

San Lorenzo Lumber Company and General Teamsters, Packers, Food Processors & Warehousemen, Teamsters Local 912, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Cases 32-CA-210 (formerly 20-CA-12840) and 32-CA-318 (formerly 20-CA-13262)

September 29, 1978

DECISION AND ORDER

BY MEMBERS PENELLO, MURPHY, AND TRUESDALE

On March 30, 1978, Administrative Law Judge Bernard J. Seff issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief and Respondent filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The complaint alleged that Respondent violated Section 8(a)(1) of the Act by interrogating an employee about his union sympathies, by impliedly threatening retaliation against union supporters, and by granting the employees an unusually generous wage increase 4 weeks before the scheduled union election. The complaint also alleged that Respondent violated Section 8(a)(3) of the Act by discharging Steven Morotti, Michael Small, and Thomas McNellis because of their union activities. The Administrative Law Judge concluded that the record evidence did not support any of these allegations and therefore recommended that the complaint be dismissed in its entirety. The General Counsel has excepted to these findings and, for the reasons set forth below, we find merit in these exceptions.¹

I. INTERFERENCE, RESTRAINT, AND COERCION

Respondent is engaged in the retail and wholesale lumber and building supply business. The Company's premises consist of a lumberyard, a hardware store, and an enclosed woodshed. The Company is con-

trolled by two corporate officers; Robert P. Butcher, president, herein referred to as Butcher Sr., and his son, Robert W. Butcher, Jr., vice president, herein referred to as Butcher Jr.

In early February 1977, three of Respondent's employees, Steven Morotti, Steven Machado, and Michael Small, began conducting meetings at their home² with their fellow lumberyard employees in order to discuss the possibilities of joining a union. In conjunction with these meetings, Morotti, Machado, and Small met with certain teamsters officials at which time they signed union authorization cards and obtained additional cards for the other employees. The other employees signed these cards at subsequent meetings. The lumberyard supervisors, David Turner and John Engelund, also attended the organizing meetings and signed authorization cards. As a result of these activities, a petition for an election was filed with the Board and sent to the Respondent in late February.

A few days after Respondent received the petition, Steven Machado, one of the union organizers, went to Respondent's office in order to get some car keys. Both Butchers were present in the office and, upon Machado's arrival, they immediately began discussing the organizing activity at the lumberyard. During the course of the conversation, Butcher Sr. told Machado, "I know there are about 13 punks out in the back, and I hope I never find out who they are." Then, after further discussion about Jimmy Hoffa and Frank Fitzsimmons, Butcher Jr. asked Machado how he felt about the Union.

Despite the foregoing, the Administrative Law Judge failed to find that Respondent's statements to Steven Machado were in violation of the Act. In dismissing this portion of the complaint, the Administrative Law Judge reasoned that the conversation was conducted in a friendly and noncoercive manner. However, as argued by the General Counsel, whether there has been "interference," "restraint," or "coercion" does not turn on the subjective impact which the statement may have on the individual employee. Rather, the test is whether it can reasonably be said that the employer's conduct tends to interfere with the free exercise of employee rights under the Act.³ Applying this test, we find that Butcher Sr.'s remarks about the "13 punks" constituted a thinly veiled threat of retaliation against the union supporters if he ever found out who they were, and were a clear violation of Section 8(a)(1) of the Act. Similarly, Butcher Jr.'s inquiry about Machado's union sympathies was

¹ The Administrative Law Judge also dismissed the General Counsel's allegation that Respondent unlawfully threatened to reduce overtime if the employees selected the Union. In the absence of exceptions thereto, we need not rule on the Administrative Law Judge's disposition of this portion of the complaint.

² Morotti, Machado, and Small resided in the same house.

³ See, e.g., *Continental Chemical Company*, 232 NLRB 705, fn. 5 (1977); *Litton Dental Products, Division of Litton Industrial Products, Inc.*, 221 NLRB 700, fn. 2 (1975).

also in violation of the Act. There appeared to be no legitimate purpose for asking the question, nor was Machado given assurances against reprisal. Moreover, when considered in connection with the accompanying threat of retaliation we find such interrogation to be inherently coercive and therefore unlawful.

As noted above, the Administrative Law Judge also dismissed the General Counsel's allegation that Respondent unlawfully granted a wage increase in early 1977, in order to induce the employees to vote against the Union in the upcoming April 27 election. In so ruling, the Administrative Law Judge found that the pay raise was in accordance with Respondent's practice established over the past 15 years. However, the Administrative Law Judge misinterpreted the General Counsel's position. In this regard, the General Counsel stated in the record and in his exceptions that he does not dispute the Employer's practice of granting pay raises every April. Rather, the General Counsel argues that, in April 1977, Respondent used the occasion for giving annual raises to grant pay raises which were disproportionately higher than those granted in recent years. The record supports the General Counsel's contention. For example, from 1973 to 1976, only 11 percent of the unit employees were granted raises in excess of 35 cents per hour but, in April 1977, 60 percent of these unit employees received raises in excess of 35 cents per hour. Viewed another way, Respondent's records reveal that, while only 7 percent of the unit employees received an annual raise of 50 cents per hour or more from 1973 to 1976, in April 1977 nearly one-half of the unit employees received raises equal to or in excess of 50 cents per hour. Thus, as the Employer has not offered any countervailing justification for its uncharacteristic actions, it is our view that the unusually high raises granted by Respondent in April 1977, 4 weeks before the union election, tended unlawfully to interfere with the employees' right to select their collective-bargaining representative and thereby violated Section 8(a)(1) of the Act.⁴

II. THE TERMINATION OF STEVEN MOROTTI

Steven Morotti was hired by Respondent in August 1975 to work in the lumberyard. The record reveals that during the course of his employment he made rapid progress through the Company and was granted frequent pay raises. By the time of his discharge on March 14, 1977,⁵ he was fifth in seniority

among all of Respondent's yard employees (30 in number).

