

**CBF, Inc., and/or Charles Santangelo, Single Employers and United Mine Workers of America, AFL-CIO.** Cases 6-CA-23769, 6-CA-24186, 6-CA-24646, and 6-CA-24804

September 12, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On July 23, 1993, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief, and an answering brief in opposition to the General Counsel's cross-exceptions, the General Counsel filed cross-exceptions and an answering brief in opposition to the Respondent's exceptions, and the Charging Party filed a response in opposition to the Respondent'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,<sup>1</sup> findings,<sup>2</sup> and con-

<sup>1</sup> We do not pass on the judge's discussion of the single employer issue or the issue of derivative liability as unnecessary to the disposition of the unfair labor practice allegations.

<sup>2</sup> 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.

We also find no merit in the Respondent's allegations of bias and prejudice on the part of the judge. Thus, we find no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated a bias against the Respondent in his analysis or discussion of the evidence. Similarly, there is no basis for finding that bias and prejudice exist merely because the judge resolved important factual conflicts in favor of the General Counsel's witnesses. *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949).

We agree with the judge's conclusion that the Respondent had knowledge of union activity when it began its campaign of unlawful activity, but we do not rely on the judge's finding of unlawful impressions of surveillance by Supervisor Joseph Persely on July 10 and 25. We disagree with the judge that Persely's actions on those two occasions created the impression that employees' union activities were under surveillance. We note that, in any event, the violations would be cumulative and do not affect the remedy or the Order.

We correct the following inadvertent factual misstatements by the judge: John Michael Stout, Steve Stout, and James Byers were laid off on July 12, 1991, not June 12; Jacob Hartmen was laid off on July 13, 1991, not June 13; David Romito was discharged on July 25, 1991, not July 26; and the Respondent instituted drug testing on July 19, 1991, not June 19.

Finally, we deny the Respondent's motion for oral argument as the record, exceptions, and briefs adequately present the issues and positions of the parties.

<sup>3</sup> The Order is modified to reflect the traditional language used to order reinstatement and backpay.

clusions and to adopt the recommended Order as modified.<sup>3</sup>

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, CBF, Inc., and/or Charles Santangelo, Single Employers, McClellandtown, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

“(a) Offer to Robert Belch, James Byers, Jacob Hartmen, Dennis Hornbeck, David Romito, Wesley Shaffer, John Michael Stout, Steven Stout, and Marion Strosnider immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.”

2. Insert the following as paragraph 2(b), and reletter the subsequent paragraphs.

“(b) Make whole employees Robert Belch, James Byers, Jacob Hartmen, Dennis Hornbeck, David Romito, Wesley Shaffer, John Michael Stout, Steven Stout, Glenn O. Franks, and Marion Strosnider for any losses they suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.”

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of rights guaranteed in Section 7 of the Act by interrogating employees about union support or union activities, by creating the impression employees' union activities are under surveil-

lance, by threatening plant closure, layoffs, discharge, loss of overtime, and vandalism of employees' property, by threatening unspecified reprisals, by soliciting grievances and promising benefits, by stating that an employee would be the first laid off or terminated because he attended a Board hearing, and by implying that an employee would not have been terminated for failing a drug test were it not for the Union.

WE WILL NOT terminate, lay off, or reduce any employees' overtime opportunities, fail to recall employees from layoff, or institute a drug testing program for all employees or otherwise discriminate against them because of or in retaliation for their engaging in union activities or other protected concerted activity.

WE WILL NOT unilaterally implement changes in terms and conditions of employment without bargaining in good faith.

WE WILL NOT unilaterally change contractual provisions previously agreed to, fail and delay to provide requested information relevant to the Union's collective-bargaining duties, and fail and refuse to bargain collectively with the Union with regard to layoff and tenure, and fail and refuse to meet or to bargain collectively because of a union's filing of charges with the Board or for any other invalid reason.

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

WE WILL offer Robert Belch, James Byers, Jacob Hartmen, Dennis Hornbeck, David Romito, Wesley Shaffer, John Michael Stout, Steven Stout, and Marion Strosnider immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority and other rights and privileges previously enjoyed and WE WILL make them and Glenn O. Franks whole for any loss of earnings and other benefits resulting from their discharge or layoff, less any net interim earnings, plus interest.

WE WILL notify each of them that we have removed from our files any reference to the discharges and layoffs and that these discharges and layoffs will not be used against them in any way.

WE WILL, on request, supply the Union with the information it requested and on request rescind the drug testing program and health care plan previously instituted and implemented and on request bargain in good faith with the Union as the exclusive bargaining agent of our employees with respect to their wages, hours, and other terms and conditions of employment and embody any understanding reached in a signed agreement.

CBF, INC., AND/OR CHARLES SANTANGELO, SINGLE EMPLOYERS

*Leone P. Paradise, Esq.*, for the General Counsel.

*Francis Recchuiti, Esq.*, of Norristown, Pennsylvania, for the Respondent.

*Thomas E. Waters Jr., Esq.*, of Blue Bell, Pennsylvania, for Respondents as alleged single employers.

*William Marion, Esq.*, of Washington, Pennsylvania, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Pittsburgh, Pennsylvania, beginning December 7 and concluding December 18, 1992. Subsequent to an extension in the filing date, briefs were filed by the General Counsel and Respondent. The proceeding is based on a series of charges first filed on July 25, 1991,<sup>1</sup> by United Mine Workers of America, AFL-CIO. The Regional Director's third consolidated amended complaint dated October 5, 1992, alleges that Respondent, CBF, Inc., of McClellandtown, Pennsylvania, violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act by threatening closure of its operations and interrogation and surveillance of employees and creating an impression their union activities were under surveillance; soliciting employee grievances; telling employees that termination for failing a drug test was related to union organizing; threatening employees with property damage and bodily harm, denial of wages and unspecified reprisals, discharging or laying off and failing to recall or reemploy employees; reducing an employee's overtime hours; and instituting a drug-testing program because of union organizational actions by employees. It is further alleged that Respondent unilaterally extended health care coverage to certain employees and took actions regarding layoff and recall without notice to or bargaining with the Union, unilaterally changed previously agreed-on contract provisions, failed and refused to provide the Union with requested information, and has refused to meet and bargain in good faith with the Union, all in violation of Section 8(a)(1) and (5) of the Act.

On a review of the entire record<sup>2</sup> in this case and from my observation of the witnesses and their demeanor, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

Respondent is a corporation engaged in operating a sanitary landfill in Western Pennsylvania.

It annually provides services valued in excess of \$50,000 to other enterprises directly engaged in interstate commerce and it admits that at all times material it has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

<sup>1</sup> All following dates will be in 1991 unless otherwise indicated.

<sup>2</sup> The General Counsel's brief embraces a motion to correct certain errors in the transcript. The corrections requested are appropriate and the motion is granted.

II. MOTION TO FURTHER AMEND COMPLAINT AND TO REOPEN CASE

During the course of the hearing certain testimony was presented which tends to indicate that Charles Santangelo, president and owner of Respondent CBF Inc. (as well as his mother, Helen Santangelo), has had an interest or affiliation with several other business enterprises each with an office of place of business in Norristown, Pennsylvania. At the close of the hearing Respondent also stipulated that Charles Santangelo, an individual, is a single employer with CBF, Inc. The General Counsel's motion alleges that Santangelo Hauling, Inc., and Keystone Hauling, Inc. (both engaged in transporting garbage), S.H. Bio, Inc. (transporting medical waste), Santangelo Transfer, Inc. (transporting and storing garbage), Gold Star Leasing, Inc. (equipment leasing to other enterprises), and Gold Star Financial, Inc. (financial services for the other enterprises), have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered a common labor policy; have shared common premises and facilities; have provided services for and made sales to each other; have interchanged personnel with each other; and have disregarded the corporate form of the entities and held themselves out to the public as single-integrated business enterprises, and that based on its operations as described, Respondents CBF, Inc., Santangelo Hauling, Inc., Keystone Hauling, Inc., S.H. Bio, Inc., Santangelo Transfer, Inc., Gold Star Leasing, Inc., and Gold Star Financial, Inc. constitute a single-integrated business enterprise and a single employer within the meaning of the Act.

Respondent CBF, Inc. points out during the related representation proceedings, CBF sought to have it and some of the companies in Eastern Pennsylvania treated as the appropriate bargaining unit, but the Union objected and the parties, with the approval of the Regional Director, agreed that only CBF, Inc. was a proper party to the representation proceedings and that much of the financial information testified to at the hearing was provided, in different form, to the Board's investigator more than a year before the trial provided the General Counsel with knowledge of such enterprises well prior to the time General Counsel rested and well prior to the proffered amendment after Respondent was well into its defense and it urges denial of the General Counsel's motion. Counsel for the named additional Respondents has entered an appearance and protest the inclusion of the single-employer issue in the case at this juncture.

The court of appeals in *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1122 (3d Cir. 1982), offered this following definition:

A "single employer" relationship exists where two nominally separate entities are actually part of a single integrated enterprise so that, for all purposes, there is in fact only a "single employer." The question in the "single employer" situation, then, is whether the two nominally independent enterprises, in reality, constitute only one integrated enterprise. . . . In answering questions of this type, the Board considers the four factors approved by the Radio Union court. (380 U.S. at 256, 85 S.Ct. at 877): (1) functional integration of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership.

. . . "Single employer" status ultimately depends on all the circumstances of the case and is characterized as an absence of an "arm's length relationship found among unintegrated companies." [Citation omitted.]

In the instant hearing Respondent's principal made certain remarks concerning the long-term financial viability of its landfill operations and, accordingly, the General Counsel, although with apparent prior knowledge of the existence of at least some of the other allegedly affiliated entities, became concerned over the Respondents future ability to remedy any backpay liability found warranted and has alerted Respondent and these apparently affiliated entities to the possibility that they may be derivatively responsible to remedy any financial liability arising from unfair labor practices found in the proceeding. It is noted that it is the usual practice of the Board to consider the issue of derivative liability at the compliance stage of proceeding and, accordingly, the allegedly affiliated Respondents are not required to attend or present a position at the time of the initial hearing. By the same token, however, they cannot assert a lack of knowledge when they subsequently are charged with derivative liability in order to satisfy any unsatisfied liability charged to an affiliated entity found to have engaged in unfair labor practices.

Here, there is no need to resolve the single-employer question in order to establish the Board's jurisdiction over the primary Respondent and there is no corresponding necessity to do so in order to determine the proper collective-bargaining unit or to change the appropriate entity affected by a collective-bargaining obligation. To attempt to pursue the derivative liability issue at this stage of the proceeding, especially through a reopening of the General Counsel's case in chief and further hearing, is unnecessary and unduly burdensome to the record, and otherwise needlessly interruptive and untimely. The record and the allegations of the proffered fourth amended complaint are basically sufficient for a threshold showing of single-employer status that can be litigated, if necessary, and rebutted if warranted, at a possible future compliance stage, supplemental proceeding. The allegedly affiliated single-employer entities are on notice of that possibility and they are further made aware that the Board can and will disregard the corporate veil and that they can be held accountable regardless of any subsequent event such as a Chapter 11 bankruptcy proceeding involving CBF, Inc., or any division of assets to avoid backpay liability. See *Honeycomb Plastics Corp.*, 304 NLRB 570 (1991).

