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Summit Logistics, Inc. *and* Gilbert Noriega. Case 32–CA–17642

July 30, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND BARTLETT

On July 7, 2000, Administrative Law Judge Clifford H. Anderson issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and a supporting brief. The General Counsel and the Respondent each filed an answering brief to the other party's exceptions.

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 and to adopt the recommended Order.

The Respondent operates a large warehousing facility in Tracy, California, that distributes groceries to stores of a supermarket chain in Northern California. Approximately 1600 employees at the facility are represented by Teamsters Union Local 439 and are covered by a collective-bargaining agreement. The Respondent maintains detailed labor standards for its employees. These standards allow individual employee productivity results to be compiled, printed, and routinely posted in the warehouse so that employees can see how their performance compares to the predetermined 100 percent performance standard. As detailed in the judge's decision, new employees have a probationary period, during which they must increase their performance to the 100 percent standard by the end of their initial 7 weeks of employment.

Gilbert Noriega was hired by the Respondent on June 2, 1999, and assigned to the meat department as an order taker on the second shift. The work of order takers is physically demanding and the entire crew was working mandatory overtime. On June 18, 1999, Noriega discussed with his coworkers employee complaints about the length and number of days per week they were required to work, and he agreed to go to the "Labor Board," the Union, or the company with these complaints. On July 21, 1999, Noriega telephoned the California State Labor Commission and discussed the workweek and overtime issues with someone from that office. Noriega immediately spoke to Shop Steward Scott Donaldson and repeated what the official at the "Labor Board" told him.[2] Donaldson subsequently approached Tim Gomes, the department manager, where he discussed Noriega's telephone call.

Approximately an hour after Donaldson's conversation with Gomes, Gomes called Noriega into his office to talk about Noriega's poor performance level.

Gomes' version of his conversation with Noriega is as follows:

> I called [Noriega] in the office and I says, well, I want to go over some of your reports here and see why you're still at a low rate, why you can't meet the standards. And he says, well, I'm—he says, Tim, I'll never be able to meet your hundred percent standard. I says, well, how about if we give you some more training. He says, Tim, you could give me some training, he says, but I can't make your standard it's too tough. He says, you're working us a lot of hours. And I says, there's nothing I can do about that, we have a work load we have to do.

Noriega described the same conversation as follows:

> [H]e [Gomes] asked me why my percentages were so low and I told him I was tired. They [Respondent] were working us 10, 12 hours a day, two, three weeks in a row. Then he [Gomes] said, well your percentages are low. You [Noriega] know, we can work you as many hours and days as we please. And then he [Gomes] said, by the way, I hear you're unhappy with us working you so hard.

As detailed in his decision, the judge found that the General Counsel had met his initial burden of persuasion that Noriega's protected concerted activity was a substantial and motivating factor in the Respondent's decision to terminate him. However, the judge also concluded, and we agree, that the Respondent has sustained its affirmative defense that it would have discharged Noriega at that time even if he had not engaged in protected, concerted activity.

In finding that the Respondent had met its affirmative defense, the judge found it unnecessary to credit either Gomes' or Noriega's version of the conversation leading

[1] 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.

[2] Noriega was told by an official from the California State Labor Commissioner, which he termed the "Labor Board," that employees could not be required to work seven days a week without time off unless they were given proper notice and appropriate compensation.

to Noriega's termination, set out above. The judge found that, under either version, "Noriega in answering Gomes' request for an explanation of his low numbers told Gomes that he could not meet the performance standards because of the heavy work load within the Meat Department."[3] The judge found that there was "a clear statement by Noriega that, in effect, so long as the work load was heavy, Noriega's performance would remain at the current level."[4]

Unlike our dissenting colleague, we find no merit in the General Counsel's exceptions contending that the judge erroneously failed to resolve whether Noriega's or Gomes' version of the meeting is to be credited. Specifically, we reject our dissenting colleague's contention that, if Noriega's version of the conversation is credited, the Respondent's affirmative defense to the 8(a)(3) and (1) allegations would fail. Accepting Noriega's version of the conversation, Noriega conceded that his production was low, and he explained that this was because he was tired. He further explained that he was tired because he was being required to work "10, 12 hours a day, two, three weeks in a row." According to Noreiga, Gomes replied that Respondent had a right to require those hours and days. Thus, based on Noreiga's own testimony, the conditions would continue, and consequently the tiredness and low production would continue. Phrased differently, additional training would not increase production because lack of training was not the problem.