The incident which purportedly gave rise to Morotti's discharge occurred a few minutes before check in time on Saturday morning, March 12. Morotti, having lost the tape measure which was needed in the performance of his duties, went to buy one at the retail hardware section of Respondent's facility. According to Morotti, while waiting at the counter to pay for the item, he decided to leave and pay for the item later so that he could punch in his timecard before 9 a.m. It is apparent from the record that Morotti's actions in taking the tape were not secretive: he openly took it from the shelf—which was proper—and discarded the wrapper in the trash can as he left. Immediately following Morotti's departure, Don Gerig, Butcher Jr.'s brother-in-law who worked in the store, retrieved the wrapper and informed Butcher Jr. that he had observed Morotti taking a tape measure without paying for it. Butcher Jr. testified that he said nothing to Morotti at that time, but during the course of the day checked the invoices at the store to see if Morotti had paid. The invoices showed that Morotti had not. Then, in the middle of the next business day, Monday, March 14, Butcher Jr. confronted Morotti about the matter. Morotti acknowledged that he had not paid for the tape. In this regard, Morotti explained to Butcher that he left the store in order to avoid being late for work, and that he subsequently forgot to pay for it. At that point, Butcher told Morotti to take his lunch break and then return.

The record evidence appears to support the reasonableness of Morotti's explanation, as Morotti and the other employees had recently been criticized about their tardiness. Furthermore, Morotti testified that he was so accustomed to having the tape measure hooked onto his belt that he simply forgot about it during the course of the day.⁶ Nevertheless, after Butcher Jr. discussed the incident with his father, the Butchers decided to terminate Morotti immediately. After lunch they informed Morotti of their decision.

The Administrative Law Judge, finding no evidence of union animus on the part of Respondent, concluded that Morotti was lawfully discharged on March 14 because he stole the tape measure. We disagree. Contrary to the Administrative Law Judge's findings, there is substantial evidence in the record of Respondent's hostility to its employees' organizing activity, which was at its height at the time of the discharge. It has already been shown that in late February, shortly after receipt of the Union's petition,

⁴ See, e.g., *The Savings Bank Company*, 207 NLRB 269, 272 (1973).

⁵ The Administrative Law Judge inadvertently found that Morotti was discharged on May 14, 1977. All dates discussed herein are 1977 unless otherwise indicated.

⁶ Morotti further testified that at the end of the day, while operating Respondent's truck, the tape measure fell off his belt. Morotti testified that this had often happened before. The tape remained in the Company's truck until his discharge on Monday afternoon.

Butcher Jr. unlawfully interrogated Steven Machado, and Butcher Sr. coercively threatened retaliatory action against union supporters if he ever learned their identity. Thereafter, in early March, the Butchers summoned the lumberyard supervisors, David Turner and John Engelund, to their office to inquire about their involvement with the union activity. Despite their attendance at the union meetings, both supervisors disclaimed involvement and denied any knowledge of the petition. A week later, 3 days before Morotti's discharge, Turner was summoned again to Respondent's office at which time the Butcher accused Turner of lending support to the Union. Turner did not deny this accusation. At the conclusion of the meeting, Respondent's attorneys, who were present, secured an affidavit from Turner relating to his supervisory status. On March 14, Turner was discharged for his union activity. The record shows that by this time Respondent knew of Morotti's role in the organizing effort.⁷ That same day Morotti was fired purportedly for stealing a tape measure.

This alleged theft of the tape measure involved an item that was frequently needed by Morotti to perform his work.⁸ While Morotti did not deny his obligation to pay for the tape, he never removed it from the Company's premises. Nevertheless, despite Morotti's record as an exemplary employee, and despite the absence of any prior incidents casting doubt on his integrity, Respondent was unwilling to credit Morotti's reasonable explanation for failing to pay for the tape. When considered in light of the timing of the discharge, Respondent's other antiunion conduct, its knowledge of Morotti's leadership role in the union campaign, and its avowed threat to retaliate against union supporters if it learned their identity, we are compelled to conclude that Respondent seized upon what it considered a theft as a pretext for carrying out its threat to retaliate against union supporters.⁹ Accordingly, we find that Morotti's discharge violated Section 8(a)(3) and (1) of the Act.

⁷ In this regard, Butcher Jr. admitted that he knew of the union meetings being conducted in the home of Morotti, Machado, and Small. The Administrative Law Judge himself accurately noted that Respondent did not deny that it knew Morotti to be one of the chief union activists. Moreover, aside from the foregoing, it is well established that knowledge of an employee's union activities by a supervisor is imputed to the employer. See, e.g., *Continental Chemical Company, supra*. Here, both supervisors, Turner and Engelund, attended the meetings at Morotti's home and were interrogated about the organizing activity.

⁸ It was understood that items such as tape measures might also be put to personal use. Aside from the tape measure, most other tools used on the job were supplied by Respondent free of charge. In many instances, the employees would acquire these tools by taking them from Respondent's hardware store.