Accordingly, the General Counsel's motion is denied and this decision will be based on the allegations of this third amended complaint.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent's president, Charles Santangelo, purchased a preexisting sanitary landfill facility (with four employees) in McClellandtown (in Western Pennsylvania) in 1988, and a related trash collection business (with seven employees) the following year. For many years Santangelo had been actively operating Santangelo Hauling, a trash disposal company serving Norristown and Montgomery County (in Eastern Pennsylvania). His mother, Helen Santangelo, is president and majority shareholder of that entity. CBF, Inc. was created in 1988 to operate this new landfill; however, Santangelo's initial plans to utilize this facility for disposal of trash from his

Montgomery County operation was precluded by the passage of new regulations in Pennsylvania's 1988 Waste Flow Act. These regulations also set new standards (including double liners in landfills) and required re-permitting of all facilities. Construction of a new cell in accordance with state requirement proceeded in 1990; however delays and problems occurred which extended the "cell" construction into 1991 and engendered cash flow problems which required that CBF, Inc. be subsidized by major loans from Santangelo Hauling and Helen Santangelo personally, as well as from a group of private investors. At times as many as 30 persons were employed until cell 1 construction was completed in June 1991. Construction of a second lined cell was planned but was contingent on obtaining financing. Certain layoffs of employees began in July after cell 1 was completed.

The Union began an organizing campaign in early June after an employee discussed with Union District 4 Secretary-Treasurer Joe Volansky the possibility of organizing Respondent's employees. Shortly thereafter, John Michael Stout, Wesley Shaffer, David Romito, and Robert Belch met with Volansky and discussed organizing Respondent's employees. These employees, along with Glenn Franks, became the Union's most vigorous supporters. Other meetings were held which drew the attention of alleged "foreman" and Supervisor Joseph Persely. Stephen Duranko, another "foreman," also is alleged to be a supervisor. Dean Mori,<sup>3</sup> who initially worked at the facility as a consultant engineer, became Respondent's operations manager in the beginning of 1991. Miller Fahrig is an "agent" of the Respondent who assisted and advised the Company on labor matters and negotiations.

On July 11, the Union filed a petition in Case 6-RC-10644 and Respondent received a copy of the petition on July 12 in the mail.

About noon on July 12, Respondent's secretary (Sharon Brewer) called Santangelo on a two-way radio and told him, "Well, we just got something. Something just came in and I don't think you're going to like it." Santangelo testified that he was at the landfill on July 12, and did not deny receiving the call.

Mike Stout and Steven Stout (cousins) and James Byers were laid off June 12 and the following Monday, June 13, Hartman was also laid off. Meanwhile, some less-experienced employees were retained. Meanwhile, certain other

events (described in the Discussion section herein) occurred, many of which are alleged to have been unfair labor practices.

On July 18, in the early afternoon, insurance agent Matthew Walsh faxed a letter to Respondent reminding Respondent of the importance of establishing a drug-testing policy and procedure for its truckdrivers. At 4 p.m. that same day, Respondent assembled all of its employees for a meeting. Santangelo told them that two employees would be fired for stealing and that Respondent would not tolerate thieves. Santangelo then stated that he did not understand why the employees went to the Union instead of coming to him with their problems, that he thought they were "all just one big happy family." He further explained that Respondent was "operating in the red," that he could not afford to buy his children school clothes, and that he was going to lose his home over the union organizing campaign. Santangelo then announced that drug testing of all employees would begin immediately and that any employee who failed the drug test or refused to take the drug test would be fired. Drug testing of employees was implemented the next day and again on July 25.

On July 26 employee David Romito was discharged following a discussion with Persely for allegedly stating that he (Romito) was "going to close the place down."

A representation hearing in Case 6-RC-10640 was held the morning of July 26. Employee Wesley Shaffer attended as a subpoenaed witness for the Union. Shaffer arrived at the hearing about 9 a.m. and sat with Union Officials Volansky and Clemmy Allan and Union Attorney William Manion but did not testify because the Union and Respondent signed a Stipulated Election Agreement.

When Shaffer returned to work about 1 or 2 p.m., Santangelo asked him why he had not called on July 25 to report off work for July 26. Shaffer explained that he did not know until the night before that he was subpoenaed to appear at the representation hearing. Santangelo told him he still should have called and that if work ever got slow Shaffer would "be the first one to go because he showed no interest" in Respondent.

Respondent's secretary then told Shaffer that Mori wanted to speak to him before he left. Shortly thereafter, Mori returned and told Shaffer that Respondent had just received positive results on his drug test, and that he was discharged.

On August 8, Santangelo and Mori approached Belch at the landfill and Santangelo told Belch that he had bad news, that Belch had failed the drug test. Belch told Santangelo and Mori that there was no way he could have failed but Santangelo said he had it in black and white and would have to terminate him. Santangelo told Belch that he was a very good worker and that Respondent wished it did not have to terminate him because he was a "no vote" for the Union but that if he did not terminate Belch, the Union would find out and that Respondent had already terminated one employee for a positive result. Respondent said he could not keep Belch on the payroll but that, depending on the outcome of the election, if the Union did not win, Respondent would consider retesting Belch and rehiring him. In mid-August before the election, Persely also advised Belch to "keep his nose clean" and that, after the election, Respondent would consider retesting him.

<sup>3</sup>On brief, the Respondent appears to renew its objection to a ruling enforcing the exclusion of Manager Dean Mori from the hearing room. On the fourth day of the General Counsel's presentation of witnesses, while the 16th witness, James Byers, was on the stand, Mori entered the hearing room and was instructed to leave in accordance with the sequestration order, which was granted when Respondent's counsel requested "a sequestration of the witnesses." Owner Santangelo was present through the hearing as Respondent's representative while alleged discriminatee John Michael Stout was Charging Party's representative and Union Representative John Barnhart was selected as the General Counsel's representative. Three more witnesses appeared for the General Counsel after that ruling; however, the Respondent fails to point to any testimony adduced that could have been affected by the absence of Manager Mori to advise counsel. Respondent otherwise fails to request any particular relief and it fails to show how or why Mori's presence at this late juncture was "essential" to the presentation of its cause or how his exclusion (until such times as he was called to testify) was prejudicial in any respect. Accordingly, my ruling at the hearing is affirmed.

Respondent supervisors and agent had a number of conversations (described in the Discussion, below), with employees in the several weeks prior to the election, the election was held on August 22. Employee Glenn Franks served as the union observer. The final count was 10 for the Union and 7 against.

The day after the election Santangelo drove over to where Franks was working and told him to get in his truck. He proceeded to tell Franks that Franks had "done him in" and that it was all Franks' fault that Respondent had lost the election. Santangelo said that Duranko and Persely were "no" votes and, if their votes were counted, the tally of ballots would have been 9 to 9 and if Franks had voted against the Union, Respondent would have won the election.

Santangelo explained that maybe he should not blame Franks for Respondent losing the election but that is what he was doing and that it was all Franks' fault. Santangelo told Franks he did not understand how Franks could believe the Union rather than him and that he felt as though Franks had betrayed their friendship. Santangelo said he didn't care if someone blew up the landfill. He mentioned that he knew Franks had been at the Union party after the election and asked if he had heard the Union making any plans against him. Santangelo then said he felt like someone had died, that he would no longer talk to Franks and that Franks should now return to work.

The same day Duranko told employee William Rummel to tell Franks that he was no longer permitted to operate equipment, that Franks was just a laborer and that two new hires were permitted to operate the equipment but that Rummel and Franks were not.

A week later on about August 29, before noon, Mori drove over to Franks at the landfill and roughly handed Franks a copy of the unfair labor practice charge filed by the Union in Case 6-CA-23859. Mori told Franks that these are the "assholes that you voted to represent you" and that if the Union is going to take that attitude, Respondent and the Union are not going to be able to work things out.

The Union and Respondent began negotiations for a collective-bargaining agreement in September. The Union's negotiating team consisted of Volansky, Franks, and employee Richard Hagner. Respondent's negotiating team consisted of Fahrigh, as principal negotiator, and Mori. The parties met about five times in September and October, and negotiated a number of noneconomic issues, many of which were agreed on. They also discussed the reinstatement of the six employees who had been discharged and Respondent provided the Union with a seniority roster.

At the October 31 negotiating session, Union Deputy Regional Director for Region 1 Keith Barnhart replaced Volansky as the chief negotiator for the Union and the parties discussed procedural guidelines for bargaining (Fahrigh admittedly was unfamiliar with labor negotiation), reviewed the contractual provisions previously discussed and agreed on certain of them.

Thereafter, the parties met for negotiations about eight times between October 31 and April 29, 1992.

At the November 2 negotiating sessions, the parties agreed and signed off on guidelines for negotiations and before the next November 21 negotiating session and Barnhart submitted a number of contractual proposals for Respondent's review.

At the next meeting the parties reviewed, agreed on, and signed off on 21 contractual articles and reviewed the Union's economic proposals, and also discussed the Union's assistance to Respondent in securing contracts with various potential customers. Fahrigh frequently responded that Respondent simply could not afford the Union's economic proposals.

Barnhart told Fahrigh that the Union, without seeing Respondent's financial documents, could only await Respondent's counterproposals and said that if Respondent did not provide the Union with financial statements, Barnhart doubted that the bargaining unit employees would accept Respondent's claim of financial hardship. The parties also discussed a health care plan for the employees and Barnhart asked Fahrigh if the Union were able to obtain more extensive health care coverage for the employees for less money, would Respondent be willing to consider such coverage. Fahrigh agreed and also advised Barnhart that Respondent did not have a problem with the union-security clause, but that Respondent's agreement to that provision would be the quid pro quo for the Union's agreement to allow Santangelo's children to work at the landfill.

In mid-December, Barnhart called Fahrigh because Respondent had canceled the two negotiating sessions set for December 11 and 12, and asked Fahrigh what the problem was. Fahrigh replied that Respondent had received two more unfair labor practice charges and added that "it's real hard to negotiate when you keep filing these god damn charges."

Employees Steven Stout, Byers, and Strosnider were laid off in December. Despite an exchange of phone calls between Fahrigh and Barnhart during this period, Respondent admitted that it did not notify the Union or afford it an opportunity to bargain regarding these layoffs.

In mid-January 1992, the parties agreed to a contract provision that allows Santangelo's children to perform work at Respondent; however, on January 16, subsequent to the filing of a charge involving the December layoffs, Respondent sent a letter to the Union, that Respondent viewed a recent unfair labor practice charge filed by the Union as "counter productive" and would "consider" the unfair labor practice charges when the parties "discuss the financial side" of the contract.

Meetings and exchanges occurred in January and February including an abortive meeting between Santangelo and Union officer Donald Redman in which Santangelo immediately launched a profane tirade against the Union with frequent references to the Union's filing of additional charges.

March and April meetings included discussions of health care benefits and Respondent's economic condition and an agreement on a seniority list for recalls and layoffs.

