Double D Construction Group, Inc., *and* International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers Local 272, AFL–CIO. Cases 12–CA–21951 and 12–RC–8709

June 17, 2003

DECISION AND ORDER REMANDING

BY MEMBERS LIEBMAN, SCHAUMBER, AND ACOSTA

On September 10, 2002, Administrative Law Judge Keltner W. Locke issued the attached bench decision. The General Counsel filed exceptions and a supporting brief.

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

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

This case involves objections to a representation election held on December 7, 2001,[1] as well as unfair labor practice allegations. The judge found that the Respondent-Employer engaged in objectionable conduct sufficient to set aside the results of the election, violated Section 8(a)(3) and (1) of the Act by discharging employee Dean Martindill, and violated Section 8(a)(1) by engaging in various threatening and coercive conduct and statements.[2] The General Counsel has excepted, inter alia, (1) to the judge's failure to find that the Respondent violated Section 8(a)(1) by virtue of a statement made to employee Tomas Sanchez; and (2) to the judge's dismissal of the 8(a)(3) allegation that the Respondent unlawfully discharged Sanchez.[3]

For the reasons that follow, we reverse the judge and find that the Respondent did violate Section 8(a)(1) with respect to the statement to Sanchez. As for the Sanchez discharge, we remand that portion of the case to the judge for further consideration, consistent with our decision.

Our analysis of the Sanchez discharge hinges on the judge's erroneous decision to discredit Sanchez, based solely on his use of a false social security number to obtain employment. As we will explain, the judge's approach—which could have significant consequences in other cases, if endorsed by the Board—amounts to a disqualification of Sanchez as a sanction for his conduct, not a proper determination of his credibility, which requires consideration of multiple factors. Our dissenting colleague argues that we violate the principle of judicial restraint by deciding this issue. On our contrasting view of the record, however, the issue is squarely presented. Even if it were not, we would feel obliged, in the exercise of our reviewing authority, to address the judge's error, because it threatens harm to the effective administration of the Act. In such circumstances, restraint is not prudent.

1. *The Statement to Sanchez*: The complaint alleges that on December 5, 2001,[4] Respondent's president, Don Lock, threatened employees with discharge because of their union support and activities. Employee Tomas Sanchez testified that while at the jobsite 2 days before the election, Lock pointed and shook his index finger at him and repeated three times, "Remember your bills." Sanchez testified further that he understood this message as intended to scare him into believing that if he voted for the Union he would be fired and, thus, unable to pay his bills. Lock did not deny making the statement.

The judge found that the statement attributed to Lock constitutes neither a threat nor a promise that interfered with, restrained, or coerced employees' exercise of Section 7 rights. Instead, he found it to be merely a reference to a legitimate election campaign theme of the Respondent, which emphasized the Union's wasteful expenditure of employees' dues money. Accordingly, he found no violation.

The General Counsel argues that Lock's comment and accompanying gesture, made just 2 days before a re-run election brought about by Respondent's objectionable conduct prior to the first election, are on their face threatening. The General Counsel asserts that the timing, tone, and tenor of Lock's remark suggest that Sanchez would be fired if he voted for the Union.

We agree. The test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable con-

[1] On October 19, 2001, an election was held among the Respondent-Employer's full-time and regular part-time installers/placers employed in Miami-Dade and Broward Counties, Florida. The tally of ballots showed 1 vote for and 10 against representation by the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers Local 272, AFL–CIO (the Union). The Union filed objections. The parties thereafter entered into a stipulation for a second election, which the Board conducted on December 7, 2001. The vote was 10 to 4 against representation, with 2 nondeterminative challenges. The Union again filed objections, evidence of which paralleled the unfair labor practice allegations considered in this proceeding. The judge found merit in an objection alleging that the Respondent-Employer threatened to inflict bodily harm on the individual who voted for the Union in the first election.

[2] The Respondent did not file exceptions to these findings.

[3] The General Counsel has also excepted to the judge's failure to find that a statement made to employee Martindill violated Sec. 8(a)(1). Because the violation, if found, would be cumulative of a violation found by the judge and not excepted to, and thus, would not affect the remedy here, we do not pass on the General Counsel's exception.

[4] Dates hereafter refer to 2001.

struction.[5] The evidence establishes that the Respondent had unlawfully threatened employees' job security. The judge found that on October 18, the day before the first election, the Respondent (by Lock) violated Section 8(a)(1) by telling a group of employees, including Sanchez, that he would close the business if the Union won the election. Where the company president had already threatened to close the company if the Union came in, his thrice-repeated statement "Remember your bills," delivered with finger-pointed emphasis, could reasonably be construed as a similar threat. Accordingly, contrary to the judge, we find that Lock's December 5 comment violated Section 8(a)(1).

2. *The Discharge of Sanchez*: The complaint alleges that the Respondent violated Section 8(a)(3) by terminating Sanchez from employment on December 10 because of his union and protected activities. The judge dismissed the allegation on two alternative grounds. First, he concluded that the General Counsel had failed to prove, under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), that the Respondent had knowledge of Sanchez' union activities. Second, he determined that Sanchez had suffered no adverse employment action, i.e., that Sanchez was not terminated, but rather had merely stopped showing up for work.

Both grounds implicate the judge's discrediting of Sanchez, based solely on evidence that Sanchez had proffered to the Respondent a false social security number to obtain employment. We find that the judge erred in relying on this basis alone to discredit Sanchez and, as a result, that neither basis for dismissing the discharge allegation is sound, at least without further analysis by the judge. A remand is therefore appropriate.

The judge's finding that the Respondent did not know of Sanchez' protected, union activities turns on whether Company President Lock saw Sanchez in the company of Union President David Gornewicz in the Miami federal building, where the Board's offices are located, on November 13, the day the hearing on objections to the first election was scheduled to take place. In evaluating testimony on the matter, the judge credited Lock (whose denial of a plant-closing threat he had earlier discredited), gave essentially no weight to the testimony of Gornewicz, and observed, "there are reasons to doubt Sanchez' testimony." The judge's analysis, however, is flawed.

First, Lock did not unequivocally deny t*hat he saw Sanchez.* Rather, as the judge acknowledged, Lock testified that he did not recall seeing Sanchez.[6] When asked whether he had seen Sanchez in the hearing room with Union President Gornewicz, for example, Lock replied:

> I don't know—I really don't personally recall him being here, okay. *He could have been* but I do not recall him being here.[7]

Similarly, when asked whether Sanchez had served him with a subpoena for the hearing, Lock answered:

> Possibility [sic], with all of the things that I've gone through, I can't give you an honest answer. *It's a possibility that he did*, but I can't swear to that.[8]
>
> Thus, crediting Lock simply means that he truthfully testified, at the time of the hearing, that he had no recollection of seeing Sanchez. It cannot support a finding that Lock did not, in fact, see Sanchez on November 13.[9]

Second, the testimony of Gornewicz supports a finding that Lock saw Sanchez. Gornewicz testified as follows:

> Q. Did Mr. Lock and his attorney, Robert Soloff, see you while you were sitting with Mr. Sanchez before the hearing?
>
> A. I believe they did. They entered the cafeteria.[10]

Based, it appears, solely on the fact that Gornewicz referred to his *belief* that Lock saw Sanchez, the judge "infer[red] that Gornewicz was less than certain about this fact."[11] Absent any reference to Gornewicz' demeanor, or to any other factor that suggests equivocation by the witness or casts doubt on his knowledge and recollection, the judge erred in giving no weight to his testimony—particularly in contrast to the judge's treatment of Lock's testimony, which indicated an uncertain memory.[12]

For his part, Sanchez testified unequivocally that Lock saw him.[13] The dissent argues that because Sanchez'

[5] *Jordan Marsh Stores Corp.*, 317 NLRB 460 (1995).

[6] Tr. of proceedings pp. 39–40.

[7] Tr. p. 39 (emphasis added).

[8] Tr. p. 40 (emphasis added).

[9] Our dissenting colleague reads Lock's testimony as if it amounted to a simple denial that he saw Sanchez, citing Lock's statement, "No, I don't recall Tomas Sanchez being here" and focusing on the word "no." In our view, Lock's testimony, as a whole, reflects his lack of memory, limiting the weight that can properly be given to it.

[10] Tr. p. 55.

[11] Decision, Appendix A p. 320.

[12] The dissent argues that Gornewicz' testimony is "more supportive of Lock's testimony—that Lock saw Gornewicz but he did not see Sanchez—than it is of Sanchez' belief that Lock saw him." But Gornewicz testified that Sanchez was sitting with him when Lock entered the cafeteria, which clearly tends to suggest that Lock saw both men.

[13] Sanchez was asked, "Did Don Lock see you in this Federal Building on that day?" He answered, "Yes, he seen me in the room." In

testimony did not include sufficient details—for example, the distance between Lock and Sanchez and whether Lock showed any sign of recognition—the testimony cannot support a finding that Lock did, in fact, see Sanchez. But Sanchez' testimony was not inherently implausible. Had the details cited by the dissent tended to cast doubt on Sanchez' testimony, they were for the Respondent to elicit on cross-examination, which it did not do. While more details might have bolstered Sanchez' testimony, they were not necessary to credit Sanchez. The judge himself asked no questions of Sanchez in this regard, and his opinion raises none of the grounds for discrediting Sanchez that our colleague does.

Finally, assuming the evidence of Sanchez' use of a false social security number was admissible under Federal Rule of Evidence 608,[14] there was no basis for completely discrediting Sanchez with respect to his hearing-related contact with Lock and the circumstances of his termination solely because he had used a false social security number in obtaining employment. As the General Counsel contends, the judge's rationale effectively operates as a sanction, which could deny the protections of the Act to any person who has made a false statement related to his social security number or his immigration status, at least if his testimony was critical to finding a violation of the Act.[15] We reject that approach as inconsistent with the Act, which protects statutory employees who are undocumented aliens. See *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984). See also *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

Here, the judge effectively disqualified Sanchez as a witness, as opposed to making a true credibility determination, which considers the witness' testimony in context, including, among other things, his demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. E.g., *Daikichi Sushi*, 335 NLRB 622, 623 (2001). The judge's approach is inconsistent with Board precedent. See, e.g., *Harvey Aluminum*, 142 NLRB 1041, 1047 (1963) (rejecting employer's argument that employee's false statement on employment application and incomplete disclosures on Defense Department questionnaire, required testimony to be discredited). The Board has long been willing to credit witnesses who made false statements on employment applications or unemployment claims, if their testimony can be judged reliable under all the circumstances. See, e.g., *W. L. Maxson Corp.*, 44 NLRB 1136, 1157 (1942). See also *Rainbow Garment Contracting*, 314 NLRB 929, 937 fn. 5 (1994; *Vanguard Oil & Service*, 231 NLRB 146, 153 fn. 3 (1977).[16]

Contrary to the dissent's apparent view of our decision, we do not hold that an employee's use of a false social security number cannot be taken into consideration in evaluating his truthfulness. But careful analysis is surely required in each case—and that analysis is missing here. The judge reasoned that use of the false Social Security number demonstrated that Sanchez "was willing to risk the legal penalty" to obtain work. The judge equated that situation with the proceeding before him, where "a job [was] at stake once more," essentially finding that because Sanchez had used a false social security number, he was testifying falsely. We are not prepared to make this inference.[17] With respect to the incentives for truth-telling, filling out a government immigration form in the workplace—even one that recites the criminal penalties for false statements in the event the signer's false statement is detected and leads to a conviction—is not the same as testifying under oath in a legal proceeding. This may be particularly true with respect to immigrants who face compelling pressure to find work and earn a livelihood. In any case, the risk that a lie will be discovered and punished, and the moral stigma attached to lying, are surely greater where sworn testimony, provided in the solemn atmosphere of a hearing room, is concerned. There is no possibility, for example, that the judge and the opposing litigant will be indifferent to the

response to a further question, Sanchez explained that he was with Gornewicz when Lock saw him. Tr. p. 94.

[14] Rule 608 provides that to attack the credibility of a witness, a court, in its discretion, may permit the introduction of evidence of "specific instances of conduct," if they are "probative of truthfulness or untruthfulness." The judge here arguably could have refused to admit the evidence in question. See *Enterprise Industrial Piping Co.*, 117 NLRB 995 fn. 2 (1957) (trial examiner did not abuse discretion in refusing to permit cross-examination concerning employees' false statements on unemployment insurance claim).

[15] We infer that Sanchez was an undocumented alien when he applied for employment. The dissent correctly notes that the record does not conclusively establish this fact. It shows only that Sanchez provided a false social security number and that he later acquired, and provided to the Respondent, a valid number. Under the circumstances, we believe that our inference as to Sanchez' immigration status is reasonable. On remand, the judge may wish to clarify the matter. But our remand of this case does not depend on Sanchez' status: the judge's error was in discrediting Sanchez solely because of his false statement.

[16] The dissent would distinguish these cases on their facts, but it cannot quarrel with the principle they stand for: that a prior false statement by a witness—including a statement related directly to getting or keeping a job—is not dispositive of credibility.

[17] Cf. *Beltran-Tirado v. INS*, 213 F.3d 1179 (9th Cir. 2000) (undocumented alien's conviction for use of false Social Security number to further otherwise legal behavior was not crime of moral turpitude within the meaning of federal alien registry statute). The dissent attacks citation of this case, arguing that Sanchez was not similarly situated to the undocumented alien in *Beltran-Tirado*. Indeed, Sanchez has not been convicted of any criminal violation, despite the dissent's repeated reference to criminal penalties assertedly implicated by Sanchez' conduct.

falsehood. In contrast, some employers who are eager to hire and retain workers may be prepared not to check social security numbers or to ignore the use of a false number (though we certainly do not suggest that this was the case here).

Our holding here is not premised, as the dissent suggests, on the notion that mitigating circumstances such as economic need somehow excuse prior false statements or false testimony under oath in a Board proceeding. Our point, rather, is that in assessing whether a witness is telling the truth in a Board proceeding, a judge must take into account all of the factors that bear on the credibility of the witness *at the time of his testimony*. It is not enough to say that because the witness was untruthful in the past, and regardless of any factors that may tend to support his testimony, he cannot be credited now. Here, for example, Sanchez subsequently did acquire his own, valid social security number and, not long after his termination, provided accurate information to the Respondent in order to correct his record.

In contrast to our dissenting colleague, we do not believe that our approach is foreclosed by federal immigration law and policy, as reflected in the Immigration Reform and Control Act (IRCA). IRCA does not provide that a person who has violated its provisions is disqualified from serving as a witness in a federal legal proceeding. That would be the effective result of upholding the judge's ruling in this case. This result, in turn, cannot be reconciled with the protected status of undocumented workers under the National Labor Relations Act.

Accordingly, we do not adopt the judge's finding that the Respondent lacked knowledge of Sanchez' participation in protected union activities. On remand, the judge must reconsider that issue and explain what basis, if any, remains for his original finding, balancing Gornewicz' testimony and Sanchez' testimony, properly evaluated, on the one hand against Lock's testimony on the other.

The judge must also reconsider his alternative basis for dismissing the 8(a)(3) allegation: his finding that Sanchez suffered no adverse employment action. This finding, too, was based on discrediting Sanchez' version of events and crediting Lock, who claimed that Sanchez simply stopped reporting for work.[18] For the reasons explained above, the judge erred in discrediting Sanchez on the basis of the false social security number alone and in failing to take into account Sanchez' later acquisition of a valid number. On remand, the judge must reevaluate the conflicting testimony of Sanchez and Lock, basing his choice between their accounts on appropriate considerations in determining credibility.

Disposition of the Case: In light of our disposition of these issues, we will order the election in Case 12–RC–8709 set aside, sever the representation proceeding from the unfair labor practice proceeding, and remand the representation proceeding to the Regional Director for Region 12 for further appropriate action. We will remand Case 12–CA–21951, in part, as indicated. Final disposition of any other issues raised in this proceeding will be held in abeyance, pending receipt of a supplemental decision from the judge.

ORDER

It is ordered that the election in Case 12–RC–8709 is set aside, that the representation proceeding is severed from the instant unfair labor practice proceeding, and that the representation case is remanded to the Regional Director for Region 12 for further appropriate action, including, if a request to proceed is filed prior to the final disposition of the outstanding unfair labor practice issues, expeditiously scheduling and holding a third election in the above-described appropriate unit.