Our dissenting colleague confuses the conditions with the complaint about the conditions. The complaint may have played a role in the discharge, and this is the substance of the prima facie case. However, quite apart from the complaint, the conditions themselves and their impact on Noreiga's performance would have resulted in his discharge.[5]

The judge's decision is consistent with this view. In his decision, the judge specifically stated that the matter of whether Gomes offered Noriega additional training was not dispositive of the issue because it was clear that retraining would not address Noriega's underlying performance problem. Under either version, Noriega admitted he could not meet the performance standards at the current level of work in the Respondent's facility. We agree with the judge that Noriega's statement, "They were working us 10, 12 hours a day two, three weeks in a row," in explaining his low work percentages, amounted to an admission that his performance would remain at its current level as it had been for the 40 days since he had begun working for the Respondent. As fully recounted by the judge, the Respondent showed that the factor of performance drove the Respondent's personnel decisions both generally and in the case of Noriega. Thus, the evidence affirmatively shows that Gomes would have discharged Noriega, regardless of his protected concerted activities, as a result of Noriega's inadequate performance and his concession to Gomes that he was too tired or the standards were too tough.

We reject our dissenting colleague's contention that Noriega's reference to the long work hours was necessarily a direct reassertion of his protected concerted activity in complaining to the "Labor Board." But even assuming that it was, this would only serve to bolster that aspect of the judge's analysis that the General Counsel had made out its initial burden to show that the termination was unlawfully motivated. Our colleague has not explained how this statement negates the Respondent's affirmative defense that Noriega's production deficiencies would have caused his discharge, regardless of his Section 7 activity.

In sum, the evidence clearly shows that Noriega's work performance, as measured by objective employee evaluation criteria, was consistently deficient in relation to the Respondent's objective, published performance standards. Even Noriega's testimony provides corroboration on this point.[6] Furthermore, the credited testimony of Supervisor Hayward reveals that he had met with Noriega to discuss his poor performance on at least three occasions during his weekly performance reviews. Under these circumstances, we conclude that the evidence supports the judge's conclusion that Noriega was discharged because of his inadequate performance, not his protected concerted union activities.

We find that the judge's findings and conclusions are well supported by a preponderance of the entire record. We shall therefore adopt his recommendation to dismiss the complaint.

[3] Noriega's performance ratings were not challenged by the General Counsel. In his almost 40 days as a meat department probationary employee, he consistently under-performed with no signs of improvement. His weekly performance averages for the 5-week period of June 13 through July 17, 1999, were all in the 53 percent to 59 percent range, and he ranked at the bottom of the list of the meat department employees for 29 of the 38 days he worked before he was terminated.

[4] In view of the judge's crediting of Gomes' testimony that he initiated a review of Noreiga's performance the day before Noreiga contacted the California State Labor commission on July 21, and the crediting of Supervisor Walter Haywood's explanation for why he did not conduct the review, we find that the Respondent has fully explained a lawful, performance-based reason for Gomes' meeting with Noreiga at this time.

[5] There is no allegation that the conditions were unlawful.

[6] Our dissenting colleague says that Noriega did not testify that he told Gomes his performance would remain at the current level. However, this was the main thrust of what Noriega told Gomes. Noriega said that he was tired and that the standard was too tough.

ORDER

The recommended Order of the administrative law judge is adopted, and the complaint is dismissed.

Dated, Washington, D.C. July 30, 2002

Peter J. Hurtgen, Chairman

Michael J. Bartlett, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting.

Contrary to my colleagues, I find that the judge's failure to resolve a credibility dispute between Gilbert Noriega and Tim Gomes precludes our resolving this Section 8(a)(3) and (1) discharge case at this time. Accordingly, I would remand the case to the judge to make the required credibility resolution. (The conflicting testimony is quoted in the majority opinion.)

The judge found, and my colleagues do not dispute, that the General Counsel met its initial burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Specifically, the facts show that Department Manager Gomes discharged Noriega almost immediately after he had learned that Noriega had made a telephone call to the "Labor Board" complaining about excessive work hours, which the judge found established that Noriega's protected activities were a substantial and motivating factor in the Respondent's decision to terminate him.

