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South Jersey Sanitation Corporation and Teamsters Union Local No. 115 a/w International Brotherhood of Teamsters. Case 4-CA-37537

November 30, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER
AND HAYES

On March 7, 2011, Administrative Law Judge Robert A. Giannasi issued the attached decision. The Respondent filed exceptions with supporting arguments, and the Acting General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and answering brief and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order as modified.³

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

Some of the Respondent's exceptions allege that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

The Respondent's exceptions regarding the judge's reliance on former employee Jeff Kissling's testimony about the circumstances of Kissling's discharge also lack merit. The judge properly considered Kissling's testimony as relevant background evidence. The fact that no charge was filed regarding Kissling's termination is immaterial to whether evidence concerning his termination has value in considering the complaint allegations. See e.g. *Kmart Corp.*, 320 NLRB 1179 (1996).

² We find it unnecessary to pass on the judge's finding that the Respondent unlawfully promised employee Jeraldo Cotto in January 2010 that the Respondent was working on improved health benefits, as we agree with the judge that the Respondent unlawfully made a similar promise at a June 9 employee meeting after the Union's election petition was filed. Finding the additional violation would be cumulative and would not affect the remedy.

In analyzing whether Cotto's June 16 discharge was a violation of Sec. 8(a)(4), (3), and (1), the judge inadvertently stated that Cotto submitted his subpoena to appear before the Board to the Respondent on June 15 and requested time off to attend a Board hearing 2 days later. The record shows, as the judge correctly stated earlier in his decision, that Cotto gave his supervisor the subpoena on the morning of June 16 for a hearing 1 day later, on June 17. This inadvertent error does not affect the judge's findings, particularly with respect to the Respondent's knowledge of the subpoena and motivation, because Cotto was discharged at the end of the workday on June 16.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, South Jersey Sanitation Corporation, Hammonton, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(k) and reletter the subsequent paragraph accordingly.

“(k) Threatening employees with the sale of its business if they select the Union as their bargaining representative.”

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

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

Mark Gaston Pearce, Chairman

Craig Becker, Member

Brian E. Hayes, Member

Also with respect to the judge's analysis of Cotto's discharge, we correct the judge's inaccurate statement that the driver whose abstract was not analyzed by insurance broker Kirk Cavicchio was Jorge C, when in fact it was Eusebio Colon. This error does not affect the judge's finding, as the Respondent's owner testified that Colon was still employed.

Member Hayes finds there is insufficient evidence to support the judge's conclusion that the termination of Cotto violated Sec. 8(a)(4), and he relies solely on the 8(a)(3) theory in finding Cotto's termination to be unlawful.

Member Hayes agrees with his colleagues that on May 28 the Respondent unlawfully promised employee Cotto a raise, and unlawfully granted him a raise a few days later. In contrast to the Respondent's suggestion in exceptions, this Respondent was not in the kind of bind some employers may encounter during a union campaign when employers, while acting in good faith, may find themselves concerned with being accused of violating the Act whether they grant a benefit or deny one. Here, the Respondent's owner offered Cotto a raise in the same conversation in which he engaged in other unlawful conduct in a context of significant unfair labor practices. Although he is sympathetic to the dilemma articulated, Member Hayes finds Respondent's argument unpersuasive in this case.

Member Hayes does not rely on the judge's reference to *Fresh & Easy Neighborhood Market, Inc.*, 356 NLRB No. 90 (2011), a case in which he dissented, as the facts are distinguishable from the facts in this case.

³ We shall modify the judge's recommended Order to conform to our standard remedial language.

For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB No. 9 (2010), Member Hayes would not require electronic distribution of the notice.

(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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against you for engaging in union or other protected concerted activities, or because you were subpoenaed to testify before the NLRB.

WE WILL NOT coercively question you about your union or other protected concerted activities.

WE WILL NOT threaten you with loss of employment or other reprisals if you engage in union or other protected concerted activities.

WE WILL NOT promise you improved benefits, including health benefits and wage increases, in order to discourage union or other protected concerted activities.

WE WILL NOT give you wage increases in order to discourage you from supporting the Union.

WE WILL NOT create the impression that we are engaged in surveillance of your union or other protected concerted activities.

WE WILL NOT place you under surveillance while you engage in union or other protected concerted activities.

WE WILL NOT ask you to inform us about union activities.

WE WILL NOT threaten you that you could quit or be fired if you engaged in union or other protected concerted activities.

WE WILL NOT threaten you that selecting a union representative would be futile.

WE WILL NOT threaten you with the sale of our business if you select the Union as your bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Jeraldo Cotto full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

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

WE WILL, within 14 days of the Board's Order, remove from our files any reference to Cotto's unlawful discharge, and WE WILL, within 3 days thereafter, notify him in writing that we have done so and that the discharge will not be used against him in any way.

SOUTH JERSEY SANITATION CORPORATION

Margaret McGovern, Esq. and *David Rodriguez, Esq.*, for the General Counsel.

Russell Lichtenstein, Esq., of Atlantic City, New Jersey, for the Respondent.

Norton Brainard, III, Esq., of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on January 24 and 25, 2011. The complaint alleges that Respondent violated Section 8(a)(1) of the Act by various acts, threats, and statements; and Section 8(a)(3), (4), and (1) of the Act by discharging employee Jeraldo Cotto for engaging in union activities on behalf of the Charging Party Union (the Union) and because he was subpoenaed to appear as a witness in an NLRB representation proceeding. The Respondent filed an answer denying the essential allegations in the complaint.¹

After the trial, the Acting General Counsel and the Respondent filed briefs, which I have read and considered. Based on the entire record in this case, including the testimony of the witnesses, and my observation of their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New Jersey corporation with a facility in Hammon, New Jersey, is engaged in providing trash collection and recycling services to business and residential custom-

¹ In connection with this case, the Acting General Counsel filed a petition for a 10(j) injunction in a United States District Court. I am informed that the District Court judge has agreed to utilize the administrative record in this case. As a result, and in the interest of judicial economy, I agreed to hear, in this proceeding, so-called "just and proper" evidence that would not be relevant in the unfair labor practice case, but would be relevant in the injunction case. It is also my understanding that the parties are free to submit additional "just and proper" evidence in the injunction proceeding.

