

Apollo Tire Company, Inc. and Manuel Figueroa.
Case 31-CA-7024

July 17, 1978

DECISION AND ORDER

BY MEMBERS PENELLO, MURPHY, AND TRUESDALE

On December 28, 1977, Administrative Law Judge Earldean V. S. Robbins issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and General Counsel filed limited exceptions and an answering brief to Respondent's exceptions. General Counsel also filed a motion to strike part of Respondent's brief; Respondent filed an opposition to that motion; and General Counsel filed a response to the opposition.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings,¹ findings,² and

¹ The Administrative Law Judge refused to allow Respondent to inquire into the alleged illegal alien status of the discriminatees on the ground that their alleged status had no bearing on Respondent's actions toward them which she found to be unfair labor practices. We agree with the Administrative Law Judge's ruling for, assuming *arguendo* that the discriminatees were illegal aliens, the Board has consistently held illegal aliens to be employees under the Act and entitled to its protection. See, e.g., *Amay's Bakery & Noodle Co., Inc.*, 227 NLRB 214 (1976), and cases cited therein.

² Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.*, 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing her findings.

Respondent has appended to its brief an affidavit of its foreman, Vramsabu Karakezian (referred to herein and in the attached Decision as Manug) and, based in part thereon, has moved that the instant proceeding be remanded to the Administrative Law Judge for further hearing. In the affidavit, Manug states he "meant to" testify that on April 22, 1977, before Respondent laid off the discriminatees, Respondent had received 20 orders for a total of 500-600 tires, rather than 20 orders for 500-600 tires each, as the record indicates he testified. Respondent does not dispute the accuracy of what the record states. Therefore, if Manug erred in his testimony at the hearing, Respondent could have corrected that error at that time. Respondent was fully represented by counsel then and we shall not permit it to attempt to amend the record at this time. We also find no merit in Respondent's argument that the Administrative Law Judge throughout the proceeding improperly pressured Manug to testify without the assistance of an available interpreter. Accordingly, Respondent's motion to remand this proceeding is denied. Finally, assuming *arguendo* the accuracy of Manug's affidavit, we still agree with the Administrative Law Judge's discrediting his testimony that the layoffs were economically motivated. Respondent contended that the layoffs were due to its having a 16,000-tire inventory. According to Respondent, its entire 25-26 employee complement was to be laid off, but, with its new orders, only the 6 alleged discriminatees were chosen. But, according to the Manug affidavit, the new orders were for only 500-600 tires. In light of the 16,000-tire inventory, these new orders were hardly enough to warrant revising the layoff schedule so that 19-20 employees were retained and only 6, those who coincidentally had filed complaints

conclusions of the Administrative Law Judge and to adopt her recommended Order as modified herein.³

General Counsel has excepted to the Administrative Law Judge's failure to find that Respondent threatened physical harm against an employee's wife because she had assisted another employee in filing a complaint about Respondent's working conditions with the United States Department of Labor. We find merit in the exception. As set out by the Administrative Law Judge, employee Figueroa, in March 1977, was asked by Respondent's general manager, Bostanian, whether Figueroa's wife, Hilda Niz, had gone to the "Labor Commission."⁴ Figueroa told Bostanian he did not know if his wife had gone to the "Labor Commission." According to Figueroa, Bostanian said that if she had gone there he would have her killed. Bostanian and another employee, Perez (who acted as Bostanian's interpreter), denied the conversation and, while the Administrative Law Judge recited the facts involved in the incident, she did not resolve the credibility issue and did not make a finding on the merits. In other instances, the Administrative Law Judge credited Figueroa's testimony where it conflicted with that of Bostanian and Perez. In these circumstances, we also credit Figueroa's testimony on this point.⁵ Accordingly, we find that Bostanian's statement that he would have Niz killed if she had gone to the "Labor Commission" was a threat in violation of Section 8(a)(1) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified herein, and hereby orders that the Respondent, Apollo Tire Company, Inc., Canoga Park, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 1(c) and renumber the subsequent paragraph accordingly:

with the Labor Department, were laid off. Accordingly, the information supplied in the affidavit does not in any event alter our agreement with the Administrative Law Judge's conclusions.

³ In view of the fact that a substantial number of Respondent's employees are Spanish-speaking, we find merit in General Counsel's request that Respondent be required to post the notice to employees in Spanish as well as in English, and we shall modify the Administrative Law Judge's recommended Order accordingly.

⁴ The Administrative Law Judge noted that the term "Labor Commission" was equated by Respondent's employees with any governmental agency which administered labor laws. According to Niz, she had already told Respondent that if her son were not paid overtime money allegedly due him she was going to the "Labor Commission."

⁵ *Shook & Fletcher Supply Company*, 107 NLRB 1246, fn. 3 (1954); see *Midwestern Manufacturing Company, Inc.*, 158 NLRB 1698, 1699 (1966).

“(c) Threatening physical harm against employees’ relatives because such relatives assist employees in filing complaints against Respondent with the United States Department of Labor.”

2. Substitute the following for paragraph 2(c):

“(c) Post at its facility in Canoga Park, California, copies of the attached notice marked “Appendix.”¹¹ Copies of said notice, written in English and Spanish, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent’s authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.”

3. 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

After a hearing at which all sides had a chance to give evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post this notice. We intend to carry out the Order of the Board and abide by the following:

The Act gives employees these rights:

- To engage in self-organization
- To form, join, or help unions
- To bargain collectively through representatives of their choosing
- To act together for collective bargaining or other mutual aid or protection
- To refrain from any or all of these things.