IT IS FURTHER ORDERED that Case 12–CA–21951 is remanded, in part, to the administrative law judge for reconsideration of matters of credibility as they relate to the 8(a)(3) allegation involving Tomas Sanchez, and that the judge make findings and conclusions consistent with the guidelines set forth in this decision, and thereupon issue a supplemental decision on the merits of that allegation.

IT IS FURTHER ORDERED that the final disposition of all other issues raised in this proceeding be held in abeyance pending our receipt of a supplemental decision from the administrative law judge.

MEMBER ACOSTA, concurring.

The administrative law judge in this case discredited the testimony of employee Tomas Sanchez, an assumed undocumented worker, on the ground that Sanchez knowingly used a false social security number to obtain employment. I join the majority opinion, but write separately to express my substantial disagreement with the judge's reasoning and to emphasize the consequences that could result were the judge's holding permitted to stand.

I.

The General Counsel alleges, inter alia, that the Respondent-Employer discriminatorily discharged Tomas Sanchez in violation of Section 8(a)(3). To support this claim, the General Counsel presented testimony from Sanchez.

[18] The judge's crediting of Lock, of course, cannot be divorced from his discrediting of Sanchez, on what we believe was an insufficient ground. Lock was an interested witness, just as Sanchez was.

The judge discredited Sanchez' testimony. The judge explained: Sanchez "admitted that when he applied for work with Respondent, he used a false Social Security number. . . . There are certain similarities between using a false Social Security number and giving untrue testimony. Both obviously involve the element of falsehood, but more than that, they both entail a substantial legal risk. The punishment for using a false Social Security number is quite significant, and so is the penalty for perjury. . . . If Sanchez demonstrated a willingness to use a false government document to obtain work, notwithstanding the risk, he may also be willing to offer false testimony to obtain reinstatement, notwithstanding the risk. To the extent that Sanchez' testimony conflicts with [Respondent's witness], I credit [Respondent's witness]." The judge dismissed the 8(a)(3) allegation as unsupported by evidence.

II.

Undocumented workers are statutory employees entitled to the rights guaranteed by Section 7 of the National Labor Relations Act. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984). The Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), does not diminish these rights, and in fact, reaffirms the *Sure-Tan* holding.

To guarantee employees the free exercise of these rights, Section 8 prohibits employers from, inter alia, discharging an employee because he or she has lawfully exercised Section 7 rights. The protections afforded by Section 8 are a critical part of the Act. A right without remedy would be no right at all. See *3 W. Blackstone Commentaries* 23 (1973) ("Where there is a legal right, there is also a legal remedy.").

The judge's reasoning in this case effectively would deny undocumented workers their Section 8 protections. His reasoning effectively discredits the testimony of any once-undocumented worker, who to obtain work provided a false social security number. Such an automatic sanction is inconsistent with the Act. More importantly, because these cases typically turn on whose facts are believed, such an automatic sanction makes it exceedingly difficult for the General Counsel to establish an unlawful discharge or other unfair labor practice directed against an undocumented worker.

As the majority opinion explains, this does not mean that providing a false social security number is irrelevant to a credibility resolution. A fair credibility determination includes a weighing of multiple factors including, demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. See *Majority Opinion* at 309. A fair credibility determination likewise includes an inquiry into the reason why an employee might provide a false social security number. Such an inquiry is simple, and will not place an undue burden on the judge.

This Agency's continued commitment to prosecuting unfair labor practices directed against undocumented workers requires an understanding of the workplace and life realities faced by these individuals. See GC Memorandum 02–06 (July 19, 2002). Providing a false social security number on an employment application and/or a form I-9 in order to obtain work is not the equivalent of perjury in a legal proceeding. To the extent that the judge so found, he erred. We, thus, remand this case to the administrative law judge to reconsider his credibility determination.

MEMBER SCHAUMBER, dissenting in part.

Introduction and Summary

The majority holds today that an administrative law judge errs if he discredits the testimony of an employee, "solely" because the employee provided fictitious numbers as a social security number[1] to obtain a job. I must respectfully disagree.[2] I believe that an administrative law judge has the discretion pursuant to the Federal Rules of Evidence which govern our procedures and consistent with extant Board law, to disregard the testimony of a witness for a prior act of falsification. See Rule 608, Federal Rules of Evidence and nn. 12, 13 infra. (See *Adelphi Institute, Inc.*, 287 NLRB 1073 fn. 2, 1077 (1988) (employee Black's testimony discredited, in part because she gave false and misleading information to her present and past employers about her college degree).) That is not what we are dealing with here, however; the judge did not rely "solely" on the employee providing a false social security number; this is quite clear from his decision. The judge relied on the following factors: the false social security number was provided on an official government document, the falsification of which Congress made subject to serious criminal penalties, the discredited testimony, if credited, would result in the employee's reinstatement to the job he provided the false information to get, and the contrary testimony of Re-

[1] The employee, Tomas Sanchez, testified that the numbers he used were not real but fake numbers.

[2] Although I dissent from the majority's decision to reverse the judge's credibility resolution and remand to the judge the complaint allegation that the Respondent violated Sec. 8(a)(3) and (1) by discharging employee Sanchez, I join in finding that the Respondent's December 5, 2001 statement to Sanchez violated Sec. 8(a)(1) and in finding it unnecessary to pass on the judge's failure to find that a statement to employee Martindill violated Sec. 8(a)(1). I also join in severing the representation proceeding from the unfair labor practice proceeding and remanding the representation proceeding to the Regional Director for further appropriate action.

spondent's president, Don Lock, which the judge independently credited. In addition, there were no mitigating circumstances introduced for the judge to take into consideration. While this factor was not mentioned by the judge, it was unnecessary on this record for him to do so.

Apart from that fact the very issue articulated by my colleagues is refuted by the record in this case, for the reasons discussed below, it is unnecessary to reach the credibility determination with which my colleagues take issue. In addition, to give force and meaning to their decision my colleagues infer facts not in evidence, namely, that the employee, Tomas Sanchez, may be an undocumented alien.[3] As such, the majority's decision is inconsistent with the "fundamental and longstanding principle of judicial restraint," *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439 (1988), which, I believe, should guide the Board in its decisionmaking. See *Office Employees Local 29 (Dameron Hospital Assn.)*, 331 NLRB 48, 63 (2000) (Brame, concurring in part, dissenting in part); *K & K Transportation Corp*., 254 NLRB 722, 734 (1981).

As mentioned, my colleagues ignore the inadequacy of the evidence under the Board's *Wright Line* analysis,[4] which makes consideration of the judge's credibility determination wholly unnecessary. While the judge found that Sanchez was engaged in protected activity by accompanying the union president to the Board's offices at the federal building the day of the hearing on the election, he concluded that the General Counsel failed to prove that the Employer's president, Don Lock, saw Sanchez at the federal building that day.[5] The judge's finding that Lock did not see Sanchez is fully supported by the evidence without implicating the judge's credibility determination. *Even if credited*, Sanchez' subjective conclusory statement—*his belief* that Lock "saw" him—is insufficient to prove that fact. This is so because Sanchez was not asked any of the questions normally posed a witness to circumstantially support a reasonable inference that such a sighting occurred. Simply put, Sanchez was not asked the reasons why he believed Lock saw him. In the face of Lock's testimony that *he saw the union president but he did not see Sanchez* that day, testimony that the judge specifically credited based on Lock's demeanor, Sanchez' belief to the contrary, was insufficient to establish that fact by a preponderance of the evidence.

My colleagues, nevertheless, reverse the judge's discrediting of Sanchez' testimony concerning Sanchez' alleged discharge and remand it to the judge for reconsideration because he relied "solely" on Sanchez' providing a false social security number. According to my colleagues, the judge did not consider "multiple factors" required for a proper credibility determination. My colleagues construct a straw man. The judge considered a variety of factors[6] and my colleagues do not identify any factors that he overlooked.

I am afraid the majority's decision will turn hearing procedures on their head. When the credibility of an employee is impeached with information that he or she falsified an I-9 form to get a job, presumably the majority would require the administrative law judge to inquire into the existence of any mitigating circumstances, such as for immigrant applicants compelling pressure to find work and earn a livelihood, in the event counsel for the General Counsel does not do so. If, as here, neither inquire, and the judge subsequently discredits the employee's testimony as a result of the falsification, the judge's credibility determination will be set aside.

Finding that the testimony of a former employee cannot be discredited on this record runs counter to the Congressional policy underlying the Immigration Reform Control Act. 8 U.S.C. § 1324(a), et seq. (1986). Central to the IRCA is the employment verification system it established and the criminal and civil penalties for both employer and job applicant if the system is ignored or false documentation or information is provided. See 18 U.S.C. § 1546(b); 8 U.S.C. § 1324c; see also 42 U.S.C. §

[3] There is no record evidence that Sanchez was an undocumented alien or an immigrant for that matter. The majority addresses this absence of evidence indirectly by saying that their decision does not depend on the Sanchez' immigration or citizenship status. Nevertheless, the majority cites the Supreme Court's decisions in *Sure-Tan, Inc*. 467 U.S. 883 (1984), and *Hoffman Plastic Compounds, Inc., v. NLRB*, 535 U.S. 137 (2002), and rejects the judge's credibility determination because it would deny undocumented aliens the protections of the Act. Elsewhere, my colleagues speak of immigrants who face compelling pressure to find work and earn a livelihood. It is abundantly clear, therefore, that Sanchez' hypothetical status as an undocumented alien or immigrant is what motivates the majority.

[4] In his decision, the judge correctly summarized the General Counsel's burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982):

> [T]he General Counsel must establish four elements by a preponderance of the evidence. First, the government must show the existence of activity protected by the Act. Second, the government must prove that Respondent was aware that the employees had engaged in such activity. Third, the General Counsel must show that the alleged discriminatees suffered an adverse employment action. Fourth, the government must establish a link, or nexus, between the employees' protected activity and the adverse employment action.

[5] For the purpose of this dissent, I assume arguendo that sitting with the union president in the cafeteria of the federal building, to which Sanchez was subpoenaed to testify, is protected activity.

[6] The judge expressly mentioned also the consistency of other evidence with Lock's denial that he discharged Sanchez.

408(a)(7)(B) (penalizing false statement to obtain social security benefits). An integral part of this employment verification system is the I-9, the document Sanchez falsified. A message, very different from the message sent by the Congress in the IRCA, is sent by the majority in their decision. For the majority, providing a false social security number on an I-9 is not sufficiently serious to be probative of the employee's truthfulness or untruthfulness even where, as here, the testimony, if believed, would reinstate the employee to the job he gave false information to get, there were no mitigating circumstances introduced and the judge independently credited Lock's testimony to the contrary.

The majority distinguishes providing false information in an I-9 from testifying falsely under oath where "[t]he risk that a lie will be discovered and punished and the moral stigma attaching to lying, are surely greater." They are of the view that "[t]his may be particularly true with respect to immigrants who face compelling pressure to find work and earn a livelihood." I do not share the view that a person providing false information is somehow less culpable because the false information was provided under circumstances that made it easier or that "fac[ing] compelling pressure to find work and earn a livelihood" is peculiar to illegal aliens requiring that they be treated differently.

I believe the rule the majority adopts, while well intentioned, threatens to lower the bar on the degree of truth and honesty to be expected in Board proceedings. After all, why should the rule be limited to the falsification of an Immigration and Naturalization Service Form I-9 and not be applied to additional documentation provided during the course of employment? Why should the majority's decision be limited to undocumented aliens that are the focus of its decision and not be expanded to others who have compelling personal reasons to lie to get a job?

For these reasons and for the reasons more fully set forth below, I respectfully dissent.

I.

THE MAJORITY'S DECISION IS INCONSISTENT WITH THE LONG-STANDING PRINCIPLE OF JUDICIAL RESTRAINT

Judicial restraint is defined as the "principle that, when a court can resolve a case based on a particular issue, it should do so, without reaching unnecessary issues." *Black's Law Dictionary* 852 (7th Ed. 1999). Thus, "judges should remain keenly aware of the possibility that a controversy is not, in fact, properly before them and should resist the temptation to decide an issue broader than the one actually before the court." Wallace, *The Jurisprudence of Judicial Restraint: A Return To The Moorings,* 50 Geo. Wash. L. Rev. 1, 8 (1981).

This principle of judicial restraint is often invoked in the context of constitutional issues:

> [T]he Supreme Court has for generations warned against reaching out to adjudicate constitutional matters unnecessarily. See, e.g., *Ashwander v. TVA*, 297 U.S. 288, 346-47, 56 S. Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring); *Burton v. United States*, 196 U.S. 283, 295, 25 S. Ct. 243, 49 L.Ed. 482 (1905); *Liverpool, N.Y. & Phila. Steamship Co. v. Commissioners of Emigration*, 113 U.S. 33, 39, 5 S.Ct. 352, 28 L.Ed. 899 (1885). It is a "fundamental and longstanding principle of judicial restraint [that] courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988).[7]

Its application, however, is not limited to issues of constitutional interpretation. As the court of appeals, considering a challenge to a deportation order, said in *Michel v. I.N.S.*, 206 F.3d 253, 260 fn. 4 (2d Cir., 2000):

> Where, as here, no harm results from our failing to answer a question, we believe that the "doctrine of judicial restraint provides a fully adequate justification for deciding [the] case on the best and narrowest ground available." *Air Courier Conference of Am. v. American Postal Workers Union*, 498 U.S. 517, 531, 111 S.Ct. 913, 112 L.Ed.2d 1125 (1991) (Stevens, J., concurring in judgment).

The applicability of the principle of judicial restraint has been recognized in cases before the Board. See *Office Employees Local 29* (*Dameron Hospital Assn.)*, 331 NLRB 48, 63 (2000) (Brame, concurring in part, dissenting in part); *K & K Transportation Corp*., 254 NLRB 722, 734 (1981). Courts reviewing Board decisions also have invoked this principle. See *NLRB v. Augusta Bakery Corp.*, 957 F.2d 1467, 1471 (7th Cir. 1992); *U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1314 (7th Cir. 1991).

I firmly believe judicial restraint should guide the Board in its decisionmaking. With an enormous backlog lessening our effectiveness, the Board should not reach out to address issues unnecessary for it to decide. This is particularly true in this case where, as mentioned, it is unnecessary to reach the judge's credibility determination, my colleagues' decision is motivated by inferred and potential facts—undocumented-immigrant status, consequent financial need—not in evidence and the judge did not rely *solely* on the falsification of the I-9 as the majority repeatedly asserts.

[7] *Horne v. Coughlin*, 191 F.3d 244, 246 (2d Cir. 1999).

II.

THE REMAND ORDER IS UNNECESSARY BECAUSE THE GENERAL COUNSEL FAILED TO SATISFY HIS BURDEN OF PROOF UNDER *WRIGHT LINE* WITHOUT REGARD TO SANCHEZ' DISCREDITED TESTIMONY

It is well-settled Board law that in cases such as this one "we base our findings as to the facts upon a *de novo* review of the entire record. . . [W]e do not deem ourselves bound by the Trial Examiner's findings." *Standard Dry Wall Products, Inc*,. 91 NLRB 544, 545 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). Since a de novo review of the record in this case fully supports the judge's finding that the General Counsel failed to satisfy his burden of proving that Respondent had knowledge of Sanchez' protected union activity, it is unnecessary to reach the credibility determination with which my colleagues take issue.

A review of the record demonstrates that the General Counsel's evidence, pertinent portions of which follow, was wholly insufficient to establish that Lock saw Sanchez with Gornewicz in the federal building cafeteria.

The Testimony of the Employer's President, Donald Lock

Lock testified that while he did see Gornewicz in the Federal Building on November 13, he did not see Sanchez. His testimony on this point was direct and without equivocation:

> Q. Okay. And you appeared [in this Federal Building] with your attorney for the hearing, correct?
>
> A. Yes, ma'am.
>
> **Q. And when you appeared you saw your employee, Tomas Sanchez, correct?**
>
> **A. *No*, I don't recall Tomas Sanchez being here.**
>
> Q. You recall seeing David Gornewicz, the union president—
>
> A. Yes, ma'am.
>
> Q.—correct? **And the—and that day, when you appeared without your attorney for the hearing, you went to the lunchroom correct, or cafeteria of this building?**
>
> **A. I don't recall what I did that day.**
>
> **Q. Okay. *Where was Dave Gornewicz when you saw him?***
>
> **A. Here in the room.**
>
> Q. In which room?
>
> A. If I ain't mistaken, **it was this room.**
>
> **Q. And Tomas Sanchez was also in this room with him, correct?**
>
> **A. I don't know—I really don't personally recall him being here, okay. He could have been but I do not recall him being here.**
>
> Q. Tomas Sanchez was going to testify for the union at that hearing, correct?
>
> A. There again, I don't recall him being here, okay, so I can't give you an answer to that question.

