Flat Rate Movers, Ltd. *and* Local 116, RWDSU, UFCW. Cases 2–CA–39373, 2–CA–39374, 2–CA–39377, 2–CA–39388, 2–CA–39405, 2–CA–39458, and 2–RC–23399

November 16, 2011

DECISION, ORDER, AND DIRECTION

BY CHAIRMAN PEARCE AND MEMBERS BECKER AND HAYES

Following an election in which there were a potentially determinative number of challenged ballots and there were objections filed by the Union, as well as the issuance of a complaint by the Regional Director pursuant to unfair labor practice charges, a consolidated hearing took place before Administrative Law Judge Raymond P. Green on various dates from July to December 2010. On March 7, 2011, Judge Green issued the attached decision. Thereafter, the Respondent filed exceptions and a supporting brief, and the Acting General Counsel and the Union each filed an answering brief to the Respondent's exceptions.

The National Labor Relations 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,[1] and conclusions as modified below, and to adopt his recommended Order as modified.

The election tally showed that 67 employees voted for, and 85 voted against, the Union; there also were 95 challenged ballots. The judge found that, prior to the election, the Respondent violated Section 8(a)(3) and (1) of the Act by discharging 40 of its employees and that these employees therefore were eligible to vote in the election. We adopt the judge's findings on these issues[2] and overrule the challenges to the ballots of the 22 unlawfully discharged employees who voted. We further adopt the judge's recommendation to sustain the challenges to the ballots of 57 seasonal employees who the judge properly determined lacked a reasonable expectation of future employment with the Respondent.[3] We decline, however, at this time to resolve the eligibility of six challenged voters who worked for an entity, Flat Rate Elite, that the judge determined to be a single employer with Flat Rate Movers. Though the Respondent has excepted to the judge's single-employer ruling, we find that the current record is insufficient to resolve the issue. Nor does application of *Caesars Tahoe*, 337 NLRB 1096 (2002), which sets forth the Board's three-prong test to resolve questions of eligibility in stipulated unit cases, settle the eligibility of Flat Rate Elite employees, as the language of the parties' stipulation is ambiguous, the evidence of the parties intent is unclear, and the record is inconclusive as to whether the Respondent's employees and Flat Rate Elite's employees share the requisite community of interest.[4] Under these circumstances, we reserve consideration of the eligibility of Flat Rate Elite employees until after the Regional Director has issued a revised tally of ballots. If after that revised tally issues the six challenged Flat Rate Elite employees' ballots remain determinative, we direct the Regional Director to reopen the hearing and develop a record sufficient to resolve the issues pertinent to their eligibility.

Accordingly, we shall remand this proceeding to the Regional Director for further actions consistent with our Decision, Order, and Direction.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Flat Rate Movers, Ltd., Bronx, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.[5]

IT IS FURTHER ORDERED that the challenges to the ballots of the following employees be overruled:

Roberto Arroyo
Enrique Dela Nuez
Franklyn Delahoze
Jesus Dias
Heyfreed Dominguez
Giovanni Eleo
Miguel Lerbu Felix

[1] The judge stated in sec. II,(c) of his decision that a memorandum agreement between the Respondent's owners was dated June 28, 2009. The memorandum was actually dated June 8, 2009.

[2] We also adopt his finding that the unlawful discharges warrant setting aside the election if the final tally of ballots reveals that a majority voted against representation. We further adopt the remainder of the judge's unfair labor practice findings.

[3] In the absence of exceptions, we also adopt the judge's recommendation to overrule the challenges to the ballots of Michael Jagielski, Giovanni Eleo, Tenzin Namgyal, Carlos Monserrate, Ouazeno Mourad, Adam Sarkozy, and Kazimierz Wiktorek, whom the Union claimed were not employed in the relevant time period.

[4] Member Hayes notes the absence of any objection or evidence suggesting the existence of confusion among voters as to the scope of the stipulated unit.

[5] The judge in pars. 2(a) and (b) of his Order directed the Respondent to reinstate and make whole the employees listed in app. A of his decision. We note that David Guevara, listed in app. A, was not alleged to have been discriminatorily discharged by the Acting General Counsel, and no evidence was developed on his status. Accordingly, the Respondent will not be ordered to reinstate or make whole David Guevara.

Francisco Garcia
Andres Gomez
Edwin Guevara
Warren Iglesias
Michael Jagielski
Victor Leclerc
Miguel Lerbu
Humberto Matos
Jose Maguana
Emmanuel Martinez
Julich Mera
Carlos Monserrate
Ouazeno Mourad
Tenzin Namgyal
David Neciosup
Nelson Rodriguez
Rafael Ramos
Adam Sarkozy
Daniel Torres
Alejandro Farciert Veliz
Kazimierz Wiktorek
Manuel Zhinin[6]

IT IS FURTHER ORDERED that Case 2–RC–23399 is severed from Cases 2–CA–39373, 2–CA–39374, 2–CA–39377, 2–CA–39388, 2–CA–39405, and 2–CA–39458, and that it is remanded to the Regional Director for Region 2 for action consistent with the Direction below.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 2 shall, within 14 days from the date of this decision, open and count the ballots of the employees listed above, and that he prepare and serve on the parties a revised tally.

If there are no remaining determinative challenged ballots and the revised tally reveals that the Petitioner has received a majority of the valid ballots cast, the Regional Director shall issue a certification of representative. If, however, there are no remaining determinative challenged ballots and the revised tally shows that the Petitioner has not received a majority of the valid ballots cast, the election must be set aside and a new election held at such time as the Regional Director deems appropriate.

If, after the preparation and service of the revised tally, the challenged ballots of the following employees prove determinative, the Regional Director shall designate a hearing officer to adduce additional evidence as to whether they were eligible voters: Mahamatt Abduley, Urbie Cooper, Jose Martinez, Amauri Nunez, Jose Rodriguez, Carlos Segura, Adolfo Trabanino, and Felix Zapata.[7]

IT IS FURTHER DIRECTED that the hearing officer designated for the purpose of conducting the hearing shall prepare and cause to be served on the parties a supplemental report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of the challenges. Following service of the supplemental report, the provisions of Section 102.69 of the Board's Rules and Regulations shall apply.

Dated, Washington, D.C. November16, 2011

Mark Gaston Pearce, Chairman

Craig Becker, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[6] The Board agent challenged the ballot of Mahamatt Abduley because he arrived late to the polling location and his name did not appear on the list of eligible voters, but the judge inadvertently failed to rule on Abduley's eligibility. Similarly, the Board agent also challenged the ballot of Urbie Cooper because Cooper's name was not on the eligibility list. The Union asserted in its objections that Cooper was discharged by the Respondent because of his activities on behalf of or membership in the Union. The Respondent contended, however, in its Memorandum of Law In Opposition to Petitioner's Request For a 10(j) Injunction, which was introduced as the Acting General Counsel's Exhibit 49, that Cooper remained employed with the Respondent. Indeed, the Acting General Counsel does not seek his reinstatement. But because the record is silent on Cooper's employment status and the judge inadvertently failed to rule on his eligibility, we have no basis to rule on the challenge to his ballot. Under these circumstances, as explained below, if the revised tally demonstrates that Abduley's and Cooper's ballots are determinative, the Regional Director shall designate a hearing officer to hold a hearing on their eligibility. See *Vemco, Inc.*, 304 NLRB 911, 915 fn. 12 (1991).

The Respondent challenged the ballot of Enrique Velasquez on the grounds that he was no longer employed as of the date of the election. The judge inadvertently failed to rule on the challenge. Because the record demonstrates that Velasquez voluntarily left employment with the Respondent on May 22, 2009, we sustain the challenge to his ballot.

[7] Martinez, Nunez, Rodriguez, Segura, Trabanino, and Zapata were all employees of Flat Rate Elite. As mentioned, we do not pass on their eligibility.