⁹ The pretextual nature of the discharge is not rebutted by testimony regarding two prior instances within the last 10 years in which Respondent allegedly discharged employees for taking company property. As Respondent has failed to show that these two incidents were comparable to the instant situation, they do not demonstrate sufficiently the reasonableness of Respondent's action here. Thus, with regard to the discharge of Dennis

III. THE TERMINATION OF MICHAEL SMALL.

Michael Small was hired by Respondent on April 19, 1976, as a yardman. He was considered a valuable employee and received four pay raises prior to his discharge on June 29, 1977. As was Morotti, Small was active in the Union. He also served as the Union's observer at the election conducted on April 27.¹⁰

On June 28, 1977, Small, while operating a forklift, was warned by his foreman, John Engelund, not to drive it at such an excessive speed. Nothing further was said until the end of the workday when Engelund asked to meet with Small privately. As Small had already punched out, he told Engelund, "You can talk to me [tomorrow] when I'm getting paid for it." Engelund then replied, "Why don't you hang on a second, Mike. I want to talk to you about what happened out there." Small said he had to catch his ride and walked out of the office. While it is undisputed that this conversation was conducted in a friendly manner, Engelund testified that he was angered by what he considered to be an act of insubordination and reported the incident to Butcher Jr. Butcher Jr. then discussed the matter with his father, and both agreed that Small should be discharged immediately. Small worked the following day, and Engelund made no effort to speak with him about the incident of the previous evening. At the end of that day, however, Small was summoned to Butcher Jr.'s office where he was told by the latter that he was being terminated because of his (1) reckless operation of the forklift, (2) his insubordination, and (3) his lateness. During this meeting, Small was not asked to verify these charges or explain his version of the incident with Engelund.

Based on the foregoing, the Administrative Law Judge concluded that Michael Small was lawfully discharged in the normal routine of plant discipline. The

Crawford for stealing a tape measure in 1971, there is no evidence that Crawford was a senior and valued employee; nor does the record reveal Crawford's explanation when confronted with his failure to pay for the tape. The other incident, which occurred over 10 years ago, is even more dissimilar to the instant situation as it involved the theft of plywood for personal use. Respondent offered no other explanation of the circumstances surrounding this latter discharge.

Moreover, in a more recent situation, Respondent did not discharge an employee who failed to disclose his knowledge of a theft. Thus, on a Sunday afternoon, employee Bob Slough borrowed a van from employee Preston Stone and stole some lumber from Respondent's yard. Respondent discovered the theft the next morning, knew Stone's van was involved, and still took no action against Stone. Slough had not reported to work. Stone, who learned of the theft by Monday evening, was finally confronted with the incident the following Wednesday and disclosed that it was Slough who had taken the lumber. While Stone was required to pay for the missing lumber, no other disciplinary action was taken. Slough never reported to work after the incident.

¹⁰ The Union prevailed by a vote of 26 to 17 and was certified as the collective-bargaining representative of the employees. Respondent thereafter refused to bargain with the Union, and the Board, on March 15, 1978, issued a Decision at 235 NLRB 199, finding that Respondent violated Sec. 8(a)(5) and (1) of the Act.

reasons for discharge offered by Butcher Jr. however, cannot withstand scrutiny. At the hearing John Engelund admitted that the employees frequently operated forklifts in a reckless manner. Yet, no one except Small was ever discharged for doing so. With regard to the alleged confrontation between Engelund and Small, it is clear from the record that Engelund and Small were close friends and that their conversation itself was friendly. Moreover, Engelund had previously advised Small that if management ever wished to speak with him after work he should make sure that he was punched in on the Company's time. In refusing to speak with Engelund after punching out on June 28, Small was apparently following Engelund's own advice. Thus, the incident scarcely seems to have risen to the level of insubordination. With regard to the alleged instances of lateness, Butcher Jr. admitted that he had never warned Small about being late. While there is evidence that Small was warned by Engelund for minor instances of lateness, i.e., 5-10 minutes, on June 24 and 27, it appears from the record that Small's alleged tardiness was never discussed when the Butchers made their termination decision. Significantly, at the hearing, Butcher Jr. himself admitted that other employees have also been late but have never been discharged, or even disciplined, because of it.

Based on these factors, we find that the termination herein is inexplicable on the grounds asserted by Respondent. It is well settled that when, as here, the asserted reasons for a discharge do not withstand examination, the Board can infer that there is another reason—an unlawful one which the employer seeks to conceal—for the discharge.¹¹ The facts and circumstances here provide substantial support for the inference, which we draw, the Small was discharged for his union activity. Thus, Small was one of the instigators of the union campaign and a union observer at the election; Respondent had knowledge of Small's union activities;¹² and Respondent demonstrated nothing but hostility toward the organizing effort and its leaders. Indeed, Butcher Sr. threatened retaliation against union supporters if he discovered who they were. Thus, in light of these factors, coupled with the fact that Small was an admittedly valuable employee who was abruptly discharged before being allowed even to advance a defense to the charges leveled against him, we find that Small was fired because of his union activity in violation of Section 8(a)(3) and (1) of the Act.¹³

¹¹ *Shattuck Denn Mining Corporation v. N.L.R.B.*, 362 F.2d 466, 470 (C.A. 9, 1966).

¹² See fn. 6, *supra*.

¹³ In discussing the reasons given by Respondent for Small's termination, the Administrative Law Judge also cited an incident in which Small allegedly made derogatory remarks about the Butchers. However, it is unclear

IV. THE TERMINATION OF TOM MCNELLIS

Tom McNellis began working for Respondent in March 1976. He was a well-regarded employee who, at the time of his discharge on June 24, 1977, was sixth in seniority among the 30 other employees at the lumberyard.¹⁴ He, also, was a union supporter and attended the meetings at Morotti's and Small's home in February and March.

In mid-March 1977, McNellis suffered a back injury while operating a forklift. After having his back examined at a nearby medical center, he took a week off, pursuant to the doctor's instructions, in order to recuperate. Upon returning to work, the Administrative Law Judge found that McNellis resumed his activities in the yard, but again experienced back pains a week or so later. The record shows that the second injury was less severe than the first as McNellis was able to continue working and made no request for lighter duties. Nevertheless, John Engelund reported the second injury to Butcher Jr. and, as a result, McNellis was transferred, against his wishes, to a lighter assignment in the dry shed.

