United States Coachworks, Inc. *and* Local 259, United Automobile Workers, AFL–CIO. Cases 29–CA–20894 and 29–CA–20910

August 6, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS TRUESDALE AND WALSH

On November 25, 1998, Administrative Law Judge D. Barry Morris issued the attached decision. The Respondent filed exceptions and a supporting brief. The Charging Party filed an answering brief.

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

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

1. Contrary to our dissenting colleague, we agree with the judge that the Respondent unlawfully discharged employee Bauer.[2]

The relevant facts, as found by the judge, are these. Bauer was the chief organizer for the Union at the Respondent's facility. He distributed approximately 30 authorization cards on March 31, 1997.[3] The Respondent received the Union's request for recognition on April 1. On April 2, Gravitt, the Respondent's president and owner, told Bauer, "I know you are the one that is disbursing Union cards." That day, or the day after, Bauer wore a union jacket which had "Local 259" printed on both the front and the back. On viewing Bauer's jacket, Gravitt told Bauer, "nice f*** coat." On April 2, Bauer, who had been working approximately 3 hours of overtime per week, reported in early for overtime, but was told by Shapiro, his supervisor, that "due to all the bull*** that is going on" there would be no more overtime. Later that day, Bauer asked Gravitt if he (Gravitt) was aware that Bauer had been in jail. Thus, it was Bauer who brought this matter to the Respondent's attention, rather than the Respondent having discovered this on its own.

Subsequent to Bauer's revelation, the Respondent commissioned an investigator's report regarding Bauer. The report (dated April 7) disclosed, inter alia, that, during the past 10 years, Bauer had been convicted of a felony (conspiracy to distribute metamphetamine) and had been incarcerated for that offense. Notwithstanding the fact that he had been incarcerated from May 16, 1991, to May 23, 1993, Bauer had reported on his employment application that he had worked at Masterweld from 1990 until 1992 and at Avenger Slat from 1992 until 1995.

On April 7, the Respondent discharged Bauer. The record contains notes in the form of a memorandum made by Gore, the Respondent's co-owner, relating to the April 7 termination meeting at which Gore, Gravitt, and Bauer were present. The memorandum states:

> I took the following notes of our meeting with Robert Bauer today at 3:30 p.m. In addition to Mr. Bauer, you [Gravitt] and I were also present.
>
> At this meeting you advised Mr. Bauer that he was in his probationary period and you were not happy with his performance and among other things the following events stood out.
>
> He threatened to assault Howard Nathan and repeated the threat to you. Mr. Bauer stated "never did not."
>
> You told Mr. Bauer that he was observed carrying a large knife (6–8 inches) in addition to his smaller knife. But when you spoke to him about it, he denied the existence of the larger knife. Mr. Bauer stated "lie yup[.]"
>
> You told Mr. Bauer he shoved a co-worker who said something to him that he didn't like. Mr. Bauer stated "I did, Who?" You told Mr. Bauer you weren't going to tell him. He said "news to me[.]"
>
> You told Mr. Bauer that he apparently has a tendency toward violent conduct in the work place, and that he had mentioned[ ] to you the fact that he was incarcerated. You told him we had investigated what he had said and we found that he had a history of violent conduct outside of the workplace.[4] You advised him in

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Member Truesdale notes that *East Island Swiss Products*, 226 NLRB 1207 (1976), which is cited and distinguished by the judge in his discussion of backpay and reinstatement at sec. II,A,4, par.1 of his decision, is distinguishable from the instant case for an additional reason. Specifically, the issue here is whether the Respondent discharged Bauer because it acquired knowledge of a prior conviction. We adopt the judge's finding that he was not discharged for that reason. In *East Island Swiss Products,* the respondent did not learn of the criminal background until after the discharge. In that context the issue was whether the Board's usual reinstatement remedy should be modified.

[2] The judge also found, inter alia, that the Respondent had unlawfully ceased to assign overtime work to Bauer. Our dissenting colleague does not disagree with this finding.

[3] All dates refer to 1997 unless otherwise indicated.

[4] In this regard, the April 7 investigator's report revealed that, in addition to the conviction and incarceration mentioned above, Bauer had been convicted of other offenses. One of these matters (attempted assault, 1994) involved a misdemeanor, and the report does not disclose whether the other matters (second degree assault and criminal mischief, 1985) were misdemeanors or felonies. The other section of the report

> light of all this we are severing our employment relationship with him. Mr. Bauer said "[s]ounds good to me." You asked him if there was anything he didn't understand and he replied, "don't understand nothing[.]" [A]t this point he got up and left your office.

As Bauer was about to leave the Respondent's building after being terminated on April 7, Gravitt told him, "I cut the head off the dragon that breathed the fire of the Union."

