

**Syracuse Scenery & Stage Lighting Co., Inc. and International Alliance of Theatrical Stage Employees, Local 9.** Cases 3–CA–23798–1 & 2 and 3–RC–11249

July 30, 2004

DECISION, ORDER, AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS  
SCHAUMBER AND WALSH

The issue presented in this case is whether the Respondent violated the National Labor Relations Act when it terminated four employees who left work early without permission on 4 consecutive days, prepared and submitted fraudulent timesheets to secure payment for hours not actually worked, and then steadfastly lied about their misconduct when confronted by their employer.<sup>1</sup> The administrative law judge found that the Respondent violated Section 8(a)(3) and (1) of the Act on the grounds that the Respondent's primary motivation for monitoring the work hours of these employees was to establish a basis for firing them in order to discourage unionization. We disagree. For the reasons discussed below, we find that the Respondent established that it would have terminated these four employees for their misconduct even in the absence of their union activity. Accordingly, we shall reverse the judge's decision and dismiss the complaint.<sup>2</sup>

<sup>1</sup> On March 18, 2003, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions, a supporting brief, answering briefs, and reply briefs. The General Counsel and Charging Party each filed cross-exceptions, a supporting brief, and an answering brief.

No exceptions were filed to the judge's dismissal of the complaint allegation that the Respondent violated Sec. 8(a)(1) by posting no-solicitation signs in its facility.

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

<sup>2</sup> The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The General Counsel and Charging Party have 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 evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Charging Party and General Counsel filed cross-exceptions asserting that the judge incorrectly limited his analysis concerning the Respondent's practice of allowing employees to "float hours," and incorrectly failed to find that the Respondent had a policy of accepting inaccurate timesheets. Because we adopt the judge's findings that the four discharged employees did not float hours during the week in question, and because the documentary evidence on timesheets introduced

I. FACTS

The Respondent, Syracuse Scenery & Stage Lighting Co., Inc. (Syracuse), is a small company in the business of stage and scenery manufacturing, installation, and sales. In the summer of 2002, Syracuse employed the four discharged employees, Jeff Bidwell, John Szusznik, Joseph Vitetta, and Michael Noga, as installation technicians or "riggers."

In June 2002, Syracuse announced to the riggers that it was implementing a modified retirement fund. The riggers, led by Bidwell, met with Syracuse's president, Christine Kaiser, and its vice president, Frank Willard, to protest aspects of the new retirement plan. Subsequently, Bidwell led an organizing campaign of the riggers, and on August 20, Local 9 of the International Alliance of Theatrical Stage Employees (IATSE) filed, and Syracuse received, a union representation petition. At approximately the same time, Willard held a meeting with installation technicians, during which he reiterated the Respondent's existing policy requiring the submission of accurate timesheets.

On or about August 12, Bidwell, Szusznik, Vitetta, and Noga (the crew) were assigned to a project in Seneca Falls, New York. The project was scheduled to take 2 weeks, with the crew working regular workweek shifts of 7 a.m. until 3 p.m. When the project was not completed on schedule, Kaiser decided to send Project Manager Joseph Varco to check on the progress of the job.

On August 26, as the crew was entering into its third week of work, Varco arrived at the site at approximately 2 p.m. and found that none of the crew members was present. When the crew had not returned by 2:30 p.m., Varco contacted Willard to report the crew's absence and also made notes to that effect. The following afternoon, Tuesday, August 27, Varco returned to the site at approximately 2 p.m. with another project manager, Harold Shippers. As they arrived on the site, the crew appeared to be preparing to leave for the day. Varco and Shippers spoke briefly with two members of the crew, and the crew did not leave. Varco and Shippers left the site, and waited nearby for a half hour. When they returned to the site at approximately 3 p.m., they found the crew had left the site early. Varco and Shippers reported what they saw verbally to Kaiser, as well as in writing.

On Wednesday, August 28, Vice President Willard again arrived at the site about 2 p.m. and watched the crew from his car until 2:30 p.m., at which time the crew departed en masse. On Thursday, August 29, with the project delay continuing to mount, Varco again returned

at hearing was limited to the four discharged employees, we find no merit in these exceptions.

to the site and again observed the crew leaving at approximately 2:30 p.m. Willard and Varco reported their observations back to Kaiser both verbally and in writing.

At the end of the week, the crew coordinated and turned in their timesheets, each member falsely reporting a full 32 hours of work for the week. On September 3, Kaiser and Willard questioned the crew members separately, and each falsely maintained that the timesheets were accurate and denied leaving the jobsite early on any of the days in question.<sup>3</sup> The following day, September 4, Kaiser and Willard terminated the crew for falsifying timesheets for the week ending August 30, 2002. Kaiser explained to the employees that in light of their falsifying their timesheets and dishonesty when confronted with the matter, she had no choice but to discharge them.

The Respondent's policy manual addresses misconduct with regard to work hours. Specifically, page 4, section I-B of the manual provides that "[e]mployees are expected to be present and ready for work at their scheduled starting time and to depart at their regularly scheduled time." Further, page 5, section I-E states that "falsifying records or timesheets" is "[c]onduct that may result in disciplinary action or termination."

In the spring of 2002, Brian Britton, a former installation technician, failed to show up for an out-of-town installation project on a Friday. Britton claimed on his timesheet that he worked that day. After arriving for work the following Monday and being confronted with the incorrect timesheet by Willard, Britton immediately confessed to missing work. Further, he informed Willard that he made a mistake, expressed remorse, and promised that he would not engage in such conduct again. He was not disciplined.

## II. JUDGE'S DECISION

The judge credited the observations of Varco, Shippers, and Willard that the crew left work early on 4 consecutive days during the week of August 26, submitted falsified timesheets claiming wages for work they had not performed, then lied about the matter when questioned by management. Nonetheless, the judge concluded that the Respondent violated Section 8(a)(3) and (1) of the Act by terminating the crew in order to discourage its employees from engaging in union activity.

<sup>3</sup> Employee Noga was actually questioned twice. He steadfastly denied any "leaving early" violation during the first interview. During the second meeting, when told that witnesses personally observed that he was not at the jobsite at all times he had claimed to be there, Noga would only concede that his daily timesheets might have been off by 5-15 minutes, but that his total hours were accurate.

Applying a *Wright Line*<sup>4</sup> analysis, the judge found that Kaiser and Willard knew of Bidwell's lead role in the organizing effort, and were made aware of Szusniak, Noga, and Vitetta's support for the Union through informants in the bargaining unit. The judge inferred anti-union animus from the Respondent's monitoring of the crew, which he found was motivated by a desire to find a basis for terminating union supporters rather than by the Respondent's asserted business motivation. Further, the judge inferred animus from the Respondent's allegedly disparate treatment of former employee Brian Britton. The judge likewise inferred discriminatory motivation from the timing of the discharges. The judge regarded the disparate treatment finding as "critical" to his determination that the Respondent's asserted reasons for its actions taken against the crew were pretextual.

Although the judge determined that each of the four crew members attempted to steal wages for work not actually performed, left work early without permission in violation of the policy, and then lied about their misconduct, he nonetheless found that the Respondent failed to meet its burden of demonstrating that the discharges would have occurred even in the absence of the crew members' protected activity.

## III. ANALYSIS

Where, as here, the employer's motivation is at issue, the General Counsel must establish under *Wright Line* that (1) the employee was engaged in protected activity; (2) the employer was aware of the activity; and (3) the activity was a substantial or motivating reason for the employers action. See *Manno Electric*, 321 NLRB 278, 283 fn. 12 (1996). Once the General Counsel makes this initial showing, the burden of persuasion shifts to the Respondent to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity. *Id.*

Assuming arguendo that the General Counsel met his initial *Wright Line* burden to show the Respondent was motivated by antiunion animus in terminating the four crew members, we find that the Respondent established that it would have taken the same action against these employees even in the absence of their union activity.<sup>5</sup>

<sup>4</sup> *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981).