The judge further found, however, that the Respondent would have terminated Noriega when it did, even if he had not engaged in protected activity. The judge relied on evidence that Noriega told Gomes that his performance was low because of the workload in the meat department, which the judge found could not be addressed or ameliorated in further training. In my view, this finding is not adequately supported by the judge's analysis of the evidence and cannot stand absent the resolution of the testimonial conflict.

The judge found that under either Noriega's or Gomes' version of the conversation, Noriega admitted he could not meet the performance demands of the Respondent. On the contrary, I find that Noriega's version, if credited, shows a direct nexus between his complaints to the "Labor Board" and the oral exchange which immediately led to his discharge. If credited, Noriega's testimony would undercut the Respondent's defense and support a finding that Noriega was discharged for engaging in protected concerted activity. At the very least, it would challenge the judge's blanket assertion that Noriega's performance issues could not be addressed or ameliorated by training, and necessitate an inquiry into whether training could have provided an appropriate resolution of Noriega's performance problems.

Noriega's reference to the "10, 12, hour working days two, three weeks in a row" the Respondent was working the meat department employees and the associated explanation that he was tired, refers to the same mandatory overtime and other working conditions for which he sought relief with the "Labor Board." This reference provides no basis for the judge to conclude that Noriega was thereby admitting that he could not perform to standard in the absence of what was perceived as excessive overtime. Moreover, if credited, Noriega's testimony demonstrates that Gomes (who assertedly remarked, "I hear you're unhappy with us working you so hard") was aware of Noriega's protected activities and may serve to establish an overriding retaliatory motive behind the Respondent's discharge of Noriega. The need for a remand is not premised on any finding that the production standard was itself discriminatory, for which there is no support in the record.

I disagree that the disputed testimony bears only on the General Counsel's already-established *Wright Line* initial showing, and not on the Respondent's defense. That defense can only be established by what was said at the July 21 meeting, because Gomes admitted he did not intend to discharge Noriega prior to the meeting. Thus, Noriega testified that during the meeting he emphasized the heavy workload, which prompted his protected activity. Noriega did not testify that he told Gomes that his performance would remain at its current level, and he certainly never admitted that even with additional training, he would not be able to meet the Respondent's standards.

Noriega's testimony clearly suggests that Gomes may have suddenly decided to discharge Noriega as a result of this exchange because he anticipated that Noriega would make further complaints to the "Labor Board," given a continued demanding work schedule. By contrast, the Respondent's claimed reliance on the rejected offer of additional training is wholly dependent on crediting Gomes' testimony over Noriega's, and that dispute has not yet been resolved by the judge. Given that Respondent was well aware of Noriega's consistent record of low production, and that the Respondent had not until then discharged him, the judge should make factual findings as to what was said at this determinatve July 21 meeting before the Board can decide that the Respondent has affirmatively sustained its burden to prove a *Wright Line* defense.

Therefore, I would remand this matter to the judge to resolve the conflicting testimony and how it bears on Gomes' atypical interaction with Noriega following his learning of Noriega's protected, concerted activities.

Dated, Washington, D.C. July 30, 2002

Wilma B. Liebman Member

NATIONAL LABOR RELATIONS BOARD

George Velastegui, Atty., for the General Counsel.
Alan I. Model, Atty. (Grotta, Glassman & Hoffman, P.A.), of Roseland, New Jersey, for the Respondent.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard this case in trial on March 24, 2000, in Stockton, California, pursuant to a complaint and notice of hearing issued by the Regional Director of Region 32 of the National Labor Relations Board on December 29, 1999, based on a charge in Case 32–CA–17642–1 filed on August 17, 1999, by Gilbert Noriega, an individual, against Summit Logistics, Inc. (the Respondent).

The complaint alleges that the Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by discharging Gilbert Noriega on or about July 21, 1999, because he joined or assisted Teamsters Union Local 439, International Brotherhood of Teamsters, AFL–CIO (the Union) or because he attempted to obtain for himself and other employees, benefits under the collective-bargaining agreement between the Union and the Respondent. The Respondent denies that it has violated the Act averring that it discharged Noriega for performance reasons unrelated to any protected concerted activity Noriega may or may not have engaged in.