WE WILL NOT do anything that interferes with or restrains or coerces employees with respect to these rights.

WE WILL NOT lay off or discharge, refuse to reinstate, or otherwise discriminate against our employees because they exercise their right to complain to or file charges with the United States Department of Labor, the National Labor Relations Board, or any other governmental agency concerning their working conditions or engage in other protected concerted activities.

WE WILL NOT tell our employees that they were laid off or discharged or would not be reinstated

because they complained to or filed charges with governmental agencies concerning their working conditions.

WE WILL NOT tell our employees that they will be recalled only if they fail to pursue such complaints.

WE WILL NOT threaten physical harm against our employees’ relatives because those relatives assist employees in filing complaints against us with the United States Department of Labor.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in their exercise of any of the rights set forth above which are guaranteed by the National Labor Relations Act.

WE WILL, to the extent we have not already done so, offer to Manuel Figueroa, Filimon Ordorica Enciso, Jorge Fernandez Cortez, Amador Galiana, Cristoval Hernandez, and Efrain Gracia immediate and full reinstatement to their former jobs or, if those jobs are no longer available, to substantially equivalent jobs, without prejudice to any seniority or other rights and privileges previously enjoyed by them.

WE WILL make each of the above-named employees whole for any loss of earnings which they may have suffered by reason of the discrimination against them, plus interest.

APOLLO TIRE COMPANY, INC.

DECISION

STATEMENT OF THE CASE

EARLDEAN V. S. ROBBINS, Administrative Law Judge: This case came to hearing before me in Los Angeles, California, on various dates in September 1977. The charge was filed by Manuel Figueroa, an individual, and served on Respondent on May 3, 1977, and first and second amended charges were filed by Figueroa and served on Respondent on June 8, 1977, and September 16, 1977, respectively. The complaint, which issued on June 15, 1977, alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act. At the hearing, the complaint was amended to allege a violation of Section 8(a)(4) of the Act. Post-trial briefs were filed by the General Counsel and by Respondent.

The basic issue herein is whether Respondent discharged Filimon Ordorica Enciso (herein called Ordorica), Manuel Figueroa, Cristoval Hernandez, Jorge Fernandez Cortez (herein called Fernandez), Amador Galiana, and Efrain Gracia because they complained about Respondent’s working conditions to, or assisted in the investigation of said working conditions by, the United States Department of Labor and refused to reinstate Figueroa and Ordorica because they filed charges, or gave testimony under the Act.

Upon the entire record, including my observation of the witnesses and after due consideration of the briefs filed by the parties, I make the following:

FINDINGS OF FACT

I. COMMERCE

Respondent, a California corporation with an office and principal place of business in Canoga Park, California, is engaged in the retail sale and retreading of tires. Respondent, in the course and conduct of said business operations, annually purchases and receives goods or services valued in excess of \$50,000, directly from suppliers located outside the State of California.

The complaint alleges, Respondent admits, and I find that Respondent is an employer engaged in commerce, and in a business affecting commerce, within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

1. The events prior to the layoffs

Hilda Niz testified that her son, Manuel Lobos, was terminated by Respondent around January 9, 1977.¹

In March, according to Niz, she and Lobos had a conversation² with Stephen Bostanian, Respondent's general manager, during which she demanded that inasmuch as Lobos had been fired, Respondent pay the overtime pay allegedly due Lobos. Bostanian replied that he would have to speak to Foreman Vramsabu Karakezian, commonly known as Manug.³ On cross-examination Niz admitted that she asked Bostanian to rehire Lobos and said they would forget about the overtime pay if he was rehired. She further stated that if Bostanian did not pay the overtime, she was going to the "Labor Commission."⁴

About a week later, Lobos and Niz, accompanied by an English-speaking friend, Elise Warner, again visited Bostanian. Bostanian called Luis Armando Perez in to act as interpreter. Niz testified that Bostanian asked what was her problem. She said she wanted him to pay the overtime pay due her son, and that she was going to the "Labor Commission" if he did not pay. The testimony of Perez and Bostanian is more detailed than that of Niz.⁵ However, there is no essential conflict in these versions except that both Perez and Bostanian testified that Niz did not mention the "Labor Commission." She merely said she would cause problems or do Bostanian harm.

Lobos later returned to work and worked only 1 day. There is some conflict in the testimony as to why he left Respondent's employ after only 1 day, but the reason is irrelevant herein.

¹ All dates herein are in 1977 unless otherwise indicated.

² Employee Louis Armando Perez was used as an interpreter.

³ He is an admitted supervisor and some witnesses referred to him as "Malu."

⁴ This seems to be a term which was loosely used by the witnesses herein to refer to any governmental agency which administers labor laws.

⁵ Lobos did not testify.

On April 18, Niz complained about Respondent's alleged failure to pay for overtime to the Wage and Hour Division of the United States Department of Labor. Linda Goodrich, the compliance officer with whom she spoke, gave her complaint forms in Spanish to be distributed to other employees, filled out, and returned to Goodrich.⁶ Goodrich also gave to Niz a memo written in English, addressed to Respondent's employees, which requested that the employees indicate their names, addresses, and telephone numbers in order to facilitate future investigation of Niz' complaint.

On April 18 and during the following 2 days, Hernandez, Galiana, Figueroa, Ordorica, Gracia, Ortis, and Fernandez signed this memo. Only Hernandez and Ortis can read English. Niz explained to the others that if they signed the memo they would receive all of the overtime pay due them. However, this memo was never returned to Goodrich. Certain employees did fill out and return the complaint forms. Goodrich testified that within the following week she received complaint forms from Hernandez, Fernandez, Ordorica, Figueroa, Galiana, Ortis,⁷ and Gracia.

