Overnite Transportation Company *and* Teamsters Local 667, affiliated with the International Brotherhood of Teamsters. Cases 26–CA–19037, 26–CA–19044, 26–CA–19100, 26–CA–19168, 26–CA–19208–1, and 26–CA–19208–2

December 16, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On July 17, 2002, Administrative Law Judge Leonard M. Wagman issued the attached decision. The General Counsel, the Charging Party, and the Respondent each filed exceptions and supporting briefs. The General Counsel and the Charging Party filed separate answering briefs to the Respondent's exceptions and separate reply briefs to the Respondent's answering brief. The Respondent filed separate answering briefs to the General Counsel's and the Charging Party's exceptions, and separate reply briefs to the General Counsel's and the Charging Party's answering briefs.

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[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified and to adopt his recommended Order as modified and set forth in full below.[3]

A. Overview

The issues presented in this case are: (1) whether the Respondent violated Section 8(a)(3) and (1) by terminating six employees for engaging in protected concerted conduct, and by terminating a seventh employee in order to mask the reason for terminating the other six; (2) whether the Respondent violated Section 8(a)(3) and (1) by disciplining, suspending, and terminating employee Sam Powell for engaging in protected concerted activity; (3) whether the Respondent violated Section 8(a)(5) and (1) by failing to respond to the Union's information request; and (4) whether the Respondent violated Section 8(a)(3) and (1) by terminating employees Walter Jones and Terry Holcomb for engaging in protected concerted activity.

The panel unanimously agrees with the judge, for the reasons set forth in his decision, that (1) the Respondent violated Section 8(a)(5) and (1) by failing to respond to the Union's information request, and (2) the Respondent did not violate Section 8(a)(3) and (1) by allegedly terminating employees Walter Jones and Terry Holcomb for engaging in protected concerted activity. A majority of the panel (Chairman Battista and Member Liebman) disagrees with the judge's findings that the Respondent violated Section 8(a)(3) and (1) by suspending and then discharging seven employees[4] in February 1999. A different majority (Member Liebman and Member Walsh) agrees with the judge's findings that the Respondent violated Section 8(a)(3) and (1) by twice disciplining employee Sam Powell, on February 18 and 24, by suspending him on April 22, and by discharging him on May 4, because of his protected concerted union activity.

B. The Respondent did not Violate Section 8(a)(3) and (1) of the Act by Terminating Seven Employees in February 1999

1. Factual background

The Respondent is a commercial freight carrier headquartered in Richmond, Virginia. The Respondent employs 530 employees at its Memphis facility, 200 of whom are dockworkers who load and unload freight. Following a representation election, on October 9, 1997, the Board certified the Union as the exclusive collective-bargaining representative of a unit including all city drivers, road drivers, dock workers, jockey/hostlers, building maintenance employees, and shop employees. The Union and the Respondent have been bargaining, both locally and nationally, since 1997, but had failed to reach agreement as of the date of the judge's decision. On October 21, 1998, a decertification petition was filed. The Regional Director dismissed the petition on April 22, 1999, and the Board affirmed that dismissal on May 19, 1999.

On December 24, 1998, the Respondent discovered that the fence at its Memphis Service Center had been cut and that approximately $250,000 worth of merchandise had been taken. The Respondent launched an immediate investigation. A second incident occurred the following week. In both incidents, the thieves cut holes into the terminal fence and broke into selected trucks containing high value cargo. Based on this evidence, the Respondent's officials and company investigators concluded that

[1] No exceptions were filed to the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(1) and (3) by terminating Tony Perezz Brown.

[2] The parties have each 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 Drywall 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.

[3] In accordance with this decision, we have included an amended remedy, a new Order, and a new notice to conform to the language in the Order.

[4] Charles Watkins, Floyd Wilbanks, Frederick L. Clark, Autra Wilkerson, Wilford Hugh McCalla, William Palmer, and Kyle Medley.

the thieves were either company employees with knowledge about the cargo or outsiders who were assisted by company employees.

Thereafter, the Respondent continued investigating the thefts with the help of the FBI, State, and local police. The Respondent posted notices offering a $25,000 reward for information regarding the persons responsible for the thefts, but received no leads. In February,[5] the Respondent's investigators, Roger Gleason and Mike Martin, who were former police officers, decided to perform background checks on all employees and supervisors/managers whose job applications predated 1997, when the Respondent began conducting prehire background checks on all job applicants. The investigators were looking for any employees who had criminal backgrounds that they failed to divulge on their employment applications. If they found employees in this category, they would confront the employees with this information and the investigators hoped that the employees would be more forthcoming with information about the Memphis thefts. The investigators had previously employed this technique in their theft investigations at the Respondent's facilities in Los Angeles, Atlanta, and Houston, as well as Oakland and Fontana, California.

Since 1994, the Respondent's employee handbook has included a provision that employees who falsify their employment applications will be subject "to disciplinary action, including dismissal." Employees are required to sign an acknowledgement on job applications that each answer is "true and correct" and that "incomplete or deceptive" responses will result in termination. Prior to September 1994, the Respondent's employment application included the question: "Have you ever been convicted of a felony?" Subsequent to September 1994, the Respondent changed the question to "Have you ever been convicted of or pled guilty or nolo contendre (no contest) to a crime other than a traffic violation?" That question was followed by: "If yes, describe in full and give court location, date."

Investigators Gleason and Martin searched the criminal court records of Shelby County, Tennessee, which included Memphis, and De Soto County, Mississippi. Most of the employees resided in these two counties. As a result of its investigation, the Respondent discovered that seven employees and one supervisor at the Respondent's Memphis facility had failed to disclose criminal records on their job applications. After questioning these employees, the Respondent terminated all eight of those individuals.[6]

[5] All dates hereafter refer to 1999, unless otherwise specified.

[6] The individual circumstances of each of those individuals are detailed in sec. II,(B) of the judge's decision. Five of the eight individuals answered "no" to the question of whether they had ever been convicted of a felony (in pre-9/94 applications), despite having been convicted of felony crimes. Three employees answered "no" to the question of whether they had been convicted of/pled guilty to any crime (in the post-9/94 applications), despite the fact that two had been convicted of misdemeanors and one of a felony.

As noted above (fn. 1), we need not address whether the discharge of one of the eight terminated individuals (Tony Perezz Brown) violated the Act, because there were no exceptions to the judge's finding that Brown was a supervisor (and thus exempt from the Act's protection).

[7] The judge found that the timing of seven of the eight suspensions, and seven of the eight discharges, in February 1999, while the decertification petition was pending, suggested that the Respondent was mindful of that petition and sought to erode the Union's majority support.

2. The judge's findings

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending and later discharging six employees because of their union activities, and discharging the seventh employee (Hugh McCalla, who was not a union supporter), in order to mask its reason for discharging the other six employees. The judge determined that the General Counsel made an initial showing of discriminatory intent, based on the timing of the investigation and discharges,[7] the fact that six of the eight of the suspended and discharged individuals openly supported the Union, and the Respondent's stated antiunion policy, as reflected in its employee handbook. The judge also relied on the Board's decision in *Overnite Transportation,* 335 NLRB 372 (2001), in which the Board found that the Respondent had committed multiple violations of the Act at the same Memphis facility in 1996 and 1997, 2 years prior to these events.

The judge rejected the Respondent's defense. He noted that the Respondent's policy stated that such conduct (i.e., failure to disclose criminal records on job application) would be subject to "disciplinary action, including dismissal" and therefore dismissal was not mandated. The judge further rejected the Respondent's evidence that its discharge of the seven employees was consistent with its past practice both at the Memphis facility, where it had discharged three employees for application falsification in 1998, and at five other Overnite facilities.

The judge found that the Respondent terminated the three employees at the Memphis facility in 1998 because of their criminal backgrounds, rather than application falsification. The judge further found that the Respondent failed to show that the 1998 discharges presented circumstances comparable to the discharges of the seven employees here. Finally, the judge relied on the Respondent's failure to discharge two employees who committed posthire felonies as evidence of disparate treatment, particularly in light of the Respondent's consideration of the employees' employment records in those cases.

3. Analysis

In order to prove a violation of Section 8(a)(3) and (1), the General Counsel has the initial burden of establishing that the employee's union activity or other protected activity was a motivating factor in the employer's adverse personnel decision. See *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *Transportation Management*, *Inc. v. NLRB*, 462 U.S. 393 (1983). The elements commonly required to support such a showing are union activity by the employee or employees, employer knowledge of that activity, and antiunion animus on the part of the employer. *Wal-Mart Stores*, 340 NLRB 220, 221 (2003) (citing *Briar Crest Nursing Home*, 333 NLRB 935, 936 (2001)).

Once the General Counsel has made an initial showing of discrimination, the burden of persuasion shifts to the employer to prove that it would have taken the same action even if the employee had not engaged in protected activity. *Wright Line*, supra, at 1089. That burden requires a Respondent "to establish its *Wright Line* defense only by a preponderance of evidence." *Merillat Industries*, 307 NLRB 1301, 1303 (1992).

Applying this *Wright Line* test, we find that, even assuming that the General Counsel satisfied his initial burden of showing that the Respondent's actions were motivated in part by its animus towards the employees' protected conduct, the Respondent met its rebuttal burden under *Wright Line*.[8] More specifically, the Respondent has sufficiently demonstrated that it would have discharged the seven employees even in the absence of their protected concerted conduct.

To begin, there is no allegation or finding here that the Respondent's investigation into the criminal backgrounds of its employees in February 1999 was improperly motivated. Moreover, the Respondent's loss of a quarter million dollars of its property in two separate thefts amply supported its decision to undertake an investigation into the case. After more traditional methods failed, the Respondent's two investigators, both former police officers, decided to perform criminal background checks on all employees in order to ascertain if any of the Respondent's employees had been involved in crimes involving theft in the past. The Respondent had employed this investigative technique previously at several other facilities.

The Respondent's subsequent decision to terminate those employees whom it discovered had falsified their job applications was consistent with its widely published company policy. It is undisputed that all seven employees failed to disclose criminal backgrounds on their job applications. Their prior undisclosed criminal histories collectively included, among other offenses, convictions for manslaughter, rape, drug possession, possession of weapons, and unemployment fraud. The Respondent's job application itself notified the employees that "incomplete or deceptive" responses to application questions "would result in termination." The 1994 employee handbook further notified employees that such falsification would be subject to disciplinary action "including dismissal."[9]

Moreover, the Respondent's decision to terminate those seven employees was consistent with its past practice both at the Memphis facility and at other facilities. Specifically, in 1998, the Respondent fired 3 employees for application falsification at the Memphis facility and 12 employees at 5 other facilities. We find unpersuasive the judge's attempt to distinguish the prior discharges of the three Memphis employees on the grounds that those employees were terminated (1) after the company routinely started imposing its background checks in 1996; and (2) because of their criminal background, rather than for falsifying their employment applications. The fact that the Respondent fired the three employees in 1998 pursuant to its post-1996 routine background check is not material, so long as the Respondent treated the employees similarly once it discovered the falsifications. The evidence shows that all three were terminated once the

[8] Although Chairman Battista agrees that it is unnecessary to resolve whether the General Counsel met his initial burden, he disagrees with two of the factors relied on by the judge to support a finding of animus. In his view, the Respondent's timing for the discharges, in February 1999, was clearly justified by the large-scale theft only 1 month earlier, and therefore does not demonstrate the Respondent's animus. Likewise, the judge's reliance on the statement in the company handbook (i.e., "the Company values union-free working conditions") is not evidence of animus. In Chairman Battista's view, such a statement is protected by Sec. 8(c) of the Act, which protects expression of views containing no threat of reprisal or promise of benefits.

[9] The dissent asserts that "three of the employees disclosed their convictions at the interview, but were told not to worry about it." As to employee Autra Wilkerson, even if he did disclose this information to the interviewer he did not reveal any of this to the investigators when they inquired years later. As to employee Floyd Wilbanks, the Respondent's investigator simply did not believe his story that he was given permission to omit information from the application. Irrespective of whether he was, in fact, given that permission, the Respondent could reasonably disbelieve him and act on that basis. As to employee Charles Watkins, while he did testify that he revealed his prior criminal history at the time of his interview, the Respondent presented evidence to the contrary (i.e., that Watkins never informed his interviewers of his prior record). In any event, the Respondent's investigators did not believe his story and the interviewers themselves denied it. Following Watkins' discharge, the Respondent received documentation from the State of Tennessee showing that Watkins had disclosed his conviction to the company. The Respondent then admitted it had made a mistake and offered Watkins reinstatement and backpay. That the discharge was mistaken does not however prove that it was unlawfully motivated.

application falsifications were discovered. Further, in paperwork for each of the three individuals terminated post 1996, the Respondent cites application falsification as the reason for the termination.[10]

The judge erred by disregarding evidence that the Respondent fired 12 employees at other facilities for application falsification. The judge reasoned that "crucial factors required to show comparable circumstances were absent," such as whether the employees attempted to show extenuating circumstances, the union status of the employees fired, and whether all employees who falsified their applications at those locations were fired. The relevant inquiry, however, is whether the Respondent treated its employees consistently when it discovered application falsification. It did. The evidence shows that the Respondent had a "zero tolerance" policy for application falsification and that it applied that policy in an evenhanded manner.

In the absence of countervailing evidence of disparate treatment based on protected activity (a point discussed below), this showing was sufficient, under the preponderance-of-the evidence standard. See *Merillat Industries*, supra, 307 NLRB at 1303. The Respondent was not required to demonstrate that the employees at other facilities were fired under *identical* circumstances. Id. The evidence the Respondent introduced was probative, even if no situation was '"on all fours' with the case in question." Id.[11]

Finally, we find that to support his finding of disparate treatment of the employees in this case, the judge erroneously relied on evidence that three nonunion supporters at the Memphis facility were not discharged after engaging in posthire misconduct. For example, the judge noted that the Respondent allowed employee Charles Foster to remain as an employee, despite its knowledge that he was convicted of a felony and engaged in other misconduct while employed by the Respondent.[12]

However, we find that the Respondent's treatment of Foster is not an accurate comparison to its treatment of the seven terminated employees in this case. It is undisputed that Foster did not falsify his employment application, unlike the seven employees at issue in this case. Although Foster had been convicted of a 1982 misdemeanor and a 1983 felony, he was not required to disclose either on his job application. When Foster filled out his application in March 1983, the Respondent did not require disclosure of misdemeanor convictions. Moreover, he could not have disclosed his 1983 felony conviction, as it occurred after he submitted his job application. Thus, as the Respondent asserts, Foster's misconduct did not involve "willful deceit against the company."

Likewise, the judge's reliance on the Respondent's tolerance of misconduct by employees Gloria and Jerry Burnsides is misplaced. The Burnsides were accused of falsifying their driving logs while employed for the Respondent. Again, the Burnsides were not alleged to have committed application falsification. Furthermore, the Burnsides were ultimately found not guilty of falsifying their driving logs, so the judge's reliance on the Respondent's failure to discipline them for a violation of a company policy is inapposite.

In sum, the record supports the Respondent's defense. The Respondent's investigation was legitimately motivated. Moreover, the Respondent's subsequent decision to terminate the seven employees was consistent with its policy that employees who falsified their employment applications by concealing prior criminal histories would be immediately terminated.

C. The Respondent Violated Section 8(a)(3) and (1) of the Act by Twice Disciplining and then Suspending and Discharging Employee Sam Powell

We find, in agreement with the judge and for the reasons set forth below, that the Respondent violated Sec-

[10] For example, according to the "Employee Separation Sheet[s]" of employees Thomas Roberson and Robert Scott, the two employees were purportedly terminated for "falsifying documents." Likewise, Jeff Ashburn's HR "Action Form" listed the reason for his termination as "due to falsifying application, criminal section."

[11] First, there is direct evidence that the investigators also disregarded the excuses (or "mitigating circumstances") offered by the other employees who were fired for falsifying documents at other facilities. For example, investigator Martin testified at the hearing that the employees at the other facilities all had "some type of an excuse" for failing to disclose their prior convictions, but the investigators rejected all such excuses. Moreover, investigator Gleason testified that such falsification "always resulted in termination for everyone that I've ever been involved with since I've been with the company since 1994." Again, in the absence of evidence to the contrary, this testimony supports the Respondent's assertion that it applied its termination policy in a consistent manner.

[12] Foster was hired by the Respondent in March 1983. Foster had been convicted in 1982 of the misdemeanor of impersonating a police officer. However, Foster had not been required to disclose this misdemeanor on his application, which only required disclosure of felonies. On November 14, 1983, Foster pled guilty to obtaining services under false pretenses (i.e., health insurance benefits), conduct which was unrelated to his job. He paid a fine and was put on 5 years' probation, but was not required, either by the terms of his conviction or the Respondent's rule, to inform the Respondent. Additionally, in Foster's personnel file, the investigators discovered that, on October 15, 1997, Foster was issued a final warning and suspension for misappropriating a trash can while on duty. The investigators discovered both the 1982 and 1983 convictions and the discipline during the 1999 criminal background checks, but decided not to take action against Foster.

tion 8(a)(3) and (1) of the Act by twice disciplining and then suspending and discharging employee Sam Powell.

1. Background: Sam Powell's union involvement

Powell had been employed as a dockworker at the Memphis facility for over 20 years at the time of his discharge. He was indisputably one of the most outspoken and active members of the Union working on the docks. From the inception of the Teamsters' organizing efforts in 1995, Powell wore clothing with union insignia, handbilled, and made house calls, and appeared in an organizing video making statements in support of the Union.

In the first Board held election in 1995, Powell served as a union observer and also appeared as a witness in Board hearings involving the Union and the Respondent. Following the Union's certification as the unit's representative after the second Board-conducted election in 1996, Powell was elected by the Union to serve as the bargaining unit's chief steward and traveled around the country, assisting with the Union's organizing efforts elsewhere.

The Respondent was openly hostile towards Powell's organizing efforts. For 2 consecutive years, 1995 and 1996, Powell was asked to leave formal dinners sponsored by the Respondent, after he interrupted the Respondent's CEO's address to the employees. Powell came to the 1995 dinner dressed in a Teamsters T-shirt. After the CEO made public statements regarding the pension fund, Powell rose and attempted to correct those statements. Powell was not allowed to speak and was soon escorted out of the dinner by security.

At the 1996 dinner, Powell arrived again in a union t-shirt. After the CEO began making statements regarding the potential impact of Teamsters representation, Powell again rose to correct the speaker's misstatements. Powell was asked to leave and, when he rose to do so, 70 or 80 of his coworkers (also wearing Teamsters T-shirts) stood up to join him. The Respondent's operations manager, Duane Williams, warned the employees that if they left they would be fired. Nonetheless, 70 employees accompanied Powell out of the dinner. Neither Powell, nor any of the employees who left with him, were disciplined for this conduct.

After the second representation election in 1996, Memphis Service Center Manager Danny Warner met with Supervisor Dale Watson and discussed Powell's union activism and outspoken conduct at the Respondent's annual meetings. Warner suggested to Watson at that meeting that Watson should "come up with an excuse to discipline Powell."

a. The February 18 discipline

In mid-February 1999, Powell, acting in his capacity as chief union steward, approached Acting Manager Joe Jasmer on the dock and inquired why the Respondent had terminated 10 or 11 employees for falsifying their job applications. Jasmer responded that it was "none of Powell's business." Later that week, Powell again raised the issue with Supervisor Dale Watson who also had "no comment." Powell then asked whether supervisors were being investigated and made references to Watson's past service in the Vietnam war.[13] Powell further commented that someone should investigate Watson's past, and suggested that Watson could be guilty of war crimes similar to the Nazis.

Watson became upset by the remarks and told Powell to return to work. Powell approached Watson two additional times thereafter, attempting to discuss the discharges and Watson's war photographs. Watson again repeated that he did not want to talk about the terminations or the photographs. There is no evidence that any other employees overheard any of the war crimes discussions.

On February 18, Watson complained to Acting Manager Jasmer about Powell's conduct and Jasmer filed an incident report. The report contained a statement that Watson "asked Mr. Powell to only speak about freight handling issues." Watson signed the statement, but later denied directing Powell in such a way. Based on this report, Powell was issued a corrective action report for "insubordination."

b. The February 24 discipline

On February 24, during the midnight shift, an employee broke his leg after being run over by a forklift. When Powell arrived at work later that morning for a preshift meeting, Midnight Shift Supervisor David Braden encouraged the employees to "speed up and unload more trailers that day" because they were behind in their work. Powell, who was upset about the employee's injury on the previous shift, commented that the Respondent's manual said that employees should not sacrifice safety for speed. Powell added, "Let's don't work faster. Let's work safer." When Supervisor Braden became upset with Powell's comment, Powell reminded him about the forklift accident and commented that he did not want it to happen again. Powell insisted that the employees would work slower to be safe.

[13] Watson had served in the military during the Vietnam war and, during that service, had taken photographs containing graphic images of mutilated bodies. In 1984 or 1985, he brought those photographs in to work and showed them to Powell.

Powell began his shift unloading freight, consisting of thirty 55 gallon drums, each weighing 500 pounds. Powell unloaded the drums, one at a time, using a drum jack, which the judge found to be "sort of like a two wheeler." That same morning, Supervisor Willie B. Jones advised Powell that there was some "hot freight" (i.e., freight that a customer needed unloaded quickly) on the trailer that Powell was unloading. Powell said that he would unload that freight when he could. Jones repeatedly reminded Powell of the need to unload the freight quickly. Powell began his work at 5:30 a.m. and completed the unloading at 11:55 a.m., at a rate of productivity later determined to be 3.7 bills/hour.[14] Powell subsequently unloaded a second trailer containing a similar mix of freight at a rate later determined to be 7.5 bills per hour. Based on Jones' determination that Powell was intentionally unloading the first trailer slower than usual, Jones issued Powell a corrective action report for inefficiency.

c. The April 22 suspension and May 4 discharge

On the morning of April 22, Plant Manager Bob Cecil and Assistant Manager Jasmer conducted a tour of the Memphis facility for 40 visiting employees from other facilities. These employees had volunteered to replace strikers in the event of a strike at Memphis. Powell was working on the dock that day, wearing a T-shirt that read "Will strike if provoked."

As the group passed by, Powell asked Cecil if they were the replacements. Cecil responded, "could be." Powell advised the group "to take their hands out of their pockets if they intended to work" at the Memphis facility.

As the group continued to pass by, Powell confronted two employees at the rear of the group and asked them what they were doing in Memphis. When one of the employees answered that they had come to work, Powell stated: "Well, you guys don't want to come down here. You'd get hurt if you come down here and work. Have a lot of accidents." He also warned that "people get hurt with forklifts down here," and that "[w]e get run over with forklifts on this dock." Powell pointed at one of the two employees on the tour and asked him if he wanted to get hurt.

The two employees reported this exchange to Cecil and the Respondent investigated the incident. That same day, after interviewing Powell, the Respondent suspended Powell, pending the investigation. Subsequently, the Respondent interviewed additional witnesses to Powell's conduct on April 22. On May 4, the Respondent discharged Powell for threatening the two visiting employees.

2. Analysis

We find that the Respondent's decisions to twice discipline, suspend, and then discharge Powell were discriminatorily motivated and therefore violated Section 8(a)(3) and (1) of the Act. In so doing, we adopt the judge's conclusion, but modify his rationale, as explained below.

a. The General Counsel's initial burden

Again, we are guided by the legal framework of *Wright Line,* supra. We find that the General Counsel met his initial burden of demonstrating that the Respondent's actions were motivated in part by its animus towards Powell's protected conduct. It is undisputed that Powell, a 20-year employee, was one of the most outspoken advocates for the Union, and that the Respondent was well aware of his prounion sympathies. In addition to performing in the very visible role as union steward, Powell had also publicly expressed his prounion views to the Respondent, including during two dinners before the CEO and all of corporate management. As a result of Powell's public expression of his union support and opposition to the CEO's comments, Powell was twice required to leave Respondent's companywide dinners in 1995 and 1996.

The record further demonstrates that the Respondent was openly hostile towards Powell's protected conduct and desired to retaliate against him for that reason. Indeed, the judge credited Former Supervisor Dale Watson's testimony that Memphis Service Center Manager Danny Warner had expressed his strong dislike of Powell and "suggested that Supervisor Dale Watson come up with an excuse to discipline Powell."

