

EVENFLOW TRANSPORTATION, INC.

Evenflow Transportation, Inc. and Local 713, International Brotherhood of Trade Unions. Case 02–CA–040128

July 3, 2012

DECISION AND ORDER

BY MEMBERS HAYES, GRIFFIN, AND BLOCK

On August 30, 2011, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent, Evenflow Transportation, Inc., filed exceptions and a supporting brief. The Acting General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions as modified below and to adopt the recommended Order as modified and set forth in full below.²

The judge found that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by interrogating and threatening employees in the course of a union organizing campaign, and violated Section 8(a)(3) and (1) of the Act by laying off five employees on September 23, 2010.³ We affirm those findings for the reasons stated below.

Background

Only a brief overview of the factual background of this case is necessary. The Respondent provides round trip, nonemergency transportation services to patients traveling between their homes and a variety of healthcare facilities. Some drivers work alone, but others work in driver-helper teams, particularly when transporting wheelchair-bound patients. The Respondent bills the healthcare facilities for its services, and the facilities, in turn, bill Medicare, Medicaid, and private insurers for those services.

Local 713 of the International Brotherhood of Trade Unions (the Union) began organizing the Respondent's employees in the spring of 2009. Following the settlement of an unfair labor practice charge that had been filed by the Union, the organizing drive resumed in July

2010. In July and August, union organizer Carlos Rodriguez began discussing unionization with three drivers, Julio Castro, Anthony Smidth, and Nelson Rodriguez, at Comprehensive Care Management (CCM), one of the healthcare facilities served by the Respondent. Unlike some drivers who drove patients to and from different facilities, Castro, Smidth, and Rodriguez almost exclusively drove patients to and from CCM.

As we explain in more detail below, at about the same time that organizer Rodriguez was discussing unionization with Castro, Smidth, and Rodriguez, the Respondent began questioning these employees about their union activity and that of their coworkers, began threatening Castro, and, finally, laid off these three drivers and two helpers who worked with them.

I. INTERROGATIONS

In the summer of 2010, John Bizzarro, the Respondent's general manager, began questioning Smidth, Castro, and Rodriguez about union activity among its employees. In June or July, Bizzarro told Castro that he, Bizzarro, wanted to know if anybody was talking to the Union. Bizzarro also told Castro that he did not want his company unionized, and that if he had to, "he'd bring his dogs out to get the union out." Castro and Bizzarro had two more conversations, each about 2 weeks apart, in which Bizzarro made similar comments about his "dogs." In August, Bizzarro spoke to employee Smidth in Bizzarro's office. Bizzarro told Smidth that the Union was getting ready to come around again and asked Smidth to tell other employees not to sign a petition supporting the union. Then Bizzarro asked Smidth to let him know if any employees signed the petition. Also in August, Bizzarro asked employee Rodriguez if he had spoken to the union organizer. When Rodriguez replied that he had, Bizzarro said the organizer was a "creepy guy" and that Rodriguez should stay away from him. Bizzarro also asked Rodriguez to let him know if any other employees were speaking to the Union. Bizzarro and Rodriguez had two similar conversations in the following few weeks.

An employer's interrogation of employees concerning union or other protected concerted activities is unlawful if it reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), affd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In assessing the lawfulness of an interrogation, the Board applies a totality of circumstances test. Id. This test involves a case-by-case analysis of various factors, including those set out in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964): (1) the back-

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

² We shall modify the judge's recommended Order and notice to conform to our findings and to the Board's standard remedial language.

³ All dates hereafter are in 2010, unless otherwise noted.

ground, i.e., whether the employer has a history of hostility toward or discrimination against union activity; (2) the nature of the information sought, i.e., whether the interrogator appears to have been seeking information on which to base taking action against individual employees; (3) the identity of the interrogator, i.e., his or her placement in the Respondent's hierarchy; (4) the place and method of the interrogation; and (5) the truthfulness of the interrogated employee's reply. The Board may also consider whether the employer tells employees that it has a legitimate purpose for the questioning and whether it offers assurances against retribution. *Norton Audubon Hospital*, 338 NLRB 320, 321 fn. 6 (2002); *Hanover Concrete Co.*, 241 NLRB 936, 936 (1979).⁴ These factors "are not to be mechanically applied," but represent "some areas of inquiry" for consideration in evaluating whether an interrogation is lawful. *Rossmore House*, supra, 269 NLRB at 1178 fn. 20.

