American Gardens Management Company and Bailey Gardens Realty Corporation *and* Local 32E, Service Employees International Union, AFL–CIO. Cases 2–CA–33475 and 2–CA–33605

November 22, 2002

DECISION AND ORDER REMANDING

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

On March 6, 2002, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondents filed a brief in opposition to the General Counsel's exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to remand these cases to the judge for further findings, analysis, and conclusions consistent with this decision.

These cases involve the alleged discriminatory discharges of three maintenance employees by joint employer Respondents, American Gardens Management Company and Bailey Gardens Realty Corporation. The Respondents rent residential real estate in the New York City area, managed by Thomas Matthews. The amended complaint alleges that the Respondents discharged employees Roberts and Rosales in violation of Section 8(a)(1), (3), and (4) because they testified at a representation hearing.[1] The complaint also alleges that the Respondents discharged employee Frias in violation of Section 8(a)(1) and (3) because he assisted the Union and engaged in concerted activities. The Respondents argued that Roberts and Rosales were discharged for lack of work and that Frias was discharged for his insubordinate and volatile attitude.

The judge recommended dismissing the complaint, concluding that the Respondents had presented substantial evidence that Roberts and Rosales were discharged because of lack of work, and that there was insufficient evidence to establish that Frias' discharge was motivated by antiunion considerations. In recommending dismissal, however, the judge did not refer to potentially relevant testimony of certain witnesses, so that it is unclear whether he implicitly (but affirmatively) discredited them, or merely ignored certain portions of the record.[2] Neither did the judge fully delineate the elements of his legal analysis, or clearly state which facts he relied on in reaching his conclusions. Ultimately, and without case citation, the judge recommended that the complaint be dismissed.

The General Counsel excepts, arguing that the judge erred in failing to find that Roberts and Rosales were discriminatorily discharged.[3] The General Counsel argues that, applying *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983), it has met its burden of showing that protected conduct was a motivating factor in the Respondents' decision to discharge Roberts and Rosales, and that the Respondents' proffered reason for the discharges, lack of work, is pretextual. In its exceptions, the General Counsel emphasizes the following factors as demonstrating pretext: the timing of the discharges (a little over 1 week after the Regional Director's decision in the representation proceeding to include Roberts and Rosales in the bargaining unit); Matthews' testimony in the representation case that, after the renovation work was complete at Bailey Gardens, he would transfer Roberts and Rosales to another location; and vacancy reports showing a steady turnover of apartments. Moreover, the General Counsel claims that the judge made a critical factual error in finding that the renovation project ended in 1999, rather than in 1998.[4] According to the General Counsel, the judge's erroneous finding that the renovation ended in 1999 led to the judge's erroneous acceptance of the Respondents' lack of work defense.

[1] In the representation proceeding, the Respondents had challenged Roberts' and Rosales' inclusion in the proposed unit, alleging alternatively that: (1) they were temporary employees, or (2) they did not share a community of interest with the remainder of the bargaining unit.

[2] For example, the judge never specifically mentions the testimony of Jose Acevedo (Bailey Garden's current superintendent, who opposed the Union) or Thomas John (president and owner of American Gardens). The latter testimony, if credited, would arguably support the Respondents' "lack of work" defense, while the former testimony suggests both a lack of work and, at the same time, arguably indicates that other maintenance employees who lack work have not been discharged. The judge should give more explicit attention to this testimony and make the necessary credibility findings.

Further, Member Liebman finds that the judge did not make a clear credibility determination regarding certain testimony by employee Frias which the judge concluded did not, even if credited, support a finding of animus. Because views may differ on whether the comments reported by Frias can be evidence of animus, a credibility determination by the judge would aid the Board.

Member Liebman also finds that the judge, in disregarding certain evidence, may have overlooked its implications bearing on the Respondents' "lack of work" defense—specifically, the Respondents' use of floater maintenance employees at Bailey Gardens in the week prior to the discharges and thereafter, and their attempts to hire an additional handyman after the discharges.

[3] The General Counsel did not except as to employee Frias.

[4] The General Counsel excepts both to the judge's findings that: (1) most of the contractor's 20 workers "left in the summer of 1999," and (2) Roberts "was put back on Bailey's payroll" in 1999. See sec. II,(a), last sentence in par. 5 and second sentence in par. 7, of judge's decision. In both instances, the General Counsel argues that the correct date is 1998. While there is some conflict on the record as to the "end" date of the "big project," there may be merit in these two exceptions.

