

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Trinity Protection Services, Inc. and Michael Romo and David B. Fair and Tom Smith. Cases 20–CA–34660, 20–CA–34729, and 20–CA–34730

November 30, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER
AND HAYES

On October 14, 2010, Administrative Law Judge James M. Kennedy issued the attached decision. The Acting General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief and the Acting General Counsel filed a reply brief.

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 only to the extent consistent with this Decision and Order.

The judge found, and we agree, that the Respondent did not violate Section 8(a)(1) of the Act by discharging three employees who were undergoing training for positions as security guards. The judge also found that the Respondent did not violate Section 8(a)(1) by threatening employees with reprisals if they violated a company policy prohibiting them from divulging any knowledge about the company to its clients. We reverse that finding for the reasons discussed below.²

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

² In adopting the judge’s dismissals of the 8(a)(1) discharge allegations, we assume without deciding that the three alleged discriminatees engaged in protected concerted activity by reporting malfunctions of their handguns to officials of the Federal Aviation Administration (FAA), and by discussing whether to report and reporting perceived deficiencies in their training to the Inspector General of the Department of Homeland Security (DHS). We agree with the judge, however, that the Acting General Counsel failed to satisfy his burden of proving that the Respondent had knowledge of the employees’ asserted activities. See *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

With respect to the malfunctioning handguns, an email message dated April 17, 2009, from DHS official Le Lieu to the Respondent’s project manager, Daryl Brooks, vaguely indicated that “reports were made” that some handguns had malfunctioned “during gun qualifying.” However, the email did not specify who made the reports or mention the names of any of the alleged discriminatees. Further, Brooks would

The Respondent provides security guard services at various Federal facilities in several states throughout the country. In 2007, the Federal Protective Service (FPS), an agency within the DHS, awarded the Respondent a contract to provide security services at multiple Federal properties in northern California. In March 2009, the contract was revised to include an FAA Control Center near Sacramento.³

Under the contract with FPS, guards hired by the Respondent were required to successfully complete a 3-week training course before they could be posted at the FAA facility. The Respondent hired eight employees to guard the FAA facility and sent them for training by an outside contractor, Action Security Training Institute (ASTI). There is no dispute that by the second week of training in late April, the guards became concerned that ASTI’s training methods were seriously deficient and they discussed among themselves whether to report the deficiencies to the DHS Inspector General.

Daryl Brooks was the Respondent’s project manager for the security contract covering the FAA facility. On May 13, during the final week of training, he visited ASTI and spoke to the class about several matters, including the Respondent’s chain-of-command policy. Brooks told the class that “divulging any company knowledge to any client was prohibited by company policy and could result in disciplinary action.” The complaint alleges that Brooks’ statement “threatened employees with reprisals, including termination, if they discussed issues related to their training with agencies of the United States Government” and thereby violated Section 8(a)(1).

The judge dismissed the complaint allegation by construing Brooks’ statement as a reference to the guards’ discussions about reporting to the Inspector General their belief that ASTI was providing inadequate training. He concluded that because Brooks had no knowledge of those discussions, there could be no 8(a)(1) violation. We disagree.

not reasonably have understood the email as a reference to the alleged discriminatees, because their handguns malfunctioned during a non-qualification practice shoot, not “during gun qualifying,” which was the subject of the email’s inquiry.

As for discussions about perceived training deficiencies, there is no evidence in the record that, prior to the discharges, the Respondent learned that the alleged discriminatees had reported any training concerns to the Inspector General of DHS or discussed doing so.

Accordingly, we dismiss the complaint allegation that the discharge of the three alleged discriminatees was unlawful. Member Hayes would also adopt the judge’s finding that the Respondent satisfied its *Wright Line* rebuttal burden of proving that it would have discharged each of the three alleged discriminatees even absent any protected concerted activities.

³ All dates are in 2009 unless otherwise indicated.

It has been well established, since the Supreme Court's decision in *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978), that Section 7 protects employee efforts to "improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." Consistent with *Eastex*, the Board has held that employees' concerted communications regarding matters affecting their employment with their employer's customers or with other third parties, such as governmental agencies, are protected by Section 7 and, with some exceptions not applicable here, cannot lawfully be banned. See *Kinder-Care Learning Centers*, 299 NLRB 1171, 1171-1172 (1990), and cases cited therein.⁴ As the Board explained in *Kinder-Care*, prohibiting employees from communicating with third parties "reasonably tends to inhibit employees from bringing work-related complaints to, and seeking redress from, entities other than the Respondent, and restrains the employees' Section 7 rights to engage in concerted activities for collective bargaining or other mutual aid or protection." *Id.* at 1172.

Similarly, in *Guardsmark, LLC*, 344 NLRB 809 (2005), *enfd.* in relevant part 475 F.3d 369 (D.C. Cir. 2007), the Board held that a chain-of-command restriction comparable to the one imposed by Brooks was unlawful. The Board found that the restriction, which prohibited employees "dissatisfied with any . . . aspect of [their] employment" from "register[ing] complaints with any representative of the client" violated Section 8(a)(1) because it "trench[e]d upon the right of employees under Section 7 to enlist the support of an employer's clients or customers regarding complaints about terms and conditions of employment." *Id.* at 809.⁵

Brooks' statement to employees on May 13 plainly violated Section 8(a)(1). He specifically enjoined them from disclosing "any company knowledge to any client" and warned that failure to heed his directive "could result in disciplinary action." Because of the expansive scope of Brooks' admonition, employees would reasonably conclude that they could be disciplined for disclosing *any*

⁴ See *id.* at 1171 fns. 6-11, 1172 fn. 13.

⁵ See also *Hyundai America Shipping, Inc.*, 357 NLRB No. 80, slip op. at 1, 13 (2011) (chain-of-command rule directing employees to "[v]oice your complaints directly to your immediate supervisor or to Human Resources" violated 8(a)(1) by "restrict[ing] employees from complaining about any work related matters, including wages, hours, or working conditions, to . . . interested third parties, such as unions or governmental agencies"). The chain-of-command restrictions in *Guardsmark* and *Hyundai America Shipping* were set forth as workplace rules in employee handbooks. Applying the legal analysis for determining the legality of workplace rules, see *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-647 (2004), the Board found that maintaining the rule in *Guardsmark*, and maintaining or enforcing the rule in *Hyundai*, violated Sec. 8(a)(1).

information about the Respondent to its clients, thereby prohibiting concerted contacts regarding their wages, hours, and working conditions. Under *Eastex* and established Board precedent, however, such communications are protected activity under the Act. Accordingly, we reverse the judge and find that the Respondent violated Section 8(a)(1) by threatening to discipline employees for divulging "any company knowledge to any client."⁶

ORDER⁷

The National Labor Relations Board orders that the Respondent, Trinity Protection Services, Inc., Sacramento, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discipline if they disclose to clients information concerning their wages, hours, or other terms and conditions of employment.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action

(a) Within 14 days after service by the Region, post at its business facility in Sacramento, California copies of

⁶ Contrary to the judge, it is irrelevant to our 8(a)(1) finding whether Brooks was aware that employees had discussed reporting their complaints about deficient training to the Inspector General or actually did report the deficiencies. "[I]t is well established that evidence of employer knowledge is not a necessary element of an 8(a)(1) violation. Rather, the test is whether the Respondent's conduct would reasonably tend to interfere with, threaten, or coerce employees in the exercise of their Section 7 rights." *Alliance Steel Products*, 340 NLRB 495, 495 (2003) footnote omitted). As we have found, Brooks' statement would clearly have this unlawful effect.

We do not find that the Respondent's promulgation or maintenance of the chain-of-command rule also violated Sec. 8(a)(1), because the complaint did not allege such a violation.

In agreeing with his colleagues that Brooks' May 13 oral statement interfered with employees' Sec. 7 rights, Member Hayes notes that Brooks did not specifically reference the Respondent's written chain-of-command policy, which is not alleged as unlawful. Further, there is no evidence that any trainee ever received or read the chain-of-command policy. Under these circumstances, Member Hayes finds that the written policy did not preclude employees from reasonably interpreting Brooks' oral statement as restricting their Sec. 7 activities.

The General Counsel has excepted to the judge's dismissals of the allegation that Danny Hodges, an alleged agent of the Respondent and owner of ASTI, violated Sec. 8(a)(1) by a statement that he made to the class on April 15. We find it unnecessary to pass on this allegation, as it is cumulative of the above 8(a)(1) statement by Brooks and, if found, would not affect the remedy.

⁷ We have modified the judge's Order to reflect the violation found and to provide for electronic posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010), *enfd.* 656 F.3d 860 (9th Cir. 2011). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 20, 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 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 its Sacramento facility at any time since May 13, 2008.

(b) 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.

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

Dated, Washington, D.C. November 30, 2011

Mark Gaston Pearce, Chairman

Craig Becker, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
 APPENDIX
 NOTICE TO EMPLOYEES
 POSTED BY ORDER OF THE
 NATIONAL LABOR RELATIONS BOARD
 AN AGENCY OF THE UNITED STATES GOVERNMENT

⁸ 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."

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 threaten you with discipline if you disclose to clients information concerning your wages, hours, or other terms and conditions of employment.

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

TRINITY PROTECTION SERVICES, INC.

David B. Reeves, Esq., for the General Counsel.
Na'il Benjamin, Esq. and *Clifford E. Yin, Esq.*, (*Coblentz, Patch, Duffy & Bass*), of San Francisco, California, for the Respondent.