While it was not noted by the Administrative Law Judge, the record also reveals that 1 month later, close to the time of the union election, Butcher Jr. criticized McNellis for his lack of initiative. And, although Respondent's business has a high turnover of employees, and McNellis was admittedly a valued employee, had received a pay raise earlier that month, and had never up until that time been criticized by management, Butcher Jr. told McNellis there would be no hard feelings if he wished to quit. Shortly thereafter, McNellis was again reprimanded for assisting in an effort to reduce a backlog of wood rather than servicing customers as authorized by McNellis' shed leader. During the reprimand, Butcher Jr. threatened to discharge McNellis if there were any further incidents involving his work.

On June 14, McNellis mentioned to Engelund that he was having chest pains which he thought might be attributable to the sawdust in the dry shed. Engelund advised McNellis to report the matter to Dave Leonard who, at that time, was responsible for overseeing the yard, the shed, and the retail store. While Mc-

from the record whether, in fact, such an incident was ever mentioned to Small at the time of his discharge. At the hearing, Butcher Jr. first testified that the reckless driving, the insubordination, and the latenesses were the only reason given for the discharge. Subsequently, however, Butcher Jr. testified that he might have mentioned the derogatory remarks in his meeting with Small. The Administrative Law Judge did not set out his basis for crediting Butcher's subsequent, but uncertain, testimony over Butcher's straightforward former testimony. In the absence of such an explanation, we decline to find, on the basis of such questionable testimony, that the alleged derogatory remark was ever offered as a basis for the discharge.

¹⁴ In December 1976, McNellis left Respondent in order to look for a better job elsewhere. At that time, Butcher Jr. offered McNellis a fourth raise in 9 months in an unsuccessful effort to induce him to stay. McNellis returned in January 1977 and was immediately rehired by Respondent.

Nellis chose not to do this, John Engelund decided to bring the matter to the attention of Butcher Jr. Immediately thereafter, Butcher Jr. conferred with his father and made the decision to discharge McNellis. On that same day, Butcher Jr. met with McNellis and told McNellis that, because of the chest pains that he was having, it was "best for him and the company" that he be terminated immediately. McNellis clearly did not want to leave, and asked Butcher Jr. if he could resume his forklift duties out in the yard¹⁵ or transfer to another job within the Company. Butcher Jr. refused, reiterating his concern for McNellis' health and noting the possibility that, if transferred, his back problem could reoccur. McNellis was handed a paycheck which was already made out before he arrived at Butcher Jr.'s office.

Based on these facts, the Administrative Law Judge found that McNellis was lawfully discharged because of his health problems and for no other reason. However, in discharging McNellis out of "concern" for his health, Butcher Jr. had no clear or firsthand knowledge of McNellis' condition and made no effort to learn about it. In this regard, the record shows that at no time during their discussion did Butcher Jr. question McNellis about his chest pains despite the fact that McNellis himself had never complained to Butcher about them. Similarly, Butcher Jr. never inquired about the status of McNellis' back despite the fact that the most recent back injury known to Butcher Jr. had occurred over 2 months before. Nor did Butcher Jr., or anyone else for that matter, know whether the sawdust was the cause of the chest pains. Thus, despite the uncertainty of McNellis' health problems, the Butchers' after learning of the chest pains through a third party, decided to discharge McNellis before they even spoke with him. And, as McNellis' paycheck was already made out before he met with Butcher Jr., it appears that Respondent had no intention of altering its decision upon speaking with McNellis. In fact, the record shows that Respondent was unwilling to allow McNellis to remain on the job until the cause of the chest pains could be determined.

Based on the foregoing, it is apparent that Respondent's asserted reason for the discharge, when considered in connection with predictable alternatives¹⁶

¹⁵ Employees working out in the yard did not come into contact with sawdust.

¹⁶ In one prior instance, Respondent transferred an employee to its retail store because that employee was unable to handle the heavy workload out in the yard. More importantly, here, Respondent did not explore the most obvious means of avoiding the discharge; namely, it had no desire to allow McNellis to verify whether the chest pains were caused by sawdust. If they were not, Respondent, presumably, would have had no reason to terminate McNellis' employment. Second, when McNellis asked to return to the forklift 2-1/2 months after his back injury, Respondent again had the opportunity to allow McNellis to verify whether it was medically advisable for him to resume his duties in the yard. Yet, without knowing whether McNellis still

which could have avoided immediate termination, does not ring true. Rather, we are persuaded, based on the record as a whole, that McNellis, like employees Small and Morotti, was discharged because of his union activities. Thus, McNellis attended the organizing meetings in the presence of Supervisors Turner and Engelund and signed a union card; Respondent had knowledge of McNellis' support for the Union; and, as noted above, the record is replete with evidence of its antipathy towards the Union and its supporters. Indeed, Respondent's hostility toward the union supporters was directed at McNellis in late April 1977 shortly before the election. At that time, as noted above, Respondent solicited McNellis to quit his job because of a single instance of "lack of initiative." Yet McNellis was a valued employee with an unblemished work record, and Respondent admits that its business was plagued by an excessive amount of employee turnover. We find it highly unlikely that Respondent would go beyond a mere reprimand and encourage an experienced employee such as McNellis to leave his job unless it was motivated by some other reason. As this incident occurred shortly before the union election, at a time when Respondent was engaged in its antiunion campaign, it becomes apparent that Respondent's treatment of McNellis in late April was but another attempt to get rid of a known union supporter. Although this April incident was not alleged as a separate unfair labor practice, it serves to shed light on Respondent's subsequent conduct towards McNellis.

