Golden State Foods Corp. *and* Danny L. Davidson.
Case 36–CA–8426

September 29, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On August 14, 2001, Administrative Law Judge Thomas Michael Patton issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed limited exceptions and a brief in support of the administrative law judge's decision.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, as modified, and to adopt the recommended Order[2] as modified and set forth in full below.

We agree with the judge, for the reasons set forth in his decision, that the Respondent threatened employees with job loss, and loss of work and pay if they supported the Union, and promised employees new driving routes if they did not support the Union, in violation of Section 8(a)(1). Contrary to our dissenting colleague, we also agree that the Respondent created the impression that employee union activities were under surveillance, in violation of Section 8(a)(1), through comments the Respondent made to several employees in the context of its unlawful threats of job loss. However, contrary to the judge, we do not reach the issue of whether the Respondent unlawfully interrogated another employee in violation of Section 8(a)(1).[3]

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

[2] We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001). We shall also substitute a new notice in accordance with our recent decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

[3] The statements are: Supervisor Henderson's remark to Davidson that "the eyes are on you and you need to watch your step because you can get fired for discussing this stuff on company grounds," alleged and found as a threat of discharge; Supervisor McGee's statement to Davidson that he "better watch his step," because the Company had "really got their eye on" him and was "out to get" him, part of which was alleged and found as a threat of discharge; and Supervisor Lard's statement to employee Justice after the election that someone had "ratted him out," which occurred in the same conversation in which other statements were alleged and found to be threats of reprisal. The judge's finding that the Respondent unlawfully interrogated employee Mark Klingbeil arises from a discussion conducted at the close of the Respondent's Super Bowl party regarding the union affiliation of several absent employees.

1. Impression of surveillance

The Respondent excepts to the judge's findings of impression of surveillance, noting that the violation, and the comments that the judge found violative, were not specifically alleged in the complaint. We find no merit in that exception. "It is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Williams Pipeline Co.*, 315 NLRB 630 (1994) (quoting *Pergament United Sales*, 296 NLRB 333, 334 (1989)). Here, as the recitation of facts below makes clear, the language that conveyed an impression of surveillance was contained in the very statements that the judge found to be unlawful threats of discharge, as alleged in the complaint. The statements came out in full during the hearing, and the Respondent had the opportunity to cross-examine witnesses who testified about the statements. See *Williams Pipeline Co.*, supra at 630. In fact, the Respondent introduced its own witnesses who denied making the statements, testimony that the judge discredited. Thus, the Respondent took full advantage of the opportunity to prove that the statement was not made. Having failed to present convincing evidence in support of that claim, the Respondent's only remaining defense was to make the argument that the words used in the statement did not create an impression of surveillance. The Respondent could have made that argument in its brief to the Board but did not do so. Accordingly, the Respondent had a full opportunity to defend itself against this allegation. We therefore disagree with our colleague's assertion that the Respondent was denied due process with respect to this allegation. Rather, we find that the unalleged violations were closely related to the allegations of the complaint and fully litigated, and that the judge correctly concluded that these statements constituted not only unlawful threats of discharge but also created an impression of surveillance in violation of Section 8(a)(1).

2. Coercive interrogation

The Respondent also excepts to the judge's finding that employee Mark Klingbeil was coercively interrogated in violation of Section 8(a)(1) at the Respondent's Super Bowl party, a violation not alleged in the complaint. Specifically, two employees and several managers remaining at the party engaged in a discussion about the union affiliation of the other drivers in the unit, and Klingbeil participated by shouting out "yes" or "no" as drivers' names were called out from a list. At the end of

the discussion, the Respondent's labor consultant, Robert Marciel, stated "if those six [pro-union] drivers do not get fired, [the Respondent's owner] Jim Williams, wants the management fired." Because we find that the issue of whether the discussion preceding this remark constituted an unlawful interrogation was not fully litigated, we reverse the judge's finding of a violation.

The only evidence in the record regarding Klingbeil's unalleged interrogation is his own vague testimony describing the circumstances leading to Marciel's threat of discharge, testimony elicited by counsel for the General Counsel on direct examination. None of the Respondent's witnesses testified about the preceding discussion. Given the lack of specificity of Klingbeil's testimony and the absence of testimony about this matter by the Respondent's witnesses, we conclude that, even assuming the allegation of the Klingbeil interrogation was closely related to allegations in the complaint, the issue was not fully litigated.

3. Suspension and discharge of Danny Davidson

The judge also found that the Respondent suspended and then discharged employee Danny Davidson for engaging in protected Union activity, in violation of Section 8(a)(3) of the Act. The judge relied on a dual motive analysis in reaching this conclusion, because he found that legitimate reasons existed, along with the predominating unlawful motive, for the Respondent's actions. Because neither the judge's findings nor the record establish that the Respondent relied on those reasons, however, we would not characterize this case as one of dual motive. Instead, we find the reasons supplied by the Respondent to be a pretext and adopt the judge's conclusion that the discharge and suspension were unlawful based on a pretext analysis.

A. Factual Background

The facts, more fully set forth in the judge's decision, are summarized as follows.

The Respondent warehouses and distributes food products for McDonald's in several states including Oregon and Washington. It employs drivers who work from two terminals, one in Sumner, Washington, and one in Portland, Oregon. The events in this case involved drivers at the Portland location. Employee Danny Davidson (Davidson) first worked for the Respondent in Sumner, but transferred to Portland when that terminal opened in 1996. His wife, Annette Davidson, also worked for the Respondent at the Portland location.

In 1997, the Union unsuccessfully attempted to organize the Portland drivers. Davidson had not supported that effort. In October 1998, however, Davidson approached the union agent and initiated a second organizing attempt. Davidson distributed authorization cards to employees and an election petition was filed January 13, 1999.

After the petition was filed Davidson wrote, and sent to employees, an unsigned letter urging union support. About 2 days later, the Respondent held a meeting of drivers and warehouse employees, where Corporate Vice President John Jakubek angrily expressed his displeasure about the letter. Jakubek said that management had an idea about who had written the letter and suggested that that person should not be working for the Respondent. Annette Davidson testified that, shortly after that meeting, the Respondent's labor consultant and agent, Robert Marciel, asked her why she and her husband were organizing a union and stated that he knew Danny wrote the letter.

During the period between the filing of the petition and the immediate aftermath of the election, the Respondent, on numerous occasions, threatened its employees with job loss and loss of work assignments if they supported the Union. About a week after Davidson sent the letter, the Respondent's supervisor John Henderson told him, "the eyes are on you and you need to watch your step because you can get fired for discussing this stuff on company grounds." Around the same time, in January, the Respondent's plant manager Mark Scavo told driver Klingbeil that if the Union won the election the Respondent would take away the employees' desirable and remunerative Boise shuttles, but if the Union lost the employees would keep these shuttles and get additional ones. According to Davidson's credited testimony, shortly before the election the Respondent's supervisor Lee McGee told Davidson, "it looks like the Union is pretty close . . . you know that they really got their eye on you, you are going to have to watch your step." Two days before the election, Scavo told Davidson that the Respondent's president Jim Williams and Scavo considered the union organizing to be a direct insult to them, stating "I guarantee you one thing, that after these elections, come Monday, there are jobs going to be lost."

The Respondent sponsored a Super Bowl party, the day before the election, which was attended by several managers and some employees. At the end of the party, when several managers and employees were still there, the names of all the drivers were listed on a board. There was a discussion as to whether or not each person on the list was for or against the Union. Six drivers, including Davidson, were identified as being pro-Union. Labor consultant Marciel remarked about the known union supporters that "if those six drivers do not get fired Jim Williams wants the management fired."

The day after the election, employee and union supporter Dave Justice asked Scavo if he was going to be fired and Scavo indicated that was a possibility, stating "you promised us you wouldn't get involved so what are we supposed to do?" The next day, supervisor Lard told Justice that some of the other drivers had "ratted him off," that the Company was "really pissed off" and that the Respondent might eliminate his job. When Justice asked what he should tell his children, Lard replied, "you should have thought of that before you got involved in that crap."