Simon Koike, Esq., Rhonda Ellen Gottlieb Esq., and *Jeff F. Beerman, Esq.,* for the General Counsel.
Ivan D. Smith, Esq. and Gregory Glickman, Esq., for the Respondent.
Bryan McCarthy, Esq., for the Union.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in New York, New York, on various dates from July 14, 2010, to December 2, 2010.

The representation election petition in Case 2–RC–23399 was filed by Local 116. RWDSU on July 6, 2009. Thereafter, pursuant to a Stipulated Election Agreement approved on July 24, 2009, an election was held on August 14, 2009. Of about 274 eligible voters, 67 cast votes for the petitioner, 85 cast ballots against unionization and 95 ballots were challenged.

The challenges fall into several categories. First, were those people who were challenged by the Employer who were discharged and are the subject of the related unfair labor practice case. The second group consisted of people who were challenged by the Union because they allegedly were temporary students who worked during the summer of 2009. A third category consists of six individuals whom the Employer asserts were not employees of Flat Rate Movers, but were employed by another corporation. The final category is a group of people that the Union claimed were not employed during the eligibility period.

The unfair labor practice charge in Case 2–CA–39373 was filed by Alejandro Veliz on July 7, 2009. The charge in Case 2–CA–39374 was filed by Rarpi Division on July 7, 2009. The charge in Case 2–CA–39377 was filed by Daniel Torres on July 8, 2009. The charge in Case 2–CA–39388 was filed by Jose Maguana on July 14, 2009. The charge and the amended charges in Case 2–CA–39405 were filed by Local 116 on July 27, August 11, September 29, and December 29 2009. The charge in Case 2–CA–39458 was filed by the Union on August 26, 2009.

A complaint on these charges was issued by the Regional Director for Region 2 on March 31, 2010, and an amendment to the complaint was issued on May 14, 2010. In substance, the consolidated complaint as amended, alleged as follows:

1. That in late May 2009, the Respondent by Antonio Pabon, threatened employees with discharge and other unspecified reprisals if they supported the Union.

2. That beginning about June 10 or 15, 2010, and continuing through July 2009, the Respondent by its supervisors, Zukin, Pabon and Chomitz, engaged in surveillance of employees' union activities.

3. That on or about June 25, 2009, the Respondent by Chomicz, its quality control manager, engaged in surveillance and created the impression of surveillance.

4. That on or about June 25, 2009, the Respondent assigned employees more onerous jobs by increasing assignments involving walk up apartments.

5. That in or about late June 2009, the Respondent by Pabon, instructed employees to refrain from engaging in union activities.

6. That in late June and on or about July 7, 2009, the Respondent by Pabon (a) engaged in surveillance of employees' union activities; and (b) made threats of discharge and unspecified reprisals to employees.

7. That on or about July 3, 2009, the Respondent by Sam Gholam, its CEO, engaged in surveillance by photographing employees engaged in union activity.

8. That on or about July 6, 8, 10, and 17, 2009, the Respondent by Chomicz, interrogated employees about their union sympathies.

9. That on or about July 7, 8, 10, and 20, 2009, the Respondent by Pabon, interrogated employees about their union activities.

10. That from July 7 to 23 and on various other unknown dates the Respondent, for discriminatory reasons, discharged 40 employees.

11. That on or about July 10, 2009, the Respondent by Chomicz, threatened employees with discharge if they supported the Union.

12. That on or about July 10, 2009, the Respondent by Jasmine Rosado, its human resources manager, interrogated employees about their union sympathies.

The Objections to the Election

In relation to the representation case, the Union filed objections on August 19, 2009, and the Regional Director issued a report advising the parties that these allegations would be subject to a hearing. In addition to Objections 1 through 5, alleging the same conduct that is alleged in the unfair labor practice charges, the Union alleged:

Objection No. 5: That on unknown dates believed to be in the last 2 weeks of July 2009, the Employer threatened employees that if the Union's campaign was successful, the Employer would change the employees terms and conditions of employment including dealing with grievances and granting time off.

Objection No. 6: That during the critical period, the Employer discharged Roberto Arroyo, Urbie Cooper, Jose Maguana, Julich Mera, and Manuel Zhinin because of their activities or membership in the Union.

Objection No. 7: That on the date of the election, the Employer created the impression of surveillance by the deployment and/or use of video cameras in and around the polling place.

Objection No. 8: That on the date of the election, the employer intimidated employees who were attempting to vote and in some cases prevented employees from voting , by placing a supervisor and an armed guard either within or directly outside of and on the path to the polling place.

The Challenges

In her report, the Regional Director advised the parties that the various challenges to the votes of certain individuals would also be litigated. These are as follows:

1. The Employer challenged the ballots of Emanuel Martinez, Edwin Guavara, Miguel Lerbu, Enrique Velasquez, and Miguel Felix on the ground that they were no longer employed

as of the date of the election and therefore ineligible to vote. As these individuals were employed at the time that the petition was filed and it is alleged in the unfair labor practice case that they were illegally discharged, their eligibility will be determined by my conclusions regarding the 8(a)(3) allegations.

2. The Board agent conducting the election challenged the votes of the 26 individuals listed below because their names did not appear on the "eligibility" list that was used during the election.[1]

Roberto Arroyo	Jose Maguana
Urbie Cooper	Julich Mera
Enrique Dela Muez	David Neciosup
Franklymn Delahoz	Amavri Nunez
Jesus Diaz	Jose Rodriguez
Heuford Dominguez	Nelson Rodriguez
Alejandro Farciert	Rafael Ramos
Francisco Garcia	Carlos Segura
Andres Gomez	Adolpho Travanino
Warren Iglesias	F Daniel Torres
Victor Leclerc	Felix Zapata
Jose Martinez	Manuel Shinin
Humberto Matos	

As some of the individuals listed above were employed at the time that the petition was filed and are also alleged to have been discriminatorily discharged, their eligibility will be determined by the outcome of the unfair labor practice case.

3. There were six individuals who were not on the list and whose ballots were challenged. These were people who the Employer asserts were not employees of Flat Rate Movers but were employed by a separate corporation called Flat Rate Elite. This is a separate corporation that has its offices at the same facility and is owned by the same three owners that own Flat Rate Movers. The employees who were on the Elite payroll as of the time of the election and who therefore were not on the eligibility list were:

Jose Rodriguez	Carlos Segura
Amauri Nunez	Adolfo Trabanino
Jose Martinez	Felix Zapata

4. The employer put into evidence payroll records of seven employees who it asserts were challenged by the Union but who actually were employed by the Respondent during the election eligibility period. These were:

Michael Jagielski	Ouazeno Mourad
Giovanni Eleo	Adam Sarkozy
Tenzin Namgyal	Kazimierz Wiktorek
Carlos Monserrate	

5. The Union challenged a group of individuals who were hired by the Employer as seasonal employees. This group consisted of college or university students from foreign nations who were employed only during the summer under a particular Immigration program. That is, none of these people were citizens or permanent residents of the United States and were only allowed to travel and work in the United States under what is called a J1 visa.

The issue with respect to this set of employees is whether they were entitled to vote because they had a reasonable expectation of returning to work for the employer and had a community of interest with the other regular employees of the Company.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

There is no dispute and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (the Act). I also conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.[2]

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Company's Business Operations and the Great Recession

The Respondent is a Company that provides interstate moving services for commercial and residential customers. It was formed around 2001 and its owners are Israel Carmel, Sharone Ben-Harosh, and Zvi Lepar Klipper. In 2009, Klipper went to Israel and has not been involved in operations. The chief executive officer is Sam Gholan and three of the managers who were mentioned in this case were Gilead Zukin, Tony Pabon, and Prezemyslaw Chomicz. Also, the Company employed a human resource manager whose name is Jasmine Rosado. It was stipulated that all of these people were supervisors within the meaning of the Act. Finally, it is noted that during the relevant period, the Company employed a general counsel.

