

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CORLISS RESOURCES, INC.

and

**TEAMSTERS LOCAL 174,
AFFILIATED WITH THE
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS**

Case Nos.

19-CA-093237

19-CA-093281

19-CA-102190

19-CA-104557

19-CA-105226

19-CA-106514

**TEAMSTERS LOCAL 174'S BRIEF IN SUPPORT OF LIMITED
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW
JUDGE**

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I. STATEMENT OF THE CASE

This case involves a vicious anti-union campaign waged by Corliss Resources, Inc. (“Employer” or “Corliss” or “Respondent”), consisting of blatantly unlawful acts designed to intimidate employees from exercising their right to unionize and engage in protected activities. The Employer is the operator of a trucking and hauling company based in Sumner, Washington, employing both dump truck drivers who work in the aggregate division, and mixer truck drivers who work in the concrete division. Teamsters Local 174 (“Union” or “Local 174”) filed a petition to represent the drivers in the aggregate department in spring of 2012, and notwithstanding the Employer’s efforts, eventually became certified as the exclusive bargaining representative for those drivers. Corliss began its concerted campaign to destroy union support amongst employees as soon as it learned that its employees desire to organize and its efforts did not abate after the Union was certified as Corliss dump truck drivers’ collective bargaining representative. Corliss has made vicious threats against supporting the union, and has followed through on those threats by taking retaliatory action against employees who have demonstrated support for the Union or participated in NLRB proceedings against the Employer.

II. FACTUAL BACKGROUND

The Employer first learned of employees’ efforts to organize in March 2012. ALJ Decision, p. 2. It organized a meeting that same month to try to convince drivers not to vote in the Union, making certain promises and claiming that bringing the Union in would “kill the business.” ALJ Decision, p. 2:13-22. The Union filed a representation petition to represent the dump truck drivers, which the Employer contested was an inappropriate unit. ALJ Decision, p. 2:24-3:2. Throughout this time, the Company

continued its antiunion campaign. ALJ Decision, p. 3:6. The Union narrowly lost a representation election, but a rerun election was held as a result of the Union filing election objections to the Employer's preelection conduct alleging that Corliss made unlawful threats and promises and unlawfully surveilled employees leading up to the election. ALJ Decision, p. 3:11-19. A rerun election was held, and following a hearing on challenged ballots, the Union was certified as the exclusive bargaining representative. ALJ Decision, p. 3:16-19.

Leading up to the Union's certification and since that time, Corliss management made various unlawful statements meant to deter employees from engaging in protected activity. For example, Corliss President, Scott Corliss, told drivers that he would "fight the Union forever," that "I'll never go Union." ALJ Decision, p. 4:8-17. He also made several unlawful threats and promises leading up to the Union elections. ALJ Decision p. 4:34-38. Co-owner, Tim Corliss, also made several unlawful statements, such as telling a driver that Corliss was "trying to keep the [prounion] assholes away from the new people," ALJ Decision, p. 6:7-10, and indicating that he would assign antiunion drivers to more desirable trucks, ALJ Decision, p. 5:21-25. Longtime Corliss supervisor Randy Britt also made several unlawful statements, such as interrogating drivers about the union and their union sympathies, ALJ Decision, p. 6-7 and p. 10:10-15; informing drivers that they would not receive a raise with the Union there, ALJ Decision, p. 7:2-3; informing drivers of plans to retaliate against prounion drivers; ALJ Decision, p. 8:6-18; stating that Scott Corliss would "sell everything he owns to fight the Union," ALJ Decision, p. 8:23-25; telling drivers that he needed them to vote against the Union, ALJ Decision, p. 9:39-40; telling drivers to keep his comments about the Union to them "on the down low,"

ALJ Decision, p. 10:6-7 and p. 10:20-21; informing drivers that Scott and Tim Corliss “liked to get even,” ALJ Decision p. 11:1-2; telling a driver to “keep his nose clean” and avoid being seen talking to prounion drivers because the Company planned to rid itself of all the “union guys,” ALJ Decision, p. 11:29-31; telling drivers “We have the numbers and we’re going to get all of you guys out,” ALJ Decision, p. 13:1-2; telling drivers that the Company would “never” sign a contract, ALJ Decision, p. 13:21-22; and telling drivers that they could not transfer out of the aggregate department because the Company needed their vote in a decertification election, ALJ Decision, p. 14:22-29.