Employee and union negotiating team member Franks was laid off for 5 days on April 6, 8, and 13 and May 8 and 23, 1992, by Mori, who told Franks there was no work available because the backhoe was not working. Franks was not assigned to work mine loads by hand as had occurred on other occasions when equipment was not operative.

On May 5, 1992, Respondent, by letter, submitted a number of contract proposals to the Union and, on May 18, Barnhart advised Fahrigh that the Union had received health care benefits information and that the cost would be \$400 in excess of Respondent's current health care cost per employee. Fahrigh said that would not be a problem, but that the

entire contract was contingent on the Union ratifying the wages. The Union advised Respondent that it would accept Respondent's wage proposal and that the membership would ratify the entire agreement.

On May 19, 1992, the Union faxed and mailed to Respondent information concerning health care benefits and life insurance and on May 20, mailed Respondent a collective-bargaining agreement embodying the provisions the Union believed the parties had agreed on. It then faxed Respondent the outstanding contractual provisions which the parties had orally agreed to, but had not signed off on.

Late that same afternoon, Fahrig called Barnhart and reviewed with Barnhart some differences in Respondent's understanding of the contractual provisions agreed on. Barnhart suggested that Respondent make the appropriate modifications to the contract, sign off, and return the contract to the Union. On June 1, Barnhart called Fahrig and asked him about the status of the contract but Fahrig told Barnhart that he and Santangelo had agreed that it was going to be very difficult for Respondent to work with the Union because the Union was continually trying to "fuck" Respondent by filing unfair labor practice charges.

On June 4, Case 6-CA-24600 was filed by Duranko (not the Union), alleging that he was discharged on April 27, 1992, in violation of the Act.

Meanwhile, employee and truckdriver Dennis Hornbeck, an early union supporter, was elected president of the local unit in May. He previously had been involved in 1991 in a nonwork-related motor vehicle accident near Respondent's landfill. While absent from work and in the hospital, he was visited by Forman Persely. Hornbeck asked Persely what would happen if he lost his license because of the accident. Persely told Hornbeck that he could take a chance and drive without a license or Respondent would try to work something out by assigning Hornbeck to work in the landfill until he got his license back.

On June 5, 1992, Hornbeck was notified that he was required to surrender his driver's license for 30 days and so advised Union Representative Volansky. Volansky immediately telephoned Mori to request a meeting regarding the revocation of Hornbeck's license. Later in the afternoon Mori met with Volansky and District 4 President Ed Yankovich. After a discussion of the revocation of Hornbeck's license for 30 days, Mori told Volansky that while the Union wanted assistance from Respondent in the Hornbeck matter, the Union did not offer much assistance to Respondent. They then discussed what the Union could do to assist Respondent in maintaining some of its trash collection contracts and Yankovich told Mori that the Union would do everything within its power to assist Respondent to secure and keep contracts and offered to write letters to various township and borough officials in support of Respondent.

Mori advised the Union that he had no problem assigning Hornbeck to either the landfill as a laborer or to the garbage trucks as a helper and stated, "30 days is not that long a period of time. He is a real good worker and we would hate to lose him. Tell Dennis to report to work on Monday at 7 a.m. and we'll find something for him to do. We'll make arrangements then as to what he can do for this 30 day period of time."

When Hornbeck reported to work on Monday, June 8, 1992, Mori told Hornbeck that he did not think it would ever

come to this but that Mori had to terminate him. Mori then advised Hornbeck to come back next week to talk to Santangelo but not to bring the Union with him as Santangelo did not like anyone telling him what to do and that Santangelo might assign Hornbeck to work as a laborer in the landfill. Except as discussed above, no notice or bargaining occurred over the discharge decision.

On June 8, Barnhart called Fahrig again and was told that Respondent had received two more unfair labor practice charges and that it was going to be impossible to reach agreement on a contract because the Union was continually filing unfair labor practice charges. Also on June 8 Respondent sent the Union a letter saying that the "Union's continuous filings of frivolous cases is also a strain on negotiations and that it would promptly implement health care coverage for Respondent's employees not presently receiving health care benefits.

On June 10, the Union notified Respondent, by letter, that it would agree to health care coverage for bargaining unit employees as long as the health care coverage was that provided in the Blue Cross/Blue Shield plan, that the Union had submitted to Respondent on May 19, 1992, or another plan that provide the same coverage.

On June 19, Respondent notified the Union, by letter, that, it would implement health care coverage for Respondent's six bargaining unit employees who were without health care coverage and stated that these employees would receive the same health care coverage that Respondent's other employees received.

Barnhart requested a copy of the health plan. After it was not provided "within the next few days" as promised, a charge related to that request was filed by the Union on June 24. On June 26, 1992, the Union requested, by letter, information showing the health care coverage provided to the bargaining unit employees and the costs of that coverage in order for the Union to evaluate the health care plan and to determine if the health care coverage implemented by Respondent was substantially identical to the coverage the parties had agreed upon. The Union also required financial information relating to the parties' negotiations of the Enabling Clause Agreement.

On July 28, Respondent submitted 25 contractual provisions, previously agreed to by the Union which included unilateral changes by Respondent to articles 1, 3, 6, 11, 15-17, 21, and 25 and appendix D.

On Tuesday, August 4, after giving notice to Persely and receiving approval, Franks took off from work to meet with a Board attorney. On Friday August 7, he inquired if he was scheduled for his frequently assigned Saturday overtime work but was told there was nothing for him. He questioned Mori about the matter after learning that all other employees had worked overtime that day. Mori said that Franks had his "priorities mixed up," and had messed up Mori's schedule and, therefore, he messed up Franks' schedule. Mori said he had been told by employees that Franks was at the union hall on August 4 on union business. Mori told Franks Respondent was not going to reward him with time and one-half when he was "in the enemy camp" on union business. Franks explained, in more detail, why he had been off on August 4 and Mori said that if he had known Franks was meeting with the Board attorney it might have made a difference or it might not have, but that as far as Mori was concerned,

Franks was off on union business and that is why he was denied overtime on August 8.

On August 14, Respondent, by letter to the Union, acknowledges that Respondent had "revised" the articles previously agreed to by the parties. On August 19, the Union requested Respondent to set aside dates for collective bargaining and on September 3, Respondent advised the Union that the Union's "continual filing" of unfair labor practice charges, which Respondent viewed as "frivolous and unwarranted" did "not help" the collective-bargaining process. The Union, by letter, again asked Respondent to provide the information previously requested and to establish dates on which the parties could meet face-to-face to negotiate.

Since September 1992, Respondent has not contacted the Union to resume contract negotiations and the parties have not met to negotiate since April 1992. The Union did not receive either the health care or financial information that it requested except to the extent that after the hearing opened such information was embraced in the documentation made available in response to the General Counsel's subpoena.

#### IV. DISCUSSION

The issues in this case arose during a brief union organization drive starting in June 1991 that culminated in a union election victory on August 22. The Union drive coincided with the Employer's completion of construction on one phase or "cell" of its landfill operation as well as with the Employer's decision to implement a drug-testing program, both of which generated the layoff or termination of employees. The Employer also took certain actions both during and after the union organizational drive, that are alleged to be unfair labor practices and, in addition, it failed to successfully complete negotiations for an initial collective-bargaining agreement with the Union under circumstances that are alleged to be indicative of bad-faith bargaining. The Respondent's defense of its actions is based on its assertion that it is a small employer and that the dismissals were for legitimate business reasons and that the Union is at fault and has failed to bargain in good faith. Otherwise, Respondent's brief and argument on brief generally fails to tie in its requested findings of facts and citations of authority with specific allegations of the complaint.

##### A. Supervisory Status of Persely and Duranko

Section 2(11) of the Act defines a supervisor as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsible to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It is not necessary that an individual possess all the indicia identified in Section 2(11) of the Act to be considered a supervisor. Here, the record shows that Persely was salaried and enjoyed the use of a company vehicle and he shared use of the office used by Owner Santangelo and Manager Mori. He was the only supervisor present between 5 and 8:30 a.m. and he had the responsibility to direct and assign truckdrivers

and helpers to specific garbage routes and to transfer them to other routes or work when such reassignment became necessary. Persely hired or effectively recommended the hiring of numerous employees and he disciplined employees, giving them oral and written warnings as well as suspensions, and Mori told employees, who had asked Mori who they were supposed to report to, that Persely was in charge of the truckdrivers and garbage trucks.

Duranko, who was not called by Respondent as a witness, was in day-to-day onsite charge of construction at the landfill; he arrived at work about 6:30 a.m. and was the highest-ranking personnel at Respondent's facility with responsibility for laborers and equipment operators for 2 hours or more every morning. Duranko assigned employees work on a daily basis, telling them what to do and where to work. He would assign the employees additional work and transfer employees from job to job during the day and Mori told employees that Duranko was "in charge" when they were working in the landfill.

The Respondent's proposed findings of fact assert that both Duranko and Persely operated equipment and did not have the power to hire, fire, or discipline, however, Respondent's argument fails to pursue the issue or to offer any position or authority for the evaluation of their supervisory status. The record shows that Persely in fact did discipline employees and made effective recommendations on hiring and, moreover, at the time of the election, both Duranko and Persely were excluded from the unit because of their apparent supervisory status. Although Duranko's responsibilities may have diminished in the latter part of 1991, and Persely became more involved in truck operations, the record shows that both Duranko and Persely exercised the use of independent judgment in directing employees in their respective areas during the critical time period involved and the employees reasonably believed that both were authorized to act on behalf of management as their supervisors.

The mere fact that they spent a portion of their time on manual, nonsupervisory labor and that the manager or owner would sometime countermand their actions is not controlling. Both made independent judgments in directing employees, and both were the highest-ranking employee in their respective areas and were held out by management to be the bosses of day-to-day operation and no higher manager was ever on the premises for up to 3 hours or more at the start of each day. Santangelo was not at the facility on a daily basis and it is clear that Mori principally was involved in the engineering, technical, and regulatory aspects of landfill operations rather than the day-to-day collection and disposal of trash or the day-to-day grading and basic site preparations also involved and he would have been the only onsite supervisor were it not for the presence of Persely and Duranko.

Under these circumstances, I find that the overall record shows that both Persely and Duranko exercised functions as statutory supervisors under Section 2(11) of the Act, see *Schmuck Markets v. NLRB*, 961 F.2d 700, 706 (8th Cir. 1992), and cases cited therein and, accordingly, their conduct in relation to Respondent's employees properly is attributable to the Respondent, see *United Artist Circuit*, 277 NLRB 115, 121 (1985).

### B. Alleged Violations of Section 8(a)(1)

It is well established that Section 8(a)(1) of the Act prohibits interference, restraint, or coercion of employees in the exercise of their right to self-organization and that an employer's threats to take actions against employees if they select a union as their collective-bargaining representative or related actions during a union campaign in interrogation or surveillance of employees or in solicitation of grievances and promises of benefits are classic examples of behavior that interferes with employee Section 7 rights.

