

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

CCA CIVIL HALMAR INTERNATIONAL, INC.

and

Case No. 2-CA-40207

**BUILDING MATERIAL TEAMSTERS LOCAL 282,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS**

Jeff Beerman, Esq. and Nicole Buffalano, Esq.,
New York, New York, for the Acting General Counsel
Thomas P. Piekara, Esq. and Ian H. Hlawati, Esq.,
Jackson Lewis, LLP, for the Respondent
Joseph Vitale, Esq., Cohen, Weiss & Simon, LLP,
for the Charging Party

DECISION

Statement of the Case

LAUREN ESPOSITO, Administrative Law Judge. Based upon a charge filed on November 10, 2010, by Building Material Teamsters Local 282, International Brotherhood of Teamsters (“Local 282” or the “Charging Party”), a Complaint and Notice of Hearing issued on April 29, 2011. The Complaint alleges that CCA Civil Halmar International, Inc. (“Halmar” or “Respondent”) violated Sections 8(a)(1) and (3) of the Act by discharging Mike Verni on July 19, 2010, and again on August 19, 2010, in retaliation for his union activities. Respondent filed an Answer denying the material allegations of the Complaint. This case was tried before me on August 16, 17 and 18, 2011, in New York, New York.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel (the “General Counsel”) and Respondent I make the following

Findings of Fact

I. Jurisdiction

Respondent is a corporation with a place of business located in the Bronx, New York, and is engaged in the business of managing commercial construction projects. Annually, Respondent in the course and conduct of its business operations purchases and receives at various construction sites in New York goods valued in excess of \$50,000 directly from suppliers outside the State of New York. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits and I find that Local 282 is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

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Respondent manages heavy and highway construction projects in the New York metropolitan area. Since approximately May 2009, Respondent has been engaged in a project renovating the Alexander Hamilton Bridge, which involves thirty supervisors and between 160 and 225 building trades workers. All of the employees on the project are represented by various building trades labor unions, with Local 282 representing the drivers employed by Respondent. As many as 20 drivers work on two shifts, as needed according to the demands of the work at the time.

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At all times material to the events at issue here, Jesse Jameson was Respondent's Projective Executive or Project Manager for the Alexander Hamilton Bridge work. Jameson is responsible for running the entire project, including dealing with subcontractors, government agencies and all personnel issues. Lee Trogisch is Respondent's Equipment Manager, and is responsible for repairs, purchasing, and oversight of trucking, operating engineers, and mechanics on all of Respondent's projects. Respondent admits and I find that Jameson and Trogisch are supervisors within the meaning of Section 2(11) of the Act, and are agents acting on Respondent's behalf.

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Several of Local 282's current officers testified at the hearing in this matter. Thomas Gesualdi has been Local 282's President for approximately two years. Louis Bisignano has been Local 282's Secretary-Treasurer since January 2008. Anthony D'Aquila is the Union's Manhattan business agent and Recording Secretary. Robert Machado is a federally appointed investigations officer, and investigates allegations regarding Local 282; Machado did not testify at the hearing.

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The collective bargaining agreement between Respondent and Local 282 provides for a twenty-day probationary period. Under Section 30 of the contract, during the first ten days of the probationary period, a new employee has no recourse to the grievance procedure. During the second ten days the employee may be discharged for just cause, as defined in the contract,¹ without recourse to the grievance procedure. Section 42 of the contract provides for a Drug Testing and Employee Assisting Program. Section 42 permits the employer to suspend an employee and refer them to the Program for immediate testing where the employer "has reasonable cause to believe that an Employee is a drug abuser, substance abuser, or alcohol abuser."

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B. Mike Verni's Internal Union Activities and Initial Hiring at the Alexander Hamilton Bridge Jobsite, Respondent's Shaping and Hiring Policies

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Verni has been a driver in the construction industry and a member of Local 282 for over twenty years. In November 2009, Local 282 held an election for three Business Agent/Trustee offices, and for Vice President. Verni ran for Vice President against incumbent Anthony Pirozzi. The candidates for Business Agent/Trustee on Pirozzi's slate were incumbents Michael O'Toole, Dominic Marrocco, and Paul Luddine. Pirozzi's slate won this election.

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¹ Section 30 defines "just cause" as "unexcused absences, tardiness, unsafe driving, or refusing to take direction from supervisory personnel."