Our dissenting colleague assumes arguendo that the General Counsel established a prima facie case that Bauer was unlawfully discharged. However, our colleague would find that the Respondent would have discharged Bauer even in the absence of his protected activity. Specifically, he maintains that "the Respondent seems to have reached the entirely well-founded conclusion that Bauer was a dangerous and unreliable person to have as an employee," and was, therefore, justified in discharging him.

Contrary to our colleague, we agree with the judge that Bauer was unlawfully discharged. The General Counsel presented a strong prima facie case that the Respondent was motivated by antiunion animus in discharging Bauer; the judge found no evidence substantiating three of the Respondent's asserted reasons for discharging Bauer; the Respondent offered shifting reasons for discharging Bauer, from which the judge properly inferred that the real reason was an unlawful one; and Gravitt's statement to Bauer on discharging him is "smoking-gun"—type evidence that Bauer was discharged because of his protected activities.

First, to establish that an employee was discharged in violation of Section 8(a)(3),[5] the General Counsel must persuade, by a preponderance of the evidence, that an employee's protected conduct was a motivating factor in the employer's decision. See *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983); see also *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). "The elements commonly required to support a prima facie showing of discriminatory motivation. . . . are union activity, employer knowledge, timing, and employer animus." *Best Plumbing Supply*, 310 NLRB 143 (1993). If the General Counsel is able to make such a showing, the burden of persuasion shifts "to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." See *Wright Line*, supra at 1089. Stated otherwise:

> [u]nder the Board's two-step *Wright Line* test … the Board's General Counsel must first present evidence that proves that protected conduct was a motivating factor in the discharge. . . . If this burden of persuasion is met, the employer may avoid liability only if it demonstrates by a preponderance of the evidence "that it would have reached the same decision absent the protected conduct."

NLRB v. G&T Terminal Packaging Co., 246 F.3d 103, 116 (2d Cir. 2001).

Here, as the judge found, the General Counsel has demonstrated that Bauer's Union conduct was a motivating factor in the Respondent's decision to discharge him. As the Union's chief organizer at the Respondent's facility, Bauer distributed approximately 30 authorization cards and presented the cards to the Union. The Respondent knew about Bauer's union activities: On April 2, Gravitt told Bauer, "I know you are the one that is disbursing Union cards";[6] on April 2, Shapiro told Bauer when Bauer reported early for overtime work that, "due to all the bull*** that is going on" there would be no more overtime; and on either April 2, or April 3, when Gravitt saw Bauer wearing a union coat, he stated, "nice f*** coat." The Respondent demonstrated its antiunion animus toward Bauer through Shapiro's April 2 remark quoted above (which was not alleged to be an unfair labor practice). The Respondent also demonstrated antiunion animus toward Bauer by unlawfully ceasing to assign him overtime work (a finding with which our dissenting colleague does not disagree), and by unlawfully interrogating him. Further, the Respondent demonstrated its overall antiunion animus by discharging employee Smith.[7] Finally, the Respondent bluntly demonstrated its antiunion animus when Gravitt stated, as Bauer was about to leave the building following his discharge on April 7, "I cut the head off the dragon that breathed the fire of the Union." This last statement supplies direct evidence of the Respondent's antiunion motivation in discharging Bauer (as well as the Respondent's knowledge of Bauer's union activities). With respect to timing,

is entitled "Non-confirmed arrests and related charges." Notably, the disposition of those matters was unknown.

[5] Sec. 8(a)(3) prohibits an employer from discriminating against employees "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

[6] The judge correctly found that this statement gave the impression that the activities on behalf of the Union were under surveillance in violation of Sec. 8(a)(1). Thus, this statement is also evidence of the Respondent's antiunion animus toward Bauer. See fn.7.

[7] When a discharge occurs against the background of other unfair labor practices, those unfair labor practices may constitute evidence of a respondent's antiunion animus. See *Novartis Nutrition Corp.*, 331 NLRB 1519 (2000).

Bauer was discharged on April 7, only 6 days after the Respondent had received the Union's request for recognition, and only 5 days after occurrence of the predischarge incidents described above (cessation of overtime, interrogation, creation of the impression of surveillance, and Gravitt's antiunion remark concerning Bauer's union jacket).

Second, the judge discredited all of the Respondent's asserted reasons for discharging Bauer relating to his workplace conduct. Specifically, the judge found that Bauer did not carry a large knife, did not shove an employee, and did not threaten an employee with physical harm. The Respondent did not even call as witnesses those individuals who it claimed had observed Bauer carrying a long knife and shoving an employee. Our colleague's point that "there is no denial that [Bauer] carried a smaller knife" is irrelevant because the record does not reflect that one of the Respondent's reasons for discharging Bauer was for carrying a small knife. In this regard, Gore's memorandum, which is quoted in full above, stated: "You told Mr. Bauer that he was observed carrying a large knife . . . in addition to his smaller knife. But when you spoke to him about it, he denied the existence of the larger knife." Bauer testified that he used a small knife for work, and the record further reflects that Gravitt, the Respondent's president, initiated his investigation into this matter based on an employee's report (which was discredited by the judge, as stated above) that Bauer carried a large knife. Indeed, as Gravitt's notes reveal, Gravitt was not concerned with Bauer's using the small knife as long as it was for work. Additionally, the judge found that Shapiro had told Bauer that "he was extremely happy with the way [Bauer] did his job."