Under these circumstances, particularly noting Respondent's attempted inducement of McNellis to quit in late April, coupled with its retaliatory threats against union supporters and unlawful discharges of other valued employees, we conclude that Respondent's concern for McNellis' health was pretextual and that the termination of McNellis was, in fact, motivated by his support for the Union. Accordingly, we find that Tom McNellis was unlawfully discharged in violation of Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. San Lorenzo Lumber Company is an Employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. General Teamsters, Packers, Food Processors & Warehousemen, Teamsters Local 912, International Brotherhood of Teamsters, Chauffeurs, Warehouse-

had a back problem, Respondent denied McNellis' request. Finally, had Respondent desired to retain McNellis until it was certain that his current employment was jeopardizing his health, it is unlikely that Respondent would have made such an unalterable decision without first speaking with him.

men and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, by interrogating an employee about his union sympathies, has engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

4. Respondent, by threatening retaliation against supporters if it learned their identity, has engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

5. Respondent, by granting the employees an unusually high wage increase in order to influence their vote with respect to the Union, has engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

6. Respondent, by discharging Steven Morotti, Michael Small, and Thomas McNellis because of their union activities, has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall Order that it cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act. We shall Order Respondent to offer Steven Morotti, Michael Small, and Thomas McNellis immediate and full reinstatement to their former positions or, in the event such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges. We shall also require Respondent to make the above-named employees whole for any loss of pay they may have suffered by reason of Respondent's unlawful conduct against them, by payment to each of a sum of money equal to that which each would have earned from the date of discharge to the date of an offer of reinstatement, less net earnings during such period. Backpay and interest thereon is to be computed in accordance with the formulas prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).¹⁷

As the unlawful discharges of Steven Morotti, Michael Small, and Thomas McNellis are of such serious nature and strike at the very heart of rights intended to be protected by the Act, we shall issue a broad cease-and-desist Order requiring Respondent to cease and desist in any manner from infringing upon employee rights.¹⁸

¹⁷ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

¹⁸ *N.L.R.B. v. Entwistle Mfg. Co.*, 120 F.2d 532, 536-537 (C.A. 4, 1941).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, San Lorenzo Lumber Company, Santa Cruz, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating its employees about their union sympathies.

(b) Granting its employees unusually high pay raises in order to induce them to refrain from engaging in union activities; nothing herein, however, requires Respondent to rescind any portion of the increases granted.

(c) Threatening retaliation against employees because of their support for General Teamsters, Packers, Food Processors & Warehousemen, Teamsters Local 912, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

(d) Discharging employees because they engaged in union activities.

(e) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed by Section 7 of the Act.

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

(a) Offer to Steven Morotti, Michael Small, and Thomas McNellis immediate and full reinstatement to their former positions or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges.

(b) Make whole the above-named employees for any loss of earnings they may have suffered by reason of the unlawful action taken against them, in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board and its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel record and reports and all other records necessary to analyze the amount of backpay due under the term, of this Order.

(d) Post at its premises in Santa Cruz, California, copies of the attached notice marked "Appendix."¹⁹ Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in

¹⁹ In the event that 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."

conspicuous places, including all places where notices to employees are customarily placed. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

APPENDIX

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

WE WILL NOT interrogate our employees about their union sympathies.

WE WILL NOT grant our employees unusually high pay raises in order to induce them to refrain from engaging in union activities. However, nothing herein requires us to rescind any portion of the increases granted.

WE WILL NOT threaten retaliation against our employees because of their support for General Teamsters, Packers, Food Processors & Warehousemen, Teamsters Local 912, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

WE WILL NOT discharge our employees because they engage in union activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed by Section 7 of the Act.

WE WILL offer Steven Morotti, Michael Small, and Thomas McNellis immediate and full reinstatement to their former positions or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges.

WE WILL make the above-named employees whole for any loss of earnings they may have suffered by reason of the unlawful action taken against them, plus interest.

SAN LORENZO COMPANY

DECISION

STATEMENT OF THE CASE

BERNARD J. SEFF, Administrative Law Judge: This case was heard before me in Santa Cruz, California, on January 19 and 10, 1978. The charge in Case 32-CA-210 was filed

by the Union on May 3, 1977; the first amended charge in Case 32-CA-210 was filed by the Union on June 22, 1977; the charge in Case 32-CA-318 was filed by the Union on August 11, 1977; the first amended charge in Case 32-CA-318 was filed by the Union on September 13, 1977.¹

All of the above cases were consolidated for hearing and complaint issued July 29. Respondent in its answer admits the commerce information alleged in the complaint, but denies the commission of any unfair labor practices. The unfair labor practices allegations in the complaint encompass alleged unlawful interrogation, the granting of an excessive wage increase just prior to an election conducted by the National Labor Relations Board, and the discharge of three employees which will be discussed more fully *infra*.

Upon the entire record, including my observation of the demeanor of the witnesses, and after giving due consideration to the excellent briefs filed by the General Counsel and the Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

San Lorenzo Lumber Company, Inc., a California corporation, is engaged in the retail and wholesale lumber and building supply business at Santa Cruz, California. The Company's premises consist of a lumber yard, a large hardware store area, and an enclosed shed for plywood, moulding and lumber. The Company's president is Robert T. Butcher. Its vice president is his son, Robert W. Butcher, Jr.

There are approximately 50 employees, some of whom work in the hardware store and the lumberyard, and as truckdrivers. The lumberyard and truckdriver employees are supervised by the yard foreman and an assistant yard foreman. The Company is open 6 days a week.

Allegation II, subparagraph (b), alleges that the Respondent, in the course and conduct of its business operations, had gross revenues in excess of \$500,000 and during the same period purchased and received goods valued in excess of \$50,000 directly from outside the State of California. Respondent's answer admits, and I find, that Respondent is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

I find that General Teamsters, Packers, Food Processors & Warehousemen, Teamsters Local 912, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The complaint alleges (1) that Respondent, by Robert W. Butcher, at its premises interrogated an employee regarding his feelings about the Union; (2) Respondent allegedly threatened retaliatory action against employees if they sup-

¹ All dates referred to in this case occurred in 1977 unless otherwise indicated.

ported the Union; (3) it is further alleged that Respondent, Robert W. Butcher, threatened to impose more onerous working conditions in order to discourage the employees from supporting the Union; (4) Respondent is charged with having granted its employees a wage increase to discourage them from joining or supporting the Union and for designating or selecting the Union as their collective-bargaining representative. It is further alleged that the following employees were discharged because they engaged in concerted activities: Steven L. Morotti, who was discharged May 14; Thomas McNellis, who was discharged on June 14; and Michael Small, who was discharged on June 29, 1977.