Michael Romo, of West Sacramento, California, *David Fair*, of El Dorado Hills, California, and *Tom Smith*, of Sacramento, California, Charging Parties, all appearing individually pro se.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried in Sacramento and San Francisco, California, for 5 hearing days beginning March 2, 2010, pursuant to a consolidated complaint issued on December 30, 2009, by the Regional Director for Region 20. The complaint is based upon unfair labor practice charges filed on September 15 by Michael Romo and on November 9, 2009,¹ by David Fair and Tom Smith. The complaint alleges that Trinity Protection Services (Trinity or Respondent) has committed certain violations of Section 8(a)(1) of the National Labor Relations Act (the Act). Respondent denies the allegations. The General Counsel and Respondent have filed posthearing briefs which have been carefully considered.

Issues

Although there are some credibility questions which need resolution, the issues presented are two-fold: First, whether the Charging Parties engaged in concerted activity for the mutual aid and protection of themselves and other employees and second, whether the General Counsel's evidence is sufficient to support a finding that Respondent discharged the Charging Parties because of those activities. Subsidiary to these is whether an independent training institute can be regarded as an

¹ All dates are 2009 unless otherwise indicated.

agent or apparent agent for the purpose of imputing knowledge of the activity as well as animus sufficiently strong to have led to Respondent's decision to fire the three. Respondent denies that the three engaged in activity protected by the Act. It asserts that if they did, it was unaware of it; and that it fired the three because they had engaged in unprotected behavior which rendered them unsuitable for employment.

I. FINDINGS OF FACT

JURISDICTION

Respondent admits that at material times it has been a Maryland corporation with an office and place of business in Sacramento, California, where it has been engaged in providing security guard services to agencies of the United States Government. It further admits that during the 12-month period ending December 31, 2009, in conducting its business operations it provided services valued in excess of \$50,000 in states other than the State of California. The complaint did not allege the value of its services to the United States, but the evidence shows that due to its connection to the Department of Homeland Security and the Federal Protective Service its services have such a substantial impact on the security of the Nation that jurisdiction should be asserted without regard to any interstate commerce data. Either way, Respondent is clearly an employer engaged in commerce within the meaning of Section 2(2), (3), and (6) of the Act. In general, see, *Ready-Mixed Concrete*, 122 NLRB 318, 320 (1958).²

Background

The site where the alleged unfair labor practices occurred involved employment at a Federal Aviation Administration air traffic control facility known as the Northern California TRACON³ at Mather Field in Rancho Cordova outside Sacramento. This operation manages air traffic at 21 airports in Northern California. It is located on a 27-acre campus having only one entry/exit point. Its principal building occupies 98,000 square feet, or 11 of the 27 acres. Prior to April 2009, the FAA had a security services contract at that location with Diamond Detective Agency. As that contract came to an end on March 31, the Department of Homeland Security directed the FAA to let lapse its arrangement with Diamond. Beginning in 2007, DHS's Federal Protective Service (the FPS) had entered into an area-wide security services contract with Respondent covering some 57 Federal properties. Consistent with that arrangement, DHS directed that the FAA's Northern California TRACON facility be folded into that area-wide contract.

Respondent's project manager for the contract, Darryl Brooks, testified that the contract's geographical region runs from the town of Sonora to the Oregon border, a 400-mile range; Respondent employs approximately 250 guards at Gov-

² Moreover, the Board regularly asserts jurisdiction over guard services that have contracted to protect Federal properties. *Federal Services*, 115 NLRB 1729 (1956); *Atlas Guard Services*, 237 NLRB 1067 (1978); *Champlain Security Services*, 243 NLRB 755 (1979).

³ TRACON is an acronym for Terminal Radar Approach Control.

ernment facilities in that territory.⁴

Notice of this change occurred in March, allowing Respondent only a brief transition time to prepare to hire armed security guards at that location. The obvious option and ultimate choice was to hire the experienced guards then employed by Diamond.⁵

This presented at least one difficulty. Although the Diamond guards had been trained by the FPS when that agency was under the authority of the General Services Administration, FPS no longer recognizes that training and requires its guard services contractors to train new hires in accordance with DHS standards. This meant that the former Diamond guards needed to be trained anew, specifically to undergo the 120-hour program prescribed by FPS.

It is against this background that Brooks was instructed by his headquarters in Maryland to hire the Diamond guards since they were familiar with the facility and they were available. As will be seen, this effort ran into some difficulties which led to this unfair labor practice proceeding.

Each of the Charging Parties, Michael Romo, David Fair, and Tom Smith had been Diamond guards. Smith had served as the site supervisor for Diamond.⁶ The others whom Respondent selected were Marcia Norris, Erich Woods, Alan Maxwell, Art Rumrill, and Ludmilla Ianova. This became the class of eight which was to be trained according to the DHS/FPS guidelines. The five guards listed last here were the ones who succeeded in being hired.

Since Respondent has no DHS/FPS certified trainers on its own on staff, Brooks was obligated to seek a training school which could meet the necessary training requirements. According to CEO Greg Hollis, Respondent in the past has used three different training institutes: California Security Training Institute (CSTI), Universal Training Institute and Action Security Institute (ASTI), all located in the greater Sacramento area. In this instance Brooks selected ASTI, which is owned and operated by an individual named Danny Hodges. Respondent has no ownership interest in any of the three training institutes. It simply hires each of them on an as needed basis, accepting the schools' billings as issued. In the past Hodges has actually been employed by Respondent, but was not a regular employee during times pertinent here, perhaps occasionally responding to an on-call request, though that is not entirely clear; there is no evidence he did so while training the eight. Hodges did not testify.

The Complaint

The General Counsel's complaint asserts that at all material times "Hodges has been an agent of Respondent within the

⁴ All of these guards are represented by a labor union. Although the Union's name does not appear in the record, the General Counsel's brief states that it is the United Government Security Officers of America. The union has played no role in this case since the collective-bargaining contract does not cover trainees.

⁵ Respondent's CEO Greg Hollis: "Our thinking was that they were already there, qualified, competent with the exception of the 120-hour class, and that's pretty much within our policy, that's pretty much how we operate when we go into an existing building."

⁶ Diamond has its headquarters in Chicago.

meaning of Section 2(13) of the Act.” From that allegation, the General Counsel asserts that Hodges himself made statements to trainees that independently violated Section 8(a)(1) of the Act. More specifically, Hodges on April 15 is alleged to have threatened employees with unspecified reprisals if they discussed with agencies of the United States Government problems they had with firearms provided by Respondent for their training, activity said to be protected by Section 7 of the Act.⁷ In addition, on May 13, Hodges and Brooks supposedly “threatened employees with reprisals, including termination, if they discussed issues relating to their training with agencies of the United States Government.” (The evidence shows that only Brooks made some sort of statement to that effect that day.) Hodges is also said to have been the one who conveyed the notice of discharge to Romo and Smith on May 15. In fact, however, the phone call in question had more to do with telling the employees to speak to Brooks about what was happening. Finally, though not specifically set forth in the complaint, the General Counsel argues that Hodges is the individual who made the complaint which resulted in Romo and Smith’s discharge. The evidence does not support that allegation, either. In addition, as noted, the General Counsel wishes to impute Hodges’s knowledge of the employees’ concerted activities to Respondent, thereby rendering Respondent’s decision to discharge them unlawful under Section 8(a)(1). A major problem with the General Counsel’s imputation of knowledge theory is that there is no evidence demonstrating what Hodges actually knew.

THE ALLEGED UNFAIR LABOR PRACTICES

The Guns

The evidence adduced by the General Counsel is both confused and confusing. With respect to the firearms issue, it may be boiled down to two incidents. The first occurred even before the eight were hired and about a month before their classroom training was to begin. In mid-March, at roughly the same time Respondent interviewed the eight and distributed the so-called “hiring package,” Brooks decided to allow five Diamond guards who were not scheduled for duty at FAA TRACON on Sunday, March 15, to go to a neighboring firing range in Rancho Cordova for a practice shoot, to be followed 2 days later by an FPS overseen qualification shoot at the Chabot Gun Club in Castro Valley, approximately 110 miles southwest in Alameda County.

Brooks supplied some handguns and arranged for some on-site supervision by Hodges. There is a dispute concerning whether Hodges or the guards failed to appear at the right time on Sunday. As a result, the practice shoot seemed inconclusive to Brooks, who was quite annoyed that his directions had not

⁷ In pertinent part §7 reads: “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities. . . .” (Emphasis supplied.)

been followed.⁸ Nevertheless, at some point that day, the guards engaged in a practice shoot, supervised by someone else. Afterwards, Smith reported to Brooks that at least two of the revolvers were defective, for their cylinders froze and would not fire properly. Smith exchanged those two guns, together with a third, for others from Brooks. The day after that, those guards utilized those weapons at the qualification shoot at the gun club in the Castro Valley; all five passed.⁹ There may have been a second gun jamming for one of the shooters. No one reported the second incident to Brooks. Even so, the entire incident is relatively benign. Certainly it did not interfere with their ability to qualify.