Corliss has also retaliated against drivers it knows to be Union supporters. For instance, it removed vocal union supporter Jeff Cope from his new transfer truck and placed him in one of the oldest trucks in the fleet.¹ ALJ Decision, p. 15-18. Mr. Cope was eventually placed in a belly dump truck and scheduled to start his day over an hour before the rest of the drivers ensuring that he would no longer have opportunities to speak to other drivers about the Union. ALJ Decision, p. 18-19; Tr. 56:16-20; 505:7-21; 286:22-287:3. Corliss also terminated driver Don Sturdivan in retaliation for Mr. Sturdivan’s union support and testimony at an NLRB representation proceeding. ALJ Decision, p. 19-24. The Company also suspended driver Duane Crow just days after he revealed his cooperation in an NLRB investigation into charges against the Employer.² ALJ Decision, p. 24-26.

¹ The facts surrounding Corliss’s actions against Mr. Cope are explained in more detail below, pp. 9-12, and are fully incorporated herein.

² The facts surrounding Corliss’s actions against Mr. Crow are explained in more detail below, pp. 12-19, and are fully incorporated herein.

A seven-day hearing was held on several unfair labor practice charges filed by the Union in August 2013 and the ALJ issued a decision correctly finding merit to several of the charges on March 24, 2013.

III. QUESTIONS PRESENTED

1. Whether the Employer violated the Act when Supervisor Britt accused employees of being “backstabbers.” **Exceptions 1-2.**
2. Whether the Employer violated the Act when it changed driver Jeff Cope’s scheduled start time in an attempt to isolate him from other drivers. **Exception 3.**
3. Whether the Employer retaliated against driver Duane Crow by suspending him in response to his actual or perceived union activity and/or participating in Board proceedings. **Exception 4.**
4. Whether the Employer conferred favorable treatment on anti-union drivers by granting them more favorable work schedules and assignments. **Exception 5.**

IV. ARGUMENT

A. The ALJ erred in finding that Supervisor Randy Britt did not violate the Act when he accused employees of being “backstabbers” (p. 12).

It is undisputed that Supervisor Britt referred to prounion employees as “a bunch of backstabbers,” but the ALJ found that this statement did not violate Section 8(a)(1) of the Act. This conclusion is in error, as the evidence adduced at trial establishes that Britt’s statements would lead reasonable employees to understand that the comments were made in reference to and meant to discourage their union activities.

The first “backstabber” comment occurred on March 6, 2013. On that day, driver Brian Tilly approached Britt to invite him and a known antiunion driver to a get together organized by drivers, intended to improve morale amongst employees which was low given the ongoing contention over the Union. Tr. 370:13-371:18. The antiunion driver yelled, “That’s a fucking joke,” and Britt added, “Why the fuck would I want to go to drink with a bunch of backstabbers?” Tr. 371:12-18; ALJ Decision p. 12:16-19. When

asked by Tilly who Britt was referring to, Britt first clarified that he was referring to “everyone,” but then said that he was referring to Tilly specifically. ALJ Decision, p. 12. Britt had previously told one of the antiunion drivers (Vandyk) that the Union had sent a letter which “outed” a union sympathizer to the Company. *Id.* Tilly told Vandyk that this was incorrect. *Id.* Britt said that this why Tilly was a “backstabber.” *Id.* Britt proceeded to tell Tilly, “We have the numbers and we’re going to get all of you guys out,” and ordered him to “get the fuck out” of his office. *Id.* At some point during the exchange, Britt told Tilly that “Friends don’t do what you are doing to me.” Tr. 1075:1-24. The ALJ incorrectly determined that Britt’s “backstabber” comment was not made in reference to Tilly’s union support but was instead made because Britt was upset at having been called a liar. ALJ Decision, p. 12.

The very next day, Britt accused another union supporter of being a backstabber. Driver John Bobbitt made a comment over the CB radio (which transmits to other drivers’ trucks and to the dispatch office) contesting the fact that seniority was not observed when two less senior drivers pulled out of the plant before him and another more senior driver. ALJ Decision, p. 12, FN 27; Tr. 378:8-14; 578:7-13. In response to this comment, Britt came on the CB radio, suggesting that the less senior drivers had been instructed by him to leave in the order they did. Tr. 579:2-5; 378:19-22. When Bobbitt responded that this violated seniority, Britt became agitated and said, “You guys are a bunch of whiners and you’re a backstabbing piece of shit.” Tr. 579:11-16; 378:10-13. The ALJ concluded that Britt’s comment was not in reference to Bobbitt’s union support, but instead a reflection of Britt’s annoyance at having his dispatch decisions questioned.

