White Electrical Construction Co. *and* Lance James.
Case 10–CA–35116

September 30, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On March 4, 2005, Administrative Law Judge Michael A. Marcionese issued the attached decision. The General Counsel filed a limited exception, a supporting brief, and an answering brief. The Respondent filed exceptions, a supporting brief, and a reply brief.

The National Labor Relations Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings[1] and conclusions only to the extent consistent with this Decision and Order.[2]

We agree with the judge's finding that the Respondent violated Section 8(a)(1) of the Act by discharging Stanley Vincent and then converting his discharge into a final warning because he engaged in protected concerted activity. For the reasons discussed below, we find, contrary to the judge, that the Respondent's subsequent termination of Vincent and nine other night shift electricians was not unlawful.

1. The discharge and final warning of Stanley Vincent

The judge found, and we agree, that the Respondent violated Section 8(a)(1) by discharging Vincent on March 4, 2004,[3] in the mistaken belief that he had engaged in a work stoppage, and in converting the discharge to a final warning when it learned that no work stoppage had occurred. As the judge found, Vincent (who was on a break at the time) asked a group of apprentices who their journeyman was; when the apprentices' foreman explained that two recently hired travelers from another local union were the journeymen, the discussion ended. There was no stoppage or slowdown of work. As the judge also found, in asking his question, Vincent was trying to find out whether the Respondent was complying with the ratio of journeymen to apprentices specified in the collective-bargaining agreement. In attempting to enforce the contract, Vincent was engaged in protected concerted activity. *NLRB v. City Disposal Systems*, 465 U.S. 822, 840 (1984); *Interboro Contractors, Inc.*, 157 NLRB 1295, 1298 (1966), enfd. 388 F.2d 495 (2d Cir. 1967). Thus, when the Respondent terminated him based on its mistaken belief that he engaged in misconduct during the course of that protected activity, the Respondent violated Section 8(a)(1). *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). And although it cancelled the discharge, the Respondent continued to act unlawfully when it issued a final warning to Vincent.

Contrary to our dissenting colleague,[4] and consistent with Board law, our order simply forbids that which is forbidden by the Act, as interpreted by the Supreme Court. See *Burnup & Sims*, supra. We do not agree that employers, under such an order, will refrain from disciplining employees for misconduct allegedly committed during the course of protected activity. Rather, they will investigate thoroughly and carefully, knowing that an erroneous finding will result in a violation. Given the underlying protected activity involved, we do not believe that a thorough and careful investigation is inconsistent with the Act and its remedial principles.

2. The March 7 terminations

On March 7, the Respondent terminated Vincent and nine other night shift electricians, assertedly for unsatisfactory work performance and low productivity. The Respondent's assessment was based in part on its supervisors' observance of slow work on the part of several of the night-shift employees the night before.

The General Counsel alleged that the 10 employees were discharged because they had engaged in concerted activity—i.e., protesting Vincent's discharge on March 4. The judge found that the only evidence supporting this allegation was the employees' grumbling that the discharge was unfair. He also found that, assuming that this conduct was protected, the General Counsel had not established that any member of the Respondent's management knew about it. The judge therefore found no 8(a)(3) or (1) violation under this theory, because he found no evidence that the Respondent was motivated by any concerted activity engaged in by these 10 employees. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). There were no exceptions to this finding.

However, the judge found an 8(a)(1) violation under a different theory. Because the Respondent had erroneously believed that Vincent attempted to cause a work stoppage on March 3, and because supervisors had observed Vincent and other members of the night shift working inefficiently only three days later, the judge

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

[2] We have modified the judge's recommended Order and notice to reflect the violation found.

[3] All dates are 2004, unless otherwise indicated.

[4] The Respondent has not raised any contentions about the language or scope of the order. Only our colleague has done so.

reasoned that the Respondent thought that Vincent and the other discharged employees were engaged in a slowdown of work on March 6. The judge concluded that the Respondent discharged the employees for engaging in the slowdown, not for low productivity, as the Respondent argued. Because he found that the Respondent's belief was (again) erroneous, the judge found that the discharges were unlawful under *Burnup & Sims*, supra.[5]

In exceptions, the Respondent contends that because the night shift employees were not involved in any protected concerted activity on the night of March 6, the judge erred in finding a violation under *Burnup & Sims*. We agree. *Burnup & Sims* applies when an employer terminates or disciplines employees for allegedly engaging in misconduct *in the course of protected activity*. In that setting, *good-faith* belief that the employees engaged in misconduct, is not a defense if the General Counsel proves that the employees did not, in fact, engage in the misconduct. That is because, as the Supreme Court stated, "A protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith." 379 U.S. at 23.

The *Burnup & Sims* rationale does not apply, however, when employees are not engaged in protected activity. Thus, an employer does not violate the Act by terminating employees based on a mistaken belief that they engaged in misconduct if their actions did not arise out of any protected activity. See, e.g., *Yuker Construction Co.*, 335 NLRB 1072, 1073 (2001). Here, there is no evidence that the night shift employees were engaged in protected activity on March 6 or that the Respondent believed that they were so engaged. Therefore, even if they were innocent of any wrongdoing, the General Counsel cannot prevail because their terminations did not arise from any protected conduct.

The General Counsel urges in his answering brief that the Board should, in any event, affirm the violation found by the judge under an alternative *Wright Line* theory. Thus, the General Counsel contends that the Respondent bore animus toward Vincent for his protected activity on March 3 and seized upon the night-shift employees' conduct on March 6 as a pretext for retaliating against Vincent and everyone associated with him.

We do not address the General Counsel's alternate theory because we find that it is not properly before us. To prove a discharge violation under *Wright Line,* the General Counsel must show that animus toward employees' protected activities was a motivating factor in the discharges. The judge specifically found that antiunion animus did not play a part in the Respondent's decision to terminate Vincent and the other nine electricians, and the General Counsel did not except to that finding. Therefore, we find that the General Counsel is procedurally foreclosed from raising this issue for consideration by the Board in his answering brief.[6]

For the reasons discussed above, we reverse the judge's finding that the Respondent violated Section 8(a)(1) by discharging Vincent and nine other night shift employees, and we dismiss that allegation.[7]

ORDER

The National Labor Relations Board orders that the Respondent, White Electrical Construction Co., Fairfield, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging its employees from engaging in protected activity by discharging, warning, or taking other adverse action against employees who have engaged in such activity and did not engage in serious misconduct during the course of that protected activity.

(b) 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, remove from its files any reference to the unlawful discharge/final warning issued to Stanley Vincent on March 4, 2004, and within 3 days thereafter notify him in writing that this has been done and that the March 4 discharge/final warning will not be used against him in any way.

(b) Within 14 days after the service by the Region, post at its facility in Fairfield, Alabama and at the Mercedes-Benz jobsite in Vance, Alabama copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region

[5] Because he found no evidence that the Respondent was motivated by antiunion animus, the judge recommended dismissal of the allegation that the discharges violated Sec. 8(a)(3). No exceptions were filed to that finding or recommendation.

[6] Board's Rules and Regulations Sec. 102.46(b)(2) states that "Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived." See, e.g., *FES*, 333 NLRB 66 fn. 1 (2001).