Jameson testified that he learned that Verni had run for office against the incumbent slate of candidates during conversations with Luddine in July and August.² Jameson testified that Luddine did not ask him to discharge Verni during these conversations.³

5 Trogisch has the primary responsibility for administration of the shaping and seniority lists for drivers at the Alexander Hamilton Bridge jobsite. Employee positions on the seniority list are determined by hire date and shaping for work. There are three Local 282 shop stewards for the Alexander Hamilton Bridge jobsite – two onsite stewards and one barn steward. When Verni began working for Respondent, the barn steward was Gary Werbitski. Trogisch testified that Respondent’s policy required the barn steward to consult with him and provide him with a new employee’s driver’s license prior to putting the new driver on the seniority list for work. Trogisch testified, however, that Werbitski often called drivers in and placed them on the list without doing so, and that Trogisch “usually” received a new driver’s information only after they were already working. Trogisch testified that about six months prior to August 2010, he realized that Werbitski was not providing him with a copy of the shape list every day, and that Werbitski had placed a driver on the seniority list without consulting him. Trogisch testified that he had several discussions with Werbitski, telling him that Trogisch had to be consulted before putting drivers on the shape list or the work list, and that he also discussed the issue with Luddine. Nevertheless, a few months later, Werbitski again put another driver on the shape or seniority list without Trogisch’s authorization, prompting Trogisch to again complain to Luddine. Trogisch testified that prior to July 19, none of the drivers placed on the seniority lists in violation of Respondent’s hiring policies were discharged.

25 Verni testified that he began working for Respondent at the Alexander Hamilton Bridge site on July 12. Verni went to the jobsite and met with Werbitski. Verni told Werbitski he was looking for work, and Werbitski said that there was no work on the day shift, but that he would speak to the superintendent and call Verni if there was night shift work available. Early in the evening, Werbitski called Verni, and told him there was night shift work available. Verni returned to the jobsite and met with Carlos, the night superintendent, as instructed by Werbitski. Verni gave Carlos his driver’s license and other documentation, and completed paperwork. Verni then began work. Verni shaped and worked the night shift for the rest of the week.

C. The July 19 Discharge of Verni

35 Verni testified that he remained on the jobsite the morning of July 19 after his shift had ended, because Werbitski had informed him that there might be day shift work available. After Verni was told there was no day shift work, he observed Luddine park his car into the parking lot and walk toward the office trailers. Later that day, Verni spoke to Werbitski over the phone. Verni testified that he asked Werbitski whether there would be night shift work available, and Werbitski said no. Verni then asked Werbitski whether he had seen Luddine at the jobsite. Werbitski said that within an hour and a half after Luddine had been at the job site, management gave Werbitski a termination letter for Verni. Werbitski read the termination letter to Verni over the phone, and said that it was signed by Jameson. The termination letter, dated July 19, states, “Please let this letter confirm that after a review of your performance we have decided to decline you employment as a driver for CCA Civil/Halmar International.”

Jameson and Trogisch contended in their testimony that Trogisch made the decision to discharge Verni and Chris Paci, another driver, after learning that Werbitski had hired Verni and

50 ² All subsequent dates are in 2010 unless otherwise indicated.

³ Luddine retired subsequent to the events at issue here, and did not testify at the hearing.

Paci without consulting him. Trogisch testified that he drafted the letter quoted above for Jameson’s signature, and an identical letter to Paci, also dated July 19.⁴ Jameson testified that there were no problems with Verni’s work performance, although his termination letter states that Respondent discharged him for that reason.

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After speaking to Werbitski, Verni called Thomas Cicillini and discussed the situation with him. Cicillini has been a Local 282 member for sixteen years, and has worked for both the Respondent and Tutor Perini Construction Corp., where he met Jameson. Cicillini offered to accompany Verni to the jobsite to speak with Jameson the next morning. Verni also called Gesualdi, told Gesualdi that he had been discharged soon after Luddine had been spotted at the jobsite, and described his conversation with Werbitski. Gesualdi said that he would look into the matter and get back to him. Verni then called investigations officer Machado and reported that Respondent had discharged him.⁵ Gesualdi testified that he also reported Verni’s allegation that Luddine had sought to have him discharged to Machado.

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Cicillini testified that after speaking with Verni he called Jameson and discussed the situation with him. Jameson told Cicillini that he would get back to him after speaking with Respondent’s owners, but he did not do so.

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On the morning of July 21, Verni and Cicillini went to the jobsite and spoke to Jameson. Verni testified that after Cicillini introduced him, Jameson told him that he was sorry, but Luddine was a union delegate, and Verni had run against him in the election. Cicillini then said that Verni had run against Pirozzi, not Luddine. Jameson replied that there was nothing he could do, because he had to “keep peace with the Union.” Jameson then said that he would speak with his superiors and see what he could do. Cicillini confirmed that Jameson referred to Verni as, “the guy who ran against Paul Luddine in the election,” and Cicillini responded that Jameson had made a mistake. Cicillini testified that before he left to go to work Verni also told Jameson that he had nothing to do with Luddine. Cicillini testified that he was present for approximately fifteen to twenty minutes of the conversation between Verni and Jameson.

