His testimony is not inherently improbable and was credibly offered. I conclude that Padilla met alone with Anderson and was given a written warning like the one given to Madrigal, which he mislaid or discarded. I also credit his testimony regarding the substance of what Anderson told him on November 2, which is consistent with General Counsel's Exhibit 3.

Herrera's testimony that he met alone with Anderson was more credibly offered than De La Cruz' claim that he and Herrera met together with Anderson. Herrera testified in English, which demonstrates that Lopez would not have been needed to interpret. I credit Herrera's testimony regarding what Anderson said to him. It is consistent with what the other employees were told, is not inherently improbable, was credibly offered and is consistent with General Counsel's Exhibit 3.

Herrera's testimony that he was given a written warning is also credited, despite having been elicited by a leading question, since his being given a warning is consistent with the other credible evidence, including his being named in the warning. The Employer stresses that when Herrera was asked whether the warning was written or typed, he replied, "[W]riting." This asserted inconsistency was not the subject of further testimony. This claimed inconsistency is an insufficient basis to discredit Herrera. In the workplace, documented warnings are often called written warnings, without regard whether or not they are handwritten. The single question and answer on this issue is insufficient to conclude that Herrera, by saying "written," was indicating that his warning was handwritten. Herrera was in obvious discomfort in his role as a witness. He nevertheless impressed me as a person attempting to testify truthfully. While he was not asked to identify General Counsel's Exhibit 3, this appears to have been, at most, an oversight and is not a reason to discredit his testimony. Herrera's testimony that he threw away his copy of the warning is credited. Moreover, I conclude that since the written warnings given to Madrigal and Padilla also named Herrera, and given the similarities and timing of the remarks made to these three employees, an inference is warranted, which I draw, that the document given to Herrera was like General Counsel's Exhibit 3 (without Madrigal's signature). I also credit his testimony regarding the substance of what Anderson told him on November 2, which is consistent with General Counsel Exhibit 3.

I do not credit De La Cruz' testimony that Herrera was present when De La Cruz received his warning. Herrera's testimony that only he and Anderson were present at their November 2 meeting was more probable and more credibly offered. The substance of De La Cruz' testimony regarding what Anderson said to him is credited. It is consistent with what the other employees were told, as well as being consistent with General Counsel's Exhibit 3.[10]

De La Cruz' shifting testimony regarding unsuccessful attempts to obtain a copy of his November 2 warning was unconvincing. He claimed first that he asked only Lopez for a copy, then that he had a conversation with Anderson regarding the warning. When it was suggested that this was inconsistent with his language barrier, he recanted that testimony. It is highly improbable that he alone would be denied a copy of the warning. It is not possible to determine whether he did not ask for a copy as he claimed or whether he discarded his copy. De La Cruz' claim that he was denied a copy of his warning appears to be an attempt to reconcile his not having a copy of the warning with his discredited claim that he took a leadership role in organizing shortly before the warnings were given. If he had taken a lead role in organizing and, like the other three employees, had been given a copy of a written warning, he would have retained the document. Based on the probabilities and his demeanor, this testimony is not credited.

De La Cruz described a second meeting he had with Anderson on November 2, about an hour later. He testified that Anderson approached him on the golf course and spoke to him alone. De La Cruz related that Anderson, "[S]aid that the warning that he had given me, it wasn't from him, he didn't have a problem. He said, 'It's that the big bosses are putting pressure on me.' He says, 'I like you, you're a good worker.' He said, 'You do everything I ask you to, you don't—you don't leave work unfinished.'"