Nevertheless, two employees, Smith and Romo, later mentioned the gun jamming to the FAA’s Brad Cantrell and Larry Marinel.¹⁰ Cantrell first said he learned of it after Respondent replaced Diamond, meaning that he learned of it in April. Counsel for the General Counsel then led Cantrell to accept March, as April did not fit his narrative. See generally Tr. 488:17–490:7. (Cantrell: “I’ll have to trust in you that that date is accurate.”) Marinel supported Cantrell’s first recollection, that they had learned of the gun jamming around the time that Respondent assumed the security contract, most likely meaning that it was after April 1. He recalled that Tom Smith mentioned the incident to him and that Mike Romo “confirmed it.” It is unclear from his testimony whether he was speaking to Smith and Romo at the same time or separately. Marinel testified that he did tell those two that he would do something about it, that he would report the matter to the FPS. Even so, it is not clear from his testimony that Smith and Romo had asked him to do anything. Neither Smith nor Romo testified that they ever asked Marinel to take any action. Marinel, of course, had his own concerns. He was troubled by the possibility that Respondent, as the new security contractor, might be inadequately arming the guards. As the FAA representative responsible for proper security, Marinel wanted to make certain that the new contractor was at least as responsible as Diamond had been.

As for the timing of Smith and Romo’s comments to Cantrell and Marinel, I accept the Cantrell/Marinel version that it occurred sometime in April. It is true that both Smith and Romo said that the contact occurred shortly after the March 17 qualification shoot. Nevertheless, I am unimpressed due to the General Counsel’s having led Cantrell, also observing that Marinel had no problem placing the incident in April. That being the case, I do not find that the misfires of March 15 were regarded as anything beyond trivial and momentarily annoying to Romo and Fair, whose guns had jammed. Marinel, after hearing of the incident, was far more concerned about the quality of guard service being provided to the FAA. From his perspective, he

⁸ Brooks testified that Hodges reported they had not appeared at the appointed time; Smith says the group arranged for a different range master and paid him themselves. Counsel for the General Counsel asserts Hodges was the one who did not appear; he also asserts, without any record support, that Hodges overslept.

⁹ Those five were Alan Maxwell, Art Rumrill, and Charging Parties David Fair, Mike Romo, and Tom Smith.

¹⁰ Both of these FAA managers had been charged to be contact persons between the FAA and the FPS concerning security contract matters.

had lost direct control over the security contractor due to DHS's intervention and had now been forced to deal with quality control problems indirectly through FPS, rather than directly with the contractor. For Marinel, good quality guard service was an imperative and the report was a memorable incident. That sharpness serves as another reason to credit his time-frame. Even so, he may not have understood that the incident occurred at a practice shoot 2 weeks before Respondent assumed responsibility at FAA TRACON.

In any event, the parties have stipulated that another qualifying shoot took place in Castro Valley on April 22 and 23. All eight attended that shoot. In addition, there appears to have been a shoot on April 10 for the three who had not gone to Castro Valley on March 17, though the record is somewhat thin on the point.¹¹ Certainly Brooks provided scores to DHS official Le Lieu for all eight in his email to her of April 17, suggesting that the other three officers had passed, as well as the five from March 17. That fact tends to confirm that a qualifying shoot had occurred on April 10 as Brooks recalled.

What is clear is that a week after that shoot, on April 17, Le Lieu (said to be a DHS program manager) had an email exchange with Brooks and with Respondent's operations director, Clifford Ward. What she wrote in her email clearly references the fact that she had spoken to someone about the gun jamming of March 15, though not mentioning the date. Specifically, see General Counsel's Exhibit 19, where she says she had neglected to ask some things during a conference call the previous day. One of the missed items involved the handguns the guards had used. Given Marinel's testimony that he had reported the matter to her, there is no reason to doubt that Lieu is referring to whatever Marinel had reported.

In her April 17 email, Lieu said: "Reports were made that new weapons issued to the incumbent guards at FAA had problems during gun qualifying. It was reported that weapons jammed when they were going through the course of fire. Please advise?" She did not say who had made the reports, nor did she say when the incidents had supposedly occurred—having at least three and probably four choices—the two in mid-March and one covering the April 10 shoot (and probably a preceding training shoot for the April 10 shooters). Yet she clearly is referring to a qualification shoot.

Brooks replied: "The FAA officers [meaning the former Diamond officers] did not have any issues with their weapons on the qualification line at the Chabot Range on the day they qualified. They all passed without having any weapon issues. No weapons were replaced for them during the course of fire or on the range that day. [Followed by a list of passing scores.]" Because Brooks was able to list the scores of all eight, it would appear that an April 10 shoot must have been included.¹²

¹¹ Brooks gave testimony about that date and R. Exh. 27 shows the signature of an FPS officer dated that day, though the document's internal references seem to refer to March 17.

¹² Lieu responded to this answer by asking Brooks who the FPS officer was who had monitored the shoot(s); she also asked if the guards would be issued the same weapons later. Brooks, in that email chain, did not answer this follow-up question; perhaps he didn't know the answer. Beyond that, it may well have been that proper monitoring by an FPS officer had not occurred, though on April 10 an FPS officer

Brooks's response demonstrates that he was unaware of any weapons issue that affected anyone's qualifying. He was aware of Smith's report and the weapons exchange after the first practice shoot of March 15, but to his knowledge, nothing of the kind had recurred. His answer to Lieu is entirely consistent with that understanding: no officer had failed to qualify and he had heard of no issue concerning inoperable weapons when class members had been on the qualification line. Indeed, there is nothing to suggest that Lieu's email was anything but a routine inquiry. Brooks did not take much interest in the matter. He knew what the problem was and knew he had taken steps to correct it. True, he had been a bit annoyed because he did not believe that one of the handguns had misfired as it had recently been repaired. Even so, from his perspective the entire matter was simply a technical one relating to equipment, not to personnel. By the time Lieu wrote her email, more than a month after the incident, it was old news. In the interim, Brooks had heard nothing further about the weapons and presumed that the matter had long since been laid to rest. Furthermore, he knew that all eight had shot qualifying scores with those same weapons.

Objectively, Lieu's email raised no questions concerning employee conduct relating to the mutual aid and protection portion of Section 7 of the Act. At worst, Brooks may have perceived Lieu's email as an employee gripe over equipment which had taken a month to travel to her. In that regard, he may even have assumed that Fair and Romo were the individuals involved, since it was their weapons he had replaced. Yet, that is simply speculation. It is also speculation to assume, as the General Counsel does, that Brooks assigned any significance to the matter. Certainly there is no evidence that Brooks became in any way exercised over Lieu's question. His answer to Lieu could not have been more routine. She had asked about jamming on the qualification line and he had truthfully answered her.

As also recounted below, on April 15, Romo says Hodges appears to have said, "[S]omebody had spoke to the FAA about the gun issues out at the range. And he told us that it wouldn't be in one's best interest to do that. And he said that Mr. Brooks was extremely unhappy that we were talking to the FAA about it and, you know, we should knock this off." Norris also recalled Hodges saying something about not going to the FAA about training issues,

Although she does not specifically corroborate Romo concerning gun issues at the range. Nor does she describe Hodges asserting that Brooks was "extremely unhappy" over guards speaking to the FAA. She did not recall Brooks saying anything on that topic.

Reporting to the Inspector General

Although Respondent in mid-March had committed itself to hiring all eight of the security officers who had worked for Diamond at the FAA TRACON facility, it was unable to arrange for the approved training program until later. Some of the

appears to have signed some documentation relating to the March 17 qualification. If the shoots had not been monitored properly, or the paperwork did not occur contemporaneously, that would seem to explain the need for the April 22–23 qualification shoot.

delay seems to have arisen due to uncertainty regarding whether FPS would simply allow them to cross over or whether the eight would be required to undergo the 120-hour training program which FPS applied to newly hired guards who were to be assigned to Federal facilities. When FPS would not budge, Respondent then settled on ASTI and its owner/trainer Danny Hodges to provide the course. Hodges had been asked earlier to conduct the March 15–17 shoots, 2 weeks before Respondent even assumed any duties at TRACON. ASTI's training classes did not actually begin until April 13, and were scheduled to run for about 3 weeks for the total of 120 hours.¹³ It is not necessary to go into detail concerning the so-called "Statement of Work" portion of the FPS contract which established the detailed training requirements. Suffice it to say that Hodges had been certified to provide that training.

According to all of the trainees who testified, the three Charging Parties, as well as Marcia Norris, said Hodges did not approach his duties professionally. Instead of providing training films, Hodges showed commercial movies and other entertainment videos extensively. These included the "Redneck Comedy Tour"; "The Fast and the Furious"; "Dale Earnhardt, the Movie"; and "XXX, the Movie"; also some concert videos such as "Eric Clapton Live," "The Phil Collins' Concert Tour", a Bob Marley event, and a jazz festival. Obviously these had nothing to do with security guard training. Rather than becoming highly trained as they recalled Brooks promising, they found themselves only marking time. In addition, the Charging Parties and Norris testified that Hodges engaged in inappropriate racial remarks and slurs. According to the witnesses, while telling anecdotes about his own experiences, Hodges frequently used the "N word" and referred to his ex-partner's wife as an "Aunt Jemima." This, of course, was not only inappropriate generally but peculiar in context. There were at least two African-American trainees in class, Fair and Norris. In addition, Respondent's Sacramento program manager, Brooks, and its CEO Hollis are African-American. If nothing else, such remarks in that context can only lead to the conclusion that Hodges does not exercise very good sense.¹⁴

At the April 22-23 shoot at Castro Valley, there is no evidence that any of the gun jamming seen in March recurred. The trainees had a different complaint at that point: they believed they were being shortchanged on the number of rounds they were supposed to fire.¹⁵

On April 22, while at the Chabot Gun Club, seven of the eight had a discussion among themselves concerning, in the words of the General Counsel, "their frustrations of what was going on in training." At least some wanted to do something about what was being perceived as some kind of fraud. One said he had a lawyer with whom he could consult and another

suggested writing a congressman. Another, Marcia Norris, was asked to write a letter on the group's behalf. Smith suggested that the group contact the DHS Office of Inspector General. Smith's motive was to make certain that the TRACON facility was properly protected as it is considered a high-level threat target. Smith convinced Romo and Fair to join him in reporting the matter to the OIG. They were all concerned for the safety of FAA TRACON. The four others did not accept that course of action, though Norris agreed to help write whatever they settled upon. There is no evidence that she was ever asked to perform that task. Left unsaid was their supposed trepidation over working with properly trained fellow guards. Of course, insofar as the eight were concerned, they had been properly trained earlier and trusted one another. Indeed, the FAA's Marinell and Cantrell considered them a well-trained team.