ers, mostly pursuant to contracts with municipalities. In a representative 1-year period, Respondent purchased and received at its facility goods valued in excess of \$50,000 directly from points outside New Jersey. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Facts

Background

Respondent employs about 30 drivers, as well as about 60 helpers or “throwers,” for a total of some 90 employees. Respondent’s owner and president, Anthony Colasurdo, is a hands-on executive, and is assisted by Operations Manager and Supervisor Edwin Morales, who has direct contact with the employees. The drivers report for work at Respondent’s yard at about 4:30 a.m. and are dispatched, along with 2 throwers per truck, for routes throughout the area. They communicate with Respondent’s office during the day by radio and return to the yard at the end of their workday. Morales is present in the morning to dispatch the drivers and he is the one who normally communicates with them during the day.²

In early 2010, one of Respondent’s drivers, Jeff Kissling, circulated a petition among the drivers asking for improved wages and benefits, including health benefits (Tr. 34, 43). According to Kissling, all the drivers signed his petition (Tr. 35). Later in January, Colasurdo approached Kissling as the latter was pulling into the yard after his run ended. Colasurdo told him that Kissling had hurt his feelings by circulating the petition and he had no option, but to discharge Kissling (Tr. 35).³

² In its original answer, Respondent denied that Morales was its agent or a supervisor within the meaning of the Act. After considerable testimony on the issue, including that of Colasurdo, Respondent stipulated that Morales was indeed its agent and a supervisor. In the course of his testimony on the issue, however, Colasurdo was evasive and seemed intent on supporting the initial challenge to Morales’s supervisory status rather than candidly answering questions. His grudging reluctance to admit to obvious facts in that connection caused me to question the reliability of his testimony, not only on the supervisory issue, but also on other issues.

³ The above is based on Kissling’s credible testimony. I found him to be a candid witness, whose testimony was not shaken on cross-examination. Indeed, it was generally supported in some respects by that of Colasurdo, who admitted knowing that Kissling circulated a petition, which he described as demanding health and other benefits and suggesting a strike if those demands were not met. Tr. 315. Although Colasurdo acknowledged the connection between Kissling’s protected activity and his termination, Colasurdo’s description of the circumstances is implausible. For example, Colasurdo testified that Kissling approached and told Colasurdo he had “tried to organize a strike for the better” and had just gotten off the phone with someone from the Labor Board who said that Colasurdo had the right to fire him. Tr. 314–316, 333. Nor do I believe Colasurdo’s testimony that Kissling voluntarily agreed to leave his employment. Indeed, in a subsequent conversation with driver Jeraldo Cotto, Colasurdo strongly implied that he had terminated Kissling for circulating the petition. Colasurdo’s testimony concerning the Kissling termination was an

example of a propensity to evade, exaggerate, or even fabricate, which infected much of his testimony.

Driver Jeraldo Cotto, who had been on vacation when Kissling was terminated, came into the office to pick up his paycheck still later in January 2010. Colasurdo engaged him in a conversation about Kissling’s petition. Morales was also present. Colasurdo asked Cotto if he knew anything about the petition. Cotto replied in the affirmative, stating that he had signed it. Colasurdo said that the person who had circulated the petition was “no longer with us.” Tr. 45. Colasurdo also stated that he would “burn the company down” before he let anyone “extort” him and that he “would be working on some health benefits” for the employees. Colasurdo ended the conversation by stating that, if employees did not like the way he ran the Company, they could “go” or would be fired. Tr. 45.⁴

The Beginning of the Union Campaign and Respondent’s Initial Reaction

During the workday on May 28, 2010, Colasurdo called Cotto over the radio and asked Cotto to see him when Cotto finished his run. Cotto reported to Colasurdo in the office, as instructed. Colasurdo told him, “I’m not firing you and I’m not laying you off.” Tr. 52. When Cotto asked for an explanation, Colasurdo said he had heard that Cotto was trying to form a union and asked Cotto what was going on. Tr. 52–53. Cotto had indeed contacted a union representative, who had given him blank authorization cards, which he then distributed to the other drivers before and after work. Tr. 50. Cotto replied to Colasurdo’s question by stating that he did not know anything about any union, admitting that he did not tell Colasurdo the truth because he was afraid that, if he did, he would be fired, just as Kissling had been. Tr. 53. Colasurdo then raised with Cotto his suspicion that Cotto had union cards in his backpack, but he did not take Cotto up on the latter’s offer to let Colasurdo look. Tr. 54–55. Colasurdo also asked Cotto which employees were involved in the organizing activities and Cotto responded that both drivers and throwers were involved. Colasurdo kept questioning Cotto about the union campaign, but Cotto kept denying any involvement or avoided answering the questions. Tr. 55.⁵

example of a propensity to evade, exaggerate, or even fabricate, which infected much of his testimony.

⁴ The above is based on the testimony of Cotto, whom I found to be a credible and candid witness. I was especially impressed with his testimony, in response to Respondent counsel’s question asking Cotto to name employees to whom he had spoken about the Union after his discharge. Despite his obvious reluctance to do so, after a long pause, Cotto provided a long list of names. I reject Colasurdo’s testimony that Cotto initiated their conversation by asking what had happened to Kissling. Tr. 317. Rather, I find, in light of Colasurdo’s other interactions with employees at this time, that Colasurdo initiated the meeting as Cotto testified. In any event, Colasurdo did not specifically deny the substance of Cotto’s testimony about the meeting. Not only was Cotto’s testimony about the meeting more specific and detailed than that of Colasurdo, but he was generally a more reliable witness than Colasurdo. Morales did not testify about the meeting.