<sup>5</sup> Member Schaumber notes that the test established in *Wright Line* was a causation test under which the General Counsel must prove by a preponderance of the evidence that the employees protected activity was a substantial or motivating factor for the adverse employment action. The Board, administrative law judge's, and circuit courts of appeals have variously described the evidentiary elements of the General Counsels initial burden of proof under *Wright Line*, sometimes adding as a fourth element the necessity for there to be a causal nexus between the union animus (i.e., Sec. 7 animus) and the adverse em-

We note at the outset that there is no evidence of other unlawful conduct in the record. We further note that it is undisputed that the crew left work without permission, submitted inaccurate timesheets—i.e., falsified records to secure payment for hours they did not work—and lied about the matter to the Respondent. This type of misconduct is a basis for termination under Respondent’s policy manual. The importance the Respondent placed on this policy is emphasized by the meeting that Willard had with the installation technicians on August 21, during which he reminded employees that weekly timesheets had to be accurate.

The judge and the dissent have constructed their finding of a violation solely on the basis of inferences drawn from the alleged disparate treatment of Brian Britton and on circumstances surrounding the Respondent’s observation of the crew. As discussed below, the record does not support these inferences.

*A. The Failure to Discipline Brian Britton is not Evidence of Disparate Treatment*

When the Respondent learned that Brian Britton had submitted a timesheet reflecting hours that he did not work on a particular day, Vice President Willard confronted Britton, who immediately confessed to this one instance of misconduct, offered to change his timesheet, and showed contrition for his transgression. Willard and Kaiser also questioned the crew, yet none of the four acknowledged any wrongdoing. Instead, they dug in their heels, held steadfast to their lies, and gave the Respondent no indication that they regretted what they had done. Contrary to the judge and the dissent, we find that there is a sharp distinction between Britton’s admission of his act of misconduct upon being confronted by Willard, and the reaction of the crew upon being confronted with their lies and repeated violations of Respondent’s policies, which was to tell additional lies. The distinction is particularly meaningful here, where the Respondent’s projects are far away, and Respondent

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ployment action. See, e.g., *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). Member Schaumber agrees with this addition to the formulation. The existence of protected activity, employer knowledge of the same, and animus (i.e., Sec. 7 animus) may not, standing alone, provide the causal nexus sufficient to conclude that the protected activity was a motivating factor for the adverse employment action. For example, the 8(a)(1) conduct of a supervisor, while imputed to the employer, may have no relation to adverse employment action taken by another supervisor against an employee who happened to be engaged in Sec. 7 activities. Member Schaumber believes it would be preferable in the near future for the Board to adopt and thereafter consistently apply a single statement of the elements of proof, but it is not necessary to address the issue here because he and Chairman Battista have assumed arguing that the General Counsel met his initial *Wright Line* burden.

must be able to trust and rely on the accurate and honest timekeeping of its employees.

Our dissenting colleague says that Britton’s over-reported hours were quantitatively more than each of the four employees involved herein. In our view, the Respondent could reasonably place more reliance on the candor and contrition of the offender than on the number of hours involved.

The dissent also contends that the Respondent already made the decision to discharge the crew before meeting with them on September 3. Contrary to the dissent, however, Kaiser testified that after discovering that both Bidwell’s and Szusznik’s timesheets were false, she and Willard decided to confront the two employees concerning their timesheets to see if the employees could explain the falsification and, *absent any reasonable explanation*, they would discharge the employees. In addition, Kaiser explained that it was only after she met with the crew on September 3, a meeting in which each of the four employees compounded his misconduct by lying about the accuracy of his timesheets, that the Respondent decided to terminate the four employees. Accordingly, we find that the Respondent’s treatment of Britton is not evidence of disparate treatment.

*B. The Monitoring of the Crew does not Warrant the Inference of Unlawful Motivation*

We disagree with the judge that the Respondent’s “principal, and possibly only motive” for sending its agents to the Seneca Falls jobsite was to establish a basis for terminating the crew.<sup>6</sup> It is undisputed that the Seneca Falls project was a week overdue by the time the Respondent began monitoring the crew. The Respondent sent managers out to the jobsite to check on the progress of the job and to learn why the project was taking longer than expected. Once Kaiser learned that the crew left early from the site on Monday, it was reasonable for her to continue to send her managers back to the site in the ensuing days to determine whether the problem was an isolated incident.

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<sup>6</sup> We disagree with the dissent that the judge’s determination that the Respondent checked up on the Seneca Falls crew to find a basis for terminating them is a credibility determination. In *Charles Batchelder Co.*, 250 NLRB 89, 89–90 (1980), the Board explained:

[T]he question of motivation where an alleged unlawful discharge [or other adverse action] is involved is not one to be answered by crediting or discrediting a Respondent’s professed reason for the discharge, and thus we cannot accept every credibility finding by a trier of fact as dispositive of that issue. Rather, that question is one to be resolved by a determination based on consideration and weighing of all the relevant evidence.

Thus, we are not reversing any of the judge’s credibility findings, but rather are reversing his conclusion on the ultimate question of the Respondent’s motivation.

We reject as illogical the judge's and the dissent's finding regarding the Respondent's motive for sending its managers to check on the progress of the Seneca Falls project. There is no evidence that the Respondent knew that the four employees would be absent from the jobsite when Varco arrived there on August 26. Without such evidence, an inference is not warranted that Varco visited the site with the intention of establishing a basis on which to terminate the employees. Moreover, it does not make sense that the Respondent would reiterate its existing timesheet policy to employees shortly before initiating an effort to catch violations of the policy. If the Respondent wanted to terminate the employees, why would it warn them in advance about not engaging in this type of misconduct? We also reject the dissent's finding that the Respondent had never sent managers to "spy" on other crews whose projects were running behind. On the contrary, the evidence shows that the project managers regularly visit jobsites to check on the progress of the various projects. Indeed, in the past, Varco took notes when he was monitoring such projects. Further, to the extent any "spying" occurred, it did not begin until Tuesday August 27 and was justified by what occurred the day before.

Furthermore, the dissent points to the notes of Willard, Varco, and Shippers, which indicate little more than the comings and goings of the crew, as evidence of the pretextual nature of the Respondent's repeated outings to the jobsite that week. However, the notes of these managers, reflecting the crews' absence from the jobsite on 4 consecutive days, speak precisely to the issue of progress of the job: the job was not up to speed because the employees were not working the hours they claimed to be working.

As noted earlier, the nature of the Respondent's business requires that the Respondent rely on the honest timekeeping of its employees. During the period of surveillance, the Respondent discovered that the crew members were not worthy of their employer's trust or good faith. For these reasons, we find that the Respondent's monitoring of the crew does not warrant the inference of unlawful motivation.

The record supports neither the judge's finding of disparate treatment nor his inference that the Respondent's surveillance of the crew was unlawful. The only remaining basis for the judge's rejection of the Respondent's defense is the timing of the discharges. However, this evidence, standing alone, is insufficient to establish that the Respondent did not rely on its asserted reasons for the discharges under the circumstances of this case. While the employees' union activities and the discharges did occur within a relatively brief time period, so, too, was there a close proximity in time between the employ-

ees blatant misconduct and the Respondent's decision to terminate them. Under these circumstances, the factor of timing is too weak a foundation upon which to base a finding of pretext.

Nor can the dissent base a finding of pretext on the contention that the Respondent asserted an "after-the-fact" or "post-hoc" explanation for the discharge. We note initially that this theory of a violation was not relied upon by the General Counsel. There is a good reason for this. There is no support for it. In this regard, the dissent contends that the discharge letters given to the discriminatees contained two reasons for termination—"leaving your assigned job site during your scheduled work hours" and "falsifying your time sheet." The dissent asserts that a third reason, viz—"lying upon being confronted about this misconduct" was given only at the hearing. This assertion is not correct. This third reason was stated to the crew at the time they were given their discharge letters. Thus, the explanation was not "post-hoc" as the dissent claims; it was contemporaneous with the receipt of their termination letters.