It appears, at least from Fair's testimony, that all three did take their issues to the OIG. The record does not demonstrate the means by which they contacted the OIG, whether in person, in a group, individually, in writing or by telephone. The record is simply bare of any description. Nor is there any evidence concerning when they made contact or what the substantive nature of the communication actually was. Indeed, it is unclear about whom they were complaining—ASTI and Hodges or Respondent? Again, the record is bare of such evidence. Furthermore, there is no specific evidence of how the OIG responded.

Danny Hodges

ASTI and Danny Hodges's role in this matter has been deliberately obscured by counsels' decisions regarding the litigation. The complaint asserts that Hodges is either Respondent's agent or its apparent agent. Why then, did counsel for the General Counsel not call Hodges? Since it was counsel for the General Counsel making the allegation, the burden was on the Government to prove it. Was that failure because he was afraid of what Hodges would say? The General Counsel, of course, has adduced testimony from the trainees concerning statements made by Hodges to the class which could be imputed to Respondent if Hodges/ASTI were deemed to be its agent or apparent agent. Based upon that testimony, the General Counsel asserts that it has presented sufficient evidence in to meet its burden and to require Respondent to rebut it.

On the other hand, Respondent asserts that ASTI and Danny Hodges are simply independent actors who seem to have antagonized the trainees and perhaps engaged in some sort of scheme, the object of which is not entirely clear.¹⁶ It contends that whatever Hodges may have done or said was without its knowledge or authority. Certainly Brooks has testified that he was unaware of any of the training shortcomings or false paperwork issues being raised by the Charging Parties. Given that, Respondent asserts that there is no evidence that it deputized or authorized Hodges to ever speak for it. Accordingly,

¹³ The schedule was not continuous, as FPS delayed some obligatory direct training.

¹⁴ Hodges' own race cannot be discerned from the record; neither can his level of familiarity with Brooks which might (or might not) excuse such references to him. But, for the class with whom Hodges was expected to maintain a professional distance, this vernacular was ill-chosen, if not downright offensive.

¹⁵ When counting all of the live-fire shoots, the total number of rounds for the course seems satisfactory.

¹⁶ In addition to the curious training Hodges apparently provided and described in the previous subsection, there is evidence that Hodges provided and instructed the class to provide false paperwork concerning the number of classroom hours and other matters. To the extent a Hodges "scheme" may be perceived, it seems likely that it was to permit these experienced and capable security officers to skate through the training without his having to give it much effort.

Respondent asserts that the General Counsel has not provided a sufficient predicate for me to draw the conclusion that either agency or apparent agency principles have been met. Furthermore, Respondent says, because of that failure of proof, there was no need to call Hodges itself, so it did not.

Before discussing the agency question, however, I turn to the evidence the General Counsel adduced concerning what Hodges told the trainees and when he told them.

First, Romo said that on April 15, apparently after Marinel had raised the gun malfunction issue with the FAA, Hodges told the class that “[S]omebody had spoke to the FAA about the gun issues out at the range. And he told us that it wouldn’t be in one’s best interest to do that. And he said that Mr. Brooks was extremely unhappy that we were talking to the FAA about it and, you know, we should knock this off.”

Second, on May 13, as the training period was beginning to wind down, and just after Fair was dismissed, Brooks went to the ASTI facility, some 6 miles distant from his office, to deal with a problem involving Norris which eventually resulted in the dismissal of Smith and Romo. He spoke to the class for a few moments and among other things told them that under Respondent’s chain of command policy, the guards should not speak to anyone outside the Company.¹⁷ He observed that the FAA was not the client (unlike the previous contract term where FAA had been the contracting agency). According to Smith and Romo he asserted that neither Cantrell nor Marinel were their friends. There is some disagreement between the employees and Brooks regarding what was said, but in essence Brooks was reminding them that company business should remain within the Company. The trainees testified that he also threatened them with discharge over the issue. Brooks does concede that a breach of the policy could result in discipline. In defense, Brooks correctly recites that Respondent’s contract with FPS imposes those same limitations. His testimony:

Q. [By Mr. REEVES] Okay. Did you tell the trainees, in Mr. Hodges’ class on May 13th, or at any other time, that they should specifically not talk about what was going on in training to Brad Cantrell or Larry Marinel?

A. [Witness BROOKS] No.

Q. But, you did tell the class, on or about May 13th, that divulging any company knowledge to any client was prohibited by company policy and could result in disciplinary action, is that correct?

A. Not solely correct. I need to clarify that.

Q. Okay. Please clarify?

A. It’s not only Trinity’s policy, it is the policy of the Federal Protective Service and the Federal Government, it’s also listed in the Statement of Work about bothering the clients with Trinity Protection’s security issues.

¹⁷ Respondent’s most recent policy statement concerning its chain of command policy is dated April 28. See GC Exh. 22. The policy itself is not the subject of the complaint. Like most chain of command policies it establishes a framework of communication up and down the lines of supervision and insists that company business stay inside the Company. There is no evidence that any of the trainees has ever seen it.

Q. Do you want to point it out to me where in your contract it so states?

A. Absolutely. Listed under the Standards of Conduct. Let me see if I have that section here. I do not have that section.

[Searching for document discussion]

THE WITNESS: Yes, it would be No. 21 on page 62 of 160. [G.C. Exh. 14]

MR. REEVES: Okay.^[18]

Whatever might be said about Brooks’s statement, it clearly had nothing to do with employees choosing to go to the OIG over any training inadequacy issue. By that date, about 3 weeks had passed since the Charging Parties had resolved to speak to the OIG. His reference to Cantrell and Marinel could only have referred to the gun question, if not, as Brooks testified, simply to tell the former Diamond guards for the first time that they were now operating under a different hierarchical system. As will be seen, Brooks’s appearance that day was somewhat contrived, for he was really responding to Hodges’s request that he come interview Norris.

The Discharges

David Fair

While employed as a security guard for Diamond at FAA TRACON David Fair operated at least two businesses on the side which were connected to that facility. For several years he and his wife and some partners had held a landscaping contract with the FAA under which his company and his employees worked at the site, mowing the grass and taking care of the grounds. In addition, in April 2008, he acquired, on a short-term basis, a janitorial contract which lasted for some period into the time-frame where Respondent had begun guarding the facility on April 1, 2009.

When Fair filled out the background paperwork required both by Respondent and by DHS, he did not list either of his business contracts with the FAA. As a result, neither Brooks, Respondent’s director of operations, Clifford Ward, nor HR official Jackie Bradley, were aware of Fair’s outside connections to the FAA TRACON facility.

The connection was uncovered due to an incident which occurred in the first week of May when veteran security guard Chere Heyermann was faced with an incident she didn’t understand. She had come to know Fair as he and the FAA’s Cantrell sometimes went in and out of the facility together. Fair had an identity card she checked on at least one occasion. Then one day, apparently in May, she encountered Fair with one of Fair’s linen supply trucks at the loading dock. She stepped aboard the truck to determine whether the truck was safe and was rudely put off the matter by Fair, who called Cantrell on his cell phone. Cantrell (essentially Marinel’s successor as the FAA point man) appeared and told her she didn’t need to be there.

¹⁸ That portion of the contract states: “21. Disclosure of any information involving duty assignment(s), security equipment, practices, procedures, operations, or other security related issue shall require the express approval of the COTR [the FPS official having responsibility over the contract].”

Puzzled by Cantrell and annoyed with Fair's attitude,¹⁹ she returned to the guard shack where she learned from another guard that Fair had tried to wave the truck through the entrance without going through security. From the guards' point of view, Fair did not have the authority to do so, since he wasn't yet working as a guard.

Although the incident itself (ultimately innocent as presenting a hazard to the site) became misdescribed as it percolated up through the bureaucracy to Brooks,²⁰ it caught Brooks's attention. What was Fair even doing at the site? He was only a trainee, not a guard. Why did he possess a security ID? Why did Cantrell have so much such confidence in Fair that he could wave off Brooks's security officer? Fair's application forms provided no assistance in answering the questions. Even so, Brooks quickly learned that Fair "worked for" the landscape company at FAA TRACON. Brooks initiated a review of Fair's forms and also had some conversations with FPS' May Joe, a personnel security specialist who was working on the trainees' security clearances.

In Brooks's opinion, under the disclosure rules, Fair's omission of his employment contracts from both the Federal security forms and from his employment application appeared to be a serious matter. Yet, in the beginning, he thought it could be worked out by Fair making corrections. When Brooks discussed the situation with CEO Hollis, however, Hollis didn't want to employ someone who held two jobs, one of which might be a conflict of interest.²¹ Sometime before May 4, he told Brooks to force Fair to make a choice and to draft a letter to Fair to that effect. Brooks did so on May 4, but didn't get to Fair until May 11.