The test for a Section 8(a)(1) violation is “whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.” *American Freightways Co., Inc.* 124 NLRB 146, 147 (1959). The test is objective does not turn on an employer’s subjective motivation. *Id.*

Several Board decisions make clear that calling an employee a “backstabber” is the type of comment which may violate the Act. For instance, in *Wometco Coca-Cola Bottling Co.*, 255 NLRB 431, 443 (1981), an employer was found to have violated the Act by calling an employee a “backstabber,” despite the fact that “the word ‘union’ was not mentioned during this conversation.” *Id.* While the comment was not made with explicit reference to union activities, the Vice President had previously made comments about some employee’s union activities, and discharged another employee because of his union activity. Moreover, the record revealed “no other reasonable explanation for the ire which Dean displayed during this conversation.” *See also, In Re S. Monterey Cnty. Hosp.*, 348 NLRB 327 (2006) (supervisor violated the Act when it called employees “liars and backstabbers” after they told her they were not involved with Union but had actually supported the Union); *Jeffrey A. Swardson*, 340 NLRB 179 (2003) (employer violated the Act by calling an employee a “backstabber” for walking off the job with other employees in protest of rate of wages); *Transp. Solutions, Inc.* 6-CA-35206, 2007 WL 2238533 (NLRB Div. of Judges 2007) (calling an employee a “backstabber” sent clear message of perceived disloyalty); *Climatemp Air Conditioning Co., Inc.*, 4-CA-31251, 2003 WL 21262105 (NLRB Div. of Judges 2003) (“backstabber” comment unlawful where made in context of other ULPs and suggested possible retaliation).

Considering the context in which they were made, each of Britt's "backstabber" statements would tend to interfere with employees' rights under the Act and violate Section 8(a)(1).

With respect to Britt's comment to Tilly, the ALJ concluded that Britt's comment was not in reference to Tilly's union activities and instead referred to a dispute between Tilly and Britt over whether the Union had sent a particular letter. Even if Britt's calling Tilly a backstabber *was* in relation to Tilly "calling him a liar" (i.e., by putting an end to the rumor initiated by Britt that the Union had "outed" a union supporter in a letter to the Company), the statement still violates Section 8(a)(1). Tilly's statement to Vandyk amounted to him speaking out in defense of the Union after Britt made accusations that the Union essentially failed to protect its supporters. Thus, while the ALJ concluded that Britt called Tilly a "backstabber" because he was upset at being called a liar, and not because of Tilly's support for the Union, ALJ Decision, p. 12:27-30, these two motivations are not mutually exclusive. A reasonable employee would understand Britt's comments to be a reaction to his umbrage that Tilly had contradicted the accusations Britt had made against the Union. The tendency of the statement would be to deter employees from attempting to contradict similar accusations leveled against the Union by management in the future.

Additionally, the fact that Britt's statement to Tilly was immediately followed by him telling Tilly that, "we have the numbers and we're going to get all of you guys out" further demonstrates that the "backstabber" comment was an expression of Britt's antipathy toward Tilly's union advocacy and meant to deter further advocacy.

Britt's naming Bobbitt a backstabber was likewise something a reasonable employee would understand to have been in reference to his protected activities. As with Britt's statement to Tilly, the ALJ concluded that Britt's statement to Bobbitt was spurred by an annoyance unrelated to Bobbitt's protected activities. ALJ Decision, p. 12, FN 27. However, just as Britt's anger at being called a liar *did* in fact relate to Tilly's union advocacy, Britt's irritation at Bobbitt for complaining about seniority directly related to Bobbitt's protected activities. While the comment was not made in explicit reference to Bobbitt's Union support, it was made in response to comments protesting failure to observe employee seniority – an issue that was hotly contested in the bargaining unit and of major concern to employees and the Union.³ Britt's statement was the type that would tend to deter employees from openly showing union support, or speaking out about their wages, hours, and working conditions. Indeed, the statement was made in direct response to a complaint about working conditions (seniority), and chastised those who complained about such things as being “a bunch of whiners” in addition to backstabbers. The objective tendency of this dressing down would be to discourage employees from engaging in protected activity by raising similar complaints. *Wometco Coca-Cola Bottling Co.*, 255 NLRB 431, 443 (1981).