An election took place on April 27 but the results of the election have not been finally resolved because of the pendency of objections, which is still a matter before the Board.

It is alleged in the complaint that David Turner and John Engelund held the respective positions of yard foreman and assistant yard foreman. Both Turner and Engelund directed the day-to-day work of the yard employees, possessed the authority to fire employees, and granted overtime to yard employees. Turner was discharged on May 14, and at that time, Engelund assumed the responsibilities of yard foreman for the duration of the incidents which form the basis of the instant complaint.

It is not denied that in late January or early February, employees Steve Morotti, Steve Machado, and Michael Small began conducting numerous meetings with Respondent's yard employees, at their home in Soquel, California, to discuss the possibilities of obtaining union representation. In addition to conducting the meetings at their home, the employees met with Teamsters officials in Watsonville, for the purpose of securing authorization cards and obtaining assistance from the union officials with regard to the organizational efforts then in progress. Morotti, McNellis, and Small signed union authorization cards. Both Turner and Engelund attended meetings and signed union authorization cards at meetings, during the course of which, Morotti, McNellis and Small were present prior to March 14. At the election which occurred on April 27, the Union prevailed by a vote of 26 to 17 and despite Respondent's objections to the election, the Union was certified by the Board as the collective-bargaining representative of the employees. The General Counsel in his brief states that even though the certification has issued, the Respondent has "technically" refused to bargain with the Union in the related proceeding pending before the Board, Case 32-CA-535.

According to the record, when the Butchers, Sr. and Jr., received a copy of the petition from the National Labor Relations Board, their first reaction was to call in their supervisors, Turner and Engelund, and referring to the petition, "asked what the hell was going on." At this point, according to the testimony of Turner, Butcher Sr. discussed the pros and cons of a union and stated that anybody with seniority, the Union would hurt, and any overtime would be cut off. Turner also testified that Butcher stated, "I don't care who they are, but they are not going to be working here any longer, whoever they are."

When Butcher Sr. testified, he explained in answer to the question, "Did you say that employees that were for the Union wouldn't be working for the Company any more?"

So what I was saying is, we have this big turnover of help, so that maybe a dozen or 15 people that were active in the Union wouldn't even be here next year because that's the history of it over the years.

When Butcher spoke to Turner, he gave certain examples of what the Union has already done for example in a cannery located near to the Respondent's facility. When the cannery was nonunion, the employees worked 11-1/2 hour shifts. The cannery went union—then the teamsters said, we do not want this overtime. We want more help in here. So now the cannery is on a 7-1/2 hour shift, and as a result of increasing the number of employees, there is much less overtime available for the workers. It should be noted that both these explanations were given by Butcher Sr. in a straightforward and direct manner, and I am persuaded that he testified truthfully in explanation of the questions asked of him.

There is, in fact, very little evidence, and none of it of a convincing nature, to indicate that the Company harbored any animus against the Union. It is further to be noted that in its Maryville operation the Company's employees are organized in a labor union.

The Discharge of Steve Morotti

The General Counsel describes Morotti as one of Respondent's most valued employees. It is not disputed that he was well thought of by Respondent. Initially he was hired as a yardman in August 1975 and he made rapid progress through the Company working as a forklift operator, operating a backsaw, and driving a truck. For the last 6 months of his employment Morotti was Respondent's only long-haul driver. In addition to his truck driving responsibilities, Morotti reported to the yard on alternate Saturdays and worked in the shed assisting customers. He was hired initially at the rate of \$2.50 an hour and he received no fewer than six pay raises in his first 14 months of employment which culminated in his receiving a rate of \$4.50 an hour. On March 14, Morotti was fifth in seniority of all Respondent's yard employees.

The controversy regarding Morotti came about because of an incident involving a tape measure. It is not disputed that Morotti found himself in need of a tape measure and went to the hardware department and took a tape measure which is a required tool in the operation of his job. He did not pay for this tape measure, and in fact made no effort to pay the Company for it. It was the Company's practice that when someone secured a tape measure, he would charge it to his account, or pay cash for it. Morotti did neither of these things. He claimed that there was no one at the counter when he secured this tape measure and that it was necessary for the work he was then engaged in. This testimony is refuted by Respondent, which proffered testimony that there were three employees who normally worked at the counter and who could have transacted the necessary business with Morotti which would have resulted in the payment for this item. This matter was reported to Butcher Jr. who did nothing about it for a day and a half, hoping that Morotti would come forward and pay for the tape measure. When he did not pay, he was confronted with this fact. Morotti said that he intended to pay for the tape mea-

sure, that he did not remove it from the Company's premises, and that he just forgot about it. Butcher Jr. discussed this episode with his father, and Butcher Sr. said that if Respondent could not trust its employees, it would be better off without them. For this reason, Morotti was discharged. It is not correct to say that the Company made no effort to secure the explanation Morotti might have had with respect to the tape measure, because he was spoken to on two occasions, and given an ample opportunity to explain how it came about that he took the tape measure and did not pay for it.

When Morotti was confronted with the problem of the tape measure, he explained that he had not paid for it because he was too busy during the day to take care of this matter. It should be noted in this connection that although Morotti claimed he was too busy during the day to pay for the tape, yet he had time to select an axe for a fellow employee and sign for that purchase. That record also shows that Morotti testified that he purchased the axe that day because, "work had gotten slow . . ."