We agree with the General Counsel that a *Wright Line* analysis, as explained more fully below, must be applied in these cases to determine whether Roberts and Rosales were discriminatorily discharged. Because the judge did not clearly undertake a *Wright Line* analysis, or, indeed, address all of the relevant record evidence, we remand these cases to the judge for further consideration.

Wright Line is premised on the legal principle that an employer's unlawful motivation must be established as a precondition to finding an 8(a)(3) violation. In *Wright Line*, the Board set forth the causation test it would henceforth employ in all cases alleging violations of Section 8(a)(3). The Board stated that it would, first, require the General Counsel to make an initial "showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. If the General Counsel makes that showing, the burden would then shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." 251 NLRB at 1089. The ultimate burden remains, however, with the General Counsel. Id. at 1088 fn. 11. The Board also applies this *Wright Line* analysis to 8(a)(4) claims. *Taylor & Gaskin, Inc.*, 277 NLRB 563 fn. 2 (1985).

To establish his initial burden under *Wright Line*, the General Counsel must establish four elements by a preponderance of the evidence. First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that the respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a motivational link, or nexus, between the employee's protected activity and the adverse employment action. *Tracker Marine, L.L.C.*, 337 NLRB 644, 646 (2002).

If, after considering all of the relevant evidence,[5] the General Counsel has sustained his burden of proving each of these four elements by a preponderance of the evidence, such proof warrants at least an inference that the employee's protected conduct was a motivating factor in the adverse employment action and creates a rebuttable presumption that a violation of the Act has occurred. Id. Under *Wright Line* the burden then shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.[6] Id.

Here, there does not appear to be any genuine controversy over the first three elements necessary to establish the General Counsel's initial burden under *Wright Line*. Both Roberts and Rosales engaged in the protected activity of testifying in the representation case;[7] the Respondents had knowledge of that activity by virtue of their presence at that hearing; and the Respondents subsequently took adverse employment action against both employees. Thus, the controversy in these cases revolves around the fourth element.

As stated previously, the judge did not cite *Wright Line*, nor did he expressly address the four elements necessary to satisfy the General Counsel's initial burden under *Wright Line*. While the framework of the judge's decision suggests a *Wright Line* type of analysis, his analysis is problematic in two important respects. First, it cannot be decisively determined from the judge's decision whether he concluded that the General Counsel has not carried his initial burden, or concluded instead that the Respondents have established their affirmative defense that they would have terminated Roberts and Rosales due to lack of work absent any protected activity. This is a critical distinction, because the judge need not reach the affirmative defense if the General Counsel has not carried his initial burden. Second, if it is necessary to rule on the affirmative defense (i.e., because the General Counsel has established his initial burden by a preponderance of the evidence), the judge's reference to "substantial evidence" suggests that the judge applied the wrong standards under *Wright Line*.[8] Specifically, *Wright Line* utilizes a "preponderance of the evidence" standard, rather than a "substantial evidence" standard. *NLRB v. Transportation Management Corp.*, 462 U.S. at 399–400.

In view of the above, we believe that it is premature for us to now rule on the substance of the General Counsel's exceptions. Instead, we remand these cases to the judge for analysis under *Wright Line.* The judge is directed to consider all of the evidence relevant to such an

[5] Of course, the employer may submit evidence to undermine the General Counsel's showing regarding any of the four elements, and this evidence must also be considered in determining whether the General Counsel has established these four elements by a preponderance of the evidence.

[6] This shifting of burdens "does not undermine the established concept that the General Counsel must establish an unfair labor practice by a preponderance of the evidence"; it merely requires the employer to make out an affirmative defense to overcome the prima face case of wrongful motive. *Wright Line*, supra at 1088 fn. 11.

[7] In light of this, we would apply *Wright Line* to the 8(a)(4) allegations as well.

[8] The judge states that the Respondents "presented *substantial evidence* that the work available . . . had so diminished by December 2000 that their services no longer made any economic sense" (emphasis added). See sec. III, third sentence in par. 8, of judge's decision.

analysis, making any additional findings of fact and credibility determinations which might be required; to apply the applicable *Wright Line* elements and standards to the facts as then found; and to issue a supplemental decision setting forth his findings, analysis, and conclusions.