The dissent argues that the judge "implicitly discredited" Kaisers uncontradicted testimony that she explained this third reason to the crew on the day of their discharge. Interestingly, neither the General Counsel nor the Union raised this "discrediting" argument to the judge or in their answering briefs to the Board. Further, the judge's decision contained a specific section concerning credibility resolutions. In that section, the judge mentioned Kaiser's testimony only once (fn. 8), and he credited Kaiser there. It is therefore an unwarranted leap to say that the judge discredited Kaiser in any respect.<sup>7</sup>

Our colleague says that the General Counsel could not have foreseen that the Respondent would argue "lying upon lying" as a basis for the discharge. However, the basis for discharge was raised at the hearing, and the General Counsel thus had an opportunity to raise, by brief, the argument that this was a post hoc reason for the discharge. The General Counsel did not do so.

In this same vein, our colleague says that the Respondent's policy expressly proscribes falsification of timesheets but it does not expressly proscribe lying about the falsification. We think it obvious that an employer who proscribes the former transgression also proscribes the compounding of the original transgression.

These proscriptive policies do not mandate discharge (or indeed any discipline) for transgression. The issue is whether an employer can lawfully choose to distinguish between an employee who falsifies a timesheet and an

<sup>7</sup> Contrary to the suggestion of the dissent, it is the testimony of the witness (Kaiser), not the statement of counsel, that is critical.

employee who falsifies a time sheet *and* then lies about the falsification. We are aware of nothing in the Act that forbids an employer from distinguishing between the two.

### C. Conclusion

For all the reasons discussed above, we conclude, contrary to the dissent, that even had the General Counsel met his initial *Wright Line* burden, the Respondent has shown that it would have terminated these four employees because of their serious misconduct, regardless of their union activity.

### D. Challenged Ballots

A representation election was conducted in Case 3–RC–11249 on January 6, 2003, in the following bargaining unit:

All regular full-time and regular part-time installation technicians, installation prep employees, rental/lighting technicians, curtain installation technicians, and shipping receiving clerks, employed by the Employer at its 101 Monarch Drive, Liverpool, New York facility.

The tally of ballots shows four for and seven against the Petitioner, the International Alliance of Theatrical Stage Employees, Local 9. The ballots of the four discharged employees were challenged by the Respondent and not counted. In the instant proceeding, the representation case was consolidated with the unfair labor practice case alleging that the four employees were discriminatorily discharged.

Having found that the Respondent's discharges of Jeff Bidwell, John Szusznik, Joseph Vitetta, and Michael Noga were not unlawful, we conclude that the challenges to their ballots are sustained.

### ORDER

The complaint is dismissed.

### CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for International Alliance of Theatrical Stage Employees, Local 9, and that it is not the exclusive representative of these bargaining unit employees.

MEMBER WALSH, dissenting.

The majority concludes that the Respondent established that it would have terminated employees Jeff Bidwell, John Szusznik, Joseph Vitetta, and Michael Noga for submitting false timesheets even in the absence of their union activity. The record shows, however, that the Respondent did not in fact rely on this asserted reason when it discharged the four discriminatees. Instead, consistent with the judge's decision, the evidence shows

that the Respondent seized on the discriminatees' inaccurate timesheets as a pretext for ridding itself of union adherents.

### I. FACTS

On or about August 12, 2002, Respondent's four-man rigging crew, comprised of Jeff Bidwell, John Szusznik, Joseph Vitetta, and Michael Noga, started a project in Seneca Falls, New York. On August 20, the Union filed, and Respondent President Christine Kaiser received, a union representation petition. The very next day, August 21, Respondent Vice President Frank Willard called a meeting of all riggers to tell them that their timesheets had to be accurate. There was no evidence Willard had ever before called such a meeting, and by Willard's own admission, he did not ordinarily check employees' timesheets as part of the ordinary course of business.<sup>1</sup>

The very next week, the Respondent ordered its managers to secretly monitor the discriminatees, purportedly to check on the progress of the job that was a week behind schedule. From Monday, August 26, through Thursday, August 29, Kaiser sent three different agents of the Company (Project Managers Joseph Oakie Varco and Harold Ike Shippers, and Vice President Willard) to the Seneca Falls site, for a total of four trips, and over 10 hours of company time. On each of these outings, one or more of these managers surreptitiously observed the discriminatees, and, at the direction of Kaiser, each recorded notes of the surveillance missions, which amounted to an accounting of the discriminatees' comings and goings.<sup>2</sup> There was no evidence that Kaiser had ever before directed her managers to engage in such surveillance. By Varco's own admission, this was the first and only time he was asked to document employees comings and goings to Kaiser; this was also the first and only time such documentation had ever been used in connection with terminating employees.<sup>3</sup>

While Varco and Willard spoke with the discriminatees at various points during the week of August 26, neither ever broached the topic of their leaving the site

<sup>1</sup> While the majority characterizes Willard's impromptu meeting as a "reiteration" of the Respondent's existing policy, there is no evidence that the Respondent ever enforced its written policy to discipline or terminate an employee for falsifying timesheets prior to its receipt of the Union's representation petition. To the contrary, the only evidence introduced at the hearing with regard to an employee falsifying timesheets to secure payment for hours he did not work is the example set by Respondent's crew chief, Brian Britton—whom the Respondent let off scot free.

<sup>2</sup> While it is not clear when the crew left the site on Monday, August 26, the credited testimony of Willard, Shippers, and Varco is that the crew left at approximately 2:30 p.m. on the three successive afternoons, when their quit time should have been at 3 p.m.

<sup>3</sup> Varco additionally admitted that that he would not be surprised if employees on long distance jobs end their shifts a bit early.

early, nor expressed concern to Bidwell or any other member of the crew about the job taking longer than anticipated. When the discriminatees turned in their timesheets for the workweek, each indicated that they had worked a full 32 hours at the jobsite.

On August 30, Bidwell attended the Union's representation hearing, at which both Kaiser and Willard were present. The very next business day, September 3, Kaiser and Willard met briefly with the discriminatees individually, to confront each of them about the inaccurate timesheets. By this time, the decision to terminate the discriminatees had already been made. Willard read from a prepared statement to each of them, and Kaiser took notes. The following day, on September 4, Kaiser and Willard handed each of the discriminatees a termination letter stating the grounds for discharge as "leaving your assigned job site during your scheduled work hours last week and falsifying your time sheet for the week ending August 30, 2002."<sup>4</sup>

Months prior to the events of this case, the Respondent's then-field installation crew chief by the name of Brian Britton submitted a falsified timesheet, claiming wages for a full 8-hour day of work that he did not perform. Britton was the only member of his crew who had skipped out of work that day. When Willard learned of this, he confronted Britton immediately. Britton told Willard he could offer no "honest answer" for his conduct. Willard testified that he could not recall whether the Respondent ever considered terminating Britton, and Britton did not receive a written warning for his transgression.<sup>5</sup>

## II. ANALYSIS

This case turns on the Respondent's motivation. Under *Wright Line*, the General Counsel must show that the discharged employees' protected conduct was a "motivating factor" in the employer's decision. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir.

<sup>4</sup> The majority points out that Kaiser testified that at the time she and Willard discharged the four discriminatees on September 4, she explained to them that she had "no choice" but to discharge them in light of their falsifying timesheets and dishonesty when confronted. The termination letters that she and Willard handed to the four men on September 4, however, make no mention of this additional basis, i.e., lying upon being confronted, for terminating the four discriminatees.

<sup>5</sup> By Britton's own testimony, Willard's reaction was benign. Britton testified: "[Willard] indicated that . . . I . . . should have known better and basically don't let it happen again. We don't like to see this and that was pretty much it." This is a far cry from Willard's testimony concerning his discovery that the four discriminatees had submitted false timesheets on August 29: "We decided that absent any reasonable explanation . . . that it was a serious offense. And that we could not support employees, regardless of how good a worker they were, that would be lying, cheating, and taking time and money from the company . . ."

1981). As part of his initial showing, the General Counsel may offer proof that the employer's reasons for the personnel decision were false or pretextual. *Pro-Spec Painting, Inc.*, 339 NLRB 946, 949 (2003) (citing *National Steel & Shipbuilding Co.*, 324 NLRB 1114, 1119 fn. 11 (1997)). See also *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995) ("When the employer presents a legitimate basis for its actions which the factfinder concludes is pretextual . . . the factfinder may not only properly infer that there is some other motive, but that the motive is one that the employer desires to conceal—an unlawful motive . . .") (citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1996) (internal quotations omitted)).