Hearing transcript at pages 39–40 (emphasis added).

The Testimony of Former Employee Tomas Sanchez

Sanchez testified that Lock "saw" him but he was not asked, and he did not give, any of the circumstances of the alleged sighting, sufficient to support an inference that his belief that Lock saw him was accurate. His testimony, which was given largely in response to leading questions during direct examination, was as follows:

> Q. Okay. Were you going to participate in an NLRB hearing concerning Double D?
>
> A. Yes.
>
> Q. Who were you going to testify for?
>
> A. For union.
>
> Q. Do you remember the date?
>
> A. Yes, in November 13th.
>
> **Q. Did Don Lock see you in this Federal Building on that day?**
>
> **A. Yes, he seen me in the room.**
>
> **Q. When he say—**
>
> **A. In the room.**
>
> **Q. When he say [sic] were you with anyone from the union?**
>
> **A. With Dave, of president of the union, union president?**

Hearing transcript at page 94 (emphasis added).

The Testimony of Union President Gornewicz

Union President David Gornewicz testified, similarly in response to leading questions asked him on direct examination, as follows:

> Q. Were you sitting with Tomas Sanchez for the hearing – waiting for the hearing?
>
> A. We were in the cafeteria on the second floor, this building.
>
> Q. Did Mr. Lock and his attorney, Robert Soloff, **see you** while you were sitting with Mr. Sanchez before the hearing?
>
> **A. I believe they did. They entered the cafeteria.**

Hearing transcript at page 55 (emphasis added).

Gornewicz' testimony, without more, is more supportive of Lock's testimony—that Lock saw Gornewicz but

he did not see Sanchez—than it is of Sanchez' belief that Lock saw him.[8]

The kind of evidence necessary for a trier of fact to reasonably draw an inference that one person saw another person is similar to kind of evidence necessary to prove a person's state of mind. The party seeking to prove the sighting must generally rely on circumstantial evidence to prove it occurred. Thus, a standard jury instruction on permissible inferences that may be drawn with regard to a defendant's state of mind reads in pertinent part as follows:

> Next, I want to explain something about proving the defendant's state of mind.
>
> (1) Ordinarily, there is no way that a defendant's state of mind can be proved directly, because no one can read another persons' mind and tell what that person is thinking.
>
> (2) *But a defendant's state of mind can be proved indirectly from the surrounding circumstances. This includes things like what the defendant said, what the defendant did, how the defendant acted, and any other facts or circumstances in evidence that show what was in the defendant's mind."*
>
> Pattern Criminal Jury Instructions of the District Judges
>
> Association of the Sixth Circuit, Instruction No. 2. 08 (1991). [Emphasis added.][9]

As mentioned above, other than Sanchez' *belief* that Lock "saw" him when he was with the union president and the Union president's *belief* that Lock and Lock's attorney saw Gornewicz when Gornewicz was seated in the cafeteria with Sanchez, no evidence was elicited from either witness to support a reasonable inference that Lock in fact saw Sanchez with Gornewicz or Gornewicz with Sanchez.

Sanchez was not asked what caused him to believe Lock saw him, *not even whether Lock looked at him*. Nor was he asked any of the standard questions trial lawyers ask witnesses to permit a trier of fact to draw a reasonable inference that the sighting occurred. A few of the many questions Sanchez could have been asked but was not are the following: Where were you when you saw Lock? Where was Lock when you believe he saw you? Why do you believe Lock saw you? Where was the union president? What was the distance between you and Lock? What was the distance between you and the union president? Was anything obstructing the distance between you and Lock at the time you believe he saw you? Did Lock give any facial signs of recognition when you believe he saw you?

My colleagues take the view that Sanchez' testimony was not "inherently implausible," and, thus, sufficient for the judge to credit, and if the "details cited by the dissent tended to cast doubt on Sanchez' testimony, they were for the Respondent to elicit on cross-examination, which it did not do." The details did not cast doubt! The details were not inquired into by counsel for the General Counsel who had the burden of proof and failed to satisfy it.

Gornewicz' testimony is similarly deficient. And, as noted above, if anything, Gornewicz' testimony supports Lock's testimony that he recalls Gornewicz being at the Federal Building on November 13 but not Sanchez. In sum, therefore, since the only evidence offered inconsistent with Lock's denial that "[n]o" he did not see Sanchez, were the above subjective conclusory statements, *one of which relates to whether Lock saw Gornewicz*, the General Counsel plainly failed to prove by a preponderance of the evidence that Lock saw Sanchez with Gornewicz.

My colleagues' position here is inconsistent with settled Board law that conclusory statements unsupported with other evidence are insufficient to prove the proposition for which they are offered. In *Control Services, Inc.* 314 NLRB 421 (1994), the Board, quoting its decision in *Sears, Roebuck & Co*., 304 NLRB 193 (1991), held that "conclusory statements made by witnesses in their testimony, without supporting evidence, does [sic] not establish supervisory authority." This is the case even if the witness is an immediate supervisor or other management official in a position to know the employee's authority. *Ironton Publications, Inc*., 321 NLRB 1048 fn. 2, 1060 (1996) (Circulation Manager Beckman's conclusory testimony that assistant mailroom foreman, Roger Jenkins, exercised the same duties as foreman except for hiring and firing found insufficient, absent supporting evidence, to establish that he did so); *Chevron Shipping Co*., 317 NLRB 379 (1995) (Captain Reynolds's conclusory, nonspecific testimony that first assistant engineers typically assigned overtime to pump men and oilers found insufficient to establish supervisory authority, absent specific explanation that first assistant engineers in fact exercised independent judgment in making overtime assignments). In *Golub Corp*., 338 NLRB 515 (2002), that Board found Loss Prevention Specialist Beeble's "conclusory testimony" about traffic congestion insufficient to show a business reason for barring solicitation because there was

[8] The only inconsistency between Lock's and Gornewicz' testimony was that Lock said he saw Gornewicz in the hearing room whereas Gornewicz believed Lock saw him in the cafeteria. Compare, hearing Tr. at p. 39 *with* hearing Tr. at p. 55.

[9] See also *U.S. v. Livingston*, 816 F.2d 184, 187 (5th Cir. 1987); *U.S. v. Holloway*, 740 F.2d 1373 (6th Cir.), cert. denied 469 U.S. 1021 (1984); *U.S. v. Hunt*, 272 F. 3d 488, 492–493 (7th Cir. 2002).

no evidence that the solicitation impeded traffic and no documentation or other testimony regarding past traffic problems caused by solicitations. Id. at 516 & fn. 9. In *Mayfield Holiday Inn*, 335 NLRB 38 (2001), the Board, in holding that the historical housekeeping employee unit remained appropriate, found that President Gerish's "conclusory testimony" about the team approach in the housekeeping department, "without specific evidence," was insufficient to overcome the bargaining history of the housekeeping employees unit, which had included housekeepers and housemen but not laundry workers or inspectresses. Id. at 40.

The General Counsel similarly relies on conclusory testimony here. Sanchez merely asserted that Lock "saw" him, not even that Lock looked at him. Finding such a statement sufficient to prove the fact for which it is being offered is, as shown above, contrary to long-standing evidentiary rules and inconsistent with analogous Board law.[10]

My colleagues beg the question when they attempt to weaken Lock's denial that he saw Sanchez with Gornewicz and they criticize the judge for not giving any weight to the union president's testimony on this point. Neither observation closes the enormous gap in the General Counsel's case on employer knowledge and provide evidentiary support for the proposition that Lock saw Sanchez with Gornewicz and, as a result, had knowledge that Sanchez was involved in union activity. Nevertheless, I will briefly address each point.

The majority states that "Lock did not unequivocally deny that he saw Sanchez." According to the majority, he testified only that "he did not recall seeing Sanchez." Id. They conclude:

> Crediting Lock simply means that he truthfully testified at the time of the hearing that he had no recollection of seeing Sanchez. It cannot support a finding that Lock did not in fact see Sanchez on November 13.

That was not Lock's testimony. As quoted above, Lock was asked the following leading question on cross-examination: "And when you appeared [in this Federal Building] you saw your employee, Tomas Sanchez, correct?" He answered: "*No.*" Hearing transcript at page 39. I find nothing equivocal in that answer. The fact that Lock added: "I don't recall Tomas Sanchez being here," does not detract from his explicit denial.

Even if Lock had only said that he "did not recall Tomas Sanchez being here," to the average layperson Lock's answer meant he did not see Sanchez in the Federal Building on November 13, the day counsel for the General Counsel was inquiring about. This was counsel for the General Counsel's understanding also as she used the phrase "you saw" and "you recall seeing" interchangeably. The following is from a portion of counsel for the General Counsel's cross-examination of Lock, also quoted above:

> Q. And when you appeared **you saw** your employee, Tomas Sanchez, correct?
>
> A. No, I don't recall Tomas Sanchez being here.
>
> Q. **You recall seeing** David Gornewicz, the union president —
>
> A. Yes, ma'am.
>
> Q. —correct?

In questioning the strength of Lock's testimony that he did not see Sanchez, my colleagues appear to confuse who has the burden of proof. They read Lock's testimony as being "not unequivocal[ ]," and find an ambiguity as to whether Lock was saying that he did not see Sanchez with the union president on November 13 or that he did not recall *at the time of the hearing* whether he saw Sanchez with the union president on November 13. They conclude that Lock's testimony "cannot support a finding that Lock did not, in fact, see Sanchez on November 13." It was not the Employer's burden, however, to prove that "Lock did not, in fact, see Sanchez." It was the General Counsel's burden to prove that he did, to present enough evidence to support a reasonable inference that the sighting occurred. For all the reasons set forth above, the General Counsel failed to satisfy that burden.

My colleagues take issue with the judge for not giving any weight to Gornewicz' "*belief* that Lock saw Sanchez." (Emphasis added.) Gornewicz did not say he believed *Lock saw Sanchez*. He answered in response to a leading question, whether it was "correct" that Lock and Lock's attorney saw *Gornewicz* when Gornewicz was sitting with Sanchez in the cafeteria: "I believe they did." Hearing transcript at page 55. The only support he gave for that subjective conclusion was that "[t]hey entered the cafeteria." Id. Clearly in the face of such inconsequential testimony there was no need for the judge to comment on Gornewicz' demeanor or other factors that cast doubt on his knowledge and recollection, as my colleagues require.

[10] Even assuming arguendo that, as the majority contends, Sanchez' bare assertion that Lock saw him could be credited, this testimony could reasonably mean, at most, merely that Sanchez *believed* that Lock saw him. Absent evidence showing that Lock was actually *aware* of Sanchez' presence—such as evidence that Lock and Sanchez made eye contact or nodded at each other or gave facial signs of recognition—Sanchez' testimony that Lock saw him would be the slimmest of reeds on which to base a finding that Lock had *knowledge* that Sanchez was present in the federal building in the company of Union President Gornewicz on the date of the election case hearing.

III.

THE JUDGE DID NOT RELY *SOLELY* ON SANCHEZ' PROVIDING A FALSE SOCIAL SECURITY NUMBER TO DISCREDIT HIS TESTIMONY AS THE MAJORITY CLAIMS

Reaching past the absence of proof on the issue of Employer knowledge, the majority finds the judge erred by discrediting Sanchez' testimony on the issues relating to his alleged unlawful discharge "*solely* because [Sanchez] had used a false Social Security number in obtaining employment." My colleagues assert that the judge's credibility determination "amounts to a disqualification of Sanchez as a sanction for his conduct, not a proper determination of his credibility which requires consideration of multiple factors." My colleagues' argument is not a fair statement of the judge's decision and, as mentioned, my colleagues never identify the multiple factors in this record that the judge should have considered which he did not.

First, the judge did not discredit Sanchez' testimony "solely" because he provided a false social security number. As mentioned above, the judge discredited Sanchez' testimony as it related to his alleged unlawful discharge because (a) Sanchez provided false social security information on an official government document, the falsification of which subjected Sanchez to serious criminal penalties; (b) the object of Sanchez' testimony, reinstatement with Respondent, was the same as the object of his falsification; and, (c) Sanchez' testimony was inconsistent with Lock's credited testimony. Further, since no mitigating circumstances were admitted into evidence by counsel for the General Counsel after Sanchez was impeached with the falsification, the judge was at liberty to conclude that none existed.

A. The Judge Discredited Sanchez' Testimony Because the False Social Security Information was Provided on an Official Government Document Exposing Sanchez to Serious Criminal Penalties

Throughout its decision, the majority refers to "the judge's erroneous decision to discredit Sanchez, based solely on his use of a false Social Security number to obtain employment." Nowhere do my colleagues mention that the false social security information was provided on an Immigration and Naturalization Service Form I-9 used to establish an employee's authorization to work in the United States, see 8 U.S.C. § 1324a(b)(1)(C) (1994), and that its falsification subjected Sanchez to serious criminal penalties.

The INS document that was falsified is entitled "Employment Eligibility Verification." It is short and easily understood. The top half is completed by the employee, the bottom half is completed by the employer. Immediately above the space for the employee's signature the form provides in plain English and in bold print:

> **I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.**[11]

That the judge found significance in all of this is clear from his decision. He states:

> There are certain similarities between using a false Social Security number and giving untrue testimony. Both obviously involve the element of falsehood, but more than that, they both entail a substantial legal risk. The punishment for using a false social security number is quite significant, and so is the penalty for perjury. B. The Judge Discredited Sanchez' Testimony Because the Object of the Falsification and Sanchez' Testimony Were the Same

The judge also relied on the fact that Sanchez' testimony, if believed, would reinstate him to the job he falsified information to get; that is, Sanchez was not being discredited for falsifying a driver's license application or an application for a rental apartment, documents unrelated to the object of his testimony. The judge commented directly on this point as follows:

> The Complaint names Sanchez as a discriminatee, and the government seeks an order requiring Respondent to reinstate him with back pay. A job is at stake once more. If Sanchez demonstrated a willingness to use a false government document to obtain work, notwithstanding the risk, he may also be willing to offer false testimony to obtain reinstatement, notwithstanding the risk.

B. The Judge Discredited Sanchez' Testimony Because it was Inconsistent with Lock's Credited Testimony

Finally, the judge discredited Sanchez' testimony as it related to his alleged unlawful discharge because he independently credited Lock whose testimony was to the contrary. As to whether Lock saw Sanchez in the cafeteria of the Federal Building, the judge said:

> Lock testified that he saw the Union president at the Board office, but could not remember whether or not he went to the cafeteria. He did not recall seeing Sanchez on this occasion.
>
> *Lock appeared quite sincere when he gave this testimony*. Moreover, for the reasons I will discuss, there are reasons to doubt Sanchez' testimony. *Crediting Lock*, I find that the government has not

[11] R. Exh. 2.

established that he saw Sanchez with the Union president on that occasion. Therefore, I conclude the General Counsel has not established the second *Wright Line* element. [Emphasis added.]

On the issue whether Sanchez was discharged or he ceased coming to work, the judge again credited Lock's testimony because, apart from having reason to doubt Sanchez, Lock's testimony that he did not discharge Sanchez was corroborated by the fact that Lock considered Sanchez to be a good employee. He said:

> The record fails to establish that Sanchez suffered an adverse employment action. According to Lock, Sanchez showed up for work on Monday, December 10, 2001, but did not show up for work after that date. Sanchez gave a different account.
>
> . . . .
>
> *Based on Lock's testimony, I find that Respondent did not discharge Sanchez, whom Lock acknowledged to be a good employee*. Rather, I find that Sanchez did not show up for work. [Emphasis added.]

C. The Judge Discredited Sanchez' Testimony in the Absence of any Evidence of Mitigating Circumstances

As mentioned, although the judge did not expressly identify the absence of mitigating circumstances to explain Sanchez' falsification, he did not have to. After Sanchez was impeached, it was counsel for the General Counsel's role to bring out any mitigating factors. She failed to do so despite the fact that additional examination was available to her and she responded in the negative when asked by the judge whether the General Counsel had anything in rebuttal. Consequently, the judge was free to conclude that there were no mitigating circumstances. In this regard, a judge does not rely *solely* on a piece of impeachment evidence, such as the falsification here, to discredit a witness' testimony. As trier of fact he or she necessarily considers whether any evidence of mitigating circumstances was introduced. If none is introduced, the impeachment stands unrebutted and unexplained as it did here.

