

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

SWIFT TRANSPORTATION CO., INC.

and

Case 21-CA-38735

INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS

Lindsay Parker and Ami Silverman, Attys., Counsel for the General Counsel,  
Region 21, Los Angeles, California  
Ronald Holland and Janelle Milodragovich, Attys., Counsel for Respondent,  
Littler Mendelson, P.C., San Francisco, California  
Michael T. Manley, Atty., Charging Party, Washington, D.C.  
Ricardo Hidalgo, International Organizer, Charging Party, Washington, D.C.

DECISION

I. Statement of the Case

LANA PARKE, Administrative Law Judge. This matter was tried in Los Angeles, California on August 4-10, 2009.<sup>1</sup> Pursuant to charges filed by International Brotherhood of Teamsters (the Union), the Regional Director of Region 21 of the National Labor Relations Board (the Board) issued a Complaint and Notice of Hearing (the complaint) on May 28, 2009. The complaint alleged that Swift Transportation Co., Inc. (the Respondent or Swift) violated Sections 8(a)(1) and (3) of the National Labor Relations Act (the Act).

II. Issues

1. Did Respondent violate Sections 8(a)(3) and (1) of the Act by discharging employees Anthony Herron, Bismark Sanchez, Marco Diaz, and Salvador Gonzalez?
2. Did Respondent independently violate Section 8(a)(1) of the Act by the following conduct: interrogating employees about their union activities; creating the impression that employees' union activities were under surveillance; threatening to terminate employees because of their protected concerted and union activities; threatening that support for the Union would be futile; threatening that Respondent would shut down its facility if employees continued to support the Union, and threatening to terminate employees who continued to support the Union.

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<sup>1</sup> All dates herein are 2009 unless otherwise specified.

### III. Jurisdiction

At all relevant times, the Respondent, an Arizona corporation, with a facility located at the Wilmington Terminal, 221 East D Street, Wilmington, California (Wilmington facility), has  
5 been engaged in the operation of a truckload motor carrier business. In conducting its business operations, the Respondent annually purchases and receives at the Wilmington facility goods valued in excess of \$50,000 directly from points outside the State of California. I find the Respondent has at all relevant times been an employer engaged in commerce within the  
10 meaning of Section 2(2), (6), and (7) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act.

### IV. Statement of Facts

Unless otherwise explained, findings of fact herein are based on party admissions,  
15 stipulations, and uncontroverted testimony. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I find the following events occurred in the circumstances described below during the period relevant to these proceedings:

#### 20 A. The Respondent's Operations

##### 1. The Wilmington California Facility

The Respondent, based in Phoenix Arizona, with 37 major terminals in 26 states and  
25 Mexico, operated a facility in Wilmington, California (Swift yard or Wilmington facility), a city located in the Los Angeles Basin. For 15-20 years, the Wilmington facility was a small operation consisting primarily of a drop trailer facility for trailer storage. Sometime in 2008, the Ports of Long Beach and Los Angeles instituted programs designed to bring newer equipment into the ports and called the Clean Fleet Program. The Respondent decided to participate in the  
30 Clean Fleet Program. Beginning in October 2008, the Respondent expanded its operations at the Wilmington facility, eventually utilizing hundreds of trucks to haul shipping containers to and from the ports of Los Angeles and Long Beach and four rail yards in the Los Angeles area.<sup>2</sup> In its operations, the Respondent was required to follow Department of Transportation (DOT) regulations.

35 By the beginning of 2009, the Respondent employed approximately 160 drivers at the Wilmington facility in two shifts: day shift, normally commencing at 7:00 a.m. and night shift, normally commencing at 5 p.m. Two driver managers oversaw the day-to-day work of the drivers: Jesus Tejeira (DM Tejeira) and Mary Raudales (DM Raudales). No specific ending time  
40 existed for either the day or the night shift, subject to the DOT regulation that prohibited truck drivers from driving more than ten hours at a time or working more than 14 hours in a 24-hour period. A shift ended for each driver when he/she completed the last dispatched driving assignment made within a shift or when the driver manager told the driver he/she was finished for the day. Drivers were generally assigned to the same truck although the equipment was  
45 sometimes "slip seated," that is a day shift driver and a night shift driver were assigned to the same equipment. The Respondent tracked all equipment assignments, load dispatches, and load deliveries through a central computer system with communication links to each truck.

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<sup>2</sup> Various rail lines picked up and/or delivered freight to the rail yards, which were located in the Los Angeles area within 15 miles of each other.

The individuals named below, holding the stated positions with the Respondent, were supervisors within the meaning of Section 2(11) of the Act and/or agents of Respondent within the meaning of Section 2(13) of the Act:

5	Jerry Moyes (Mr. Moyes)	CEO
	Gary Fitzsimmons (Mr. Fitzsimmons)	Vice President in charge of Security
	Brennan Obray (Mr. Obray)	Terminal Manager
	Mark Donahue (Mr. Donahue)	Corporate Security Investigator
	Shawn Driscoll	Director of Security

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2. Employment Applications and Hiring Policies

The Respondent’s driver employment applications contained the question, “Have you ever been convicted of a criminal offense?” If an applicant marked the “yes” box, the application required explanation of the circumstances. The applications contained the following provision:

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I acknowledge [by signing the application] that omissions of employee’s moving violations, suspensions, accidents, and criminal convictions will constitute falsification of the employment application, which will result in immediate termination of employment.

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After submitting an application for employment and receiving an offer of employment, each prospective driver attended an orientation presented by the Respondent. At the orientation, applicants were informed that failure to disclose all criminal convictions after age 18 on the application would be considered application falsification. Applicants were also informed that the company would conduct a criminal background check, and applicants were permitted to amend their applications and were encouraged to provide any missing information regarding convictions. The Respondent did not consider amendments made to the application at that time to constitute application falsification. The Respondent conducted initial criminal background checks on all new employees, utilizing in part an outside security company to perform the checks. The Respondent’s initial new-hire background checks for its Wilmington facility typically covered three of the Los Angeles Basin’s five counties, selection of which was based on the applicant’s residence.<sup>3</sup> Sometimes the Respondent performed a separate search to identify addresses associated with an applicants’ social security number. The Respondent then selected appropriate counties for background checks based on the addresses. If, after employment, an employee or employees were involved in gross misconduct or criminal activity, the Respondent might, at its discretion, expand initial background investigations to include additional localities.

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After the Respondent obtained criminal background information, the Respondent compared the information to employee application statements and interviewed the applicant if further information was wanted. While certain convictions such as those for theft, drugs, and aggressive behavior generally disqualified an applicant from employment, even those as well as other convictions did not preclude employment if the convictions had been truthfully disclosed on the application. Discrepancies between applications and criminal activity reports resulted in an investigation of the circumstances by the Respondent’s security staff.

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<sup>3</sup> The Respondent’s contract with the outside security company provided a set fee for a three-county background check. Additional counties resulted in additional fees.

If, either before or after employment, the Respondent obtained information of convictions that had not been disclosed on an employment application, the security staff interviewed the applicant or the employee to determine whether the applicant should be hired or the employee retained. In Mr. Fitzsimmons' words:

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Sometimes we interview them if we can't make a clear-cut decision as to whether we want to hire this person or not hire them or terminate their employment for false application or not, then we'll interview them to get more information about their conviction.<sup>4</sup>

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Written company policy required employees to cooperate in investigations conducted by the security staff upon pain of termination.

### 3. Pre-Trip Equipment Inspections

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DOT regulations required each driver to perform several inspections during the course of a work shift. Each driver was to conduct a pre-trip inspection (pre-trip) of his/her assigned truck before leaving the Respondent's yard to pick up a load at one of the ports. The pre-trip included checking tires, mud flaps, lights, and other equipment. At the port, the driver was to pre-trip the chassis (the trailer base upon which a container was loaded), the container, and, once again, the truck. If the driver discovered any regulatory defect, the driver was not supposed to leave the port but was to go to "roadability," a maintenance service provided at the port (port roadability) where the problem was repaired, if possible.<sup>5</sup> If the problem could not be repaired, the driver was to notify the driver manager. When drivers brought loads to the Swift yard, they were expected to "post-trip" the equipment, checking the same items covered in the pre-trip inspection.

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Containers bearing hazardous material loads were required to bear placards that were affixed with a sticky substance and centered on all four sides of the container, explaining the content of the container. DOT regulations forbade the posting of placards atop other placards. Inapplicable placards were to be removed entirely including the sticky substance used to mount them. Placards were required to be posted at a specific height on containers so that when containers were stacked together, as on rail cars, the placards were easily visible. Rail lines refused to accept improperly placarded containers. Drivers hauling hazardous material loads were expected to check the placards as part of the pre-trip. Placard problems identified at the ports were corrected by port personnel; problems otherwise identified were the drivers' responsibility.

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### B. Concerted Protected and Union Activity

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Beginning early in their employment a number of the Respondent's drivers, including Anthony Herron (Mr. Herron), Bismark Sanchez (Mr. Sanchez), Marco Diaz (Mr. Diaz), and Salvador Gonzalez (Mr. Gonzalez), discussed among themselves complaints about the Respondent's hours of work, rate of pay, failure to pay overtime, and dissatisfaction with the driver managers' treatment of them. Mr. Herron raised with Mr. Obray drivers' complaints that

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<sup>4</sup> No evidence was adduced as to what criteria the Respondent considered in deciding whether to retain an employee after the Respondent discovered application falsification.

<sup>5</sup> The Wilmington facility also had a maintenance shop called roadability (Swift roadability).

they were asked to work beyond what they considered to be the appropriate work schedule.<sup>6</sup> Mr. Herron believed that the Respondent should not ask employees to work beyond eight hours, and he showed his disagreement with the company's contrary policy by leaving work every day at 3:30 p.m.<sup>7</sup> Prior to January, Mr. Obray received a multiplicity of complaints from numerous drivers about those and other working conditions at the facility.

In early November 2008, Alfredo Salazar, organizer for the Union, contacted Mr. Diaz about union organization at the Wilmington yard. In late November 2008, the Union formed a union committee to educate drivers about the Union. The committee consisted of Mr. Diaz, Mr. Herron, Mr. Sanchez, Jose Zarate, and Diego Lopez (Mr. Lopez). The union committee members talked to coworkers about the Union and attended union meetings along with other drivers.

