

La Gloria Oil and Gas Company and Paper-Allied-Industrial, Chemical & Energy Workers, International Union, Local 4-202. Cases 16-CA-20461, 16-CA-20585, and 16-RC-10269

August 1, 2002

DECISION, ORDER, AND DIRECTION

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN
AND COWEN

On September 19, 2001, Administrative Law Judge Margaret Brakebusch issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.¹

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions

¹ The General Counsel moves to strike the Respondent's exceptions and supporting brief, arguing that the brief does not comply with Sec. 102.46(c) of the Board's Rules. Specifically, the General Counsel argues that the brief does not reference the specific exceptions addressed in each section. Because we find that the Respondent's exceptions and supporting brief are in substantial compliance with the Board's Rules, we deny the motion to strike.

The General Counsel also contends that the Board should reject the exceptions and supporting brief as untimely. The Respondent hand-delivered its exceptions and supporting brief to the Board on the due date, November 14, 2001. That same day, the Respondent sent its brief and exceptions by certified mail to the General Counsel, who did not receive the papers until November 21, 2001. Sec. 102.114(a) of the Board's Rules provides, in pertinent part, that "service on all parties shall be made in the same manner as that utilized in filing the paper with the Board, or in a more expeditious manner . . ." Sec. 102.114(c), however, also provides that, in the event of a party's failure to comply with this requirement, the Board may nonetheless accept the filing but "withhold or reconsider . . . any ruling on the subject matter raised by the document until after service has been made and the served party has had reasonable opportunity to respond." Generally, the Board will not reject an improperly served document absent a showing of prejudice to a party. *Century Parking*, 327 NLRB 21 fn. 7 (1998). Here, the Board granted the General Counsel an extension of time to file an answering brief. Because the General Counsel has not demonstrated any prejudice from the delay, we deny the motion to strike.

² For the reasons set forth in her decision, we agree with the judge's finding that the Respondent is not a joint employer with PSI, a company that provided payroll services to the Respondent.

The Respondent has excepted to certain credibility findings made by the judge. The Board's established policy is not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all the evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). After a careful examination of the record, we find no basis for reversing the findings.

only to the extent consistent with this decision, and to adopt the recommended Order as modified.³

This case involves alleged violations of Section 8(a)(1) and (3) of the Act by the Respondent during the Union's organizing campaign. Specifically, this case addresses whether the Respondent, in violation of Section 8(a)(3), discharged two of its employees for engaging in protected union activity. The decision also addresses whether the Respondent interrogated its employees regarding their union activities and threatened the employees with job loss in violation of Section 8(a)(1).

Respondent La Gloria Gas and Oil Company is a subsidiary of Crown Petroleum. La Gloria operates refineries in Tyler, Texas, and in Pasadena, Texas. This case stems from Paper-Allied-Industrial, Chemical & Energy Workers, International Union, Local 4-202's effort to organize the approximately 14 truckdrivers at the Tyler facility. In January 2000, Floyd Saylor, a La Gloria truckdriver, received union literature from an anonymous source. Previously, Saylor had questioned Mike Fuller, the drivers' supervisor, about why the truckdrivers did not have any benefits. After receiving the union literature, Saylor talked about the Union to all but three of the truckdrivers. On March 9, 2000, Saylor and two other truckdrivers, Jimmy Watts and Kevin Hensarling, met with a union representative at a restaurant in Tyler. At the meeting, Saylor presented the other employees with a petition, which three drivers had already signed. The employees at the meeting signed the petition.

On March 10, 2000, the day after the restaurant meeting, Fuller asked Hensarling to come to his office to pick up supplies. When Hensarling entered the office, Fuller asked Hensarling if he would give Fuller some information about the rumors that he had been hearing. Hensarling deferred answering the question, stating that he did not think it was a good time to talk about it. Fuller then showed Hensarling a note written by Saylor in which Saylor asked why Hensarling received a salary higher than Saylor. Fuller also referred to Saylor as a "son of a bitch." Fuller then stated that he wished someone was able to "look [him] in the eye and tell [him] what's going on" and that "he was about ready to kill someone over this." Hensarling testified that Fuller stated that, if the drivers were doing what Fuller thought they were doing, "then they're going to fire everybody, including himself, and get rid of the trucks and the trailers . . . and none of us would have a job anymore. And he would lose every-

³ We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001), and we shall substitute a new notice in accordance with our recent decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

thing he's got and he'd have to file bankruptcy." Hensarling described Fuller's demeanor as "disgusted" and "upset."

That same day, Fuller approached Watts and asked him, "What's the rumors that [he is] hearing?" Watts informed Fuller that he and other drivers (who he did not identify) had attended a meeting with a union representative. Watts told Fuller that Watts had decided "to go union." Watts explained that the drivers wanted to "go union" for the benefits, and that Watts would go along with the majority of the employees. As their conversation continued, Watts opined that, if the union did come, La Gloria would probably sell the trucks or return the leases of the trucks. Watts predicted that La Gloria would eliminate the trucking department altogether, and all the drivers would lose their jobs. Fuller responded by saying, "I'd be out of a job too."

Fuller also spoke with William Lampe. During that conversation, Fuller asked Lampe if he knew "anything about this rumor going on about the union?" Lampe replied, "yes and no," and added that he did not want to talk about it.

On March 12, 2000, 2 days after these conversations with Hensarling, Watts, and Lampe, Saylor and Lampe made assigned delivery runs from Tyler, Texas, to Mt. Belvue, Texas. During their runs, Paul Fisher monitored their driving. La Gloria employs Fisher, a former State trooper, to monitor the truckdrivers and to observe their driving patterns. Fisher does not receive a schedule of what drivers to follow; rather, he decides independently if and when he will monitor a driver. Typically, Fisher does not know the identity of the driver he is following. After monitoring the drivers, Fisher prepares a written report detailing the drivers' performance, which he provides to Fuller. No deadline exists for these reports, and Fisher estimated that he submitted reports from every 2 weeks to 6 months.

On the day that Fisher followed Saylor and Lampe, Fisher's report details the following behavior by both drivers: Saylor and Lampe followed each other too closely, exceeded the speed limit, and ran a red light. Individually, Lampe ran another traffic light, and his truck was missing a mud flap. Saylor left his turn signal on for a long period of time. Fisher turned his report into Fuller the very next day.

The day he received the report, Fuller telephoned Saylor and Lampe and instructed them not to return to work. Shortly thereafter, the Respondent terminated the two drivers. During Fuller's telephone conversation with Saylor, Saylor denied that he committed the safety violations contained in Fuller's report. Fuller testified that he decided to terminate Saylor because of Fisher's driving

report and for two other incidents of insubordination by Saylor. Specifically, Fuller stated that on January 22, 2000, Lampe and Saylor were at the Diamond Shamrock facility to unload La Gloria's product. After learning that Lampe and Saylor would not be able to unload their product for another 7 hours, Fuller claims that he instructed Saylor and Lampe to spend the night at a nearby hotel and return the next morning to unload. Fuller claims that Saylor and Lampe ignored his instructions and remained at the facility. Both Saylor and Lampe deny that Fuller instructed them to get a motel room, and both drivers testified that they would have gone to a motel room if Fuller had authorized such an action. Fuller stated that he prepared disciplinary memos regarding the incident; however, neither Saylor nor Lampe saw the memos.

Regarding Saylor's second insubordination incident, Fuller testified that on February 25, 2000, Saylor refused to drive a truck assigned to him and failed to make the assigned run. Saylor, however, testified that this particular truck had numerous known safety problems, and he considered it unsafe to drive. Saylor further testified that he explained his refusal to drive the truck to Fuller. Although Fuller prepared a disciplinary memo regarding Saylor's refusal, Saylor never saw the memo. Saylor testified that Fuller did not inform Saylor that he would be disciplined for his refusal.

In addition to the incident at the Shamrock facility, Fuller testified about other past problems involving Lampe. On December 10, 1999, Lampe urinated in the unloading area near his truck at the Arch Chemical Plant. Lampe, when confronted by an Arch Chemical representative, did not deny his behavior. Lampe testified that he telephoned Saylor to inform him about the incident. Fuller prepared a memo regarding Lampe's behavior at Arch Chemical. Again, however, Lampe did not see this memo. Fuller removed Lampe from this particular run and reassigned him a new route. Lampe previously had requested to be removed from the old route.

Fuller also testified that Lampe had attendance problems. Specifically, Fuller detailed incidents when Lampe was unable to come to work because he had to pick up his children and incidents when Lampe did not come to work and failed to explain his absence. At one point, Lampe did not show for work because he had been arrested and had spent the night in jail. However, with this incident, Lampe did telephone Fuller and explain his absence. Fuller prepared memos regarding these incidents. Nevertheless, Lampe testified that Fuller never informed him that Lampe was being disciplined for these incidents, and Lampe never saw the memos.

Regarding his general disciplinary practice, Fuller testified that, when he disciplined drivers, he would prepare a memo summarizing the action and place the memo in that particular driver's file. Fuller testified that he had prepared anywhere from 10 to 50 memos noting drivers' severe violations, but that he had purged all his files, save for two memos. Of the two saved memos, one involved a driver who received a 2-week suspension for following too closely and for not making a complete stop at a railroad crossing. Fuller testified that he gave that particular driver an opportunity to explain the incident before imposing the suspension. Fuller also testified that he tries to be lenient with the drivers, to "be easy" on them, and to "give them as many chances as possible."

After the termination of Saylor and Lampe, an election was held on December 15, 2000, in a unit of "[a]ll truck-drivers employed by [La Gloria] on the payroll of PSI at its Tyler, Texas, facility excluding all other employees, including drivers of any common carriers, guards, and supervisors as defined in the Act." The unit contained 14 eligible voters. Out of those voters, six voted for the Union, and six voted against the Union. Saylor and Lampe's challenged ballots are determinative.

Judge's Decision

The judge found that Fuller's questioning of Hensarling, Watts, and Lampe constituted interrogations in violation of Section 8(a)(1). The judge discredited Fuller's testimony that he did not know about the Union and was not asking about union activity. The judge determined that, although Fuller did not specifically mention the Union by name, his references were clearly directed to the union activity. Applying the test set forth in *Rossmore House*, 269 NLRB 1176 (1984), the judge found Fuller's questioning to be sufficiently coercive so as to violate Section 8(a)(1). The judge also found that Fuller's statements to Watts and Hensarling constituted unlawful threats of job loss in violation of Section 8(a)(1).