Against this backdrop, on February 3, the day after the election,[4] the Respondent's human resources manager, Joelle Rogers, received and reviewed a number of Certification of Violation (COV) forms that all drivers are required to submit annually to report any convictions for moving violations within the previous 12 months. The COV reports enable the Respondent to comply with the Commercial Motor Carrier Safety Regulations promulgated by the Department of Transportation (DOT). The COV forms also identify the state in which the employee holds a Commercial Driver's License (CDL).[5] Among the forms received that day were the COVs of Danny and Annette Davidson. Rogers, who knew that the Davidsons had moved from Oregon to Washington State in February of 1998, immediately noticed that Davidson's form indicated he was licensed in Oregon rather than Washington State, and brought this to Henderson's attention. The Respondent's drivers are required by law to maintain valid CDLs when driving the Respondent's trucks, and the Washington statute requires that state residents maintain Washington State CDLs.

Upon learning that Davidson did not have a Washington State CDL, Henderson contacted Davidson at a McDonald's store 150 miles away where he was making a delivery and told him to cease driving immediately. Henderson told him that his license was invalid and that he was being placed on suspension until he obtained a Washington CDL. Annette Davidson similarly lacked a Washington CDL and was also placed on suspension.[6] As found by the judge, there is no evidence that employees were ever reminded that they were obligated to maintain their CDLs in their states of residence, or that any employees were ever disciplined for failing to do so.

Also on February 3, after Davidson was suspended, Henderson told employee Mark Klingbeil, "We got him." Klingbeil testified, "He told me what the deal was. He told me they believed Danny did not switch his address on his license in time. So that's what they were going to suspend him for."

The following morning both Davidsons secured the correct CDLs and were taken off suspension. That same day, Henderson reviewed a Department of Motor Vehicles' report regarding Davidson's driving record that had been generated in response to a COV form Davidson submitted earlier in the week.[7] Henderson reviewed the new report, and then proceeded to examine all of the records in Davidson's file, which records showed that Davidson had not disclosed on his 1997 and 1998 annual COVs that he had been convicted of speeding in 1997. Instead, Davidson had written "None" in the space provided on the document for reporting violations. Also, although Davidson's newly submitted report acknowledged a November 1998 driving violation on his 1999 COV, he had not reported that infraction within 30 days of the violation in accordance with the Respondent's rule.

Later on February 4, the Respondent discharged Davidson, for the stated reason of willfully falsifying two COVs in violation of company policy, and failing to report a traffic violation in a timely manner.[8] Prior to the discharge the Respondent did not ask Davidson to explain the inconsistencies in his records, nor did it review any other employee's complete file for similar inconsistencies.

B. Analysis

The judge, treating this as a case of dual motives, found that the Respondent was aware of Davidson's union activity and that the Respondent suspended and discharged him for his protected activity in violation of Section 8(a)(3). The judge determined that Davidson had an invalid driver's license at the time of the suspension and that he failed truthfully to report his driving record on two annual COVs, misconduct that may have warranted discipline, but that the Respondent had not shown that these circumstances would have resulted in Davidson's suspension and discharge in the absence of his protected con-

[4] The judge took official notice of the fact that the Union lost the election. No objections were filed to the conduct of the election.

[5] A driver is allowed to have a CDL from only one state.

[6] The General Counsel did not allege that Annette Davidson's suspension also violated the Act.

[7] The report showed that Davidson had received a citation for a traffic violation in November 1998.

[8] The termination document stated that Davidson was terminated for "Violation of Group 1 Work Rule 3: Willfully making a false statement to the Company on an application for employment, on any document or form which the employee is required to complete during the course of his work, or in person to any supervisor or other member of management," and "Violation of Subpart C—Notification of Convictions for Driver Violations." The document states that Davidson falsely certified on both his 1997 and 1998 COVs that he had no violations within 12 months, despite a 1997 speeding conviction. In addition, the document states that Davidson did not notify the Respondent of a November 1998 traffic violation until he filed his February 1999 COV, in violation of DOT requirements that such convictions be reported to the employer within 30 days.

duct. In exceptions, the Respondent asserts that its motivation for its action was nondiscriminatory and that it suspended Davidson for failing to maintain a valid CDL and discharged him for misrepresenting his driving record.

In cases like this one, involving 8(a)(3) violations that turn on the employer's motivation, we apply the analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under that analysis**,** the General Counsel must make an initial showing that (1) the employee was engaged in protected activity; (2) the employer was aware of the activity; and (3) the activity was a substantial or motivating reason for the employer's action. Once the General Counsel makes this initial showing, the burden of persuasion then shifts to the Respondent to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity. *Manno Electric*, 321 NLRB 278, 283 fn. 12 (1996). However, if the evidence establishes that the reasons given for the Respondent's action are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis. *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

As the judge found, the Respondent's numerous 8(a)(1) statements establish that it had specific knowledge of Davidson's union activities and that it harbored antiunion animus against Davidson as a result of those activities, as well as toward other employees who supported the Union. Thus, Henderson warned Davidson 1 week after he sent a letter to his fellow employees encouraging them to support the Union that "the eyes are on you and you need to watch your step." Supervisor McGee made a similar comment to Davidson a few days before the election. Moreover, the Respondent's labor consultant, Robert Marciel, told Davidson 2 days before the election "I guarantee you . . . after these elections . . . there are jobs going to be lost," and repeated that threat the day before the election, telling a group of employees and managers at the Respondent's Super Bowl party that six prounion drivers, including Davidson, would be fired. In fact, Davidson was suspended the day after the election and discharged the next day. As the judge concluded, such suspicious timing and compelling evidence of animus strongly indicate that Respondent's treatment of Davidson was unlawfully motivated.

In concluding that the General Counsel met its burden of establishing that Davidson's suspension was unlawfully motivated, the judge also relied on employee Klingbeil's testimony, which the judge credited, that, on the day of the suspension, Henderson told Klingbeil, "we got him." Klingbeil testified: "He told me what the deal was. He told me they believed Danny did not switch his address on his license in time. So that's what they were going to suspend him for." Although the judge did not expressly so find, we find that this testimony clearly demonstrates that management used Davidson's improper license as a pretext for taking action against him.

The Respondent argues that the fact that it suspended Davidson, and his wife, immediately upon discovering their improper licensing and took them off suspension as soon as they corrected the problem, demonstrates that Davidson's suspension was in response to his failure to meet the Respondent's licensing requirements. However, as the judge found, there is no evidence that the Respondent even sought an explanation from Davidson for retaining his Oregon license before suspending him.[9] Such failure to investigate is strong evidence of pretext. *Clinton Food 4 Less*, 288 NLRB 597, 598 (1988). Moreover, the judge found no evidence that the Respondent ever disciplined any other employee for having a CDL from the wrong state. We conclude that this evidence, combined with Klingbeil's credited testimony, clearly establishes that management seized on the discovery of Davidson's invalid license as an opportunity to retaliate against him because of his union activity. Cf. *Dravo Lime Co.*, 326 NLRB 1222, 1224 (1998).

Similarly, we find that the Respondent's discharge of Davidson was a continuation of its plan to "get" him because of his union activities. As the judge found, the Respondent had announced its intention to discharge Davidson along with other union supporters well before learning of his inaccurate reporting on his 1997 and 1998 COVs. The Respondent nevertheless asserts that these falsifications necessitated Davidson's discharge because it had received an unsatisfactory rating after a 1996 DOT audit and risked being put out of business if it failed properly to maintain DOT required records regarding its drivers. The Respondent further asserts that its requirement that drivers complete annual COVs that the Respondent regularly compares with the drivers' DMV abstracts for accuracy, evidences the importance it places on compliance with DOT and other state law requirements.

The judge concluded that Davidson's inaccurate reporting "may well have justified discipline." However, the judge also found that the Respondent in fact demon-

[9] The evidence indicates that another driver, Jerry Whitney, also retained an Oregon CDL due to his complicated living situation—part time at a residence in Oregon and part time at a residence in Washington—and that the Respondent was aware of this situation.

strated a lackadaisical attitude towards its employees' driving records and the accuracy of their reporting, even after receipt of the unsatisfactory DOT rating in 1996. Thus, Davidson's supervisors in 1997 and 1998 signed documentation certifying that he met the Respondent's minimum requirements for drivers, ostensibly after reviewing his COV, indicating no violations, and comparing it with the DMV report, indicating his conviction. Similarly, the Respondent admits that it overlooked the failure of employee Klingbeil (an open union opponent) to list a 1997 speeding conviction on his 1998 COV, although the Respondent acknowledged receiving a DMV report indicating that conviction. The Respondent presented no evidence concerning other incidents of inaccurate COVs at any of its terminals and the resulting discipline, if any, imposed. We agree with the judge that the Respondent's careless review of Davidson's and Klingbeil's records strongly suggests that Respondent was lax in enforcing its reporting requirements. We further find that the Respondent seized on its discovery of Davidson's inaccurate reporting as a pretext for carrying out its previously expressed intention of discharging him for his union activity.[10]

In sum, we find that the Respondent seized upon its stated reasons for the suspension and discharge of Davidson as a pretext for retaliating against Davidson for his union activism. Further, even assuming these reasons were a basis for the suspension and discharge, we agree with the judge that the Respondent has not shown that it would have taken those actions in the absence of union activity.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Golden State Foods Corp., Portland, Oregon, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with loss of work and pay if they support the Union.