⁵ The above findings are based on Cotto’s credible testimony. Colasurdo did not specifically deny interrogating Cotto as described above. Indeed, Colasurdo admitted that, when he first learned of the union activity at his facility in late May or early June, he “didn’t know what to do” and might have questioned drivers about the union activities. Tr. 271. In addition, there is uncontradicted testimony from em-

At the May 28 meeting, Colasurdo told Cotto that he had previously gone to bat for Cotto when Respondent's insurance company had threatened to drop him from coverage because of his driving record. Tr. 53. Cotto had had a couple of accidents in company trucks about 2 years before, just after he started with Respondent as a driver; Colasurdo told Cotto, at that time, that he needed to be more careful, because the insurance company wanted to "let [him] go," but Colasurdo had somehow intervened with the insurance company to keep him on. Tr. 76. In response to Colasurdo's reference to the earlier driving and insurance problem in the May 28 meeting, Cotto told Colasurdo that he appreciated Colasurdo's intervention with the insurance company, but stated that Colasurdo had not come through with the health benefits he had promised Cotto during their January meeting. Colasurdo replied that he was working on the matter and Cotto had to be patient, because that took time. Tr. 53.⁶

Colasurdo also told Cotto that he was going to have a meeting with the drivers in early June to discuss health benefits and insurance. As Cotto testified, Colasurdo said "he wanted to have an insurance meeting for all of us to get us our benefits and insurance, health benefits and insurance for us." Tr. 56-57. Cotto asked about the throwers, but Colasurdo said the meeting, which admittedly would be called in response to the union activities, would only involve the drivers. Cotto testified that Colasurdo said that the employee meeting was scheduled for June 5, but was subsequently postponed. According to Cotto, Colasurdo also mentioned that he knew about a union meeting that had been scheduled for June 12. Cotto said he wanted to attend the meeting to see "what they had to offer." Tr. 57. Colasurdo did not mention anything about the upcoming union meeting in his testimony about the May 28 meeting, so Cotto's credible testimony in this respect is uncontradicted.

In the course of the May 28 meeting, Cotto also expressed his dissatisfaction with the 25-cent-per-hour raise he had received a few weeks before, because Colasurdo had recently hired some new drivers who were making more money than he. Tr. 54. Colasurdo said he would look into the matter, but, after Cotto left the meeting, Colasurdo came outside and apologized to Cotto. He said that he had thought further about what Cotto had said and had decided to give Cotto an additional 25-cent-per-hour raise because of the good job Cotto was doing. Tr. 93. Colasurdo also told Cotto to let him know about any union activity, particularly if anyone approached him about union cards. Tr. 56, 94.

According to Cotto, Morales was present for the entire meeting between him and Colasurdo, including the portion outside the office when Colasurdo offered him the additional raise. Tr. 56. The next week, on June 4, Cotto received the extra quarter per hour raise promised to him by Colasurdo, bringing him up

ployee Migel Capeles that Colasurdo questioned him about his suspected distribution of union authorization cards, but later apologized to Capeles, stating he had found out it was not Capeles after all. Tr. 117-120.

⁶ The above account of the May 28 meeting is based on Cotto's credible testimony. Insofar as it deals with Colasurdo's having gone to bat for Cotto with the insurance company on a prior occasion that testimony is uncontradicted.

to \$13 per hour. Tr. 56.⁷

The Union Campaign Intensifies and Respondent Discharges Cotto

During the spring of 2010, Cotto was the Union's main inside organizer (Tr. 219). He not only distributed and collected union authorization cards, but he helped arrange and attended a union meeting with employees on June 12, at a Day's Inn motel in Vineland, New Jersey (Tr. 60, 62, 219). Before that meeting, Operations Manager Morales called Cotto on his cell phone while he was driving one of Respondent's trucks during the workday. Morales told Cotto that he was being pinpointed as the leader of the union effort. He went on to tell Cotto that, if a union came in, it would "mess it up for everybody" and a lot of people "would be out of work," suggesting that those people would be the throwers. Tr. 61-62. He also told Cotto he knew about the June 12 meeting at the Day's Inn. Tr. 61. Both before and after the Day's Inn union meeting, which lasted about an hour and a half, Cotto observed Morales sitting in a parked car outside the Day's Inn with another of Respondent's supervisors. Tr. 62-63.⁸

In early June, Respondent called several group meetings of employees to discuss the union campaign at a Howard Johnson's restaurant in nearby Hamilton, New Jersey. Colasurdo spoke to the employees, as did independent consultants hired by Respondent, advising the employees to reject the Union. At one of the meetings, on June 9, which Cotto attended, Colasurdo told employees that the Company would "crumble" if the Union won representation rights, because it bids only for non-union jobs and could not afford a union. According to the credible testimony of Cotto, Colasurdo continued by stating he "would have to sell [the Company]" if it went union and there "would be people out of work." Tr. 59. Driver Jose Caragena, who attended the same meeting, supported Cotto's testimony.

⁷ The above findings concerning the May 28 meeting between Cotto and Colasurdo are based on the credible testimony of Cotto, whose testimony was detailed, candid, and specific. Colasurdo gave a cleaned-up, abbreviated version of discussing and granting increased benefits to Cotto. His testimony lacked context, and, as indicated, Colasurdo was a generally unreliable witness. Moreover, Colasurdo's version was not corroborated by Morales, who failed to testify about the meeting.

⁸ The above is based on the credited testimony of Cotto. Morales generally denied calling employees on a cell phone to discuss union issues. He also specifically denied telling Cotto that he was "messing things up for other employees" or that the Union would in any way affect the jobs of employees. Morales further denied being in a car with another supervisor outside the union meeting at the Day's Inn. Tr. 360-361. But he did not specifically deny telling Cotto that he knew about the upcoming union meeting at the Day's Inn. In addition to my favorable assessment of Cotto's overall testimony and demeanor, I found that his testimony about his interactions with Morales was more detailed than that of Morales and fit better in the context of, not only Respondent's reaction to the union campaign, but also Morales's role in fighting it. Thus, Morales admitted he could not recall all the conversations he had with drivers (Tr. 362); and there is uncontradicted testimony by employee Migel Capeles that both Colasurdo and Morales questioned him about union activities (Tr. 117-120, 130). I therefore find Cotto's testimony more reliable than that of Morales where the two conflict.