[7] In view of our decision, we find it unnecessary to pass on the General Counsel's exception to the judge's speculation that the night-shift employees probably would have been laid off on March 9 for nondiscriminatory reasons when the Respondent laid off 40 employees because of a loss of work.

[8] 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."

10, 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 March 4, 2004.

(c) 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.

MEMBER SCHAUMBER, dissenting in part.

Member Schaumber disagrees with his colleagues' order to the extent that it requires Respondent to cease and desist from "[d]iscouraging its employees from engaging in protected activity by discharging, warning, or taking other adverse action against employees who have engaged in such activity and did not engage in serious misconduct during the course of that protected activity." For the reasons he expressed in his partial dissenting opinion in *Detroit Newspapers*, 340 NLRB 1019 (2003), Member Schaumber finds such an order incapable of being complied with without impermissibly chilling lawful conduct. An employer cannot lawfully be enjoined from disciplining an employee in the future based on the employer's reasonable good faith belief that the employee is engaged in serious misconduct. He would revise the order in a manner consistent with the order he suggested in *Detroit Newspapers*, supra.

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 a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discourage you from engaging in protected activity by discharging, warning, or taking other adverse action against employees who have engaged in such activity and did not engage in serious misconduct during the course of that protected activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights described above.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful March 4 discharge/final warning of Stanley Vincent, and WE WILL within 3 days thereafter, notify him in writing that this has been done and that the March 4 discharge/final warning will not be used against him in any way.

WHITE ELECTRICAL CONSTRUCTION CO.

Gregory W. Powell, Esq., for the General Counsel.
Forrest W. Hunter, Esq. and *Allison V. Richardson, Esq.,* for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in Birmingham, Alabama, on October 20 and 21, 2004. Lance James, an Individual, filed the charge on July 22, 2004, and a complaint was issued August 31, 2004.[1] On September 8, an amended complaint issued alleging that White Electrical Construction Co. (the Respondent), violated Section 8(a)(1) and (3) of the Act. Specifically, the amended complaint alleges that the Respondent terminated Stanley Vincent on March 4 and converted the termination to a final warning the same day because Vincent engaged in union and other protected concerted activities, and that the Respondent terminated 10 named employees, including Vincent, on March 7, and thereafter refused to rehire them and designated them as ineligible for rehire, because the named employees engaged in union and other protected concerted activities.[2]

On September 15, the Respondent filed its answer to the amended complaint, which it amended on September 30. The Respondent denied the allegations regarding Stanley Vincent and, while it admitted terminating the 10-named employees and designating them as ineligible for rehire on and after March 7, denied that it did so because they engaged in any activity protected under the Act. The Respondent also raised several affirmative defenses based upon Section 10(b) of the Act.

[1] All dates are in 2004, unless otherwise indicated.

[2] The named discriminatees are: Stanley Vincent, Chris Turner, Don Malone, Lance James, Shane Myers, Steve Bell, John Roy Jones, William Vincent, Mike Guthrie, and James McCoy.

On the entire record, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, provides, inter alia, commercial electrical wiring and distribution services out of its facility in Fairfield, Alabama. The Respondent annually purchases and receives for use in Alabama materials valued in excess of $50,000 directly from suppliers located outside the State of Alabama. 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. The Respondent further admits that the International Brotherhood of Electrical Workers Local Union 136 (Local 136) is a labor organization within the meaning of Section 2(5) of the Act.

A. The Evidence

The Respondent, an electrical contractor in the construction industry, is headquartered in Atlanta and has branch offices in several cities. The Birmingham branch office, located in Fairfield, Alabama, was acquired about 2 years before the hearing when the Respondent acquired Sargent Electric. The Respondent has had a collective-bargaining relationship with the IBEW for many years. The Birmingham branch office is a party to the agreement between Local 136 and the Birmingham Division, Gulf Coast Chapter of the National Electrical Contractors Association (NECA). The current agreement is effective for the period June 1, 2003, through May 31, 2006. The Respondent is also party to a supplemental Industrial Market Recovery Agreement (IMRA) between the Union and NECA intended to assist union contractors in competition with nonunion contractors. The IMRA modifies the overtime, hours of work, journeyman/apprentice ratio, and other provisions of the standard inside wire agreement on jobs determined to be eligible under the market recovery program.

In 2004, the Respondent's Birmingham branch office had a contract with RNG Mechanical to perform work at the Mercedes-Benz plant in Vance, Alabama. RNG in turn had a contract with Comau/Pico to install robotic assembly equipment in two body shops at the Mercedes-Benz plant. Comau/Pico had been hired by Mercedes-Benz to design, build and install the robotic equipment. After designing, building and testing the equipment in Detroit, and demonstrating it to Mercedes-Benz' satisfaction, Comau/Pico broke down and shipped the equipment to be installed at the Vance plant by RNG. RNG had hired the Respondent to do the electrical installation. The Mercedes-Benz job in Vance was covered by the IMRA.

Jerry Collar, the Respondent's Birmingham branch manager, was the lead management official responsible for this project. Steve Wofford was the Respondent's general foreman on the job.[3] Jerry's brother, Don Collar, started the job as general foreman in late 2003 and became the safety coordinator after the Respondent's workforce on the job reached 50 employees, sometime in February. The Respondent admitted that Jerry Collar and Steve Wofford were its supervisors and agents within the meaning of the Act and stipulated that Don Collar was at least an agent in his role as safety coordinator. The Collar brothers and Wofford are longtime members of Local 136 and have had a good working relationship with the Union over the years.

The Respondent used the Local 136 hiring hall as its source for electricians for the Mercedes-Benz job. The first journeyman referred to the job started in December 2003. By early March, the Respondent employed about 115 electricians, journeymen and apprentices, on this job, working two 12-hour shifts, 7 days a week. The Respondent started the night shift in late February with two employees, John Roy Jones and Chris Turner. By the time of the alleged unfair labor practice, there were 14 journeymen working the night shift. All 10 alleged discriminatees are journeymen electricians and members of Local 136 who were referred to the job on various dates between January 15 and February 26.[4] At the time of the alleged unfair labor practice, all ten were working the night shift, from 5 p.m. to 3:30 a.m.

Stanley Vincent[5] has been a journeyman and member of the Union for 38 years. He had worked previously for the Respondent on other jobs without incident. He was referred to the Mercedes-Benz job on February 5. After working the day shift for several weeks, he was transferred to nights, sometime in late February. Vincent testified that, on the night of March 3, while on break in a designated break area with the other nine alleged discriminatees, he asked three apprentices who were working nearby who was the journeyman on their shift. The three apprentices were working over from the day shift. According to Vincent, he was concerned that the apprentices were working alone when the contract required them to be working under the supervision of a journeyman. In response to Vincent's question, the apprentices said they did not know who their journeyman was. At that point, according to Vincent, Greg Lowery, the day-shift foreman and another member of Local 136, came over and told Vincent that two travelers from Mobile had been hired that day to be the journeymen. Vincent thanked Lowery for the information and left.