#### 1. Surveillance and interrogation

On July 10, the night of the first union organizing meeting, Persely drove to employee Belch's home and asked his wife if he was at home. When informed that Belch was out, Persely drove off without leaving a message or further explanation. Near the same time, employee Romito received a telephone call from an individual who did not leave his name or a message.

I credit the testimony of employee Byers that on July 25, the night of the second union organizing meeting, Persely telephoned him and asked if his "buddies are having a union meeting tonight?" When Byers told Persely he did not know, Persely persisted and asked, "you do not know where they went either?" No legitimate business reason for Persely's question was offered and as Persely's comment did not contain any assurances against reprisal, Byers' refusal to divulge any information is indicative of the coercive effect of the questions. These questions, on the night of the second union meeting, also indicate that Persely had a similar and improper motive for his unexplained visit to an employee's house on the night of the first meeting. Persely admitted that once or twice another employee had told him that a union meeting was going on and otherwise he did not rebut or otherwise explain these occurrences. Under these circumstances, I conclude that these employees could reasonably assume from Persely's actions that their union activities had been placed under surveillance. See *Hudson Oxygen Therapy Sales Co.*, 264 NLRB 61 (1982).

On July 13, the day after Respondent received the petition in Case 6-RC-10640, Persely drove his truck up to where Franks and Shaffer were working, jumped out, and asked them, "Who in the hell started this bull shit union?" and stated that if he found out who started the Union he would burn that employee's house, car, and everything else. Respondent subsequently apologized to Franks and Shaffer for Persely's threat. Although Persely had denied making them, he was "chewed out" by Manager Mori and told to listen to what Mori had to say and to keep his mouth shut.

On August 23, the day after the election, Santangelo told Franks that it was all Franks' fault that Respondent had lost the election, then analyzed the election results and told Franks that if Franks had voted against the Union, Respondent could have won the election (if Persely and Duranko had not been challenged as supervisors). Santangelo then told Franks that he knew Franks had been at the union party after the election and asked if he had heard the Union making any plans against him. Santangelo's statements to Franks implied surveillance of the employees' union activities and his questions, even though made to an open union supporter, were about the union activities of other employees and were made

in the context of a highly coercive and confrontational conversation. Subsequently, on August 10, 1992, Mori had occasion to comment to Franks that he was "in the enemy camp" and that he knew Franks had been at the union hall on union business. This statement clearly warns the employee that his union activities are being watched even after the election is long over, yet at a time when contract negotiations have been unsuccessful and, as found below, have been unlawfully discontinued.

These incidents of interrogations and surveillance, and in giving the impression of surveillance, were not random occurrences nor were they merely innocuous casual conversations. They occurred repeatedly and before and after the election and while contract negotiations should have been ongoing. They occurred not in a vacuum but under circumstances that included threats and other illegal conduct and they thus display the necessary indicia of coercion and I find that in each of the incidents discussed above Respondent's conduct is shown to have violated Section 8(a)(1) of the Act, as alleged, compare *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

#### 2. Threats

The credible testimony of employees Franks and Steven Stout shows that on several occasions in June, July, and August 1991 Supervisors Mori and Duranko each made remarks to the effect that Respondent could not afford a union, and that if the employees elected the Union there would be cut-backs or layoffs and that Respondent might close down or sell out.

As will be noted later, of particular significance is Steven Stout's testimony (unrebutted by Duranko) that in July, Duranko told Stout that he had been talking to Santangelo who said he would sell the Company if the employees elected the Union to represent them and that Santangelo was going to "hire six niggers" to do the work of six employees who already had been laid off and/or discharged instead of recalling or reinstating them.

As noted above, Franks (and Shaffer) credibly testified that when Persely aggressively questioned them about "who in the hell" started the Union he also threatened that if he found out, he would burn their house or car. It is observed that the record shows Persely regularly carried a firearm (a .357 Magnum), at the landfill and that his demeanor while testifying was blunt and aggressive and fully consistent and in character with the conduct attributed to him.

These threats tellingly indicate to the employees that they will lose their job, be laid off and replaced, or subjected to vandalism of their property if they persist in attempting to obtain union representation. Accordingly, I concluded that these threatened reprisals have interfered with and coerced employees in their attempted exercise of their Section 7 right and I find that Respondent is shown to have violated Section 8(a)(1) of the Act in these respects, as alleged.

Subsequent to the election Duranko was terminated by the Respondent and he filed a charge, not a part of those proceedings, with the Board. In June 1992, Mori told Franks, the Union's vice president, that he had heard Franks was helping Duranko get his job back and then warned: "I am telling you right now, that if you or anybody else tries to help Steve get his job back, they are going to be in serious trouble and have serious problems." This event was wit-

nessed by employee Richard Hagner (a current employee of Respondent who has never been laid off) who recalled that he heard Mori tell Franks that "anyone trying to help Steve get his job back, would be in serious trouble with him." Hagner testified that he thought Mori meant that person would be discharged.

On August 10, 1992, Mori also told Franks, that he was not assigned overtime on August 8 because Franks had "his priorities mixed up," had taken off work on union business, and would not reward Franks with time and one-half. This action constitutes a threat to withhold from Franks the opportunity to engage in regularly available overtime and in each instance the threat is related to Franks' participation in union activities and, for the reasons noted above, coercively interferes with employee rights in violation of Section 8(a)(1) of the Act, as alleged.

### 3. Solicitation of grievance and complaints and promising of benefits

In mid-July, prior to the election, Mori asked Belch why employees were supporting the Union. After Belch said he thought employees were mistreated, Mori asked why that was the case and why the employees did not come to him with their problems. Mori asked Belch to tell the employees to come to him with their problems instead of "dragging the Union in on it" because Respondent "didn't need a third party telling them how to run their business." This question constitutes an unlawful solicitation of grievances with the implied promise to favorably act on the complaints if the employees bypass the Union, and I find that it violates Section 8(a)(1) of the Act, as alleged.

### 4. Advising employees that, but for the union organizing campaign, employees would not have been terminated for failing the drug test

On August 8, Santangelo told Belch that he was terminated because he had failed the drug test. Belch credibly testified that Santangelo said he was a good employee and that Santangelo wished he did not have to terminate Belch because he was a "no vote" for the Union but that Respondent could not keep him on the payroll because the Union would find out and Respondent had already terminated one employee for a positive result. Santangelo then suggested that, if the Union lost the election, Respondent would consider retesting him. The effect of this statement is to make it plain that, but for the union organizing campaign, good employees would not have been terminated as the consequence of one drug test and that if most of the employees vote against the Union he might well be rehired.

Accordingly, Respondent's conduct is shown to interfere with employee rights and I find that it is a violation of Section 8(a)(1) of the Act, as alleged.

### C. Layoffs, Terminations, and Other Alleged Violations of Section 8(a)(3)

In a layoff or discharge case of this nature, applicable law requires that the General Counsel meet an initial burden of presenting sufficient evidence to support an inference that the employees' union or other protected, concerted activities were a motivating factor in the employer's decision to terminate them. Here, the record shows that Respondent's owner

was well aware of union activity and that he personally, as well as his supervisors and agents, also had engaged in certain unfair labor practices, otherwise discussed above, in an attempt to interfere with their free exercise of their right to select a union as their bargaining representative if they so chose.

While the record shows that owner Santangelo is justifiably proud of having developed his various business interest and the principal Respondent company, CBF, Inc. (taken from the first names of his three children), it also shows that he was especially challenged by state regulatory burdens, financial burdens (at least partially attributable to the general economy), and competition from a large, nationwide waste management concern. Having successfully completed the regulated construction of one new cell, he also was faced with the need to proceed with the planning for the development and financing of the next cell, in June 1991, and he suddenly was faced with employee involvement in the organization of a union.

He did not quietly accept this challenge. Statements and conduct attributed to him (much of it not seriously controverted) show that he rigorously, intemperately, and profanely responded regarding his perceived rights, but with little regard for the possible rights of others. This conduct continued after the election and during the period of negotiations and reinforce the indication that Santangelo consistently expressed union animus both before and after the union election and it all strongly supports an inference that this animus was a motivating factor behind Respondent's layoffs, terminations, and sudden implementation of drug testing and other retaliatory actions. In this connection, I especially find Santangelo's assertion that he didn't open the mail on July 12 (which included the union petition) until the next day to be unbelievable in view of the credible testimony that he was told at noon on July 12 by his secretary that he had some mail he "wouldn't like." Respondent's animus, combined with the timing of these principal actions shortly after the organization notice was received by Respondent and prior to the election, as well as the contemporaneous commission of the various illegal practices discussed above, all provide ample evidence to establish a prima facie showing that Respondent's actions were unlawfully motivated. I also find that the record shows that Respondent was discriminatorily motivated against all of its employees because of the Union (for example, Respondent's indications to Belch that it couldn't keep him on the payroll even though he was expected to be a "no" vote, because it already had terminated one person as a result of the drug test, and the Union would find out), and specific proof of an awareness of each individual's union activity is not required under such circumstances. See *American Warehousing Services*, 311 NLRB 371 (1993).

Although it is true that the ultimate burden rest with the General Counsel, once the General Counsel establishes a prima facie case, the burden shifts to the Respondent to show that it would have taken the same action even in the absence of union considerations. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Accordingly, the testimony will be discussed and the record evaluated to consider Respondent's defense and, in the light thereof, whether the General Counsel has carried his overall burden.

Respondent contends that union activity didn't begin until younger, newer employees "realized" that when construction (of cell 1) ended, so would their jobs. Somewhat incongruously, it then notes that layoffs are not required to proceed along seniority lines, a factor that "younger, newer employees" would seemingly not be opposed to.

There is evidence that Persely engaged in surveillance of employee Belch the night of the first formal union organizing meeting on July 10, a meeting that was attended by many of those involved in Respondent's alleged retaliatory actions (previous to this time, employees Mike Stout, Shaffer, Romito, and Belch had begun discussing a union with others at this rather small facility). Clearly, however, Santangelo was notified at noon on July 12, prior to the issuance of any layoffs, that "something" he wouldn't like (the Union's petition) had arrived. Accordingly, I specifically discredit Santangelo's testimony that he didn't learn of the union activity and organizational drive until after the first layoff (on Friday, July 12).

Between 3 and 3:30 p.m., select employees were told to report to Santangelo or Mori before leaving. These included M. Stout, Steve Stout, and Byers; Hartman was told the following Monday. None of the employees had any advance notice or warning prior that any layoff would occur then and, in response to a question by Steve Stout, Mori said the selections were determined by seniority and the versatility of the equipment operators.

Although Respondent's proposed findings of fact included some probative and credible information about Respondent's financial condition, the completion of cell 1, delays in development of cell 2, and a reduced need for employees, its arguments on brief fail to tie these facts in with any aspects of the need for or manner of implementation of the layoffs. Although Respondent contends that over 30 persons were working "at the landfill" at some point prior to the completion of cell 1, it appears that this number included those who were involved in installation of the "liners" required by state regulations.

