Alamo Rent-A-Car *and* Teamsters Local 665, International Brotherhood of Teamsters, AFL–CIO. Cases 20–CA–29022, 20–CA–29132, and 20–CA–29336–1

December 10, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On June 1, 2000, Administrative Law Judge Joan Wieder issued the attached decision. The Respondent filed exceptions and a supporting brief.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.[2]

1. Contrary to our dissenting colleague, we have adopted the judge's finding that the Respondent violated the Act by soliciting employee grievances and impliedly promising to remedy them during a March 1999 employee meeting. Our dissenting colleague has relied too much on the absence of express promises of improvements. We agree with the judge's analysis (in sec. III,A,2 of the attached decision). As discussed therein (1) City Manager Raffio, the Respondent's highest-ranking local official, called this unusual mandatory meeting of unit employees just days after the Union filed its petition to represent them; (2) he asked them, in response to the Union's representation petition, why they were unhappy with their present situation; and, (3) more pointedly, he asked them what complaints they had about working for the Respondent. We agree with the judge that the employees could reasonably infer that the Respondent was soliciting their complaints for the purpose of acting favorably on them in order to blunt the employees' enthusiasm for, or at least perceived need for, the Union. See, e.g., *Maple Grove Health Care Center*, 330 NLRB 775 (2000); *Traction Wholesale Center Co.*, 328 NLRB 1058 (1999), enfd. 216 F.3d 92 (D.C. Cir. 2000); *Burlington Times*, 328 NLRB 750, 751 (1999); *Debber Electric*, 313 NLRB 1094, 1099 (1994); and *Jumbo Produce*, 294 NLRB 998 (1989), enfd. 931 F.2d 887 (4th Cir. 1991). Further, we find nothing in the record to rebut this inference. Cf. *Uarco, Inc.*, 216 NLRB 1 (1974) (inference of promise to correct grievances rebutted where employer repeatedly told employees it could make no promises regarding the grievances raised; also, no showing of union animus and no evidence that employer's preelection activities were conducted in a context of other unfair labor practices).[3]

2. Contrary to our dissenting colleague, we have adopted the judge's finding that the Respondent unlawfully discharged employee Danny Elvena because he appeared as a witness at a hearing in these proceedings. We agree, for the reasons given by the judge, that the Respondent's purported reason for discharging Elvena—Elvena's violating company policy by "lying" (i.e., testifying in detail at the hearing in the instant consolidated cases, after denying any knowledge of the events giving rise to these charges in a sworn declaration sought by the Respondent) was pretextual.

As an initial matter, Elvena's sworn, but knowingly false, declaration does not appear to fall within the Respondent's written policy against lying. The Respondent's rule against "misrepresent[ing] the truth to management" covers "[f]alsif[ication of] records, including but not limited to applications, time cards, petty cash vouchers, rental agreements, imprest account, and invoices," and time and attendance records. Thus, the policy specifically addresses misrepresentations involving

[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.

The Respondent has also excepted to the judge's decision on the basis that it reflects bias and prejudice. Upon our full consideration of the entire record in these proceedings, we find no evidence that the judge prejudged the case or demonstrated bias against the Respondent in her analysis and discussion of the evidence.

Our dissenting colleague would reverse the judge's finding that City Manager Steve Raffio unlawfully threatened employee Ubaldo Reyes with discharge because, in our colleague's view, Raffio did nothing more than attempt to mollify a valued but frustrated employee who had complained about unpaid medical bills. The judge's unfair labor practice finding turned on credibility findings against Raffio and in favor of Reyes' version of events. As noted above, the Respondent has not presented us with any basis for reversing those credibility findings. Moreover, credited testimony reveals that Raffio's effort to resolve Reyes' complaints about medical bills was integral to the Respondent's efforts to dissuade Reyes from supporting the Union. We have no doubt that Reyes got the message from Raffio that he could be discharged if he voted for the Union. In our view, the judge correctly found, in that context, that Reyes reasonably interpreted Raffio's comments as an implied threat of discharge. In fact, the Respondent ultimately did more than threaten to discharge Reyes. It unlawfully reassigned him to guard an empty parking lot and then to work on a different shift that the Respondent knew Reyes was unable to work, thereby constructively discharging him. Accordingly, we adopt the judge's unfair labor practice finding.

[2] We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001).

[3] We note that the judge inadvertently attributed to the *Uarco* majority a passage contained in the *Uarco* dissenting opinion. 216 NLRB at 4.

the Respondent's financial and business records and the like. It does not, on its face, contemplate coverage of employee declarations obtained in anticipation of litigation in which the employee potentially has an adverse interest.

Unquestionably, the circumstances in which Elvena, an employee with a limited education and no mastery of English, found himself when the Respondent solicited his declaration were inherently coercive. The Respondent knew that Elvena had been subpoenaed to testify in these proceedings. The Respondent's opposition to the Union was well known to employees. Early in the union organizing campaign, the Respondent had unlawfully interrogated Elvena about employees' union activities. Then the Respondent and its attorney informed Elvena that they knew he had been subpoenaed to appear as a witness and examined Elvena in detail about what he knew regarding the complaint allegations. In this context, Elvena's reluctance to volunteer information to the Respondent was completely understandable. Elvena apparently was not confident that he could rely on the Respondent's assurances that his cooperation was voluntary and that he could decline to participate without adverse consequence. Rather, knowing that he was being untruthful, Elvena signed a sworn statement that he did not know anything about the complaint allegations. He explained to Maintenance Manager H. Singh that he provided the statement because he "just want[ed] to get the—only job—protection for my security." He feared for his job if he did not.

While we obviously do not condone employee dishonesty, we find here that Elvena's disclaimer of knowledge, recorded in an employer-solicited declaration in conjunction with these unfair labor practice proceedings, was given out of reasonable fear for his job security. Although Elvena was not forthcoming with the Respondent's internal investigation of the complaint allegations, he testified truthfully in these proceedings. His credited testimony provided critical support for the unfair labor practices we find. Accordingly, we find that Section 8(a)(4) protects him from discharge on account of his testimony.

Furthermore, contrary to our dissenting colleague, we agree with the judge that the Respondent failed to establish that it would have discharged Elvena even in the absence of his protected activity. In this regard, our colleague's reliance on *6 West Limited Corp. v. NLRB*, 237 F.3d 767 (7th Cir. 2001), denying enforcement to *6 West Limited Corp.,* 330 NLRB 527 (2000), is misplaced. In *6 West Limited Corp.*, the Board rejected an employer's affirmative defense, asserted under *Wright Line*, that it would have discharged an employee for dishonesty, even in the absence of his union activity. The Board relied, in part, on the fact that the employer did not have a formal policy on giving credible answers in an investigation. As our colleague notes, the Seventh Circuit criticized the Board on this point, emphasizing that "[n]o company needs to have a set procedure for what action it will take when adjudicating every single employee problem." 237 F.3d at 778. We agree and, with due respect to our colleague and the Seventh Circuit, we do not read *6 West Limited Corp.* as establishing any such requirement. Rather, as indicated, in *6 West Limited Corp.,* the Board considered the absence of a formal policy as one piece of evidence, among other evidence, bearing on the employer's affirmative defense under *Wright Line*.[4]

This is surely appropriate. After all, the Board must determine based on all of the record evidence whether the employer has established that it "'*would* have fired' the employee, not merely that 'it *could* have done so.'" 330 NLRB at 528 (quoting *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 31 (D.C. Cir. 1998) (emphasis in original)). The existence or nonexistence of an applicable disciplinary policy is relevant to this inquiry.

We have taken the same approach in this instance. Thus, in affirming the judge's finding that the Respondent failed to prove that it actually would have discharged Elvena for untruthfulness, we do not rely merely on our impression, stated above, that Elvena's false declaration falls outside the Respondent's policy against lying. In addition, we emphasize, as did the judge, that City Manager Raffio's claim that the Respondent discharged employees for lying was undercut by his admission that some employees found to have lied were not discharged; that the judge specifically discredited Raffio's claim that the Respondent would have discharged Elvena; and that Elvena was a 9-year employee with no other alleged infractions. For all of these reasons, we agree with the judge that, while the Respondent lawfully could have discharged Elvena for lying, the Respondent failed to prove that it actually would have done so even absent his protected activity.

Nor are we persuaded by our colleague's contention that our conclusion is inconsistent with the timing of Elvena's discharge, which occurred after he testified in this proceeding in September 1999. It is true, as our colleague points out, that the Respondent knew of Elvena's union activity since February 1999. However, the fact that the Respondent initially tolerated Elvena's union activity does not prove that his ultimate discharge was

[4] In *6 West Limited Corp.,* the Board also relied on statements attributed to the employer's managers and supervisors and the employer's failure to identify the official who allegedly decided to discharge the employee. See 330 NLRB 527, 527–528.

unrelated to such activity. Cf. *NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62, 66 (2d Cir. 1992) (employer's general indifference to union activity did not preclude a finding that it discriminated against an employee on a particular occasion). Indeed, the timing of Elvena's discharge, coming on the heels of his giving testimony damaging to the Respondent's interests, supports the judge's finding of illegal motivation. See *NLRB v. Main Street Terrace Care Center*, 218 F.3d 531, 542 (6th Cir. 2000) (evidence that employer had tolerated employee's protected concerted activity in the past did not undercut Board's finding that employee ultimately was fired for actual "union" activity, which could have been viewed by employer "as more threatening").

ORDER

The National Labor Relations Board orders that the Respondent, Alamo Rent-A-Car, Burlingame, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union activities; soliciting grievances from employees and thereby impliedly offering to remedy those grievances; impliedly threatening to discharge employees if they voted for the Union in a Board-conducted election; directing employees not to talk to other employees while on the clock because the employees had been engaging in union activity; informing employees Respondent gave them certain work assignments at remote locations to isolate them from other employees because these employees had engaged in union activity; threatening employees that those employees who supported the Union would be fired or would have to find another job; telling employees that certain employees would not be assigned to drive the shuttle bus because Respondent did not want them to talk to other employees about the Union; and granting wage increases to its employees in order to discourage them from supporting the Union.

(b) Reassigning, issuing disciplinary warnings, suspending and discharging its employees because they engage in protected concerted activities.

(c) Suspending and discharging employees because they have given an affidavit and testified in a Board proceeding.

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

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

(a) Within 14 days from the date of this order, offer Michael Paulo, Ubaldo Reyes, and Danny Elvena immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Michael Paulo, Ubaldo Reyes, and Danny Elvena whole for any loss of earning and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any references to their unlawful disciplines of Michael Paulo, Ubaldo Reyes, and Danny Elvena, and within 3 days thereafter notify them in writing that this has been done and that such unlawful disciplines will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Regional Director, post at its San Francisco Airport and Burlingame, California offices copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained by it for 60 consecutive days thereafter 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 other material. In the event that, during the pendancy of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since February 25, 1999.

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

MEMBER HURTGEN, dissenting in part.

I join my colleagues, except as set forth below.

1. The judge found that the Respondent violated the Act by soliciting employee grievances and impliedly

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

promising to remedy them during a March 1999 employee meeting. I disagree.

The relevant facts are these. Following the filing of a representation petition, the Respondent met with its employees to express its opposition to unionization. During the meeting, Respondent's city manager, Steve Raffio, asked employees what they disliked about working at Alamo. He did not promise to rectify employees' grievances. Raffio also asked employees to state what they liked about working for Alamo. He recorded their responses on a display board. He did not promise to grant additional benefits or threaten to take away existing benefits based on employees' views for or against union representation. Then, referring to the list on the display board, Raffio told the employees to remember that "with the union you don't know what you're getting, with Alamo you know what you've got."[1]

The judge found that, by soliciting employee grievances and then soliciting and recording employee "likes" on a display board, the Respondent impliedly promised to remedy the grievances. The judge analogized Raffio's conduct to "the vice inherent in the conferral of benefits." She inferred from Raffio's inquiry into employee likes and dislikes, coupled with his reminding employees that "you know what you've got" at Alamo, that employees would have understood Raffio to be reminding employees that their benefits exist by the largesse of Respondent, and warning them that an implied promise of benefit—i.e., the promise to remedy employees' grievances—was tied to the discontinuance of employee support for the Union. Having thus found that the Respondent created a "nexus" between the solicited grievances, the benefits granted, and the employees' rejection of the Union, the judge found that the Respondent violated Section 8(a)(1).

In my view, the judge has read far more into Raffio's dialogue with employees than can fairly be attributed to it, and has inferred coercion where employees would not reasonably have perceived it. I do not believe that Raffio solicited employees' grievances or promised to correct same. Rather, he asked employees what they liked and what they disliked. In essence, he was charting employee satisfaction and dissatisfaction with working conditions. He was not promising to change anything. To the contrary, he was suggesting that the status quo would remain. ("With Alamo, you know what you've got.") Concededly, he *did* suggest that things could change with a union. ("With the union, you don't know what you're getting.") But, this is a legal truism—collective bargaining can yield improvements or detriments or no change at all.

Absent an accompanying threat or promise of benefit, the Respondent was privileged, by Section 8(c) of the Act, to express its views about the Union.[2] It made no promise to remedy grievances, nor did it imply that it would do so by inquiring about employee likes and dislikes. At most, Raffio exhorted employees to consider the full range of their job-related likes and dislikes when deciding whether to choose union representation. The connection between Raffio's conduct and the inferences drawn by the judge are simply too speculative and attenuated to warrant an unfair labor practice finding.

Accordingly, I would reverse the judge's unfair labor practice finding.

2. I would not find that the Respondent, by City Manager Steve Raffio, impliedly threatened to discharge employee Ubaldo Reyes during a meeting between Reyes, Raffio, Assistant City Manager Nedic, and Maintenance Manager H. Singh in late March or early April.

In late March, Reyes complained by e-mail to various managers and supervisors about Respondent's alleged failure to pay medical bills and about what he viewed as harassment of Reyes by H. Singh and Administrative Manager J. Singh. Reyes informed the e-mail addressees that he was going to vote for the Union because of these conditions. During a meeting held to discuss Reyes' complaints, the Respondent attempted to mollify Reyes and persuade him not to support the Union. Raffio asked Reyes what the Respondent could do to make Reyes "happy." He told Reyes "you are a good worker and we don't want to lose you." My colleagues affirm the judge's finding that the latter comment constituted a threat that Reyes would be fired if he supported the Union.

I find no threat of discharge in Raffio's comment. Reyes initiated the meeting by seeking resolution of problems he was experiencing with respect to payment of medical bills, and to put an end to what he considered harassment. Raffio responded positively to these concerns expressed by "good worker" Reyes, whose services the Respondent was fearful of losing because of these concerns. It is clear from the context that Respondent was seeking to *retain* Reyes, not threatening to fire him. Respondent asked Reyes what it could do to make him

[1] As discussed infra, the judge has characterized this latter remark as a "threat of the possible loss of benefits."

[2] Sec. 8(c) provides:

> The expressing of any views, argument, or opinion or the dissemination thereof, whether in written, printed, graphic, or whether in written, printed, graphic, or visual form, shall not constitute or be evidence on an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

"happy," and then immediately said, "You are a good worker we don't want to lose you." Plainly, Respondent was telling Reyes that it wanted to retain him, and would consider making changes to accomplish that goal. The fact that Reyes initially identified his grievances as the source of his intention to support union representation does not change the nature of Raffio's expression—one of desire to eliminate Reyes' discontent and, thus, retain Reyes in the Respondent's employ. Accordingly, I would reverse the judge's unfair labor practice finding.