Lowery, who testified as a witness for the General Counsel, essentially corroborated Vincent's version of this incident.[6] Specifically, Lowery confirmed that Vincent and the night crew were on break, that the apprentices were working nearby when Vincent spoke to them, and that Lowery happened to walk by during the conversation and provided the answer for the apprentices. Lowery testified that he believed Vincent's inquiry

[3] At several places in the transcript, Wofford is identified as "Walker." This is obviously a typographical error as there is no evidence of any other general foreman with the name Walker working for the Respondent at this job. Accordingly, I shall correct the transcript to replace Walker with Wofford wherever it appears.

[4] Steve Bell was one of the first journeymen referred to the job, on January 15. He became the night shift foreman when the Respondent added this second shift in February. No party contends that Bell was a supervisor or agent of the Respondent in his role as foreman.

[5] Vincent's full name is Robert Stanley Vincent. He is known among his fellow journeyman as Stanley or "Sam."

[6] Lowery worked for Respondent as a foreman on the day shift from December 2003 to March 2004. There is no contention, nor evidence, that he was a statutory supervisor at the time.

was related to safety. Lowery also testified that all but four of the 22 electricians on his crew were apprentices. Lowery testified further that, after this incident, he called his boss, Wofford, because he believed that Vincent was questioning the Respondent's compliance with the journeyman apprentice ratio in the collective-bargaining agreement and he didn't want to get the company or himself in trouble with the Union. According to Lowery, he told Wofford that "we had some safety concerns out here" and he asked Wofford if he was "inside the agreement." Wofford told Lowery that he was within the agreement, not to worry about it and to continue working. Lowery testified that later that evening, at the end of his shift, around 6:30 or 7 p.m., Wofford approached him in the break area. After asking Lowery about the work to be done that night, Wofford gave him the keys to all the gang boxes and told him not to let the night crew into the gang boxes.[7] Lowery also described a conversation he had the following morning, at the start of his shift, with Jerry Collar. According to Lowery, Collar talked about the work that had been done the night before and then asked him who had the safety concerns. Lowery told Collar it was Vincent. Collar asked if there was any work stoppage and Lowery told him no, everything went okay.

Wofford testified for the Respondent. He acknowledged receiving a call from Lowery one evening in early March. According to Wofford, he was home at the time. Wofford recalled that Lowery appeared "excited," describing his tone of voice as "frantic." He testified that Lowery told him that someone on night shift had come over and questioned the manpower in terms of the ratio of apprentices to journeymen. With help from leading questions by counsel, Wofford also recalled that Lowery told him that Lowery and his men were working, in a work area, at the time. Wofford testified further that he assumed that Lowery was trying to get something done and that the individual who raised the question was preventing them from doing that. Wofford admitted on cross-examination that he reached the conclusion that there had been a work stoppage as a result of the issue being raised. In his direct testimony, Wofford placed this incident in the context of receiving regular complaints from representatives of Comau/Pico that the Respondent was behind in its work. Wofford did not contradict Lowery's testimony about the conversation later that evening involving the gang boxes.

Wofford testified that, after his conversation with Lowery, he called Jerry Collar. According to Wofford, he informed Collar what was going on, as relayed to him by Lowery. Specifically, Wofford told Collar that Lowery felt the guy who questioned him about the workforce was being disruptive. Wofford also testified that he informed Collar that he had been told by Lowery that Vincent was the individual who raised the issue with Lowery. Collar told Wofford he would talk to Vincent the next day. Wofford denied making any recommendations to Collar about how the situation should be handled. He did recall that he and Collar agreed that the Respondent was within the ratios required by the collective-bargaining agreement.

Collar corroborated Wofford regarding their phone call. He testified that Wofford told him that Lowery was agitated and had asked why this guy was bothering him about the ratios. Collar recalled that Wofford also appeared upset because he felt that Lowery's work was being disrupted. According to Collar, Wofford said Lowery was upset because he didn't know whether he should continue working if the Respondent was out of compliance with the ratio. Collar told Wofford to tell Lowery to continue working that he believed they were in compliance, and that he would look into the matter the next morning.

There is no dispute that Collar prepared the paperwork to fire Stan Vincent the next morning, before speaking to Vincent, Lowery, or anyone else about the matter. Collar explained that he did this because there would be no one around to prepare a final paycheck and termination notice after Vincent arrived for work at 5:30 that evening. Collar testified that he had not yet made a decision to fire Vincent but he wanted to be prepared to do so if Vincent's answers did not satisfy him. There is no dispute that Jerry Collar had his brother Don Collar pick up Vincent's final paycheck and termination notice from the office during the day on March 4. The termination notice stated that the reason for termination was "failure to comply with company policy."

Vincent testified that he arrived for work on March 4 at about 5 p.m. While standing outside the job trailer with the other nine employees on night shift, waiting to be taken to the building where they would be working, Doug Holley, the day-shift steward, came out of the trailer and told Vincent he had been fired. Buddy McCoy, who had just been appointed the night-shift steward, was standing with Vincent and his son, William Vincent. McCoy said he would go into the trailer and speak to Don Collar.[8] McCoy came out of the trailer a short time later and told Vincent that Don Collar said he had been fired for a work stoppage. At this point, according to Vincent, the other night crew members standing around started to grumble that this was unfair, that there was no work stoppage, etc. However, when the van pulled up to take the men to work, all but Vincent, his son and McCoy got in and went to the plant. When the van returned to the trailer, the Vincents and McCoy got in and rode to the plant to find Jerry Collar. None of the other nine discriminatees were called to testify about their "grumbling" outside the trailer upon learning of Vincent's termination. Don Collar corroborated Vincent and McCoy's testimony to the extent that he testified that he told Vincent that "they had his money." On cross-examination, Collar conceded that this meant Vincent was terminated. Don Collar also testified that he told Vincent, when asked for a reason, that he didn't know why and that he recommended that Vincent find Jerry Collar and talk to him.

Vincent testified that when they got to the plant, He asked Wofford to call Jerry Collar. Shortly thereafter, Jerry Collar rode up in a golf cart. It does not appear that William Vincent was still present at this time because when Collar saw Vincent and McCoy, he said, "[D]oes it take two people to do this?" McCoy told Collar that he was the steward for the night shift,

[7] Gang boxes, referred to erroneously in the record as "game boxes," are where the electricians keep their personal as well as company tools for the job.

[8] Don Collar is usually in the trailer when the night shift comes on duty.

indicating he was there to represent Vincent. According to Vincent, he explained what had happened the night before, answered some questions from Jerry Collar and specifically denied that he had caused or intended to cause a work stoppage. Although Vincent testified that he could not recall all the questions Collar asked him, he did not recall being told, "next time, get a steward." At the end of this conversation, Collar took the final paycheck he had prepared for him, put it in his pocket and said, "[T]his is your final warning. Now go to work." McCoy corroborated Vincent's version of this conversation.