It is not denied by Respondent that it knew Morotti to be one of the chief union activists in the plant. Not only did Morotti solicit signatures on union authorization cards, but he also conducted a number of union meetings in his home. Two of the Company's supervisors, Engelund and Turner, were both present at a number of union meetings which took place in Morotti's home. The weak link in the General Counsel's case concerning Morotti lies in the fact that there is no nexus between Morotti's discharge and his union activities. Nor has it been shown in any convincing manner that Respondent harbored an animus against the labor union or that the reason given for Morotti's discharge was pretextual. The fact of the matter is that Respondent established by its testimony that in 1971 an employee named Dennis Crawford stole a tape and was discharged for this action. On another occasion, an employee named Pedro Costa stole some plywood. He, too, was discharged for this theft which he admitted. The General Counsel takes the rather remarkable position with respect to Morotti that even if he, in fact, did steal the tape, the punishment meted out to the employee was too harsh. Absent a direct linkage to union activities, it is elementary that a company may discharge an employee for any reason or for no reason, providing the motivation for the discharge was not related to union and/or concerted activities. Since I have found that Morotti's discharge was not due to union activities, I cannot substitute my judgment for that of management.

The Termination of Michael Small

Michael Small was employed by the Company from April 1976 through June 29, 1977, as a yardman. The events which preceded Small's discharge are not in substantial dispute.

On Tuesday, June 28, sometime around 3 p.m., Foreman Engelund observed Small driving one of the Company's forklifts in a reckless manner.

Engelund approached Small and told him to drive carefully. At the end of the work day, Small turned in his work orders to Engelund in the yard office. As Small walked to the timeclock, Engelund asked if he could speak with Small about what had happened on the forklift. Small proceeded

to punch his timecard and said, "you can talk to me when I'm getting paid for it." Engelund then asked, "Why don't you hang on a second, Mike. I want to talk to you about what happened out there." Instead of replying, Small walked out of the office and went home. It is not denied that Engelund's tone of voice during this conversation was friendly.

Engelund was angry about this act of insubordination. He immediately went to speak to Butcher, Jr. Butcher told Engelund that he would discuss the matter with his father.

Butcher Jr. was aware of other problems relating to Small. Small had been late on at least 10 occasions within the past couple of months. He had been warned three or four times. Engelund had warned Small on the day before, Monday, June 27, that he had been late that day and the preceding Friday, and that he must get to work on time. Butcher Jr. had also learned from his sister that Small had referred to the Butchers Jr. and Sr. to a family friend as a couple of sons-of-bitches.

Butcher spoke with his father and related what had occurred. They then decided that Small would be discharged. Butcher Jr. told Small that he was being discharged for insubordination. Butcher Jr. also remarked that Small had been late on many occasions and had driven recklessly while operating a forklift and had made derogatory remarks about him and his father.

It is not denied that the Company had knowledge of Small's union activities, and the further fact that Small had appeared as the Union's observer at the Board election which took place on April 27. However, it should be pointed out, that nowhere in the conversations held by Engelund and Butcher with Small, was any mention made nor can any inference be drawn that Small's termination was related in any way to his union activities. His discharge took place in the normal routine of plant discipline. It is not the role of the Administrative Law Judge to substitute his judgment for that of management. Small was discharged for cause, without any relationship to his union activities, and I will therefore recommend that the allegation concerning Small's discharge be dismissed.

The Discharge of Thomas McNellis

McNellis was terminated by Butcher on June 14. He had been rehired in February 1977, and during the course of his employment, he drove a forklift and worked in the lumberyard.

Sometime around March 21, McNellis injured his back while at work. He was sent to the Company's workmen's compensation doctor, and he remained off work for about 1 week. Upon his return, McNellis was assigned light duty for a few days, and then he resumed work in the yard. About a week or so later, he again injured his back. When this incident was reported to Butcher, Jr. he instructed the yard foreman to assign McNellis to a lighter job in the yard in order to prevent a serious injury to his back. General yardwork frequently requires lifting of heavy lumber. McNellis was then transferred to the shed area where he handled moulding and other lightweight wood. As part of his duties in the shed, McNellis was required to operate a power saw to cut lumber for customers.

On June 14, McNellis advised the shed leader, Bob Menneffi, that for the past 3 weeks, he had been experiencing chest pains caused by the sawdust in the shed area. McNellis also report his chest pains to Yard Foreman John Engelund. Because of the potential seriousness of the complaints made by McNellis, both Engelund and Menneffi reported McNellis' complaints to Butcher Jr. Upon learning of this problem, Butcher Jr. went to speak to his father. He explained the problems McNellis had experienced with his back and his recent problem with chest pains. Butcher Sr. stated that he had experienced problems with employee back injuries and sawdust problems in the past. Butcher Sr. and his son decided that because of the risk of substantial injury to McNellis, and since there was no other job available which did not involve lifting or exposure to sawdust, McNellis would have to be terminated.

Butcher Jr. met with McNellis the same day and advised him that, because of his health problems and because there was no other position available, McNellis would have to be let go. McNellis testified that there was no mention of the Union during this conversation. After he left his employment with the Company, his chest pain problem cleared up.

Once again, this discharge occurred in the normal course of plant discipline; and there was no proof, direct or indirect, that the discharge of McNellis had anything whatever to do with union activities. Attention is called to the fact that the election took place on April 27, and the discharge took place on June 14. It would appear that since McNellis had engaged in certain activities on behalf of the Union prior to the Board election in April, and that this fact was known to Respondent, if it had desired to eliminate McNellis because of his union and/or concerted activities, it had plenty of opportunity to take this action long before June 14. On the basis of the facts adduced at the hearing, it is clear that McNellis was discharged because of his health problems and for no other reason. I will therefore recommend that the allegation concerning the termination of McNellis be dismissed.