The decision to credit Watts' testimony also led the judge to conclude that Fuller knew about the employees' attempt to organize. Having concluded that the Respondent was aware of the union activity, the judge determined that the discharge of Saylor and Lampe violated Section 8(a)(3) of the Act. Although the judge determined that Saylor and Lampe most likely committed the alleged driving infractions, he found that the Respondent failed to meet its burden of demonstrating that the discharge would have occurred irrespective of Saylor and Lampe's protected conduct.

The judge also found that the Respondent's stated reasons for discharging Saylor and Lampe—their driving infractions and previous discipline—were pretextual and

that the true factor motivating the discharge was anti-union animus. As evidence of pretext, the judge cited both the suspicious timing of the discharge and disparate treatment of the drivers. Regarding the timing of the discharge, the judge noted that the Respondent terminated Saylor and Lampe within 3 days of Watts' conversation with Fuller. In support of his determination regarding disparate treatment, the judge noted that the Respondent had not previously terminated any driver based solely on Fisher's reports. Therefore, the judge concluded that Fuller's past practice was not to discipline drivers for driving infractions.

Having found that the Respondent's discharge of Saylor and Lampe violated Section 8(a)(3), the judge determined that Saylor and Lampe were, at all relevant times, employees of the Respondent and therefore eligible to vote. Thus, the judge recommended that the challenges to their ballots be overruled and that their ballots be opened and counted.

Finally, the judge rejected the Respondent's argument that it was a joint employer with PSI, a company that provided payroll services to the Respondent. The judge found that the Respondent hired the truckdrivers, determined their work hours and rates of pay, assigned the work, and administered the discipline. In contrast, PSI handled solely administrative matters, such as payroll. Thus, because PSI and the Respondent did not share or codetermine matters concerning the essential terms of and conditions of employment, the judge determined that the Respondent was the sole employer of the truckdrivers.

Analysis

Section 8(a)(1)

We adopt the judge's findings that Fuller's questioning of Hensarling, Watts, and Lampe was unlawful. The test of whether an unlawful interrogation has occurred is whether, under all the circumstances, the alleged interrogation reasonably tends to restrain, coerce, or interfere with the employees in the exercise of rights guaranteed by the Act. *Rossmore House*, 269 NLRB at 1177–1178. An appropriate analysis of whether an unlawful interrogation has occurred must consider the circumstances surrounding the alleged interrogation, such as the background of the relationship, the nature of the information sought, the identity of the questioner, and the place and method of interrogation. *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985). Here, Fuller was the truckdrivers' supervisor, and he initiated the questioning, which occurred at La Gloria's plant, either in Fuller's office or at the loading area. Although Fuller did not expressly mention union activity, except to Lampe, the

judge found that Fuller was referring to such activity. Hensarling and Lampe refused to answer Fuller's questions. Cf. *Central Transport, Inc. v. NLRB*, 997 F.2d 1180 (7th Cir. 1993) (employees' denial of union activity tended to show that supervisor's mode of questioning was not merely social or incidental). Further, as noted by the judge, none of the employees questioned were open and active union supporters at the time of the interrogation. See, e.g., *Rossmore House*, supra at 1178 (open union supporter not unlawfully interrogated). Fuller also expanded the scope of his questioning, seeking to elicit information about other employees' union activities. Interrogating an employee about other employees' union sentiments is unlawful. *Sumo Container Station, Inc.*, 317 NLRB 383 (1995). Given these surrounding circumstances, we agree with the judge that, even though Fuller did not specifically mention the Union by name, his questioning was sufficiently coercive to violate Section 8(a)(1).⁴

We also agree with the judge's finding that Fuller threatened Hensarling in violation of Section 8(a)(1). Fuller's statements that the Respondent would fire everyone, including himself, and get rid of its business clearly implied that employees would lose their jobs if the Union succeeded. Fuller's inclusion of himself in his dire prediction does not render his words any less a threat. *Clinton Electronics Corp.*, 332 NLRB 479 (2000).

However, contrary to the judge's recommendation, we do not find that Fuller's remarks to Watts constituted a threat of job loss. Quite unlike Fuller's conversations with Hensarling, the prospect of job loss originated from Watts, not Fuller. Fuller's statement came only in response to Watts' own personal opinion that the drivers would likely lose their jobs if the Union came. Fuller did not add to or embellish Watts' expressed thoughts regarding the effect of the Union. Rather, Fuller's statement that he also would lose his job merely mirrored Watts' already expressed opinion.

Section 8(a)(3) and (1)

The General Counsel contends that the terminations of Saylor and Lampe were attributable to their union activity. In response, the Respondent argues that it terminated

⁴ Member Cowen agrees with his colleagues that Fuller unlawfully interrogated employee William Lampe when Fuller asked Lampe if he knew "anything about this rumor going on about the Union." The question directed to Lampe specifically referred to the Union, unlike the questions Fuller directed to employees Watts and Hensarling. Member Cowen finds it unnecessary, however, to pass on the Watts and Hensarling conversations with Fuller because any additional findings of unlawful interrogation would be cumulative and would not affect the remedy.

Saylor and Lampe because of their driving violations and disciplinary record. Thus, the issue presented is one of motivation. In cases alleging 8(a)(3) violations that turn on the employer's motivation, we apply the analysis set forth in *Wright Line*, 251 NLRB 1083 (1980). Under that analysis, the General Counsel must make an initial showing that (1) the employee was engaged in protected activity; (2) the employer was aware of the activity; and (3) the activity was a substantial or motivating reason for the employer's action. Once the General Counsel makes this initial showing, the burden of persuasion then shifts to the Respondent to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity. *Manno Electric*, 321 NLRB 278, 283 fn. 12 (1996).

Prior to their discharges, Saylor and Lampe had engaged in protected activity: Saylor had met with a union representative, and Lampe had signed a representation petition. We agree with the judge's findings that the Respondent had knowledge of this activity. After Fuller's conversation with Watts, Fuller knew that the employees had attended a meeting with a union representative and that they wanted to go union for the benefits. Given the small size of the work force (consisting of approximately 14 drivers), it can reasonably be inferred that Fuller was aware of the identity of the employees involved in the union activity. See *Weise Plow Welding Co.*, 123 NLRB 616, 618 (1959). Moreover, Saylor had previously spoken to Fuller about his desire for benefits, and Fuller, when questioning Lampe about the Union, had received an equivocal response. Further, the timing of the discharge in relation to Fuller's learning of the activity supports a finding that Fuller knew of the activity and knew who had been involved. See *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995) (Board may infer knowledge based on circumstantial evidence such as the timing of the alleged discriminatory actions, respondent's general knowledge of its employees' union activities, respondent's animus against the union, and the pretextual reasons given for the adverse personnel actions). See also *Metro Networks, Inc.*, 336 NLRB 63 (2001) (Board can infer knowledge from the timing of the discharge).⁵

The General Counsel also produced sufficient evidence to warrant an inference that Saylor and Lampe's protected activity was a motivating factor in their discharges. The Respondent interrogated several employees, including Lampe, regarding their union activity and

⁵ Chairman Hurtgen would not infer knowledge from the other factors which make up the prima facie case. Rather, in his view, knowledge is a separate element of the prima facie case. He agrees that knowledge can be based on circumstantial evidence.

threatened job loss if the Union were successful in obtaining representation. During Fuller's interrogation of Hensarling, Fuller raised the issue of Saylor's involvement with the Union, showing that the Respondent was aware of Saylor's activity. Further, the fact that Saylor and Lampe's discharge followed closely on the heels of the interrogations and threat of job loss illustrates the Respondent's desire to cut any budding union activity. Such evidence shows the Respondent's animus toward the Union and is sufficient to support a finding that this animus played a role in the discharge of Saylor and Lampe.

Having found that the General Counsel has met his initial burden of persuasion, we now examine the Respondent's argument that it would have taken the same action in the absence of that protected activity. In doing so, we must distinguish between a "pretextual" and a "dual motive" case. If the Respondent's evidence shows that the proffered lawful reason for the discharge did not exist, or was not, in fact relied upon, then the Respondent's reason is pretextual. If no legitimate business justification for the discharge exists, there is no dual motive, only pretext. See *Talawanda Springs, Inc.*, 280 NLRB 1353, 1355 (1986). In the case at hand, the judge supported her finding of a violation using both a dual motive and pretextual rationale. However, we find that the Respondent had no legitimate justification for the discharge and instead seized on Saylor and Lampe's driving performance as a pretext for their discharge.

The Respondent argues that, because Lampe and Saylor's driving violations were so blatantly in disregard of public safety, the Respondent had no choice but to terminate them. The Respondent also contends that no driver had ever committed such violations before; therefore, absent a comparable situation, the judge erred in finding disparate treatment of Saylor and Lampe. However, the lack of a comparable driving report is not dispositive in light of the judge's finding, with which we agree, that Fuller had a practice of not disciplining drivers for driving infractions. In fact, Fuller himself testified that he tries to be lenient with his drivers and to give them as many chances as possible. Before the termination of Saylor and Lampe, the Respondent had never terminated a driver for violations contained in one of Fisher's reports. However, Fisher's notes of drivers' performances describe incidents of unsafe driving by other drivers, including failing to stop at a railroad crossing, following too closely, speeding in excess of 10 miles per hour over the posted limit, changing lanes unnecessarily, crossing over the yellow line, and running off the road. Despite these numerous violations by other drivers, the Respondent took disciplinary action in only one instance, sus-

pending a driver for 2 weeks. In contrast to the situation at hand, the Respondent gave that driver an opportunity to explain his behavior. Here, however, though the drivers faced the prospect of termination, the Respondent failed to give either Saylor or Lampe an opportunity to explain his conduct.⁶

In addition to the disparate treatment of Saylor and Lampe, the abruptness of the discharge also supports a finding of pretext. Fuller learned of the union activity on March 10, 2000. On March 12, Fisher monitored the runs of Saylor and Lampe, submitting his report the next day, March 13. On that day, without giving them an opportunity to respond to Fisher's report, the Respondent terminated Saylor, who had initiated the organizing campaign, and Lampe, one of the drivers who signed the representation petition. Thus, the suspicious timing of the discharge is a factor giving support to an inference that the Respondent terminated Saylor and Lampe because of their union activity. See *Service Technology Corp.*, 196 NLRB 1036, 1043 (1972) (reason for disciplinary action found to be a pretext where action was "abrupt" and where the employer failed to give the disciplined employee an opportunity to present her version of the incident precipitating the action). Therefore, we reject the Respondent's assertions that it lawfully discharged Saylor and Lampe for their driving violations and prior disciplinary incidents. Rather, the evidence shows the Respondent's assertions were pretextual and were an attempt to disguise the fact that antiunion animus was the true motivation behind Lampe and Saylor's discharge.