IV.

THE CREDIBILITY DETERMINATION THE MAJORITY REVERSES CONSTITUTED A PROPER EXERCISE OF JUDICIAL DISCRETION BY THE ADMINISTRATIVE LAW JUDGE

My colleagues reverse the judge's credibility determination on a variety of grounds. The majority's decision is based on restatements of the judge's findings and conclusions, many of which are incorrect, and it relies on inapt case law. Contrary to my colleagues, I believe the judge's decision not to credit Sanchez' testimony insofar as it related to his alleged unlawful discharge was a proper exercise of judicial discretion. I will address each one of my colleagues arguments below.

A. The Judge's Decision to Permit Sanchez' Credibility to be Impeached with the Introduction of the I-9 He Falsified was Consistent with the Federal Rules of Evidence

Citing Rule 608 of the Federal Rules of Evidence, the majority takes the position that the judge "arguably could have refused to admit the evidence." While the judge could have excluded evidence of Sanchez' falsification of the I-9, to have done so on this record would have been an abuse of discretion.

Rule 608 provides in pertinent part:

> (b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, *if probative of truthfulness or untruthfulness*, be inquired into on cross- examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. [Eemphasis added.]

The Advisory Committee Notes comment that "effective cross-examination demands that some allowance be made for going into matters of this kind [particular instances of misconduct]" and that the possibility of abuse, though substantial, is minimized by the requirements that the "instances inquired into be probative of truthfulness or its opposite and not remote in time."

When Lock introduced evidence that Sanchez falsified the I-9, counsel for the General Counsel objected, claiming the evidence was "irrelevant." Hearing transcript at pages 103–109. Counsel never explained why. She never argued that the evidence was not probative of the truthfulness or untruthfulness of Sanchez' testimony either due to mitigating circumstances or because it was remote in time. And other than introducing the "right" social security number Sanchez gave the Employer 2 days before the Union filed a notice of charges, she did not attempt to rehabilitate the witness.

To suggest that Sanchez' falsification of the I-9 was not "probative of his truthfulness or untruthfulness" is inconsistent with Rule 608 and common intuition. The General Counsel was asking the judge to credit Sanchez' testimony that, if believed, would result in Sanchez being reinstated to the job he falsified the I-9 to get. The false information was not provided on an employment applica-

tion or imbedded in the applicant's resume, it was provided on an official government document formulated to confirm an applicant's authorization to work in the United States, the falsification of which was expressly made subject to serious criminal penalties. Sanchez' testimony relating to the alleged 8(a)(3) violation was inconsistent with Lock's testimony that the judge independently credited. Further, Sanchez' falsification was not remote in time; it occurred only 17 months prior to his testimony.

B. The Judge's Credibility Determination does not Deny Sanchez the Protections of the Act and is Consistent with Congressional Purpose Underlying the Immigration Reform Control Act

My colleagues make the sweeping declaration that the judge's credibility determination "effectively operates as a sanction, which could deny the protections of the Act to any person who has made a false statement related to his Social Security number or his immigration status, at least if his testimony was critical to finding a violation of the Act. We reject that approach as inconsistent with the Act, which protects statutory employees who are undocumented aliens." My colleague's statement is incorrect as a matter of law and logic.

Considerations to be taken into account in determining the credibility of a witness do not turn on the employee's status as an illegal alien, any more than the employee's nationality, country of origin or sex. The rules of evidence call on triers of fact, whether judge or jury, to weigh and consider many factors in determining a witness' credibility. No one class of employees, or employers for that matter, have a necessary monopoly on any of them. Compelling pressure to find work and earn a living *can be* a mitigating factor for an employee whose testimony is impeached because he or she lied in order to get a job; it is not a factor reserved for the illegal alien community.

It is well-settled law that Acts of Congress should be construed so as not to make them inconsistent with one another. *Watt v. Alaska*, 451 U.S. 259 (1981); *Southern S.S. Co. v. NLRB* 316 U.S. 31 (1942). The policy announced by the majority today runs counter to this principle. Congress passed the Immigration Reform Control Act (IRCA), supra, as a "comprehensive scheme prohibiting the employment of illegal aliens in the United States . . . [and] made combating the employment of illegal aliens central to '[t]he policy of immigration law" *Hoffman Plastic Compounds, Inc., v. NLRB*, 535 U.S. 137 (2002). The IRCA not only made it illegal for employers to hire undocumented aliens, it made it illegal for persons to subvert the employment verification system established by the IRCA by falsifying documents to obtain employment in the United States. 8 U.S.C. § 1324c(a)(1)–(3). Individuals who do so are subject to fines and criminal prosecution. 18 U.S.C. § 1546(b). If Sanchez was an undocumented alien, this is exactly what he did here. By announcing as Board policy that an administrative law judge errs by discrediting a witness' testimony on this record because he falsified information required by the IRCA, the Board affirms conduct Congress proscribed. The message sent is an unmistakable one: unlike the Congress which provided for criminal sanctions if the IRCA is violated, the Board will not take violations seriously enough to permit a judge to discredit the testimony of an alleged discriminatee because he provided false information in direct violation of the IRCA even where, as here, the testimony if credited would reinstate the employee to the position he falsified information to get.

In *Southern S.S. Co. v. NLRB*, 316 U.S. 31 (1942), the Supreme Court set aside a Board's order requiring reinstatement and backpay to employees whose conduct amounted to a mutiny in violation of federal law. The Court said:

> It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. [316 U.S. at 47.]

The Court in *Southern S. S. Co.* was addressing the Board's remedial authority under the Act whereas here we are dealing with a rule of evidence to be applied in hearings conducted under the Act. Since the rule the majority announces is, as shown below, not supported by Board law, it is inconsistent with commonly accepted evidentiary standards and it runs counter to Congressional objectives underlying the IRCA, I believe the majority acts "so single-mindedly" today.

C. The Judge's Credibility Determination is Consistent with Board Law

Since as far back as 1951, "[t]he Board's established policy [has been] not to overrule an administrative law judges' credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect." *Standard Dry Wall Products*, 91 NLRB 544, 545 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). Indeed, the Board rarely reverses credibility findings, particularly as they are based on the judge's observation of the witnesses. *El Rancho Market*, 235 NLRB 468, 470 (1978). Despite this longstanding Board law, the majority reverses the judge's credibility determination with respect to Sanchez' testimony on the alleged 8(a)(3) violation and remands the case to the judge for

him to reconsider it. I believe my colleagues' decision is incorrect because the "preponderance of all the relevant evidence," described above, supports the judge's credibility determination.

My colleagues also contend that the judge's credibility determination is inconsistent with certain Board decisions that have found that various forms of employee false statements do not require discrediting the employee's testimony. Each of these cases turns on its own unique facts; they are not analogous and none involves an employee's falsification of an official government document as here.[12] Moreover, these cases do not hold that employees' prior false statements can never be used as a basis for discrediting their testimony.[13]

In *Harvey Aluminum*, 142 NLRB 1041 (1963), the employees, alleged discriminatees Vidales and Torrico, lied on their employment applications about not having arrest records and Vidales failed to list all his convictions on a separate questionnaire. The judge recognized that these facts "clearly raise[d] a question of credibility" that "might well persuade a trier of fact to find [their] testimony . . . deficient in worth," 142 NLRB at 1057, but he rejected the employer's contention that all of the employee's testimony had to be rejected. The judge noted that, among other things, each employee admitted to having criminal convictions on the separate questionnaire they completed contemporaneously with their employment applications, Vidales was under age 20 at the time he completed the application and that Torrico's criminal conviction was stale, as it occurred 17 years before.

The facts in the present case are not similar. Unlike in *Harvey Aluminum*, there is no evidence that Sanchez was a minor at the time he falsified the I-9 and Sanchez' falsification occurred 17 months, not 17 years, before his testimony. Significantly also, in *Harvey Aluminum* the employees accurately answered the questionnaire, putting the employer on notice that they had criminal convictions. Here, Sanchez allowed the Respondent to file W-2 forms containing the false social security number for 2 tax years. Moreover, the Board in *Harvey Aluminum* adopted the judge's decision letting stand his observation that a trier of fact could reasonably conclude that Vidales's and Torrico's testimony should be rejected.

In *W. L. Maxson Corp*., 44 NLRB 1136 (1942), the Board credited employee Cook's testimony concerning the employer's domination of an in-house union despite Cook having supplied fictitious references on his employment application. Unlike the present case where Sanchez falsified an official government document to obtain his job and is now seeking reinstatement to that job, there was no nexus between Cook's falsifications on his application and the subject or purpose of his testimony. Further, while Sanchez' conduct is a violation of Federal law, there was no indication that Cook providing false references was also unlawful.

In *Rainbow Garment Contracting*, 314 NLRB 929 (1994), the judge credited the testimony of three employees despite the employer's contentions that they submitted false documents to obtain employment. The judge also credited the testimony of a fourth employee whose job application stated that he worked for certain employers longer than he actually had. The false documents were never identified. Thus, the four employees' conduct cannot be compared to the serious falsification of an official government document involved here.

V*anguard Oil & Service, Inc*., 231 NLRB 146 (1977), is wholly unlike the present case. In *Vanguard Oil*, a backpay proceeding, the judge credited discriminatee Hester's testimony despite his failure to report certain employment to unemployment compensation authorities. The judge explained that Hester appeared to be a reliable witness based on observation and demeanor, there was no evidence that Hester's statements to the state unemployment authorities were under oath, and he readily admitted interim earnings and it was against his interest to do so. In the present case, no portion of Sanchez' testimony was against his interest and Sanchez entered a false social security number on the I-9, which warned that "federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with completion of this form."

Finally, citing *Daikichi Sushi*, 335 NLRB 622 (2001), my colleagues give as a reason for reversing the judge's credibility determination the finding that he "essentially disqualified Sanchez as a witness" without making a "true credibility determination." According to the majority, a judge must "consider[] the witness's testimony in context, including among other things, his demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences drawn from the record as a whole."

The majority is incorrect. The judge did not disqualify Sanchez as a witness. He credited Sanchez' testimony

[12] My colleagues respond to my argument distinguishing the cases they rely on by saying that I do not quarrel with the principle that a prior false statement of a witness is not dispositive of credibility. My colleagues are incorrect. I believe a prior false statement of a witness is not *necessarily* dispositive taking into account whether there are any mitigating circumstances introduced sufficient to rehabilitate the witness in the eyes of the administrative law judge. I believe this would be the case whether the falsification is contained in an official government document or in an employment application, whether the falsification is committed by an undocumented alien or an applicant for employment. This view, as shown above, is fully consistent with extant Board law. See also infra fn. 13.

[13] See *Adelphi Institute*, supra.

that Lock threatened to close the company if the employees voted for union representation. The record reveals that his decision not to credit Sanchez' testimony in so far as it related to his alleged unlawful discharge was a considered determination. To the extent the majority suggests a judge must make express findings on each factor he considered in making his credibility determinations, it is also incorrect. While desirable, as mentioned above, the Board does not require it. And it did not require it in *Daikichi*.

In *Daikichi* three employees testified that the company president made a speech, in English, threatening discharge for union activity. Although the judge expressed misgivings about the employees' testimony because, among other things, "their understanding of English was at best hit or miss," he ultimately credited their testimony because it was uncontroverted by any company witness. Little more was said by the judge to support his decision. Nevertheless, the Board adopted the judge's credibility determination, relying on the Board's "established policy 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. "*Daikichi Sushi*, 335 NLRB 622 fn. 1. After reciting the factors that a judge should consider, the Board summarily concluded that "[t]hat is exactly what the judge did here. " Id. at 623.

Far more can be said about the judge's credibility determination in the instant case. As mentioned above, the judge expressly gave the following reasons for discrediting Sanchez' testimony on the issues related to his unlawful discharge:

- One, he independently credited Lock's testimony which was contrary to Sanchez' testimony because of Lock's demeanor—he "appeared quite sincere when he gave this testimony"—and because his testimony that he did not discharge Sanchez was consistent with his testimony that he considered Sanchez a good employee.
- Two, Sanchez falsified the I-9 to get a job with Respondent and if his testimony was believed he would be reinstated to the job he falsified information to get.
- Three, the similarity between falsifying an I-9 and giving false testimony in that "both . . . involve the element of falsehood . . . [and] entail a substantial legal risk. The punishment for using a false Social Security number is quite significant, and so is the penalty for perjury."

In addition to the above, the record, which we review *de novo*, does not support Sanchez' testimony that Lock saw him in the cafeteria. Sanchez' *belief* that Lock saw him and the union president's *belief* that Lock saw the union president were conclusory and uncorroborated by circumstantial evidence sufficient to support a reasonable inference that the sightings occurred. Also, counsel for the General Counsel elected not to ask Sanchez any questions about the falsification of the I-9 leaving the judge free to conclude that there were no mitigating circumstances for him to take into consideration other than the mildly mitigating fact that Sanchez notified Respondent just before the Union filed a notice of charges that he had a valid social security number.

D. The Majority's Effort to Minimize on this Record the Probative Value to Credibility of Sanchez' Falsification is Without Merit

Citing the Ninth Circuit's decision in *Beltran-Tirado v. INS*, 213 F.3d 1179 (9th Cir. 2000), the majority states that it is unwilling to conclude that Sanchez "was testifying falsely" because he "had used a false Social Security number." My colleagues deprecate the care the judge exercised when considering the conflicting testimony of Lock and Sanchez on the issues relating to Sanchez' alleged unlawful discharge and they mischaracterize the nature of the judge's credibility finding. As mentioned above, the judge expressed three reasons why he was discrediting Sanchez' testimony on the issues relating to Sanchez' alleged unlawful discharge; the record, which we review de novo, provides additional reasons. In addition, Sanchez' willful falsification of an official government document that subjected him to possible criminal penalties is something more than "using a false Social Security number." Similarly, the probative value of the falsification to Sanchez' truthfulness or untruthfulness cannot fairly be challenged by relying on the court's decision in *Beltran-Tirado*, supra.

In *Beltran-Tirado*, supra, a divided panel of the Ninth Circuit was faced with the possible deportation of a Mexican national who had lived in the United States for 32 years and who already served a sentence for using a false social security number on an I-9 to obtain employment. As if to telescope where it was headed, the court began the "Factual Background" portion of its decision by noting that "Beltran-Tirado is fifty years old and has been living in the United States since arriving here at the age of eighteen in 1968." 213 F.3d at 1179. It was on these facts that the court found that Beltran-Tirado's crime was not a crime of "moral turpitude" barring her from applying for "registry" under 8 U.S.C. § 1259. Circuit Judge Noonan aptly began his dissent by observing: "The court reaches very far to perform a kindly deed." 213 F.2d at 1183 .

The decision in *Beltran-Tirado*, supra, is not applicable to the facts here. Apart from the fact that this is not a deportation proceeding, the court's decision turned on the specific statutory exemption granted certain aliens under a 1990 amendment to 42 U.S.C. § 408. But for that exemption, "a person convicted of using a false social security card in violation of 42 U.S.C. § 408(a)(7)(B) ordinarily would be considered to have committed a crime of moral turpitude because § 408(a)(7)(B) explicitly requires proof of 'intent to deceive.'"[14] There was no showing on this record that Tomas Sanchez belongs to the class of aliens granted the above-mentioned statutory exemption, thus the legal reasoning employed in *Beltran-Tirado*, supra, cannot be stretched to cover the judge's credibility determination at issue here.

For the above reasons, I respectfully dissent from the majority's decision reversing the judge's credibility determination and remanding the case for him to reconsider it.

Marcia Valenzuela, Esq. and *Jennifer Burgess-Solomon, Esq.,* for the General Counsel.
Donald G. Lock, of Miami, Florida, for the Respondent.
David Gornewicz, of Fort Lauderdale, Florida, for the Charging Party.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. I heard this case on July 29, 2002, in Miami, Florida. After the parties rested, I heard oral argument, and on July 31, 2002, issued a bench decision pursuant to Section 102.35(a)(1) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.[1]

The rulings on Charging Party's objections affecting the results of the election in Case 12–RC–8709 are set forth below. The Conclusions of Law, Remedy, Order, and Notice provisions also are set forth below, following the rulings on objections.