Moreover, the fact that the two “backstabber” comments occurred *a single day* apart undermines the supposition that there were non-union related explanations for both comments. Instead, Britt's comments were part of a single diatribe against drivers who supported the Union and his perception that this support amounted to driving a knife in the back of the Company. Each of his comments were of the type that would discourage

³ In fact, just a few weeks later, the Union filed a charge alleging that the Employer was no longer honoring seniority in work assignments and was instead favoring antiunion drivers. *See*, Charge No. 19-CA-102190 filed on April 5, 2013.

other employees from speaking out about the union or working conditions, whether it be to defend the Union from inaccurate attacks, or to protest perceived unfairness in working conditions.

B. The ALJ erred in finding Respondent met its burden in establishing that it would have changed Jeff Cope's start time and placing him in a belly dump regardless of his union activity (p. 19:13-21).

While the ALJ correctly concluded that the Employer retaliated against Jeff Cope by taking him out of truck #337, he failed to recognize that the Employer further violated Section 8(a)(1) of the Act when it placed Mr. Cope in a belly dump truck on an early start schedule so that Mr. Cope could no longer share his union views with other employees. The ALJ determined that the Company had a non-discriminatory reason for changing Cope's schedule and that it would have taken this action even in the absence of Cope's union activity. ALJ Decision, p. 19. The evidence does not support this finding.

It is well-established that an employer violates the Act by isolating an employee from others in order to prevent the employee from engaging in protected activities and advocating for the union. *See Masiongale Electrical-Mechanical*, 331 NLRB 534 (2000); *Zimmerman Plumbing & Heating*, 325 NLRB 106, 114 (1997), *enf'd.*, in rel. part, 188 F.3d 508 (6th Cir. 1999).

The evidence overwhelmingly demonstrated that Corliss's actions in placing Cope in a belly dump and changing his start time was part of a well thought out plan to neutralize Cope by isolating him from other employees. The ALJ credited testimony that in September 2012, Tim Corliss approached another driver to plot how to prevent Cope from being able to continue to "badmouth" the Company, ALJ Decision, p. 8:12-14, a comment the ALJ determined referred to "Cope's outspoken support for the Union." ALJ Decision, p. 8, FN 16. The plot specifically involved placing Cope in a belly dump

truck, which is exactly what Corliss eventually did. ALJ Decision, p. 8:6-18. The ALJ also credited the undisputed testimony of Duane Crow that in May 2013, Tim Corliss admitted to “trying to keep the assholes away from the new people.” ALJ Decision, p. 6:7-10.

There is a further abundance of evidence in the record of the level of animosity Corliss harbored toward Jeff Cope because of his role as an outspoken advocate for the Union. Randy Britt approached John Bobbitt to tell him that Tim and Scott Corliss were “not too happy” with Jeff Cope and other open union supporters. ALJ Decision, p. 10:17-20. In the same conversation, Britt told Bobbitt that the Corliss brothers “liked to get even.” ALJ Decision p. 11:1-2. At hearing, Supervisor Britt named Jeff Cope as an employee who he considered to be “brash” in demonstrating his union support, Tr. 1133-1137, and explained his thoughts on the risks of being “brash” in supporting the union at Corliss:

Don't be brash about it. Nothing good is going to come out of kicking Corliss in the teeth. You know, you can be union but don't rub it in [Scott Corliss's] face, you know. Nothing good is going to come out of it.

Tr. 1085.

Despite all of this, the ALJ concluded that Corliss had a legitimate reason for changing Cope's start time. This finding was in error. Corliss's justification for changing Cope's start time was clearly pretextual given the overwhelming evidence of its animosity toward Cope and its admitted desire to keep prounion drivers like Cope isolated. Indeed, while there are rarely “smoking guns” in such cases, incredibly, in this case there was undisputed testimony both that: 1) the employer wanted to do a “secret squirrel job” by placing Cope in a belly dump truck in order to prevent him from espousing his prounion views to other drivers, and 2) the employer told a *second*

employee of its plan to isolate “the assholes,” i.e. the union supporters. ALJ Decision, p. 8:6-18; 6:7-10.

The Company’s claim that it would have changed Jeff Cope’s start time to 5 a.m. even were it not for its unlawful motive fails for several reasons. First, the evidence showed that the Company had not instituted such a practice in the 12-month history prior to making the change, undermining its claim that it was simply a non-discriminatory business decision. ALJ Decision, p. 19, 16-19. Second, the fact that the Company also changed the start time for belly dump driver Dye does not disprove and is not inconsistent with its intent to isolate Cope. Tim Corliss described his plan as a “secret squirrel job” – it is hardly surprising that the Company was savvy enough to change *both* belly dump truck drivers’ schedules so as to disguise the unlawful motivation for making the change to Cope’s schedule. It is not enough for Corliss to show that it had a legitimate reason for taking the actions it took; it must prove that its nondiscriminatory reason was *the* reason it did what it did. *Center Property Mgt.*, 277 NLRB 1376 (1985); *GSX Corp. v. NLRB*, 918 F.2d 1351, 1357 (8th Cir. 1990) (employer must show not only that it had a legitimate reason for its action but also that this reason would have led it to make the same decision even absent the unlawful motivation).