Here, Bizzarro made the Respondent's hostility toward the Union apparent during his questioning of Castro by threatening Castro that he would bring his "dogs" out to get rid of the Union—a threat we find independently unlawful for the reasons stated below. See *Demco New York Corp.*, 337 NLRB 850, 851 (2002) (implicit threat during questioning supported finding that interrogation was coercive). Bizzarro also requested that the employees report on the union activities of other employees. See *Norton Audubon Hospital*, supra, 338 NLRB at 321 (questions that addressed other employees' support for the union added to the coercive nature of the interrogation). Bizzarro's status in the Respondent's corporate hierarchy is also significant. He was the Respondent's general manager, the top official in charge of running the day-to-day business, and married to a co-owner of the Respondent. And while some of Bizzarro's questioning occurred in neutral areas, Bizzarro questioned at least two of the employees in his office, a locus of managerial authority. See *id.*; see also *Stoody Co.*, 320 NLRB 18, 18 (1995). Finally, Bizzarro never offered the employees a legitimate explanation for his questions and never assured the employees that they were safe from retribution. See *Norton Audubon Hospital*, supra, 338 NLRB at 321 fn. 6. Weighing all of those circumstances, we find that Bizzarro's questioning of employees Castro, Smidth, and Rodriguez was coercive and therefore violated Section 8(a)(1).

⁴ Member Hayes notes that, while Board decisions have occasionally referred to these additional factors, proof that an employer has informed an employee that it has a legitimate purpose for questioning and has given assurances against retribution is not prerequisite to finding that an interrogation is lawful.

II. THREATS

As described, in the course of interrogating employee Castro, Bizzarro made clear that he did not want his company unionized, and warned Castro "that if he had to, he'd bring his dogs out to get the union out." Later, Bizzarro told Castro that "he'd call his dogs out from the street to come and get the union out." Whether Bizzarro meant these statements to be taken literally, as a reference to persons under Bizzarro's control, or merely as a colorful figure of speech, they reasonably conveyed a threat to take some retaliatory action if employees selected the Union as their bargaining representative. See *Cox Fire Protection, Inc.*, 308 NLRB 793, 793 (1992). As a result, we agree with the judge that these statements violated Section 8(a)(1).⁵

III. THE LAYOFF

On September 23, 2010, the Respondent permanently laid off Castro, Smidth, and Rodriguez, and two helpers who worked with them: employees Lindbergh Wallace and Luis Correria. The judge found that the layoff of all five employees violated Section 8(a)(3) and (1) of the Act. In its exceptions, the Respondent contests the judge's finding that it knew of the union activities of any of the five employees; it even denies knowing that the union organizing drive had restarted until after the layoffs occurred. The Respondent also contends that it implemented the layoff out of economic necessity. We affirm the judge's findings.

In cases alleging violations of Section 8(a)(3) and (1) where the employer's motive is in issue, the Board applies the analytical framework set forth in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the Acting General Counsel must first prove, by a preponderance of the evidence, that the employee's protected conduct was a motivating factor in the employer's decision. Once the Acting General Counsel makes that showing by proving the employee's union activity, employer knowledge of the union activity, and employer animus against the employee's protected conduct, the burden of persuasion shifts to the employer to demonstrate that it would have taken the

⁵ In light of our analysis, we find it unnecessary to rely on the judge's finding that Bizzarro threatened Castro with physical harm. Rather, we find that Bizzarro's statements threatened unspecified reprisals, and we shall modify the judge's conclusions of law, Order, and notice accordingly.

same action even in the absence of the protected conduct. See *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004). If, however, “the evidence establishes that the reasons given for the Respondent’s action are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis.” *Rood Trucking Co.*, 342 NLRB 895, 897–898 (2004) (citations omitted); see also *Austal USA, LLC*, 356 NLRB No. 363, 364 (2010) (if proffered reason for discharge is pretextual, employer necessarily fails to establish *Wright Line* defense).

Here, it is undisputed that all five employees engaged in protected union activity by speaking with union organizer Rodriguez while they were waiting to drive patients home from CCM. The Respondent’s animus toward union supporters, moreover, is clearly established by Bizzarro’s unlawful interrogations of employees Castro, Smidth, and Rodriguez, and his unlawful threats made to Castro. The timing of the layoff also gives rise to an inference of animus, as the layoff occurred within a few weeks of the renewal of the organizing campaign and on the heels of Bizzarro’s unlawful conduct directed at three of the five laid-off employees. See generally *Hewlett Packard Co.*, 341 NLRB 492, 498 (2004) (suspicious timing may strongly indicate unlawful motive).⁶