3. I would also reverse the judge's finding that the Respondent unlawfully discharged employee Danny Elvena because he gave an affidavit in this proceeding. As set forth in detail in the judge's decision, the Respondent interviewed Elvena during its investigation of the charges in this case. Elvena sought the advice of Maintenance Manager H. Singh in conjunction with Elvena's receipt of a subpoena to appear in this proceeding. H. Singh notified the Respondent's attorney, Neely, that Elvena had been subpoenaed. The Respondent initiated meetings with Elvena as a result of this information and ultimately obtained from him a sworn statement. In that statement, Elvena denied any knowledge of the matters alleged in the unfair labor practice complaint. During its meetings with Elvena, and again before Elvena signed and swore to the truth of his statement, the Respondent assured Elvena that his participation was voluntary and that Elvena could decline to participate without suffering adverse consequences.

Elvena's prehearing affidavit and his testimony at the hearing in this case differed from the sworn statement earlier provided to the Respondent. Elvena admitted that the sworn statement that he provided to the Respondent was false, and that he did not inform the Respondent about the falsity. Elvena never indicated that he lacked understanding of the statement that he signed. After Elvena's testimony at the instant hearing, the Respondent suspended him and then fired him for lying.

The General Counsel asserts that Respondent discharged Elvena because of his testimony. However, it was that testimony which revealed that Elvena had previously lied to Respondent.

The General Counsel then asserts that the lie was not in contravention of Respondent's policies. However, the Respondent's policy states that it is unacceptable for an employee to "misrepresent the truth to management." Concededly, the policy mentions only the falsification of records. However, even assuming arguendo that falsity in an affidavit is not a falsification of a record, the fact is that lying to one's employer is not protected activity.

In addition, even if Respondent had no policy dealing specifically with lying in an affidavit, it is clear that Respondent would nonetheless act lawfully by discharging Elvena. In *6 West Limited Corp.*, 330 NLRB 527 (2000), enf. Denied sub nom. *6 West Ltd. Corp. v. NLRB*, 237 F.3d 767 (7th Cir. 2001), my colleagues, over my dissent, held that the employer unlawfully discharged an employee who had lied. My colleagues relied heavily on the fact that the employer had no explicit policy on lying. The Court of Appeals for the Seventh Circuit strongly disagreed. The court said (id. at 778):

> The Board's reliance on the absence of any formal policy requiring honesty is not only misplaced legally, but divorced from the real world, and an example of skewed and position-oriented decision-making without the application of logical reasoning and common sense.

The court also said that "an employer is entitled to expect and require truthfulness and accuracy from its employees," and that it is "obvious" that companies must be able to discharge "an untruthful employee."

My colleagues suggest that the court in *6 Limited Corp.* misread the Board's opinion in that case. They say that the absence of an employer policy against lying is only *a* factor to be weighed in connection with the employer's defense. I do not think that the court misread the Board's opinion.[3] Further, as the court observed, it is "obvious" that an employer, even without a policy, must be able to discharge "an untruthful employee".

My colleagues also argue that the Respondent has refrained from firing other employees who lied in the past. However, this does not establish that Elvena was fired for union activity. Respondent knew of Elvena's union activity since February 1999; it was not until Elvena's lie was revealed at trial in September 1999, that he was discharged. Thus, the lie, and not the union activity, caused the discharge. In addition, as to timing, my colleagues concede that the discharge of Elvena came "on the heels of his giving testimony." They ignore the fact that the testimony was the event, which revealed the falsity of Elvena's affidavit. Further, there is no showing of discriminatory treatment. That is, there is no showing that nonunion liars are immune from discharge while union liars are discharged. In short, Elvena was fired for lying, and the General Counsel has not established the contrary.

Finally, my colleagues suggest that Elvena lied in response to coercive questioning. However, the General Counsel does not even allege that the questioning was unlawful. Thus, there is no basis on which to conclude that the questioning was coercive.

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[3] See my dissenting opinion in *6 West Limited Corp.*, 330 NLRB, supra at 530.

Accordingly, I find that the Respondent lawfully discharged Elvena for lying.

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 we have been ordered to post 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.

Accordingly, we give you these assurances:

WE WILL NOT interrogate employees about their union activities; solicit grievances from employees and thereby impliedly promise to remedy the grievances; impliedly threaten to discharge employees if they vote for the Union in a Board-conducted election; direct employees not to talk to other employees while on the clock because the employees had been engaging in union activity; inform employees Respondent gave them certain work assignments at remote locations to isolate them from other employees because these employees had engaged in union activity; threaten employees that those employees who supported the Union would be fired or would have to find another job; tell employees that certain employees would not be assigned to drive the shuttle bus because Respondent did not want them to talk to other employees about the Union; and, grant wage increases to employees in order to discourage them from supporting the Union.

WE WILL NOT unlawfully and disparately: assign employees to oversee primarily empty parking lots to harass them and isolate them from their fellow employees; issue disciplinary warnings; constructively discharge employees; suspend and discharge Michael Paulo and Ubaldo Reyes and Danny Elvena because they assisted the Union and engaged in union and other protected concerted activities.

WE WILL NOT unlawfully and disparately suspend and discharge employees because they have given an affidavit and testified in a Board proceeding.

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

WE WILL, within 14 days from the date of this Order, offer Michael Paulo, Ubaldo Reyes, and Danny Elvena immediate and 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 Michael Paulo, Ubaldo Reyes, and Danny Elvena whole for their loss of earning and other benefits resulting from their suspensions and 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 reassignments, disciplinary warnings, suspensions and terminations of Michael Paulo, Ubaldo Reyes, and Danny Elvena, and WE WILL, within 3 days thereafter, notify each of them that we have removed from our files any reference to their unlawful disciplines and discharges and their unlawful disciplines and discharges will not be used against them in any way.

ALAMO RENT-A-CAR

Jonathan J. Seagle, Esq., for the General Counsel.
Robert L. Murphy, Esq. (Stokes & Murphy, P.C.), of San Diego, California, and *Locke Neely, Esq. (Stokes & Murphy, P.C.)*, of Dallas, Texas, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOAN WIEDER, Administrative Law Judge. This case was tried on September 28 and 29, 1999,[1] and February 1, 2000, at San Francisco, California. The charge in Case 20–CA–29022 was filed by Teamsters Local 665, International Brotherhood of Teamsters, AFL–CIO (Charging Party or Union) on March 25, the first amended charge in this case was filed by the Union on May 25; the initial charge in Case 20–CA–29132 was filed by the Union on May 18, and the second amended charge was filed by the Union on September 23, against Alamo Rent-a Car (Respondent). After the close of the proceeding involving Cases 20–CA–29022 and 20–CA–29132, General Counsel filed a motion to reopen the record and consolidate cases. This motion was based on a charge filed by the Union in Case 20–CA–29336–1 on October 1, and amended on November 30. After considering Respondent's objections to the motion to reopen the record and consolidate cases, I granted General Counsel's motion on December 15.

The consolidated complaints, as amended, allege Respondent violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act (Act). Principally, the consolidated complaints, as amended, claim Respondent violated Section 8(a)(1) of the Act by: interrogating employees about their union activities; soliciting grievances from employees and thereby impliedly offering to remedy those grievances; impliedly threatening to discharge employees if they voted for the Union in a Board-

[1] All dates are in 1999 unless otherwise indicated.

conducted election; directing employees not to talk to other employees while on the clock because the employees had been engaging in union activity; giving its employees the impression their union activities were under surveillance by Respondent; informing employees Respondent gave them certain work assignments at remote locations to isolate them from other employees because these employees had engaged in union activity; threatening employees that those employees who supported the Union would be fired or would have to find another job; telling employees that certain employees would not be assigned to drive the shuttle bus because Respondent did not want them to talk to other employees about the Union; and, in April Respondent granted wage increases to its employees working at its San Francisco International Airport (SFO) and Burlingame, California locations in order to discourage these employees from supporting the Union.

The consolidated complaint alleges Respondent violated Section 8(a)(3) and (1) of the Act by: assigning employees Michael Paulo and Ubaldo Reyes to oversee empty parking lots to harass them and isolate them from their fellow employees; on or about April 21, Respondent sent Paulo home prior to the end of his scheduled shift; thereafter, Respondent gave Paulo a written warning for being absent on April 21, without giving Respondent proper notice; on or about April 26 assigning Reyes to work the a.m. shift beginning May 11; thereby constructively discharging Reyes; on May 11, suspending Paulo for 3 days; on May 18, discharging Paulo; because Paulo and Reyes assisted the Union and engaged in union and other protected concerted activities, and to discourage employees from engaging in these activities. The complaint in Case 20–CA–29336–1 alleges Respondent violated Section 8(a)(4), (3), and (1) of the Act by: suspending employee Danny Elvena on or about September 30, and on or about October 7 terminating Elvena because he engaged in concerted protected activity and gave testimony in this proceeding, which testimony differed from a declaration Respondent requested him to give voluntarily.

Respondent's timely filed answers to the consolidated complaints, admit certain allegations, deny others, and deny any wrongdoing. Respondent also asserted the following affirmative defenses: the complaints failed to state a claim on which relief may be granted; the unfair labor practice charges fail to state a claim on which relief may be granted; Respondent's actions were based on legitimate business reasons; the Board, by Region 20, failed to fully investigate the charges; Respondent's supervisors lack authority to make unauthorized statements in violation of the Act; and, any actions or statements by any supervisor or agent that violated the Act were beyond the scope of their employment. I find these affirmative defenses lack merit based on the following findings and conclusions.

All parties were given full opportunity to appear and introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs.

Based on the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs, I make the following[2]

FINDINGS OF FACT

I. JURISDICTION

Based on the Respondent's answers to the consolidated complaints, as amended, I find Respondent meets one of the Board's jurisdictional standards and the Union is a statutory labor organization.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent is a Florida corporation with an office and place of business in various locations in the State of California. It is engaged in the business of renting vehicles to the general public 24 hours a day, 7 days a week. The facilities in this proceeding are located at and/or near San Francisco Airport (SFO). Respondent admits the following individuals are supervisors and agents under Section 2(11) and (13) of the Act, respectively: Anthony Juliano, vice president for the Western Division of Respondent, Steve Raffio, city manager; Vladimer Nedic, assistant city manager; Henry Singh, maintenance manager; Julie Singh, administrative manager; and Jimmy O'Connor, production manager.

Respondent's operation at SFO and Burlingame, California, includes facilities located within a few miles of the airport.[3] Respondent was purchased by Republic Industries Corporation, which owns National Car Rental. There is no evidence in this record that the operations of Respondent and National Car Rental were merged at SFO. All or most car rental operations of car rental operators at or near SFO relocated to the airport on or about January 1, 1999.

Until December 1998, the primary facility for Respondent at SFO was located on Burlway Road in Burlingame, California, between 1/2 and 3/4 miles south of SFO. Respondent shuttled clients to and from the airport using buses and vans. The San Francisco Airport Authority decided in December 1998 to relocate all the rental car facilities to a location about 1/2 mile north of SFO. Respondent relocated to a new facility located on McDonald Road. Respondent continued some operations at the Burlway Road location. As a result of this relocation, the need for bus drivers greatly diminished. Another company provided shuttle service to the rental car agencies' facilities and Respondent's drivers were offered the opportunity to transfer to this new company, which was not affiliated with Respondent.

In January, the Union initiated an organizing drive among Respondent's SFO employees. On or about February 25, the Union filed a representation petition in Case 20–RC–1750, seeking to represent a unit of employees including full-time and regular part-time service agents, service agent lead persons, shuttlers, PDI/fleet control employees, RDL/best friend em-

[2] I specifically discredit any testimony inconsistent with my findings.

[3] The Union sought to represent Respondent's employees in the proposed unit at the SFO facility, the Burlingame facility and two locations in downtown San Francisco.

ployees and PSR/best friend employees, excluding all other employees, guards, and supervisors as defined in the Act.[4] Gate guards are a subcategory of the service agent classification.[5] H. Singh admitted his supervisor informed him of the filing of the representation petition shortly after February 25.

For approximately 2 months prior to filing the representation petition, the Union engaged in an organizing drive at Respondent's SFO location, obtaining sufficient showing of support for union representation. An election was held on 2 days in early March, which resulted in the issuance of a Decision and Direction of Election in Case 20–RC–17501 on March 25. Respondent filed a Petition for Review of the Decision and Determination of Election on April 7. Review was granted by the Board on April 22. An election was conducted on April 23 among the unit employees. The results of the election have not yet been announced, the ballots are impounded.

B. Alleged Violations of Section 8(a)(1), (3), and (4) of the Act

1. Elvena's conversation with Raffio

Danny Elvena has worked for Respondent since 1990, and for the last 9 years worked as a service agent. He testified on September 28, pursuant to a subpoena, that in February he had a conversation with Raffio at the car wash facility in Burlingame. Elvena testified:

> He [Raffio] approached me and he asked me if I hear about the union, and I say yes, and he asked me if I join on it, and I said, I don't said nothing on it. And he told me, he said, you know, I think you join the union, and I said, he told me, you lie, and I said, if you believe me on it, you know.[6]

Elvena distributed between 10 and 15 union authorization cards during the organizing campaign. He signed a union authorization card in February, and he attended meetings with union officials concerning the organizing effort. At the time he gave this testimony Elvena was an employee of Respondent.

Raffio acknowledged he knew the representation petition was filed by the Union on or about February 25. Raffio conceded he approached Elvena in February and "admitted he asked him if he knew why the union—if he knew anything at all about why the union—why there was union activity at the San Francisco facility?" Raffio explained his action was based on the fact he has known Elvena since 1989 when they were both working for Respondent in Tampa, Florida, and had always liked Elvena. Raffio claims he said: "I heard all this buzz going around about this, there's talk about it, I could feel some tension on the property, you know, what's going on with this thing, is this here or what, you know. I wasn't really sure what was going on so I figured I'd ask him." Elvena replied, according to Raffio, that: "He doesn't know anything about it, he's not for it, he just wants to do his job." Raffio denied saying he thought Elvena supported the union or that he thought he was lying when he claimed he did not support the union.

Raffio admitted knowing about the union representation petition in February and communicated Respondent's position to the employees: "Alamo wished to remain union free." Raffio asserts the employees who were in the proposed unit were given various materials by Respondent concerning their rights under the Act.[7] This was the first union organizing campaign Raffio experienced. Respondent, by Raffio and others, also asserts it managers received training learning:

> You couldn't spy, you couldn't interrogate employees as to their affiliation. You couldn't threaten employees with loss of wages, benefits or their position because of their affiliation. You couldn't promise wage enhancements or favorable work schedule or a myriad of things in order to gain their vote.

Elvena appeared earnest and direct while testifying. While he apparently had language difficulties on occasion, he gave the impression he was trying to testify truthfully. Based on these observations, I find Elvena is a credible witness. Consequently, I conclude Raffio made the statements Elvena recalled.

2. The March employee meeting

Alamo held an employee meeting in early March at the airport. Approximately 60 employees attended and Raffio was the principal spokesperson for Respondent. During the meeting, Raffio asked the employees why they wanted to join a union, that Respondent was worried the employees were not supporting the company. The employees were also informed that if they joined the union they would have to pay dues. When asked if Raffio said anything about complaints, Elvena replied: "Well, it's some of it there because of the hearing people were complaining about, you know, harassing people and wouldn't work

[4] The exact duties of these employees are described in the Decision and Direction of Election, Emp. Exh. 5.

[5] It was determined in the Decision and Direction of Election:

> The gate guards are a subcategory of the service agent classification. The gate guards work at the exit gatehouse and use a hand-held computer to log in the [vehicles] leaving SFO. They are responsible for ensuring that the cars are in the custody of the person to whom the car has been rented. Other employees have at times worked as gate guards, including regular service agents, RDL's and PSR's. The gate guards wear the same uniform as the RDL's and PSR's. Service Agent Danny Elvena testified that he had worked as a gate guard about twice a month. The record does not disclose the number of regular gate guards or how frequently other non-gate guard employees other than Elvena had worked as gate guards. Elvena testified the only training given to him for the gate guard position concerned how to punch in numbers on a computer. Neither party contends that the gate guards are statutory guards under the Act who should be excluded from the unit.