A finding of pretext defeats any attempt by the Respondent to show that it would have discharged the discriminatees absent their union activities. This is because where "the evidence establishes that the reasons given for the Respondent's action are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis." *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003) (citing *Limestone Apparel Corp.*, 255 NLRB 722 (1981)). See also *Sanderson Farms, Inc.*, 340 NLRB 402 (2003).

Here, the Respondent asserts that it discharged the discriminatees because they submitted timesheets that misrepresented the number of hours that they actually worked. There is no question that the discriminatees submitted inaccurate timesheets for the week of August 26–29, 2002. This is not a case, therefore, where the reasons asserted for the discharges are false. It is, instead, a case where the evidence establishes that the Respondent did not actually rely upon its asserted reason in terminating the crew. As the judge properly found, the Respondent knew that the four discriminatees were union adherents,<sup>6</sup> and the Respondent seized on the inaccuracy of the discriminatees' timesheets as a pretext for discriminating against them on the basis of their union activity. The pretextual nature of the Respondent's defense makes out the General Counsel's case; it also defeats the Respondent's attempt to show that it would have discharged the discriminatees even in the absence of their union activity.

The judge's finding of pretext, as discussed below, is supported by the evidence of the Respondent's disparate

<sup>6</sup> Respondent President Christine Kaiser testified that during the summer of 2002, she became aware of the distribution of union authorization cards and other goings-on in the organizing campaign through the reports of more than one unit member.

treatment of Brian Britton as compared to the four discriminatees, as well as the surrounding circumstances of the discharges.

#### A. Disparate Treatment

The majority declares that the Respondent's leniency toward Brian Britton—its crew chief who was caught in his attempt to steal an entire day of time—differs from its harsher treatment of the four discriminatees because Britton admitted to his transgression immediately, whereas the discriminatees did not. Indeed, the linchpin of the Respondent's argument is that the Respondent terminated the four discriminatees not only for falsifying time records, but also for *lying upon being confronted* about this misconduct. However, this after-the-fact explanation for the Respondent's discharge of the discriminatees is not supported by the documentary evidence at the time of the terminations. As the judge found, each of the four termination letters clearly state that the discriminatees were discharged for "leaving your assigned job site during your scheduled work hours last week and falsifying your time sheet for the week ending August 30, 2002." It was only at the hearing, when the Respondent was faced with the stark evidence of its disparate treatment of Britton, that the Respondent advanced an additional basis for terminating the discriminatees.<sup>7</sup> This post hoc "lying upon lying" explanation was and remains a vain attempt to distinguish the Respondent's downright lax treatment

<sup>7</sup> The majority argues that this additional or third reason for terminating the discriminatees was communicated to them at the time they were given their discharge letters. While Kaiser testified to that effect, a close reading of the judge's factual findings shows that he implicitly discredited Kaiser's testimony. "Such implicit credibility resolutions are appropriate where an ALJ's treatment of the evidence is supported by the record as a whole." *NLRB v. Katz's Delicatessen of Houston Street, Inc.*, 80 F.3d 755, 765 (2d Cir. 1996). Here, the judge stated at the outset of his decision that his findings of fact were based on "the entire record, including [his] observation of the demeanor of the witnesses." In the fact section of his decision discussing the reasons the Respondent gave for terminating the discriminatees, the judge referenced only the two reasons stated in the termination letters and made no mention of Kaiser's testimony about a third reason. The majority errs by asserting that the judge credited a portion of Kaiser's testimony in the section of his opinion containing specific credibility resolutions. The only reference in that section to Kaiser's testimony is as corroboration for Varco's admission that Kaiser told him that he could either resign as union president, resign his employment, or be fired. (See fn. 8 of the judge's decision and accompanying text.)

The record amply supports the judge's implicit discrediting of Kaiser's testimony, which was not corroborated by any other witness. In fact, at the hearing, the Respondent's own counsel did not interpret Kaiser's testimony as establishing a third reason for termination. He stated: "[I]t's unfair to characterize that [the discriminatees' lying] as the reason for termination. *The misconduct is the two reasons stated in the letter.*" (Emphasis added.) In these circumstances, the majority's assertion that "it is . . . an unwarranted leap to say that the judge discredited Kaiser in any respect" is clearly incorrect.

of Britton, who did not so much as suffer a slap on the wrist for his blatant misconduct. It is also compelling evidence of pretext.<sup>8</sup> See *McClendon Electrical Services*, 340 NLRB 613 (2003) (where reasons advanced at hearing differed from reasons stated in disciplinary notice, "[t]he Company's vacillation and the multiplicity of its alleged reasons for firing [the employee] render its claims of nondiscrimination the less convincing") (citing cases); *Power, Inc. v. NLRB*, 40 F.3d 409, 420 (D.C. Cir. 1994).

Furthermore, under the Respondent's policy manual, the Respondent should have punished Britton for his misconduct. Its failure to do so while discharging the discriminatees "is obviously suggestive of improper motivation." *Wyman-Gordon Co. v. NLRB*, 654 F.2d 134, 141 (1st Cir. 1981). Here, the Respondent has a policy that proscribes, inter alia, the conduct of (1) not reporting to work at the scheduled starting time; and (2) falsifying time records. Contrary to the suggestion of the majority, the policy does not contain an additional provision concerning "lying about lying." Rather, it proscribes *lying in the first instance*. No matter how the majority wishes to favorably distinguish Britton from the four discriminatees, the majority cannot escape two basic truths: (1) Britton did not report to work for an entire day; and (2) Britton proceeded to lie about it an attempt to cheat his employer out of a day's work by turning in a falsified timesheet. Under the Respondent's policy, as well as the testimony of Kaiser and Willard that absent a "reasonable explanation," such lying and cheating conduct will not be tolerated, Britton should have been terminated.<sup>9</sup> There is simply no principled basis for the Respondent's termination of four discriminatees in light of its lax treatment of Britton.

The Respondent's disparate treatment of Britton—a crew chief who stole roughly the same amount of time as *the four discriminatees combined*—undermines the Respondent's assertion that such transgressions are not ordinarily tolerated. See *Pro-Spec Painting, Inc.*, supra at 950–951 (evidence that respondent "tolerated a lot

<sup>8</sup> The majority "note[s]" that the General Counsel did not advance the Respondent's post hoc explanation as a "theory of a violation." This observation is totally irrelevant. Obviously, the General Counsel is not prescient and cannot anticipate what defenses a respondent may raise for the first time at the hearing. The "theory of a violation" advanced by the General Counsel at all relevant times was that the Respondent's defenses were pretextual. As discussed above, the General Counsel's theory is fully supported by the record and the findings of the judge.

<sup>9</sup> The majority's reliance on Kaiser's testimony that it was only "absent any reasonable explanation" that she would terminate the discriminatees for falsifying timesheets is farcical in light of Britton's own testimony that when asked why he had falsified timesheets for an entire day of time, he replied: "I don't have an honest answer for that."

worse” constituted disparate treatment that belied respondent’s assertion that it fired employee for cause); *Guardian Automotive Trim, Inc.*, 340 NLRB 475 fn.1 (2003) (relying on evidence of disparate treatment to show the respondent’s antiunion motive where respondent issued a greater corrective action to discharged employees than it did to other employees disciplined for similar conduct); *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1124 (2002) (rejecting respondent’s claim that absent an exact comparable situation, the judge erred in finding disparate treatment, where there was evidence of respondent’s leniency towards employees who committed similar transgressions). There is no evidence that the Respondent has ever before fired an employee for misrepresenting hours worked on a timesheet.<sup>10</sup> With respect to Britton in particular, there is no evidence that Kaiser ever asked Willard or any of her managers to monitor Britton at any time, even after their discovery of his misconduct.

