

**D&J Ambulette Service, Inc. and Angel Moreno, Christopher Rodriguez, Yhou Tejada, and Carlos Valentin.** Case 02–CA–040254

February 13, 2013

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN  
AND BLOCK

On June 12, 2012, Administrative Law Judge Raymond P. Green issued the attached decision. Counsel for the Acting General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

*Greg Davis, Esq., Jeff F. Beerman, Esq., and Rebecca Leaf, Esq.,* for the Acting General Counsel.

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

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in New York City on January 17, 18, and 19 and March 5, 6, and 7, 2012. The charge and amended charges were filed on December 10, 2010, and January 20 and March 31, 2011. The complaint, which was issued on October 30, 2011, and amended at the hearing, alleges as follows:

1. That in or about August 2010, the Respondent by Luis Montas, its lead mechanic (a) interrogated an employee about his activities for Local 854, International Brotherhood of Teamsters; (b) threatened employees with unspecified reprisals for supporting the Union; (c) told employees that the discharge of Angel Moreno was because of his union activities; (d) threat-

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

We find it unnecessary to rely on the judge's determination that the inference of animus that can be drawn from the timing of the discharges is mitigated by the Respondent's other collective-bargaining relationships, including Local 854's representation of the Respondent's matrons. Moreover, even assuming that the Acting General Counsel carried his initial burden with respect to the discharges of employees Angel Moreno, Carlos Valentin, and Christopher Rodriguez, the Respondent established that it would have discharged these employees even in the absence of their union or protected conduct.

ened employees with discharge because of their support for the Union; and (e) created the impression that its employees union activities were under surveillance.

2. That in August 16, 2010, the Respondent by Eli Talvy, its supervisor (a) told an employee that the reason for his discharge was because of his support for the Union; (b) interrogated employees about their union activities; and (c) impliedly threatened employees with unspecified reprisals because of their union activities.

3. That on or about February 14, 2011, the Respondent by Joseph Davoli (a) interrogated an employee regarding his cooperation in the Board's investigation of this case; and (b) impliedly threatened employees with unspecified reprisals because of their cooperating with the Board in the investigation.

4. That on the dates listed next to their names, the Respondent discriminatorily discharged the following employees:

|                       |                    |
|-----------------------|--------------------|
| Angel Moreno          | August 11, 2010    |
| Carlos Valentin       | August 13, 2010    |
| Christopher Rodriguez | August 16, 2010    |
| Yhou Tejada           | September 21, 2010 |

The Respondent admitted at the hearing that Davoli was a supervisor. It denied, however, that Luis Montas or Eli Talvy were statutory supervisors or agents. In all other respects, the Respondent denied the substantive allegations of the complaint.

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

FINDINGS AND CONCLUSIONS

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 National Labor Relations Act (the Act). It also is agreed and I find that Local 854, International Brotherhood of Teamsters is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

*A. Background and Organizing Activity*

The allegations of this case deal with a small group of employees, most of whom are mechanics. Two of the alleged discriminatees were mechanics, these being Carlos Valentin and Yhou Tejada. In addition, there was one employee, Angel Moreno, who was employed as a tow truckdriver and another employee, Christopher Rodriguez, whose function was to park vehicles at the end of the day, collect keys, and do odd jobs as needed.

The Company started out by providing taxi services but later branched out to providing van and small bus services for people who are taken to and from medical appointments or other kinds of social care facilities. Its place of business is located at Zerega Avenue in the Bronx where among other things, it parks and repairs its vehicles. The president of the Company is Joseph Gallitto and the vice president is Steven Squitieri. Carlos Sacco is the general manager and he reports to Gallitto and Squitieri. Under him is Joseph Skip Davoli who is in charge of

vehicle maintenance and who is the direct supervisor of the mechanics. It is conceded by the Respondent that these individuals are supervisor and agents within the meaning of the Act.

The General Counsel asserts that Eli Talvy was the Respondent's operations manager and therefore a supervisor within the meaning of the Act. In this regard, there was evidence that he was one of several individuals who performed dispatch functions. The Respondent denies that he was a statutory supervisor and frankly there is no credible evidence that he had or performed any of the functions listed in Section 2(5) of the Act. Talvy is also the former brother-in-law of alleged discriminatee Christopher Rodriguez and in this instance he was instrumental in getting Rodriguez the job. However, apart from this one situation, where Talvy recommended him, there was no other evidence that Talvy, as part of his normal duties as a dispatcher, interviewed, hired, or recommends the hiring of employees. He may or may not engage in such activities, but the record does not support that conclusion.