The judge found that the Respondent had not previously terminated any driver based *solely* on driving violations. We recognize that the Respondent here ostensibly relied, in part, on prior nondriving conduct of these employees. However, in light of the fact that this prior conduct did not even result in the giving of a disciplinary memo, we find that these prior incidents were suddenly dredged up to mask a discriminatory intent.

In sum, we find that the Respondent unlawfully interrogated Watts, Hensarling, and Lampe, and threatened Hensarling in violation of Section 8(a)(1). We also find that the Respondent's termination of Saylor and Lampe violated Section 8(a)(3). Therefore, we adopt the judge's recommendation that the Respondent's challenges to Saylor and Lampe's ballots be overruled and that their ballots be opened and counted.

⁶ Our dissenting colleague asserts that the conduct of Lampe and Saylor "justified, in fact, compelled, the immediate discharges of Lampe and Saylor—no questions asked, no excuses accepted." Although this is the opinion of our colleague, there is no evidence that the Respondent follows such a policy, and no evidence that any external law or regulation compels such a policy.

ORDER

The National Labor Relations Board adopts the recommend Order of the administrative law judge as modified below and orders that La Gloria Oil and Gas Company, Tyler, Texas, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(d):

“(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.”

2. Substitute the attached notice for that of the administrative law judge.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 16 shall, within 14 days from the date of this Decision, Order, and Direction, open and count the ballots of Floyd Saylor and William Lampe. The Regional Director shall then prepare and serve on the parties a revised tally of ballots and issue the appropriate certification.

MEMBER COWEN, dissenting in part.

I do not agree with my colleagues that the Respondent violated the Act by discharging employees William Lampe and Floyd Saylor. I find that the Respondent has shown that it would have discharged these two employees because of their serious driving misconduct, regardless of their union activity.

The Respondent, who is engaged in the petroleum refining business, employs drivers who drive tanker trucks filled with liquefied petroleum gas. The Respondent also employs former state public safety officer, Paul Fisher, to monitor the driving behavior of its drivers, relying on Texas motor vehicle laws and United States Department of Transportation regulations. Fisher randomly selects a tanker truck to follow on its assigned run; he does not know the identity of the driver. Fisher prepares a written summary of what he has observed and submits that summary to the Respondent.

The Respondent assigned Lampe and Saylor to drive tanker trucks from its refinery in Tyler, Texas, to a customer in Mt. Belvue, Texas, on March 12, 2000. Fisher followed them for approximately 3 hours. Fisher observed that Lampe’s truck was missing a mud flap, Saylor forgot to turn off his turn signal, each driver intermittently drove five to ten miles over the posted speed limit,

and each driver followed the other too closely. Fisher also observed Lampe run a red light in Henderson, and observed both drivers run a second red light in Diboll. With respect to the Diboll incident, Fisher specifically observed that both Lampe and Saylor had plenty of time to stop for the red light, but neither driver applied the brakes.

Fisher contacted the Respondent by phone the very next day, Monday, June 13, and reported what he had observed the previous day, including that both Lampe and Saylor had deliberately run the red light in Diboll. The Respondent asked Fisher to appear at the refinery to deliver his written report and discuss it with the Respondent, which he did, providing greater detail about the driving violations he had observed. After discussion among various principals of the Respondent, both Lampe and Saylor were discharged because of the severity of their driving violations.

My colleagues and the judge find that the Respondent violated Section 8(a)(3) of the Act by discharging Lampe and Saylor because of their union activities. My colleagues find that the General Counsel has met his initial burden of proving that union activity was a motivating factor in Lampe and Saylor’s discharges, and that the Respondent failed to show that they would have been discharged even in the absence of their protected activity.⁷ Assuming *arguendo* that the General Counsel has met his initial burden of persuasion and shown that these employees’ union activity motivated their discharges,⁸ I nonetheless find that the Respondent met its burden of showing that it would have taken the same action regardless of their union activity.

I accept the testimony of Paul Fisher, an experienced former public safety official, regarding the events of Sunday, March 12. That testimony shows that Lampe and Saylor, each driving a tanker truck filled with flammable, highly dangerous liquefied petroleum gas, tailgated, intermittently exceeded the speed limit, and ran red lights twice on the same trip. In my view, the Respondent had an absolute right to fire Lampe and Saylor *immediately* upon learning of what they had done.

My colleagues find that Saylor and Lampe’s driving performance on March 12 provided the Respondent with a “pretext” for their discharges. They rely, in part, on the lack of a consistent disciplinary practice which, they claim, resulted in the “disparate treatment” of Lampe and

⁷ *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).

⁸ I note, however, that I disapprove of the “small plant” doctrine relied on by the judge and my colleagues to impute to the Respondent knowledge of the employees’ union activity.

Saylor. However, although the record shows that other of the Respondent's drivers had committed certain of these acts of driving misconduct without being discharged, there is no record evidence that a driver had engaged in a comparable combination of serious acts of driving misconduct during a single delivery run without being discharged. Furthermore, in the context of this case, the lack of a past, consistent disciplinary practice is, quite simply, irrelevant. These back-to-back, apparently deliberate, red-light running incidents in blatant disregard of public safety were so serious that the Respondent was more than justified in discharging the drivers at fault.

My colleagues also rely on the "suspicious timing" of the discharges, which occurred only a few days after the Respondent learned of the union activity. Under these circumstances, timing has little evidentiary value. The seriousness of these driving violations justified, in fact, compelled, the immediate discharges of Lampe and Saylor—no questions asked, no excuses accepted. In fact, it would be perfectly logical to presume that any employer with employees who had driving incidents like those that Saylor and Lampe had would immediately cease using them to drive trucks carrying liquefied petroleum gas on public roads, unless that presumption is rebutted by evidence establishing that the employer is completely indifferent to public safety concerns. The fact that the Respondent employed a former state public safety officer just to monitor the driving behavior of its drivers confirms that the Respondent took these safety concerns seriously.

Furthermore, whatever might be said about the motives of an employer who waits to discipline an employee for past acts of misconduct until after the employer learns of the employee's union activities, that is not the situation here. The Respondent discharged Saylor and Lampe the very next day following their reckless driving, which is the first day that the Respondent had an opportunity to review Fisher's report on their driving misconduct and discuss the report with him. There is absolutely nothing suspicious about the timing of their discharges.

My colleagues also accept the judge's finding that the Respondent's reliance on prior discipline meted out to Lampe and Saylor was pretextual. I do not agree. The additional acts of misconduct engaged in by Lampe and Saylor, which include public urination at a customer's facility, failing to report for work, and failing to follow Department of Transportation regulations to go off duty

during a lengthy delay in unloading their trucks at a customer's facility,⁹ support their discharges.

In sum, I find that Lampe's and Saylor's driving infractions standing alone are sufficient to establish that the Respondent, acting on very serious public safety concerns, would have discharged Saylor and Lampe regardless of their union activities. I find, therefore, that the Respondent did not violate Section 8(a)(3) of the Act as alleged.

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the Paper-Allied-Industrial, Chemical & Energy Workers International Union, Local 4-202 or any other union.

⁹ Sec. 395 of the Federal Motor Carrier Safety Regulations, issued by the Federal Highway Administration of the United States Department of Transportation, governs the hours of service of truckdrivers. Under Sec. 395.3(a)(2) a driver who has been on duty for 15 hours or more may not drive again until he has been off duty for at least 8 consecutive hours. Thus, by refusing to comply with the Respondent's instruction to go off duty and get a motel room, and instead remaining on duty for at least 15 hours, Saylor and Lampe rendered themselves ineligible to drive until they were off duty for at least 8 hours.

The judge credited Saylor's and Lampe's testimony over Fuller's that they did not refuse the directive to go off duty and get a motel room during the long delay, because there was "no evidence of any benefit they derived by remaining at the facility and refusing to get a motel room." Based on this finding the judge found Fuller's contrary testimony on this point so incredible that it "tips the scales" against his credibility generally. The judge's factual finding is clearly erroneous. By refusing to go off duty and take a motel room, Saylor and Lampe benefited themselves by guaranteeing that they would not have to drive for the Respondent again for at least 8 consecutive hours after they finally decided to go off duty. Because it was this erroneous factual finding that "tipped" the balance for the judge in deciding whether or not to credit Fuller generally, the judge's decision to generally discredit Fuller would appear to be fatally flawed.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT threaten you with termination if you choose the Union to represent you.

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

WE WILL, within 14 days, offer Floyd Saylor and William Lampe full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Floyd Saylor and William Lampe whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days, remove from our files any reference to the unlawful discharges of Floyd Saylor and William Lampe, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

LA GLORIA OIL & GAS COMPANY

Art A. Laurel, Esq. and Edward B. Valverde, Esq., for the General Counsel.

G. Mark Jodon, Esq. and James V. Carroll III, Esq., for the Respondent.

Bernard Middleton, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARGARET BRAKEBUSCH, Administrative Law Judge. On September 29, 2001,¹ an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing issued in Cases 16-CA-20461 and 16-CA-20585 upon charges filed by Paper-Allied-Industrial, Chemical & Energy Workers, International Union, Local 4202 (Union), alleging that La Gloria Oil and Gas Company (Respondent), violated Section 8(a)(1) and (3) of the Act. Specifically, the complaint alleges that Respondent violated Section 8(a)(3) of the Act by terminating its employees William A. Lampe (Lampe), and Floyd Saylor (Saylor), because of their activities on behalf of the Union. The complaint further alleges Respondent violated Section 8(a)(1) of the Act by interrogating employees about their union activities, threatening employees with termination if employees chose a union to represent them, and making a coercive statement to a principal union organizer. Respondent submitted an answer denying the essential allegations in the consolidated complaint.

Case 16-RC-10269 involves a Board-conducted representation election on December 15, 2000, in which 6 votes were cast

for the Union and 6 votes were cast against the Union, with 2 determinative challenged ballots. The challenged ballots of Saylor and Lampe were sufficient to affect the outcome of the election. On June 1, 2001, the Regional Director for Region 16 issued an order directing hearing, second order consolidating cases and notice of hearing in Cases 16-CA-20461, 16-CA-20585, and 16-RC-10269. This consolidated case was tried in Tyler, Texas, on June 13, 14, and 15, 2001.