### B. Surrounding Circumstances

#### 1. Surveillance of the crew

The Respondent’s asserted reasons for initiating its monitoring of the discriminatees are equally specious. While the majority is quick to point out that the judge credited the testimony of Willard, Varco, and Shippers as to what each observed of the comings and goings of the discriminatees, the majority simultaneously disregards the judge’s rejection of these witnesses’ testimony on their *reasons* for monitoring the discriminatees in the first place. The preponderance of the evidence, as discussed below, supports the judge’s determination that “Respondent checked up on the Seneca Falls crew from August 26–29 with the primary, and possibly the sole, objective of finding grounds for terminating them.” There is thus no basis for disturbing the judge’s credibility resolution on this point. See *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951).

<sup>10</sup> Tellingly, Willard could not recall a single instance—in his 28 years with the Respondent—when an employee had been terminated for misrepresenting hours on a timesheet. The majority’s repeated assertion that the Respondent placed great importance on a timesheet policy that the Respondent did not bother to enforce until the advent of the Union’s campaign thus rings hollow. Indeed, Brian Britton recounted how he and his crew violated this purported policy on a regular basis: “Say we worked, some weeks we would actually put in more than 40 [hours] to get finished. But there was other weeks where we wouldn’t put in our 40 at 38, 39, and then we’d just kinda, we had an agreement that we would, you know, as long as we kept within 1 or 2 hours of that time each week, and I, as, well, the head guy at the installation point, would say, okay, you know wed work a little extra here, a little less there, but we always, for the most part, put our 40 hours in. . . .”

First, while the Seneca Falls project was 1 week overdue, Project Manager Varco testified that jobs are often overdue. He also testified that the Seneca Falls project was the first and only job for which he and two other managers were sent to the site to monitor and record the comings and goings of a work crew for Kaiser. There was no evidence that the Respondent had ever before sent management employees to spy on other crews whose projects were running over or nearing completion.<sup>11</sup>

Second, while Varco, Shippers, and Willard all testified that they went to the site to check on the progress of the job because it was behind schedule, as the judge correctly noted, their recorded notes belie this explanation. For example, while Varco testified that he went to check on the progress of the job on August 26 on his own, and brought along Shippers on August 27 for his “technical expertise,” neither Varco’s nor Shipper’s notes reflect anything about the progress of the job on either date.

Third, as the judge also correctly noted, “an employer interested only in getting its employees to work a full day would have taken immediate remedial action on August 26,” the first day that it learned that the crew left the job early. Instead, numerous opportunities came and went for Varco, Shippers, and Willard to confront the crew. For example, on Tuesday August 27, Varco and Shippers spoke with Bidwell and another crew member at the site, but concealed their knowledge of Varco’s presence at the site the afternoon prior. Varco and Shippers then pretended to leave the site, only to hide in a nearby parking lot for an additional half hour. Varco, Shippers, and Willard did not confront the crew at any point during that week. Varco could not even recall telling Bidwell that he was unhappy with the progress of the job when Bidwell called him on August 28 for a routine check-in. This conduct on the part of the Respondent’s agents, at the direction of the Respondent’s president, is utterly inconsistent with the Respondent’s professed concerns with the progress of the Seneca Falls job.<sup>12</sup>

Finally, Willard testified that the reason he did not address the issue of leaving early with the discriminatees

<sup>11</sup> The majority points to Varco’s testimony that he has taken notes when he has monitored projects in the past. However, this vague testimony was not supported by the production of any such notes by Varco or any other of the Respondent’s managers for that matter. Nor is there anything in Varco’s testimony or elsewhere in the record that indicates that he or any other manager had monitored any other project in the surreptitious and hidden manner engaged in by the Respondent’s managers in this case.

<sup>12</sup> These facts also undermine the Respondent’s argument, adopted by the majority, that Willard treated Britton and the discriminatees similarly in this regard. Willard consciously chose not to confront the discriminatees upon learning of their misconduct, whereas he confronted Britton immediately upon learning of Britton’s misconduct.

prior to September 3 was because of the hearing that took place on Friday, August 30. This does not explain why Willard did not say anything to these men for the 4 previous days he and the other managers had observed the worksite. The failure to confront the discriminatees earlier in the week is particularly telling because this project, as the majority repeatedly underscores, was to be finished by that Friday, and was already a week behind schedule. That none of the Respondent's managers checked the jobsite on August 30, even though the project was supposed to be completed on that day, is equally telling of the Respondent's unlawful motivation, particularly in light of the fact that Vitetta was still working on the job that day. These facts support the inference that the Respondent's true motivation for observing the discriminatees that week was to establish a basis for firing them, not to address purported concerns for the progress of the job.

## 2. Timing

The timing of the Respondent's monitoring and ultimate discharge of the discriminatees—coinciding with the Union's organizing drive of the riggers—is “stunningly obvious” and provides additional evidence that establishes the Respondent's unlawful motivation.<sup>13</sup> The chronology of relevant events bears repeating and speaks for itself:

- August 20—Respondent receives Union's representation petition.
- August 21—Willard calls first-ever meeting to tell riggers of the importance of timesheet accuracy.
- August 26–29—Respondent's managers secretly monitor the discriminatees.
- August 30 – Bidwell attends Union's representation hearing at which Willard and Kaiser are both present.
- September 3—Willard and Kaiser confront the discriminatees, their decision for termination already made.
- September 4—the discriminatees are terminated.

## C. Conclusion

The evidence of disparate treatment, together with the evidence concerning the surrounding circumstances of the terminations, warrants the inference of discriminatory motivation drawn by the judge in this case. See *Pro-*

<sup>13</sup> *NLRB v. American Geri-Care, Inc.*, 697 F.2d 56, 60 (2d Cir. 1982) (“An inference of anti-union animus is proper when the timing of the employer's actions is stunningly obvious.”), cert. denied 461 U.S. 906 (1983).

*Spec Painting, Inc.*, 339 NLRB at 949 (2003) (“Respondent's explanations for the terminations are pretexts and those pretextual explanations, along with an analysis of the circumstances of their terminations support findings of discrimination”). Because this is a case where the pretextual nature of the Respondent's defense makes out the General Counsel's case, the Respondent's attempt to show that it would have discharged the discriminatees even in the absence of their union activity necessarily fails. *Golden State Foods Corp.*, 340 NLRB at 385 (2003).

Accordingly, the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act should be adopted, the challenges to the ballots of the discriminatees should be overruled, their ballots should be opened and counted, and the appropriate certification should be issued.

*Robert Ringler, Esq.*, for the General Counsel.

*John T. McCann and Christian P. Jones, Esqs. (Hancock & Estabrook, LLP)*, of Syracuse, New York, for the Respondent.

*Mairead E. Conner, Esq. (Chamberlain, D'Amanda, Oppenheimer & Greenfield)*, of Syracuse, New York, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Syracuse, New York, on January 30–31, 2003. The charges were filed September 4 and 5, 2002 and the complaint was issued November 25, 2002. The General Counsel alleges that Respondent, Syracuse Scenery and Stage Lighting Company, Inc., violated Section 8(a)(3) and (1) of the Act in discharging four employees, Jeff Bidwell, John Szusznik, Joseph Vitetta, and Michael Noga, on September 4, 2002, in order to retaliate against at least some of them for engaging in union organizing activity and to discourage all of its employees from engaging in such activities. Respondent contends that it discharged the four employees for legitimate nondiscriminatory reasons—leaving work early and then submitting inaccurate timesheets. The General Counsel also alleges that Respondent violated Section 8(a)(1) by posting no-solicitation signs at its facility on or about June 18, 2002.

A representation election was conducted at Respondent's facility on January 6, 2003, in the following collective-bargaining unit:

All regular full-time and regular part-time installation technicians, installation prep employees, rental/lighting technicians, curtain installation technicians, and shipping receiving clerks, employed by the Employer at its 101 Monarch Drive, Liverpool, New York facility.

Seven votes were cast against the Union; four were cast for the Union; the four employees who were discharged on September 4, 2002, cast ballots, which were challenged by the

Respondent and not counted. Thus, if the Board finds that these employees were discriminatorily discharged, their ballots could be determinative of the election.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent, and Charging Party, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

Respondent, a corporation, fabricates stage curtains, installs theatrical equipment and sells theatrical supplies at or from its facility in Liverpool, New York, outside of Syracuse. It annually sells and ships goods valued in excess of \$50,000 directly to points located outside the State of New York. The Respondent 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 the Union, Local 9 of the International Alliance of Theatrical Stage Employees (IATSE), is a labor organization within the meaning of Section 2(5) of the Act.

