

**Alliance Beverage Distributing Company, LLC and  
John Markiewicz.** Case 28–CA–16900

February 15, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN  
AND BARTLETT

On September 14, 2001, Administrative Law Judge Gregory Z. Meyerson issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.<sup>2</sup>

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Alliance Beverage Distributing Company, LLC, Phoenix, Arizona, its officers, agents, successors, and assigns shall take the action set forth in the Order except that the attached notice should be substituted for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated 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.

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

<sup>2</sup> We shall substitute a new notice in accordance with our recent decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

WE WILL NOT discharge, issue an unwarranted written warning, or otherwise discriminate against any of you for supporting the Transport, Local Delivery and Sales Drivers, Warehousemen and Helpers, Construction, Mining, Motion Picture and Television Production State of Arizona, Teamsters Local Union No. 104, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, or any other union, or for engaging in protected concerted activities.

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 from the date of the Board's Order, offer John Markiewicz full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL rescind the unwarranted written warning issued to John Markiewicz.

WE WILL make John Markiewicz whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge and written warning issued to John Markiewicz and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the unlawful discharge and written warning will not be used against him in any way.

ALLIANCE BEVERAGE DISTRIBUTING COMPANY,  
LLC

*Sandra L. Lyons*, for the General Counsel.

*Steven G. Biddle*, Phoenix, Arizona, for the Respondent.

DECISION

STATEMENT OF THE CASE

GREGORY Z. MEYERSON, Administrative Law Judge. Pursuant to notice, I heard this case at Phoenix, Arizona, on July 11 and 12, 2001. John Markiewicz, an individual (Markiewicz or Charging Party), filed an original and an amended unfair labor practice charge in this case on December 4, 2000,<sup>1</sup> and January 4, 2001, respectively. Based on that charge as amended, the Regional Director for Region 28 of the National Labor Relations Board (Board) issued a complaint on February 26, 2001. The complaint alleges that Alliance Beverage Distributing Company, LLC (Company or Respondent), violated Section 8(a)(1) and (3) of the National Labor Relations Act (Act). The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices.

<sup>1</sup> All dates are in 2000 unless otherwise indicated.

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based on the record,<sup>2</sup> my consideration of the briefs filed by counsel for the General Counsel and counsel for the Respondent, and my observation of the demeanor of the witnesses, I now make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

The complaint alleges, the answer admits, and I find that the Respondent is an Arizona corporation, with an office and place of business in Phoenix, Arizona, where at all times material herein it has been engaged in the business of wholesale liquor distribution; and that during the 12-month period ending December 4, 2000, the Respondent, in the course and conduct of its business operations, purchased and received at its Phoenix facility goods valued in excess of \$50,000 directly from points outside the State of Arizona.

Accordingly, I conclude that the Respondent<sup>3</sup> is now, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

##### II. LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that at all times material, Transport, Local Delivery and Sales Drivers, Warehousemen and Helpers, Construction, Mining, Motion Picture and Television Production State of Arizona, Teamsters Local Union No. 104, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (the Union), has been a labor organization within the meaning of Section 2(5) of the Act.

##### III. ALLEGED UNFAIR LABOR PRACTICES

###### A. *The Dispute*

The complaint alleges the Respondent issued Markiewicz an undeserved and unwarranted written warning on or about June 6, and, thereafter, discharged him on June 13. It further alleges that the Respondent took this action because Markiewicz, a union steward, concertedly complained to the Respondent regarding, among other matters, its changes in employee starting times, and its drug testing policies and practices. Counsel for the General Counsel also contends that Markiewicz' repeated, vocal support for the Union generally and for improved wages, hours, and working conditions caused the Respondent to single him out for disparate treatment and discipline.

The Respondents' answer denies the commission of any unfair labor practice and affirmatively alleges legitimate business reasons, rather than union or protected concerted activity, motivated the discipline it imposed on Markiewicz. Specifically, the Respondent claims that Markiewicz' written warning resulted from his failure to abide by the company policy requiring

employees to call with an explanation when absent from work. The Respondent further alleges that it subsequently fired Markiewicz for a violation of another company policy, leaving work without permission. The Respondent denies any disparate treatment of Markiewicz.

###### B. *The Facts*

Markiewicz, first employed by the Respondent on September 17, 1981, worked continuously thereafter for nearly 19 years, until his discharge on June 13, 2000. At all relevant times, the Respondent classified him as either a warehouseman or a lead warehouseman. Pursuant to the parties' collective-bargaining agreement,<sup>4</sup> the Union appointed Markiewicz as a job steward on May 28, 1998, and notified the Respondent of this appointment. He held that position until his discharge.<sup>5</sup> Although the Respondent admits Markiewicz engaged in some union activity, it argues, contrary to the General Counsel's principal theory, that he was not a particularly active steward. However, the record evidence clearly establishes the Charging Party's extensive union and protected concerted activity.