The Respondent operates its business in New York, Florida, California, New Jersey, and Washington, D.C. It has a sales office in Manhattan and operates a terminal at 27 Bruckner Boulevard. in the Bronx. Its Bronx operations consist of two buildings and two parking lots, one of which is for the Company's trucks. At the Bronx location there are about 230 employees who are directly engaged in moving operations.

[1] The use of the words "eligibility list" is a bit of a misnomer because unless there is a stipulation by the parties as to the eligibility of the voters, the list does not actually connote any conclusion regarding the eligibility of the names that are placed on the list or the names of persons left off the list. For convenience, the general practice is for the Board to utilize a list of names that has been furnished by the Employer when the election is conducted. As such, this list is simply one that reflects only the Employer's view of which employees are eligible to vote and the Union has the right to either challenge the names of people on the list or present other people to vote that it believes are eligible voters notwithstanding their absence from the "eligibility list."

[2] Although the Respondent denied that the Union was a labor organization, the Union's business agent testified without contradiction that it admits employees to membership and deals with employers concerning wages and other terms and conditions of employment. I therefore conclude that it is a labor organization within the meaning of Sec. 2(5) of the Act. *Alto Plastics Mfg. Corp*., 136 NLRB 850, 851–852 (1962).

In addition to the employees directly employed by the Respondent, the owners of Flat Rate Movers also set up, in April, 2008, a separate corporation called Flat Rate Elite which also operates out of the Bruckner Boulevard location. The purpose of Flat Rate Elite was to provide higher end moving services to customers who were willing to pay higher rates. The moving employees of Flat Rate Elite were recruited from the Respondent and they were paid a higher commission rate than the employees of Flat Rate Movers. During 2009, when business was slow for both corporate entities, Flat Rate Elite essentially appropriated jobs that had been booked by Flat Rate Movers and had those jobs reassigned to the drivers on its own payroll. Thus, when there was not enough jobs booked by Flat Rate Elite to keep its workers fully employed, that entity simply allocated to itself (via the Respondent's dispatcher), jobs that had been obtained by Flat Rate Movers.[3]

Until around August 2009, the moving employees were paid solely on a commission basis. That is, the crew assigned to do a moving job usually consisted of three or four men and were paid a total of 27 percent of the total price of the move. This was then divided amongst the members of the crew, with the highest going to the person designated as the foreman, the next highest going to the second foreman, the third highest to the driver, and the least to the helper. The practice was to maintain each crew as a unit and if the crew was not assigned to do any jobs on a particular day, they did not get paid for that day. Although there seems to have been some kind of health insurance program available, it seems that few if any of the employees availed themselves of this option. Therefore, the payroll costs to the Respondent essentially consisted of the payment of a set commission to each crew depending on the price for the job that was assigned.[4] I should note that after July 2009, the Respondent modified its pay plan so as to conform to the minimum wage laws of New York. Thus, under the new plan, employees would get paid either the commission rate or the minimum hourly and overtime rate, whichever was higher.

The evidence shows that the moving business is seasonal with the winter months being the least busy. Generally, the summer season is busier and this tends to run from May to September. The evidence also shows that from at least 2007, the Respondent has hired, through a set of agency sponsors, foreign national students who enter the United States under a particular work study program. Under this program, a foreign student who wants to visit and work in the United States, must obtain a United States sponsor (other than the prospective employer) and also obtain a J1 visa. If the student is successful in obtaining both, he or she would then be eligible to stay in the country for 4 months and work for some employer who is called a host. As far as I can see, this program is only open to foreign students, but is not limited to only 1 year.

Since it began operations in 2001, the Respondent has never had a group layoff or discharge of the moving department employees. The discharges that took place in July 2009 were the first instance of this type of occurrence in the Respondent's history.

There is no question but that the Respondent's business started to slow down in the fall of 2008 after the commencement of the Great Recession. Indeed, at that time, the Respondent cut the salaries of its managerial and administrative staffs by up to 10 percent; albeit it did not reduce the commission rates paid to the moving employees.

One consequence of the business slowdown was that Flat Rate Elite began to poach jobs from Flat Rate Movers and preference was given to the drivers on that company's payroll as opposed to the employees on the payroll of the Respondent.

Another consequence was that the Respondent's management made a decision to retain as many of its permanent crew as possible by offering potential customers reduced rates in an effort to increase the volume of its business even as the Company's profit margins were substantially reduced. The Company's witnesses described this program as "economy moves." And in my opinion, the evidence shows that the principle reason that the Company adopted this program was not so much to increase gross sales, but rather to retain (despite the program's adverse impact on costs), an experienced and qualified work force.[5]

The economy move program was started soon after the economy tanked and was continued until shortly after July 3, 2009, when it was abandoned. Thus, this program was canceled shortly after the Company became aware of the Union's organizing campaign. At that point, it apparently was no longer so important to retain an experienced group of permanent employees. And so the Company decided to discharge 40 of its permanent employees while at the same time continuing to keep a greater number of foreign college students who had been hired as temporary employees.

B. The Union's Organizing Campaign,Alleged Surveillance, and Company Knowledge

The Union's organizing efforts began in May 2009 when employee Daniel Torres called Union Business Agent Luis Rodriguez. Shortly thereafter, authorization cards were distributed to employees by Torres, Hayfreed Dominguez, and Nelson Rodriguez. These cards were surreptitiously distributed by them during May and for most of June 2009.

However, commencing on or about June 21, 2009, the Union decided to bring its organizing campaign out into the open and from that date onward, union agents stationed themselves at the

[3] In addition to Flat Rate Movers and Flat Rate Elite, there are a number of other commonly owned corporations such as Flat Rate Long Distance, Flat Rate International, Flat Rate Other Inc., and another company that deals with storage. Furthermore, the building on Bruckner Boulevard in the Bronx is owned by 27 Bruckner Boulevard Corp. and the shareholders of that corporation are the same as the Respondent.

[4] In the case of Flat Rate Elite employees, this was not strictly the case. According to testimony by the Employer's witnesses, Flat Rate Elite employees received a higher commission rate based on a higher price paid by that company's customers. However, when Flat Rate Elite started poaching the jobs obtained by Flat Rate Movers, the former's employees received the same commission rate even though the price charged to the customer was a good deal lower.

[5] According to the testimony of Sam Gholam, the Company's chief operating officer, "we introduced economy moves where we charged less just to keep the guys kind of busy."

corner of Bruckner Boulevard and Lincoln Avenue every morning from around 6:30 to 9 a.m. where they talked to employees, solicited signatures on union authorization cards, and distributed union literature. Business agent Rodriguez testified that he also started to meet with employees who frequently ate breakfast at a local restaurant called La Famiglia before going out on their routes.

The Respondent admits that it became aware of the Union's organizing campaign by June 24, 2009.

The General Counsel contends that during the period from around June 24 to mid-July 2009, agents of the Respondent engaged in surveillance of the employees' union activities outside or near the Respondent's facilities. The evidence on this score is not convincing. There is no question but that from late June 2009, company supervisors found themselves outside the facility or at the nearby restaurant where they happened to look at and observe union agents talking to employees. But much of this union activity was taking place at the corner of the street where the facility was located and was at most, 100 to 200 feet away from the entrance. Therefore, the union activity was open and notorious and was conducted at times when company supervisors could not help but being present either because they were going to work, getting a bite to eat, having a cigarette, or checking to see that the trucks and their crews were ready to go out on their appointed rounds.

In short, while the evidence establishes that the Company's supervisors, managers, and owners had knowledge of the Union's activity no later than June 24, 2009, and had observed its employees talking to union representatives, I don't think that the evidence is sufficient to establish that the Respondent's agents engaged in activities that were outside their usual routines and therefore constituted unlawful surveillance. See for example *Sprain Brook Manor Nursing Home, LLC,* 351 NLRB 1190, 1191 (2007); *Loudon Steel, Inc.*, 340 NLRB 307, 311 (2003). In those cases, the Board held that an employer may observe open union activity at or near its property, but that cannot do something "out of the ordinary," which gives employees the impression that it is surveilling its employees' union activities.[6]

On July 6, 2009, the Union filed a petition for an election in Case 2–RC–23399.