[6] Elvena said he understood this comment to convey Raffio thought he was a union supporter.

[7] Raffio claims the affected employees were informed:

> They had a freedom of choice, they had the right of secrecy as far as their affiliation, whether pro-Alamo or pro-Teamsters. They have a right to be free from harassment and any kind of surveillance by members of Alamo management.

Respondent failed to proffer any documents containing such information and failed to present any employee witnesses who received this information. I do not credit Raffio's testimony based on his less than forthright manner, except where it is an admission against Respondent's interests or is credibly corroborated. I also note Raffio seemed to be volunteering information, appeared to be tailoring his testimony to fit Respondent's litigation plan, engaged in surmise, and gave contradictory evidence.

hard, you know, that's what it is. "Elvena could not recall if Raffio or any other supervisor promised to correct any of the problems raised by the employees during the meeting. Elvena then was given his affidavit dated April 7, to refresh his recollection. After reading his affidavit, Elvena said, "[T]hat's honest words in there."

Elvena's affidavit provides:

> Sometime in early March, 1999, I attended a meeting along with about 60 other day shift employees. . . . The meeting was all about soliciting employee complaints. Raffio did most of the talking. He asked us why we were unhappy, why we wanted to join the Union, and what complaints we had about working for the company. The employees who spoke up complained about the number of supervisors we have to deal with and all the yelling and harassment they engage in to make us work harder.
>
> Raffio never offered to stop the harassment and yelling, however. He did not offer any other benefits. The only other thing I can recall from the meeting is that Raffio told us it wasn't a good idea to join the Union because we would have to pay dues.

Respondent claims Raffio's comments during the employee meetings were derivatives of Respondent's open-door policy and team leader meetings.[8] Respondent avers as part of these policies it has a commitment to attempt to resolve problems raised during team leader meetings and by employees availing themselves of the open-door policy. Respondent also advised employees during these meetings that it could not solve every problem. Raffio testified Respondent held three employee meetings between February and April. He denies suggesting Alamo would remedy any problems raised by employees in order to encourage them to vote against the Union. He also denied suggesting to the employees attending the meetings that Respondent would solve problems and it would thus be futile to vote for the Union.

Raffio claims at most 30 employees attended. At the conclusion of his testimony, Raffio stated:

> We discussed—I had a grease board and on the grease board—I asked the people in attendance what do you like about Alamo, what's good about this company, and then they would say, well, we like flexible work schedules, they would say, we work around our other jobs a lot, I'd write that down, you know. They'd say you allow us to go back home, to the Philippines, or wherever their homeland is, we usually allow them, especially in the off season, to go home for extended periods of time, three or four weeks sometimes, so I'd write down the list of things that they liked about the company. And I said, well, I just want you to remember, this is what you got, you know what you've got at Alamo.
>
> Q. Did you tell them that they would lose all that if they voted for the union?
>
> A. No, absolutely not. I told them that with the union you don't know what you're getting, with Alamo you know what you've got.

I credit Raffio's statement indicating Respondent is flexible in scheduling its employees who have second jobs to permit them to continue to hold both jobs is an admission against Respondent's interests.

3. Wage increase

As noted above, the representation election was held April 23. Also in April, Respondent implemented a wage increase for many of the proposed unit members. Henry Singh informed Paulo in mid-April that he would receive a wage increase. According to Paulo, H. Singh he said, "[H]ey, you might get an increase too, why don't you go talk to Steve Raffio, he got a pretty good raise, it might change your mind about the union." Paulo did receive a wage increase that was reflected in the paycheck he received the same week as the representation election.

H. Singh denied telling Paulo, concerning the April wage increase, that he hoped the increase would change his mind about the Union. Raffio asserted the April wage increase was not granted to employees for the purpose of discouraging union activity or encourage support of the Company in the representation election. H. Singh admitted there were two wage surveys and wage increases. When asked if all the employees eligible to vote in the representation election received raises, he replied, "I don't believe 100 percent" and that many who were not eligible to vote also received raises. According to Joe Penna, the classification eligible to vote in the representation election that received wage increases in April were service agents and best friends, which was admittedly a high percentage of the voting group.[9] H. Singh's attempt to minimize the impact of the wage increase adversely affects his credibility because it demonstrates he tried to tailor his testimony to fit Respondent's litigation theories and that he was not trying to respond clearly and accurately. Moreover, he did not testify in an open and direct manner.

Raffio claims Respondent does a wage rate survey about every quarter to remain competitive in the market place. The timing of these surveys vary, based on operational circumstances, such as moving into SFO, a location which put Respondent side by side with its competition. Moreover, Respondent affiliated with National Rent-a-Car in January. Raffio was responsible for conducting the survey. He believes he instituted the survey process in mid-December 1998 and concluded the

[8] Raffio testified Respondent has team leader meetings with various hourly employees. The head office sends the team leader a topic monthly, which is a subject of discussion at these meetings. The discussion between the team leader and the attending hourly employees is not limited to the specified topic. There is no evidence employee grievances are solicited during these team meetings. There is no evidence regarding who conducts these meetings, which employees attend, whether attendance is mandatory, and how many employees attend. Raffio described the open-door policy as follows:

> The open-door policy is one in which any hourly employee—actually, I should change that to any employee whatsoever has the right to go up the chain of command and then the grievance that they have, or problem or complaint, and that they will not be refrained from speaking out. So, you can also, if you wish to, you can even skip the chain of command if you wanted to.

[9] Joe Penna is a manager working in Respondent's human resources department.

fact finding about mid-January. The survey included only the geographical radius of the SFO car rental agencies.

After attempting to determine the wages paid by its competition, Raffio presented the information to Penna for his review and approval. Penna then forwarded the material to Juliano for his review and recommendations. Juliano then passed on the final recommendation to corporate headquarters in Fort Lauderdale, Florida. Raffio received corporate approval of the proposed wage increases in "[t]he last week in May, first few days of April, somewhere around there. First few days of April I think."

According to Raffio, it took about 2 weeks for implementation after receiving corporate approval.

Assistant City Manager Nedic corroborated Raffio as follows:

> I believe the first time we talked about it was some time in November or December of 1998, as we knew we were going to move the operations of the city to a new car rental facility. We knew that all companies, all rental car companies would be together in the same building, and it was necessary for us to remain competitive. In order to remain competitive, it was necessary for us to, you know, to check the wages of what the other companies were paying their employees.

Nedic also testified wages are surveyed every 2 to 3 years, not quarterly as Raffio claimed. He recalls all the data had been collected by early March. He passed the survey to Juliano, they passed the information back and forth a few times making revisions from early to mid-March. Then their final proposal was forwarded to Juliano's superiors. According to Nedic, this proposal was approved without changes in late March and implemented in mid-May. Nedic also denied the purpose of the wage increases was to persuade people concerning the union representation election. The increase was actually implemented the same week as the union representation election.

4. Events involving Paulo

Paulo was employed by Respondent in July 1992. He became a product service representative in the early spring of 1998. Paulo initially contacted and personally met Rich Rodriguez of the Union about January. Paulo met Rodriguez while applying for a job with a shuttle bus company that operates at SFO. Paulo indicated to Rodriguez some Alamo employees were contemplating unionizing. Subsequently, Paulo met with Rodriguez about 1 month later concerning organizing employees at Respondent. Paulo informed Rodriguez and another union official the employees already had a few representation cards signed and were trying to obtain more to support a representation petition.[10] Paulo circulated between 25 and 30 cards to Alamo employees, most of whom returned them signed. Paulo also executed an authorization card. Paulo wore a union button at work that was observed by H. Singh. H. Singh testified, "I think a day or two before the vote, I had seen him in his jacket with a lot of Teamsters buttons, that's the only time I saw him." Paulo was also a union observer at the election.

[10] The petition was filed February 25.

I find, based on demeanor, H. Singh was not a believable witness. He did not appear to be giving candid and forthright answers without regard to Respondent's litigation position. Supporting this conclusion, I noted at times he engaged in surmise, volunteered information, and, occasionally he demonstrated poor recall. I also note H. Singh engaged in hyperbole, avoided answering some questions on cross-examination, and appeared to be tailoring his testimony to fit Respondent's litigation theories.[11] When H. Singh was asked if Paulo's wearing the jacket and union buttons led him to conclude Paulo was a union supporter, H. Singh testified:

> Q. And was that the first time that you believe that he was supporting the union, when you saw him wearing the buttons?
> A. Well, I didn't have all the details, what he was doing but that's the only time I had seen the Teamsters buttons on him.
> Q. But, when you saw him wearing the Teamsters buttons, did that indicate to you that he was in fact supporting the Teamsters?
> A. I would say for how long I've known him, maybe a yes and a no, because I've known him for years.
> Q. When you saw the buttons, did that convince you that he was supporting the Teamsters or were you still doubtful about that?
> A. I wasn't sure.
> Q. Were you ever aware that Michael Paulo had been the union observer at the NLRB election?
> A. No, until I saw him on Friday.
> Q. On Friday?
> A. On the voting day.
> Q. When you saw him on Friday, was he wearing an observer button?
> A. I did not see the button, no.

Near the close of his testimony of cross-examination, H. Singh testified:

> Q. Did seeing him with the union officers lead you to believe that he was supporting the union?
> A. If he was the observer, I guess, yeah.

[11] For example, he gave a list of reasons why Paulo was assigned to guard Lot 1, but admitted he had no first-hand knowledge and did not participate in the decision. While Raffio stated only he saw a suspicious individual at the lot and Marriott Hotel managers said they saw some youths outside the gate, one of whom was trying to climb the fence, H. Singh testified:

> If I'm not wrong, Mr. Raffio had said about he got a call regarding somebody from Marriott, some security issues in Lot 1, the windows and doors were broken in that lot, people had broken it, some homeless people, if I'm not wrong. We were in the process of repairing that building, there were some other projects going on regarding moving the body shop department out there. We also had brought some Jeep Wranglers from Hawaii. I remember one day I was out there with Mike writing manifest, sending the cars out, some people were buying these cars. So, there was some business activities going on, I was there with Michael a couple of times, driving cars up, looking at the cars or getting numbers.

Q. That is did you know that he was the observer at the election or did you not know?

A. I think I knew that, yeah, because if I'm not—Steve had mentioned that Michael is the observer for the union, because they had a meeting in the morning I guess.

Q. And did the fact that you knew that Michael Paulo had been the union observer, did that indicate to you that he was a supporter of the union?

A. I would say yes.

I find this testimony demonstrative of H. Singh's lack of candor. Based on the factors stated above, I find H. Singh's testimony is credible only when convincingly corroborated or constitutes an admission against Respondent's interests. I conclude the evidence clearly demonstrates Paulo was active in the union organizing campaign. I further find H. Singh's admission he knew Paulo was a union supporter, an admission Respondent had knowledge of at least some of Paulo's union activities. The following representatives of Respondent saw Paulo working as an observer; Penna, Raffio, Juliano, another manager from Republic Industries, whose name Paulo forgot, an attorney for Alamo whose last name is Stokes, and Nedic.

a. Paulo's reassignment

Paulo, a long-term employee was hired by H. Singh, who was always Paulo's direct supervisor, remained a customer service representative until about February 16, when H. Singh informed him "that they had a new position opened for me, starting that day." Immediately after this conversation Paulo spoke with both Raffio and H. Singh. During this conversation, Raffio told Paulo

> [t]hat a couple of nights prior to that day somebody had informed him that a person or persons were trying to break into one of our lots, which is Lot 1 in 1755 Old Bayshore Road, in front of the Marriott Hotel. He said that they're expecting Jeep Wranglers coming from Hawaii, and they will use that lot to store the Wranglers, and for that reason they needed security for that lot and I was the lucky one.

Raffio corroborated Paulo's testimony, supporting the accuracy of Paulo's recall. Raffio testified he regularly drove past lot 1 on his way home and noticed a suspicious acting individual by the gate to the lot. When he turned his car around and approached the individual, "they ran away." About 1 week to 10 days later, the managers at the Marriott Hotel informed him "some kids were running around there," one of whom tried to scale the fence. Raffio claims Respondent had some buses stored there from time to time. There was no claim the buses were stored there at the time Paulo and/or Reyes were assigned to guard lot 1. Raffio failed to claim, contrary to H. Singh's testimony, that equipment was stored in the building on lot 1. Respondent also failed to explain why only two guards, sequentially, not at the same time, Paulo and Reyes had been assigned to lot 1, why there was no day-shift guard or guards for both the swing and evening shifts.

Paulo started his guard assignment the same day. This was the first time in Paulo's employment with Respondent that he was assigned as a guard. Paulo knew of no other instance when a product service representative had been assigned to guard a lot as distinguishable from the previously described gate guards. Paulo worked his regular hours, 5:30 p.m. to 2 a.m. Respondent did not clearly and convincingly refute this testimony. Paulo described lot 1 as completely devoid of vehicles and contained a building that was empty and locked.[12] About 2 days after his assignment to lot 1, between 35–40 Jeep Wranglers were brought to the lot. The Jeeps were then picked up and the lot was again empty. The assignment to lot 1 lasted 1 month.[13] On some days during this assignment there were no vehicles on lot 1.

Lot 1 was about 1 mile north of Respondent's Burlway Road facility. During this assignment, Paulo did not have contact with any other employees, in contrast to his experience as a product service representative, where he had daily contact with co-workers. Paulo would return to base at lunchtime to get his food. H. Singh would visit him at lot 1 about twice a week. There were no accessible toilet facilities at lot 1. Reyes understood there were toilet facilities in the building but Paulo and Reyes were not given access to the building. Paulo discussed the lack of facilities with H. Singh several times including H. Singh's first visit to Paulo at lot 1. H. Singh instructed Paulo "not to go back to the base, you know, not to go back to the base at all, just stay in the lot." H. Singh also instructed Paulo not to sit in the car but remain outside the vehicle. The following day H. Singh instructed Paulo to "keep my eyes opened and don't fall asleep." When Paulo needed to urinate, he did so against the side of the building.[14]

When Paulo asked what he should do to meet his personal needs, he testified H. Singh replied, "[W]ell, that's not your problem—that's not my problem, that's yours." Paulo did go to the McDonald Road facility of Respondent on or about March 7, to get his paycheck. J. Singh spoke to him, and according to Paulo:

> She questioned my presence there. She asked me if anybody knew that I was there. And I told her no, because there was nobody around where I was at to ask permission, and I didn't know that I was supposed to ask permission to go there and pick up my check. Then she said, well, next time, call me and I'll send your paycheck to you wherever—or I'll ask somebody to give you your paycheck wherever you are. And I asked her why. Then she said, well, we don't—I'm sorry—we do not want you here, you are forbidden to come here, we know about your participation in the union and we don't want you talking to other employees and using union cards. Then she told me, now leave and don't talk to anybody. Then on my way out, she was right behind me, she followed me until I got into the car, the service that I use, and then I just drove off.

J. Singh denied telling Paulo she knew he was a union supporter or that he was reassigned to lot 1 because Respondent wanted to isolate him. Based on demeanor, I do not credit the

[12] Paulo described the building as having glass all around so he could readily discern the building was empty. His testimony was not convincingly contradicted or refuted.

[13] Paulo was then assigned to guard another empty lot, which was removed from Respondent's main SFO location, designated lot 3.

[14] Paulo did not complain to Raffio for he did not see him.

testimony of J. Singh unless it is an admission against interest or is credibly corroborated. She did not appear to be trying to give accurate answers, she did not seem open and forthright. Moreover, she volunteered information. Further, there was no refutation of Paulo's testimony his paycheck was delivered to him at lot 1, supporting his claim J. Singh forbade his interaction with other employees.

About 2 days after this conversation with J. Singh, H. Singh came to visit Paulo at lot 1 and, according to Paulo, H. Singh said:

> That he doesn't want me going to the McDonald Road location and he doesn't want me talking to any other employees while I'm on the clock. I asked him why. He said, well, we know about your participation in organizing the union, that's why we put you in Lot 1, to isolate you, and then he just left.