##### II. ALLEGED UNFAIR LABOR PRACTICES

###### A. *The Union Organizing Campaign*

In the summer of 2002, Respondent employed about 33 individuals, including approximately 14 installation technicians, or "riggers."<sup>1</sup> The riggers generally worked at school or community theaters installing counterweights and other apparatus for the suspension of scenery and stage curtains and hanging lights. Approximately 90 percent of Respondent's customers for its rigging services were public institutions. On these public projects, Respondent was required to pay the riggers a "prevailing wage rate." The prevailing wage consisted of a base wage and a fringe benefit component. This prevailing rate ranged anywhere from \$25 per hour to \$42 per hour, depending on the location of the worksite. The fringe benefit component, which ranged between \$6 per hour and \$14 per hour, could by statute either be paid to employees as part of their paycheck or placed in a retirement, insurance or other fringe benefit fund.

Prior to June 2002, Respondent paid its riggers the entire prevailing rate as part of their paychecks. On June 3, 2002, Respondent president, Christine Kaiser, announced to employees that Respondent was implementing a retirement fund (an Internal Revenue Service 401 pw account) into which the entire fringe portion of the riggers' pay would be deposited. The rigging employees later met with Ms. Kaiser and Respondent's vice president, Frank Willard. Rigger Jeff Bidwell protested on behalf of the rigging employees that the retirement plan would reduce their take home pay drastically. Kaiser said her decision regarding implementation of the retirement fund was irreversible.

At another meeting on June 10, with Frank Willard, Bidwell again complained about the decrease in the riggers' take home pay and asked that the implementation of the retirement plan be

<sup>1</sup> At least half of the employees were not members of the proposed bargaining unit, such as employees who sewed curtains at Respondent's shop.

delayed. At some point in the meeting, Bidwell stated that the riggers' problem was that they didn't have a union. Willard asked which union they were interested in. Shortly thereafter, Bidwell and others, including John Szusznik, started an organizing drive and solicited employees to sign IATSE authorization cards. Several employees, including all the discriminatees, attended at least two union meetings at Bidwell's home. Joseph Vitetta signed an authorization card. Chris Kaiser and Frank Willard learned of the union organizing drive shortly thereafter. A bargaining unit employee provided them with information about the organizational campaign. Although Bidwell, Szusznik and possibly some other of employees of Respondent already were members of IATSE, the Union was not their collective-bargaining representative with Respondent.<sup>2</sup>

###### B. *The Seneca Falls Project and Events Leading to the Discharges*

A four man rigging crew began work installing theatrical equipment at a school in Seneca Falls, New York, on Monday, August 12, 2002. Employees were paid the prevailing rate for time spent on this project. Jeff Bidwell was the crew chief. He and crewmember John Szusznik reported to Respondent's shop in Liverpool each morning and then drove 40-45 minutes to the Seneca Falls jobsite. Bidwell and Szusznik returned to the shop each evening. The two other crewmembers, Michael Noga and Joseph Vitetta, drove directly to and from the jobsite from their residences.

On August 20, 2002, the Union filed a petition to represent Respondent's riggers, lighting technicians, and shipping clerks. Respondent apparently received the petition the same day. On or about August 21, Frank Willard met with the entire rigging staff. At this meeting Willard told the rigging employees that their weekly timesheets had to be accurate.

On Monday, August 26, Joseph Varco, Respondent's project manager for the Seneca Falls site went to the school at about 2 p.m. He found that none of the crewmembers were at the site. He stayed at the jobsite until about 2:30 p.m., reported the crew's absence to Willard and then drove back to Respondent's shop in Liverpool. At about 3:45 p.m. Bidwell and Szusznik arrived at the shop. Neither Varco nor Willard asked these employees why they were not at the jobsite during Varco's visit.<sup>3</sup>

Respondent contends that Varco went to Seneca Falls on August 26, the beginning of the crew's third week on that project, because the work was to have been completed within two weeks. Despite this contention, there is no evidence that Varco, Willard or any other member of management asked Bidwell or any other crewmember why the job was taking them so long. Varco testified that the Seneca Falls job was not the only project that took longer to complete than anticipated. There is no evidence that Respondent sent management employees to spy on work crews on any other job whose duration exceeded expectations. I therefore infer that Respondent's principal, and

<sup>2</sup> Prior to the summer of 2002, the Union hiring hall had referred a number of its members to Respondent, including Bidwell and Szusznik. Up until June 2002, Joseph Varco, one of Respondent's project managers, was president of Local 9.

<sup>3</sup> No such inquiry was made later in the week, either.

possibly only, motive for sending Varco out to the jobsite was to establish a basis for terminating Bidwell and the other members of his crew, all of whom had at least attended union organizational meetings.

Varco returned to the site with another project superintendent, Harold "Ike" Shippers at about 2 p.m. on Tuesday, August 27. As Varco and Shippers entered the school grounds they encountered crewmembers Noga and Vitetta, in separate vehicles, leaving the site. Varco and Shippers drove behind the school to the theatre area where they found Bidwell sitting in his company van, talking on a cell phone and Szusznik packing up the crew's materials. Shippers called Frank Willard and informed him of these facts.

Varco and Shippers went to the stage area where they were first joined by Bidwell and Szusznik, and then by Noga and Vitetta, who turned around and came back to the worksite. At no time did Varco or Shippers indicate to the crew that they were unhappy with the progress of the job. Both made notes of their visit, which dealt exclusively with checking on the times at which the crew left the jobsite.<sup>4</sup> Varco and Shippers left the site at about 2:30 and hid for about a half hour. They returned at about 3 p.m. and found none of the crewmembers at the site. They stayed at the site for about 15 minutes. On the way back to Liverpool, Varco and Shippers had to repair a flat tire. When they arrived at the shop, Bidwell and Szusznik were already there. Neither Varco nor Shippers asked where the two crewmembers were between 3 and 3:15 p.m., or indicated that they had returned to the worksite.

On Wednesday, August 28, Respondent's Vice President Frank Willard drove to Seneca Falls jobsite, arriving at about 2 p.m. He watched the crew unobserved from a parking lot and saw them leave at 2:30 p.m. Willard stayed at the Seneca Falls school until 3 p.m. Willard also made no inquiry as to why the crew left early nor did he indicate to any of them that he was aware of their early departure.

Varco went back to the site on Thursday, August 29, arriving about 2:20 p.m. He watched the crew from a concealed location and saw them leave the site at about 2:30 p.m. Varco reported his observations to Willard. Varco returned to the shop, and was there when Bidwell and Szusznik arrived at 4:10 p.m. Again, Varco made no inquiries as to their whereabouts after 2:30 p.m.. Bidwell and Szusznik turned in their weekly timesheets to Varco on August 29 because neither was to be at work on Friday. They both reported that they had arrived on the jobsite at about 7:15 a.m. on Monday and about 6:45 a.m. Tuesday–Thursday. Bidwell and Szusznik also reported that they after spending 8 hours on the jobsite, they left Seneca Falls at 3:45 p.m. on Monday and 3:15 p.m. Tuesday and Thursday. Their timesheets reported 32 hours of work at the jobsite, which was to be compensated at the prevailing wage rate and 6 hours of driving time and a half hour of shop time, which was paid at a much lower rate than the prevailing wage.

On Friday, August 30, Bidwell attended a representation case hearing at the Federal Building in Syracuse, pursuant to a

<sup>4</sup> Varco made notes regarding all his jobsite visits to Seneca Falls during the week of August 26–30. These notes deal almost exclusively with the early departure of the crewmembers.

union subpoena. Christine Kaiser and Frank Willard were also present. Neither Szusznik nor Noga worked on August 30; Vitetta worked 6 hours at the jobsite. All four crewmembers reported 8 hours of work on the jobsite for Monday, August 26 through Thursday, August 29.