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Jameson admitted during his testimony that he brought up the election and Luddine during the conversation with Verni and Cicillini at the jobsite. Jameson testified that he did so because he was particularly busy that morning due to a staff meeting with the Department of Transportation. Jameson testified that he mentioned Luddine and the election “to squash the conversation as soon as possible.”

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Jameson testified that during the first week of August, Gesualdi called him and told him that he was investigating Verni’s discharge. Gesualdi asked Jameson why he discharged Verni, and whether Verni had been discharged because he ran in the Union election. Jameson testified that he told Gesualdi that Verni had been terminated for work performance issues, as stated in the discharge letter. Gesualdi testified that he could not recall having had this conversation.

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⁴ Verni testified that Paci actively campaigned for the incumbent slate of candidates that Verni ran against in the 2009 election.

⁵ No grievance was filed regarding Verni’s July 19 discharge. Verni testified that he felt that filing a grievance was unnecessary because he had reported the issue to Machado, who was investigating.

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D. The Reinstatement and August 19 Discharge of Verni

On August 10, Respondent and Local 282 discussed Verni's discharge and issues involving hiring for the Alexander Hamilton Bridge project at a labor-management claims panel hearing. Gesualdi testified that after the parties met on an unrelated matter, he suggested to Jameson and Trogisch that they discuss Verni's discharge. D'Aquila was also present. Gesualdi and D'Aquila testified that they asked Jameson and Trogisch why Verni and Paci had been terminated, and Jameson and Trogisch responded that they did not have to provide a reason, because the two employees were still within their probationary period. D'Aquila then proposed that Verni be reinstated, and Werbitski be moved to one of Respondent's jobsites in Manhattan. Jameson and Trogisch ultimately agreed.

Jameson and Trogisch testified that D'Aquila and Gesualdi said that they wanted to get the issue involving Verni resolved before Machado returned from vacation. Jameson and D'Aquila both testified that the agreement reached included the reinstatement of both Verni and Paci at the Alexander Hamilton Bridge jobsite, in exchange for the transfer of Werbitski to Manhattan.⁶ Gesualdi and D'Aquila testified that they could not recall any discussion of Machado.

Jameson testified that after Werbitski was transferred to the Manhattan jobsite, Trogisch maintained the seniority list, and the onsite shop steward brought potential new employees to meet Trogisch after interviewing them, prior to their beginning work.

Verni returned to work at the Alexander Hamilton Bridge jobsite on August 11, after Gesualdi informed him that he had been reinstated, and worked the night shift. On August 12, Verni shaped the day shift, but there was no work available. Later that day, Werbitski called Verni and said that there was no night shift work available. Werbitski also reported that he had been directed to assign a "casual" employee to work on the night shift, even though the casual employee had not been shaping to maintain the seniority necessary to work that shift. Verni worked the night shift on August 13, and shaped on August 17 but was not assigned work. On August 18, Verni shaped the morning shift and did not work. While at the site, he noticed that an extra casual was assigned work for the shift, even though the extra casual had not been shaping. Verni then visited the Union hall and filed a grievance (Claim No. 4815) alleging that Respondent had assigned work to employees out of seniority order, in violation of Sections 10 and 11 of the collective bargaining agreement.

Bisignano's office at Local 282 faxed Verni's seniority grievance (Claim No. 4815) to Respondent's office on August 18 at approximately 2:30 p.m. Jameson admitted that he received a copy of Verni's grievance prior to making the decision to discharge him a second time on August 19.

Jameson testified that since July 17 to 20, he had been under the impression that Verni was involved in some sort of drug use, based upon conversations with safety manager Jim Ferer, who had also worked with Jameson at Tutor Perini. However, Jameson testified that he felt constrained from acting on this information because of obligations under the Health Insurance Portability and Accountability Act ("HIPAA"). Jameson testified that on August 19, during a conversation with Respondent's counsel Art Rigby regarding pending regulatory

⁶ D'Aquila testified that at the time of this meeting he was aware of several issues between Werbitski and Respondent's managers, including an ongoing disagreement about shaping or hiring procedures.

5 matters, he mentioned “Teamster problems.” Jameson testified that Rigby responded that he was familiar with Verni from his work at Tutor Perini, and that while employed at Tutor Perini Verni had committed fraud in connection with a drug test.⁷ Jameson testified that after receiving this information from Rigby, he no longer considered himself to be restricted under HIPAA, as the matter involved fraud, as opposed to a substance abuse issue. Rigby confirmed that he and Jameson discussed Verni’s misconduct while at Tutor Perini during a telephone conversation on August 19.