The General Counsel also asserts that Luis Montas was either a supervisor or agent of the Respondent. In this regard, the evidence shows that Montas was a senior mechanic who speaks English and Spanish. From time to time, he will transmit instructions from Davoli and will also be used to translate between Davoli who speaks English and those employees who speak Spanish. Typically about half of the mechanics employed by the Respondent speak mostly Spanish and need a person to translate for them. (There is a degree of turnover among mechanics and the Company generally employs about seven mechanics at any given time.) Other than that, the credible evidence does not demonstrate that Montas had any of the powers or authorities set forth in Section 2(11) of the Act and that to the extent that he sometimes gave working instructions to other mechanics, these were routine and of a kind usually attributable to a lead man.<sup>1</sup> For example, in a pretrial affidavit taken from Yhou Tejeda, it states: "Skip would tell Luis what needed to be done and Luis would tell the mechanics."

Regarding the issue of nonsupervisory agency, there was no evidence that Montas was asked to translate on any matters dealing with union or employment issues. There was no evidence that the Company authorized him to speak on its behalf regarding the issue of unionization or that its managers ever engaged in any conduct designed to give the employees the impression that Montas was authorized to speak on its behalf regarding such matters. None of the statements he allegedly made to employees were consistent with any statements made either by the Company's owners or its conceded supervisors. There is no evidence that the Employer conducted any anti-union propaganda meetings where he participated.

<sup>1</sup> In *Rochelle Waste Disposal LLC v. NLRB*, (7th Cir. 2012), the court found that substantial evidence supported the Board's finding that an employee named Jarvis, despite having a supervisory title, was not a supervisor as defined by Sec. 2(11) of the Act because he lacked the authority to "responsibly direct" the work of other employees. The court noted that the record did not show that Jarvis took actions to correct other employees' work or that he was held accountable for their performance. See also *Oakwood Healthcare, Inc.*, 348 NLRB 686, 689 (2006), and *Lynwood Manor*, 350 NLRB 489, 490-491 (2007).

In short, I conclude that neither Talvy nor Montas were supervisors as defined in the Act. Nor do I find that they were general agents whose remarks if any, to employees about unionization, should or could be attributed to the Respondent.<sup>2</sup> Further, as I do not conclude that either man has been shown to be a supervisors or agent, I cannot conclude that any knowledge that they may have had regarding the employees' union activities can be attributed to the Respondent.

At the time of these events the Company had about 150 to 170 vans and buses plus 1 tow truck. It employed approximately 175 drivers, all of whom are represented by another union, namely Local 124, International Union of Journeymen and Allied Trades. It is noted that the drivers are required to have a commercial driving license (CDL) with a 19(a) certification that permits a person to transport children or individuals with medical issues. (Having a CDL, the 19(a) certification is fairly easy to obtain and involves a written test, a physical, and a road test.)

In addition to drivers, the Company employs about 65 persons who are matrons and who were not covered by the contract covering the drivers. Also, the Company employed dispatchers, office workers, and one tow truckdriver who was utilized to bring damaged vehicles back to the garage. This was supplemental to its use of outside tow truck companies and was originally intended to cut towing costs by having a company employee do some of this work instead of always using an outside tow truck company.

On April 27, 2010, Local 854 Teamsters filed a petition in Case 02-RC-023477, seeking an election for the matrons. The Company entered into a Stipulated Election Agreement on May 18, 2010, and an election was held in this unit on June 7, 2010.<sup>3</sup> The Union won the election and was certified on June 15, 2010. Thereafter, the parties commenced negotiations. At the time of the hearing in this case, no contract had been reached.<sup>4</sup>

On April 27, 2010, Local 854 also filed a petition in Case 02-RC-023478. In this petition, the Union sought an election in a unit of drivers and mechanics. However, as the Company already had a contract covering the drivers, the Union withdrew this petition on May 17, 2010.

About 3 months later, in July, Angel Moreno, the tow truckdriver, talked to an organizer from Local 854 and obtained a group of authorization cards. He proceeded to solicit the mechanics and the parking lot employee, On July 30, Moreno

<sup>2</sup> Judge Fish in *AFL Web Printing*, JD(NY)-16-12, wrote an exhaustive review of case law where the Board determined that a non-supervisory person was nevertheless an agent. His conclusion that the individual in that case was an agent was based on a variety of factors beyond what are present in the present case. In my opinion, the mere fact that an individual is used to translate routine day-to-day work instructions from supervisor to employees, cannot by itself, be the basis for finding that he or she is an agent within the meaning of Sec. 2(13) of the Act.

