Tres Estrellas de Oro *and* Automotive, Industrial and Allied Workers Local 495, International Brotherhood of Teamsters, AFL–CIO

Tres Estrellas de Oro *and* Automotive, Industrial and Allied Workers, Local 495, Wholesale Delivery Drivers, Salespersons, Industrial and Allied Workers, Local 848, Miscellaneous Warehousemen, and Helpers, Local 986, International Brotherhood of Teamsters, AFL–CIO. Cases 21–CA–30443, 21–CA–30444, and 21–CA–31200

September 3, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND BRAME

On May 15, 1997, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed a limited cross-exception and an answering brief, and the Respondent filed a reply 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[2] and to adopt the recommended Order as modified.[3]

Contrary to our dissenting colleague, we agree with the judge's finding that the Respondent's agent, Victor Guzman, unlawfully created the impression of surveillance of employee Juan Monroy's union activities. The relevant facts are as follows.

The Respondent and Turi-Mex, a Mexican entity, are both owned by the Guzman family. The Respondent provides bus transportation between its terminals in Southern California and Tijuana, Mexico, where Turi-Mex maintains a facility.

On December 19, 1994, the Respondent's busdrivers commenced an organizing campaign. Between that date and December 21, 1994, Monroy distributed union literature and authorization cards to employees at the Tijuana facility and at a gas station employees used located near the Respondent's Huntington Park, California facility.

On December 21, 1994, Monroy received a telephone call at home from Victor Guzman, one of the owners of Turi-Mex and the brother of the Respondent's president. The judge found, and our dissenting colleague concedes, that Victor Guzman was the Respondent's agent.[4] Guzman asked Monroy if he was a politician. When Monroy said that he did not understand what Guzman was saying, Guzman replied, "Don't be naïve, I know what you wanted to do, you want to do a work stoppage [or] a strike." Monroy protested that employees simply wanted their rights.[5]

After the conversation with Guzman, Monroy telephoned fellow union activist Ruben Acosta and told him that the Respondent now unquestionably knew that they were engaged in union activity. The very next day, the

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In addition, some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

[2] In concluding that the Respondent violated Sec. 8(a)(3) and (1) of the National Labor Relations Act, the judge referred to the General Counsel's "prima facie case." The Board has traditionally described the General Counsel's initial burden of demonstrating discriminatory motivation as one of establishing a prima facie case. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The D.C. Circuit, however, has suggested that, in light of the Supreme Court's decision in *Office Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 276–278 (1994), the General Counsel's burden should be described as that of persuading "the Board that the employer acted out of antiunion animus." *Southwest Merchandising Corp. v. NLRB*, 53 F.3d 1334, 1339–1340 fn. 8 (1995). However, this change in phraseology does not represent a substantive change in the *Wright Line* analysis. See *Schaeff, Inc. v. NLRB*, 113 F.3d 264, 266 fn. 5 (D.C. Cir. 1997), and *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). Therefore, the judge's use of the term "prima facie case" in describing the General Counsel's burden here does not substantively affect her analysis or conclusions. See *3E Co.*, 322 NLRB 1058 (1997).

We find it unnecessary to pass on the judge's finding that the Respondent's agent, Victor Guzman, unlawfully interrogated employee Juan Monroy as the remedy for this alleged violation would be cumulative and would not affect the Order.

We shall modify the judge's Conclusions of Law 1 and par. 1(a) of the recommended Order to more accurately reflect the violations found by the judge.

In affirming the judge's finding that Victor Guzman was the Respondent's agent, we find it unnecessary to rely on the judge's discussion (in the fifth paragraph of the section entitled "Agency Status of Victor Guzman") of whether there was an internal inconsistency in the Respondent's position.

Further, because we affirm the judge's agency finding, we find it unnecessary to pass on the discussion contained in fn. 14 of the judge's decision.

[3] In view of the fact that a substantial number of the Respondent's employees are Spanish speaking, we find merit in the General Counsel's limited cross-exception, and we shall modify the judge's recommended Order to require that the notice be posted in Spanish, as well as in English.

We shall also modify the judge's recommended Order in accordance with *Excel Container*, 325 NLRB 17 (1997).

[4] In affirming the judge's finding that Victor Guzman was the Respondent's agent, we find it unnecessary to rely on the judge's discussion (in the fifth paragraph of the section entitled "Agency Status of Victor Guzman") of whether there was an internal inconsistency in the Respondent's position. Further, because we affirm the judge's agency finding, we find it unnecessary to pass on the discussion contained in fn. 14 of the judge's decision.

[5] In addition to finding that Guzman created the impression of surveillance, the judge also found that Guzman unlawfully interrogated Monroy during this phone conversation. We find it unnecessary to pass on the judge's interrogation finding because the remedy for this alleged violation would be cumulative and would not affect the Order.

Respondent unlawfully discharged both Monroy and Acosta in violation of Section 8(a)(3) and (1) of the Act.

The Board's test for determining whether an employer has created an impression of surveillance is whether the employee would reasonably assume from the statement in question that his union activities had been placed under surveillance. *United Charter Service*, 306 NLRB 150 (1992). "The Board does not require employees to attempt to keep their activities secret before an employer can be found to have created an unlawful impression of surveillance. . . . Further, the Board does not require that an employer's words on their face reveal that the employer acquired its knowledge of the employee's activities by unlawful means." Id. at 151. "The idea behind finding 'an impression of surveillance' as a violation of Section 8(a)(1) of the Act is that employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways." *Flexsteel Industries*, 311 NLRB 257 (1993).