The Respondent cites cases for the general propositions that an employee's efficiency, degree of skill, versatility, seniority, or other factors can be a proper basis for a layoff, yet it fails to apply any part of the record to show the applicability of its citations. As noted above, the Respondent has the burden of showing the layoffs and related actions were based on legitimate business reasons; however, no analysis is made of the work available, the skills needed, and the number of employees required and there is no evidence that any such analysis was made at or prior to July 12. And, although Respondent asserts that cell 1 was finished at some time in mid-June, there is no explanation or indication of why layoffs didn't occur until mid-July or, if in fact the need for layoffs had been predetermined, why employees were suddenly laid off without any advanced notice whatsoever.

The only apparent intervening factor that would trigger Respondent's actions was the receipt of the Union's recognition petition which occurred only a few hours before the layoffs. The receipt of the petition apparently confirmed Respondent's preexisting knowledge that some union activity was taking place and it triggered an apparent immediate response.

Less than a week later, Mike Stout's layoff was converted into a termination because of a report that he had made a

derogatory comment. The previous day, July 18, Respondent had an employee meeting to announce the start of a drug-testing program to begin the next day. Shortly thereafter, Romito and Shaffer were terminated, the latter as a purported result of his drug test and, on August 8, Belch was terminated for the same reason.

Turning first to the four initial layoffs, I find little evidence that would show that such layoff would have occurred as they did, without any advanced notice on July 12 and 15, regardless of the employees' union activities and, specifically, the clear public unveiling of that activity formalized by the Union's recognition petition to the Board, received earlier the same day by the Respondent.

The requested factual finding that Santangelo had no knowledge that any of these particular employees were involved in union activities is meritless under the circumstance. I discredit his claim in that respect and find that there is ample circumstantial evidence as well as the showing of interrogation and surveillance, to infer that Santangelo or his agents were at least suspicious that certain "younger newer employees" were behind the union activity, see *NLRB v. P. E. Guerin, Inc.*, 999 F.2d 536 (2d Cir. 1993) (mem.).

Clearly, Mike Stout was one of these suspected employees and, in fact, was one of the four initial organizers. Less than 1 week after his layoff, Respondent seized on some gossip and converted Stout's layoff into a discharge.

My evaluation of the demeanor of Mike Stout as a witness is that he was balanced, straightforward, and credible and I credit his testimony over that of other witnesses whose testimony may in part conflict with his.

On July 19 Mike Stout went with his cousin to get his last paycheck. Santangelo gave a check to Steve but asked to speak privately with Mike who asked if there was a problem. Santangelo said he hadn't returned his uniforms yet and when Stout said, "no problem I can bring them back," Santangelo added, "I already fired one man for stealing and you know if you don't bring them back I could fire you on the same grounds," Santangelo then said that two people had told him that I had called him a "fat Dago." Stout said it was not the truth, that they were lying, and he asked him who it was and Santangelo said it was none of his business. Santangelo then looked at Stout and pointed his finger at him, and said, "if I find out that this is the truth, I'm coming after you."

Although other laid-off employees were recalled, including his cousin, Stout was never recalled and Respondent admits and argues that he was justifiably terminated for making ethnic slurs.

Mori testified that he told Santangelo that Mike Stout had an "attitude problem" and specifically that Stout had called him "the Pillsbury Doughboy" and Santangelo a "fat Dago" and that Santangelo became "enraged" when he heard it. Mori also testified that the "Doughboy" comments had occurred in the spring and that the alleged "fat Dago" comment had been when he came by a "whole group" of operators who were congregating near the fueling tanks "close to evening" and "they" wanted to know answers about what Respondent was doing, apparently about wages.

Stout admitted that he had referred to Mori to his face as the "Pillsbury Doughboy" in jest on a few occasions in April or March when they were working together getting the liner into the landfill and that he just felt comfortable around

Mori and said the guys were just joking. There is nothing to indicate that Mori took that to be insubordinate or offensive conduct or that he expressed any disapproval at the time.

As noted, Santangelo became "enraged" when he heard Mori's belated report. He made no effort to investigate the circumstances of the "Doughboy" comment and, despite Stout's denials, made no investigation of the circumstances of the asserted ethnic remark. Inasmuch as the latter remark came from a whole group of operators asking questions close to evening it certainly seems possible that Mori could have mistaken who, if anyone, had made the alleged remark and I am not persuaded that Stout was accurately accused of the deed. Moreover, the record otherwise fails to show that such a comment, let alone the jesting Doughboy remark, was of such a nature (although regrettable) in this particular workplace setting that it would justify an employees discharge.

Credible evidence indicates that Foreman Duranko has said that Santangelo said he would sellout if the Union won the election and that Santangelo would hire six "niggers" to do the work of the laid-off employees. This clearly discredits the claim that Respondent would not tolerate ethnic (or racial) slurs and indicates that Respondent's reason for converting Stout's layoff to a discharge is false and pretextual. The pretextual nature of Respondent's claim regarding Stout is further amplified by its failure to tell Stout this reason at any time prior to the hearing and belated attempt to assert that Stout was not a good operator, because he abused equipment and operated too fast. Most of the other employees testified that Mike Stout was highly skilled or was the best and most versatile. Most specifically, the testimony by Steven Stout that when he questioned Mori about the criteria for the layoff Mori agreed that Mike Stout was "the most competent and versatile equipment operator" stands unrebuted. Although Stout was twice cautioned about driving too fast, it is observed that this occurred at a time when Respondent assertedly was rushing to meet construction deadlines and there is little indication (one ripped liner and one routine equipment problem) that his attempt to operate expeditiously had any negative effects.

Moreover, when the Respondent initially laid off Mike Stout, he was told he would be recalled when business improved, not that he was a poor or "unproductive" employee. Finally, Respondent's justification for connecting his layoff to a discharge is not persuasive, especially as the alleged remark was made in front of Mori at least a month earlier (without any attempt at discipline or a warning), no investigation was made of the circumstances, and, as noted above, the circumstances indicate that Mori could have been mistaken and that Stout's denial could have been accurate.

Under these circumstances it appears that Stout's alleged "attitude problem" was his support of the Union and I am not persuaded that Respondent has shown that the timing and substance of its layoff and discharge of Mike Stout was based on valid, nonpretextual business reasons. I conclude that Respondent was discriminatorily motivated by Stout's and other employees' union activities and I find that its actions are shown to have violated Section 8(a)(1) and (3) of the Act, as alleged.

Steven Stout, an equipment operator and sometimes laborer, is alleged by Respondent to have been regarded by others as a poor employee who was hard on equipment while

learning on the job. He supported the Union and was recognized as a cousin of Mike Stout, however, his demeanor appeared to be more restrained than his cousins to the extent that he did not appear to be the type to "joke" with supervisors but he did question Mori at the time of the initial layoff about his cousin and the layoff criteria. Despite his low seniority and asserted lack of ability he was recalled from layoff a few weeks later.

Route driver Byers was laid off on July 12 but recalled 1 week later. He was laid off again December 28, recalled in February 1992 part time, and made full time a month later. He spoke with other employees about the Union and became a member.

Hartman was an equipment operator who signed an authorization card, attended organizing meetings, and spoke with others about the Union. He was part of the initial July layoff and was recalled 3 or 4 weeks later.

It appears that Stout was recalled as a result of the July 26 layoffs of Romito and Shaffer and Hartman was recalled after Belch's August 8 layoff, each discussed below. Byer's recall appears to be related to the termination of the other employees for stealing. At the time of the initial layoff, however, the record shows that both Romito and Belch were initially cultivated by Respondent as potential promanagement votes in any election. As in the case of Mike Stout, discussed above, these three other layoffs were not made when cell 1 was completed on June 13 but were made almost immediately after the Respondent received formal notification and conformation of the suspected union organizational drive. They were made suddenly and without advanced notice and were based on apparently subjective criteria or reasons which I find to be pretextual and unpersuasive as legitimate business reasons that would outweigh or rebut the timing and motivational factors otherwise established on the record, and I find that the Respondent has not shown that these specific employees would have been laid off on July 12 and 15 were it not for the receipt of the union petition from the employees in general and Respondent's inferred suspicion linking these employees to the Union's action. Accordingly, I conclude that these layoffs were discriminatorily motivated and not based on the economic reasons asserted and I find that the Respondent's action in this respect is a violation of Section 8(a)(1) and (3) of the Act, as alleged.

Turning to Romito's layoff on July 26, it appears that Santangelo had cultivated Romito's friendship and support as indicated by a conversation on July 19 (after the drug test). Santangelo told Romito that if Respondent needed to lay off employees, the layoff would not be based on seniority and assured Romito that he had nothing to worry about because he liked Romito, liked Romito's work, and liked Romito because he was Italian. Santangelo said that Romito was stuck in the middle of all the union activity and that Santangelo wanted to make Romito a full-time equipment operator but could not do that now, adding that the employees had picked the wrong time to start a union. Three days later, on Monday, July 22, Mori learned of and informed Santangelo about some remarks Supervisor Duranko and head mechanic Dan Bassinger had heard from Romito, remarks to the effect that the place would be shut down.

It appears that Santangelo took information about Romito's union involvement as a personal and ethnic betrayal and, between July 22 and 26, when he returned to

western Pennsylvania from Norristown, persuaded himself that the alleged statement by Romito that Respondent “would be shut down” was a threat that Romito would contact the uncle of a girlfriend, Charles Duritza, a high official in the State DER, and prevail on him to take some action against Respondent that would result in the revocation of Respondent’s permit to operate a landfill or some such other significant action and that this threat justified Romito’s discharge.

Romito testified that on July 19, Santangelo had chewed out Romito, Persely, and Bassinger for standing around while a belt was being fixed on the screening plant and then snapped at Romito when Persely mentioned Romito had had car trouble that day saying “do you think I fucking did it?” After Santangelo left Duranko came by and asked what he had been yelling about. Romito replied that he thought Santangelo found out he had signed a union card and was headhunting him. He then made a complaint about not taking that for the amount of money he was getting and added, “I think the place is going to end up being shut down.”

Later, Duranko told Romito that Bassinger had informed Santangelo of what was said. On Friday, before the termination, Santangelo called Duritza to explain the alleged remark and what he was doing. Romito tried to explain he didn’t make any “threat” and didn’t mean the DER, but Santangelo said he had two employees who said he did and told him he couldn’t keep him on the property any more and that “I’m not laying you off, I am fucking firing you.”

Santangelo testified that when he spoke on the phone with Duritza, Santangelo said, “I don’t know if he [Romito] means the DER or if he means the Union and Duritza said to do what he had to do, he had no problem with that.”