According to Mr. Herron, in early January Mr. Obray told Mr. Herron in the presence of 15-20 other drivers that the Union would never make it at the Respondent and that Mr. Moyes would close the place down if he thought employees were trying to form a union. Mr. Herron could not be certain "about the conversation and how it struck up," and in spite of the presence of a number of drivers who must have heard Mr. Obray's statements, no other witness testified of them. Although a warning of plant closure is a significant, if not dramatic, threat, there is no evidence that Mr. Herron reported any such threat to union representatives or that Mr. Obray's alleged statements were the subject of discussion among employees. Given the lack of reasonable context for Mr. Obray's alleged statements and the absence of any corroboration, I cannot accept Mr. Herron's testimony in this regard.

At the beginning of January, Mr. Obray approached DM Tejeira, Mr. Diaz, and Nick \_\_\_\_\_ and asked them to talk to the drivers about selecting one employee representative for every 25 drivers for the purpose of communicating driver complaints and concerns to him. In the second or third week of January, Mr. Herron organized a meeting of 30-60 employees of the night and day shifts in the company parking lot during the shift change. By a show of hands, the drivers elected six employee representatives: three for the day crew, Mr. Herron, Mr. Diaz, and Nick \_\_\_\_\_, and three for the night crew, Jimmy \_\_\_\_\_, Oscar Navarro, and Elias \_\_\_\_\_ (the Employee Committee). As the employees were thus occupied, Mr. Obray came to the group and inquired whether the meeting had to do with union organization.<sup>8</sup> Mr. Herron said the

<sup>6</sup> It is unnecessary to detail the Respondent's work schedule and pay policies or its changes thereto during the relevant time period. It is sufficient to note that many employees, particularly Mr. Herron, were dissatisfied with the policies and complained about them.

<sup>7</sup> Mr. Herron's testimony in this regard was as follows:

Q: Aside from making complaints, did you do anything else to show that you didn't agree with this policy [of being asked to work beyond 3:30 on occasions].

...

A: Well, I would prepare myself every day to leave at 3:30 and I would do so.

...

Q: Did you always refuse to work past 3:30?

A: Yes, in most cases.

<sup>8</sup> Mr. Diaz testified that Mr. Obray asked if they were forming a union; Mr. Sanchez recalled that Mr. Obray said, "I hope this isn't a union meeting;" Mr. Gonzalez recalled that Mr. Obray said, "I thought you guys were talking about the Union," and Mr. Herron testified that Mr. Obray asked if the drivers were talking about the Union." Mr. Obray testified that he said nothing about any union but merely asked, "What are you guys doing?" Given the extensive corroborative testimony, I find that Mr. Obray asked the employees, in effect, whether they were talking about the Union.

employees were not talking about the Union; they were just doing as Mr. Obray had asked, discussing problems and selecting representatives. According to Mr. Obray, he replied, "This isn't exactly the time that I wanted you guys to do it but go ahead."

5 Mr. Obray's instruction to the Employee Committee was to meet with him every Friday to present employee complaints and to resolve them if possible. The first meeting took place the last week of January at which time Mr. Herron, Mr. Diaz, and Nick \_\_\_\_\_ met with Mr. Obray in his office. Mr. Herron informed Mr. Obray of the following complaints: five or six drivers had problems with their checks and disorganized truck parking made it difficult for the crews to  
10 easily find their assigned trucks.

Sometime in early February, a contretemps at work occurred between drivers Hugo Molina (Mr. Molina) and Mr. Lopez concerning Mr. Lopez' accusation that Mr. Molina intended to report drivers who were not performing their work duties to management (Molina/Lopez  
15 incident).<sup>9</sup> Mr. Diaz became involved in the dispute, and Mr. Molina later reported to a driver manager that he had felt threatened by his coworkers.

A second meeting between Mr. Obray and the Employee Committee took place  
20 sometime in February with all six representatives in attendance. Mr. Herron raised two issues: (1) discipline of a driver that had been, in the committee's view, unfairly suspended for receiving a faulty equipment ticket for which the maintenance department, not the driver, was at fault and (2) failure to reemploy a driver who had left work for a month on a family emergency but, because of a paperwork error, had no job when he returned. Mr. Obray agreed to remove the suspension of the first driver and to reinstate the second.  
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A third meeting between Mr. Obray and members of the Employee Committee occurred on February 5 and centered on an assignment given to Mr. Sanchez on that day. It is undisputed that in the afternoon of February 5, DM Tejeira told Mr. Sanchez to see to the repair of two containers that Mr. Sanchez had earlier delivered to the Swift yard, one of which was  
30 missing tail lights and the other a mud flap, and to deliver them, seriatim, to the rail yard.

According to Mr. Sanchez, he calmly pointed out to DM Tejeira that it was nearly time to clock out and that he could not make the deliveries because he had to pick up his son. DM Tejeira told Mr. Sanchez to make the deliveries or he would be terminated for refusing a load.  
35 According to DM Tejeira, Mr. Sanchez was angry and profane, saying, "I am not going to f\_\_\_\_ing do it." When DM Tejeira told him he had to do it, Mr. Sanchez said, "F\_\_\_\_ this. I am not going to do it. F\_\_\_\_ this...I am tired of this...f\_\_\_\_ you, I am not going to do it."

Mr. Sanchez went to Mr. Obray's office with DM Tejeira following. According to  
40 Mr. Sanchez, he told Mr. Obray that he did not want to refuse the loads, but that he had a son to pick up, which he couldn't do if he had to fix both containers and deliver them. He did not yell at Mr. Obray or threaten him in any way. Mr. Obray and DM Tejeira's accounts of the interaction differ significantly from Mr. Sanchez'. According to Mr. Obray and DM Tejeira, Mr. Sanchez was red-faced and angry and in the ensuing interchange pounded on Mr. Obray's desk. Mr. Obray  
45 said Mr. Sanchez sprayed spittle as he yelled and the veins in his neck stood out. Mr. Sanchez said he would not take the "f\_\_\_\_ing containers back" because it was raining, that he had made

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50 <sup>9</sup> The details of the contretemps are complicated and are not material to the issues. In the course of the investigation of the Molina/Lopez incident, detailed below, DM Tejeira admitted to Mr. Donahue that in order to motivate Mr. Lopez, he had told Mr. Lopez that Mr. Molina was making a list of drivers who were derelict in their work duties.

plans, and that he was done for the day. He said that the containers had been fine when he dropped them in the Swift yard and that he believed he was being sabotaged. Mr. Obray said the company had cameras in the yard, and he would look into it.

5 Mr. Sanchez acknowledged that ultimately Mr. Obray told Mr. Sanchez to fix the containers and to deliver only one load to which Mr. Sanchez agreed. According to Mr. Obray when he first proposed the compromise, Mr. Sanchez said, "I'm not f\_\_\_ing taking anything." Even after Mr. Sanchez agreed to take one container to the rail yard, he repeatedly said, "That's f\_\_\_ing bulls\_\_\_," and he kicked the door open as he left the office.<sup>10</sup>

10 After he left Mr. Obray's office, Mr. Sanchez complained to Mr. Diaz and Mr. Herron that Mr. Obray had directed him, under threat of termination, to deliver two containers to the Santa Fe railroad yard in spite of Mr. Sanchez' objection that he needed to go home because of child-care issues. Mr. Diaz and Mr. Herron gathered with Mr. Sanchez and about 30-40 other drivers  
15 in an enclosed area of the facility referred to as the driver area.

Mr. Herron telephoned Mr. Obray, saying that Mr. Diaz and he would like to talk to Mr. Obray about a situation with Bismark Sanchez. Mr. Obray entered the driver area, and the drivers surrounded him as he walked toward Mr. Herron.<sup>11</sup> Mr. Obray was surprised to see  
20 Mr. Sanchez in the group, as he had expected him to be working toward getting the container to the rail yard. According to Mr. Obray, Mr. Sanchez "was in [his] face screaming...that 'this is f\_\_\_ing wrong. I don't know why you're f\_\_\_ing doing this. You treat us like f\_\_\_ing sh\_\_\_'," while Mr. Herron standing nearby said, "This is not fair what you're doing to Bismark [Sanchez]. If you make Bismark [Sanchez] take this load to the rail, then us drivers will not show up  
25 tomorrow."

Mr. Obray was shocked because Mr. Herron had not told him he would be meeting with a large group of drivers. He said, "You guys ambushed me; this is bulls\_\_\_." As Mr. Herron and Mr. Obray talked, the crowd of drivers engaged in a group protest regarding Mr. Sanchez and employer unfairness to the drivers, talking over each other with raised voices.<sup>12</sup> According  
30 to Mr. Herron, after he and Mr. Obray discussed the matter, Mr. Obray said, "Well, at least let [Mr. Sanchez] take one container," to which Mr. Sanchez agreed.<sup>13</sup> Mr. Obray testified that he told the drivers, "It doesn't help you guys for me to be out here getting yelled at and arguing with Anthony [Herron]," and he left the group. Mr. Obray felt threatened by the confrontation,

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<sup>10</sup> I credit DM Tejeira and Mr. Obray's account. I found DM Tejeira and Mr. Obray to be forthright and clear about what had transpired, whereas Mr. Sanchez did not impress me as a reliable witness. In disputing DM Tejeira and Mr. Obray's account of his behavior on  
40 February 5, Mr. Sanchez testified that he never used profanity, yet Mr. Gonzalez said he had often heard Sanchez use profanity at work. Further, Mr. Sanchez inaccurately reported to Mr. Diaz that Mr. Obray had ordered him to deliver both loads, and I note that Mr. Sanchez delayed in preparing to deliver the one load he was eventually assigned, which is unaccountable if, in fact, his claim of a child-care exigency were true.

45 <sup>11</sup> In Mr. Herron's words, "The crowd [surrounded] him as soon as he initiated his movement through the crowd. They followed right behind."

<sup>12</sup> Mr. Herron agreed that maybe the drivers yelled in "trying to get their point across."

50 <sup>13</sup> Mr. Gonzalez testified that initially Mr. Obray held to his order to Mr. Sanchez that he take the two loads and told the drivers that if they did not like it, they should "look for another job." Since Mr. Sanchez testified that Mr. Obray had earlier limited his assignment to one load, I cannot credit Mr. Gonzalez' testimony in regard to the two-load order, and because of the doubt that inconsistency creates, I cannot accept Mr. Gonzalez' uncorroborated testimony that Mr. Obray said dissatisfied drivers should look for another job.

particularly by Mr. Sanchez' "yelling and spitting in [his] face." Thereafter, Mr. Sanchez reported to Mr. Obray that the electrical problems on his assigned rig could not be readily repaired, and Mr. Obray told him he could go home.