This claim that Anderson sought De La Cruz out for a separate private conversation shortly after the November 2 meeting to offer explanations, to essentially apologize, to compliment his job performance and to declare how he liked De La Cruz was unconvincing. The record is devoid of any suggestion that Anderson and De La Cruz were friends or that De La Cruz had a special relationship with Anderson. None of the other three employees reported similar remarks by Anderson. De La Cruz' appraisals prior to any union activity are not consistent with Anderson's purported praise of De La Cruz' work. De La Cruz' testimony regarding the conversation is also inconsistent with his asserted limited command of English. While De La Cruz claimed on cross-examination that he understands the majority of English words, but that he does not know how to respond well in English, this testimony was offered only after he recanted his testimony that he had asked Anderson for a copy of the warning. De La Cruz' testimony regarding this purported private conversation with Anderson was not credibly offered, is improbable and is not credited. While not a reason relied on in making this credibility resolution, the remarks De La Cruz attributes to Anderson, if true, would show that Anderson may reasonably be assumed to be favorably disposed to De La Cruz, rather than a neutral. Cf. *Levingston Shipbuilding Co.,* 249 NLRB 1, 19 (1980). Anderson having been fired by the Employer supports this conclusion. This would warrant an adverse inference because the General Counsel did not call Anderson as a witiness. *Guardian Industries Corp.,* 319 NLRB 542 (1995); *International Automatic Machines,* 285 NLRB 1122 (1987), enfd. 861 F.2d 720 (6th Cir. 1988). While De La Cruz' testimony regarding this meeting has not been credited, a different conclusion would not affect the ultimate decision, because the record does not show that the decision to discharge De La Cruz was based on Anderson's assessment of De La Cruz.

4. The discharge of De La Cruz

De La Cruz offered the following description of a February 24, 2000 meeting in an office at the golf course. Present were De La Cruz, St. John, Lopez, and another man whose name De La Cruz did not know. De La Cruz identified Andy Wright,

[10] While it is not necessary to resolve why De La Cruz placed Herrera in the meeting with him, it may have been more than a simple difference in recollection. Herrera was uncomfortable as a witness, was not asked to identify GC Exh. 3 and did not place Lopez in his meeting. Consistent with my impression that De La Cruz was generally attempting to tailor his testimony to improve his case, he may have mistakenly thought it would be helpful to provide a more positive version of the Anderson-Herrera meeting.

who was then in the hearing room, as being the other man. St. John read from a piece of paper. Lopez asked De La Cruz if he understood. He replied that he did not and Lopez translated. St. John informed De La Cruz that he wasn't in the work program or the schedule. St. John said that he wanted De La Cruz to punch his timecard, bring in his uniforms, and pick up his check. De La Cruz punched out, went home, and returned with his uniforms and was given his check by Lopez. De La Cruz denied being given any documents at this discharge interview.

St. John testified regarding the meeting and identified two documents that were prepared prior to De La Cruz' discharge. One was a form titled "Separation Notice" and was dated February 24, 2000. It indicates that De La Cruz was discharged on that date for unacceptable performance. It bears the signature of St. John and Wright. The second document is a typed memorandum. St. John recalled that he gave a copy of this memorandum to De La Cruz. De La Cruz' denial that he was given any document at the time of his discharge appears more probable because the memorandum is not addressed to him and it appears to be a file memo. Moreover, Wright was present in the hearing room, but was not called to corroborate St. John. Accordingly, De La Cruz' version of the conversation and his denial that he received a copy of the memo is credited. I judge that the differences between De La Cruz' and St. John's testimony regarding this conversation were merely a failure in recollection. The document is on an otherwise blank sheet of paper and reads as follows:

> Desert Pines Golf Club
> Employee:Sergio De La Cruz
> Supervisor: Gary St. John
> Reason of Notice: Termination of Employment
>
> On this day of February 24, 2000, Sergio De La Cruz is being terminated of his golf course maintenance position at Desert Pines Golf Club. This decision is based upon Sergio's job performance, which is unsatisfactory to meet supervisor's expectations and requirements as an employee of Desert Pines Golf Club.
>
> This termination of employment is effective immediately. Sergio's final paycheck will be available upon return of his company uniforms.
>
> Supervisor: [St. John's signature]
> Date: February 24, 2000

St. John credibly testified that he made the decision to discharge De La Cruz and described how the decision was reached. He testified that when he began assumed his duties he reviewed the prior evaluations of the maintenance employees during his first week. St John noted what he described as low figures on De La Cruz' prior evaluations and concluded, based on his daily observation of De La Cruz' work performance, that he did not have the ambition that St. John considered necessary to correct deficiencies in the golf course. According to St. John, De La Cruz showed no drive or desire and was very slow. De La Cruz was the only employee St. John has discharged.