Where an employer's representatives have announced an intent to discharge or otherwise retaliate against an employee for engaging in protected activity, the Board has before it "especially persuasive evidence" that a subsequent discharge of the employee is unlawfully motivated. *Turnbull Cone Baking Co. of Tennessee v. NLRB*, 778 F.2d 292, 297 (6th Cir. 1985) (citing cases), cert. denied 476 U.S. 1159 (1986). See also *Golden State Foods*, 340 NLRB 382, 385 (2003). Thus, we find that

[14] Todd Fisher, manager of operations planning, defined bills per hour as follows: "Each day the hours that we actually pay, not reported but pay, are then compared to those shipments and we get a productivity indicia called bills per hour." Although every incoming trailer contained a predetermined number of bills, the bills per hour measurement was highly dependent upon what types of freight each trailer contained. For example, one trailer could contain 20 bills sitting on pallets that could be unloaded easily, while another trailer could contain just one bill, but consist of hundreds of small boxes that had to be unloaded manually. Thus, the only accurate way to compare bills-per-hour rates of trailers was to compare trailers containing the same mix of freight.

the General Counsel has met his burden of showing that the Respondent's decision to discipline and discharge Powell was motivated by Powell's protected concerted conduct.

b. The Respondent's defenses

The Respondent maintains that it twice disciplined, suspended, and then discharged Powell, not because of his protected union conduct, but because of his misconduct on February 18 and 24, and April 22. For the reasons that follow, we reject the Respondent's assertions that it legitimately disciplined, suspended, and discharged Powell. Instead, we find that the reasons cited by the Respondent were pretextual and that the true reason for the disciplines, suspension, and discharge was the Respondent's hostility towards Powell's union activities.

(1) The February 18 discipline

We find that Powell was unlawfully disciplined on February 18, for engaging in protected conduct as a union steward. In instigating a conversation with Watson regarding the reasons for the discharge of his eight coworkers, Powell was legitimately seeking information from Watson that might assist the Union in deciding whether to challenge the discharges. Powell thus was fulfilling his duties as union steward in gathering information for potential grievances, and was thereby engaged in protected concerted conduct.[15] We reject the Respondent's arguments (1) that Powell's conduct was not protected, and (2) that even if it was protected, Powell lost the protection of the Act by discussing matters outside the scope of the Act.

We first reject the Respondent's argument that Powell was disciplined for attempting to bargain without authority with his supervisor, allegedly in violation of its "Labor Communication Policy." The Respondent failed to mention Powell's violation of its "Labor Communication policy" as a reason for Powell's discharge in his corrective action report. Instead, the Respondent noted only that Watson instructed Powell to "discuss only freight related issues." However, the judge credited Powell's testimony (as corroborated by Watson) that Watson had never instructed Powell in such a manner. This justification for the discharge is thus unsubstantiated and further supports a finding of unlawful motive.

The Respondent (and our dissenting colleague) further assert that, even if Powell was engaged in protected conduct, he lost the protection of the Act by suggesting to Watson that he should be investigated for possible war crimes in connection with his Vietnam service. In considering the issue of whether an employee, who is initially engaged in protected conduct, subsequently loses the protection of the Act through opprobrious conduct, we apply the four-factor test set forth by the Board in *Atlantic Steel Co*., 245 NLRB 814 (1979). Pursuant to that test, we consider: "(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice." Id. at 816.

Applying these factors, we find that Powell's conduct was not so opprobrious as to warrant the loss of the Act's protection. As to the first factor, the conversations occurred on the dock, during work hours, and at Powell's instigation. Given the public setting for the discussion and the potential for disruption to work, we recognize that this factor might ordinarily weigh in favor of loss of protection. However, here there is no record evidence that other employees actually heard this exchange. Therefore, we do not find that there was any actual disruption of the employees' work schedule or public undermining of Watson's authority.

Moreover, we find that the remaining factors also weigh in favor of finding that Powell's conduct retained its protected status. As to subject matter, it is clear that the discussion concerned Powell's legitimate inquiries into the termination of several of Powell's coworkers, clearly a protected subject. This is not altered by the fact that Powell later mentioned Watson's Vietnam experience. Indeed, it was only after Jasmer, then Watson refused to discuss the matter, that Powell brought up the subject of Watson's Vietnam activities.

As to the nature of Powell's outburst, Powell's suggestion to Watson that he might be investigated for war crimes was unaccompanied by obscenity or any type of verbal or physical threat.[16] Thus, we do not find the conduct so egregious as to warrant his loss of protection under the Act, particularly where Powell was clearly initially engaged in his official duties as a steward.[17]

Finally, as previously noted, Powell's outburst was triggered by Watson's complete refusal to discuss the circumstances of the discharges of Powell's colleagues.

[15] See, e.g., *Winston-Salem Journal*, 341 NLRB 124, 126 (2004).

[16] Compare *Trus Joist MacMillan*, 341 NLRB 369 (2004) (where employee used obscenities with her supervisor and accused her of being a prostitute, employee lost protection of the Act); *Felix Industries*, supra, 339 NLRB 195, 196 (2003) (employee's use of obscenities on the telephone to supervisor weighs in favor of loss of Act's protection; although Board ultimately found conduct to be protected), enfd. mem. 2004 WL 1498151 (D.C. Cir. 2004).

[17] See *Clara Barton Terrace Convalescent Center*, 225 NLRB 1028, 1034 (1976) (union steward's conduct in processing grievance protected by the Act "unless the excess is extraordinary, obnoxious, wholly unjustified, and departs from the res gestae of the grievance procedure").

Even if the discharges ultimately proved lawful, Powell's outburst nevertheless was provoked by Watson's hostile refusal to discuss the situation. *Felix Industries*, 331 NLRB 144, 145 (2000) (considering employer's provocative conduct, even though not alleged as unfair labor practice), enf. denied and remanded 251 F.2d 1051 (2001), on remand 339 NLRB 195 (2003), enfd. mem. 2004 WL 1498151 (D.C. Cir. 2004).

In sum, we find that the Respondent violated Section 8(a)(3) of the Act by disciplining Powell for engaging in protected concerted conduct on February 18.

(2) February 24 discipline

The Respondent further asserts that its decision to issue a written warning to Powell on February 24 was justified by his misconduct on that date. More specifically, the Respondent maintains that, despite the Respondent's repeated instructions to Powell to unload the cargo quickly, Powell intentionally unloaded that freight in a slower than normal fashion and failed to use the most efficient means to do so.

We find, in agreement with the judge, that Powell's discipline for inefficiency was pretextual. The judge credited testimony that Powell worked "as fast as he could" on the morning in question. While his efficiency rate may have been lower than usual that day, that rate was explained by the unusually difficult freight he was unloading (i.e., thirty 500-pound drums). Moreover, in light of the fact that a coworker had broken his leg on the previous shift, Powell's effort to work at a safe pace was understandable. Thus, contrary to the dissent's characterization, Powell's pace likely reflected both the difficulty of the task and his stated intent, at the morning meeting, to complete the task in as safe a manner as possible.

We further find significant evidence of the Respondent's animus in its failure to discipline any other employees that day, despite the fact that five employees had efficiency rates lower than Powell's. The dissent criticizes our reliance on evidence of other employees' efficiency rates where there is no evidence as to what types of freight those other employees were unloading. While it is true that the record is silent on this matter, the Respondent itself compared Powell's inefficiency rate on his first trailer to his second without proof that the contents were comparable.[18] Thus, the record supports our finding that employees with lower efficiency rates than Powell's were not disciplined. This disparate treatment is further evidence that the Respondent was targeting Powell for discipline. See *Ellicott Development Square,* 320 NLRB 762 (1996), enfd. mem. 104 F.3d 354 (2d Cir. 1996); *Allegheny Ludlum Co*., 320 NLRB 484 (1995), enfd. in relevant part 104 F.3d 1354 (D.C. Cir. 1997).

(3) The April 22 suspension and the May 4 discharge

The Respondent asserts that its decisions to suspend Powell on April 22, and to discharge him on May 4, were motivated not by Powell's protected conduct, but by his misconduct on the morning of April 22. Specifically, the Respondent points to Powell's threatening remarks to visiting potential strike replacements who were touring the dock that day, as the legitimate and nondiscriminatory reason for the termination.

We reject the Respondent's contention that it would have suspended and discharged Powell for his April 22 misconduct, even in the absence of his protected conduct. While Powell's remarks made to the visiting employees ("you don't want to work here, you could get hurt here. People get run over by forklifts") could have been construed as intimidating,[19] those brief verbal remarks were unaccompanied by gestures or physical contact. Given the circumstances of the statements—during the Respondent's scheduled "tour" in which potential strike replacements were paraded in front of predominantly prounion dock employees prior to an expected strike—the Respondent reasonably might have anticipated such a conflict and some verbal exchange. Thus, we find that the Respondent seized on these statements as a pretext for carrying out its previously expressed desire to retaliate against Powell for his union activities. See *Golden State Foods*, supra, at 386.[20]

As found by the judge, Powell's termination is inconsistent with the Respondent's tolerance of violent threats by employees at the Respondent's other facilities. Indeed, the Respondent failed to take any adverse action against several procompany employees who made extremely violent threats, including the use of weapons to intimidate prounion coworkers at the Respondent's Kan-

[18] In the absence of evidence that Powell's second trailer contained 500-pound drums that required individual unloading, we give no weight to the Respondent's assertion that the two trailers contained a "similar mix of freight."

[19] In this regard, we disagree with the judge's determination (sec. II,(D)) that Powell's remarks did not constitute a threat. Clearly, a reasonable employee who heard Powell's remarks could interpret them as containing at least an implicit threat or warning that they might get injured (either accidentally or intentionally) if they decided to work there.

[20] The dissent's reliance on the Respondent's discharge of three employees at the Memphis facility for making threats as evidence of its consistent termination of employees engaging in such conduct is misplaced. Those terminations involved employees who made overtly violent threats to supervisors and to coworkers, including obscene language, threats to kill a supervisor, and threats to use guns in the workplace. This case does not present such extreme facts.

sas City facility.[21] Although the victims reported these incidents to the Kansas City management, the Respondent failed to discipline the employees involved. By contrast, its decision to suspend and terminate Powell for a relatively benign statement demonstrates that its motive was to single him out because of his protected conduct. See *Sonoma Mission Inn & Spa*, 322 NLRB 898 fn. 2 (1997) (employer failed to show that employees would have been discharged for threats, irrespective of their prounion status, where other employees engaged in comparable conduct not similarly punished).

We disagree with the dissent that the Respondent's conduct at a neighboring facility has no relevance to this case. The judge who tried this case also heard the testimony in the Kansas City case, as both cases were consolidated for trial. Accordingly, the judge was uniquely qualified to weigh the evidence before him and draw conclusions from it. Although those charges ultimately settled, the parties agreed that any of the evidence in the record could be referred to in other litigation. Accordingly, it was entirely appropriate for the judge to consider such evidence.

Additionally, although there is no direct evidence that any of the managers at the Memphis facility were directly involved in those incidents, there is strong circumstantial evidence that the Memphis management likely learned of that misconduct. One of those employees who committed the violent misconduct, Charles Foster, was a truckdriver who operated out of the Memphis facility. The employee who was threatened by Foster reported the incident to the facility's Fleet Service manager, Tony Pratt, who stated that he would contact the Memphis terminal about Foster's conduct. In light of the Respondent's failure to rebut this testimony, we may reasonably draw the adverse inference that the supervisors at the Memphis facility learned of Foster's conduct, but failed to discipline him for it.[22] *Grimmway Farms*, 314 NLRB 73 fn. 2 (1994), enfd. in relevant part mem. 85 F.3d 637 (9th Cir. 1996).

In sum, there is ample evidence of the Respondent's unlawful motive in terminating Powell, including: (1) the Respondent's directions to "get rid" of Powell; (2) the two pretextual disciplinary warnings; and (3) the Respondent's disparate treatment of Powell. We further find that the Respondent failed to meet its burden of rebutting this evidence by showing that it would have discharged Powell in the absence of his protected conduct. Accordingly, we find that the Respondent violated Section 8(a)(3) of the Act in disciplining and discharging Powell.

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having discriminatorily disciplined, suspended, and discharged employee Sam Powell, the Respondent shall offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of the suspension to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We shall also order the Respondent to remove from its files any references to the discipline, suspension, and discharge of Sam Powell, and notify him in writing that it has done so and that it will not use these adverse actions against him in any way. Finally, having found that the Respondent violated Section 8(a)(5) and (1) by refusing to comply with the Union's February 16, 1999 information request, we shall order that the Respondent shall furnish the requested information.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Overnite Transportation Company, Memphis, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in full below.

1. Cease and desist from

(a) Disciplining, suspending, discharging, or otherwise discriminating against any employee for engaging in union activity on behalf of, or otherwise supporting

[21] More specifically, the unrebutted testimony of Anthony Johnson (employee at the Kansas City facility) is that several employees who did not support the Union made the following threat to him: drivers Jim Powell and Bob Hall threatened that they carried a gun and would use it; Brad White and Buss McKenzie placed knives to Johnson's stomach while complaining about union supporters who were passing out literature at the terminal; Ron Meyer threatened to come back with a gun and shoot supporters of the Union, and Charlie Foster put a knife to Johnson's throat and said that he would use it on union supporters. The Respondent presented no evidence that it ever disciplined any of these employees, although it is undisputed that this misconduct was reported to several supervisors and the terminal manager at the Kansas City terminal.

[22] We further reject the Respondent's assertion that Powell's backpay was cut off by his subsequent unlawful secondary picketing. We agree with the judge that there is insufficient evidence in the record that Powell engaged in such conduct. In any event, the Respondent will have the opportunity to raise such matters during the compliance hearing.

Teamsters Local 667, affiliated with the International Brotherhood of Teamsters, or any other union.

(b) Refusing to furnish information about the Respondent's investigation of bargaining unit employees' criminal records, which the Union requested in February 1999, and which is necessary and relevant to the Union's duties as the exclusive representative of the unit employees.

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

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

(a) Within 14 days from the date of this Order, offer Sam Powell 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 previously enjoyed.

(b) Make Sam Powell whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the amended remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline, suspension, and discharge of Sam Powell, and within 3 days thereafter notify him in writing that this has been done and that the discipline, suspension, and discharge will not be used against him in any way.

(d) Provide the Union with the information it requested in February 1999 regarding the Respondent's investigation of the criminal records of the employees in the following bargaining unit:

> All city drivers, road drivers, dock workers, jockey/hostlers, building maintenance employees and shop employees employed at Overnite Transportation Company's Memphis, Tennessee, Hub and City Terminal facilities; excluding[23] all office clerical employees, managerial employees, professional employees, guards and supervisors as defined in the Act.

(e) 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.

(f) Within 14 days after service by the Region, post at its facility in Memphis, Tennessee, copies of the attached notice marked "Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 11, 1999.

(g) 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.

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.

I disagree with the majority's finding that the Respondent violated Section 8(a)(3) and (1) by twice disciplining, suspending, and ultimately discharging employee Sam Powell. My reasons are set forth below.

The majority has set forth the relevant facts and I will not repeat them here. Even assuming that the General Counsel met his initial burden of showing that the Respondent's actions were motivated in part by antiunion animus, I find that the Respondent adequately demonstrated that it would have taken these actions, even in the absence of protected conduct.

a. The February 18 discipline

As to the first disciplinary incident, I agree with the majority that Powell initially approached Watson in his role as a steward and made legitimate inquiries regarding his coworkers' terminations. Thus, I would find that Powell's conduct was initially protected by the Act. However, Powell lost the Act's protection by repeatedly and personally attacking his supervisor and by compar-

[23] In describing the unit in his decision (sec. II,A of recommended Order at par. 2(d)), the judge erroneously omitted the word "excluding."

[24] 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."

ing his supervisor's conduct in the Vietnam war to the conduct of the Nazis in World War II.

My colleagues rely on *Atlantic Steel*.[1] They find that Powell's references to Watson's war record were not so opprobrious as to lose the protection of the Act. I disagree.

First, as the majority recognizes, Powell chose a public location—i.e., the docks—to approach Watson on three separate occasions. See *Aluminum Co. of America*, 338 NLRB 20, 22 (2002) (employee lost the protection of the Act where his profane outbursts took place in employee breakrooms). Indeed, Powell's outburst at this place was designed to publicly humiliate Watson on a sensitive issue.

Next, with respect to the subject matter of the remarks, Powell's personal attack on Watson regarding his Vietnam service was wholly unrelated to his inquiries regarding the discharges of his coworkers. Thus, the subject matter of Powell's remarks were "personal, highly offensive, and escalated" to the point where Watson felt the need to complain to the Plant Manager. See *Trus Joist MacMillan*, 341 NLRB 369, 372 (2004).

Third, in regard to the nature of the remarks, I note that Powell's remarks were not a mere passing reference. Powell repeated his references three times, notwithstanding Watson's efforts to defuse the situation by saying that he did not want to talk about it.

Finally, I would find that the outburst was not provoked by any unlawful conduct by the Respondent. As the majority finds above, and I agree, the Respondent lawfully discharged the seven employees in question. Thus, the Respondent had not committed any unfair labor practices that would have incited such a response.

Thus, I find that the Respondent has shown that Powell engaged in misconduct towards his supervisor, Watson, and that he was disciplined therefore.

b. The February 24 discipline

I further disagree with the majority's finding that the Respondent's decision to discipline Powell on February 24, violated the Act. Instead, I would find that the Respondent's decision to discipline Powell for his work inefficiency was legitimate and not motivated by any antiunion animus.

The majority recognized that Powell had started his day by instructing his fellow employees "don't work faster . . . work safer." As such instructions have been found to be code words for advocating an unlawful work slowdown, the Respondent was justified in closely monitoring Powell's conduct after that point. See *United Airlines, Inc. v. IAM*, 243 F.3d 349, 366 (7th Cir. 2001).

[1] 245 NLRB 814 (1979).

Powell subsequently made good on his implicit threat to slow his pace. He unloaded a trailer at an unreasonably slow rate of speed, as observed by three supervisors. Powell persisted in this slow pace, even after being repeatedly informed that the cargo contained "hot freight" and that the Respondent's customer needed it immediately.

Moreover, the Respondent later corroborated the supervisors' perception that Powell had decreased his productivity. His productivity rate for the first trailer, containing "hot freight," was 3.7 bills per hour, as compared to his "normal rate," as found by the judge, of 7.5 bills per hour for the second trailer containing a "similar mix of freight."[2] Additionally, Powell did not explain his failure to use a more efficient means of unloading (i.e., a forklift instead of hand unloading), although he acknowledged at trial that using a forklift would have doubled his efficiency. Further, contrary to the majority's suggestions that the Respondent should have assisted Powell, I note that Powell was a seasoned veteran with 20 years' experience, 8 of those years as leadman. Thus, Powell did not need the help or advice of his supervisors in deciding the most efficient means of unloading a trailer.

To be sure, employees have a right to refrain from unsafe work practices. However, there is no showing that Powell would have endangered himself or others if he had worked at the Respondent's desired rate. Indeed, the evidence suggests that Powell was engaging in a slowdown, not an effort to protect himself from workplace injury.

In sum, I would find that the Respondent's decision to discipline Powell for his inefficiency on February 24, did not violate the Act.[3]

c. The April 22 suspension and May 4 termination

Finally, I disagree with the majority's finding that the Respondent's decisions to suspend Powell on April 22, and to terminate him on May 4, violated the Act. I find that the Respondent adequately demonstrated that these decisions were legitimately motivated by his threatening

[2] The majority's reliance on the comparison of other employees' productivity rate with Powell's is misplaced. Unlike the evidence regarding Powell (where we can compare his rate for the two trailers unloaded because the freight was similar), such a comparison is not appropriate with the other employees, where we have no information regarding the contents of the freight they unloaded. The majority acknowledges as much in its fn. 14 where it finds "the only accurate way to compare bills-per-hour rates of trailers was to compare trailers containing the same mix of freight."

[3] With respect to both disciplines, my colleagues note that in 1996, Manager Warner told Supervisor Watson to "come up with an excuse to discipline Powell." In response, I note that the remark was made 3 years before the events herein. Further, even assuming arguendo that it is relevant, it simply strengthens the General Counsel's prima facie case.

conduct on April 22, rather than by any antiunion animus.

My colleagues admit that Powell's conduct on April 22 (i.e., threatening the potential strike replacements that they "could get hurt" and suggesting that they would be "run over" by a forklift), constituted threatening behavior. They would nonetheless find that the Respondent's suspension and discharge of Powell was evidence of disparate treatment. However, the Respondent's decision to terminate Powell was consistent with its termination of four other employees at the Memphis facility, all of whom had made similar threats to either coworkers or supervisors.[4]

The majority relies on evidence that the Respondent tolerated violent threats by company supporters at the Kansas City facilities to support a finding of unlawful animus. That reliance is misplaced. The majority reasoned that such evidence is relevant because those charges were consolidated with this case (though tried separately) and the settlement was made part of the record. While that is true, the settlement also contained a "non-admissions clause" explicitly stating that the Respondent was not admitting to liability by settling the cases. In the absence of a decision setting forth the judge's explicit factual findings and credibility resolutions in that case, I would not rely on such testimony to establish a violation here.

Further, I do not see the relevance of events that occurred at one of the Respondent's facilities several hundred miles from Memphis to this case. There is no evidence in the record that, at the time of the instant discipline, any of the management officials at the Memphis facility had any connection to or knowledge of the disciplinary decisions at the Kansas City facility. Although one of the employees involved, Charlie Foster, was an employee of the Memphis facility, the evidence fails to definitively demonstrate that Foster's Memphis supervisors were ever informed of his misconduct. Indeed, the Respondent's policy is to discipline the employee at the facility where misconduct occurred (i.e., Kansas City), so the Memphis supervisors would have had no reason to take action against Foster. Thus, the Respondent's failure to discipline employees at the Kansas City facility is simply not relevant here.

In sum, I would find that the Respondent adequately demonstrated that it decided to twice discipline, suspend and then to terminate Powell for legitimate reasons (i.e., because he engaged in misconduct), rather than for discriminatory reasons.

[4] The majority attempts to distinguish these discharges from Powell's on the basis that the employees involved made threats of a more violent nature (i.e., involving gun, threats to kill, etc.) than Powell did. In my view, Powell's threat to potential replacement employees that they could be run down by forklifts is every bit as intimidating as any of the threats made by prior employees.

MEMBER WALSH, dissenting in part.

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act when it suspended and discharged six employees because of their union activities and when it discharged a seventh employee to mask its reason for discharging the other six. The judge rejected the Respondent's claim that it lawfully discharged the employees because they had falsified their job applications. The judge's findings are fully supported by the record and should be adopted. First, many of the discharged employees had legitimate explanations for failing to disclose their convictions or were told they did not need to disclose them. For example, three of the employees advised the Respondent about their convictions at their job interview, but were told not to worry about it. Another employee was told by both his probation officer and a company official that his conviction was a misdemeanor. Second, the evidence offered by the Respondent to show that it consistently discharged employees who falsified their employment applications by denying their criminal histories is unpersuasive. Such evidence describes employees who were discharged or not offered employment under circumstances that are not comparable to the employees discharged here. Finally, the record also establishes disparate treatment, with the Respondent choosing to look the other way when it came to wrongdoing by employees who had indicated they did not support the Union. For instance, one employee who had expressed that he had nothing to do with the Union received no discipline at all following a post-hire felony conviction, notwithstanding the fact that the Respondent's employee handbook provided that he was subject to disciplinary action including dismissal because of such conviction. Accordingly, I agree with the judge that the Respondent has failed to prove it would have imposed these discharges in the absence of the employees' union activity, and I dissent from my colleagues' failure to adopt the judge's decision in this regard.

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 discipline, suspend, discharge, or otherwise discriminate against any employee for engaging in union activity on behalf of, or otherwise supporting Teamsters Local 667, affiliated with the International Brotherhood of Teamsters, or any other union.

WE WILL NOT refuse to furnish information about the Respondent's investigation of bargaining unit employees' criminal records, which the Union requested in February 1999, and which is necessary and relevant to the Union's duties as the exclusive representative of the unit employees.

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

WE WILL, within 14 days from the date of this Order, offer Sam Powell 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 previously enjoyed.

WE WILL make Sam Powell whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discipline, suspension, and discharge of Sam Powell, and within 3 days thereafter notify him in writing that this has been done and that the discipline, suspension, and discharge will not be used against him in any way.

WE WILL provide the Union with the information it requested in February 1999 regarding the Respondent's investigation of the criminal records of the employees in the following bargaining unit:

All city drivers, road drivers, dock workers, jockey/hostlers, building maintenance employees and shop employees employed at Overnite Transportation Company's Memphis, Tennessee, Hub and City Terminal facilities; excluding all office clerical employees, managerial employees, professional employees, guards and supervisors as defined in the Act.

OVERNITE TRANSPORTATION COMPANY

Linda M. Mohns and *David M. Biggar, Esqs*., for the General Counsel.

Andrew M. Slobodien and *Kenneth F. Sparks, Esqs. (Matkov, Salzman, Madoff & Gunn),* of Chicago, Illinois, for the Respondent.

Samuel Morris and *Timothy Taylor, Esqs. (Allen, Godwin, Morris, Laurenzi & Bloomfield),* of Memphis, Tennessee, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LEONARD M. WAGMAN, Administrative Law Judge. These cases were tried in Memphis, Tennessee, on June 19–20, 23, and 26–28; on July 11–13 and 18–21; on November 6–10, 2000; and on March 19 and 20, 2001. When these proceedings commenced before me on June 19, 2000, Cases 26–CA–19037, 26–CA–19044, 26–CA–19100, 26–CA–19168, 26–CA–19208–1, and 26–CA–19208–2 were consolidated with Cases 10–CA–31891, and 10–CA–32257, 17–CA–20134, 17–CA–20329–3, 25–CA–26709–2, 26–CA–19263, 26–CA–19402. Informal settlements in these latter cases resulted in their severance from the other cases during the trial.