C. The Discharges

As noted above, the Respondent started to experience a drop in sales around October 2008. And although it reduced the salaries of its managerial, supervisory, sales, and clerical employees by up to 10 percent, it did not lay off any of its moving employees or reduce their commission rates. Instead, it reduced its prices in order to increase the sales volume so that there would be adequate work for the movers.

According to Jasmine Rosado, the Company's human resource manager, she learned how bad business was at management meetings but nevertheless was instructed to go out and hire temporary employees for the summer of 2009. Thus, in a letter sent to a company called Starway dated April 30, 2009, Rosado confirmed that the Respondent was willing to hire 17-listed foreign students for the summer of 2009. Shortly thereafter, she sent another letter to Starway indicating that Flat Rate was willing to hire an additional 10 people. If business was so terrible at the time, it is apparent that Respondent's management expected things to pick up by the summer. (Typically, the summer months constitute the Company's busiest season.)

With respect to the seasonal employees that were hired, it should be noted that they were paid at the same rates and worked under basically the same terms and conditions as the Company's regular employees. The contracts that Flat Rate made with the referring companies indicate that these students would be retained for a maximum of 4 months and were terminable at will. As noted above, these temporary employees were hired under an Immigration Department program to promote relatively short visitations to the United States by foreign students. I will have more to say about these students when we discuss their voting eligibility status. Suffice it to say that starting in May 2009, these people started arriving at Flat Rate and were put to work.

General Counsel's Exhibit 6 is a memorandum dated May 18, 2009, that memorializes a discussion between two of the owners, Ben-Harosh and Israel Carmel. It states:

> As discussed today, we need to continue reducing our company expenses due to the fact that we projected less income during summer 2009.
>
> Our major expense, the payroll, must be reduced. We need to look in all departments to see where we can cut manpower.
>
> Need to save also on the other two major expense items, packing material (continue to do triple bidding) and insurance (renewal in few weeks).
>
> Will continue monitoring income and expense at the beginning of June and will advise.

Notwithstanding this memorandum, the evidence shows that the Respondent had hired 19 seasonal employees before it was written. Moreover, subsequent to May 18, the Respondent hired 16 more seasonal employees in May, 18 more seasonal employees in June, and one more seasonal employee in July. So much for cutting down on manpower.

As noted above, the Union went public with its organizing campaign on or about June 21, 2009, by stationing its agents outside the facility. As the Respondent has security cameras focused on the street, it is unlikely that it did not become aware of this activity as soon as it started. Nevertheless, there is no dispute that the Respondent's management became aware of the Union's campaign no later than June 24, 2009.

General Counsel's Exhibit 7 is a memorandum dated June 28, 2009, sent by Carmel to Ben-Harosh. It states:

> As we reviewed May 2009 budget report, we noticed that the income dropped considerably in comparison with prior year, May 2008.
>
> Therefore, more expenses need to be cut and we need to consider reducing more manpower [including] slowing down in sales. Currently, even with offering less $/cu.ft. we are losing much more per job.

[6] On balance, I am going to credit the witnesses of the Respondent who denied engaging in surveillance.

> I understand that you believe that if we to reduce our sales (and manpower accordingly) by 10% we would be able to increase eventually our rates during the Summer or immediate thereafter.
>
> We will check the scenario of layoff movers as a result of reducing sales and improving our A/R to A/P ration.
>
> Will monitor June sales again in the beginning of July so we can take final decision.

The Respondent asserted in its brief that Carmel and Ben-Harosh "did not know about the Union campaign when it made the final decision to lay off workers."[7] But this is not correct. While it may be said that they thought about the possibility of laying off some workers before they became aware of union activity, the June 28 memorandum clearly shows that no final decision had yet been made. Therefore, the evidence establishes that the decision to discharge employees was made almost immediately *after* the Company became aware of the Union's organizing activity.

According to Jasmine Rosado, she was involved in at least two meetings in June and before July 3, 2009, where there was discussion about the possibility of cutting about 40 jobs. She also testified that there was no discussion about laying off the seasonal employees who had just come to work in May and June.

On or about July 3, the Company's owners made the decision to discharge 40 moving department employees and on that date, the Company posted a notice which read:

> Our most recent strategy to increase sales by lowering our price per cube has been, for the most part, ineffective. Through this plan, we intend to focus on few moves at prices reflecting the quality of our services, designed to allow us to continue operations which will likely result in better quality moving jobs and additional employee benefits.
>
> As a result of the current economic environment and in the hopes of reemerging a stronger more efficient company, we have reached the conclusion, after weighing a wide variety of options, that downsizing within various departments through the Company is the necessary, although unfortunate approach that must be implemented in order to survive these turbulent times.
>
> In these uncertain economic times, to which the Company is not immune, difficult decisions must be made. Please accept our assurances that we have weighed alternative options very seriously. We appreciate your patience and commitment to the Company's business and will keep you apprised as further developments arise.

The July 3 notice was the first indication that any of the employees had that there would be terminations. The discharge decision also seems to have come as a surprise to Sam Gholam, the Company's CEO.[8]

In any event, the evidence shows that a decision was made on or about July 3, 2009, to discharge (not lay off) 40 of the Company's permanent moving department employees. They were not told that they might be recalled when business conditions improved. The Respondent also decided that all of the foreign students should be retained.

According to Rosado, she and the other managers met over a few days to select the people who would be discharged. In this respect, it is not clear to me precisely when this selection process started and when it finished. Assuming that the discharge decision was made on July 3, the fact that the following day was July 4, and that it took at least 2 days to come up with a list, it seems likely that the initial selections were probably made after the Election Petition was filed. But even if the initial selections were made before the Petition was received, this is of no great moment because it is clear to me that the decision to have a mass discharge was made immediately after the Company became aware that the Union was engaged in an organizing campaign.

According to Rosado, the process of selecting names involved a roundtable discussion where the personal records were available so as to evaluate the workers in terms of attendance, prior warnings, accidents etc. (Other company witnesses do not recall documents or personal files being present.) In any event, Rosado testified that although there was a good deal of documentation present, there also was some documentation missing for employees that some of the managers did not like. She testified that there was a consensus decision as to which employees to let go. There is no evidence that there was any discussion about the seasonal employees at these meetings.[9]

The Respondent asserts that laying off the seasonal employees was not an option. It asserts that the Company was fearful of the repercussions of breaching its contracts with the sponsoring agencies that referred the foreign students for summer work. Apart from the minimal amount of testimony by company witnesses to support such a fear, the fact is that an examination of the exemplar contracts put into evidence by the Respondent shows that Flat Rate could easily have laid off or terminated these temporary employees without any risk of penalty.[10]

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[7] P. 22 of Respondent's brief.

[8] Gholam testified that he was not involved in discussions about laying off employees and only found out about that decision on July 2 or 3, 2009. He testified that when he was told of the decision he relayed that to his managers to carry out the decision.

[9] There was evidence that many of the discharged employees had prior warnings. (A large number of these were in the category of not calling in when employees failed to show up for work.) But others did not receive any warnings and in some cases the warnings had been issued long before the discharge decisions were made. The record does not show what if any warnings were issued or not issued to those of the permanent employees who were retained. There is, therefore, no way to compare the disciplinary records of the discharged employee with those who were not discharged.

[10] For example, the contract with Cenet merely states; "[I]f there is a problem between the student and the host company or if the host company must release the student because of downturn in business or any other unforeseen difficulty the sponsor will be notified immediately." The contract with Intrax Work Travel states that the host company will make a good-faith effort to retain the IWT participant for as long as possible and with as many scheduled hours as possible in the event of a labor force reduction due to unforeseen circumstances. The contract with InterExchange states that the student understands that either he or [Flat Rate] can terminate the employment relationship at any time with

The other reason given for not laying off or discharging the seasonal employees was that they were seasonal and would therefore leave after the summer. I don't really understand this rationale. To my mind, this is an example of circular reasoning; that the Respondent did not want to lay off the temporary workers because they were temporary workers. From October 2008 until the end of June 2009, the Company went to substantial lengths to retain its permanent work force, even to the extent of making extensive unprofitable sales in order to "keep the guys busy." Now all of a sudden, it no longer was important to retain an experienced, trained and permanent work force.