5 C. Mr. Donahue's Investigation into Vandalism

On February 5, about 15 minutes after Mr. Sanchez met with Mr. Obray concerning his two-load assignment, DM Tejeira told Mr. Obray he had a flat tire on his car, which was parked in front of the facility office. Investigation revealed that a back tire on Mr. Obray's car had a two-  
10 inch cut in its sidewall, damage presumably wreaked by an unidentified vandal. Mr. Obray believed a driver had cut the tire. When, shortly thereafter, Mr. Obray met with the large group of drivers in the driver area, as described above, and saw that Mr. Sanchez had not set about delivering the one load he had been assigned but was still at the facility and was still upset, Mr. Obray began to suspect Mr. Sanchez of cutting his tire. Following his interaction with the  
15 employee group in the driver area, Mr. Obray telephoned Mr. Donahue at the Respondent's Fontana, California terminal. Mr. Obray told Mr. Donahue about the tire-slashing and that he suspected Mr. Sanchez of having done it because of a confrontation he had had with the driver.

On February 6, Mr. Donahue visited the Wilmington yard. He reviewed with Mr. Obray  
20 the security camera output applicable to the slashing of Mr. Obray's tire. Although the footage showed an individual at the appropriate time on the appropriate date stopping briefly beside Mr. Obray's car, the image was too poor to permit identification.

During the same visit, DM Raudales reported to Mr. Donahue that driver Mr. Molina had  
25 been threatened by other drivers. Mr. Donahue interviewed Mr. Molina in an office at the Swift yard. Mr. Molina told Mr. Donahue that Mr. Diaz and Mr. Lopez had threatened him in the parking lot. Mr. Molina also told Mr. Donahue that a tire on his personal vehicle had been slashed while it was parked at the Swift yard and that the vehicle had been broken into while  
30 parked at his residence.

After interviewing Mr. Molina, Mr. Donahue met with Mr. Diaz.<sup>14</sup> Mr. Donahue asked  
35 about the Molina/Lopez incident. After Mr. Diaz summarized facts of the incident, Mr. Donahue wanted to know why Mr. Lopez had taken the issue to Mr. Diaz rather than going to Mr. Molina, asking Mr. Diaz, "Why do you think that you're a leader or a spokesperson to all these other drivers?" Mr. Diaz said that because of his fluency in both Spanish and English, some drivers felt comfortable talking to him, and he told Mr. Donahue about the Employee Committee. Mr. Donahue asked Mr. Diaz to write a statement about the creation of the Employee  
40 Committee and about the Molina/Lopez dispute, which Mr. Diaz did. Thereafter, Mr. Donahue asked Mr. Diaz what he would say if Mr. Donahue told him that the company had caught Mr. Sanchez on camera slashing Mr. Obray's tires. Mr. Diaz said that was hard to believe. Mr. Donahue told Mr. Diaz that if Mr. Sanchez had a friend that could say Mr. Sanchez had slashed the tires and felt sorry for what he had done, Mr. Donahue would be willing to use his resources to have him merely fired without criminal action being taken. After a pause, Mr. Diaz  
45 said, "I can't do this." Mr. Donahue said he understood and ended the conversation.

After interviewing Mr. Diaz, Mr. Donahue spoke with Mr. Lopez who denied that he or  
Mr. Diaz had threatened Mr. Molina. At Mr. Donahue's request, Mr. Lopez provided a brief written statement about the Molina/Lopez incident. Mr. Lopez testified at the hearing that

50 <sup>14</sup> Mr. Donahue and Mr. Diaz' accounts of the interview did not materially differ although Mr. Diaz provided greater detail. The facts of the interview are a reasonable amalgamation of the participants' credible testimony.

5 during his February 9 meeting with Mr. Donahue, the investigator asked whether Mr. Diaz was a union leader. In a written statement given to the Union on February 10, Mr. Lopez said that Mr. Donahue wanted to know why Mr. Lopez had talked to Mr. Diaz, asking, "Was he some sort of leader of something amongst us because he spoke to...the drivers [about the Molina/Lopez incident]?" Mr. Lopez' statement to the Union says nothing about Mr. Donahue's having asked if Mr. Diaz were a union leader. Had Mr. Donahue asked that question, it is reasonable to believe that Mr. Lopez would have informed the Union. Since Mr. Lopez' contemporaneous statement omits any reference to such a statement, I find Mr. Donahue did not ask Mr. Lopez if Mr. Diaz were a union leader.

10 On February 11, Mr. Donahue met again with Mr. Diaz. Mr. Diaz' account of the meeting was as follows: Mr. Donahue asked Mr. Diaz, "Who wants to start the Union?" Mr. Diaz said he did not know what Mr. Donahue was talking about. Mr. Donahue said, "For somebody that knows a lot, that everybody tells him things...answer me this question, who wants to start the Union?" Mr. Diaz again disclaimed knowledge, saying, "There's nobody that wants to start the Union." Mr. Donahue asked Mr. Diaz to tell him what the problems were at the facility. Mr. Diaz told him of the concerns employees reported: problems with paychecks, problems with truck parking, and problems with not being paid for all hours worked.

20 Again Mr. Donahue asked, "Who wants to start the Union here?" Mr. Diaz said, "Nobody." Mr. Donahue asked for details about the problems Mr. Diaz had enumerated. After Mr. Diaz told him, Mr. Donahue asked, "How many people want to start the Union?" Mr. Diaz told him, "Two or three." Mr. Donahue asked more questions about the enumerated problems, including the names of drivers having problems with their paychecks.

25 At some point during Mr. Donahue's questioning about employee problems, Mr. Diaz said, "I don't feel comfortable telling you anymore names." Mr. Donahue said, "Okay. That's fine. Well, who are these drivers that want to start the Union?" Fearing he would be terminated for noncooperation, Mr. Diaz said, "Bismark Sanchez and Anthony Herron."

30 Mr. Donahue said, "Well, these guys are already fired."<sup>15</sup> Mr. Diaz said, "Well, those are the names that I could give you." Mr. Donahue told Mr. Diaz to wait outside in the parking lot. After a while, Mr. Donahue came to Mr. Diaz and told him, "This conversation is over." The conversation had lasted about two hours.

35 Mr. Donahue's account of his February 11 meeting with Mr. Diaz was significantly different from Mr. Diaz'. According to Mr. Donahue, he asked Mr. Diaz if he had any additional information about the incident with Mr. Molina and if he knew anything about the incident with Mr. O Bray's tire. Mr. Diaz said he knew nothing. Mr. Diaz voluntarily said he had heard that drivers were talking about the Union and that he had heard they weren't supposed to talk about that at work. Mr. Donahue said he didn't care about the Union, that what he cared about was drivers getting threatened or drivers becoming victims of vandalism or physical violence.

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<sup>15</sup> As detailed below, Mr. Herron and Mr. Sanchez were terminated on February 6 and February 9, respectively.

I found Mr. Diaz's testimony to be clear, detailed, and trustworthy. In contrast, Mr. Donahue's testimony was somewhat vague and initially nonresponsive.<sup>16</sup> Accordingly, I accept Mr. Diaz' account of his February 11 meeting with Mr. Donahue.

#### 5 D. Expanded Criminal Background Checks

During the course of Mr. Donahue's investigation, Mr. Fitzsimmons initially ordered expanded criminal background checks to be run on five drivers, including Mr. Diaz and Mr. Gonzalez. No evidence was adduced as to the identities of the other three drivers or why they were selected. The expanded checks revealed that three of the five drivers had criminal convictions previously unnoted on their applications, i.e. false applications. Two of the three were Mr. Diaz and Mr. Gonzalez, both of whom, as detailed below, were terminated for false applications. No evidence was adduced as to the nature of the third driver's unnoted conviction(s) or the consequences to that driver of the false application.

After the initial expanded criminal background checks revealed three false applications, Mr. Fitzsimmons ordered expanded background checks for every driver at the Swift yard. Following these expanded checks, additional drivers were terminated. Mr. Fitzsimmons could not recall how many additional drivers were terminated, but he thought "maybe" five. No evidence exists of the names of the five drivers, the nature of their unnoted convictions, or the circumstances of their terminations. No evidence exists as to how many false applications overall were found, and no evidence exists as to whether false applications were discovered that did not result in terminations.

#### 25 E. The Respondent's Communications to Employees about the Union

##### 1. Mr. Obray's Alleged Statements to Office Employees

Ligia Navarro (Ms. Navarro), who worked at the time as a customer representative for the Respondent and whom the Respondent terminated in March testified as a witness for the General Counsel.<sup>17</sup> Ms. Navarro said that in January Mr. Obray told the office staff that if drivers asked them about unionization, the staff was to tell them that the Union was not the best thing for them, that the Union wasn't going to do anything for them, and that Mr. Moyes knew what was going on. Mr. Obray said the company was going to get rid of Mr. Sanchez, Mr. Lopez, Mr. Navarro, Mr. Diaz, and Mr. Cabrerias because they were the ones talking to the drivers about the Union. Ms. Navarro said Mr. Obray mentioned Mr. Sanchez more than the other drivers, saying that Mr. Sanchez was the one promoting the Union to the others. According to Ms. Navarro, Mr. Obray mentioned Mr. Sanchez to the office staff almost twice a day every day after January, saying that he was going to get rid of Mr. Sanchez. I decline to

<sup>16</sup> After Mr. Donahue testified that Mr. Diaz raised the issue of the Union, counsel asked Mr. Donahue what Mr. Diaz said about the Union. Mr. Donahue gave a rambling response to the effect that Mr. Diaz said that people felt they could talk to him. Only after counsel again asked Mr. Donahue what Mr. Diaz had said about the Union did Mr. Diaz respond, and his responses were vague and qualified. Mr. Donahue testified that Mr. Diaz said he had heard drivers were talking about the Union ("I think that's the way he worded it"). Upon being asked if Mr. Diaz provided further information, Mr. Donahue said that Mr. Diaz said he had heard they weren't supposed to talk about that at work ("or something like that").

<sup>17</sup> The Respondent fired Ms. Navarro on March 11 for allegedly costing the company \$11,000 by failing to check on demurrages.