In the bench decision, I deferred a final ruling on the issue of whether Respondent's president, Donald G. Lock, was, at times material to the complaint, Respondent's supervisor and agent. Considering all of the evidence, including Lock's role in authoring the memos distributed to employees, I find that the General Counsel has proven these allegations.

Summary of Unfair Labor Practice Findings

As discussed in the attached bench decision, I have found that the General Counsel has established the allegations in complaint paragraphs 1 through 4, establishing that the charge and its amendments were timely filed, that Respondent is an employer engaged in commerce and subject to the Board's jurisdiction, and that the Charging Party met the statutory definition of a labor organization.

Additionally, I find that the Government has proven the allegations in complaint paragraphs 5(a) through (f) and (i), and 6(b). Further, I conclude that Respondent's actions described in these complaint paragraphs violated Section 8(a)(1) of the Act and that Respondent's discharge of employee Dean Martindill, described in complaint paragraph 6(b), also violated Section 8(a)(3) of the Act. However, I do not find that Respondent violated the Act in any other manner alleged in the complaint.

Two other allegations merit further discussion because of their relevance to the objections filed by the Union in Case 14–RC–8709. These allegations appear in complaint paragraphs 5(g) and (h).

Complaint paragraph 5(g) alleges that on or about October 31, 2001, at its Fort Lauderdale airport jobsite, Respondent created an impression among its employees that their union activities were under surveillance. This allegation rests on the testimony of Abelardo Garza, whom Respondent formerly employed.

According to Garza, an employee named Juan Lopez began work for Respondent on October 31, 2001, but worked only 1 day. Garza testified that Lopez "work[ed] only one day because he say [sic] he want to find so that I support the union." When asked, "Who said that?" Garza replied, "Don Lock."

The record does not establish a foundation for the statement attributed to Lock. Garza does not specify where he heard Lock make such a statement, what prompted Lock to do so, or who else was present. Without such anchoring facts, the testimony is rather nebulous and not entitled to much weight.

Moreover, for the reasons discussed in the bench decision, I do not have a good deal of confidence in Garza's testimony and do not credit it. Therefore, I do not find that Respondent engaged in the alleged conduct.

Complaint paragraph 5(h) alleges that on or about December 5, 2001, at its Water Plant jobsite, Respondent threatened employees with discharge due to their union support and activities. This allegation rests on the testimony of Tomas Sanchez that Lock told him, "Remember your bills." For the reasons stated in the bench decision, I did not find that such a comment violated the Act.

The Objections

As discussed more fully in the bench decision, on October 19, 2001, the Board conducted a secret-ballot election in a unit consisting of all full-time and regularly scheduled part–time installers/placers employed by Respondent in Miami–Dade and

[14] *Souza v. Ashcroft*, 2001 WL 823816 (N.D. Cal. 2001).

Under 42 U.S.C. § 408(a)(7)(B), a person who, "with intent to deceive, falsely represents a number to be the social security account number assigned by the Commissioner of Social Security to him or to another person, when in fact such number is not the social security account number assigned by the Commissioner of Social Security to him or to such other person," is guilty of a felony punishable by fine or imprisonment for not more than 5 years, or both.

[1] The bench decision appears in uncorrected form at pp. 146 through 172 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as Appendix A to this certification.

Broward Counties. The Union filed timely objections to conduct affecting the results of this election.

Respondent and the Union thereafter entered into a stipulation providing for a second election, which the Board conducted on December 7, 2001. The Union also filed timely objections to conduct affecting the results of this election. Initially, the Union filed five objections but later withdrew three of them. In the remaining two objections, the Union alleged that Respondent threatened employees if they voted for the Union, and gave discriminatory treatment to known union supporters.

The Union did not present separate evidence regarding these objections. Instead, it relied on the evidence which the General Counsel presented to establish the unfair labor practice allegations.

In considering the union objections, I note that the critical period for a second election commences as of the date of the first election. *Star Kist Caribe, Inc.*, 325 NLRB 304 (1998). Therefore, in the present case, the critical period began on October 19, 2001, the date of the first election.

The record establishes that Respondent made certain statements violating Section 8(a)(1) of the Act before the first election. Because these statements fell outside the critical period for the second election, I do not consider them.

The complaint also alleges that Respondent engaged in certain conduct violating Section 8(a)(1) during the critical period. Specifically, complaint paragraphs 5(f), (g), and (h) allege that Respondent's president and owner, Donald G. Lock, made violative statements on October 19 and 31, and December 5, 2001, respectively.

For the reasons discussed above and in the bench decision, I have found that the record does not establish the allegations in complaint paragraphs 5(g) and (h). Similarly, the record does not establish that the alleged statements constitute objectionable conduct.

On the other hand, the record does establish that Respondent violated Section 8(a)(1) of the Act by the conduct alleged in complaint paragraph 5(f). Specifically, crediting the testimony of employee Raul Zanales, I find that on October 19, 2001, after the first election, Respondent's president "said that he had won 10 to 1 and that he would like to find the guy that voted 1. He'd like to break his face."

It could be argued that this one statement, made at the very start of the critical period and almost 2 months before the second election, had such a limited impact that it did not appreciably disturb the laboratory conditions necessary for voters to make an uncoerced choice.

However, the statement conveys an implied threat of violence to an employee because of the way the employee voted. Thus, it directly ties the exercise of a vital Section 7 right with the possibility of physical harm.

Respondent did not repudiate or disavow this statement during the remainder of the critical period and thus, I conclude, the laboratory conditions were not restored. Cf. *Action Mining*, 318 NLRB 652 (1995) (disavowal and repudiation sufficient to remedy an unfair labor practice is also sufficient to restore the laboratory conditions). Therefore, I recommend that the Board set aside the December 7, 2001 election, and direct that a new election be conducted.

The Union's remaining objection alleges that Respondent gave discriminatory treatment to union supporters. The record establishes that Respondent did discriminate against employee Dean Martindill by discharging him on December 15, 2001, in violation of Section 8(a)(3) and (1) of the Act. However, this conduct took place 8 days after the second election, and therefore could not have affected the results of that election. The record does not establish that Respondent engaged in any unlawful discrimination against union supporters before the election. Therefore, I recommend that the Board overrule this objection.

In sum, because of the conduct alleged in complaint paragraph 5(f) and established by the record, I conclude that Respondent engaged in objectionable conduct and recommend that the Board set aside the December 7, 2001 election, and direct that a new election be conducted. Further, I recommend that the Board sever Case 12–RC–8709 from Case 12–CA–21951 and remand the representation case to the Regional Director so that the election may be conducted expeditiously.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including posting the notice to employees attached hereto as Appendix B.

Additionally, I recommend that the Board order Respondent to offer employee Dean Martindill immediate and full reinstatement to his former position, or to a substantially equivalent position if his former position is not available, and to make him whole, with interest, for any losses suffered because of Respondent's unlawful discrimination against him.

CONCLUSIONS OF LAW

1. The Respondent, Double D Construction Group, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers Local 272, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times, Respondent's president, Donald G. Lock, was Respondent's supervisor and agent within the meaning of Section 2(11) and (13) of the Act, respectively.

4. The Respondent violated Section 8(a)(1) of the Act by prohibiting or discouraging an employee from placing a union sticker on his automobile, by interrogating employees about their Union membership, activities and sympathies, by prohibiting an employee from discussing the Union while at work, by threatening employees with closure of the business and/or loss of jobs should they select the Union to represent them, by threatening employees with bodily injury due to their union support and activities, and by discharging employee Dean Martindill because he joined and assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities.

5. The Respondent violated Section 8(a)(3) of the Act on about December 15, 2001, by discharging employee Dean Martindill because he joined and assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. The Respondent did not engage in the unfair labor practices alleged in the consolidated complaint not specifically found herein.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended[2]

ORDER

The Respondent, Double D Construction Group, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting or discouraging employees from placing union stickers on the vehicles.

(b) Interrogating employees about their union membership, activities, and sympathies.

(c) Prohibiting employees from discussing the Union while at work.

(d) Threatening employees with closure of the business and/or loss of jobs should they select the Union to represent them.

(e) Discharging employees because they joined and assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities.

(f) In any like or related manner 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) Offer Dean Martindill immediate and full reinstatement to his former position or to a substantially equivalent position if his former position no longer is available.

(b) Make Dean Martindill whole for all losses he suffered because of Respondent's unlawful discrimination against him.[3]

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its offices in Miami, Florida, at its jobsites in Miami–Dade and Broward counties, and at all other places where notices customarily are posted, copies of the attached notice marked "Appendix B."[4] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX A

BENCH DECISION

This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations. The complaint alleges that Respondent unlawfully discharged two employees, Tomas Sanchez and Dean Martindill. I conclude that the evidence establishes Respondent discharged Martindill in violation of Section 8(a)(3) and (1) of the Act, but that the record does not establish that Respondent unlawfully discharged Sanchez. Additionally, I find that by making certain statements to employees, Respondent violated Section 8(a)(1).

Procedural History

This consolidated case began on September 17, 2001, when the Union, Local 272 of the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, AFL–CIO, filed a petition in Case 12–RC–8709. The Union sought to represent a unit of ironworkers and helpers employed by the Respondent, Double D Construction Group, Inc.

The Union and Respondent entered into a Stipulated Election Agreement providing for a Board-conducted secret ballot election on October 19, 2001. A majority of voters did not select the Union to represent them and, on October 23, 2001, the Union filed Objections to Conduct Affecting Results of the Election.

The Union and Respondent entered into a stipulation providing that the first election be set aside and that a new election be conducted. Approving this stipulation, the Regional Director for Region 12 of the Board issued an Order directing that the second election be conducted on December 7, 2001.

Two days before the election, the Union filed an unfair labor practice charge against Respondent in Case 12–CA–21951. The Union later amended this charge twice.

On December 7, 2001, all 16 eligible voters cast ballots. The Board agent conducting the election challenged two ballots of voters whose names were not on the eligibility list provided by Respondent. Additionally, the Union challenged three of the ballots on the basis that the voters were supervisors.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, these 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.

[3] Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[4] 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."

The initial tally of ballots indicated that 4 employees had voted for the Union and 7 had voted against it. In principle, the five challenged ballots, then unopened, could have affected the results of the election. However, the Union had challenged three of these voters on the basis that they were supervisors, and may not have expected these three ballots to favor representation. On December 12, 2001, the Union filed timely Objections to Conduct Affecting the Results of the Election.

The Union later withdrew its challenges to the ballots of the three voters. On July 22, 2002, a Board agent opened and counted these challenged ballots. Although the Board agent did not open the two challenged ballots cast by individuals not on the eligibility list, those ballots would not have affected the outcome of the election. A revised tally of ballots included the following information:

Approximate number of eligible voters	16
Number of void ballots	0
Number of votes cast for Petitioner	4
Number of votes cast against participating labor organization	10
Valid votes counted	14
Number of challenged ballots	2
Valid votes counted plus challenged ballots	16

The remaining two challenged ballots are not sufficient in number to affect the results of the election.

On May 31, 2002, the Regional Director issued a complaint and notice of hearing in Case 12–CA–21951. Respondent filed a timely answer.

On July 15, 2002, the Acting Regional Director issued an Order which consolidated the representation case, Case 12–RC–8709, with the unfair labor practice case, Case 12–CA–21951, for hearing before an administrative law judge. On July 23, 2002, the Acting Regional Director issued a Revised Order Consolidating Cases for Hearing and Notice of Hearing (the "Revised Order").

Initially, the Union had filed five objections to conduct affecting the results of the December 7, 2001 election, but later withdrew three of them (Objections 2, 3, and 5) before the Acting Regional Director issued the July 23, 2002 Revised Order. The two remaining objections, which are to be resolved in this proceeding, allege that before the December 7, 2001 election, Respondent engaged in the following conduct affecting the results of the election:

1. Threatening employees if they voted for the Union.
4. Discriminatory treatment of known Union supporters.

On July 29, 2002, hearing opened before me in Miami, Florida. Respondent did not retain counsel. Rather, Respondent's president, Donald G. Lock, represented his Company in this proceeding.

The parties completed the presentation of evidence and rested on July 29, 2002. That same day, they presented oral argument. Today, July 31, 2002, I am issuing this bench decision.

Complaint Paragraphs 1 through 4

The first four complaint paragraphs allege facts which form a necessary predicate to the unfair labor practice allegations appearing thereafter. Respondent has not admitted these allegations.

Complaint paragraph 1(a) alleges that the Union filed the initial charge on December 5, 2001, and that a copy was served on the Respondent by regular mail on December 6, 2001. Complaint paragraph 1(b) alleges that the Union filed the first amended charge on February 28, 2002, and that a copy was served by regular mail on Respondent on March 1, 2002. Complaint paragraph 1(c) alleges that the Union filed the second amended charge on March 28, 2002, and that a copy was served on Respondent by regular mail on April 2, 2002.

Although Respondent has not admitted these allegations, it has not offered any testimony or other evidence that it did not receive the charges. Therefore, Respondent has not refuted the affidavits of service in evidence as General Counsel's Exhibits 1(c), 1(f), and 1(g). Based on this uncontroverted evidence, I find that the charges were filed and served as alleged in complaint paragraph 1.

Complaint paragraph 2 alleges facts to establish that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act and, therefore, is subject to the jurisdiction of the National Labor Relations Board. Although Respondent's answer did not admit these allegations, Respondent did admit similar facts by entering into the September 28, 2001 Stipulated Election Agreement in Case 12–RC–8709. Specifically, Respondent stipulated as follows:

> The Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act and a question affecting commerce has arisen concerning the representation of employees within the meaning of Section 9(c) . . . . The Employer, Double D Construction Group, Inc., a Florida corporation is engaged in the construction industry as a structural steel contractor. The Employer's principal place of business is located at 6051 SW 46th Street, Miami, Fl[orida] 33155. During the past calendar year, a representative period of time, the Employer in the course and conduct of its business operations as described above, provided services valued in excess of $50,000 to other enterprises, including Baker Concrete, a general contractor, located within the state of Florida, and those other enterprises who have in turn purchased and received goods and products valued in excess of $50,000 directly from outside the [S]tate of Florida.

Based on this stipulation, I find that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Further, I conclude that Respondent is subject to the Board's jurisdiction.

Complaint paragraph 3 alleges that at all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act. Based on the uncontradicted testimony of Union President David Gornewicz, I find that the Union is an organization in which employees participate, and which exists for the purpose of dealing with employers concerning grievances, labor disputes, rates of pay, hours of employment

or conditions of work. Therefore, I conclude that it is a labor organization within the meaning of Section 2(5) of the Act.

Complaint paragraph 4 alleges that at all material times, Respondent's president, Donald G. Lock, has been a supervisor and agent of Respondent within the meaning of Section 2(11) and 2(13) of the Act. Respondent has not admitted this allegation and the General Counsel bears the burden of proof. For purposes of analysis today, I will assume that the evidence establishes that President Lock is Respondent's supervisor and agent, an assumption consistent with the testimony of Raul Canales that Lock hired him. However, I will defer a final ruling on the supervisory and agency issue until issuance of the certification of this bench decision.

The Unfair Labor Practice Allegations

The complaint alleges that Respondent, by its president, Donald G. Lock, made a number of statements to employees which interfered with, restrained and coerced them in the exercise of rights guaranteed by Section 7 of the Act, in violation of Section 8(a)(1) of the Act. The complaint also alleges that Respondent discharged two employees, Tomas Sanchez and Dean Martindill, in violation of Section 8(a)(3) and (1) of the Act.

For clarity, I will begin by describing Respondent's business. As a structural steel contractor, Respondent plays a vital step in the construction of concrete buildings. To assure that such a building will have adequate strength, workers pour the concrete around reinforcing steel bars, or "rebar." Respondent's ironworkers put the rebar in place.

In about May 2001, Respondent began work on a project at the Hialeah, Florida water plant. In June or July 2001, Respondent began work on a project at the Fort Lauderdale Airport. The complaint alleges that Respondent's president made a number of unlawful statements to employees working at these sites.

The first of these allegations concerns a conversation between Respondent's President Lock and an ironworker, Dean Martindill, who testified that the conversation took place around August or September 2001. According to Martindill, there was a sticker on his car which displayed the American flag and mentioned the Union. Martindill quoted Lock as saying that he "appreciated it" if Martindill did not have the sticker on his car because it made Lock "look bad."

According to Martindill, Lock also told him that "he didn't appreciate me supporting the union or I shouldn't have it on there if I didn't support the union." Based on my observations of the witnesses, I credit Martindill's testimony about this conversation, and find that Lock did make the statements Martindill attributed to him.