Markiewicz actively supported the Union or actively engaged in union activity even before he became a job steward. For example, as early as June 1997, he attended a contract ratification meeting to vehemently oppose ratification. To exhibit his outspoken opposition, he carried a "monkey wrench" to the meeting. When discussions centered on a proposed contract article that he opposed, he held his wrench aloft and yelled "monkey wrench, monkey wrench." Forty or 50 union members attended this meeting; and in later years four became supervisors. He and most other employees thereafter engaged in a 1-week strike over this contract dispute.

Following his appointment as steward, Markiewicz' protected activity increased. In April 1999, when Markiewicz served as a lead warehouseman as well as steward, he spoke to supervisor Jim LaDune about complaints from employees that LaDune yelled at, and harassed them. This exchange degenerated into a heated and inconclusive argument between LaDune and Markiewicz as to whether the employees had been talking rather than working.

In the same month, Markiewicz began voicing employee complaints about overtime to second shift supervisor Joe Molnar. These complaints pertained to employee dissatisfaction with the starting time for the weekend overtime that the Respondent implemented in April 1999. This added overtime continued over the course of the next 6 months. Initially voluntary, the overtime became mandatory in June 1999. Over the course of this 6month period, Markiewicz complained to Molnar nearly every Friday, but Molnar steadfastly refused to change the starting time. After a while, Markiewicz began accusing Molnar of being unfair. These accusations usually ended their discussions. However, increasingly, Molnar's demeanor began to indicate to Markiewicz that the supervisor was "getting more edgy and irritated" with him. In fact, Molnar finally told Markiewicz that he did not appreciate the same

<sup>2</sup> The General Counsel's unopposed motion to correct the record, dated August 16, 2001, is hereby granted and received into evidence GC Exh. 39.

<sup>3</sup> In its present form, the Respondent is the result of a number of mergers and acquisitions.

<sup>4</sup> The current collective-bargaining agreement is by its terms effective from August 27, 1997, through March 31, 2002. (GC Exh. 2.)

<sup>5</sup> Two or three other employees served as job stewards concurrent with Markiewicz.

complaints from him every week about overtime and that, in any event, the starting time would not change.

The Charging Party was involved in an accident at work in June of 1999. The Respondent had a policy which required that an employee involved in an accident must take a drug test. Pursuant to that policy, Markiewicz was sent to a medical facility where the test was to be administered. However, he refused to sign a "waiver of liability" form and was, therefore, refused permission to take the test. The Respondent considered Markiewicz to have refused to take the drug test, which was the equivalent of a positive test. Therefore, the Respondent discharged him. A grievance was then filed, and a meeting was subsequently held to discuss the matter with Markiewicz, chief steward Frank Vasquez, and the Respondent's executive vice president, Jim McArdle, present. The Charging Party continued to object to signing the waiver of liability form, on behalf of himself and other employees. However, he ultimately agreed to accept Jim McArdle's suggestion to sign the form and write beside his signature that it was "under duress." He passed the drug test and his discharge was then rescinded. It is, of course, the General Counsel's contention that this initial refusal to sign the waiver of liability form was done in the Charging Party's capacity as job steward.

In August 1999, the Respondent's facility moved to a new warehouse. At that point a change was made to the starting time of the second shift employees. A number of employees complained to Markiewicz, who in his capacity as steward brought those concerns to Joe Molnar. The starting time continued to change and the Charging Party continued to complain to Joe Molnar, who apparently was unmoved. However, subsequently the Respondent divided the second shift warehouse employees into two separate starting times. This change was also not popular with certain employees, who complained to their steward. In turn, Markiewicz complained on two or three occasions to Joe Molnar and Supervisor James Ralls.<sup>6</sup> Specifically, Markiewicz was complaining that the Respondent did not utilize seniority in determining which employees would be placed in a particular starting time. The Respondent's supervisors took the position that the contract did not require that seniority be followed.<sup>7</sup> On subsequent occasions, the Charging Party again without success complained about starting time to Glenn Barker, manager, and Jim McArdle. These conversations apparently took place prior to the Charging Party's vacation in the fall of 1999.

Another example of the Charging Party's exercise of union activity occurred about October of 1999. On that occasion, Jim McArdle reprimanded the Charging Party for being out of his work area and for stopping the conveyor. McArdle yelled at Markiewicz and called him "stupid." Markiewicz then went to

<sup>6</sup> James Ralls was identified as the supervisor originally named in the complaint as "Jimbo."