He testified that Colasurdo said: “[I]f the [U]nion win, I will have to sell the [C]ompany. I can’t pay the union wage. . . . [I]f the [U]nion win, it will cripple the [C]ompany. Everybody will be lost their job.” Tr. 206. That testimony, although it reflects Cartegena’s difficulties with English, was clear and unambiguous. Because of his status as a present employee testifying under a subpoena against his employer’s interests, I found this particular aspect of Cartegena’s testimony quite reliable.⁹

During the June 9 meeting, Colasurdo also told employees that he was considering granting employees improved health benefits, but he could not do so at this time because of the pendency of the union campaign. This is based on the testimony of Cotto, as well as employee Migel Capeles. See Tr. 59, 132. Colasurdo’s testimony on this point is not much different. He testified that he spoke about health benefits, invoking Cotto’s earlier discussion with him about the subject. He said that there was difficulty with Respondent’s present health plan and its affordability, but that he was looking into new plans. He also testified that any plans to improve health benefits predated the union campaign and that he told employees his consultants advised him that he could make no changes in the middle of a union campaign. Tr. 286–288, 307.

Based on Cotto’s submission of signed authorization cards, on June 7, 2010, the Union filed a petition for election with the Board’s regional office in Philadelphia. GC Exh. 18. A hearing was scheduled on the petition for June 17, 2010. GC Exh. 18. Cotto was the only employee subpoenaed to appear at the hearing on behalf of the Union. Tr. 221. On June 16, Cotto gave a copy of the subpoena to Operations Manager Morales and told him to give it to Colasurdo. Cotto also told Morales he would not be at work on June 17 because he had been subpoenaed to appear at the Board hearing on the election petition. Tr. 64–65. He then went on his run and worked all day on June 16. Tr. 65.

At about 4:30 in the afternoon of June 16, Colasurdo called Cotto on his truck radio and told Cotto to stop in to see him at the end of his run. Cotto reported to the office as instructed. When Cotto arrived, Colasurdo told Cotto to turn in his gas card, handed him an envelope and told Cotto he was terminated, effective immediately. Tr. 65. In the envelope was a letter, dated June 16, stating that Cotto was being terminated, because the insurance broker placing the Respondent’s com-

mercial vehicle insurance had advised Respondent that he “would not be able to place insurance . . . with our current insurance carrier or any other competitive carrier based on your history of motor vehicle violations and points accumulated over 36 months.” The letter further stated that Cotto was terminated, “as a result of our inability to renew our insurance policy as a result of your driving history.” GC Exh. 2. The evidence shows that Respondent’s insurance broker did indeed report that Cotto was uninsurable. Respondent received a faxed letter to this effect late in the day on June 15. GC Exh. 6. I shall discuss Cotto’s insurance coverage in greater detail later in this decision.¹⁰

Two days later, on June 18, after Cotto had already been discharged, Colasurdo asked Cotto to come in to the office to pick up his last paycheck, at which time Colasurdo presented Cotto with another letter, dated June 17, which elaborated on the reasons for his discharge. Tr. 68–69, GC Exh. 3. That second letter emphasized that the points that were referenced in the first letter were insurance rating points not state motor vehicle violation points. It also added a new reason for the discharge, namely that, nearly 2 years before, from November 30 to December 15, 2008, Cotto had driven a company truck while his license had been suspended. GC Exh. 3. At the meeting on June 18, Colasurdo also told Cotto he regretted having to fire him, but the decision was that of the insurance company. Tr. 69, 71. Colasurdo told Cotto that he was a good employee and that Colasurdo would give him a letter of reference. Tr. 69.

Discussion and Analysis

Independent 8(a)(1) Violations

The complaint alleges that Respondent violated Section 8(a)(1) of the Act in the January meeting between Colasurdo and Cotto by (1) interrogating Cotto concerning the Kissling petition, which amounted to protected concerted activity; (2) telling Cotto that he would “burn down” the company before he let anyone extort him, thus indicating that it would be futile for employees to engage in future union or protected concerted activity; (3) telling Cotto that he had gotten rid of Kissling, who had circulated a petition among employees; (4) telling Cotto

⁹ Colasurdo also testified about what he said at the Howard Johnson’s meeting, although it is not clear that he was specifically testifying about what he said at the meeting Cotto and Cartagena attended. Colasurdo spoke at a number of these meetings, including six after Cotto’s discharge. His testimony appeared to summarize generally what he stated at the meetings. For example, he testified he did not tell employees that he would shut down his business, but rather that a union attorney made such a threat to him. Colasurdo conceded, however, that the alleged threat by the union attorney was made at a June 17 meeting, well after the meeting Cotto and Cartagena testified about, and even after Cotto’s discharge. See Tr. 299–304. Because of his inability to focus on the particular meeting involved and based on my previous assessment of Colasurdo’s reliability as a witness, I cannot credit his testimony where it conflicts with the far more reliable testimony of Cotto and Cartagena.

¹⁰ Based on my assessment of the reliability of both witnesses, as shown elsewhere in resolving many conflicts in their testimony, I credit Cotto’s testimony that Colasurdo told Cotto to turn in his gas card at the outset of this meeting. Colasurdo testified that he decided to discharge Cotto the night before and the discharge letter was prepared either that night or the next day, June 16. He also testified that he first saw Cotto’s subpoena only after he decided to discharge Cotto, but, when Cotto arrived, he told Cotto that the decision was the insurance company’s and had nothing to do with his union activity—something Cotto did not mention in his testimony. Tr. 307–308. I found Colasurdo’s testimony in this respect blatantly self-serving and unreliable, as was much of his testimony in this proceeding. But his testimony that he told Cotto that the discharge had nothing to do with his union activity is telling. It demonstrates that Colasurdo clearly had Cotto’s union activities on his mind at the time of the discharge. Colasurdo further testified that he told Cotto, at this June 16 meeting, that he liked him and offered to give him a reference for future employment. Tr. 308. I find that the latter statement was not made at this meeting but rather in a subsequent meeting 2 days later, as Cotto credibly testified. Indeed, Colasurdo did not testify about what was said at that second meeting.

that employees who did not like the way he ran the company could quit; and (5) telling Cotto that he was going to work on improved health benefits to discourage employees from further concerted activity.