<sup>3</sup> It is noted that Luis Montas who had been out recuperating from a heart attack, returned to work at about the same time that the election was held. He testified that as the election involved nonmechanics, he paid no attention to it.

<sup>4</sup> No contention is made in this case that the Employer has bargained in bad faith.

signed a card and he obtained other employee signatures on either that date or on August 2, 2010. Among the people he solicited was Luis Montas, who as noted above, was a senior mechanic. Montas refused to sign a card and the evidence indicates that he was dismissive of unionization. The other employees who did sign cards were Christopher Rodriguez, Eduardo Jurjo, Carlos Valentin, and Yhou Tejada.

Montas was clearly aware of the organizing because he was directly solicited by Moreno. However, there was no other direct evidence that the Company was aware of this activity. And unless, the General Counsel can show that Montas was either a supervisor or agent, knowledge of union activities by him cannot legally be attributed to the Employer. The General Counsel points to the fact that the building has a number of security cameras. But there was no showing that these cameras recorded sound or that they recorded conversations or transactions between union business agents, Moreno, or the group of employees solicited by Moreno.

Carlos Valentin testified that several days after he signed a card (on August 2), Montas spoke to him near the car lift and said that they "were crazy for having signed the card," and that they would get kicked out for signing cards. Valentin states that his response was, "kick us out." According to Valentin, Yhou Tejada was present during this conversation but Tejada's testimony was somewhat different. In this regard, Tejada testified that on or about August 4, he had a conversation with Montas who asked him if he had spoken to Moreno who was promoting a card and who stated that he should be careful. Tejada stated that there was no one else present during this conversation. He did not testify that Montas said that anyone who signed a card would be "crazy" or that Montas threatened him with discharge.

Apart from a conversation with Moreno where he rejected the card solicitation, Montas denied that he spoke to the other employees about a union or union cards. He also credibly testified that he never reported to his bosses that he had been approached by Moreno to sign a union card.

Eduardo Jurjo, an employee who is still employed by the Respondent, was a reluctant witness who testified after being compelled to do so by a United States District Court. He was called by the General Counsel and his answers were vague and evasive. The General Counsel asked him to testify about an alleged conversation that he had with Eli Talvy who is employed as one of the Respondent's dispatchers. In his affidavit, Jurjo described Talvy as a manager but did not specify what if any managerial or supervisory duties he had. After being shown his affidavit,<sup>5</sup> Jurjo testified that sometime in August, Talvy asked him about union cards and that he responded that he had signed a card. Jurjo testified that Talvy told him that it was no one's business what Jurjo signed. Jurjo acknowledged that in his affidavit, it stated that Talvy told him that if the bosses

<sup>5</sup> Jurjo gave an affidavit to a Board agent that is dated March 4, 2011. This affidavit was taken 7 months after the incidents described and was the result of a subpoena issued to him during the investigation of this case. Jurjo testified that he answered the questions posed to him and that he rather cursorily reviewed the affidavit because his car was parked at a meter. (He stated that he got ticket.)

asked him about signing a card, he should tell them that he didn't understand what he signed.

Jurjo further testified that he received a subpoena from the Regional Office in February 2011 and that he may have spoken to Talvy about it so as to get the day off to go to the NLRB. (At this time, Jurjo was involved in a custody battle and had spent a good deal of worktime in family court.) After being asked to review his affidavit, Jurjo testified that he may also have spoke to Skip Davoli. Jurjo could or would not recall anything that was said between himself and Davoli but acknowledged that his affidavit stated that Davoli asked him where he was going and what he was going to tell the Labor Board, to which he (Jurjo) responded that he was going to get fired like Angel Moreno for the union thing. When confronted with this statement in his affidavit, Jurjo testified that he had no recollection of the conversation.<sup>6</sup> Parenthetically, I note that even assuming that this was accurately notated by the Board agent, the conversation makes very little sense to me. Thus, according to the affidavit, Jurjo, out of the blue, volunteered that he was going to tell the Labor Board agent that he was going to be fired just like Angel Moreno. This is not something that Davoli is alleged to have said to Jurjo, but something that Jurjo is alleged to have said to Davoli. Davoli, for his part, denied that he had such conversation with Jurjo. I credit Davoli.