<sup>7</sup> It is apparently the Respondent's position that a "Letter of Understanding" between the Respondent and the Union dated March 23, 1999, in certain respects alters the seniority provisions of the collective-bargaining agreement. The Respondent also takes the position that in the period through December 31, 1999, it could transfer, assign, and schedule employees without objection by the Union, or recourse to the grievance and arbitration procedures of the contract. GCExh. 3, pg. 9.

Cheri Gwinner, human resources manager, to complain that McArdle had been abusive to him and to other employees as well. Gwinner said she had heard such complaints from other employees and would report the incident to headquarters.

In the late fall of 1999, the Charging Party was active in arranging a union meeting for the Respondent's employees. He contacted chief steward Frank Vasquez and a meeting date was selected. Markiewicz made copies of announcement flyers and passed them out at work, inviting coworkers to attend the meeting at the union hall. He testified that the day following his distribution of the flyers, he was approached by Brett Underwood, day warehouse manager, and told that he was not allowed to pass out fliers "on company time." Further, he was told that he would be written up if he were caught doing this again. Underwood also told him that he had heard that Markiewicz had been "harassing workers to join the Union." A similar incident occurred in February of 2000. On that occasion, a fellow employee asked Markiewicz when there was to be another union meeting. Thereafter, he was approached by Cindy McKellips, receiving supervisor, who told him, "You're not allowed to do any union activity on company time." Markiewicz indicated he thought she was wrong, and that he intended to continue his union activity. Thirty minutes later, he was called to Brett Underwood's office. In the presence of Jon Willis,<sup>8</sup> Underwood told the Charging Party that he could not engage in union activities "on company time," and that he would be written up if he did so. However, Underwood made it clear that he could engage in union activity on his coffee break, lunch break, and after work.

Markiewicz testified about another example of union activity which occurred in March of 2000. On that occasion, the Charging Party spoke with Marvin Pinnick, safety director, about the Respondent's drug testing policy. The Charging Party complained that the policy was being enforced in a discriminatory manner. He alleged that not everyone who got into an accident was being required to take a drug test. Further, he asked to be given a copy of the written policy so that he might discuss it with Pinnick.

In my view, the record clearly reflects that the Charging Party was an active job steward. Over the 2 years that he held the position of steward, Markiewicz repeatedly engaged in what can only be described as union or protected concerted activity. His testimony regarding these incidents is certainly credible, especially in view of the fact that for the most part the Respondent's witnesses do not deny that the incidents occurred. The existence of the "Letter of Understanding" between the Respondent and the Union did not make Markiewicz' complaints about starting times, shifts, and seniority anything less than genuine union or protected concerted activity. Accordingly, there can be no doubt that the Respondent had knowledge of that extensive union and protected concerted activity. However, union and protected concerted activity and knowledge of that activity by the Respondent does not by itself establish that the Charging Party's written warning and subsequent discharge were in any way related to that activity. It is, therefore, neces-

<sup>8</sup> Although the Charging Party testified that Willis is a regional manager, the complaint does not allege him as a supervisor.

sary to consider the events leading up to Markiewicz' discharge.

The sequence of events, which ultimately lead to the Charging Party's discharge, began with his placement on "restrictive" duty from January 1, 2000, until May 12, 2000.<sup>9</sup> According to Markiewicz, this restrictive or light duty was the result of a right side hernia, which he had developed. However, on May 8, the Charging Party sustained an injury at work which included a left side hernia. Subsequently, he was referred to a surgeon, Dr. Miller, who recommended surgery on both hernias, which surgery was initially scheduled for May 17. Markiewicz informed the Respondent of his scheduled surgery and was apparently given permission to remain off work from May 17, until released by the surgeon to return to work. Unfortunately, he neglected to fast the morning of the scheduled surgery, and was, therefore, informed by the surgeon that the surgery could not proceed as scheduled. An apparently unhappy Dr. Miller told the Charging Party that the surgery would need to be rescheduled, and to go home and wait for his call. Subsequently, he received a call from Dr. Miller's office rescheduling the surgery for May 19. Markiewicz acknowledged that he did not notify the Respondent that the surgery had been postponed, allegedly because he assumed it was not necessary, as he had been given permission to remain off of work until released by the surgeon following the operation. The surgery was in fact performed on May 19. According to the testimony of the Charging Party, this was double hernia surgery requiring both a right and left incision, and the placement of wire mesh for support.

Following his surgery, Markiewicz saw Dr. Miller twice, after which he was told by the surgeon to return to work. The surgeon released him to return to work approximately 2 weeks following the operation. This release was for "light" duty work only; however, the Charging Party testified that he was still in extreme pain. Despite the pain, he returned to work on June 5. However, prior to actually starting work, he approached Brett Underwood in the Respondent's parking lot and informed Underwood that he was "in real bad pain" and wanted to see a different surgeon to get a second opinion.<sup>10</sup> Underwood informed Markiewicz that he had been released for light duty work, which was available, and that he should remain and work. Markiewicz was insistent that he needed to see a different doctor, and so ultimately Underwood told him to go. Unfortunately, Markiewicz was not successful in getting an appointment with any doctor on June 5, and so he remained off work on June 6, and continued his unsuccessful attempt to get an appointment with a doctor. He testified that he remained in extreme pain.