Based on my factual findings set forth above, I find that Colasurdo did make the statements alleged in the complaint and those statements were violative of the Act. There is, of course, no doubt that circulating a petition among employees seeking improved benefits is protected concerted activity and it is clear that Kissling was engaged in such conduct. There is also no doubt that Colasurdo's remarks to Cotto in their January meeting made clear that Kissling was terminated for engaging in such protected activity. Colasurdo asked Cotto if he knew anything about the Kissling petition and stated that Kissling, who had circulated the petition, was "no longer with us." The interrogation about protected concerted activity, in that context, was obviously coercive, as it took place in the situs of authority, Colasurdo's office, and suggested the same fate for Cotto or anyone else who would engage in similar conduct in the future.¹¹ The latter statement amounted to an unlawful threat of retaliation. An additional threat of retaliation was made when Colasurdo said that employees who did not like the way he ran the Company could quit or be fired because, in context, the threat was tied to future protected concerted activity, which Colasurdo obviously did not view favorably.¹² Likewise unlawful was Colasurdo's threat to burn down the company before he let anyone extort him. In context, that threat was a reference to Kissling's petition, which Colasurdo viewed as an effort to extort him to pay increased benefits. Colasurdo's words amounted to a statement that it would be futile for employees to engage in future protected concerted activity, which includes union activities.¹³ Finally, Colasurdo's suggestion that he was or would be working on improved health benefits was an obvious response to Kissling's petition, which sought such improvements. It also amounted to an unlawful promise of benefits clearly tied to discouraging future petitions or other protected concerted activity. "[T]he Board has often held that an employer violates the Act when it acts to prevent future protected activity." *Parexel International, LLC*, 356 NLRB No. 82, slip op. 4 and fn. 9 (2011), and cases there cited.¹⁴

The complaint also alleges that, during the May 28 meeting between Colasurdo and Cotto, Colasurdo violated Section 8(a)(1) of the Act by the following: (1) interrogating Cotto concerning his union and protected activity; (2) promising a wage increase in order to discourage union activity; (3) asking Cotto to inform him if he was approached by union representatives; (4) telling Cotto that he would set up a meeting to address medical insurance and other issues; and (5) creating the impres-

sion that employee union activities were under surveillance by telling Cotto that he had been identified as the Union's leading adherent and that he, Colasurdo, knew about an upcoming Union meeting. The complaint alleges a further violation of Section 8(a)(1) on June 4, when Respondent granted Cotto the increase in wages promised him in the May 28 meeting to discourage him from supporting the Union.

Based on my factual findings set forth above, I sustain all of the allegations concerning the May 28 meeting, except for the allegation that Respondent violated the Act by telling Cotto that Colasurdo was going to set up employee meetings to talk about the union campaign and health insurance. The evidence on this point shows Colasurdo simply told Cotto that he was going to exercise his right to speak to the employees about the union campaign. I do not read the testimony that Colasurdo said the meeting was going to cover the subject of insurance and other benefits to mean that Colasurdo promised improved benefits tied to rejection of the Union. I shall therefore dismiss the allegation that Colasurdo made an unlawful promise to increase health or insurance benefits in the May 28 meeting with Cotto.¹⁵

As noted, I sustain the other allegations of 8(a)(1) violations outlined above. At the meeting on May 28, Colasurdo repeatedly questioned Cotto about his union activities, in the context of other unlawful statements discussed below. The questioning was clearly coercive. It was undertaken by the Respondent's highest official, in his office, and it was not accompanied by assurances against reprisal or lawful reasons for the inquiries. Indeed, the questioning took place in the context of other unfair labor practices. Thus, in telling Cotto that he had heard Cotto was trying to form a union and knew about the upcoming union meeting, Colasurdo created the impression that he was engaging in surveillance of union activities—a further violation of Section 8(a)(1).¹⁶ Colasurdo also violated the Act when he asked Cotto to inform him if he was approached by anyone who approached him about the Union or asked him to sign cards.¹⁷ Finally, it is clear, in context, that Colasurdo's promise to give Cotto another 25-cent raise, just weeks after he was given a similar raise was unlawful. The entire May 28 meeting dealt with Colasurdo's suspicions that Cotto was behind the union effort. The natural inference is that Colasurdo sought to dissuade Cotto from supporting the Union both by the promised wage increase on May 28 and the actual grant of the increase

¹¹ See, with regard to unlawful interrogation, *Correctional Medical Services*, 356 NLRB No. 48, slip op. 3 (2010), and cases there cited.

¹² See, with regard to threats that employees should quit or be fired, *Fresh & Easy Neighborhood Market, Inc.*, 356 NLRB No. 90, slip op. 1 at fn. 2 (2011); and *Jupiter Medical Center Pavilion*, 346 NLRB 650, 651 (2006).

¹³ See, with regard to futility of engaging in union or protected concerted activity, *Wellstream Corp.*, 313 NLRB 698, 706 (1994).

¹⁴ With regard to promises of benefits that might not be available until later, see *E.L.C. Electric, Inc.*, 344 NLRB 1200, 1201 (2005).

¹⁵ In her brief (br. 12), counsel for the Acting General Counsel asserts this allegation in the complaint refers to a solicitation of grievances with a promise to resolve them without a union, a specific type of violation described in *Amptech, Inc.*, 342 NLRB 1131, 1137 (2004). I find that the applicable complaint allegation was not framed in language that could encompass such a violation. Nor do I believe that Colasurdo's statement about his upcoming employee meetings could be construed as a solicitation of grievances and a promise to resolve them without a union. Accordingly, even if I agreed that the complaint could be read to allege the violation specified in the Acting General Counsel's brief, I would dismiss the allegation.

¹⁶ See, with regard to creating the impression of surveillance, *Bridgestone Firestone South Carolina*, 350 NLRB 526, 527 (2007).

¹⁷ See, with regard to instructions to report on union activity of others, *Maple Grove Health Center*, 330 NLRB 775 (2000).

on June 4. Indeed, when Colasurdo went outside to tell Cotto that he would be granting Cotto his additional raise, he asked Cotto to let him know about any future union activity, thus clearly tying the raise to an effort to enlist Cotto in fighting the Union. It is obvious that the alleged inequity between Cotto's pay and that of the other drivers recently hired, a subject that Cotto himself raised, would not have inspired Colasurdo to promise or grant the additional raise, but for the hope that Cotto, a perceived leader in the union campaign, would abandon his efforts in appreciation of the raise. As the Supreme Court has aptly stated:

The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.

NLRB v. Exchange Parts Co., 375 U.S. 405, 409 (1964).