#### *B. Angel Moreno*

Angel Moreno was hired as a tow truckdriver in February 2009. Prior to his hire, the Company had purchased a used tow truck in or about 2008 but did not use it until after getting a variety of permits. Moreno was not the first driver of the tow truck, but he was hired after the original driver did not work out. The impetus for having a company owned and operated tow truck was to save money by being able to reduce its reliance on outside towing companies.<sup>7</sup> At the time that the Com-

<sup>6</sup> Since the affidavit was taken and executed about 7 months after the events described, it cannot be considered to be an example of a past recollection recorded. Rule 803(5) includes as a hearsay exception a "memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party."

<sup>7</sup> The Company's principle outside tow truck operator is Crown Towing. I note that in New York City, if a vehicle breaks down on a highway such as the East River Drive, there are a group of tow truck companies that are given exclusive licenses to remove vehicles from the highway and place them on the nearest adjacent street. From that point, it is the Respondent's obligation to have the vehicle towed to its facility and prior to having its own tow truck, it used Crown which is a company located in the same neighborhood. After starting to use its own tow truck, the costs for removing vehicles from highways remained the same but the expectation was that the cost of utilizing Crown would be reduced. Based on R. Exh. 17 which is a statement of expenses for Crown, it looks like Crown charged, on average, about \$75 per hour. There is therefore no dispute that because Crown gets paid a much higher hourly rate than Moreno, the less it is used, the lower the overall cost to the Respondent if Moreno is available and willing to do the work.

pany started using its own tow truck, its fleet was fairly old inasmuch as when it expanded its business, it purchased a fleet of used vehicles.

Moreno's original schedule was from 8 a.m. to 6 p.m. Sometime in March 2010, Moreno asked to have his schedule changed to 7 a.m. to 5 p.m. because he was taking an EMT course. This change was made. When hired, Moreno was paid \$12 per hour. In June or July he received a raise to \$14 per hour.

As noted above, Moreno successfully solicited cards from some of the mechanics and the car parker on July 30 and August 2, 2010. Among the people he solicited was Montas who expressed no interest in joining Local 854.

On August 11, 2010, Moreno was told by Davoli that the Respondent had decided to "park the truck" and that his services were no longer needed.

You Tejada testified on or about August 4, Montas asked him if he had spoke to the tow truckdriver to which he responded: "[A]bout what?" Tejada testified that Montas said that it was about a card that he was promoting and that Tejada should be careful "if you sign it."

Tejada also testified about another conversation he had with Montas that took place on the day that Moreno was let go. He testified that Montas told him that the Company had fired the tow truckdriver and that it "was because of the signing of the Union." According to Tejada, Montas then said that "everybody who signs is going after." Tejada testified that he asked Montas if he was going to be let go and that Montas told him not to worry because he was going to speak to one of the bosses and tell him that he (Tejada) had "nothing to do with that because I had very little time there." According to Tejada, Montas told him later in the day that he had spoke to "Papa" and that he needn't worry.

Montas denied both of these alleged conversations.<sup>8</sup>

The Respondent's witness testified that even though it had hired Moreno in order to reduce towing expenses, it was not working out as planned. They assert that on several occasions, Moreno after his schedule had been changed, he refused to go out in the afternoon and pick up a vehicle if it would mean that he would not get back to the facility before 5 p.m. In this regard, Moreno conceded that this did happen on one occasion. The upshot was that if Moreno wasn't willing to go out to pick up a vehicle during the afternoon, then that vehicle would have to be towed by Crown, thereby obviating to some degree, the reason for Moreno's employment.

The Respondent also asserts that it started buying new vehicles in 2009 in an effort to upgrade its aging fleet. It contends that as its fleet of vehicles became newer on average, the rate of road breakdowns would go down thereby reducing the need for towing services. Given these factors, the Respondent contends

<sup>8</sup> Although perhaps not relevant, I note that Montas testified that Tejada's father was his neighbor and that he (Montas), as a favor to the father, arranged for Tejada to be interviewed for the job. This type of transaction is not unusual and does not, in my opinion, establish that Montas had, as a part of his job, the authority to recommend hiring or that he was an agent for other purpose other than translating routine work orders.

that it decided to "park the truck." It denies that union considerations played any role in Moreno's layoff and the evidence shows that the Company's 14-year-old tow truck has not been utilized for towing services since August 11.<sup>9</sup>

I also note that although there is some difference as to when this occurred, Moreno testified that at the time of his leaving, the Respondent offered him a job as a van driver. Moreno testified that he rejected this offer because he did not have the 19(a) certification that was needed to transport ill or injured people. However, he did have a commercial driver's license and it is not particularly difficult or time consuming to obtain the necessary certification to be a van driver. In any event, if the Company was looking to rid itself of the key union supporter, it is not likely that it would offer him another job. (As a driver, Moreno would be covered by the collective-bargaining agreement with Local 124, International Union of Journeymen and Allied Trades.)