Figueroa testified that in March he had a conversation with Bostanian during which Perez interpreted. According to Figueroa, Bostanian asked if it were true that Figueroa's wife (Hilda Niz) had gone to the "Labor Commission." Figueroa said he did not know. Bostanian asked him to tell the truth so he could protect the factory. Bostanian said he had four lawyers who could find out if she had gone, that the lawyers could defend him, and that he had the money to pay for this and much more. Bostanian further said that if Niz had gone to the "Labor Commission" he would have her killed. Bostanian and Perez deny this conversation. Bostanian admits that several years earlier Respondent had gone through a wages and hours investigation which resulted in a \$5000 liability.

2. The layoffs

On April 22 Galiana, Fernandez, Ordorica,⁸ Hernandez, Figueroa, and Gracia were laid off. Respondent contends that they were laid off because of a tremendous buildup in inventory. According to Bostanian, sales were not very good at the time and they were negotiating for a new contract with Respondent's biggest customer, Mark C. Bloom,⁹ who was seriously considering switching to a new supplier. During this period of uncertainty, purchases by Mark C. Bloom dropped tremendously because it was purchasing on a fill-in basis rather than stocking its 36 stores, as usual. However, during the first 3 weeks of April, Respondent was producing at full capacity.

According to Manug and Bostanian, the inventory exceeded the normal available space so that tires were

⁶ The forms were standard forms utilized by the Wage and Hour Division printed in Spanish, the language of the employees involved herein.

⁷ She does not recall exactly when Ortis' complaint was received.

⁸ The correct names of Fernandez and Ordorica are Jorge Fernandez Cortez and Filimon Ordorica Enciso, respectively. However, they are known on the job as Jorge Fernandez and Filimon Ordorica and will be referred to herein respectively as Fernandez and Ordorica.

⁹ Bostanian testified that 25 to 30 percent of Respondent's retread sales were to Mark C. Bloom.

stacked to the ceiling.¹⁰ Bostanian testified Respondent was cited by the fire department and by the Occupational Safety and Health Administration (OSHA). Manug testified that he was told by someone from the fire department that he would be fined personally. However, Respondent offered no documentation of these citations or notices of noncompliance.

Respondent did enter into evidence a summary of recap units sold from October 1976 through May 1977 and casing units purchased during that same period. This summary shows that during April Respondent's purchase of casing units exceeded its sale of recap units by an amount greater than any other month during the period.¹¹ However, it does not compare the size of the inventory as of April 22 with the size of the inventory during other months in the period and with the exception of November 1976 and February, March, and May 1977, Respondent's gross sales for April exceeded that for other months in the period January 1976 through May 1977. Also Bostanian testified, in essence, that there is little relationship between the number of casings purchased and the number of recap units it needs to produce. Rather, Respondent must purchase casing units as they become available in order to protect its source of supply. Furthermore, the casing units are kept in the yard and the alleged fire and safety hazard was in the warehouse and factory. Under the circumstances, I find these summaries useless as corroboration of Bostanian's and Manug's testimony regarding the alleged inventory buildup and resulting fire and safety hazard.

Manug and Bostanian testified that within the 2 weeks prior to April 22 some drivers were laid off due to a decrease in sales¹² and that within the week preceding April 22 they seriously considered closing the plant for about 2 weeks because of the inventory buildup. According to Bostanian, at about 8 or 9 a.m., on Friday, April 22, they made the decision to close the plant. However, by 11 a.m., Respondent had secured enough orders to obviate the necessity to close the plant. Bostanian then told Manug that he did not think it was necessary to close the plant but that Manug should check to see what was necessary to be done in the plant.¹³

Manug testified that by 1 p.m., on April 22, he had decided to lay off six employees. When questioned as to what prompted him to decide to lay off six employees rather than the entire work force, Manug testified that Respondent had received beginning around 9 that morning more than 20 orders of 500 or 600 tires each. According to him, Respondent had an inventory at that time of around 16,000 tires but needed particular sizes.

Manug further testified that he told Bostanian that he wished to lay off six people but did not identify the six. However, Bostanian testified that, at or about 5:15 p.m., when he distributed paychecks, he was unaware that Manug planned to lay off some employees.

¹⁰ Several employees denied that tires were stacked to the ceiling.

¹¹ The differences as of April 22 were 6,081 units, and as of the end of April, 7,532.

¹² Respondent began recalling drivers on Monday, April 25.

¹³ Bostanian testified that in the retread industry, particular sizes are always in short supply and that regardless of the size of an inventory, one is always short of some sizes.

Manug first testified that he selected for layoff those that were least productive. He then testified that they were selected for layoff for various reasons. Ordorica was selected because he took off without notice for 2 months during the preceding year, he was always quarreling and fighting with fellow employees, and had even tried to fight with Manug,¹⁴ and could do no job other than buffing.¹⁵ Figueroa was selected for layoff because he was lazy and could only perform the job of tire inspector, whereas the other tire inspector could perform other jobs. However, according to Manug, Figueroa was selected for layoff mainly because of his drinking. Hernandez was laid off because he was a relief man¹⁶ and, with production dropping, he did not need a relief man. Fernandez was employed to move tires. With the cut in production, the checkman could move tires as necessary. He could also stack tires which was the job performed by Galiana. Manug contends that he did not lay off a checkman because checkmen are important to production and are in demand in the industry. As to Gracia, he was one of three millmen, he was absent a lot, and he was often late on Mondays.