Jerry Collar testified that he met with Vincent and McCoy at the start of the night shift on March 4. He asked Vincent what he was doing in Lowery's area talking to Lowery and the apprentices. He told Vincent that he had his own job to do. According to Collar, Vincent said he was sorry for any confusion, that he was just checking on the work being done in that area, that he knew there were a lot of apprentices there and he was concerned for their safety. After Vincent apologized again for any "inconvenience," Collar told him that's what the stewards were for, that it was not something Vincent should be concerned with. He ended the conversation by telling Vincent he needed to go on back to work. Collar denied telling Vincent that this was his final warning. According to Collar, after his meeting with Vincent and McCoy, he wrote, "cancelled" across the face of the termination notice, a copy of which is in evidence. Collar did not recall ever handing Vincent the termination notice or his final paycheck. Collar testified further that he considered the matter closed after this conversation. He denied bearing any animosity toward Vincent over the incident.

There is no dispute that the Respondent in fact terminated Stanley Vincent on March 7 along with nine other electricians from the night crew.[9] Jackie Goodwin, Local 136's business manager, testified that Jerry Collar called him that day to inform in accordance with the terms of the collective-bargaining agreement that the union steward, Buddy McCoy, had been terminated. Goodwin testified further that Collar called him again within a few days and said that the 10 terminated employees were ineligible for rehire. The Respondent has admitted this. According to Goodwin, the reason given by Collar was that "the owner wasn't happy with the performance of the night shift and wanted them off the job." The Respondent did not terminate the entire night shift, however. It retained four electricians, brothers Barry and T.J. Maddox, Royce Fant, and Greg Clark, who had recently been referred to the job. There is no dispute that the 10 terminated employees were the only electricians terminated from this job for performance and that none had received any prior warnings or discipline before their termination on March 7.

Vincent testified that he first learned that he was being terminated again when he arrived for work on March 7. Vincent recalled that Jerry Collar rode up to the trailer while the night crew was waiting for its ride to the plant. Collar had the gang box with the employees' tools on the back of the vehicle. He handed out the employees' final checks and termination notices and told them they'd been fired. According to Vincent, Collar did not give a reason and none of the employees asked why they were being fired. Vincent conceded that Collar made no mention of the earlier incident involving him when he terminated the 10 employees. The termination notices given to the 10 employees were identical, with the boxes for "lack of productivity" and "other" checked under "reason for termination" and the words, "unsatisfactory work" written in the explanation section.

McCoy, the steward for the night shift, testified that he first learned of the termination earlier that day when he received a call from a secretary in Respondent's office telling him to report to the jobsite to pick up his last check and tools. When McCoy asked the secretary what was going on, she said if he had any questions to ask the foreman. McCoy told her he would report to the job at the normal starting time. McCoy testified that when he reported to the trailer at the start of his shift, he saw Jerry Collar and asked him what was going on. Jerry Collar told him the entire night shift was being terminated and were not allowed back on the property. McCoy protested the termination, telling Collar it wasn't right, that they had done nothing wrong. He also asked Collar about the other four members of the night shift who were not being terminated. According to McCoy, Collar said those four hadn't been on the job long enough to see if they would work out. McCoy then asked Collar if he was singling him out. According to McCoy, Collar replied in the affirmative, telling McCoy if he had a problem with that, he should talk to Jackie Goodwin. McCoy is the only one of the 10 terminated employees to pursue the matter through the grievance procedure. None of the other eight alleged discriminatees testified in this proceeding.

Jerry Collar testified that he made the decision to terminate the 10 night-shift electricians. According to Collar, the Respondent was under increasing pressure from Comau/Pico's representative on the job, Richard Saro, to meet contractual deadlines for different phases of the job. Collar testified that he was meeting with Saro on a daily basis in March over Saro's complaints that things were not getting done on time. Collar characterized these meetings as "adversarial" and "tense." Collar testified that Saro complained more about work not getting done on nights than days. Wofford also testified that the Respondent started having problems meeting targets for completion of work in February and March. According to Wofford, these problems were emanating from the night shift, which did not even begin until late February. Wofford testified that he was receiving reports from the foremen on the day shift that work left for the night shift to complete was not getting done. The Respondent also called Saro as a witness to corroborate the testimony regarding these problems. Saro arrived on the job in the first week of February. He testified that even before he got there, he was receiving complaints from his employees on the job about the Respondent not meeting time targets. Once he arrived on the job, Saro held daily meetings with Jerry Collar to define objectives for each shift and to review performance. Saro testified that the Respondent routinely failed to meet these objectives and he frequently had to "yell at Jerry" about this. Saro also testified that he was receiving reports from the Comau/Pico mechanics and electrical leads who worked the night shift about the lack of productivity of that crew. Saro recalled that of the two electrical leads he had working nights, John

[9] See fn. 2 above.

Routly and Jeff Flugie, Flugie complained more, calling Respondent's electricians "bums." On cross-examination, Saro acknowledged that he was receiving complaints about both the day and the night shifts.

Despite the apparent seriousness of the Respondent's failure to meet time targets and the adversarial nature of its meetings with Comau/Pico, the Respondent produced no documentation to support this testimony. The Respondent's witnesses acknowledged that there were schedules and other documents that would show when certain work was expected to be completed, but claimed there were no records showing what work was left undone. The Respondent's witnesses also claimed that there were no written memos or other documents regarding Comau/Pico's complaints about the Respondent's performance of its portion of the contract. The General Counsel sought an adverse inference from the Respondent's failure to produce such evidence to support its claims. I reserved ruling on the General Counsel's request and shall rule on it later in this decision.

Collar testified further that, on March 6, 3 days after the incident with Stanley Vincent, he and Wofford stayed late to observe the night shift's performance of a "hot job." According to Collar, the Respondent had a commitment "cast in stone" to complete a cable pull at one end of the building.[10] There is no dispute that the day shift had started the task and had left it for the night shift to finish. Collar testified that he and Wofford stood in plain view and watched a group of 8 to 10 of his electricians milling around for 10–15 minutes before their scheduled break, after they had set the reels and prepared to pull the cable. After milling around, the employees went on their 15-minute break but did not return until 25 minutes later and only then did they proceed to pull the wire. According to Collar, Wofford left when the employees went on break, telling Collar that he felt like "he had been slapped in the face." Collar remained observing the employees for another 45 minutes before he too went home.

Collar admitted that he never approached the employees to inquire why they were milling around, or to question them about the length of their break, or even to simply tell them to get back to work. In fact, he and Wofford said nothing to the employees that night. Collar also acknowledged that regular Night Shift Foreman Steve Bell was not working that night and that the night-shift steward, McCoy, and the Charging Party, James, were not assigned to the wire pull but were working elsewhere that evening. Collar also admitted, during cross-examination, that the day shift had set the reels from which the wire was to be pulled in the wrong location and that the night shift had to break down the reels and move them before it could pull the wire. However, Collar said that it did not take the crew long to re-set the reels.

Jerry Collar testified that the following day, March 7, when he arrived on site, he asked Wofford if the wire pull had been completed. Wofford told him it had. Collar then asked if any other work had been done and Wofford said that the night shift was supposed to have cable or wire pulled at another location (the pick and place line) but did not finish that job. Wofford also told Collar that even the portion of the work they did finish had been done improperly and had to be reworked. According to Collar, after confirming this information with Homer Allen, the foreman on the day shift who was responsible for that part of the job, he generated the paperwork to terminate everyone on the night shift except those four electricians who had just started on the shift that week. Collar testified further that he decided to terminate this group without making any individualized determination regarding each employee's responsibility for the lack of productivity and even though he was aware that several employees from the day shift had worked over that evening on the wire pull. According to Collar, "[T]his was the group of people he had a problem with based on what he had observed and the reports he had been getting in the previous week to 10 days." Collar specifically denied that the incident involving Stanley Vincent on March 3 had anything to do with his decision.