After carefully considering the record, the demeanor of the witnesses who testified, and the posthearing briefs filed by the Respondent and the General Counsel, I make the following²

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, with an office and place of business in Tyler, Texas, is engaged in the business of refining petroleum products. During the 12 months preceding issuance of the complaint, Respondent sold and shipped from its Tyler, Texas facility, goods valued in excess of \$50,000 directly to customers located outside the State of Texas. Respondent admits, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

La Gloria Oil and Gas Company, a subsidiary of Crown Central Petroleum, operates a refinery in Tyler, Texas. Prior to Crown Central Petroleum's acquisition of La Gloria in 1991, the Union had been involved with the Tyler refinery for approximately 40 years. Bill Tyler, Crown's manager of human resources west, testified that in March, Respondent was involved in contract negotiations with the Union for both the company's Tyler and Pasadena, Texas facilities. Respondent had also incurred numerous unfair labor practice charges involving the Tyler facility. Until January, Respondent had maintained a lockout for 5 years at its Pasadena, Texas facility. Tyler also acknowledged that at the time of Lampe and Saylor's discharge in March, the Union was conducting a corporate campaign. As of that time however, the truckdrivers operating out of the Tyler facility were not represented by the Union and received no benefits. Mike Fuller and his assistant, Haskell Foster, supervised the drivers at the Tyler facility.

B. The Initiation of the Organizing Activity

Mike Fuller hired Floyd Saylor as a truckdriver on September 1, 1999. In January, Saylor questioned Fuller two or three times about Professional Staffing, Inc. or PSI, the company sending his paychecks. In one of these conversations, Saylor specifically asked why truckdrivers could not have benefits when the other employees at La Gloria had benefits. Fuller told

² To the extent that I do not reference certain facts or alleged facts urged by either party in their brief, it is because I was not persuaded by the underlying testimony or because I viewed such facts as irrelevant or merely cumulative.

¹ All dates are in 2000 unless otherwise stated.

Saylor that even though La Gloria supervised him, the drivers were paid through Professional Staffing, Inc. or PSI. In a later conversation with Fuller around the first of February, Fuller asked Saylor why he was pushing the issue in regard to benefits. Saylor recalls that Fuller told him, "You work for La Gloria, so you got what you want, but there's no benefits. And that's not going to change."

Saylor recalled that sometime in January, an anonymous source gave him union literature by dropping it over the top of a restroom stall while he in the restroom at Respondent's facility. He read the material and then contacted the Union. Saylor received additional documentation from the Union and then spoke by telephone with union organizer, Mike Cross. Saylor met with Cross at the union hall around the first of February and again in mid-February. After receiving the union literature, Saylor began talking with other drivers about the Union.³ He recalled speaking with all drivers except Larry Thornton, Curtis Walton, and Ed Englebrock. On March 9, Cross met with Saylor as well as employees Jimmy Watts and Kevin Hensarling at the What-a-Burger restaurant in Tyler.⁴

Saylor testified that Fuller approached him at the end of the day during the first week of March. During the conversation, Fuller said he wanted to talk with Saylor about a couple of rumors. Fuller asked Saylor if he had hired an attorney or was he going to sue La Gloria. Saylor also asserts that Fuller asked if he were part of the Union and Saylor told him he was. Fuller told him that it would not work and Saylor responded, "You never know until you try."

Both employees, Jimmy Watts and Kevin Hensarling, testified they attended the meeting at the What-a-Burger on March 9. After Watts returned from his regular driving run on March 10, he was sitting on a propylene propane rack where the trucks are loaded. While sitting there, Mike Fuller drove to the loading area and stopped to talk with Watts. Watts recalled that Fuller asked, "What's the rumors that I am hearing?" Watts explained that he could have said that he didn't know but that would have been lying. He could see that Fuller was worried about something and he wasn't going to lie to him.⁵ As Watts described the conversation, he had not held back in giving Fuller information. Watts told Fuller that he had attended a meeting with the union representative and he identified Cross by name. Watts told Fuller that he had promised not to give the names of the other employees who attended the meeting, however he confirmed that he had signed "to go union." Watts went on to tell Fuller that the employees wanted to go Union for the benefits. He also told Fuller that he would go with the majority of the employees. As they talked, Watts offered his

³ There were approximately 14 drivers.

⁴ The Union submitted into evidence a petition containing five signatures with signing dates of March 7, 8, and 9. Saylor testified that three of the employees had signed the petition prior to the meeting. Kevin Hensarling testified that he had been the fourth employee to sign the petition and recalled that he had signed at the March 9 meeting. The petition reflects that Floyd Saylor signed on March 7 and employees Willie Jett, William Lampe, and Kevin Hensarling had signed the petition on March 8. The only signature for March 9 was Jimmy Watts.

⁵ Watts candidly stated that he liked both Mike Fuller and Haskell Foster.

opinion to Fuller as to what might happen if the employees tried to bring in a union. Watts opined that La Gloria would probably sell the trucks or return the leases of the trucks and sell the trailers to Martin Transport or another company. Watts further speculated that Respondent would probably just get rid of the trucking part of the operation altogether and they would all be out of a job. In response, Fuller said, "I'd be out of a job too."

Kevin Hensarling testified that as he was unloading his truck on March 10, Fuller came to the work area and suggested that he come by the office to pick up some supplies. When Hensarling entered the office, the supplies were all laid out for him. Fuller asked if he would talk with him for a few minutes. Hensarling could not recall the exact words used, but he recalled that Fuller asked if he would give him some information about the rumors that he had been hearing. Without recalling his exact response, Hensarling told Fuller that he didn't think that it was time to talk about it. Hensarling also recalled Fuller's saying, "I just wish somebody would have the balls to be able to look me in the eye and tell me what's going on." He added that he was about ready to kill somebody over this. Fuller went on to tell Hensarling that if it was what he thought that the guys were doing, then everyone would be fired including himself. Respondent would get rid of the trucks and trailers and no one would have a job. Fuller added that he would lose everything that he had and he would have to file bankruptcy. Hensarling said that he could not recall how the conversation got around to Saylor but Fuller became even more upset when he began talking about Saylor. Hensarling recalled that he had referred to Saylor as a "fat son-of-a-bitch." Fuller showed Hensarling a memo written by Saylor complaining that Hensarling was getting more pay.⁶ Fuller told Hensarling he just wanted him to see what his friend had written about him. The conversation concluded and Hensarling went to his truck to leave. As he was getting into his truck, he saw Fuller also leaving the facility. Fuller stopped at the guard shack area where Jimmy Watts was either loading or unloading his truck. Hensarling saw Fuller talking with Watts.

William Lampe testified that on March 9, he went to the office to turn in his fuel receipt and logbooks at the end of the day. As he walked into the office, Fuller asked, "Hey, Bill do you know anything about this rumor going on about the Union?" Lampe responded, "Yes and no, but I do not want to talk to you about it." Lampe described Fuller as becoming very irate at that point and he asked why everyone was such a coward. Fuller asked why no one wanted to talk with him about "what was going on with the Union." Fuller said that when everyone was hired, they knew they were hired into a non-union shop without benefits. Fuller added that he knew Floyd Saylor was involved. Lampe testified Fuller made the statement, "I am so mad right now that I could kill someone."

⁶ GC Exh. 4 is a memo dated November 15, 1999, written by Saylor. In the memo, Saylor states, "Mike, just curious why the new guy Kevin is making \$8 more a load than myself, when I have more experience than he does and I am a self starter as you know. Is there a problem with my job performance or lacking [sic] of knowledge. Not trying to make you mad just want a reason why the extra money to Kevin."

Fuller added “You know I could lose my job and lose everything?” Lampe testified that when he told Fuller they just wanted benefits, Fuller threatened that he had the full authority to fire all of the drivers if a union were formed.

C. Lampe, and Saylor’s Run on March 12

Floyd Saylor was scheduled for his normally assigned run from Tyler, Texas, to Mt. Belvue, Texas, on Sunday, March 12. On Friday, March 10, Fuller called William Lampe and asked him to also make that same run on March 12. Lampe was normally not assigned this Sunday run, however, he had occasionally been offered extra runs in the past. Both Lampe and Saylor testified they have made this same run from 30 to 50 times previously. Lampe and Saylor left Respondent’s facility at the same time and Lampe followed Saylor throughout the trip to Mt. Belvue.

Paul Fisher has worked part time for Respondent for 5 or 6 years. His job is to randomly monitor the driving patterns of the La Gloria drivers and to report any type of traffic violations. Fisher testified that it is his practice to follow La Gloria trucks and then prepare handwritten summaries of the drivers’ driving performance. Pursuant to subpoena, Respondent provided a compilation of handwritten notes by Fisher covering the period from November 7, 1996, to June 2, 2000. The note documents that Fisher picked up the trucks driven by Saylor and Lampe as they left Respondent’s facility on March 12. His notes reflect that he followed the trucks from 12:55 until 4 p.m. Over the course of the trip, Fisher noted a series of infractions that included such things as Lampe’s truck having a missing mud flap and Saylor having left the turn signal on for a period of time. Fisher recorded that although Lampe stopped at a railroad track in Henderson, Texas, he then proceeded to run a traffic light. Fisher goes on to note infractions of following too closely and the trucks intermittently driving over the speed limit. The report ends with the notation that both trucks ran a red light in Diboll, Texas. Fisher testified that there is no set time for him to turn in his reports to Mike Fuller and he estimated that he might submit the reports every 2 weeks or even every 6 months. In this instance however, Fisher contacted Fuller on March 13 and informed him of the content of his March 12 monitoring report and submitted the report to Fuller later that day.

D. Saylor’s Discharge

Fuller testified that Fisher called him on Monday morning to report the incidents of the previous day. Fuller maintained that this was the first time that Fisher had ever called to report that he had observed drivers “blatantly or intentionally” running a red light. Fuller said he made the decision to terminate Saylor because of his tailgating and running the red light on March 12, and because of Saylor’s two prior incidents of insubordination. Saylor denied that he ran any red lights, followed too closely, or violated any traffic laws during the March 12 run to Mt. Belvue.

Fuller maintains that Saylor’s first incident of insubordination occurred on January 22. He said Lampe called him from

the Diamond Shamrock facility,⁷ and reported that he and Saylor were having problems getting their product unloaded and they were going to be there for a long time. Fuller testified that he told Lampe that he and Saylor were to get a motel room and Respondent would send a com check to pay for the room. Fuller asserts that despite his directive, Saylor and Lampe remained at the unloading facility. Respondent asserts that both Saylor and Lampe were insubordinate by remaining at the facility and not getting a hotel room.⁸

Saylor testified that when he and Lampe arrived at the Diamond Shamrock facility on January 22, there had been a long line of trucks ahead of them to unload product. They were given an estimate of 5 to 7 hours before they could unload their trucks. Lampe recalled their actual wait had been closer to 9 hours. Lampe called Fuller twice to give an update on how long it was taking for them to get their trucks unloaded. Fuller told him that they should wait it out. Saylor and Lampe spent their time sitting in the drivers’ breakroom at the unloading facility. They napped while sitting in the chairs, ate from the vending machines, and talked with other drivers who were also waiting. Lampe denies that at any time Fuller authorized their getting a hotel room. Both Lampe and Saylor testified that if authorized to do so, they would have obtained a motel room rather than to wait at the facility as they had done.