This was the first time during Paulo's employ that his paychecks were delivered to him. Respondent does not refute it delivered his paycheck to him at lot 1 after this conversation. Paulo complained to Juliano the same day of the threats, April 21. H. Singh admitted observing Paulo giving out union leaflets to employees as part of the organizing campaign on April 21. According to Paulo, he told Juliano:

> I told him this guy is always yelling at me, you know, I've been doing whatever he tells me to do, you know, why he keep on yelling at me. Then Tony says, well, you know, these things happen when, you know, the union organization, let's just forget about these things and just find things for him to do, he told Henry that.

Paulo admitted he did not inform Juliano that H. Singh said he sent him to lots 1 and 3 to isolate him and/or threatened to fire him. Paulo was familiar with Respondent's open-door policy and did not avail himself of the policy by specifically complaining to managers about H. Singh's threats. While Respondent, by H. Singh, denies telling Paulo he could not take breaks and leave lots 1 and 3 to meet his personal needs, Respondent did not present Paulo's timecard, although it admitted he would have to clock out for lunch and there is no evidence whether he would have clocked out for breaks.

Respondent claims it reassigned Paulo because there was a customer complaint that he purloined her property from a returned vehicle. Paulo admitted he was voluntarily interviewed by the police but understood someone else committed the theft sometime in November or December 1998. Respondent never adduced any evidence indicating the date of the alleged complaint or incident in relation to Paulo's reassignment. Raffio testified he suspected Paulo of stealing from customers since there were two instances where customers reported they left items in the rental vehicles when returned and those items were missing, they were not turned in to Respondent's lost and found by the return agent. Raffio admits the incident, which resulted in Paulo's locker being inspected, without evidence of wrongdoing being found, occurred in 1998. Respondent did not introduce any police report even though Raffio claims the customer insisted the police be called.

Respondent failed to convincingly explain why it waited until February to reassign Paulo. Interestingly, he was assigned as a guard, an individual whose duties required him to protect property. These anomalies lead me to conclude these reasons for Paulo's reassignment to lot 1 were pretexts and discredit Raffio's claim he wanted to see if theft problems abated after Paulo was removed from his work in the return area. Moreover, if Respondent strongly suspected Paulo of wrongdoing, even if it lacked evidence, his attendance record in 1998 would have been sufficient to warrant his discharge. As found above, Raffio is not a credible witness. He appeared to be engaging in hyperbole and attempting to fashion his responses to questions to be most favorable to Respondent's litigation theories rather than appearing to answer honestly and directly. He volunteered information. His testimony will be credited only when credibly corroborated or when it is an admission against Respondent's interests.

Events of April 21

About 1 week prior to the union election on April 23, Paulo had a conversation with H. Singh regarding a new work assignment. After working 1 month at lot 1, Paulo was reassigned to Burlway Road and on April 20 was assigned to guard lot 3, located approximately 1-1/2 miles south of Respondent's Burlway Road site. According to Paulo, H. Singh told him, "I'm supposed to stay there now. And I asked why, and he said, well, you're supposed to do security there. It's like for what, there's nothing there, it's empty. Just have to go there, so I went."

The lot 3 assignment lasted about 2 weeks. Lot 3 was adjacent to a Sheraton Hotel. The lot was surrounded by a fence. There were no vehicles or buildings within the lot. Lot 3 also did not have a restroom so Paulo used the facilities at the Sheraton Hotel. Paulo did not have any contact with line employees during his assignment to lot 3. As was the case at lot 1, lot 3 did not have any food service available for Paulo, unlike the amenities available to him prior to his assignment to lot 1.

He did not have lunchbreaks during his assignment to lot 3 because, as Paulo explained: "It's too far to go back and he instructed me not to go back anyway, even though I defied him the first time on lot 1, I didn't want to take that risk at lot 3." Paulo brought snacks with him to lot 3. When Paulo was working as a product service representative, there was food service readily available. Paulo's uncontroverted evidence was that lot 3 was "completely deserted." No vehicles were moved to lot 3 during Paulo's tenure of guard at that site.

Paulo's affidavit indicated he left lot 3 for lunch. He testified this was an error. If he did leave lot 3 to go to the base facility for lunch, he was required to clock out. His time and attendance records would demonstrate such activity. These records were not placed in evidence. Therefore, Paulo's testimony that the affidavit was in error appears to be accurate.

The following day, Paulo, on his way to lot 3, stopped by the employee parking lot to obtain a tape cassette to listen to in the company van. Paulo recalled H. Singh saw him and, according to Paulo:

> So, he started yelling at me, he was outside, within the fence of Alamo, I was at the parking lot, and he was yell-

ing at me until I got closer, then he was telling me that, I told you to—pardon me—get your ass to Lot 3 right now. I said, wait, I'm just getting a tape from my car, relax. He said, well, if I tell you to get your ass to Lot 3, you'd better get your ass there right now. I said, you keep yelling at me and I keep trying to explain to him that, you know, I was just getting a cassette tape from my car. So, I got frustrated and I yelled back and I said, what do you want to do, fire me right now. And then he said, well, there's only a couple of days after the election, eventually you union guys will get fired or find another job for sure Alamo will win the election and the union will lose, now get your ass to Lot 3 right now. I said, no, I want to watch the video that you guys made against the union. He said, okay, fine, watch it at 9:30 a.m. So then I watched it.

After watching the video, H. Singh pulled Paulo aside and said, "[Y]ou know what, if you don't want to do what I'm telling you to do, why don't you just go home right now. I asked why, he said, well, just go home, don't ask any questions. So, then I went home. And he said, just go home and see you on election day." Paulo went home and did not report for work again until election day, April 23. Contrary to past experience, Paulo did not receive any documentation of his suspension.[15] H. Singh admittedly did not tell him he was suspended or tell him to report to the human resources office. H. Singh admitted he told Paulo he could go home that day.

Based on Paulo's credited testimony, I find H. Singh told Paulo he should not report back to work until election day. While the term "suspension" was not used, informing an employee he should go home and not report for work until election day is tantamount to a suspension. That Respondent did not terminate him for the 3-day absence, in accord with its absenteeism policy, indicates it also considered his absence was due to a suspension. Only when he was the Union's observer did his absences become the basis for verbal and written warnings as well as suspension and discharge. The assignment to lots 1 and 3 appear to be a sham. There is no evidence anyone working the same hours as he was assigned to guard lots 1 and 3 after Paulo and Reyes, even though H. Singh said they were considering placing equipment in the building on lot 1 to convert it to a repair facility.

On May 10, H. Singh informed Paulo he was being reassigned again, stating, "[T]here's a new position for me again, I'm not supposed to go to lot 3 anymore, instead he will find things for me to do at the base, like clean the car wash, the facility, the bathrooms and so on." There is no evidence Respondent assigned another employee to replace Paulo at lot 3. H. Singh directed Paulo to clean the lobby of Respondent's old rental facility at Burlway Road. Raffio and Nedic retained their offices in that building. Whoever cleaned their offices and the lobby prior to Paulo, if anyone, was undisclosed. There is no evidence Paulo replaced another employee. During the course of performing these cleaning duties, Paulo claimed he sustained an injury to his lower back, neck, and shoulder.

Paulo informed H. Singh:

> My back was hurting, because I threw all the boxes that he instructed me to throw away, the old paper supplies in the boxes, and the computer box, I think 20 computer monitors, about four big printers, keyboards, and all the junk in the lobby, I told him to—he started to give me to throw all this, so I asked for your help and he said no, so now my back is hurting, can I go home to see a doctor. He said, yeah, go ahead, but make sure that you come back tomorrow, because you still have to vacuum the lobby. Fine.[16]

Paulo testified he was unable to get out of bed the following 2 days and he called in speaking to Helu Cafaco each time, to report he was unable to work. This testimony was not clearly and convincingly refuted. When Paulo reported for work on May 13, he asked, "[H]ey Henry, can I go home right now to see a doctor, because my back is really hurting. He says, well, no need, I'm going to suspend you anyway, come see me at 10:00 o'clock and I'll send you home.[17] I said, okay." Paulo was instructed to return to work on May 18. There is no assertion Paulo did see a doctor. After his termination, the Union's attorney advised him to file a workmen's compensation claim. Previously, around 1993 or 1994, Paulo had occasion to file a workmen's compensation claim and admittedly knew Respondent's procedure required him to file a claim as soon as he can after the injury.

On May 18, he was instructed to see Nedic. When Paulo spoke to Nedic, Farzaneh Yountchi was also present.[18] According to Paulo, Nedic said:

> You know why you're here, you know, and then he handed me my termination letter and said would you like to read this, I said okay. And then I said can I explain, and he said no, no need, the decision has been made.

Nedic read Paulo the following termination notice:

> To maintain an efficient and productive work environment, Alamo expects associates to be reliable in reporting of scheduled work.
>
> Your attendance record has been extremely poor and despite numerous verbal and written warnings, you failed to improve in this critical area.

[15] When Paulo was again suspended on May 13, he was not given written documentation of the disciplinary action, but was told such documentation was being prepared.

[16] H. Singh engaged in surmise and testified he would have had Paulo report to a doctor and start a file for workmen's compensation if he reported he was injured at work. He could not recall why Paulo left work on May 10. H. Singh said such information would be reflected on Paulo's timecard, which was not placed into evidence. There was no claim Paulo's timecard was unavailable. The resort to surmise rather than existing documentation was unexplained and further calls into question H. Singh's testimony.

[17] Paulo was previously suspended for fighting and received written documentation of this suspension. He did not receive any written documentation concerning his April 21 suspension.

[18] Farzaneh Yountchi did not appear and testify. There is no claim that Yountchi was a supervisor or agent of Respondent, accordingly, no inference is warranted from this employee's failure to appear and testify.

> Due to the severity of the violation, your employment with ALAMO RENT A CAR is terminated effective immediately.

Paulo admitted he missed as many as 14 days of work during 1998 claiming the outside work resulted in his getting colds and the flu. He also recalled his attendance record in 1997 may have had excessive absences. His attendance record for 1997 was not introduced into evidence. Paulo estimated he missed 6 to 7 days of work in 1999. He attributed his absences in 1999 to two times in January he was sick and after he was reassigned he "started feeling, you know, nervous and scared, losing my job, you know, couldn't concentrate working, scared." He did not file a workmen's compensation claim for stress-related illness.

He admitted being previously warned about his absences. In 1998 Paulo never received a reprimand for absences even though he had about 14 absences.[19] In January, just after Respondent moved to the new rental car facility, his lead agent, Pedro Medifore, claimed several employees left their jobs early. Paulo showed Medifore his timecard reflecting he worked 8-1/2 hours that shift, but Medifore said it was still a verbal warning and gave Paulo a document to sign. Respondent has a booklet called FAMPACT, which Paulo understood to be a combination employee handbook and employment contract. Paulo did not recall if the booklet contained some provisions dealing with attendance because the last time he read it was in 1992.[20] Paulo understood he was to become familiar with the standards and rules contained in the booklet.

Respondent also maintains policies on computers under the code name POPS. According to Paulo's uncontroverted testimony, Respondent changed the code word to access the program and he was not given the code. While Paulo understood there were attendance requirements, the number of absences was not published in the booklet and not posted on any of the bulletin boards maintained by Respondent on its premises.

Respondent had a document entitled "Counseling Review," dated April 28, signed by H. Singh only. The counseling review was a verbal counseling concerning Paulo's attendance. The form provides: "Mike Paulo called in sick on 4/25/00. That is his 6th call in 4-month work period. Last year, Mike had 14 sick calls."[21] The document noted the absences were leading to a pattern of excessive absences and Paulo was told to improve his attendance immediately. Paulo claims he never saw the form prepared by H. Singh on April 25, and denies being informed such a counseling had been issued. The signature lines for the associate signature and the signature of an individual who witnessed the associate's refusal to sign were blank.

Respondent usually makes a written record of verbal warnings and the employee is requested to sign the document. The form indicating Paulo received a verbal warning in April was not signed and there was no note he refused to sign the warning. Paulo testified he never refused to sign a warning. Respondent failed to place into evidence records demonstrating Paulo was warned numerous times verbally and in writing concerning his attendance.

Paulo received evaluations in 1997 and 1999 that he claimed, without contradiction, contained overall evaluations of outstanding. O'Connor did compliment Paulo in an e-mail "for doing a good job at work." This claim is uncontroverted. His 1997 evaluation, dated January 26, 1997, and prepared by H. Singh, indicated Paulo's performance was above average.

On October 15, 1998, Respondent's annual review for Paulo stated: "Michael successfully completed six years of service with Alamo. Increase based on performance." Paulo received a 30-cent-an-hour increase. His annual review, dated October 4, 1998, and prepared by O'Connor, indicated he was courteous to customers and other employees, punctual and ready to begin work as scheduled, met the Respondent's standards for personnel grooming, was able to work consistently with only moderate fatigue, met the Respondent's standards for quality of work, and his uniform was always clean, all or most of the time. Most of the time, Paulo was able to withstand the pressure of the job and remain calm in high volume situations and was reliable and dependable and knowledgeable of his job function. This evaluation did not have any marks in the "not often enough" and "never" boxes. Paulo's overall evaluation was marked above average. Paulo received a 12-cent-an hour increase on January 26, based on a special review.

Respondent introduced into evidence eight termination reports of other employees discharged for excessive absences and/or tardiness. Six of these former employees were probationary employees and of the two nonprobationary employees, one was Paulo. John Solis, a nonprobationary employee, was terminated for excessive absences effective February 20, 1999. The number of absences, prior written and verbal warnings, and other details concerning the decision to terminate Solis were not adduced on the record. J. Singh admitted this information was contained in Solis' file maintained by Respondent. Therefore, there are no predicates to analogize Solis' discipline to that of Paulo.[22]

[19] As previously noted in late 1994 or early 1995, Paulo received a warning for fighting. There is no indication this warning was considered a factor in the determination to terminate Paulo.

[20] Par. 19 of the booklet addresses the importance of attendance and the employees need to call his supervisor at least 2 hours before the start of his shift if unable to come to work due to a family emergency or illness or as soon as possible if the employee does not work at a facility that is open prior to the duty hours. Respondent did not place into evidence any testimony or records that dispute Paulo testimony he called in while off for the back injury and left a message as claimed. The employee is to call his supervisor daily, if he can. The provision concludes:

> I understand that there is a clear connection between my attendance and my success at Alamo. Good attendance can work to my advantage; frequent or unexplained absences of frequent tardiness, will harm my chances for merit pay increases and promotions, and can result in serious disciplinary action, up to and including termination from employment.

[21] Paulo readily admitted he was probably absent 14 times in 1998, but he did not recall the 9 absences through May 1999, possibly because he did not consider the days he was suspended as absences.

[22] J. Singh claimed the Respondent consistently followed a policy of terminating employees with excessive absences, i.e., more than six. This unsupported testimony fails to explain why Respondent tolerated the numerous absences of Paulo in 1998, and thus, is contrary to the evidence of record.

H. Singh claims he issued a verbal warning to Paulo on December 29, 1998, for excessive absences. A counseling review, which was not signed by Paulo and there is no evidence Paulo ever saw the document, indicates H. Singh briefly talked with Paulo about his attendance and was warned to be "very careful" because his attendance for 1998 was way beyond Respondent's allowable absences.[23] There was no convincing explanation why Respondent did not follow its policy of giving first a verbal warning after a stated number of absences, then a written warning, then a suspension, and finally termination for more than three absences within a 3-month period. The failure to follow its written policy in this instance, as noted herein, was not convincingly explained and Respondent's tolerance of Paulo's absences in 1998 indicates it strictly observed the policy only with regard to probationary employees, and there was no clear pattern established concerning Respondent's treatment of permanent full-time employees whose absences exceed the stated policy. Moreover, this purported verbal warning was dated about 1 month before Paulo received an above average evaluation.