Upon charges filed by the Union, Teamsters Local 667, Affiliated with the International Brotherhood of Teamsters in Cases 26–CA–19037, 26–CA–19044, 26–CA–19100, 26–CA–19168, 26–CA–19208–1, 26–CA–19208–2, and 26–CA–19402, on various dates in 1999[1] and 2000, alleging that the Company, Overnite Transportation Company, had violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), the Regional Director for Region 26 issued an order consolidating cases, consolidated complaint, and notice of hearing. Thereafter, as stated above, Cases 26–CA–19263 and 19402 were severed from the consolidated complaint after the General Counsel and the Company had executed an informal settlement in those cases. In the remaining cases captioned above, the first consolidated complaint alleged that the Company violated Section 8(a)(1) and (3) of the Act by disciplining, suspending, and discharging employees Walter G. Jones and Terry Holcomb, and by disciplining and discharging employee Sam Powell, because they engaged in concerted activity protected by Section 7 of the Act and because they supported the Union.

In a fourth order, dated March 29, 2000, the Regional Director consolidated cases alleging that the Company violated Section 8(a)(1) and (3) by suspending and then discharging employees Fred Clark, Kyle Medley, William Palmer, Charles Watkins, Autra Wilkerson, K. W. Wilbanks, Tony Brown, and Wilford Hugh McCalla because they were union members. This consolidated complaint also alleged that the Company violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with information necessary for and relevant to the Union's performance of its duties as exclusive collective-bargaining representative. The Company, by its answers to the complaints, denied committing the alleged unfair labor practices.

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

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

by the General Counsel, the Company, and Local 667, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, with an office and place of business in Memphis, Tennessee, referred to below as its Memphis service center, engages in the interstate transportation of general commodity freight. During the 12-month period ending February 29, 2000, the Company derived gross revenues in excess of $50,000 for transporting freight from the State of Tennessee directly to points outside the State of Tennessee. During the same 12-month period, the Company, in conducting its business operations, purchased and received at its Memphis Service center goods valued in excess of $50,000 directly from points located outside the State of Tennessee. The Company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Local 667 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background and Issues Presented

The Company is a less-than-truckload commercial freight carrier headquartered at Richmond, Virginia. In *Overnite Transportation Co.,* 333 NLRB 1392 (2001), the Board found that the Company operates approximately 175 service centers nationwide. One of these centers, located at Memphis, Tennessee, is involved in the instant cases. The Memphis service center performs as a city terminal and a hub terminal. The Memphis service center receives freight from other company service centers for distribution in and around Memphis. The Memphis facility also picks up freight in and around Memphis for shipment to other company terminals. The Memphis service center also receives and ships through freight to other company service centers.

The Company employs approximately 530 employees at its Memphis facility. Of these, 200 are dockworkers, who unload and load freight. They use forklift trucks and other equipment to accomplish their tasks. The Memphis service center also employs 147 over-the-road drivers, 41 city drivers, and approximately 60 shop employees, who maintain the tractors and trailers. In addition, the Company employs dispatchers and office employees at Memphis. The management of the Memphis service center consists of 1 service center manager, 2 assistant managers, 6 operations managers, and 12 supervisors.

On October 9, 1997, following a representation election,[2] the Board certified Local 667 as the exclusive collective-bargaining representative of the following unit of the Company's employees:

> All city drivers, road drivers, dock workers, jockey/hostlers, building maintenance employees and shop employees employed at Overnite Transportation Company's Memphis, Tennessee, Hub and City Terminal facilities; all office clerical employees, managerial employees, professional employees, guards and supervisors as defined in the Act.

On April 22, the Regional Director dismissed a petition filed in Case 26–RD–1008, on October 21, 1998, seeking a decertification election in the above-described bargaining unit. On May 5, the Company filed a timely request for review by the Board. Thereafter, the Board, in an order issued on May 19, affirmed the Regional Director's dismissal. Thus, Local 667 continues to be the exclusive collective-bargaining representative of that unit.

Local 667 and the International Brotherhood of Teamsters have been bargaining with the Company locally and nationally since 1997. However, the parties have not reached an agreement. Local 667 engaged in a strike at the Memphis service center from July 5 to 9. Other Teamster locals conducted simultaneous strikes at Atlanta and Kansas City. Local 667 began a second strike at Memphis in October that was in progress when the hearing in these cases closed in March 2001.

On the morning of December 24, 1998, Acting Hub Manager Joseph G. Jasmer received word from the facility's guard service that there had been a break-in at the Memphis service center. He immediately contacted company investigator, Roger Gleason. On December 26, 1998, Jasmer also contacted company investigator Mike Martin and advised him of the break-in. Gleason and Martin began their investigation of the Memphis break-in during the interim between Christmas and New Year's Day. They learned that approximately $250,000 worth of merchandise had been taken. The loss included computers, television sets, and other electronic equipment, satellite dish equipment, and Nike shoes and apparel.

A second break-in occurred during the New Year's weekend. As in the earlier break-in, the thieves cut holes in the terminal fence, and broke into selected trailers containing high value cargo. Jasmer, Gleason, and Martin concluded that the thieves were either company employees, who knew which trailers contained high priced cargo, or were people who had help from Company employees.

Gleason and Martin sought help in their investigation from the FBI, the Memphis Police Department, and the Shelby County Sheriff's office. The two investigators also sought information from selected dock employees and management staff. The Company posted notices on all the buildings at its Memphis service center, offering a $25,000 reward for information regarding the person or persons responsible for the thefts. These efforts produced neither leads nor suspects.

Gleason and Martin decided to review employment applications. I find from Mike Martin's uncontradicted testimony that he and Gleason included rank-and-file employees and management in their search. They planned to do background checks on all employees and members of management whose job applications predated 1997, when the Company began making prehire background checks on all job applicants.

Issues presented in the captioned cases are whether a preponderance of the evidence shows that the Company violated Section 8(a)(3) and (1) of the Act by:

[2] In the Board-held election, on September 16, 1996, Local 667 received 219 votes: 210 votes were cast against Local 667. *Overnite Transportation Co.,* 335 NLRB 1392, 1396 (2001).

(a) Suspending and then discharging eight employees because they falsified their job applications.

(b) Issuing two written warnings to Sam Powell, and then discharging him because he engaged in union activity.

(c) Suspending and discharging Walter Jones and Terry Holcomb because they engaged in union activity.

A further issue presented is whether the Company violated Section 8(a)(5) and (1) of the Act by refusing to furnish the Local 667 with information it requested in February 1999, regarding the Company's investigation of bargaining unit employees' criminal records.

B. The Eight Discharges Resulting From the Investigation

l. The facts

a. The investigation

I find, from Roger Gleason's testimony, that in February, he and company investigator Martin began conducting their criminal background checks. Gleason considered this to be "part of an investigative technique" to identify employees who "may have a propensity" to get involved in theft or theft-related conduct. He also finds this technique reveals falsifications of applications regarding criminal records. Armed with this information, Gleason has found that employees are more forthcoming with information about the theft when confronted with their own falsification.

Gleason and Martin in recent years have used this technique at company service centers at Los Angeles, California, Atlanta, Georgia, and Houston, Texas. In these three instances, the background check was restricted to only the particular shift involved in the theft at each service center. In 1998 or 1999, Gleason did background investigations for the entire Oakland and Fontana, California service centers, where the Company was unable to pinpoint a specific shift or group of employees as suspects in either theft. There was no showing that the Company solved any of the thefts at those locations.

At Memphis, in 1999, Gleason and Martin limited their background searches to the criminal court records of Shelby County, Tennessee, which included Memphis, and DeSoto County, Mississippi. I find from Gleason's testimony that most of the Company's Memphis employees live in those two jurisdictions. The records available in Shelby County went back to the 1970's. Those in DeSoto County went back 7 to 10 years.

Since 1994 Overnite's "Employee Handbook" has included in its "Employee Conduct" section a list of employee misconduct "that will subject the employee to disciplinary action, including dismissal." One specification of such misconduct included in this list is the following:

> 17. Falsifying any Company record or employment application.

Prior to September 1994, the Company's employment applications included the question: "Have you ever been convicted of a felony?" followed by "If yes, explain." After September 1994, the Company's employment applications contained the following question: "Have you ever been convicted of or pled guilty or nolo contendre (no contest) to a crime other than a traffic violation?" followed by: "If yes, describe in full and give court location, date."

b. The discharges

(1) Charles Watkins

Charles Watkins applied for work at the Company's Memphis service center on January 30, 1992. When he filled out his application on that date, he answered no to the felony question. The Company did not respond to this application. On April 13, 1992, Watkins filled out a second Company job application in which he left blank the answer to the question about a felony conviction. However, Assistant Terminal Manager J. J. Lewis interviewed him and asked Watkins for an answer to that question. Watkins disclosed that he had a felony conviction. In fact, he had pleaded guilty to two drug possession charges in 1989.

Upon hearing his disclosure, Lewis made a phone call and handed the phone to Watkins. A woman on the other end of the phone asked Watkins about his felony and whether he was ready to turn his life around if her agency helped him get a job. Watkins said he was willing to turn his life around if they helped him get a job. After further questioning Watkins, the woman asked him to put Lewis back on the phone. After Lewis got off the phone, he said Watkins would be hired, but would be required to go to an office elsewhere and fill out some papers.

Watkins began working at the Company's Memphis service center 1 or 2 days after his interview with Lewis. Approximately 1 month later, on the advice of Supervisor Willie Jones, Watkins went to an office of the Tennessee Department of Employment Security where he completed a form for the Targeted Job Tax Credit program. The form stated that an employer who hired Watkins would enjoy a Federal income tax credit.

The Company employed Watkins first on its dock and later in terminal maintenance. Until Acting Service Center Manager Jasmer fired him on February 17, the Company had never disciplined Watkins. During his employment, Watkins actively supported Local 667. He belonged to its 1995 organizing committee and handbilled at the Memphis terminal's gate. Watkins participated in both the July and October 1999 strikes. Since Local 667's certification, he has been the dock employees' steward.[3]

On February 11, Acting Manager Jasmer summoned Watkins to Jasmer's office.[4] Waiting for Watkins were Jasmer, and company investigators Martin and Gleason. The investigators confronted Watkins with their discovery of his 1989 felony conviction. He protested that he understood that his criminal record was confidential and should not be brought up. He also asserted that he had filled out a second application in April 1992. Watkins admitted omitting any disclosure of his drug

[3] I based my findings regarding Watkins' employment history and union activity upon his testimony, which was uncontradicted.

[4] Jasmer denied that he had participated in Watkins' interview. Watkins impressed me as being a careful and candid witness. Further Jasmer's testimony shows he participated in at least two investigative interviews with Gleason and Martin. I also noted that Watkins' interview took place in Jasmer's office. Accordingly, I have credited Watkins' testimony showing Jasmer's presence at Watkins' interview.

conviction on his applications. Watkins insisted that the Company knew of his 1989 conviction because of the papers he filled out for a tax credit that it received for hiring him. Watkins told the investigators that J. J. Lewis and former Memphis City Service Center Manager Carroll McKee also knew of his 1989 conviction and the tax credit.

The investigators had no evidence to support Watkins' story. They did not believe Watkins' explanation. Gleason and Martin took Watkins out of service and escorted him to the service center's parking lot. They passed the results of their investigation and interview with Watkins to Acting Manager Jasmer.[5]

On February 17, Jasmer telephoned Watkins and fired him. By this time, Watkins had assembled evidence supportive of his explanation. Jasmer was not interested in Watkins' evidence.

Martin conducted a further investigation. He sought and obtained written statements from J. J. Lewis, Carroll McKee, and Willie Jones. None of the three substantiated Watkins' story. Indeed, they denied hearing about his conviction at the time that he was hired. However, in March, Local 667's counsel obtained documents from the State of Tennessee showing that Watkins had been telling the truth about his participation in the Targeted Job Tax Credit program (TJTC) and about his disclosure to the Company of his felony conviction when he applied for work in 1992. Counsel sent the documentation to the Company's counsel. In mid-April, Martin received confirmation of Watkins participation in the TJTC program. Martin notified the Company's director of Hub Operations, H. Thomas Nelson III, of the new information on Watkins.[6]

Local 667 filed an unfair labor practice charge in Case 26–CA–19100 on March 29, alleging Watkins' discharge as one of a series of violations of Section 8(a)(3) and (1) of the Act. Thereafter, on March 29, the Acting Regional Director issued a consolidated complaint including an allegation that the Company had violated Section 8(a)(3) and (1) of the Act by discharging several employees, including Watkins.

In May, the Company's director of Hub Operations telephoned Watkins and announced that there had been some mistakes and went on to offer reinstatement and backpay for the period following Watkins' discharge on February 17. Watkins returned to work on May 10.[7]

At the hearing of the above cases on June 28, 2000, counsel for the General Counsel announced that there was a non-Board settlement of Watkins' portion of Case 26–CA–19100. Counsel for the General Counsel also reported that the Company's counsel had agreed to expunge the record of Watkins' discharge from the Company's records. Counsel for the General Counsel stated that if the expungement occurred prior to the resumption of the hearing on July 11, 2000, she would request withdrawal of so much of that case as concerned Watkins.

The record does not show that the Company has expunged Watkins' discharge from its records. Nor has the General Counsel moved for withdrawal of the complaint allegations regarding Watkins' discharge on February.[17]

(2) Floyd Wilbanks

Floyd Wilbanks applied for work as a city driver at the Company's Memphis service center on March 26, 1992. When he filled out his application, he left blank the space after the question: "Have you ever been convicted of a felony?" However, in 1981 Wilbanks was convicted of a drug offense, which, after plea-bargaining, was reduced to an attempt to commit a felony. Also, in 1984, Wilbanks was convicted of illegal possession of firearms. Terminal Manager Carroll McKee interviewed Wilbanks and reviewed the latter's application. McKee noted the blank space and asked Wilbanks about it. Wilbanks explained the convictions resulting from his plea bargain and the 1984 firearm offense. He said he was not certain that his 1981 convict was a felony. McKee advised Wilbanks to leave the space blank. McKee said he would check with the Company's main office at Richmond, Virginia, and let Wilbanks know. Two or three days later, McKee telephoned Wilbanks and told him to report to the Memphis terminal for work on the following Monday.[8]

McKee testified that he had no specific recollection of his conversation with Wilbanks when they discussed the blank space on the latter's employment application in April 1992. However, McKee carefully explained his practices during a prehire interview. One such practice related to instances when the applicant had left blank the answer to the question regarding felony convictions. In that circumstance, McKee's practice was to ask the applicant if he had a felony conviction. If the applicant answered that he did, and if McKee was interested in hiring the applicant, he would have asked his regional vice-president or vice-president of personnel for clearance to hire the applicant. That Wilbanks was hired 2 or 3 days after his interview strongly suggests that McKee followed his practice and obtained the necessary clearance.

I have noted that Assistant Terminal Manager James J. Lewis apparently signed the last page of Wilbanks' application on April 6, 1992. Next to Lewis's signature is the declaration that Lewis interviewed and hired Wilbanks. However both McKee and Wilbanks credibly testified that McKee interviewed and hired Wilbanks.[8]

The record contains no evidence regarding Lewis's participation in Wilbanks' hiring, beyond his signature at the end of Wilbanks' application. Lewis did not testify in these proceedings. No testimony was elicited from the two company investigators, who testified extensively before me, regarding Lewis' role in the hiring of Wilbanks. On cross-examination before me, Joseph Jasmer, who was acting service center manager at Memphis during the investigation of Wilbanks' employment application, admitted that no effort was made during that proc-

[5] I based my findings regarding Watkins' interview on his and Martin's testimony.

[6] I based my findings regarding Martin's further investigation and his contact with Nelson on their testimony.

[7] My findings regarding Watkins' telephone contact with Nelson are based on their testimony.

[8] McKee distinctly recalled that at the prehire interview, Wilbanks wore his hair in a long gray ponytail and had tattoos all over his arms. McKee's frank admission that he did not remember details of the interview and his frank and forthright testimony regarding his relationship with Wilbanks persuaded me that he was a reliable witness doing his best to tap his recollection.

ess to contact Lewis and ask him about his signature and what he knew of Wilbanks' prehire interview. Jasmer also admitted that he considered such information irrelevant. Without any explanation for Lewis' signature, I have relied on Wilbanks' and McKee's credible testimony in making my findings of fact regarding the circumstances leading up to the Company's hiring of Wilbanks in April 1992.

Except for a short stint as a dockworker, Wilbanks worked for the Company as a city driver from 1992 until his discharge in 1999. McKee, who resigned as manager of the Memphis service center in 1996, became acquainted with Wilbanks' work performance. I find from McKee's testimony that he considered Wilbanks to be an exceptional employee, "very good with customers, very good with other drivers, dispatchers." McKee was not aware of Wilbanks having any disciplinary problems at work. Nor was there any showing that Wilbanks' work performance or conduct deteriorated after McKee's resignation. Due to a heart attack, Wilbanks was on sick leave from his employment from June 1998 until February 1999. [9]

Wilbanks supported Local 667 during his employment at the Company's Memphis service center. He attended a few union meetings; distributed union literature wore a union button on occasion and dallied at the terminal's gate with other union activists. He distributed union literature by leaving copies of it in the two or three different trucks he drove on a working day. During his tenure as manager of the Memphis service center, McKee was not aware of Wilbanks' union activity. Indeed, Wilbanks' usual response to questions about his union sentiment was that it was nobody's business.

In February 1999, soon after he returned from sick leave, Acting Manager Jasmer and Roger Gleason,[10] one of the Company's investigators, confronted Wilbanks in an office at the Memphis service center. Gleason explained that during the investigation of the break-in at Memphis during Christmas 1998, the investigators found that Wilbanks had a criminal record and was a convicted felon. The investigator went on to say that Wilbanks would be suspended or terminated. Wilbanks told Jasmer and Gleason that he had mentioned the felony to McKee. Mckee had said he would get back to Wilbanks about it, but never did. When Wilbanks asked if he should contact McKee, Jasmer and Gleason said they would.

At the conclusion of the meeting, Jasmer sent Wilbanks home with instructions to call the Memphis terminal's office on the following Friday. Wilbanks called the office on Friday and was told to call again on Monday. When he called on Monday, the person who answered the phone told him to call the next day. When he called as instructed, Wilbanks learned that he had been discharged. Jasmer made the decision to discharge Wilbanks.[11]

On February 11, Gleason took a short statement from Wilbanks regarding the latter's prehire interview with McKee in April 1992. In this statement, Wilbanks asserted that during his exchange with McKee, the felony charge was "mentioned." Also, in his statement, Wilbanks stated, in substance, that he and McKee agreed that in light of the 11-year span since the conviction, there was "no reason to fill in the blank."

Soon after his discharge, Wilbanks contacted McKee and asked if he would talk to the Company on Wilbanks' behalf. McKee said he thought it better that he wait until the Company contacted him. The Company investigators contacted McKee about Watkins' termination. However, they did not ask him about Wilbanks.[12]

Investigator Gleason telephoned Frank Plemmons, a former Memphis operations manager and asked him to contact McKee about Wilbanks' job application. Plemmons reported back that McKee was uncertain about whether he had had any conversation with Wilbanks regarding the latter's job application and that McKee was annoyed by the Company's repeated inquiries.[13]

I find from McKee's testimony that he told Plemmons that he believed that he had received clearance to hire Wilbanks after explaining the applicant's felony conviction. The Company's investigators did not contact J.J. Lewis, the assistant manager whose signature appeared at the bottom of Wilbanks' application.

McKee contacted Acting Manager Joe Jasmer at the Memphis service center by telephone and then visited him. McKee looked at Wilbanks' application and told Jasmer that he, McKee, "was not one-hundred percent sure" but he believed that he had "done something" about the application, that he had "called someone." McKee insisted that Wilbanks' application had been cleared. McKee told Jasmer that Wilbanks was being falsely accused.[14]

After his encounter with Jasmer, McKee attempted to pursue the matter of Wilbanks' application by telephoning the Company's Richmond office. He sought help from the Company's General Counsel's office. McKee explained Wilbanks' plight to someone in that office. McKee asserted his belief that after learning of Wilbanks' felony conviction he had obtained clear-

[9] My findings of fact regarding Wilbanks work assignments and his sick leave are based on his uncontradicted testimony.

[10] Jasmer testified that investigator Mike Martin was with him when they questioned Wilbanks in February 1999. However, I find from Martin's and Gleason's testimony that Gleason was the sole investigator present on that occasion.

[11] My findings regarding Wilbanks' suspension and his notification of discharge are based on his and Jasmer's testimony.

[12] My findings regarding Wilbanks' request for McKee's assistance and McKee's initial contact with the Company's investigation are based on their testimony.

[13] My findings regarding investigator Gleason's contact with Plemmons are based on Gleason's uncontradicted testimony.

[14] According to Jasmer, McKee lied about visiting Jasmer regarding Wilbanks' discharge. However, McKee's testimony in this regard seemed logical in light of his decision to help Wilbanks. Also, I find McKee's account of his visit amply detailed and reasonable. The decisive factor in resolving this issue of fact was my impression that McKee was a frank witness, doing his best to fathom his recollection. In contrast, Jasmer seemed less forthright on cross-examination. His testimony that confirming whether J .J. Lewis had in fact interviewed and hired Wilbanks was irrelevant to the mystery surrounding the hiring of Wilbanks in 1992, added to my doubt as to the reliability of his testimony regarding Wilbanks.

ance from Richmond to hire Wilbanks. McKee's testimony did not reveal the response to his attempt to verify his assertions.[15]

(3) Frederick L. Clark

On October 17, 1988, Frederick L. Clark pleaded guilty to the felony of fraudulent receipt of unemployment benefits under the Tennessee Criminal Code. He received a 6-month suspended sentence and probation. Following his conviction, Clark's probation officer told him that he had been convicted of a misdemeanor.[16].

On April 5, 1994, Clark applied for work at the Company's Memphis service center. He received a job application from Personnel Director Gail Luna. In filling out the form, Clark came upon the question, "Have you ever been convicted of or pled guilty to a felony?" In the blank space provided for an answer. Before writing this answer, Clark told Luna that in 1988, he had been arrested for overdrawing on his unemployment. She replied that his offense was not a felony. Accordingly, Clark wrote "No" in the space. Luna completed the interview and said she would get back to Clark, who went home. Upon arrival at home, he found a message from Luna inviting him to return to the Company and take a drug test. Clark returned to the Memphis Hub, took the drug test, and was hired. Luna put him to work that evening on the night shift.[17]

The Company hired Clark as a dockworker, a position he held at the Memphis hub until his discharge on February 11. The Company assigned him to the day shift, which began at 6:30 a.m. Until his discharge, the Company did not discipline Clark.[18]

Clark was an open and persistent supporter of the Teamsters. He frequently handed out literature for the Teamsters at the terminal's entrance from 5:30 until 6:15 a.m. He also wore shirts at work, daily, that contained Teamster messages. One such message was "Will Strike If Provoked." Clark began supporting the Teamsters in 1995, during their organizing drive at Memphis.

In February, Martin and Gleason interviewed Clark in connection with the investigation of the Christmas break-in. They began the interview by asking if he knew about the break-in. Clark said he had heard rumors about it but had no knowledge of it. I find from Gleason's testimony that he told Clark that in the course of their investigation Gleason and Martin had discovered a criminal conviction that Clark neglected to show on his job application. Clark replied that he had been put on probation as a result of that conviction and was under the impression that it was a misdemeanor and not a felony. Clark also said that inasmuch as he didn't kill anybody, he believed his crime could not be a felony. Gleason relieved Clark of his duty until further notice. On the Thursday of the following week Clark received a telephone call from a person who said they were calling from the Company's Richmond, Virginia office and announced that Clark was discharged for falsification of his application.[19]

On March 15, Clark visited a Tennessee Department of Correction office and obtained the following letter from Benjamin J. Poindexter, manager[20] I find from;

> To Whom It May Concern:
>
> This letter is to verify that Mr. Frederick Clark, D.O.B. 6/24/55 was sentenced for six (6) months on a misdemeanor for the offense of Unemployment Fraud. He was placed on probation on 10/17/88 and his probation expired on 10/17/93 11/89.
>
> If you should have any questions, please feel free to contact me at (901) 344-5076.
>
> Sincerely,
>
> Benjamin J. Poindexter, Manager

Clark never showed this letter to either Assistant Manager Jasmer or to investigators Gleason and Martin. The Company's investigative files related to Clark's termination included a copy of this letter together with cover memorandum from Congressman Harold E. Ford Jr.'s office dated April 26 and May 24, respectively.