Between July 3 and 6, 2009, the Company asked the moving employees to sign a "non-disclosure agreement." This was designed to prevent employees from disclosing to outside people information that the Company deemed to be confidential. This included "information concerning company's employees, including salaries and skills." While the General Counsel does not allege that the solicitation of these nondisclosure agreements constituted an independent violation of the Act, the fact that employees were asked to sign a document agreeing to keep their wages secret from outsiders shows an intention to keep the Union at bay.

On July 7, 2009, the Company started to discharge permanent moving department workers. Forty employees were fired over the next 2 weeks while the foreign students were retained. During the course of the exit interviews, each employee was asked to sign a separation agreement/release form. In some of the discharge interviews, David L. Giampietro, its general counsel was present. (It is likely that these forms were drafted or adopted by its in-house attorney.) The discharged employees were offered amounts ranging from $150 to $400 to sign these documents. In pertinent part, they read:

> In consideration of the promises contained in this Agreement, you agree:
>
> a. On behalf of yourself and anyone claiming through you, irrevocably and unconditionally to release, acquit and forever discharge the Company and/or its parent corporation… from any and all claims, liabilities, promises, actions, damages and the like, known or unknown, which you ever had against any of the Releasees arising out of or relating to your employment with the Company and/or the termination of your employment with the Company.
>
> b. That you shall not bring any legal action against any of the Releasees for any claim waived and released under this Agreement and that you represent and warrant that no such claim has been foiled to date. You further agree that should you bring any type of administrative or legal action arising out of claims waived under this Agreement, you will bear all legal fees and costs, including those of the Releasees.

While some of the discharged employees could speak and/or write English, many could not. The form were not translated into Spanish and even assuming someone could read and understand English, the document is composed in the type of legalese that ordinary people are not likely to understand. Some employees took the proffered money and signed the form. Most did not. The Respondent contends that the 15 employees who signed the forms have no legal standing to pursue any claims or obtain any remedy from the National Labor Relations Board.

The election was held on August 14, 2009, and the votes were indeterminate because of the number of challenged ballots.

Starting in late September 2009, the Company started to hire new employees. As shown in General Counsel's Exhibit 3, two new employees were hired in September and 33 new employees were hired in October. Except for one person (Frandy Cabrera), none of the people who were discharged in July were recalled at that time.[11]

This case involves a group discharge and it is not necessary for the General Counsel to establish that the Employer had knowledge of the union activities of each and every individual employee who was discharged. *Delchamps, Inc*., 330 NLRB 1310, 1317 (2000). The General Counsel's theory is that this mass discharge was motivated by the Respondent's desire to discourage union activity amongst its employees. The fact that certain employees who were not involved in union activity may also have been discharged does not rule out a finding that the decision was itself unlawfully motivated. As pointed out by the General Counsel in his brief, the court in *Majestic Molded Products, Inc. v. NLRB*, 330 F.2d 603, 606 (2d Cir. 1964), stated that a "power display in the form of a mass layoff, where it is demonstrated that a significant motive and a desired effect was to 'discourage membership in any labor organization,' satisfied the requirements of Section 8(a)(3) to the letter even if some white sheep suffer along with the black."

In determining whether the Respondent's motivation was to discourage union activity, the timing of the decision in relation to when the Employer became aware of union activity can by itself, raise a strong inference, via circumstantial evidence, of both knowledge and animus. *Best Plumbing Supply*, 310 NLRB 143, 144 (1993). On the other hand, the employer can show that its decision was motivated by a legitimate intervening event occurring between the time that it obtained knowledge of union activity and its decision to discipline or discharge the employees in question. *Dallas & Mavis Specialized Carrier Co*., 346 NLRB 253 (2006).[12]

prior notice to the employer and InterExchange . . . for any reasons not prohibited by law.

[11] On July 10, 2010, the Regional Office of the NLRB obtained an injunction pursuant to Sec. 10(j) of the Act which required the Respondent to reinstate a large number of the discharged employees.

[12] With respect to the issue of knowledge, I note that decimation was a practice of the Roman Army to punish a group of defeated soldiers by selecting, at random, a tenth for execution. It seems that the Romans felt that it was not necessary to have knowledge of the particular culprits in order to influence the behavior of the group. By the same reasoning, the rational course of action for an employer who wants to discourage a union organizing campaign (and who either doesn't know or care about the law), would be to discharge a portion of his work force without regard to who were the union activists. This should do the trick.

In my opinion, the General Counsel has made out a compelling prima facie showing that the Respondent's decision to discharge this group of employees was made for discriminatory reasons. Thus, contrary to the Respondent's contention, the decision to discharge employees was made only after June 24, 2009, when the Respondent admittedly became aware of union activity.

Because I conclude that the General Counsel has made out a prima facie showing that the Respondent's decision to engage in a mass discharge in order to discourage its employees from engaging in union activity, it is incumbent on the Respondent to demonstrate that it would have taken the same action notwithstanding the employees' union or concerted activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). In my opinion, the Respondent has not met its burden.

The Respondent asserts and I am willing to accept the proposition that business had declined because of the recession. But that decline started in October 2008 and despite its continuance, the Company made the decision to lower its prices and thereby increase its volume (at a reduced margin), in order to "keep the guys busy." To me this would be a rational decision only if it was important for the Company to keep its permanent work force intact and available for the time when it anticipated that business would pick up. Until July 2009, the Respondent not only refused to lay off permanent workers, it essentially decided to subsidize them in order to retain them. Moreover, in or around April 2009, the Company decided to hire a substantial number of foreign students to work from May to September. If business was bad, it seems that the Company anticipated that it would sufficiently improve during the summer season so as to support its normal workforce plus around 60 additional seasonal workers. Indeed, while contending that business was only getting worse, the Respondent went ahead and put those students to work starting in May 2009.

Assuming that by the end of June 2009, the Company's business continued to decline and therefore necessitated (finally), a decision to reduce its work force, the question is why choose to discharge (and not layoff), permanent workers who the Company had made such efforts to retain and not an equivalent number of temporary workers. To answer that question simply by stating that the temporary workers were temporary does not make any sense to me. To say that the Respondent feared that it would be in breach of its employment contracts is not convincing since the terms of those contracts treated the summer students as at-will employees who could be laid off or discharged at any time. It might have made some sense if the student employees were less costly to the Respondent than the permanent employees. But that was not the case as they were paid the same wages and worked under the same terms and conditions of employment as the permanent employees.

Given my conclusion that the owners and managers of the Respondent were rational, the only rational reason that I can see for making this choice would be that the permanent employees would be more likely support unionization whereas the foreign students, who would soon be returning to their homes in Europe, would have nothing to gain by supporting a union and would therefore not likely be a group that would favor unionization.[13]

The Respondent asserts that even if I were to conclude that the discharges were illegally motivated, I cannot provide a remedy to the 15 discharged employees who signed the separation agreements that contained what purport to be releases. In this regard, the Respondent relies on *BP Amaco Chemical-Chocolate Bayou*, 351 NLRB 614 (2007), where a Board majority of Battista and Schaumber (with Liebman dissenting), concluded that severance agreements containing similar releases signed before any unfair labor practice charges had been filed by a group of employees laid off in a reduction in force, precluded any Board remedy for claims that they had been selected for termination because of their union sympathies or activities. In my opinion, the facts in this case are sufficiently distinguishable as to make the holding in *BP Amaco* inapplicable.