10 Jameson testified that he after his conversation with Rigby he decided to discharge Verni if possible. Jameson testified that after confirming that Verni was still within his probationary period, he prepared a letter to Gesualdi discharging Verni.

15 Verni showed up for work on August 19 and 20, but was not assigned a shift. When he showed up for work on August 23, Werbitski read him a letter from Respondent stating that he had been terminated while on his probationary period. Verni called Gesualdi and said that he had been fired again, and Gesualdi said that he would tell D’Aquila and Luddine to meet with Respondent’s management. Verni stated that D’Aquila called him later, telling him that management had been uncooperative, and that a panel hearing would be arranged to address his discharge.

20 D’Aquila testified that on August 23, after learning that Verni had been discharged again, he called Trogisch and asked him why Verni had been discharged, given the parties’ agreement that he return to work. Trogisch stated that the parties did have an agreement, until Verni filed a grievance. D’Aquila responded that Respondent could not discharge an employee for filing a grievance, and that grievances had to be addressed through the prescribed contractual procedure. D’Aquila reiterated that the company had breached the agreement reached by the parties at the August 10 panel hearing, and Trogisch responded that Verni’s discharge was “above his pay grade.” Trogisch testified that he could not recall telling D’Aquila that Verni was discharged because he had filed a grievance.

30 On August 25, Local 282 filed a grievance (Claim No. 4823) contesting Verni’s August 19 termination. On September 7, Verni’s discharge and seniority grievances were addressed at a panel hearing, where Gesualdi, Bisignano, Pirozzi, and Marrocco represented the Union, and Jameson was present for Respondent. Gesualdi and Bisignano testified that the Union contended that Respondent had violated the contract by calling employees in for work over the phone while Verni was physically present, showing up at the jobsite.⁸ The Union also contended that the onsite shop steward was working on a truck, work which should have been performed by a worker on the shape list.⁹ Gesualdi then asked why Verni had been discharged a second time, when there had been no disciplinary or work performance incidents after his August 11 reinstatement. Jameson responded that he did not have to give the Union an answer under the contract, stating that the contract, “says for any reason.” Gesualdi and Bisignano said that Respondent would violate the law by discharging Verni in retaliation for union activity or filing a grievance, even during the probationary period, and noted that Verni had been discharged the morning after the Union had faxed the seniority grievance to Respondent’s office. Jameson

45 ⁷ Verni testified that in 2002 he provided clean urine to a childhood friend who was concerned that he would test positive for marijuana. He was discharged from Tutor Perini at that time as a result.

⁸ Jameson did not testify regarding the September 7 panel hearing.

50 ⁹ According to Jameson, such seniority issues had been an ongoing point of contention between Respondent and Local 282.

asked Gesualdi and Bisignano, “show me where it says that in the contract,” and the discussion continued in this vein for a while. Gesualdi and Bisignano testified that Jameson never raised complaints regarding the 2002 drug testing incident or Verni’s work performance during this meeting.

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Respondent and Local 282 were unable to resolve the grievances regarding assignment of work and Verni’s August 19 discharge, and on November 5, an arbitration hearing took place. On November 18, arbitrator Stanley Aiges issued a decision finding that as of August 19, Verni was a probationary employee, in that he had not worked for Respondent for more than ten days. Arbitrator Aiges found that as a result, Verni was not entitled to invoke the grievance and arbitration procedure in order to contest his discharge.¹⁰

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III. Analysis and Conclusions

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A. General Principles

Under Section 8(a)(3) of the Act, an employer may not discriminate with regard to the hire, tenure, or any term or condition of employment in order to encourage or discourage membership in a labor organization. In order to determine whether an employee’s discharge violated the Act in this manner, the Board applies the analysis articulated in *Wright Line*, 251 NLRB 1083 (1980), enf’d. 662 F.2d 899 (1st Cir. 1981), cert denied, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). To establish an unlawful discharge under *Wright Line*, the General Counsel must first prove, by a preponderance of the evidence, that the employee’s union sympathies or activities were a substantial or motivating factor in the employer’s decision to take action against them. *Manno Electric, Inc.*, 321 NLRB 278, 280 (1996). The General Counsel makes a showing of discriminatory motivation by proving the employee’s union support or activity, employer knowledge of that activity, and animus against the employee’s protected conduct. *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). Proof of an employer’s motive can be based upon direct evidence or can be inferred from circumstantial evidence, based on the record as a whole. *Ronin Shipbuilding*, 330 NLRB 464 (2000); *Robert Orr/Sysco Food Services*, 343 NLRB 1183 (2004).