The complaint also alleges that Respondent violated Section 8(a)(1) of the Act when Morales, its supervisor and agent, engaged Cotto in a cell phone conversation in early June. It is alleged that, in that conversation, Morales: (1) interrogated Cotto about his union activities and those of other employees; (2) created the impression that union activities were under surveillance by telling Cotto that everyone was pointing a finger at Cotto as the leader in the union effort; and (3) threatened that employees would lose their jobs if the union effort succeeded. A separate complaint allegation states that Morales engaged in actual surveillance by sitting in a car outside the June 12 union meeting.

Consistent with my factual findings set forth above, I conclude that Respondent, through Morales, violated Section 8(a)(1) in three respects. Morales called Cotto on his cell phone, telling him that Cotto was being pinpointed as the leader of the union effort, and that he, Morales, knew about the union meeting scheduled for June 12, thus giving Cotto the impression that union activities were under surveillance. In addition, Morales actually engaged in surveillance of that meeting. He showed up outside the union meeting, which was after working hours and at a public gathering place, and remained there both before and after the meeting, in full view of employees as they entered and left the meeting. Such conduct is clearly unlawful.¹⁸ Moreover, Morales's cell phone conversation also contained a threat. He told Cotto that, if a union came in, it would "mess it up for everybody" and a lot of people "would be out of work." In the context of Respondent's other contemporaneous unfair practices, it is clear that the loss of work would be caused by Respondent's reaction to the union campaign. Thus, Morales's statement amounted to an unlawful threat of reprisal. I do not, however, find anything in the conversation that amounted to an interrogation. It appears that Morales was confident enough of his knowledge of Cotto's leadership role that he dispensed with any questions about the matter. I will therefore dismiss that allegation of the complaint.

Finally, the complaint alleges that Colasurdo further violated

Section 8(a)(1) of the Act by making the following statements at the June 9 meeting of employees at Howard Johnson's: (1) threatening that Colasurdo would sell the business if employees selected the Union; and (2) impliedly promising to improve health benefits.

Consistent with my factual findings set forth above, I find that Colasurdo threatened to sell the business, with attendant job losses, if the Union won representation rights. That threat of retaliation was not tied to demonstrably probable consequences outside the Respondent's control and therefore violated Section 8(a)(1) of the Act. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). Colasurdo's statements concerning improved health benefits were likewise unlawful. He had earlier promised such improvements to discourage concerted protected activities in the form of employee petitions. This time he did so in an explicit effort to forestall employees from supporting the Union. It is, of course, no defense that Colasurdo told employees that his hands were tied because he could not implement changes, because of the impending union election. Indeed, it is clear from the evidence that, although Colasurdo undertook an effort to inquire into improved benefits after the Kissing petition brought the matter to his attention, he abandoned it. He never followed through on the quotation for improved benefits secured from his insurance broker in late May. Tr. 366–367, 377–378. Yet he used the promise of such benefits in his speech to employees on June 9. With respect to promised benefits an employer must act as if a union were not on the scene and make it clear to employees that any adjustments will not be dependent on whether or not they select a union. See *Earthgrains Co.*, 336 NLRB 1119, 1129–1130 (2001), citing and discussing *Atlantic Forest Products*, 282 NLRB 855, 858 (1987). Colasurdo did not do anything of the kind in his speech; instead, he used the possibility of improved health benefits as an enticement to get employees to reject the Union. Such a promise was clearly unlawful.

Cotto's Discharge as a Violation of Section 8(a)(4), (3) and (1)

Motive-based allegations of discrimination are decided under the framework of the Board's *Wright Line* decision.¹⁹ Under *Wright Line*, the General Counsel must make an initial showing that the employee's protected or union activity was a motivating factor in the adverse employment action. Once the General Counsel makes that showing, the burden of persuasion "shift[s] to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Bally's Atlantic City*, 355 NLRB No. 218, slip op. 3 (2010), and cases there cited. See also *Allied Mechanical*, 356 NLRB No. 35, slip op. 2 (2010), dealing, as here, with violations of both Section 8(a)(3) and Section 8(a)(4). The issue is not simply whether the employer "could have" taken action against the employee in the absence of protected activity, but whether it "would have." *Carpenter Technology Corp.*, 346 NLRB 766, 773 (2006), and cases there cited. Put another way, to satisfy its burden, the employer "cannot simply present a legitimate reason for its actions," but must "persuade by a preponderance

¹⁸ See, with regard to surveillance of a union meeting, *Wisconsin Steel Industries, Inc.*, 318 NLRB 212, 214 (1995).

¹⁹ *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

of the evidence that the same action would have taken place even in the absence of the protected conduct.” *Peter Vitale Co.*, 310 NLRB 865, 871 (1993).

On this record, the Acting General Counsel has easily met his burden of proving that Respondent fired Cotto, because he was a leader in the Union’s campaign and because he was subpoenaed to testify in a Board proceeding in support of the Union’s election petition. Both Cotto’s union activity and his participation in a Board proceeding were protected under the Act. Cotto was the main employee union organizer, who not only distributed and collected authorization cards, but helped set up the union meeting on June 12, just a few days before his discharge. He was also the only employee subpoenaed to testify at the Board proceeding in support of the Union’s election petition. It is clear that, at the time of the discharge, Respondent knew of Cotto’s union activities and of the subpoena for him to testify in the Board proceeding. Cotto had submitted his subpoena to Respondent a day before his discharge, asking for time off two days later to attend the Board hearing. He had been the subject of numerous unfair labor practices in the period leading up to his discharge, including some within 3 weeks of his discharge. By its initial unfair labor practices, Respondent sought to prevent Cotto from engaging in protected concerted activity in connection with the Kissling petition, which was a precursor to union activities. But most of Respondent’s unfair labor practices, especially the later ones, dealt with Cotto’s union activities or those of other employees. Respondent’s numerous unfair labor practices demonstrate antiunion animus that was directed towards Cotto: first, in an effort to discourage his union support, and, later, to retaliate against him, once Respondent concluded that its earlier effort had failed. Significantly, Respondent had previously fired another employee for engaging in protected concerted activity, as Colasurdo pointedly reminded Cotto. Causation is established by the timing of the discharge, which came, as indicated, in the midst of Cotto’s union activities and immediately upon receipt of a copy of Cotto’s subpoena. In sum, the evidence in support of the Acting General Counsel’s initial showing of unlawful motivation is overwhelming.