Monday, September 2, was the Labor Day holiday. The next working day, Tuesday, September 3, 2002, Christine Kaiser and Frank Willard met very briefly with Bidwell, Szusznik and Noga. Kaiser and Willard confronted all three with the assertion that they left the jobsite considerably earlier than their timesheets indicated. All three insisted that the timesheets were materially accurate. Neither Kaiser nor Willard indicated to any of the three the basis on their assertions. Willard had a brief telephone conversation with Joseph Vitetta in which Vitetta told Willard that he was upset because he was putting his dog to sleep and that he would speak to Willard about the timesheets the next day.<sup>5</sup>

Later in the afternoon, Willard met again with Michael Noga, this time in the presence of Joseph Varco and "Ike" Shippers. In this second meeting, Willard informed Noga that the three had personally observed that Noga was not at the jobsite at all times he claimed to have there. At this point, Noga conceded that the information on his timesheets could be off by 5–15 minutes but that the total number of hours he claimed to have worked was correct.<sup>6</sup>

On the morning of September 4, all four employees were called into Chris Kaiser's office. They were each handed a letter stating that they were being terminated for "leaving your assigned job site during your scheduled work hours last week and falsifying your time sheet for the week ending August 30, 2002." It is unclear whether Joseph Vitetta was ever given an opportunity to admit that his timesheet was not accurate or whether he was accorded an opportunity to correct it.<sup>7</sup>

### C. Credibility Resolutions

None of the witness who testified regarding the circumstances surrounding the four discharges is unbiased. Moreover, Varco, possibly the key witness in this case, was one of the most ill at ease, nervous witnesses I have ever observed. He also initially testified, less than forthrightly, that nobody at Respondent told him to resign as president of the Union. He later admitted that in or about June 2002, Christine Kaiser told Varco he could either resign as president of the Union, resign his employment, or be fired.<sup>8</sup> Varco chose to remain employed. He has remained a member of the Union but has not attended a union meeting since June 2002. I infer that Varco was very

<sup>5</sup> It is unclear whether there was any substantive discussion about the timesheets with Vitetta on September 3.

<sup>6</sup> Frank Willard testified that Noga admitted to "fudging" his timesheets by as much as a half an hour. Noga testified that he offered to amend his timesheets on September 4, but was not allowed to do so.

<sup>7</sup> Joseph Varco conceded that all four discriminatees were generally good employees. With the exception of Bidwell, who had received a written warning for alleged marijuana use in March 2001, none of the four had been disciplined by Respondent previously.

<sup>8</sup> Kaiser also testified that she told Varco that he could either resign as union president, be fired, or resign his employment.

worried that he might lose his job as a result of his testimony at this hearing.

Nevertheless, I conclude that the testimony of Varco, Shippers, and Willard, regarding the times at which they found crewmembers absent from the Seneca Falls jobsite, or observed them leaving the jobsite, is credible. Nothing in this record indicates that any of this testimony is fabricated. While the charging party's brief attacks Varco's credibility, it offers no reason to discredit the corroborating testimony of Shippers and Willard with regard to the crew's whereabouts on Tuesday, August 27 and Wednesday, August 28.

Moreover, there are a number of inconsistencies in the testimony of the four alleged discriminates. Bidwell's account of his September 4 conversation with Frank Willard regarding his hours the prior week is internally inconsistent. First, Bidwell testified that he told Willard that the crew left the jobsite at about 4 p.m. each day (Tr. 43). Then, he testified that, "Frank Willard asked me about not being on the job at a certain time. I said it could be due to us floating hours" (Tr. 44). This term refers to the practice of Respondent's crews, when working at locations several hours away from the shop. At these sites, the crews often work late Tuesday through Thursday, so they can drive to the site on Monday morning, arriving at midday and leave the jobsite early on Friday and be back to Respondent's shop by 5 p.m. on Friday. When "floating hours," the crews record 8 hours per day of work on their timesheets even though they worked more than 8 hours on Tuesday through Thursday and less Monday and Friday.<sup>9</sup> There is no credible evidence that the Seneca Falls crew worked longer hours on some days to make up for leaving early on others. Moreover, if Bidwell and Szusznik were leaving the jobsite each day at the times to which they testified, there was no need for them to "float hours."

John Szusznik testified that on August 27, after Noga and Vitetta left the jobsite at about 2:30 p.m., he and Bidwell cleaned off all the lights that the crew had to hang the next day. Further, he testified that this task took about an hour and that the two finished cleaning all the lights (Tr. 180-181). This testimony, which accounts for a time period during which Varco contends the Bidwell and Szusznik were not at the site, is inconsistent with Joseph Vitetta's testimony as to how he spent his time on Friday, August 30. Vitetta testified that he and employee Terry Burdick cleaned, dusted, and then hung the lights (Tr. 135). Vitetta testified that these lights were dusty and had not been cleaned (Tr. 149).

Michael Noga's testimony varied significantly within a few minutes. Respondent's counsel asked him:

Q. Mr. Noga, if Mr. Willard were to testify that he visited the jobsite Wednesday, August 29, and observed the crew, including yourself, departing at 2:30 p.m. would that testimony be accurate?<sup>10</sup>

A. I don't know.

Q. Do you have any reason to believe it would be inaccurate?

A. No. (Tr. 202-203).

However, Noga then continued to deny that he left the jobsite early on August 28 and minutes later testified that Willard's testimony would be inaccurate if he concluded that Noga had left the jobsite prior to 3:30 p.m. and that Willard had observed the crew leaving at 2:30 p.m. (Tr. 203-205).

Finally, Joseph Vitetta conceded at trial that his timesheets for the week of August 26-30 were inaccurate (Tr. 143-144).

#### D. Analysis of the Alleged 8(a)(3) Discharges

In order to prove a violation of Section 8(a)(3) and (1), the General Counsel must generally make an initial showing that (1) the employee was engaged in protected activity; (2) the employer was aware of the activity; and (3) the activity was a substantial or motivating reason for the employer's action. Once the General Counsel makes this initial showing, the burden of persuasion shifts to the Respondent to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity, *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981); *La Gloria Oil & Gas Co.*, 337 NLRB 1120 (2002).

However, when an employer discharges a group of employees to discourage employees generally from engaging in union activities, it is the discharge, not the selection of individual employees that is unlawful. Thus, the General Counsel is not required to show a correlation between each employee's union activity and his or her discharge. Instead, the General Counsel's burden is to establish that the discharge was ordered to discourage union activity or in retaliation for the protected activities of some of the employees, *ACTIV Industries*, 277 NLRB 356 fn. 3 (1985). As the Second Circuit noted almost 40 years ago, "[a] power display in the form of a mass lay-off, where it is demonstrated that a significant motive and a desired effect were to 'discourage membership in any labor organization,' satisfies the requirements of Section 8(a)(3) to the letter even if some white sheep suffer along with the black," *Majestic Molded Products, Inc. v. NLRB*, 330 F.2d 603 (2d Cir. 1964).

Jeff Bidwell was the primary employee involved in the Union's organizing effort. I find that Christine Kaiser and Frank Willard were well aware of this fact. I infer that Kaiser and Willard made the connection between the statements made by Bidwell regarding the company's pension plan and the union's representation petition received on or about August 20. Moreover, Christine Kaiser testified that more than one bargaining unit member was supplying her with information about organizing campaign, including the distribution of union authorization cards. Given the relatively small size of the bargaining unit (approximately 16 employees), it can reasonably be inferred that Kaiser and Willard were aware of the identity of the leaders of the organizing campaign, and possibly all those involved in union activity, *La Gloria Oil & Gas Co.*, *supra* at 1122. Finally, if there was any doubt in the minds of Kaiser and Willard about Bidwell's support for the Union, those doubts would have been dispelled by his attendance at the representation case hearing on August 30.

I also find that Kaiser and Willard were aware of John Szusznik's support for the Union. First of all, they were both aware that Szusznik had originally been referred to their com-

<sup>9</sup> This apparently has something to do with the requirements of the New York prevailing wage law.