Romito did “date” Duritza’s niece and had met with him in family situations (and this was common knowledge on the jobsite). Romito also testified that at a union meeting on July 10 there was some discussion of some employees being afraid to be caught signing cards and that if the Respondent reacted they might be able to strike and close the place down. It fairly appears that his remark was directly related to the possibility of a union-called strike and plant shut down. There is no credible evidence that Romito said anything about the State DER<sup>4</sup> and I find that Santangelo’s claim that he believed and based his firing of Romito on the speculation that a peripheral relationship such as existed between Romito and state official’s niece would cause that official to jeopardize his position by responding to Romito’s supposed influence and revoke or fail to issue Respondent’s environmental permits is so tenuous as to be unbelievable when contrasted with the more likely scenario which indicates that Santangelo was upset by Romito’s “betrayal” in joining the Union and his prediction or “threat” that the Union could call a strike and shut down the operation. Romito’s conduct in speaking about a possible strike was a protected activity and his termination for engaging in that activity, motivated as it was by the Respondent’s demonstrated animus, is illegal. Respondent has failed to show any other

<sup>4</sup> Respondent failed to call as a witness at the hearing either Duranko or Bassinger who, if Respondent’s assertion were to be believed, would have supported Respondent’s position. Respondent’s failure to call either Duranko or Bassinger supports an inference that their truthful testimony would have corroborated Romito, not the Respondent.

valid, nonpretextual business reason for its action and, accordingly, I find that the General Counsel has shown that Romito’s termination was a violation of Section 8(a)(1) and (3) of the Act, as alleged.

Employee Robert Belch was a “pretty good” friend of Supervisor Persely but he attended the organizational meeting and signed an authorization card. Wesley Shaffer was one of the strongest union supporters. On July 26 Shaffer called off work informing Persely that he had been subpoenaed for the NLRB hearing (in the representation proceeding). He attended and was seen sitting with a union representative but was not called to testify as the parties reached a Stipulated Election Agreement. When he returned to work, Santangelo complained that he should have called off the night before and Shaffer tried to explain that he didn’t know until that previous night. Santangelo said Shaffer showed “no interest” in Respondent and would be the first to go if work got slow. He later was told to see Mori and was then informed that he had failed his drug test taken July 19 and was terminated.

In mid-July Mori called Belch off his machine and asked him what he knew about the Union and why the men were trying to organize, an indication that Respondent felt he was trusted by management as amplified by Mori’s request that it would be appreciated if Belch would tell the employees to come to Mori with their problem rather than dragging the Union in on it.

Belch took the second drug test, given on July 25. On August 8, Santangelo and Mori went to Belch in the landfill and told him that he had bad news, he had failed the drug test. Belch said that there was no way he could have failed but Santangelo said here it is—it is in black and white—and that he would have to be terminated. Santangelo told Belch that he was a very good worker and he wished he did not have to terminate him because he was a “no vote” for the Union. Santangelo explained that if he did not terminate Belch, the Union would find out, that Respondent had already terminated one employee for a positive result and could not keep Belch on the payroll. Santangelo then told Belch that, depending on the outcome of the election, if the Union lost, Respondent would consider retesting Belch and rehiring him. In mid-August, just before the election, Persely also advised Belch to “keep his nose clean” and that, after the election, Respondent would consider retesting him.

While an employee’s failure to pass a valid drug test may provide a proper business reason for an employee’s discharge, surrounding circumstances, including the timing of the test, antiunion motivation, the reliability of this test and its documentation, and the equality in application of the discipline all play a part in determining whether in fact those discharge actions would have taken place notwithstanding the employees underlying union or protected conduct.

Here the record shows that Belch initially was believed by Respondent to be a “no vote” and he was reluctantly discharged, being told Respondent had to do it because of the Union as it already had discharged Shaffer for positive test results and was further told he might be rehired if the Union lost the election. Interestingly, Belch was told of the test results 2 weeks after taking the test, while Shaffer, the known union activist, got his results (and was discharged), 1 week after the test, a test that the test provider was instructed to “rush” with notification to be picked up by Mori. Shaffer

was immediately terminated the day after he took off work to be a witness for the Union at the representation hearing. The General Counsel also introduced the findings of the employees' unemployment compensation appeals which awarded benefits to both Shaffer and Belch because the Respondent did not prove willful misconduct. Shaffer was in the first group tested, even though he was a laborer and not an over-the-road driver and thus was not in the group targeted by Respondent's insurance carrier and its asserted drug policy.

Belch also was a laborer/operator, not a truckdriver affected most directly by the insurance carrier, and it is clear that Respondent's implementation of its drug-testing program was based on the reason that it received a fax from its insurance agent on July 18 which requested implementation "in the near future."

Although Respondent had a longstanding antidrug policy, with a slogan, "Drugs are Garbage—Just Say No," on its trash trucks and business cards, it took no other programmed action despite the fact that, as early as September 1990, Respondent's insurance agent, Matthew Walsh, personally visited Respondent and advised Respondent of the necessity of establishing a drug-testing program. In the winter of 1990 and the spring of 1991, Walsh again advised Respondent of the necessity to drug test its drivers. Respondent did not institute a drug-testing program but on May 7, 1991, Respondent held a substance abuse training seminar for its drivers (Shaffer and Belch did not attend as they were not drivers). It notified the drivers that they were going to be drug tested but they were not.

No one was tested until 6 days after the Respondent's receipt of the union petition and "immediately" after the July 18 insurance fax which request action "in the near future." As noted, testing started the day after Santangelo angrily denounced stealing, questioned why employees had gone to the Union, said he had received a letter and was immediately starting drug testing for everyone, and said he would fire those who failed.

Under these circumstances, especially as it related to the testing of nondrivers, I find that Respondent's hasty and sudden implementation of drug testing for "all" its employees was motivated by its anger at the union activity and would not have occurred "immediately" on July 19 and 25 for "all" employees were it not for such union activity. This conclusion is reinforced by the fact that Respondent has attempted to excuse its subsequent failure to have any followup testing for anyone, even though its insurance carrier has requested it. Accordingly, I find that the Respondent has failed to persuasively show that its institution of drug testing for all employees at that immediate time was for a valid, nonpretextual reason and I find that it was because of the union activity and was designed to discourage employees from such activities and therefore it violates Section 8(a)(1) and (3) of the Act, as alleged.

Likewise, the termination of Shaffer and Belch was dependent on an improperly implemented drug-testing program that was not shown to have been validly applied to non-drivers and I therefore find that Respondent would not have made these two terminations were it not for the invalid test and its antiunion motivation and I find that it had violated Section 8(a)(1) and (3) of the Act in this respect, as alleged. Shaffer's termination also occurring after Santangelo had told him that he would be the "first to go" because of his actions

in attending a Board hearing as a subpoenaed, prospective witness, and I find that it therefore also violates Section 8(a)(4) of the Act, as alleged.

The next series of allegations concerns the subsequent lay-off of Steven Stout, Byers, and Marion Strosnider on and after December 28, 1991, and Respondent's failure to reemploy these employees. First, I recognize the record establishes that Respondent did not notify or bargain with the Union regarding its December 28 layoffs, and thus it is a violation of Section 8(a)(5), as alleged. See *Holmes & Narver*, 309 NLRB 146 (1992).

Because there is no demonstrated tie-in of timing and because there is some rationalization for seasonal construction conditions and a cutback in Respondent's municipal waste collections, the loss of the "Masontown" contract (11,709 tons in the last quarter of 1991 v. 10,633 tons in the first quarter of 1992), and because contract negotiations were at least on-going, I am not persuaded that the three December 1991 layoffs were in themselves a violation of the Act.

A different conclusion is required about Respondent's failure to recall two of these employees. Stout was called "when the weather started getting nice" but did not start work because the weather turned bad. He was told he would be called back when the weather improved but was not. In July 1992 Stout went to Respondent and talked with Mori about recall. Mori told him that unfair labor practice charges had been filed against Respondent, that the charge would cost a lot of money, and he suggested that if Stout got the unfair labor practice charges dropped, Respondent would probably recall him.

Marion Strosnider, a route laborer, was one of Respondent's original employees. He supported the Union and attended some union organizing meetings. At the end of September, Respondent employee Alex Demniak wrote a memorandum to Respondent advising Respondent that Strosnider had asked him to sign a union authorization card and support the Union. Strosnider was told he would be recalled when things picked up but was not, except for two, 1-day, temporary occasions. Respondent's records show that in the second quarter of 1992 municipal waste increased to 13,359 tons and total waste went up to 15,410 tons, a figure that increased slightly in the third quarter of 1992.

Byers was the driver of the truck that Strosnider worked on as a laborer. After his second layoff in December (for the same reason given Strosnider), he was recalled part time for, 2 days a week, in February and then went on full time in March. The record shows that several new hires were employed at Respondent after July 1, 1991, and are no longer employed, specifically equipment operator Thomas Zavage, and laborers Barry Skochelak, and Vogola Homely. Also, several employees were hired by Respondent after July 1, 1991, and are currently employed: Glenn Baird, truckdriver, equipment operator, and laborer; Robert Blaker, equipment operator; James Collins, laborer; Scott McClelland, truckdriver and equipment operator; Gerald Pyrock, equipment operator; John Skochelak, laborer; and Ralph Cavimee, equipment operator and temporary foreman. Otherwise, the Respondent has failed to point out any documentary evidence or argument to establish any specifics of its generally argued business downturn that would explain any possible reasons why Stout and Strosnider were not recalled to work in a timely fashion.

Under these circumstances, the record is devoid of any rationalization that would indicate a valid reason for Respondent's failure to recall Stout and Strosnider, especially after the first quarter of 1992, and, in view of the motivation shown by the General Counsel, as otherwise discussed above, as well as Respondent's increasing hostility in negotiation during this period of time, the record supports the conclusion that Respondent's failure to recall Stout and Strosnider violates Section 8(a)(1) and (3) of the Act, as alleged.

Glenn Franks was a union officer and active on the union negotiating team and, as noted above, had been the subject of certain 8(a)(1) violations. Franks was laid off for 5 days, on April 6, 8, and 13, 1992, and May 8 and 23, 1992, by Mori, who told Franks there was no work available because the backhoe was not working.

Franks, who was considered to be a good employee and was the highest paid laborer, also filled in as a truckdriver and equipment operator, and had never been laid off before and he testified that in the past employees worked the mine loads by hand on other occasions when the equipment was not operative. Negotiations were ongoing at this time but no notification of or bargaining about Franks' layoff occurred, and, as discussed above, this lack of bargaining was a violation of Section 8(a)(5) of the Act, as alleged.

In June, Franks was threatened by Mori with "serious problems" if he tried to help Duranko in his effort to get his job back and then, after Franks notified Persely early on August 3 that he would not be at work the next day, Persely said "okay" and that he "guessed this was a personal matter." Later that morning, Mori acknowledged to Franks that he understood Franks would not be at work on August 4 and Franks said he had intended to tell Mori later that day.

On August 4, Franks met with a Board attorney at the Union's office.

On Friday, August 7, Franks asked Respondent's secretary if there was work scheduled for him for Saturday, August 8. Respondent's secretary called Mori on the two-way radio and Franks was told there was nothing for him. After Franks learned that all the other employees had worked overtime that Saturday, he asked Mori if there was a reason he had not been allowed to work. Mori said, "Yes," and told Franks that he had been told by employees that Franks was at the union hall on August 4 on union business. Franks explained that he had given Respondent notice, and that other employees had taken days off and had not been punished. Mori told Franks that he had his priorities mixed up and that he had taken off on union business and was "in the enemy camp" and that Respondent was not going to reward him with time and one-half. When Franks explained that he had been with a Board attorney, Mori said that if he had known that it might have made a difference or it might not have, but that as far as Mori was concerned, Franks was off on union business and that is why he was denied overtime on August 4.