As stated, the Respondent claims that it had no prior knowledge of the laid-off employees’ union activities. The record, however, establishes that the Respondent knew, or at least suspected, that its CCM drivers and helpers were engaged in renewed union activities. Although there is no direct evidence of such knowledge, direct evidence is not required to establish knowledge. See *Kajima Engineering & Construction*, 331 NLRB 1604, 1604 (2000). Instead, the knowledge element of *Wright Line* “may rest on circumstantial evidence from which a reasonable inference of knowledge may be drawn.” *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), enfd. mem. 97 F.3d 1448 (4th Cir. 1996). The Board may infer knowledge based on such circumstantial evidence as the timing of the alleged discriminatory actions; the respondent’s general knowledge of its employees’ union activities; the respondent’s animus against the union; and the pretextual reasons given for the adverse personnel actions. See *North Atlantic Medical Services*, 329 NLRB 85, 85–86 (1999), enfd. 237

F.3d 62 (1st Cir. 2001); *Montgomery Ward*, supra; *BMD Sportswear Corp.*, 283 NLRB 142, 143 (1987), enfd. 847 F.2d 835 (2d Cir. 1988). The circumstantial evidence in this case is compelling.

The Respondent’s repeated unlawful interrogations and threats confirm general knowledge of the renewed organizing campaign. Moreover, that the Respondent knew, or at least suspected, that the renewed campaign had taken root among the CCM-based drivers and helpers is evidenced by the fact that the Respondent subjected that same contingent of employees to its interrogations and threats. See, e.g., *Southern Pride Catfish*, 331 NLRB 618, 620 (2000) (knowledge of union activities shown, in part, by employer’s interrogation of discriminatee).⁷ Coincidence cannot explain why at the same time that the CCM-based employees began renewed organizing activities, the Respondent began asking about that activity and trying to discourage it. The Respondent’s knowledge of such activity, however, provides a reasonable and logical explanation. Although there is no evidence that the Respondent questioned or threatened helpers Wallace and Corraera, they worked side-by-side with employees Castro, Smidth, and Rodriguez, justifying an inference that the Respondent suspected them as well. Further, as we explain below, the Respondent’s proffered business reasons for the layoffs were pretextual, which also supports a finding that it knew or suspected that the laid-off employees were engaged in union activities. See *North Atlantic Medical Services*, supra.

Yet, even if the Respondent did not know or suspect each individual discriminatee of engaging in union activity, we would still find that the Acting General Counsel met his initial *Wright Line* burden. In cases like this involving a mass discharge, the Board has held that the crux of the violation is the employer’s motivation for undertaking such a broad action. The requisite proof follows the nature of the employer’s decision—if the employer treats the employees as an undifferentiated whole, then there is no requirement that the Board make individualized findings regarding the employer’s knowledge of each employee’s union activity. Where the employer

⁷ Thus, this case is even stronger than the *BMD Sportswear* case, cited above, where the Board found that the employer had at least general knowledge of laid-off employees’ union activity based on the employer’s unlawful interrogations of and threats made to other employees, the timing of the layoffs shortly after the union campaign commenced, and the laid-off employees’ association with known union supporters. 283 NLRB at 143.

⁶ Although we find the timing of the layoff significant, we do not rely on the fact that the layoff occurred 1 day before a scheduled union meeting because there is no evidence that the Respondent knew about that meeting.

acts to send a general message of warning or retaliation, “common sense dictates that . . . the relevant inquiry is the Employer’s motivation for that single decision.” *Dillingham Marine & Mfg. Co.*, 610 F.2d 319, 319 (5th Cir. 1980); see also *Delchamps, Inc.*, 330 NLRB 1310, 1315 (2000).

Accordingly, it is not the Acting General Counsel’s burden to show that each discriminatee’s layoff was causally related to his or her union activity, but rather to establish that the Respondent ordered the mass layoff to discourage union activity altogether or in retaliation for the union activity of some of the CCM employees. See *Delchamps*, supra, 330 NLRB at 1315; *Intersweet, Inc.*, 321 NLRB 1, 15 (1996), enfd. 125 F.3d 1064 (7th Cir. 1997); see also *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1168–1169 (D.C. Cir. 1993), enfg. 306 NLRB 426 (1992).⁸ Given the Respondent’s demonstrated focus on the CCM-based drivers and helpers, including Bizzarro’s repeated interrogations about their union activities, specific requests that CCM-based drivers report the union activities of their coworkers, explicit expressions of antipathy towards the Union to the CCM-based drivers, and broad threats of reprisals, we find that the Acting General Counsel has made the required showing in this case.⁹