However, if credited, the testimony of the alleged discriminatees belies these contentions. Thus, Galiana testified that Manug spoke to him in Spanish at the time of layoff, stating that there would be no work for Galiana until Respondent found out if he had signed papers for the "Department of Labor Commission" and that it would take 3 or 4 weeks to find out. If he had signed, there would be no work. If he had not signed, he would be recalled.

Fernandez testified that Manug told him he was going to lay him off for 4 weeks because there was a lot of work and besides Bostanian had problems with him and the others. Fernandez then went to Bostanian's office and asked Bostanian why he was being laid off. Bostanian replied because Fernandez had signed some papers for the "Labor Commission." Fernandez denied signing such papers and Bostanian said he had proof, that he had the names of all of those who had signed.

Ordorica testified that Manug told him there was no more work and when Ordorica inquired as to why, Manug said he did not know, that Bostanian telephoned saying there was no more work. Figueroa and Fernandez were present. Ordorica then went to Bostanian and asked why he was laid off. Bostanian said because he had signed some papers for the "Labor Commission," that if he learned they did not sign the papers or if he did not hear anything about the papers, they would be recalled in 3 or 4 weeks. Ordorica asked who told him and Bostanian replied that he had three or four lawyers in the "Labor Commission," who informed him of the signatures. Perez was used as interpreter during this conversation.

Hernandez testified that he asked Manug why Ordorica and Figueroa were laid off. Manug said he was also going to lay off Hernandez possibly for 1 or 2 weeks, that they had a lot of work or a lot of tires.¹⁷ According to Hernandez this seemed a strange reply because the production was the same so he inquired if there had been a problem. Ma-

¹⁴ Ordorica denies fighting with Manug.

¹⁵ There were two buffmen other than Ordorica.

¹⁶ He was used to replace other employees on breaks, etc.

¹⁷ At first Hernandez said "work," then he said "tires."

nug said the laid-off employees already knew what the problem was. Hernandez asked Manug to please tell him what the problem was. Manug replied that Fernandez, Ordorica, Gracia, and Galiana all went to sign some papers at the "Labor Commission" and suggested that Hernandez talk to Bostanian.

According to Hernandez, he then went to Bostanian's office and asked why Bostanian had not told him he was being laid off.¹⁸ Bostanian told him to close the door and then inquired as to what type of form they had filled out for the "Labor Commission." Hernandez replied that it concerned overtime. Bostanian asked what they wanted with him, why were they not happy working with him, and what did they want from him. Hernandez asked if he was sure the employees had signed those papers. Bostanian replied yes and showed Hernandez a paper listing the names of the employees who had signed.

Figueroa testified that, in the presence of Fernandez, Gracia, Galiana, and Ordorica, Manug told him he was going to lay him off for 4 weeks. Figueroa asked why and Manug replied because there was a lot of work. Figueroa then went to Bostanian and asked if it were true that he had laid them off. Bostanian said yes. Figueroa asked why and Bostanian replied that Figueroa had listened to his wife, and signed papers for the "Labor Commission," and because of that he was laid off. Bostanian further said, according to Figueroa, that if he could take care of that matter within 4 weeks he would recall Figueroa and, if not, he would not. Bostanian also said if it was true, Figueroa would never work for him again.

Gracia was called as a witness for Respondent. He testified that on the day he was laid off, he heard Manug say something to other employees but all he understood was "go, many, many tires there." He then talked to Bostanian and asked Perez to interpret. According to him, Bostanian said they were being laid off for 2 or 3 weeks because there were a lot of tires and they would send letters for them to return to work.

Manug testified that he informed all of the laid-off employees collectively that they were laid off. According to him, he said, "Too much tire in stock, no got room, fire department come, it is too much tire, it is only about 2, 3 weeks stay home." He further told them to look at their paychecks to be sure they received pay for Friday, April 22.¹⁹ Galiana said he was not paid for the extra day. According to Manug, no one inquired as to the reason for the layoff and he denies saying that they were laid off because they had filed papers with the Department of Labor. He further testified that he did not know then and does not know now that they had filed papers with the Department of Labor.

Manug also testified that he asked employee Roberto Beltran to interpret during this conversation. Beltran testified that before he was asked to interpret, he heard Manug say in English, "Necessary stop somebody because don't have job for everybody." Manug then requested Beltran's assistance as interpreter and told the employees that there

were a lot of tires, that it was necessary to lay them off for 2 weeks and that Respondent would send out a notice when they should return.

Bostanian testified that a group of employees came to his office and said Manug had laid them off. Bostanian paged Manug on the intercom and asked what happened. Manug said he had to lay them off because of production and that the layoff would be for 2 or 3 weeks. According to Bostanian, he then spoke to all, or nearly all, of the laid-off employees with Perez as interpreter. He explained to each of them that the layoff was due to overproduction, lack of sales, and inventory buildup, and that they would be sent a notice when to return to work.

Perez testified that Bostanian spoke to the laid-off employees individually, that in each instance he explained that they were being laid off for 2 or 3 weeks because they had too much production and not enough sales. He further said the fire department said the tires were stacked too high, that they could see this for themselves, and that as soon as he started to sell they could return to work, and he would send them a letter. He also said that if the sales did not start, the factory would have to be closed and he did not think they would have to close the factory.

3. The recalls

On Monday, April 25, the laid-off employees filed complaints with the Department of Labor regarding Respondent's alleged failure to pay them overtime. By letter dated April 25, Respondent was informed that a wages and hours investigation was being initiated and a May 4 appointment was requested. Bostanian testified that he received this letter on April 26 or 27 and that this was the first he knew of a Department of Labor investigation. On its face the letter shows certain enclosures: the Fair Labor Standards Act, the Handy Reference Guide to the Act, Section 516 of the regulations under the Act and a booklet entitled "Sir, The Wage and Hour Representative is Here."