That day, according to Brooks, he handed Fair the letter (GC.Exh. 18(b)) (still dated May 4) and told Brooks that he needed to make a choice. Fair argued that he didn't "work for" the landscape company; he was the owner and didn't have to make the disclosure. Brooks asserted that the connection needed to be disclosed, and pointed out that the forms have appropriate places for that information. Brooks recalled that instead of agreeing, Fair asked Brooks to be deceptive and say "to the government" (FPS), that it was really his wife who owned the business. Brooks was offended by the request and refused. He says Fair then walked out of the meeting. That walkout prompted Brooks, following Hollis's instructions, to terminate Fair.

Fair does not significantly disagree with Brooks's description of what was said. He agrees that he argued against supplementing the forms and that he refused to do it then and there as

¹⁹ She testified: "He told me I didn't belong there, get out of his way. He was upset. And so he got back on his telephone and walked away from me as I went with the delivery driver in the back door."

²⁰ It became a landscape issue in the reports, not a janitorial supply truck.

²¹ Hollis was on the right track, but didn't know it. Fair was listed as the president of TMD Security Services, an actively licensed (but said to be dormant) guard services company owned by him, Smith and Romo. Its website's home page is in evidence. Respondent did not learn of that company until after the discharges and the company plays no essential role in my decision here. Nevertheless, its mere existence would have raised conflict of interest issues upon discovery.

Brooks asked. However, he contends that Brooks gave him the option of taking the form home and to "return to training on May the 12th." This testimony is not credible on its face. Brooks was under an instruction to force Fair to make the choice. That required Brooks to ask Fair to add the omitted information. Moreover, Brooks had come to believe, after a telephone call with her, that FPS's May Joe believed the application as it stood was deceptive and warranted corrective action. See Joe's confirming testimony in the footnote.²² I find, therefore, that Fair's testimony that Brooks gave him an option cannot be credited. It is not something Brooks would have said, even if he had earlier been reluctant to discharge Fair over the incomplete paperwork.

The General Counsel's argument to the contrary is rejected even if it is true that Brooks has misinterpreted Joe's comments to mean that Respondent was obligated to discharge Fair. Under either scenario, Fair's response to Brooks's query meant that Fair had no intention of correcting his forms. Moreover, I find that he walked out of Brooks's office having refused to deal with the issue²³ and that Respondent's decision to discharge him followed on the heels of that departure. Fair was in fact discharged on May 12, though not notified until the next day when Brooks intercepted him before the training class began and barred him from further training.

Smith and Romo

The next morning, May 13, Hodges called Brooks. Brooks: "[Hodges] told me that I needed to report to his training school, there was an issue that was brought to his attention and that it required me, as the contract manager, to come over and speak with Ms. Norris. That was it." Brooks went to the ASTI facility and, needing some cover to pull Norris from the classroom so he could talk to her confidentially, made a short speech about what he characterized as 'background issues' (the need to follow the chain of command). His comments have been discussed elsewhere. After his remarks, he discreetly escorted Norris from the class and then to a nearby Starbucks coffee shop. Brooks testified about their conversation there:

Ms. Norris had this real saddened look on her face. I ordered

²² [By Mr. BENJAMIN] Q. An applicant that has a federal contract, or has had a federal contract, needs to disclose that in this section, isn't that right?

A. [Witness JOE] That is if he has any employment, previous employment as a federal contractor.

....

Q. That's right. And so then also the Section No. 6 Code, do you see that, where it says, Self-Employment ?

A. Self-Employment, yes.

Q. And then there's a Code No. 4 that says, Other Federal Employment, do you see that?

A. Yes.

Q. If an applicant has an employment history with any of those categories, that applicant is required to put that in the SF85P, isn't that right?

A. Yes.

²³ Counsel for the General Counsel argues the information was not required, but only voluntary, and Fair was not obligated to provide it. Assuming that to be so, Fair nevertheless had refused a reasonable direct order.

coffee, came back, sat down until my order was ready.

I spoke with Ms. Norris and I'm like, I asked her what is the problem. So, as she was pulling herself together to start telling me what the problem was, she started crying. She said, Mr. Brooks, I need to tell you of some things that's been happening. She stated that, I feel that I can bring this to your attention since Mr. Fair is no longer in class.

She says, I've been sexually harassed and badgered by several people in the class. She kept referring to them as they, she kept saying they. She went on to tell me of instances while working on post with these individuals, how she was made go (sic) [to] do the rounds out in the rain, out in the heat, but was always her while these individuals stayed relaxed in the guard house. She went on to state that it was her that did all the work at the FAA location.

She went on to say that during the time that they were at the training, Chabot outdoor range, she was badgered by these employees. She went on to tell me that, the conversation came up about her supposedly taking one for the team. And then she pulled herself together enough to explain it to me. And I was like, I know what 'one for the team' means but, in your case, I mean what was meant by that?

Ms. Norris told me that she was supposed to sleep^[24] with Mr. Ward in order to secure jobs for those individuals to come onto the contract, so they would have a secure position. She was real hesitant in telling me because Mr. Ward is the Director of Operations, who is my direct supervisor. She went on to say that she was just very scorned by this, that she had never had anything like this happen before. She said, this is something that she did not want to see happen to her, because knowing that she was coming over to a new contractor she wanted to start out with a clean slate.

Near the end of our conversation, I asked Ms. Norris, I was like, Okay, now that you've told me this, who are we talking about? Are we talking about Romo, Smith and Fair? She said, Yes, those are the ones.

He asked Norris to put all of this in a written statement. She did so at home that evening. The principal difference between what Brooks said she told him orally and what she wrote is that when naming her antagonists she mentioned Fair and Romo by name, but omitted Smith. That afternoon, not yet having her statement in hand, Brooks contacted CEO Greg Hollis in Maryland, both by phone²⁵ and by what appears to be a confirming email. In the email he lists all three as having been involved in what can only be described as a hare-brained scheme to blackmail Ward into hiring all three under threat of a sexual harassment suit.

The scheme, according to Norris, and more completely de-

²⁴ When Norris testified, she was surprised that the phrase "take one for the team" had been interpreted as Fair asking her to have sex with Ward. She had limited it to "date" Ward. If she and Brooks did not have the same understanding of the phrase, that divide does not reflect on Brooks' assessment of the situation. He honestly believed she was reporting that Fair had been coercing her to do something improper and it needed to be strongly and promptly addressed.

²⁵ Per Hollis's testimony.

tailed in her statement than in the testimony, started on March 26, a week before Trinity was to replace Diamond. In the presence of Fair and Romo, she had telephoned Ward from the guard shack to ask when training would begin. After everyone listened to Ward's answer, Fair suggested she go on a date with Ward and "take one for team." Fair said she could dress up and lure Ward into a bad situation, even offering to buy her a dress. (Both Fair and Romo deny the entire episode.)²⁶ She said she told Fair it was wrong and she wouldn't do such an unethical thing. That might have been the end of the matter and the whole thing might have been disregarded as simple prehire banter among nervous prospective employees, but it resumed later on.

Norris's relationship with Fair and some of the other former Diamond guards such as Smith was not the best. Rightly or wrongly, she believed Smith had treated her unfairly as Diamond's ranking officer and she wanted to start anew, free of whatever baggage she had acquired with Smith while employed by Diamond. She was also aware of a rumor that Fair had accused her, behind her back, of being a "snitch," though she could not imagine why.

Then, during May, the time-frame when Fair found himself being questioned about his FAA TRACON contract(s) and while the officers were undergoing the training at ASTI, she perceived that things had become worse. In particular, her statement said, on April 22, at the Chabot Gun Club firing range, Fair again asked her to take a hit for the team to secure a job for him and to support a lawsuit. She responded that wasn't going to happen and instructed Fair not to approach her again on the subject. On the following day, again at the club, she said she encountered some negativism, a continuation, it would seem, of the same sort she had seen while in training class.

Curiously, the second day at the Chabot range was the same day she agreed to serve as a scrivener for complaints about the training.

Although Brooks was ready to fire them both after his interview with Norris, Hollis decided that it would be proper, before proceeding to any decision, for Brooks to give them the opportunity to explain what they had been up to. That process took a few days to arrange. In the meantime, the class had proceeded to the stage where the trainees were to take an FPS final test in San Francisco on Friday, May 15. Romo testified that Hodges had told him to call afterwards to report how the testing had gone. While driving back to Sacramento afterwards, Romo and Smith were riding together and called Hodges. Both testified, as the call ended, that Hodges told them that he was resigning as their instructor and that they should take any questions they had to Brooks. Romo, at least, tried almost immediately to reach Brooks, but was unable to do so. Nor could anyone reach Brooks over the weekend.

The next day, Saturday, Smith went to ASTI and was able to meet Hodges outside the school. He says he asked Hodges for

²⁶ Romo, on May 21, wrote a narrative about the March 26 telephone call from the guard shack which he submitted to Brooks on May 22. Although the narrative corroborates Norris to some extent, he does not mention Fair as being present and portrays Norris as being flirty with Ward. He does agree that Ward offered a positive outlook for their hire. Unlike Norris, he says the conversation was aimed at hiring, not when training would begin.

an explanation, but Hodges just repeated he wasn't going to be their instructor any more. Romo asked why not, and says Hodges responded "... some people had made some statements and he wasn't going to be my instructor because he was trying to protect his school. And when I asked him I said, what statements are those, he wouldn't tell me."