#### C. Carlos Valentin

Initially, Carlos Valentin was hired as a maintenance worker at \$8 per hour. In or about late April or early May, Skip Davoli told him that there was an opening for a mechanic and asked him what he could do. Valentin told Davoli that he wasn't a technician but that he did know how to change brakes, transmissions, water pumps, batteries, and alternators. In early June Valentin was promoted to a mechanic and was given a raise to \$12 per hour.

According to Valentin, he was solicited to sign a card for Local 854 by Angel Moreno. He signed the card on August 2, 2010.

Valentin testified that on or about August 4, he and two other mechanics (including Tejada), participated in a conversation with Montas at the car lift where Montas said that "we were crazy for having signed the card, because they were kick out for having signed them." This was denied by Montas and not corroborated by Tejada. (In an affidavit given by Valentin on April 18, 2011, it stated that on August 11, 2010, Carlos, a mechanic, told us that we were crazy that we had signed the paper for the Union.)

According to Valentin, he had a second conversation with Montas on or about August 9. He states that Montas told him that the Company was "investigating who had filled out the union card." Valentin testified that he responded by saying "kick us out." Montas denies this conversation and Valentin states that no one else was present.

Valentin also testified that the day before Moreno was fired Montas again approached him and said that the Company knows who had signed the cards. He claims that no one else was present and Montas denied the conversation.

According to Valentin, on August 13, he was called into the office by Davoli, given a check and told that he was being laid off. He testified that Davoli said that he was sorry that they had "kicked me out." When asked what happened, he claims that

<sup>9</sup> The only evidence is that the tow truck, has on occasion, been used within the Respondent's own facility. No new tow truckdriver has been hired.

Davoli said that he didn't know. Valentin also states that Davoli offered him a job at a car wash that Davoli owned.

The Company's witnesses testified that Valentin was given the chance to work as a mechanic but was unable to perform the job. They state that he could not do repairs accurately or quickly and that shortly before he was let go, he improperly put calipers on the brakes thereby making them inoperative and dangerous. Davoli testified that he made the decision to let Valentin go because of the brake job after previous deficiencies. He testified that he decided not to put Valentin back to his old job because that position had been filled in the interim and would have required Valentin to take a \$4 cut in pay. Davoli testified that he personally liked Valentin and that was the reason he offered him a job elsewhere at a company that he owned.

Notwithstanding Valentin's testimony that he received no warnings or criticism of his work, the evidence shows that prior to this job, he did not have any meaningful training or experience to work as an auto mechanic. At most, he enrolled in a course in Puerto Rico, *which he did not complete*. His assertion that he occasionally worked on cars for his friends does not persuade me that he had acquired competence as a mechanic. This is therefore consistent with the Respondent's contention that Valentin could not do mechanic's work and that he messed up a brake job shortly before he was laid off.

#### D. Christopher Rodriguez

Rodriguez is related by former marriage to Eli Talvy. And because of this relationship, Rodriguez was hired by the Company on January 11, 2010.<sup>10</sup> His job was to park vehicles in designated spots when they came back to the facility and to take the driver's keys. He testified that he closed the facility at night after the last vehicle came in around 9–10 o'clock. Rodriguez states that he would close the exterior gates and make sure that everything was locked. He had the nickname of cake, apparently because other employees considered that his job was a "piece of cake."

Angel Moreno solicited a card from Rodriguez which he signed on July 30. According to Rodriguez, Moreno explained that the Teamsters could help get overtime and benefits. Rodriguez states that he told Moreno that he was concerned about losing his job if he went behind the Employer's back and that Moreno said that he didn't have anything to worry about because the Teamsters would not let anyone know who signed the cards.

The Respondent offered the testimony of John Oliveri regarding Rodriguez' failure to do his job. In this regard, Oliveri is not directly employed by the Respondent. He had previously been a manager of D&J and now works for another company owned by Steven Squitieri, one of the Respondent's owners. In this capacity, Squitieri has given Oliveri the responsibility of checking on the D&J facility at night.