Applying these principles here, we find, in agreement with the judge, that Guzman's statements on their face would reasonably suggest to Monroy that Guzman was closely monitoring the degree and extent of Monroy's organizational efforts and activities. Contrary to our dissenting colleague, Guzman's remarks are not "too vague and ambiguous to establish this violation." In addition to questioning Monroy about being a "politician," an obvious and sarcastic dig to Monroy's leadership role in the organizational campaign, Guzman stated that he knew that Monroy wanted to create a work stoppage or strike, activities that are often associated with unionization. Although our dissenting colleague states that we are "reaching too far," our unfair labor practice finding is supported by Board cases finding similar derisive statements to create an impression that employee union activities were under the watchful eye of management. See *Jennie-O Foods*, 301 NLRB 305, 338–339 (1991) (impression of surveillance created where plant manager stated that he heard that employee was "getting into politics"); *Emerson Electric Co*., 287 NLRB 1065 (1988) (impression of surveillance created where plant manager indicated that he knew the extent of the employee's involvement with the union).[6]

Our dissenting colleague also suggests that a violation cannot be sustained on these facts because Guzman's statements "likely resulted from Monroy's open distribution of union literature on the property of the Respondent's sister corporation, Turi-Mex." Our dissenting colleague's position is at odds even with that of the Respondent, which contends in its exceptions that it had no knowledge of Monroy's union activities. Furthermore, in making his argument, our dissenting colleague relies on nothing more than speculation. Thus, there is no evidence that a representative of the Respondent was present when Monroy distributed union cards and literature at the Turi-Mex facility, and when Monroy distributed union materials at the gas station, he was not on property owned by the Respondent or Turi-Mex. In addition, at the time of Guzman's telephone conversation with Monroy, the employees had not revealed to management that they were engaged in an organizational campaign. In sum, there is no simply no basis in the record for concluding that Monroy would reasonably believe that the Respondent had learned about the extent of his union activities through any legitimate means.

Accordingly, for all these reasons, we find no merit in our dissenting colleague's position, and we adopt the judge's unfair labor practice finding.[7]

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 1.

"1. By interrogating employees concerning their union activities and sympathies; creating the impression among its employees that it was engaging in surveillance of their union activities; informing an employee that it did not want "leaders" working for it, that employees who had engaged in union activities in the past had been terminated, and that the employee could be terminated if he continued to engage in such conduct; informing an employee that engaging in union activities was "not right" and impliedly threatening to retaliate against the employee by stating that the employee would have to "face the consequences" of engaging in such conduct; and by threatening to terminate an employee because he was "agitating" other employees, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Tres

[6] Citing *NLRB v. Simplex Time Recorder Co.,* 401 F. 2d 547, 549 (1st Cir. 1968), our dissenting colleague applies a different test, one requiring "willful [employer] conduct" that gives employees a "justifiable impression" that their union activities are under surveillance. Even under the dissent's test, properly applied, a violation has been established. Guzman's caustic statements are "willful conduct" and, for the reasons set forth above, they would reasonably tend to give Monroy a "justifiable impression" that his union activities were under surveillance.

[7] We disagree with our dissenting colleague's reliance on *NLRB v. Pilgrim Foods*, 591 F.2d 110 (1st Cir. 1978), a case that denied enforcement of the pertinent part of a Board Order. Furthermore, even under the court's standard, an impression of surveillance violation has been established here. The court specifically stated that an employer's "acknowledging an employee's union activity" would be unlawful if accompanied by "more," such as "an intimidating quality to the remark." Id. at 114. Here, Guzman went beyond acknowledging Monroy's union activity when Guzman accused Monroy of "want[ing] to do a work stoppage [or] a strike," a wholly gratuitous comment with an intimidating quality.

Estrellas de Oro, Huntington Park, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Interrogating employees concerning their union activities and sympathies; creating the impression among its employees that it was engaging in surveillance of their union activities; informing an employee that it did not want "leaders" working for it, that employees who had engaged in union activities in the past had been terminated, and that the employee could be terminated if he continued to engage in such conduct; informing an employee that engaging in union activities was "not right" and impliedly threatening to retaliate against the employee by stating that the employee would have to "face the consequences" of engaging in such conduct; and threatening to terminate an employee because he was "agitating" other employees."

2. Substitute the following for paragraph 2(e).

"(e) Within 14 days after service by the Region, post at its Huntington Park, Los Angeles, and San Ysidro, California facilities, in both English and Spanish, copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 21, 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. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 21, 1994.''

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

MEMBER BRAME, concurring in part and dissenting in part.

Contrary to the majority and the judge, I would not find that the Respondent unlawfully created the impression of surveillance of employee Juan Monroy's union activities. I stress that the statements the judge relied on as the basis for this violation were uncertain in nature and that the Respondent made them immediately after Monroy openly distributed union literature on property owned by the Respondent's sister corporation. In the remaining respects, I agree with my colleagues' decision.

The evidence shows that between December 19 and 21, 1994,[1] Monroy distributed union literature to employees both at a Tijuana, Mexico facility owned by Turi-Mex, a Mexican entity owned by the same family which owns the Respondent, and at a diesel gas station located near the Respondent's Huntington Park, California facility that employees used.[2] On December 21, Monroy received a phone call from Victor Guzman, whom the judge found, and I agree, was a Respondent agent. Guzman asked Monroy if he was a politician. When Monroy claimed that he did not understand what Guzman was saying, Guzman replied, "don't be naïve I know what you wanted to say, I know what you wanted to do, you want to do a stoppage on [sic] a strike." Monroy denied that employees were going to strike and stated that they simply wanted their rights. On December 22, the Respondent suspended Monroy without pay and later converted that suspension into a discharge.

I disagree with the judge's finding that by his comments Victor Guzman created the impression of surveillance in this case.[3] The First Circuit, while considering a similar issue in *NLRB v. Simplex Time Recorder*, 401 F.2d 547 (1968), enfg. 164 NLRB 812 (1967), specifically recognized the inherent difficulty in defining this alleged violation due to the "nebulous" nature of the conduct involved. Although the court in that case ultimately agreed with the Board's finding of such a violation, it established the standard that "creating 'an impression of surveillance' means willful conduct and a justifiable impression," 401 F.2d at 549. In my view, Guzman's comments here asking if Monroy was a politician and stating that he knew what Monroy "wanted to do" are too vague and ambiguous to establish that they created a "justifiable impression" of surveillance to Monroy. I think that the judge and my colleagues are guilty of reaching too far in interpreting these statements as creating the impression that Monroy's union activities were unlawfully under surveillance.[4]

Subsequent to *Simplex Time Recorder Co.*, the First Circuit reversed the Board and found that the employer did not create the impression of surveillance in *NLRB v. Pilgrim Foods, Inc.*, 591 F.2d 110 (1978). There, an assistant plant manager told an employee he was aware that the employee was the "spokesman for the men," and

[1] All dates are in 1994.