Paulo's excessive absences in 1998 were known by Respondent yet did not even result in a written warning. Respondent did not even follow its policy in 1999. Respondent did not first give Paulo a documented verbal warning, followed by a written warning, then a suspension and only after a suspension, suspension pending review to determine if discharge is warranted. Respondent's written policy indicates absenteeism problems are to be the subject of progressive discipline, not, as Respondent claims, an infraction that would skip the written warning and suspension phases and go directly to suspension pending investigation to determine if termination is appropriate. H. Singh's testimony indicates he normally followed Respondent's policy when dealing with absenteeism problems.[24]

In corroboration of Paulo's testimony he called in sick when he hurt his back, H. Singh issued a verbal counseling on April 26 because Paulo called in sick on April 25, which was his sixth sick call in 4 months. As previously noted, H. Singh wrote on the form he told Paulo he had to improve his attendance immediately. I credit Paulo's testimony based on his direct and convincing mien. Paulo appeared to be testifying candidly, readily admitting his absences and prior warnings.

Also on April 26, H. Singh prepared a written warning, which was not signed by Paulo, for not reporting to work on April 22 and not calling in to report his absence. While H. Singh notes on the form Paulo was "talked to today," there is no explanation for his failure to get Paulo's signature or have Paulo's refusal to sign witnessed by another individual. H. Singh clearly knew Respondent's procedure as stated in his policy and his failure to follow it in this instance indicates proscribed reasons. I conclude Respondent's failure to follow its stated policy in this instance is another reason for finding the basis for Paulo's termination are pretexts.

Contrary to J. Singh, Raffio testified Respondent's management "look[s] at each situation, we do have a policy that we follow, but in Mr. Paulo's case there was no improvement year over year, so I would have to say I believe he had a problem for 1998 and 1999."[25] Raffio's testimony indicates Respondent does not rigidly enforce its absenteeism policy. Respondent's absenteeism policy, effective December 1, 1995, defines an absence as an "absence that lasts from one-half of the scheduled work day up to three consecutive work days." If an employee is absent "without contacting the immediate supervisor" that action "may be considered "resignation without notice" or "job abandonment." The guidelines contained in the policy after two absences within a 3-month period is; after the third absence a documented verbal warning, after the fourth absence a written warning, after the fifth absence a 3- to 5-day suspension, and, after the sixth absence suspension pending investigation, possibly leading to termination.

Respondent did not follow this policy with regard to Paulo. Raffio explained: "Mr. Paulo far exceeded the amount necessary. We could have terminated so much sooner, but because of his tenure with the company we wanted to give him an opportunity to, for lack of better terms, clean it up and show exemplary attendance for a change. But, that did not occur." Respondent failed to convincingly explain why it failed to follow its written policy in 1998 and only in 1999 after Paulo was active in the union organizing effort, including visibly wearing union buttons and acting as a union observer during the election did his absenteeism become intolerable. It was not until May, when Paulo called in sick that Respondent suspended him for 3 days pending investigation, rather than merely for 3 days as provided for in Respondent's policy. When Paulo reported to work on May 13, H. Singh asked him to sign the counseling review and when Paulo refused, Singh had the refusal witnessed. H. Singh knew the procedure and did not follow it by not following the progressive discipline stated in its absenteeism policy.

H. Singh's failure to follow the absenteeism policy, including having Paulo sign the warning form or have his refusal witnessed by another individual, as well as his general lack of credibility, leads me to conclude Paulo's version of the April absences due to his suspension is credible and H. Singh's fail-

[23] The counseling form does not indicate the nature of the action taken, such as a verbal or written warning. H. Singh admitted he never showed the form to Paulo. Respondent merely spoke to Paulo knowing well before his suspension and termination that he had an excessive number of absences. H. Singh testified he knew the absenteeism policy called for a verbal warning after two sick calls within a 3-month period.

[24] H. Singh testified:

> Well, when I would counsel somebody, I would look at appearance and the guy's attendance, I put in a person's attendance. I would issue—if I issued somebody a verbal warning, attendance usually starts with a verbal warning or verbal counseling, you would talk to the person and I would always document it and leave it in his file. I had experience in the past where, you know, you've talked to a person, you know, and then he goes in the same pattern again or he's calling in sick again, you don't remember when you're talking with the employee, you wouldn't remember that hey, you know, somebody had talked to him. So, I always, if I talk to somebody, I always leave a note in his file, documentation. I would only present it to him if it's a written warning or suspension.

[25] This contradictory testimony buttresses my conclusion Respondent's reasons for reassigning, suspending, and discharging Paulo were pretexts.

ure to document such action, contrary to policy is not demonstrative that H. Singh failed to suspend Paulo. Supporting this conclusion is the fact that Paulo received a merit increase in April, a time when Respondent knew of his poor attendance and purportedly issued warnings to Paulo that his attendance record was unacceptable.

Nedic testified several weeks before Paulo's termination H. Singh brought Paulo's attendance record to his attention and after reviewing it, he discussed it with Raffio and Joe Penna, Respondent's human resources manager. According to Nedic, these discussions admittedly occurred several weeks prior to Paulo's termination.[26] Respondent failed to convincingly explain why it waited until after the union election to terminate Paulo if his attendance record "had excessively passed any reason" as claimed by Nedic. Nedic met with Paulo on May 18, and read the previously prepared termination notice. Nedic did not explain why Respondent's absenteeism policy was not followed in Paulo's case. Nedic admitted knowing Paulo was an active supporter in the union organizing campaign after he exited the voting area.

I find Nedic did not appear open and forthright during his testimony. Therefore, his testimony will only be credited when believably corroborated or if it constitutes an admission against Respondent's interests. For example, Nedic testified:

> Q. During May 1999, were you aware that Michael Paulo had been a supporter of the union during the election campaign?
>
> A. No, I was not.
>
> Q. Did you have any opinion as to whether he had been for the union?
>
> A. No, I did not.
>
> Q. Were you aware that he had been the union observer at the NLRB election?
>
> A. Only after he exited the meeting or the voting.
>
> Q. That is did you see him wearing an observer button at the election?
>
> A. No, I did not.
>
> Q. Did you observe him performing any duties as an observer during the election?
>
> A. I didn't see him perform the duties, I believe I saw him being given instructions but not performing duties.
>
> Q. But you did know that he was the union observer?
>
> A. Yes.
>
> Q. And did that indicate to you that he was a supporter of the union because he had been a union observer?
>
> A. No, it did not.

Nedic admitted knowing of Paulo's participation as a union observer prior to the decision to terminate him. Respondent failed to clearly explain the disparate treatment of Paulo between 1998 and 1999 knowing his absenteeism record at least as early as December 1998. It was only after Paulo was known as a union supporter in April and May that his poor attendance record became cause for warnings that did not follow Respondent's absenteeism policy and he was terminated without first being suspended and only after another absence was he suspended pending investigation to determine if further discipline was warranted. This disparate treatment of Paulo between 1998 and 1999 further indicates a proscribed motive as does Respondent's failure to follow its progressive discipline guidelines in its absenteeism policy and the timing of the termination.

5. Events involving Reyes

Reyes began working for Respondent in June 1994 as a busdriver. He was interviewed for the position by H. Singh. During this interview, Reyes informed H. Singh he could work in the afternoon only because he had a job with the San Francisco Unified School District, as a security guard from 7:30 a.m. to 3:30 p.m.[27] Respondent hired Reyes to work from 4:30 p.m. to 1 a.m. taking customers between the airport and the Alamo facility at Burlway Road. Reyes reminded Respondent's agents and/or managers of his job with the school district on all the occasions he requested vacation time. Reyes admitted Respondent never promised his hours and job duties would never change.

In November 1998, in preparation for Respondent's move to SFO, Respondent offered its bus drivers the option of working for a new company that was formed by the car rental companies moving to SFO or accept reassignment in different jobs at Alamo. Reyes accepted the latter and was assigned to work 3 days a week as a shuttle driver and 2 days a week as a gate guard. The bus Reyes drove 3 days a week transported Respondent's employees to various locations, it did not transport customers.

In March, Reyes met with Rodriguez at the Union's office to inform him Respondent's employees wanted union representation. During the union organizing campaign, Reyes attended approximately three union meetings and less than five times distributed union authorization cards to other employees of Respondent.

In late March, Reyes had a coworker send on his behalf an e-mail to Raffio, Nedic, Juliano, and Penna wherein he complained about the failure of Respondent to pay medical bills and harassment by J. Singh and her husband H. Singh and to inform the addressees "the reason why I wrote the letter is because I'm going to let everybody know that I'm voting for the union and I'm going to vote for the union because it's the only way to stop the harassment." Juiliano admitted one of the items that caught his attention in the e-mail was "I see the words 'medical' again and I see the words that, you know, these are the things that lead people, male or female, you know, to turn towards the union." Since Raffio, H. Singh, Penna, and Nedic also received this e-mail, I find Respondent had knowledge Reyes was supporting the Union.

A few days after the e-mail was sent, Reyes was contacted to meet with Raffio, Nedic, and H. Singh. Raffio was Respondent's spokesman. According to Reyes:

[26] Penna testified this meeting occurred just a few days prior to Paulo's termination. Inasmuch as Nedic's testimony constitutes an admission against Respondent's interests, I credit Nedic's testimony as to the timing of this meeting.

[27] Reyes also noted his job with the school district on his job application with Respondent. Reyes still has his job with the school district.

> Raffio tried to persuade me to don't vote for the union, and explained to me what benefits I don't have and what the union has, what we can get through the union, things like that. And when he asked me what we can do for you to make you happy and don't vote for the union, I said, nothing, I've already made the decision to vote for the union and I'm going. And he said, well, I know that you are a hard worker, you are a good worker and I don't want to lose you, and that's what he said. I'm sorry, he didn't say I, he said we, we don't want to lose you.

I credit Reyes testimony based on his open and direct demeanor. I find this testimony further supports my finding that Respondent knew Reyes supported the union organizing movement. Also shortly after he sent the e-mail, Raffio and J. Singh met with Reyes and J. Singh apologized to Reyes because Reyes felt she yelled at him and did not treat him "right." H. Singh admitted reading the e-mail. While J. Singh did not feel there was any basis to apologize, having found her testimony unbelievable based on demeanor and other considerations, I find this admission an indication and support for the finding Respondent was attempting to persuade Reyes to change his position and not support the union organizing drive. Moreover, that J. Singh apologized diminishes Respondent's claim Reyes was improperly denigrating J. Singh.

Reyes understood "that he's going to fire me if I go for the union when Raffio said, '[W]e don't want to lose you if you vote for the union."' Also during the meeting Reyes complained that he had requested a company jacket from J. Singh "many times" and never received one. Raffio got up during the meeting, went to his vehicle, and gave Reyes his company jacket. They also discussed the medical bills Reyes thought Respondent should have paid.

The following day, Reyes met with Raffio and Nedic. When asked what was discussed during this meeting, Reyes responded:

> Same thing, they tried to persuade me don't vote for the union, and a minute before they promised to me—with my bills and at the second meeting Mr. Steve Raffio and I would walk to the second floor to meet Joe Penna, and Steve Raffio had the medical bills in his hand and give to him to work out with those bills, that's what he told me.

That same week, Reyes had a third meeting with Respondent's managers where his mistreatment by J. Singh was discussed with Raffio and J. Singh. As previously noted, J. Singh admittedly apologized to Reyes during this meeting.

a. Work reassignment

On April 1, shortly after this third meeting, O'Connor told Reyes that Raffio said he would have to work at lot 1. O'Connor told Reyes, "Steve Raffio send you to Lot 1, because you talk to the people about union." O'Connor also told Reyes "I have to remain on Lot 1, and I'm not allowed to come back to the base or go to the airport." Reyes was also informed by O'Connor, "he will bring my paycheck to Lot 1." Reyes then asked O'Connor "if they don't want me to go to the base or the airport, how I going to do my—when I want to use the toilet or whatever. And I asked him, you want me to go hop the fence and go to the other lot, and he just laughed, he didn't answer, not nothing."[28] There was no food available at lot 1. Prior to this assignment, Reyes had access to food service.

O'Connor denied making these statements claiming he determined to reassign him because of the dispute with J. and H. Singh concerning his medical bills. O'Connor admitted he was not "really that involved in the situation;" that he "was not too clear on what happened"; and he was "kind of unclear on the sequence of things." O'Connor said he heard Reyes was criticizing J. Singh and Raffio and asked Reyes to give Raffio a chance to resolve the medical bill problem. Reyes, according to O'Connor, said he would give Raffio a chance to resolve the matter. There is no claim by O'Connor that he gave Reyes a warning or instructions. O'Connor clearly engaged in surmise in his rendition of these facts, further diminishing his credibility.

The next evening, an employee again told him he had ridden a shuttle driven by Reyes and Reyes was still criticizing J. and H. Singh. At that juncture, O'Connor claims he determined to reassign Reyes to lot 1. O'Connor denied instructing Reyes he could not leave lot 1 but admitted the issue of use of the toilet did arise and claims he told Reyes he could take breaks and warm his food in the microwave at the base. Checks were brought to Reyes, but O'Connor claims it was at Reyes's request. Inasmuch as Reyes had a company vehicle at lot 1 and had to return it, it seems a waste of O'Connor's time to deliver the check. Moreover, there was no reason advanced for Reyes wanting his check delivered to him personally by a supervisor or why a supervisor would agree to such a request.

That both Paulo and Reyes were brought their checks, were told not to go to the Burlway Road location or SFO facility during their working time, joined with O'Connor's use of surmise, leads me to conclude Respondent did assign Paulo and Reyes to lot 1 to isolate them from other employees.

When Reyes was assigned to lot 1, it was empty, there were no vehicles stored there and the building was empty. O'Connor visited Reyes at lot 1 several times a week. During these visits, O'Connor would ask Reyes, "[W]hy I think about the union, am I still going for or he had changed my mind." Reyes responded, "[N]o, I'm still going for the union, I didn't change my mind." Reyes voted in the union election.

Respondent claims it reassigned Reyes to guard lot 1 because he was disruptive, he complained to other employees while driving the shuttle bus about what he considered to be mistreatment of him by O'Connor and H. Singh. Respondent indicated employees Carlos Moreno and Oscal Dimandal complained to Respondent about Reyes' remarks concerning J. and H. Singh. Reyes candidly admitted O'Connor spoke to him about these comments and Reyes continued to make them despite O'Connor's request that he stop making them. Reyes was not aware of Respondent's policy requiring every employee to treat every other employee with dignity and respect claimed during his employment he did try to treat all other employees with dignity and respect.

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[28] Reyes testified he did not leave the lot for breaks, he used a bottle to urinate. Prior to his assignment to lot 1, Reyes had access to toilet facilities.

O'Connor admitted the building on lot 1 was empty, contrary to Respondent's others witnesses, that asserted there were computers or other items stored in the building and other reasons to keep the building without toilet facilities, locked and guarded. O'Connor also admitted he did not know of any employees other than Paulo and Reyes assigned to guard lot 1. I credit O'Connor's admissions against Respondent's interests and find the statement of Respondent's managers claiming a need to guard the locked building false and another basis to find the reasons for assigning Paulo and Reyes to guard lot 1 pretexts.

b. Change in Reyes' hours

After the union election, on or about April 26, Reyes was informed by O'Connor and H. Singh that Steve Raffio changed his schedule and position. Reyes was informed he was scheduled to work from 7 a.m. to 3 p.m. at the car wash at the airport. In response to this announcement, Reyes said:

> This is ridiculous because everybody in that company knows that I have a second job in the morning shift, and why didn't Steve Raffio find a better way to fire me. And Mr. O'Connor said, well, this is his decision, and Mr. Henry Singh told me that he have to be very clear that he has nothing to do with that decision, that it's coming from Steve only.
>
> . . . .
>
> Mr. O'Connor also told me that that decision hurt him because he knows that I'm a good worker and a good person.