Fuller testified the second incident of insubordination by Saylor occurred on February 25, when he refused to drive a loaner truck assigned to him and he failed to make the assigned run. Saylor recalled that when he reported for his run on February 25, his regular truck was not there and he was left with a rental truck. Saylor described the truck as a lease truck that had been used very seldom and it was considered to be the “last resort” truck. Saylor told Foster that the rental truck was an unsafe truck and that other drivers had complained about the truck. Saylor had driven the truck previously and knew that it shook and vibrated at all speeds. Despite Saylor’s protests, Foster told him to take the truck and added, “You’ll love that 55 mile an hour truck.” When Saylor asked to see Fuller, Foster told him that he was in a safety meeting. When Saylor asked where the meeting was being held, Foster told him it was none of his business. Saylor does not deny he told Foster he was not going to take out an unsafe truck. Saylor later spoke with Fuller about his refusal to take the truck. Although Fuller told him that he should have taken the truck, he was not disciplined for his refusal. Saylor testified that prior to his discharge, he had not received discipline for any incidents. Fuller maintained he had told Saylor that he was disciplined for both the January 22 and February 25 incidents.

E. Lampe’s Discharge

Mike Fuller testified he made the decision to terminate Lampe because of the driving incidents on March 12 and because of his having previously received discipline. Lampe

⁷ Diamond Shamrock is described as one of the facilities where La Gloria drivers routinely unload their product.

⁸ Fuller said that they also completed their log incorrectly by showing that they were off duty. He maintained that by remaining at the unloading facility, they were to have shown that they were on duty but not driving.

denied that he ran any red lights on March 12 or failed to maintain a safe distance between other vehicles. Lampe admitted that occasionally, he might go over the speed limit, although it is unintentional. He said that there are no specific time requirements for deliveries to Mt. Belvue, Texas, and he did not recall being in any hurry on this March 12 run.

Fuller identified the first prior discipline given to Lampe was for his having urinated in the unloading area near his truck at the Arch Chemical Plant on December 10, 1999. A representative from Arch Chemical called him,⁹ and told him that he didn't want Lampe returning to the plant. Fuller assigned Lampe to another kind of run and removed him from the regular acid run to Arch Chemical. Lampe does not deny he urinated near his truck as alleged. He contends he had been taking medication that caused him to urinate with greater urgency and he had not thought that he had enough time to get to the restroom facilities. He urinated between his truck and trailer, but didn't think that anyone could have seen him. When confronted by an Arch Chemical representative, he admitted what he had done and then called Fuller to let him know what had happened. Lampe denied that he received any discipline from Fuller for this incident. Three days after the incident, Fuller told him that he was being taken off the acid truck run and transferred to liquid propane. Lampe testified that although the acid truck deliveries paid more money, he was pleased with the move. While on the acid run, he had been required to work every weekend and he had little opportunity to spend with his children. Lampe further maintained that he had previously asked Fuller to take him off the acid run schedule. From that time until his discharge in March, Lampe was given liquid propane deliveries rather than the acid product deliveries.

Fuller maintained the second discipline was given to Lampe for his failure to get a motel room when he and Saylor had been stranded at the Diamond Shamrock facility. Lampe denied he had been given any authorization by Fuller to get a hotel room during their long wait at the Diamond Shamrock facility. He remained at the facility and had logged his time as off duty.

Fuller also testified that Lampe received prior discipline for an attendance problem during his last 2 months of employment. Respondent introduced into evidence three memos concerning Lampe's attendance that was alleged to have been added to Lampe's personnel file in January and February. A January 27 memo contains "Bill Lampe could not run today because he had to go get his kinds [sic]. This has been a regular problem with Lampe's attendance." A February 7, memo states, "Bill Lampe did not come to work Saturday or Sunday. He did not call anyone to say he would not be at work. I told Lampe this could not continue." A third memo dated February 24 contains the language "Last night I received a phone call from Bill Lampe telling me that he had just got out of jail and could not make his run. Lampe tells me that he was arrested falsely. This is getting to be a real problem with Lampe's attendance

⁹ Although the incident occurred on December 10, 1999, the first written documentation of the incident from Arch Chemical is an e-mail dated April 24, 2000. The e-mail confirms that there had been previous conversations and that Arch Chemical did not want Lampe to return to their plant.

concerning the problems with his kids." Lampe admitted that he called Fuller on February 24 to let him know that he could not make his run as he was just released from jail.¹⁰ Fuller told him he could make up the run. Lampe denies that Fuller ever told him that he was being disciplined because of this cancellation or for any other attendance incident. Lampe contends that not only was he not disciplined for a failure to show up on February 7, he had not even been scheduled to work on that day. Lampe testified that he was not scheduled to work any weekends in February. Contrary to the testimony of Lampe, Fuller asserted that he had told Lampe about each incident of discipline prior to March 12.

F. 8(a)(1) Allegations

In his brief, counsel for the General Counsel sets forth various incidents of alleged interrogation and threats by Respondent purported to be violative of Section 8(a)(1) of the Act. General Counsel asserts Fuller's questioning of Lampe on March 9 and his questioning of Hensarling and Watts on March 10, constitutes unlawful interrogation and is violative of Section 8(a)(1) of the Act. General Counsel also alleges that in these same conversations with Lampe and Watts, Fuller violated the Act by threatening employees with job loss if the Union were selected as the employees' bargaining representative.

Paragraph 7(c) of the consolidated complaint alleges that about March 17, Fuller coerced an employee by "advising that he had just gotten rid of the ring-leader and that trouble should stop now." The proof of this allegation was presented through the testimony of Floyd Saylor. Saylor testified that on March 17, he had a brief conversation with Fuller when he returned to Respondent's facility to pick up his last check. Saylor asserts Fuller muttered under his breath, "I just got rid of the ring-leader and now trouble will stop."

G. Analysis and Conclusions

The discharges of Saylor and Lampe are the focal point of this case and certainly the most difficult for analysis. At hearing, all counsels agreed that the resolution of Lampe and Saylor's discharges is substantially coextensive with the resolution of the challenged ballots. General Counsel maintains Respondent terminated Lampe and Saylor because they engaged in union activity. General Counsel relies upon the timing of their discharges in relation to their union activities, Respondent's knowledge, and the nature of their discharges are sufficient to demonstrate that their discharges on March 13 were pretextual.

Under Board precedent established in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1982), *cert. denied* 455 U.S. 989 (1982), and approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 403 (1983), the General Counsel bears the initial burden to establish a prima facie showing that (1) the alleged discriminatees engaged in union activity; (2) the employer had knowledge of that activity; and (3) the employer based its discriminatory action upon antiunion animus. Once General Counsel meets its

¹⁰ Lampe testified that he could have made up any excuse but chose to tell Fuller the truth about why he was not available to work. He explained that he had been incarcerated because of an allegation of his ex-wife that was later litigated.

burden of persuasion, the burden shifts to the Respondent to show it would have taken the discriminatory action without consideration of the employee's protected activity. *Bardaville Electric*, 309 NLRB 337 (1992).

Respondent asserts that the discharges were based upon these employees' egregious driving performances on March 12 and their having received prior discipline for other infractions. The Board has previously noted that the Government only has to show that some animus was present. There must be just enough to be a "substantial or motivating factor." *Signature Flight Support*, 333 NLRB 1250 (2001). Once General Counsel has demonstrated the presence of animus in the decision-making atmosphere, Respondent must show that its decision was not tainted by it. In *Signature*, the Board further noted that the employer couldn't simply present a legitimate reason for its action, but must persuade by a preponderance of the evidence that the same action would have taken place, even in the absence of the protected activity.

The General Counsel has made a prima facie showing herein sufficient to support the inference that the protected conduct by Saylor and Lampe was a motivating factor in Respondent's termination of their employment. For the reasons set forth below, it is also my finding that Respondent has not met its burden under *Wright Line* to show that these employees would have been terminated without consideration of their protected activity.

1. Respondent's knowledge of these employees' union activity

Respondent denies any knowledge of union activity by its drivers prior to the discharges of Lampe and Saylor. Fuller claimed that he had been totally unaware of any union activity at the facility prior to his talking with Saylor on March 13. When he spoke with Saylor about the driving incidents on March 12, Saylor told him he (Fuller) was just trying to get rid of him because he was trying to organize a union. I do not credit Fuller's testimony. General Counsel presented four witnesses who testified that Fuller asked them about "rumors." As I will discuss later in this decision, I do not credit all of the testimony presented by these four witnesses.¹¹ I do find that there is a sufficient thread of truth that runs through these alleged conversations to support a finding of Respondent knowledge. Repeatedly, Fuller asked about rumors and asked what the drivers were involved in that excluded him. Respondent concedes Fuller may have asked the drivers about rumors.¹² On direct examination, Fuller said that he heard rumors about the drivers holding a meeting, but he thought that the meeting concerned benefits and insurance. Fuller explained his assumption by saying said that he had been aware of the drivers' interest in benefits for years. On cross-examination, Fuller admitted that

¹¹ I do not credit the testimony of Saylor concerning a February conversation with Fuller. Saylor alleges that Fuller asked him if one of the rumors was about the Union and if he (Saylor) was a part of it. Saylor also testified that in February, Fuller told him he knew that Saylor was the ringleader. This alleged conversation is consistent with other non-credible testimony by Saylor that was gratuitous and self-serving.

¹² Fuller admitted that he asked Lampe about rumors and could not recall if he asked Saylor, Watts, and Hensarling.

in an earlier affidavit given to the Board, he said the rumors involved a potential buy out of the Company. In its brief, Respondent asserts that Fuller assumed the rumors involved either benefits or the potential "buy out" of Crown/La Gloria. At one point during Fuller's testimony, he asserts he did not recall whether he asked the drivers about buy out rumors. At another point in his testimony, Fuller contended that he had asked the drivers about the rumors because he just wanted to know what they had heard about the buy out. Respondent submitted three March press releases about two corporations submitting proposals to acquire Crown Central Petroleum Corporation. Fuller was asked on cross-examination whether as a member of management, he would not have been in a better position than the drivers to know about the buy out world. Fuller replied "I don't think so." On cross-examination, Fuller's testimony about the buy-out rumors included the following:

Q. Where did the thought of the buy-out—how did it come about?

A. We had I believe that Crown—the company let us know that Crown was—La Gloria was for sale.

Q. The company let you know—

A. I believe that is right, I can't really—

Q. Who is us?

A. Everybody that worked there.

Q. Everybody, including the PSI drivers?

A. I don't recall that. Well, they probably heard that through the rumors.

Q. They did? How did they hear that?

A. I do not know.

Q. —just word of mouth?

A. Probably so.

When Fuller was asked why he needed to know what the drivers knew about a buy out, he admitted he didn't need to know and he was just being curious. He could not recall when he first heard there was a buy out in the works and he could not recall taking with anyone else other than the drivers about a buy-out rumor. Even though Respondent presents a plausible "rumor" that could have been the basis for Fuller's inquiries; Fuller's testimony simply does not support such a finding. Finding that Fuller's testimony runs counter to the likelihood of benefits or buy out rumors, I must conclude that it was the rumors of union activity that prompted Fuller's inquiries.