Third, the judge found that the Respondent presented shifting reasons for discharging Bauer. Specifically, the judge found that, at the hearing, the Respondent added two reasons for discharging Bauer—the fact that he lied on his employment application and its general knowledge of the Pagans Motorcycle Club (a group with which Bauer was affiliated)—that were not mentioned in Gore's memorandum quoted above.

The dissent takes the position that these two alleged reasons were "quite consistent" with those set forth in Gore's memorandum, and therefore do not constitute shifting reasons. The dissent arrives at that conclusion through the following reasoning. The Gore memorandum states that the Respondent had investigated what Bauer had said (presumably about his prior conviction), and had found that he had "a history of violent conduct outside of the workplace." The investigation referenced in the memorandum produced an investigative memorandum, and in that investigative memorandum there is a reference to Bauer's membership in the Pagans Motorcycle Club and information suggesting that Bauer could not have worked for the entire time that he stated on his employment application. Thus, according to the dissent, in the "Respondent's mind" when it mentioned the investigation in the Gore memorandum it was really thinking of the Pagans Motorcycle Club and Bauer's misrepresentation on his employment application.

The dissent's reasoning is based on nothing more than speculation. The Gore memorandum nowhere mentions the investigative report or any specific matter referenced in it. The Gore memorandum does carefully set forth several specific reasons why it discharged Bauer. Given this, it would seem safe to assume that if the Respondent had other reasons for discharging Bauer it would have specifically stated them in the memorandum.

"Shifting explanations for discharge may, in and of themselves, provide evidence of unlawful motivation." *NLRB v. Henry Colder Co.,* 907 F.2d 765, 769 (7th Cir. 1990). See also *Abbey's Transportation Services, Inc. v. NLRB*, 837 F.2d 575, 581 (2d Cir. 1988): "shifting assertions strengthen the inference that the true reason [for an employer's decision to discharge an employee] was for union activity"; *Sound One Corp*., 317 NLRB 854, 858 (1995), quoting *Aluminum Technical Extrusions*, 274 NLRB 1414, 1418 (1985): "The Board has long expressed the view that 'when an employer vacillates in offering a rational and consistent account of its actions, an inference may be drawn that the real reason for the conduct is not among those asserted.'" Thus, the judge appropriately drew an adverse inference from these shifting reasons that the actual reason for the Respondent's conduct was not among those asserted. Indeed, as noted above, the judge found that these reasons were not only shifting, but pretextual in themselves.

Furthermore, even if we were to conclude that the Respondent's reliance on Bauer's membership in the Pagans Motorcycle Club does not constitute a shifting reason, the judge nonetheless properly rejected this reason as pretextual. The judge found that the Respondent was aware of Bauer's affiliation with the Pagans Motorcycle Club at the beginning of Bauer's employment and that Bauer regularly wore clothing displaying the name Pagans. Given the Respondent's awareness of Bauer's affiliation with the Pagans when he began his employment, it is reasonable to infer that this reason was pretextual.

With respect to the Respondent's contention that it decided to discharge Bauer on discovering that he had falsified information on his employment application, the judge specifically stated that he did not believe that that

was the reason for Bauer's discharge, thus indicating that this reason was pretextual as well.[8]

Finally, as mentioned above, after Bauer was discharged, Gravitt told him, "I cut the head off the dragon that breathed the fire of the Union." This statement is virtually an admission by Gravitt as to why he actually discharged Bauer, who was the Union's chief organizer at the Respondent's workplace.

Thus, contrary to our colleague, the evidence does not demonstrate that the Respondent discharged Bauer because he "was a dangerous and unreliable person to have as an employee." Summing up, the General Counsel has presented a strong prima facie case that the Respondent was motivated to discharge Bauer because of his union activity. Further, the judge specifically found that Bauer did not assault an employee, did not threaten an employee, and did not carry a large knife to work. The judge also found that two of the Respondent's other reasons for discharging Bauer—the Respondent's general knowledge of the Pagans (a group with which Bauer was affiliated) and Bauer's lying on his employment application—constituted evidence of the Respondent's shifting reasons for discharging Bauer and were pretextual. In light of these findings, as well as the "smoking gun" statement referred to above, we must reject the Respondent's assertion that it would have discharged Bauer even in the absence of his protected conduct.

2. Contrary to our colleague, we also agree with the judge that the Respondent unlawfully created the impression of surveillance when Gravitt told Bauer on April 2, "I know you are the one that is disbursing Union cards out." Our colleague maintains that this statement was not unlawful because the judge made no finding that Bauer's distribution of authorization cards was conducted clandestinely, and made no finding that Gravitt was unlikely to have learned of Bauer's activity by purely innocent means.