<sup>10</sup> The fact that Talvy as Rodriguez' brother-in-law, recommended that the Company hire him, does not establish, in my opinion, that Talvy, as a regular part of his job, was authorized to hire employees or effectively recommend hiring.

In any event, Oliveri testified that on Saturday, August 7, 2011, he went to the facility and noticed that the lot and garage doors were open. He testified that when he entered the facility, he saw that some vehicles still had their keys in them and that some were not in their designated spots. According to Oliveri, he attempted to locate Rodriguez but could not.

Oliveri testified that on Monday, August 9, he spoke to Rodriguez and asked him what had happened on Saturday. He states that Rodriguez stated that he shouldn't worry about it; that he had issues with his girl friend and that he had to run out. Oliveri states that he then spoke to Carlo Sacco and that Sacco asked if this was the first problem he had with Rodriguez. Oliveri responded that there was nothing drastic in the past but that he was concerned. According to Oliveri, Sacco told him to tell Rodriguez to not let it happen again and that this would suffice for now.

Rodriguez testified that a week later on Saturday, August 14, he was sent by Talvy to finish cleaning up a parking lot that was owned by the Company. He states that he called Talvy and told him that the bus wash crew had left and that he was on the way to clean the lot. According to Rodriguez, he told Talvy that the facility was still open and that Talvy told him to leave it open because some mechanics were still there and that they still had drivers coming in. Rodriguez testified that at around 2 or 2:30 p.m., Talvy called and asked if he had finished with the lot. According to Rodriguez, Talvy told him that he was almost done whereupon Talvy explained that Johnny [Oliveri] was asking where he (Rodriguez) was and why the facility was still open. Rodriguez testified that Talvy told him that he took care of the situation and not to worry about it. According to Rodriguez, after he finished cleaning the lot, he drove back to the facility and noticed that the facility was closed and that there were vehicles left out on the street. (On Saturdays, the facility closes in the afternoon.)

Oliveri's version is as follows. He testified that on Saturday, August 14, he visited the facility shortly before 1 p.m., asked a dispatcher where Rodriguez was and was told that he was at the lot. According to Oliveri, he drove over to the lot which was a few minutes away and could not find Rodriguez. He states that he then returned to the main office where he found Rodriguez and asked him where he had been. Oliveri testified that Rodriguez responded in a flip manner and made comments to the effect that Oliveri had no authority over him and that he shouldn't be asking these questions. According to Oliveri, Rodriguez said: "Don't worry about it, I had it covered. I'm, you know, I'm cool, you know." Oliveri testified that he responded by saying that he didn't think that Rodriguez belonged there right now. He states that Rodriguez responded by saying: "You know, man, leave me alone" to which he told Rodriguez: "Why don't you get out of here now. . . ." According to Oliveri, Rodriguez picked up the phone and called Ely Talvy and said: "Yo E, this nigger's sending me home." Oliveri states that he then stopped Rodriguez and said: "No, no, no, you're wrong. This nigger isn't sending you home, this nigger is throwing you out. You're fired."

Although the evidence does not suggest that Oliveri would normally have much contact with D&J's employees or that he would be authorized to discharge an employee, he testified that

he called Squitieri, who after being told about the events, authorized the discharge.

Talvy's testimony was that on Saturday, he was at home when he received a phone from Rodriguez who told him that he had an argument with Oliveri and that Oliveri had told him that he was terminated. Talvy states that Rodriguez was very angry and said: "[T]his asshole just told me I was fired." According to Talvy, he told Rodriguez there was nothing he could do right now because he wasn't at work and didn't know the situation.

On Monday, August 16, Rodriguez came to the facility and was told by Talvy that he didn't know what Oliveri told Squitieri but that he was fired. According to Rodriguez, he then went to the office and asked the owners if he could speak about what happened on Saturday. He states that their response was that there was nothing to speak about.

Rodriguez testified that as he was leaving the office, he spoke with Talvy who said, "they have a list." Rodriguez states that when he asked what Talvy was talking about, the latter responded by saying: "Stevie knows. Stevie has a list of people who signed and you and Angel are one of them that popped up. That's the real reason why you're fired."

Not surprisingly, Talvy denies making any such statements to Rodriguez. To the contrary, he testified that when Rodriguez asked for his assistance to keep his job, he told Rodriguez that there was nothing he could do and that "you broke company rules and that's pretty much it." Based on the demeanor and the record as a whole, I credit Talvy.

#### *E. Yhou Tejada*

Yhou Tejada was hired in July 2010 and he was recommended for this job by Montas who is a friend of his father. He was employed as a mechanic and worked the evening shift from 2 to 10 p.m. He also worked on Saturdays.