⁸ Although the Acting General Counsel did not specifically allege a mass discharge theory in the complaint, we find that the Respondent was adequately notified of the acts that make up the unfair labor practice. Board complaints require only a clear and concise description of the acts which are claimed to constitute unfair labor practices, not the legal theory relied on. See Sec. 102.15 of the Board’s Rules and Regulations; *Davis Supermarkets*, supra, 2 F.3d at 1169 (no due process violation where the complaint did not specifically allege a mass discharge theory). Here, the Acting General Counsel alleged that the Respondent discharged the five employees both because of their union activities and to discourage employees from participating in union activities. Thus, the Respondent was on notice that it was the act of discharging the five employees that was alleged to be an unfair labor practice. In any event, the Respondent was not prejudiced by the Acting General Counsel’s failure to explicitly rely on the mass discharge theory because there is no significant defense to the complaint allegation that the Respondent did not raise anyway. *Id.*

⁹ See, e.g., *Hunter Douglas, Inc.*, 277 NLRB 1179, 1180 (1985), enfd. 804 F.2d 808 (3d Cir. 1986), where the Board found that a mass layoff of almost all second-shift employees was in response to a union organizing effort, without reference to the employer’s knowledge of the individual employees’ union sentiments. There, the employer’s plant manager knew of the union activity, he suspected that it was focused on the second shift, and he questioned second-shift employees about their union sympathies. The Board found that the plant manager had knowledge of the second shift’s union activity because of this questioning and because he solicited employee grievances and instituted new no-solicitation/no-distribution rules. *Id.*

Given our analysis here, we find it unnecessary to pass on the judge’s finding that the Respondent’s dispatcher, Antonio Cabrera, is a supervisor or agent, and the judge’s citation to *Parkside Group*, 354 NLRB 801, 804 fn. 18 (2009).

For all of those reasons, we find that the Acting General Counsel carried his initial *Wright Line* burden, shifting the burden to the Respondent to demonstrate that it would have laid off the five employees in question even absent their union activities. As the judge did, we find that the Respondent has failed to carry its burden.

The Respondent contends that the September layoff was required because its financial condition had been worsening since May, and that it had been seriously considering a layoff as early as May or June. Specifically, the Respondent claims that two separate financial problems necessitated the layoff. First, CCM had consistently failed to pay the Respondent for transportation services it had provided to CCM patients. Indeed, the judge found that in May 2010, CCM owed the Respondent approximately \$100,000. Second, Bizzarro testified that the Respondent knew by at least May 2010 that the IRS would be seeking back taxes from it; and, in fact, by at least June 2010, the IRS began levying payments that clients would otherwise have made to the Respondent. But the Respondent introduced no financial statements or other financial records showing what effects, if any, the CCM delinquencies and IRS levies were having on its profits, its ability to make payroll, or its overall business health.¹⁰ Moreover, the Respondent hired two new employees, Juan Torres and Christopher Terry, in June. That hiring activity casts even further doubt on the Respondent’s asserted financial difficulties and its claim that it was contemplating a layoff as early as May.¹¹ As a result, we find that the Respondent has failed to show that it would have taken the same action absent its un-

¹⁰ Compare *Martech MDI*, 331 NLRB 487, 502–504 (2000), enfd. mem. 6 Fed. Appx. 14 (D.C. Cir. 2001) (finding the employer met its burden of showing it would have instituted a mass layoff even absent its union animus with financial records demonstrating decreasing sales after the temporary effect of a product recall ended). The Respondent excepts to the judge’s findings that the CCM delinquency was largely caused by problems with the Respondent’s computer system and that an IRS tax levy is like a garnishment. Irrespective of the cause of the CCM delinquency or the mechanics of IRS levies, the point is that the Respondent failed to show that either circumstance adversely affected its business activities to the point that a layoff was required.

¹¹ Although both employees’ applications bear handwritten notations stating that they were hired in June, the Respondent suggests that they were actually hired later because their W-4 forms are dated October 29. This proves nothing. The employees could have filled out the W-4 forms long after they were hired; in fact, Bizzarro testified that drivers do not fill out the W-4 form at the same time that they are hired. But even if they were actually hired in October, the Respondent has failed to explain why it hired them if it was necessary to lay off five employees in September or, if a layoff was necessary, why it later hired new employees instead of recalling two of the discriminatees.

lawful motivation. We therefore find that the layoff violated Section 8(a)(3).¹²

AMENDED CONCLUSIONS OF LAW

Replace the judge's Conclusion of Law 2 with the following paragraph:

"2. By threatening an employee with unspecified reprisals if he selected the union as his bargaining representative, the Respondent has violated Section 8(a)(1) of the Act."