(b) Promising added new routes if employees do not support the Union.

(c) Creating the impression of surveillance of employees' union activities

(d) Threatening that employees will be terminated if they engage in protected union activity.

(e) Threatening employees by stating that top management expected local management to fire identified employees because of their union activity.

(f) Suspending and discharging its employee Danny L. Davidson or any other employee because that employee has engaged in union activity.

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

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

(a) Within 14 days from the date of this Order, offer to Danny L. Davidson full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges he previously enjoyed.

(b) Make Danny L. Davidson whole for the loss he suffered as a result of the discrimination against him, with interest, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days of the date of this Order, remove from its files all reference to Danny L. Davidson's unlawful suspension and discharge and notify Davidson in writing that this has been done and that evidence of this unlawful discipline will not be used against him in any way.

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

(e) Within 14 days after service by the Region, post at its facility in Portland, Oregon, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 36, 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 are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the no-

[10] The judge found unpersuasive evidence offered by the Respondent that it had discharged two employees who falsified other documentation, because, unlike Davidson, these employees had previous disciplinary records. In addition, the judge found that the Respondent failed to discipline Klingbeil after he belatedly reported his 1997 conviction on his 1999 COV and that the Respondent's leniency towards Klingbeil undercuts the conclusion that Davidson would have been terminated for his misrepresentations on his COVs.

[11] 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."

tices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the Portland, Oregon terminal at any time since January 17, 1999.

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

(g) IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

CHAIRMAN BATTISTA, dissenting in part.

Contrary to my colleagues, I would not adopt the judge's findings that the Respondent violated Section 8(a)(1) by creating the impression of surveillance of its employees' union activities. The General Counsel did not include this allegation in the complaint, or in her amendments to the complaint at the hearing. Although the General Counsel, at the hearing, amended the complaint in certain respects, she did not add the instant one. Thus, in my view, the Respondent could reasonably conclude that the instant matter was not being alleged. Similarly, the fact that the statements at issue were alleged as other kinds of violations (e.g. threats of discharges) would reasonably lead the Respondent to believe that they were not alleged as impressions of surveillance.

To be sure, the General Counsel presented testimony concerning these statements, and the Respondent sought to rebut same. However, a threat of discharge is substantially different from the creation of an impression of surveillance. Thus, the factual and legal defenses are different. The fact that a party defends in a certain way with respect to one allegation does not necessarily mean that the party would defend in the same way with respect to the other.

Notwithstanding the above, the judge found that the allegations at issue were closely related to violations alleged, and that they were fully litigated. As to the former finding, I find that it is not enough that an allegation of one unfair labor practice is "closely related" to another allegation. For purpose of pleading in a complaint, each unfair labor practice must be specifically and separately alleged. In that way, a respondent can know what it must defend against. Similarly, it is not enough that the record contains evidence of an impression of surveillance. The respondent must be placed on notice that such matters are alleged as unlawful. In that way, a respondent knows that it must defend against the allegation. In sum, I find that the Respondent was denied due process with respect to the allegation of creating an impression of surveillance. Accordingly, I would reverse the judge's findings that the Respondent created an impression of surveillance, in violation of Section 8(a)(1).[1]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any 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 threaten employees with the loss of work or pay if they support Teamsters Local Union 162, IBT, AFL–CIO or any other union.

WE WILL NOT promise added new routes if employees do not support the Union.

WE WILL NOT create the impression of surveillance of employees' union activities.

WE WILL NOT threaten that employees will be terminated if they engage in union activity.

WE WILL NOT suspend or discharge any employee for engaging in union activity.

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

WE WILL, within 14 days of the date of the Board's Order, offer Danny L. Davidson full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges he previously enjoyed.

WE WILL make Danny L. Davidson whole for any loss of earnings and other benefits suffered as a result of the

[1] Based on the same rationale, as well as the basis set forth by my colleagues, I find that there was no violation as to Klingbeil's interrogation.

discrimination against him, less any net interim earnings, plus interest.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the unlawful suspension and discharge of Danny L. Davidson and will notify him that this has been done and that evidence of this unlawful activity will not be used against him in any way.

GOLDEN STATE FOODS

Jo Anne P. Howlett, Esq., for the General Counsel.
Richard N. Van Cleave, Esq. (Davis Wright Tremaine LLP), of Portland, Oregon, for the Respondent.

DECISION

STATEMENT OF THE CASE

THOMAS MICHAEL PATTON, Administrative Law Judge. These cases were heard at Portland, Oregon, on December 7, 2000, and on January 16 and 17, 2001. Danny L. Davidson, an individual, filed the charge on March 15, 1999. The charge was timely filed and served. The charge alleges violations of the National Labor Relations Act (Act) by Golden State Foods Corp. (the Employer or Respondent).

The complaint, as amended at the hearing, alleges that the Employer on several occasions threatened Danny L. Davidson in response to his protected union activities and thereafter suspended and then terminated him in reprisal for his union activities in violation of Section 8(a)(1) and (3).[1] The complaint also alleges that statements made by supervisors and agents of the Employer violated Section 8(a)(3) and independently violated Section 8(a)(1). The Employer denies any violation of the Act.

My findings are based upon the entire record, including post-hearing briefs filed by the General Counsel and the Employer. Testimony contrary to my findings has not been credited. In assessing credibility I have considered the inherent probability of the testimony, as well as the demeanor of the witnesses. Some testimony has not been accepted because it is inconsistent with credited testimony or exhibits or because it was inherently unworthy of belief.

FINDINGS OF FACT

I. JURISDICTION

The Employer admits facts establishing that it meets the Board's jurisdictional standards and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Employer admits that General Teamsters Local Union 162, IBT, AFL–CIO (the Union or Local 162) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Evidence and Initial conclusions

1. Introduction

The Employer is engaged in the nation-wide warehousing and distribution of food products for a national restaurant chain and has distribution centers in several states, including terminals in Portland, Oregon, and Sumner, Washington (near Seattle, Washington). The Employer distributes products by truck. The Department of Transportation (DOT) regulates the trucking operations.

The Employer admits that Vice-President of Human Resources John Jakubek, Plant Manager Mark Scavo, Trucking Supervisor John Henderson, Warehouse Superintendent Kevin McDade, Night Trucking Supervisor Lee McGee, Transportation Supervisor Jerry Whitney and Transportation Manager Erick Lard were Section 2(11) supervisors and Section 2(13) agents. Labor Consultant Robert Marciel is an admitted Section 2(13) agent.

Danny L. Davidson is a truckdriver. He began working for the Employer at the Sumner terminal in 1994. In 1996 the Employer opened the Portland terminal. The Portland operation employs about 42 drivers. Davidson transferred to the Portland terminal in 1996. Davidson's wife, Annette Davidson (Ms. Davidson), also worked at the Portland terminal.