An example of a problem with De La Cruz offered by St. John was that he declined to work overtime. St. John said he had offered the crew daily overtime and that the other employees worked overtime, with the exception of Padilla, who sometimes was unable to work overtime because of conflicts with other employment. St. John described group meetings he had with the maintenance crew, including De La Cruz, where he described his plans to improve the golf course and offered the employees overtime. St. John testified that February was a good time to do improvement work on the grounds because the weather was mild in Las Vegas at that time.

De La Cruz denied that St. John ever offered him overtime and denied knowledge of other employees working overtime during the 2 weeks before his discharge. He contended that February was a slow time because the grass does not grow as fast then. De La Cruz did not deny that St. John held employee meetings to discuss upgrading the golf course. Madrigal, Padilla, and Herrera did not testify regarding overtime, the Employer offered no business records regarding overtime and there is no evidence regarding the crew meetings and overtime other than the testimony of De La Cruz and St. John. The testimony of St. John was more credibly offered and is not improbable. This credibility issue and the burden of persuasion are discussed in greater detail in the analysis section below.

The record reflects that De La Cruz received two annual performance reviews during his employment. The first was on July 7, 1998, after about 90 days on the work force. The second was on January 19. Brian Haviland, a former assistant superintendent, prepared both performance reviews. The assistant superintendent position apparently did not exist during St. John's tenure. Each of the performance reviews rated De La Cruz' performance in 10 categories. The initial review found his performance consistently met supervisor's expectations (3 on a scale of 1-5) in eight categories, but was rated 2 (not consistently meeting supervisor's expectations) in the categories of dependability/attendance and safety/security. On his second review he was given a rating of 3 in six categories and was rated 2 in judgement/problem solving/ decision making, 2 in quality/quantity of work, 2 in attitude/initiative/motivation, and 1 (seldom meeting supervisor's expectations) in interaction/cooperation/teamwork. In discussing the latter rating Haviland observed, "Others have a problem working with him at times. Has lied about issues to supervisors before. Supervisors do not have confidence in things he says." On December 9, 1998, Haviland had suspended De La Cruz without pay for 1 day for clocking in early and lying to Haviland, with the notation "dismissal from employment" should the incident occur again. De La Cruz' average score on his second appraisal was 2.5. Both reviews were prior to the union organizing.

The appraisal forms used for De La Cruz' two appraisals are entitled, "Annual Appraisal" and St. John credibly testified that during his tenure employees were appraised annually. The De La Cruz appraisals in evidence nevertheless indicate that De La Cruz' performance was to be reviewed in 6 months. The reason for a review in 6 months is not explained. While it suggests that De La Cruz may have been on probation, the issue was not fully litigated and no significance is attached to this. There is no evidence that De La Cruz was appraised between January 19 and his discharge. Accordingly, De La Cruz was due an appraisal when St. John was hired.

The General Counsel entered into evidence performance evaluations dated December 6 for employees Daniel Caballero and Javier Montoya over the objection of the Employer. They were among the personnel records produced at the hearing by the Employer pursuant to a subpoena addressed to the custodian of records. The Employer conceded that the documents were from the Employer's personnel records, but objected to the lack of any testimony to demonstrate their relevance. They were received as exhibits, but with the caveat that no decision was being reached as to the weight that would be given to the documents in the absence of supporting testimony. A supervisor did not sign these two evaluations and it was not established who prepared them. The documents indicate that they were issued at the end of the employees' 6-month probationary period. The performance evaluation forms differed from those used for De La Cruz. The forms rated employees in 11 areas. The choices were as follows: E-Excellent, A-Above Average, S-Satisfactory, D-Decreased Performance, and U-Unsatisfactory.

On his performance evaluation, Caballero received four ratings of D-Decreased Performance in creativity, independence, initiative, and knowledge of job. He received two ratings of A-Above Average in behavior pattern and in adherence to policy. His other ratings were S-Satisfactory, with an overall rating of average, with the comment, "Very new to golf industry. Needs to lean all aspects in golf maintenance." If numerical values of 1–5 are assigned to the five ratings, Cabellero's average score is 2.82.

Montoya received four ratings of D-Decreased Performance in creativity, dependability, initiative, and knowledge of job. His other ratings were S-Satisfactory. An overall rating for Montoya is not indicated. If numerical values of 1–5 are assigned to the five ratings similar to De La Cruz' evaluation, Montoya's average score is 2.64.