ORDER

The National Labor Relations Board orders that the Respondent, Evenflow Transportation, Inc., Mount Vernon, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their union activities or those of their coworkers.

(b) Threatening employees with unspecified reprisals if they select the Union or any other labor organization as their bargaining representative.

(c) Laying off or otherwise discriminating against employees because they or their coworkers support Local 713, International Brotherhood of Trade Unions, or any other labor organization.

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

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

(a) Within 14 days from the date of this Order, offer Julio Castro, Anthony Smidth, Nelson Rodriguez, Luis Correa, and Lindbergh Wallace full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Julio Castro, Anthony Smidth, Nelson Rodriguez, Luis Correa, and Lindbergh Wallace whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

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

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good

¹² Because we find that the layoff itself violated Sec. 8(a)(3), we find it unnecessary to consider Bizzarro's alleged justifications for selecting individual employees for layoff.

cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Mount Vernon, New York facility copies of the attached notice marked "Appendix."¹³ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 2010.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER HAYES, concurring in part.

I would affirm the judge's analysis of the unlawful layoff without further comment. The Respondent's exceptions are summary in nature and almost exclusively limited to meritless challenges of the judge's credibility findings. They warrant neither the extensive independent analysis essayed by my colleagues nor the expansive pronouncements of law made to support the analysis. Further, I believe it is quite unnecessary and inappropriate to interject at this juncture of litigation the alternative mass discharge theory of violation. While I believe my colleagues have good intentions, the ironic possibility of writing on such large scale is that, if the Respondent files a motion for reconsideration challenging their analysis and then seeks review by a court of appeals, it will have much more to argue than would be the case if we simply adopted the judge's decision in the face of limited, patently meritless exceptions.

¹³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT coercively question you about your union membership or sympathies.

WE WILL NOT threaten you with unspecified reprisals if you select the Union or any other labor organization as your bargaining representative.

WE WILL NOT layoff or otherwise discriminate against any of you because you or your coworkers support Local 713, International Brotherhood of Trade Unions, or any other labor organization.

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

WE WILL, within 14 days from the date of the Board's Order, offer Julio Castro, Anthony Smidth, Nelson Rodriguez, Luis Correa, and Lindbergh Wallace full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Julio Castro, Anthony Smidth, Nelson Rodriguez, Luis Correa, and Lindbergh Wallace whole for any loss of earnings and other benefits resulting from their layoffs, less any net interim earnings, plus interest.

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

EVENFLOW TRANSPORTATION, INC.

Julie Y. Rivchin, Esq. and Leah Jaffe, Esq., for the Acting General Counsel.

*Denise A. Forte, Esq. and Scott P. Trivella, Esq., for the Respondent.*¹

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in New York City on June 6 and 27 and July 5 to 6, 2011. The charge and the amended charge were filed on September 23 and November 22, 2010, and January 24 and March 9, 2011. The complaint which was issued by the Regional Director on March 31, 2011, alleged as follows:

1. That on several occasions in August and September 2010, the Respondent by John Bizzarro, its general manager, (a) solicited employees to discourage union activities among their coworkers and (b) interrogated employees about their union activities and the union activities of other employees.

2. That on or about September 23, 2010, the Respondent, for discriminatory reasons, discharged Julio Castro, Anthony Smith, Nelson Rodriguez, Luis Correa, and Lindbergh Wallace.

3. That on or about October 1, 2010, the Respondent by Bizzarro (a) made a threat of unspecified reprisals to an employee and (b) made a threat of physical harm to an employee.

On the entire record,² including my observation of the demeanor of the witnesses, and after considering the brief filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Parties agree and I find that the Respondent is an Employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also is agreed and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Respondent, Evenflow Transportation Management Inc., is a corporation that is a wholly owned subsidiary of another entity called EF Management, which in turn is owned by Julie Bizzarro and Jack Mahanian. Although not clear from the record, it seems that Julie Bizzarro and Jack Mahanian, on some undetermined date, purchased Evenflow from another individual whose name is Kenneth M. Hochbrueckner.

Julie Bizzarro's husband is John Bizzarro and he is the general manager of Evenflow. From this record, it appears that he

¹ The caption was amended at the hearing to correctly reflect the name of the Respondent.