Collar testified that, after making his decision, he telephoned the Union's business manager because, under the contract, he had to notify the Union if a steward was going to be terminated. Collar met the employees as they arrived for work and gave them their final paychecks and the termination notices. Collar testified that he specifically told the employees what he had observed on the wire pull and that he was getting complaints from the customer about their productivity. According to Collar, he told the employees that the customer was not satisfied with their work and did not want them on the site. That same day, before meeting with the employees, Collar met with Saro and told him that he had taken care of the problem without specifying that he had fired the night shift. According to Collar, Saro replied that he was tired of hearing this and informed Collar that the Respondent had decided to remove another part of the job, that had not yet started, from the Respondent and to bring in 40 electricians from Detroit to perform this work. Collar testified that, after his meeting with Saro, he looked at the work to be taken away and laid off another 40 electricians who would have worked on that portion of the job. The termination notices for these layoffs show that most occurred the following Tuesday, March 9. There is no dispute that the Respondent subsequently won back the work from Comau/Pico and has been permitted to finish the job. Hiring Hall records in evidence show that the Respondent called Local 136 for electricians beginning in late April and continuing through May. Some of the 30–40 electricians referred out to the job after April were still working there at the time of the hearing. Because the Respondent had designated the alleged discriminatees as ineligible for rehire, none were referred as the work increased.

Wofford corroborated Collar's testimony regarding their observation of the wire, or cable, pull on March 6 and their discussions the next morning regarding what other work had been done by the night shift. Wofford did not make any recommendation that the crew be fired but he agreed with Collar's decision when he learned of it later that day. According to Wofford, Collar told him he made the decision to terminate the crew because of the accumulation of everything that had been going on for several weeks with the wire pull being the last straw. Wofford denied that Collar mentioned anything about Vincent's activities on March 3 in connection with this decision. Saro also corroborated Collar's testimony about their conversa-

[10] Several witnesses also refer to the cable pull as a wire pull.

tion in which Collar said he had taken care of the problem and Saro informed him that Comau/Pico was removing work from the Respondent. Saro testified that the decision to take work away from the Respondent had been made before this conversation and was in the process of being implemented. In fact, the 40 electricians from Detroit arrived at the job on March 10. These contractors left the job on March 24. Saro denied that there were any problems with the work done by the contractors from Detroit.

The Respondent also called Don Collar, the Respondent's safety coordinator on the Mercedes-Benz job, to testify about a conversation he had with John Roy Jones, one of the alleged discriminatees, in February. Jones and Chris Turner were the only two employees on night shift when it started. According to Collar, they would come into the trailer every day before the start of their shift to sign the roster. Collar testified that about a week after the number of employees on the night shift increased from 2 to 12 or more, Jones came in the office and told Collar that the "night shift was messing up," "they're not doing right" and Jones "did not want to be part of it." Collar testified that Jones did not provide any specifics in this conversation. Jones told Collar he was thinking about going back on days. Don Collar offered to help Jones get back on days but Jones came back later and said he would stick it out. Don Collar told his brother Jerry and Wofford about this conversation the next day because he considered Jones' concerns a safety issue. There is no evidence that either Jerry Collar or Wofford pursued the matter further until the incidents at issue here.

In anticipation of the Respondent's defense, the General Counsel called John Routly as a witness. As noted above, Routly was one of the two electrical leads, or supervisors, for Comau/Pico working on the night shift at the Mercedes-Benz job. Routly reported to Bob Talley at Comau/Pico. He testified that Saro was in upper management with the Company and ordinarily did not deal with manpower issues. Routly testified further that he was responsible for making sure that "hit list" items left over from the day shift were completed. This was work in addition to the contractual installation work the Respondent was expected to do.[11] Routly had regular contact with Steve Bell, the Respondent's night-shift foreman and one of the alleged discriminatees. He and Bell would go over the work to be done each night and Bell would then lay out the work for his crew. According to Routly, the Respondent's night shift was split between electricians assigned to installation work and electricians assigned to work with Routly on the hit list. In his role as electrical lead for the General Contractor, Routly had an opportunity to observe the work of the Respondent's electricians. He testified that, in his opinion, their work was good, allowing for the fact that some of the Respondent's electricians were new to this type of installation work. Routly testified that he and Bell were working with the crew, finding out where each individual's strengths were and assigning them where they could work best. He also testified that he saw no difference in the quality of work done by the day and night shifts. Although Routly acknowledged that the night shift was completing only about 50 percent of the hit list each night, he attributed this to a lack of manpower. In fact, Routly testified that he noted this on the bottom of each list at the end of the shift.[12]

Routly testified that the weekend of March 6 and 7 was his weekend off and he was not there for the wire pull or the termination of the night crew. Routly learned that the Respondent had terminated the crew when he returned to work. According to Routly, it was shortly after this that Comau/Pico stopped using the Respondent to install the tooling and brought in a crew of nonunion contractors from Detroit. Routly described this period as a "madhouse," testifying that the Detroit crew was trying to do 60 days worth of work in 2 weeks. According to Routly, he was still trying to repair the work done by the Detroit electricians at the time of the hearing.

The General Counsel also questioned Vincent about the wire pull on March 6. Vincent testified that Bell was not working that night. Chris Turner, who was acting foreman, assigned him to work on the wire pull. According to Vincent, Andy Harding, an electrician on the day shift, who was in charge of this wire pull that day, stayed over on the night shift with three apprentices to finish it.[13] Harding told Vincent and the other night-shift electricians assigned to this task what was left to be done.[14] The crew first had to break down and move the reels because they had been set up by the day shift in the wrong place. Because the wire was going into an overhead conduit, the crew needed to locate and set up a scissors lift and one of the crew had to stand on the lift and pull up the cable to feed it into the conduit. In addition, because of the distance from the reels and the end of the pull, someone had to stand in the middle to facilitate communication between the men feeding the wire at one end and those pulling it at the other. Vincent acknowledged that the crew went on break after setting up the pull and performed the pull after break. Vincent explained that they did this because it was almost break time when they completed the set up and they did not want to start the pull and have to stop for break before it was done. Vincent recalled that it took 35–40 minutes to do the pull and he did not think there was anything out of the ordinary about this particular job.

On cross-examination, Vincent admitted that, after his termination, he asked the Union's business manager, Jackie Goodwin, about getting his termination slip changed so he could apply for disability. Apparently as a result of conversations between Goodwin and Jerry Collar, Vincent's termination slip was changed. The new termination notice, which is dated March 8, has the box "other" checked under reason for termination with the following explanation written in: "physically unable to perform the work required as an electrician." While acknowledging that he requested this change, Vincent denied using the revised notice to apply for disability. At the time of the hearing, Vincent was still seeking work as an electrician.

[11] This "hit list" appears to be in the nature of a punch list typical of construction sites.