The forms for Caballero and Montoya have a date entered for their next evaluation on June 6, 2000. They were still employed at the time of the hearing, but there is no evidence regarding later evaluations. St. John testified that he had seen the documents, which were prepared before he was hired, but could furnish no other details. Four employees have quit during St. John's tenure and six have been hired. De La Cruz was the only employee St. John has discharged. Maintenance employees receive annual evaluations, however, no performance evaluations for other employees were placed in evidence.

B. Analysis

1. The alleged independent violations of Section 8(a)(1)

When an employer creates the impression among its employees that their union activities are being watched or spied on, employees' future union activities and the exercise of their Section 7 rights tend to be inhibited. See, e.g., *Link Mfg. Co.,* 281 NLRB 294 (1986), enfd. mem. 840 F.2d 17 (6th Cir. 1988), cert. denied 488 U.S. 854 (1988). Section 8(a)(1) is violated if an employer's statements would reasonably cause employees to believe that their activities have been under surveillance. The written warnings and statements made to employees by Anderson on November 2 created the impression of surveillance of employees' union activities. The warning stated that management had "received word" that the employees were engaged in union activity and that some employees were being "harassed" about the Union. The clear message was that unidentified persons were informing the Employer regarding employees' union activities. Employees would reasonably assume from the warning and from Anderson's remarks that any union activities by them had been and would be under surveillance. The Employer accordingly violated Section 8(a)(1) of the Act. *Peter Vitalie Co.,* 310 NLRB 865 (1993).

The evidence also establishes that the Employer impermissibly restricted the right of employees to solicit for the Union when Anderson gave written warnings to employees by on November 2. There is no evidence of any solicitation by the four employees and therefore there is no evidence of unprotected union activity by them. An employer may lawfully forbid employees from engaging in solicitations for any nonwork related object so long as the prohibition is limited to working time, is nondiscriminatory in its application, and there is no independent evidence that the rule is being imposed for union-related considerations. However, if a no-solicitation rule is overly broad, it is an unlawful interference with employee rights guaranteed by Section 7 of the Act. *Republic Aviation Co. v. NLRB,* 324 U.S. 793 (1945); *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105 (1956); *NLRB v. Steelworkers*, 357 U.S. 357 (1958); *Stoddard-Quirk Mfg. Co*., 138 NLRB 615 (1962); see also *6 West Limited Corp.,* 330 NLRB 527, 545, 546 (2000); *T.R.W, Inc*., 257 NLRB 442 (1981). Furthermore, if the parameters of no-solicitation restrictions are vague or ambiguous, the risk of noncompliance with the limitations established by the Supreme Court falls on the employer. *G. C. Murphy Co.,* 171 NLRB 370 (1968); *Hi-Lo Foods,* 247 NLRB 1079 (1980); *NLRB v. Miller-Charles & Co.,* 341 F.2d 870 (2d Cir. 1965). In the absence of evidence that the four employees who received warnings had even engaged in solicitation of other employees to support the Union, a warning to refrain from vague and unspecified "harassment" and from engaging in union activity that might make other employees "uncomfortable" was not privileged and violated Section 8(a)(1) of the Act.

2. The alleged violations of Section 8(a)(1) and (3) by issuing warnings

The written warnings issued to the four employees on November 2 violated Section 8(a)(1) and (3). General Counsel's Exhibit 3, on its face, indicates that it was issued in response to actual or suspected of union activity. The Employer offered no evidence that the employees had engaged in any unprotected conduct that might arguably privilege discipline. Rather, the Employer denied responsibility for the warnings, a defense not established by the evidence. Accordingly, a dual motive analysis is not necessary. *Tradesmen International, Inc.,* 332 NLRB No. 107 (2000).

The warnings were adverse employment actions against the four employees because they were made subject to immediate discharge if they engaged in unspecified union activity the Employer might find made other employees "uncomfortable" or that the employer deemed to be "harassment" and which themselves independently violated Section 8(a)(1). Thus, the employees were essentially placed on probation, and they were

thereby discriminated against in their terms or conditions of employment. An employer violates Section 8(a)(3) and (1) when it issues a warning letter or disciplinary writeup to an employee when the warning is motivated by the employee's union activity. See *Marshall Durbin Poultry Co*., 310 NLRB 68 (1993); *Yenkin-Majestic Paint Corp*., 321 NLRB 387 (1996); *Country Boy Markets*, 287 NLRB 234 (1987).