² The record in this case consists of the transcript and any documents that have been received in evidence by me. In this regard the only post hearing document that was received by me was R. Exh. 2, a letter dated June 3, 2010, with attached invoices. No other posthearing documents have been received as exhibits or considered.

is in charge, with two dispatchers, of operating the business on a day-to-day basis. His wife is, to a larger extent, responsible for bookkeeping and record keeping. The Company conducts its business from a facility located in Mount Vernon, New York.

Assisting in the day-to-day operations of the business, the Respondent utilizes two dispatchers whose names are Antonio Carrera and Leonardo DeSilva. These individuals assign the drivers to their daily tasks, rearrange their assignments when necessary, act as a liaison between management office and the drivers, and are directly involved in the hiring of new employees. From the testimony in the record, it is my opinion that they are supervisors as defined in Section 2(11) of the Act and/or agents as defined in Section 2(13) of the Act.

The Respondent provides ambulette services for non-emergency transportation of patients or elderly people to and from various medical facilities. In or about March 2009, Evenflow merged with another company called Oasis and as a result, it took over the employees of Oasis and its customers. It also hired Antonio Carrera as a dispatcher as he was familiar with the Oasis accounts and the drivers who serviced them. The principle account that was taken over was Comprehensive Care Management, (called CCM). CCM has its principal office at Allerton Avenue in the Bronx. The contact person between the Respondent and CCM is Sheryl Davenport.

Unlike other accounts, the CCM account requires the use of 2, two man crews as this account provided transportation services for people in wheelchairs. When Evenflow took over the account, it also took over the "two man" crews who had received special training in dealing with wheelchair patients.³

According to Bizzarro, before the merger with Oasis, Evenflow employed about 12 drivers and that after the takeover it added 10 more drivers and two helpers who were utilized in the two man crews. Thus, before the layoffs that occurred on September 23, 2010, the Respondent employed about 24 people who directly performed the transportation services plus two dispatchers who directed their work.

The Union commenced organizing the employees in March and April 2009. A Petition was filed by the Union on May 14, 2009, and a Stipulated Election Agreement was approved by the Regional Director on June 3, 2009. At that time, the Employer was represented by Thomas P. Piekara. He signed the Stipulated Election Agreement on behalf of the Employer and this provided for the holding of an election on Thursday, June 25, 2009. The unit was described as follows:

Included: All full-time and regular part-time drivers employed by the Employer at and out of its facility located at 68 Sandford Boulevard, Mt. Vernon, New York. Excluded: All other employees, including office clerical employees, managerial employees, confidential employees and guards, professional employees and supervisors as defined by the Act.

On April 30, 2009, before the election was to be held, the Union filed an unfair labor practice charge in Case 02-CA-

³ According to Davenport, the two man crews were not employed by Oasis but by another contractor. However, when Evenflow merged with Oasis, it was also given the two man crew work.

039280. On July 14, 2010, the Respondent signed an informal settlement agreement that contained a nonadmission clause. This provided for the posting of a notice for 60 days and it appears that the notice was posted on August 10, 2010. According to the testimony of Bizzarro, he believed that once the notice had been posted for the requisite time, that the whole matter was over and that the Union would be gone.

Notwithstanding that belief, the Union restarted its organizing campaign in July and August 2010 and met with employees, typically at the premises of CCM. According to the testimony of dispatcher Cabrera, he was aware of union agents talking to Evenflow's employees because he actually overheard such conversations. Therefore, as I have concluded that Cabrera is a supervisor or agent, I shall attribute his knowledge of the resumed union activity to the Respondent. *Parkside Group*, 354 NLRB 801 fn. 18 (2009).

In addition to imputing knowledge to the Respondent based on the testimony of Cabrera, I also conclude that the credible evidence shows that Bizzarro interrogated various employees about the union during the summer of 2010.⁴

Anthony Smidth credibly testified that in August 2010, when he returned to the facility for the day, Cabrera asked him if he knew anything about people signing the papers again. He states that he said not really and that Cabrera said that Bizzarro wanted to speak to him. Smidth credibly testified that when he went back to the office, Bizzarro told him that the Union was getting ready to come around again and that he wanted Smidth to speak to the drivers and let them know to not sign any petition for the Union. He testified that Bizzarro asked him to let him know if any employees signed a union petition.

Nelson Rodriguez credibly testified that in August 2010, John Bizzarro asked him about the Union and whether he had spoken to a union representative. Rodriguez replied that he had. Bizzarro then said that the union representative was a "creepy guy"; that Rodriguez should stay away from him; and that Rodriguez should tell Bizzarro if any other employees spoke with union representatives.

Rodriguez testified that about 2 weeks later, Bizzarro again asked if he had spoken to Union Representative Carlos Rodriguez. According to Nelson Rodriguez, he ultimately had a third conversation with Bizzarro who again asked about the Union and to let him know if other employees were talking to the Union.