Reyes requested a meeting with Raffio and under the open-door policy he would like to review his file, including his job application.[29] Reyes requested a copy of his job application. There was no response to these requests.[30] On May 6, Reyes had a conversation with O'Connor during which O'Connor offered him "a fleet control position in the afternoon shift, but he said he have to ask Mr. Steve Raffio first. And he asked me if I can take that position and I said, yes, I will." Reyes clearly understood O'Connor to say that there was a fleet control position available during the swing shift. The following day, Reyes met with O'Connor who told him, "I'm sorry but Steve Raffio cannot give me that position because Steve Raffio said that I got to go and I got to go."

Reyes did not attempt to change his schedule with the school district but did tell O'Connor and H. Singh, "[I]f they pay me what the school district pay me, in the Alamo salary, I would work with them, I quit on the San Francisco School District. And Mr. O'Connor respond that they cannot pay that, they won't."

On or about May 10, Reyes went to Juliano and gave him a letter.[31] May 10 was the last day Reyes worked for Respondent. Juliano began reading the letter, paused and informed Reyes the missive raised serious considerations and called his secretary, Candice Capote, to witness the conversation. Juliano then finished reading the letter and said: "Steve Raffio told me that he's going to change your schedule because he needs more people to work in the morning, and he's the one who is running that company." Reyes asked Juliano if he had received his March e-mail Juliano replied he had. Reyes asked if he read it and Juliano replied, "[Y]es, but I didn't finish."

Reyes telephoned Respondent on May 11, and informed the answering party that he could not report to work because the changed schedule interfered with his other job. His job for the school district paid $15.75 per hour compared to his Alamo wage of about $9 per hour. The school district also provided greater benefits, including more vacation time, sick days, floating holidays, and medical benefits. When Reyes did not report to work for 3 days, Respondent terminated his employment.

Reyes admitted Respondent's busy seasons were December, around the holidays; Easter, and starting in June the summer vacation period. Reyes did not know whether the day shift needed additional workers in May. Respondent failed to adduce any documentation indicating there was increase in business at the time of Reyes' reassignment of shortly thereafter. There was no evidence Respondent replaced Reyes. Reyes testified in a direct and convincing manner. He candidly admitted complaining to coworkers about his treatment by O'Connor. and H. Singh. Accordingly, his testimony is found to be believable.

O'Connor described his job duties as operations manager on the swing shift as including scheduling, discipline and hiring. Since Reyes worked the swing shift until May 10, Respondent failed to explain why Raffio rather than O'Connor determined

[29] O'Connor admitted Reyes said he wanted to speak with Raffio.

[30] Respondent argued Paulo's failure to use the open-door policy to question his discipline was indicative of the lack of merit to the claim he was discriminatorily disciplined. Respondent failed to explain its failure to meet Reyes' requests under the open-door policy, which undermines its argument concerning Paulo. Moreover, there was no showing Paulo or any other employee successfully used the open-door policy. Respondent might argue its response to Reyes' e-mail demonstrated the efficacy of the open-door policy. However, Reyes' mention of the union organizing campaign and Respondent's admitted posture of opposing union organizing may well explain Respondent's response to the e-mail.

[31] The letter, dated May 10 and addressed to Juliano, stated he was fired by Raffio after being mistreated by J. and H. Singh. Reyes referenced his e-mail and further declared:

> During the first week after I wrote the letter to you and everybody else they called me every day to participate in meetings but I was not in accordance with these demands. More specifically, when Steve Raffio found out that I did not change my thinking on the matter he sent me on April 1, 1999 to guard Lot #1 which was my first punishment. The building itself is empty has no lighting outside and the gates and doors are locked. I was not provided with a key to inside not even to use the bathroom. When I had to urinate I had to do it in a plastic bottle because I was told I could not go to the base or to the airport. Since I was talking to the people about union matter is I was given a hard time in an effort to make me quit, but he knows that I would not resign. Further action was taken on April 26, 1999. Henry Singh and Jimmy O'Connor called me to the production office to tell that I was fired in a subtle way. The[y] told me that Steve Raffio had changed my schedule and position. My new assignment was to work at the car wash during the morning shift when he knows that is an impossibility because I'm working in the morning already for the San Francisco Unified School District and have been since 1990. When I initially applied I requested to work evening shifts and I have been working the evening shift since I started in June of 1994 until the present.

to reassign Reyes. The staffing of the swing and day shifts on and after May 10 was not introduced into evidence, thus there is no evidence of whether Reyes was replaced on either shift. O'Connor admitted he was informed Reyes was transferred to the day shift around the time of the union election. He also admitted he might have told Reyes "that the decision hurt me." This admission indicates O'Connor understood the reassignment to the day shift would result in Reyes' leaving Respondent's employ and/or that Reyes was needed on the swing shift.

O'Connor also admitted discussing the possibility of Reyes being assigned another swing shift position shortly after Reyes was informed of the change in his schedule to mornings. O'Connor admitted Reyes was upset over the rescheduling and informed O'Connor "he would not be able to work that shift." O'Connor admitted Reyes "was a very good worker, very helpful and I thought great, you know, here's somebody who has been with the company for a long time, experienced."

While Respondent argues it had the greatest need for Reyes on the day shift because of his attributes, it reassigned him to guard an empty lot and building and guaranteed he would leave its employ because of his other employment, as Reyes informed Respondent at the time he was hired, at the time he scheduled his vacations and around the time he was informed of the reassignment. There was no evidence adduced concerning whether Reyes was replaced on the swing shift or how many, if any, employees were transferred to or hired for the day shift immediately after Reyes' reassignment. If there was a need for workers like Reyes, Respondent failed to explain why his request to follow the open-door policy and talk to other managers about reversing the decision to assign him to the day shift was never honored. There was no evidence Respondent offered to reassign any other employees to the day shift, just Reyes.

O'Connor testified there was a need for a good worker like Reyes on the day shift and Reyes was chosen because Respondent usually reassigned the individual with the least seniority. If Reyes was such a valued employee, why did Respondent insure his departure by the reassignment to the day shift. Respondent failed to detail those times when it does not follow this seniority rule. Moreover, Respondent failed to place into evidence its seniority list at the time of Reyes' transfer. Respondent did not claim to be following seniority when it reassigned Paulo and Reyes to guard lot 1. According to O'Connor, at the time of Reyes' rescheduling, there were 11 to 12 service agents on the day shift, about 9 on the swing shift, and 3 on the graveyard shift. The lack of a seniority list, as well as the failure to establish with documents regularly kept by Respondent, a seniority list, support the conclusion Respondent's reasons to reassign Reyes are a pretext.

If he was such a valued employee, as O'Connor admitted, it is inconsistent to reassign him to a shift guaranteed to cause his loss based on the claim they needed him. The bare claim he was the least senior cojoined with the failure to grant his request to pursue the reassignment through the open-door policy are further indications of pretext. O'Connor also admitted in scheduling and assignments, while attendance and seniority in a position were considered, ability was a principal consideration. Reyes' admitted ability would indicate Respondent would attempt to retain him, not assign him to a shift it knew would result in his leaving. This conflict between Raffio's and O'Connor's testimony is a further indication of pretext.

Raffio said Respondent determined to reassign Reyes because Respondent was always short staffed at the new facility at SFO, and that it was competing with the other car rental companies at the same location exacerbated the situation. While Raffio was aware of Reyes' day job, he chose to reschedule Reyes because he was the least senior person in his new category. Respondent did not present any evidence another night-shift or swing-shift employee was transferred to the day shift to support this claim of great need. Respondent did not put this policy in writing. There was no documentary evidence Respondent followed this practice or policy with any other employees. Moreover, if there was a great need for experienced employees and good workers, as O'Connor testified, then Respondent's action to insure the loss of such an employee at a time of claimed dire need indicates Respondent's reason for Reyes' reassignment was pretext. Moreover, Respondent did not need either Paulo of Reyes to be productive for the month or more they were assigned to lot 1 and/or lot 2.

While Raffio testified there were no other swing-shift or night-shift jobs available for Reyes, Respondent failed to introduce into evidence any documents demonstrating the staffing of these shifts before and after Reyes' reassignment. Inasmuch as I have found Raffio to be unbelievable, I find this bare assertion, without supporting documentary evidence to be unpersuasive, particularly in light of Raffio's admission that Reyes was a good worker he did not want to lose.

6. Termination of Elvena

Elvena signed an authorization card and distributed 10 to 15 authorization cards to other employees. His native language is Tagalog and he has a seventh grade education. He claims his ability to read English is "not to good" and his ability to understand spoken English is "[s]ome good—some. Not too good." When asked to read portions of his declaration, Elvena was able to present an accurate rendition of the paragraphs he was requested to read.

As previously noted, Respondent, during its investigation of the charges filed by the Union, interviewed Elvena because, as H. Singh admitted, he was subpoenaed to appear in this proceeding. Elvena approached H. Singh and stated he not could attend the hearing because he had scheduled a vacation with his family. H. Singh advised him he had to attend the hearing and informed Neely, one of Respondent's attorneys, Elvena had been subpoenaed to testify. In response to this information Respondent had two meetings with Elvena.

There is no claim these interviews or meetings violated the Act or were otherwise improper. See *Johnnie's Poultry*, 146 NLRB 770 (1964); *Avondale Industries,* 329 NLRB 1064 (1999). It is undisputed during the interviews Respondent's attorney, A. Locke Neely informed Elvena:

> At that meeting, first of all, we—is that I recall I know you and I, and I believe Mr. Singh as well, told Mr. Elvena numerous times that his participation in a meeting was totally voluntary. He was not comfortable participating in the meeting, he could leave. There would be no—

> absolutely no bad or adverse consequences for his decision not to speak with us.
>
> He voluntarily spoke with us.

In October, Respondent's representatives, Robert Murphy, H. Singh, and Neely, reviewed the then-current consolidated complaint line by line with Elvena and inquired if Elvena knew anything about the allegations. When Elvena denied knowledge, Respondent's representatives inquired if he was willing to give them a declaration to that effect. Elvena was informed by Neely the declaration was voluntary: "If he chose not to do it, he was free to choose not to do it. There would be no consequences. Bad—no bad adverse consequences on him, his job, if he chose not to do that." Elvena stated, "[H]e had no problem giving the declaration." At the conclusion of the first meeting, Elvena was informed Respondent would prepare the declaration for him and they would meet the following day to review the document. Elvena was informed he could make any changes to the declaration he chose.

When they met the next day, Respondent's representatives read both the complaint and declaration to Elvena. Elvena had a copy of both documents in front of him. According to Neely's undisputed testimony:

> We wanted him to go through the declaration, make sure everything was correct. Again, we went through the declaration line by line and compared it to the complaint.
>
> Again, we put it in the simplest language that we could. Explained everything. He had a copy in front of him. Asked him throughout the explanation of the declaration if he understood. If it was correct. If everything was in—was correct in the declaration
>
> We asked him—we told him, if there's anything you—that needs to be corrected, if there's anything that you want to take out, if there's anything you want to add, we can do that.
>
> We reiterated again when we were done that his signature of the—of the declaration was voluntary. It was under penalty of perjury that, you know, he was swearing that this was the truth, but we wanted to make sure that he was comfortable doing that.
>
> And if he was not comfortable doing it, he didn't have to sign it.

According to Neely, who appeared to be testifying in a direct and convincing manner, Elvena never indicated he did not understand the documents or that there was a need to modify the declaration. Elvena, according to Neely, did not make any comments about being concerned about his job security during these meetings. Elvena admits the declaration was not accurate but does not claim he informed Respondent about the inaccuracy. Elvena avers he told H. Singh during the meeting "I just tell him and said I just want to get the—only job—protection for my job security." However, Elvena also admitted he told H. Singh he wanted to sign the document. Elvena admitted H. Singh informed him he did not have to sign the declaration if he did not want to.

Shortly after the first 2 days of hearing concluded, Elvena was suspended by Raffio. Raffio had been informed by Respondent's counsel Elvena's testimony conflicted with his declaration. Upon this information, Raffio decided to suspend Elvena pending investigation. Elvena admitted Raffio told him he was suspended because he lied to the Respondent in the declaration, that he was not honest. The counseling review given to Elvena on September 30, provides:

> During a hearing before the National Labor Relations Board, you testified under oath that statements you had made in a declaration dated October 11, 2999, were untrue. You also admitted that you had given the declaration voluntarily and that you understood that it was given under penalty of perjury. This is in direct violation of company policy listed under "work rules and standards of conduct" which specifically demands truthfulness from Alamo associates to management and representatives of Alamo.

This form also informs Elvena he was suspended for 5 days without pay pending investigation. Elvena was instructed to report to Raffio on October 5. When Elvena met with Raffio on October 5, he was informed he was fired. Elvena admitted Raffio said the reason he was terminated was because he "was not honest to the company." The termination form provides Elvena was terminated effective October 7 for "violation of company policy." The counseling review quoted above was attached to the termination form.

Raffio testified the policy provides:

> If an associate knowingly, consistently, and willfully violates the company's work rules and standards of conduct, the associate may be subject to disciplinary action, including verbal warning, written warnings, suspension without pay, for one or more days, or termination of employment.

Other offenses for which an employee can be terminated under Respondent's policies that Respondent claims apply to Elvena include; misrepresentation of the truth to managers or customers and theft or deception.

Raffio admitted in some circumstances an employee's first violation of these policies would be subject to progressive discipline. According to Raffio, during his 13 years in his current position with Respondent, other employees were disciplined for lying to the Company or for making false statements and in some cases the employees were terminated. There was no evidence concerning the disciplining of these other employees, which were terminated, if any, which were disciplined in another manner and why. Raffio explained in Elvena's case, there was no better proof than the official records.

III. ANALYSIS AND CONCLUSIONS

A. Alleged Violations of Section 8(a)(1) of the Act

1. Alleged interrogation of Elvena

As the Board held in, *Medcare Associates, Inc*., 330 NLRB 935 (2000), in determining the lawfulness of alleged interrogations under *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), consideration is to be given to "the *Bourne* factors," so named because they were first set out in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). Those factors are:

(1) The background, i.e. is there a history of employer hostility and discrimination?

(2) The nature of the information sought, e.g. did the interrogator appear to be seeking information on which to base taking action against individual employees?

(3) The identity of the questioner, i.e. how high was he in the company hierarchy?

(4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of unnatural formality?

(5) Truthfulness of the reply.

The *Bourne* factors "are not to be mechanically applied in each case." 269 NLRB at 1178 fn. 20. The Board concluded in *Medcare Associates, Inc.*, supra at 940:

> In the final analysis, our task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act. . . . When . . . employees have been subjected in several different incidents to explicit questioning or implicit pressure to elicit an expression of union sentiments, a proper analysis must take all of those incidents into account rather than considering each one in isolation. Suggestions conveyed in one conversation may, in the light of later events, acquire a more ominous tone.

I have credited the testimony of Elvena that Raffio approached him and inquired if Elvena joined the Union. When Elvena disclaimed knowledge, Raffio called him a liar, indicating he thought Elvena joined the Union. There was no credible evidence Raffio, who admittedly represented Respondent's position of opposing union organization, usually approached Elvena and discussed matters that did not directly relate to Elvena's work duties. Raffio was in charge of Respondent's facility and the top local manager. Elvena clearly did not regard the question as innocuous because he gave an untruthful answer. Raffio's rejoinder that he did not believe Elvena's disclaimer contributed to the coerciveness of the inquiry. I find Raffio's interrogation of Elvena, under the circumstances of this case, tended to coerce Elvena in the exercise of his Section 7 rights, and thus is violative of Section 8(a)(1) of the Act.