On Tuesday or Wednesday, April 26 or 27, according to Bostanian and Manug, Manug told him he was going to need more employees, that they could return to full production. Manug did not ask Bostanian to recall the laid-off employees, but, according to Bostanian, he decided that it would be better to recall the laid-off employees than to hire new employees. So on Saturday, April 30, he sent letters by certified mail, return receipt requested, to the laid-off employees, written in English, asking them to report to work on Tuesday, May 3. At the same time he asked other employees to tell them to return to work. Later when asked on cross-examination why he waited until Saturday to recall these employees, Bostanian testified that he immediately sent messages by other employees for them to return to work. He admits that he had never before sent recall letters and that he sent the letters so he would have unequivocal proof that they were recalled. When asked why he wanted such proof, Bostanian testified that there was no particular reason, that he just wanted to have documentation and ensure that the notices were received.²⁰

¹⁸ A few minutes earlier, Bostanian had distributed paychecks with no mention of layoff.

¹⁹ The pay period ended on Thursday, April 21.

²⁰ Figueroa and Ordorica did not receive the letter until May 4. Fernandez credibly testified that he did not receive the letter.

On Monday, May 2, Gracia returned to work. On May 3, Hernandez returned to work. According to Bostanian, either Hernandez or Manug told him that Hernandez wished to speak with him. Bostanian went to the factory and Hernandez told him that a group of people, whom he identified by name, had gone to the "Labor Commission" and signed some papers. On that same day or the next day Gracia showed Bostanian a bruise and said that Figueroa and Ordorica had physically assaulted him to force him to sign the complaint. He also told Bostanian the names of the other employees who had signed complaints with the Department of Labor.

Manug testified that Gracia told him Figueroa hit him, displayed a gun, and said, "with this gun I will kill you, I will kill Roberto, I will kill Stephen." Gracia testified that he did not tell Manug or Bostanian about any threats until after he talked to Respondent's lawyer in preparation of the case herein. He specifically denies telling them about the threats when he returned to work. He also denies that he had a black eye when he returned to work. He further testified that Figueroa forced him to sign the Department of Labor papers by threatening to throw him to the law. He told Goodrich about this threat.

Hernandez testified that on the day he returned to work, Bostanian called him to the office and told him that he had his job if he was not going to give Bostanian more problems. Bostanian further said, "I want that you help me. I'm going to give you more money by the hour. The form that you filled out, you're going to sign another paper that says that you were very—had drank too much when you filled that paper."

Goodrich creditably testified that on May 4 she was in conference with Bostanian from 9 until approximately 10 a.m. During that hour Bostanian told her that he knew that complaints had been initiated by employees, that one of the employees had told him the names of those who had signed a piece of paper and that one of the names was a phony.²¹ He specifically mentioned Ordorica, Figueroa, and Gracia as being complainants. He further said that some of the complainants were at work that day and that others would be there later. He also mentioned that Gracia had been physically assaulted. Goodrich indicated that investigations could be initiated without complaints and that it was Department policy not to reveal whether there were complainants.

At the completion of their initial conference, Bostanian took Goodrich on a tour of the facility during which he introduced her to Gracia. After the tour, Goodrich returned to the office and began reviewing some of Respondent's records and interviewing employees. She interviewed employees both during the morning and during the afternoon when she interviewed Gracia. He was very reluctant to talk to her and gave her information different from that indicated in his complaint. Later Ortis (Abram Flores) and Hernandez also gave information contradictory to that indicated on their complaints.

That afternoon, at or about 3:30 p.m., Bostanian again mentioned the names of the complainants to Goodrich. He

²¹ Respondent has no record that Ortis worked there. Ortis was employed under the name Abram Flores.

said that Hernandez had signed the complaint while he was drunk, that Figueroa had been prompted by his wife, that Ordorica thought he would get \$30,000 from the NLRB for filing, that Gracia had been beaten up, that Ortis had never worked for the Company and was a phony name, and that Fernandez has been promised \$30,000. Also during that afternoon, as Bostanian was going through some papers, he handed Goodrich a copy of the charge herein and said, "this shows they went to the NLRB, here's what Manuel Figueroa has done, he's gone to the NLRB and complained." Bostanian testified in essential agreement with Goodrich except that he places all of the above conversations in the morning.

Galiano testified that he received the recall notice but did not return to work because Bostanian had recalled Figueroa and Ordorica and then refused to let them work.

Fernandez credibly testified that he did not receive the recall letter. However, after 4 weeks²² he returned to work.

4. The refusal to reinstate Figueroa and Ordorica

On May 4, at or about 10:30 or 11 a.m., immediately after they received their recall letters, Figueroa and Ordorica went to the plant and spoke to Bostanian in the yard. Perez was the interpreter. Figueroa testified, "Bostanian said to me was I crazy because I was going appreciating my wife and going to the Labor Commission, that he commported himself well with us, that there wasn't reason for us to be going there. If we were going to behave ourselves, that we would be returning to work the 5th at 6 a.m. We told him yes He told us to go, and not to go into the factory where the workers were." Ordorica and Figueroa then left.

Bostanian testified that they showed him the recall notice and asked what it was. Bostanian explained that it was a recall notice, that it was too late to start work that day, but if they wanted to return to work on Thursday, May 5, or Monday, May 9, they could. They both said they would return to work on May 5. Ordorica testified in essential agreement with Bostanian.