On Monday, May 18, both Romo and Smith again went to ASTI, apparently to participate in the graduation exercise scheduled for that day. Hodges asked why they had come and would not let them in. Romo explained that they had been unable to reach Brooks so they had come to class and that they just wanted to graduate. Hodges then said they needed to talk to Brooks, that some kind of ethical issue had arisen, but he did not elaborate; again, he told them they should speak to Brooks.

On May 20, to try to obtain their side of the story, Brooks called both Romo and Smith in for interviews. The meetings did not go well. Both were angry and upset. From Brooks's perspective, they were uncooperative and unprofessional, even disrespectful. He had asked one of his sergeants, David Rollins, to be an observer for these interviews and Rollins corroborates Brooks's assessment of their behavior. Brooks said he tried to get them to describe what they knew about any sexual harassment aimed at Norris.²⁷ Both denied any knowledge of such behavior. They acknowledge being upset, though they don't believe their behavior was excessive; Brooks disagrees.²⁸ Nevertheless, I think it is fair to observe that they were unable to report much, because they really didn't understand what Brooks was driving at. Brooks did not wish to reveal what Norris had said about them and had to hold back. The upshot was that Brooks was faced with assessing their behavior as evidence of guilt or innocence as opposed to having factual material to analyze. And, to that extent he viewed their behavior as defensive, which in turn suggested they were trying to conceal what they knew. When Romo filled out the written statement Brooks asked for, he curtly wrote "I have nothing to discuss until this matter is finished. I don't have any info to give you at this time." On its own terms, this answer insinuates that he is in possession of pertinent information but is withholding it until a later time. From that, Brooks concluded, reasonably, that Romo was essentially lying.

Romo knew his answers were unsatisfactory, and on May 21 wrote the narrative referred to in footnote 26. On May 22, he delivered it to Brooks in an effort to patch up his unacceptable

²⁷ Norris would not describe the scheme as "sexual harassment" and does not believe she ever made a complaint about sexual harassment. Although she does not use the terms, she would probably describe Fair as taunting or bullying her.

²⁸ Brooks: "... there was so much confusion, there was a lot of issues, a lot of badgering going back and forth, a lot of hate and discontent going on with those two [Romo and Smith], surrounding those two, the numerous phone calls that I received badgering me, telling me I didn't know how to do my job and being cussed out on the phone, I was just so to the point of washing my hands of the situation because it was just lie after lie after lie. I didn't want to continue with this anymore. I knew it was something wrong, I just couldn't pinpoint what the whole entire issue was but, everything surrounding the whole entire circumstances of Marcia Norris sexual harassment, beginning at that point, everything led me to believe I couldn't possibly trust these guys."

answer from May 20. This narrative partially corroborates Norris in that it shows that there had been a phone conversation with Ward at the guard shack and that Romo at least approved of her flirting with Ward. It did not confirm her story but instead can be read to be as an attempt to divert responsibility from Romo (and anyone else, such as the omitted Fair) to Norris herself. Moreover, it offered nothing about what had happened at the Chabot range. It certainly wasn't sufficient to dig Romo out of the hole he had dug for himself with his May 20 behavior and his transparent effort to conceal what he knew.

As for Smith, aside from being upset with the entire matter, in his first statement he attempted to describe what he thought Brooks wanted, but missed the mark, describing his movements on May 15, saying he had no problems with Hodges and asserting he had not "planned any action against him or his school." He mentions complaints during training and suggests that maybe something had been misunderstood, perhaps being taken out of context. For Brooks, the statement was a non sequitur. Smith gave a second statement on May 22, simply denying knowledge: "I know nothing of these statements: 'taking one for the team,' sexual harassment, law suite (sic) against Trinity to secure a job." Indeed, Smith seems to have been the odd man out. Although Brooks recalled Norris mentioning Smith as being one of "them," her written version did not include him, nor was he present by anyone's account at the guard shack on March 26.

However, Hollis was already operating under the belief, mainly from Brooks's first report, that both Smith and Romo were involved in Fair's scheme. In addition, Brooks sent an email to Hollis and Ward on May 21 in which he describes a conversation he had just had with Art Rumrill, one of the successful trainees who had worked with Fair, Romo, and Smith at Diamond. He said:

Officer Rumrill just left my office and he informed me about Michael Romo, Thomas Smith and David Fair. He said that if they would have come on board, there would have been some major problems because he has had several conversations with those 3 officers. He said he would put it all in writing if you needed it. However he could help out. [Brooks then lists reasons why he trusts Rumrill.] He stated this morning that we go back a long ways and he wanted to be honest with me about those 3 officers. *He said Officer Norris got the worst from those 3.* [Emphasis supplied.] (R.Exh. 13)

Hollis asked, a minute later, if Rumrill had heard any of the language Norris described. If there was an answer, it was not by email.

In addition, there is email correspondence describing reports made to Brooks to the effect that Smith and Norris did not get along. At one point Brooks reports Smith as telling him that Respondent should never have hired Norris as she "has always been a problem."

In the morning of May 22, Hollis in Maryland had reached his decision, even though Smith and Romo's second statements were yet to be made/delivered. He emailed Brooks at 7:31 a.m. (PDT), "We will not be picking them up" as both Smith and Romo had been named by Norris. Thus the effective

discharge date was May 22,²⁹ although Brooks's letters were not sent until June 22. In a sense the letters were unnecessary as both knew they had not completed the training class and had not been assigned duties. Romo acknowledges as much. The discharge letters were probably delayed as the three filed a grievance with the union which took some time to be rejected.

II. ANALYSIS

This case presents a fact pattern which grew out of job insecurity and which should have never happened. That job insecurity began with DHS's insistence that the fully trained and experienced Diamond guards needed to undergo the full 120 hour re-certification program. That in turn infused the Diamond guards with near-panic fears and loss of income while the recertification played out over a 6-week period. It was a wrenching experience which no responsible person foresaw, though someone should have.

As soon as it was announced that the FAA TRACON security contractor, Diamond, was to be replaced, those guards working for Diamond began to harbor their worst fears, even though Respondent had fairly promptly determined to hire eight of them. The discomfort of displacement started on March 15, when the five misconnected with Hodges followed by two guns jamming at the Rancho Cordova firing range. It was exacerbated on March 17 when the five who were scheduled to drive from Sacramento to Castro Valley were given back the same or similar guns and then had difficulty keeping up with Hodges as he led them 110 miles down some very busy freeways to the Chabot Gun Club range. For unexplained reasons Smith and Romo came to believe that Hodges was trying to "ditch" them. Specifically, the FAA's Cantrell alluded to their odd frame of mind concerning their perceptions. He observed that "They" (without specifying whether it was Romo, Smith or both), "were frustrated to the fact that they were instructed to follow somebody else to the [Castro Valley] shooting range, and felt like they were trying to be ditched, and had to do their best to keep up in traffic conditions to get there. And when they reported that the firearms failed, I remember this discussion, this part of the discussion really well, that they were given back the same or similar firearms and told they're fine, there's nothing wrong with them."³⁰

From that point on, Smith, Romo, and Fair, the most prominent of the eight Diamond guards, harbored suspicions about Respondent's motives and good faith. Why they felt that way is not really explainable, since they had been fast-tracked to jobs with Respondent. Still, the hurdles these experienced guards were required to meet seemed to them, somehow wrong. They thought the recertification procedure was entirely unfair and an unnecessary gantlet they were being required to run. Among

²⁹ Conceivably Romo and Smith's second statements could have caused Hollis to reverse himself, but their ineffectiveness was manifest to both Hollis and Brooks.

³⁰ Telling Cantrell that the person they were to follow to Castro Valley (Hodges) was trying to ditch them, suggests that from the outset they held suspicions about Respondent's verities that exceeded reality. Certainly, given Respondent's urgent necessity to hire them, it makes no sense to undermine its need by 'ditching' them in a 110-mile chase even before they were hired.

other things, the training schedule was unfriendly. They had to wait 2 weeks into Respondent's contract takeover before training even began. Plus, during the training period Respondent would not pay them what they knew themselves to be worth—instead paying them only the minimum wage. And, since the training schedule was somewhat dependent on FPS's willingness to provide its FPS-specific portion only according to its own convenience, which did not match Respondent's needs (and was in San Francisco, to boot), the training period became unnecessarily drawn out. The upshot of all this is that by the time training began in mid-April, these three, at least, had exceeded their quotient of anger. They didn't know to who to blame, but they thought they were being victimized.

I think it is fair to say that they were maltreated by the system that DHS had put in place. Even so, they needed to exercise better patience than they showed to Brooks as he began to focus on allegations of misconduct—Fair's disclosure gap and Smith and Romo's faceoff over Norris's accusation. Their livid behavior in the May meetings with Brooks actually overshadows nearly everything that went before. If Fair had supplemented his paperwork as Brooks requested and if Romo and Smith had calmly worked through what Brooks was trying to reach concerning Norris, they would probably be employed today. Instead, they allowed their built-up emotions to overrun their good sense and this litigation is the result.