Tejada signed a union card on August 2, 2010, but was not discharged at the same time as Moreno, Rodriguez, and Valentin. It is speculated by the General Counsel that the reason he kept his job was because Montas intervened on his behalf and convinced the owners that as a new employee, Tejada didn't know what he was signing.

Tejada testified that on September 21, he arrived at the shop and started working on a vehicle. Tejada states that soon thereafter, Montas told him to speak to a driver who had just come in and that he refused, stating: "Luis, how do you expect me to speak to him? I don't speak English and he has already spoken to you." According to Tejada, one of the other mechanics who was present said that the driver only wanted to have air put in the tires, to which he said to Montas: "But Luis . . . how can it be that while I'm fixing a motor you're going to tell me to put air into a tire?" According to Tejada, Montas insisted that he do this and that finally, he said to go home. Tejada states that he asked Montas if he was being thrown out and Montas said: "I already told you. Go home." At this point, according to Tejada, he went to get his tools while Montas went to Skip Davoli's office. He states that when Davoli came out of the office, he told him that he wanted his uniform back. Tejada states that he then left the facility. He testified that he never said or indicated that he was resigning.

Montas testified that on this date Tejada arrived at 2 p.m. and that he asked him to do some work because he (Montas) was tired and he wanted to go home. According to Montas, Tejada refused and stated that he too was tired and that he had a backache. Montas testified that he told Tejada that if he was so tired because he had another job, he should punch out and go home. At that point, according to Montas, Tejada went back to his personal car and started to drive it out of the garage. He testified that Davoli then asked Montas why he was leaving and Tejada said that he was leaving and that he had work at another place.

Davoli's version is that the incident took place at the end of the shift and that Montas came and told him that he had asked Tejada to change a tire and that Tejada refused. Davoli states that Montas said that he wanted to go home and that Tejada refused to do a job after which Montas told Tejada to go home. According to Davoli, when he saw Tejada start to drive out of the garage, he asked him what he was doing. He states that Tejada said he was leaving and that he was done there. According to Davoli, he thereupon asked Tejada to give back his uniform.

The Respondent contends that Tejada resigned while the General Counsel argues that he was fired. In fact, the entire transaction is rather ambiguous although both sides have a reasonable interpretation of what happened. The issue here is whether the Company engaged in conduct that was motivated by antiunion considerations. And in this regard, this event in September is fairly remote in time to when the employees signed union cards. Moreover, this incident occurred in the absence of any other union activity by the mechanics.

The Respondent suggested that Tejada's reason for resigning was because he had another job closer to his home in New Jersey. Although Tejada conceded that he drove from Jersey City to the top of the Bronx each day (at least 25 miles), he denied that he had another job at the time.<sup>11</sup>

#### Analysis

The basic allegations of the complaint are (a) that the Respondent became aware of union organizing activity within the above group of individuals; (b) that two alleged supervisors and/or agents interrogated and threatened employees about union activity; and (c) that it discriminatorily discharged four of the employees soon after they signed union authorization cards.

The legal test for determining whether an employer violates Section 8(a)(1) and (3) of the Act is set forth in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 622 F.2d 899 (1st Cir. 1981), *cert denied* 495 U.S. 989 (1982). Under that standard, once the General Counsel has established a *prima facie* showing of unlawful motivation, the burden is shifted to the respondent to establish that it would have laid off or discharged an employee for good cause despite his or her union or protected activities.

<sup>11</sup> To get from Jersey City to the Bronx requires a driver to either go through the Holland or Lincoln Tunnels or over the George Washington Bridge.

Timing by itself can be construed as circumstantial evidence of both knowledge and anti-union animus. *Best Plumbing Supply*, 310 NLRB 143, 144 (1993). On the other hand, an employer may be able to overcome those inferences if it can show that its decision was motivated by some intervening event that would justify disciplinary action. *Dallas & Mavis Specialized Carrier Co.*, 346 NLRB 253 (2006).

The timing of three of the four terminations took place in early August and therefore occurred soon after these employees signed cards for Local 854. However, this element is mitigated by the facts that the Respondent has had a longstanding collective-bargaining relationship covering its drivers and had recently participated in an NLRB election after which it recognized Local 854 as the representative for about 60 matrons. Further, although Local 854 filed a petition to represent the drivers and mechanics, that petition had been withdrawn and there is no indication that Local 854 representatives had ever notified the Employer that they were seeking to represent the group of people involved in this case.