ORDER

It is ordered that this proceeding be remanded to Administrative Law Judge Raymond P. Green for further action consistent with this decision.

Karen Newman, Esq., for the General Counsel.
Jeffrey D. Pollack, Esq. and *Jerald M. Stein, Esq.*, for the Respondents.
Katchen Locke, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried before me in New York City on December 11 to 13, 2001. The charge in Case 2–CA–33475 was filed on December 14, 2000, and the charge in Case 2–CA–33605 was filed on February 22, 2001. An order amending complaint, amended consolidated complaint and notice of hearing was issued by the Regional Director on October 31, 2001. It alleged as follows:

1. That on or about December 8, 2000, the Respondents discharged employees Mathew Roberts and Alfredo Rosales because of their union activities and because they gave testimony in Case 2–RC–22297.

2. That on or about December 12, 2000, the Respondents discharged employee Fidencio Frias because of his union membership and/or activities.

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

FINDINGS OF FACT

I. JURISDICTION

It is admitted that the two companies are joint employers and that they are engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also is admitted that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Mathew Roberts and Alfredo Rosales

Bailey Gardens is an apartment house complex located in the Bronx, New York. The owner is Bailey Gardens Realty Corporation and it is managed by American Gardens Management Company.

The day-to-day management of Bailey Gardens is handled by Thomas Mathews. He is also responsible for managing two other properties, Audubon Gardens and another two apartment buildings in New Jersey. The employees of Audubon Gardens are represented by Local 32E and are covered by a collective-bargaining agreement.

Bailey Gardens consists of three buildings with a total of 219 apartments. They are located at 3138, 3150, and 3300 Bailey Avenue, in the Bronx and were acquired at a foreclosure sale in 1996. At that time, the buildings, and especially 3300 Bailey Avenue were run down and had a very high occupancy rate. At the time of the purchase, there were about 60 to 70 vacant apartments. There also were a large number of department of housing code violations.

After purchasing the buildings, the Respondents began a major project to renovate the buildings and the apartments within them. This involved plumbing and electrical repairs to the buildings and complete refurbishing of apartments that were in serious disrepair.

The repair and refurbishing project took place over a part of 1998 and largely finished in or about August 1999. The work of refurbishing vacant apartments was undertaken by a contractor named JAJ Construction Corp., and for at least a time, alleged discriminatee Mathew Roberts, who previously was employed at Bailey Gardens, was put on the payroll of that contractor. Electrical and plumbing replacement or repairs were done by other contractors. It appears that during the period when the major portion of the work was being done, there were about 20 workers at Bailey Gardens performing work of one sort or another. Most of these people left in the summer of 1999 and Mathews went back on the payroll of Bailey Gardens.

After the contractors left, Bailey Gardens, at any given time up to December 2000, had one superintendent, one porter, usually one handyman, and two general workers. The superintendent does a variety of tasks including painting, plastering, simple plumbing, and simple electrical work. In addition, he is responsible for maintaining the boiler, a job which requires a New York City license. The porter's job involves taking out the trash and cleaning the buildings. The handyman's job is essentially the same as the superintendent's job and he is supposed to be able to do simple plumbing and electrical work in addition to having a license to take care of the boiler. Part of the handyman's responsibility is to take over from the superintendent when the latter is not present.

Mathew Roberts was hired to be a general maintenance employee at Bailey Gardens and as noted above, he was put on the payroll of a contractor while the major refurbishing project was undertaken. After the contractor left, he was put back on Bailey's payroll and in 1999, Alfredo Rosales was hired to be his helper. The difference between Mathews and Rosales and the people who were handymen, is that although their job functions overlap, Mathews and Rosales did not do plumbing or electrical work and were not licensed to deal with boilers. Thus, although the superintendent and a handyman could do all the things that Mathews and Rosales did, the opposite was not true. (All also did repairs to occupied apartments when tenants had complaints.)