FINDINGS OF FACT

Upon the entire record, including helpful briefs from the Respondent and the General Counsel, I make the following findings of fact.[1]

I. JURISDICTION

The Respondent, a Delaware corporation with an office and place of business in Tracy, California, has at all times material been engaged in the warehousing and nonretail distribution of supermarket products. During its business operations the Respondent, in the 12-month period preceding the issuance of the complaint, enjoyed revenues in excess of $500,000 and sold, shipped, or provided services valued in excess of $50,000 directly to customers or business enterprises who themselves meet one of the Board's jurisdictional standards other than the indirect inflow or indirect outflow standards.

Based on the above, there is no dispute, and I find, that the Respondent is and has been at all times material an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

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

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent operates a large warehousing facility in Tracy, California, that distributes perishable and nonperishable retail groceries to the retail stores of a major supermarket chain in Northern California. The facility exceeds 40 acres in size and employs approximately 1600 employees. These employees are represented by the Union and are covered by a collective-bargaining agreement effective from September 27, 1997, through September 27, 2000.

The Respondent's operations are closely monitored by the supermarket chain for whom it warehouses and distributes merchandise. The Respondent utilized an outside entity, Stroch, to design detailed time and motion engineering based labor standards for its employees. These standards were revised in 1998 with the assistance of the Union. On a regular basis individual employee productivity results are compiled, printed, and posted in the warehouse so that employees may see how their own performance compares to the predetermined 100 percent performance standard. Each employee in a given department is ranked by level of departmental performance every 30 hours of straight-time work. Managers and supervisors also receive copies of the performance of the employees in their units. Supervisors are evaluated based on the performance of the employees they supervise and managers are evaluated based on the performance of those employees under their management. Finally, the entire operation is evaluated by the supermarket chain according to the total overall performance of the Respondent.

Each unit position has its own algorithm for determining performance and that performance level assumes that the employee is an experienced-trained employee. New employees have a 520 straight time hour probationary period[2] during which they are required to achieve an ever-increasing percentage of the normal 100 percent standard. In the Respondent's training packet distributed to new employees, after 2 weeks of employment, an employee is expected to achieve 60 percent of standard performance. That expected level increases by 10 percent per week for 3 weeks and by 5 percent for 2 more weeks until, after 7 weeks of employment, the employee is judged by the 100 percent standard. The Respondent noted that the intermediate levels of achievement are outdated and are not followed, but argued that the performance levels at the 6th and 7th weeks and thereafter were followed at all relevant times.

There are various subunits of the warehouse. Thus, for example, there is a frozen department and a meat department. At

[1] As a result of the pleadings and the stipulations of counsel at the trial, there were few disputes of fact regarding collateral matters. Where not otherwise noted, the findings are based on the pleadings, the stipulations of counsel, or unchallenged credible evidence.

[2] Under the terms of the contract, the grievance and arbitration clause does not apply to the discharge of probationary employees.

relevant times department manager, Tim Gomes, supervised these two departments. Each department also has a team leader who reports to the department manager and directly supervises department warehouse employees. At relevant times the meat department team leader was Walter Hayward. At relevant times the meat department was staffed by approximately 60 employees.

In the meat department "order taker" or "selector" employees obtain orders and go through the meat department warehouse selecting the ordered items and placing them in a proper manner on a pallet for ultimate loading and delivery to a retail store. The work is physically demanding and there is a substantial rate of turnover among employees with a very high initial turnover of probationary employees.[3]

B. Events

Gilbert Noriega was hired by the Respondent for general warehouse work on June 2, 1999, and, following a period of normal screening and orientation, was assigned to the meat department as an order taker on the second shift. The months of June and July 1999 were extremely busy for the Respondent and its meat department. Employees were working mandatory overtime hours each day and were working up to 7 days a week. The work of the order selectors is physically demanding and the entire crew was working hard and long.

Noriega testified that he and the other employees discussed among themselves the lengthy days and number of days per week they were required to work. He recalled a specific discussion in the workplace lunchroom on June 18, 1999, in which he responded to other employees' complaints about working conditions with the assertion that they should stop whining and do something about their working conditions. He suggested they go to the "Labor Board," the Union, or the Company with their complaints. Several employees responded that since he has such a "big mouth," he should undertake such a task. Noriega agreed to do so.