Board law in this area is clear:

> The Board's test for determining whether an employer has created an impression of surveillance is whether the employee would reasonably assume from the statement in question that his union activities had been placed under surveillance [citation omitted]. "The Board does not require employees to attempt to keep their activities secret before an employer can be found to have created an unlawful impression of surveillance. . . . Further, the Board does not require that an employer's words on their face reveal that the employer acquired its knowledge of the employee's activities by unlawful means."

Tres Estrellas de Oro, 329 NLRB 50 (1999), quoting in part *United Charter Service*, 306 NLRB 150, 151 (1992). The rationale for this rule "is that employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways." Id., quoting *Flexsteel Industries*, 311 NLRB 257 (1993).

Thus, our colleague's point that the judge made no finding that the distribution was conducted in a clandestine manner is plainly inconsistent with Board law, which, as stated above, requires no such finding for violations of this sort. The issue here is not how Gravitt acquired his knowledge of the Union campaign (as stated above, a comment does not have to reveal, on its face, that an employer acquired its knowledge through "unlawful means"); instead, the issue is whether Bauer "would reasonably assume from" Gravitt's statement "that his union activities had been placed under surveillance." Id.

The credited testimony does not demonstrate that the Respondent knew which employees had distributed (or were distributing) authorization cards as of April 2, the date on which Gravitt made the above-quoted remark to Bauer. Thus, Bauer could reasonably assume, from Gravitt's remark, that Gravitt had been surveilling his activities relating to the Union campaign, and the judge correctly found the statement to be unlawful under Section 8(a)(1).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, United States Coachworks, Inc., Bohemia, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

CHAIRMAN HURTGEN, dissenting in part.

Unlike my colleagues, I find that Robert Bauer's termination was lawful. I assume arguendo that the General Counsel established a prima facie case that the termination violated Section 8(a)(3) and (1) of the Act, but I conclude that the Respondent has successfully rebutted that case.

On April 2, 1997, employee Bauer asked William Gravitt, president and owner of the Respondent, whether

[8] In adopting the judge's finding that the Respondent did not discharge Bauer because of his criminal history, we find it unnecessary to rely on the judge's statements, at sec. II,A,3 and sec. II,A,4, par. 1 of his decision, regarding the Respondent's failure to demonstrate that a prior conviction on drug related charges had any bearing on Bauer's ability to perform cut and stretch work.

We also find it unnecessary to rely on the judge's statements, at sec. II,A,3 and sec. II,A,4, par. 2 of his decision, referring to the Respondent's failure to include a question in its application form concerning prior convictions.

Gravitt knew that Bauer had been in jail. The Respondent then commissioned an investigator's report on Bauer, which it received on April 7. The report disclosed that Bauer had been convicted of attempted assault (1994), second-degree assault and criminal mischief (1985), and conspiracy to distribute metamphetamine (arrested 1990, began serving sentence 1991). The report also indicated, under the heading "Non-Confirmed Arrests and Related Charges," that Bauer had been arrested on June 17, 1986, and charged with assault with intent to cause physical injury with a weapon. Under the same heading, the report stated that, according to confidential law enforcement sources, Bauer had been arrested at some time before July 1990, on a cocaine-related charge. As to each of the three confirmed convictions, the report showed that Bauer had served time in jail or prison.

The metamphetamine conviction resulted in his incarceration from May 16, 1991, to May 23, 1993, at the McKeen Federal Correction Institute in Pennsylvania. Bauer, on his employment application, had stated that he worked at Masterweld from 1990 until 1992, and at Avenger Slat from 1992 to 1995.

The Respondent terminated Bauer on April 7.

Respondent's coowner John Gore prepared a memorandum to Gravitt reflecting the notes that Gore took concerning what Gravitt told Bauer at the termination meeting held with him on April 7. The memorandum stated:

> I took the following notes of our meeting with Robert Bauer today at 3:30 PM. In addition to Mr. Bauer, you and I were also present.
>
> At this meeting you advised Mr. Bauer that he was in his probationary period and you were not happy with his performance and among other things the following events stood out.
>
> He threatened to assault Howard Nathan and repeated the threat to you. Mr. Bauer stated "never did not."
>
> You told Mr. Bauer that he was observed carrying a large knife (6-8 inches) in addition to his smaller knife. But when you spoke to him about it, he denied the existence of the larger knife. Mr. Bauer stated "lie yup."
>
> You told Mr. Bauer he shoved a co-worker who said something to him that he didn't like. Mr. Bauer stated "I did, Who?" You told Mr. Bauer you weren't going to tell him. He said "news to me."
>
> You told Mr. Bauer that he apparently has a tendency toward violent conduct in the work place, and that he had mentioned to you the fact that he was incarcerated. You told him we had investigated what he had said and we found that he had a history of violent conduct outside of the workplace. You advised him in light of all this we are severing our employment relationship with him. Mr. Bauer said "Sounds good to me." You asked him if there was anything he didn't understand and he replied, "don't understand nothing" at this point he got up and left your office.