Although the complaint alleges that Respondent prohibited employees from putting union stickers on their vehicles, the evidence here does not establish such an outright prohibition. Lock did not order Martindill to remove the sticker but only asked Martindill to do so. All the same, this request violated the Act.

In *Electrical South, Inc.*, 327 NLRB 270 (1998), a supervisor told employees that he would appreciate their not wearing any union paraphernalia, and also said that it was unprofessional and inappropriate for the employees, who were engineers, to display their support for the union in that manner. The Board found this action violative. Similarly, I conclude that Lock's statement to Martindill interfered with the exercise of rights guaranteed by Section 7 of the Act, and recommend that the Board find that Respondent thereby violated Section 8(a)(1).

Sometime before September 26, 2001, an ironworker, Raul Canales, applied for work with Respondent. On that date, Canales called Lock concerning his job application. According to Canales, Lock asked him if he had been in the Union. Canales answered, "Yes I was, because I was from up north. According to Canales, Lock replied "that was fine, as long as I did not talk any union crap at the job . . . ."

In cross-examining Canales, Lock elicited testimony that Canales was from Jacksonville, rather than from "up north." If that constitutes an inconsistency, it is not sufficient to discredit Canales. The phrase "up north" might well refer to somewhere along the Great Lakes or, conceivably, the Yukon. But a compass needle in Miami would also point generally in the direction of Jacksonville.

Canales did not have anything to gain from his testimony. The complaint does not allege that Respondent has discriminated against him. Additionally, based on my observations of the witnesses, I conclude that his testimony is reliable. Crediting that testimony, I find that on or shortly before September 26, 2001, Lock did ask this job applicant about his union affiliation. Moreover, Lock admonished Canales not to "talk any union crap at the job . . . ."

As the Supreme Court held in *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995), a job applicant falls within the statutory definition of "employee" and is entitled to the protection of the Act. I must now determine whether Lock's asking Canales about his union affiliation is unlawful.

In *Smith and Johnson Construction Co.*, 324 NLRB 973 (1997), the Board affirmed the administrative law judge's analysis of certain statements alleged to violate Section 8(a)(1) of the Act. The judge had described the framework for that analysis in these terms:

> In deciding whether interrogation is unlawful, I am governed by the Board's decision in *Rossmore House*, 269 NLRB 1176 (1984). In that case, the Board held that the lawfulness of questioning by employer agents about union sympathies and activities turned on the question of whether "under all circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act." The Board in *Rossmore House* noted the [test set forth in *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964)] was helpful in making such an analysis. The *Bourne* test factors are as follows:
>
> 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.

Of these factors, two weigh in favor of finding no violation. The record does not reveal that the Respondent has previously been found guilty of unfair labor practices. The evidence is insufficient to show a history of employer hostility. Additionally, the questioning took place by telephone, not in the president's office, which would constitute a locus of authority possibly enhancing any coercive effect.

On the other hand, the question goes directly to the job applicant's union sympathies and therefore clearly implicates rights protected by Section 7 of the Act. Additionally, after obtaining an affirmative answer to this question, Lock immediately warned Canales not to "talk any union crap at the job . . . ." This warning gives the question a more ominous context.

Moreover, the questioner was the Respondent's president. Additionally, Canales truthfully replied concerning his union affiliation.

On balance, the factors weigh in favor of finding a violation. I conclude that Respondent interfered with, restrained, and coerced an employee in the exercise of rights guaranteed by Section 7 of the Act, and recommend that the Board find that Respondent thereby violated Section 8(a)(1).

On October 18, 2001, the day before the first election, Respondent's President Lock spoke with employees at the Fort Lauderdale Airport jobsite. Witnesses provided varying accounts of what Lock said.

Employee Raul Canales attended this meeting. He identified two other employees, Abelardo Garza and Tomas Sanchez, as being present, but he could not recall the names of others who attended. According to Canales, Lock told the employees that they were going to have an election the next day, "and that if we voted union that he was going to shut his doors down."

Sanchez testified that Lock told the employees that if they voted for the Union, they would have to live with the consequences, and that if they voted for the Union, he was going to close the Company.

Although the accounts of Canales and Sanchez are consistent, another employee present, Abelardo Garza, gave conflicting testimony. According to Garza, Lock said "vote for the Union or he's [going to] close the company."

This testimony does not accord with common experience in labor relations. Managers typically do not use threats of plant closure to coerce employees into voting *for* a petitioning union.

Garza's native language is Spanish but he testified in English. It is quite possible that a language difficulty distorted what he intended to say. However, when the General Counsel asked Garza a second time about what Lock had said, Garza again quoted Lock as telling employees to vote for the Union or else he would close the Company.

Another part of Garza's testimony casts some doubt on its reliability. Garza described a telephone conversation he had with Tomas Sanchez some time after Garza had quit working for Respondent. Garza testified specifically that this conversation took place on November 21. He also testified specifically that the conversation took place after the second election. However, the Board conducted the second election on December 7.

A conversation on November 21 would have taken place before, not after, the second election. When asked about this inconsistency on cross-examination, Garza changed his testimony and said that his conversation with Sanchez took place on December 21. Because of these problems with Garza's testimony, I have doubts about its reliability and do not credit it.

Employee Dean Martindill also attended the meeting at the Fort Lauderdale Airport jobsite. According to Martindill, Lock told the employees "that the Union would take our money, and that he didn't want to be paying for, for the Union people in the office driving around BMWs. That's the part that I remember the best."

Martindill's testimony does not establish that Lock said anything unlawful at this meeting. Respondent's campaign against the Union focused on the dues which employees would pay to the Union and reported information about the salaries of Union officers, presumably obtained from documents the Union filed with the Department of Labor. An expression of opinion that the Union would spend the money poorly does not constitute a threat of reprisal or force or promise of benefit, and does not violate the Act. However, there is some question as to how much of what Lock said Martindill actually heard or recalled. His comment—"That's the part that I remember the best"—suggests that there were other parts Martindill did not remember as well.

Lock also testified concerning what he told employees at the Fort Lauderdale Airport jobsite on October 18, 2001. In evaluating his testimony, his dual roles of witness and advocate must be taken into account. The testimony he gave from the witness stand, under oath and subject to cross-examination, certainly constitutes evidence on which findings of fact may be predicated. Statements he made in oral argument, which were not subject to cross-examination, do not constitute evidence.

In evaluating his testimony, I also bear in mind that although labor lawyers typically elicit very specific testimony, including explicit denials of all allegations which warrant denial, Lock is not a labor lawyer. Moreover, no attorney appeared to represent Lock or the Respondent and, to a considerable extent, he had to provide his testimony in a narrative form. In determining whether Lock's testimony has denied a particular allegation, I will look to the general sense of the testimony and consider whether, to a lay person, it would reasonably seem to communicate a denial.

Lock gave the following testimony concerning what he told employees at the Fort Lauderdale jobsite on October 18, 2001:

> To the best of my recollection, I was telling them and I said 'I'm paying this amount of money, they're paying that amount of money, you do what you want, okay. I can't tell you what to do, but I'm telling you that we have an election coming up because they want, people want to go union.' And I [said] . . . if you want to go union that's fine, if you don't, that's fine, okay, but I'm still working this job, I'm still hiring people.

Although this testimony does not specifically deny that Lock threatened to close the Company if employees selected the Union, I infer that Lock intended it to be a complete, if rather brief summary of all that he told the ironworkers on that occasion. Therefore, I conclude that Lock, in effect, denied the threat attributed to him.

However, I do not credit this testimony, which two other witnesses, Canales and Sanchez, contradict. The complaint alleges that Respondent unlawfully discharged Sanchez, so he is not a neutral witness but rather one with a definite interest in the outcome of this case: He stands to get his job back. Similarly, Lock is not a neutral witness. But Canales had nothing obvious to gain by testifying as he did. That fact, together with the fact that Sanchez corroborated his testimony, persuades me that it should be credited.

Respondent elicited testimony from several witnesses that they never heard Lock threaten anyone. Such testimony is too vague to refute the specific allegation that on a particular occasion—in this instance a gathering of employees on October 18, 2001 at the Fort Lauderdale Airport jobsite—Respondent's president threatened to close the business if employees selected the Union.

Based on the credited testimony of Canales, I find that on October 18, 2001, Respondent, by its President Lock, did threaten to close the Company if employees voted for the Union. Moreover, the record does not establish that Lock cited objective facts as a basis for such a statement. Rather, it stands as a rather naked threat.

In sum, I conclude that this statement interfered with, restrained, and coerced employees in the exercise of rights guaranteed by Section 7 of the Act. I recommend that the Board find that Respondent thereby violated Section 8(a)(1) of the Act.

Canales further testified that after the election ended on October 19, 2001, Lock said in his presence that he had won 10 to 1 and that he would like to find the guy who voted "1" and break his face. Crediting Canales, I find that Lock made this statement.

To determine whether such a statement is unlawful, I apply an objective test to ascertain what message the words reasonably would convey. In this instance, the linking of the protected activity—voting for the Union—with the possibility of physical violence reasonably would chill employees in the exercise of protected rights. I recommend that the Board find that this statement violated Section 8(a)(1).

Abelardo Garza also gave testimony concerning a comment Lock reportedly made on October 19, 2001 after the election. According to Garza, Lock referred to the employee who served as the Union's observer and said, "he said he look at me like this, I want to walk by and fight with the guy."

For reasons I have already discussed, I do not have confidence in Garza's testimony and do not credit it. Therefore, I do not find that Lock made the comment which Garza attributed to him.

Before both the first and the second elections, Respondent distributed memoranda to employees. These fliers expressed negative opinions about the Union. They focused in part on the amount of Union dues, and how the Union would spend this money. For example, a December 3, 2001 flier listed the salaries paid to various Union officers and also stated that in the year 2000, the Union paid $31,524 for car loans. The flier also stated that "The union's promises are not guarantees. They make many promises to try to get your vote because these union officials want more money—union dues—from your pay."

These documents certainly were critical of the Union, but none of them made a threat of reprisal or force or promise of benefit. Additionally, the complaint does not allege that any of these fliers contained an unlawful statement.

The second election took place December 7, 2002. According to employee Sanchez, 2 days before the election, Lock told him, "Remember your bills." Such a statement does not constitute a threat or promise. It appears simply to be an allusion to the same theme Respondent articulated in its fliers, namely, that if employees selected the Union, the Union would collect dues from them and then waste the money.

I conclude that the statement attributed to Lock does not unlawfully interfere with, restrain, or coerce employees in the exercise of Section 7 rights, and recommend that the Board find that it did not violate the Act.

The complaint alleges that on December 10, 2001, Respondent discharged employee Tomas Sanchez. In evaluating this allegation, I will follow the framework set forth by the Board in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, supra, the General Counsel must establish four elements by a preponderance of the evidence. First, the Government must show the existence of activity protected by the Act. Second, the Government must prove that Respondent was aware that the employees had engaged in such activity. Third, the General Counsel must show that the alleged discriminatees suffered an adverse employment action. Fourth, the Government must establish a link, or nexus, between the employees' protected activity and the adverse employment action.

In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the respondent bears the burden of showing that the same action would have taken place even in the absence of the protected conduct. *Wright Line*, 251 NLRB 1083, at 1089. See also *Manno Electric, Inc.*, 321 NLRB 278, 280 at fn. 12 (1996).

The General Counsel first must prove that Sanchez engaged in protected activity. He testified that on November 13, 2001, he went with the Union president to the Federal building in which the Board offices are located. That day, the Union president met with Respondent's president and entered into a stipulation to set aside the first election and to have a second.

Accompanying the Union president constituted protected activity. I conclude that the General Counsel has established the first *Wright Line* element. Next, the Government must prove that Respondent had knowledge of Sanchez' Union activities.

Although the Union president went to the Board offices, the record does not establish that Sanchez actually entered those offices. However, Sanchez and the Union president also went to the cafeteria in the same building. According to Sanchez, Respondent's President Lock saw him with the Union president in the cafeteria.

Union President Gornewicz testified that he *believed* that Lock and his attorney saw them in the cafeteria. However, I infer that Union President Gornewicz was less than certain about this fact.

Lock testified that he saw the Union president at the Board office, but could not remember whether or not he went to the cafeteria. He did not recall seeing Sanchez on this occasion.

Lock appeared quite sincere when he gave this testimony. Moreover, for reasons I will discuss, there are reasons to doubt Sanchez' testimony. Crediting Lock, I find that the Government has not established that he saw Sanchez with the Union president on that occasion. Therefore, I conclude that the General Counsel has not established the second *Wright Line* element.

Because the General Counsel has not established all four *Wright Line* elements, the burden does not shift to the Respondent to rebut the Government's case. The analysis therefore may stop here. However, in the event that the Board may disagree with my conclusion, I will briefly address the remaining two *Wright Line* elements and also discuss the issue of Sanchez' credibility.

The record also fails to establish that Sanchez suffered an adverse employment action. According to Lock, Sanchez showed up for work on Monday, December 10, 2001, but did not show up for work after that date.

Sanchez gave a different account. However, he also admitted that when he applied for work with Respondent, he used a false social security number. Although asked, he did not say where he obtained this number, but only admitted that it was false.

There are certain similarities between using a false social security number and giving untrue testimony. Both obviously involve the element of falsehood, but more than that, they both entail a substantial legal risk. The punishment for using a false social security number is quite significant, and so is the penalty for perjury.

Sanchez used a false social security number to obtain employment. To obtain work, he was willing to risk the legal penalty.

The complaint names Sanchez as a discriminatee, and the Government seeks an order requiring Respondent to reinstate him with backpay. A job is at stake once more. If Sanchez demonstrated a willingness to use a false Government document to obtain work, notwithstanding the risk, he may also be willing to offer false testimony to obtain reinstatement, notwithstanding the risk. To the extent that Sanchez' testimony conflicts with that of Lock, I credit Lock.

Based on Lock's testimony, I find that Respondent did not discharge Sanchez, whom Lock acknowledged to be a good employee. Rather, I find that Sanchez did not show up for work. Therefore, I conclude that the General Counsel has not established the third *Wright Line* element. Since there was no adverse employment event, it would not be possible for the General Counsel to establish a connection between the protected activity and the adverse employment event. Therefore, I further conclude that the Government has not established the final *Wright Line* element.

In sum, I recommend that the Board dismiss the allegation that Respondent discharged Sanchez unlawfully.

The complaint further alleges that Respondent unlawfully discharged employee Dean Martindill on December 15, 2001. According to Martindill, Lock notified him of the discharge while the two of them talked in a parking lot. Martindill testified as follows:

> The first thing Don said is that I was moving like a snail and was walking around with a soda can in my hand too much. And then he was saying that, uh, he knew that I'd voted for the Union, and I told him 'I don't know how you have proof.' He says he didn't have proof but that he felt that I did and then after that he said he didn't have enough work for me. And that was my last paycheck.

Lock admitted taking an employment action against Martindill. He described it as follows:

> Dean Martindill picked up his paycheck at Walgreen's, and I told him the reason I cut his hours 'cause he went from a foreman—because I was told by the general contractor he could no longer work on that job for whatever reason—three weeks later I hired him back and put him on another job and he went from a foreman to an ironworker.
>
> He had an attitude about him. I gave him his paycheck, told him 'The reason I'm cutting your hours down is because you've got an attitude and you don't walk around with a Coke can in your hand all day long.
>
> [Martindill responded:] "I'm the best thing you've got. I'm the hardest worker you've got. I guess you don't need me."
>
> I said, "I didn't say that. You give me a call. Think [about] it over the weekend. Give me a call."
>
> The phone call I got 2 weeks later was threatening me with the Union. That was his phone call. And that's all I have to say, Your Honor.

Analyzing the facts using the Board's *Wright Line* framework, I conclude that Martindill engaged in protected activity and that Respondent knew it. Thus, Martindill displayed a Union sticker on his vehicle and Lock asked him to remove it.

Clearly, reducing an employee's hours—in this case to zero—constitutes an adverse employment action. The General Counsel has established the third *Wright Line* element.

The Government also has proven the fourth element. Lock's earlier request to remove the Union sticker provides some evidence of antiunion animus. Additionally, Lock's own explanation, characterizing Martindill as having an "attitude," also raises questions.