Moreover, while the ALJ Decision addresses Corliss’s purported nondiscriminatory reason for changing Cope’s schedule, it does not address why Cope was placed in a belly dump truck in the first place, rather than be returned to his regularly assigned truck. Even if the Board were to credit Corliss’s explanation for changing Cope’s start time to 5 a.m., which it should not, Corliss has failed to meet its burden

under *Wright Line*⁴ that it would have placed Cope in a belly dump but for its unlawful motivation of wanting to carry out its “secret squirrel job” and keep the union supporters away from the rest of the drivers.

C. The ALJ erred in finding that the General Counsel failed to establish that Duane Crow was suspended in retaliation for Crow’s known or suspected support for the Union or cooperation with Board proceedings (p. 25-27).

1. Crow’s suspension.

The ALJ found that the General Counsel failed to establish, by a preponderance of the evidence, that dump truck driver, Duane Crow, was left home in retaliation for his known or suspected union activities or cooperation in the Board’s investigation. This finding was in error, as the evidence in the record is more than sufficient to establish that Corliss’s actions were motivated by its perception that Crow was aiding in the Board investigation into Corliss’s unlawful conduct.

Crow initially approached Scott Corliss about the Union in March 2013, when he introduced himself and asked Corliss “what his options were” with respect to the Union.

ALJ Decision, p. 4:3-6. Corliss replied:

Duane, this is what’s going to happen. They’re going to force me to wave my white flag, they’re going to tell me I’m going to have to go union. I’m not going to go union, I’ll never go union, and I will fight them forever. So you’ve got two options. You can come to work, do your job, or you can stand outside that fence and hold a sign like the rest of them.”

ALJ Decision, p. 4:8-12.

By May 2013, several unfair labor practice charges had been filed against Corliss. Crow was set to give an affidavit in support of the charge. Tr. 240:8-16. As discussed in more detail above, the atmosphere at Corliss was poisonous at this time, with the

⁴ 251 NLRB 1083 (1980), *enfd.*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982), approved in, *NLRB v. Transportation Mgt. Corp.*, 462 U.S. 393 (1983).

Employer taking several actions to intimidate and discourage employees from supporting the Union in any way. The day before Crow was scheduled to provide an affidavit, he cancelled the appointment, hoping to make clear to management that he was not supporting the Union. Tr. 240:12-16; 247:5-8; 259:6-20. In furtherance of this goal, the day after cancelling the appointment, he approached Scott Corliss to tell him that he had previously been scheduled to give an affidavit, but that he had changed his mind. Tr. 239:24-240:3; ALJ Decision, p. 4:14-17. Corliss replied, “Well it doesn’t matter, Duane, I’m not going Union. I’ll fight it forever.” *Id.*

Just a few days later, on May 28, 2013 (the next workday Crow was scheduled to work), when Crow called in to get his start time, he discovered that he had been taken off the schedule for the day. Tr. 241:12-13. He was informed that there was no work for him that day. Tr. 241:15-22. Crow asked if he could come in to do some plant to plant work. Tr. 241:24-25. Britt said that he could, and Crow ended up working nine hours. Tr. 241:1-242:12.

The next day, May 29, when Crow called to get his schedule, he was told that there was no work for him to perform due to the fact that there had been a lot of rain over the weekend. Tr. 242:13-24. However, later that day Crow saw more junior Corliss drivers driving dump trucks, and called to find out why he was being kept home. Tr. 243:8-244:1. Manager Darrin Rousseau told Crow that he didn’t know “what the hell was going on” and that he needed a couple of hours to figure it out. Tr. 244:3-5. Crow called back and was told by Rousseau that someone had reported to Randy Britt that Crow had left pea gravel on the reach of his truck (the piece of the truck that connects the trailer to the cab), and that this is why he was being left home. Tr. 244:6-18.