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If the General Counsel is successful, the burden of persuasion then shifts to the employer to show that it would have taken the same action even in the absence of the employee’s union support or activities. *Wright Line*, 251 at 1089; *Septix Waste, Inc.*, 346 NLRB 494, 496 (2006); *Williamette Industries*, 341 NLRB 560, 563 (2004). Once the General Counsel has met its initial burden under *Wright Line*, an employer does not satisfy its burden merely by stating a legitimate reason for the action taken, but instead must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *T&J Trucking Co.*, 316 NLRB 771 (1995); *Manno Electric, Inc.*, 321 NLRB at 280 fn. 12 (1996).

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B. The Preponderance of the Evidence Establishes that Respondent Discharged Verni on July 19 in Retaliation for his Protected Activity

I find that the General Counsel has established a strong *prima facie* case that Verni was discharged on July 19 in retaliation for his protected activity. The evidence establishes that

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¹⁰ Arbitrator Aiges retained jurisdiction over the grievance regarding assignment of work for further adjudication.

Verni ran for Vice President of Local 282 in an election conducted in November 2009, which constitutes protected activity under Section 7 of the Act. *See, e.g., Sullivan, Long & Hagerty*, 303 NLRB 1007, 1010-1012 (1991), *enfd*, 976 F.2d 743 (11th Cir. 1992) (seeking internal union office activity protected by Section 7); *Barton Brands*, 298 NLRB 976, 980 (1980). The evidence also establishes that Respondent knew of Verni’s internal union activities, as Jameson admitted that he learned from Luddine prior to Verni’s July 19 discharge that Verni had run against Luddine’s slate of candidates.

The evidence further establishes that during a conversation with Verni and Cicillini on the morning of July 21, Jameson informed them that Verni had been discharged “to keep peace with the union” because Verni had opposed Luddine’s slate in the Local 282 election. Such an explicit attribution of adverse employment action to protected activity on the part of higher-level management evinces animus, and indicates that General Counsel has presented a particularly strong *prima facie* case. *See Vemco, Inc.*, 304 NLRB 911, 911-912 (1991), *enf denied*, 989 F.2d 1468 (6th Cir. 1993).

Respondent argues that Jameson’s admitted reference to Verni’s having opposed Luddine should be disregarded as irrelevant to Respondent’s motivation for the July 19 discharge. Specifically, Jameson contends that he was caught off guard by the unexpected appearance of Verni and Cicillini at a time when he was preoccupied with other matters, and simply made whatever response that he believed would end the conversation most quickly. Respondent therefore argues that his reference to Verni’s protected activity was in fact unrelated to the actual motivation for his discharge. This argument, however, is not convincing. The evidence indicates that Jameson’s comment did not in fact end the discussion, as Cicillini testified that Verni and Jameson spoke for fifteen to twenty minutes before his leaving the jobsite. Moreover, it is simply implausible that any supervisor or manager in such a situation would believe that a comment explicitly attributing an adverse personnel action to internal union political issues would quickly defuse the confrontation, as opposed to exacerbating it. Given Jameson’s lengthy experience with the New York City area building trades, his assertion that he assumed that tossing in a reference to internal union politics would terminate, as opposed to escalate, the dispute is not credible.

Respondent also argues that Jameson’s overall responsibility for the Alexander Hamilton Bridge project precluded his becoming involved in the discharge of any one particular employee, and his July 21 comment was therefore an off-the-cuff remark made without knowledge of the actual reasons for Verni’s discharge. However, Verni’s having run for union office was important enough to have merited discussion between Jameson and Luddine earlier, as Jameson eventually testified. Indeed, at the hearing Jameson initially denied having discussed Verni with Luddine, and contended that he could not recall how he learned that Verni had run against Luddine’s slate of candidates (Tr. 207-208). Only on cross-examination did he reveal that Luddine himself had given him this information (Tr. 221). Jameson’s changing testimony on this point undermines the credibility of his testimony regarding Respondent’s motivation for Verni’s first discharge.