As stated in *James Julian Inc. of Delaware*, 325 NLRB 1109 (1998), "The Board has repeatedly found, with court approval, that, in a labor-relations context, company complaints about a "bad attitude" are often euphemisms for prounion sentiments. E.g., *Promenade Garage Corp.*, 314 NLRB 172, 180 (1994); *Helena Laboratories Corp.*, 225 NLRB 257, 269 (1976), enfd. in pertinent part 557 F.2d 1183 (5th Cir. 1977); *L. S. Ayres & Co.*, 221 NLRB 1344, 1345 (1976), enfd. 94 LRRM 3210 (4th Cir. 1977).

Lock gave, as an example of Martindill's attitude, the fact that Martindill often walked around carrying a coke can while at work. However, the record does not establish that Respondent had any rule prohibiting employees from drinking a soda while working. Moreover, when a supervisor, Delmar Blanchard, testified about Martindill carrying a can of coke, he did not sound particularly concerned about it.

In other words, the evidence does not establish any plausible explanation for Lock's conclusion that Martindill had a bad "attitude" unless Lock took Martindill's union sympathies into account. I find that the General Counsel has established the final *Wright Line* element.

At this point, the burden shifted to Respondent to present evidence that it would have taken the same employment action against Martindill even if he were not sympathetic to, or active on behalf of the Union. In *Lampi LLC*, 327 NLRB 222 (1998), the Board discussed how a respondent could carry this burden of proof:

> To establish an affirmative defense under *Wright Line* to a discriminatory discharge allegation, an employer must do more than show that it had reasons that could warrant discharging the employee in question. It must show by a preponderance of the evidence that it would have done so even if the employee had not engaged in protected activities. In assessing whether the Respondent has established this defense regarding [the alleged discriminatee's] discharge, we do not rely on our views of what conduct should merit discharge. Rather we look to the Respondent's own documentation regarding [the alleged discriminatee's] conduct, to its "Personnel Policy" handbook, and to the evidence of how it treated other employees with recorded incidents of discipline.

Respondent has not presented such evidence and, I conclude, has not established that it would have taken the same employment action against Martindill even in the absence of union activities. Although Martindill could not continue to work at the Fort Lauderdale Airport jobsite because of problems with a drug test required of personnel who worked at the airport, Respondent later employed him to work at another site. Therefore, Martindill's problem with the drug test and his consequent inability to work at the airport jobsite would not carry Respondent's burden of proof.

In sum, I recommend that the Board find that by discharging Martindill, Respondent violated Section 8(a)(3) and (1) of the Act.

When the transcript of this proceeding has been prepared, I will issue a certification which attaches as an appendix the portion of the transcript reporting this bench decision. This certification also will address the effect of the unfair labor practices on the election, and will include recommendations for the resolution of the Union's objections. The certification also will include provisions relating to the Findings of Fact, Conclusions of Law, Remedy, Order and Notice to Employees.

When that certification is served upon the parties, the time period for filing an appeal will begin to run. All parties have tried this case in a very courteous and professional manner, which I truly appreciate. The hearing is closed.

Hearing Closed: July 31, 2002 at 12:09 p.m.

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P R O C E E D I N G S

(Time Noted: 11:00 a.m.)

JUDGE LOCKE: Mr. Lock is present by speakerphone because I believe he got delayed in coming down here this morning, or his schedule got confused.

But, anyway, you are present, Mr. Lock. I assume you're on the line?

MR. LOCK: Yes, sir, I am.

JUDGE LOCKE: Very well. Opposing counsel are present so I will begin to make the decision.

MR. LOCK: Thank you, sir.

JUDGE LOCKE: This decision is issued pursuant to Section 102.358(m) and Section 102.45 of the Board's Rules and Regulations.

The complaint alleges that Respondent unlawfully discharged two employees, Tomas Sanchez and Dean Martindill. I conclude that the evidence establishes Respondent discharged Martindill in violation of Section 8(a)(3) and (1) of the Act but that the record does not establish that Respondent unlawfully discharged Sanchez.

Additionally, I find that by making certain statements to employees, Respondent violated Section 8(a)(1).

PROCEDURAL HISTORY

This consolidated case began on September 17, 2001, when the Union, Local 272 of the International Association of Bridge,

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Structural, Ornamental and Reinforcing Iron Workers, AFL–CIO, filed the petition in Case 12–RC–8709. The Union sought to represent a unit of iron workers and welders employed by the Respondent, Double D Construction Group, Inc.

The Union and Respondent entered into a stipulated election agreement providing for a Board-conducted secret ballot election on October 19, 2001. The majority of voters did not select the Union to represent them and on October 23, 2001, the Union filed objections to conduct affecting the results of the election.

The Union and Respondent entered into a stipulation providing that the first election be set aside and that a new election be conducted. Approving the stipulation, the Regional Director for Region 12 of the Board issued an order directing that the second election be conducted on December 7, 2001.

Two days before the election, the Union filed an unfair labor practice charge against Respondent in Case 12–CA–21951. The Union later amended this charge twice.

On December 7, 2001, all 16 eligible voters cast ballots. The Board agent conducting the election challenged two ballots of voters whose names were not on the eligibility list provided by Respondent. Additionally, the Union challenged three of the ballots on the basis that the voters were supervisors.

The initial tally of the ballots indicated that four employees had voted for the Union and seven had voted against it. In principle, the five challenged ballots stayed unopened

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because it affected the results of the election. However, the Union had challenged three of these voters on the basis that they were supervisors and may not have expected these three ballots to favor representation.

On December 12, 2001, the Union filed timely objections to conduct affecting the results of the election. The Union later withdrew its challenges to the ballots of the three voters. On July 22, 2002, a Board agent opened and counted these challenged ballots. Although the Board agent did not open the two challenged ballots cast by individuals not on the eligibility list, those ballots would not have affected the outcome of the election.

A revised tally of the ballots included the following information: approximate number of eligible voters, 16; number of void ballots, 0; number of votes cast for Petitioner, 4; number of votes cast against participating labor organization, 10; the ballot votes counted, 14; number of challenged ballots, 2; valid votes counted plus challenged ballots, 16. The remaining two challenged ballots are not sufficient in number to affect the results of the election.

On May 31, 2002, the Regional Director issued a complaint and notice of hearing of Case 12–CA–21951. The Respondent filed a timely answer.

On July 15, 2002, the acting Regional Director issued an order which consolidated the representation case, 12–RC–8709,

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with the unfair labor practice case, 12–CA–21951, for hearing before an administrative law judge. On July 23, 2002, the acting Regional Director issued a revised order consolidating cases for hearing/notice of hearing of the revised order.

Initially, the Union had filed five objections for conduct affecting the results of the December 7, 2001 election. Later it withdrew three of them, Objections 2, 3, and 5, before the acting Regional Director issued the July 23, 2002 revised order.

The two remaining objections which were to be resolved in this proceeding, alleged and put forth before the December 7, 2001, election the Respondent engaged in the following conduct affecting the results of the election: (1) drafting employees that had voted for the Union; (4) discriminatory treatment of known Union supporters.

On July 29, 2002, the hearing opened before me in Miami, Florida. Respondent did not retain counsel. Rather, Respondent's president, Donald G. Lock, represented his company in these proceedings. The parties completed presentation of evidence and rested on July 29, 2002. On the same day, they presented oral argument.

Today, July 31, 2002, I am issuing this bench decision.

Complaint Paragraphs 1 through 4

The first four complaint paragraphs allege facts which form the necessary predicate to the unfair labor practice allegations

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appearing thereafter.

The Respondent does not admit to these allegations.

Complaint paragraph 1(a) alleges that the Union filed the initial charge by December 5, 2001, and that a copy was served on the Respondent by regular mail on December 6, 2001.

Complaint paragraph 1(b) alleges that the Union filed a First Amendment charge on February 28, 2002, and that a copy was served by regular mail on Respondent on March 1, 2002.

Complaint paragraph 1(c) alleges that the Union filed a Second Amendment charge on March 28, 2002, and that a copy was served on Respondent by regular mail on April 2, 2002.

Although Respondent does not admit these allegations, it has not offered any testimony or other evidence that it did not receive the charges; therefore, Respondent is not refusing the affidavits as heard in evidence as General Counsel's Exhibits 1(c), 1(f), to 1(g). Based on this uncontroverted evidence, I find that the charges were filed and served as alleged in Complaint paragraph 1.

Complaint paragraph 2 alleges facts to establish that Respondent is an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the National Labor Relations Act, and, therefore, is subject to the jurisdiction of the National Labor Relations Board. Although Respondent's answer did not admit these allegations, Respondent did admit similar facts by entering into the September 28, 2001, stipulated

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election agreement in Case 12–RC–8709. Specifically Respondent stipulated as follows:

"The Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act, and the question affecting commerce has arisen concerning the representation of employees within the meaning of the Section 9(c). The Employer, Double D Construction Group, Inc., a Florida corporation, is engaged in the construction industry as a structural steel contractor. The Employer's principal place of business is located at 6051 Southwest 46th Street, Miami, Florida, 33155.

During the past calendar year, a representative period of time, the Employer in the course of the context of a business organization as described above, provided services valued in excess of $50,000 to other enterprises including Baker Concrete, a general contractor, located within the state of Florida, and those other enterprises have in turn purchased and received goods and products valued in excess of $50,000 directly from outside the state of Florida."

Based on this stipulation, I find that at nearly all the material times the Respondent has been an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7), of the Act. Further, I conclude that Respondent is subject to the Board's jurisdiction.

Complaint paragraph 3 alleges that at all material times

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the Union has been a labor organization within the meaning Section 2(5) of the Act. Based on the uncontradicted testimony of Union president David Gornewicz, I find that the Union is an

organization in which employees participate and which exists for the purpose of dealing with employers concerning grievances, labor disputes, rates of pay, hours of employment, or conditions of work. Therefore, I conclude that it is a labor organization within the meaning of Section 2(5) of the Act.

Complaint paragraph 4 alleges that at all material times Respondent's president, Donald G. Lock, has been a supervisor and agent of Respondent within the meaning of Section 2(11) and Section 2(13) of the Act. Respondent has not admitted this allegation and the General Counsel bears the burden of proof.

For purposes of an analysis today, I will assume that the evidence establishes that President Lock is Respondent's supervisor and agent, and as such is consistent with the testimony of Raul Conales that Lock hired him. However, I will defer a final ruling on the supervisory and agency issue until issuance of the certification of this bench decision.

The Unfair Labor Practice Allegations

The complaint alleges that Respondent's vice president, Donald Lock, made a number of statements to employees which interfered with, restrained, and coerced them in the exercise of rights guaranteed by Section 7 of the Act in violation of Section 8(a)(1) of the Act. The complaint also alleges that

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Respondent discharged two employees, Tomas Sanchez and Dean Martindill, in violation of Section 8(a)(3) and (1) of the Act.

For clarity, I will begin by describing Respondent's business. As a structural steel contractor, Respondent plays a vital step in the construction of concrete buildings. To be sure that such a building will have adequate strength, workers pour the concrete around reinforcing steel bars, or rebar. The Respondent's iron workers put the rebar in place.

In about May 2001, Respondent began work on a project at the Hialeah, Florida, water plant. In June or July 2001, Respondent began work on a project at the Fort Lauderdale Airport.

The complaint alleges that Respondent's president made a number of unlawful statements to employees working at these sites.

The first of these allegations concerns a conversation between Respondent's president Lock and the iron worker Dean Martindill, who testified that the conversation took place around August or September 2001.

According to Martindill, there was a sticker on his car which displayed the American flag and mentioned the union. Martindill quoted Lock as saying that he "appreciated it" if Martindill did not have a sticker on his car because it made Lock "look bad."

According to Martindill, Lock also told him that "he didn't

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appreciate me supporting the union or I shouldn't have it on there if I didn't support the union."

Based on my observations of the witnesses, I credit Martindill's testimony about this conversation. I find that Lock did make the statements Martindill attributed to him.

Although the complaint alleges that Respondent prohibited employees from putting union stickers on their vehicles, the evidence here does not establish such an outright prohibition. Lock did not order Martindill to remove the sticker but only asked Martindill to do so. All the same, this request violated the Act.

In *Electrical South, Inc.*, 327 NLRB 58 (1998), a supervisor told employees that he would appreciate their not wearing any union paraphernalia, and also said that it was unprofessional and inappropriate for the employees, who were engineers, to display their support for the union in that manner.

The Board found this action violable.

Similarly, I conclude that Lock's statements to Martindill interfered with Martindill and interfered with the exercise of the rights guaranteed by Section 7 of the Act, and recommend that the Board find that Respondent thereby violated Section 8(a)(1) of the Act.

Sometime before September 26, 2001, an iron worker, Raul Canales, applied to work for the Respondent. On that date,

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Canales called Lock concerning his job application. According to Canales, Lock asked him if he had been in the union. Canales answered, "Yes, I was because I was from up north."

According to Canales, Lock replied, "That was fine as long as I did not talk any union crap at the job."

In cross-examining Canales, Lock had elicited testimony that Canales was from Jacksonville rather than from "up north." If that constitutes an inconsistency, it is not sufficient to discredit Canales. The phrase "up north" might well refer to somewhere along the Great Lakes or conceivably the Yukon but a compass needle in Miami would also point generally in the direction of Jacksonville.

Canales did not have anything to gain from his testimony. The complaint does not allege that Respondent has discriminated against him.

Additionally, based upon my observations of the witnesses, I conclude that his testimony is reliable. Crediting that testimony, I find that on or shortly before September 26, 2001, Lock did ask this job applicant about his union affiliation. Moreover, Lock admonished Canales "not to talk of any union crap at the job."

As the Supreme Court held in *NLRB v. Town and Country Electric*, [516 U.S. 85 (1995)] a job applicant falls within the statutory definition of "employee" and is entitled to the protection of the Act.

I must now determine whether Lock's asking Canales about

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his union affiliation is unlawful.

In *Smith and Johnson Construction Co.*, 324 NLRB 153 (1997), the Board affirmed the administrative law judge's analysis that certain statements alleged did violate Section 8(a)(1) of the Act.

The judge had described the framework for that analysis in these terms:

"In deciding whether an interrogation is unlawful, I am governed by the Board's decision in the *Rossmore House*, 269 NLRB 1176 (1984)."

In that case the Board held that the lawfulness of questioning by employer agents about union sympathies and activities turned on the question of whether 'under all circumstances an interrogation reasonably tends to restrain and interfere with the employees in the exercise of rights guaranteed by the Act.' The Board in *Rossmore House* noted the tests of the Board in *Bourne Company v. NLRB*, 332 F.2d 47 (2nd Cir. 1964), was helpful in making such an analysis.

The *Bourne* test factors are as follows: (1) The background, i.e., is there a history of the 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 the standing in the company hierarchy; (4) place and method of interrogation,

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e.g., was the employee called from work to the boss' office, was there an atmosphere of unnatural formality; (5) truthfulness of the reply.

Of these factors, two weigh in favor of finding no violation. The record does not reveal that the Respondent has previously been found guilty of unfair labor practices. The evidence is insufficient to show a history of employer hostility.

Additionally, the questioning took place by telephone and not in the president's office, which would constitute a locus of authority possibly enhancing any coercive effect.

On the other hand, the question goes directly to the job applicant's union sympathies and, therefore, clearly implicates rights protected by Section 7 of the Act. Additionally, after obtaining an affirmative answer to his question, Lock immediately warned Canales not to "talk any union crap at the job." This warning gives the question a more ominous context.

Moreover, the questioner was the Respondent's president. Additionally, Canales truthfully replied concerning his union affiliation.

On balance, the factors weighed in favor of finding a violation. I conclude the Respondent interfered with, restrained, and coerced an employee in exercise of rights guaranteed by Section 7 of the Act, and recommend that the Board find the Respondent thereby violated Section 8(a)(1).

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On October 18, 2001, the day before the first election, Respondent's president Lock spoke with employees at the Fort Lauderdale Airport jobsite. Witnesses provided varying accounts of what Lock said.

Employee Raul Canales attended this meeting. He identified two other employees, Abelardo Garcia and Tomas Sanchez, as being present but he could not recall the names of others who attended.

According to Canales, Lock told the employees that they were going to have an election the next day, "and that if we voted union that he was going to shut his doors down."

Sanchez testified that Lock told the employees that if they voted for the union, they would have to live with the consequences and that if they voted for the union he was going to close the company.

Although the accounts of Canales and Sanchez are consistent, another employee present, Abelardo Garcia, gave conflicting testimony. According to Garcia, Lock said, "Vote for the union or he's going to close the company."