In 1997 Local 162 had attempted to organize the Portland drivers, but the effort was unsuccessful. Davidson had not supported that effort, but in October 1998 Davidson approached Local 162 agent Jack Selby and initiated a second organizing attempt. Selby provided Davidson with authorization cards that he gave to other employees and signed cards were returned to Selby. Other employees also supported the organizing effort. A representation petition was filed on January 13, 1999, in case 36–RC–5898. The Union and the Employer entered into an election agreement approved on January 21, 1999, and an election was held on February 1 and 2, 1999. The Union lost the election. No objections to the conduct of the election were filed and the results of the election were certified on February 10, 1999.[2]

After the petition was filed Davidson wrote an unsigned letter that he mailed to other employees at their homes. The letter urged employees to support the Union to get better pay and benefits. The letter was signed "your fellow employee." The record does not establish when the letter was sent, other than that it was sent after Davidson had secured some signed cards and that it was early in the organizing campaign. About 2 days after the letter was mailed the Employer called a mandatory

[1] The General Counsel's motion was granted at the opening of the hearing to renumber par. 6 as par. 6(a) and to add pars. 6(b) through 6(i) as independent 8(a)(1) violations. Because the motion to amend par. 6 was extensive and without prior notice to the Employer, the motion of the Employer for a continuance was granted. Par. 4 was also amended to name additional persons as supervisors and agents. The General Counsel also moved to add as par. 7(c) an allegation that the Employer discriminated against Annette Davidson in December 1998 by imposing more onerous working conditions in violation of Sec. 8(a)(3). That motion to amend was denied as not being the subject of a charge and barred by Sec. 10(b).

[2] Official notice has been taken of the petition, election agreement and certification of results.

meeting of drivers and warehouse employees in Portland. Several management representatives were present. There are differences in the recollections of the employees who testified about the meeting, but they all credibly testified that corporate vice-president John Jakubek was the management representative who spoke at the meeting. Employee witnesses Danny Davidson, Mark Klingbeil, David Justice, Annette Davidson, Tony Bonnici, and Diana Tompkins credibly described the meeting. While their recollections varied regarding details, a composite of their credibly offered testimony shows that Jakubek expressed his displeasure in a very angry fashion concerning the letter that Davidson had written and that Jakubek said he would like "to take them out back" and show them what he thought about the matter. Jakubek compared the benefits the letter claimed were available under a union contract with those that the Employer paid and asserted that the Employer would be unable to meet some of the purported union benefits described in the letter. While they could not recall the exact words, several employee witnesses credibly testified that Jakubek said, in substance, that management had an idea who wrote the letter and suggested that the person who wrote the letter should not be working for the employer. Jakubek was not called as a witness. The complaint does not allege and the General Counsel has not urged that the statements by Jakubek violated Section 8(a)(1). Accordingly, I shall make no finding on that issue. See *Armored Transport,* 334 NLRB 143, 150 (2001). Nevertheless, the remarks by Jakubek are evidence of antiunion animus by the Employer, addressed below in the discussion of the alleged violations of Section 8(a)(3) and (1).

The record demonstrates, and the Employer acknowledges in its posthearing brief, that the Portland distribution center is a small facility and that the Employer became aware during the organizing effort that Davidson was one of the employees who actively supported the Union. Over the objection of the Employer, Annette Davidson credibly testified that on one occasion, shortly after the meeting discussed above, Marciel approached Annette Davidson where she was working near the maintenance room. Marciel asked Ms. Davidson why she and her husband were organizing a union. She told him that she didn't know what he was talking about. Marciel then told Annette that he knew that Danny wrote the letter, and that they knew he was organizing. Marciel did not deny the conversation. The complaint does not allege and the General Counsel has not contended that the Employer violated the Act by Marciel's question and remarks. Accordingly, I shall make no finding on that issue. See *Armored Transport,* id. Nevertheless, the testimony establishes the Employer's knowledge of Davidson's union activity early on, including knowledge that he had sent the letter.

2. Independent violations of Section 8(a)(1)

About a week after Davidson mailed the letter discussed above, Henderson and Davidson had a conversation in Henderson's office at the terminal. Henderson asked Davidson to come into his office. No one else was present. There ensued a conversation about the organizing effort. Davidson testified that Henderson's remarks included the statement, "[T]he eyes are on you and you need to watch your step because you can get fired for discussing this stuff on company grounds." Henderson denied this threat and the suggestion that Davidson' union activities were under surveillance. Davidson's testimony was more credibly offered and is not improbable, given the nature of the remarks a few days earlier by Jakubek. Such statements violate Section 8(a)(1) because they are threats and create the impression of surveillance. *Jordan Marsh Stores Corp.*, 317 NLRB 460 (1995). Accordingly, I conclude that Henderson threatened Davidson with termination if he engaged in protected union activity, in violation of Section 8(a)(1). Henderson's statement to Davidson that he was being watched is not specifically alleged. Because it is closely related to the other allegations of the complaint and occurred at the time of the unlawful threat and was fully litigated, I conclude that Henderson created the impression of surveillance in violation of Section 8(a)(1). *O-J Transport Co*., 333 NLRB 1381 (2001).

Employee Mark Klingbeil was a driver. He testified that just before he left on a Boise run in January 1999, Transportation Supervisor Jerry Whitney told him that if the employees voted the Union in, Portland drivers would lose their Boise shuttles. The Boise shuttle runs were viewed as desirable and remunerative. Klingbeil estimated that he would lose $500 per month if the Boise shuttles were lost.

Klingbeil testified that when he completed the run to Boise and returned to Portland, he talked with Scavo, Whitney, and Henderson in Scavo's cubicle. Klingbeil testified that with Henderson and Whitney present, Scavo told Klingbeil that the Employer would farm out the Boise shuttles if the drivers voted for the Union. Scavo promised that if the employees did not vote for the Union the drivers would keep the Boise shuttles, that they would get "bun shuttles" that were being done by Sumner drivers, and that they would get 13 additional stores. Whitney denied that either he or Scavo told Klingbeil that Portland might lose the Boise shuttles or that Scavo said that the drivers would get new truck routes if the Union lost the representation election. The new routes would have benefited the Portland drivers.

Whitney denied that he made the statements attributed to him. Whitney and Henderson denied any recollection of the meeting in Scavo's office. Scavo did not testify. I credit Klingbeil's testimony because it was credibly offered and is not improbable in the context of other acts by the Employer.

Threats that employees will lose work if they select a union to represent them violate section 8(a)(1). *Rainbow Painting & Decorating,* 330 NLRB 972 (2000). Accordingly, I conclude that the Employer violated Section 8(a)(1) when Scavo threatened Klingbeil with loss of the Boise shuttles if employees voted for representation.

I also conclude that the Employer violated Section 8(a)(1) when Scavo promised Klingbeil that the Portland drivers would get desirable new assignments if employees rejected the Union. *Insight Communications Co.*, 330 NLRB 431 (2000).

The complaint inaccurately alleges that Scavo's statements were made on December 1, 1998, however, the dates the incidents occurred are not so remote as to warrant dismissal for that reason and the issue was fully litigated. The statements by Whitney are not alleged as violations and it appears that they may have been made before he assumed his supervisory duties.

Moreover, a finding of a violation by Whitney's remark would not affect the remedy.

Another employee, Tony Bonnici testified as follows regarding an asserted conversation he had with Marciel

> Q. Did Mr. Marciel ever say during this conversation that you claim you had if you went union, quote, unquote, you'd lose the Boise shuttles or you'd lose Walla Walla or any of these other
>
> A. Well, his thoughts on it—what he portrayed it to me was they'd give or take away anything that they want.

Marciel denied that he suggested to Bonnici that work would be lost if the Union won the election. No date for the asserted conversation was established. On balance, Marciel's testimony was more credibly offered regarding this conversation and is credited over that of Bonnici.

Davidson testified that he had a conversation at the Portland terminal with supervisor Lee McGee about the representation election. The conversation occurred while Davidson was fueling his truck, shortly before the day of the election. Davidson testified as follows

> He said, well, it looks like the union is pretty close. We're going to have elections here any day now. I said, yeah. He went on to say that, well, you know that they really got their eye on you. I said, yeah. It's getting pretty tough right now, really hard. He said, Yeah. Well, you are going to have to watch your step.

McGee denied making the threatening statement to Davidson. Davidson's testimony was credibly offered and is not improbable, given the nature of the remarks of Jakubek and Henderson.

I conclude that McGee threatened Davidson with termination if he engaged in protected union activity, in violation of Section 8(a)(1). McGee's statement to Davidson that he was being watched is not specifically alleged. Because it is closely related to the other allegations of the complaint and occurred at the time of the unlawful threat and was fully litigated conclude that Henderson created the impression of surveillance in violation of Section 8(a)(1). *O-J Transport Co.*, supra; *Huck Store Fixture Co.*, 334 NLRB 119 (2001). The complaint inaccurately alleges that this incident occurred on December 1, 1998, rather than shortly before the February 1, 1999 election. This variance is not so great as to make the pleadings inadequate. Moreover, the issue was fully litigated.