Noriega testified that he was too busy to take any action until the morning of July 21, 1999. That morning he telephoned and spoke with the Stockton, California, State Labor Commissioner's Office, believing it to be the "Labor Board." He was told by an official there, in his recollection, that employees could not be required to work 7 days a week without time off unless they were given proper notice and appropriate compensation.

Later that same day in the early afternoon at the meat department breakroom just before the beginning of his shift, Noriega spoke to shop steward, Scott Donaldson. Noriega testified he told Donaldson that he had telephoned the "Labor Board" and repeated what he had learned. Donaldson in turn told Noriega he would look into the matter and raise it with the Respondent, filing a grievance if it was established that the Respondent had been violating the law. Donaldson essentially corroborated Noriega respecting this conversation and there was no contrary evidence. I credit Noriega as to these events.

[3] Irma Camarillo, the Respondent's human resources manager, credibly testified without contradiction that about half of the Respondent's new unit employees quit before their probationary period ends.

Following this conversation, Donaldson testified he went to Gomes' office and there had a conversation with Gomes alone. An unrelated matter was first discussed. Then Donaldson raised the subject of Noriega. He testified:

> I mentioned that an employee came to me and said that he went to the Labor Board and that he—he mentioned that it was—apparently there was a law that says that they weren't allowed to work employees seven days a week. And Tim [Gomes] was saying that—that, you know, if they need employees on a need-be-basis, they have the right to bring them in. And I was telling him that according to this lady, that she said it was a law and I—and the other employee was going to get proof, you know, because I told him to bring in some documentation or anything stating that it was against the law.
>
> And then Tim [Gomes] asked me, you know, who it was and I said that I didn't know what his name was, he was a newer probation period—a newer guy, a newer older man, and I—I kind of phrased him like an employee, his name was Ariel Rosetti. I said that it was Ariel Rosetti's father. And—and then Tim kind of crossed his arms and said, I—I think I know who you're talking about. And then, I'm all like, okay, whatever. And then I left.

Tim Gomes testified that this conversation occurred "way before" July 21, 1999, perhaps the preceding Friday. He described it:

> Mr. Donaldson came to me . . . and told me that an employee said that they couldn't work [employees] six or seven days. And I says, well, Mr. Donaldson, I says, we have a contract with the union to get the work done. I says, I don't know what he's talking about. I says, we have to get the work done.

In light of the corroborating testimony of Donaldson and Noriega, the certainty of Noriega as to the timing of the events, as well as the demeanor of each of the three individuals in testifying, I find Gomes was mistaken as the date of his conversation with Donaldson respecting the employee who had gone to the "Labor Board." I specifically credit Donaldson's recollection.

There is no dispute that Noriega was called into Gomes' office on the afternoon of July 21, 1999. Gomes described his conversation with Noriega at that time:

> I called [Noriega] in the office and I says, well, I want to go over some of your reports here and see why you're still at a low rate, why you can't meet the standards. And he says, well, I'm—he says, Tim, I'll never be able to meet your hundred percent standard. I says, well, how about if we give you some more training. He says, Tim, you could give me some training, he says, but I can't make your standard, it's too tough. He says, you're working us a lot of hours. And I says, well, there's nothing I can do about that, we have a work load we have to do. I says, you're sure, I says, where's—where's your problems. He just said, it's too hard. And I said, well, you're kind of putting me in a position where I have to make a move here because you're telling me you're not going to be able to do it even if I give you help. And he says, well, I can't meet your standard, Tim. And I says, well, again, you're putting

> me in a position where I have to say, hey, either we're going to have to part company here, you go your way, and he said, well, I can't do it. And I says, well, what do you want to do then. I says, do you want to finish today off, because some of the guys ride together, or do you just want to quit now? And he says, let's just do it right now.