Markiewicz apparently was of the initial opinion that he did not need to call the Respondent on June 6, in order to report his continued absence from work. He allegedly thought following

<sup>9</sup> A letter from Brett Underwood dated May 1, 2000, set out the Respondent's position that Markiewicz' restrictive duty was to end on May 12, 2000. (GC Exh. 5.)

<sup>10</sup> Consistent throughout the Charging Party's testimony was his dissatisfaction with Dr. Miller's treatment of him, and his desire to obtain a different physician.

his conversation with Brett Underwood on June 5, that he had permission to remain off work until he was able to see a doctor. However, on June 6, he received a letter at home from Cheri Gwinner essentially directing him to report back to work, or face possible disciplinary action.<sup>11</sup> Following receipt of that letter, the Charging Party returned to work on June 7. He testified that he attempted to work, but continued to be in pain. Finally, he asked for and was given permission by Brett Underwood to go to the Respondent's medical clinic in order to see a doctor. Unfortunately, no doctor was available and so he returned to work. In any event, he did not remain at work long, as he informed Brett Underwood that he would like to petition the Industrial Commission for a change in doctors.<sup>12</sup> Underwood told him he could go to the Industrial Commission for this purpose, and he did so. After that he went home.

Brett Underwood testified the Respondent had an attendance policy that essentially required that if an employee was going to be absent and had not secured permission in advance from his supervisor, the employee must call the Respondent as soon as possible and report the absence.<sup>13</sup> It was apparently on June 7, that Brett Underwood presented the Charging Party with a written warning dated June 6, for allegedly violating the Respondent's attendance policy by failing to call in when he was absent from work on May 17 and 18, and on June 6. These absences were considered "No Call, No Shows" by the Respondent. (See GC Exhibit No. 8.)

According to Markiewicz, he remained in extreme pain and so on June 8, he called Brett Underwood from home and asked for permission to take the day off as his birthday holiday. Underwood gave his permission, and the remainder of the conversation was taken up with a discussion of whether Markiewicz could take leave under the Family Medical Leave Act. Basically, the Charging Party wanted to take leave without pay so that he could use the time to heal and obtain medical treatment. However, it was Underwood's position that the Charging Party would first have to exhaust all of his vacation leave before he could use leave without pay.

On June 9, the Charging Party reported for work, but because he was in extreme pain, he asked for and was given permission by Underwood to leave work. The next day that Markiewicz was scheduled to work was June 12. Respondent contends the events of that day resulted in Markiewicz' discharge.

The Charging Party testified that his pain had been getting worse. He credibly described the pain as "extreme" in his groin and back with pressure going from his chest to his legs. He attempted to work on the morning of June 12, although he felt "awful." Markiewicz described himself as "desperate," and when he was unable to get an appointment to see Dr. Miller, he

<sup>11</sup> According to this letter, he must either return to perform light duty work, or obtain medical documentation supporting an inability to work. See GC Exh. 29.

<sup>12</sup> Apparently this was necessary, as the Respondent's insurance carrier, Hartford Insurance, had informed him that he was not permitted under the Respondent's workers' compensation policy to see a physician other than Dr. Miller.

<sup>13</sup> See Respondent's "Attendance and Tardiness Standards" GCExh. 28.

told Underwood that he wanted to go to an emergency room at a hospital to see a doctor. According to the Charging Party, Underwood said that if he left he would need to take vacation time, to which Markiewicz objected. The Charging Party then told Underwood that he wanted to talk with chief steward Frank Vasquez. Almost 45 minutes passed before Vasquez arrived.

Markiewicz explained to Vasquez that he needed to go to the hospital and that Underwood wanted him to take vacation time. Vasquez agreed that this was unfair, and the two of them went to talk with Underwood. Surprisingly, there is relatively little dispute between the three men as to what was said at their meeting.<sup>14</sup> Underwood does not deny that the Charging Party was asking permission to leave work in order to see a doctor, although he emphasizes that Vasquez had told the Charging Party to go to the union hall and file a grievance. According to Underwood, he told Markiewicz that he must either follow the doctor's restrictions or get the doctor to change them, and that if Markiewicz left without taking vacation time, it would constitute an unexcused absence. Finally, Underwood claims that he told the Charging Party that whatever Markiewicz decided to do, he should let Underwood know. According to Vasquez, it was clear from Markiewicz's demeanor that he was in pain, and he indicated that because of his pain he was not able to do the work. Further, Vasquez testified that while Underwood wanted Markiewicz to remain at work, he gave him three options. Those were to either go back to the doctor who had restricted him to light duty work, to take vacation time and get the matter resolved, or to leave and have it considered an unexcused absence. Vasquez testified that he told Underwood that the Charging Party was trying to see a doctor, and since this was an industrial injury, it was unfair to make Markiewicz use his vacation time. Finally, Vasquez advised the Charging Party to go by the union hall and file a grievance.