As indicated above, I do not find all of General Counsel's witnesses to be credible with respect to their alleged conversations with Fuller. I do find however, that employee Watts was an impressive and credible witness. His demeanor and his straightforward recitation of the conversation with Fuller was convincing. Unlike Saylor, who often appeared to improvise and embellish his testimony, Watts's recall appeared to be without adornment. In describing his conversation, Watts recalled that he had been the one who predicted the possibility of job loss or shutdown of the driving operation if the Union were selected. He did not gratuitously ascribe these threats to Fuller. It is certainly believable that Fuller's response was, "Yes, and I

will be out of a job too.”¹³ This comment is consistent with his comments to Lampe that Fuller could lose his job and lose everything. In his conversation with Hensarling, Fuller predicted that if the employees selected the Union, he would lose everything and would have to file bankruptcy. Considering the testimony of all witnesses, I find Watts to be a totally credible witness.¹⁴ If Fuller did not know with certainty that there was organizing at the facility prior to talking with Watts, he certainly knew it after talking with Watts.¹⁵

2. Timing

One of the most persuasive factors in finding these discharges to be violative of Section 8(a)(3) is the timing of the terminations. Lampe and Saylor were discharged within 3 days of Watts having told Fuller about the union meeting and the drivers wanting the Union to obtain benefits. The precipitous nature of the discharges certainly gives rise to a strong suspicion that the discharges were premised upon union animus. The Board has previously noted similar timing to be “stunningly obvious.”¹⁶ The record also reflects this union activity came at a sensitive time for Respondent in dealing with the Union. This union activity came within 2 months of a lockout that had lasted for 5 years at Respondent’s Pasadena, Texas facility. Respondent was faced with contract negotiations with the Union for both the Tyler, Texas, and Pasadena, Texas facilities. Respondent admits that it had been the target of numerous unfair labor practice charges at the Tyler facility and the Union was waging a corporate campaign.

3. The issue of disparity

Respondent submits that no other driver had ever committed the types of violations that Lampe and Saylor committed on March 12. Respondent further asserts that before finding disparate enforcement of discipline, the Board requires evidence of leniency in a “truly comparable situation.” Counsel argues in brief that Respondent should not be found to have disciplined

¹³ Although Fuller denied knowledge of the union petition, he did not deny having a conversation with Watts on March 9.

¹⁴ Respondent asserts in its brief that Watts’s testimony is unreliable because he testified that he signed a union authorization card at the What-a-Burger meeting. Respondent points out that Saylor testified that Watts signed the union petition and the petition that was received into evidence bears Watts’s signature. I am not convinced that Watts has any appreciation for a union authorization card versus a union petition. The record reflects that Watts attended the union meeting on March 9 and signed a document to show his interest in union representation. Whether he mistakenly took this document to be an authorization card does not discredit his testimony.

¹⁵ It is well established that Board and court precedent knowledge may be inferred from the record as a whole. Consideration may be given to the small number of employees as well as the timing and abruptness of the employer’s adverse action. *Wiese Plow Welding Co.*, 123 NLRB 616 (1959); *Coca-Cola of Miami*, 237 NLRB 936, 944 (1978); and *NLRB v. Sutherland Lumber Co.*, 452 F.2d 67 (7th Cir. 1971). With comparable employee complements the Board has found that knowledge of employees’ union activity may be imputed to the employer under the “small-plant doctrine.” *Modesti Brothers, Inc.*, 255 NLRB 911 (1981).

¹⁶ *North Atlantic Medical Services*, 329 NLRB 85 (1999), and *NLRB v. Novelty Products Co.*, 424 F.2d 748, 750 (2d Cir. 1970).

Saylor and Lampe disparately simply because Respondent is unable to identify another driver who has committed the same offense.

There is no dispute that a driver’s manual is given to drivers when they begin their employment with Respondent. The manual contains disciplinary rules and regulations and the penalties that attach for noncompliance. Respondent does not dispute General Counsel’s assertion that Fisher’s summaries contain 68 violations of the driver’s manual. General Counsel submits that Fisher’s reports contain eight entries between April 17, 1997, and September 15, 1998, that Fisher flagged with additional notes “talked to you already about these” in the margin, indicating Fisher had previously talked to Fuller about the entry. The March 12 report on Lampe and Saylor that Fisher testified was “the worst he had observed” was not flagged. General Counsel further asserts that Fisher’s report also contains seven entries that describe Respondent’s drivers committing three or more violations of the Respondent’s manual.¹⁷

Despite previous violations of the driver’s manual, no driver had ever been terminated for traffic violations reported by Fisher before the termination of Lampe and Saylor. Fuller testified that he talks with the drivers about all violations noted by Fisher and if a violation is severe or notable, he may prepare a written memo. He estimates that he has prepared more than 10 but less than 50 memos of serious or notable violations. The record however, contains only one memo dated prior to Lampe and Saylor’s discharge documenting that employee Curtis Walton was given a week off in March 1998 because, of Fisher’s “bad driving report.” A second memo is dated June 30, 2000, and documents Fuller talked with a newly-trained driver who was reported as following too closely by Fisher. No discipline was imposed upon the employee. Fuller justified the absence of any other memo by his assertion that he purges the files every 6 months. Respondent asserts that it also terminated driver Robert Vaughn in April 1999. Bill Tyler, manager of human resources, admitted that Vaughn’s termination followed his having a wreck while under the influence of drugs.

Based upon Fuller’s overall testimony, I do not find his testimony to be credible with respect to prior discipline. I do not find it plausible that Fuller consistently prepared 10 to 50 memos noting drivers’ severe or notable violations and yet purged them all from the files with the exception of the two noted above. Respondent is correct in its assertion that there is no record of any incident in which a driver engaged in the exact same conduct for which Lampe and Saylor were terminated. This fact does not preclude a finding that Respondent acted disparately in its treatment of Lampe and Saylor. Despite the driver’s manual provisions to the contrary, Fuller’s past practice was not to discipline drivers for driving infractions. His practice was not even to prepare additional documentation beyond Fisher’s reports.

¹⁷ The driver’s manual specifies that a driver is “immediately terminated” for the third offense of such conduct as following too closely, driving too fast for existing conditions, failure to observe speed limits, failure to comply with laws relating to crossing railroads, and failure to stop for stop signs or signals.

4. The 8(a)(1) analysis

In brief, General Counsel argues that Respondent unlawfully interrogated employees William Lampe, Floyd Saylor, Kevin Hensarling, and Jimmy Watts. General Counsel also submits Respondent unlawfully threatened employees Lampe, Saylor, and Watts because of their union activity.¹⁸ The final 8(a)(1) violation alleged in the complaint concerns the comment made by Fuller to Saylor on the day he returned to pick up his final check.

a. Alleged interrogation

In determining whether or not an interrogation violates Section 8(a)(1) of the Act, the Board looks to whether under all the circumstances the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of the Section 7 rights. The total circumstances of the conversation must be considered in determining whether any questioning was coercive in nature. See *Rossmore House*, 269 NLRB 1176 (1984). I have reviewed the testimony of Lampe, Hensarling, Watts, and Saylor in light of the Board's analysis. I find the testimony of Lampe, Hensarling, and Watts to support that Respondent engaged in interrogation violative of Section 8(a)(1) of the Act.¹⁹ The totality of the circumstances of Fuller's conversations with these three employees reflects the coercive nature of the questioning. While Fuller admits that he questioned employees about rumors, he denies that he asked about the Union. I do not credit Fuller's testimony that he did not know about the Union and did not ask about union activity. Even if Fuller had failed to specifically mention the Union by name, his references were clearly directed to the union organizational effort and sufficiently coercive in nature to be violative of Section 8(a)(1).²⁰ At the time of Fuller's questioning of Lampe, Hensarling, and Watts, none of these employees were open and active union supporters. His questioning them about the rumors at the plant was not limited to just their union activity, but he sought to elicit information about other employees' union activity. It is well established that interrogating an employee regarding the union sentiments of others is unlawful. See *Cumberland Farms*, 307 NLRB 1479 (1992), and *Sumo Container Station, Inc.*, 317 NLRB 383 (1995). Accordingly, I find that Fuller unlawfully interrogated Watts, Hensarling, and Lampe on March 9 and 10.

b. Alleged unlawful threats

In reviewing all of the testimony of General Counsel's witnesses, I find Jimmy Watts's description of his conversation with Fuller to be the most credible description of Fuller's discussions with the drivers. When Watts recited to Fuller all the

¹⁸ I note that the consolidated complaint contains no allegations of an unlawful threat occurring on March 10, the date Fuller spoke with Watts. I also note that while Kevin Hensarling testified about a threat of job loss by Fuller on March 10, this date is not included in the consolidated complaint and this threat is only tangentially referenced by counsel for the General Counsel in his brief.

¹⁹ Saylor testified that in mid-February, Fuller asked him if one of the rumors was about the Union and if he were a part of it. General Counsel did not allege this February conversation as violative of Sec. 8(a)(1). Were it alleged, I would find no basis to credit Saylor.