[2] The Respondent is owned by three brothers, Jose, Luis, and Gregorio Guzman, and provides bus transportation between Southern California and Mexico. Turi-Mex is owned by these same three brothers plus another brother, Victor Guzman, and their mother.

[3] I join the majority, however, in finding it unnecessary to pass on the judge's further conclusion that Guzman coercively interrogated Monroy during this conversation as this alleged violation would be cumulative here.

[4] I disagree with the finding of a violation in *Jennie-O-Foods*, 301 NLRB 305, 338–339 (1991), where the employer similarly told an employee he had heard that the employee was "getting into politics." Furthermore, my colleagues' reliance on *Jennie-O-Foods* and *Emerson Electric*, 287 NLRB 1065 (1968), to support the finding of a violation here is misplaced as both cases are distinguishable from the present situation in that the employers there were commenting on union activities that had occurred at union meetings and not on the Respondent's property as in this case. Thus there was no "justifiable impression" of surveillance under the test that *NLRB v. Simplex Time Recorder Co.,* supra, established for the finding of this violation.

suggested that the employee make up a list of employee grievances. 591 F.2d at 113. The court stressed, quoting from *NLRB v. Mueller Brass Co.*, 509 F.2d 704, 709 (5th Cir. 1975), that "[t]he Act does not prevent an employer from acknowledging an employee's union activity, without more." Id. at 114. According to the court, the "more" would, for example, include "continuous monitoring of employee telephone conversations and threatening confrontations." Id. As the court found, in words that apply to the present situation, "the mere recognition of union activity" is not a violation of Section 8(a)(1). Id.[5] The evidence in this case establishes only that the Respondent may have observed Monroy's open union activities on Turi-Mex's property and then perhaps vaguely commented on them during Guzman's telephone conversation with Monroy.[6] Thus the General Counsel has not introduced evidence establishing that Guzman did anything beyond "acknowledging" Monroy's union activities.

Accordingly, I conclude that the General Counsel has failed to establish on these facts that the Respondent created the impression of surveillance. I therefore find that this allegation should be dismissed.

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate you concerning your union activities and sympathies; create the impression that we are engaging in surveillance of your union activities; inform you that we do not want "leaders" working for us, that employees who have engaged in union activities in the past have been terminated, and that you could be terminated if you continue to engage in such conduct; inform you that engaging in union activities is "not right" and impliedly threaten to retaliate against you by stating that you would have to "face the consequences" of engaging in such conduct; and threaten to terminate you because you are "agitating" other employees.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Automotive, Industrial and Allied Workers, Local 495; Wholesale Delivery Drivers, Salespersons, Industrial and Allied Workers, Local 848; or Miscellaneous Warehousemen Drivers and Helpers, Local 986, International Brotherhood of Teamsters, AFL–CIO or any other union.

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

WE WILL, within 14 days from the date of the Board's Order, offer Ruben Acosta (a/k/a Ruben Asael Acosta Mia), Juan Monroy, and Juan Rodriguez 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 Ruben Acosta (a/k/a Ruben Asael Acosta Mia), Juan Monroy, and Juan Rodriguez whole for any loss of earnings and other benefits resulting from their discharges, 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 discharges of Ruben Acosta (a/k/a Ruben Asael Acosta Mia), Juan Monroy, and Juan Rodriguez, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

TRES ESTRELLAS DE ORO

Neil A. Warheit, Esq., for the General Counsel.
Ann K. Smith, Esq. and *Araceli Cole, Esq.* (*Sheppard, Mullin, Richter & Hampton*), of Los Angeles, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

MARY MILLER CRACRAFT, Administrative Law Judge. This case was litigated in Los Angeles, California, from February 24–28, 1997. The charges in Cases 21–CA–30443 and 21–CA–30444 were filed by Automotive, Industrial and Allied Workers Local 495, International Brotherhood of Teamsters, AFL–CIO (the Union) on December 29, 1994, and amended on March 31, 1995. The charge in Case 21–CA–30444 was further amended on April 7, 1995. Consolidated complaint in these cases issued May 31, 1995, alleging that Tres Estrellas de Oro (Respondent) violated Section 8(a)(1) and (3) of the Act.

The charge in Case 21–CA–31200 was filed by the Union and Wholesale Delivery Drivers, Salespersons, Industrial and Allied Workers, Local 848, International Brotherhood of Team-

[5] I reject the majority's characterization of Guzman's statements during this conversation as having an "intimidating quality." In my view, Guzman was simply expressing his view regarding the possibility that Munroy's union activism could result in a strike, a view to which Guzman was entitled under the free speech proviso in Sec. 8(c) of the Act.

[6] I note that it is highly unlikely Guzman made his remarks as a result of Monroy's open distribution of union literature on the property of the Respondent's sister corporation, Turi-Mex.

sters, AFL–CIO, and Miscellaneous Warehousemen, Drivers and Helpers, Local 986, International Brotherhood of Teamsters, AFL–CIO, on March 1, 1996, and complaint issued on September 10, 1996. By order of September 24, 1996, Case 21–CA–31200 was consolidated for hearing with Cases 21–CA–30443 and 21–CA–30444.