At the hearing, the Respondent's witness testified that Respondent terminated Bauer because of his behavior on the job, his criminal history, the fact that he lied on his employment application, and the general knowledge of the nature of the Pagans, a motorcycle gang to which Bauer belonged. (The investigator's report, under "Affiliations," stated that Bauer was "President and Sergeant-at-Arms of the Pagans Motorcycle Gang").

The judge concluded that Bauer's termination was unlawful. The judge relied substantially on a finding that the Respondent had offered vacillating reasons for Bauer's termination (i.e., memorandum vs. hearing).

I disagree. In my view, the reasons given at the hearing were quite consistent with those set forth in the memorandum. The "behavior on the job" was mentioned at the hearing and was detailed in the memorandum. The "criminal history" was mentioned at the hearing and was referenced in the memo. In this regard, the memo referred to the investigation, which revealed violent conduct outside the workplace. The matter of the Pagans was mentioned at the hearing and was adverted to in the memorandum. In this regard, the memorandum referred to the investigation which revealed Bauer's presidency of the Pagans and Bauer's history of violent conduct outside the workplace. In Respondent's mind, there was a connection between the two. The matter of lying on the employment application was mentioned at the hearing and was referred to in the memo. That is, the memo referred to the investigation, which revealed that Bauer could not have worked during the times he claimed.

My colleagues state that the text of the memorandum mentions neither the Pagans nor Bauer's lying on his employment application. As noted supra, however, the memorandum stated that the Respondent had learned, through its investigation, that Bauer had a history of violent conduct outside the workplace. Given the reputation of the Pagans, this statement is broad enough to include not only Bauer's arrest and convictions, but also his quite prominent role in the Pagans. As to the employment application, the investigation revealed that Bauer was incarcerated from May 16, 1991, to May 23, 1993. This fact revealed the further fact that Bauer had lied when he stated that he worked at Masterweld from 1990 until 1992, and at Avenger Slat from 1992 to 1995. I therefore attribute little weight to the fact that the memorandum did not separately and explicitly detail this deception.

In sum, the Respondent seems to have reached the entirely well-founded conclusion that Bauer was a dangerous and unreliable person to have as an employee.[1] In this regard, the memorandum and the testimony are quite consistent. Because the reasons for Bauer's termination were substantial, legitimate, and not "shifting," I find that the Respondent has shown that it would have terminated him even in the absence of his protected activity. Accordingly, I would dismiss this allegation.

My colleagues rely heavily on the fact that, at the time of discharge, Gravitt said, "I cut the head off the dragon that breathed the fire of the Union." To be sure, this statement adds strength to the prima facie case that a motivating reason for the discharge was Bauer's union activity. However, where, as here, there is also a lawful reason for the discharge, sufficient in itself to warrant the discharge, there is no violation. The fact that an employer was pleased with the result (because it was consistent with one of the employer's motives) is not sufficient to invalidate the lawful discharge.

I also disagree with the judge's conclusion concerning the incident in which Gravitt told Bauer, "I know you are the one that is disbursing Union cards out." The judge concluded that this statement gave Bauer the impression that his activities on behalf of the Union were under surveillance, in violation of Section 8(a)(1) of the Act. Under certain circumstances, I agree that such a statement could give that impression. Thus, for example, if it were established that the cards were being distributed secretly or away from the workplace, and that the identity of the distributor was not generally known, a statement like the one at issue might create an impression of surveillance. However, in the instant case, Bauer, the Union's chief organizer, distributed about 30 authorization cards on March 31. The judge made no finding that this distribution was conducted in a clandestine manner. Nor did he make any other finding suggesting that Gravitt was unlikely to have learned of Bauer's activity by purely innocent means.

My colleagues correctly state that "the Board does not require employees to attempt to keep their activities secret before an employer can be found to have created an unlawful impression of surveillance." I agree. There is no *requirement* that an employee seek to maintain secrecy in his union activity. However, the issue here is whether the employee would reasonably infer that his union activity is being spied on. Where, as here, an employer tells an employee that it has knowledge of his union activity, the employee can come to two possible conclusions: (1) the employer saw the employee as he openly engaged in union activity; (2) the employer spied on the employee as he surreptitiously engaged in union activity. In the instant case, Bauer was the chief union organizer, and he distributed 30 authorization cards. The General Counsel has not shown that Bauer did so secretly. Accordingly, on this record, it has not been shown that Bauer would reasonably come to conclusion No.2 above. In these circumstances, I find that there is not a sufficient basis to conclude that Gravitt's statement was unlawful. I would therefore dismiss this allegation as well.