Further Alleged Independent 8(a)(1) Violations

The General Counsel seems to make much of the fact that Respondent granted its employees on April 1, a general wage increase. The undisputed testimony in the record shows that for at least 15 years, the Company granted across-the-board wage increases to its employees on April 1, and on October 1. Following its long-established practice, on April 1, 1977, the Company again granted its employees a wage increase; Butcher Sr. testified that he consulted with counsel prior to giving the raise and was advised that since he had always given a raise on April 1 in the past, that he should give one in 1977 or risk being accused of unfair labor practices for not granting a pay increase at that time.

Steve Machado went to Butcher Sr.'s office to get Butcher Sr.'s car keys because the car was in the way of some lumber in the yard. After some general discussion about Butcher Sr.'s office furnishings, Machado testified that Butcher Jr. joined them. Machado further testified that Butcher Sr. immediately began discussing the Union and said, "I know there are about 13 punks out in the back, and I hope I never find out who they are." Butcher Sr. then

mentioned some newspaper clippings about teamster leaders Jimmy Hoffa and Frank Fitzsimmons. Machado then said that Butcher Jr. asked him how he felt about the Union. Machado replied that his father was a union member and that the Union had been good to his family. On cross-examination, Machado admitted that the entire conversation was carried on in a friendly vein. He further testified that he was not fearful that he would lose his job. There were no threats made regarding union activities. Respondent's counsel points out in his brief that both Butcher Sr. and Jr. had spoken to him and had been cautioned about questioning employees about their feelings toward the Union, or about threatening them. While the comment about 13 punks does not seem to fit the pattern of a friendly discussion, it was pointed out also in Respondent's brief that any employee who had already signed a union card might not feel secure in his job after hearing this remark. Despite this fact Machado felt comfortable in his conversation with the Butchers Sr. and Jr. and it would certainly appear from the testimony in the record that these comments made by both Butchers were not threatening in any manner and did not violate the free speech provision of the Act.

Insofar as the alleged threat to reduce overtime is concerned, this allegation has been discussed supra, and disposed of. Butcher Jr. testified that he did not threaten to reduce overtime if the employees selected the Union. He merely cited as an example of what could happen by pointing to the cannery, where the union did not want overtime, but rather requested that more employees be put on the payroll. In that case the union forced the company to eliminate overtime and to hire additional employees. At no time was it alleged that the company reduced overtime, and in fact it did not take any such action.

Small's testimony has a number of significant contradictions. He testified that he actively solicited employees to support the Union. Yet in his affidavit he stated that he was not one of the more active union supporters, and that Butcher Jr. was surprised when he was the Union's observer in the election. Small denied having been warned by Engelund for being late on June 24 and 27. His affidavit indicates that he was warned on both occasions. Under the circumstances described above, I do not credit Small's contradictory and uncorroborated testimony.

With respect to the wage increase granted on April 1, it should also be noted that an increase, again in accordance with well established past practice, was also granted on October 1, but the General Counsel did not allege a violation because of the payment of the general increase in October. The law is well stated as found in *The Gates Rubber Company*, 182 NLRB 95(1970), where the Board said, "It is well settled that the employer's legal duty [granting a wage increase] is to proceed as he would have done had the union not been on the scene."

The burden of proving that an employee was illegally discharged rests with the General Counsel. In order to meet this burden, General Counsel must prove by a preponderance of probative evidence, not merely suspicion, that the alleged discriminatee was engaged in union activities or protected concerted activities, and that such activities were known to Respondent, that Respondent harbored union

animus, and that the discharge was motivated by union considerations. None of these requirements have been met by the General Counsel with respect to the discharges of Morotti, McNellis, or Small.

Concluding Findings and Analysis

It is well settled that union activists may not use their activity as a shield from otherwise justifiable grounds for discharge. The court said in *N.L.R.B. v. Ayer Lar Sanitarium*, 436 F.2d 45, 49-50 (C.A. 9,1970), as follows:

Certainly in the absence of other circumstances the employer has the right to discharge its employees . . . and the mere fact that an employee is or was participating in union activities does not insulate him from discharge.

. . . The test is whether the business reason or the protected union activity is the moving cause behind the discharge. . . . In other words, would this employee have been discharged *but for* his union activity?

While it is true that when an employer discharges a leading union proponent, there is a suspicion that the discharge was motivated by the employer's antipathy to the employee's union organizational efforts. Nevertheless, an employee's union activity does not insulate him from discharge for engaging in conduct for which he would have been terminated even if he had not been a union proponent. In *Klate Holt Company*, 161 NLRB 1606, 1612 (1966), the Board said:

The mere fact that an employer may desire to terminate an employee because he engages in unwelcome concerted activities does not, on itself, establish the unlawfulness of a subsequent discharge. If an employer provides an employer with a sufficient cause for his dismissal be engaging in conduct for which he would have been terminated in any event, and the employer discharges him for that reason, the circumstance that

the employer welcomed the opportunity to discharge does not make it discriminatory and therefore unlawful.

The cardinal issue presented to me with respect to the alleged discriminatory discharges, is not whether the discriminatees were engaged in union activities, but whether their discharges were unlawfully motivated. A careful examination of the events which lead to the discharges of Morotti, McNellis, and Small, clearly warrants the conclusion that the Respondent did not engage in unlawful discrimination.

The basic weakness in the General Counsel's case, both with respect to the alleged unfair labor practice discharges, and the independent 8(a)(1) violation set forth in the complaint, is that there is not connection between the activities admittedly engaged in by the employees and their union or concerted activities. In such event, the conclusion is inescapable that the General Counsel did not prove his case by a preponderance of credible evidence. For all of these reasons I therefore recommend that the complaint be dismissed in its entirety.

Upon the basis of the foregoing findings of fact, and upon the entire record of this case, I make the following:

CONCLUSIONS OF LAW

1. The Respondent is, and at all times material herein has been, an Employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has failed to prove by a preponderance of the evidence that the Respondent violated Section 8(a)(3) and (1) of the Act.

[Recommended Order for dismissal omitted from publication.]