There is no evidence that the four disciplined employees had actually engaged in soliciting of other employees. However, even if it is assumed that the evidence does not establish employer knowledge of actual union activity, employer discipline motivated even by suspected union activity violates Section 8(a)(1) and (3*). Rainbow Garment Contracting, Inc.,* 314 NLRB 929 (1994); *Superior Micro Film*, 201 NLRB 555 (1973), enfd. 485 F.2d 681 (3d Cir. 1973). The language of the warnings issued to employees demonstrates that the Employer at least suspected that the employees had engaged in union activities or harbored union sympathies. The Employer admits that it was aware of union organizing prior to the November 2 warnings. Accordingly, the warnings violated Section 8(a)(1) and (3). *Kajima Engineering & Construction, Inc.,* 331 NLRB 1604 (2000).

3. The alleged violations of Section 8(a)(1) and (3) by discharging De La Cruz

The General Counsel contends that De La Cruz was discharged because he engaged in union activity, while the Employer contends that he was discharged for cause and that union activity played no part in his discharge.

To set forth a violation in dual motive Section 8(a)(1) and (3) discrimination cases, the General Counsel is required to show by a preponderance of the evidence that animus against protected activity was a motivating factor in the employer's conduct. Once this showing has been made the burden of going forward shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. To sustain his initial burden, the General Counsel must show (1) that the employee was engaged in protected activity, (2) that the employer was aware of the activity, and (3) that the activity was a substantial or motivating reason for the employer's action. *Wright Lin*e, 251 NLRB 1083, 1089 (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). Motive may be demonstrated by circumstantial evidence as well as direct evidence and is a factual issue, which the expertise of the Board is peculiarly suited to determine. *FPC Moldings, Inc. v. NLR*B, 64 F.3d 935, 942 (4th Cir.1995), enfg. 314 NLRB 1169 (1994); *Andrex Industries Corp.*, 328 NLRB 1279 (1999).

The evidence presented to satisfy the General Counsel's initial burden must be analyzed separately from the employer's defense. *Pace Industrial*, 320 NLRB 661 (1996), enfd. 118 F.3d 585 (8th Cir. 1997). Nevertheless, the employer's stated reasons for adverse action against an employee can be considered as a part of the General Counsel's initial burden and if they are pretextual they can support an inference that the employer had an unlawful motive. *Black Entertainment Television*, 324 NLRB 1161 (1997). The entire record may be examined to ascertain whether the adverse action was motivated by union activity. Thus, in determining whether the evidence presented has satisfied the General Counsel's initial burden, the evidence is not limited to the evidence introduced by the General Counsel, but can also include the reasons advanced by the Employer for the discharge and any additional reasons offered at the hearing. *Williams Contracting*, 309 NLRB 433 (1992).

The evidence establishes that De La Cruz engaged in union activity. The relevant union activity by him was his attendance at two union meetings on unknown dates before he was discharged. The only certain date of any union activity was September 23 (the first day of fall), when Madrigal signed a card, a date that is consistent with the Employer's concession that it was aware of union organizing in late summer. De La Cruz claimed that Madrigal passed out union cards at the second meeting, which would be consistent with Madrigal receiving his card on that date. Based upon the record evidence, I conclude that De La Cruz' union activity was limited to attending two union meetings, the second of which likely occurred on or before September 23.

The evidence does not establish that the Employer had knowledge of the actual union activity by De La Cruz, but does establish that the employer suspected he had engaged in union activity. If his discharge was motivated by suspected union activity that suspicion is sufficient to satisfy the *Wright Line* requirement that the General Counsel prove knowledge of union activity. *Kajima Engineering & Construction, Inc.,* supra, *Rainbow Garment Contracting, Inc.,* supra*; Superior Micro Film*, supra. Employer admits that it had knowledge of union organizing. The language of the warning issued to De La Cruz on November 2 shows that Anderson, an admitted supervisor and agent of the Employer, suspected that De La Cruz was engaging in union activities or that he had prounion sympathies.