The consolidated complaints, as amended at hearing, allege the discharge of three employees in violation of Section 8(a)(1) and (3) of the Act as well as allegations of independent 8(a)(1) violations including threats of discharge, interrogation, and impression of surveillance. On the entire record,[1] including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by counsel for the General Counsel and for Respondent,[2] I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent is a California corporation with an office and place of business in Huntington Park, California. It is engaged in the business of providing bus transportation of passengers between Southern California and Mexico. During the 12-month period ending June 1, 1996, Respondent derived gross revenues in excess of $500,000 and purchased and received goods valued in excess of $5000 from other enterprises located within the State of California each of which other enterprises received those goods directly from points outside the State of California. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Jose Guzman is president of Respondent. He and two of his brothers, Luis and Gregorio Guzman, own Respondent. Jose Guzman is also president of a Mexican entity known as Turi-Mex, which he owns with his brothers Luis, Gregorio, and Victor Guzman, as well as their mother. Respondent denies that Victor Guzman and another brother, Juan Guzman, are its agents or supervisors.

Respondent conveys passengers by bus 7 days a week between various locations in Southern California and Tijuana, Mexico. Respondent's terminals in Southern California are located at Sixth Street in Los Angeles, Florence Avenue in Huntington Park, and in San Ysidro, California. In Tijuana, passengers are dropped off and picked up at either the Turi-Mex airport facility or the central bus depot. Insignia on the side of Respondent's buses denote either "Tres Estrellas" or "Turi-Mex." Printed on bus tickets purchased in Tijuana are the names Tres Estrellas and Turi-Mex.[3]

Respondent employs approximately 12 busdrivers who work 6 days per week. Each day, each driver makes one round trip between Southern California and Tijuana. Drivers earn $60 to $70 per trip. Respondent does not provide sick pay, vacation pay, or medical benefits. In April or May 1994, Jose Guzman told employees that benefits and pay increases would be forthcoming when the Respondent's economic position improved.

In the fall of 1994, Juan Guzman, the general manager at Turi-Mex's airport facility, told his brother Jose Guzman, president of Turi-Mex and Respondent, that he suspected that Turi-Mex ticket agents were stealing ticket receipts. Jose Guzman retained an accountant and an attorney to investigate. On November 8, 1994, Jose Guzman filed an "accusation" in Mexico alleging the theft. No bus drivers were named in this "accusation."[4]

B. Discharges of Ruben Acosta and Juan Monroy

On December 18, 1994, Ruben Acosta, a busdriver who had worked for Respondent since December 1991, met with Jose Guzman. Acosta asked if Respondent was solvent at that time. Jose Guzman asked why Acosta wanted to know and Acosta responded that employees had not received either a pay increase or the benefits previously discussed. The discussion became heated and Acosta left. When Acosta returned home, he received a message from Gregorio Guzman telling him not to report to work as scheduled on the following day.

Acosta visited the union hall on December 19 and received literature and authorization cards. He gave the literature to fellow driver Juan Monroy who distributed it on December 19, 20, and 21 to coworkers at the Tijuana facility as well as at a diesel station utilized by drivers located near Respondent's Huntington Park facility. Acosta distributed the authorization cards on December 20 at the diesel station and at the Huntington Park facility. According to Acosta, 11 of the 12 drivers signed authorization cards on December 19 and the remaining driver signed on December 21.

Acosta was advised by a telephone call from Gregorio Guzman on December 20 to drive a bus departing Huntington Park on December 21 at 8:30 a.m. He was instructed to arrive at 7:30 a.m. However, when he arrived at 7:33 a.m., another driver had already taken the bus and Gregorio Guzman instructed him to take the 2 p.m. departure instead. As Acosta was leaving, he saw Ramon Pinado, the remaining unsolicited driver. The company accountant was about 6 feet away smoking a cigarette. Pinado told Acosta that he knew all about it and was ready to sign the card. Acosta returned from Tijuana in the early morning of December 22. He received a message that Jose Guzman wanted to talk with him at 1 p.m. that day.

Meanwhile, Monroy received a telephone call on December 21 from Victor Guzman, brother of Jose Guzman and one of the owners of Turi-Mex. Victor Guzman asked Monroy if he was a politician and accused Monroy of wanting to create a work stoppage or a strike. Monroy protested that employees simply wanted their rights. Victor Guzman questioned what rights Monroy was referring to and added that money was what

[1] Counsel for the General Counsel's unopposed motion to correct the transcript is granted and received in evidence as G.C. Exh. 9.

[2] Counsel for the General Counsel moved to strike Respondent's brief on various procedural grounds including failure of Respondent to serve counsel for the General Counsel with a copy of Respondent's brief. In response, Respondent hand delivered a copy of its brief asserting clerical error in failure to serve counsel for the General Counsel. Thereafter, Respondent amended its proof of service. Both counsel for the General Counsel's and Respondent's brief were received by the Division of Judges on April 4, 1997, the date they were due. Under these circumstances, I find no substantial prejudice to counsel for the General Counsel and deny the motion to strike Respondent's brief.

[3] There is no allegation that Respondent and Turi-Mex are alter egos, a single or joint employer, or related business entities.

[4] Respondent did not prove that any theft occurred. However, Respondent presented evidence that its investigation concluded that ticket agents were involved in a scheme to pocket tickets and ticket money.

Monroy wanted. Monroy protested that this was not correct. Victor Guzman and Monroy agreed to meet at the Huntington Park terminal the following day but no specific time was set. Monroy conveyed to Acosta his conclusion that Respondent knew they were attempting to organize for the Union. Victor Guzman did not testify.[5]

Both Monroy and Acosta were advised to meet with Jose Guzman at the Huntington Park facility on December 22. Both Monroy and Acosta called the Union stating that they expected to be terminated. It was agreed that a letter would be transmitted by the Union to Respondent by facsimile stating that Monroy and Acosta were attempting to organize for the Union and setting forth employee rights in that regard.

On the following day, in separate meetings, Jose Guzman terminated Acosta and Monroy. The contemplated letter from the Union arrived after Acosta was terminated and before Jose Guzman met with Monroy. Jose Guzman told Acosta that he no longer had a job and told Monroy that he was suspended without pay. Victor Guzman was present during Monroy's termination meeting.[6]

Jose Guzman testified that he decided to terminate Acosta and Monroy because driver Ramon Pinado informed him on the afternoon of December 21, 1994, that Acosta and Monroy were involved in a scheme with Turi-Mex ticket agents to defraud Turi-Mex. However, both Acosta and Monroy stated that they were never confronted with allegations of theft during their termination interviews. Jose Guzman testified that he did confront Monroy with allegations of theft and that Monroy denied these allegations.