This testimony does not accord with common experience in labor relations. Managers typically do not use threats of bankrupture to coerce employees to vote for a petitioning union.

Garcia's thinking language is Spanish but he testified in English. It is quite possible that a language difficulty distorted what he intended to say. However, when the General

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Counsel asked Garcia a second time about what Lock had said, Garcia again quoted Lock as telling employees to vote for the union or else he would close the company.

Another part of Garcia's testimony casts some doubt on his reliability. Garcia described a telephone conversation he had with Tomas Sanchez sometime after Garcia had quit working for Respondent. Garcia testified specifically that this conversation took place on November 21. He also testified specifically that the conversation took place after the second election, however, the Board conducted the second election on December 7.

The conversation on November 21 would have taken place before, not after, the second election. When asked about this inconsistency on cross-examination, Garcia changed his testimony and said that this conversation with Sanchez took place on December 21.

Because of these problems with Garcia's testimony I have doubts about his reliability and do not credit it.

Employee Dean Martindill also attended the meeting at the Fort Lauderdale Airport jobsite. According to Martindill, Lock told the employees "that the union would take our money and that he didn't want to be paying for the union people in the office driving around in BMW's. That's the part that I remember the best."

Martindill's testimony does not establish that Lock said

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anything unlawful at this meeting. Respondent's campaign against the union focused on the dues which employees would pay to the union and reported the information about the salaries of union officers, presumably obtained from documents the union filed with the Department of Labor. An expression of opinion that the union would spend the money poorly does not constitute a threat of reprisal or force, or promise a benefit, and does not violate the Act.

However, there is some question as to how much of what Lock said Martindill actually heard or recalled. His comment "that's the part that I remember the best" suggests that there were other parts Martindill did not remember as well.

Lock also testified concerning what he told employees at the Fort Lauderdale Airport jobsite on October 18, 2001. In evaluating his testimony, his dual roles of witness and advocate must be taken into account.

The testimony he gave from the witness stand under oath as subject to cross-examination certainly constitutes evidence on which bindings effect they be predicated. The statements he made in oral argument which were not subject to cross-examination do not constitute evidence.

In evaluating his testimony I also bear in mind that although labor lawyers typically elicit very specific testimony, including explicit denials of all allegations which warrant denial, Lock is not a labor lawyer. Moreover, no attorney

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appeared to represent Lock and the Respondent, and to a considerable extent, he had to provide his testimony in a narrative form.

In determining whether Lock's testimony has denied a particular allegation, I will look to the general sense of the testimony to consider whether to a lay person it would reasonably seem to communicate a denial.

Lock gave the following testimony concerning what he told employees at the Fort Lauderdale jobsite on October 18, 2001:

"To the best of my recollection, I was telling them that I—and I was telling them and I said, 'I'm paying this amount of money. They're paying that amount of money. You do what you want, okay. I can't tell you what to do but I'm telling you that we have an election coming up because they want people who want to go union." And I said, "If you want to go union, that's fine; if you don't, that's fine, okay, but I'm still working this job, I'm still hiring people."

Although this testimony does not specifically deny that Lock threatened to close the company if employees selected the union, I infer that Lock intended it to be a complete if rather brief summary of all he told the iron workers on that occasion. Therefore, I conclude that Lock, in effect, denied the threat attributed to him. However, I do not credit this testimony which two other witnesses, Canales and Sanchez, contradict.

The complaint alleges that Respondent unlawfully discharged

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Sanchez so he is not a neutral witness but rather one with a definite interest in the outcome of this case. He stands to get his job back.

Similarly, Lock is not a neutral witness, but Canales had nothing obvious to gain by testifying as he did. That fact, together with the fact that Sanchez corroborated his testimony, persuades me that it should be credited.

Respondent elicited testimony from several witnesses that they never heard Lock threaten anyone. Such testimony is too vague to refute the specific allegation that on a particular occasion, in this instance the gathering of employees on October 18, 2001, at the Fort Lauderdale Airport jobsite, the Respondent's president threatened to close the business if employees selected the union.

Based on the credited testimony of Canales, I find that on October 18, 2001, Respondent['s] vice president Lock did threaten to close the company if employees voted for the union. Moreover, the record does not establish that Lock cited objective facts as a basis for such a statement. Rather, it stands as a rather naked threat.

In sum, I conclude this statement interfered with, restrained, and coerced employees in the exercise of rights guaranteed by Section 7 of the Act. I would recommend that the Board find the Responded thereby Section 8(a)(1) of the Act.

Canales further testified that after the election ended on

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October 19, 2001, Lock said in his presence that he had won ten to one, and that he would like to find the guy who voted "one," that he would like to break his face. Crediting Canales, I find that Lock made the statement.

To determine whether such a statement is unlawful, I applied an objective test to ascertain what message the words reasonably would convey. In this instance the linking of the protected activity of voting for the union with the possibility of physical violence reasonably would chill employees in the exercise of protected rights. I recommend the Board find that this statement violated Section 8(a)(1).

Abelardo Garcia also gave testimony concerning a comment Lock purportedly made on October 19, 2001, after the election. According to Garcia, Lock referred to the employee who served as the union's observer and said, "He said—he looked at me like this. 'I want to walk by and fight with the guy.'"

For reasons I have already discussed, I do not have confidence in Garcia's testimony and do not credit it, therefore, I do not find that Lock made the comment which Garcia attributed to him.

Before both the first and the second elections, Respondent distributed memoranda to employees. These flyers expressed negative opinions about the union. They focused, in part, on the amount of union dues and how the union would spend this money. For example, a December 3, 2001, flyer listed the

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salaries paid to various union officers. It also stated that in the Year 2000, the union paid $31,524 for car loans. The flyer also stated that "the union's promises are not guarantees. They make many promises to try to get your vote because these union officials want more money, union dues from your pay."

These documents certainly were critical of the union, but none of them made a threat for reprisal or force or promised a benefit. Additionally, the complaint does not allege that any of these flyers contained an unlawful statement.

The second election took place December 7, 2002. According to employee Sanchez, two days before the election Lock told them, "Remember your bills." Such a statement does not constitute a threat or promise. It appears simply to be an allusion to the same theme Respondent articulated in his flyers, namely that if the employees selected the union, the union would collect dues from them and then waste the money.

I conclude that the statement attributed to Lock does not unlawfully interfere with, restrain, or coerce employees in the exercise of Section 7 rights. I would recommend that the Board find that it did not violate the Act.

The complaint alleges that on December 10, 2001, the Respondent discharged employee Tomas Sanchez. In evaluating

this allegation, I will follow the framework set forth by the Board in *Wright Line*, 251 NLRB 1083 (1980); enforced 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

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Under *Wright Line*, the General Counsel must establish four elements by a preponderance of the evidence. First, the Government must show the existence of activity protected by the Act. Second, the Government must prove that Respondent was aware that the employees had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered adverse employment action. Fourth, the Government must establish a link or a nexus between the employee's protected activity and the adverse employment action.

In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, Respondent bears the burden of showing that the same action would have taken place even in the absence of the protected conduct. *Wright Line*, 251 NLRB 1083–1089. See also *Manno Electric, Inc.*, 321 NLRB 278, 280 to fn. 12 (1996).

The General Counsel first had to prove that Sanchez engaged in protected activity. He testified that on November 13, 2001, he went with the union president to the federal building in which the court offices were located. That day the union president met with Respondent's president and entered into a stipulation to set aside the first election and to have a second one.

Accompanying the union president constituted a protected activity. I conclude that the General Counsel has established

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the first *Wright Line* element.

Next the Government must prove that Respondent had knowledge of Sanchez' union activities. Although the union president went to the Board offices, the record does not establish that Sanchez actually entered those offices. However, Sanchez and the union president also went to the cafeteria in the same building. According to Sanchez, Respondent's president Lock saw him with the union president in the cafeteria. The union president, Gornewicz, testified that he believed that Lock and his attorney saw him in the cafeteria; however, I infer that the union president was less than certain about this fact.

Lock testified that he saw the union president at the Board office but could not remember whether or not he went to the cafeteria. He did not recall seeing Sanchez on this occasion. Lock appeared quite sincerely engaged in his testimony. Moreover, for reasons I will discuss, there are reasons to doubt Sanchez' testimony.

Crediting Lock, I find that the Government has not established that he saw Sanchez with the union president on that occasion. Therefore, I conclude that General Counsel has not established the second *Wright Line* element.

Because the General Counsel has not established all four *Wright Line* elements, the burden does not shift to Respondent to rebut the Government's case. The analysis, therefore, may stop here. However, in the event that the Board may disagree with my

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conclusion I will briefly address the remaining two *Wright Line* elements, and also discuss the issue of Sanchez' credibility.

The record also fails to establish that Sanchez suffered an adverse employment action. According to Lock, Sanchez showed up for work on Monday, December 10, 2001, but did not show up for work after that date.

Sanchez gave a different account. However, he also admitted that when he applied for work with the Respondent he used a false Social Security number. Although asked, he did not say where he obtained this number but only admitted that it was false. There are certain similarities between using a false Social Security number and giving untrue testimony. Both obviously involve the element of falsehood, but more than that they both entail a substantial legal risk. The punishment for using a false Social Security number is quite significant, and so is the penalty for perjury.

Sanchez used a false Social Security number to obtain employment. To obtain work he was willing to risk the legal penalty.

The complaint named Sanchez as a discriminatee and the Government seeks an order requiring the Respondent to reinstate him with back pay. A job is at stake once more. If Sanchez demonstrated the willingness to use a false document government document to obtain work, notwithstanding the risk, he may also be willing to offer false testimony to obtain reinstatement,

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notwithstanding the risk. To the extent that Sanchez' testimony conflicts with that of Lock, I credit Lock.

Based on Lock's testimony, I find that Respondent did not discharge Sanchez and Lock did not deny him the chance to be gainfully employed. Rather, I find that Sanchez did not show up for work. Therefore, I conclude that the General Counsel does not establish the third *Wright Line* element.

Since there was no adverse employment event, it would not be possible for General Counsel to establish a connection between the protected activity and the adverse employment event. Therefore, I further conclude that the Government has not established the final *Wright Line* element.

In sum, I recommend the Board dismiss the allegation that Respondent discharged Sanchez unlawfully.

The complaint further alleges that Respondent unlawfully discharged employee Dean Martindill on December 15, 2001. According to Martindill, Lock notified him of the discharge while the two of them talked in a parking lot.

Martindill testified as follows: "The first thing Don said is that I was moving like a snail and was walking around with a soda can in my hand too much, and then he was saying that he knew that I voted for the union, and I told him 'I don't know how you have proof.' He says he didn't have proof but that he felt that I did, and then after that he said he didn't have enough work for me, and that was my last paycheck."

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Lock admitted taking an employment action against Martindill. He described it as follows: "Dean Martindill picked up

his paycheck and called me, and so I told him the reason I cut his hours because he went from a foreman, because I was told by the general contractor he could no longer work on that job for whatever reason. Three weeks later I hired him back and put him on another job, and he went from a foreman to an iron worker. He had an attitude about it. I gave him his paycheck, told him, "The reason I'm cutting your hours down is because you've got an attitude, and you don't walk around with a Coke can in your hand all day long.' Martindill responded, 'I'm the best thing you've got. I'm the hardest worker you've got. I guess you don't need me.' I said, 'I didn't say that. You give me a call. Think about it over the weekend and give me a call.'"

"The phone call I got two weeks later was threatening me with the union. That was his phone call and that's all I have to say, Your Honor."

Analyzing the facts using the Board's *Wright Line* framework, I conclude that Martindill engaged in protected activity and that Respondent knew it. Thus, Martindill displayed a union sticker on his vehicle and Lock asked him to remove it. Clearly reducing an employee's hours, in this case to zero, constitutes an adverse employment action. The General Counsel has established the third *Wright Line* element.

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The Government also has proven the fourth element. Lock's earlier request to remove the union sticker provides the sentiments of anti-union animus. Additionally Lock's own information characterizing Martindill as having an attitude also raises questions.

As stated in *James Julian Inc. of Delaware*, 325 NLRB 206 [1109 (1998)], "The Board has repeatedly found with court approval that in a labor relations context company complaints about a bad attitude are often euphemisms for pro-union sentiments. *A. June Garage Corp.* (ph.), 2314 NLRB 170–180 [*Promenade Garage Corp.*, 314 NLRB 172, 180] (1994); *Elvino Laboratories Corp.* (ph.), *[Helena Laboratories Corp.]* 225 NLRB 257, 269 (1976), enfd. in pertinent part 557 F.2d 1183 (5th Cir. 1977); *L. S. Irons & Co.* (ph.), [L. S. Ayres & Co.,] 221 NLRB 1344, 1345 (1976); enfd. 94 LRRM 3210 (4th Cir. 1997)."

Lock gave as an example of Martindill's attitude the fact that Martindill often walked around carrying a Coke can while at work; however, the record does not establish that Respondent had any rule prohibiting employees from drinking a soda while working. Moreover, when a supervisor, Delmar Blanchard, had testified about Martindill carrying a can of Coke, he did not sound particularly concerned about it. In other words, the evidence does not establish any explanation for Lock's conclusion that Martindill had a bad attitude unless Lock took Martindill's union sympathies into account.

I find that the General Counsel has established the final

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Wright Line element.

At this point the burden shifted to Respondent to present evidence that it would have taken the same employment action against Martindill even if he were not sympathetic to or active on behalf of the union.

In *Lampi LLC*., 327 NLRB [222 (1998)], the Board discussed how a Respondent can carry this burden of proof. "To establish an affirmative defense under *Wright Line* to a discriminatory discharge application, an employer must do more than show that there are reasons that could warrant discharging the employee in question. It must show by a preponderance of the evidence that it would have done so even if the employee had not engaged in protected activity. In assessing whether the Respondent has established this defense regarding the alleged discriminatee's discharge, we do not rely on our views of what conduct should merit discharge. Rather we look to Respondent's own documentation regarding the alleged discriminatee's conduct. His personnel policy handbook can be evidence of how it treated other employees for the record of proving more instances of discipline."

Respondent has not presented such evidence and I conclude does not establish that it would have the same employment action against Martindill even in the absence of the protected activities.

Although Martindill could not continue to work at the Fort

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Lauderdale Airport jobsite because of problems with the drug test required of personnel who work at the airport, the Respondent later employed him to work at another site. Therefore, Martindill's problem with the drug test and the consequent inability to work at the airport jobsite would not carry Respondent's burden of proof.

In sum I recommend that the Board find that by discharging Martindill, Respondent violated Section 8(a)(3) and (1) of the Act.

When the transcript of this proceeding has been prepared, I will issue a certification which attaches as an appendix the portion of the transcript recording this bench decision. The certification also will address the effect of the unfair labor practices on the election, and will include recommendations for the resolution of the Union's objections. The certification also will include provisions related to the findings of fact, conclusions of law—order, and notice to employees.

When that certification is served upon the parties, the time period for filing an appeal will begin to run.

All parties have tried this case in a very courteous and professional manner, which I truly appreciate. The hearing is closed.

Off the record.

(Whereupon, at 12:10 p.m., the hearing in the above-entitled matter was closed.)

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CERTIFICATION

This is to certify that the attached proceedings before the National Labor Relations Board (NLRB), Region 12, in the matter of Double D Construction Group, Inc., Case No. 12–RC–8709; 12-CA–21951, held at Miami, Florida, on July 31, 2002, were held according to the record, and that this is the original, com-

plete, and true and accurate transcript that has been compared to the reporting or recording, accomplished at the hearing, that the exhibit files have been checked for completeness and no exhibits received in evidence or in the rejected exhibit files are missing.

APPENDIX B

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT prohibit or discourage employees from placing union stickers on their vehicles.

WE WILL NOT interrogate employees about their own or other employees' union membership, sympathies, or activities.

WE WILL NOT instruct employees not to discuss the Union while at work.

WE WILL NOT threaten employees with closure of our business or the loss of jobs if they select a union to represent them.

WE WILL NOT threaten employees with bodily injury because they voted for or supported a union.

WE WILL NOT discharge employees because they joined or assisted a union or engaged in concerted activities or to discourage employees from engaging in these activities.

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

WE WILL offer immediate and full reinstatement to our employee, Dean Martindill, and make him whole, with interest, for all losses he suffered because we unlawfully discharged him.

DOUBLE D CONSTRUCTION GROUP, INC.