[1] The judge credited Bauer's denial that he carried a large knife at the work place. However, there is no denial that he carried a smaller knife. In any event, his other conduct, at and away from the work place, clearly supports Respondent's concerns. Further, the fact that his job performance may have been satisfactory does not diminish Respondent's concerns about his character and conduct.

Marcia Adams, Esq., for the General Counsel.
Martin Gringer, Esq. (Franklin & Gringer), of Garden City, New York, for the Respondent.
Richard Dorn, Esq. and *Ronald E. Klein, Esq. (Sipser, Weinstock, Harper, & Dorn),* of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in Brooklyn, New York, on June 16 and 17, 1998. On charges filed on April 11 and 16, 1997,[1] a consolidated complaint was issued on March 12, 1998, alleging that United States Coachworks, Inc. (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by the parties on August 6, 1998.

On the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation, with its principal office and place of business in Bohemia, New York, has been engaged in the manufacture and retail and wholesale sale of stretch limousines. Respondent has admitted, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, it has been admitted and I find, that Local 259, United Automobile Workers, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

[1] All dates refer to 1997 unless otherwise specified.

II. THE ALLEGED UNFAIR LABOR PRACTICES

THE FACTS

1. Robert Bauer

The complaint alleges that from April 3, until April 7, 1997, Respondent reduced the work hours of Bauer by ceasing to assign him overtime work and on April 7, Respondent terminated Bauer because of his union activities. Bauer began his employment with Respondent in January 1997. He was the chief organizer for the Union. I credit his testimony that he distributed approximately 30 authorization cards on March 31. At approximately 5 a.m. on April 1, he turned over the cards to the union business agent. The parties stipulated that Respondent received the union's request for recognition at 4:37 p.m. on April 1.

I credit Bauer's testimony that on April 2, William Gravitt, president and owner of Respondent, told Bauer "I know you are the one that is disbursing Union cards." Either on that day or the next day Bauer wore a union jacket, which had "Local 259," printed on both the front and on the back. When Gravitt saw the jacket he told Bauer, "nice f—coat." Prior to April 2 Bauer had been working approximately 3 hours overtime per week. On April 2, when Bauer reported in early for overtime, he asked his supervisor, David Shapiro, whether he could still come in early. I credit Bauer's testimony that Shapiro replied "[D]ue to all the bullshit that is going on" there would be no more overtime.

On April 7, when Bauer was finishing his day's work, he was approached by Shapiro who told him that Gravitt would like to see him in his office. Gravitt told Bauer that they were not happy with his job performance. He also told Bauer that he had shoved an employee and that he had carried a large knife on the job. Gravitt also referred to Bauer's criminal background. I credit Bauer's testimony that when he was about to leave the building Gravitt told him, "I cut the head off the dragon that breathed the fire of the Union."

2. Discussion and Conclusions

The complaint alleges that Respondent reduced the overtime work of Bauer and terminated him on April 7, because of his union activities. Under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board requires that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Once this is established the burden shifts to the employer to demonstrate that the "same action would have taken place even in the absence of the protected conduct." I find that the General Counsel has made a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in Respondent's ceasing to assign Bauer overtime work and its termination of Bauer on April 7. Bauer was the chief organizer for the Union and distributed approximately 30 authorization cards on March 31. On April 2 or 3, he wore a jacket with the Local 259 insignia at which time Gravitt commented "nice f--- coat." I have credited Bauer's testimony that on April 2, when Bauer appeared for his regular overtime, Shapiro told him that there wouldn't be any overtime "due to all the bullshit that is going on." I have also credited Bauer's testimony that after he was terminated Gravitt told him "I cut the head off the dragon that breathed the fire of the Union."

The record contains a memorandum from John Gore to Gravitt reflecting the notes that Gore took concerning what Gravitt told Bauer at the termination meeting of April 7. The memorandum indicates that Bauer was told that Gravitt was not happy with his performance; that he threatened to assault Howard Nathan; that he was observed carrying a large knife; that he shoved a coworker; and that he had been incarcerated. No mention was made of his membership in the Pagans Motorcycle Club. During the hearing it was stated by Respondent that the factors which "came into play" in determining that Bauer should be terminated were "his behavior on the job, his criminal history, the fact that he lied on his employment application, and the general knowledge of what [were] the Pagans." The Board has long expressed the view that "when an employer vacillates in offering a rational and consistent account of its actions, an inference may be drawn that the real reason of its conduct is not among those asserted." *Aluminum Technical Extrusions*, 274 NLRB 1414, 1418 (1985); *Zengel Bros.*, 298 NLRB 203, 206 (1990).