Under these circumstances, the layoff and failure to assign alternative work and the denial of regular overtime, is shown to have been for discriminatory reasons, unsupported by valid business considerations and I conclude that both are shown to be violations of Section 8(a)(1) and (3) of the Act, as alleged. Mori, however, did not know of the Board's involvement in Franks' absence on August 4 and therefore no

violation of Section 8(a)(4) occurred regardless of Mori's statement about whether or not his knowledge would have made a difference.

Dennis Hornbeck was a truckdriver and laborer and was elected Local president in May 1992. In January 1991, Hornbeck was involved and injured in a nonwork-related vehicle accident, was absent from work for about 1 week, and was visited in the hospital, by Persely.

In February Hornbeck asked Persely what would happen if he lost his license because of the accident. Persely told Hornbeck that he could take a chance and drive without a license or Respondent would try to work something out by working him in the landfill until he got his license back. Also, when Hornbeck was hired he was told that he could also work in the landfill to get extra hours and he usually worked in the landfill operating equipment or picking mine piles about 6 to 8 hours per week.

In August 1991, after the election, Santangelo asked about the status of his license and told him that if he did not have a license he could not drive and frequently thereafter Santangelo made a status check. Nothing was said, however, that would indicate that he faced discharge if he lost his driver's license. To the contrary, after Hornbeck was notified on June 5, 1992, that he was required to surrender his driver's license for 30 days and Union Representative Volansky immediately requested a meeting with Mori, and on that same afternoon met and discussed the 30-day revocation of Hornbeck's license. I credit Volansky's testimony that Mori told him that while the Union wanted assistance from Respondent in the Hornbeck matter, the Union did not offer much assistance to Respondent. Mori and District 4 President Ed Yanyovick, who was also present, began to review what the Union could do to assist Respondent in maintaining some of its trash collection contracts. Yankovich told Mori that the Union would do everything within its power to assist Respondent to secure and keep contracts and offered to write letters to various township and borough officials in support of Respondent. Mori said that he had no problem assigning Hornbeck to either the landfill as a laborer or to the garbage trucks as a helper, stating: "I'm sure we can work with Dennis. Thirty days is not that long a period of time. He is real good worker and we would hate to lose him. Tell Dennis to report to work on Monday at 7 a.m. and we'll find something for him to do."

Hornbeck credibly testified that when he reported in on Monday, June 8, Mori said that he did not think it would ever come to this but that he had to terminate him, then advised him to come back next week to talk to Santangelo, explaining that he might have a chance to work in the landfill if he did not bring the Union in because Santangelo did not like anyone telling him what to do.

Otherwise, however, the record shows that former truckdriver William Rummel was assigned to work as a helper and laborer by Santangelo after Rummel's license was revoked (apparently at a time prior to any union activity), and he continued to work for lengthy periods until he was terminated for other reasons.

As otherwise discussed below, by May 20, 1992, contract negotiations had moved to a stage where the Union had marked and faxed to the Respondent provisions apparently agreed to, including provisions agreed to and which Respondent was expected to sign off on. On June 1 company

negotiator Fahrig told union negotiator Barnhart that he and Santangelo had agreed that it was going to be very difficult for Respondent to work with the Union because the Union was continually trying to “fuck” Respondent by filing unfair labor practice charges. Then on June 8, when Barnhart called Fahrig to inquire about the status of the contract, Fahrig stated that Respondent had received two more unfair labor practice charges and that it was going to be impossible to reach agreement on a contract because the Union was continually filing unfair labor practice charges.

Here, in addition to the basic motivational conclusions reached above, the record shows that at the time of Hornbeck’s discharge the Respondent had become hostile about pursuing contract negotiation and had become critically irritated by the Union’s filing of charges. The timing of the discharge and the surrounding circumstances strongly reinforce the inference that Respondent’s action was motivated by union animus and, accordingly, I find that the General Counsel has made a strong prima facie showing and that Respondent has a substantial burden to show that it would have taken the same action even in the absence of antiunion considerations.

Despite its burden, Respondent’s argument on brief fails to specifically address the Hornbeck discharge. Respondent proposed findings of fact assert that: “Hornbeck was informed he would be fired if he lost his operator’s license, because of insurance requirements, in the presence of CBF’s lawyer and the NLRB’s investigator, Robert Edison. [90, 1239–1241, 1386–1387.]”

First, page 90 of the transcript has nothing that would support this assertion. At page 1240 Santangelo testified that he told Hornbeck that when you lose your license “you are terminated from here,” explaining that his insurance company and his attorney said he can’t drive without a license. At page 1387 Mori confirmed the “termination” statement. These self-serving statements, even if true, do not refute Hornbeck’s and Barnhart’s testimony that the Respondent also discussed a logical alternative to termination, namely reassignment to a nondriver position. Moreover, in view of Respondent’s other use of employee “layoff” as a frequent practice and its past practice under similar circumstances with driver Rummel of reassignment as helper/laborer, there is no justifiable reason shown why Hornbeck was not merely laid off for the 30 days of his license suspension or reassigned as others had been and as had been discussed and, in effect, promised by Manager Mori. Here, the record supports the conclusion that Mori was overruled by Owner Santangelo because of Santangelo’s irritation over Hornbeck’s recent election as union president and the status of contract negotiations and anger at the Union’s filing of additional unfair labor practice charges.

Accordingly, I find that the General Counsel has carried its ultimate burden of proof and I conclude that Respondent is shown to have violated Section 8(a)(1), (3), and (5) of the Act, as alleged by both its termination of Hornbeck and its failure to bargain with the Union about its decision to terminate.

#### *D. Alleged Refusal to Bargain and Related Charges*

It is admitted that the following unit:

All hourly production and maintenance employees employed by Respondent CBF at its McClellandtown, Pennsylvania, facility; excluding all other employees and professional employees, guards and supervisors as defined in the Act.

is an appropriate unit for the purpose of collective bargaining that on September 3, 1991, the Union was certified as the exclusive collective-bargaining representative of the unit and that, since that time, the Union has been the collective-bargaining representative of the unit.

#### 1. Unilateral action on health care benefits

As noted above, the parties discussed health care benefit proposals for employees during collective-bargaining negotiations. Respondent had health care coverage in effect for certain of its bargaining unit employees at the beginning of negotiations but not for others. The parties did not reach agreement during negotiations. But, on June 8, 1992, Respondent notified the Union that it was providing health care coverage for all bargaining unit employees. On June 10, the Union advised Respondent that it would agree to Respondent’s implementation of health care coverage only if such coverage was either the health care plan submitted to Respondent by the Union or health care coverage that provided equivalent.

On June 19, Respondent advised the Union that they were at impasse and that it would implement health care coverage to the six uncovered bargaining unit employees.

The issue here is not whether the Union wisely argued about the terms of the proposed coverage but whether Respondent’s unilaterally implementing on a mandatory subject of bargaining was justified despite the Union’s request to bargain.

The Respondent addressed this subject on brief by proposing as a finding of fact that “after CBF realized the negotiations were not going anywhere, it provided insurance to the uninsured employees so all employees would have health insurance as previously promised to them.”

This does not show waiver by the Union, actual impasse in negotiation, or anything else that might rebut the General Counsel’s allegations in this regard and, as a review of the record otherwise discloses no facts that would require a contrary finding, it must be concluded that Respondent violated Section 8(a)(1) and (5) of the Act when it unilaterally extended health care coverage to certain bargaining unit employees without bargaining over it with the Union, as alleged.

#### 2. Failure to provide requested information

On brief the Respondent addresses this issue by arguing that the Union’s request didn’t come until July 1992, well after it knew of Respondent’s difficult financial situation and the loss of its Masontown contract and alleging that in any event, all such information was provided at the hearing.

It is well established that the duty of an employer to bargain in good faith includes the obligation to disclose to its employees’ collective-bargaining representative data relevant and reasonably necessary to its role as bargaining agent. Here, there is no serious question that the information relating to employees’ health care benefits and the employer’s financial status. See *A. Aiudi & Sons*, 287 NLRB No. 133

(Feb. 28, 1988) (not reported in Board volumes), and *Nielson Lithographing Co.*, 305 NLRB 697 (1991).

The fact that some of the information came out at the hearing in the General Counsel's subpoenaed documents is not the equivalent of compliance with the Union's request for information, it must be communicated specifically to the requesting party. Moreover, an unreasonable delay (as here) in furnishing requested information is as much a violation as a flat refusal, *Bundy Corp.*, 292 NLRB 671 (1989), and possible subsequent compliance does not render a complaint moot. See *Teamsters Local 921 (San Francisco Newspaper)*, 309 NLRB 901 (1992).

Accordingly, I conclude that the Respondent has failed and refused to provide the information requested by the Union in its letters dated June 26 and August 11, 1992, and has thereby violated Section 8(a)(1) and (5) of the Act, as alleged.

### 3. Failure to bargain because of continued union charges

An employer who has a collective-bargaining relationship has an enforceable obligation to engage in bargaining until such time as a valid impasse is reached and that obligation otherwise is not negated or excused by pending court proceedings. See *Peat Mfg. Co.*, 261 NLRB 240 (1982), or the filing of charges by one party against another. See *Dane County Dairy*, 273 NLRB 1711 (1985).

Here, the Respondent has gone beyond using the filing of charge by the Union as an "excuse" and has elevated this reason to a "cause" for discontinuing negotiations. The record shows that during the course of negotiations Company Representative Fahrig, in December 1991, complained that it was "real hard to negotiate" when the Union kept filing these "God damn unfair labor practice charges." Union Representative Barnhart explained that Respondent could not lawfully refuse to negotiate because the Union had filed unfair labor practice charges, but again in January 1992, at a negotiating session, Fahrig advised the Union that it was difficult for Respondent to continue to negotiate when the Union continued to file "God damn" unfair labor practice charges.

On January 16, 1992, by letter, Respondent said it considered the unfair labor practice charges as "spurious counter productive" and would "consider them" when the parties discussed the economic package.

At a meeting on February 20, 1992, Santangelo angrily told the Union, that "you people have fucked me for over a year and you keep filing these God damn unfair labor practice charges and you expect me to negotiate."

Fahrig admitted that he subsequently told the union negotiating team that the Union's filing of unfair labor practices was an "immense hurdle" to negotiating a collective-bargaining agreement. Then, on June 8, Fahrig told Barnhart that Respondent had received two more unfair labor practice charges and that it was going to be impossible for Respondent to come to an agreement with the Union because the Union kept filing unfair labor practice charges is undisputed and undenied.

Respondent's letter on the same day informed the Union, that the Union's continuous filing of unfair labor practice charges with the Board was frivolous and a strain on negotiations.

Finally, on July 17, Respondent, by letter, informed the Union that the Union's filing of unfair labor practice charges with the Board had brought collective-bargaining to impasse and again on September 3, Respondent wrote the Union that the Union's "continual filing" of frivolous and unwarranted unfair labor practice charges undercuts the collective-bargaining process.