The evidence is that notwithstanding the fact that many of the apartments, particularly in 3300 Bailey Ave., had been completely refurbished by the summer of 1999, there were others that had not yet been refurbished because they were occupied at the time. Thus, even after the contractors left,

when apartments because vacant, they would require, to a greater or lesser degree, painting, plastering, floor work, tiling, and sheet rock work to make an apartment habitable for the next tenant. These tasks were done by Roberts and Rosales. But as people vacated apartments and new tenants came in, the number of apartments requiring substantial refurbishing work, not already done during the 1998–1999 period, began to be less and less. The Employer asserts that by November 2000, it was clear that the amount of work available for Roberts and Rosales had declined to such an extent that the superintendent and one handyman could do all of the work that all four had done previously. General Counsel's Exhibit 8 contains a record of apartments that were vacant and available for rent during a period in 2000 and 2001. It indicates a steady rate of turnover but would not by itself indicate the amount of repair any of the apartments listed would require before being re-rented. That would depend on the condition of the apartment when vacated.[1]

In August 2000, Roberts called the Union and this resulted in two meetings held at the apartment of Gilberto Cardona, the porter.

These union meetings were held on August 30 and September 11, 2000. Four of the employees were at these meetings and at least three and possibly all of them signed union authorization and dues-checkoff authorization cards. The employees who attended the meetings were Mathew Roberts, his helper Alfredo Rosales, Gilberto Cardona, the porter, and Fidencio Frias, who at that time was a handyman. The superintendent at the time, Fernando Robles, was not in attendance albeit there was testimony that after the September meeting, the employees asked if he wanted to join the Union and he refused. Also not attending was Jose Acevado, who at the time was a handyman but who became the superintendent when Robles was discharged on December 15, 2000.

Cardona testified that on or about September 11 (the same day as the meeting in his apartment) Thomas Mathews asked him why he signed for the Union. He testified that he told Mathews that he signed to get various benefits. According to Cardona, Mathews said that he should have talked to him first. Mathews denies this and testified that he can't even talk to Cardona without a translator. Cardona speaks Spanish and very little English. Mathews speaks English but with an Indian accent. There is, to my mind, a serious question as to whether these two men could speak to each other about anything other than the simplest of matters.

On October 13, 2000, the Union filed a petition for an election in Case 2–RC–22297 and a hearing was held on October 23, 2000. At the hearing, the Employer took the position that Frias had only been temporarily employed at Bailey Gardens; that he had been transferred from another property called Hollis Gardens and was currently working at still another location known as Audubon Gardens. The Employer also argued that Mathew Roberts and Alfredo Rosales, as general workers, would soon be terminated from Bailey Gardens because the work that they had been doing was soon going to be completed. Thomas Mathews who testified for the employer, asserted that Roberts and Rosales would be transferred within a matter of a month to another property managed by the Respondents. Both Roberts and Rosales testified at the representation hearing in support of the Union's contention that they were permanent employees and therefore eligible voters.

On November 27, 2000, the Regional Director issued a Decision and Direction of Election. She concluded that an appropriate unit consisted of all full-time and regular part-time maintenance employees including porters, handymen, janitors, superintendent and maintenance workers employed at Bailey Gardens, excluding all other employees, guards, professional employees, and supervisors as defined in the Act. The Regional Director further concluded that Roberts and Rosales were eligible to vote because the evidence to support the contention that they would be let go within 1 month "was unsubstantiated and insufficient" and therefore did not establish that they would be laid off on a date certain.

Frias testified that sometime in November 2000, as he was driving back from New Jersey with Thomas Mathews, Mathews said, "why did you sign for Union?" Frias also testified that during this conversation, Thomas Mathews mentioned Mathew Roberts, but his testimony in this respect is not all that clear. He testified that "during the conversation he said that Robert Matthews—that the company could pay him— the company could pay the compensation and fire him and that's it."

On December 8, 2000, the Employer laid off Roberts and Rosales. Although Thomas Mathews asserted at the representation hearing that he had intended to transfer these two employees to another location, this did not happen and neither employee has been offered employment at any other location.

On December 12, 2000, Thomas Mathews discharged Frias. At this time, Frias had been away from Bailey Gardens for at least a month, having been transferred to Audubon where the employees were already covered by a collective-bargaining agreement. (Frias also did some work in New Jersey.) The Company contends that Frias was discharged for insubordination.

On December 20, 2000, the Board issued, in the representation case, an order denying the Employer's request for review and on December 22, 2000, an election was conducted. There was one vote for the Union and one against. There also were four challenged ballots. On December 28, 2000, the Employer filed objections and on January 10, 2001, the parties agreed to set the election aside. A second election was held on January 26, 2000. There was one vote for the Union, zero votes against, and four challenged ballots. On February 1, 2001, the Employer again filed objections and by agreement, the parties agreed to set this election aside as well.