While it appears that there was no specific conclusion to the meeting, both Vasquez and Markiewicz contend that Underwood knew that Markiewicz was leaving work to try and see a doctor about his continuing pain. Underwood does not deny that he knew that Markiewicz wanted to see a doctor; however, he contends that he never actually gave Markiewicz permission to leave work, and was surprised when he learned that Markiewicz was gone, because Markiewicz had not told him he was leaving. The Charging Party testified that while he was aware of what was happening, he was in extreme pain and was willing to let Vasquez do the talking, as things were becoming "fairly fuzzy."

After he left work, the Charging Party followed Frank Vasquez' advice and went to the union hall. There, he met with business agent Cliff Davis and informed him as to what had transpired. He was at the union hall for approximately 30 minutes. From the union hall, Markiewicz went directly to the emergency room at John C. Lincoln Hospital. At the hospital, he saw a doctor who diagnosed his problem as sever constipation, a reaction to the surgery. The doctor informed Markiewicz that the constipation created pressure and pushing against the surgical incisions and his back. This in turn, caused

the pain. The doctor gave Markiewicz instructions for treatment of the constipation, and also gave him a signed note which read, "No work until re-evaluated by surgeon on 06-15-00 and medically cleared." (See GC Exhibit No. 10.) After about 4 hours, the Charging Party was released from the hospital. He then went to a grocery store which had a fax machine, and faxed the doctor's note to the Respondent's office.

The following day, June 13, Brett Underwood called Markiewicz and asked him to come in for a talk. The Charging Party asked Cliff Davis and Frank Vasquez to attend, and they met with Brett Underwood and Cindy McKellips. Underwood then informed Markiewicz that he was being terminated, and handed him a notice of disciplinary action setting forth the reasons for the termination. (GC Exhibit 11.) Underwood then refused to discuss the matter further.

The notice of disciplinary action reflects that the Respondent terminated Markiewicz because he left work on June 12 without authorization, meaning without permission from Brett Underwood or any other supervisor.<sup>15</sup> Underwood admits that the Charging Party's fax was sent to the Respondent's place of business on the evening of June 12, and placed on his desk the morning of June 13. However, it is the Respondent's position that this was too late, as Markiewicz had already left his workstation without authorization, in effect, abandoning his job. It should be noted, the Respondent also takes the position that the prior written reprimand which the Charging Party received for not calling in when he was going to be absent from work (GC Exh. 8), was not a contributing factor to the decision to terminate him. Brett Underwood testified that the prior written reprimand was listed on the notice of disciplinary action of June 13, merely because the form had a place to list any previous discipline. The Respondent plainly contends that it fired Markiewicz solely because he left work on June 12, without authorization.

#### IV. ANALYSIS AND CONCLUSIONS

It is clear that the issues before the undersigned center around the question of the Respondent's motivation in issuing a written warning to and subsequent termination of the Charging Party. In *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. This showing must be by a preponderance of the evidence. Then, on such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The Board's *Wright Line* test was approved by the United States Supreme Court in *NLRB vs. Transportation Corp.*, 462 U.S. 393 (1983).

In the present case, I conclude that the General Counsel has made a prima facie showing that the Charging Party's protected

<sup>14</sup> Although Cindy McKillips was also apparently at the meeting, she did not testify.

<sup>15</sup> The notice of disciplinary action cites rules nos. 12 and 14 of the Respondent's work rules. (GC Exh. 12.)

conduct was a motivating factor in the Respondent's decision to discipline and subsequently terminate him. In *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991), enfd. 988 F.2d 120 (9th Cir. 1993), the Board held that in order to establish a prima facie case, the General Counsel must show: (1) that the discriminatee engaged in protected activities; (2) that the employer had knowledge of such activities; (3) that the employer's actions were motivated by union animus; and (4) that the employer's conduct had the effect of encouraging or discouraging membership in a labor organization. As has been noted in detail above, Markiewicz engaged in extensive union and protected concerted activities regarding such matters as making complaints to management about shift starting times, overtime, seniority, drug testing, and harassment of employees. Further, his union activities included arranging for union meetings and notifying fellow employees of those meetings. Without question, the Respondent had knowledge of that protected activity, as the Charging Party had interaction directly with a number of the Respondent's supervisors.<sup>16</sup>

Regarding the question of whether the Respondent's actions were motivated by union animus, it appears fairly obvious that the Respondent's supervisors were not very happy with Markiewicz's actions. As is reflected in the credible testimony of Markiewicz,<sup>17</sup> Supervisor Joe Molnar got mad at him and was visibly "edgy and irritated" because Markiewicz repeatedly complained to him about starting time for overtime work. Also, he testified that in the fall of 1999, he was approached by Brett Underwood and told not to engage in union activity "on company time," or he would be written up. In February of 2000, both Cindy McKellips and Brett Underwood made similar statements to Markiewicz about not engaging in union activity on company time, and Underwood again told Markiewicz that he would be written up if he were caught doing it.