Davidson testified that on January 30, 1999, the Saturday before the February 1, and 2 elections, Davidson had a meeting with Plant Manager Mark Scavo at the Portland facility. Davidson had asked for the meeting. Davidson related that as he sat with Scavo in the conference room, Marciel came in and told Davidson that he and Jim Williams considered it a direct insult that employees were organizing the Union. Williams was described by the witnesses as being the employer's owner. According to Davidson, Marciel said "I guarantee you one thing, that after these elections, come Monday, there are jobs going to be lost." Davidson described Marciel as appearing to be very angry and that he was pointing his finger at Davidson as he spoke. Davidson testified that Marciel then walked out and that Scavo said only "Bob will be Bob."

Marciel testified to a very different version of the meeting. He described being called into the meeting by Scavo. Marciel said that Davidson was telling Scavo that he was not the ringleader of the organizing effort and that Scavo said, in substance, that it was not his problem, that what the employees were going to do they would do. Marciel testified that he said, "I'm really disappointed here because we made a lot of positive changes here in the pay scales, the way the drivers deliver their loads now, going from that incentive type program to a hourly rated contract, and also the changes we made in the warehouse." He specifically denied the statements about him and Jim Williams being insulted or saying that jobs would be lost after the election. Scavo was not called as a witness. Davidson's testimony was more credibly offered than Marciel's and is not improbable.

Accordingly, I conclude that the Employer violated Section 8(a)(1) when Marciel threatened Davidson that employees would lose their jobs if the employees selected the Union. *Rainbow Painting & Decorating*, supra.

On January 30, 1999, the day before the election, the Employer held a Superbowl party. The event was held at a Portland hotel. Persons in attendance included some employees and several members of management, including Jakubek, Henderson, Whitney, and Scavo. Marciel was present. Klingbeil described remarks by Marciel at the party. A raffle tied to the score in the Superbowl game was conducted. The names of all employees were entered, including those not in attendance. Justice was not present at the party, but was a raffle winner. Justice was one of the employees who supported the organizing effort. Justice had also supported the first attempt to organize the Portland employees. When it was announced that he was one of the winners, Marciel referred to his winnings as "severance pay."

Klingbeil testified regarding events at the party later in the evening, after all the unit employees other Klingbeil and one other employee had left. The names of all the drivers were listed on a board, and one by one there was discussion as to whether or not each person was for or against the Union. At this time Klingbeil was opposed to the Union and had been speaking against the union to other employees. He offered his opinion regarding the employees listed on the board. Six of the employees were listed as likely to vote for the union. One of those listed was Davidson. When the list was completed, Marciel then yelled, "if those six drivers do not get fired, Jim Williams wants the management fired."

Marciel claimed to not remember who won the raffle and denied making the statements regarding severance pay and that the union supporters should be fired. No witness corroborated Marciel regarding the party. The testimony of Klingbeil regarding what happened at the party and what Marciel said was more credibly offered and is credited over the contrary testimony. Marciel's remark about severance pay, in the context of other remarks at the party, amounted to a threat that employees might be fired for their union activities. I conclude that Marciel's remarks about severance pay, his interrogation of Klingbeil about other employees' union sympathies and his threatening

statements in the presence of employees that top management expected local management to fire identified union sympathizers, including Davidson, each violated Section 8(a)(1). *Rainbow Painting & Decorating*, supra; *W. C. McQuaide, Inc.*, 319 NLRB 756 (1995).

On February 2, 1999, Justice initiated a conversation with Marciel. According to Justice, he asked Marciel if he was going to be fired and that in response, Marciel told him "[Y]ou promised us you wouldn't get involved, so what are we supposed to do?" Justice testified that he had been an open supporter in the first organizing drive, and claimed that he had an understanding with management that he was not to help in any subsequent organizing drive. According to Justice, Marciel went on to tell Justice that he could only make recommendations, and that the decision was up to Mark Scavo.

Marciel testified that Justice had approached him and asked if he was going to be fired for supporting the Union, but that he only told Justice that he was talking to the wrong person and that Justice would have to talk to Scavo. Marciel's version of this conversation was more credibly offered regarding this incident and is credited. Marciel's statements in this conversation are not alleged as a violation.

Justice testified that he had a conversation with Scavo on February 3, 1999, and asked if he was going to be fired. Scavo replied that Justice had promised that he would not get involved with the Union (an apparent reference to a conversation Justice had with management following the previous organizing effort). Justice testified that Scavo said that he couldn't give Scavo the "yellow brick road" answer that he was looking for and that he said that he could not give Justice an answer yet. Justice's testimony regarding this conversation is not denied, was credibly offered, is not improbable and is accordingly credited. Accordingly, I conclude that the Employer violated Section 8(a)(1) when Scavo threatened Justice with discharge for his union activity. *Rainbow Painting & Decorating*, supra.

Justice testified that on February 4, 1999, he called in sick and spoke with Henderson. When he began his telephone conversation with Henderson he said, "Hi John, this is Justice", According to Justice, Henderson replied, "Justice who?" Justice stated that he could hear Henderson speaking to others in the background, saying, "do you know a Justice?" and Kevin McDade, whose voice he recognized, said, "[O]h, isn't that the guy that drives for Swift?". Henderson testified that he may have made the remarks described by Justice, but if he did, the remarks were made in a joking fashion because he and Justice had " a pretty good rapport on giving each other a bad time." Justice's testimony was credibly offered, is not improbable and is credited. Moreover, the remark takes on added significance because it occurred in the contest of other threats made by the Employer, particularly the threat made to Justice by Scavo the day before. Accordingly, I conclude that the Employer violated Section 8(a)(1) when Henderson made these remarks, because they amounted to a threat of discharge. *Rainbow Painting & Decorating*, supra.

Justice testified that on February 5, he drove a truck to the Employer's Sumner facility. He was then a driver trainee. Justice described a conversation he had with Transportation Manager Eric Lard while he was at the Sumner terminal. Lard was responsible for the transportation departments at both Sumner and Portland. According to Justice, Lard accused him of being the ringleader in the organizing drive, which Justice denied. Lard said that some of the drivers had "ratted him off." Lard told Justice that he didn't know what was going to happen with Justice's job, because the Company was "really pissed off." Lard observed that Justice was a driver trainee, and that the Employer was going to do away with the driver-training program. Justice asked where that would leave him. Lard replied that Justice would be "out of a job." Justice testified that he asked Lard if he could go back to the warehouse, and Lard told him they weren't hiring. Finally, Justice asked Lard what he should tell his kids, and Lard told him "you should have thought of that before you got involved in that crap." Justice's testimony regarding this conversation is not denied, was credibly offered, is not improbable and is accordingly credited.

The accusation of being a union ringleader, made in this context, is a threat of reprisal for engaging in union activities and created the impression of surveillance of his union activities. Moreover, Lards remarks regarding driver training were a threat of loss of employment in retaliation for union activity. I conclude that the statements violated Section 8(a)(1) of the Act. *Custom Bent Glass Co.*, 304 NLRB 373 (1991); *Jordan Marsh Stores Corp*., supra.

Neither at the hearing nor in the posthearing brief did the General Counsel associate specific evidence with the allegations of paragraphs 5(c) or 6(b) of the complaint. Because I am unable to determine what evidence, if any, the General Counsel relies on in support of these allegations, I shall recommend their dismissal.

The complaint alleges that the incidents that are alleged to be independent violations of Section 8(a)(1) in complaint paragraphs 5(a) through 5(c) and paragraphs 6(a) through 6(i) are also 8(a)(3) violations. No persuasive explanation of the legal basis for these 8(a)(3) allegations has been articulated and the basis is not self-evident. Accordingly, I shall recommend dismissal of those 8(a)(3) allegations.

3. The suspension and termination of Danny L. Davidson

a. Facts

After Davidson transferred from the Sumner, Washington terminal to the Portland, Oregon terminal, he and his wife, Annette Davidson, moved their residence from Roy, Washington (near Seattle), to Keizer, Oregon (near Salem and about 50 miles south of Portland). In late February 1998 the Davidsons moved to Battle Ground, Washington (north of Portland, across the Columbia River).[3] From the time they moved back to Washington in February 1998 through February 4, 1999, the Davidsons maintained their residence in the State of Washington.