The following morning, Ordorica and Figueroa reported to work at 6 a.m., and waited for Bostanian who arrived around 6:10 a.m. Bostanian told them to go to the office. According to Figueroa, Bostanian said there was no more work because he had found out that Figueroa had signed some papers for the "Labor Commission." He said he had treated them very well but Figueroa had not treated Bostanian well because he had not told Bostanian about Niz. Bostanian also said that he knew Figueroa had threatened Gracia and forced him to sign. He said if they did not cause any more trouble they would be back within 2 or 3 weeks. Ordorica testified that Bostanian said there was not any work because they had had a lot of problems with him because of the papers they had filled out for the "Labor Commission."

According to Bostanian, he spoke to Figueroa and Ordorica in a combination of Spanish and English. He told them there were many problems with them, they had assaulted Gracia and other employees, and had made threats

²² At the time of his layoff, Manug told him it would be a 4-week layoff.

to other employees; but if there were no more assaults and threats they could return to work in possibly 2 or 3 weeks. Both Figueroa and Ordorica deny that Bostanian mentioned anything regarding problems or trouble with other employees.

Bostanian testified that he normally does not come to work that early but that this morning he arrived early for the express purpose of having the above conversation with Ordorica and Figueroa. This was prompted by Manug. According to Bostanian, at or about 11:30 a.m., on May 4, Manug asked if he had recalled Figueroa and Ordorica. Bostanian replied yes; whereupon, Manug said, "He doesn't feel they are good workers and they cause a lot of problems and they will cause me a lot of problems with the other employees as to the fightings and drinking and threats." Bostanian said he would look into it.

Later that day, according to Bostanian, he talked to at least two employees and was told that Figueroa and Ordorica were not good workers, that there was an incident of beating one of the employees; that there were some fights and drinking; and that Figueroa took siestas in the yard in the afternoon with cans of beer around him.

B. Conclusion

1. The layoffs

Credibility resolution is complicated herein by a language barrier. The employees involved are Spanish-speaking but most of them have a limited vocabulary and understanding of English. Bostanian speaks English but has a limited vocabulary and understanding of Spanish. Manug speaks Rumanian and heavily accented English. He claims that he speaks no Spanish except for a few dirty words which he learned from employees. Yet 99 percent of the employees supervised by him are Spanish-speaking. Several employees testified that they communicated with Manug through a combination of Spanish and English. Manug admits that he attempts to communicate with them. I do not credit his testimony that he has no Spanish words to utilize in this attempt at communicating instructions. I find it difficult to believe that he would learn dirty words and fail to learn a few words to aid him in his work. Further, the testimony of some of the employees that they communicate with him through a mixture of Spanish and English is mutually corroborative.

Because of the language difficulty, some misunderstanding is perhaps inevitable. Thus, I suspect that the conflict in testimony as to whether Manug said there was too much work or too much production was the result of a misunderstanding and that Manug was attempting to convey the idea of an excessive number of tires. Also, I found a real tendency on the part of the Spanish-speaking witnesses to ignore certain qualifying words or phrases at the beginning of sentences which tended to make answers to leading questions somewhat unreliable unless pursued further. In general this was done during the course of the hearing but it leaves me somewhat reluctant to place much reliance upon statements contained in prehearing affidavits inconsistent with the testimony herein, particularly in the case of Fernandez and Hernandez who clearly indicated during

their testimony that they were unaware of the import of certain statements contained in their affidavits and did not intend the meaning conveyed. However, I conclude that whatever difficulty there might be with the understanding of one word, such as work or production, or the grasp of the meaning of a long, involved sentence or question, the persons involved herein did make themselves understood to each other by the use of simple, direct phrases and uninvolved sentences. I further conclude that a misunderstanding was highly unlikely, and I find there was no misunderstanding as to the matters most critical herein—statements concerning signing papers for the "Labor Commission."

I do not credit Manug that the layoffs were necessitated by the buildup in inventory. His own testimony indicates that on April 22, prior to the layoffs, orders were received for in excess of 10,000 tires.²³ According to his testimony, this wiped out more than 60 percent of his inventory. Earlier in the day, Bostanian's position had been that no layoff was necessary. I also note that Bostanian contends that he knew nothing of the layoffs until the end of the workday when the laid-off employees demanded an explanation from him as to their layoffs. Yet Manug testified that he had earlier told Bostanian that he was laying off certain employees but had not identified the employees. This conflict lends credence to a pretext theory.

Furthermore, by Monday or Tuesday Respondent was concerned with replenishing stock and needed to hire new employees. Yet the recall letters were not sent out until Saturday, April 30. I do not credit Bostanian and Manug that other employees were requested earlier in the week to notify the laid-off employees to return to work. Initially Bostanian testified that he made this request at the same time he sent the letters. It was only after he was pressed as to a reason for the delay that he testified that the oral requests preceded the letters. I also note in this regard that it was during the course of that week that Bostanian received the appointment letter from the Wage and Hour Division along with the accompanying material which indicated that it is illegal to discharge employees because they complain to the Wage and Hour Division.²⁴

I do not credit Manug that he selected the employees to be laid off for the reasons advanced by him. He admits that turnover of employees is a production problem. Yet he selected for layoff persons who had worked for Respondent for 1 to 2 years. Furthermore, it strains credulity that it was sheer coincidence that the persons selected for layoff just happened to be all those identifiable as having signed a sheet indicating that they wished to be contacted during the course of a wage and hour investigation. Of the seven who signed, only Ortis was not laid off, and he was not readily identifiable because he worked for Respondent under the name of Abram Flores.