²⁰ *Electro-Netic Products Corp.*, 183 NLRB 482 (1970).

possible ramifications of the employees bringing in the Union to get their benefits, Fuller verbalized his realization that he would be out of a job. In each of the alleged 8(a)(1) conversations, Fuller is described as verbalizing his own concerns and anticipating how he will be personally affected by the organizational effort. He talks of losing his job and looking at the possibility of bankruptcy. Based upon Fuller's demeanor at trial and his apparent supervisory style with these drivers, it is believable that his concerns and predictions were directed at his own potential job loss.²¹ I also credit the testimony of Hensarling who testified that Fuller warned, "If it's what I think you guys are doing, then they're going to fire everybody, including me and get rid of the trucks and trailers, none of us would have jobs anymore." Fuller then exclaimed, "I will lose everything I've got and will have to file bankruptcy and there is nothing else I could do." The record reflects that Fuller was, in effect, exchanging his concerns with the drivers about what might happen to him and to the driving operation if the drivers elected a union. Despite that these conversations may have been more a discussion of his own "gut feelings," Fuller's statements are no less violative of the Act. The fact that Fuller includes himself in the predicted job loss does not neutralize or legitimate his statements. *Clinton Electronics Corp.*, 332 NLRB 479 (2000), and *Central Transport v. NLRB*, 997 F.2d 1180, 1191 (7th Cir. 1993).

c. Alleged coercion of Saylor on March 17

Saylor alleges that when he went to the plant on March 17, he overheard Fuller make the comment, "I just got rid of the ring-leader and now trouble will stop." I do not credit this statement by Saylor. This testimony is consistent with other testimony of Saylor that appears contrived and self-serving. Just as Saylor appeared to try to bolster his case by alleging the mid-February interrogation, this alleged comment appears to be a similar kind of after thought. Additionally, it is certainly inconceivable that Fuller would have made such a comment at that time. By March 17, Fuller had already met with Human Resources Director Tyler and would have been fully apprised of what he could say to Saylor. As an additional precaution, Fuller asked security guard Kenneth Smith to be present when he gave the final check to Saylor at the entrance to Respondent's facility.

On the basis of the above reasoning, I find that on or about March 9 and 10, 2000; Respondent interrogated employees about their union activities and the union activities of others and threatened employees with loss of jobs if they selected the Union as their collective-bargaining representative. Conversely, I recommend dismissal of complaint allegations 7(c).

d. Whether Lampe and Saylor would have been terminated absent the Union's organizational efforts

In his brief, counsel for the Respondent states that my credibility determinations are critical to the resolution of this case. Counsel asserts that I must determine whether Respondent's

²¹ While I am not convinced that Fuller had the self-assurance to proclaim that he would fire all of the drivers if a union were formed, I am satisfied that he predicted they would all lose their jobs if the employees selected the Union to represent them.

explanation for the terminations is either supported by falsifying documents and by a conspiracy of false testimony or that Saylor and Lampe did in fact commit the violations and their dismissals were fully warranted. While I agree that credibility determinations are critical, a resolution of the matter requires more than a determination of whether Lampe and Saylor committed the driving infractions as alleged by Respondent. Having heard 3 days of testimony and after reading 954 pages of transcript, I must conclude that Lampe and Saylor's actual driving performance on March 12 remains an unsolved mystery. As evidenced above, I have not credited Lampe and Saylor with respect to their full testimony. Based upon their apparent veracity in other areas of testimony, I suspect they committed driving infractions over the course of the 3 hours in which they were followed. It is certainly likely that these infractions may have even included running the red light as Fisher states in his report. The total record evidence does not support however, that these employees would have been terminated if there had been no union organizational activity. While I do not fully credit Lampe and Saylor's denials of any driving infractions, I do not credit Fuller's assertion that Lampe and Saylor were terminated because of their driving on March 12 and because of their having received prior discipline.

As discussed above, the record does not support that Fuller had a practice of disciplining or even counseling drivers about infractions noted in Fisher's reports. While Fuller claims that he has written more than 10 and less than 50 disciplinary actions, Respondent could only produce the disciplinary memo for Curtis Walton that proceeded March 12, 2000. Fuller contends the other memos could not be produced because he purged the files every 6 months. This testimony is contradicted by the very fact that Walton's discipline is dated March 1998. I also note that Walton's disciplinary memo indicates that Fuller specifically called Walton and asked him to provide an explanation of the incident prior to imposing discipline. No such opportunity to explain was given to Lampe and Saylor.

e. Alleged prior discipline

Respondent contends that the decision to terminate Lampe and Saylor was based not only upon their driving on March 12, but also upon prior disciplinary incidents. For the reasons explained below, I find Respondent's asserted reliance on these alleged incidents enhances the pretextual nature of these discharges.

(1) Lampe's alleged prior discipline

Respondent contends that Lampe had been the subject of three prior disciplinary warnings covering the period from December 10, 1999, to the time of his discharge. Lampe does not dispute that he urinated on the grounds of the Arch Chemical plant in December 1999. Despite the fact that a complaint was made by Arch Chemical and Lampe was restricted from that facility, Lampe was not terminated. He was simply allowed to transfer to another run.²²

Lampe denies he had an attendance problem prior to his discharge. He admits he was unable to take the run on February

24, because of his having just been released from jail. In looking at just the December 10 and February 24 incidents, it is understandable that Fuller might have been displeased with Lampe's performance. I would find Fuller's testimony to be far more credible if he had restricted Lampe's infractions to just those uncontroverted incidents. The fact that Fuller appears to bolster Lampe's prior discipline history by including the Diamond Shamrock incident tips the scales against his credibility. Fuller maintains that Saylor and Lampe were insubordinate because they did not get a motel room to wait out the long delay at Diamond Shamrock. If Fuller is to be credited, one would have to conclude that Lampe and Saylor chose to sit in a driver's lounge or in their trucks for 9 hours rather than go to a comfortable motel room where they could have had privacy and a chance to adequately rest. If I did not credit Lampe and Saylor on any other point, I find their testimony totally credible in this regard. They both testify that they would have certainly gone to a motel if they had been given the opportunity. There is no evidence of any benefit they derived by remaining at the facility and refusing to get a motel room.

I also find Fuller's testimony to be unworthy of belief based upon the three memos that are alleged to have been added to Lampe's personnel file contemporaneous with attendance infractions. While Fuller contends that he discussed each infraction with Lampe, Lampe denied he was ever counseled about problems with attendance. The memos are suspect as they contain more conclusionary language than factual documentation of problems.²³

Thus, I must conclude that all of the other disciplinary actions alleged to have been given to Lampe are raised only as an attempt to hide the true unlawful motive for Lampe's discharge.

(2) Saylor's alleged prior discipline

Respondent asserts that Saylor's discharge is based not only upon his driving infractions on March 12, but also upon his two prior incidents of insubordination. Saylor does not deny that he refused to drive the loaner truck on February 25. Respondent submits a written memo to the file that is alleged to document this incident. While the memo documents that Saylor was told this kind of behavior could not continue and he should make the run in whatever truck he is expected to take, there is no indication that any kind of discipline was administered. Saylor's second alleged act of insubordination was his failure to get a motel room on January 22, when he and Lampe were delayed at the Diamond Shamrock facility. As indicated in the discussion above, I credit the testimony of Saylor and Lampe and find Fuller's testimony to be unworthy of belief.

f. The pretextual nature of the discharges

In summary, I find the prior discipline alleged to have been given to both Lampe and Saylor is only an attempt to further justify Respondent's precipitous discharge of Lampe and Saylor. The fact that these prior "disciplines" seem so contrived undercuts Respondent's reliance upon the March 12 driving infractions as a basis for discharge. Respondent argues in its

²² This accommodation by Respondent preceded Lampe's union activity.

²³ Each statement contains added language such as, "This has been a regular problem . . .", "I told Lampe that this could not continue," and "This is getting to be a real problem . . ."

brief that a compressed timeframe renders it impossible to find that Fuller prepared and backdated the disciplinary memoranda in order to buttress his discharge recommendation. Respondent asserts that Fuller did not learn about Fisher's report until March 13th and he had to meet with Bill Tyler on March 14 to review Lampe and Saylor's files. I am not persuaded by this argument. As of at least March 10, Fuller knew about the union meeting and the union's organizational effort. Respondent had ample time to begin creating a paper trail of alleged prior discipline for any of the potential union supporters. The incidents of March 12 simply gave Respondent an opportunity to target both Saylor and Lampe. The Board has previously stated that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal.²⁴ Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case. Evidence of suspicious timing, false reasons given in defense, or disparate treatment all support such inferences.²⁵ There were only 14 drivers employed by Respondent at the time of the Union's organizing. As of March 10, Fuller knew that drivers had met with the Union and were interested in the Union as a means of getting benefits. Saylor had distinguished himself as an employee who pushed for additional pay and benefits. Crediting the testimony of Hensarling, Fuller became angry when just talking about Saylor. It would have taken very little for Respondent to identify that Saylor was one of the employees actively involved in the union organizational activity. Even Respondent's suspicion that Saylor and Lampe were involved in the campaign would be sufficient to establish the requisite element of knowledge.²⁶ The pretextual nature of the discharges is further demonstrated by Respondent's rush to remove Saylor and Lampe from their opportunity to further organize. In Respondent's rush to terminate Saylor and Lampe, neither Fuller nor any other management official took the time or opportunity to find out their version of what happened on March 12.²⁷ The pretextual nature of Respondent's defenses for terminating Lampe and Saylor supports the inference that their terminations were unlawful.

As discussed above, I find that General Counsel has established by a preponderance of the evidence that antiunion sentiment was a substantial or motivating factor in the discharge of Lampe and Saylor. The burden of persuasion then shifts to the Respondent to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity.²⁸ I am compelled to conclude that Respondent has failed to sustain that burden and to further conclude that the reasons it has asserted for the discharges are pretextual.

²⁴ *Fluor Daniel, Inc.*, 304 NLRB 970 (1991).

²⁵ *Electronic Data Systems Corp.*, 305 NLRB 219 (1991).

²⁶ *New River Industries v. NLRB*, 945 F.2d 1290, 1995 (4th Cir. 1991), denying enf. on factual grounds of 299 NLRB 773 (1990).

²⁷ See *Service Technology Corp.*, 196 NLRB No. 160 (1972), and *NLRB v. Big Three Industries*, 497 F.2d 43, 50 (5th Cir. 1974), where the failure to afford the employee a reasonable opportunity to explain the full circumstances of what occurred is relevant to a finding of unlawful motive and may be evidence of a discriminatory intent.

²⁸ *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996).

g. Credibility determinations

In finding that Respondent violated Section 8(a)(1) and (3) of the Act, I have fully considered the whole record, including the briefs filed by the General Counsel and Respondent and the testimonial demeanor of all witnesses. Assessing the credibility of Fuller, Saylor, Lampe, Watts, and Hensarling is fundamental in determining whether union animus was the motivating factor in Lampe and Saylor's terminations. As I have indicated above, I have not reached this decision by blankly crediting all of the General Counsel's witnesses. Lampe to some extent, and Saylor to a greater extent, embellished their testimony concerning conversations with Fuller. I am not persuaded that they drove for over 3 hours on March 12, without any driving infractions. I credit a portion of their testimony concerning their conversation with Fuller about the "rumors" and their testimony about the nature and severity of alleged prior discipline.