[12] The Respondent offered no such documents into evidence.

[13] It is undisputed that Harding and the day-shift apprentices were not terminated as a result of the wire pull.

[14] Vincent recalled that alleged discriminatees Don Malone, Mike Guthrie, and his son William Vincent were also assigned to the wire pull.

As previously noted, steward McCoy was the only one of the alleged discriminatees to file a grievance under the collective-bargaining agreement over his termination. McCoy testified that he attended a labor/management meeting at the apprenticeship school to discuss his grievance on May 6. The Union was represented by Business Manager Jackie Goodwin, his brother Randy Goodwin, the Local's president and business representative, and Herbert Prestidge, a representative of the IBEW. On the management side were Gene Jernigan, the assistant chapter manager for NECA in Birmingham, Dave Roberts, NECA's Southern Region director, Jerry Collar and Wofford for the Respondent and two other officials from NECA. McCoy testified that he asked Wofford during this meeting, "Steve, I've worked for you before, didn't I do a good job?" and that Wofford said, "yes." When McCoy then asked what was the problem now, Wofford replied, "[O]ff the record, you didn't do anything wrong, we wanted to get rid of one guy and you all got caught up in it. We should have got rid of this person before you guys got there." According to McCoy, Wofford did not identify the individual he was talking about. Although this statement was made in the presence of everyone at the meeting, no one said anything in response.

The Respondent called the Goodwin brothers and Jernigan, in addition to Jerry Collar and Wofford, to dispute McCoy's testimony about the May 6 meeting. All of these witnesses recalled an exchange between McCoy and Wofford similar to that described by McCoy but their version of Wofford's answer to McCoy's question differs from his testimony. Jerry Collar recalled that Wofford said, "[B]y and large, sometimes a couple of people can be caught up in these kinds of terminations, but they're all grown men and they all have to be able to contribute to what they're doing." Wofford recalled that he said, "[T]here's a lot of people kind of—seemed to me you got caught up in it, and—but done nothing about it." Wofford explained that he was referring to the alleged lack of productivity by the night shift and the failure of anyone to try to improve the situation. Jernigan testified that he heard Wofford say that he felt "McCoy was just caught up in a situation of being fired." Jackie Goodwin testified that all he heard Wofford telling McCoy was "something to the effect of you could have got caught up in it." Finally, Randy Goodwin testified that he remembered Wofford telling McCoy that he never had any problems with him in the past and then, adding, "[T]his is off the record, a couple of you guys might have got caught up in it." Randy recalled that there was further discussion between McCoy and Wofford but he didn't hear everything that was said. All of the Respondent's witnesses denied hearing Wofford say that the Respondent had terminated McCoy or the others in order to get one employee. The Respondent also offered the formal minutes of the meeting maintained by NECA which, as to be expected, contain no reference to any conversation between McCoy and Wofford.

The General Counsel also offered records from the Union's hiring hall showing referrals made by Local 136 to the Mercedes-Benz job after the termination of the alleged discriminatees and confirming that the four night-shift electricians who were not terminated on March 7 continued to work at the site until they were laid off as work decreased. The General Counsel also offered payroll records from the Respondent showing that two of the alleged discriminatees, Bell and Jones, were hired by a different branch office of the Respondent to work at other jobsites after their terminations, notwithstanding the designation as ineligible for rehire. Collar testified that he had no control over the hiring done by other branch managers at other job sites outside his jurisdiction.

B. Analysis

1. The case of Stanley Vincent

The complaint alleges that the Respondent violated Section 8(a)(1) and (3) of the Act on March 4 by discharging Stanley Vincent, then converting his discharge to a final warning, because he engaged in union and protected concerted activity. The General Counsel's theory of the case is that Vincent's questioning of the apprentices on March 3 was protected because it was an attempt by him to enforce the collective-bargaining agreement between the Respondent and Local 136. See *NLRB v. City Disposal System,* 465 U.S. 822, 840 (1984); *Interboro Contractors,* 157 NLRB 1295, 1298 (1966), enfd. 388 F.2d 495 (2d Cir. 1967). The Respondent denies that it terminated, or issued any warning to, Vincent as a result of this incident. Under the Respondent's view of the evidence, Jerry Collar had not made a final decision to terminate Vincent when he met with him and McCoy on March 4, but was merely investigating the reports he had received the night before suggesting that Vincent was causing a work stoppage. Once Collar was satisfied that there had been no work stoppage, he permitted Vincent to return to work and wrote cancelled on the termination slip he had prepared in case Vincent's answers to Collar's questions were unsatisfactory. The Respondent denied that it issued any warning to Vincent as a result of this incident.

The Supreme Court, in *City Disposal Systems,* supra, approved of the Board's interpretation of Section 7 of the Act as including, within the definition of "concerted activity," an individual employee's "reasonable and honest invocation of a right provided for in his collective-bargaining agreement." Such activity falls within the "mutual aid and protection" clause even if the individual employee has his own interests most immediately in mind. 465 U.S. at 830. The Court agreed with the Board that the employee did not have to make an explicit reference to the collective-bargaining agreement when invoking his rights as long as it was reasonably clear that the right asserted was one encompassed by the agreement. Id. at 839–840. The Court also agreed with the Board that an employee's invocation of a perceived contractual right was protected regardless of whether the employee turned out to have been correct in his belief as to his rights. Id. at 840. See also *Interboro Contractors,* supra. Accord: *Union Carbide Corp.,* 331 NLRB 356 (2000).

There is no question here that Stanley Vincent was engaged in protected concerted activity when he asked, first the apprentices, then the foreman, who was their journeyman. This question was obviously related to the journeyman: apprentice ratio established in the collective-bargaining agreement and the IMRA, which in turn relates to the safety of the job. The fact that Vincent was not the steward is immaterial since the Act protects employees as well as stewards in their efforts to en-

force a collective-bargaining agreement. It is also clear that the Respondent perceived Vincent's inquiry to be a question related to its compliance with the contract. Thus, Lowery expressed his concern to Wofford whether he was working "within the agreement" and Wofford and Jerry Collar discussed the contractual ratio during their telephone conversation about Lowery's report. In fact, Collar even told Wofford that they would look into the ratios the next day. The protected nature of Vincent's activity and the Respondent's knowledge of it is plainly established by the evidence.

It is also clear from the evidence that Jerry Collar made a decision to fire Vincent, based on the report he received from Wofford, in the belief that Vincent was slowing down or interfering with the work of the apprentices. I do not credit Jerry Collar's testimony that no decision had been made before he met with Vincent and McCoy. McCoy and Vincent credibly testified that Vincent was told when he arrived for work that he had been fired. This testimony was bolstered by that of Don Collar, a witness for the Respondent, that he recommended to Vincent that he go to the job and find Jerry to see about getting his job back. Don Collar's testimony contradicts Jerry Collar's testimony that he sought out Vincent to investigate the reports he had received the night before.