I credit the testimony of the employee witnesses that Bostanian and, in some cases, Manug, told them they were being laid off because they had signed papers for the "Labor Commission." Their testimony is mutually corroborative. Contrary to Respondent's contentions, I find no in-

²³ More than 20 orders of 500 or 600 tires each.

²⁴ See Fair Labor Standards Act, 29 USC § 215(a)(3) and Handy Reference Guide to the Fair Labor Standards Act, p. 7.

consistency between Galiana's testimony and that of other employees. In its brief, Respondent argues that Galiano claimed he never went across the street to talk to Bostanian and that Ordorica and Figueroa claimed he accompanied them. A fair assessment of Galiana's testimony reveals only that he did not talk to Bostanian. It is by no means clear that he contends that he did not go with the group to the office. Even Bostanian admits that he may not have talked to each individual in the group.

Nor do I find it inconsistent that Ordorica testified that Perez acted as translator during his conversation with Bostanian whereas Figueroa testified that Perez was not present. They were separate conversations. It is clear from the record that Bostanian often did not utilize an interpreter.

I found both Manug and Bostanian to be evasive witnesses at times—such as Manug's improbable contention that it was none of his business whom Respondent hired during the week of April 25; his initial testimony that he started receiving massive orders on April 22 and then in an attempt to explain the hiring of new employees the following week, he testified that 4 days after the layoff, he started getting orders; Bostanian's attempts to explain the use of the recall letters; and his alleged lack of reaction to the wage hour investigation. Also, as noted above, I found the testimony of Manug and Bostanian to be contradictory in some regards as was that of Bostanian and Gracia.

In making credibility findings, I have fully considered the extent to which Perez corroborates Bostanian's testimony as to the conversations of April 22. However, I note that Perez was not used as translator in some of these conversations on other dates. The alleged remarks made by Bostanian in those other conversations are consistent with the statements allegedly made in Perez' presence. Also the alleged discriminatees' versions of the April 22 conversation make more plausible Bostanian's preference for individual conversations. If the conversations were innocuous and as identical as contended by Bostanian and Perez, there seems no need for private conversations.

I therefore find that in violation of Section 8(a)(1) of the Act, both Manug and Bostanian told employees that they were laid off because they signed papers for the "Labor Commission" and that the term "Labor Commission" was used to refer to the Wage and Hour Division of the Department of Labor. I also find that Respondent violated Section 8(a)(1) of the Act by Bostanian's statement that employees would be recalled only if they failed to pursue such complaints. I further find in all the circumstances, particularly the statements made by Manug and Bostanian, the timing, the unconvincing nature of Respondent's alleged reason for the layoffs, and the fact that the only persons laid off were those identifiable as having signed papers to participate in a Wage and Hour Division investigation, that Amador Galiana, Efrain Gracia, Jorge Fernandez Cortez, Filimon Ordorica Enciso, Cristoval Hernandez, and Manuel Figueroa were laid off or discharged by Respondent in violation of Section 8(a)(1) of the Act because they complained about Respondent's working conditions to, or assisted in, the investigation of Respondent's working conditions by the United States Department of Labor.²⁵

2. The refusal to reinstate Manuel Figueroa and Filimon Ordorica Enciso

The complaint alleges that Respondent refused to reinstate Figueroa and Ordorica in violation of Section 8(a)(4) of the Act. On May 4, Bostanian told Figueroa and Ordorica to report to work on May 5. Yet on May 5, Bostanian refused to permit them to return to work. Respondent argues that after Bostanian talked to Figueroa and Ordorica on May 4, Manug told Bostanian that they were not good workers and caused a lot of problems with other employees with fighting, drinking, and threats. Allegedly, Bostanian talked to two employees, one of whom was Gracia. Both Manug and Bostanian testified that Gracia told them that Figueroa and Ordorica had beaten him up to force him to sign the Department of Labor papers and Manug testified that Gracia told him that Figueroa threatened to shoot employee Roberto Beltran and Bostanian and that Beltran was the interpreter during this conversation. Gracia denies making such statements prior to May 5, and even Beltran's testimony indicates that he did not participate in such a conversation at this time.

Both Bostanian and Gracia state that Gracia told him prior to May 4 that he was forced to sign the papers for the Department of Labor. Gracia contends that he was forced by threats to send him to jail. In any event this was prior to May 4. Any other dissatisfactions Manug had were known prior to the layoff. He testified that he assumed Bostanian would be recalling laid-off employees, yet, prior to May 4, Manug never requested that Figueroa and Ordorica not be recalled. Moreover, Bostanian clearly was not impressed by fighting among employees. He admits that this was a problem with Lobos. Yet Lobos was permitted to return to work. Also undenied testimony shows that Manug condoned drinking. Also suspicious is the unusual use of certified letters of recall.

I find merit in General Counsel's contention that the only intervening factor between the May 4 recall and the May 5 refusal to reinstate was receipt of the charge herein. I do not credit Bostanian's testimony that he knew of this charge prior to his May 4 conversation with Figueroa and Ordorica. Bostanian testified that his mail is received between 9 and 9:30 a.m. Goodrich creditably testified that her scheduled 9 a.m. conference with Bostanian started on time. Bostanian mentioned everything else he knew to Goodrich regarding his employees' complaints during the morning conference. Yet it was not until the afternoon, according to Goodrich, that he mentioned the charge herein. Nor did he mention it to Figueroa and Ordorica. I conclude that Bostanian did not see his mail prior to his talk with Figueroa and Ordorica.