One week after their discharges, the Union filed a petition to represent a unit of Respondent's bus drivers. This petition was later withdrawn. By letters of January 27, 1995, Acosta and Monroy were informed that Respondent had completed its investigation into loss of tickets and revenue and decided to terminate them.

The "accusation" previously filed by Jose Guzman in Mexico was amended on December 22, 1994, to include luggage handlers, drivers, and dispatchers by classification without specifically naming any individuals. On April 10, 1995, it was amended to specifically name Acosta and Monroy.

Several months after their terminations, Acosta and Monroy learned that they were named in a Mexican document authored by Turi-Mex as conspirators in the ticket and revenue theft. However, neither Acosta nor Monroy has ever been served copies of any such document although they attempted to ascertain through Mexican authorities if such a document had indeed been filed against them and were told that no charges were found by those they contacted.

C. Discharge of Juan Rodriguez

Juan Rodriguez also worked as a busdriver for Respondent. He was hired in 1995 and was discharged on March 4, 1996. Respondent's stated reason for the termination was refusal to follow instructions. Shortly thereafter, the Union and Locals 848 and 986 filed a petition to represent Respondent's bus drivers. An election was held pursuant to a stipulated election agreement. The drivers rejected the Union and no objections were filed.

After discussing organizing with a business agent on the evening of February 16, 1996, Rodriguez distributed union authorization cards at the Los Angeles and Huntington Park facilities as well as in Tijuana on February 17, 1996. According to Rodriguez, Jose Guzman was in the immediate proximity while Rodriguez was passing out cards. Jose Guzman approached Rodriguez and asked him what he had given to the other drivers. Rodriguez told Jose Guzman it was a card to sign for union representation. Jose Guzman replied that he did not want any "leaders" working for Respondent and told him that on other occasions employees had tried to organize and had been fired. Jose Guzman said that it was possible Rodriguez would follow them.[7]

Rodriguez did not reply to Jose Guzman's comments but left on his assigned route to Tijuana. While at the repair shop in Tijuana Rodriguez continued soliciting employees. Juan Guzman asked Rodriguez what he was doing and Rodriguez replied that he was distributing union authorization cards. Juan Guzman told Rodriguez that this was not correct and Rodriguez would pay the consequences. The following day, Rodriguez continued distribution of authorization cards at the Tijuana repair shop. All employees signed these cards. Juan Guzman approached Rodriguez that day and stated that he had spoken to Jose Guzman about what Rodriguez was doing and Jose Guzman was going to fire Rodriguez for agitating the employees.[8]

On February 20, Rodriguez was discharged. Gregorio Guzman testified that Rodriguez was discharged because there had been complaints of rudeness from customers and Rodriguez repeatedly failed to follow instructions as to departure times from Tijuana. Gregorio Guzman stated that he had counseled Rodriguez about these problems on at least 15 or 20 occasions. Jose Guzman testified that Rodriguez was discharged because he left the Turi-Mex repair shop earlier than he had been instructed that day and that this was a common problem in that Rodriguez refused to obey instructions not to drive the bus until it was released from the shop.

D. Analytical Framework

Section 8(a)(1) and (3) of the Act provides in relevant part that an employer may not interfere with, restrain, or coerce employees in the exercise of their right to self-organization, to form, join, or assist labor organizations and that an employer may not discriminate in regard to hire or tenure of employment in order to discourage membership in any labor organization.

[5] Respondent argued at the hearing that Monroy's testimony did not establish that he was speaking with Victor Guzman. I find, to the contrary, that Monroy's testimony adequately authenticated that the voice he heard on the telephone was that of Victor Guzman. Monroy was familiar with Victor Guzman's voice and had spoken with him on numerous occasions by telephone. Monroy stated that he addressed the caller as Victor during the conversation. This evidence provides a sufficient authentication of the voice. Moreover, when Monroy reported to Jose Guzman's office on the following day, the meeting with Jose Guzman did not occur until Victor Guzman arrived. This action is consistent with the import of the telephone conversation in that Victor Guzman stated to Monroy that he would meet with him at the Huntington Park terminal on the following day.

[6] According to Monroy, whom I credit, the meeting began when Jose Guzman asked what Monroy wanted to tell him and Monroy responded, the same thing I told Victor Guzman last night. Jose Guzman responded that he was not interested in what Monroy said to Victor Guzman.

[7] Jose Guzman denied the conversation and denied that he was at work that day. I credit Rodriguez

[8] Juan Guzman did not recall such a conversation. I credit Rodriguez.

In *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst Cir. 1981), cert. denied 445 U.S. 989 (1982); cited with approval in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983), the Board set forth the burden and allocation of proof to be utilized to determine whether a discharge violates the Act. Initially, the General Counsel must show that protected conduct was a motivating factor in the employer's decision to terminate. At that point, the burden shifts to the employer to demonstrate that it would have taken the same action in any event.

E. Contentions

Counsel for the General Counsel argues that Respondent had direct knowledge of the protected activities of Acosta and Monroy and exhibited animosity toward this activity. Specifically, counsel notes evidence that Acosta confronted Jose Guzman with an inquiry regarding improved wages and benefits to which Jose Guzman reacted in a heated manner. Counsel also relies on evidence that Acosta then enlisted Monroy to distribute literature and authorization cards to the entire complement of employees and thereafter, Monroy was interrogated by Victor Guzman, whom counsel claims acted with apparent authority, who also offered that Respondent knew what he was doing. Moreover, counsel points to the timing of the discharges days after organizing activity occurred. Finally, counsel for the General Counsel argues that there is no evidence that the employees engaged in misconduct and even if Respondent had shown a good faith belief that Acosta and Monroy were involved in alleged theft, Respondent's failure to investigate such allegations by confronting the two warrants an inference that it acted unlawfully. Accordingly, counsel claims that Respondent has failed to rebut his prima facie showing of discrimination.