Mr. Gonzalez' recollections of what Mr. Moyes said were fragmentary. Both Mr. Diaz and Mr. Gonzalez failed to place Mr. Moyes' statements about unionization in a clear and specific context that would enable me to determine that Mr. Moyes actually threatened facility closure upon unionization or whether Mr. Diaz and Mr. Gonzalez unwarrantedly inferred that from Mr. Moyes' lawful threat to close the facility if vandalism continued.<sup>21</sup> As noted earlier, I found Mr. Obray's account of what was said to be relatively comprehensive, clear, detailed, and credible, and I give it weight. I do not credit Ms. Navarro's account. Not only was I unimpressed with her manner and demeanor, her version of the meeting is, in large part, significantly different from other employee testimony, and I cannot accept it.

At some point during the meeting, Mr. Obray spoke up, saying, "Look guys, we don't want to close this thing down...we're here to make it work. But we have some people out there that are causing violence; they're sabotaging containers that are making us lose customers. And if we can get rid of these bad apples, we would have a pretty good fleet over here."

Although Mr. Donahue attended the meeting, he paid little attention to what was said, as he watched the audience. Mr. Donahue observed that Mr. Gonzalez, who was standing next to Mr. Diaz, rolled his eyes and said, "Yeah, right," in a loud, sarcastic voice in response to one of Mr. Moyes' comments. Mr. Donahue thought Mr. Gonzalez' comment was "odd, indignant, rude." Shortly after the meeting and prior to February 24, Mr. Driscoll told Mr. Fitzsimmons that an unidentified employee had been rude to Mr. Moyes when he met with the Wilmington yard drivers on February 11. Mr. Fitzsimmons characterized the rudeness as "making comments...in the background." At some point prior to Mr. Gonzalez' termination, Mr. Donahue told Angelica Flores (Ms. Flores), security investigator, that Mr. Gonzalez had been rude to Mr. Moyes, and Ms. Flores noted, "Rude to Jerry Moyes" on Mr. Gonzalez' master driver sheet.<sup>22</sup>

### 3. Mr. Moyes' February Teleconference

About a week later Mr. Moyes telephoned Mr. Obray to ask how things had gone since his February 12 meeting. When Mr. Obray told him there were rumors of a driver walkout, Mr. Moyes asked him to round up ten drivers whom he could address telephonically, which Mr. Obray did. Approximately ten drivers gathered in the office, including Mr. Lopez, Mr. Gonzalez, and Melvin English (Mr. English). According to Mr. English before the conference call, Mr. Obray told the assembled drivers that even if the Union came in, Mr. Moyes would not allow it, that he would close up shop and move somewhere else. Mr. Gonzalez corroborated Mr. English's testimony, although he placed the comment after the teleconference had ended.<sup>23</sup>

When Mr. Moyes talked to the group by speakerphone, he told the assembled drivers that he had heard rumors of a walkout in Wilmington, which he did not think was a good idea with the economy the way it was because customers would be upset when the company could

<sup>21</sup> Mr. Gonzalez testified that Mr. Moyes warned that if employees "kicked it up," he would take the company out of state. Such a statement is more congruent as a reference to vandalism than to union activity.

<sup>22</sup> In light of the extensive attention the Respondent's security investigators gave to Mr. Gonzalez' "rude" conduct, I cannot accept Mr. Fitzsimmons' testimony that he did not know the identity of the "rude" employee. I find it reasonable to infer that at the time he fired Mr. Gonzalez, Mr. Fitzsimmons was aware that Mr. Gonzalez was the employee accused of being rude to Mr. Moyes.

<sup>23</sup> Mr. Gonzalez testified that when the drivers were walking out of the meeting, Mr. Obray said, "You know what, guys? Jerry [Moyes] has never gone union, he never will be union, and he will close this place down; I have seen him do it."

not service them. Mr. Moyes talked about the company's financial losses and the shortage of freight, and he urged patience. Mr. Lopez and Mr. English said that Mr. Moyes told the drivers he had heard employees were talking about unionization. Mr. Gonzalez recalled that Mr. Moyes said the money was not there for the Union.<sup>24</sup>

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Mr. Gonzalez spoke up during the phone conference, but witnesses disagree about what he said. According to Mr. Gonzalez, he asked why, if the company was so opposed to a union, didn't the company offer competitive wages and union packages. Mr. Moyes asked his name, which Mr. Gonzalez gave. Mr. Moyes answered that neither the money nor the freight was there right then.<sup>25</sup> According to Mr. English, Mr. Gonzalez asked if Mr. Moyes would give the drivers a \$2.00 per hour raise, but he did not recall what Mr. Moyes said.<sup>26</sup> Mr. Lopez said that one of the drivers, whom he did not identify, asked if the company would pay union wages if employees went union. At some point in the conference, Mr. Obray said that the company had a good fleet and good drivers, but there were a few bad apples, and they needed to push the bad guys out.<sup>27</sup>

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Having considered the manner and demeanor of each witness, I accept the accounts of the General Counsel's witnesses, particularly those of Mr. English and Mr. Gonzalez whose testimonies I found to be clear, candid, and reliable. I find, therefore, that at Mr. Moyes' February teleconference, the subject of employees' interest in unionization was broached, that Mr. Gonzalez asked a question about union benefits, and that Mr. Obray said the company needed to push the bad apple drivers out. I further find that either before or after the teleconference, Mr. Obray told the drivers that if the Union came in, Mr. Moyes would close the Wilmington facility,

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#### 4. Mr. Obray's Post-Teleconference Statements to Mr. Lopez

A day or two after Mr. Moyes' teleconference with employees, Mr. Obray told Mr. Lopez that the "union thing" was not going to happen because Mr. Moyes would never be union, the company had never been union, and unionization would not be good for the company. Mr. Obray said there were a couple of bad apples in the company, but the company was going to fix that, adding, "Because you are a good driver, I don't want to see you getting fired...We want to keep you, but rather than be union...we will close the terminal down and move to Phoenix, and it won't be union."<sup>28</sup>

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<sup>24</sup> According to Mr. Lopez, Mr. Moyes said that rather than "be union," he would move the company to Phoenix. Mr. Moyes and Mr. Obray denied saying anything about closing the facility, and Mr. English did not recall Mr. Moyes saying anything along those lines. I do not accept Mr. Lopez' testimony in this regard.

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<sup>25</sup> Mr. Gonzalez' recollection as to whether Mr. Moyes responded to his question had to be refreshed with his affidavit. I do not find that circumstance to detract from his credibility. Mr. Gonzalez readily agreed that the affidavit account was accurate, and he appeared committed to being truthful.

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<sup>26</sup> I do not find that Mr. English's failure to recall that Mr. Gonzalez mentioned the Union in his question about raises contradicts Mr. Gonzalez' testimony. Mr. English's testimony is consistent with, although not fully corroborative of, Mr. Gonzalez' testimony that he raised the issue of union wages and benefits.

<sup>27</sup> Mr. Obray testified that he had meant those who were causing violence and sabotaging containers.

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<sup>28</sup> Mr. Obray testified that he never discussed union organization at the facility with Mr. Lopez. According to Mr. Obray, on one occasion, Mr. Lopez asked Mr. Obray if he could get more hours. Mr. Obray told him that if the drivers walked out, it would result in fewer hours

F. Discharges of Anthony Herron, Bismark Sanchez,  
Marco Diaz, and Salvador Gonzalez

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1. Anthony Herron

According to DM Tejeira in November or December 2008, he counseled Mr. Herron about “abandoning” loads, i.e., delivering loads to the yard and leaving them without reporting it to a driver manager. DM Tejeira also asked Mr. Herron why he was leaving work early. Mr. Herron replied that he only worked eight hours a day.<sup>29</sup> DM Tejeira told Mr. Herron that Respondent was a trucking company, not an eight-hour facility. Mr. Herron repeated that he only worked eight hours. A week or so later, DM Tejeira again told Mr. Herron that he needed to be available for more hours. Again Mr. Herron said that he only worked eight hours a day; that was all the work he needed. Thereafter, Mr. Herron continued to go home early.

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In late January or in early February, DM Tejeira told Mr. Obray that Mr. Herron was leaving before his shift ended (that is, when he still had dispatches to fulfill and/or the driver manager had not told him he could leave for the day). DM Tejeira told Mr. Obray that he had spoken to Mr. Herron about the problem and that Mr. Herron had said he would not work past eight hours. Not long thereafter on an afternoon, DM Tejeira reported to Mr. Obray that Mr. Herron had just abandoned a load and said he was done for the day. Mr. Obray followed Mr. Herron as he walked out of the Swift yard and asked him where he was going. Mr. Herron said he was going home for the day. Mr. Obray told him that his work was not yet done and that he needed to return to the yard. Mr. Herron said his eight hours were up for day, and he was going home. Mr. Obray told him he didn’t work eight hours, he worked until the job was done or his [DOT] hours of service expired. Mr. Obray told Mr. Herron that employee morale was low and the drivers were influenced by whatever Mr. Herron did. Mr. Herron replied that if going home when he was supposed to was doing something wrong, then the drivers were doing what they should do because they were there to work eight hours a day. Mr. Herron said, “I have completed my day. If you don’t know or believe me, I am going to go home.” Mr. Obray told him, “If you leave, I promise you, you’ll be terminated.” Mr. Herron said, “Sorry,” and left.

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After Mr. Herron left, Mr. Obray called Michelle Grey (Ms. Grey) who worked in the Respondent’s Human Resources in Phoenix. Mr. Obray explained what had happened with Mr. Herron and said he wanted to terminate him for insubordination. Ms. Grey advised Mr. Obray to give Mr. Herron a warning instead. On the following day, Mr. Obray called Mr. Herron into his office and told him, “Anthony, we’re giving you a chance here. I’m going to need you to work full shifts from now on. Do not leave before your driver manager says you can leave for the day. If something like this comes up again, it could lead to termination.” Mr. Herron said nothing; he stood up and left the office.

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On February 5, Mr. Herron, who was qualified to haul hazardous materials, was assigned to pick up a container of hazardous material on a chassis from one of the ports and deliver it to the Wilmington yard (Mr. Herron’s February 5 hazmat load). According to Mr. Herron when he arrived at the Swift yard with the load, he delivered the hazmat paperwork

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because customers would get upset and go away. Mr. Lopez said he did not think the walkout was a good idea, but the drivers were unhappy. Mr. Obray said he thought there were a lot of really good drivers that just wanted to work, and if the company could get rid of the bad apples that were causing the problems and the violence, then they would have a good fleet. I found Mr. Lopez’ testimony in this regard to be clear and convincing, and I credit it.