But, even without direct evidence, animus or hostility towards an employee's union activity may be inferred from all the circumstances. *Shattuck Denn Mining Corp., v. NLRB* 362 F.2d 466 (9th Cir. 1966); and *U. S. Soil Conditioning Co.*, 235 NLRB 762 (1978). Such an inference is warranted here. The

<sup>16</sup> Through amendments made at the hearing to both the complaint and answer, counsel for the Respondent ultimately admitted the supervisory and agency status of the individuals named in paragraph 4(a) of the complaint, as amended. However, the Respondent continued to deny the agency status of Joe Nasser, as alleged in paragraph 4(b) of the complaint. While I concluded that the General Counsel has not established that Joe Nassar was an agent of the Respondent, it is not an allegation essential to the finding of a violation of the Act.

<sup>17</sup> The undersigned has had the opportunity to observe the demeanor of John Markiewicz while testifying, as well as to evaluate the inherent plausibility of his testimony. On that observation, it is my conclusion that he has testified credibly. Further, the Respondent's witnesses do not dispute his version of events to any material extent. In evaluating his credibility, I have considered, among other matters, the affidavit given by Markiewicz to agents of the Board on January 4, 2001, which affidavit was at the time of the hearing placed in the rejected exhibit file as R. Exh. 4. On further reflection, I have concluded that my original ruling was in error, and that the affidavit should have been admitted into evidence pursuant to Rule 613(b) of the Federal Rules of Evidence (Prior Statements of Witnesses). Therefore, I now admit the affidavit into evidence despite objection by counsel for the General Counsel.

Respondent had attempted to obtain the acquiescence of the Union in its unilateral establishment of employee transfers, assignments, and scheduling, through December 31, 1999, by means of the Letter of Understanding. (See GC Exh. 3.) I find that the Charging Party's repeated complaints about these very matters became a considerable source of irritation to management. Supervisor Molnar admitted as much when he indicated that he was under no obligation to follow the seniority provisions in the contract and was upset that Markiewicz kept bringing these matters to him. While Markiewicz' characterization of himself as a "pain" may have been accurate, it does not in any way detract from the fact that his complaints on behalf of employees constituted legitimate union activity. Under these circumstances, I believe my inference about Respondent's animus towards Markiewicz for his protected activity has considerable support in this record.

The Charging Party served as a very vocal and persistent job steward who brought repeated employee complaints to management. Any disciplinary action taken against him because of his union activity would unquestionably have had the chilling effect of discouraging membership in the Union. In this way, the Respondent warned other employees that persistent activity, in the nature of union or protected concerted activity, would not be tolerated.

The General Counsel, having met its burden of establishing that the Respondent's actions were motivated, at least in part, by antiunion considerations, the burden now shifts to the Respondent to show that it would have taken the same action absent the protected conduct. *Senior Citizens Coordinating Council of Riverbay Community*, 330 NLRB 1100 (2000); and *Regal Recycling, Inc.*, 329 NLRB 355 (1999). The Respondent must persuade by a preponderance of the evidence. *Peter Vitale Co.*, 310 NLRB 865,871 (1993). The Respondent has failed to meet this burden.

Regarding the written warning of June 6, it is the Respondent's position that it issued this warning to Markiewicz because he had failed to report for work on 3 separate dates, and had also failed on those occasions to call in and notify his supervisor that he would not be coming to work. The Respondent refers to this type of absence as a "No Call, No Show." (GC Exh. 8.) As is noted above, Markiewicz does not deny failing to call in on the three occasions in question, but he offers reasonable explanations for each of them. In any event, the warning indicates that Markiewicz "is expected to adhere to company attendance polic[ies] and work when scheduled." However, the only written attendance policy that the Respondent offered into evidence indicates that less than 4 unscheduled absences in a 12-month period are considered within accepted standards. It is not until the 4th unscheduled absence that a verbal warning is issued, and not until the 5th unscheduled absence that a written warning is issued. (GC Exh. 28, "Attendance and Tardiness Standards.")