Respondent contends that no prima facie case has been set forth because there is no evidence that Victor Guzman was an agent of Respondent and, absent such evidence, there is no evidence that Respondent, specifically Jose Guzman, was aware of any union organizing activity or was motivated to discharge Acosta and Monroy for such activity.

As to Rodriguez, counsel for the General Counsel argues that Juan Guzman is an agent of Respondent and that Juan Guzman's threats of reprisal and termination to Rodriguez supply ample animus and direct knowledge of Rodriguez' activities. Moreover, counsel notes that the timing of the discharge and the implausible reasons for discharge support an inference of unlawful motivation. On the other hand, Respondent claims that Rodriguez was terminated because his performance was inadequate and he was insubordinate. Accordingly, Respondent urges that even if the evidence establishes that union activity may have been a motivating factor in its decision, the termination would have occurred in any event.

F. Analysis

1. Amendments to and timeliness of certain complaint allegations

Relying on *Nickels Bakery of Indiana,* 296 NLRB 927 (1989), Respondent contended at the hearing that certain 8(a)(1) allegations were not properly included in the consolidated complaint. I allowed these amendments. Specifically, paragraph 7 of the consolidated complaint in Cases 21–CA–30443 and 21–CA–30444 was amended to change the phrase, "at the Los Angeles terminal," to the phrase, "by telephone"; paragraph 6(a)(i) of the complaint in Case 21–CA–31200 was amended to delete the phrase, "at the Los Angeles Terminal," and substitute, "in Huntington Park, California"; and paragraph 6(a)(ii) was amended to change the phrase, "at the Tijuana Terminal," to the phrase, "a repair shop in Tijuana, Mexico." The amendments merely conformed the pleadings to the evidence and did not change the nature or date of the allegations nor the person allegedly engaged in the conduct but only the locations. Accordingly, these amendments were ministerial in nature. Advance notice of intent to amend was provided no later than a conference call held on February 18, 1997. Although not specifically relevant to this issue, I note in addition that Respondent was allowed to amend its answer to the complaint in Case 21–CA–31200 to deny that it operated a terminal in Tijuana, Mexico, while its previous answer had admitted this allegation.

The amendments are clearly closely related to the allegations set forth in the charges. In this respect, I note that the amended charge in Case 21–CA–30444 alleges interrogation and creation of the impression of surveillance during the 6-month period preceding April 7, 1995. The consolidated complaint both before and after amendment alleged interrogation and creation of the impression of surveillance in violation of Section 8(a)(1). The charge in Case 21–CA–31200, filed March 1, 1996, alleged Respondent discharged Juan Rodriguez in violation of Section 8(a)(1) and (3) within the 6 months preceding filing of the charge. The complaint alleges threats of termination and retaliation preceding the discharge by 2 and 3 days. Although the same legal theory is not involved, the 8(a)(1) allegations arise from the same sequence of events leading up to the discharge. Under similar circumstances, complaint allegations were held closely related to a timely filed charge. See, e.g., the cases relied on by counsel for the General Counsel, *Transport America,* 320 NLRB 882, 889 (1996); *Well-Bred Loaf,* 303 NLRB 1016 fn. 1 (1991).[9]

2. Agency status of Victor Guzman

Victor Guzman did not testify. Based on the testimony of Monroy and Acosta, I find that Victor Guzman was cloaked with apparent authority on behalf of Respondent for purposes of the December 21 statement to Monroy regarding Respondent's knowledge of Monroy's union activities and his question about strikes and stoppages.

In 1991 and 1992, Victor Guzman worked for Respondent at the Huntington Park facility as a "dispatcher and supervisor" (according to Monroy). When Turi-Mex opened in December 1992, Victor Guzman became the "administrator and supervisor" of that operation (according to Monroy).[10] Monroy further testified that Victor, "supervised all of the employees," at the Turi-Mex airport facility and told employees their departure times to Los Angeles and when to change their shifts. In December 1993, Victor Guzman left Turi-Mex and moved to Mexico City where he practices law. Following his departure

[9] In addition, were it necessary to determine whether the unamended allegations set forth in the complaints were closely related to the charges, I would find that they were for the same reasons specified above. In addition, I note specifically with regard to the 8(a)(1) allegations in Case 21–CA–31200 that the complaint, issued September 10, 1996, provided notice of these allegations well in advance of the hearing.

[10] Jose Guzman testified consistently that Juan Guzman was administrator and general manager of the Tijuana Turi-Mex airport facility and that Juan Guzman replaced Victor Guzman.

from Turi-Mex, Victor Guzman nevertheless retained an ownership interest in Turi-Mex.

Monroy's testimony, which I credit, establishes that Victor Guzman called Monroy on the evening of December 21,[11] informed Monroy that Respondent was aware of his activities for the Union, and arranged to speak with Monroy on the following day. When Monroy reported to Jose Guzman's office the following day, the meeting was not held until Victor Guzman arrived.

Family relationship is one of the facts to be considered in determining apparent authority and, when viewed in the context of other factors, may be sufficient for a finding of agency based on apparent authority." *Laborers Local 270 (OPEIU Local 29),* 285 NLRB 1026, 1028 (1987). Apparent authority requires a manifestation by the principal to a third party and also requires that the third party must believe that the extent of the authority granted to the agent encompasses the contemplated activity. Restatement 2d, Agency § 8; and see *Dentech Corp.,* 294 NLRB 924, 925 (1989), quoting *Service Employees Local 87 (West Bay Maintenance*), 291 NLRB 82 (1988). Articulated another way, "an employer can be responsible for the conduct of an employee, as an agent, where under all the circumstances the employees would reasonably believe that the individual was reflecting company policy and acting on behalf of management." *Kosher Plaza Supermarket,* 313 NLRB 74, 85 (1993).