In February, following the interview, Martin went to a law library and found that Clark's offense was a felony under Tennessee law. He reported his finding to Acting Manager Jasmer, who admittedly discharged Clark on February 11.[21]

At the hearing in these cases, counsel for the General Counsel used the letter quoted above in cross-examining Gleason and Jasmer. Gleason testified that the letter quoted above would not have changed his view that Clark had falsified his employment application in 1994. Jasmer testified that he did not remember anyone telling him that Clark had answered no to the question about whether he had been convicted of a felony because he believed his conviction in 1988 had been for a misdemeanor. When shown the letter from the Tennessee Department of Correction, quoted above, Jasmer testified that he might have considered Clark's false answer as the result of misunderstanding rather than willful deceit. Jasmer also conceded that the letter might have caused him to think differently about Clark's termination.

[15] I based my findings regarding McKee's call to the Company's Richmond office on his uncontradicted testimony.

[16] My findings regarding Clark's conviction and his probation officer's remark are based on Clark's uncontradicted testimony.

[17] My findings regarding Clark's encounter with Luna are based on his full and forthright testimony. On direct examination, in answer to leading questions, Luna denied that she had ever given advice to anyone that a particular crime was a felony or that she had ever advised any applicant how to fill out a job application section dealing with criminal background. Her denials came quickly, without hesitation. Of the two, Clark seemed more conscientious in his effort to provide his recollection. Accordingly, I have credited Clark's testimony in this regard.

[18] My findings regarding his work at the Memphis Hub and his manifestation of support for the Teamsters are based on his uncontradicted testimony.

[19] My findings regarding the investigators' interview with Clark are based on Clark's and Gleason's uncontradicted testimony.

[20] My findings regarding the circumstances under which Clark received this letter are based on Poindexter's and Clark's uncontradicted testimony.

[21] My findings regarding Martin's legal research are based on his uncontradicted testimony.

(4) Autra Wilkerson

In November 1995, while an employee of Manpower, Incorporated, Autra Wilkerson was assigned to work at the Company's Memphis service center as a dockworker. In January 1996, Wilkerson applied to the Company for employment as a dockworker. The Company employed him as a dockworker at Memphis until February 14.[22]

In his application dated January 15, 1996, Wilkerson wrote in "no" in response to the question: "Have you ever been convicted of or pled guilty to a crime other than traffic violations?" However, at the time he filled out this application, Wilkerson was on a 3-year term of probation following his manslaughter conviction in Tennessee. He explained to his interviewer, David Allgaier, that he had been convicted of manslaughter and was now on probation. Allgaier told Wilkerson not to worry about the conviction and not to write it down.

At the time of this interview, the Company was concerned about a drug problem among its Memphis' employees. Allgaier asked if Wilkerson had a drug problem. Further, Allgaier noted that Wilkerson had worked at his last job for 14 years and asked why he had left it. When Wilkerson had completed the application, he submitted it to Allgaier. The Company hired Wilkerson approximately 3 weeks later.[23]

In his testimony before me, Wilkerson admitted that he also had a felony conviction in 1979 for larceny and a further conviction in 1985 for gambling. There was no showing that he ever revealed these two convictions to Allgaier, or to any other member of the Company's management.

On July 16, 1996, Wilkerson filed a second application for employment by the Company as a dockworker. He again wrote "no" in the space following the question about prior crime convictions. Wilkerson's testimony at the hearing in these cases did not disclose why he filed the second application. Nor is there any explanation anywhere in the record.

During his employment at the Company's Memphis service center, Wilkerson consistently came to work on time and was absent for only 2 days because of a strep throat. At most, the Company issued two disciplinary writeups to him during his tenure at Memphis.

Wilkerson supported Local 667 and the Teamsters. He wore union shirts, caps, and pins, attended all the union meetings and handbilled before his shift started. During the years he worked at the Company's Memphis service center, Wilkerson handbilled for the Teamsters or Local 667 10 or 12 times. Every workday, Wilkerson wore a union cap and a union pin or button.

In February 1999, Roger Gleason, while investigating the Christmas 1998 break-in at the Company's Memphis service center, discovered a court record showing Wilkerson's 1995-manslaughter conviction. Gleason checked Wilkerson's applications and noted the discrepancy between the employee's answer to the question about convictions and the court record. Gleason and Martin arranged to interview Wilkerson.

On or about February 15, Gleason and Martin met with Wilkerson and informed him of their investigation. The investigators told Wilkerson about the break-in, the offer of a reward and the absence of any response. They also told Wilkerson that they were doing a background check on everyone at the terminal.

The remarks focused on Wilkerson's two applications. Gleason asserted that the investigation had found a manslaughter conviction against Wilkerson that he had not shown on his applications. Wilkerson admitted that he had a criminal conviction. He insisted that he was a good employee and that his criminal act came in the context of self-defense. Wilkerson explained that his attorney had advised him to take a plea asserting self-defense. He also admitted that he had not answered the application's question regarding prior convictions.

Wilkerson said his lawyer advised him not to reveal his conviction on his application. He also said he thought that a truthful answer would prevent him from being hired and that he did not want anyone to know about it. The investigators suspended Wilkerson, who was escorted to the terminal's entrance.[24]

The investigators reported the discrepancy between Wilkerson's job applications and the court records showing the manslaughter conviction to Acting Manager Jasmer. Jasmer decided to discharge Wilkerson. Three or four days after Wilkerson's suspension, Jasmer telephoned Wilkerson and discharged him.[25]

On April 20, the Memphis office of Congressman Harold E. Ford Jr. sent a memorandum from the Tennessee Department of Correction to the Company regarding Autra Wilkerson's 3-year probation period following his manslaughter conviction. In pertinent part, the memorandum stated:

> This is to advise you, that in the course of monitoring Mr. Wilkinson's employment status, the probation officer

[22] My findings of fact regarding Wilkerson's job history and union activity are based on his uncontradicted testimony.

[23] Allgaier testified on direct examination by company counsel that he had no specific recollection of interviewing Wilkerson in 1996. Allgaier also testified that, as a matter of practice, he never told any job applicant to leave blank the answer to the application's question regarding crime conviction. However, he conceded, on cross-examination, that when company supervisors recommended a manpower dockworkers for hire by the Company, that recommendation, alone, was enough information to sustain a decision to hire him or her. Allgaier admitted that, in the face of such a recommendation, there "[p]robably wouldn't be much of an interview." Allgaier also conceded that at the time of Wilkerson's interview, the company interviewers were more focused on drug use. This last assertion corroborated Wilkerson's testimony that during his interview in 1996 Allgaier asked Wilkerson if he had "ever been involved in drugs." Allgaier's testimony left open the possibility that he hired Wilkerson without regard to the latter's manslaughter conviction. As he testified, Wilkerson seemed to be giving his recollection frankly. His demeanor and Allgaier's admissions convinced me to credit Wilkerson's version of his prehire interview by Allgaier in 1996.

[24] My findings regarding Wilkerson's interview with the Company's investigators are based on Martin and Gleason's testimony. Wilkerson's recollection of that encounter seemed sketchy. Martin and Gleason seemed to have a much better grasp of the interview and testified in an objective manner about it.

[25] My findings regarding the investigators' report to Jasmer and his decision to fire Wilkerson are based on the uncontradicted testimony of Jasmer and the investigators.

would have verified Mr. Wilkerson's employment with his employer/supervisor.

Maintaining employment is a condition of probation. It is the probation officer's responsibility to verify employment with the employer. It should be assumed that at some point that Taylor talked to Wilkerson's employer/supervisor.

Taylor, whose given name was London was a probation officer for the Tennessee Department of Correction until November 1998. He monitored Wilkerson's 3-year probation. As of March 3, Taylor was deceased.

The Company quickly passed the memorandum to investigator Mike Martin, who read it and contacted Dorothy B. Johnson, manager of the Tennessee Department of Correction's Memphis office. On May 24, pursuant to Martin's request made on or about May 16, Johnson faxed copies of Taylor's contact notes to Martin. These notes reflected verification of Wilkerson's employment during his probation. Martin reviewed the contact notes and found no reference to any personal contact with a member of company management regarding Wilkerson's employment.

I have reviewed the same notes and agree with Martin's analysis. I also find from Martin's testimony that he learned from discussion with Johnson and other Correction employees that Taylor's verification of Wilkerson's employment would be satisfied by company payroll check stubs supplied by Wilkerson and that contact with a Company official would be unnecessary for verification. After considering the memorandum and the other evidence and testimony provided by the Memphis office of the Tennessee Department of Correction, Martin and ultimately, the Company, saw no grounds for changing their conclusions regarding Wilkerson's falsification of his job applications.[26]

(5) Wilford Hugh McCalla

Wilford Hugh McCalla was convicted of rape in October 1966, after pleading guilty, by the Criminal Court of Shelby County, Tennessee. On May 19, 1970, while McCalla was serving a jail sentence for that conviction, the Governor of Tennessee commuted his sentence and McCalla was released.

On August 29, 1978, McCalla applied to the Company for employment as a salesman. In filling out his application, McCalla did not respond in the blank space next to the question: "Have you ever been convicted of a felony?" After he submitted his application, two Company sales managers interviewed McCalla without asking about his failure to disclose whether he had ever been convicted of a felony. McCalla did not volunteer the information. On the following day, the Company hired McCalla as a sales representative at its Memphis service center.[27]

I find from McCalla's uncontradicted testimony that his immediate supervisor was the Company's district sales manager based at Indianapolis, Indiana. Prior to his discharge on June 1, McCalla's work record was clear any disciplinary action. During his tenure, McCalla received recognition for his performance, having won several companywide sales contests.[28] Carroll McKee, who managed the Company's Memphis service center from August 1990 until sometime in 1996, observed McCalla's work performance. I find from McKee's testimony that he considered McCalla to be an outstanding trucking company sales representative in Memphis. Paul Reed, the Company's district sales manager, who supervised McCalla in 1999, until June 1, considered him to be an average employee. In a range of 1 to 5, Reed rated McCalla a 3.

There was no showing that McCalla supported the Teamsters or Local 667. Further, I find from the testimony of Sam Powell, a strong activist for Local 667 and the Teamsters, who worked at the Company's Memphis service center for over 20 year prior to his discharge on April 22, McCalla did not show any union sentiment.

In the winter of 1999, the Company's investigators, in checking McCalla's background, did not find any record of his 1966-rape conviction in Shelby County's files. That record was not available either on-line or on microfiche. The county's on-line and microfiche records went back only to 1979. To obtain records of McCalla's conviction, which was 13 years earlier than 1979, the investigators needed to know the date of McCalla's conviction and the nature of his crime. They did not have that information.[29]

The cover sheet on the memorandum of April 20, regarding Wilkerson, from Congressman Ford to the Company, included the assertion that "I have been informed by some of the employees that have called our office . . . that the sales department has a felon working everyday." Soon after the arrival of this tip, investigator Mike Martin learned that McCalla was the employee referred to on the cover sheet. He had other matters to work on. Field investigator Joseph Giebler took over the further investigation of McCalla's background.[30]

Soon after the Company learned that McCalla might be the felon working in the sales department, Acting Manager Jasmer summoned McCalla to his office for an interview. Jasmer told McCalla about the letter from Congressman Ford's office and its suggestion of disparate treatment of other employees, who had been discharged because they had criminal records. Jasmer asserted that he had heard an allegation that McCalla had falsified his job application by failing to report a conviction for rape. McCalla claimed that the Governor had pardoned him and that was why he had failed to mention the conviction in his application. Jasmer asked McCalla to provide a copy of the pardon. McCalla asserted that he would look for it at home. Jasmer suggested that if he couldn't find the document at home,

[26] My findings regarding the memorandum from Congressman Ford and Mike Martin's subsequent inquiry are based on Martin and Dorothy Johnson's testimony.

[27] My findings regarding McCalla's conviction, the commutation of his sentence, his prehire interview, and the Company's decision to hire him are based on his uncontradicted testimony.

[28] My findings regarding McCalla's clean record and his recognition for outstanding sales records are based on his uncontradicted testimony.

[29] My findings that the Company's initial background check on McCalla provided no showing of his rape conviction are based on the uncontradicted testimony of investigators Gleason and Martin.

[30] My findings regarding Mike Martin's receipt of information regarding McCalla's criminal record and Geibler's role in the new investigation are based on the two investigators' uncontradicted testimony.

McCalla should contact the court for a copy of the pardon. Jasmer also told McCalla to get in touch with Geibler.[31]

Later in April, McCalla contacted Geibler. McCalla explained that he had been convicted of rape "around 1963." He also asserted that he had received a pardon from Governor Buford after serving 3 years of a 15-year sentence and that the criminal record had been expunged. Geibler requested documentation of the pardon. McCalla replied that he would search his attic and come up with the document.[32]

On April 27, Geibler wrote to Donna Drake at the Tennessee Board of Paroles seeking a copy of a pardon issued by Governor Buford to McCalla. On or about April 29, Geibler received a letter from Drake reporting that there was no pardon. Instead, she wrote, Governor Buford had commuted McCalla's jail term. Geibler reported his discovery to Paul Reed, McCalla's immediate supervisor.

In May, McCalla went on a 2 or 3-weeks leave from his employment at the Company for a hernia operation. During his recovery period, McCalla told Geibler that he could not find the documents showing his pardon and the expungement of his conviction.

McCalla returned to work on June 1. On June 10, the Company discharged him for submitting a falsified job application. Reed testified that with the advice of counsel and on the information Geibler provided, he made the decision to discharge McCalla for falsifying his job application. Reed, who was stationed in Indianapolis, did not go to Memphis to discharge McCalla. He asked Service Center Manager Bob Cecil to perform that function. On June 10, Cecil together with the Company's director of Hub operations, H. Thomas Nelson III, and Andy Carpenter, the Company's director of national accounts, met with McCalla. Cecil discharged McCalla. Cecil also explained to McCalla that the reason for discharge was falsifying his job application by failing to report his conviction for rape.[33]

(6) William Palmer

In 1986, William Palmer had two convictions for driving under the influence of alcohol and one conviction for possession of a knife over 4 inches long. Palmer had the knife, along with fishing tackle, in the back of his jeep when he was stopped on the DUI charges. I find, from the records of the General Sessions Court of Shelby County, Tennessee, that Palmer pleaded guilty to DUI and was fined $250 for that conviction. The same records show that Palmer pleaded guilty to possession of a knife over 4 inches long and was fined $25 for that conviction.

On October 4, 1995, Palmer filled out an employment application to be a parts man at the Company's Memphis service center. In filling out his application, Palmer answered no to the following question: "Have you ever been convicted of or pled guilty to a crime, other than traffic violations?" Supervisor John Ballard interviewed Palmer for employment at the Company. Ballard asked Palmer how he felt about the union. Palmer answered that he never saw much use in one.

The Company hired Palmer as a parts man in 1995. After 1 year, the Company transferred him to work as a trailer mechanic at the same location. He worked on the third shift, from 11:30 p.m. until 7 a.m., under the immediate supervision of Danny Jackson. Aside from "maybe a couple of writeups here and there," Palmer's record at the Company was clean.[34]

I find from Palmer's uncontradicted testimony that he openly supported the Teamsters while employed at the Company's Memphis Hub. Occasionally, at work, Palmer wore a union hat or a T-shirt adorned with a teamster logo on the back and "Overnite Teamster" on its front side.

In February 1999, investigators Gleason and Martin interviewed Palmer about his conviction and his failure to acknowledge it in his 1995 job application. Palmer was surprised to learn of their discovery. He explained that his conviction was for a driving related offense and that the police found his fishing knife with his fishing tackle in his jeep in the course of their search. Palmer did not consider the knife to be of sufficient importance to warrant reporting it on his job application. The investigators took Palmer out of service and told him that he would soon be called.[35]

I find from investigator Gleason's testimony that he reported Palmer's falsification to Acting Manager Jasmer. Gleason disregarded the DUI conviction and focused on the knife possession conviction. I find from Jasmer's testimony that he did not know Palmer and could not pick him out of a crowd. I also find from Jasmer's testimony that he decided to discharge Palmer. Jasmer asked one of the investigators to notify Palmer. I find from Palmer's testimony that a few days later, he received a call from the investigators telling him that he was fired.

(7) Kyle Medley

On October 29, 1986, Kyle Medley pleaded guilty to the misdemeanor of carrying a dangerous weapon, a pistol. The records of the General Sessions Court of Shelby County show that Medley paid a fine of $250. I find from his testimony that the court also sentenced him to 1 year's probation. On May 2, 1988, Medley pleaded guilty to violation of his probation. The court sentenced him to serving 2 weekends in jail. Medley violated his probation by his arrest for driving under the influence of alcohol.

On April 14, 1989, Medley filled out a job application for a dock position at the Company's Memphis service center. Medley answered no to the following question: "Have you ever been convicted of a felony?" Approximately 3 months later, the Company called Medley and invited him in for an interview. Following the interview, the Company hired Medley.

[31] My finding regarding Jasmer's encounter with McCalla are based upon their testimony. Where I found inconsistency between their testimony, I relied on Jasmer's version. Of the two, Jasmer seemed to have a better grasp of details of their conversation. Jasmer also testified in an objective manner.

[32] My findings regarding McCalla's conversation with Geibler are based on their testimony.

[33] My findings regarding McCalla's meeting with Cecil, Nelson, and Carpenter are based on Cecil, Nelson, and McCalla's testimony.

[34] My findings regarding Palmer's job interview, and his employment at the Company's Memphis facility are based on his uncontradicted testimony.

[35] My findings regarding Palmer's interview by the Company's investigators are based on the testimony of Gleason, Martin, and Palmer.

Medley began his employment at the Memphis service center as a dock employee. He did some truck jockeying at the Memphis facility. After 3 or 4 years, the Company employed him as a part-time over-the-road driver.

On July 8, 1995, Medley filed a second job application with the Company, seeking the position of driver. This application included the following question: "Have you ever been convicted of or pled guilty to a crime other than traffic violations?" Medley answered no. I find from Medley's testimony that he treated this question as a request for information about felonies, not misdemeanors.

Soon after he submitted this application, the Company employed him as a full-time driver at Memphis, and retained him in that position until his discharge in February 1999. Aside from a few writeups for misloads, when he worked on the dock, Medley suffered no discipline by the Company throughout his employment at Memphis.

Medley was opposed to the Teamsters and Local 667 in the first representation election in 1995. However in 1997 and 1998, Medley's attitude toward the Teamsters and Local 667 changed. He frequently wore a blue T-shirt bearing Local 667's name and yellow symbols of the local. A supervisor saw the shirt and expressed surprise that Medley was wearing it. On occasion, when passing through the Memphis facility's gate, Medley would accept prounion handbills from union activists. From time to time, he visited a Teamsters' tent located near the Company's Memphis facility, where hot dogs and Cokes were available.[36]

In February 1999, company investigators Gleason and Martin interviewed Medley, who had no information regarding the Christmas break-in. Gleason and Martin showed his 1995 application to Medley, pointing out his answer to the question about prior crime convictions. They then confronted Medley with a court record showing his conviction for carrying a pistol. Medley said he knew about the conviction but thought that the 1995 application was similar to his 1989 application and thus was asking about felonies. Medley also told the investigators that he feared that disclosure of his conviction would prevent him from obtaining the job he was seeking and might cause his termination. The investigators suspended Medley pending further investigation. They said they would get back to him.[37]

I find from Martin's testimony, that Gleason and Martin reported the results of their investigation of Medley's 1995 job application and his false answer to the question regarding criminal convictions to Acting Manager Jasmer, who decided to discharge Medley. I find from Medley's testimony that a few days after his suspension, one of the investigators called Medley and told him he was discharged.

(8) Tony Perezz Brown

On August 17, 1989, in the U.S. District Court for the Western District of Tennessee, Tony Perezz Brown, after a guilty plea, was found guilty of possessing cocaine with intent to distribute. On November 9, 1989, the court sentenced Brown to 52 months in prison and 4 years' probation.

On July 26, 1994, Brown signed an application for employment as a dockworker at the Company's Memphis service center. The application contained the following: "Have you ever been convicted of or pled guilty to a felony? If yes, explain." Brown wrote N/A in spaces provided for reply. Brown's intention was to abbreviate "no answer at this time." At the time he filled out the application, he was in a hurry to return to work that day as a gardener. He assumed that before hiring him, someone from the Company would ask Brown to explain his N/A responses.

A few days later, Office Manager Gail Luna telephoned Brown and invited him to attend an informational meeting at the Company's Memphis service center. Brown attended the meeting, at which Luna and seven or eight other job applicants were present. Luna told the job applicants that if they were mentally or physically handicapped, or had been arrested, the Company would receive a "tax break.'' Luna also advised the applicants that if they met any of the three criteria, they should report to an office on Mendenhall. Luna showed a movie about the Company and had the job applicants fill out W-2 tax forms. During the meeting, Brown spoke by telephone with someone who told him that he qualified for the tax relief program and should report to the Mendenhall office. Brown told Luna that he needed to go to the Mendenhall office. However, Brown could not go there because he had to return to his job. After getting directions to the Mendenhall office, Brown left the meeting and returned to work. Luna did not discuss Brown's job application with him.

Within a few days, someone from the Company telephoned Brown and instructed him to report to the dock at its Memphis service center. Brown worked on the dock for about 6 months, at which point he was assigned as a billing clerk. He remained a billing clerk for some time until he became a dock supervisor. For approximately 1 year before his discharge in February 1999, Brown was a dispatcher. Brown may have been disciplined only once during his employment at the Company's Memphis facility.[38]

As a dispatcher, Brown was not a member of the bargaining unit. The parties disagree as to whether he was a supervisor within the meaning of Section 2(11) of the Act.[39] I find from Brown's uncontradicted testimony that as a road dispatcher he did not have authority to hire or fire employees. However, the uncontradicted testimony of former Assistant Manager Jasmer shows that, as a road dispatcher, Brown had authority to discipline employees. I also find, from Brown's testimony, that he

[36] My findings regarding Medley's employment at the Company's Memphis facility and his union sentiment and activity are based on his uncontradicted testimony.

[37] My findings regarding Medley's interview by Gleason and Martin are based on the testimony of all three.

[38] My findings regarding Brown's employment history at the Memphis terminal are based on his uncontradicted testimony.

[39] Sec. 2(11) defines supervisor:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

exercised independent judgment when he decided that the Company's commitment to service required that he dispatch a trailer with only one-half or three-quarters of a load. I also find from Jasmer's testimony that road dispatchers have authority to use their judgment to assign loads to company drivers, or contract drivers, or to authorize rail transportation of loaded trailers.

I also find from Jasmer's uncontradicted testimony that Brown had authority to approve payment of wage supplements to road drivers. These included drop and hook pay, fueling pay, off route mileage, and delay pay. I also find from Jasmer's uncontradicted testimony, that Brown used his judgment when deciding that a driver was entitled to one of these wage supplements. Brown used his judgment to decide if the driver had properly performed his job. The Company's brief contends that these payments are rewards. I find that these payments reflected Brown's authority to responsibly direct road drivers and reward them.

Unlike bargaining unit employees, who were hourly paid, company supervisors were salaried. When Brown worked as a road dispatcher, he was salaried. The Company paid its Memphis supervisors an annual bonus based upon the Memphis facility's productivity. As a road dispatcher, Brown received the same bonus.[40]

During his employment at the Company's Memphis service center, Brown made no secret of his criminal record. In a conversation with Supervisors Donald Tuggle, Billy Scott, and David Bradin, Brown revealed his having been confined in prison. Shortly after the Company hired him, Brown told of his prison experience to Rick Eller, who was then the Memphis s ervice center's manager.

There was no showing that Brown supported the Teamsters or Local 667. Jasmer never saw Brown wear any union clothing or engage in union handbilling. Nor did Jasmer ever hear Brown express any prounion sentiment. However, Brown is a distant cousin of Henry Perry, who, between 1996 and January 8, was a Teamster organizer. After the latter date, Perry became a full-time employee of Local 667. Perry has been involved in bargaining with the Company and has filed unfair labor practice charges against the Company.[41]

During Brown's employment, Service center Manager Danny Warner, in the presence of Supervisors Tommy Lee Jones, Billy Scott, and Jeff Cain, asked Brown if Henry Perry was his cousin. When Brown said yes, Scott told Brown: "Don't be tradin him no information." In January 1999, the month before Brown's discharge, Jasmer in conversation with Brown asserted that he had seen Brown's cousin, Henry Perry.[42]

In February 1999, investigators Gleason and Martin interviewed Brown. They told him that they had found records of his conviction and incarceration for possession of cocaine with intent to distribute it. The investigators asked Brown for an explanation of his failure to reveal his criminal record on his job application. Brown explained that, in haste, he had written N/A in answer to the question regarding whether he had a felony conviction on his record. He further explained that he was in a hurry to get back to work and expected to have an opportunity to explain it in an interview, if the Company were interested in hiring him. The investigators suspended Brown from work and reported the results of their investigation to Acting Manager Jasmer, who discharged him later in February.