Where, as here, the General Counsel makes out a strong showing of discriminatory motivation, the respondent’s *Wright Line* defense burden is substantial. *Bally’s Atlantic City*, cited above. I find that, on this record, Respondent has not overcome that substantial burden and persuasively shown that it would have fired Cotto absent his union and protected activity.

It is undenied that Respondent regarded Cotto as a good employee and was willing, even after his discharge, to give him a letter of reference. The crux of Respondent’s defense is that it was forced to discharge Cotto because its insurance broker notified Respondent of Cotto’s uninsurability and Respondent always discharged drivers deemed uninsurable. But the force of that defense is seriously undercut by the uncontradicted evidence that Colasurdo had previously intervened on Cotto’s behalf when questions were raised about Cotto’s insurance coverage. Colasurdo reproached Cotto at their meeting on May 28 for his reported union activities, reminding him that Colasurdo had previously gone to bat for Cotto when the insurance carrier wanted to “let [him] go.” Implicit in that reproach

was a warning that, if Cotto did not support Colasurdo on the union issue, he could not count on Colasurdo’s support on future insurability issues. Thus, Respondent itself injected the issue of Cotto’s insurance coverage into its antiunion campaign, thereby undermining it as an independent valid ground for Cotto’s discharge under *Wright Line*.

Respondent’s continued employment of Cotto after Colasurdo’s previous intervention to keep him insured, despite the insurance carrier’s threat to drop him from coverage, not only shows that the decision to retain or discharge a driver rests with Respondent, notwithstanding alleged insurability issues, but it also refutes Respondent’s contention that it always fires drivers deemed “uninsurable.” Although Respondent did fire other drivers for problems with their insurance coverage—it was stipulated that drivers AM and Jose C were terminated in 2009 for failure to meet “minimum insurance requirements” (R. Exh. 7)—that evidence does not overcome Colasurdo’s past tolerance of Cotto’s insurance problems. One other driver, CV, was also declared uninsurable shortly before Cotto in June 2010 (GC Exh. 6a), but Colasurdo conceded that he may have discharged CV for having had multiple accidents, even before receiving the notice of CV’s uninsurability (Tr. 313–314).

Moreover, Cotto’s asserted uninsurability in June 2010 was not based on an insurance carrier’s assessment during the term of a particular policy, as was the situation with drivers AM and Jose C, mentioned above. It was based on the assessment of Respondent’s insurance broker, who was in the process of choosing a new carrier because Respondent’s existing carrier, Delos (also known as Five Star Specialty), had served notice that it was not going to renew the existing policy after its term expired on August 1, 2010. GC Exh. 4. According to Respondent’s insurance broker, Kirk Cavicchio, he applied certain insurance standards to the motor vehicle abstracts of drivers whose names were provided to him by Respondent, in order to assess their insurability. He would then try to get an insurance carrier to cover Respondent’s drivers. Tr. 144–152. But there are serious flaws in the broker’s analysis that render it unreliable and unpersuasive.

Even though Delos, Respondent’s previous carrier, had indicated that it was not going to renew Respondent’s policy, Cavicchio inexplicably used the insurance-points standards of Delos to assess the insurability of Respondent’s drivers, including Cotto. Tr. 149–150. In the faxed letter to Respondent notifying it of Cotto’s uninsurability, Cavicchio stated that Cotto’s driving record did not meet the Delos standards and that would make him uninsurable if Respondent chose to seek a reconsideration of Delos’s failure to renew Respondent’s policy. The letter continued by stating that Cavicchio would then need to reach out to another insurance carrier, and Cotto’s driving record would not qualify him for any other insurer, except for a high risk carrier. GC Exh. 6. According to Cavicchio, Colasurdo responded to this letter by directing Cavicchio to drop Cotto from consideration. See Tr. 188–189.²⁰

²⁰ Respondent had used a high risk carrier in the past, for the policy term immediately before the Delos policy that expired on August 1, 2010. Tr. 176–178. But there is no evidence to support the suggestion that Respondent was seeking reconsideration of Delos’s decision not to

As a result of Colasurdo's directive, Cavicchio went back to the drawing board and he placed Respondent's insurance with Berkley. The Berkley quote came just 3 days after Cotto was discharged (Tr. 193), so Cotto was not analyzed in support of that coverage (Tr. 195). Indeed, there is no evidence that the broker did another, or any, analysis under the Berkley standards; nor is there any evidence as to whether Cotto would have met those standards. Although Cavicchio initially testified that the Delos and Berkley standards were the same (Tr. 190), a comparison of the two standards shows they are different. GC Exh. 8 & 9. And Cavicchio later conceded some significant differences. Tr. 193–194.

As Cavicchio admitted, the insurability analysis he conducted during June of 2010 was imprecise and the whole process is, in his words, "not an exact science." Tr. 164. Significantly, he testified that, based on his June 2010 analysis, Cotto would not have been insurable under the existing Delos policy, although he had been covered under that policy for the past year. Tr. 182–183. In contrast, the record provides no satisfactory innocent explanation for why Cotto was only declared uninsurable in June 2010, when he was in the midst of leading a union organizing campaign. Most of the points charged against Cotto in the June 2010 uninsurability finding involved old incidents—in October and November of 2007, just after he was first employed by Respondent as a driver. Tr. 42, 76, 146–163, GC Exh. 10(b). And, as discussed earlier, when insurability issues were raised at that time, Colasurdo intervened to keep Cotto covered. Moreover, I have serious questions about Cavicchio's methodology. For example, he charged 2 points against Cotto for driving on a suspended license because of failure to pay an insurance surcharge, even though that suspension was removed from his record 15 days later. Cavicchio could not explain why he charged Cotto points for this offense. He admitted that he did not "see suspension on Delos' list" (Tr. 156), and he apparently did not count suspensions in other driver abstracts (Tr. 159–161). Indeed, Cavicchio admitted that he did not even analyze the abstract of one of Respondent's drivers, Jorge C, who, it appears, would have failed the Delos standards. Tr. 159–164, GC Exh. 10(bb). Insofar as the record shows, Jorge C was not fired, is still driving, and is covered under Respondent's new insurance policy.