2. Alleged solicitation of grievances

I find Raffio corroborated Elvena's testimony that he asked employees for their complaints about Respondent during the March mandatory employee meetings. While Respondent claims it had a policy and practice of soliciting employees grievances and comments under its open-door policy and team leader meetings, there was no evidence the team leader meetings were mandatory or that employees were asked, in response to the union organizing effort, to state their complaints. There was no evidence the open-door policy or team leader meetings involved or envisioned senior management officials initiating discussions to discover employees' grievances. *6 West Limited Corp.*, 330 NLRB 527 (2000).

The solicitation of grievances at an employee meeting that was not shown to be normally conducted by Respondent's top local manager during a union organizing campaign where Respondent admittedly publicized its opposition to the campaign, was designed to influence the employees prior to the election thereby interfering with the employees freedom of choice under Section 7 of the Act, in violation of Section 8(a)(1) of the Act.[32] As the Board held in *Uarco, Inc.*, 216 NLRB 1, 4 (1974):

> Where there is no past practice of soliciting employee grievances and the solicitations are in response to the union's organizational activities, there is a presumption that such solicitations carry with them the implied promise that such grievances will be remedied.

There is no evidence Raffio had previously held a similar meeting with a comparable group of employees and solicited their grievances as well as asked them to state the privileges they esteem. Elvena admitted Raffio and Respondent's other representatives attending this meeting did not specifically promise to rectify any of the grievances. Thus, the next question is whether the solicitation of grievances also included an implied promise of benefits. "Grievance Solicitation during the pre-election period . . . constitutes an unfair labor practice if the employer also promises or implies that it will remedy the grievance if the union is rejected, or if its promise or implication otherwise serves as an inducement to vote against the Union." (Citations omitted.) *Presbyterian/St. Luke's Medical Center v. NLRB*, 723 F.2d 1468, 1474 (10th Cir. 1973).

Thus, in assessing Raffio's comments, it must also be found he impliedly promised, or at least led employees to understand that Respondent intended to remedy or consider remedying the solicited grievances. I find the inference exits in this case because Raffio admitted he listed on a board during the meeting benefits the employees stated they enjoyed, including the opportunity to visit the Philippines or homelands for extended vacations, the flexible schedules that permitted them to work other jobs, etc. Analogous to the vice inherent in the conferral of benefits, the listing of benefits currently enjoyed by the employees in the context of grievance solicitation, warrants the conclusion "[e]mployees are not likely to miss the inference that the source of benefits now conferred is also the source from which benefits must flow and which may dry up if it is not obliged." *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409–410 (1964). Raffio emphasized this by admittedly informing the employees "with the Union you don't know what you're getting, with Alamo you know what you've got."

Respondent impliedly promised to rectify the grievances by writing down the benefits the employees stated they valued, and inferring such benefits exist by the largesse of Respondent.

[32] Respondent, on brief, argues it did not solicit a grievance when Reyes met with managers concerning his medical bills and Raffio gave him his company jacket in response to Reyes' complaint. I find Reyes approached Respondent's managers under its open-door policy to resolve a problem. There was no evidence Respondent solicited grievances from Reyes and there is no evidence any of Respondent's agents solicited the uniform jacket grievance. Counsel for General Counsel's brief does not allege this meeting with Raffio was a solicitation of grievances with a promise of benefit in violation of the Act. I find the evidence concerning these meetings does not establish a violation of the Act.

The reference to the possible loss of benefits if Alamo was not free of the Union, meets the objective standard of demonstrating the implied promise of benefit was tied to the "discontinuance of employee support for the Union." *Bakersfield Memorial Hospital*, 315 NLRB 596 (1994). The meeting was called in response to the union organizing effort and upcoming election. Raffio admittedly related to employees Respondent opposed the organizing effort while soliciting their grievances. Thus, I find Respondent conveyed there was a nexus between the solicited grievances, the benefits granted, and the employees' rejection of the Union, and that such solicitation of grievances with the attendant implied promise of benefit violates Section 8(a)(1) of the Act.

3. Wage increase

It is undisputed Respondent announced the wage increase survey during the union organizing campaign and implemented the wage increase the same week as the union election. H. Singh mentioned to Paulo the receipt of a wage increase might change his "mind about the union." The credited evidence does not show the timing of the increase was mere serendipity. Respondent initiated the wage survey in late 1998. There was no convincing explanation of why Respondent could not have speeded up the process or delayed the implementation of the increases until after the election. Not all those in the unit received wage increases and some employees not in the unit received wage increases, including management.

General Counsel relies on the holding of *Nissan Research & Development*, 296 NLRB 598, 611 (1989), as follows:

> A grant or promise of benefits made by an employer to its employees during a union organizational effort will be considered unlawful unless the employer can provide an explanation for the timing of the grant or announcement of such benefits. It is upon the employer to show by objective evidence that it would have made the same grant or announcement of benefits had the union not been present. *Village Thrift Store*, 272 NLRB 572 (1983). An employer, when confronted by a union organizing campaign must proceed as it would have done had the union not been conducting its campaign. *Russell Stover Candies*, 221 NLRB 441 (1975). The granting of wage increases during the pendancy of a representation proceeding has been held to be lawful where such action is consistent with past practices or has been decided upon prior to the onset of union activities. *Marine World USA*, 236 NLRB 89, 90 (1978).

According to Respondent, the wage increase was warranted and not unlawful. Respondent argues the wage increase was not granted to discourage union activity or to encourage support for Respondent in the union election. The Respondent claims it was merely following a longstanding practice of conducting wage surveys to remain competitive in a difficult labor market and in anticipation of Respondent's move to SFO where its employees would be working in closer proximity to competitors employees. Another reason advanced by Respondent for the wage survey was its impending merger with National Car Rental. This usual activity did not have to be deferred, Respondent avers. *Belcher Towing Co. v. NLRB*, 726 F.2d 705, 710 (8th Cir. 1984); *Simpson Electric Co. v. NLRB*, 654 F.2d 15, 17 (7th Cir. 1981).

While Respondent claims to routinely run wage surveys, it failed to demonstrate this survey was within the parameters of that routine. In fact, the evidence is to the contrary that the wage survey was motivated by the merger and move to SFO. Moreover, there is no evidence raises are given within so many months of the survey's completion or approval. Employees' performances are reviewed annually and at that time wage increases, if any, are determined. Paulo's performance review in October 1998 resulted in a wage increase based on performance on or about October 15, 1998. Paulo received a special review in March 1999 to "have common review dates for all employees." Paulo received another increase at that time. This special review was not shown to be a result of the survey. There are no documents indicating Paulo, Reyes, or other unit employees received wage increases other than as a result of reviews by supervisors.

If the March increase is averred to be a result of the wage survey, then what did Respondent implement in April, the week of the election. The documents for this increase indicate it was "special" not a routine event. To have a third wage increase between October and April was also not demonstrated to be the result of a routine practice. There is no showing by documentary or other probative evidence the April wage increase had been budgeted by Respondent. Respondent failed to show past practices that resulted in implementing of wage increases based on surveys shortly after employees such as Paulo received two wage increases within 5 to 6 months. Respondent failed to show there was a decision to implement wage increases if the survey indicated they were warranted prior to the commencement of the union organizing campaign.

There was no documentary evidence the increase in April was governed by factors other than the union organizing campaign. On the contrary, H. Singh's comments to Paulo demonstrate this pay increase was timed and implemented to induce employees to vote against the Union. While Respondent claimed such surveys are routinely conducted by Respondent, there was no convincing evidence similar surveys were conducted at Respondent's locations other than SFO during the pendancy of union election. The comparison of the wages of those employees receiving increases compared to Respondent's competitor's employees was not introduced into evidence.

Thus, there was no objective or persuasive subjective evidence demonstrating the granting of the wage increases was consonant with Respondent's policies or was necessary to keep its wages competitive in the SFO marketplace. Based on the timing of the event, H. Singh's comment to Paulo and the Respondent's failure to bear its burden of convincingly explaining its timing and demonstrating the timing of the raises was not influenced by the union organizing campaign, I find the grant of the wage increases interfered with, restrained and coerced its employees in the exercise of rights guaranteed them in Section 7 of the Act and, thereby, violated Section 8(a)(1) of the Act. *Baker Brush Co.,* 233 NLRB 561 (1977).

4. Informing employees they were assigned to lot 1 because they engaged in union activity

I have found above the credited evidence establishes J. Singh told Paulo she knew he supported the union organizing effort and was assigned to lot 1 to isolate him. I also credited his testimony that on or about March 9 H. Singh told him he wanted him to remain at lot 1 and not go to Respondent's McDonald Road location because Respondent did not want him talking to the other employees, that is why he was isolated. In addition to Paulo's persuasive demeanor and J. and H. Singh's unconvincing demeanor while testifying[33] as discussed above, Respondent's unusual practice of Paulo's and Reyes' paychecks to lot 1, as well as instructing them to remain at lot 1 and not take breaks for food and personal needs, thereby removing them from prior routine contact with other employees, lends weight to this testimony. I find informing an employee he was isolated from the other employees due to protected activity is coercive and thereby violative of Section 8(a)(1) of the Act. *Hall of Mississippi, Inc.*, 249 NLRB 775 (1980).

5. Instructing employees not to talk to other employees while on the clock

I have previously found Paulo's testimony concerning this March 9 conversation with H. Singh to be credible. Accordingly, I find H. Singh told Paulo "he doesn't want me talking to any other employees while I'm on the clock" because "we know about your participation in organizing the union." Respondent does not claim to have a valid no-solicitation or no-talking rule that applied to all employees at the time of this conversation on or about March 9. The instruction was tied to Paulo's union activity and isolation from other employees and was made with other evidence of union animus. Respondent has not demonstrated it has a longstanding rule prior to the advent of the union organizing campaign that prohibited such conversations and that was previously enforced. This is not a single isolated incident of antiunion behavior. There is no evidence Respondent similarly instructed other employees not to talk to other employees while they were on the clock. The instruction to Paulo was disparate treatment. Accordingly, I find H. Singh's comment coercive and thereby violative of Section 8(a)(1) of the Act. Compare *Super-H Discount*, 281 NLRB 728 (1986). See *Opp Textiles, Inc.*, 168 NLRB 201 (1967).

6. Impression of surveillance

I agree with Respondent the General Counsel failed to support this allegation with probative evidence. Counsel for General Counsel did not address this issue in his brief. Inasmuch as there was no direct testimony concerning this issue, I find this allegation should be dismissed.

7. Implied threat to discharge employees if they voted for the Union

As found above, Raffio told Reyes during one of the meetings they had concerning his medical bills:

> Steve Raffio tried to persuade me to don't vote for the union, and explained to me what benefits I don't have and what the union has, what we can get through the union, things like that. And when he asked me what we can do for you to make you happy and don't vote for the union, I said, nothing, I've already made the decision to vote for the union and I'm going. And he said, well, I know that you are a hard worker, you are a good worker and I don't want to lose you, and that's what he said. I'm sorry, he didn't say I, he said we, we don't want to lose you.

Reyes understood these comments to mean that if he voted for the Union he would be fired. While Nedic, H. Singh, and Raffio testified there was no discussion of the Union or union activity during this meeting, I have found, based on their demeanors and other factors, that Reyes was the more believable witness. Raffio admitted telling Reyes he heard he was a good worker and he did not want to lose him but Raffio disclaims he tied this statement to Reyes' union activity. Considering the other violations of the Act found herein in addition to my credibility resolutions, I conclude Raffio made the alleged statement. In the context of Respondent's other violations, I conclude it was reasonable for Reyes to interpret Raffio's comment as an implied threat of discharge if he voted for the union. Such an implied threat of discharge is violative of Section 8(a)(1) of the Act.

8. Threat union supporters will be fired

Paulo's credited testimony is that during the April 21 confrontation with H. Singh:

> I said, you keep yelling at me and I keep trying to explain to him that, you know, I was just getting a cassette tape from my car. So, I got frustrated and I yelled back and I said, what do you want to do, fire me right now. And then he said, well, there's only a couple of days after the election, eventually you union guys will get fired or find another job for sure Alamo will win the election and the union will lose, now get your ass to Lot 3 right now. I said, no, I want to watch the video that you guys made against the union. He said, okay, fine, watch it at 9:30 a.m. So then I watched it.

I do not credit H. Singh's denial and rendition of the conversation. H. Singh claimed Paulo challenged him to a fight and H. Singh walked away. In addition to the previously stated reasons for not crediting H. Singh's testimony, I find an incident where an employee who ostensibly had been warned for poor attendance and suspected of theft, as Respondent claimed, would not have a threat to get physical with a supervisor ignored, thus I find H. Singh's testimony inherently unbelievable. I conclude H. Singh threatened to fire Paulo for being a union supporter, which is intimidating and a violation of Section 8(a)(1) of the Act.

9. Telling employee he was removed from driving shuttle bus because Respondent did not want him to talk with other employees

When Reyes was informed of his reassignment to lot 1, the credited testimony is O'Connor said: "Steve Raffio send you to

[33] Respondent's argument H. Singh is a credible witness is unpersuasive based on his unconvincing mien and for the previously stated reasons.

Lot 1, because you talk to the people about union." O'Connor denied making the comment and Respondent argues Reyes admitted he continued to make adverse comments about J. and H. Singh after he had been instructed by O'Connor to stop making the comments. Thus, Reyes was disciplined for failing to follow instructions and "disrespectful behavior toward supervisors." Respondent also noted O'Connor testified he thought Reyes was against the union. I find this self-serving testimony another reason to discredit O'Connor. O'Connor failed to give any clear and convincing predicates for this opinion. Moreover, Reyes credibly testified that in his e-mail as well as in conversations with other supervisors, he clearly expressed his support for the Union.

Interestingly, Respondent did not issue any disciplinary forms concerning these alleged infractions and the payroll change notice dated March 1, for Reyes did not mention any disciplinary basis for the change. O'Connor and Raffio testified Reyes was considered a very good employee at the time of his termination in May, which does not indicate Reyes was insubordinate and disrespectful. As discussed in greater detail below, the similar removal of Paulo from his work and assignment to guard Lot 1, further raises the specter of proscribed motive and lends credence to Reyes' testimony about this conversation with O'Connor. Accordingly, I conclude O'Connor made the claimed statement, which interfered with Reyes' Section 7 rights, in violation of Section 8(a)(1) of the Act.

B. Alleged Violations of Section 8(a)(3) and (1)

Wright Line, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), established a test for approaching allegations of discrimination under Section 8(a)(3) of the Act, which was restated in *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996):

> Under [*the Wright Line*] test, the board has always first required the General Counsel to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity. *Office of Workers Compensation Programs v. Greenwich Collieries*, 114 S.Ct. [2551 (1994)] at 2258.

This analysis will be used to determine the merits of the various allegations in the complaint alleging violations of this section of the Act.

1. Paulo's reassignment to lot 1

I find General Counsel has met his burden of demonstrating Paulo's union activity was a motivating factor in Respondent's decision to reassign Paulo to lot 1. Paulo was an active union advocate, contacting union personal, distributing authorization cards to coworkers, wearing a union button at work and serving as the union observer at the election. The credited testimony also demonstrates J. and H. Singh knew of Paulo's union activities and told Paulo on March 7:

> I was supposed to ask permission to go there and pick up my check. Then she said, well, next time, call me and I'll send your paycheck to you wherever—or I'll ask somebody to give you your paycheck wherever you are. And I asked her why. Then she said, well, we don't—I'm sorry—we do not want you here, you are forbidden to come here, we know about your participation in the union and we don't want you talking to other employees and using union cards. Then she told me, now leave and don't talk to anybody.