At the time Davidson moved his residence to Battle Ground, Washington, he held an Oregon commercial driver's license (CDL) and he did not obtain a Washington CDL until after the Employer suspended him on February 3, 1999. The facial rea-

[3] Notice has been taken of the directions and distances based upon AAA North American Road Atlas (American Automobile Association, 1998).

son that he was suspended was that he did not have a Washington CDL.

The Employer's drivers, including Davidson, are required by both state law and the Employer's policies to have a valid CDL when driving the Employer's trucks. CDLs are issued by each state and are subject to state law. The State of Washington has adopted the Uniform Commercial Driver's License Act, RCW Chapter 46.25. That statute provides, in part, "No person who has been a resident of this state for thirty days may drive a commercial motor vehicle under the authority of a commercial driver's license issued by another jurisdiction."

Davidson was aware that as a consequence of his moving his residence to Washington he was required by law to surrender his Oregon CDL and obtain a State of Washington CDL and I do not credit his testimony to the contrary. As an experienced professional driver, the testimony is inherently suspect and his testimony on this issue was not credibly offered. Objectively, he signed a written acknowledgement of the pertinent U.S. Department of Transportation (DOT) requirements when he was hired. Moreover, the requirement that he obtain a Washington CDL was brought to his attention in November 1998 by a Washington State police officer during a traffic stop.

On February 3, 1999, the Employer's human resources manager, Joelle Rogers, had received and reviewed a number of Certification of Violations (COV) forms that all drivers are required to submit annually to report any convictions for moving violations within the preceding 12 months. The COV report permits the employer to comply with the Commercial Motor Carrier Safety Regulations promulgated by the U.S. Department of Transportation (DOT). Among the forms reviewed that day were the COV of Danny Davidson and his wife Annette Davidson. Joelle Rogers knew at the time of their move that the Davidsons had moved to Washington State and shortly after the move Davidson had submitted a change of address form to the employer that reflected the move to Washington. The evidence does not show that the timing of the 1999 COV requirement or that the timing of the review was related to Davidson's union activity.

Danny Davidson's lack of a Washington license was immediately brought to Henderson's attention. He contacted Davidson at a store where he was making a delivery, about 150 miles away, near Bend, Oregon. Henderson told Davidson to cease driving immediately because his license was invalid and Davidson was placed on suspension until he obtained a Washington CDL. After learning of the problem with Davidson's license, Henderson checked Ms. Davidson's COV, which disclosed that she did not have the required license and she was also suspended. Ms. Davidson's suspension is not alleged to be a violation. There is no evidence that the Employer had ever reminded employees of their obligation to maintain their CDL in the state where they resided. There is no evidence that other employees had been disciplined because they had a CDL from the wrong state.

Klingbeil described the following remarks made at the Portland terminal by Henderson on the day Davidson was suspended

> Q. So he comes around the corner and he says, we got him?
>
> A. Right.
>
> Q. Did you know what he was talking about? Did he say anything else?
>
> A. Yeah. He told me what the deal was. He told me that they believed Danny did not switch his address on his license in time. So that's what they were going to suspend him for. They also told me they were going to fire him. But I wasn't supposed to say it at the time. But I knew it was coming. I think everybody in the company knew it was coming.
>
> Q. So they were getting him for not having changed his license over. Now, what did you understand to be the employer's policy about people being licensed in the state they live?

Klingbeil's testimony that Henderson told him Davidson was going to be suspended because of his CDL was more credibly offered than Henderson's contrary testimony, does not appear to be improbable and is accordingly credited. Davidson's testimony that "they" told him that Davidson was going to be fired was not as credibly offered as Henderson's contrary testimony and is discredited for that reason. Moreover, Davidson's testimony that "they" told him that Davidson was going to be fired was not developed and it appears that Klingbeil was embellishing his account.

The following morning, February 4, 1999, the Davidsons secured CDLs from the State of Washington. They then went to the terminal and showed the licenses to Henderson and he told them that they were off suspension. Neither the Davidsons nor the General Counsel contend that the Davidsons did not change their legal residence to the State of Washington in February 1998, or that they were not required to obtain a State of Washington CDL.

The General Counsel contends that Davidson was treated differently than Supervisor Jerry Whitney, arguing that the evidence establishes that Whitney is a resident of Oregon, but holds a Washington CDL. Whitney transferred from the Sumner, Washington terminal to Portland as a driver in 1996 and later worked in various positions at the Portland terminal and was employed by the Employer at Portland at the time of the hearing. At all times he held positions that required him to have a CDL and at all times he has had a State of Washington CDL. The General Counsel contends that the evidence shows that the Employer knew that Whitney's state of residence was Oregon and that the Employer tolerated Whitney not having the correct license. In support of this contention the General Counsel introduced evidence that Whitney initially stayed with his mother at her home in Oregon City, Oregon, when he transferred to Portland and that in May of 1998, he bought a house in Oregon City, Oregon, with his sister. The record further shows that the Employer's list of telephone numbers shows two numbers for Whitney, both with a 503 area code. One of the numbers is a cell phone that would permit the Employer to call him when he was in Washington.

Whitney credibly testified that when he initially began working in Portland he stayed at his mother's house during the week and commuted to Shelton, Washington, for the weekends. He testified that later, he and his sister bought a house next door to his mother's house where he stayed during the week when he

was working at the terminal and that he commuted to Washington on the weekends, where he lives with his former wife and her husband. At other times he was on the road driving the Employer's trucks. The Employer was aware of Whitney's unusual living arrangements. In Portland Whitney drives to the terminal in a vehicle his mother owns that has Oregon license plates, but he owns a pickup truck and a motorcycle that are registered in Oregon. He uses the Washington address for tax purposes, but pays Oregon nonresident state income taxes on his Oregon wages. His checking account is in Washington. He acknowledged that with a residence in Washington he has sometimes benefited by paying lower Washington income taxes under a statute identified as the "Amtrak Law", but asserted that he had paid more at times to register his vehicles in Washington.

A driver is allowed to have a CDL from only one state. To show disparate treatment it is necessary to establish that Whitney was a resident of Oregon, was required to hold an Oregon CDL and that the Employer knew that this was the case. There are indicia of residency in both Oregon and Washington. The reported cases show that issues of residency and domicile are frequent and often difficult issues in state and federal court litigation and there is no bright line test. Moreover, the criteria for establishing residency vary depending on the jurisdiction and the matter at issue. Some situations present choice of law issues. The General Counsel has the burden of proof, but the only authority I have been referred to is an Oregon statute, O.R.S. § 807.062. That provision states, as does the Washington statute quoted earlier, "No person who has been a resident of this state for thirty days may drive a commercial motor vehicle under the authority of a commercial driver's license issued by another jurisdiction." The Oregon statute goes on to provide that notwithstanding this requirement, "[A] person who is gainfully employed in this state shall not be considered a resident of this state if the person has taken no other steps to become a resident." Although Whitney is employed in Oregon and owns an interest in a house where he stays when he is working in Portland, he pays Oregon taxes as a nonresident and maintains a place of abode in Washington where he regularly stays and he registers his vehicles and maintains his bank account there. Absent other substantial evidence of residency I am unable to conclude that the General Counsel has established that Whitney was a resident of Oregon for CDL licensing purposes and the argument that Whitney was treated more leniently has therefore not been established. Moreover, even if it is assumed that Whitney should have had an Oregon CDL, the uncertainties undercut the claim that the Employer acted inconsistently and with unlawful motive by disciplining Davidson because he retained his Washington CDL.

Later in the day on February 4, Henderson reviewed a report regarding Davidson's driving record. A commercial provider of driving records supplied the report. The report was prepared February 4, 1999, and appears to have been received by fax. The record does not show that this report was other than routine and it affirmatively appears that similar reports were requested for all the drivers who had submitted COVs. Henderson reviewed Davidson's report, as well as all the records in Davidson's file. The records show that Davidson had never disclosed in his annual COVs that he had been convicted of speeding in April 1997. In addition, the records show that while Davidson had reported a November 1998 conviction for driving in the left lane on his 1999 COV, there was no indication that he had reported it earlier.