The night of May 28, Scott Corliss allegedly sent Rousseau and Britt a text message picture of the gravel on Crow's reach, and directed Britt to keep Crow's truck at home until Rousseau could investigate. Tr. 804:25-8; 812:12; 1052:3-13; 1054:11-17; 1057:1-11; 906:9-907:6. Rousseau knew immediately that the truck in question, #306, belonged to Crow. ALJ Decision, p. 25:10-11. Rousseau testified that he completed his investigation by 7 or 8 a.m. on May 29 and that the "investigation" consisted of taking a picture of Crow's truck and confirming that Crow had driven his truck on May 28. Tr. 910:18-24; 805:11-22. Despite the fact that Rousseau's investigation was complete early in the day, Crow was not allowed to come into work, and Rousseau believed that Scott Corliss had made the decision to keep Crow home the *entire* day. Tr. 911:5-8. Crow received a verbal written warning for the incident. GC Ex. 11.

The ALJ's conclusion that Corliss's suspension of Crow did not violate the Act was based on several mistaken conclusions, including 1) that there was no evidence that Crow actually supported the Union or was suspected of supporting the union, 2) that the evidence was insufficient to establish that Scott Corliss knew that it was Crow's truck, and 3) that there is nothing remarkable about the fact that Corliss ordered Crow's truck to remain parked. Each of these conclusions is in error.

2. An employer violates the Act even when they act based on a mistaken perception of union activity or cooperation with the Board.

While the ALJ concluded that the Act was not violated because there was no evidence that Crow actually supported the Union, participated in any Board proceeding, or cooperated in any Board investigation, this is not the relevant inquiry. Several Board decisions establish that it is an employee's *perceived* union activity which must be proven to establish a violation of Section 8(a)(3), not the actual activity itself. *See Valley*

Slurry Seal Co., 343 NLRB 233, 251 (2004) (Respondent acted in retaliation for “perceived activities” in support of union); *JCR Hotel, Inc. v. N.L.R.B.*, 342 F.3d 837, 840 (8th Cir. 2003) (recognizing principle that “an employer commits an unfair labor practice when it acts on a mistaken belief that an employee has engaged in protected concerted activity”); *Liberty Ashes & Rubbish, Co., Inc.*, 323 NLRB 9, 11 (1997) (employer violated Section 8(a)(3) by discharging employee based on mistaken belief that employee was engaging in protected activity); *Handicabs, Inc.*, 318 NLRB 890, 897 (1995), *enfd* (Act is violated when employer acts against an employee in the belief that he has engaged in protected activities); *Salisbury Hotel*, 283 NLRB 685, 686 (1987) (“An employer clearly violates the Act by discharging an employee whom the employer mistakenly believes has engaged in union activity”).

Moreover, it is unnecessary that an employer’s conduct actually has the effect of discouraging union membership; rather, the Act is violated if that is the natural and foreseeable consequence of the employer’s actions. *Radio Officers’ Union v. NLRB*, 347 U.S. 17 (1954).

Here, Crow approached the president of the company and revealed that he had been in communication with the National Labor Relations Board about possibly supplying testimony in the unfair labor practice charge pending against the Employer, and that he had been scheduled to provide an affidavit. While Crow had not yet actually provided testimony in support of the charge, he unmistakably indicated to Corliss that he had considered doing so and even taken the step of scheduling an affidavit. This revelation is sufficient to establish both that Crow *actually* cooperated in a Board investigation and that Scott Corliss was aware of Crow’s protected activities. Tr. 239:24-

240:3; ALJ Decision, p. 4:14-17. Additionally, while Corliss's actions did not actually have the effect of deterring Crow from engaging in protected activity and/or testifying for the Board, it is enough that Corliss's actions would tend to discourage employees from communicating in any way with a Board agent about the possibility of cooperating in an investigation. *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954).

Moreover, the Supreme Court has instructed that Section 8(a)(4) is to be read to provide expansive protection to employees who participate in the Board's investigations and that "[t]his complete freedom is necessary...to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses." *N. L. R. B. v. Scrivener*, 405 U.S. 117, 121-22, 92 S. Ct. 798, 801, 31 L. Ed. 2d 79 (1972) (internal citations omitted). "The approach to § 8(a)(4) generally has been a liberal one in order fully to effectuate the section's remedial purpose." *Id.* at 124. The Board should find that Corliss acted unlawfully when it retaliated against Crow for having cooperated with the Board by considering giving an affidavit against Corliss.