With respect to management's knowledge that Bauer belonged to the Pagans, I believe that they knew that information from the very beginning of his employment. I credit Bauer's testimony that he regularly wore short-sleeved shirts and that the name Pagans was prominently displayed on his body and was clearly visible. Steven Smith corroborated this testimony. With regard to the Howard Nathan incident Respondent has not shown that Bauer threatened him with physical harm. It was Nathan who apologized for the incident and afterwards they both shook hands. Concerning the alleged shoving of Kirchner I credit Bauer's testimony that he did not do so. Kirchner was not called by Respondent as a witness. Similarly, with respect to his having a long knife, I credit Bauer's testimony that he did not have one. Mauricio, the person alleged to have seen the knife, was not called as a witness. Finally, I credit Bauer's testimony that Shapiro told him that "he was extremely happy with the way I . . . did my job." Respondent has made no showing to the contrary.

3. Criminal History

On April 2, while Gravitt was walking through the shop he stopped at Bauer's station who looked up at him and asked him if he was aware that he had been in jail. On April 7, Respondent received an investigator's report, which disclosed that during the past 10 years Bauer had been convicted of a felony and had been incarcerated. Respondent's employment application does not ask whether an applicant has had any criminal convictions. It does, however, ask for a list of former employers. Bauer was incarcerated from May 16, 1991, to May 23, 1993. The employment application that Bauer completed states that he worked at Masterweld from 1990 until 1992 and at Avenger Slat from 1992 to 1995. Respondent contends that as soon as it discovered that Bauer had lied on his employment application it decided to terminate him. I do not believe that that was the reason for Bauer's termination. If prior convictions had been that important to Respondent it would have spe-

cifically had a question in its application form concerning prior convictions. In addition, Bauer was hired to cut and stretch limousines. Respondent has made no showing that a prior conviction on drug related charges has any bearing on Bauer's ability to perform cut and stretch work. I find that Respondent has not satisfied its burden of demonstrating that the "same action would have taken place even in the absence of the protected conduct."

4. Backpay and reinstatement

Citing several cases, Respondent argues that even if a violation of Section 8(a)(1) and (3) of the Act is found, it would be inappropriate to order reinstatement and backpay for Bauer as part of the remedy since he lied on his employment application. I believe, however, that the cases Respondent has cited are distinguishable. In *East Island Swiss Products*, 226 NLRB 1207 (1976), when the charging party, Tracht, first applied for work with respondent he had already been suspended by his previous employer, the U.S. Post Office, for suspicion of appropriating funds. On his application Tracht properly noted that the Post Office had been his former employer but left blank the space requiring him to state the reason for his leaving his former employer. A year later, when Tracht took a leave of absence to stand trial he falsely told respondent that he was merely hunting for a job in Brazil and when he took a leave of absence to be sentenced he again falsely told respondent that he was taking off for personal reasons. The Board stated (at 1208):

> And it is also true that Tracht was responsible for concealing such information by failing to complete the appropriate space in the application form, thereby making it impossible for Respondent to establish that it would have never hired Tracht had it known of his prior misconduct from the outset. Under these circumstances, and particularly considering the serious and employment-related nature of Tracht's criminal offense, we do not believe that Respondent should have the burden of establishing that it would not have continued Tracht upon obtaining this information.

I believe that *East Island* is distinguishable inasmuch as in the instant proceeding there was no question on the application form regarding prior convictions. In *East Island*, however, Tracht failed to complete the appropriate space in the application form, which required him to state the reason for leaving his former employer. In addition, in *East Island* the Board noted the "employment-related nature of Tracht's criminal offense." In the instant proceeding, Respondent has made no showing that Bauer's prior conviction on drug-related charges had any bearing on his job involving stretching and welding of limousines.

Similarly, I believe that *Ohio Ferro-Alloys Corp*., 209 NLRB 577 (1974), cited by Respondent, is distinguishable. In that case the Board stated (at fn. 2): "The arbitrator also found that Schiesz falsified his employment application by stating therein that he had never been arrested or served a jail sentence when he in fact had a history of arrests and had been convicted and sentenced to San Quentin State Penitentiary for a term of 5 years to life." In the instant proceeding, Bauer never stated that he had not been convicted. Indeed, as pointed out above, the employment application did not ask the question whether the applicant had any prior convictions.

5. Termination of Steven Smith

The complaint alleges that on April 14, Respondent terminated its employee, Steven Smith, and refused to reinstate him until April 21, because of his union activities. Smith was one of the three employees who distributed union authorization cards. In the beginning of April he also wore a hat to work with the union insignia on it. In addition, in early April Smith wore a shirt to work containing the union insignia. Gravitt told him, "Why don't you take that shirt off, Mr. Smith." On April 14, Shapiro asked Smith to work overtime and Smith refused saying, "I had things to take care off". On cross-examination of Smith, counsel for Respondent established that on April 9, 1996, Smith was suspended for having refused to work mandatory overtime. However, he was not terminated. I find that pursuant to *Wright Line,* supra, the General Counsel has made a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in Respondent's decision to terminate Smith. While Respondent demonstrated that for such an infraction as refusing to work overtime Smith had been previously suspended, no showing was made that Smith, or any other employee, had previously been terminated for such an infraction. Accordingly, I find that Respondent has not satisfied its burden of showing that the "same action would have taken place even in the absence of the protected conduct."