A statement signed by Davidson when he was hired acknowledged that he was required to report traffic violations to the Employer within 30 days. Davidson testified that he had told Whitney at the time that he had been given a ticket for the left lane violation, which Whitney denied. Whitney's testimony on this issue was more credibly offered and is credited. Davidson also claimed he noted the incident on his trip sheet. There is no evidence that he made this claim prior to testifying at the hearing. I decline to draw the adverse inference requested by the General Counsel because the Employer destroyed the trip sheet in accordance with routine practice.

Henderson testified that the Employer also had a policy of requiring employees to report a violation by providing written notice or a copy of the citation within 30 days of the occurrence and that no such written notice or copy of the citation was in Davidson's file. If there was such a policy, which seems questionable, it is clear that the Employer did not routinely discipline employees for failing to provide a written notice or a copy of the citation within 30 days. The record discloses that drivers Mark Klingbeil, Diane Tompkins, Willie Mack, Michael Plumondore, Bob Lamantia, and Fred Piek, each completed COVs in which they reported having moving violations within the previous 12 months. There were no copies of moving violations in their files and the record evidence does not show that written notification had been given. The record does not reflect that those drivers were disciplined for violating the claimed rule regarding written notification.

In an affidavit given by Henderson during the administrative investigation of the charge, he states

> Later that day Danny Davidson's DMV report came in. At that time, Joelle Rogers came to me and stated that while Danny had written on his C.O.V. that he had an infraction on 11-15-98, there was no copy of the ticket in his file as we require. Since I have been a transportation supervisor, I have required drivers to give us a copy of any ticket for a moving violation they receive no later than 30 days. She (Joelle) then asked me if Davidson had ever notified me of this ticket and I said no. Based on this Davidson had violated the 30 day notification requirement. This requirement is not a written rule but is required under D.O.T. regs 383.31.
>
> Following that Joelle Rogers and I reviewed Davidson's file and realized he had also failed to properly fill out his C.O.V. forms in 1997 and 1998. Even though I had reviewed his C.O.V. and DMV abstract in 1998 I had failed to notice he had failed to properly fill out his 1998 C.O.V. form and his 1997 C.O.V. form.
>
> We then went and notified Mark Scavo of what we had found. Based on this, and our concern over an unsatisfactory rating by DOT and pending DOT audit as well as a corporate audit we made a decision to terminate Davidson. Based on the seriousness of Davidson's actions and our

concern that this type of violation had gotten us an unsatisfactory rating by DOT, we felt we had to take action.

Davidson was never asked to explain the deficiencies disclosed by Henderson's review of Davidson's COVs and driving record. There is also no evidence that inquiry was made of other supervisors to determine if Davidson had informed them of the 1998 ticket. Instead, he was called at home and told to report to the office. When he arrived his wife and children accompanied him. Henderson and Warehouse Manager Kevin McDade represented the Employer. Henderson, McDade, and Davidson described what occurred at the meetings. The accounts are largely consistent. The following is based upon a composite of the credible testimony. I found the testimony of McDade to have been the most credibly offered. I reserved ruling on the receipt of Respondent Exhibits 17 and 18 and told the parties that the issue could be addressed in brief. The arguments advanced in the Employer's brief are convincing and the exhibits are received. I have found it unnecessary, however, to rely on the exhibits in making my credibility resolutions. The General Counsel urges findings that the Employer was not privileged to rely on Davidson's 1997, 1998, and 1999 COV (GC Exhs. 4–5 and R. Exh. 5) arguing that they are altered and in part illegible. This contention lacks merit.

Davidson complied with a request that he sign a "Notice of Disciplinary Action/Suspension" documenting his suspension the day before and then a "Notice of Termination of Employment." The termination document stated that Davidson was terminated for not reporting his September 1997 speeding conviction on either his October 1997 or his 1998 COVs. The document goes on to state that he did not notify the Employer of the 1998 traffic violation until he filed his February 1999 COV, contrary to the DOT requirements that he had been advised of when he was hired. The termination document also stated that Davidson was discharged for making a willfully false statement to the Employer, a reference to the COVs. The Employer has not contended that Davidson's CDL problem was a reason for his discharge and that problem was not mentioned in his discharge interview or the discharge notice that purported to state the reasons for his discharge. There is no contention that Davidson's job performance was substandard.

There was not an investigatory interview regarding Davidson's COVs. Henderson attempted to conduct a termination interview by merely reading the termination notice. The situation became quite heated. Henderson began reading the termination letter, but Davidson interrupted declaring "I don't really have to listen to it" McDade repeatedly advised Davidson that he did need to listen, but Davidson began singing "la la la" and began using profanity. Davidson referred to McDade and Henderson as "dick heads" and "sorry assholes" and stated he could not believe they were "doing shit like this to me." McDade then terminated the meeting. At this point, Ms. Davidson asked whether she was also fired and Henderson responded that she was not. She then responded by quitting. Henderson and Ms. Davidson then went upstairs to get her uniforms. McDade asked Davidson to leave the premises. Davidson refused and invited McDade out to the street to fight. McDade credibly testified (contrary to Davidson) that Davidson said "I know where you live and I'll be paying you a visit." Henderson and Ms. Davidson then returned to the room and the Davidsons left the property. The next day he returned to get his paycheck and told McDade that he was going to quit anyway but the company just beat him to it.

b. Analysis

To set forth a violation in dual motive Section 8(a)(1) and (3) discrimination cases, the General Counsel is required to show by a preponderance of the evidence that animus against protected activity was a motivating factor in the employer's conduct. Once this showing has been made the burden of going forward shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. To sustain his initial burden, the General Counsel must show (1) that the employee was engaged in protected activity, (2) that the employer was aware of the activity, and (3) that the activity was a substantial or motivating reason for the employer's action. *Wright Lin*e, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). Motive may be demonstrated by circumstantial evidence as well as direct evidence and is a factual issue, which the expertise of the Board is peculiarly suited to determine. *FPC Moldings, Inc. v. NLR*B, 64 F.3d 935, 942 (4th Cir.1995), enf. 314 NLRB 1169 (1994); *Andrex Industries Corporation*, 328 NLRB 1279 (1999).

The uncontroverted evidence demonstrates that Davidson was engaged in protected activity when he initiated and supported the 1998–1999 organizing activities on behalf of the Union. The record demonstrates and the Employer concedes that it was aware of Davidson's union activity.

(1) The Discharge

I find that the General Counsel has made a strong prima facie showing that Respondent was motivated by antiunion considerations in discharging Davidson. The angry remarks made by Jakubek at the employee meeting that he would like to "take them out back," and his statement that the person who wrote the prounion letter should not be working for the Company revealed the Employer's hostility to union supporters early in the campaign. It became clear that Davidson was the focus of the hostility when Marciel interrogated Ms. Davidson as to why she and her husband were organizing and explicitly told her that the Employer knew her husband wrote the letter. Only a week after Davidson wrote the letter Henderson cautioned him to watch his step because he could get fired for discussing the Union at the terminal. McDade, during a discussion of the Union, cautioned Davidson that he was being watched and that he was going to have to watch his step and McGee made similar remarks to Davidson shortly before the election. Davidson's discharge was foretold by Marciel when he told Davidson 2 days before the election that after the election jobs were going to be lost. This is particularly pertinent in view of the timing of Davidson's discharge 2 days after the election. Marciel made it clear at the Superbowl party that discharges of union supporters was possible when he referred to Justice's raffle winnings as severance pay and explicitly stated that top management expected local managers to discharge named union supporters,

including Davidson, that had been listed on a board. While not necessary to my conclusion that the General Counsel has made a prima facie showing regarding Davidson's discharge, that conclusion is also supported by the other 8(a)(1) violations found, particularly the threats made by Lard to Justice.

In summary, the blatant expressions of hostility to union organizers generally and Davidson individually, and the explicit and repeated suggestions that Davidson's job was at risk, as well as the other evidence of antiunion animus discussed above and the other independent violations of Section 8(a)(1), are very strong evidence that animus against protected activity was a motivating factor in the employer's conduct.