The credited testimony is that 2 days after J. Singh made her comments to Paulo, H. Singh told Paulo Respondent knew of his union activity and assigned him to lot 1 to isolate him from the other employees. Factors supporting Paulo's testimony about these comments are: the instruction Paulo not return to base for meals and personal needs supporting the isolation motive; instructing Paulo not to pick up his paycheck, rather it will be brought to him at lot 1, another method of removing him from contact with other employees; and the various violations of Section 8(a)(1).

Another indicia of pretext included Raffio's testimony he was informed of the claimed suspicious activity at lot 1 in early January and again 1 week later but failed to assign any other employee to guard the lot until Paulo was assigned on February 16. Respondent failed to convincingly explain[34] the delay of more than a month between the asserted suspicious activity and the reassignment of Paulo. If Raffio was sincerely concerned for the security of lot 1, there would not have been a hiatus between the report and reassignment or explanation for the hiatus. Thus, I find Respondent's explanations to be pretexts probative of proscribed motive. Another reason advanced for the reassignment was the alleged suspicion of theft. The date of this incident was never advanced. That the police were present indicates there was a police report, but no documentation was placed in evidence. This bare assertion without any documentary evidence is another indicia of pretext.

O'Connor testified that guards are assigned to lot 1 only when there are vehicles. The unrefuted testimony of Paulo and Reyes is that most of the time, the lot was empty. The delivery dates of vehicles was not established on the record. The amount of time the vehicles were on the lot was also not established. Thus, Respondent failed to explain why only Paulo was assigned for an eight-hour period to guard lot 1. If, as Respondent's witness claimed, there was computer equipment in the building on the lot, why did Respondent not assign guards 24 hours a day 7 days a week rather than first Paulo, then Reyes. Why did Respondent assign an employee it ostensibly suspected of theft to guard duty? Moreover, the credited evidence establishes the building was empty. This finding is supported by the failure of Respondent to assign around the clock guards. These reasons adduced by Respondent are also determined to be pretexts and form another basis to find Paulo was assigned to lot 1 for proscribed motives.

In sum, I find General Counsel met his burden under *Wright Line*, and Respondent failed to meet its burden of persuasion by demonstrating its affirmative defense that it would have taken the same action absent Paulo's union activity. My credibility

[34] Raffio did not offer any reason for the delay.

resolutions and other findings require the conclusion Paulo's reassignment was for proscribed reasons and was violative of Section 8(a)(3) and (1) of the Act. *6 West Limited Corp.*, 330 NLRB 527 (2000).

2. The reassignment of Reyes

As noted above, the evidence clearly demonstrates Respondent knew Reyes supported the Union. He distributed authorization cards to coworkers, proclaimed his intention to vote for the Union in his e-mail to Respondent's top local managers and during meetings with some of these managers. About 1 week after these proclamations, Reyes was reassigned to guard lot 1. The credited testimony demonstrates Respondent's motive, O'Connor admitted the reason for the reassignment was because of Reyes's union activity of talking to other employees. Some time after this reassignment, O'Connor inquired if Reyes has changed his mind about the union. Thus, I find General Counsel has established Reyes' union activity was a motive for his reassignment.

As an affirmative defense, Respondent claims Reyes' admitted complaining to other employees about J. and H. Singh required his reassignment. While this reason appears valid, the need to reassign Reyes was never claimed as a need to isolate him from all other employees based on his comments about J. and H. Singh. Rather, Respondent denies its intent was to isolate Reyes. This claim is convincingly contradicted by the instructions given Reyes when he was assigned to lot 1. He was instructed not to leave the lot for food or personal needs, despite the lack of facilities. His paycheck was brought to him at the lot. At the time Reyes was assigned to guard the lot, it was empty, there were no vehicles or other property to guard. Thus, I find the reasons Respondent advanced for his assignment to lot 1 were pretexts and such reassignment was violative of Section 8(a)(3) and (1) of the Act.

3. Paulo's April 21 suspension

Based on the credited evidence, I find on April 21, H. Singh sent Paulo home for 3 days. Respondent's claim the suspension did not occur was not supported by credible evidence. Paulo's testimony indicates he and H. Singh yelled at each other and Paulo refused to follow H. Singh's directive to report to his assigned duty station. H. Singh also claimed Paulo wanted him to fight. H. Singh's claim he did not discipline Paulo for this conduct is not credible. I find Paulo was told to go home and not report to work until the day of the election. I also find the admitted conduct by Paulo warranted the discipline. I do not credit H. Singh's testimony that he did not send Paulo home for 3 days and if he had he would have issued a disciplinary notice. H. Singh admitted he did not always follow Respondent's disciplinary policies, Paulo's subsequent suspension was not accompanied by paperwork, and the record clearly demonstrates that Respondent did not follow its policy concerning Paulo's absences in the past. Paulo clearly failed to follow his superiors directives, yelled at his supervisor and challenged H. Singh to a fight. Given these findings, I conclude Paulo was suspended but not suspended in violation of Section 8(a)(3) of the Act and I shall dismiss this allegation of the complaint.

4. The April 26 written warning to Paulo

H. Singh issued a written warning to Paulo on April 26 because he was absent on April 22 without calling and notifying Respondent. As previously found, the credited evidence establishes H. Singh suspended Paulo on April 21 and instructed him not to report to work until April 23, the day of the election. Paulo did report for work on April 23. Respondent knew of Paulo's union activities, reassigned him to isolate him to prevent Paulo from engaging in union campaigning with other employees, H. Singh admitted observing Paulo giving out union leaflets on April 21, and H. Singh knew why Paulo did not report for work on April 22 and did not call in on that date. The timing of the discipline, shortly after Paulo acted as a union observer at the election also supports the finding of unlawful motivation.

Further, as discussed in greater detail below, Paulo's past history of unexcused absences had been tolerated by Respondent with little if any remark and without discipline. Only after Paulo became a prominent union activist did these absences become the subject of discipline. Paulo's following H. Singh's directive to go home and not report for work until April 23 being used as a basis for discipline further demonstrates Respondent was motivated by discriminatory reasons and that the same action would not have been taken in the absence of Paulo's protected activity. Given these circumstances, I find Respondent failed to meet its burden of demonstrating Paulo would have been disciplined for his absence on April 22 without calling in save for his protected concerted activity. Therefore the issuance of this warning is based, at least in part, on proscribed motives, and is violative of Section 8(a)(3) and (1) of the Act.

5. Paulo's suspension and termination

Respondent threatened Paulo several times because he was a prominent union activist. Paulo was discriminatorily reassigned to lot 1 and subsequently disciplined with a written warning. Paulo had a history of significantly exceeding Respondent's absence guidelines. Paulo credibly testified he reported his back injury to Respondent and called in the days he was absent due to this injury. Paulo was a veteran long-term employee who received better than average work evaluations despite his record of absences in 1998. It was only after Paulo's conspicuous activities on behalf of the Union in the representation campaign, including acting as a union observer, that his absences became the basis for discipline. Respondent also demonstrated animus toward the union organizing campaign, including various violations of Section 8(a)(1) of the Act.

During and after the union campaign, Respondent made numerous illegal statements, most to Paulo. Respondent enforced its absenteeism policy more stringently after Paulo's union activities became known. Only one other full-time permanent employee was shown to have been terminated for exceeding the absenteeism policy. The details of that discipline were never presented on the record. There is no clear showing that Respondent would have discharged an employee who had absences similar to Paulo. Also, the reliance on absences when Paulo was suspended as a basis for further discipline diminishes Respondent's claim of meritorious discharge. At most, Respon-

dent demonstrated Paulo's absences might have warranted discipline under its policies. Respondent failed to meet its burden of showing it would have fired Paulo absent his union activity, not merely that it could have justified his termination. *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 31 (D.C. Cir. 1998); *6 West Limited Corp.*, supra.

Based on the credited evidence, I conclude Respondent has failed to demonstrate with a preponderance of the credible evidence that it would have terminated Paulo based on his attendance record. Respondent has failed to explain why Paulo's 1998 attendance record was acceptable, did not warrant discipline and did not adversely affect his performance rating yet a similar attendance record after he became a conspicuous union advocate suddenly became intolerable and the subject of discipline. I find Respondent seized upon Paulo's poor attendance record as a pretext to terminate a union activist. The disparate treatment of Paulo between 1998 and 1999 for the same infractions further indicates pretext.

Respondent discharged Paulo at a time it claims it was entering its busy season and was short-handed on the day shift, even though Paulo's job performance evaluations indicated he was considered a valued employee. The differences in Raffio's and H. Singh's testimony, where Raffio indicated Respondent did not rigidly follow the absenteeism policy and H. Singh indicated the policy was rigidly followed, further undermines Respondent's claim Paulo's attendance record was the sole basis for his termination. This conclusion is supported by the fact Paulo received a merit increase in April, when Respondent knew of his attendance record. Thus, Respondent demonstrated by its prior actions that it did not consider Paulo's attendance record negatively until after his conspicuous activities on behalf of the Union.

I find Respondent has not met its burden of demonstrating it would have discharged Paulo absent his union or protected activity, and that his termination was substantially motivated by his union or other protected activity, in violation of Section 8(a)(3) and (1) of the Act.

6. The transfer of Reyes to the morning shift

I find Respondent's reasons for the reassignment of Reyes to the day shift are pretexts. Reyes had always made it clear he had another job in the mornings and could not work for Respondent on the day shift. Raffio, admitted he told employees during company meetings that were part of Respondent's efforts to defeat the union organizing campaign the employees being afforded the opportunity to work schedules that permit them to work a second job was a benefit the employees appreciated. Respondent failed to advance a convincing reason for its abandoning this benefit in the case of Reyes.

Reyes was a known union supporter who was the subject of discrimination in his assignment to lot 1 and the subject of intimidation by Respondent. While Respondent claims Reyes' low seniority was the basis for his transfer to the day shift, Respondent failed to demonstrate how it married its policy of accommodating employees work schedules to other jobs with this unwritten seniority policy. Moreover, Respondent did not follow any seniority policy when it transferred Paulo to guard lot 1, clean buildings or in any of his other work assignments after he prominently began campaigning for the Union. As noted above, Respondent failed to demonstrate with documentary or other credible evidence it followed a seniority rule in assignment of shifts.

Respondent's claim there was a need for Reyes on the day shift also conflicts with its action, which Reyes informed Respondent would lead him to cease working for Respondent. Respondent's witnesses admit Reyes was a valued employee. It failed to convincingly explain why they undertook a scheduling change that was guaranteed to lead to the loss of this valued employee. Respondent did not introduce a seniority list and did not introduce any evidence of who was assigned to the position Respondent scheduled Reyes for on the day shift. This lack of credible evidence is further indication Respondent's motives were discriminatory.

In sum, I conclude General Counsel presented a convincing case and Respondent failed to demonstrate by a preponderance of the credible evidence that it would have reassigned Reyes to the day shift absent his Union or other concerted protected activity. Respondent violated Section 8(a)(3) and (1) of the Act by reassigning Reyes with the knowledge that it would force his resignation.

7. Suspension and termination of Elvena

It is undisputed Elvena was terminated shortly after he testified in this proceeding because his testimony differed from his declaration given willingly to Respondent under penalty of perjury. The undisputed record demonstrates Elvena knew he was giving a voluntary declaration, he could refuse without prejudice, and he agreed to document his denials of any knowledge of the alleged violations in the complaint.

The evidence clearly supports a finding General Counsel presented a convincing case and Respondent knew of Elvena's position of support for the Union as reflected in Raffio's comment to him that his denial of joining the Union was a lie. General Counsel also established Elvena's testimony was the predicate upon which Respondent stated he was a liar and determined to terminate him.

While at first glance it appears Respondent's claim it fired Elvena because he lied in either his affidavit, testimony, or declaration, I find this claim is a pretext under the circumstances of this case. Initially, Raffio is not a credible witness. He testified some employees have been terminated for lying, but Respondent failed to introduce any documents supporting this claim. Raffio also testified the severity of the discipline for lying depends on the proof. There is no documentary evidence concerning the discipline of any employees where the evidence was not persuasive or where there was a lack of persuasive evidence.

Elvena was a 9-year employee of Respondent and this was the only infraction of company rules he is alleged to have committed. Raffio indicated repeated behaviors are considered in assessing discipline. Elvena's declaration, affidavit, and testimony were the only incident of claimed falsehood. The record fails to demonstrate Elvena's termination was comparable to any other employees who were allegedly terminated for lying. Respondent failed to clearly and convincingly establish under its policies, including documentary evidence, that it

would discharge an employee who lied. To the contrary, Raffio admitted some employees found to have lied were not fired. As noted above, and as found in *6 West Limited Corp.*, supra at 528:

> Nor did any witness testify to company policy, which would support a finding that the Respondent *would* discharge an employee who failed to give credible answers in an investigation of missing property. In this regard it bears emphasizing that a mere showing that an employee did something that might warrant discharge or discipline is insufficient to carry an employer's affirmative defense under *Wright Line*. A Respondent employer must show that it "*would* have fired" the employee, not merely that "it *could* have done so." *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 31 (D.C. Cir. 1998). [Emphasis in original.]

Respondent's resort to a bare claim by a witness who is not believable it was following established practice leads me to conclude it has failed to demonstrate by a preponderance of the credible evidence that it would have discharged Elvena for legitimate reasons apart from his union or other protected concerted activity, including his testifying in this proceeding. Respondent was shown to have animus to union activists by its numerous violations of the Act after learning of the Union organizing drive. I find Respondent violated Section 8(4), (3), and (1) of the Act by discharging Elvena for proscribed reasons.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, Teamsters Local 665, International Brotherhood of Teamsters, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct: interrogating employees about their union activities; soliciting grievances from employees and thereby impliedly offering to remedy those grievances; impliedly threatening to discharge employees if they voted for the Union in a Board-conducted election; directing employees not to talk to other employees while on the clock because the employees had been engaging in union activity; informing employees Respondent gave them certain work assignments at remote locations to isolate them from other employees because these employees had engaged in union activity; threatening employees that those employees who supported the Union would be fired or would have to find another job; telling employees that certain employees would not be assigned to drive the shuttle bus because Respondent did not want them to talk to other employees about the Union; and, in April Respondent granted wage increases to its employees working at its San Francisco International Airport and other Burlingame, California locations in order to discourage these employees from supporting the Union.

4. Respondent violated Section 8(a)(3) and (1) of the Act by assigning employees Michael Paulo and Ubaldo Reyes to oversee predominately empty parking lots in order to harass them and isolate them from their fellow employees; giving Paulo a written warning for being absent on April 21, without giving Respondent proper notice; on or about April 26 assigning Reyes to work the morning shift beginning May 11; thereby constructively discharging Reyes; on May 11, suspending Paulo for 3 days; on May 18, discharging Paulo; because Paulo and Reyes assisted the Union and engaged in union and other protected concerted activities, and to discourage employees from engaging in these activities.

5. Respondent violated Section 8(4), (3), and (1) of the Act by suspending employee Danny Elvena on or about October 1, 1999, and terminating Elvena on or about October, 7, 1999, because Elvena engaged in concerted protected activity and gave an affidavit and testimony in this proceeding, which testimony differed from a declaration Respondent requested him to give voluntarily.

6. The unfair labor practices described above are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

7. The allegations of the complaint not specifically found to violate the Act above are without merit and shall be dismissed.

REMEDY

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

I recommend Respondent immediately offer employment to Michael Paulo, Ubaldo Reyes, and Danny Elvena, or, if their prior positions are not available, to substantially equivalent positions. Further, Respondent shall be directed to make Michael Paulo, Ubaldo Reyes, and Danny Elvena, whole for any and all losses of earning and other rights, benefits, and privileges of employment they may have suffered by reason of Respondent's discrimination against them, with interest. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I recommend Respondent be ordered to expunge from its records any reference to the unlawful suspensions and terminations and to give Michael Paulo, Ubaldo Reyes, and Danny Elvena written notice of such expunction and to inform them that Respondent's unlawful conduct will not be used as a basis for further personnel actions.

[Recommended Order omitted from publication.]