I also credit Figueroa and Ordorica that on May 5 Bostanian said there was not any work for them because of the papers they had filled out or signed for the "Labor Commission." I further find that by "Labor Commission" Bostanian was referring to the charge herein. That was the only labor matter brought to his attention following the

²⁵ *Triangle Tool & Engineering, Inc.*, 226 NLRB 1354 (1976); *King Soopers, a Division of Dillon Companies, Inc.*, 226 NLRB 867 (1976); *Alleluia Cushion Co., Inc.*, 221 NLRB 999 (1975).

May 4 conversation when he told them they could return to work. I therefore find that Respondent, in violation of Section 8(a)(1) and (4) of the Act, refused to reinstate Manuel Figueroa and Filimon Ordorica Enciso because Figueroa filed a charge with the National Labor Relations Board alleging that the April 22 layoffs or discharges were violative of the Act.

I further find that the evidence is insufficient to establish that Figueroa and Ordorica engaged in misconduct so flagrant as to render them unfit for further employment.²⁶ The only testimony in this regard came from Gracia and referred only to Figueroa. Both Figueroa and Ordorica deny Gracia's testimony that Figueroa said he was going to damage Beltran's station wagon and shoot Beltran and Bostanian. I do not credit Gracia in this regard. The entire tenor of his testimony indicates that he was frightened by the consequences of his action and that he was attempting to disassociate himself from the protected activity of his fellow employees and ingratiate himself with Respondent.

CONCLUSIONS OF LAW

1. The Respondent, Apollo Tire Company, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By telling employees they were being laid off or would not be reinstated because they complained regarding Respondent's working conditions to the Wage and Hour Division of the United States Department of Labor, or filed charges or gave testimony under the National Labor Relations Act; and by telling laid-off employees that they would be recalled only if they failed to pursue such complaints, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

3. By laying off or discharging Filimon Ordorica Enciso, Manuel Figueroa, Cristoval Hernandez, Jorge Fernandez Cortez, Amador Galiana, and Efrain Gracia because they complained about Respondent's working conditions to, or assisted in the investigation of Respondent's working conditions, by the Wage and Hour Division of the United States Department of Labor, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By refusing to reinstate Manuel Figueroa and Filimon Ordorica Enciso because they filed charges or gave testimony under the Act, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(4) and (1) of the Act.

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

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (4) of the Act, I shall recommend that Respondent be ordered to cease and desist therefrom and to take certain affirmative

²⁶ *Richlands Textile, Inc.*, 220 NLRB 615 (1975); *Coronet Casuals, Inc.*, 207 NLRB 304 (1973); *Daniel A. Donovan, et al., d b a Fairview Hall Convalescent Home*, 206 NLRB 688 (1973).

action designed to effectuate the purposes of the Act.

To the extent it has not already done so²⁷ it is recommended that Respondent offer Manuel Figueroa, Filimon Ordorica Enciso, Amador Galiana, Jorge Fernandez Cortez, Cristoval Hernandez, and Efrain Gracia immediate and full reinstatement to their former positions, or if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges,²⁸ and make each of them whole for any loss of pay they may have suffered as a result of the discrimination against them by payment to them of a sum of money equal to that which each would have earned as wages during the period from the date of their layoff to the date on which Respondent offers reinstatement less their net earnings, if any, during the said period, with interest thereon to be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).²⁹

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER³⁰

The Respondent, Apollo Tire Company, Inc., Canoga Park, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Laying off or discharging, refusing to reinstate, or otherwise discriminating against any of its employees because they complained regarding Respondent's working conditions to, or assisted in the investigation of Respondent's working conditions by, the Wage and Hour Division of the United States Department of Labor; or because they filed charges or gave testimony under the National Labor Relations Act.

(b) Telling employees they were being laid off or would not be reinstated because they complained regarding Respondent's working conditions to the Wage and Hour Division of the United States Department of Labor; or filed charges or gave testimony under the National Labor Relations Act.

²⁷ Respondent argues that Galiana has forfeited any right to reinstatement by failure to report to work in response to the April 30 and June 10 letters offering reinstatement. Galiana credibly testified that he received only the June letter and that he failed to respond because he knew that Ordorica and Figueroa had received recall letters and yet were refused reinstatement when they reported to work. In these circumstances, I find that Galiana is entitled to reinstatement.

²⁸ During the course of the hearing, I did not permit Respondent's counsel to ask questions regarding the alleged discriminatees' legal status in this country. Respondent admits that in laying off and/or failing to reinstate the alleged discriminatees, it was not motivated by the legality or illegality of their status in this country nor did Respondent allege that it had any evidence or suspicion of illegal status other than speculation arising from the ethnic origins of the alleged discriminatees. It appears from its brief that Respondent is requesting that I reconsider my ruling in this matter. I have done so and I adhere to my previous ruling.

²⁹ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

³⁰ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

tions Act; and telling laid-off employees that they would be recalled only if they failed to pursue such complaints.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

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

(a) To the extent it has not already done so, offer Manuel Figueroa, Filimon Ordorica Enciso, Amador Galiana, Jorge Fernandez Cortez, Cristoval Hernandez, and Efrain Gracia immediate and full reinstatement to their former or substantially equivalent positions; and make each of them whole for any loss of earnings he may have suffered by reason of Respondent's discrimination against him in the manner and to the extent set forth in the section here entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records neces-

sary to analyze the amount of backpay due and the right of reinstatement under the terms of this recommended Order.

(c) Post at its facility in Canoga Park, California, copies of the attached notice marked "Appendix."³¹ Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 31 in writing, within 20 days from the date of this Order, what steps it has taken to comply herewith.

³¹ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."