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<sup>29</sup> Mr. Herron admitted that in most cases he refused to work past 3:30 p.m.

to DM Tejeira, who told him to park the load and take his lunch break and cleared him to go home. DM Tejeira, however, testified that Mr. Herron did not speak to him about the load and left work without clearance.<sup>30</sup> That evening, a night driver attempted to deliver Mr. Herron's February 5 hazmat load to the rail yard. Although it was his responsibility to check the load's placards before leaving the yard, the night driver did not do so, and the rail yard rejected the container because of defective placards.<sup>31</sup>

On the morning of February 6, DM Tejeira received notice that the rail yard had rejected Mr. Herron's February 5 hazmat load the previous evening because its hazmat placards were flawed.<sup>32</sup> When Mr. Herron reported to the yard the morning of February 6, DM Tejeira showed him the notice from the rail yard and told him to fix the placard problems. Mr. Herron took the container to the Swift roadability, where, according to Mr. Herron, a maintenance employee agreed to fix the placards. According to DM Tejeira, Mr. Herron reported that the Swift roadability would not clean (i.e., scrape off) the old placards, and DM Tejeira told him, "They don't fix the placards. That is your job." Mr. Herron refused to clean the placards, saying it wasn't his job. DM Tejeira repeated that it was his job and that he needed to get it done. Mr. Herron did not comply, and DM Tejeira informed Mr. Obray of the situation.<sup>33</sup>

Mr. Obray called Ms. Grey in Human Resources and said that Mr. Herron had been insubordinate again and had failed to follow instructions, and that Mr. Obray would like to terminate him to which Ms. Grey agreed. Later that day, Mr. Obray called Mr. Herron, DM Tejeira and DM Raudales into his office. Mr. Obray told Mr. Herron he was going to terminate him and handed him a Performance Counseling Report that read in pertinent part:

Reason For Counseling

Failure to follow instructions/insubordination.—Anthony was instructed to take his load to the rail, he brought it to the yard and then went home instead. The load Anthony brought to the yard was refused at the rail due to placards being too low. This is a large expense to Swift; it is the driver's responsibility to properly check the container before pulling out of the port. This driver was given a verbal warning on leaving early by his DM Jesus and myself.

Corrective Action To Be Taken

Driver to be terminated.

According to Mr. Herron, he protested that he had no authority over the placement of placards and no knowledge of the rail yard procedures. Mr. Obray said that Mr. Herron had also left work early the day before, which Mr. Herron denied.<sup>34</sup> Mr. Herron said he told Mr. Obray he

<sup>30</sup> Mr. Herron did not leave the Swift yard at that time because he was advised by other drivers of a situation involving Mr. Sanchez. Mr. Herron immediately telephoned Mr. Obray and asked Mr. Obray to discuss Mr. Sanchez' grievance with the drivers.

<sup>31</sup> Mr. Obray testified that the night driver was disciplined, but he could not recall the driver's name or the nature of the discipline.

<sup>32</sup> One placard was not centered and was placed too low; another was peeling.

<sup>33</sup> I credit DM Tejeira's account where it conflicts with that of Mr. Herron. I did not find Mr. Herron to be candid or trustworthy in testifying about the events of February 5 and 6. In reaching that conclusion, I note, among other factors, that Mr. Herron's testimony of his response to Mr. Obray's termination-interview accusation of leaving early was inconsistent. He initially testified he told Mr. Obray that DM Tejeira had authorized him to leave early, but in later testimony, he said that DM Tejeira told Mr. Obray that Mr. Herron had not left early.

<sup>34</sup> As noted in the preceding footnote, Mr. Herron was inconsistent in his denial.

thought he was being terminated because of his activities and affiliation with the Union. Mr. Obray said he would stick with his decision to discharge Mr. Herron.

## 2. Bismark Sanchez

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On Monday, February 9, when Mr. Donahue returned to the Wilmington Yard to continue his investigation into tire-slashing and the Molina/Lopez incident, he spoke with Mr. Sanchez in an office there. Mr. Donahue explained that he was looking into the vandalism of Mr. Obray's tire and was reviewing security camera footage. Mr. Sanchez demanded to see the tapes, and Mr. Donahue said, "Not at this point." According to Mr. Donahue, Mr. Sanchez argued about the questions Mr. Donahue asked, saying, inter alia, "Bulls\_\_\_" and "I'm not giving you sh\_\_\_." Mr. Donahue asked Mr. Sanchez to step out of the office to cool down. While Mr. Sanchez was out of the office, Mr. Donahue telephoned Mr. Driscoll and told him how the interview was going. Mr. Driscoll suggested that Mr. Donahue just ask Mr. Sanchez to write a statement. Mr. Donahue asked Mr. Sanchez to come back into the office and asked him to give a written statement, giving him a blank sheet of paper. Mr. Sanchez refused, saying, "I'm not giving you sh\_\_\_." Mr. Donahue again asked Mr. Sanchez to step out and telephoned Mr. Driscoll. When Mr. Donahue told Mr. Driscoll what had occurred, Mr. Driscoll said to terminate Mr. Sanchez for failing to cooperate with the investigation.

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After talking to Mr. Driscoll, Mr. Donahue asked Mr. Obray to come into the office as a witness. Mr. Obray testified that when he entered the office, Mr. Sanchez said, "I'm not f\_\_\_ing signing anything." Mr. Donahue said, "Bismark, I'm not asking you to sign anything. I'm asking you to write your side of the story. I just want a statement from you...and then it's done. It's part of the investigation." Mr. Sanchez said he was not putting his name on sh\_\_\_ . Mr. Donahue said, "I'm sorry that I have to tell you that Swift's going to terminate your employment because you are failing to cooperate with an investigation." Mr. Sanchez said, "This is f\_\_\_ing bullsh\_\_\_" and left the office.

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Mr. Sanchez testified that when he met with Mr. Donahue that morning, Mr. Donahue told him that surveillance cameras at the facility showed Mr. Sanchez had slashed Mr. Obray's tire and that he could call the police to pick him up. Mr. Sanchez said that was impossible because he had not slashed the tire and asked to see the video tape, which request Mr. Donahue refused. Mr. Donahue asked Mr. Sanchez to sign a document that in essence stated that Mr. Sanchez had slashed Mr. Obray's tire but that he would not be terminated for it. Mr. Sanchez refused to sign it. Mr. Obray joined Mr. Donahue and Mr. Sanchez and told Mr. Sanchez that the Respondent was going to have to terminate him because he would not cooperate by signing the document. For reasons stated earlier, I did not find Mr. Sanchez to be a reliable witness. I accept Mr. Donavan and Mr. Obray's accounts of the termination meeting.

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## 3. Marco Diaz

In the employment application he submitted to the Respondent on September 29, 2008, Mr. Diaz marked the "no" box for the question "Have you ever been convicted of a criminal offense?" Mr. Diaz had understood the question to refer only to the previous five years. When, in the course of new employee orientation, Mr. Diaz learned the criminal offense period the company was interested in ran from age 18, he changed his answer to "yes" and penned the following explanation: "driving too fast 1989 & soliciting 6/89."

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Because he had amended his application, Mr. Diaz was instructed to meet with Mr. Donahue. Mr. Donahue asked Mr. Diaz why he had changed his answer to the application question concerning past criminal offenses. Mr. Donahue explained his misunderstanding

about the time period and told Mr. Donahue that he had had a reckless driving conviction in 1988 or 1989 and a solicitation conviction in 1990-1992. Mr. Donahue told Mr. Diaz, "If I find anything else, then we're not going to hire you." According to Mr. Diaz, he then recalled that he had also had a restraining order against him in the past and told Mr. Donahue about it.<sup>35</sup>

5 Mr. Donahue said, "Well, that falls under domestic. Is there anything else?" Mr. Diaz told him no. Mr. Donahue denied that Mr. Diaz mentioned any restraining order or told him of any convictions relating to its violation.<sup>36</sup>

10 After meeting with Mr. Donahue, Mr. Diaz completed the Respondent's "Conviction Form" on which he noted (1) that his first arrest was in March 1989 for reckless driving with the additional comment, "driving too fast I was 18 [years old] and (2) that his second arrest was June 1989 for solicitation with the additional comment, "soliciting a prostitute I was 18 [years old]."<sup>37</sup>

15 On February 24, Mr. Diaz was told to report to Mr. Donahue at the facility. When Mr. Diaz did so, he found Mr. Fitzsimmons with Mr. Donahue. Mr. Fitzsimmons asked Mr. Diaz if he remembered what Mr. Donahue had told him in the orientation about what would happen if the company found additional criminal offenses in his background. Mr. Diaz said he remembered, and Mr. Fitzsimmons said, "Well, we found a restraining order."

20 Mr. Diaz said he had told Mr. Donahue about the restraining order. Mr. Donahue said nothing but shook his head. Mr. Fitzsimmons explained that the company had found the restraining order and was going to have to let Mr. Diaz go. Mr. Diaz said, "Well, I thought a restraining order fell under a domestic issue." Mr. Fitzsimmons said, "Well, yeah, but there's two other violations [of the restraining order]."<sup>38</sup> Mr. Diaz said he had forgotten about the violations.<sup>39</sup> Mr. Fitzsimmons said the company was going to have to let Mr. Diaz go because of them.

#### 4. Salvador Gonzalez

30 Mr. Gonzalez completed his employment application for the Respondent on October 13, 2008.<sup>40</sup> At a concurrent employee orientation meeting, Mr. Donahue informed Mr. Gonzalez and other drivers that applicants were to list in their applications all criminal convictions since age 18. Mr. Gonzalez marked "no" boxes for all questions about criminal convictions. On the same date, Mr. Gonzalez signed an Application Update Acknowledgement that stated, in pertinent part:

<sup>35</sup> The restraining order had been obtained by an ex-girlfriend in 1994 or 1995.

<sup>36</sup> I accept Mr. Diaz' testimony that he told Mr. Donahue of the restraining order. I found Mr. Diaz's testimony of his interview with Mr. Donahue to be forthright and sincere.

40 <sup>37</sup> In later testimony, acknowledging that the arrest for solicitation had occurred five or six years after his 18<sup>th</sup> birthday, Mr. Diaz said that he did not know "why I would have put '18' [on the Conviction Form]."