For the foregoing reasons, I reject the contention that Jameson’s comment to Verni and Cicillini was irrelevant to Respondent’s reasons for Verni’s discharge. I find that Jameson’s admitted reference to Verni’s internal union activities constitutes evidence of animus against Verni’s protected activity, and evinces Respondent’s actual motivation for discharging Verni.¹¹

¹¹ Respondent argues that an adverse inference should be drawn based on General Counsel’s failure to call Luddine and Werbitski as witnesses. However, Jameson admitted that

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In addition, the evidence establishes that Respondent has offered three different reasons for Verni’s July 19 discharge. Jameson’s July 19 termination letter stated that Verni had been discharged for work performance issues, and this was the reason that Jameson
 5 admittedly provided to Gesualdi during a telephone conversation in early August. By contrast, as discussed above, when Verni and Cicillini visited the jobsite on July 21, Jameson informed them that Verni had been discharged because he ran against Luddine in the union election. Then at the hearing in this matter, Respondent contended that it discharged Verni for neither of these previously asserted reasons. Respondent instead claimed that Verni and another
 10 employee, Chris Paci, were simultaneously discharged because Werbitski did not follow company procedures when Verni and Paci were hired. Thus, Respondent ultimately took the position that its own initially asserted reason for terminating Verni – work performance problems – was in fact contrived, and that its second articulated reason – Verni’s internal union activity – was asserted in error. Such shifting defenses are indicative of animus, and tend to establish
 15 that Respondent’s asserted legitimate, non-discriminatory reason for the discharge is in fact pretextual. See, e.g., *Bebley Enterprises*, 356 NLRB No. 64 at p. 8 (2010).

For all of the foregoing reasons, I find that General Counsel has established a strong
 20 *prima facie* case that Respondent discharged Verni on July 19 in retaliation for his running for union office. *Vemco*, 304 NLRB at 912. As a result, Respondent bears a “substantial” burden in establishing that it would have discharged Verni regardless of his protected activities. *Vemco, Inc.*, 304 NLRB at 912; see also *Acme Bus Corp.*, 357 NLRB No. 82 at p. 25-26 (2011); *Metro One Loss Prevention Services Group*, 356 NLRB No. 20 at p. 15 (2010).

As discussed above, Respondent now asserts that Verni was discharged on July 19,
 25 together with Paci, because Werbitski failed to comply with Respondent’s procedures for hiring employees. Respondent did introduce evidence in support of this contention, which establishes that Paci and Verni were both discharged on July 19. The evidence also establishes that Respondent and Local 282 had an ongoing conflict regarding the hiring procedures at the
 30 Alexander Hamilton Bridge jobsite. Ultimately Werbitski was transferred to a jobsite in Manhattan and, according to Trogisch, the handling of seniority lists and driver interviews was changed as a result.

Overall, however, the evidence adduced by Respondent in support of this reason for
 35 Verni’s discharge is contradicted by other evidence in the record, and is insufficient to overcome General Counsel’s strong *prima facie* case. For example, Trogisch testified that he became aware that Werbitski was not complying with Respondent’s hiring procedures beginning in early 2010. In fact, Trogisch stated that Werbitski failed to provide him with any shape lists and seniority lists prior to July. Trogisch also testified that at least two drivers were hired in an
 40 inappropriate manner in February and March. Nevertheless, Trogisch admitted that despite this history of non-compliance with hiring procedures, these two employees were not discharged,

he made comments on July 21 which were, at the very least, substantially similar to those
 45 attributed to him by Verni and Cicillini, and he testified that Luddine had informed him prior to July 19 that Verni had run against the incumbent slate in the election. The finding of a violation as alleged in the complaint does not require a determination that Luddine actually directed Jameson to discharge Verni, as Respondent implies. The evidence need only demonstrate that Respondent discharged Verni for an unlawful reason, including a belief that doing so would
 50 “keep peace with the union” given Verni’s having run for union office against the incumbent slate. As such, it does not appear that drawing an adverse inference based upon General Counsel’s declining to call Luddine and Werbitski is appropriate.

even after a conversation with Luddine failed to resolve the problem. Instead, Verni and Paci were the first and only employees discharged for this purported reason. The evidence also establishes, as Respondent discusses in its Post-Hearing Brief, that Paci campaigned in support of Luddine’s slate during the November 2009 Local 282 election. However, because there is no evidence in the record that Respondent was aware of Paci’s activities during the election at the time he and Verni were discharged, this fact cannot be considered germane to Respondent’s motivation.

For all of the foregoing reasons, the evidence does not support Respondent’s contention that, as it now argues, Verni was discharged because Werbitski failed to comply with Respondent’s hiring procedures. As a result, I find that Respondent discharged Verni in retaliation for his having opposed Luddine’s slate of candidates in the Local 282 election, in violation of Sections 8(a)(1) and (3) of the Act.