The unlawful warning issued to De La Cruz on November 2 establishes hostility by the Employer to union activity by De La Cruz and others and demonstrates willingness by the Employer to violate the law. Accordingly, the remaining question presented on whether the General Counsel has met the initial *Wright-Line* burden is whether a preponderance of the evidence shows that animus against protected activity was a motivating factor in discharging De La Cruz.

The discharge occurred 16 weeks after the warning against further union activity and there was no union activity following the warning. The General Counsel contends that because the Employer did not warn De La Cruz of problems with his work and did not tell De La Cruz the specific reasons for his discharge, an inference is warranted that the Employer's stated reasons are pretextual and that its real motivation was illegal in nature, citing *American Wire Products,* 313 NLRB 989 (1994); and *International Automated Machines,* 285 NLRB 1122, 1131 (1987). The facts are unlike those in the cited cases. De La Cruz' past appraisals, prior to any union activity, described deficiencies in his performance and those deficiencies had worsened over time. De la Cruz had been given copies of those appraisals. St. John credibly described deficiencies in De La Cruz' job performance that he had personally observed. While the Employer did not give detailed reasons to De La Cruz for

his discharge and the reasons are not detailed in the personnel records, there is no evidence of a past practice or procedure different from what done. The printed separation notice form requires only the selection of a reason from a checklist. The choice for De La Cruz was "Unacceptable Performance." Cf. *American Wire Products,* supra.

The quick decision to discharge De La Cruz after St. John had been on the job only 2 weeks is urged as a reason to infer that hostility to union activity was the real reason for the discharge. Implicit in this argument is a suggestion that St. John was more willing than Anderson to discharge De La Cruz for unlawful reasons. There is no credible and probative evidence to support this. Since Anderson had been fired, it is reasonable to assume that the person hired to replace him would be under pressure to demonstrate his own competence. It is not unusual in such circumstances for personnel changes to be made early in the tenure of a new manager. De La Cruz' last performance review, described above, was a little over a year before St. John was hired, so he was due a regular annual appraisal when St. John assumed his duties. Accordingly, close scrutiny of De La Cruz at that time is not inherently suspect. There is no probative evidence to dispute St. John's credibly offered testimony that after his review of the personnel records of the maintenance employees De La Cruz stood out as a less satisfactory employee. In reaching this conclusion, little weight is given to the performance reviews of Caballero and Montoya, because they were new employees who had been appraised on December 6 at the end of their probationary period and they were not due another evaluation until June 6, 2000. Their subsequent appraisals were not offered and there is no evidence to show that they did not, unlike De La Cruz, demonstrate improvement in later appraisals. No appraisals of other employees were offered and there is no other probative evidence to show that De La Cruz' performance compared favorably with other comparable employees.

The General Counsel stresses that De La Cruz was discharged on a Thursday, rather than on a Friday, where the normal payday was every other Friday. This does not appear to be significant in the context of this case, because the discharge was not precipitated by protected activity close in time to the discharge and there had been no antiunion activity by the Employer since November 2. The record does not establish a practice regarding the discharge of employees on a payday. The record does indicate that while Caballero and Montoya began on Monday, December 6, 1999, St. John assumed his duties on Thursday, February 10, 2000, Madrigal's first day was Saturday, October 4, 1997, and De La Cruz began on Friday, February 10, 1998. Since the evidence suggests that there was no practice regarding what day employees went on the payroll, it would not be reasonable to assume that there was a practice concerning when in the payroll period an employee would be discharged. Cf. *American Wire Products,* supra.

As described earlier, St. John testified that De La Cruz, unlike other employees, did not work overtime. De La Cruz denied he was offered overtime and testified that February was slow. The General Counsel did not call Madrigal, Herrera, or Padilla to corroborate De La Cruz on the overtime issue. The General Counsel urges that an adverse inference should be drawn because the Employer did not offer payroll records to establish that overtime was being worked during the first 2 weeks of St. John's tenure. An adverse inference is available against the party with the burden of persuasion on an issue or against the party who is relying on the statements of an uncalled witness. *KBMS, Inc.,* 278 NLRB 826 (1986). See *Parts Depot, Inc.,* 332 NLRB No. 65 (2000); *Forsyth Electrical Co.,* 332 NLRB No. 68 (2000); *Van Dorn Plastic Machinery,* 265 NLRB 864 (1982). At this stage of the *Wright Line* analysis, the burden of persuasion to establish unlawful motive is on the General Counsel and there is a question whether accepting the General Counsel's position would improperly shift that burden to the Employer. Even assuming that such an adverse inference would lie, it would be more than offset by an adverse inference because the General Counsel did not call Madrigal, Herrera, or Padilla to corroborate De La Cruz on the overtime issue. The testimony of St. John regarding overtime was credibly offered is not improbable. Moreover, overtime was offered only as an example of what St. John perceived to be a lack of motivation and willingness to work, rather than the principal reason for De La Cruz' discharge.