Cardona testified to the effect that sometime after the election, Thomas Mathews told him that he was not working on

[1] According to alleged discriminatee Mathew Roberts, if an apartment had already been renovated, the amount of work required when a tenant left would take about 2 or 3 days. On the other hand, he testified that the amount of work that would be required to renovate an apartment when a tenant left, if the apartment had not yet been renovated, could take about 4 weeks of work for two people. Obviously, as the number of fully renovated apartments increased over time, the amount of work needed to be done for any particular apartment when a tenant vacated, became drastically reduced.

apartments until the case with the Union was finished.[2] Mathews denies this assertion. In this regard, I note that the apartments rent from about $500 to $700 per month and holding them off the market for an indefinite period could cost the Company a fair amount of income.

Subsequent to the layoffs of Roberts and Rosales, the Employer utilized the services of two people named Jesus and Abraham to do work that had been done by Roberts and Rosales But Jesus and Abraham are handymen who were long standing employees of the Company and who are used at various locations as needed and go from one location to another. Also, after the layoffs, there have been three separate handymen who have been hired and fired over a period of time at Bailey Gardens. Thomas Mathews testified that he is still looking to hire a handyman for that complex because the superintendent needs a break. Mathews testified that he has not rehired Roberts and Rosales because the only position that he needs is for a handyman and neither has all of the skills or licenses required to be a handyman.

B. The discharge of Fidencio Frias

Frias was originally employed at Hollis Gardens where he had an encounter with a tenant. That led to his arrest and Frias pleaded guilty to assault. This resulted in a $500 fine and a year's probation. Frias had to leave the Hollis Gardens location as long as the tenant remained and he was transferred to Bailey Gardens. At Bailey Gardens, Frias was the second handyman and worked there from about the end of September 2000 to November 2000. Thereafter, he was transferred by Thomas Mathews to Audubon Gardens where he worked as a handyman until he was discharged on December 13, 2000. Frias also had a run in with the law back in 1993 when he first came to the United States. That resulted in a 5-year probation for some type of criminal activity. Based on his prior history and also based on my observation of his demeanor, I would say that Frias has a somewhat volatile temperament.

Because Frias was transferred to Bailey Gardens in September 2000, he arrived in time to be involved in the union organizing campaign. But as he was transferred to Audubon in late November 2000, where there was already a union contract, Frias had no further involvement in the election situation that evolved at Bailey Gardens. (As noted above, the Regional Director issued her Decision and Direction of Election on November 27, 2000.)

Frias essentially admits that he was late to work on December 11, 2000, and that when Thomas Mathews spoke to him about it on the phone he (Frias) said shit or something like that. Frias testified that when Mathews came down to Audubon to talk to him about his lateness, they got into an argument. According to Frias, his wallet fell to the ground whereupon Mathews said, "do you want to hit me."

On December 13, Mathews tendered a letter to Frias and asked him to sign it. Frias claims that General Counsel's Exhibit 2 is not the tendered letter but he agrees that some of the things in the exhibit are correct. In any event, Frias says he never got a chance to apologize and that after some more arguing, Mathews told him that he couldn't work there anymore.

The Company's position is that Frias was not discharged for lateness, but rather because of the insubordinate and aggressive way that he acted toward Thomas Mathews on December 12 and 13, 2000. In this respect, Mathews testified that on December 12 when he confronted Frias about his lateness, Frias became angry and threw his wallet to the ground. He also testified that when he attempted to present a warning letter to Frias on December 13, Frias again became enraged and refused to sign it. With respect to these incidents, the Company produced witnesses who corroborated Mathews' version of the events.

III. DISCUSSION

The evidence shows that the normal complement of workers at a building complex like Bailey Gardens would be one superintendent, one janitor, and either one or two handymen. The evidence also establishes that during the time that Mathew Roberts and Alfredo Rosales were employed at these buildings (either as employees of a subcontractor or as direct employees of the Respondent), they were there principally to participate in a project to renovate the buildings and the apartments therein after the Company purchased the complex in a foreclosure sale.