Based on the closely held family nature of Respondent and Turi-Mex, on Victor Guzman's ownership in Turi-Mex, on Victor Guzman's past status in directing employees, and his presence at the Huntington Park terminal on occasion following cessation of his employment with Respondent, Monroy would reasonably believe that Victor Guzman was reflecting company policy and acting on behalf of Respondent when Victor Guzman called Monroy on December 21. Not only is Victor Guzman an owner of Turi-Mex, which I find is a related business entity based on substantially common ownership and management as well as interrelationship of the two operations, but Victor Guzman also worked for both Respondent and Turi-Mex giving directions to the drivers. Moreover, Respondent, a closely held family operation owned solely by Victor Guzman's brothers, relies on evidence from Turi-Mex in support of its decision to terminate Acosta and Monroy. Respondent cannot have it both ways. That is, Respondent cannot, on the one hand, claim that the owners of Turi-Mex have no authority with regard to Respondent but, on the other hand, claim that Turi-Mex's information regarding Acosta and Monroy establishes a business reason for their discharges from Respondent. Such family relationship when viewed in the context of Victor Guzman's ownership in Turi-Mex, his past positions with Respondent and Turi-Mex, the involvement of Turi-Mex in the discharge, and the fact that Victor Guzman agreed to meet Monroy at the Respondent's Huntington Park terminal on the following day and in fact did meet him and was present at his discharge, provides a sufficient basis for finding that Victor Guzman spoke with apparent authority when he told Monroy that Respondent knew of his Union activities and asked Monroy about strikes and stoppages. See, e.g., *Guille Steel Products Co.,* 303 NLRB 537, 539 (1991) (son of owner who was perceived to be and functioned as a leadman and informed employee of his discharge was an agent).[12]

3. Prima facie case regarding Acosta and Monroy

Both circumstantial and direct evidence indicates that a motivating factor in the decision to discharge Acosta and Monroy was their union and protected activity. Jose Guzman was aware of Acosta's concern on behalf of himself and the other drivers for a wage increase and for benefits. Jose Guzman evidenced intense animus regarding Acosta's questioning him on these subjects.[13] Without explanation, Acosta's route for the next day was canceled. In the following days, Acosta and Monroy distributed union literature and authorization cards. Victor Guzman indicated that Respondent was aware of these activities and his comments and interrogation regarding strikes and stoppages indicates an animus toward these activities.[14] They were immediately discharged. Based on this evidence, I find that the General Counsel has established a prima facie case that Acosta's and Monroy's protected activity was a motivating factor in the decision to discharge them.

4. Respondent's rebuttal regarding Acosta and Monroy

Respondent has failed to demonstrate that it would have taken the same action for legitimate reasons regardless of the protected activity. Respondent claims that Acosta and Monroy were part of a conspiracy with various ticket agents in Mexico to steal tickets and ticket receipts. However, Respondent's evidence falls short of such proof. Respondent introduced evidence that it had been told that an investigation by Turi-Mex implicated unnamed drivers in the ticket agent conspiracy. Juan

[11] Respondent contends that it was error to receive evidence of the telephone conversation because Victor Guzman's agency status was not established by any competent evidence and, accordingly, testimony regarding the telephone conversation was hearsay and not admissible under any exception to the hearsay rules. Moreover, Respondent notes that there is no evidence that Jose Guzman was aware of or ratified Victor Guzman's conduct. I adhere to my ruling allowing this testimony subject to my ultimate finding regarding agency.

[12] Respondent relies on *Shen Automotive Dealership Group,* 321 NLRB 586 (1996), in which the Board found that the brother of the owner who was part of the bargaining unit and performed leadman-type functions was not acting with apparent authority when he solicited employees to sign a decertification petition and made certain other statements which he specifically attributed to his brother because the employee with whom he spoke on these occasions would not have reasonably believed he was acting for his brother. In that case there were no manifestations by management, no ownership of a related business entity, and no participation in disciplinary proceedings. I find this case distinguishable on those facts. Respondent also relies on *NLRB v. Cherokee Hosiery Mills,* 196 F.2d 286, 290 (5th Cir. 1952). This case, however, does not deal with apparent authority and is, therefore, not helpful in determining whether Victor Guzman spoke with apparent authority on the evening of December 21, 1994.

[13] I specifically credit Acosta's testimony regarding his conversation with Jose Guzman about wages and benefits. According to Acosta, Jose Guzman's response was that the law did not require that he pay employees higher wages or any benefits, that Acosta was working for Respondent only because Jose Guzman felt sorry for him, and that, "he would wipe [U.S. labor laws] on his testicles."

[14] In the absence of a finding of agency with regard to Victor Guzman which, in turn, supports a finding of knowledge and animus, I would nevertheless infer that Respondent was aware of the union activities of Acosta and Monroy based on circumstantial evidence including the timing of the discharges, the small size of the work force, animus shown toward Acosta's questioning benefits and a wage raise on behalf of himself and other employees, and the fact that the only two employees soliciting for the Union were discharged simultaneously. Moreover, the reason given for discharge, discussed infra, is extremely week and further raises suspicion of an unlawful motive. See *Montgomery Ward & Co.,* 316 NLRB 1248, 1253 (1995).

Guzman, administrator and general manager of the Turi-Mex airport facility, testified that he suspected the drivers were Acosta and Monroy because they were friendly with the specifically implicated ticket agents. No witness testified that Acosta and Monroy were actually proven coconspirators. Acosta and Monroy protested their innocence on the witness stand and claimed they were never confronted by Respondent regarding this matter.

Jose Guzman's testimony regarding his conversation with Ramon Pinado was at times vague and at times confusing. Moreover, his testimony was not corroborated by Ramon Pinado, a driver employed by Respondent at the time of the hearing.[15] Finally, Respondent apparently stated in the discharge interview with Monroy that he was suspended pending investigation and claims to have sent letters to Acosta and Monroy dated December 22, 1994, stating that both were suspended pending investigation.[16] Whether these letters were sent or not, I credit Acosta and Monroy that they did not receive them. There is no claim that Acosta or Monroy was contacted at any time between December 22, 1994, and January 27, 1995, the date they received notice that the investigation was completed and they were discharged. Moreover, the "accusation" was not amended for several months following the discharges. Under these circumstances, Respondent has not rebutted the General Counsel's prima facie case.