Unlike the facts in *BP Amaco*, the record in this case shows that many of the employees who were asked to sign the release could not read or adequately understand the contents of the document. Indeed, even if they could read English, this is a document that is drafted in language that a nonlawyer is not likely to understand. The evidence does not show that the employees were given an adequate explanation of what a release meant. There is no evidence that they were notified that by executing the document this would preclude them from filing or getting relief from the Board. While some were told that they could consult an attorney, there is little likelihood that this class of individuals would likely have access to legal counsel. Nor were the employees given a reasonable period of time to revoke any document that they signed. In my opinion, the consideration for executing the release, ranging from $150 to $400 was totally inadequate. And unlike the facts in *BP Amaco*, the General Counsel did not acknowledge that it had a weak case.

Therefore, I conclude that by discharging the 40 employees named in the complaint in order to discourage its employees from supporting a union or engaging in union or protected concerted activities, the Respondent has violated Section 8(a)(1) and (3) of the Act. Because, absent the discrimination against them, they would have been employed as of the eligibility date and on the date of the Election, I also conclude that these individuals were eligible to vote and that their challenged ballots should be opened and counted. Finally, based on the above, I will sustain the Union's objections which allege, inter alia, that the Respondent discharged employees in order to dissuade employees from engaging in union activities.

Before moving on to the other allegations, I note that the evidence suggests that the Respondent made its decision to discharge 40 employees on July 3, 2009. The evidence further suggests that the selection of some but not all of the persons for discharge took place before July 7. However, the evidence also

[13] I am not going to rely on certain testimony of Humberto Matos in reaching the conclusion that the 40 discharges were illegal. He testified that at his exit interview he asked Pabon if he was being fired because of the Union and that Pabon said, "could be." But on cross-examination, his testimony was that Pabon never said those words and simply shrugged his shoulders. In this context, I don't think that a shoulder shrug is the equivalent of a yes.

shows that the selection of whom to discharge was not completed by July 7 and that the selection process went on for at about 2 weeks after that date. Thus, not all of the discharges took place on July 7 or 8. Instead, this process continued through to July 23 when Roberto Arroyo, the final employee, was fired.

D. Other 8(a)(1) Allegations

Daniel Torres testified that at some point after the Union's representatives started showing up outside the facility, he was in the dispatch area to pick up his contract and Tony Pabon said something about an incident and then asked: "Did you sign a card?" Torres replied that he did not. According to Torres, Pabon then said: "[B]ecause you know what's going to happen to you if you sign that card." Torres placed this incident as occurring about 10 or 12 days before he was fired. (He was fired on July 10, 2009.) Pabon denied that he interrogated or threatened Torres or anyone else.

Franklyn Delahoze testified that on or about July 6, 2009, he had a conversation with Chomicz about getting a shirt and that when Chomicz took him into a room that had uniforms, he asked if Delahoze was part of the Union and if he had signed a card. Delahoze testified that he asked Chomicz why he was asking this and that he only wanted to get a shirt. According to Delahoze, Chomicz gave him a shirt and the conversation ended. Delahoze was discharged on July 7, 2009. Chomicz denied this allegation.

Edwin Guevara testified that on June 26, 2009, after he parked his truck, Pabon came over and told him:"Don't associate with the union and don't get involved with the union." According to Guevara, no one else was present and he thereupon stubbed out his cigarette and went to the office. Guevara was included in the initial batch of discharged employees and was kept on until July 15, 2009.

Miguel Lerbu testified that around June 25 or 26, he was in the materials area when Gilead Zukin asked him if he was supporting the Union. He states that Zukin said that he had to tell him if his preference was for the Company or for the Union. Lerbu testified that he responded that he supported both the Company and the Uion. Zukin testified that he didn't recall speaking to any of the employees about the Uion.

Jesus Diaz testified that he was called to go to a meeting with human resources on July 8 and that while he was waiting, Pabon came over and said: "[Y]ou want to be with the Company or the union?" Diaz testified that after this statement he waited for about 2 hours before he was called into a meeting with Rosado who told him that he was being discharged and asked to sign a paper.

Humberto Matos testified that on July 8, 2009, he was called into a meeting with Rosado and Pabon at which he was discharged. He testified that during this meeting, Pabon asked if he was with the Company or with the Union.

Miguel Lerbu testified that on July 10, 2009, he was called into the office to meet with Rosado and she started asking him questions including whether he was supporting the Union. He states that she said, "I'm going to be straight up and direct [with] you, what is it that you prefer, the union or your job?" Lerbu testified that he responded by saying that he preferred his job but that he was going to continue to support the Union. At that point, according to Lerbu, Rosado said: "[W]ell you're no longer going to work for this company." Rosado denied interrogating any employees or making any threats.

Nelson Rodriguez, who was fired on July 10, testified that he was asked to go to a meeting with the human resource person on that date and that before he actually entered the meeting, Pabon asked about the Union and that he responded that he supported the Union. At this point, according to Rodriguez, Pabon said: "Okay then, just go to Human Resources." He was then discharged.

Alejandro Farciert testified that after his discharge, he returned to the Company on or about July 17, in order to turn in a cell phone and some contracts. Farciert states that he asked a police officer to accompany him to the office and that after the officer left, Chomicz asked him why he had contacted and supported the Union. According to Farciert, Chomicz, in the presence of Rosado, stated that he would lose his job and his family would go hungry because of his support for the Union. At this meeting, Farciert was asked to and refused to sign a separation agreement that listed a number of prior warnings as additional grounds for his termination. One of these was for an incident involving his crew where he acknowledges that on July 1, 2009, they ate some of the customer's fruit. These alleged statements are denied by Chomicz and Rosado.

The issue here is essentially one of credibility. Some, but not all of the employees called by the General Counsel related conversations in which they reported that managers, Rosado, Pabon, Chomicz, and Zukin either interrogated them about whether they supported the Company or the Union and in a few cases indicated that their jobs depended on who they supported. Except for Zukin, the Respondent's witnesses expressly denied these allegations. (In Zukin's case, he didn't recall making any statements about the Union.)

The Respondent asserts that it is implausible that its managers would have interrogated employees about the Union at the exit interviews inasmuch as the list of employees had already been selected for discharge. (No such list was offered into evidence.) But this is not precisely correct. It seems to me that although the Respondent had, before July 7, selected some of the 40 employees to be discharged in the first wave starting on July 7 and 8, it had not yet selected all of the people it was going to discharge. On the contrary, the evidence suggests that the process of selection went on after July 7 and into the next 2 weeks. And since I am convinced that the decision to discharge permanent employees instead of the foreign student temporary employees, was motivated by its intention to cull union support, it is entirely plausible that from July 7 to 23, the Respondent's managers made further efforts to ascertain who would likely support the Union and who would not.

In view of all the circumstances and based on my observation of the demeanor of the witnesses, I conclude that the Respondent (a) on various dates in June and July 2009 interrogated employees about their union sympathies and support and (b) threatened employees with job loss if they supported the Union.

As there is no convincing evidence that Sam Gholam took photographs of the employees while talking to union representatives, I shall dismiss this allegation.

E. Alleged Imposition of More Onerous Working Conditions

The General Counsel contends that the Respondent, after June 25, 2009, began to assign the crew that included Alajandro Farciert and David Neciousup to the more onerous assignments of doing moves that required them to walk up stairs. As it is conceded that the Respondent became aware of union activity no later than June 24, it is the General Counsel's contention that this was motivated by antiunion considerations.

Not everyone in New York City lives in apartment buildings with one or more elevators. Many people live in apartments that do not have elevators and where the movers would have to carry furniture up and down stairs. Obviously, the Respondent takes what customers it can get and there is a random mix of residential moving jobs that require the movers to walk up and down stairs. This does involve greater physical effort on the part of the moving crew but it is also noted that in these cases, the customers are typically charged an extra fee and therefore the movers derive some part of that fee as part of their commissions.