(9) Charles E. Foster

The Company hired Charles E. Foster as a road driver on March 16, 1983. In filling out his employment application for the Company, Foster truthfully wrote no in answer to the question whether he had ever been convicted of a felony. However, on November 14, 1983, Foster pled guilty and was found guilty of a felony, obtaining services under false pretenses under $200. The Shelby County Criminal Court put Foster on 5 years' probation. He did not report this felony to the Company.

In February 1999, Gleason and Martin did a background check on Charles E. Foster. At the Shelby County courthouse, the investigators discovered Foster's 1983 felony conviction and a 1982 misdemeanor conviction for impersonating a police office. In reviewing Foster's personnel file, the investigators also found that on October 15, 1997, the Memphis service center manager had issued a final warning and suspension to Foster for misappropriation of a trash can belonging to Exxon. The investigators mentioned the final warning and the contents of the corrective action report of October 15, 1997, to Jasmer.[43]

Investigator Martin and Acting Manager Jasmer interviewed Foster.[44] Martin asked Foster to explain his felony conviction. Foster asserted that he had engaged in a fraud involving health insurance for which he had been convicted, and that he had made restitution. At first, Jasmer testified that, Foster was very forthcoming about the circumstances that resulted in his felony conviction. However, Jasmer changed his opinion after counsel for the General Counsel showed him Martin's notes reporting that Foster had to be reminded of both of his convictions. I also find from Jasmer's testimony that during the interview, Foster declared that he was for the Company and had nothing to do with the Union.

According to Martin's testimony and notes of the interview, Foster did not remember either of his convictions until Martin showed him the documents obtained from the county courthouse. At that point, Foster began to remember the felony of-

[40] My findings regarding Brown's wages and bonuses are based on his and Jasmer's testimony.

[41] My findings regarding Perry's status and relationship to Brown are based on their testimony. My findings regarding Jasmer's knowledge of Brown's union activity are based on Jasmer's uncontradicted testimony.

[42] My findings regarding Brown's confrontation with Warner and the other supervisors regarding Perry are based on Brown's uncontradicted testimony.

[43] My findings regarding Martin and Gleason's investigation and report to Jasmer are based on the two investigators' uncontradicted testimony

[44] I find from Martin and Gleason's testimony that Martin and Jasmer interviewed Foster. Of the three, Martin and Gleason seemed more certain of their recollections of the processing of the revelations of Foster's criminal record. Accordingly, I have credited the investigators rather than Jasmer where his testimony contradicts or is inconsistent with theirs.

fense and the misdemeanor. Foster explained both. At the conclusion of the interview, Martin suspended Foster pending further investigation.

On further investigation, Martin determined that Foster's felony conviction had occurred after he had filed his job application with the Company. Thus, Foster concluded that Foster had not filed a false application. Martin also learned, on further investigation, that if committed in 1999, Foster's fraud would have been classified as a misdemeanor.[45]

I find from their testimony that Martin and Gleason made an oral report of their findings to Jasmer. This report covered the posthire felony, the prehire misdemeanor, and the charged theft of the Exxon garbage can. I find from Jasmer's testimony that he decided that further discipline of Foster was unwarranted and restored him to service.

Since 1994, the Company's employee handbook has stated that an employee who committed a posthire felony is subject to disciplinary action, including dismissal. The same handbook also specifies "Dishonesty" as grounds for disciplinary action, including dismissal. I find from Gleason and Martin's uncontradicted testimony that the Company's policy has been, routinely, to discharge employees found guilty of a posthire felony.

(10) Gloria Burnside

The Company's employee handbook, in effect since 1994, includes a rule stating: "Any driver knowingly falsifying his/her logs will be terminated." In 1998, testimony at a Board hearing revealed that the Arizona Department of Public Safety had cited company driver Gloria Burnside on November 11, 1997, for making false log entries. I find from the testimony of Richard Pair, who was her immediate supervisor in 1997 and 1998, that the Company did not investigate Burnside's allegedly false entries. I also find from Pair's testimony that the Company did not look into the entries in the log of her husband, Jerry Burnside, who was her codriver on that date. I also find from Pair's testimony that at the time of the hearing in these cases, both Burnsides remained in the Company's employ and were not participating in the Teamsters' strike.

2. Analysis and conclusions

The General Counsel contends that the Company violated Section 8(a)(3) and (1) of the Act[46] by suspending and later, discharging employees Watkins, Clark, Wilkerson, Wilbanks, Palmer, Medley, Brown, and McCalla in an effort to reduce Local 667 and the Teamsters' support among its Memphis employees. Specifically, the General Counsel argues that the first seven-named employees suffered suspension and discharge because they supported Local 667 and the Teamsters and that the Company suspended and discharged McCalla, who was not a union supporter, to camouflage its unlawful motive for getting rid of the seven. The Company seeks to avoid a finding that these suspensions and discharges were unlawful by showing that its motive for punishing each of these eight employees was that they falsified their respective employment applications. The Company also contends that Tony Perezz Brown was a supervisor within the meaning of Section 2(11) of the Act, and thus not entitled to the Act's protection.

Under Board policy, if the record shows that the Company's hostility toward union activity was a motivating factor in its decision to take adverse action against an employee, that action will be found unlawful unless the Company shows, as an affirmative defense, that it would have taken the adverse action even in the absence of the union activity. *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 402–403 (1983), affg. *Wright Line,* 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S.989 (1982). Accord: *Manimark Corp. v. NLRB,* 7 F.3d 547, 550 (6th Cir. 1993). Where it is shown that the reason or reasons given by the Company for its adverse action were a pretext—that is that the reasons either do not exist or were not in fact relied on—it necessarily follows that the Company has not met its burden and the inquiry is logically at an end. *Wright Line,* supra at 1083. Accord: *Architectural Glass & Metal Co. v. NLRB,* 107 F.3d 426, 431 (6th Cir. 1997).

The required unlawful motivation may also be shown where an employer has taken adverse action against a neutral or antiunion employee in furtherance of an effort to discourage union activity. *Mini-Togs, Inc.,* 304 NLRB 644, 648 (1991), enfd. in part 980 F.2d 1027 (5th Cir. 1993); accord: *Birch Run Welding & Fabricating, Inc.*, 761 F.2d 1175, 1180 (6th Cir. 1985).

Motive is a question of fact, and as an employer rarely admits unlawful motivation, circumstantial evidence alone can be sufficient to support an inference of unlawful motivation. *Limestone Apparel Corp.,* 255 NLRB 722, 735 (1981). Accord: *Turnbull Cone Baking Co. v. NLRB,* 778 F.2d 292, 297 (6th Cir. 1985), cert. denied 476 U.S. 1159 (1986). Circumstantial evidence supporting an inference of unlawful antiunion motivation includes the employer's knowledge of the employees' union activity,[47] the employer's antiunion animus as demonstrated by its willingness to engage in unfair labor practices,[48] the employer's expressed hostility toward unionization,[49] the timing of the adverse action in advance of a contemplated Board-directed representation election,[50] and "the disparate treatment of certain employees compared to other employees with similar work records or offenses." *Turnbull Cone Baking Co.,* 778 F.2d at 297.

The two break-ins at the Company's Memphis service center occurred, respectively, on Christmas Eve 1998, and during the following New Year's weekend, while a petition for a decertifi-

[45] My findings regarding Martin's further investigation are based upon his uncontradicted testimony.

[46] Sec. 8(a)(3) of the Act provides in pertinent part:

"It shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

Because antiunion discrimination necessarily "coerces employees in the exercise" of their rights under Section 7, "a violation of [Section] 8(a)(3) constitutes a derivative violation of [Section] 8(a)(1)." *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 698 fn. 4 (1983).

[47] *NLRB v. E. I. DuPont De Nemours,* 750 F.2d 524, 529 (6th Cir. 1984).

[48] *NLRB v. DBM, Inc.*, 987 F.2d 540, 543 (8th Cir. 1993).

[49] *E. I. DuPont De Nemours,* 750 F.2d at 529.

[50] *NLRB v. Piezo Mfg. Corp.*, 290 F.2d 455, 456 (2d Cir. 1961). See also *Taylor Machine Products,* 317 NLRB 1187, 1214 (1995).

cation election was pending before the Regional Director for Region 26, in Case 26–RD–1008. That petition held out the possibility that Local 667 would lose its status as the certified collective-bargaining representative of the Company's Memphis City and Hub terminal employees. The vote in the Board-held election in 1996, which resulted in Local 667's October 9, 1997 certification, was decided by 18 votes out of the 420 cast. The confluence of the petition and the necessary investigation that quickly ensued provided an opportunity to attack Local 667's majority.

The Company's attitude toward Local 667 and the Teamsters strongly suggests that this opportunity did not go unnoticed by Acting Manager Jasmer and his superiors in Richmond, Virginia. Indeed, the Company's employee handbook shows a corporatewide antiunion policy in the following statement:

> It is important for you to know that the Company values union-free working conditions. We believe that true job security can come only from you and the management of this company working together in harmony to produce a quality product. A union-free environment allows this kind of teamwork to develop. We look forward to working with you as an individual, with dignity and in a spirit of mutual trust and respect.

The Board, in *Overnite Transportation Co.,* 335 NLRB 1392, 1395 (2001), recognized that the quoted policy, while "not unlawful itself" is "indicative of animus."

In the same decision, id. the Board found that in 1996 and 1997, at its Memphis City and Hub terminal, the Company "harbored antiunion animus" when it violated Section 8(a)(5) of the Act by unilaterally implementing a stricter dock policy, and Section 8(a)(1) and (3) of the Act by threatening employees with a reduction in hours and by sending an employee home early and by disciplining, suspending, and discharging two other employees because they supported Local 667. It is well settled that such evidence of prior unfair labor practices is relevant in determining the Company's motivation in the instant case. E.g., *Maphis Chapman Corp. v. NLRB,* 368 F.2d 298, 303–304 (4th Cir. 1966). The application of this principle is appropriate in the instant case, where less than 2 years elapsed between the 8(a)(3) violations in the prior *Overnite* case and the eight alleged unlawful discharges complained of in the instant cases, which occurred in February 1999, at the same facility, now called the Memphis service center.

The timing of seven of the eight suspensions and seven of the eight discharges in February 1999 suggests that the Company was mindful of the decertification petition and sought to erode the Union's majority support. The record shows that six of the eight suspended and discharged employees openly supported Local 667 and the Teamsters. Their immediate supervisors must have seen the hats and shirts bearing words and logos showing support for Local 667. It is reasonable to assume, as I do, that these same supervisors reported such observations to Assistant Terminal Manager Jasmer. The timely departure of the six would remove their support from Local 667. Also, news of their discharges might persuade other bargaining unit employees to abandon Local 667.

The six were open supporters of Local 667. Charles Watkins was a prominent supporter of Local 667. He was a member of its1995 organizing committee and, since October 1997, had been the dock employees' steward. Floyd Wilbanks supported Local 667 by handbilling and wearing a union button. He also attended union meetings and stood with other Local 667 supporters at the Memphis service center's gate. Fred Clark was an active supporter of Local 667 during its 1995 organizing campaign at Memphis and thereafter until his discharge. He distributed union literature at the Memphis service center's entrance and wore shirts bearing pro-Teamster messages. Autra Wilkerson openly supported Local 667 at work. Every work day, he wore a union cap and a union pin or button to work. He distributed handbills before his shift started and attended Local 667 meetings. William Palmer openly supported the Teamsters by wearing a union hat or a T-shirt adorned with a Teamster logo on the back and "Overnite Teamster" on its front side. Kyle Medley became a Local 667 and Teamsters supporter in 1997. He frequently wore a shirt bearing Local 667's name and symbols. At times, when passing through the terminal entrance, Medley accepted union literature from union activists and occasionally stopped by a Teamsters' tent, located near the terminal. I find it likely that the Company's management at Memphis observed these open manifestations of prounion sentiment by the six employees.

At the time of his discharge, the Company's Memphis management was aware of Tony Perezz Brown's family ties to Henry Perry, an official of Local 667. However, the Company contends that Brown was a supervisor, within the meaning of Section 2(11) of the Act, at that time and thus not entitled to the Act's protection. I agree. Section 2(11) of the Act defines the term "supervisor'" as follows:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment[.]

This section is to be read in the disjunctive; possession of any one of the enumerated powers establishes supervisory status. *Eastern Greyhound Lines v. NLRB,* 337 F.2d 84, 87 (6th Cir. 1964). As the party contending that Brown was a statutory supervisor at the time of his discharge, the Company bears the burden of proof on this issue. *W. C. McQuaide, Inc.,* 319 NLRB 756, 758–759 (1995), enfd. in pertinent part 133 F.3d 47 (DC Cir. 1998).

I have found above, that Brown had authority to discipline employees. I have also found above, that Brown exercised authority to approve payment of wage supplements to road drivers. These included drop and hook pay, fueling pay, off route mileage, and delay pay. I also found that Brown used his judgment when deciding that a driver was entitled to one of these wage supplements. Further, Brown used his judgment to decide if the driver had properly performed his job. The Company's brief contends that these payments are rewards. I find that these payments reflected Brown's authority to responsibly direct road drivers and to reward them. I find, therefore, that at

the time of his discharge, Brown was a supervisor within the meaning of Section 2(11) of the Act. As there has been no showing that Brown's discharge interfered with employee rights under Section 7 of the Act,[51] I find that it did not violate the Act. *Parker-Robb Chevrolet, Inc.,* 262 NLRB 402, 403–404 (1982).

The General Counsel contends that the Company discharged Brown in retaliation for Henry Perry's union activity and thereby violated Section 8(a)(1) of the Act, citing *Tasty Baking Co.*, 330 NLRB 560, 578–581 (2000). In that case, the Board concluded that there had been a violation of Section 8(a)(1) of the Act, where it found that the employer had demoted a supervisor in retaliation for her husband's union activity. In the instant case, the evidence shows only that the Company discharged Brown after Service Center Manager Danny Warner had told him not to "be tradin" any information to Perry. Thus, I find that the Company's motive for discharging Brown was to prevent him from assisting Local 667 with information about the Company's activities and sentiments. I further find, therefore, that Brown's discharge did not violate Section 8(a)(1) of the Act. *Parker-Robb Chevrolet*, 402 NLRB at 404. I shall recommend dismissal of the allegation that Brown's discharge violated Section 8(a)(3) and (1) of the Act.

The Company did not talk to McCalla about his criminal record until April 1999, after management had received a letter from Congressman Ford's office. That letter reported that Company employees had complained that a felon was working in the sales department. In the same letter, the Congressman had included documents pertaining to Autra Wilkerson, who was an open supporter of Local 667.

Congressman Ford's letter alerted the Company to the possibility that the complaining employees had noticed that it had suspended and discharged six supporters of Local 667 and the Teamsters for having criminal backgrounds and had continued to employee McCalla, who had a felony in his past. Absent the alarm from Congressman Ford's office, the Company would not have taken the trouble to look into McCalla's past.

The Board, with court approval, has recognized that a showing that an employer has selected a large percentage of union adherents among a group of employees to be laid off may be used as evidence of discriminatory motive. *Camco Incorp.,* 140 NLRB 361, 366 (1962), enfd. 340 F.2d 803, 809 (5th Cir. 1965), cert. denied 382 U.S. 926 (1965). Here, the Company discharged one supervisor and seven employees of whom only one had no connection with Local 667 and the Teamsters. Brown's connection was a family relationship with Henry Perry, an official of Local 667. The other 6, or 75 percent of the group, were open adherents of Local 667 and the Teamsters. This percentage exceeds by approximately 23 percent the Union's percentage of the votes counted in the Board-held election of 1996. In light of the Company's demonstrated union animus as recited above, the percentage of union adherents in the group of discharged employees and the timing of their discharges strongly suggest a design to erode Local 667's support in the contemplated decertification election. In sum, I find from the foregoing that the General Counsel has made a prima facie showing that the Company suspended and then discharged employees Watkins, Clark, Wilkerson, Wilbanks, Palmer, and Medley because of their adherence to Local 667 and the Teamsters. The General Counsel also made a prima facie showing that the Company suspended and then discharged employee McCalla in June 1999 to mask its unlawful motive for discharging the six prounion employees.

The Company contends that it suspended and discharged Watkins, Clark, Wilkerson, Palmer, Medley, and McCalla because they falsified their employment applications by answering no to a question regarding a criminal record or by not answering the question. According to the Company, its employee handbook announces that an employee, who falsifies an employment application, is subject to discharge. However, I note that the exact language of the handbook states that an employee who has engaged in such conduct would be subject to "disciplinary action, including dismissal." Thus, the handbook does not mandate dismissal as the only punishment for falsifying an employment application. The Company could have resorted to suspension alone or a warning. In light of the General Counsel's prima facie showing that the Company was anxious to erode Local 667's support among the bargaining unit employees, the use of the ultimate punishment adds support to the General Counsel's case. The Company's attempt to show that its treatment of the alleged discriminates was evenhanded does not withstand analysis.

The Company's argues that it consistently discharged employees who falsified employment applications by denying criminal histories. The Company sought to support its position by offering records showing the discharges of employees Robert Scott, Thomas Roberson, and Jeff Ashburn, who had applied for employment at its Memphis service center in 1998. However the documents show that these three applied for employment when the Company was enforcing its new policy of doing background checks on new applicants.

Under this new policy, the Company did a background check on Scott and found that he had a criminal record, contrary to the denial of such a record in his application. When Roberson filled out his application, he checked the "yes" box next to the question about his criminal record and wrote in "will discuss." The employee separation sheet included in his file reported that the last day Roberson worked was May 4, 1998, and that the Company discharged him for "Falsifying Documents." The Memphis service center's human resources manager, Deborah Murphy Walker, approved the discharge on May 20, 1998.

The same Deborah Murphy Walker, in a letter to Roberson, dated May 6, 1998, announced that the Company could not offer employment to him because of his criminal record, a copy of which was included with the letter. I find that the Company discharged him because of his criminal record. As the Company discharged Scott under the same policy it applied to

[51] Sec. 7 of the Act guarantees employees the right to engage in "concerted activities . . . for mutual aid or protection." Section 8(a)(1) of the Act makes it an unfair labor practice to "interfere with, restrain, or coerce employees in the exercise of their [Sec. 7] rights."

Roberson, I find that Scott's criminal record was the real reason for his discharge.[52]

Ashburn's file, as received in evidence, lacked a separation sheet. A document headed "Human Resources Action Form" reports that he was terminated on July 14, 1998, but does not state a reason for this action. In a section of the form labeled "Termination Information" there appears under a "Remarks" space the words "Criminal Section." A memorandum in the file reports that "Ashburn's background results have been received and not approved for hire, due to falsifying his application, criminal section." An attached report shows that on November 6, 1997, Ashburn pleaded guilty to the misdemeanor of "Leaving Scene of Accident." Ashburn's file, as received in evidence, did not include a letter announcing that his criminal record precluded his employment by the Company. The date of Ashburn's employment application was June 26, 1998. Thus, I find that he was subject to the same policy enforced against Roberson. Accordingly, I find that the real reason for Ashburn's discharge was his criminal record.

In sum, the circumstances surrounding the discharges of Roberson, Scott, and Ashburn deprive them of any comparability to the seven discharges under consideration here. Another ingredient absent from the comparison is a showing of the union sentiments of the three. The record does not disclose whether each was prounion, antiunion, or neutral.

The Company 's further evidence of discharges during the 90s at Fontana and Oakland, California, at South Holland, Illinois, Houston, Texas, and Indianapolis, Indiana, for falsification of employment applications by denying any criminal background does not present circumstances comparable to those surrounding the seven discharges under examination here. Thus in the discharges presented by the Company, there is no showing of the employees' efforts to present extenuating explanations. Nor did the Company show its impressions of their respective sentiments toward union representation. Finally, there is no showing that the Company discharged all employees at those locations, who falsified their employment applications regarding criminal backgrounds. Here again, crucial factors required to show comparable circumstances were absent.

The Company also attempted to show that it treated Charles Foster with the same consideration it had shown the seven alleged discriminates. In February 1999, the Company's investigation revealed that Foster had a post-hire conviction of a felony and a misdemeanor. Under company policy, as stated in its employee handbook, Foster was subject to "disciplinary action, including dismissal" because of his posthire felony conviction. However, the Company did not discipline Foster at all. On direct examination, Jasmer testified that he decided against terminating Foster because he was "very forthcoming with information regarding [the conviction] during the interview. Didn't try to hide anything." Jasmer added: "[A]nd because of the time he had been with the company."

Jasmer's explanation of his decision to retain Foster was fatally damaged on cross-examination. Investigator Martin's notes of Foster's interview revealed that the latter had to be reminded of both convictions. Also, on cross-examination, Jasmer admitted that during the interview, Foster asserted that he was "for the [C]ompany and had nothing to do with the union." As a member of a management actively hostile to Local 667, Jasmer must have found comfort in Foster's declaration of allegiance to the Company. I find that Jasmer's attitude toward this expression of procompany sentiment during the pendency of a decertification petition caused him to shrug off the felony conviction in light of Foster's 15-year tenure.

In contrast to his careful treatment of Foster, Jasmer discharged the six alleged discriminates, who he knew were supporters of Local 667 without considering their employment record, tenure, or any other favorable information in their personnel files. Similarly, District Sales Manager Paul Reed did not stop to weigh McCalla's 25-year history as a company salesman and the commutation of his 1966-jail sentence. Nor did Medley's 10-year history, first as a dockman and later as a full-time driver, at Memphis give Jasmer pause. Jasmer focused on the falsification of employment applications and discharged six known supporters of Local 667. Reed did the same and discharged Wilford Hugh McCalla, who did not support Local 667, but whose discharge would mask the Company's attempt to reduce Local 667's numbers at the Memphis facility.

The Company's treatment of Gloria Burnside and her husband regarding alleged false log entries contrasts sharply with the treatment accorded the seven employees referred to in the previous paragraph. The Company's employee handbook includes a separate section devoted to hours of service and log entries. In that section, the Company warns that: "Any driver knowingly falsifying his/her logs will be terminated." The Company did not enforce that policy against Gloria Burnside or her husband after it learned that the Arizona Department of Public Safety had cited her for making false log entries, and that her husband had been her codriver at the time the Arizona authorities had examined Gloria's logbook. The Company did not investigate the alleged violations. This relaxed attitude toward falsification of a company record contrasts sharply with the strict enforcement of its policy regarding falsification of applications for employment against the seven.

The Burnside's have shown the Company their loyalty by not supporting either the Teamsters' strike in July 1999 or the Teamsters' strike that began in October 1999 and was in effect at the time of the hearing in these cases. Given the Company's demonstrated hostility toward Local 667 and the Teamsters, it appears that the Burnsides' repudiation of the strikes persuaded the Company to tolerate some false log entries.

[52] Gleason testified that the Company discharged Scott for falsifying his employment application. The Company's records support Gleason's testimony and show that Scott was discharged on May 5, 1998. Indeed, Gleason testified using those records. His testimony also shows that he did not investigate Scott's background. Gleason also conceded that Scott was processed under the Company's new policy requiring background checks on job applicants. Scott applied to the Company for employment in April 1968 and began work while the Company was doing a background check on him. His last day of work was May 2, 1998. Having considered the circumstances leading up to Scott's discharge and the Company's new policy as applied to Roberson, I have rejected Gleason's testimony regarding the reason for Scott's discharge. Although Gleason was generally a credible witness, on this occasion his testimony amounted to restating the information on Scott's separation sheet, which I find unreliable in light of the Company's new policy as applied to Roberson.

In sum, I find that the Company has not rebutted the General Counsel's prima facie showing that the Company's motive for the seven suspensions and discharges was its desire to eradicate the Union's support among the bargaining unit employees. I find, therefore, that the seven suspensions and discharges violated Section 8(a)(3) and (1) of the Act.

C. Local 667's Request for Information

1. The facts

On February 16, Local 667's counsel sent a letter to the Company's counsel requesting bargaining about "the disciplinary issues arising out of the Company's intensified criminal records search." The same letter requested the following information "[I]n connection with the Company's investigation of the criminal records of Overnite Memphis employees:

> 1. Any and all records of the theft prompting the investigation, including police reports memos, supervisory documentation, and internal memoranda.
>
> 2. Copies of any and all company rules regarding criminal records, including handbooks, work rules and hiring criteria.
>
> 3. Copies of any and all job application forms utilized since 1980.
>
> 4. Copies of any and all searches run regarding Memphis employees' criminal records.
>
> 5. Any and all discipline relating to current or past criminal investigation of Memphis employees since 1980.

In a letter dated March 9, the Company's counsel assured Local 667's counsel that the Company was "in the process of gathering information responsive "to the Union's request of February 16. However, the Company did not provide the requested information.

On March 29, Local 667 filed an unfair labor practice charge in Case 26–CA–19100 alleging that the Company had violated Section 8(a)(3) and (1) of the Act in February by discharging seven employees at the Memphis service center. The same charge alleged that the Company had violated Section 8(a)(5) and (1) of the Act by refusing to furnish Local 667 with the requested information.