Finally, although the Company had participated in a recent Board election, there was no evidence to show that during that election process, its supervisors or managers made statements or engaged in conduct that could be construed as demonstrating antiunion animus.

The General Counsel produced evidence suggesting that the Company was aware of the employees' union activities based on the conceded fact that Montas was solicited to sign a union card. Nevertheless, as I have concluded that Montas was neither a supervisor nor agent of the Respondent, I shall discount this evidence.

The General Counsel also produced evidence based on alleged statements by Montas and Talvy to the effect that the reason that at least three of these employees were discharged was because they had joined the Union and/or they were on a list of people who had signed union cards. Again, as I have concluded that these two individuals were not supervisors or agents, their "admissions" cannot be the basis either for finding that these statements violated Section 8(a)(1) of the Act or for finding the Respondent liable for the discharges alleged.

At best, the General Counsel has made out a weak and circumstantial *prima facie* case; a case completely reliant on the timing of three of the discharges that took place within 1 or 2 weeks after these employees signed union cards.

As to Moreno, the Respondent has produced evidence that in late July or early August 2010, it made a decision to reduce costs and that this included the decision to park the tow truck because it was not saving or going to save as much money as had originally been anticipated. The credible evidence was that Moreno refused on at least one and probably more occasions to go out in the tow truck if he couldn't return before 5 p.m. Further, the Company produced evidence that it has replaced and continues to replace a substantial number of its older vehicles with new vehicles, thereby reducing the number of breakdowns that are likely to occur. The evidence shows that except for some use at the Company's facility, the tow truck has not been used to bring vehicles back to the yard and no new tow truck driver has been hired.

There is no direct evidence that the Company's management or supervisors obtained knowledge of union activity amongst this set of employees before their discharges. I cannot say that a decision to cease using its own 14-year-old tow truck was either untrue or so unreasonable so as to warrant a conclusion that a discriminatory motive should be inferred. Moreover, any inference of bad motive is in my opinion, mitigated by the fact that at the time of his discharge or soon thereafter, the Company offered Moreno another job.

Accordingly, based on the record as a whole, it is my opinion that the complaint should be dismissed insofar as it alleges that the Respondent illegally discharged Angel Moreno.<sup>12</sup>

The Respondent argues that Valentin was not a competent mechanic and that he messed up a brake job shortly before his discharge. As the testimony of Valentin demonstrates that he did not actually have the training or experience to be a mechanic, I credit the testimony of the Respondent's witnesses as to their evaluation of his work. Accordingly, I conclude that the Respondent has demonstrated that even if the General Counsel had shown that it was aware that Valentin had signed a union card, the Respondent has shown that it would have discharged Valentin for legitimate reasons.

As to Rodriguez, it is my opinion that the credible evidence shows that his discharge was not motivated by union considerations. In this instance, the evidence shows that on two occasions, he failed to be where he was supposed to be and failed to close the facility when it should have been closed. The fact that Oliveri may not have had the authority to fire Rodriguez is irrelevant inasmuch as the discharge was subsequently approved by the owners. I also credit Talvy's denial that he told Rodriguez that he was discharged because of his union activities or because he was on a list.

In my opinion, the General Counsel has not made out a *prima facie* case with regard to Yhou Tejada. Unlike the other three, Tejada was not discharged shortly after he signed a union card. There was, as far as I can see, no other union activity among the mechanics after the first three had been discharged. Although there may be some ambiguity as to whether Tejada resigned or was discharged, it is my opinion that there is no credible evidence to show that whatever took place on September 21, was motivated by his union activity.

I have already concluded that neither Talvy nor Montas were supervisors or agents within the meaning of Section 2(11) and (13) of the Act. Therefore I shall dismiss the allegations of the complaint that allege any statements made by them as being violative of Section 8(a)(1) of the Act. Finally, as I credit Davoli's testimony regarding the alleged conversation he had with Jurjo, I shall also recommend that these allegations of the complaint be dismissed.

#### CONCLUSION OF LAW

The Respondent has not violated the Act in any respect.

<sup>12</sup> There was uncontested evidence that after his discharge, Moreno threatened Montas with physical harm. However, as I have concluded that his discharge did not violate the Act, it is not necessary to consider what if any effect this post discharge conduct would have on any reinstatement or backpay remedy.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>13</sup>

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<sup>13</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopt-

ORDER

The complaint is dismissed.

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ed by the Board and all objections to them shall be deemed waived for all purposes.