Noriega described the same conversation:

> Well, when [Gomes] came in, he asked me why my percentages were so low and I told him because I was tired. They were working us 10, 12 hours a day, two, three weeks in a row, Then he said, well, he said your percentages are low. You know, we can work you as many hours and days as we please. And then he said, by the way, I hear you're unhappy with us working you so hard. Maybe it's better that we just go our separate ways. And then I asked him, are you firing me? And he said, well, you should go your way, we should go ours. And he said, why don't you come back tomorrow and get your check and I told him, no, I want my check now. So he went to go get it.

My discussion of the conflicting versions of this conversation is set forth below.

Waiting for his paycheck to be prepared, Noriega went to the warehouse to tell a colleague he would have to make new arrangements to get home that evening. He saw Donaldson working and had a conversation with him. He asked Donaldson what he had told the company earlier since he had just been fired. Donaldson told him the discharge was wrong and that he should file charges. The substance of the conversation is not in true dispute and I credit the testimony respecting it.

Soon thereafter Donaldson approached Gomes and asked him what had happened to Gilbert Noriega. He recalled that Gomes told him that he had "fired" Noriega. When Donaldson asserted to Gomes that it was unusual that Noriega had been fired so soon after Donaldson had talked to Gomes about Noriega having gone to the "Labor Board," Gomes answered that Noriega had been fired for too low a production level.

Subsequent to the termination, Noriega applied for state unemployment compensation. The Respondent asserted in its response to these applications that Noriega was terminated for inadequate production.

C. Analysis and Conclusions

1. The argument of the parties and the legal framework to be followed in evaluating the discharge of Noriega

The General Counsel alleges in his complaint and argued at trial and on posthearing brief that Noriega was discharged because of his protected concerted activities of taking employee complaints about working hours to regulatory authorities and for taking those complaints about working hours to the Union. Discharging an employee for such activities is indisputably a violation of Section 8(a)(1) and (3) of the Act. The Respondent avers in its answer, at trial and in its posthearing brief that Noriega was simply fired by the Respondent for a failure to meet the objective working standards applied to all employees, and further asserts he was not fired for any other reason including any protected concerted or union activities he may have engaged in.

The Board in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), established a test for approaching discrimination allegations which was recently restated in *Manno Electric*, 321 NLRB 278, 280, fn. 12 (1996):

> Under [*the Wright Line*] test, the Board has always first required the General Counsel to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity. *Office of Workers Compensation Programs v. Greenwich Collieries*, [114 S.Ct. 2251, 2257–2258 (1994)], at 2258.

Applying the teachings of *Wright Line* and *Manno* to the instant case, it is appropriate to consider first if the General Counsel has met his burden of persuasion that Noriega's protected, concerted, and/or union activities were a substantial or motivating factor in the Respondent's decision to terminate him. If the General Counsel carries that burden, then it is appropriate to explicitly shift the burden of persuasion to the Respondent to determine if it has established its affirmative defense that Noriega would have been discharged even if he had not engaged in protected activity.

2. The General Counsel's claim that antiunion or antiprotected concerted activity sentiment was a substantial or motivating factor in Noriega's discharge

While the credibility of both the General Counsel's and the Respondent's witnesses was in issue, Noriega's testimony that he acted on behalf of other employees in calling the state agency—albeit mistakenly identified as another agency—and in reporting what he believed he had learned from his Union steward was uncontradicted, corroborated in part by Donaldson, and was believably delivered. I have credited his testimony, supra. I also find that it is sufficiently clear to assert without case citation that such conduct is protected under the Act. This being so, I further find that Noriega's actions were both protected concerted activities and union activities for which he could not properly have been discharged.

Noriega and Donaldson together lay out a series of conversations which establish a close temporal relationship between the disclosure by Donaldson to Gomes of the fact that an employee had called the Labor Board and repeatedly learned that the Respondent's mandatory overtime was improper and the subsequent discharge of Noriega. Gomes challenged this series of events by placing his conversation with Donaldson as probably several days before and by discounting the significance of the conversation and of his ability to identify the employee involved in complaining from the content of Donaldson's remarks. I found both Noriega and Donaldson to be honest witnesses and have credited their corroborative versions of what occurred between them as well as the timing of events, above. I further find that Noriega was readily identifiable as an older new employee.