6. Suspension of Bennett

however, where I to have found that the General Counsel did make a prima facie showing, I The complaint alleges that on April 1, Respondent suspended its employee, Alex Bennett, for 5 days because of his union activities. Bennett was employed by Respondent in its air-conditioning department from January 1994 to May 1998. He testified that on March 27, he handed out authorization cards to other workers at lunchtime and before and after work. He admitted that no one from management saw him handing out the cards. On March 27, he reported to work 25 minutes late. On that day he took a 2-hour lunch period. When he returned to work Gravitt yelled at him for being out for 2 hours. While Bennett testified that he was working a side job pursuant to instruction of Shapiro and supervisor Hampton, nevertheless he admitted that he did not give this explanation to Gravitt. On March 28 Bennett called in sick. Gravitt testified that he believed that Bennett called in sick in retaliation for Gravitt's having yelled at him the previous day. Gravitt did not work on Monday, March 31. On Tuesday morning, April 1, at 7 a.m. Gravitt suspended Bennett. Inasmuch as the General Counsel has not shown that management knew of Bennett's union activities prior to the suspension, I find that pursuant to *Wright Line,* supra*,* the General Counsel has not made a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in Respondent's decision to suspend Bennett. Even, believe that under the facts as detailed above Respondent has satisfied its burden of showing that the "same action would have taken place even in the absence of the protected conduct."

7. Alleged violations of Section 8(a)(1)

The complaint alleges that in early April Gravitt interrogated employees concerning their union activities and gave the employees the impression that their activities on behalf of the Union were under surveillance. I have credited Bauer's testimony that on April 2, Gravitt asked him questions about union activities at Respondent's plant and asked him "who was disbursing the Union cards." I find that this constitutes unlawful interrogation, in violation of Section 8(a)(1) of the Act. Bauer also credibly testified that around the same time Gravitt told him "I know you are the one that is disbursing union cards out." I find that this statement gave employees the impression that their activities on behalf of the Union were under surveillance, in violation of Section 8(a)(1) of the Act. See *Haynes Motor Lines*, 273 NLRB 1851, 1855 (1985); *Walton Mirror Works*, 313 NLRB 1279, 1285 (1994).

CONCLUSIONS OF LAW

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

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

3. By interrogating its employees about their union activities and by giving its employees the impression that their activities on behalf of the Union were under surveillance Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By ceasing to assign Robert Bauer overtime work and by discharging Bauer and Steven Smith for their union activities, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

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

6. Respondent did not violate the Act in any other manner alleged in the complaint.

THE REMEDY

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

Respondent, having unlawfully reduced the work hours of Robert Bauer by ceasing to assign him overtime work from April 2, until April 7, 1997, and Respondent, having unlawfully discharged Bauer and Steven Smith, I find it necessary to order Respondent to make them whole for any loss of earnings they may have suffered. Inasmuch as Smith was reinstated on April 21, his backpay period extends from April 14, until April 21, 1997. As stated earlier in this decision, I believe that Bauer is entitled to backpay and be offered reinstatement. Accordingly, I shall order Respondent to offer him full reinstatement to his former position, or if such position no longer exists, to a substantially equivalent position, without any prejudice to his seniority or other rights and privileges. Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[2]

On the foregoing findings of fact, conclusions of law, and on the entire record, pursuant to Section 10(c) of the Act, I issue the following recommended[3]

ORDER

The Respondent, United States Coachworks, Inc., Bohemia, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees about their union activities and giving its employees the impression that their activities on behalf of the Union are under surveillance.

(b) Reducing the overtime work of employees and discharging employees for activities protected by Section 7 of the Act.

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

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

(a) Within 14 days from the date of this Order offer Robert Bauer full reinstatement to his former position, or if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make whole Bauer and Steven Smith for any loss of earnings they may have suffered, with interest, in the manner set forth in the remedy section above.

(c) Within 14 days from the date of this Order remove from its files any references to the unlawful discharges and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve, and within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Bohemia, New York, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places

[2] 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.

[3] 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.

[4] 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."

where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 2, 1997.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(g) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

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.

WE WILL NOT interrogate our employees about their union activities and give them the impression that their activities on behalf of the Union are under surveillance.

WE WILL NOT reduce the overtime work of employees and discharge them for activities protected by Section 7 of the Act.

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

WE WILL, within 14 days from the date of this Order, offer Robert Bauer full reinstatement to his former position, or if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make whole Bauer and Steven Smith for any loss of earnings they may have suffered, with interest.

WE WILL, within 14 days from the date of this Order, remove from our files any references to the unlawful discharges and within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

UNITED STATES COACHWORKS, INC.