C. The Preponderance of the Evidence Establishes that Respondent Discharged Verni on August 19 in Retaliation for his Protected Activity

I find that General Counsel has also established a strong *prima facie* case that Verni was discharged on August 19 in retaliation for his protected activity. The evidence establishes that Verni filed a grievance alleging that Respondent had assigned work to drivers out of seniority, and that this grievance was sent by fax to Respondent’s office on August 18. Jameson admitted during his testimony that he had received the grievance as of August 19, when he decided to discharge Verni and in fact did so. The timing of Verni’s discharge, the day after his seniority grievance was faxed to Respondent and Jameson admittedly learned of it, constitutes significant evidence that the discharge was unlawfully motivated. See, e.g., *Manorcare Health Services – Easton*, 356 NLRB No. 39 at p. 3, 25 (2010) (discipline of employee “just days” after her initial public support for the union indicative of unlawful motivation); *McClendon Electrical Services*, 340 NLRB 613, fn. 6 (2003), citing *La Gloria Oil*, 337 NLRB 1120 (2002).

Trogisch’s statements to D’Aquila during their August 23 conversation also evince a discriminatory motivation. D’Aquila’s uncontested account establishes that he called Trogisch to protest Verni’s second discharge, given the agreement reached at the August 10 claims panel hearing to reinstate him. I credit D’Aquila’s testimony that Trogisch responded that the parties had an agreement until Verni filed a grievance, thereby attributing the discharge to Verni’s having filed the seniority grievance. Trogisch did not explicitly deny having made this statement, but testified that he did not recall having done so, and he did not provide any alternative account of his conversation with D’Aquila. D’Aquila’s testimony was therefore not meaningfully rebutted in this respect. See, e.g., *Precoat Metals*, 341 NLRB 1137, 1149 (2004) (“professed lack of recollection” insufficient to refute “positive testimony” and thus create an issue of fact). As a result, I find that Trogisch did in fact tell D’Aquila that Verni was discharged because he had filed the seniority grievance after returning to work.¹² As discussed above, such managerial statements explicitly attributing an adverse employment action to protected

¹² Trogisch’s subsequent statement that Verni’s discharge was “above his pay grade” does not negate the import of this comment, as Respondent contends. The statement itself appears in the context of the overall conversation to refer to Trogisch’s decision-making authority, as opposed to his knowledge of the reason for Verni’s August 19 discharge. In addition, it is undisputed that Trogisch, as Equipment Manager, had supervisory authority over the drivers, and in fact discharged Verni in July, according to Respondent.

activity constitute evidence of animus, and indicate that General Counsel has established a strong *prima facie* case. *Vemco, Inc.*, 304 NLRB at 911-912.

Respondent argues that it discharged Verni on August 19 because Jameson learned that day that Verni committed fraud by providing another employee with clean urine for a drug test while employed at Tutor Perini Construction Corp. in 2002. However, even if Jameson first learned of Verni's previous misconduct from Rigby on that date,¹³ the evidence does not satisfy Respondent's substantial burden in establishing that Verni was discharged for this reason.

There is no evidence to demonstrate that Verni's 2002 misconduct at Tutor Perini was even tenuously connected to his employment with Respondent, an entirely different company, in the summer of 2010. There is no evidence that there were any problems with Verni's work performance while employed by Respondent. There is no contention on Respondent's part that Verni was somehow obligated to disclose his 2002 misconduct and instead concealed it. Respondent simply did not present sufficient evidence to establish any nexus between Verni's 2002 misconduct at Tutor Perini and his 2010 employment sufficient to rebut General Counsel's *prima facie* case. In fact, ongoing substance abuse on Verni's part would have been a far greater threat to Respondent's operations, and the evidence indicates that Jameson did so little to investigate his purported suspicions regarding that possibility that he did not take them seriously, if they indeed existed. All of this strongly suggests that Respondent's asserted rationale for Verni's August 19 discharge is in fact pretextual.

In particular, the evidence does not support Jameson's assertion that he had significant, ongoing concerns that Verni would somehow create an unsafe condition or otherwise pose a danger to Respondent or its employees because of drug use. Jameson testified that safety was a critical priority for Respondent's operation of the jobsite, and the operation of trucks and other heavy machinery while under the influence of alcohol or drugs is obviously a safety hazard. Jameson testified that he had believed since his own employment with Tutor Perini that Verni had some sort of substance abuse issue, and that by July 17 to 20, he was under the impression that Verni had a drug problem. In fact, Jameson was aware as of 2002 that Perini had issued a memo specifically instructing managers not to hire Verni, a position that he would surely have connected, as of July 20, with Verni's supposed drug use. However, Jameson did not avail himself of the contract's provisions permitting him to suspend Verni and refer him to the Employee Assistance Program, and in fact the evidence establishes that Jameson did absolutely nothing regarding his purported suspicions.¹⁴ Indeed, Jameson agreed at the August 10 panel hearing to have Verni reinstated, and never mentioned any suspicions about drug use, even when the Union pressed him for a description of the "work performance" problems which Respondent was then claiming motivated Verni's July 19 discharge. All of this evidence is inconsistent with a genuine concern that unsafe conditions were being created by an employee's possible drug use, and undermines Jameson's credibility regarding his motivation for discharging Verni on August 19.