The testimony of Lowery, who I found to be a credible witness, establishes that Vincent did not in fact cause any interruption in work. Moreover, the brief duration of his questioning could not have had any significant impact on the ability of the apprentices to carry out their duties. If Collar had terminated Vincent because he believed Vincent caused or attempted to cause a work stoppage, the termination would be unlawful under *NLRB v. Burnup & Sims* and its progeny.[15] Under these cases, an employer violates Section 8(a)(1) if it is shown that the discharged employee was engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity and the employee was not in fact guilty of the alleged misconduct. An unfair labor practice will be found regardless of the employer's motive or good faith belief that the misconduct occurred.[16]

Although I have found that Jerry Collar made a decision to terminate Vincent on March 4, and went so far as to prepare his final paycheck and termination notice with the intent of implementing the decision when Vincent arrived for work, he cancelled the termination after speaking to Vincent and McCoy. This raises the issue whether the Respondent cured any unfair labor practice committed by Collar's decision to terminate Vincent. In *Passavant Memorial Area Hospital,*[17] the Board held that, in certain circumstances, an employer may relieve itself of liability for unlawful conduct by repudiating the conduct. To be effective, such repudiation must be "timely," "unambiguous," "specific in nature to the coercive conduct," and "free from other proscribed illegal conduct." In addition, there must be adequate publication of the repudiation to the employees involved and there must be no proscribed conduct on the employer's part after the publication. Finally, the Board has noted that such repudiation should give some assurance to the employees that in the future the employer will not interfere with their exercise of Section 7 rights. Id. at 138–139. Accord: *United Refrigerated Services*, 325 NLRB 258 (1998).

I find that the Respondent did not cure the unfair labor practice when it rescinded Vincent's termination. Although the cancellation of the discharge was timely, unambiguous and specific to the unlawful conduct, it was followed immediately by a "final warning" to Vincent not to engage in the same protected activity. I credit the testimony of McCoy and Vincent that Jerry Collar did issue a final warning before sending Vincent back to work. I note further that Jerry Collar himself testified that he advised Vincent to go through his steward in the future. This "advice" diminished Vincent's right recognized in *City Disposal Systems,* supra, to seek enforcement of the collective-bargaining agreement without having to find a steward. Collar's warning to Vincent, which itself was an unfair labor practice, also failed to give any assurance that the Respondent would not interfere with employees' rights in the future. Finally, as will be discussed, infra, the Respondent's subsequent termination of Vincent and the other nine employees on the night shift was an additional unfair labor practice that undermined the effectiveness of the Respondent's repudiation of Vincent's unlawful discharge on March 4.

Accordingly, based on the above and the record as a whole, I find that the Respondent violated Section 8(a)(1) of the Act, on March 4, by discharging Stanley Vincent and converting the discharge to a final warning.[18]

2. The termination of the night shift

The complaint alleges that the Respondent also violated Section 8(a)(1) and (3) of the Act, on March 7, by discharging Vincent again along with nine other electricians who worked on the night shift with him, and by thereafter declaring these ten employees ineligible for rehire.[19] According to the General Counsel's theory of the case, the Respondent was motivated by the concerted activity of these 10 employees in protesting the unfair termination of Stanley Vincent on March 4 and/or its desire to conceal an unlawful motive for the March 7 termination of Vincent. Although the Respondent admits terminating the 10 alleged discriminatees and declaring them ineligible for rehire, it denies that its action was motivated by any union or other protected activity on their part. The Respondent contends that its sole reason for terminating the night shift employees was their lack of productivity on the job, which was generating complaints from its customer, Comau/Pico.

[15] 379 U.S. 21 (1964). See also *La-Z-Boy Midwest*, 340 NLRB 80 (2003); *Shamrock Foods Co.*, 337 NLRB 915 (2002), enfd. 346 F.3d 1130 (D.C. Cir. 2003). Although most often applied in the context of allegations of strike misconduct, *Burnup & Sims* itself and the above-cited cases arose in the context of other Sec. 7 activity similar to that engaged in by Vincent here.

[16] For this reason, the Board's test for determining motivation, adopted in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), is inapplicable. See *Felix Industries*, 331 NLRB 144 (2000).

[17] 237 NLRB 138 (1978).

[18] I find it unnecessary to determine whether the discharge and final warning also violated Sec. 8(a)(3) of the Act because this additional finding would not affect the remedy.

[19] The 10 alleged discriminatees are identified in fn. 2 above.

Because resolution of this allegation turns on employer motivation, the Board's decision in *Wright Line,* supra, applies. In that decision, the Board held that the General Counsel must first establish, by a preponderance of the evidence, that union or protected concerted activity was a "motivating factor" in the decision to discharge an employee. In order to meet his initial burden, the General Counsel must show that the employee was engaged in protected activity, that the employer was aware of this activity and that the employer exhibited animus against such activity. The Board has approved reliance upon circumstantial evidence to establish elements such as knowledge and animus, acknowledging the reality that direct proof of motivation will seldom be available. *Naomi Knitting Plant,* 328 NLRB 1279 (1999); *Abbey's Transportation Services,* 284 NLRB 698, 701 (1987), enfd. 837 F.2d 575 (2d Cir. 1988). Only if the General Counsel has made the requisite showing will the burden shift to the Respondent to "demonstrate [by a preponderance of the evidence] that the same action would have been taken even in the absence of the protected conduct." Id. See also *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399–403 (1983). Where an employer asserts, as here, that some type of employee misconduct was the reason for discharge, the employer "does not need to prove that the employee *actually* committed the alleged offense. It must show, however, that it had a *reasonable belief* the employee committed the offense, and that the employer acted on that belief in taking the adverse action against the employee." *Midnight Rose Hotel & Casino,* 343 NLRB 1003 (2004).

The only evidence of protected activity on the part of the nine discharged electricians other than Vincent is the testimony of Vincent and McCoy that these nine employees were present when Don Collar announced that Vincent had been fired for causing a work stoppage and protested that the firing was unfair. It is not clear from the testimony of these two witnesses, however, that Don Collar was even aware of the "protest." There is also no evidence that Jerry Collar, who made the decision to fire the 10 employees, was aware of any concerted protest by these employees. Thus, even assuming that the grumbling of the employees about Vincent's discharge on March 4 was concerted activity protected by the Act, the General Counsel has not established knowledge of this activity by the Respondent.[20] On the evidence in the record, I am not persuaded that the Respondent's discharge of the ten electricians was motivated by any concerted activity actually engaged in by this group of employees.