Despite the confused record and the peculiar circumstances surrounding Norris, as well as counsel for the General Counsel's broad credibility challenges aimed at Brooks and Norris,³¹ his charge that Hodges was committing misconduct of his own in which Respondent was complicit, together with his unwarranted request that I draw adverse inferences, I find that credibility issues actually lean the other way.³² The anger displayed by the Charging Parties evidences a clear bias and amounts to a call for retaliation for perceived mistreatment rather than an effort to provide the unvarnished truth. Indeed, where those three put up a united front, rather than seeing mutual corroboration, I see long-time friends and business partners sticking up for one another.³³ They present as a club exclusive to themselves. Frankly, where they disagree with Brooks, I find myself trusting Brooks's version over theirs.

The factual mixture is confusing and often improbable. For example, Brooks had good reason to fully credit Norris, even if she did not see her accusations as involving sexual harassment. Yet, it can be argued that she has her own agenda and used Brooks as a cat's paw in order to get Smith and Fair fired. In addition, how did a routine equipment shortcoming, the gun jamming, get blown into a working conditions complaint even

³¹ After the transactions described here, Norris was fired from her job, wrongly it would appear, and was in the process of being reinstated while the hearing was underway. The General Counsel has argued that her testimony was corrupted by the offer of reinstatement. I have considered the argument and hereby reject it as unsupported, both in demeanor and in contextual probability.

³² For the rules concerning drawing adverse inferences, see *International Automated Machines*, 285 NLRB 1122, 1123 (1987). Counsel for the General Counsel did not set the predicate for invoking those rules.

³³ Referencing their effort to establish the TMD Security Services.

before the trainees were on board? How does an alleged remark by Hodges, claiming Brooks is upset, become an imputation issue, when the supposed statement does not fit the chronology, stands naked and is only weakly corroborated? And how does a rule, written or not, designed to make certain that new employees understand that the communications lines have been changed, become a Section 7 matter?

The Alleged Threat of April 15

Utilizing Occam's razor logic, that is, applying the simplest and most straightforward probability to the facts, the gun jamming in March barely touches on Section 7 concerns even though it may have led to Hodges saying something on April 15. The Charging Parties say they had become concerned over their mutual safety in the event of an incident requiring gunfire at FAA TRACON. In the abstract, that is a Section 7 matter. Still, the jamming was promptly addressed and no repetition was reported to Brooks. He rightly regarded it as an equipment issue. Furthermore, there has been no showing that any class member who succeeded in being hired was ever issued an inoperable weapon. Of course, misfiring weapons at a range has no bearing on what would have happened later when the guards assumed their posts. Finally, there is no evidence that the guns they were issued for practice and qualification would have been the guns issued to them as permanent employees. In large part, therefore, their concerns about mutual safety on the job were both premature and not exactly real, for safety was not part of their dialog with Marinel and Cantrell. Safety seems to have been an afterthought.

Hodges is said (through Romo's testimony) to have threatened employees with unspecified reprisals on April 15, when he supposedly told the class, "[S]omebody had spoke to the FAA about the gun issues out at the range. And he told us that it wouldn't be in one's best interest to do that. And he said that Mr. Brooks was extremely unhappy that we were talking to the FAA about it and, you know, we should knock this off."

First, there is a significant chronology flaw in the General Counsel's evidence. There is no evidence that Brooks knew anything about such a report/complaint until April 17. That is the day DHS's Le Lieu made her email inquiry to Brooks about gun jamming. Her email was the first that Brooks had any inkling that anyone outside the Company had mentioned the gun jamming to anyone. Even then he didn't know that the FAA was involved. Certainly Marinel never told Brooks what he had done; nor did Romo or Smith say they had mentioned it either to Brooks or Hodges. So how could Hodges on April 15 be telling the class that Brooks was upset about it? It had not yet happened. That suggests embellishment on Romo's part because Norris (though referencing a different time-frame, mentions only Hodges's admonition to follow the chain of command (not to go to the FPS about training issues), and did not recall Brooks being mentioned at all. Accordingly, Romo's testimony must be rejected as untrue.

While there is no doubt that rules which inhibit employees from going to outsiders to complain about workplace matters can violate Section 7 of the Act, the rule must be read reasonably and in context. See below. I recognize that the supposed admonition Hodges gave the class on April 15 (the second day

of training) is not exactly a rule or even the same rule which can be found in Respondent's employee manual. Nevertheless, I shall treat it as such.

Treating it as a company rule, the law to be applied is: In general, if a rule specifically restricts Section 7 activities, the rule is invalid. *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). See also *Waco, Inc.*, 273 NLRB 746, 748 (1984) (rule explicitly prohibiting employees from discussing wages with each other constitutes a clear restraint on §7 activity). Certainly nothing which Hodges is supposed to have said was in any explicit way aimed at a Section 7 right. "In determining whether a challenged rule is unlawful, the Board must . . . give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper inference with employee rights." *Lutheran Heritage*, supra at 646. In determining whether a rule or policy is on its face a violation of the Act, it is necessary to balance the employer's right to implement rules of conduct in order to maintain discipline with the right of employees to engage in Section 7 activity. See, *Intermet Stevensville*, 350 NLRB 1349, 1382 (2007) (adopted without exceptions) finding that the employer's confidentiality rule could not reasonably be construed to prohibit Section 7 rights when the clear purpose of rule was to prohibit disclosure of information pertaining to the Company's business, its customers and its suppliers.

According to the General Counsel, Hodges's statement accomplishes two things. First, it is an independent threat under Section 8(a)(1) and second, it supposedly establishes that Respondent harbors animus against employees who engage in Section 7 activity. In both instances, it requires a finding that Hodges was speaking on behalf of Respondent as either its actual agent or its apparent agent. But even before that, comes the question of whether such an admonishment can truly be characterized as an 8(a)(1) violation. Under the above-cited case law, we must take the context into account. The change-over from Diamond Detective to Respondent required a change in the thinking of the employees working for the security contractor. Previously, the Charging Parties under Diamond's arrangement with the FAA had simply spoken to their FAA overseer (known as the COTR) Larry Marinel if there were any issues that needed to be discussed. Smith, as Diamond's site supervisor was used to that sort of direct dealing. He and Marinel were comfortable with each other and Marinel held him in high esteem. When Respondent became the security contractor, the FAA no longer had any powers under the contract. It had simply become an FPS client and could no longer directly communicate with the contractor. If it had problems, it first had to take them up with FPS which could then make an independent determination about that issue and act accordingly. Indeed, Respondent's culture as it dealt with FPS throughout Northern California was that its guards did not deal with the client at all, but only FPS. It was that chain of command which Respondent needed to inculcate into its staff, a staff which was used to doing things a different way.

In that circumstance therefore, if Hodges made the statement as Romo describes, there is a significant question about whether it amounted to an unlawful threat under Section 8(a)(1). Clearly, some emphasis was required to retrain the

former Diamond employees from their previous routine of going directly to the FAA with work-related matters. Respondent simply does not deal with FPS clients as a matter of its contract with FPS. As one of Respondent's former employees, Hodges undoubtedly was familiar with its chain of command rule.

From the context here it is clear that if Hodges made the remark, he was aiming to change the Diamond employees' culture of dealing directly with the FAA about workplace issues in order to comply with Respondent's obligation to deal with FPS, the actual client. Brooks said something similar a month later, so Respondent does deem it important to instill into the employees' minds that Respondent speaks on contract compliance matters only to the FPS. Accordingly, I do not find that the trainees' version of what Hodges said on April 15 had anything to do with inhibiting employees from exercising their Section 7 right to obtain redress of grievances from sources outside the workplace.³⁴ Consequently, even if Hodges had said to the class that Brooks was upset about someone speaking to the FAA about the gun jamming, it is of no moment legally, for he had the right to instruct employees about how Respondent does business.

Finally, even if one could find Section 8(a)(1) merit to Hodges's remark, I do not see how it imputes anything to Brooks and/or Respondent. None of the trainees thought Hodges was anything but a teacher. Later they knew Hodges was making racist remarks, which the African-American management would not have authorized; was using entertainment films as a substitute for training, which they must have known was not authorized; and may have been falsifying documentation, again conduct which they reasonably knew could not have been authorized. Reasonable people having such knowledge would not conclude that Respondent had authorized Hodges to say anything on its behalf. He couldn't be trusted, and they knew it.

Beyond that, see *Ready Mix*, 337 NLRB 1189, (2002), where the Board discusses the lack of agency and lack of apparent agency status.

As the judge also found, Hampton made various claims to employees that he had authority to direct work and to coordinate job tasks. There is no evidence, however, that the Respondent either conferred this authority on Hampton or cloaked him with apparent authority to act as its agent.

The Board applies common law principles of agency to determine whether an individual possesses actual or apparent authority to act for an employer, and the burden of proving an agency relationship is on the party who asserts its existence. See, e.g., *Pan-Ostion Co.*, 336 NLRB 305, 305-306 (2001). "Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question." *Southern Bag Corp.*, 315 NLRB 725 (1994). The test is whether, under all the circumstances, employees would reasonably believe that the alleged agent was

reflecting company policy and speaking and acting for management. See, e.g., *Pan-Ostion Co.*, supra, citing *Waterbed World*, 286 NLRB 425, 426-427 (1987), enf'd. 974 F.2d 1329 (1st Cir. 1992).