The fact of Noriega's protected, concerted, and union activity and the disclosure of these activities to the Respondent's

agent, Gomes, coupled with the virtually immediate discharge of Noriega, satisfies me that the General Counsel has met his burden of persuasion that Noriega's protected concerted union activities were a substantial or motivating factor in the Respondent's decision to terminate him. I reach this finding irrespective of whether Noriega's, Gomes', or some intermediate version of their July 21, 1999, conversation be credited. Accordingly, it is appropriate to turn to the Respondent's affirmative defense.

3. The Respondent's affirmative defense

Counsel for the Respondent both at trial and on brief emphasized that the instant matter presents a definitive case of an objectively based discharge which constitutes a successful affirmative defense to the discharge allegation irrespective of the General Counsel's argued initial showing under *Wright Line*. The Respondent's defense is essentially that Noriega's work performance, as measured by objectively determined, universally applied, employee evaluation criteria, was grossly inadequate and was consistently inadequate refuting any hope or expectation that Noriega would with time achieve a satisfactory level of performance. The Respondent argues that the evidence is clear that in all such situations, the Respondent discharges such employees for inadequate performance and must be found to have done so respecting Noriega.

The record clearly establishes, and the General Counsel does not directly challenge the proposition, that the Respondent's "100% Standard" of employee performance was at all relevant times a critical part of the Respondent's employee, supervisory, and managerial evaluation procedures. The record also clearly established that the Respondent's employees, supervisors, and managers regularly reviewed the posted or distributed lists of individual employee performance under that rating process. The Respondent in the instant case has established that in its warehousing operations it regularly utilizes a method of objectively evaluating unit employee work performance. And the evidence further establishes that the extent that the entire enterprise—from employees to supervisors to managers and even to the supermarket chain that retains the Respondent to perform its warehousing—utilizes that information on a regular basis is simply extraordinary.

Noriega, in his almost 40 days as a meat department probationary "order taker" received performance ratings for each of those days and the objective determination of those ratings is not under challenge.[4] Noriega, by his second week of work in the department was with some consistency achieving performance scores ranging between 49 and 66 percent. His weekly performance averages for the 5-week period of June 13 through July 17, 1999, were all in the 53 percent to 59 percent range. His performance over time did not improve markedly. He never achieved a score of 66 percent or more on any given day. His week-to-week progress was essentially flat. In comparative terms, Noriega's daily performance ratings within the meat department were very low. He ranked at the bottom of the list of meat department employees for 29 of the 38 days he worked. These daily rankings generally ranked 25 to 30 or so employees including probationary employees. I agree with the Respondent that Noriega's "numbers" were very low, were consistently low, and that he was regularly the lowest producer among the ranked employees.

The General Counsel attacks the significance of these assertions and hence the value of such ratings indirectly in a number of ways. First, counsel for the General Counsel argues that the performance standards were not being rigorously applied by the Respondent in June and July of 1999 because of the heavy press of business and the Respondent's admitted dire need for workers. He relies on the statements of the Respondent's witnesses that workers were needed and that special care was spent to bring along probationary workers so that they could stay with the employer.

I agree with the General Counsel that the Respondent generally and the meat department in particular was in need of workers and management including Gomes was anxious to insure that employees who could meet the Respondent's performance standards were given the time and training to become able to do so. I do not find on this record sufficient evidence to suggest—and specifically reject the governments argument's to the contrary—that the Respondent had or was simply lowering its performance standards or forgiving employees for a consistent failure to meet the standards because of its need for employees, even inadequately performing employees, to accomplish its daily work.

The General Counsel further argues on brief at 19:

> During his term of employment, Noriega was never warned or disciplined in any way about his performance and he had no way of knowing that Respondent was not satisfied with his performance despite his low productivity standards. The credible evidence establishes that his productivity was never an issue prior to July 21 and that the productivity of probationary employees have never been a primary concern for Respondent in the meat department.