In a letter dated April 7, the Company's counsel stated that the Company would not produce the requested information. Citing six cases as authority for its position, the Company's counsel declared that by filing the unfair labor practice charge, Local 667 had waived its right to receive information related to the discharges.

2. Analysis and conclusions

The Company's duty to bargain collectively with Local 667 included the obligation to provide Local 667 with information necessary for the performance of its duties as the certified collective-bargaining representative of the Memphis service center's employees. *NLRB v. Acme Industrial Co.,* 385 U.S. 432, 435–437 (1967). Among those duties is the processing of grievances, including the decision to proceed with a grievance. Id. Consistent with this policy, the Board has recognized that an employer is obligated to honor a union's request for necessary information that has "no apparent connection to any pending unfair labor practice allegation." *Western Summit Flexible Packaging, Inc.*, 310 NLRB 45, 46 (1995).

In *Western Summit,* at 46, the Board found that a union's request for information had been "outstanding for 2 months before the Union amended its [unfair labor practice] charges to allege [the] additional matter [related to the information sought]. The Board held that the employer violated Section 8(a)(5) and (1) of the Act. Id. at 45.

Here, there was no pending unfair labor practice allegation that any discharges resulting from the Company's investigation violated the Act, when Local 667 made its request for information on February 16. The Company did not provide the requested information, notwithstanding its assurance on March 9, that it would be "responding shortly." Local 667 waited until March 29, 6 weeks after its request before it filed an unfair labor practice charge touching on the requested information. In its letter of February 16, Local 667 requested bargaining on the "disciplinary issues" rising from the Company's investigation. That was a valid reason for Local 667's request for the information specified in the same letter. The Company's refusal to comply with that request violated Section 8(a)(5) and (1) of the Act.

D. Sam Powell's Warnings and Discharge

1. The facts

When the Company discharged Sam Powell on April 22, Sam Powell had been an employee at its Memphis service center for over 20 years. During that time, the Company employed him as a dock employee, a lead man, and as a book man. At the time of his discharge, Powell was a dock employee, working on the day shift, beginning at 5:30 a.m., under the immediate supervision of Willie Jones.

During the Teamsters' organizing efforts at the Company's Memphis facility in 1995 and 1996, Powell took an active role in support of the organizing campaign. He wore Teamsters hats, shirts, buttons, and caps. He handbilled for the Teamsters in 1995 and in 1996 and made house calls. In *Overnite Transportation Co.,* 335 NLRB 1392 fn. 5 (2001), the administrative law judge found that during its organizing campaign, in August 1996, Local 667 produced a video entitled "Time for Unity." In footnote 5, on page 9 of his decision, the judge also found that Sam Powell was 1 of 14 employees who appeared in the video and "made statements supporting the Union."

During the Board-held elections, Powell was a Teamsters' observer. He appeared as a witness in Board hearings involving Local 667 and the Teamsters. Since the second election in 1996, Powell has served as the bargaining unit's chief steward, an elected office. During his employment at Memphis, Powell has traveled around the country, helping the Teamsters organize other Company terminals.

Prior to each of the representation elections at its Memphis service center, the Company held a dinner for the employees of that location. The Company invited the employees, their spouses or girlfriends. In 1995, the Company held the dinner at a country club. Four or five hundred people attended the function. Powell and two other employees attended the dinner, wearing yellow T-shirts inscribed: "Vote Teamsters."

The Company's CEO, Jim Douglas was the speaker at the 1995 dinner. He addressed the employees about the Teamsters. He made a comment that stirred Powell to respond immediately, while the CEO was talking. The CEO attempted to drown out Powell and told him to sit down. Powell complied and resumed his dinner. Soon, one of Powell's companions, speaking from the floor, interrupted Douglas.

A security guard approached Powell and ordered him and his two companions to leave the dinner. The guard escorted the three out of the dining room. The Company imposed no discipline on Powell and his colleagues for their conduct at this dinner.

In 1996, prior to the Board-held election in September of that year, the Company held a dinner for the Memphis employees, at the Peabody Hotel, in Memphis. Again, CEO Jim Douglas spoke about the Teamsters to the assemblage of perhaps 300. Powell and other Teamsters supporters at this dinner wore Teamsters T-shirts. Douglas said something that provoked Powell, who spoke up and disrupted the CEO's discourse.

Company Operations Manager Frank Plemmons ordered Powell to sit down and stop directing questions at the speaker. Powell said he would ask questions if he wanted to. Plemmons ordered Powell to leave the dining room. As Powell rose to leave, 70 or 80 of his fellow employees rose to follow him out. Operations Manager Duane Williams warned Powell's supporters that if they left they would be fired. Powell suffered no discipline for his conduct at the 1996 dinner.[53]

Danny Warner, who was the Memphis service center's manager from August 1996 until December 1998, was well versed in Powell's union activity and sentiment. He noted that Powell wore union insignia daily and that he was vocal about his support for the Teamsters. Warner also observed that Powell called attention to himself at group meetings. Following the second representation election, Warner expressed strong dislike of Powell and suggested that Supervisor Dale Watson come up with an excuse to discipline Powell.[54]

Joe Jasmer was an assistant manager at the Memphis service center from July or August 1998 until May 1999. I find from Jasmer's testimony that during his tenure at Memphis, he was aware that Powell was Local 667's shop steward. I also find from Jasmer's testimony that he saw Powell as openly prounion; that he wore union hats, buttons, and T-shirts and made prounion remarks. Jasmer believed that Powell was an outspoken union supporter.

Hugh McCalla's employment at the Company's Memphis service center, as an account manager, covered the period from August 1978 until June 1. His last actual workday was on April 1. During his employment, McCalla attended meetings with Memphis-based management. At sometime before the 1995 representation election, the meetings included discussions of labor problems at the service center. During such discussions, Sam Powell's name, his activity on the dock, and his conversations with employees surfaced. I find from McCalla's testimony that these discussions continued until the end of his employment. Bob Cecil presided at these meetings, after he became manager of the Memphis Hub in February 1999. I find from McCalla's testimony that Manager Cecil was present when Powell's name and union activity were discussed.[55]

I also find that Jasmer's contact with Cecil from February 1999 until May 1999, provided opportunities for Jasmer to share with the new manager his knowledge of Powell's leadership in Local 667's and the Teamsters' activities. I also find that Cecil's superiors were aware of Powell's union activity at the dinner meetings conducted by the Company's CEO and during the Teamsters' organizing campaigns at Memphis and at other company facilities. His contacts with the Company's higher management regarding his transfer provided opportunity for Cecil to learn about Powell, the pending decertification petition and the investigation of the Christmas Eve 1998 break in. I find from these circumstances that, by the time he arrived at Memphis, Cecil had learned that Powell was Local 667's chief steward on the dock and a strong supporter of Local 667 and the Teamsters. After Cecil's arrival, I find that Jasmer and the sales-management meetings updated Cecil on Powell's union activity.

Sometime about mid-February 1999, Powell heard that the Company had terminated 10 or 11 employees for falsifying their job applications. Powell, in his capacity as chief steward of the bargaining unit, approached then Acting Manager Jasmer, and asked him why the Company had terminated those employees. Jasmer replied that it was none of Powell's business. Powell reminded Jasmer that, as chief steward, Powell had a right to know why the Company was terminating these employees. Jasmer again said it was none of Powell's business.

Later in the same week, Powell approached Supervisor Dale Watson and asked him to explain the recent terminations. Watson answered "no comment." Powell also asked if managers were being investigated and suggested that as Nazis were convicted of war crimes someone should examine Watson's past. Powell was referring to photographs of mutilated bodies taken during the Vietnam war that Watson had brought in to work in 1984 or 1985 and shown to Powell. Powell's remarks upset Watson, who ended the encounter by telling Powell to return to work.

[53] I based my findings of fact regarding Powell's union activity upon his uncontradicted testimony.

[54] Warner, in response to a leading question by the Company's counsel, denied telling Watson to write up union supporters. However, Watson testified in detail, in a full and forthright manner, when he provided his version of Warner's instructions regarding Powell. Therefor, I have credited Watson's testimony.

[55] Cecil flatly denied that anything was said about Powell at any of the meetings he attended. Cecil also denied knowing when he fired him in April 1999, that Powell was a leading union activist. The record makes plain Powell's reputation, and the fact that Jasmer and other members of Company management, including its CEO, were well aware of Powell's strong prounion sentiment and his many activities on behalf of Local 667 and the Teamsters. Jasmer had ample opportunity to inform Cecil about Powell. Company officials at its Richmond headquarters also had opportunity to tell Cecil about Powell. Manager Cecil's circumlocution when first asked a leading question about his knowledge of Powell's union sentiment and activity strongly suggested that Cecil was not being forthright about this topic. In contrast, McCalla impressed me as being an objective witness giving his best recollection. Accordingly, I have credited McCalla's testimony and have rejected Cecil's denials regarding his knowledge of Powell's union activity and sentiment.

Powell approached Watson two more times with the same question about the terminations of employees and the remarks about war crimes and Watson's Vietnam photographs. During these encounters Powell said that the Company had hired Watson away from another carrier so that he could fire the Teamsters' supporters. On each occasion, Powell returned to work as directed by Watson. Supervisor Watson thought Powell was on a rampage and tried to avoid him. Watson told Powell he did not want to talk about the terminations and the photos.

Upon completing his rounds on February 18, Watson went to Acting Manager Jasmer's office and complained. When he had completed his complaint, Jasmer asked Watson to repeat what he had reported. As Watson recited Powell's repetitious remarks, Jasmer began to type a memorandum including the following assertion: "I have asked Mr. Powell to only speak to me about freight handling issues." Watson read the memorandum and signed it.

At the hearing, Watson asserted that he never asked Powell to speak to him only about freight handling issues and that the memorandum was incorrect in attributing that remark to Watson.[56] I find from Jasmer's uncontradicted, frank and forthright testimony that Watson was visibly upset on February 18, when he dictated the details of his complaint against Powell. Under such stress, Watson might not have noticed the disputed statement. Given Watson's state of mind on that occasion and his admission, on cross-examination, that he usually reads documents before signing them, I also credit Jasmer's testimony that Watson read over the memo before signing it.

Somewhere between 10 and 15 minutes after Watson had signed the memorandum, Jasmer wrote a warning, in the form of a corrective action report, to Powell. The form of discipline called for on the corrective action report was counseling. Jasmer designated insubordination as Powell's offense. In the "Remarks' section of the form, Jasmer counseled Powell as follows:

> You have been instructed by Operations Manager Dale Watson to discuss only freight-related issues with him. You have failed to adhere to this instruction. For this reason you are receiving this counseling for insubordination. In the future you are to discuss issues directly related to the performance of your job with Dale Watson.

Dale Watson sought out Powell on the dock and conducted him to Jasmer's office. Jasmer handed the corrective action report to Powell for reading and signature. Powell protested that the assertions about Watson's instruction to limit discussions with him to "issues directly related to the performance of [Powell's] job" were false. Powell signed the disciplinary form under protest. I find from Watson's testimony that he did not read the corrective action report. I also credit Watson's testimony that he never instructed Powell to limit discussions with Watson to issues directly related to Powell's work performance.

There was no showing by the Company that, after his third confrontation with Watson, Powell asked Watson about the terminations of bargaining unit employees or pursued him about his Vietnam war pictures. According to Jasmer's testimony, the ground for his determination that Powell had been insubordinate was Powell's following statement to Watson, as reported in Jasmer's memorandum; "[Y]ou are not going to tell me when I can or cannot talk to you, I will talk to you any time I want."

Later in the same day, Powell approached Jasmer in the main office and, in Watson's presence, addressed Jasmer, and asked him why everyone was being terminated. Jasmer said it was none of Powell's business. Powell reminded Jasmer that he, Powell, was chief job steward, and that he represented the terminated employees. Jasmer ended the discussion by repeating that it was none of Powell's business. As soon as this discussion ended and Powell had walked off, Jasmer accompanied by Watson, went to Jasmer's office. Jasmer asked Watson to dictate his recollection of this last encounter between Jasmer and Powell. Watson complied with Jasmer's request. Jasmer typed the dictation on a computer and had Watson sign it.[57]

On the Monday after Jasmer had counseled him, Powell arrived at work and noticed 10 strangers working on the dock. He inquired and learned from them that they were employees from the Company's Gaffney, South Carolina terminal. Powell did not understand why these visitors were doing the Memphis dock employees' work. He sought an explanation from Joe Jasmer.

Jasmer explained that as the Memphis employees were behind in their work, he had obtained these 10 employees from Gaffney to move the freight along. Powell also complained about the Gaffney employees to Terminal Manager Bob Cecil, to Supervisor Willie B. Jones, and to Operations Manager Tommy Lee Jones.

[56] Jasmer testified that he typed the memorandum exactly as Watson dictated it on February 18. However, Watson after reading the memo at the hearing testified that he had signed it without reading it when Jasmer submitted it to him. Watson also testified that he did not include in his recitation to Jasmer the statement that he had asked Powell to talk to him only about freight handling issues. I have noted that in testifying about Powell's remarks about the Vietnam photos and war crimes, Watson did not include testimony that he had instructed Powell to talk him only about freight handling issues. Review of Powell's testimony also shows that Watson did not impose that restriction upon Powell. As Powell and Watson testified candidly, I credit them as to the content of their encounters. On February 18, when he complained to Jasmer about Powell's remarks about the Vietnam pictures and possible war crimes, Watson was agitated and upset. In that state of mind, Watson might have embellished his complaint by adding the assertion that he had told Powell to limit his remarks to Watson to issues related to freight. As Jasmer testified about Watson's complaint and dictation in a full and forthright manner, I have credited Jasmer's testimony regarding the preparation of his memorandum from Watson's dictation.

[57] Watson testified that Powell returned to Jasmer's office a few minutes after the counseling session and argued that as senior steward he was entitled to know about the terminations. According to Watson, Jasmer's answer was to tell Powell to return to work. Watson also testified that after Powell had left, Jasmer typed up his account of this exchange and Watson signed it. However, as I read the account, it is in the form of a witness' recollection of the conversation, rather than that of a participant. Watson's signature reflects his adoption of the recollection recited on the document. These circumstances and my impression that Jasmer was providing his best recollection of the incident and the recording of the conversation in an objective manner. Accordingly, I have credited Jasmer here.

Later that same day, Powell noticed that the Company was sending some of the bargaining unit employees home before they could complete their normal 8 hours. He also noted that the Gaffney employees continued to work that day. As Powell saw it, the unit employees could not be behind in their work if the Company was sending them home before they could complete 8 hours' work. Some of the Gaffney employees worked at Memphis for the rest of the week and departed.

Powell's shift began at 5:30 a.m. on February 24. However, as was his custom, Powell came to work somewhat earlier to look for a forklift truck to use during his shift. He also arrived early to attend a preshift meeting. During this day's preshift period, Powell became upset, on learning that a midnight shift employee had suffered a broken leg in a forklift accident that same night.

After learning of the injury, Powell attended the preshift meeting conducted by Midnight Shift Supervisor David Braden. Powell's shift supervisor, Willie B. Jones, came to work at 6 a.m. Braden told the assembled employees that they were behind in their work. He urged them to speed up and unload more trailers that day. Powell spoke up, reminding his listeners that the company manual entitled "Work Safely," said employees should not sacrifice safety for speed. Powell also said, "Let's don't work faster. Let's Work safer."

Powell observed that his remarks disturbed Supervisor Braden. As the meeting broke up, Braden told the employees to go to work. After Braden and Powell left the break area, where the meeting had taken place, Powell sought to pacify the supervisor by telling him not to take Powell's remarks personally. Powell reminded Braden about the forklift accident that had broken an employee's leg and said he did not want it to happen again. Finally, Powell insisted that the employees would work slower to be safe. Powell's remarks did not placate Braden.

Powell began his shift unloading a trailer containing thirty 55-gallon drums loaded at its front end. Each drum weighed 500 pounds. Powell used a drum jack to move the drums to another trailer. I find from Powell's testimony that a drum jack is "sort of like a two-wheeler." I also find from his undenied testimony that the jack is used to scoop up the drum and move it, an operation requiring "a considerable amount of force." While Powell was moving these drums, supervision moved the receiving trailer to a door next to the trailer he was unloading. I find from Powell's testimony that he worked as fast as he could. I also find from his sincere denial on cross-examination that the forklift accident that occurred during the midnight shift did not cause him to slow up.

During the same morning, Service Center Assistant Manager Tommy Lee Jones advised Supervisor Willie B. Jones that there was some "hot freight" on the trailer Powell was unloading. Willie B. Jones went to Powell and told him about the "hot freight" that a customer needed right away. Powell said that he would unload that freight when he could. The customer called again about his "hot freight." Assistant Manager Tommy Lee Jones became impatient and pressed Supervisor Jones about the "hot freight." Supervisor Jones went to Powell and reminded him about the "hot freight."

Powell finished unloading his first trailer at 11:55 a.m. Supervisor Jones checked the work record of the previous shift showing that Powell began unloading the trailer at 5:30 a.m.

Jones also looked at the work record for his shift to see when Powell completed the task.

Supervisor Jones determined that Powell had worked at the rate of 3.7 bills/hour.[58]

Supervisor Jones assigned a second trailer to Powell for unloading on February 24. Powell unloaded this trailer at the rate of 7.5 bills per hour. I find from Supervisor Jones' testimony that the Company considered this a normal rate. He observed that Powell unloaded this trailer at normal working speed.

Supervisor Jones decided to issue a written warning to Powell. However, before issuing the warning, Supervisor Jones discussed it with Assistant Manager Tommy Lee Jones. Supervisor Jones explained his decision to Operations Manager Jeff Kane, who drafted a corrective action report asserting that Powell had been inefficient in unloading his first trailer that day and that Powell had been counseled about this shortcoming.

At about 4 p. m., on February 24, Supervisor Jones called Powell to the front office. When Powell arrived at the front office, he found Supervisor Jones and Assistant Manager Tommy Lee Jones waiting for him. The supervisor and the assistant manager rejected Powell's request for the presence of a union representative on the ground that there was no investigation pending. Powell received the corrective action report, read it, protested that its assertions about his inefficiency were false, and signed it under protest.

In February 1999, the Company heard rumors that a strike was imminent at its Memphis service center. These rumors persisted during March and April of that year. Dock employees supporting Local 667 and the Teamsters wore shirts carrying the message: "Will strike if provoked."[59]

In mid-April, Local 667 began distributing buttons to the Company's Memphis employees. These buttons proclaimed: "Now is our time. Contract in '99." On or about April 16, Powell obtained some buttons that he distributed to dock employees during his shift. When the evening shift began, Powell had no more buttons. When his shift ended, at 4:30 p.m., he went to Local 667 to get more buttons.

Powell returned to the Memphis service center during the evening shift and began distributing the buttons on the dock. Assistant Manager Jeff Kane approached Powell and, noting that he was not wearing steel-toed shoes, ordered Powell to leave the dock. Powell asked if Kane was wearing steel-toed shoes. Kane said no. Powell argued that he did not need steel-toed shoes, as he was not working and Kane didn't have them either. Kane warned that he would have Powell arrested if he did not leave the dock immediately.

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[58] My findings regarding Supervisor Jones' determination of Powell's performance in unloading the two trailers on February 24, are based on Jones' uncontradicted testimony.

[59] My findings regarding the strike rumors and the shirts proclaiming the possibility of a strike are based on Sam Powell's uncontradicted testimony.

After leaving the dock, Powell visited a rest room and noticed it was "filthy." He also saw there were neither paper towels nor soap in the rest room. Powell went to Kane and complained about the bathroom. Powell suggested that Kane correct the situation so that the employees could clean up before their break and lunch. Kane replied that there were neither towels nor soap. Powell asked how he knew that. Kane replied that Powell had just told him that. Assistant Manager Hunter arrived in time to hear Powell tell Kane that he should look in the supply room instead of getting "smart" with Powell.

Hunter intervened and assured Powell that he would check the supply room and put towels and soap in the restroom. Hunter advised Powell to go home and get some rest to get ready for the next day's work. Powell went home.

The next morning, Powell came to work and immediately checked the rest rooms. He noted that there were adequate towels and soap in all of them. Hunter held a preshift meeting for Powell's shift. During this meeting, Powell thanked Hunter for attending to the rest room supplies.

On the following Tuesday, Supervisor Willie B. Jones sent Powell to Joe Jasmer's office. Assistant Terminal Manager Jasmer and Operations Manager Frank Plemmons were present when Powell arrived. Jasmer explained that he was conducting an investigation of Powell's encounter with Assistant Manager Kane on the previous Friday. Powell requested the presence of a steward. Jasmer complied with this request and proceeded to ask about what went on between Powell and Kane.

Powell reported that he had been handing out union buttons on the dock when Kane threatened him with arrest for trespassing. Jasmer asked how Powell felt about the incident. Powell complained that he was a 20-year employee and that Kane's threat was uncalled for. Powell added that he, Powell, was unhappy about Kane's conduct. That concluded Powell's meeting with Jasmer. Powell returned to work and the Company did not discipline him for his encounter with Kane.[60]

On the morning of April 22, Manager Cecil and Assistant Manager Jasmer conducted a tour of the Memphis Service center for about 40 employees from other Company terminals. Company Vice President Phil Warren arranged the tour with Cecil and set up the transportation and necessary hotel accommodations for the visiting employees. These employees had volunteered to replace strikers in the event of a strike at the Memphis service center. The Company wanted to acquaint them with that facility's layout, with a short tour.

The visiting employees arrived in the morning, early in the day shift, in a yellow touring bus. Cecil, Jasmer, and Field Security Investigator Joseph Geibler met the visitors and ushered them into a conference room in the trailer shop. Vice President Warren had dispatched Geibler to Memphis in case there was a work stoppage. Geibler was in Memphis to assist in avoiding a confrontation between the visitors and the Memphis dock employees.

During the meeting with the visiting employees, Geibler spoke to them in the presence of Cecil and Jasmer. Geibler advised the employees to avoid conversations with local employees regarding why the visitors were in Memphis. He advised Cecil and the employees to keep a low profile during the tour.

Duane Amerson, a company employee from Atlanta, volunteered for the tour. He attended the pretour meeting and asked Cecil how to respond if someone asked him why he was at Memphis. Cecil told Amerson and the group not to say much, just tell them that you are touring the Memphis facility in the event you are needed to come back.[61]

Jasmer and Cecil divided the group into two sections, one led by Cecil, and the other under Jasmer's guidance. The two groups toured the shop, office, and dock. Each tour took no more than 1 hour and 15 minutes and they were both completed by 11:30 a.m.[62] The tours occurred during Powell's shift.

On April 22, Powell wore a Teamster shirt that bore the inscription: "Will strike if provoked." When he encountered Bob Cecil and the latter's tour group, Powell asked Cecil if the group were replacements in case the Memphis employees went on strike. Cecil answered, "Could be." Turning to the group, Powell advised them to take their hands out of their pockets if they intended to work at the Memphis service center. Powell continued to work using a forklift.

Robert S. Yarborough, a trailer mechanic employed at the Company's Gaffney terminal, and Duane Amerson fell behind their group after chatting with a dock employee from Gaffney. As they walked down the dock to catch up to their group, they encountered a forklift driver, later identified by Cecil and Geibler as Powell. Yarborough began with: "Good morning." Powell asked, in substance, what Amerson and Yarborough were doing in Memphis. Yarborough answered that they had come to help with the freight, to work.

Powell warned: "Well, you guys don't want to come down here. You'd get hurt if you come down here and work. Have a lot of accidents." He also warned that "people get hurt with forklifts down here," and that "[w]e get run over with forklifts on this dock." Powell again cautioned: "You don't want to come down here and work." Yarborough observed that Powell was "angry at someone."

Yarborough attempted to break off his encounter with the forklift operator. But Powell continued his verbal assault, advising Yarborough against coming to work at Memphis. Powell warned that Yarborough and others who might come to work at Memphis would "get hurt on this dock." Powell pointed at Yarborough and asked him if he wanted to get hurt. At this point, Yarborough took Powell's warning personally and felt threatened.

During Yarborough's encounter with Powell, Duane Amerson was strolling down the dock, in front of the participants. He looked back and saw Yarborough talking and then heard the employee sitting on the forklift say: "We don't need you in Memphis. [Y]ou'll get hurt in Memphis. People get run over

[60] My findings regarding Powell's encounters with Kane, Hunter, and Jasmer and Powell's distribution of union buttons are based on Powell's uncontradicted testimony.

[61] My findings regarding Amerson's question and Cecil's response are based on Amerson's uncontradicted testimony.

[62] My findings regarding the extent and duration of the tours are based on the uncontradicted testimony of security investigator Geibler and employee Duane A. Amerson.

by forklifts in Memphis." Amerson also heard the man, who turned out to be Powell, forcefully warn: "I'm telling you you'll get hurt."