Here, there is no showing that the Respondent placed Hampton in a position that employees would reasonably believe that he was acting for management. Hampton's mere claim of alleged authority is insufficient to make him an agent.² Nor is there evidence that Hampton was held out as a conduit for transmitting information from management to employees. Compare *Pan-Ostion Co.*, supra (no evidence that employer communicated to employees that alleged agent was acting on its behalf) with *Hausner Hard-Chrome of KY, Inc.*, 326 NLRB 426, 428 (1998) (employees held to be conduits where they attended daily production meetings with top management, from which they returned to communicate management's production priorities and were the "link" between employees and upper management).

Clearly, Hodges did not hold any, nor was he perceived to have held any,³⁵ agency status with Respondent, actual or apparent.³⁶ Therefore, nothing he said or knew can be imputed to Respondent. In fact, of course, there was nothing much which could be imputed. There was no knowledge and no animus. As a result, the General Counsel's argument on this issue is unproven and his evidence fails to support the complaint. That allegation will be dismissed, mostly because Hodges's comment could not have happened when Romo says.

The Alleged Threat of May 13

The complaint specifically asserts that Brooks and Hodges on May 13 "threatened employees with reprisals, including termination, if they discussed issues relating to their training with agencies of the United States Government." In fact, no witnesses said Hodges made any remarks to that effect. Brooks, noting that he had not discussed the chain of command policy with the trainees prior to that date, says this was his first opportunity to do so. He also pointed out that it was not simply a company policy but a policy imposed upon Respondent by the FPS, citing that portion of the security services contract where

³⁵ Norris certainly didn't think so. Romo said: "I can't recall [Brooks] saying anything about Mr. Hodges' authority over us."

³⁶ To establish apparent authority the principal must either intend to cause a third party to believe that the agent is authorized to act on behalf of the principal, or the principal should realize the conduct of the alleged agent is likely to create such a belief. *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82, 83 (1988) (citing RESTATEMENT 2D, AGENCY, §27 comment a.). Therefore, two conditions must be satisfied before apparent authority exists: (1) there must be at least one manifestation by the principal to a third party, and (2) that third party must believe that the extent of the authority conferred to the agent includes the contemplated activity. The General Counsel's evidence falls short.

Moreover, under RESTATEMENT (THIRD), AGENCY (2006), §2.03, apparent authority is defined as "the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." This definition is even more restrictive. It does not assist the General Counsel's case.

³⁴ Respondent asserts that it complies with California state law concerning employees' rights concerning whistleblowing. It has posted California's official statement concerning employee rights. The posting is in evidence.

it can be found.

The Charging Parties and the General Counsel see a subtext to Brooks's remarks, tying the purported unlawful threat to the complaints they say they made to the DHS Inspector General. Of course nothing Brooks said that morning mentioned the OIG at all. Indeed, they have not shown that Brooks had any knowledge of what they had done. Indeed, there is no evidence that the OIG had begun any investigation of either ASTI or Respondent over allegations relating to ASTI. (There had been an earlier investigation of Diamond, but it, of course, is irrelevant here.)

Indeed, OIG procedures are generally kept confidential. See subsections 7(b) of the Inspector General Act of 1978 (the IG Act) which requires the Inspector General to keep the names of the complaining employees confidential.³⁷ Even if the OIG had begun an investigation, it would not likely have revealed who the complainants were.

Therefore, if the Charging Parties did make a complaint to the OIG, that complaint would in all probability be wrapped in a cocoon of confidentiality. As noted, there is no evidence at all that whatever the employees did with respect to the OIG, that either Hodges or Brooks ever had any knowledge about it. On this record, the Charging Parties never revealed it and Brooks never knew it. Thus, there is significant doubt that any responsible official of Respondent ever had any notion that the three had gone to the DHS Inspector General. It equally follows that there is no evidence that they were aware of the nature of the Charging Parties' OIG complaint.

Beyond that, it is an open question concerning whether filing a complaint with a government OIG qualifies as protected concerted activity as defined by Section 7 of the Act. The IG Act is not aimed in any way at employee protection in the workplace. section 2(2) of the IG Act says it is "to provide leadership and coordination and recommend policies for activities designed (A) to promote economy, efficiency, and effectiveness in the administration of, and (B) to prevent and detect fraud and abuse in, such programs and operations; . . ." (Emphasis supplied.) Other sections of that Act may or may not be read to directly cover a vendor such as ASTI. For example, section 7(a) of the IG Act gives the Inspector General of a covered department the authority to receive and investigate complaints or receive information from an employee of the "establishment"³⁸ concerning activities which may violate laws, rules or regulations and mismanagement, as well as gross waste of funds, abuse of authority or matters which constitute a danger to public health and safety³⁹ and bars the establishment from taking

³⁷ " . . . (b) The Inspector General shall not, after receipt of a complaint or information from an employee, disclose the identity of the employee without the consent of the employee, unless the Inspector General determines such disclosure is unavoidable during the course of the investigation."

³⁸ Under section 12(2) the term "establishment" is defined as department over which the inspector general has responsibility, meaning here, the Department of Homeland Security and its agency the Federal Protection Service.

³⁹ Sec. 7 states: "(a) The Inspector General may receive and investigate complaints or information from an employee of the establishment concerning the possible existence of an activity constituting a violation

any reprisal against complaining employees.⁴⁰

Moreover, it is not entirely clear that the Charging Parties even acted in concert—did they act as a group or act serially as individuals? Certainly, while employees may band together for their mutual aid and protection under Section 7 of the NLRA, what the employees did here was, at best from their point of view, to complain to an agency, the OIG, which could not address employee working and/or training conditions. The OIG, under its statutory mandate could only look for fraud, waste, and abuse.⁴¹

I am, of course, well aware that Section 7 has a broad reach. The Board has long held that the mutual aid and protection clause of Section 7⁴² protects employees who seek to vindicate employee rights in forums outside the workplace. In 1978, the Supreme Court in *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565, held that employees do not lose their protection under the mutual aid and protection language of Section 7 when they seek to improve their lot as employees through channels outside the immediate employee-employer relationship. And the protection includes the preliminary steps leading to that end. See *Whittaker Corp.*, 289 NLRB 933 (1988).

I understand, therefore, the General Counsel's concern. Even if the trainees were misguided in going to the OIG because the OIG was unable to address their concerns, the employees could still be seen as making an effort to address a workplace matter—proper training so that all understood the scope of their jobs and the safety issues connected to those jobs. A "mutual

of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety."

⁴⁰ " . . . (c) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, take or threaten to take any action against any employee as a reprisal for making a complaint or disclosing information to an Inspector General, unless the complaint was made or the information disclosed with the knowledge that it was false or with willful disregard for its truth or falsity."

⁴¹ See, for example, *Truckers United for Safety v. Mead*, 251 F.3d 183, 189 (D.C. Cir. 2001) where the court said: "The record in this case makes it clear that, when he investigated the plaintiffs [non government trucking companies] and seized their records, the DOT IG was not engaged in an investigation relating to abuse and mismanagement in the administration of the DOT or an audit of agency enforcement procedures or policies. Rather, the DOT IG merely lent his search and seizure authority to standard OMC enforcement investigations. In other words, the DOT IG involved himself in a routine agency investigation that was designed to determine whether individual trucking companies were complying with federal motor carrier safety regulations. This was beyond his authority." Also, *Burlington Northern R. Co. v. Office of Inspector General, R.R. Retirement Bd.*, 983 F.2d 631 at 640 (5th Cir. 1993) (" . . . the district court could reasonably determine that the proposed audit of Burlington Northern was not designed to detect fraud and abuse, but rather, was designed to ensure tax compliance, with the detection of fraud and abuse being only a by-product."

⁴² "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities. . . ." (Italics supplied.)

aid and protection” object could be seen in that scenario. Yet, in the final analysis, the General Counsel’s point of view is not based on anything the employees were known to have done. Its proof has fallen short. The subtext so clear to the General Counsel is in truth only surmise, based on what it sees as a temporal connection; that is not enough. There is no knowledge that the employees had engaged in activity constituting mutual aid and protection, and the record does not disclose any animus which might suggest that Respondent had an illegal motive behind its discharges.

Instead, the evidence, indeed, the only credible evidence, is that Respondent discharged them because they failed to respond to reasonable requests for either additional background information, as in Fair’s case or because they behaved unprofessionally during the investigation of Norris’s charges, both their refusal to engage and respond and because of the defensively hot nature of their responses. Neither of these circumstances is something which the Act is designed to protect.

So it is really unnecessary to perform a *Wright Line*⁴³ analysis. The prima facie case is missing. But even if it had been established, in my opinion, these employees’ behavior led to the discharges and would have rebutted it.⁴⁴ Fair had no good reason to refuse to supplement his background information as requested and Romo had responded to Brooks’s information

⁴³ 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982)

⁴⁴ Specifically, see *McKesson Drug Co.*, 337 NLRB 935, 936 fn. 7 (2002).

request first by lying and then by seeming to blame the victim all while he lost his temper. Smith was perhaps more a victim of Romo’s behavior since Brooks no longer trusted any of the three. Fair had already been fired, but was implicated in the Norris matter and Norris had orally implicated Smith. Moreover, Brooks had received a report from their fellow officer Rumrill that Norris had gotten the “worst from those three.” There is nothing here that points to protected conduct as being part of Respondent’s decision making process. The complaint will be dismissed.

Based on the above findings of fact, I hereby make the following

CONCLUSIONS OF LAW

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

2. The General Counsel has failed to prove that Respondent violated Section 8(a)(1) of the Act as alleged.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴⁵

ORDER

The complaint is dismissed in its entirety.

Dated, Washington, D.C., October 14, 2010.

⁴⁵ 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.