Jameson's conduct at the September 7 panel hearing reinforces this conclusion. When Gesualdi and Bisignano told Jameson that discharging Verni in retaliation for filing a grievance would violate the law, even during Verni's probationary period, Jameson's response was, "show

¹³ I have disregarded Rigby's gratuitous and non-probative remarks regarding Verni's misconduct at Tutor Perini.

¹⁴ Given these provision of the contract, I find Jameson's contention that he believed himself to be constrained by HIPAA from acting on his suspicions regarding Verni's drug use to be incredible.

me where it says that in the contract.” This then became the crux of the argument between Jameson and the Union representatives. I credit Gesualdi and Bisignano’s account of this discussion, as Jameson did not address the September 7 meeting during his testimony. Jameson’s insistence that the contract did not prohibit Respondent’s discharging Verni during his probationary period because he had filed a grievance militates in favor of a finding that this was in fact the reason for his August 19 discharge.¹⁵

For all of the foregoing reasons, the preponderance of the evidence does not substantiate Respondent’s contention that it discharged Verni on August 19 because Jameson learned of his misconduct at Tutor Perini in 2002. As a result, the evidence establishes that Respondent discharged Verni in retaliation for his having filed the seniority grievance the day earlier, in violation of Sections 8(a)(1) and (3) of the Act.

Conclusions of Law

1. The Respondent, CCA Civil Halmar International, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, Building Material Teamsters Local 282, International Brotherhood of Teamsters, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Sections 8(a)(1) and (3) of the Act by discharging Michael Verni on July 19, 2010 in retaliation for his protected internal union activities.

4. Respondent violated Sections 8(a)(1) and (3) of the Act by discharging Michael Verni on August 19, 2010 in retaliation for his union activities.

5. The above-described unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Remedy

Having found that Respondent has violated the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action necessary to effectuate the Act’s purposes.

Having discriminatorily discharged Michael Verni in retaliation for his protected concerted activities, Respondent must offer Verni full reinstatement to his former position or to a substantially equivalent position. Respondent must also make Verni whole for any loss of earnings or other benefits he may have suffered as a result of the discrimination against him, plus interest, in the manner prescribed in *F.W. Woolworth*, 90 NLRB 289 (1950) and *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). Respondent shall also be required to remove from its files all references to Verni’s unlawful discharges, and to notify him in writing that this has been done and that the discharges shall not be used against him.

¹⁵ Respondent also argues that Verni’s seniority and discharge grievances continued to be processed to arbitration, but Respondent’s compliance with the contract does not preclude the conclusion that its dissatisfaction with Verni’s having filed the seniority grievance motivated his August 19 discharge.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁶

ORDER

5

Respondent CCA Civil Halmar International, Inc., Bronx, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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(a) Discharging or otherwise discriminating against employees because they engage in protected internal union activities.

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(b) Discharging or otherwise discriminating against employees because they engage in activities on behalf of Teamsters Local 282.

(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.

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

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

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(b) Make Michael Verni 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.

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

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(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.

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(e) Within 14 days after service by the Region, post at its job site at the Alexander Hamilton Bridge in New York, New York, copies of the attached notice marked "Appendix."¹⁷

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¹⁶ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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¹⁷ 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."

Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by 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 e-mail, posting on an intranet or an internet site and/or other electronic means if 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 July 9, 2010.

(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 Respondent has taken to comply.

Dated: Washington, D.C., November 10, 2011.

Lauren Esposito
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

WE WILL NOT discharge or otherwise discriminate against you because you engage in protected internal union activities.

WE WILL NOT discharge or otherwise discriminate against you because you engage in protected activities on behalf of Teamsters Local 282.

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

WE WILL within 14 days of the date of the Board's Order, offer Michael Verni 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 and privileges previously enjoyed.

WE WILL make Michael Verni whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, 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 discharges of Michael Verni, and within 3 days thereafter, notify Verni in writing that this has been done and that the discharges will not be used against him in any way.

CCA CIVIL HALMAR INTERNATIONAL, INC.

(Employer)

Dated _____

By _____

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

26 Federal Plaza, Room 3614, New York, NY 10278-0104

(212) 264-0300, Hours: 8:45 a.m. to 5:15 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS

NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (212) 264-0346.