<sup>38</sup> Mr. Diaz twice violated the restraining order and was placed by a court on two and three-year suspensions, respectively.

45 <sup>39</sup> Mr. Fitzsimmons denied that Mr. Diaz said he had told Mr. Donahue of the restraining order in October. Mr. Fitzsimmons did not specifically recall what was said in the interview. Mr. Donahue recalled that Mr. Diaz said he thought the convictions relating to the restraining order were civil matters, but he could not recall all of Mr. Diaz' responses to Mr. Fitzsimmons questions. I found Mr. Diaz to have a far more detailed recollection of the interview than either  
50 Mr. Fitzsimmons or Mr. Donahue; I also found him to be a reliable witness, and I accept his testimony.

<sup>40</sup> Born September 16, 1975, Mr. Gonzalez was 33 years old at the time.

I acknowledge that omissions of employers moving violations/suspensions, accidents (preventable & non-preventable) and criminal convictions will constitute falsification of the employment application which will result in immediate termination of employment.

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Mr. Gonzalez was one of five employees for whom the Respondent ordered an expedited, expanded background check in early February. The background check was ordered because, according to Mr. Fitzsimmons, Mr. Gonzalez was “one of the subjects of the [Respondent’s] investigation at that time” although no evidence was adduced as to why Mr. Gonzalez was considered a subject.<sup>41</sup>

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At the end of his shift on February 24, Mr. Gonzalez was directed to an office at the facility where he met with Mr. Donahue and Mr. Fitzsimmons. Mr. Fitzsimmons told Mr. Gonzalez that the company had received the results of his background investigation and had discovered misdemeanors that Mr. Gonzalez had not listed on his employment application. Mr. Gonzalez said he had not listed them because he was under age 18 at the time he committed the misdemeanors. After checking the dates on some documents before him, Mr. Fitzsimmons said, “No, you were eighteen.”<sup>42</sup>

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Mr. Gonzalez said it was an honest mistake, that he had thought he was seventeen at the time. Mr. Gonzalez told Mr. Fitzsimmons that he understood somebody was telling him to get rid of people and that they should not waste their time talking about it; Mr. Gonzalez left the meeting.

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## V. DISCUSSION

### A. Legal Principles

Section 7 of the Act provides that employees have the right to engage in union activities and, in pertinent part, “the right to ... engage in ... concerted activities for the purpose of collective bargaining or other mutual aid or protection ...” The protections afforded by Section 7 extend to employee efforts to improve terms and conditions of employment or otherwise improve their lot as employees. Section 8(a)(1) of the Act provides: “It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.” Section 8(a)(3) of the Act provides that it shall be an unfair labor practice for an employer to discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

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To enjoy Section 7 safeguards, employee activity must be both “concerted” and “protected,” which a propounding party may prove by showing the activity (1) involves a work-related complaint or grievance; (2) furthers some group interest; (3) seeks a specific remedy or

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<sup>41</sup> While Mr. Driscoll and Mr. Fitzsimmons were aware in February that Mr. Donahue believed Mr. Gonzalez had been rude to Mr. Moyes at the February 12 employee meeting; there is no specific evidence Mr. Gonzalez’ behavior on that occasion prompted the expanded background check.

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<sup>42</sup> Mr. Gonzalez’ misdemeanor convictions of receiving and concealing stolen property and of carrying a loaded firearm in a public place occurred when he was about 18 ½ years old. A later conviction of challenging to a fight in a public place occurred when he was 20 ½ years old. More than 12 years had passed since the convictions. Mr. Gonzalez testified that when he filled out his application, he had forgotten about the challenging to fight conviction.

result; and (4) is not unlawful or otherwise improper. *NLRB v. Robertson Industries*, 560 F.2d 396, 398 (9th Cir. 1976), cited with approval by the Board in *Northeast Beverage Corporation*, 349 NLRB 1166 fn. 9 (2007). To be concerted, employee activity must be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.

5 *Meyers Industries*, 268 NLRB 493, 497 (1984). Concerted activity includes individual activity that seeks to initiate or to induce or to prepare for group action, as well as individual employees bringing group complaints to the attention of management. *Meyers Industries*, 281 NLRB 882 (1986). “[C]oncertedness...can be established even though the individual [speaking] was not ‘specifically authorized’...to act as a group spokesperson for group complaints.” *Herbert F. Darling, Inc.*, 287 NLRB 1356, 1360 (1988). Concerted activity includes concerns that are a “logical outgrowth” of group concerns. *Salisbury Hotel*, 283 NLRB 685, 687 (1987); *Compuware Corporation*, 320 NLRB 101 (1995).

15 In cases turning on employer motivation, whether in an 8(a)(1) or an 8(a)(3) context, the Board applies an analytical framework that assigns the General Counsel the initial burden of showing that protected concerted or union activity was a motivating or substantial factor in an adverse employment action. The elements commonly required to support such a showing are protected concerted or union activity by the employee, employer knowledge of that activity, and animus toward the activity on the part of the employer. If the General Counsel meets the initial  
20 burden, the burden then shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee's protected activity. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1<sup>st</sup> Cir. 1981), cert. denied 455 U.S. 989 (1982); *Alton H. Piester, LLC*, 353 NLRB No. 33 (2008).

25 In considering the lawfulness of communications from an employer to employees, the Board applies the “objective standard of whether the remark tends to interfere with the free exercise of employee rights. The Board does not consider either the motivation behind the remark or its actual effect. *Miller Electric Pump and Plumbing*, 334 NLRB 824 (2001). Communications from an employer to employees that threaten reprisal for supporting a labor  
30 organization or suggest the futility of choosing union representation interfere with, restrain, or coerce employees as contemplated by Section 8(a)(1). *Empire State Weeklies, Inc.*, 354 NLRB No. 91, at slip op. 3 (2009); *Regal Health and Rehab Center, Inc.*, 354 NLRB No. 51, at slip op. 1 (2009); *Grouse Mountain Lodge*, 333 NLRB 1322 fn. 2 (2001); *Tres Estrellas de Oro*, 329 NLRB 50, 51 (1999). Also the Board has long found that an employer's threats of plant closure and job loss in response to unionization efforts naturally tend to coerce employees in the  
35 exercise of their statutorily protected rights. *Valerie Manor, Inc.*, 351 NLRB 1306, 1321 (2007).

## B. Independent Alleged Violations of Section 8(a)(1) of the Act

### 40 1. Interrogation

The complaint alleges that in January Mr. Obray interrogated employees about their union activities. This allegation is based on Mr. Obray's mid-January question to a group of  
45 drivers. The drivers were assembled at the Swift yard to select driver representatives for the Employee Committee, and Mr. Obray asked them whether they were talking about the Union. An employer's questioning of employees about union activity is not a per se violation of Section 8(a)(1) of the Act. The test is whether, under all the circumstances, the interrogation reasonably tends to restrain, coerce or interfere with statutory rights. To support a finding of illegality, the words themselves, or the context in which they are used, must suggest an element of coercion  
50 or interference. *Rossmore House*, 269 NLRB 1176, 1177-1178 (1984), affd. 760 F.2d 1006 (9<sup>th</sup> Cir. 1985).

Applying the Board's *Rossmore* test to Mr. Obray's mid-January inquiry, I find his question tended to restrain, coerce, and interfere with the employees' Section 7 rights. Although Mr. Obray was justified in wanting to know why the employees were assembled, his question went beyond that legitimate purpose. At the highest level of coercive impact, the question could reasonably be viewed as an attempt to discover employees' protected sympathies and activities; at the lowest level, it alerted employees that their supervisor had an undue, if not hostile, interest in their union activities, which is also coercive. Questions that have a coercive effect on employees protected activities are unlawful. *Atlantic Veal & Lamb, Inc.*, 342 NLRB 418, 420 (2004). In these circumstances, I find that Mr. Obray's question as to whether the assembled drivers were discussing the Union violated Section 8(a)(1) of the Act.

The complaint also alleges that Mr. Donahue interrogated employees about their protected concerted activities on three separate occasions: February 6, February 11, and in the week of February 23. In her argument, Counsel for the General Counsel lumps the first two allegedly unlawful interrogations together, contending apparently that the second questioning corrupts the first. I have considered the two instances of interrogation separately.

On February 6, in the course of his investigation into vandalism at the Swift yard, Mr. Donahue interviewed Mr. Diaz about the Molina/Lopez incident. When Mr. Diaz described his role in the incident, Mr. Donahue asked him why he had gotten involved in the matter and why Mr. Lopez had taken the issue to him rather than going to Mr. Molina, asking "Why do you think that you're a leader or a spokesperson to all these other drivers?" Mr. Diaz cited his fluency in Spanish and English and told Mr. Donahue about the Employee Committee. After Mr. Diaz, at Mr. Donahue's request, provided a statement about the creation of the Employee Committee and about the Molina/Lopez dispute, Mr. Donahue also asked Mr. Diaz questions about Mr. Sanchez relative to the slashing of Mr. Obray's tires. Counsel for the General Counsel argues that this questioning violated the Act because it occurred during a period of union organization among employees and because Mr. Donahue gave no non-reprisal assurances.

Mr. Donahue's February 6 questioning of Mr. Diaz related to reports of threats and vandalism at the Swift Yard. Mr. Donahue did not question Mr. Diaz about employee union or other protected activity during the interview, and no linkage to protected activity can reasonably be inferred from his questions. Counsel cites no authority for the proposition that an employer may not question employees about security matters unrelated to protected activity, and I know of none. I shall, therefore, dismiss this allegation of the complaint.

On February 11, Mr. Donahue met again with Mr. Diaz in a nearly two-hour interview. Mr. Donahue repeatedly asked Mr. Diaz to identify employees at the Swift yard who wanted to start a union. Although Mr. Diaz was an active union supporter, his support was not open to management view, and the circumstances of the interrogation pronounced it to be an official questioning by the company's corporate security investigator, all of which would reasonably be expected to communicate to Mr. Diaz the potentially serious ramifications of the interrogation.<sup>43</sup> Mr. Donahue's February 11 interrogation tended to restrain, coerce or interfere with Mr. Diaz' statutory rights.

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<sup>43</sup> Mr. Donahue's interrogation thus meets all criteria for unlawful questioning enumerated in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964).