Therefore, it appears that the Respondent has exceeded its written attendance policy by issuing a written warning to the Charging Party after only three unscheduled absences. While some of the Respondent's witnesses suggest that a "No Call, No Show" absence is more serious than an unscheduled absence where the employee calls in with an excuse, no other

written attendance policy was produced. As the only written attendance policy in evidence establishes that Markiewicz' three unexcused absences in a 12-month period were within the Respondent's standards and did not require discipline, it must be concluded that the Respondent's defense is a pretext for its true motive.

I find that the Respondent has simply failed to establish by anything approaching a preponderance of the evidence that the Charging Party was issued a written warning because he was in violation of the attendance policy. The General Counsel's prima facie case has not been rebutted, as the reasons advanced by the Respondent are pretextual. It is, therefore, appropriate to infer that the Respondent's true motive was unlawful, that being because of union or protected concerted activity. *Williams Contracting, Inc.*, 309 NLRB 433 (1992); *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enf. 705 F. 2d (6th Cir. 1982); and *Shattuck Denn Mining Corp.*, supra. Accordingly, the undersigned finds that the Respondent has violated Section 8(a)(1) and (3) of the Act by issuing a written warning to Markiewicz on June 6.

In considering the circumstances surrounding the discharge of the Charging Party, it is important to note that he had been employed by the Respondent for 19 years. Further, it is very significant that the Respondent does not criticize the quality of his work as a warehouseman. To the contrary, the Respondent is in fact highly complementary of his work. Brett Underwood testified that, "John was a great warehouseman, and you need to have people like him, with his knowledge and experience—very intelligent, and you don't want to lose people like that." Marvin Pinnick testified that one of the reasons the Respondent had agreed to reinstate Markiewicz following his problem with taking the drug test was because, "He was always a good, faithful employee" The Charging Party's long employment history and the quality of his work are very significant in light of the fact that the Respondent contends that he was fired solely because he left his work without permission, in effect abandoning his job.

The Respondent alleges that Markiewicz was not treated in a disparate fashion, as every employee who left his workstation without permission was terminated. The Respondent offers employment records to support its position that other employees were fired for the same offense. However, I am not impressed with these comparisons, as the individuals given as examples by the Respondent were either short time employees or had significant disciplinary records. None of these individuals approached Markiewicz's 19-year tenure with the Respondent, nor was there any evidence that their work was as highly praised as was the Charging Party's work. It is not surprising that the Respondent was not able to offer closer examples as comparisons, since it would be highly unusual for a long time employee with a good work record to be fired for a single infraction of leaving work without permission, and even then under very extenuating and, literally speaking, painful circumstances.

However, in my view, comparisons with employees who left their work without permission are misplaced, as the circumstances surrounding the Charging Party's departure from the job on June 12, do not support the Respondent's contention that

he "abandoned" his job. Without question, Markiewicz had a serious medical problem, which was certainly apparent to Brett Underwood since June 5, the first day that Markiewicz attempted to return to work following his double hernia surgery. Underwood did accommodate the Charging Party on a number of occasions between June 5, and June 12, by allowing him to leave work to see a doctor or to go to the Industrial Commission for the purpose of trying to get permission to change doctors. Further, Underwood knew that Markiewicz continued to be in extreme pain, and had not been successful in getting to see another doctor. He knew this because Markiewicz had so informed him. On June 12, the Charging Party advised Underwood that he was still in severe pain and needed to go a hospital emergency room. Underwood does not deny that Markiewicz said he needed to see a doctor, and he testified that there was a disagreement between the two men about whether Markiewicz would need to take vacation time in order to leave work. Subsequently, Frank Vasquez met with Underwood, Cindy McKellips, and Markiewicz. There was apparently additional conversation and disagreement about what kind of leave Markiewicz would take, vacation leave or leave without pay, if he left to see a doctor. Vasquez advised Markiewicz to go to the union hall, and file a grievance over Underwood's refusal to allow him to take leave without pay. Finally, Underwood contends that he told the Charging Party to let him know what he decided to do, meaning stay at work, or go see a doctor, and if so, whether he was taking vacation leave or an unexcused absence. Underwood testified that he was surprised to later find out that Markiewicz had left work, as Markiewicz had not gotten back to him to inform him as to what he intended to do. It is Underwood's position that Markiewicz left work without authorization, as he had never actually given Markiewicz permission to leave. This, he contends, constituted job abandonment.

Brett Underwood's testimony regarding the Charging Party's alleged job abandonment is, in my view, incredible. In light of the totality of the circumstances surrounding the events of June 12, his testimony is simply inherently implausible. Certainly, any reasonable person would construe the comments made by Markiewicz on June 12, to mean that he intended to leave work to see a doctor at a hospital emergency room. Underwood acknowledged that he was aware that Markiewicz continued to be in pain. Further, he testified that he had "never denied" any employee who was in pain or had a medical condition the right to leave work to see a doctor. However, he incredibly claims that Markiewicz did not actually ask him for permission to leave work, and he did not know that Markiewicz had gone to the doctor until he received the fax from the emergency room doctor the following day. One can only wonder what Underwood thought that he, Markiewicz, and Frank Vasquez were discussing on June 12, prior to Markiewicz's departure. The issue of leave was certainly discussed, as all 3 witnesses agree. But, clearly, the central issue was Markiewicz's continuing pain, and his need to leave work to see a doctor.