I credit the testimony of Watts and Hensarling who were also interrogated by Fuller about the "rumors" in the facility. In his brief, counsel for Respondent points out that each of General Counsel's witnesses were a part of the initial in-plant organizing committee who committed at the What-a-Burger meeting to assist in the effort to organize the drivers. He opines that since the outcome of the 8(a)(3) charges will likely determine whether their efforts were successful, these witnesses have reason to provide helpful testimony in this matter. Certainly Lampe and Saylor have a substantial stake in the outcome of this proceeding. The same is not true of Watts and Hensarling. Overall, I am persuaded that Watts and Hensarling's testimony was candid and truthful and I accept their version of the facts as a basis for resolving the issue of knowledge of union activity. The Board has long recognized that the testimony of an employee against the interest of the employer is considered especially worthy of belief since it is unlikely that the employee would engage in fabrication. See *Pittsburgh Press Co.*, 252 NLRB 500 (1982). The fact that I may not believe part of Lampe and Saylor's testimony does not of itself invalidate the remainder of their testimony. The Board and the courts have found that a judge is not barred from finding elements of truth and untruths in a witnesses' testimony.²⁹ As Judge Learned Hand so eloquently stated, "It is no reason to refuse to accept everything a witness says, because you don't believe all of it, nothing is more common in all kinds of judicial decisions than to believe some and not all." See *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 753 (2d Cir. 1950).

The total record evidence leads me to conclude that Fuller's asserted basis for Lampe and Saylor's discharges is not the true motive. Despite my credibility findings concerning the testimony of any other witnesses, it is reasonable to believe that Fuller's asserted reason for the discharges is the very opposite of what he stated.³⁰ In making these credibility findings, I have reviewed the entire record and carefully observed the demeanor of all the witnesses. I have taken into consideration the apparent interests of the witnesses and the inherent probabilities in

²⁹ *United Parcel Service*, 333 NLRB 1202 (2001); *Champion Papers, Inc. v. NLRB*, 393 F.2d 388, 394 (6th Cir. 1968); and *Izzi Trucking Co.*, 395 F.2d 241, 244 (1st Cir. 1968).

³⁰ *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962).

light of other events. Fuller's testimony concerning the alleged prior incidents of discipline was unconvincing. While I cannot credit all of Saylor's testimony because of his obvious penchant for exaggeration, I am satisfied that Fuller did not advance a true version of his conversations with employees or about the reason for Lampe and Saylor's discharge.

The overall credible evidence leads me to conclude that Respondent not only tolerated any prior misconduct of Lampe and Saylor, but also had no consistent practice of disciplining employees for driving infractions prior to the union organizing. Once there was organizing among the drivers, Respondent seized the first opportunity to remove Lampe and Saylor from their organizing efforts. In order to further bolster its position, Respondent added in the alleged prior problems with attendance, insubordination, etc. Rather than legitimating its basis for discharge, the attempt to embellish with prior discipline supports a finding that all the alleged reasons for discharge were pretextual.

In applying the foregoing principles to the facts of this case, I find Respondent's asserted defense unconvincing. On the basis of the entire record, I find that Respondent discharged William Lampe and Floyd Saylor because they assisted the Union and engaged in concerted activities, and in order to discourage employees from engaging in concerted activities, thus violating Section 8(a)(3) and (1) of the Act.

h. Whether Respondent is the sole employer of the bargaining unit employees

At trial, Respondent proposed a stipulation that Respondent La Gloria is "the joint employer of the drivers, but not limited to Saylor and Lampe, who are on PSI's payroll." General Counsel declined to enter into the stipulation, citing that although the initial complaint issued 8 months previously, Respondent had previously failed to raise this issue. Counsel for the General Counsel also relied upon Respondent's having entered into a stipulated election agreement as the employer of the bargaining unit employees. Counsel for Respondent asserted that while Respondent entered into the stipulated election agreement, the bargaining unit was described as "All truck drivers employed by the Employer on the payroll of PSI at its Tyler, Texas, facility."

In its brief, Respondent reasserts that it is a joint employer with PSI. For additional argument, Respondent points out that in the original charge, the Union alleged that PSI, La Gloria, and Crown were joint employers, single employers and alter egos. General Counsel however, elected to proceed to complaint, alleging Respondent as the sole employer of these employees. Respondent maintains that joint employer status is shown by the fact that drivers are told when they are hired that they are employed by PSI. Respondent also relies upon the fact that the employment applications and the receipts for the driver's manual given to employees bear PSI's name. Paychecks are issued on a PSI bank account and annual W-2 statements are issued by PSI. Counsel also submits that after a decision was made to terminate Saylor and Lampe, a representative of PSI called them to let them know that their employment was terminated.

PSI is an Oklahoma company that provides payroll services to the Respondent for Respondent's truckdrivers. The record reflects that Respondent screens, interviews, and hires the truckdrivers. General Counsel submits that while drivers may be told when they are hired that their employer is PSI, the drivers are provided Respondent's drivers' manual that contains only the name of La Gloria Oil & Gas as the employer. Drivers' pay is determined by the number of actual product deliveries they make and this is documented by drivers' timecards. These cards are collected by Fuller and forwarded to PSI. PSI then prepares the payroll for these drivers, deducting the taxes and other required withholdings and mails the checks to the drivers. Respondent determines the work hours and rates of pay for the drivers. Respondent determines work assignments and discipline. The overall record reflects that Respondent's hiring and employment process provides drivers with minimal contact with PSI other than the receipt of their paychecks.³¹

Respondent argues that the fact that La Gloria reimburses PSI for the costs of the drivers' compensation (plus insurance benefits, if such were to be provided), and controls whether a particular driver will continue to drive La Gloria's vehicles, makes this case no different from those in which the Board has resorted to the joint employer doctrine.³² While Respondent relies upon Capitol to support its argument, I find the case distinguishable. In Capitol, an employment agency supplied temporary employees to a user-employer. The Board noted that the user-employer could effectively fire any or all these temporary employees by simply requesting the employment agency to remove them from the user employer's premises. Although the two employers did not have common ownership, or common financial control, the Board further found that the two employers shared and codetermined essential terms and conditions of employment. While the user-employer directly supervised the employees and assigned work, the supplying-employer negotiated the wage rates of the temporary employees supplied to the user employer.

In order to establish that two otherwise separate entities operate jointly for the purposes of labor relations, there must be a showing that the two employers share or codetermine those matters governing the essential terms and conditions of employment. *Riverside Nursing Home*, 317 NLRB 881 (1995), and *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982). The employers must meaningfully affect matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction. *TLI, Inc.*, 271 NLRB 798 (1984). I do not find that the overall record supports that PSI shared or in any sense codetermined matters relating to terms and conditions of employment. I am persuaded that PSI simply provides a service to Respondent by handling administrative functions such as payroll. While PSI was not plead as a joint employer with the Respondent, there appears no basis for General Counsel having done so.

³¹ Saylor testified that on one occasion he called PSI to register a verbal grievance. While he was told that someone would get back with him, he never heard anything further in the matter.

³² Respondent cites *Capitol EMI Music*, 311 NLRB 997, 998 (1993), and *M. B. Sturgis*, 331 NLRB 1298 (2002).

III. REPORT AND RECOMMENDATIONS ON
CHALLENGED BALLOTS

Pursuant to a stipulated election agreement executed by the Respondent and the Union, and approved by the Regional Director for Region 16 on November 17, 2000, an election was conducted on December 15, 2000, in an appropriate unit of the Respondent's employees. The unit was described as "All truck drivers employed by the Employer on the payroll of PSI at its Tyler, Texas, facility excluding all other employees, including drivers of any common carriers, guards and supervisors as defined in the Act." As reflected in the tally of ballots, there were approximately 14 eligible voters. Of them, 6 votes were cast for the Union and 6 votes were cast against the Union. Because the ballots of Floyd Saylor and William Lampe were challenged, the total number of challenged ballots was determined to be sufficient to affect the outcome of the election. Accordingly, on June 1, 2001, the Regional Director for Region 16 issued an Order Directing Hearing, Second Order Consolidating Cases and Notice of Hearing in Cases 16-CA-20461, 16-CA-20585, and 16-RC-10269. By virtue of the order, the issue of whether these challenges are to be sustained is included in this decision.

In general, to be eligible to vote, an employee must have been employed both on the eligibility date, which in this case was November 12, 2000, and on the election date, which in this case, was December 15, 2000. See *Plymouth Towing Co.*, 178 NLRB 651 (1969). Discriminatory personnel actions cannot be used to make an employee eligible or ineligible to vote in a Board election. Having found that Respondent's discharge of Saylor and Lampe violated Section 8(a)(3) of the Act, *supra*, it follows that they should properly be considered as employees at all relevant times. Accordingly, I find they were each eligible to vote in the election. I recommend the challenges to their ballots be overruled and their ballots opened and counted.

CONCLUSIONS OF LAW

1. Respondent, La Gloria Oil and Gas Company, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Paper-Allied-Industrial, Chemical & Energy Workers, International Union, Local 4202 is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) of the Act by coercively interrogating its employees concerning their union activities and the activities of other employees.
4. Respondent violated Section 8(a)(1) of the Act by threatening its employees with termination if they chose a union to represent them.
5. Respondent violated Section 8(a)(3) and (1) of the Act by discharging William Lampe and Floyd Saylor, because they assisted the Union and engaged in protected, concerted activities.
6. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

It having been found that the Respondent has engaged in certain unfair labor practices, it is recommended that it be ordered

to cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent discriminatorily discharged Floyd Saylor and William Lampe, I shall recommend that Respondent offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of their discharge to the date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I shall recommend that Respondent be required to expunge from its records all references to its unlawful discharge of Lampe and Saylor, and inform them in writing that this has been done, and that these actions will not form the basis of any future discipline of him.

Regarding the consolidated representation case, it is recommended that the representation case be returned to the Regional Director, with the direction to open and count the ballots of eligible employees William Lampe and Floyd Saylor. If the additional ballots give the Union the majority of the total votes, it is further recommended that the Union be certified as the exclusive representative of the bargaining unit employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³³

ORDER

The Respondent, La Gloria Oil and Gas Company, Tyler, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Coercively interrogating employees about their union activities and the union activities of other employees.
 - (b) Threatening employees with termination if they choose a Union to represent them.
 - (c) Discharging or otherwise disciplining employees because of their union activities or sympathies.
 - (d) In any like or related manner interfering with, restraining, or coercing employee in the exercise of the rights guaranteed them by 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 Floyd Saylor and William Lampe full reinstatement to their former jobs or, if that job no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.
 - (b) Make Floyd Saylor and William Lampe whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.
 - (c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has

³³ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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, including an electronic copy of the records if stored in electronic form, 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 Tyler, Texas, copies of the attached notice marked "Appendix."³⁴ Copies of the notice, on forms provided by the

³⁴ 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."

Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 9, 2000.

(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.