3. There is sufficient evidence to infer that Scott Corliss knew that it was Duane Crow's truck he ordered parked.

The ALJ concluded that there was no direct evidence to establish that Scott Corliss knew that it was Duane Crow's truck on which he noticed the gravel and which he ordered parked, and therefore that the General Counsel could not prove that Corliss's suspension of Crow was in retaliation for his protected activities. ALJ Decision p. 26: 11-22. This conclusion is not supported by the record. Employer knowledge may be established by direct evidence or circumstantial evidence together with reasonable inferences that can be drawn therefrom. *See, e.g., Davis Supermarkets, Inc., v. NLRB*, 2 F.3d 1162, 1168-69 (D.C. Cir. 1993), *cert. denied*, 511 U.S. 1003 (1994) ("the element of

knowledge may be shown by circumstantial evidence from which a reasonable inference may be drawn.”). Several facts and circumstantial evidence support an inference that Scott Corliss knew it was Crow’s truck he ordered parked.

First, as supervisor Rousseau testified, Scott Corliss knew to which trucks most of the drivers were assigned, ALJ Decision, p. 26:14-16, and it is therefore more likely than not that Corliss knew that truck #306 was driven by Crow. And, just two months before Crow’s suspension, Crow drove up to Scott Corliss, introduced himself, and brought up the Union – an interaction that was sure to leave an impression on Scott Corliss, whose virulent anti-union animus has been well-established. Tr. 234:7-235:12. Most importantly though is the utter lack of a credible, non-discriminatory reason for Crow’s suspension. As discussed below, there is simply no coherent justification for having kept Crow at home *except for* Corliss’s desire to punish Crow for having provided even a scintilla of cooperation to the Board in its investigation.

Taken together, there was more than enough circumstantial evidence to determine that Scott Corliss knew truck #306 belonged to Crow, and therefore that his actions in ordering the truck to remain parked for the day were retaliatory.

4. The evidence does not support the ALJ’s conclusion that this was a routine investigation and instead establishes that Corliss’s justification for the suspension was pretextual.

The ALJ’s Decision concluded that there was “nothing remarkable about a decision to leave a truck parked to investigate a problem with it.” ALJ Decision, p. 26:24-26. This conclusion gives too much credence to Corliss’s *ex post facto* rationalization for its suspension of Crow and is belied by several key facts.

First, the need to conduct an investigation into pea gravel being left on truck #306's reach and the attendant need to keep the driver of truck #306 home in order to complete that investigation is patently specious. Rousseau testified that the sum total of his investigation consisted of taking a picture of the truck's reach and confirming that Crow had been the driver of the truck on the day in question. Both actions were capable of being completed in a matter of seconds and cannot logically explain why Crow's truck needed to remain parked all day. Additionally, even if Crow's truck had needed to remain parked all day, there was no explanation provided as to why Crow was not allowed to come in and drive one of Corliss's spare trucks.

Second, the fact that Crow was kept home even after Corliss's so-called "investigation" into the pea gravel was complete, and therefore that Corliss's purported justification for keeping Crow at home had undisputedly evaporated by the time he called in for the second time precludes Corliss's argument that Crow was kept home for the nondiscriminatory reason of allowing an investigation to take place. Instead, consistent with Rousseau's understanding, Scott Corliss had determined that Crow was to be kept home for the entire day, irrespective of course of the investigation. Corliss's actions and explanations are inconsistent and there can be no other reason to explain the decision to keep Crow home other than retaliation.

Third, Corliss's past practice in handling gravel left on the reach of a truck indicates that its actions here were retaliatory. Dispatcher Britt testified that he could recall at least three other instances in which Scott Corliss had texted him about debris being left on trucks in May 2013. Tr. 1123:12-25. Yet none of those other three examples resulted in a driver being kept home so that an investigation could be

completed. An employer's departure from normal disciplinary practice can serve as circumstantial evidence to support an 8(a)(3) charge and it does so here. *See, Ingles Markets Inc.*, 322 NLRB 122 (1996).

Fourth, Corliss's communications to Crow reveal the pretextual nature of its explanation for keeping Crow home. Tellingly, when Crow initially learned that he had been taken off the schedule, he was given an undeniably false explanation – that things were slow and they did not need him. Tr. 242:13-24. Corliss's evasive answers point to the fact that even while events were unfolding, supervisors realized there was nothing other than pretext for discrimination to justify the decision to keep Crow home.

Taken together, there is more than enough evidence to infer that Scott Corliss suspended Crow in retaliation for Crow's perceived union activity and/or cooperation in the Board's investigation and Corliss violated Sections 8(a)(1), 8(a)(3), and 8(a)(4) of the Act.

D. The ALJ erred by failing to find that Corliss assigned work and hours more favorably to the five named antiunion employees (p. 27-32).