The renovation work was extensive and required at least 20 workers to do the job. Most of this work was completed by August 1999, but some additional renovation work remained after that date that could be done by a much reduced crew of people. Accordingly, after most or all of the code violations had been cleared and most apartments refurbished, Roberts and Rosales (hired as Robert's helper) remained on to do some of the remaining apartment refurbishing work and also general maintenance work. But as apartments were vacated and renovated (to greater or lesser degrees depending upon condition), the amount of this type of work became less and less. Thus, although some of the work done by Roberts and Rosales overlapped with the work ordinarily done by handymen, it should be noted that neither had the boiler license required of a handyman and neither did the types of electrical or plumbing work that a handyman was supposed to be capable of doing.

At the representation hearing, the Employer's agent, Thomas Mathews, testified that the work of Roberts and Rosales was just about completed and that they did not have much expectation of future employment at this location. He did, however, testify that when the work on Bailey Gardens was completed, he expected to assign them to one of the Company's other properties. Because Mathews could not say definitively when Roberts and Rosales would likely become redundant at Bailey Gardens, the Regional Director concluded that they should be considered to be eligible voters.

According to Thomas Mathews, by December 2000, there simply was not enough work for Roberts and Rosales to do in a

[2] His actual testimony, taken through an interpreter was:

> Q. Now did there come a time sometime after this conversation, after Mr. Matthew Roberts and Alfredo Rosales had been discharged, did you have another conversation with Matthew Roberts with regard to apartments—Thomas Matthews? Did you have a conversation with Thomas Matthews with regard to apartments?
>
> A. He told me that the apartments—no more working, the paint, the tile until not leaving the union—until the case with the union would be finished.

normal working day and he decided to lay them off. Mathews acknowledged his testimony in the representation case to the effect that he expected to place them elsewhere, but he testified that he had no place to put them.

Although the evidence shows that Thomas Mathews has used two other workers to do some of the same work that Roberts and Rosales did, the evidence shows that these people were long time employees of the Company who were utilized to do work at all of the Company's properties and were assigned to go from place to place as needed. Both of these employees had greater seniority than Roberts or Rosales and their utilization in this way, was not out of the ordinary.

Similarly, although there was evidence that Thomas Mathews has hired and attempted to retain (without success), a series of handymen after the layoffs of Roberts and Rosales, the evidence is that the Company needs to have someone with a boiler license and the ability to do plumbing and electrical work in order to allow the superintendent at the building complex to take a day off or go on vacation. Unfortunately, neither Roberts nor Rosales have the required license or the necessary experience.

The General Counsel contends that there is evidence of antiunion animus indicated by the testimony of Cardona and Frias concerning several conversations they allegedly had with Thomas Mathews. However, my impression was that Cardona's understanding of English was so limited that I have substantial doubts as to what if anything he understood. Therefore, I cannot credit his testimony as to these alleged conversations which were denied by Mathews. Further, the single conversation reported by Frias where he allegedly was asked why he signed for the Union, does not, even if credited, amount to evidence of animus.

There is no question but that the timing of the layoffs is suspicious, inasmuch as they occurred shortly after the Regional Director issued her Decision and Direction of Election. Moreover, that suspicion is somewhat enhanced by the Employer's assertion, in the representation case, that it intended to place Roberts and Rosales elsewhere but has failed to do so. Nevertheless, on balance, I think that the Employer has presented substantial evidence that the work available to these two employees at Bailey Gardens had so diminished by December 2000 that their services no longer made any economic sense. Further, the Employer has demonstrated that there were rational considerations for its inability to place them at other apartment complexes and for its subsequent attempts to replace them with people who had boiler licenses and work experiences possessed by neither Roberts nor Rosales.

Similarly, the evidence with respect to Frias does not, in my opinion, add up to sufficient proof that his discharge was motivated by antiunion considerations. For one thing, at the time of his discharge he was not even assigned to the location where the election was being held, but rather was employed at Audubon Gardens where the Employer had a labor contract. In any event, the credible evidence supports the Employer's contention that Frias, who has a somewhat volatile temperament, was in Mathew Robert's eyes, guilty of aggressive conduct to him when he tried to admonish Frias for being late. It may be that Frias had no intention of engaging in any type of physical conduct. But from Robert's point of view, he viewed Frias' conduct as menacing and I can't say that his view of the events was unreasonable.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The complaint is dismissed.

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