Although the Union made a number of request to resume negotiation after April 29, that was the last time the Respondent met and negotiated with the Union.

Under these circumstances, it appears that Respondent's assertions on June 8 and July 17 that it would be "impossible" to come to an agreement and that bargaining had been brought to "impasse" because of the Union's continuous filing of charges, constitutes a refusal to bargain that is unpermissible and inconsistent with its obligations. See *Dane County Dairy*, supra. This refusal, as well as Respondent's repeated and implicit threats, related to the effect of the Union's actions in filing charges on negotiations, also clearly has an effect which interferes with, restrains, and coerces the Union in the exercise of its rights and obligation to its members and, accordingly, I find that Respondent is shown to have violated both Section 8(a)(1) and (5) of the Act in this respect, as alleged.

### 4. Unilateral changes in contract provision previously agreed to

During negotiations in October 1991, the parties reviewed noneconomic articles which had been discussed during the earlier collective-bargaining sessions and the Respondent agreed to the Union's suggestion to Respondent that it prepare the contractual articles which had been discussed and agreed to by the parties and which could be signed off.

At negotiating sessions in November and January and in May the parties signed off on many noneconomic articles. After January, negotiations turned to more contentious economic issues, however, on July 28, 1992, Respondent submitted to the Union 25 contract proposals, including unilateral changes in articles 1, 3, 6, 11, 15, 16, 17, 21, and 25 and Appendix D, which had previously been agreed to and signed off on. It is well established that such a retreat from agreements reached constitutes a failure and refusal to bargain in good faith. *Milgo Industrial*, 229 NLRB 25, 30 (1977), and, accordingly, I find that Respondent's action in unilaterally changing contractual provisions previously agreed to with the Union violates Section 8(a)(1) and (5) of the Act, as alleged.

### 5. Refusal to meet and bargain in good faith

On brief the Respondent again makes generalized arguments that the Union has failed to bargain in good faith; however, this argument is not related to any corresponding pending charges and it is not tied in to any pertinence to Respondent's own demonstrated failure to meet and negotiate with the Union since its negative reply to the Union's June 10, 1992 letter.

During the course of the hearing, the Respondent attempted to make much of the asserted uniqueness of its land-fill operation and the purported lack of awareness of both the Union and the Court about its assertedly special situation. At the same time, however, it selected as its principal negotiator

a person generally inexperienced in labor contract negotiations. Despite Respondent's claims, it appears that the Union's experience with representation of employees engaged in above-ground mining operations (involving excavation, site preparation, and land reclamation) is similar to Respondent's landfill operations and there is no showing that inadequate or inappropriate conduct by the Union was a contributing or excusable cause for Respondent's breaking off of its bargaining. Although the course of bargaining between the parties was neither sure nor smooth, it is apparent that progress was being made and that the parties were not at a legally definable impasse, see *Henry Miller Spring Mfg. Co.*, 273 NLRB 472 (1984).

By letter of June 19, Respondent told the Union that:

unless the Union is prepared to back down from its impossible demands, further meetings are a waste of our valuable time" and by letter on July 15, said that "We have NEVER and WILL NEVER sign an agreement that includes an enabling clause. Under separate cover, I am sending the first 25 articles as we see them. If and when the wage package is resolved, we will then agree to meet again. Till that time we see this WHOLE PROCESS at an impasse.

By letter on September 3, Respondent wrote that it was willing to meet and bargain only after the Union had replied in writing to Respondent's letter of July 28. The letter enclosed 25 contract proposals, including those found above to be improper changes of agreed-to provisions. Insistence that the Union respond in writing to its 25 contract proposals before Respondent would agree to meet with the Union is inconsistent with the face-to-face collective-bargaining process and is indicative of bad faith. Respondent's overall conduct in this respect precluded negotiations and demonstrates a clear failure and refusal to engage in good-faith collective bargaining in violation of Section 8(a)(1) and (5) of the Act, as alleged.

#### CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act and the following employees of Respondent (the unit) has, since September 3, 1991, constituted a unit appropriate for the purposes of collective bargaining with the meaning of Section 9(b) of the Act:

All hourly production and maintenance employees employed by Respondent CBF at its McClellandtown, Pennsylvania, facility; excluding all other employees and professional employees, guards and supervisors as defined in the Act.

3. At all times pertinent Joseph Persely and Stephen Duranko were supervisors and agents within the meaning of Section 2(11) and (13) of the Act such that their conduct in relation to Respondent's employees is attributable to the Respondent.

4. By interrogating employees concerning their union sympathies and activities or those of other employees; by creating the impression of surveillance of employees' union activities; by threatening employees with plant closure, layoffs,

discharge, the loss of overtime, vandalism of employees' property, and unspecified reprisals; by soliciting grievances; by promising benefits; and by implying that an employee would not have been terminated for failing the drug test were it not for the Union, Respondent has interfered with, restrained, and coerced employees in the exercise of their rights guaranteed them by Section 7 of the Act, and thereby has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

5. By laying off employees John Michael Stout, James Byers, and Steven Stout on July 12, 1991, and Jacob D. Hartman on July 15, 1991, by terminating employees John Michael Stout on July 18, 1991, David Romito and Wesley Shaffer on July 26, 1991, Robert Belch on August 8, 1991, and Dennis Hornbeck on June 8, 1992; and by failing to recall Steven Stout and Marion J. Strosnider from layoff on and after April 1, 1992, because of employee union activities in pursuing union affiliation for purposes of collective-bargaining representation, Respondent violated Section 8(a)(3) and (1) of the Act.

6. By telling Wesley Shaffer he would be "the first to go" and terminating him because he attended a Board hearing as a subpoenaed, prospective witness, Respondent violated Section 8(a)(1), (3), and (4) of the Act.

7. By laying off Glenn O. Franks on April 6, 8, and 13 and May 8 and 23, 1992, and by reducing his overtime opportunities because of his union activities, Respondent has violated Section 8(a)(1) and (3) of the Act.

8. By instituting a drug-testing program for all employees on June 19, 1991, because of and in order to discourage employee union activity, Respondent violated Section 8(a)(1) and (3) of the Act.

9. By failing to bargain with the Union about its decisions to lay off and terminate employees on and after September 3, 1991, Respondent violated Section 8(a)(1) and (5) of the Act.

10. By unilaterally implementing changes in health care coverages on June 19, 1992, and unilaterally changing contractual provision previously agreed to on July 28, 1992, at which times no bargaining impasse existed, Respondent failed to bargain in good faith in violation of Section 8(a)(1) and (5) of the Act.

11. By threatening to discontinue negotiations and by failing and refusing to bargain with the Union because the Union exercised its rights and obligations to file unfair labor practice charges before the Board by failing and refusing to meet and negotiate with the Union on and after June 19, 1992, Respondent has failed and refused to bargain in good faith in violation of Section 8(a)(1) and (5) of the Act.

12. By failing and delaying to provide the Union with information requested in letters dated June 26 and August 11, 1992, Respondent has violated Section 8(a)(1) and (5) of the Act.

13. The Respondent otherwise is not shown to have engaged in conduct violative of the Act as alleged in the complaint.

#### REMEDY

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

With respect to the necessary affirmative action, it is recommended that Respondent be ordered to offer Robert Belch, James Byers, Jacob Hartman, Dennis Hornbeck, David Romito, Wesley Shaffer, John Michael Stout, Steven Stout, and Marion Strosnider immediate and full reinstatement to their former jobs, or substantially equivalent positions, dismissing, if necessary, any temporary employees or employees hired subsequently, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered because of the discrimination practiced against them by payment to them of a sum of money equal to that which they normally would have earned from the date of the discrimination to the date of reinstatement in accordance with the method set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).<sup>5</sup>

The Respondent also shall be ordered to expunge from its files any reference to illegal layoff or discharges and notify them in writing that this has been done and that evidence of the unlawful action will not be used as a basis for future personnel action against them. Respondent also shall be ordered to bargain in good faith with the United Mine Workers of America, AFL-CIO, for the period required by *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962), to ensure that the Union and the employees derive the benefit of the Union's 9(a) status under the Act.

Having found that Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain in good faith by refusing or delaying the production of described information requested by the Union, by unilaterally implementing a health plan without bargaining to impasse, by previously instituting a drug-testing program (in violation of Section 8(a)(3) of the Act), and by refusing or delaying the production of described information requested by the Union it is recommended that on request of the Union, Respondent be ordered to furnish the information requested, to rescind all or part of the implemented health care proposal and drug plan and to bargain in good faith with the Union as the exclusive bargaining agent of the above appropriate unit of its employees with respect to their wages, hours, and other terms and conditions of employment and embody any understanding reached in a signed agreement.

Otherwise, it is not considered to be necessary that a broad order be issued.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>6</sup>

#### ORDER

The Respondent, CBF, Inc., and Charles Santangelo, an individual, single employer, McClellandtown, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

<sup>5</sup>Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

<sup>6</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Interfering with, restraining, or coercing its employees in the exercise of rights guaranteed in Section 7 of the Act by interrogating an employee about union support or union activities, by creating the impression employees' union activities are under surveillance, by threatening plant closure, layoffs, discharges, loss of overtime, and vandalism of employees' property, by soliciting grievances and promising benefit, by stating that an employee would be the first laid off or terminated because he attended a Board hearing, and by implying that an employee would not have been terminated for failing a drug test were it not for the Union.

(b) Terminating, laying off, or reducing any employees overtime opportunities, failing to recall employees from layoff, or instituting a drug-testing program for all employees or otherwise discriminating against them because of or in retaliation for their engaging in protected concerted activity.

(c) Unilaterally implementing changes in terms and conditions of employment without bargaining in good faith.

(d) Unilaterally changing contractual provisions previously agreed to, failing and delaying to provide requested information relevant to the Union's collective-bargaining duties, and failing and refusing to bargain collectively with the Union with regard to layoff and tenure, and failing and refusing to meet or to bargain collectively because of a union's filing of charges with the Board or for any other invalid reason.

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

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

(a) Offer Robert Belch, James Byers, Jacob Hartmen, Dennis Hornbeck, David Romito, Wesley Shaffer, John Michael Stout, Steven Stout, and Marion Strosnider immediate and full reinstatement and make them and Glenn O. Franks whole for the losses they incurred as a result of the discrimination against them in the manner specified in the remedy section above.

(b) Remove from its files any reference to the layoffs and discharges of the named employees and notify them in writing that this has been done and that evidence of the unlawful layoffs and discharges will not be used as a basis for future personnel actions against them.

(c) On request, supply the Union with the information requested and on request rescind the drug-testing program and health care plan previously instituted and implemented and on request bargain in good faith with the Union as the exclusive bargaining agent of the above appropriate unit of its employees with respect to their wages, hours, and other terms and conditions of employment and embody any understanding reached in a signed agreement.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all records, reports, and other documents necessary to analyze the amount of backpay due under the terms of this decision.

(e) Post at its McClellandtown, Pennsylvania facility copies of the attached notice marked "Appendix."<sup>7</sup> Copies of

<sup>7</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

the notice, on forms provided by the Regional Director for Region 6, after being signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be

taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.