The ALJ should have found that Corliss violated the Act by making changes in the method of hours and assignments to favor the five named antiunion drivers. The ALJ correctly concluded that there was sufficient evidence to establish motive: that the five named drivers were openly antiunion, and "abundant evidence" of Corliss's gratitude toward opponents of the Union. ALJ Decision, p. 27:11-24. However, the ALJ concluded that there was insufficient evidence to establish preferential treatment with respect to: 1) total hours of work (ALJ Decision, p. 28-29); 2) weekday overtime hours (*Id.* at p. 29); 3) weekend work (*Id.* at p. 29-30); 4) prevailing wage work (*Id.* at p. 30-32); and 5) other desirable work (*Id.* at p. 32). The Union contends that the changes in

hours and assignments as outlined by the General Counsel *do* show a change with respect to several of these categories to the benefit of antiunion drivers.

First, antiunion drivers received significantly more hours than the other drivers, receiving an increase in their hours from 2012 to 2013 that was larger than their fair share. Comparing the first four months of 2012 to 2013, the five antiunion drivers received larger increases of work – an increase of 62.2% in average hours compared to a 36.2% increase received by other drivers in February, 70.1% compared to 64.1% in January, and 20.7% compared to 16.2% in April. GC Ex. 71, 70(a), 70, *see also*, General Counsel’s post-hearing brief, Attachment A. And in March 2013, when work was slower than in 2012, the favored drivers received less stark cuts in their hours than other drivers, receiving a decrease of just 7.2% as opposed to the 13.5% cut received by other drivers. *Id.* Of the various categories of preferential treatment considered by the ALJ, the total number of hours worked is the area which has the biggest impact on drivers’ pocketbooks, and the one with the greatest potential to ‘starve out’ prounion employees. The total number of hours received by the five antiunion drivers relative to the other drivers shows a clear pattern of favoritism which should have led the ALJ to find a violation.

Additionally, the ALJ Decision concluded that “openly prounion drivers who worked throughout the first 4 months had about as many or more hours as antiunion drivers,” but this conclusion is unsupported by the record. ALJ Decision, p. 29:1-10. As a specific example to support this conclusion, the ALJ notes that Brian Tilly, fourth highest in seniority, received only four and two percent less hours respectively than the two antiunion drivers closest to him in seniority in early 2013. ALJ Decision, p. 29:3-5.

However, the two antiunion drivers referred to were three and eight drivers lower in seniority than Tilly (Vandyk is seventh and Dykes is twelfth, ALJ Decision p. 27:5-9). The fact that drivers with significantly less seniority than Tilly received comparable hours to Tilly, let alone *more* hours, leads to exactly the opposite conclusion than the one reached by the ALJ: the antiunion drivers received a bigger than their share portion of the hours in early 2013.

Moreover, to the extent there are exceptions to the proposition that the five antiunion drivers generally received more hours than other drivers, that does not undercut the clear trend of these five drivers receiving a disproportionate amount of hours. For instance, the fact that certain drivers such as Swanson and Ozaki may have received more hours than certain antiunion drivers despite being lower in seniority, ALJ Decision, p. 29:5-10, is not inconsistent with the five antiunion drivers generally receiving favorable treatment.

Even if the Board were to accept the ALJ's legal conclusions with respect to the five above-referenced categories of hours and work assignments, which it should not, the Board should still find that Corliss nonetheless favored antiunion drivers by assigning them earlier start times. The ALJ failed to pass upon the General Counsel's contention that Corliss favored the five antiunion drivers by assigning them earlier start times, in contrast with its past practice of assigning start times by driver seniority. Tr. 550:1-5; 44:9-45:3; General Counsel's Brief, p. 52. Several drivers testified to the fact that the consistent past practice was for the more senior drivers to receive earlier start times. Tr. 43:22-25; Tr. 75:12; 550:1-5; 44:1-45:3. The failure to abide by this past practice and to

instead provide the antiunion drivers with the preferred earlier start times should have been found to violate the Act.

V. CONCLUSION

For the foregoing reasons, the Union respectfully requests that the Board find merit to the Union's exceptions and modify the ALJ's Decision accordingly. The ALJ's remaining findings and conclusions were based on a correct analysis of the law and the facts and should be adopted.

RESPECTFULLY SUBMITTED this 21st day of April, 2014.



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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of April, I caused the original Teamsters Local 174 Exceptions To The Decision Of The Administrative Law Judge and Brief In Support of Exceptions to be filed with the National Labor Relations Board via electronic filing at *nrlb.gov* to the attention of the Executive Secretary and true and copies of the same to be delivered via electronic mail and US First Class mail to:

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