I find this argument unsustainable. While Noriega did testify that he had never received complaints or warnings regarding his production, I discredit that testimony. The Respondent offered into evidence substantial documentary evidence that establishes the Respondent's essential preoccupation with performance statistics, including performance of probationary employees. Team leader, Walter Hayward, testified credibly that he had discussions with Noriega about his performance and the evaluation sheet, in evidence as Respondent's Exhibit 9, references production numbers for the initial weeks of Noriega's employment as well as containing entries referring to inadequate performance. While he had not had such conversations with Noriega in Noriega's later weeks of employment, Hayward credibly testified that he had been on vacation at that time and upon returning had been overwhelmed with the press of work. On the record as a whole, I have no trouble concluding that production was an ongoing issue for all employees at the Respondent's facility. I further find that it was an issue—albeit a different one in terms of initial production, training, and per-

[4] The rating Noriega received on his final day, Wednesday July 21, 1999, was disputed in that the Respondent argued it did not accurately measure the work of a partial day in which Noriega's tasks were completed by others. I have not relied on the evaluation on that day.

formance improvement—for probationary employees as well. In a setting where production numbers and ordinal rankings of employees were posted and distributed to supervision and management, it would be untenable to sustain the General Counsel's argument either that the Respondent did not care about Noriega's "numbers" and the rate of change in those "numbers" or that Noriega himself was simply unaware that his low productivity was "an issue" or a "concern" of the Respondent before his July 21, 1999 discharge.

In a different vein, the General Counsel points out that by Gomes' own admission he did not intend to discharge Noriega in his July 21, 1999 meeting with Noriega, but rather expected to learn what problems Noriega had and to offer him training to meet those problems. Thus, argues the General Counsel, since Noriega's version of the meeting did not include being offered training, Noriega was not fired because of a failure of performance but rather for engaging in protected and union activities.

I do not find the General Counsel's argument persuasive. This is so because, irrespective of how the two differing versions of the July 21, 1999 conversation between Gomes and Noriega were resolved, it is clear to me that Noriega, in answering Gomes' request for an explanation of his low numbers told Gomes that he could not meet the performance standards because of the heavy work load within the meat department. This advanced explanation of his performance was not something that could be addressed or ameliorated in training. Rather the assertion was a clear statement by Noriega that, in effect, so long as the workload was heavy, Noriega's performance would remain at the current level. Thus, under any version of this conversation, it was clear to Gomes that retraining would not address the problem, Noriega's performance problem. This being so, Gomes' failure to offer training to Noriega cannot carry the argument the General Counsel advances.

The General Counsel also reemphasizes the arguments offered in support its initial case as discussed above. Counsel skillfully marshals the evidence and argument in support of his case that the discharge decision is but pretext. Thus, counsel for the government argues, inter alia, that the close timing of Noriega's discharge hard on the union steward's disclosure of his identity to the Respondent's management and the fact that Department Manager Gomes rather than meat department team leader Hayward admittedly was the agent reviewing Noriega's performance, gives the lie to the entire course of events as offered by the Respondent.

I have carefully considered the General Counsel's evidence and argument explicitly putting the burden on the Respondent consistent with the case law cited, supra. I find the argument lacking. Simply put, I find the Respondent's primary argument that performance drove the Respondent's personnel decisions both generally and in the case of Noriega persuasive. I specifically find that, even if Noriega had not engaged in his protected concerted and union activities or if the Respondent generally, and Gomes in particular, did not have knowledge of them, that Gomes would have discharged Noriega in their meeting on July 21, 1999, without offering him further training or other additional assistance when Noriega told Gomes that his performance was low because of the workload in the meat department. The testimony of Gomes regarding his regular review of employee performance and his testimony that he had initiated his review of Noriega on July 20, 1999, which I credit, makes it clear that Noriega's performance was going to be under continuing scrutiny[5] at the time in question even had Donaldson never identified him to Gomes as the employee concerned about the Respondent's overtime policies.

All the above being so, I further find that the Respondent has sustained its affirmative defense of showing that it would have fired Noriega at the time that it did even if he had not engaged in protected activity. I therefore, further find that the Respondent has not discharged Noriega in violation of the Act and I shall dismiss the complaint in its entirety.

CONCLUSIONS OF LAW

On the basis of the above findings of fact and on the entire record, I make the following conclusions of law.

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent did not violate the Act as alleged in the complaint.

ORDER

Based on the forgoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended Order.[6]

The complaint shall be dismissed in its entirety.

Dated San Francisco, California. July 7, 2000

[5] I also credit Hayward's testimony that his failure to engage in his own performance review of Noriega at this time was due to the fact that he had just returned from vacation and was dealing with the press of work that had accumulated in that time.

[6] 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 waived for all purposes.