Notwithstanding the General Counsel's contention that the Respondent, after becoming aware of the union activity, picked on the Farciert/Neciousup crew to assign them the more onerous stair jobs, the objective evidence does not, in my opinion, support this claim. The fact is that this crew has always been assigned stair jobs from time to time and the Respondent demonstrated that during the week of June 2 to 8, 2009, this crew had five such assignments.[14] Obviously, as Farciert and Neciousup were discharged not long after July 7, 2009, it is hard to say that their assignments for the week after June 25 was typical or out of the ordinary. That is, it is impossible for me to say based on this record, whether the Farciert/Neciousup crew was assigned to stair jobs more frequently than normal after June 25 than before. I therefore shall recommend that this allegation be dismissed.

III. THE REPRESENTATION CASE

A. The Objections

Inasmuch as I have already concluded that the Union's objections, to the extent that they alleged that the Employer, after the petition was filed, discharged 40 of its employees in order to discourage the remainder from engaging in union activity, it is unnecessary for me to make findings or conclusions with respect to the other objections. This is sufficient to overturn the election.

I therefore recommend that in the event that the resolution of the challenges and the votes subsequently cast do not result in a majority for the Union, that the election in be set aside and that Case 2–RC–23399 severed and remanded to the Regional Director in order to conduct a new election.

[14] See R. Exhs. 13 to 17.

B. The Challenges

I have already concluded that the Respondent illegally discharged 40 of its permanent moving employees. It follows that, but for the illegal discrimination against them, they would have been employed on the eligibility date and the date of the election. Therefore, all of these employees were eligible to vote and their ballots should be opened and counted. They are listed in appendix A.

The Union challenged the votes of Michael Jagielski, Goovanni Eleo, Tenzin Namgyal, Carlos Monserrate, Ouazeno Mourad, Adam Sarkozy, and Kazimierz Wiktorek on the grounds that they were not employed during the relevant period of time. The Employer presented documentary evidence showing that these people were employees on the eligibility date and the date of the election.[15] I therefore conclude that their ballots should be opened and counted.

The ballots of Jose Rodriguez, Carlos Segura, Amauri Nunez, Adolfo Trabanino, Jose Martinez, and Felix Zapata were challenged because they were not on the eligibility list because the Employer claimed that they were employed by a different company.

These six individuals were not on the direct payroll of Flat Rate Movers but were place on the payroll of a company called Flat Rate Elite. This is a separate corporation that has its offices at the same facility on Bruckner Boulevard and is owned by the same three owners that own Flat Rate Movers.

Originally all of these individuals had been employed by Flat Rate Movers. But in April 2008 they were hired by Flat Rate Elite when that corporation was formed. The purpose of the latter corporation was to provide more specialized moving services to higher-end customers for a higher fee. Nevertheless, after the slow down started in October 2008, the individuals on the Flat Rate Elite payroll were assigned to do work that was obtained by Flat Rate Movers and ordinarily would have been done by its employees. These assignments given to the challenged employees were done through the dispatch office of Flat Rate Movers. Moreover, not only did Flat Rate Elite employees do work on the Flat Rate Mover accounts, they were given a preference as to assignments over Flat Rate Movers' own employees. If there was not enough work for all, Flat Rate Elite employees would get the jobs first to the detriment of Flat Rate Movers employees.

Although these six individuals remained on the payroll of a separate corporation (that was commonly owned and controlled by the same people as Flat Rate Movers), they performed work on a regular basis for Flat Rate Movers during 2009.

In light of the above, I conclude that after October 2009 and until at least the date of the election, Flat Rate Movers and Flat Rate Elite operated as a single employer and that the individuals nominally employed by Flat Rate elite were, in effect, also employees of Flat Rate Movers. See *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1122 (3d Cir. 1982). As these employees performed the same type of work as the employees in the bargaining unit, I conclude that their ballots should be opened and counted.

[15] R. Exhs. 57 through 63.

The other large group of people who were challenged, were the individuals who were hired to work for the summer season. This group consisted of college or university students from foreign countries who obtained travel/work J1 visas under rules of the Immigration Service. Basically, the purpose of these types of visas is to permit foreign students to visit the United States for no more than 4 months and be employed during that time. Most of these employees came from Eastern European countries.

The evidence shows that for at least 2 years before 2009, the Company has employed college or university students from foreign countries to work as moving employees from around the beginning of May to September.

In 2008, the Company employed 49 summer seasonal employees of which about half came from eastern Europe.

In 2009, and notwithstanding the economic slowdown, the Company decided to make offers through sponsors to a larger number of foreign students to work during the summer of that year. These offers commenced in April and by the beginning of July, the Company hired 63 students. These people were retained over the permanent employees who began being discharged on July 7, 2009. Of the group of 63 seasonal employees, between 15 and 19 had previously been employed in the summer of 2008 and 10 had been employed in 2007.[16]

The seasonal employees who were hired for 2009 left the Company's employ by September 2009 and presumably went back to their studies in their countries of origin.

Human Resource Manager Rosado testified that in August 2009, she conducted a survey among the seasonal employees to inquire who would be interested in returning for the summer of 2010. Before the election was held on August 14, she also sent out a letter purporting to make an offer of employment for the summer of 2010. There is no indication in the record as to how many, if any, of the summer employees indicated that they would accept the offers. In any event, for the summer of 2010, the Company hired no seasonal employees.

The principle test as to whether seasonal employees are eligible to vote is whether they have a reasonable expectation or reemployment in the foreseeable future. *L & B Cooling, Inc.*, 267 NLRB 1 (1983).

In the present case, there is evidence that the Company has hired seasonal employees, some of whom it had previously hired. That is, in 2009, about a fourth of the group had been employed during the summer of 2008 and a smaller percentage had been employed in 2007. On the other hand, no seasonal employees were hired in 2010.

The seasonal employees perform the same work under the basically the same conditions of employment as the Company's permanent work force. On the other hand, I doubt very much that these university students would likely have any intention of ever becoming permanent moving employees in the future. This is the type of work that college students do in order to pay for tuition and expenses. And this case, this is the kind physical labor a young man one might do in order to get a paid for trip to the United States.

In order to work for the Company, these individuals need to obtain sponsors in the United States and obtain J1 visas that will allow them to work for a limited time in this country. There is no guarantee that having obtained this visa once, they will be successful in obtaining either a sponsor or a J1 visa in any subsequent years during their university educations. After graduation, they no longer would be eligible under this program and would need to become registered permanent residents in order to work at this type of job (i.e., obtain a green card).

In my opinion, the record shows that there has been a high rate of turnover among the seasonal employees. Further, given their student status in countries outside the United States, there is, in my opinion, little likelihood that any material number would ever consider becoming permanent moving department employees of Flat Rate or any other moving company. As such, it is my opinion that these individuals do not share a community of interest with the bargaining unit employees. *Freeman Loader Corp*., 127 NLRB 514 (1960); *Maine Sugar Industries*, 169 NLRB 186 (1968); *Beverly Manor Nursing Home*, 310 NLRB 538 fn. 3 (1993); and *Fisher Controls Co*., 192 NLRB 514 (1971). Accordingly, I recommend that their ballots remain unopened and uncounted.

CONCLUSIONS OF LAW

1. By interrogating employees about their union sympathies and activities, the Respondent has illegally interrogated employees in violation of Section 8(a)(1) of the Act.

2. By threatening employees with job loss, the Respondent has threatened employees in retaliation for their union activities and has violated Section 8(a)(1) of the Act.

3. By discharging employees in order to discourage its work force to refrain from supporting or engaging in union activities, the Respondent has violated Section 8(a)(1) and (3) of the Act.

4. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Union's objections to the election are sustained to the extent that they allege that the Respondent illegally discharged employees.

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.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1187 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

With respect to Case 2–RC–23399, that case is severed and remanded to the Regional Director to take appropriate action consistent with my findings as to the challenges and objections.

[16] In the absence of any objection, I will receive into evidence R. Exhs. 71(a) to (j) representing personal files of ten individuals who were employed as summer students in 2007 and in 2009.