Amerson came back to Yarborough, who was attempting to calm Powell down. As Powell resumed his warnings, Amerson and Yarborough began walking down the dock, trying to break off the encounter. Powell pursued them continuing his harangue. Finally Amerson and Yarborough reached their tour group and left Powell on the dock.[63]

The tour ended at 11:30 or 11:45 a.m. The visiting employees congregated in a conference room at the Memphis service center, where Cecil and Jasmer thanked them for being there. Yarborough attempted to tell Cecil about his encounter with the forklift driver. However, in the commotion of the meeting, Cecil did not hear Yarborough's complaint. The Company had arranged for a luncheon for the visiting employees at a nearby hotel. The visiting employees, Cecil and investigator Geibler reconvened for lunch at the hotel.

At the hotel, Yarborough went to Cecil and said an employee had threatened him. Yarborough explained that the employee had threatened to run Yarborough over with a forklift. Yarborough described the employee and the location of the incident. Dwayne Amerson was present when Yarborough made his complaint to Cecil. After hearing Yarboorough's detailed account, Cecil concluded that Sam Powell was the employee, who had spoken to Yarborough and Amerson. Manager Cecil instructed Yarborough to write down what the employee had said and give the writing to Cecil.

Yarborough and Amerson obtained some paper and a pen at the hotel and wrote their account of their confrontation with the forklift operator. They also approached Geibler at the hotel. Yarborough reviewed the incident with the investigator. Geibler reported to Cecil about his conversation with Yarborough. Cecil told Geibler that Powell was the employee involved in Yarborough's complaint.

Yarborough and Amerson collaborated on the content of the written account that Amerson wrote. They composed the following shortened version of Yarborough's earlier report to Cecil:

> While taking a tour of the South End of the Dock, Driver of 681 Lift repeatedly stated y'all don't want to work here on our dock, people get hurt working on our dock. People get run over with forklifts, you will get hurt on this dock.

This took place while we were at the rear of the touring group.

Yarborough and Amerson both signed the quoted statement and gave it to Cecil. The two employees checked out of the hotel and departed.

That same afternoon, Cecil returned to his service center, checked the Company's records, and identified Powell as the employee who spoke to Yarborough and Amerson during the tour. After Geibler and Cecil summoned Powell to the latter's office, Geibler, in Cecil's presence interviewed Powell. Upon learning of the purpose of the interview, Powell asked for a union steward to be present. Steward Larry Arnold arrived, and the interview proceeded.

Geibler advised Powell that the interview had to do with allegations that Powell had directly threatened two employees. Powell denied threatening anyone. Upon further questioning, Powell told of asking touring employees if Cecil had promised them pizza, and warning them that, if so, Cecil would probably renege. Geibler asked whether Powell had said anything about being run over by a forklift or being hurt in Memphis. Powell answered, "No." He also denied threatening anyone. When pressed further, Powell admitted telling touring employees that "[p]eople get hurt in Memphis," and: "There's lots of forklift accidents." Powell assured Geibler and Cecil that Company records would support these remarks. Geibler asked Powell for more specificity about his remarks to the touring employees. Powell replied that he had told Geibler everything. At the end of this interview, Geibler put Powell out of service. During his direct testimony Geibler was asked why he thought it necessary to put Powell out of service. Geibler testified: "Well, I treat threats very seriously and always have within the company." Geibler prepared a written report of his interview with Powell, which the investigator furnished, to Company counsel.[64]

Yarborough arrived home, at Gaffney, South Carolina, late Thursday night, April 22. The next morning, a Company attorney telephoned Yarborough and asked if he would give a statement regarding the incident with Sam Powell. Yarborough agreed to give a statement to the attorney over the phone and did so. That same day, Yarborough received a typed transcript of his statement from the Company's attorney. Yarborough signed the statement on Monday, April 26, and returned it to the Company's attorney. On May 3, at the request of the same company attorney, Yarborough made, and signed, a second statement describing his encounter with Powell on April 22.[65]

The Company's attorney wasted no time in contacting Amerson a day or two after the latter had departed from Memphis. Amerson agreed to give a statement over the phone and did so. He received a faxed, typed statement that he signed on April 26, and returned to the Company's attorney.[66]

During the week of April 26, Geibler proceeded with the investigation of Yarborough and Amerson's complaint about Powell. Geibler interviewed seven employees, after he had received copies of Yarborough and Amerson's affidavits from

[63] Powell admitted warning members of the tour about the danger in working on the Memphis dock, advising them about 10-and 12-hour shifts and telling them they would not like working at Memphis. He also testified about talking to a 55-year-old member of the tour and telling him that it would be dangerous to work at Memphis. However, Powell's testimony about this encounter and his admissions about warning visitors are sketchy compared to Yarborough's and Amerson's testimony, which they gave as if they were reliving their confrontations with Powell. I also noted that they answered questions on cross-examination in a forthright manner. Accordingly, I have credited their accounts of Powell's remarks to them on April 22.

[64] My findings regarding Geibler's interview with Powell on April 22, and the resulting memorandum are based on Geibler and Powell's testimony.

[65] My findings regarding the circumstances surrounding Yarborough's two affidavits are based on his uncontradicted testimony.

[66] My findings regarding Amerson's affidavit are based on his uncontradicted testimony.

the Company's counsel. Geibler learned that most of the seven heard Powell "addressing the issue of, 'You don't want to work in Memphis. It's dangerous here. You can get hurt here. You can get run over by forklifts.''

Three of the seven told Geibler that Powell's remarks were "improper." Employee Gary Smith stated that if Powell directed his remarks to Smith, he would take them as a threat. Employee Hill was of the opinion that Powell had been "out of line" and "should learn to keep his mouth shut."[67]

Geibler made the notes of his investigation available to Cecil and the two discussed them. Cecil considered Yarborough and Amerson's affidavits, their initial report, Geibler's investigation, and several affidavits obtained during that investigation. Cecil also reviewed earlier instances in which the Company discharged Memphis employees for making threats to other employees. Beginning on April 22, Cecil also had frequent consultations with legal counsel regarding the treatment of Powell's misconduct. Finally on May 4, Cecil discharged Powell for threatening Yarborough and Amerson. The Company's employee handbook, under a section entitled: "Employee Conduct," states that the use of threatening language subjects an employee "to disciplinary action, including dismissal."[68]

The record in *Overnite Transportation Co.*, Cases 17–CA–20134 and 17–CA–20329–3 included evidence of threats and assaults by antiunion employees against prounion employees, at the Company's Kansas City, Missouri facility, who reported the threats to Company management.[69] The same record shows that the Company did not discipline any of the offenders.

On a morning in April 1999, Teamsters supporter Anthony Johnson was going to his locker at the end of his shift to change clothes, when he encountered antiunion employees Brad White and Buzz McKenzie. At the time of this incident, two employees were standing at the entrance to the Kansas City service center, handbilling on behalf of the Teamsters. White complained to Johnson that the two employees had blocked his entrance to the terminal. He then asked Johnson for his knife. Johnson handed his closed Craftsman knife to White. White opened the knife up and said it was not a tool, but a weapon. Whereupon, McKenzie pointed a knife in front of Johnson's stomach, looked him in the eye, and said, "I have a knife, too." Johnson froze with fear.

White took McKenzie's knife. Using both knives, White made a "Z" motion across Johnson's chest, but did not touch the blades to Johnson's skin. Johnson estimated that the length of each blade was 6 or 7 inches. Again, Johnson was fearful.

A "couple of days" later, Johnson reported his encounter with Brad White and Buzz McKenzie to Fleet Services Manager Anthony Pratt.[70] Johnson described the entire incident and emphasized his fear. Pratt said he would interview White and McKenzie.

On April 13, Johnson reported the same incident to Service Center Manager Wry, in a written statement. Johnson also reenacted the incident for Wry in the manager's office on the same day. Johnson never heard anything more about his encounter with White and McKenzie. There was no showing that the Company disciplined either of them for threatening Johnson with knives.

I find from the pleadings in Cases 17–CA–20134 and 17–CA–20329–3 that International Brotherhood of Teamsters, Local Union No. 41, is a labor organization, within the meaning of Section 2(5) of the Act. Employees supporting Local No. 41 engaged in a strike at the Company's Kansas City facility from July 5 until 9. One of these employees, Anthony Johnson, returned to work on the night of July 9–10, as a fuel bay attendant.

Soon after Johnson had returned to work, and was refueling a Company truck from Des Moines, its operator, Ron Meyer, approached him, and asked where everyone was. Johnson answered that the strike was over. Meyer declared that "no motherf—ker" was going to tell him when he could or couldn't work and that Iowa and Kansas were right-to-work states and began cursing. As he spoke, Meyer began jabbing Johnson's chest with two fingers. A button pinned to Johnson's shirt, near the jabbing read; 'Shut Overnite Down." As he was jabbing, Meyer said "That is the reason I don't like Union right there." Johnson told Meyer, "If Overnite doesn't sign a contract, the Teamsters will shut Overnite down." Meyer replied in substance that: it was lucky he was going to retire in 1 week or he would bring his 9 millimeter in and shoot the Teamsters supporters.

Later that same night, Memphis driver Charles Foster brought his truck to Johnson for refueling. Upon arrival, Foster got out of his cab and went to Johnson, who was refueling the vehicle. Foster asked if Johnson was "one of those motherf—kers that was out on the strike line." Johnson answered that he did not cross the picket line, but stayed at home. Foster said, "[Y}ou got to be for or against it a hundred percent." Foster asked about a driver out of Kansas City, who drove to Memphis. Johnson answered that he didn't know who he was.

Johnson began fueling the passenger side of Foster's truck. After finishing, Johnson replaced the hose on the pump. At this point, Foster warned, "When I see that motherf—ker, this is what I am going to do." At this point, Foster had a switchblade knife with its blade open, that he stuck to Johnson's neck. Foster, while holding the knifepoint at Johnson's neck, said, "Do something now, punk motherf—ker. You're not so tough are you, motherf—ker? You're nothing but a punk, motherf—ker." Throughout Foster's diatribe, he kept his knife pressed against Johnson's neck. Foster stepped back and said, "But me and

[67] My findings regarding Geibler's investigation are based on his uncontradicted testimony.

[68] My findings regarding Cecil's conduct leading up to and including his discharge of Powell on May 4, are based on Cecil's uncontradicted testimony.

[69] Under the informal settlement agreement in Cases 17–CA–20134 and 17–CA–20329–3, the General Counsel reserved the right to use the evidence presented in that case in the captioned cases.

[70] In its answer to the consolidated complaint in Cases 17–CA–20134 and 17–CA–20329–3, the Company admitted that Pratt and Kansas City Service Center Manager Jeff Wry were supervisors and agents of the Company, within the meaning of Sec. 2(11) and (13) of the Act.

you is cool." Johnson interpreted this last remark as a warning not to say anything about this incident. According to Johnson, the blade of Foster's knife was 7 or 8 inches long.

Employee Michael Lounsberry, a mechanic, approached Foster and Johnson. Foster began asking Lounsberry about the Kansas City driver who drove to Memphis. Lounsberry identified that driver as Steve Rickert. Foster warned that when he came upon Rickert, "I'm going to get him on my turf." Johnson invited Foster to do to Lounsberry what he had just done to Johnson. Foster pulled out his knife and stuck it to Lounsberry's stomach. Lounsberry was scared and told Foster to put the knife away. Foster put the knife away and drove off.

On the morning of July 13, after his shift, Johnson reported his encounter with Foster to Fleet Services Manager Anthony Pratt and to Shop Supervisor Bob Lindsay. John was scared and did not want to fuel Foster's truck again. He had a meeting with Pratt on the morning of July 13. Johnson complained about Ron Meyer's conduct, but complained mainly about Charles Foster's assault. Johnson reported Myers thumping on Johnson's chest and Myers remarks about his 9 millimeter gun. Pratt took notes while Johnson was speaking. At the end of this meeting, Pratt said he would check into Johnson's complaint.

During the next week, Johnson was called to Fleet Services Manager Pratt's office, where he met with Pratt and Service Center Manager Jeff Wry. Johnson repeated his reports on his encounters with Don Meyer and Charles Foster. Pratt and Wry assured Johnson that they would check into his complaints. However, neither Pratt nor Wry ever got back to Johnson about his confrontations with either Meyer or Foster. There is no showing in the record that the Company disciplined either Meyer or Foster for their conduct toward Johnson.[71]

On the morning of July 13, Lounsberry reported his encounter with Foster to Fleet Services Manager Pratt. Lounsberry reported that Foster had pointed a knife at him and threatened to hurt any Teamsters' supporter who might "mess" with him on the road or at a terminal. Foster mentioned Steve Rickart as someone he might use his knife on. Lounsberry also reported what he knew of Foster's assault on Johnson. Lounsberry reported that Foster's conduct had scared him. Pratt said he would look into Lounsberry's complaint and call Memphis. Pratt used a tape recorder to record Lounsberry's report. Pratt never reported back to Lounsberry. Nor did Pratt give a copy of his tape to Lounsberry.

Two to four days later, Lounsberry told his story to Service Center Manager Wry, who had not yet heard about it. Wry told Lounsberry he would look into the matter and report back. Lounsberry never heard anything further about his complaint from Wry. Lounsberry also noticed that Foster continued his run between Memphis and Kansas City.[72]

[71] My findings of fact regarding Johnson's encounters with Meyer and Foster and his meetings with members of the Company's management are based on Johnson's uncontradicted testimony. Lounsberry denied hearing Johnson invite Foster to point his knife at Lounsberry. However, the record does not disclose how far Lounsberry was from Johnson at the time of the asserted invitation. However, Johnson impressed me as being a careful and objective witness. I have credited his testimony in this regard.

ANALYSIS AND CONCLUSIONS

The General Counsel contends that the Company violated Section 8(a)(3) and (1) of the Act by disciplining Powell on February 18 and 24, and by discharging him on May 4. The Company argues that Powell's union activity had nothing to do with its decisions to discipline him and discharge him. Here, again, I apply the Board's policy in *Wright Line,* 251 NLRB 1083, 1084 (1980).

There is ample evidence showing that Sam Powell was an active and outspoken chief steward for Local 667 at the Company's Memphis service center. He actively supported Local 667 and the Teamsters in their organizing campaigns in 1995 and 1996. Powell made his presence known to company officials by disrupting their CEO's speeches to their Memphis employees in 1995, and again in 1996. Powell advertised his union sentiment every day by wearing shirts and other paraphernalia showing support for Local 667 and the Teamsters. Jasmer viewed Powell as an outspoken union supporter. After Cecil's arrival in Memphis in February 1999, he quickly learned about Powell's leading role in the union activity. I also find that, between his superiors in Richmond and Jasmer in Memphis, Cecil had ample opportunity to learn, by the end of February 1999, of Powell's reputation as a strong outspoken supporter of Local 667 and the Teamsters

Memphis's management found Powell annoying. After the 1996 representation election, Manager Danny Warner expressed strong dislike of Powell and wanted an excuse to fire him. In February 1999, Joe Jasmer became annoyed when Powell asked him about the flurry of discharges of bargaining unit employees. Jasmer told Powell it was none of his business.

Powell's union activity in 1999 occurred against a backdrop of tension growing out of a pending decertification petition which challenged Local 667's representative status and rumors of an economic strike by Local 667 and the Teamsters. The Company's management was worried enough about the possibility of a strike at Memphis to recruit volunteers from the employees of other company facilities to be replacements for striking Memphis employees. Also, the Company showed interest in the decertification petition by filing an appeal on May 5, of the Regional Director's dismissal of the petition on April 22.

As previously noted, one of the manifestations of hostility toward union organizing among its employees appears in the Company's employees handbook as follows:

> It is important for you to know that the Company values union-free working conditions. We believe that true job security can come only from you and the management of this company working together in harmony to produce a quality product. A union-free environment allows this kind of teamwork to develop. We look forward to working with you as an individual, with dignity and in a spirit of mutual trust and respect.

[72] My findings regarding Lounsberry's encounter with Foster and Lounsberry's reports to Pratt and Wry and their responses are based on Lounsberry's uncontradicted testimony.

Also, as recited in detail, above, the Board, in *Overnite Transportation Co.,* 335 NLRB 1392, 1395 (2001), found that in 1996 and 1997, at its Memphis City and Hub Terminal, the Company "harbored antiunion animus" when it violated Section 8(a)(5), (3), and (1) of the Act there. Finally, I have found above that the Company displayed its desire to get rid of Local 667 and the Teamsters by using unlawful suspensions and discharges in violation of Section 8(a)(3) and (1) to diminish their support in the certified bargaining unit.

The timing of Powell's two warnings and his discharge suggest management's annoyance at his relentless activity on behalf of the bargaining unit represented by Local 667. Thus, the warning of February 18, came on the heels of an inquiry to Jasmer about the recent discharges of bargaining unit employees. The warning issued by Jasmer on February 24, followed by a few days Powell's complaints to Jasmer and other supervisors that Gaffney terminal employees were working at Memphis. Cecil's decision to discharge Powell came 12 days after the latter had advised two possible strike replacements not to work on the Memphis facility's dock. Here, again, Powell was trying to help Local 667 achieve a successful strike against the Company. The timing of the two warnings and the discharge when viewed in light of Powell's union activity and the Company's hostility toward Local 667 and the Teamsters add up to a prima facie showing that Powell's union activity motivated the Company's decisions to discipline him twice and then discharge him.

The Company argues that Joe Jasmer issued a corrective action report to Powell because Powell insisted on talking to Operations Manager Watson about subjects other than freight related issues, in violation of Watson's instructions. However, the record shows that Watson did not issue such an instruction to Powell. Instead, I have found Watson became annoyed by Powell's repeated questions as to whether supervisors were being investigated and whether Watson should be investigated for war crimes in the Vietnam war. Contrary to the Company's contention in its brief, Powell was not trying to bargain with Watson. Powell was trying to get information about the investigations, which had resulted in the discharges of bargaining unit employees.

Jasmer's response to Watson's complaint was to ask him to repeat it as Jasmer wrote it down. When Watson finished, Jasmer handed him the memorandum, which included the assertion that Watson had asked Powell to limit his conversation with Watson to "freight handling issues." Watson had not imposed that restriction on Powell. However, Watson was upset by Powell's remarks about a war crime investigation of Watson's conduct during the Vietnam war. Watson quickly read the memorandum and signed it without correcting the asserted restriction.

Within 10 to 15 minutes after Watson had signed the memorandum, Jasmer wrote out a corrective action report announcing counseling for Powell because of his insubordination toward Operations Manager Dale Watson. Specifically, the report stated that Powell had failed to adhere to Watson's instruction that Powell discuss only issues "directly related to the performance of your job." Jasmer summoned Powell to Jasmer's office and gave the warning notice to him for reading and signature. When he finished reading, Powell said that the assertions in the warning were false. Jasmer did not pause to ask Powell to give his version of Watson's instruction. Apparently, Jasmer saw no issue of fact, and insisted on Powell's signature. Powell wrote on the corrective action report: "This is false & I sign under protest."

Jasmer's unquestioning acceptance of the agitated Watson's report seems to be at odds with the Company's appraisal of the latter's credibility. Indeed, in its brief to me, at p. 19, the Company asserted that Watson "has an abnormally large proclivity for exaggeration and fabrication." Also, the Company introduced the testimony of some of Watson's superiors showing his reputation for such proclivity. Jasmer was not one of those witnesses. However, when Jasmer wrote up the corrective action report on February 18, he had been stationed at the Company's Memphis service center for approximately 7 months, during which time he should have learned of Watson's reputation. In any event, Jasmer did not seek corroboration of Watson's complaint.

The warning that Jasmer issued on February 18, gave a fictitious reason for disciplining Powell. Jasmer did not afford Powell an opportunity to answer Watson's complaint. Nor did Jasmer try to find possible witnesses to their confrontations. Instead, Jasmer hastily seized on Watson's false complaint to punish Local 667's chief steward.

Contrary to the Company's assertion in its brief, Powell was not seeking to bargain with Watson about the discharges of bargaining unit employees. Powell, acting as a steward, was seeking information that might assist Local 667 in deciding how it might seek to remedy the discharges. I find that Powell's efforts to obtain that information was protected by Section 7 of the Act.

I find no merit in the Company's contention that Powell's repeated questioning of Watson, accompanied by references to Watson's possible war crimes, deprived Powell of the Act's protection. In support of its position, the Company cites Board decisions in *Calmos Combining Co.*, 184 NLRB 914 (1970); *Charles Meyers & Co.*, 190 NLRB 448 (1971); *Fibracan Corp.*, 259 NLRB 161 (1981); and *Hyatt on Union Square*, 265 NLRB 612 (1982). Those decisions are in harmony with the Board's well-established policy applicable to improper remarks made in the course of activity otherwise protected by Section 7 of the Act. The Board expressed that policy, as follows, 29 years ago in *Prescott Industrial Products Co.,* 205 NLRB 51, 52 (1973):

> The Board has long held that there is a line beyond which employees may not go with impunity while engaging in protected concerted activities and that if employees exceed the line the activity loses its protection. That line is drawn between cases where employees engaged in concerted activities exceed the bounds of lawful conduct in a moment of animal exuberance or in a manner not motivated by improper motives and those flagrant cases in which the misconduct is so violent or of such character as to render the employee unfit for further service.

In each of the four cases presented by the Company, the Board found that an employee, engaged in concerted activity,

lost the protection of the Act by crossing the line established by Board policy. In *Calmos,* supra, the employee insisted on shouting and using obscene language on the plant floor during working hours which necessitated calling the police. In *Charles Meyers,* supra, 190 NLRB at 449, the Board found that the employee, while engaged in her duties as a union committeewoman, had taunted her supervisor with a demand that he fire her, and "unnecessarily disrupted operations at the plant." In *Fibracan*, supra, 259 NLRB at 161, the Board found that an employee directed profane language at a supervisor on two occasions during meetings between employees and the supervisor. The Board held that the employee's "repeated and blatant" use of such language against the supervisor amounted to insubordination. Id. Finally, in *Hyatt on the Square*, supra*,* 265 NLRB at 616, the Board found that an employee lost the Act's protection when he engaged in "unprovoked insubordination and threatened violence." The misconduct occurred after a supervisor had refused to discuss a grievance with a shop steward. The shop steward's response to the supervisors' refusal was: "F—k you," "I'll get even with you later,"and "I'll get you outside." Id. I find the case authority the Company has cited in support of its contention is clearly inapposite here.

I find that Powell's remarks to Watson on February 18 were part of the res gestae of the chief steward's effort, on behalf of Local 667, to obtain information about the discharges of bargaining unit employees. Jasmer's refusal to provide such information to Powell and his remark that it was none of Powell's business had angered Powell. Watson's negative responses further provoked Powell. Powell's remarks to Watson, in the course of his concerted protected activity, was not so flagrant or egregious as to remove the protection of the Act and warrant Powell's discipline. E.g., *Postal Service*, 250 NLRB 4 (1980); *Thor Power Tool Co.,* 148 NLRB 1379 (1964), enfd. 351 F.2d 5584 (7th Cir. 1965). Accordingly, I find that the Company violated Section 8(a)(3) and (1) of the Act when it issued the disciplinary warning to Powell on February 18.

The Company issued a corrective action report to Powell on February 24 for inefficiency in unloading a trailer in the morning, that same day. The circumstances surrounding the decision to issue that warning strongly suggest that the asserted reason was pretextual. The warning states that Supervisor Willie B. Jones discussed with Powell "his inefficient use of time and equipment to accomplish his overall goals." According to Willie B. Jones, Powell's immediate supervisor, Powell was having difficulty late in the morning with thirty 500-pound drums. Powell 's task was to move the 30 drums to a trailer located about 30 doors down the dock from the trailer he was unloading, using a cart, which did not fit through the door of the trailer. This cart could transfer only one 500-pound drum at a time. A forklift would have moved two drums at a time. Jones knew that a forklift would accomplish the task faster. Yet he said nothing about it to Powell. Nor did Jones order Powell to get a forklift, or bring a forklift to Powell and direct him to use it. Jones testified that as a dock supervisor, his duties included making sure that trailers were unloaded efficiently. Jones also admitted that two employees, using hand drum jacks, would have speeded up the process. However, Jones did not employ this alternative to speed up Powell's performance. Jones' conduct strongly suggests that he wasn't interested in doing much to get the work done quickly.

Jones observed the distance Powell had to traverse to reach the designated trailer. Jones also noted that the cart could not enter that trailer. Jones did not discuss this situation with Powell or make any suggestions to him. Instead, Jones moved a suitable trailer to a location right next to the trailer Powell was unloading. Thus, Jones did something to help lighten Powell's burden. On cross-examination, Jones admitted that while Powell was supposedly working too slowly Jones did not discuss with Powell his inefficient use of time and equipment. Indeed, Jones admitted that the first time he counseled Powell was when he issued the warning to Powell. Thus, did Jones show that the corrective action report issued to Powell on February 24, falsely asserted that he had counseled Powell on that date.

The Company also asserts that part of Powell's inefficiently was his failure to promptly unload some "hot freight" on the morning of February 24. However, here again, Jones did little to expedite Powell's unloading. Certainly, Jones told Powell that the trailer the latter was unloading that morning contained freight that the customer wanted quickly. When a customer makes such a request, the Company's policy is to designate the requested freight as 'hot freight" and comply with the customer's request. However, in his remarks to Powell, Jones never specified which items in the trailer load were ''hot freight."