Julio Castro credibly testified that in or about June or July he spoke to Bizzarro, and was asked to let him know if the Union was coming around and that if anybody was talking to the Union, to let him know. Castro testified that Bizzarro said that he didn't want his company to be unionized and "that if he had to, he'd bring his dogs out to get the union out."

⁴ I was favorably impressed by the testimony and demeanor of the General Counsel's witnesses. They testified, in my opinion, in a forthright manner and their testimony was essentially mutually corroborative. Indeed, had they chosen to fabricate a common story, their testimony would likely have been a good deal more damaging to the Respondent. In contrast, I was not favorably impressed by the testimony of Bizzarro, who, in my opinion, showed a cavalier attitude to this legal proceeding.

Castro testified that he had a second conversation with Bizzarro in the latter's office. He places this as taking place a couple of weeks after the first conversation and he states that Bizzarro stated that he wanted to know if anybody was talking to the Union and "if the Union was coming around to start their shit again." According to Castro, Bizzarro repeated the dog statement.

According to Castro, he had a third conversation with Bizzarro about 2 weeks before he was terminated. He testified that Bizzarro said that he didn't want the Union in his company and that "he'd call his dogs out from the street to come and get the Union out."

The testimony of the General Counsel's witnesses shows that because of a late wage payment that they describe as having occurred in the first or second week of September 2010, they arranged to have a meeting with a union organizer for September 24, 2010, at a gas station located near the Respondent's facility. This meeting did not occur because on September 23, five of the employees were let go. Either on September 23 or 24, the five alleged discriminatees were told by Bizzarro or Mahanian that they were being let go because the Company was losing too much money.

Bizzarro testified that he, his wife, and Mahanian decided to lay off the five employees because of economic reasons. He further testified that he selected these five individuals for a variety of different reasons. According to Bizzarro's testimony, the decision to make these staff reductions was made in September 2010.

In the case of Lindbergh Wallace, Bizzarro testified that he was chosen because Wallace had previously advised the Company that he was relocating to North Carolina to care for his sick father.⁵

In the case of Nelson Rodriguez, Bizzarro testified that he was chosen because he had been told by another employee that Rodriguez was seen selling drugs and because Rodriguez had filed a false motor vehicle report in relation to an accident involving the vehicle that he was driving for the Company.

In the case of Luis Correa, Bizzarro testified that he was selected because he was a relatively new employee.

In the case of Julio Castro, Bizzarro testified that he was selected because he was told that Castro had taken the company vehicle to City Island and was selling pina colodas from the back of the van.

I note that the Respondent conceded that none of these employees would have been laid off or discharged for these reasons except for the fact that there was a need to reduce the number of employees "when it became financially strapped."

I also note that Bizzarro, at a latter point in his testimony, gave a different reason for selecting these individuals for layoff. On cross-examination, he asserted that the Company decided to drop the two-man assist crews that drove people in wheelchairs. Thus, in this version, four of the five employees were chosen for layoff because they happened to be assigned to the two man crews that worked on the CCM accounts that the Respondent decided to drop.

⁵ This was essentially conceded by Wallace.

In any event, the Company basically cites two circumstances that led to its economic distress. The first was the fact that CCM was overdue on its payments to the tune of about \$100,000. The second was the "sudden" realization that the Company might owe a substantial amount of money to the IRS in back taxes. This according to Bizzarro first came to his attention in or about June 2010 when a tax auditor showed up on the Company's doorstep after which a customer received what is analogous to a garnishment on money owed to the Respondent.

With respect to the CCM account, there is really no dispute that as of May 2010, CCM owed about \$100,000 to Evenflow for work that had been performed. As noted above, the CCM account was obtained by the Respondent when it acquired Oasis.

According to CCM's employee, Cheryl Davenport, the problem came to a head in May 2010 when she had a conversation with Bizzarro about late payments. In this connection, she testified that the problem largely was the result of the Respondent's computer system which failed to generate the proper invoices by which CCM could authorize Medicaid to make payments to the Respondent.

By letter dated June 3, 2010, Bizzarro sent Davenport some invoices for trips that were denied payment and stated in substance that Evenflow couldn't carry such a large balance and continue to provide the best service possible. He stated that the Company will not continue full service.