Although this finding would ordinarily end the matter, the General Counsel has posited an alternative theory that is more difficult to dismiss. The General Counsel argues that the Respondent's real reason for discharging these 10 employees was the Respondent's animus toward Vincent resulting from his perceived attempt to cause a work stoppage on March 3. The Respondent's decision to terminate 10 of the 14 employees on the night shift occurred just 3 days after its failed attempt to terminate Stanley Vincent for engaging in what the Respondent erroneously believed was a work stoppage. When Jerry Collar and Wofford observed Vincent and several coworkers performing the wire pull on March 6, it must have appeared to them that this was a further effort by these union members to cause a slow down in the work. Jerry Collar's decision the following day to terminate almost the entire crew, even those who were not at work or were working in a different location, may well have been motivated by a lingering belief that these union members were engaged in a concerted effort to interfere with productivity on the job. The statement made by Wofford at McCoy's grievance meeting 2 months later, that McCoy "got caught up in" a situation, suggests that more was involved than a concern over lack of productivity by these 10 employees.[21]

It is clear from Jerry Collar's own testimony that he was not motivated by any particular deficiency on the part of the individual employees when he made his decision to terminate these ten employees. In fact, only four of the ten were working on the wire pull that was the triggering event. Neither Collar, nor any other witness for the Respondent, cited any specific basis for determining that the other six employees were not being productive. The Respondent offered the testimony of Saro in an attempt to bolster its claim that the night shift was the cause of the Respondent's inability to meet contractual deadlines. Saro, however, was contradicted by his own supervisor, Routly, who was working the night shift with this crew and had no complaints with the amount or quality of work they were doing. Of all of the witnesses who testified about the productivity issue, I found Routly to be the most credible because he had no reason to lie and was testifying adverse to his employer. As Routly credibly testified, the reason the night shift was unable to complete all its assignments was a lack of manpower, not any slacking off on the part of the employees. It must also be remembered that there were only 14 employees on the night shift as opposed to 100 or more on the day shift, that the night shift had only been in operation for a couple weeks by March 6, and that some of the employees on the shift were diverted from contract installation work to working for Routly on the punch list. Under these circumstances, it is unlikely that the night crew was the cause of the problems Respondent was having in satisfying Comau/Pico's demands.

The Respondent's case was also undermined by the total lack of any documentary evidence to support its claims that the night shift was responsible for the Respondent's failure to meet deadlines. I find the testimony of the Respondent's witnesses, that there were no documents, incredible. Wofford conceded that the Respondent had work schedules prepared by Comau/Pico and Routly testified that he had a hit list each night of work that needed to get done. Routly also testified that he noted

[20] The concerted protest of Vincent's discharge, as described by the only witnesses called by the General Counsel, did not amount to much. According to Vincent, after some of the employees expressed their opinion that his discharge was unfair, they got in the van and rode up to the building to go to work. There is no evidence that any of the employees pursued their protest beyond this limited activity.

[21] My finding regarding Wofford's statement is based on the combined testimony of Respondent's witnesses who were at the meeting. I do not credit McCoy's version that Wofford said the Respondent fired him and the others in order to get one employee. McCoy's recollection appears to be his interpretation of what was more likely to have been said.

on his list each morning that work wasn't completed due to manpower issues. At a minimum, the Respondent should have produced such documents to show that the night shift was failing to meet production requirements. Moreover, it is highly unlikely that there would be no correspondence, memos or other documentation of Comau/Pico's complaints about the Respondent's failure to meet contractual time targets. Particularly on a job of this size, for a company like Mercedes-Benz, everyone working on the job would want to document the fact that it was the other guy who was causing the delays, if any, that existed. Such documents, known in the vernacular as "CYA" memos, are commonplace in our litigious society. Yet, despite the alleged seriousness of the problem, and the adversarial nature and frequency of meetings between Collar and Saro regarding this issue, the Respondent would have me believe that no one ever put these concerns on paper. I don't buy it and agree with the General Counsel that an adverse inference should be drawn from the Respondent's failure to produce any documentation to support the testimony of its witnesses. *Auto Workers v. NLRB,* 459 F.2d 1329, 1336 (D.C. Cir. 1972). Accordingly, I shall infer that had the Respondent produced documents, they would not have shown that the night shift was responsible for the delays in production.

I find, based on the above and the preponderance of the evidence in the record, that the asserted lack of productivity of the night crew was a pretext and that the Respondent was concealing its true motive for discharging these 10 employees. Even assuming that the Respondent was behind schedule and was under intense pressure from Saro to increase productivity and/or to meet deadlines in the contract, the Respondent has not shown that the 10 discharged employees were responsible for this situation. This case is thus different from *Framan Mechanical, Inc.,*[22] cited by the Respondent, where the Board found no violation of Section 8(a)(3) based on its finding that the employer had established that it had a legitimate need to layoff the alleged discriminatees. The Board there noted that the testimony of the employer's witnesses as to the reason for termination was consistent and supported by documentary evidence. Cf. *Davey Roofing, Inc.,* 341 NLRB 222, 223 (2004).

Having found that the Respondent's asserted reason was pretextual, I must conclude that the real reason the Respondent terminated the alleged discriminatees was its mistaken belief that they were in concert with Vincent in causing a slowdown of the work. Collar's hasty decision to terminate Vincent, based on an unsubstantiated report that he was attempting to cause a work stoppage, and his issuance of a final warning to Vincent when he cancelled the termination, is evidence of animus toward the employees' exercise of statutory rights. Thus, in that situation, Collar equated Vincent's mere questioning of the journeyman to apprentice ratio on the job as an attempt to cause a work stoppage. When he observed Vincent and his colleagues on the wire pull, Collar apparently assumed Vincent had not got the message and was still holding up the job. Rather than say something to Vincent and the others, or ask them why it was taking so long to perform the wire pull, Collar reacted by terminating everyone associated with Vincent. Significantly, Collar took no action against Harding and the apprentices from the day shift, who started the wire pull and were working with Vincent on the pull that night. The Respondent also spared from termination the four electricians who had recently started on the night shift because they were not part of Vincent's group.

Based on the above and the preponderance of the evidence in the record, I find that the Respondent terminated Vincent and the other nine alleged discriminatees on March 7, and deemed them ineligible for rehire, because of its mistaken belief that these employees were engaged in a concerted slowdown of work. Because the evidence does not show that to be the case, a violation has been established under Section 8(a)(1) of the Act. *NLRB v. Burnup & Sims,* supra. See also *NLRB v. Link-Belt Co.,* 311 U.S. 584, 589–590 (1941); *JCR Hotel, Inc. v. NLRB,* 342 F.3d 837, 840 (8th Cir. 2003); *Dayton Hudson Corp.,* 324 NLRB 33 (1997). Because the evidence does not support a finding that the Respondent was also motivated by antiunion animus in discharging these ten employees, I shall recommend dismissal of the 8(a)(3) allegation in the complaint.

CONCLUSIONS OF LAW

1. By discharging Stanley Vincent and converting the discharge to a final warning on March 4, 2004, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By discharging Stanley Vincent, Chris Turner, Don Malone, Lance James, Shane Myers, Steve Bell, John Roy Jones, William Vincent, Mike Guthrie, and James McCoy on March 7 and thereafter deeming them ineligible for rehire, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

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

The Respondent having discriminatorily 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). The evidence in the record shows that the Respondent laid off approximately 40 employees on March 9, 2 days after the unlawful discharges here, as a result of Comau/Pico removing work from the Respondent. In all probability, had the discriminatees not been terminated on March 7, they would have been laid off 2 days later for nondiscriminatory reasons. The extent to which they would have been recalled in April and May, when Comau/Pico restored work to the Respondent, had the Respondent not unlawfully deemed them ineligible for rehire, and the duration of any subsequent reemployment are matters best left for resolution at the compliance stage of this

[22] 343 NLRB 408 (2004).

proceeding. See, e.g., *Casey Electric, Inc.,* 313 NLRB 774 (1994); *Dean General Contractors,* 285 NLRB 573 (1987).

[Recommended Order omitted from publication.]