5. Apparent authority of Juan Guzman

For the same reasons that I found apparent authority as to Victor Guzman, I similarly find that Rodriguez would have reasonably believed that Juan Guzman had apparent authority on behalf of Respondent to make statements regarding union activity and its ramifications based on his family relationship, his status with Turi-Mex as administrator or general manager (according to Jose Guzman), his direction of the drivers of Respondent, his involvement through Turi-Mex in Respondent's asserted reason for Rodriguez' discharge, and the consistency of his statements and those of Jose Guzman.

6. Prima facie case regarding Rodriguez

As to Rodriguez, I find that counsel for the General Counsel has made a prima facie case of discrimination. Rodriguez distributed union authorization cards on February 17, 1996. Jose Guzman confronted him and told him that what he was doing was wrong and other employees had been fired who tried to bring in a union. Jose Guzman further told Rodriguez that he would face the same fate. I credit Rodriguez' account of this conversation over the denial of Jose Guzman. Later that same day, in Tijuana, Juan Guzman told Rodriguez that he could not distribute authorization cards and would have to face the consequences. On the following day, Juan Guzman told Rodriguez that he and Jose Guzman had discussed the matter and were going to fire Rodriguez for agitating the employees. On February 20, 1996, Rodriguez was fired. This evidence of protected activity, knowledge, and animus warrants an inference the Rodriguez union activity was a motivating factor in the decision to discharge him. The timing of the discharge furnishes further circumstantial evidence of unlawful motivation.

7. Respondent's rebuttal regarding Rodriguez

Respondent's proffered business reason for termination is rudeness to customers and insubordination. Gregorio Guzman testified that he had numerous complaints that Rodriguez was rude to customers and that Rodriguez constantly failed to wait for release of his bus from repairs before leaving to pick up passengers. In the one year that Rodriguez worked for Respondent, Gregorio Guzman estimated he had counseled Rodriguez 15 to 20 times. Even if this were true,[17] such evidence does not rebut the prima facie case of counsel for the General Counsel. Rather, it serves to strengthen the case. Respondent, by its own admission, tolerated Rodriguez' performance with only verbal counseling until Rodriguez engaged in union activity. Suddenly, what he had been doing for an entire year was unacceptable and he was fired. I find that Respondent has failed to rebut the General Counsel's prima facie case by showing that it would have taken the same action for legitimate reasons regardless of Rodriguez' union activity.

CONCLUSIONS OF LAW

1. By interrogating employees concerning their union activities and sympathies; creating the impression among employees that it was engaging in surveillance of their union activities; informing an employee that it did not want "leaders" working for it, that the employee could not engage in union activities at work, that employees who had engaged in such conduct in the past had been terminated, and that the employee would be terminated if he continued to engage in such conduct; informing an employee that engaging in union activities was "not right" and impliedly threatening to retaliate against the employee by stating that the employee would have to "face the consequences" of engaging in such conduct; and by threatening to terminate an employee because he was "agitating" other employees, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By discharging Ruben Acosta (a/k/a Ruben Asael Acosta Mia), Juan Monroy, and Juan Rodriguez, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

[15] Respondent claimed that it was denied due process because Ramon Pinado, the witness whom it claimed directly implicated Acosta and Monroy, had been intimidated and would not testify at this hearing. I refused to allow evidence regarding this alleged intimidation because Respondent did not subpoena Pinado. Accordingly, no due-process deprivation is involved. Cf. *Canadian American Oil Co. v. NLRB,* 82 F.3d 469 (D.C. Cir. 1996). Moreover, according to Jose Guzman's testimony, an attorney working for Turi-Mex informed him "at some point in December of 1994," that discharged ticket agents had implicated Acosta and Monroy. The attorney was not called as a witness. No business records were produced regarding this information. Jose Guzman further testified that Ramon Pinado told him that Pinado became aware of Acosta and Monroy's implication in the theft at an unspecified time when he was asked to pick up passengers from a bus which had broken down while being driven by Acosta. It is unclear whether Jose Guzman's conversation with Pinado took place immediately after the bus breakdown or not. Jose Guzman testified that Pinado, "went directly to my office to tell me the story." In any event, Acosta denied that Pinado had ever picked up his passengers. I credit Acosta.

[16] Neither Acosta nor Monroy received such a letter. Respondent produced a file copy of these letters but did not have receipts for the certified mail.

[17] Rodriguez denied that he had been counseled and no documentary evidence was produced.

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. Specifically, having found that Respondent discriminatorily discharged Ruben Acosta (a/k/a Ruben Asael Acosta Mia), Juan Monroy, and Juan Rodriguez, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The Respondent, Tres Estrellas de Oro, Huntington Park, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees concerning their union activities and sympathies; creating the impression among employees that it was engaging in surveillance of their union activities; informing an employee that it did not want "leaders" working for it, that the employee could not engage in union activities at work, that employees who had engaged in such conduct in the past had been terminated, and that the employee would be terminated if he continued to engage in such conduct; informing an employee that engaging in union activities was "not right" and impliedly threatening to retaliate against the employee by stating that the employee would have to "face the consequences" of engaging in such conduct; and by threatening to terminate an employee because he was "agitating" other employees.

(b) Discharging or otherwise discriminating against any employee for supporting Automotive, Industrial and Allied Workers Local 495, Wholesale Delivery Drivers, Salespersons, Industrial and Allied Workers, Local 848, and Miscellaneous Warehousemen, Drivers and Helpers, Local 986, International Brotherhood of Teamsters, AFL–CIO or any other union.

(c) 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 Ruben Acosta (a/k/a Ruben Asael Acosta Mia), Juan Monroy, and Juan Rodriguez full reinstatement to their former jobs or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Ruben Acosta (a/k/a Ruben Asael Acosta Mia), Juan Monroy, and Juan Rodriguez 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 discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records 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 facilities in Huntington Park, Los Angeles, and San Ysidro, California, copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 29, 1994.

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

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[19] If this Order is enforced by a Judgment of the 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."