According to Davenport, she and two assistants took the invoices and started to "reconcile" the Respondent's claims with its own records. (To make sure that the trips claimed to have been made by the Respondent, actually occurred). It is important to note that this is not a situation where long overdue payments are typically a prelude to nonpayment. When the accounts were reconciled, the Respondent would be paid for any and all trips that it performed on the CCM account. These payments are made by Medicaid and there is no question but that the payments would be made as soon as CCM confirmed that the services were provided.

Notwithstanding Bizzarro's letter to Davenport dated June 3, the Respondent continued to service the CCM account using the same number of employees and continued to provide the two man crews for people with wheelchairs. Indeed, there is evidence that at least two new drivers were hired in June 2010. (Juan Torres and Christopher Terry).⁶

A somewhat similar situation involves the tax issue. According to Bizzarro, he did not know that there was a tax issue until the spring of 2010 when the IRS agent came to the premises and handed him an envelope relating to back taxes. In connection with the tax issue, the IRS agent sent a notice of levy dated June 17, 2010, to a customer of the Respondent named Neighborhood Health Providers LLC. This apparently is similar to a

⁶ The Respondent failed to comply fully with a subpoena duces tecum in relation to the General Counsel's demand that it produce payroll records for a period of time before and after September 2010. Therefore, because of the Respondent's noncompliance, the record does not show, apart from Torres and Terry, whether and when other people were hired before or after the layoffs or discharges of the five discriminatees.

garnishment and required that Neighborhood send money it owed to the Respondent to the IRS instead.

Notwithstanding the notice of levy, the Respondent continued to provide services to Neighborhood and there is no evidence that any of Respondent's other customers, including CCM, were required to pay money owed to the Respondent to the IRS. Also, there is no evidence to show that this tax levy had any substantial affect on the Respondent's business operations. In the meantime, according to Bizzarro, the alleged tax liability is being handled by a tax attorney who is located in Florida.⁷

The Respondent produced no evidence to show that the amounts owed by CCM or the amounts diverted to the IRS comprised a significant portion of its business. Moreover, the CCM accounts were going to be paid eventually by Medicaid and I can't see why the Company, if it was in financial straits, would choose to reduce its services to CCM and thereby reduce its own revenues in the long run. The fact is that CCM was not a "deadbeat" customer that was not likely to pay what it owed. That money, which had been withheld due mostly through the fault of the Respondent, would eventually be paid after confirmation that the services were provided.

According to Bizzarro, both alleged financial problems came to his attention in the spring of 2010. Nevertheless, the evidence shows that the Company hired two drivers thereafter and as far as we know, it may have hired others whose names might appear on the unproduced payroll records. It was not until September 2010, almost 5 months later, that the decision was made to lay off these five employees. And this occurred after the Respondent became aware that the Union had restarted its organizing campaign in or about August 2010. In terms of timing, it is significant that the employees were told of their terminations 1 day before a scheduled meeting between employees and a union representative.⁸

With respect to the five alleged discriminatees, the credible evidence shows that in August and September 2010 (a) the Respondent had knowledge of the Union's restarted organizing campaign; (b) that the Respondent's general manager expressed

⁷ The General Counsel subpoenaed any documents relating to the IRS claims. Apart from the notice of levy dated June 17, 2010, the Respondent has failed to comply. On June 2, 2011, I issued an order attached hereto as App. A [omitted from publication] denying the Respondent's Petition to Revoke as to this and other information.

⁸ Cabrera, the dispatcher testified that he was told by Bizzarro that the employees were laid off because we were trying to cut back and "we wasn't producing as much as we were before." It seems that he wasn't told anything about the financial issues that Bizzarro testified about.

animus towards the Union; and (c) that the timing of the terminations was consistent with an antiunion motivation. It therefore is my opinion that the General Counsel has made out a prima facie case. Therefore, in accordance with *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the burden shifts to the Respondent to show that these employees would have been laid off or discharged for reasons other than their union or protected concerted activity.

For the reasons stated above, it is my opinion that the Respondent has not met its burden and I therefore conclude that by terminating the employment of the five alleged discriminatees, the Respondent has violated Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. By interrogating employees about their union sympathies and activities and by asking employees to report on the union activities of others, the Respondent has illegally interrogated employees in violation of Section 8(a)(1) of the Act.

2. By threatening employees with physical harm,⁹ the Respondent has threatened employees in retaliation for their union activities and has violated Section 8(a)(1) of the Act.

3. By discharging employees because of their union activities or support, the Respondent has violated Section 8(a)(1) and (3) of the Act.

4. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1187 (1987), com-pounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

[Recommended Order omitted from publication.]

⁹ I conclude that the statements about calling out his dogs, can reasonably be construed by the employees as a threat of physical harm.