In sum, there are just too many questions on the insurance issue to provide a persuasive defense on this record, especially in the face of the overwhelming evidence that Cotto's discharge was unlawfully motivated. In all the circumstances, I cannot find that Respondent met its burden of proving that it would have discharged Cotto in June 2010, absent his union and other protected activity. I therefore find that Respondent's discharge of Cotto violated Section 8(a)(4), (3), and (1) of the Act.

I do not consider persuasive Respondent's contention, set forth in its June 17 letter, but not in the original discharge letter,

renew its policy with Respondent. Cavicchio could not recall whether or not Delos gave him another offer to cover Respondent. Tr. 191. Nor is there any evidence that Delos's decision not to renew Respondent's policy had anything to do with Cotto's driving record. Indeed, its decision not to renew Respondent's policy was "for reasons not related to drivers." GC Exh. 4.

that the discharge was based on Cotto's having driven on a suspended license between November 30 and December 12, 2008, about a year and a half before he was fired. That reason was not relied upon by Respondent, until after Cotto's discharge, when Respondent apparently asked for and studied his driving abstract. See Tr. 344–353. It is clear that Cotto was not discharged for driving on a suspended license and that reason was an afterthought. Indeed, Respondent's apparent attempt to buttress its discharge decision by relying on this additional reason tends to support my finding that its discharge decision was improperly motivated.

In any event, even if Cotto's driving on a suspended license had been timely raised, I would reject it as a defense because Respondent has not proved that it would have discharged Cotto for that reason in the absence of his union and other protected activity. In its brief (Br. 10), Respondent cites evidence (R. Exh. 7) that it had discharged a driver, AS, for knowingly driving on a suspended license and not notifying Respondent of the suspension. But Cotto's situation was different. According to Cotto, he learned that his license had been suspended when he was stopped by a police officer. He immediately notified Operations Manager Morales and resolved the matter the next work day, at which time his license was reinstated (Tr. 72–76, 96–100, 103, 108–111). Morales denied he was so notified. But, based on my assessment of their relative reliability with respect to a previous conflict in testimony, I credit Cotto rather than Morales on this point. Thus, Respondent clearly forgave or condoned Cotto's suspension problem, just as it had forgiven or condoned his earlier insurance problem. In these circumstances, Respondent has not refuted the overwhelming evidence that its discharge of Cotto was discriminatorily motivated by relying on what it calls (Br. 10) "after acquired" evidence of his prior suspension.

CONCLUSIONS OF LAW

1. By coercively interrogating employees about their union and other protected concerted activity; threatening them with reprisals, including loss of employment, for engaging in such activity; promising them improved benefits, including health benefits and wage increases, and granting a wage increase, to discourage union or other protected concerted activity; creating the impression of surveillance, and actually engaging in surveillance of employees with respect to their union or other protected concerted activity; asking employees to inform it if they were approached to sign union authorization cards; telling employees they could quit or be fired if they engaged in union or other protected concerted activity; and by indicating that it would be futile for employees to engage in union or other protected concerted activity, Respondent violated Section 8(a)(1) of the Act.

2. By discharging employee Jeraldo Cotto for engaging in union activities and for being subpoenaed to testify in a Board proceeding, Respondent violated Section 8(a)(3), (4), and (1) of the Act.

3. The above violations are unfair labor practices within the meaning of the Act.

4. Respondent has not otherwise violated the Act.

REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall order it to cease and desist from such conduct and to take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent unlawfully and discriminatorily discharged employee Jeraldo Cotto, I shall order it to offer him full and immediate reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

On these findings of fact and conclusions of law, and on the entire record herein, I issue the following recommended²¹

ORDER

The Respondent, South Jersey Sanitation Corporation, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for engaging in union or other protected concerted activities, or because they were subpoenaed to testify before the NLRB.

(b) Coercively interrogating employees about their union or other protected concerted activities.

(c) Threatening employees with reprisals, including loss of employment, for engaging in such activities.

(d) Promising employees improved benefits, including health benefits and wage increases, in order to discourage union or other protected concerted activities.

(e) Granting wage increases to discourage union or other protected concerted activities.

(f) Creating the impression, among employees, that it is spying on union or other protected concerted activities.

(g) Engaging in surveillance of union or other protected concerted activities.

(h) Asking employees to inform it about union activities.

(i) Threatening employees that they could quit or be fired if they engaged in union or other protected concerted activities.

(j) Indicating that it would be futile for employees to engage in union or other protected concerted activities.

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

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

(a) Within 14 days from the date of this order, offer Jeraldo Cotto immediate and full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position,

without prejudice to his seniority or any other rights or privileges previously enjoyed.

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

(c) Within 14 days from the date of this order, remove from its files any reference to Cotto's unlawful discharge, and, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

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

(e) Within 14 days after service by the Region, post, at its facility in Hammonton, New Jersey, copies of the attached notice marked "Appendix."²² Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by e-mail, posting on an intranet or an internet site, and/or other electronic means, if 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 all former employees employed by the Respondent at any time since June 17, 2010.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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

APPENDIX

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this no-

²¹ 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 waived for all purposes.

²² 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."

tice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against you for engaging in union or other protected concerted activities, or because you were subpoenaed to testify before the National Labor Relations Board.

WE WILL NOT coercively interrogate you about your union or other protected concerted activities.

WE WILL NOT threaten you with reprisals, including loss of employment, for engaging in union or other protected concerted activities.

WE WILL NOT promise you improved benefits, including health benefits and wage increases, in order to discourage union or other protected concerted activities.

WE WILL NOT grant wage increases to discourage union or other protected concerted activities.

WE WILL NOT create the impression, among employees, that we are spying on union or other protected concerted activities.

WE WILL NOT engage in surveillance of union or other protected concerted activities.

WE WILL NOT ask you to inform us about union activities.

WE WILL NOT threaten you that you could quit or be fired if you engaged in union or other protected concerted activities.

WE WILL NOT indicate that it would be futile for you to engage in union or other protected concerted activities.

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

WE WILL, within 14 days of the Board's Order, offer Jeraldo Cotto immediate and full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Jeraldo Cotto whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against him, in the manner set forth in the remedy section of the Board's decision.

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

SOUTH JERSEY SANITATION CORP.