Finally, the General Counsel argues that the discharge of De La Cruz was inconsistent with the maintenance crew being shorthanded, as evinced by employees working overtime. This contention is, however, counterbalanced by the evidence that additional maintenance employees were hired. While the record does not disclose when the additional employees were hired, the evidence is insufficient to shift the burden of going forward on this issue to the Employer. In any case, that consideration is outweighed by the other credibly offered reasons offered by St. John for De La Cruz' discharge.

In view of the foregoing, I conclude that the evidence is insufficient to establish a prima facie case that the Employer was motivated by antiunion considerations when De La Cruz was discharged. An administrative law judge need not address a respondent's defense at all unless the judge first finds that the General Counsel has proved that a respondent acted, at least in part, from unlawful motives. *Pace Industrial*, 320 NLRB 661 (1996), enfd. 118 F.3d 585 (8th Cir. 1997). Accordingly, the evidence does not establish that De La Cruz was unlawfully discharged. *Wright Lin*e, 251 NLRB 1083, 1089 (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).

Even if it is assumed that the General Counsel established a prima facie case, the Employer has demonstrated that the same action would have taken place even in the absence of protected conduct. The testimony by St. John regarding the reasons for De La Cruz' discharge was credibly offered and not improbable, for the reasons discussed above.

CONCLUSIONS OF LAW

1. Desert Pines Golf Club is an employer within the meaning of Section 2(2) of the Act engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Laborers' International Union of North America, Local 872, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The Employer violated Section 8(a)(1) of the Act by issuing oral and written warnings to employees that created the impression of surveillance of employee's union activities.

4. The Employer violated Section 8(a)(1) of the Act by issuing oral and written warnings to employees that impermissibly restricted the right of employees to solicit on behalf of the Union.

5. The Employer violated Section 8(a)(1) and (3) of the Act by issuing to employees Ricardo Madrigal, Pedro Herrera, Roberto Padilla, and Sergio De La Cruz written warnings because they joined, supported, or assisted the Union or engaged in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or because the Employer believed that they engaged in such activities, and in order to discourage employees from engaging in such activities or other concerted activities.

6. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. The Employer has not otherwise violated the Act.

THE REMEDY

Having found the Employer has engaged in violations of Section 8(a)(1) and (3) of the Act, I shall recommend it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having found the employer discriminatorily issued written warnings to its employees Ricardo Madrigal, Pedro Herrera, Roberto Padilla, and Sergio De La Cruz, I shall recommend that the warnings be immediately remove from their files, that they be notified in writing this has been done, and that evidence of the unlawful warnings will not be used as a basis for any future personnel actions against them.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, Desert Pines Golf Club, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing oral or written warnings to employees that create the impression of surveillance of employees' union activities.

(b) Issuing oral or written warnings to employees that impermissibly restricted the right of employees to solicit on behalf of Laborers' International Union of North America, Local 872, AFL–CIO, or any other labor organization.

(c) Issuing employees written warnings because employees joined, supported or assisted Laborers' International Union of North America, Local 872, AFL–CIO, or any other labor organization or engaged in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or because the Respondent believes or suspects that employees have engaged in such activities.

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

(a) Within 14 days from the date of this Order, remove from its files any reference to the unlawful written warnings given to employees Ricardo Madrigal, Pedro Herrera, Roberto Padilla, and Sergio De La Cruz and, within 3 days thereafter, notify each employee in writing that this has been done and that the warning notice will not be used against the employee in any way.

(b) Within 14 days after service by the Region, post at its Las Vegas, Nevada golf course copies of the attached notice marked "Appendix."[12] 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 immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 24, 2000.

(c) 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 be dismissed insofar as it alleges violations of the Act not specifically found.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommend 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.

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