On these findings of fact and conclusions of law and on the entire record, I issue the following conclusions and recommended[17]

ORDER

The Respondent, Flat Rate Movers, Ltd., Bronx, New York, its officers, agents, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union sympathies and activities.

(b) Threatening employees with job loss in retaliation for their union activities.

(c) Discharging employees in order to discourage employees from joining, assisting or supporting Local 116, RWDSU, UFCW, or any other labor organization.

(d) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed to 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 the employees listed in Appendix A, 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.

(b) Make the employees listed in Appendix A 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 this Decision.

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

(d) Preserve and, within 14 days of a request, 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.

(e) Within 14 days after service by the Region, post at its Bronx, New York facility, copies of the attached notice marked "Appendix B"[18] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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 26, 2009.

(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.

Dated, Washington, D.C., March 7, 2011

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

[18] 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."

APPENDIX A

Discharged employees[1]

Name	*Date of Discharge*	*Did employee sign release?*	*Prior Disciplines*
Edwin Guevara	7/7/09	No	10/6/09 No call/no show.[2]
Petar Draskovic	7/7/09	Yes	None
Franklyn Delahoze	7/7/09	No	11/2/07 No call/no show. 1/2/08 No call/no show. 7/1/09 Refusal to do a job.[3]

[1] A good deal of this information comes from R. Exh. 68. Other exhibits were also used to make this summary.

[2] This refers to a situation where the employee hasn't shown up for work and did not call in to advise that he would be absent. I note that the Employer introduced into evidence three motor vehicle reports involving accidents that Guevera asserted were not his fault. None of these resulted in any warnings or other disciplinary actions.

[3] Delahoze testified that on this occasion, he was told to do another job in the late afternoon after he had finished his regular assignment and sent home his crew.

Jesus Diaz	7/7/09	No	4/12/08 Refused Saturday work at NJ facility. 10/27/08 Ran a red light. 4/4/09 Refusal to work on a second job. 5/6/09 Refusal to work on a Sunday.
Humberto Matos	7/8/09	No	None
Jorge Gonzales	7/8/09	No	12/26/08 2/6/09 6/5/09 No call/no show. Final warning. 6/30/09 Notice or termination, rescinded on 7/1/09.
Angel Bazares	7/8/09	Yes	6/22/09. Disrespectful to another employee.[4]
Victor Leclerc	7/8/09	No	12/12/08 Not showing up for a class 2/18/09 7/7/09. Allowing helper drive w/o approval.
Segundo Carcipulla	7/8/09	Yes	8/12/08 Refusal to do job. 12/23/08 No call/no show.
Manuel Zhinin	7/8/09	No	8/12/08 Refusing to do a job.
Ficco Arialdis	7/8/09	Yes	12/10/07 Not reporting to work on a Sunday. 3/14/08 No call/no show. 9/9/08 No call/no show. 10/29/08 Showing up for work unshaven.
Francisco Garcia	7/8/09	No	7/2/09 Complaint from landlord on 6/29/09.
Emmanuel Martinez	7/9/09	Yes	11/05/08 Came to work without proper uniform. 2/10/09 Seven day suspension for bad attitude.
Ramon Zapata	7/9/09	No	7/1/09 Eating customer's food.
Miguel Angel Lerbu	7/9/09	No	11/05/08 Not showing up at the end of the month.
Parris Knight	7/9/09	No	11/7/06 No call/no show. 4/23/09 No call/no show Final warning.
Jesus Camacho	7/9/09	No	3/31/08 No call/no show 1/14/09 Not showing up for class. 6/24/09 Questioned Pabon's salary.
James Morales	7/9/09	Yes	None[5]
Enrique De la Nuez	7/9/09	No	11/05/08 No call/no show. 3/9/09 3 day suspension for refusal to go to work. 4/20/09 Failed to show up without notification..
Anthony Fernandez	7/9/09	Yes	11/8/06 No call/no show. 4/2/09 Didn't come in and lateness.
Wanda Velez	7/9/09	Yes	12/22/08 No call/no show.
Rafael Ramos	7/9/09	No	None[6]

[4] In the separation agreement that was presented to him, the Respondent put N/A in the paragraph where it listed reasons in addition to downsizing for termination.

[5] The Respondent introduced into evidence an accident report indicating that there was no damage to the vehicle. This did not result in a warning.

[6] The Respondent introduced an accident report into evidence indicating that Ramos had a minor accident in January 2008. He was taken off as a driver and demoted to a helper.

Rarpi Mojica Division	7/9/09	Yes	6/4/09 No call/no show on 4/29/09 and 6/3/09. 7/8/09 E-mail No call/no show on 7/8/09.
Andres Gomez	7/9/09	No	3/9/09 Refusal to do a job. Suspended for 3 days.
Miguel Felix Lerbu	7/10/09	No	2/11/09 Two day suspension for going home.[7]
Joel Ramirez	7/10/09	No	None
Julich Mera	7/10/09	No	7/6/09 Being on a truck without approval.
Nelson Rodriguez	7/10/09	No	4/16/07 Not coming to work on 4/14/07. 4/20/07 for not coming to work. 6/3/09 E-mail from Bethany Defrank indicating he and 6 other employees were No call/no show. This document is not a warning.
Tyreek Fortune	7/10/09	No	None
Daniel Torres	7/10/09	Yes	5/29/07 No call/no show. 6/25/07 Failing to notify not available[8]
Heyfreed Dominguez	7/10/09	No	None.[9]
Warren Iglesias	7/10/09	Yes	7/1/09. Eating customers food.
Frandy Cabrera	7/10/09[10]	Yes	7/29/08 Refusing to do job at end of the month. 10/23/08 Not wearing uniform on a regular basis. 7/1/09 Eating customer's food w/o permission.
Kalen Mendenhall	7/13/09	Yes	None
Anson Lloyd	7/13/09	No	11/8/08 for not having proper uniform.
Alajandro Farciert	7/17/09[11]	No	7/30/07 Using truck for personal use. 1/23/08 No wearing uniform. 7/30/08 for cursing at manager. 7/1/09 Eating customer's food w/o permission.[12]
David Neciousup	7/15/09	Yes	5/2/07 Called foreman instead of dispatch. 6/14/07 Walked off a job. 7/1/09 Eating customer's food w/o permission.
David Guevara	7/15/09	Yes	10/4/06 No call/no show. 10/6/08 No call/no show.[13]
Rainero Madera	7/15/09	Yes	None
Jose Maguana	7/18/09	No	7/24/08 Not calling police about an accident. 8/12/08 Refusing job. Sarcastic to customer.
Roberto Arroyo	7/23/09	No	11/05/08 Not wearing proper uniform.

[7] In the proffered separation agreement the only reason given for termination was downsizing.

[8] The separation agreement that he signed, did list any reasons other than downsizing for his termination.

[9] However, the Respondent did offer an email dated 2/20/09 showing that Dominguez and seven other employees were no show/no calls. This incident did not seem to produce a warning either to him or to the others.

[10] Of the 40 employees discharged in July, Cabrera was the only one who was rehired. He was rehired in September 2009.

[11] The record indicates that Farciert's last day of work was on July 7, 2009. However, the separation agreement that he was asked to sign was dated July 17, 2009.

[12] I also received into evidence two accident reports indicating that his vehicle was hit while parked. These did not result in any disciplinary actions.

[13] The Respondent put into evidence three accident reports filled out by Guevara which do not indicate that he was a fault in any of these. No warnings were given to him in relation to these accident reports.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT discharge employees because of their union activity or to discourage employees from engaging in union or protected concerted activity.

WE WILL NOT interrogate employees about their union sympathies or activities.

WE WILL NOT threaten employees with job loss in retaliation for their union activities.

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

WE WILL make whole employees who were discharged in July 2009 for the loss of earnings they suffered as a result of the discrimination against them.

WE WILL reinstate the employees who were discharged in July 2009 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, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL remove from our files any reference to the unlawful discharges and notify them, in writing, that this has been done and that these actions will not be used against them in any way.

FLAT RATE MOVERS, LTD.