Jones testified that he spoke about three times to Powell that morning, about the "hot freight." Jones also testified that he first raised the "hot freight" with Powell at about 8 a.m. and noticed that he was moving slowly. Powell said he would get that freight off when he could. Supervisor Willie B. Jones admitted that he said nothing to Powell about helping him or assigning anyone to help unload the "hot freight" faster.

Willie B. Jones testified that during the morning of February 24, Assistant Manager Tommy Lee Jones was in a hurry to unload the "hot freight" on Powell's trailer. However, Willie B's testimony shows that Tommy Lee observed Powell working slowly, but said nothing to Powell, and gave no guidance to Willie to speed up the process. Tommy Lee was more interested in observing Powell than in satisfying the "hot freight" customer.

I find from Willie B. Jones' uncontradicted testimony that as of February 24 he had been Powell's immediate supervisor "probably about a year." Prior to that date, Willie B had not ever disciplined Powell for inefficiency. I find from Willie B's testimony that he rarely issues discipline for inefficiency. As of November 7, 2000, Willie B had issued only one warning for inefficiency for the year, and that to an employee whose name he could not recall. Thus, the issuance of the warning to Powell on February 24 was an unusual resort to discipline.

The Company's records show instances on the very day it disciplined Powell in which it failed to discipline other Memphis employees for inefficiency, where their production per hour was less than Powell's 3.7 bills. I find from Willie B. Jones' testimony, and the Company's dock management report for the day shift on February 24 that five dock employees on his shift performed below the 7.5 bills/hour standard set by the Company. Thus, Spoon's rate of performance was 4.2 bills per

hour; Lewis' rate was 3.5 bills per hour; Griffin's rate was 2.5 bills per hour; Blanchard's rate was 3.0 bills per hour, and Hill's rate was 3.6 bills per hour. The Company did not discipline any of these five employees for inefficiency in unloading trailers. Four of these employees had rates lower than Powell's 3.7. Yet there was no showing that Willie B. or Tommy Lee counseled them about using time and equipment more efficiently. I find that Powell suffered disparate treatment on February 24 when the Company singled him out for discipline for inefficiency.

In sum, I find that the Company seized on Powell's difficulty in unloading his first trailer of the day on February 24 as a pretext for issuing a warning to him. I also find that the Company acted against Powell in this manner to punish him for, and to discourage him from, engaging in union activity in support of Local 667 and the Teamsters. I further find that by this discriminatory punishment of Powell, the Company violated Section 8(a)(3) and (1) of the Act. *Pepsi-Cola Bottling Co.*, 301 NLRB 1008, 1024 (1991), enfd. mem. 953 F.2d 638 (4th Cir. 1992).

The Company argues that it suspended, and later discharged, Sam Powell because he threatened visiting employees Yarborough and Amerson with injury if they worked at its Memphis service center. I find no merit in the Company's position. According to the Company, Powell told the two employees the following, or words to the same effect; "You don't want to work in Memphis. It's dangerous here. You can get hurt here. You can get run over by forklifts."

Powell made these remarks after he learned from Manager Cecil that the touring employees might be strike replacements. On cross-examination, Powell revealed that his motive for issuing this warning was to get rid of these prospective replacements. I find that Powell's words did not amount to a threat. The word "threat" is defined in *The American Heritage Dictionary of the English Language, New College Edition,* at 1340 as: "1. An expression of intention to inflict pain, injury, evil, or punishment on a person or thing. 2. An indication of impending danger or harm." A third definition has no application here.

Powell's words to Yarborough and Amerson did not contain any expressed intent "to inflict pain, injury, evil or punishment" on them. Nor did Powell's language indicate any impending danger or harm to them. Powell was expressing an assessment of the risk involved in working on the Memphis facility's dock, albeit exaggerated. Powell's testimony showed that he issued this warning in an attempt to discourage potential replacements from volunteering to work at Memphis during a strike. His purpose was to defeat Company efforts to weaken the economic impact of the threatened strike. This was concerted activity protected by Section 7 of the Act. *Nor-Cal Beverage Co. Inc.*, 330 NLRB 610, 611 (2000). I also find that Powell's warnings to the potential strike replacements did not deprive him of the Act's protection. *Prescott Industrial Products Co.,* 205 NLRB 51, 52 (1973):

However, assuming that Powell's remarks are deemed to be a threat that Yarborough, Amerson, and others would suffer injury at the hands of Powell and his fellow union supporters, there is another grounds for rejecting the Company's proffered explanation for his discharge. The record makes plain that Powell's discharge constituted disparate treatment motivated by union animus. The Company's attitude is revealed by comparing its treatment of Powell's alleged threat against procompany employees with its treatment of physical attacks by antiunion employees on prounion employees at its Kansas City facility.

On the afternoon of April 22, employees Yarborough and Amerson complained to Manager Cecil about receiving a threat from Powell. Beginning that same afternoon, the Company, using its investigator, Geibler and attorneys, launched an investigation of the complaint. In the meantime, on that same afternoon the Company suspended Powell pending the completion of the investigation. Geibler carried out a thorough investigation, culminating in Powell's discharge on May 4.

In April 1999, Johnson reported to Fleet Service Manager White, at the Company's Kansas City service center, that antiunion employee Buzz McKenzie's had pointed a knife at Johnson. Later in April, Johnson repeated his report to Service Center Manager Wry. The Company did not take the matter further.

Again, in July 1999, after employee Anthony Johnson reported being jabbed in the chest by antiunion employee Ron Meyers and assaulted with a knife by antiunion employee Charles Foster, there was no discipline imposed on either Meyers or Foster. No does it appear that there was any investigation of Johnson's reports. No Company investigator appeared at the Kansas City facility. No company attorney sought out Johnson for an affidavit.

The Company's employee handbook states that commission of an assault is grounds for discipline including dismissal. The same handbook imposes the same range of punishment for threatening language. The Company dismissed Powell on May 4 for "threatening visiting employees with physical harm." However, the Company did not apply its policy against antiunion employees McKenzie, Meyers, or Foster, who assaulted an employee. I find, therefore, that discharging Powell for threatening employees was disparate treatment. *W. C. McQuaide, Inc.*, 319 NLRB 756, 776 (1995), enfd. in pertinent part 133 F.3d 47, 49 (4th Cir. 1998).

In light of the General Counsel's strong prima facie showing, as set forth above, I find that Powell's asserted threat was a pretext. Instead, I find that Powell's union activity and prounion sentiment motivated both Geibler's decision to suspend Powell on April 22, and Manager Cecil's decision to discharge Sam Powell on May 4. Accordingly, I find that by suspending and then discharging Powell, the Company violated Section 8(a)(3) and (1) of the Act.

The Company contends that Sam Powell is not entitled to reinstatement or backpay on the ground that he advocated an unlawful slowdown prior to his discharge. I find no merit in this contention.

The record shows that Powell cautioned unit employees against a slowdown whenever he heard them talking about it. The record also shows that Powell told employees to work safer when they complained about having to work long hours and spoke of a slowdown as a form of protest. Also, there is no evidence that Powell's advice carried any additional message. Thus, I see no grounds for denying reinstatement and backpay.

On May 22, 2002, the Company filed a motion to reopen or supplement the record in this case to show that, after his discharge, Sam Powell engaged in secondary picketing and other misconduct in support of a strike by Local 667, the Teamsters and other local unions affiliated with the Teamsters. As an alternative, the Company has made an offer of proof showing Powell's alleged misconduct. The General Counsel and the Charging Party, Local 667, have filed timely oppositions to this motion. On July 11, 2002, the Company filed a reply memorandum in support of its motion. I find no merit in the Company's motion and reject its offer of proof.

The Company asserts that the informal settlement of the secondary boycott complaint in *Teamsters (Overnite Transportation),* Case 9–CC–1629–1 satisfies the conditions I imposed for receiving as evidence findings in those cases showing Powell's participation in secondary conduct. However, the Company's assertion is wide of the mark. My ruling at the hearing in the instant cases, on November 7, 2000, was as follows:

> I think I can take official notice of findings in another proceeding that has been fully litigated that the man did something that, under the Board policy, is such that the employer doesn't have to take him back.

At a later point, counsel for the General Counsel sought clarification of my ruling and I responded in the following colloquy:

> Ms. Kirchert: Are you saying that you're inclined to defer to a CB proceeding or a compliance proceeding where these matters would be litigated?
>
> The Court: Wherever the matter has finally been determined that this man did something,

The informal settlement agreement in the secondary boycott complaint in Case 9–CC–1629, includes no determination that any of the respondents or any individuals violated Section 8(b)(4) of the Act. More important, there has been no determination in that proceeding that Sam Powell engaged in any secondary conduct against the Company.

I find that the Board has not determined that Sam Powell engaged in secondary conduct. Accordingly, I find no merit in the Company's motion and I also reject its offer of proof. The motion is dismissed.

E. The Discharges of Terry Holcomb and Walter Jones

1. The facts

The Company employed Terry Holcomb at its Memphis facility as a dock employee for 9 years and 10 months. The Company discharged him on June 25. Holcomb worked on the day shift under Willie B. Jones' supervision. Prior to his discharge, the Company issued written warnings to him on two or three occasions.

Holcomb actively supported Local 667. He distributed leaflets to employees at the terminal's gate. He wore shirts, pins, and hats showing Local 667's name or other ornamentation encouraging support for that labor organization. [73]

The Company employed Walter Jones as a dock employee at its Memphis terminal from June 16, 1985, until June 25, 1999. At the time of his discharge, Walter Jones' immediate supervisor was Wayne Reed. Jones worked on the first shift. Prior to his discharge, Jones had no problem with management. His record was clean.

Jones was a strong supporter of Local 667. In 1995, he and employee Jeff Rubicheck accompanied Sam Powell to a country club, where the Company was holding a dinner for its Memphis employees. Company CEO Jim Douglas was the speaker at this function. The three employees wore yellow T-shirts inscribed "Vote Teamsters." Powell interrupted Douglas, who attempted to drown out Powell and told him to sit down. Rubicheck also interrupted the speaker. A guard approached Powell, Jones, and Rubicheck and escorted them from the dining room.[74] During Local 667's election campaigns in 1995 and 1996, Jones was active, making house calls, and passing out leaflets to encourage employees to support the Local. After Local 667 won the 1996 election, Jones regularly wore Local 667 pins and hats at work. Jones handed out literature for Local 667 at the Memphis service center's entrance in 1999, and participated in practice picketing at the same gate in spring 1999.[75]

In early May 1999, an employee approached dock employee Jimmy Pickett, as he was operating a forklift on the Company's Memphis dock, and told him to slow down. The employee also said that Pickett was driving too fast up and down the dock; that all the freight pays the same; that people would see him and others as trying to outdo everyone else, that he should slow down and do the same as everyone else, and that everyone got paid the same. The employee did not raise any concerns about safety, nor did he claim that Pickett was operating in an unsafe manner. The employee's tone was unfriendly. At the time of this incident, Pickett did not know the employee's name. Pickett replied that he was there only to make money.

About 1 week later employee Terry Holcomb told Pickett and employee Jamie Davis to slow down, that they were working too fast, that the freight paid the same, and that all the employees received the same pay, so Pickett and Davis should do the same job as everyone else. Holcomb did not raise any issues related to Pickett's forklift driving. Holcomb's tone was hostile.

Holcomb told Pickett and Davis that the entire first shift supported the Union. Holcomb urged Pickett and Davis to "get with the program." Holcomb's tone remained hostile. Pickett replied that he was there to make a paycheck, and that was all he was concerned about.

Holcomb approached Pickett a few days later, and addressed him in a friendlier tone but with the same message. The employees needed to slow down; that the freight paid the same; all

[73] My findings regarding Holcomb's employment history and union activity are based on his uncontradicted testimony.

[74] My findings regarding the 1995 confrontation between Powell, Jones, the third employee, and CEO Douglas are based on Powell's and Jones' testimony. Where Jones' and Powell's testimony differed, I have credited Powell, who seemed to have a better recollection of the details of the incident.

[75] My findings regarding Jones' election campaign activity for Local 667, his display of Local 667 pins and hats at work, and his practice picketing are based on his uncontradicted testimony.

the employees would be paid the same, no matter how much freight they handled; they might as well all slow down, and stop making everyone else look bad.

Approximately 10 days after his second encounter with Holcomb, Pickett began having flat tires on his car. For a week and a half Pickett would experience, daily, two to four flats.

On June 9, on the Company's Memphis dock, Pickett told Operations Manager Joey Smith, a supervisor of his confrontations with the two employees who told him to slow down. Pickett identified Holcomb as one of the two. Pickett told Smith the details of the employees' remarks. As he was making his report, Pickett pointed to a dock employee, who Smith identified as Walter Jones.[76]

Immediately, Smith wrote a short summary of Pickett's report that Pickett signed. Smith escorted Pickett to the front office, where Service Center Manager Cecil and Hub Manager Tom Nelson were conferring. Pickett told Cecil and Nelson of his encounters with Jones and Holcomb and about the flat tires. Soon, Smith came to Pickett for a second statement, which contained more information about Jones and Holcomb's effort to obtain Pickett's support for Local 667. Pickett gave another brief statement to Bob Cecil. [77]

Cecil wanted a detailed report and asked Pickett to dictate a full report to Assistant Manager Vince Spataro. Pickett dictated his recollection to Spataro and then read and signed the written statement.

On June 9, Bob Cecil and his superior, Tom Nelson, interviewed Holcomb and Jones about Pickett's complaint. The managers interviewed Holcom first. Cecil began by asking if Holcomb knew why he was summoned to the office. Holcomb answered no. Cecil asked why Holcomb would tell employees to slow down. The employee did not answer. Cecil repeated his question. Holcomb said he did not know what Cecil was talking about. Cecil said he had a report that Holcomb was telling dock workers to slow down. Cecil asked why Holcomb would do that. Holcomb had a blank look. Cecil repeated his question.

Holcomb finally replied, admitting that he may have said, "work safe." Cecil pressed for more information from Holcomb, who repeated that he might have, said, "work safe." Cecil studied Holcomb's demeanor and said that the employee knew more than what he was telling. Cecil thought that Holcomb looked not dumbfounded, but "more like the cat that ate the canary." Cecil suspended Holcomb pending further investigation. In Nelson's opinion, during Cecil's questioning, Holcomb was "very nervous."

Nelson participated in the interview. He asked Holcomb if he had asked other employees to slow down. After a considerable pause of perhaps 45 seconds, Holcomb answered, "Yes, I did and to work safe." Nelson was furious at Holcomb and told him: "You damn guys are not going to run my dock." When Holcomb insisted that he was only telling employees to work safely, Nelson and Cecil told him that it wasn't his job to tell people to work safely. Holcomb insisted that it was his business if he might suffer injury. Nelson noted that unlike a previous encounter with Holcomb, in which the employee spoke looking Nelson in the eye, on this occasion Holcomb diverted his gaze.

Holcomb asked the name of his accuser. Cecil and Nelson rejected Holcomb's request and said they had sworn affidavits. They did not show the affidavits to Holcomb.

Holcomb testified, and I find, that he was on vacation from May 28 until June 8. He also specifically testified that he came back to work on June 8. His credited testimony shows that he raised his vacation as a defense to the accusations that Cecil and Nelson leveled against him. However, the record does not show that he specifically told them that he had been away from the loading dock from May 28 until June 8. Further, there was no showing that Holcomb spent his vacation out-of-town, nor did he deny visiting the Memphis terminal during his vacation. In any event, I have found from Pickett's testimony that his encounters with Holcomb occurred in early and mid-May, well before Holcomb's vacation.

Nelson said he was ashamed of Holcomb and ordered him out of the office. Cecil escorted Holcomb to the gate and told the guard that Holcomb was not allowed to reenter the premises.

On June 25, Cecil, without Nelson, had a second interview with Holcomb, who was accompanied by Steward Herman Lewis. Cecil asked Holcomb if he had anything to add to what he had already said. Holcomb repeated his assertions that he had told employees to work safely, but had not told anyone to slow down. Cecil ended the interview by saying that he would get back to Holcomb later.

On June 9, after escorting Holcomb to the Memphis terminal's gate, Cecil came upon employee Walter Jones and brought him into the dock office for an interview. Nelson was present and participated in the interview. Under Cecil's questioning, Jones admitted telling employees to work safe. He denied telling anyone to work slower. Cecil saw that Jones looked as if he were hiding the truth. Jones protested that someone was lying about him.

Nelson briefly questioned Jones, asking if he had told employees to slow down. Jones appeared nervous, and after a pause, during which he looked through the open door, answered: "No, I did not."

[76] I based my findings regarding Pickett's encounters with Holcomb and Jones, employee Davis's encounter with Holcomb, Pickett's report to Joey Smith, and the preparation of Pickett's reports on June 9, on Pickett's full and forthright testimony. Jones denied knowing employees Jamie Davis and Jimmy Pickett. He also denied telling anyone to slow down their work unless they were driving a forklift too fast. Holcomb denied knowing Pickett and admitted "vaguely" knowing Jamie Davis. Holcomb also denied ever telling an employee to slow down, except if the employees were driving a forklift at excess speed. However, Pickett impressed me as being an honest witness giving his best recollection.

[77] My findings regarding Pickett's reports to Cecil and Pickett's written statements are based on Pickett's uncontradicted testimony.

Cecil suspended Jones indefinitely, pending investigation. Cecil escorted Jones to the gate. On the way, Cecil told Jones, "Your people are not going to overrun this dock."[78]

Cecil continued to investigate Holcomb and Jones' alleged misconduct. Cecil was concerned about production at his service center. As of June 9, Memphis' productivity was among the worst of the Company's hubs nationally, and was the worst of the hubs under Nelson's management. Before June 9, Cecil had told Nelson of his impression that dock employees were moving "in slow motion on the dock." Now, after interviewing Holcomb and Jones, Cecil wanted to know his dock's productivity.

Cecil contacted an industrial engineer at the Company's Richmond, Virginia office and asked him to run Memphis' production numbers. The engineer e-mailed figures for all of 1998, and part of the current year, 1999. The figures showed that Memphis' production had slipped from 3.454 bills per hour in October 1998 to an hourly rate of 2.668 in June 1999. In March 1999, Memphis' hourly rate was 3.328. Cecil studied these figures, noting that his dock was producing below 3 bills per hour, in the 2.5, 2.6, 2.7 bills per hour range.

Cecil also studied his own computer records to determine if there had been a slow up at Memphis. He noted the sharp contrast between the March 1999 hourly average of 3.328 bills and the 2.040 bills per hour achieved on June 9, the date of Pickett's complaint. Cecil also noted a steady reduction in bills per hour from May 9 until June 9. There was no work on May 9. The production on May 10 was 3.059 bills per hour. Production on June 9, was 2.040 bills per hour. Cecil was troubled by this low rate.

Cecil considered the possibility that Pickett's forklift driving might be a safety concern. Cecil checked Pickett's personnel folder and found no record of any discipline for unsafe forklift driving. Also, Cecil obtained written statements from two dock supervisors, who were familiar with Pickett's driving. They both asserted that they had not observed him driving in an unsafe manner. Both supervisors reported that they had not received any complaint about Pickett's forklift operation.

On June 17, Cecil interviewed employee Jamie Davis, a dock employee. Cecil came on Davis, who was working on the Memphis' terminal's dock. Cecil asked if anyone had told Davis to work slower. Davis said yes. Cecil asked for names. Davis identified Holcomb and Jones. Cecil wrote notes of this interview.[79]

Cecil testified that he concluded from his investigation that Holcomb and Jones were telling employees to slow down their dock work. It is undisputed that on June 25 Cecil notified Holcomb and Jones that they were discharged.

2. Analysis and conclusions

The General Counsel and the Charging Party argue that the Company discharged Holcomb and Jones because they were urging unit employees to work safely and thus engaged in activity protected by Section 7 of the Act, in support of Local 667. The Company contends that Holcomb and Jones engaged in misconduct unprotected by Section 7 of the Act. I find merit in the Company's explanation of Cecil's decision to discharge Holcomb and Jones.

Holcomb and Jones made no secret of their support for Local 667 and the Teamsters. In 1995, Jones aligned himself with Powell at the Company's preelection dinner. When Powell interrupted CEO Douglas' speech with questions from the floor, Jones was standing next to Powell, wearing a yellow Teamsters T-shirt. Jones made strenuous efforts to assist Local 667's preelection campaigns in 1995 and 1996. He passed out leaflets and made house calls. Thereafter, he wore Local 667 hats and pins at work, on the Memphis service center's dock. In 1999, prior to his discharge, Jones was visible at the Memphis Service center's gate, handing out literature for Local 667 or engaging practice picketing.

For his part, Holcomb did not conceal his prounion sentiment. He regularly wore shirts, hats, and pins to work, showing Local 667's name or urging support for the Local.

I have no doubt that Joey Smith, Bob Cecil, and Tom Nelson were aware of Jones and Holcomb's pro-Local 667 activity and sentiment. In view of the Company's demonstrated hostility toward employees who supported Local 667 and the Teamsters, it was likely that Smith, Cecil, and Nelson would be alert for an opportunity to diminish Local 667's strength by getting rid of these two open union supporters. Thus, I find that the General Counsel has made a prima facie showing that the two employees' union activity was a factor in Cecil's decisions to discharge Jones and Holcomb on June 25.

The Company claims that Cecil suspended and fired Jones and Holcomb for attempting to slow production on the Memphis terminal's dock. In support of this claim, the Company had reports from employees Pickett and Davis showing that without any mention of safety concerns, Holcomb told them to slow down. Similarly, the Company had Pickett's detailed report that Jones had urged him to slow down without any mention of safety concerns. Cecil and Nelson gave Jones and Holcomb opportunity to explain their alleged misconduct. Cecil and Nelson provided credible testimony showing why they did not believe Jones and Holcomb. Cecil was in no hurry to discharge Jones or Holcomb. Cecil carefully investigated Pickett's report. He also gathered information showing the drop in production on his dock in May and June and checked Pickett's safety record. Finally, he questioned other dock employees and came up with Davis, who corroborated Pickett's report on Holcomb. At this point, Cecil concluded his investigation, but only after giving Holcomb one more chance to defend himself. Holcomb had nothing new to offer. There has been no showing that any employee, other than Holcomb and Jones urged an employee to slow down his or her work and got away with less punishment. Cecil was disturbed by his service center's poor production. He had a legitimate interest, as a company manager, to remove obstacles to the flow of work on his dock.

I have no doubt that the Company was unhappy about Jones and Holcomb's adherence to Local 667 and the Teamsters. Yet

[78] My findings regarding Cecil and Nelson's confrontations with Holcomb and Jones are based on a composite of the four participants' testimony.

[79] I have credited Cecil's uncontradicted testimony regarding his investigation of the allegations of misconduct against Holcomb and Jones prior to their discharges on June 25.

I cannot find that their prounion stance motivated the Company to discharge them. Accordingly, I find that the Company has rebutted the General Counsel's prima facie showing of unlawful motive. I further find that the General Counsel has not shown by a preponderance of the evidence that the Company discriminated against Jones and Holcomb within the meaning of Section 8(a)(3) and (1) of the Act. *General Electric Co.*, 321 NLRB 662, 677 (1996). I shall, therefore, recommend dismissal of the allegations that Jones and Holcomb's respective discharges violated Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. By disciplining, suspending, and then discharging employee Sam Powell, and by suspending and then discharging employees Charles Watkins, Floyd Wilbanks, Frederick L. Clark, Autra Wilkerson, Wilford Hugh McCalla, William Palmer, and Kyle Medley, because of their union activity and prounion sentiment, the Company has engaged in unfair labor practices affecting commerce, within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

2. The Company did not violate Section 8(a)(3) and (1) of the Act by discharging Dispatcher Tony Perezz Brown and employees Walter Jones and Terry Holcomb.

The Company violated Section 8(a)(5) and (1) of the Act by refusing to furnish the Union, Teamsters Local 667, affiliated with the International Brotherhood of Teamsters, with information it requested in February 1999, regarding the Company's investigation of bargaining unit employees' criminal records.

REMEDY

Having found that the Company 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 Company, having discriminatorily disciplined, suspended, and discharged Sam Powell, and having discriminatorily suspended and discharged employees Charles Watkins, Floyd Wilbanks, Frederick L. Clark, Autra Wilkerson, Wilford Hugh McCalla, William Palmer, Kyle Medley, and Sam Powell, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of suspension to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I shall also recommend that the Company be required to remove from its files any references to the unlawful discipline, suspension, and discharge of Sam Powell and any references to the suspensions and discharges of Charles Watkins, Floyd Wilbanks, Frederick L. Clark, Autra Wilkerson, Wilford Hugh McCalla, William Palmer, and Kyle Medley, and notify these employees that it has done so and that it will not use these adverse actions against them in any way.

[Recommended Order omitted from publication.]