As noted above, Underwood testified that he had "never denied" any employee the right to leave work to see a doctor. However, it appears to me that on June 12, he was denying the Charging Party the right to leave work to see a doctor, by with-

holding permission after a clear request was made. In failing to give Markiewicz permission to leave work, Underwood was certainly treating him in a disparate fashion. Further, the Respondent's decision to terminate Markiewicz for allegedly abandoning his job was even more suspect in light of the receipt the following morning of the faxed emergency room doctor's note. It certainly was clear at that point, even assuming there had been some doubt, that Markiewicz had in fact been to see the doctor. Nevertheless, the Respondent persisted in terminating him. It is important to remember that Markiewicz was a 19-year employee with a good work record. This is simply not the kind of employee who would be fired for job "abandonment," especially when the Respondent has a practice of permitting employees to leave work for medical reasons. It is, therefore, apparent to me that the true reason for the Charging Party's termination was because of his union and protected concerted activities. The Respondent's stated reason for discharging Markiewicz, that of job abandonment, was merely a pretext. Accordingly, the Respondent has failed to rebut the General Counsel's prima facie case by any standard of evidence. *Williams Contracting, Inc.*, 309 NLRB 433 (1992); *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enfd.* 705 F.2d 799 (6th Cir. 1982); and *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). Therefore, I find that the Respondent has violated Section 8(a)(1) and (3) of the Act by discharging the Charging Party on June 13.

In summary, I find and conclude that Counsel for the General Counsel has established a prima facie case, and that the Respondent has failed to rebut that evidence. Accordingly, I find and conclude that the Respondent has violated Section 8(a)(1) and (3) of the Act by issuing a written warning to the Charging Party on June 6, and by discharging him on June 13.

#### CONCLUSIONS OF LAW

1. The Respondent, Alliance Beverage Distributing Company, LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Transport, Local Delivery and Sales Drivers, Warehousemen and Helpers, Construction, Mining, Motion Picture and Television Production State of Arizona, Teamsters Local Union No. 104, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) and (3) of the Act by issuing a written warning to its employee John Markiewicz on June 6, 2000, and by discharging John Markiewicz on June 13, 2000, because he had engaged in union and protected concerted activities.

4. The above unfair labor practices have an effect upon commerce as defined in the Act.

#### THE REMEDY

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

Having found that the Respondent discriminatorily discharged employee John Markiewicz, my recommended order requires the Respondent to offer him immediate reinstatement to his former position, displacing if necessary any replacement, or if his position no longer exists, to a substantially equivalent position, without loss of seniority and other privileges. My recommended order further requires the Respondent to make Markiewicz whole for any loss of earnings and other benefits, computed on a quarterly basis from date of his discharge to date the Respondent makes a proper offer of reinstatement to him, 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).

Having found that the Respondent unlawfully issued a written warning to employee John Markiewicz in June 2000, the Respondent will be required to rescind that warning.

The recommended order further requires Respondent to expunge from its records any references to Markiewicz' discharge and written warning mentioned above, provide Markiewicz with a written notice of such expunction, and inform him that the unlawful conduct will not be used as a basis for further personnel actions against him. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

On these findings of fact and conclusion of law and on the entire record, I issue the following recommended.<sup>18</sup>

#### ORDER

The Respondent, Alliance Beverage Distributing Company, LLC, Phoenix, Arizona, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Issuing unwarranted written warnings to any of its employees if they engage in union or protected concerted activities.

(b) Discharging or otherwise discriminating against any of its employees for supporting the Transport, Local Delivery and Sales Drivers, Warehousemen and Helpers, Construction, Mining, Motion Picture and Television Production State of Arizona, Teamsters Local Union No. 104, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, or any other union, or because they have engaged in concerted activity, or have engaged in other acts which are protected by the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees 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 John Markiewicz full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without

<sup>18</sup> In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make John Markiewicz whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision.

(c) Rescind the unwarranted written warning issued to John Markiewicz.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and written warning, and within 3 days thereafter notify John Markiewicz in writing that this has been done and that the discharge and written warning will not be used against him in any way.

(e) 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 the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Phoenix, Arizona, copies of the attached notice marked

“Appendix.”<sup>19</sup> Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places 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 June 6, 2000.

(g) 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.

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<sup>19</sup> If this Order is enforced by a judgment of the 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.”