In view of the foregoing, the burden shifts to the Employer to establish that Davidson would have been fired, even in the absence of union activity. The evidence shows that Davidson did not report his 1997 speeding conviction on either his October 1997 or his 1998 COVs and that he did not notify the Employer of 1998 traffic violation until he filed his February 1999 COV. The record evidence establishes that these actions may well have justified discipline. This is, however, insufficient to carry the Employer's *Wright Line* burden. An employer cannot carry its *Wright Line* burden simply by showing that it had a legitimate reason for the action, but must persuade by a preponderance of the evidence that the personnel action would have taken place even absent the protected conduct. *Centre Property Management*, 277 NLRB 1376 (1985); *Roure Betrand Dupont, Inc.*, 271 NLRB 443 (1984). Thus, to carry its *Wright Line* burden the Employer must show that Davidson would have been discharged even in the absence of his union activity. Given the strong prima facie showing made by the General Counsel in this case, the burden on Respondent is substantial to overcome a finding of discrimination. *Eddyleon Chocolate Co*., 301 NLRB 887, 890 (1991). *Dynabil Industries*, 330 NLRB 360 (1999).

The Employer argues that the discharge of Davidson was consistent with the published policy and consistent with a history of discharging employees for the first offense of falsification. The Employer's employee handbook provides

> Group One Work Rules
>
> A violation of any Group One work rule will ordinarily subject a team member to immediate discharge.
>
> . . . .
>
> 3. Willfully making a false statement to the Company on an application for employment, on any document or form which the team member is required to complete during the course of his/her work or in person to any team member or other member of center leadership.

The Employer argues that as a commercial motor carrier it is subject to the requirements of the Commercial Motor Carrier Safety Regulations promulgated by the U.S. Department of Transportation (DOT). The record shows that the DOT, through the Federal Highway Administration (FHWA), conducts periodic audits of companies to ensure compliance with the regulations. FHWA has the authority to levy fines for unsatisfactory audits. FHWA's ultimate sanction for noncompliance is revocation of a company's operating authority. In 1996 the Employer received an unsatisfactory rating in a DOT audit. The Employer argues that it had a legitimate reason to be concerned about drivers failing to comply with DOT reporting requirements because the Employer was operating under an "unsatisfactory" DOT audit and the Employer's ability to remain in business was potentially in jeopardy from another unsatisfactory audit.

The record discloses that Klingbeil did not list any traffic violations on his 1998 COV, despite his having been convicted of speeding on April 2, 1997. The Employer received a March 6, 1998 report of that conviction, yet Henderson certified Klingbeil's driving record on March 10, 1998. Klingbeil was not disciplined for the false COV. While it is possible that Henderson may have merely been negligent in not taking note of Klingbeil's false 1998 COV, that does not warrant an assumption that Klingbeil would have been discharged if Henderson had made an issue of the omission. Instead, it demonstrates a lack of real concern regarding this issue, notwithstanding the DOT audit. Klingbeil noted the 1997 conviction on his 1999 COV, but no personnel action was taken for his failure to timely report the conviction. While the Employer might have viewed discipline a year later as not warranted, the failure of the Employer to even counsel Klingbeil about the offense undermines the Employer's contention that Davidson would have been fired even absent his union activity. One distinction between Klingbeil and Davidson's situation is that at the time Klingbeil filed the 1999 COV he openly opposed the Union. The Marciel's remarks at the Superbowl party in the presence of Klingbeil suggest that the Employer viewed Klingbeil as an ally in defeating the organizing effort. Whatever the reason for the more lenient treatment of Klingbeil for filing a false COV, it was not satisfactorily explained by the Employer. Little weight is attached to the 1996 audit. While not necessary to this conclusion, it is worth noting that despite the nationwide scope of the Employers operations, the Employer did not present evidence regarding incidents of inaccurate COVs at other terminals and the resulting discipline, if any, imposed on employees.

The Employer introduced a "Disciplinary Action Log" that shows that all other Portland employees who had been disciplined for falsification of records were terminated. There were two such employees. One was Roger Robison, who was terminated on December 18, 1997, for falsifying total shift minutes and falsifying his productivity worksheet. The other was Randy Schrader, terminated on September 11, 1997, for falsifying his driver log. There was no testimony by witnesses who had firsthand knowledge of the incidents and no details were provided.

The General Counsel points to the fact that Robinson and Schrader had been disciplined in the past with verbal and written warnings, and Schrader had previously received only a verbal warning for violation of a Group One work rule. In contrast, the Discipline Log shows Davidson's suspension and termination as the only discipline ever taken against him. The lesser discipline meted out to Schrader for a Group One violation was not satisfactorily explained.

The Employer emphasizes that other employees who supported the Union were not fired. It is well-settled, however, that a discriminatory motive in the case of the discharge of some employees is not disposed of by a showing that the employer did not discriminate against others, or failed to weed out every union adherent. *Waterways Harbor Investment Co.*, 179 NLRB 452 (1969). Assuming that the absence of discrimination

against other employees is evidence that must be considered, it would not affect my ultimate conclusion.

I find that the evidence that lawful reasons for discipline may have existed has not rebutted the strong prima facie case. The Employer had legitimate reason to be concerned about drivers failing to comply with DOT reporting requirements. Respondent must, however, show that Davidson would have been discharged in the absence of his union activities. This the Respondent has not done. Accordingly, I find that the termination of Davidson was motivated by the employee's protected union activities and that Respondent has not established that it would have discharged Davidson absent that protected conduct. Thus, I find that Respondent has failed to carry its burden under *Wright Line*. I conclude that the discharge of Davidson violated Section 8(a)(3) and (1) of the Act. See *Bronco Wine Co.*, 253 NLRB 53 (1981); and *Hunter Douglas, Inc.*, 277 NLRB 1179 (1985).

(2) The Suspension

I find that General Counsel has also made a prima facie showing that Respondent was motivated by unlawful considerations when it suspended Davidson the day after the election for the facial reason that he did not have a Washington CDL. This conclusion is supported by the timing and by the evidence of the Employer's antiunion animus discussed in connection with Davidson's discharge. Further evidence that the action taken the Employer was in retaliation for Davidson's union activities is the statement by Henderson to Klingbeil that "We got him." Further evidence is the absence of any evidence that the Employer made any inquiry to determine if Davidson, like Whitney, might have some acceptable reason for retaining his Oregon CDL.

In reaching this conclusion, I do not find that the Employer acted improperly in requiring Davidson to obtain a Washington CDL. The Employer may well have been privileged to not scheduled Davidson for future driving assignments and to not permit him to work until he either obtained his Washington CDL or satisfactorily explain why he retained an Oregon license. Rather, the prima facie showing is that the Employer's dramatic action in suspending Davidson at a location 150 miles distant and sending two drivers to that location to relieve him was in response to his involvement in the union activities and appears to have been a calculated act to intimidate employees who might be otherwise inclined to support the Union in the future. Henderson's remark to Klingbeil is strong evidence that this was the employer's motive. Moreover, although the Employer apparently does not contend that the CDL issue was a reason for Davidson's discharge, the evidence shows that the Employer was planning to discharge Davidson before the election. It is a reasonable inference that at the time Davidson was suspended Henderson had concluded that the CDL issue might be useful as a reason to discharge Davidson and accordingly exaggerated the issue.

In view of the foregoing, the burden shifts to the Employer to establish that Davidson would have been suspended before he returned to the terminal, required to park his truck, and wait for a substitute driver to arrive, even in the absence of union activity. While the record evidence establishes that the action taken might have been justified, this is insufficient to meet the Employer's *Wright Line* burden. An employer cannot carry its *Wright Line* burden simply by showing that it had a legitimate reason for the action, but must persuade by a preponderance of the evidence that the personnel action would have taken place even absent the protected conduct. *Centre Property Management*, supra. Accordingly, I conclude that the suspension of Davidson violated Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

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

2. Teamsters Local Union 162, IBT, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by:

(a) Threatening employees with loss of work and jobs if they supported the Union.

(b) Promising employees new routes if employees did not support the Union.

(c) Creating the impression of surveillance of employees' union activities.

(d) Threatening employees with termination if they engaged in protected union activity.

(e) Interrogating employees about other employees' union sympathies.

(f) Threatening employees by stating in the presence of employees that top management expected local management to fire identified employees.

4. The Respondent violated Section 8(a)(1) and (3) of the Act by suspending and discharging its employee Danny L. Davidson because he had engaged in union activity.

5. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Employer has not otherwise violated the Act.

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. The Respondent having discriminatorily suspended and discharged Davidson, Respondent must make him whole for any loss of earnings and other benefits, computed on a quarterly basis, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The inappropriate conduct of Davidson at the time of his discharge was provoked by the unlawful discrimination by the Employer and does not provide a basis for denying him reinstatement.

[Recommended Order omitted from publication.]