## 2. Threat of Termination

The complaint alleges that in late January/early February, Mr. Obray threatened to terminate employees because of their protected concerted and union activities. Counsel for the General Counsel contends that Mr. Obray's late January/early February warning to Mr. Herron that he needed to return to his uncompleted work or face termination constituted a threat to terminate Mr. Herron if he continued to engage in protected activities.

Since November or December, Mr. Herron had periodically left work after eight hours without authorization. On the occasion in question, Mr. Obray told Mr. Herron he was not to leave work because his dispatches were not completed and threatened him with termination if he did so. Mr. Herron ignored Mr. Obray's orders and left work anyway. Counsel for the General Counsel essentially argues that Mr. Herron's refusal was concerted and protected. It is true that Mr. Herron and other employees complained about work schedules. It is also true that their complaints were concerted and protected by Section 7 of the Act. Counsel for the General Counsel appears to argue that because Mr. Herron's complaints were concerted and protected, his repeated refusals to carry out work assignments beyond an eight-hour work day were also protected. While Mr. Herron's refusals to work beyond eight hours may have been concerted,<sup>44</sup> in order to enjoy the protections of Section 7, the refusals must also be protected. The Board has observed:

While employees may protest and ultimately seek to change any term or condition of their employment by striking or engaging in a work stoppage, the strike or stoppage must be complete, that is, the employees must withhold all their services from their employer. They cannot pick and choose the work they will do or when they will do it. Such conduct constitutes an attempt by the employees to set their own terms and conditions of employment in defiance of their employer's authority to determine those matters and is unprotected.

*Audubon Health Care Center*, 268 NLRB 135, 136 (1983)

Mr. Herron repeatedly refused to work past eight hours. Refusals to work are unprotected if they are "part of a plan or pattern of intermittent action which is inconsistent with a genuine strike." See *Polytech, Inc.*, 195 NLRB 695, 696 (1972). The fact that an employee may be otherwise engaged in the protected activity of complaining about work schedules does not permit him to sporadically disregard his work assignments no matter how unfair or unreasonable he may think them. Mr. Herron's refusals to work constituted an attempt to set his own terms and conditions of employment, which is not protected.

Counsel for the General Counsel also argues that because Mr. Obray referred to Mr. Herron's actions as influencing other employees and affecting employee morale, his threat of termination was directed at Mr. Herron's protected activities, i.e., his concerted complaints about hours and wages. It is clear, however, that Mr. Obray's reference to morale and influence was directed solely to Mr. Herron's unauthorized departure from work and that Mr. Herron understood it as such. When Mr. Obray mentioned employee morale and Mr. Herron's influence on other drivers, Mr. Herron replied that if going home when he was supposed to was doing something wrong, then the drivers were doing what they should do. Mr. Obray did not

<sup>44</sup> An individual action is deemed concerted "where the evidence supports a finding that the concerns expressed by the individual are a logical outgrowth of the concerns expressed by the group." *Mike Yurosek & Son*, 306 NLRB 1037, 1038 (1992), supplemented by 310 NLRB 831 (1993), enf. 53 F.3d 261 (9th Cir. 1995).

mention Mr. Herron and other drivers' complaints about any employment term; he only addressed Mr. Herron's action in leaving work without permission. Since that action was not protected under the Act, Mr. Obray did not violate Section 8(a)(1) by warning Mr. Herron about it. I shall, therefore, dismiss this allegation of the complaint.

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The General Counsel contends that when, during the course of the February teleconference among drivers and Mr. Moyes, Mr. Obray told the drivers there were a few bad apples whom the company needed to push out, he impliedly threatened the drivers with termination for engaging in union activities. Mr. Obray's comment was made during a discussion in which a potential driver walkout and unionization, both protected activities, was discussed. In the context of the meeting, the drivers would likely and reasonably have understood Mr. Obray's reference to "bad apples" to encompass drivers who supported either a walkout or unionization. Although Mr. Obray claimed that his "bad apple" reference was meant to address only perpetrators of violence and saboteurs, he didn't communicate that qualification to the drivers. The Board applies an objective standard in assessing employer communications to employees,<sup>45</sup> and Mr. Obray's statement could reasonably be expected to have a tendency to interfere with the drivers' free exercise of employee rights. Accordingly I find that Mr. Obray impliedly threatened employees with termination if they engaged in protected activity or supported the Union in violation of Section 8(a)(1) of the Act.

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A day or two after the teleconference, Mr. Obray told Mr. Lopez that the "union thing" was not going to happen and that the Respondent would close the terminal rather than accept a union. In that context, Mr. Obray further told Mr. Lopez that the company was going to "fix" its problem with bad-apple drivers, adding that he did not want to see Mr. Lopez fired. Mr. Obray's juxtaposition of intransigent opposition to the Union with concern about Mr. Lopez' continued employment impliedly threatened Mr. Lopez with termination if employees continued to support the Union in violation of Section 8(a)(1) of the Act.

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The complaint alleges that at the February 12 meeting, Mr. Moyes threatened to terminate and replace employees who continued to support the Union. As detailed earlier, I have found no credible evidence to support this allegation, and I shall, therefore, dismiss this allegation of the complaint.

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### 3. Threat of Plant Closure, Warning of Futility of Union Support, and Impression of Surveillance

Credible evidence establishes that in mid-February either before or after Mr. Moyes' teleconference with about ten drivers, Mr. Obray told the assembled drivers that if the Union came in, Mr. Moyes would close up shop and move somewhere else. Mr. Obray's statements both threaten closure of the Wilmington yard if employees persisted in supporting the Union and warn that union support would be futile. See *Austal USA, L.L.C.*, 349 NLRB 561 (2007); *Empire State Weeklies, Inc.*, supra and *Regal Health and Rehab Center, Inc.*, supra. Accordingly, I find that Mr. Obray threatened employees with plant closure and the futility of supporting the Union in violation of Section 8(a)(1) of the Act.

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The General Counsel asserts that at the February 12 meeting with drivers, Mr. Moyes created the impression that employees' union activities were under surveillance by saying he was aware of driver interest in unionization and again during his teleconference by saying he was aware drivers were talking about unionization and about a walkout. Mere knowledge of

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<sup>45</sup> *Miller Electric Pump and Plumbing*, supra

employees' union activity is not sufficient to establish that an employer created the impression of surveillance. To establish a violation, it must also be shown that this knowledge could only have come from surveillance. Communicating awareness of union-activity or employee-walkout rumors does not, without more, create the impression that employees' union activity has been under surveillance. See *South Shore Hospital*, 229 NLRB 363 (1977). I shall, therefore, dismiss the relevant allegation of the complaint.

The General Counsel also argues that at the February 12 meeting with drivers and during the teleconference a week later, Mr. Moyes made unlawful statements to employees: (1) indicating their support for the union would be futile, and (2) threatening to shut down the Wilmington facility if employees continued to support the Union. As discussed above, I have found no credible evidence to support these allegations, and I shall, therefore, dismiss these allegations of the complaint.<sup>46</sup>

When, following the teleconference, Mr. Obray told Mr. Lopez that the "union thing" was not going to happen because Mr. Moyes would never be union and that rather than be union, the Respondent would close the terminal, he unlawfully threatened closure of the Wilmington yard and warned that union support would be futile. Accordingly, I find that Mr. Obray, on a second occasion, threatened employees with plant closure and the futility of supporting the Union in violation of Section 8(a)(1) of the Act.

### C. Discharges of Anthony Herron, Bismark Sanchez, Marco Diaz, and Salvador Gonzalez

#### 1. Anthony Herron

The General Counsel has met his *Wright Line* burden as to the discharge of Mr. Herron, having proven that Mr. Herron engaged in protected concerted activity, that the Respondent knew of Mr. Herron's activity, and that the Respondent bore animus toward it. No evidence exists that the Respondent knew Mr. Herron was a union supporter. However Mr. Obray knew Mr. Herron was a member of the Employee Committee and that he took a leadership role in championing employees in their disputes with management, all of which was concerted and protected. Having instituted the Employee Committee, Mr. Obray bore no apparent animosity toward Mr. Herron's committee activities until February 5. On that date, Mr. Herron prominently and unrelentingly pursued Mr. Sanchez's grievance against Mr. Obray regarding a driving assignment. In so doing, Mr. Herron invited Mr. Obray to join a group of angrily vocal drivers.<sup>47</sup> Mr. Obray demonstrated his animus toward Mr. Herron's method of supporting Mr. Sanchez by his reaction to the driver meeting. Shocked at the number of drivers assembled with Mr. Herron, Mr. Obray accused the group of ambushing him and told them that his being yelled at and Mr. Herron's arguing did not help them.<sup>48</sup>

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<sup>46</sup> General Counsel does not argue that Mr. Moyes violated the Act by tacitly consenting to Mr. Obray's reference to "bad apples," which I have found unlawful. Moreover, the evidence does not show that Mr. Obray made the statement during the teleconference at a time or in a manner that would permit Mr. Moyes to hear it.

<sup>47</sup> While Mr. Herron's action was perhaps, at least in hindsight, impolitic, setting up a meeting between Mr. Obray and the drivers to discuss a driver complaint was unquestionably concerted and protected.

<sup>48</sup> In the absence of any allegation to that effect, I make no finding as to whether Mr. Obray's last comment constituted a threat. Even without such a finding, Mr. Obray's statement that the drivers' conduct would not help them is evidence of animus toward their conduct, particularly that of Mr. Herron and Mr. Sanchez.

The General Counsel having met the initial *Wright Line* burden, the burden shifts to the Respondent to establish persuasively by a preponderance of the evidence<sup>49</sup> that it would have discharged Mr. Herron even in the absence of his protected activities.

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The Respondent argues that it would have discharged Mr. Herron on February 6 irrespective of his concerted protected activities because he repeatedly refused to work more than eight hours a day. The credible evidence establishes that from about December 2008 until his discharge on February 6, Mr. Herron regularly refused to work longer than eight hours in spite of being told by DM Tejeira that his conduct was unacceptable. Indeed Mr. Herron agreed that he almost always refused to work past 3:30 to show his disagreement with the Respondent's requirement that employees work beyond eight hours in a day if necessary.<sup>50</sup> On one occasion in late January/early February, Mr. Obray told Mr. Herron that he work was not yet done and that he needed to return to work. When Mr. Herron refused, saying his eight hours were up and he was leaving, Mr. Obray warned him to no avail that he would be terminated if he left. On February 5, Mr. Herron left a load of hazardous material with improper placards at the Swift yard and left work without clearance. On February 6, Mr. Herron refused DM Tejeira's assignment to fix the improper placards on his load of the previous day. Later that day, Mr. Obray terminated Mr. Herron for insubordination.