<sup>10</sup> The correct date of Willard's visit was Wednesday, August 28.

pany by the union's hiring hall. Szusznjak also attended a union meeting and passed out two union authorization cards. Since Chris Kaiser was being kept abreast of the organizing campaign and the distribution of authorization cards, I infer that she was aware of the identity of several union supporters—including Szusznjak. She may also have been aware from these sources that Joseph Vitetta and Michael Noga had attended union meetings. Moreover, even if Kaiser did not have information specifically about Vitetta and Noga's interest in the Union, she could have easily inferred that those employees working on Bidwell's crew were likely union supporters.

Further, I conclude that Respondent harbored animus towards the employees engaged in the organizing campaign. First of all, I infer animus from Respondent's surveillance of the Seneca Falls crew, which it initiated within days of its receipt of the representation petition, and its failure to confront the employees immediately upon discovering that they were leaving the job early. These site visits were motivated by a desire to find a basis for terminating union supporters and intimidating others employees who might be inclined to support the Union. I also infer animus from the disparate treatment accorded these four employees when compared to Respondent's lenient treatment of Brian Britton several months previously. I also draw this inference in part from a letter that Christine Kaiser and Frank Willard distributed to employees. This letter accused those soliciting employees for the Union of misrepresenting the authorization cards' significance despite the fact that Respondent had no reliable knowledge that such misrepresentations were being made.<sup>11</sup>

Finally, I conclude that the General Counsel has established that the discharge of the four employees was motivated by Respondent's antiunion animus. Additionally, I find that Respondent has not met its burden of proving that it would have discharged the four employees absent its motive to discourage its employees from selecting the Union as their collective-bargaining representative.

There are a number of factors that suggest discriminatory motivation. The timing of the discharges, 2 weeks after the filing a representation petition and the second working day after the NLRB representation hearing, is such a factor. Another is Respondent's efforts to find a reason to discharge union supporters. A third factor is the disparate treatment of the four alleged discriminatees as compared to Respondent's treatment of a similar offense by Brian Britton several months previously.

I regard's Respondent's leniency towards Britton to be one of the most critical factors in this case. In the spring of 2002, several months before the beginning of the organizing campaign, Britton missed work on a Friday, but then joined his

crew on its return to the shop so that he could turn in his timesheet, which indicated that he had worked 8 hours on that day. This was an obvious attempt to cheat Respondent out of a day's pay. On Monday, the next working day, Respondent's Vice-President Frank Willard confronted Britton and asked him where he was on Friday. Britton admitted that he had not been at work. Willard asked him why his timesheet showed that he had worked on Friday. Britton responded that he didn't have an honest answer for that question. Willard did not discipline Britton. Willard told Britton he was disappointed in him and that such behavior could not happen again. Britton assured Willard that this wouldn't happen again and amended his timesheet.

The General Counsel and Charging Party contend that the disparate treatment of the four alleged discriminatees as compared to Britton is persuasive evidence of discriminatory motive. They also suggest that while Willard immediately confronted Britton with his misconduct, Respondent let the discriminatees' misconduct continue because it was looking for a reason to rid itself of the key union supporter (Bidwell) and viewed this as an opportunity to stymie the organizing drive.

I conclude that Respondent checked up on the Seneca Falls crew from August 26–29, with the primary, and possibly the sole, objective of finding grounds for terminating them and inhibiting the Union's efforts to organize their rigging employees. An employer interested only in getting its employees to work a full day would have taken immediate remedial action on August 26. Not only would an employer normally confront employees about "stealing time" when the employer first became aware of such an offense, Respondent's failure to immediately confront the Seneca Falls crew, as it confronted Britton, establishes discriminatory motivation with regard to its surveillance of the four alleged discriminatees.<sup>12</sup>

Respondent contends that Britton's infraction is not comparable to that of the four alleged discriminatees. It argues that Britton immediately acknowledged his misconduct, expressed remorse, amended his timesheet and assured Willard such misconduct would not recur. In contrast, the alleged discriminatees continued to claim wages for work they did not perform and gave Respondent no reason to believe they would not "steal time" in the future. This, it argues is important because Respondent's riggers most often work at remote jobsites where Respondent had little ability to monitor them.

At first blush, Britton's belated forthrightness suggests a meaningful distinction between his offense and that of the Seneca Falls crew. However, on closer examination, Britton's "remorse" and willingness to correct his timesheet fails to provide a convincing nondiscriminatory basis for treating him with a verbal warning and terminating the four alleged discriminatees. As the charging party notes in its brief, "Britton could not

<sup>11</sup> While Respondent's brief states that the information provided by Kaiser regarding the effect of the union authorization cards "was entirely accurate," Kaiser conceded that she had no basis for her assertions that:

"It has come to our attention that there may be a number of misrepresentations being made by some of those people who are distributing these union cards;" and

"It has been reported that employees have been asked to sign these union cards "so that they can get a meeting." C.P. Exh. 2, Tr. 421–430.

<sup>12</sup> In this regard, Christine Kaiser testified that Willard informed her on August 26, that Varco had discovered that the crew left the jobsite early. She directed Willard to have Varco (and possibly Shippers) visit the site again the next day and document what he observed. She did not tell Willard to confront the employees, as he had confronted Britton, and Willard did not do so on his own volition.

very well deny that he had not been at work when [his] entire crew was there and he was completely absent [p. 24, fn. 38].”

Britton had no choice but to confess his deliberate attempt to defraud Respondent. Had Bidwell, Szusznik, Noga, and Vitetta been informed that Varco, Shippers, and Willard had been spying on them all week, they may also have recanted, expressed remorse and offered to change their timesheets.<sup>13</sup> More importantly, if like Britton, the four had been confronted with their misconduct on Monday, August 26, they may also have modified their behavior, not submitted false timesheets and promised not to leave work early in the future. Having been caught and chastised, the four may have been just as inclined to be honest in the future as Britton, who worked in locations far from Syracuse after he had demonstrated a capacity for blatant dishonesty. Thus, I conclude that Respondent’s disparate treatment of the four discriminatees, as compared with Britton, establishes the pretextual nature of the Company’s explanation for the discharges.

*E. The 8(a)(1) Violation: Posting of No-Solicitation Signs*

On June 18, 2002, signs hung on the front and rear entrances of Respondent’s building read:

No Solicitations

We welcome our customers at any time the office is open.

Those offering us their products and services are seen only by appointment, made in advance by phone.

Bidwell testified that these signs were posted for the first time on June 18, 2002, after he had a conversation with Project Manager Joseph Varco indicating that Frank Willard was aware of the union organizing drive. Varco and Christine Kaiser testified that the signs had been posted for several years previously.

I dismiss the alleged 8(a)(1) violation because I credit the testimony of Christine Kaiser and Joseph Varco and find that the “no solicitation” signs at the rear and side entrances of Respondent’s facility had been posted for sometime prior to the advent of the organizing campaign. Moreover, the signs on their face do not appear to be directed at union activity. They appear to prohibit commercial solicitation without an appoint-

ment. I therefore conclude that in posting these signs Respondent was not interfering with, restraining or coercing employees in the exercise of their Section 7 right to organize.

III. REPORT AND RECOMMENDATIONS ON  
CHALLENGED BALLOTS

In general, to be eligible to vote, an employee must have been employed both on the eligibility date, which in this case was December 15, 2002, and on the election date, which in this case was January 6, 2003. Discriminatory personnel actions cannot be used to make an employee eligible or ineligible to vote in a Board election. Having found that Respondent’s discharge of Jeff Bidwell, John Szusznik, Joseph Vitetta, and Michael Noga violated Section 8(a)(3) and (1) of the Act, it follows that they should properly be considered as employees at all relevant times. Accordingly, I find they were each eligible to vote in the election. I recommend the challenges be overruled and their ballots be counted.

CONCLUSIONS OF LAW

Respondent, Syracuse Scenery and Stage Lighting Co., Inc., violated Section 8(a)(3) and (1) of the Act on September 4, 2002, by discharging Jeff Bidwell, John Szusznik, Joseph Vitetta, and Michael Noga because they engaged in union activity and/or to discourage all its employees from supporting the union.

REMEDY

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

The Respondent having discriminatorily discharged employees, 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 discharge 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).

[Recommended Order omitted from publication.]

<sup>13</sup> Noga may have offered to correct his timesheets on September 4.