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The evidence is clear that Mr. Herron was insubordinate in defying orders to complete scheduled work in January and February in spite of warnings and insubordinate in refusing to repair damaged placards on February 6. There is no question that Mr. Herron's insubordination could reasonably provide legitimate grounds for discharge. However, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *Yellow Ambulance Service*, 342 NLRB 804, 804 (2004), citations omitted. The Respondent has adduced evidence that DM Tejeira notified Mr. Herron of the Respondent's objection to his leaving work early even before Mr. Herron became a force on the Employee Committee and that Mr. Obray warned him in late January/early February that flouting the company's work schedule would result in termination. No evidence shows that the Respondent has tolerated insubordination similar to Mr. Herron's in the past or that termination in such situations was an extreme disciplinary measure. In these circumstances, it is reasonable to conclude that the Respondent has shown by a preponderance of the evidence that it would have fired Mr. Herron for his insubordination regardless of the Respondent's animosity toward his protected activity. Accordingly, I find the Respondent has met its shifted burden under *Wright Line*, and I will dismiss the complaint allegation relating to Mr. Herron's discharge.

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## 2. Bismark Sanchez

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The General Counsel has met his *Wright Line* burden as to the discharge of Mr. Sanchez, having proved that Mr. Sanchez engaged in protected concerted activity, that the Respondent knew of Mr. Sanchez' activity, and that the Respondent bore animus toward it. While no specific evidence exists that the Respondent knew Mr. Sanchez was a union supporter, Mr. Obray, and through him other management officials, knew Mr. Sanchez had presented a grievance to the Employee Committee on February 5 concerning a load

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<sup>49</sup> A "preponderance" of evidence means that the proffered evidence must be sufficient to permit the conclusion that the proposed finding is more probable than not. McCormick Evidence, at 676-677 (1<sup>st</sup> ed. 1954).

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<sup>50</sup> As explicated above, Mr. Herron practice of leaving after eight hours was not protected conduct.

assignment and had vociferously pursued it, all of which was concerted and protected.<sup>51</sup> Mr. Obray's animus toward Mr. Sanchez' conduct on that occasion is demonstrated by his belief that he had been "ambushed" and threatened, particularly by Mr. Sanchez, in the grievance meeting with drivers and by his consequent naming of Mr. Sanchez as a suspect in the tire-slashing.

The General Counsel having met the initial *Wright Line* burden, the burden shifts to the Respondent to establish persuasively by a preponderance of the evidence that it would have discharged Mr. Sanchez even in the absence of his protected activities. The Respondent argues that it would have discharged Mr. Sanchez on February 6 irrespective of his concerted protected activities because he refused to cooperate in the Respondent's investigation in vandalism and misconduct at the Swift yard.

There is no dispute that sometime on February 5, an unknown vandal cut Mr. Obray's car tire while the car was parked in the Swift yard. Thereafter, Mr. Donahue began an investigation into that and other reports of threats and vandalism. There is no evidence the investigation was other than a reasonable reaction to reports of security problems at the Swift yard, and there is no credible evidence Mr. Sanchez was discriminatorily targeted in the investigation or that the questions posed to him impinged upon his protected rights. Mr. Sanchez contumaciously refused to answer Mr. Donahue's questions or to give the investigator a written statement. Written company policy required employees to cooperate in security investigations upon pain of termination. Mr. Driscoll, to whom Mr. Donahue consulted about Mr. Sanchez' obduracy, judged that Mr. Sanchez was refusing to cooperate in the company's investigation and directed that he be terminated.

Clearly Mr. Sanchez' refusal to cooperate in the investigation provided a reasonable basis for termination under the Respondent's policies. However, the question is not whether the Respondent had a legitimate reason for discharging Mr. Sanchez but whether the Respondent would have implemented the discharge in the absence of Mr. Sanchez' protected activity. See *Yellow Ambulance Service*, supra.

The Respondent had a written policy identifying noncooperation in investigations as a terminable offense, and no evidence was adduced to show the Respondent had previously tolerated investigatory noncooperation or that Mr. Sanchez was disparately treated. Given Mr. Sanchez' obdurate, vehement, and profanity-laced refusals to cooperate in the Respondent's legitimate investigation, it is reasonable to conclude that the Respondent would have fired Mr. Sanchez for his refusals regardless of the Respondent's animosity toward his

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<sup>51</sup> I do not accept the Respondent's contention that Mr. Sanchez' conduct in pursuing his grievance on February 5 was unprotected misconduct. Board law establishes that "employees are permitted some leeway for impulsive behavior when engaging in concerted activity, subject to the employer's right to maintain order and respect [citation omitted]." *Tampa Tribune*, 351 NLRB 1324, 1324-25 (2007), enf. den. *Media General Operations, Inc. v. N.L.R.B.*, 560 F. 3d 181 (4<sup>th</sup> Cir. 2009). The Board recognizes that the protections of Section 7 would be meaningless were the Board not to take into account the realities of industrial life and the fact that disputes over wages, bonus, and working conditions are among the disputes most likely to engender ill feelings and strong responses. *Consumers Power Company*, 282 NLRB 131, 132 (1986). The standard for determining whether specified conduct is removed from the protection of the Act is whether the conduct is "so violent or of such serious character as to render the employee unfit for further service." *St. Margaret Merry Healthcare Centers*, 350 NLRB 203, 204-205 (2007); *Dreis Rump Mfg. v. NLRB*, 544 F.2d 320, 324, (7<sup>th</sup> Cir. 1976).

protected activity. Accordingly, I find the Respondent has met its shifted burden under *Wright Line*, and I will dismiss the complaint allegation relating to Mr. Sanchez' discharge.

### 3. Marco Diaz

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The General Counsel has met his *Wright Line* burden as to the discharge of Mr. Diaz. Mr. Diaz, like Mr. Herron, was a visible member of the Employee Committee and an employee spokesman to management. Services to employees that Mr. Diaz provided in either position were concerted and protected. Mr. Diaz was also a staunch union supporter, and it is reasonable to infer from Mr. Donahue's two-hour, February 11 interrogation of Mr. Diaz that the Respondent knew or at least strongly suspected what Mr. Diaz' union sentiments were. Mr. Donahue's lengthy interrogation consisted almost exclusively of repeated demands that Mr. Diaz identify the union supporters among the Respondent's drivers. When Mr. Diaz refused to name anyone but two drivers who had already been fired, his resistance must have signaled alliance with union supporters. Moreover, Mr. Diaz' refusal to name union supporters was in itself a form of union activity to which Mr. Donahue clearly exhibited animosity when he badgered Mr. Diaz to identify them. Additionally, both before and after Mr. Donahue's interrogation of Mr. Diaz, the Respondent demonstrated its animosity toward its employees' nonunion protected activity and their union activity by its unfair labor practices, as earlier detailed.

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The General Counsel having proved the requisite *Wright Line* elements: concerted protected and union activities by Mr. Diaz, employer knowledge of his activities, and employer animus toward the activities, the General Counsel has met his initial burden. Under *Wright Line*, the burden of proof shifts to the Respondent to establish persuasively that it would have discharged Mr. Diaz even in the absence of his protected activities.

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The Respondent argues that it would have discharged Mr. Diaz on February 24 irrespective of his concerted protected activities because he had provided a false application in obtaining employment. In his September 2008 application for employment, Mr. Diaz acknowledged prior convictions in 1989 for "driving too fast" and for "soliciting." At a new employee orientation, Mr. Diaz also told Mr. Donahue of a past restraining order, to which Mr. Donahue professed indifference. After conducting an expanded criminal background check of Mr. Diaz, the Respondent discovered that Mr. Diaz had twice violated the restraining order, for which a court had sentenced him to two and three year suspensions, respectively. To the extent he had failed to detail the court-imposed suspensions, Mr. Diaz had, in fact, submitted a false application to the Respondent and such was, ostensibly, a terminable offense.

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It is not sufficient for the Respondent simply to show it had a legitimate reason for discharging Mr. Diaz; the Respondent must prove that it would have implemented the discharge even in the absence of Mr. Diaz' protected activity. See *Yellow Ambulance Service*, supra. The Respondent has not met its burden. There is no evidence the Respondent had a zero tolerance policy for false applications. Rather, the evidence shows that the Respondent's post-employment discovery of a false application resulted not in immediate termination but in an investigation that included an interview with the employee, the purpose of which was to determine, by obtaining more information about the omitted conviction(s), if the offending employee should be retained. Although there is no evidence as to what criteria the Respondent used in deciding whether or not to retain such an employee, there is no question that retention was a viable option.

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Mr. Fitzsimmons and Mr. Donahue met with Mr. Diaz after learning that he had submitted a false application, but the brevity of the meeting, the cursory interchange regarding Mr. Diaz' application omissions, and the inaccuracy of Mr. Donahue's denial that Mr. Diaz had told him of the restraining order, show the meeting was not for investigatory or evaluative purposes but merely to inform Mr. Diaz that he was fired. There is no evidence Mr. Fitzsimmons or any other manager evaluated the nature of Mr. Diaz' omitted convictions<sup>52</sup> or Mr. Diaz' proffered explanations; certainly there is no evidence of any managerial discussion of the circumstances surrounding the false application.

It is reasonable to infer from these facts that the Respondent's motive in firing Mr. Diaz was something other than Mr. Diaz' false application. The General Counsel has proved the Respondent bore animus toward Mr. Diaz' protected activities. That proof, coupled with the Respondent's failure to follow its evaluative policy regarding false applications, warrants an inference that animus prompted Mr. Diaz' discharge. The Respondent might have rebutted such an inference by showing that Mr. Diaz was treated the same as other false applicants, but the Respondent failed to do so. Evidence shows the Respondent unearthed as many as eight false applications in its expanded security checks, but the total number found and the disciplinary consequences attached to them are unknown. Specifically, during the initial expanded background check, a third driver in addition to Mr. Diaz and Mr. Gonzalez was identified as having made a false application, but there is no evidence as to the nature of the third driver's conviction(s) or whether he was disciplined.

In arguing that it lawfully terminated Mr. Diaz, the Respondent's reliance on *Overnite Transportation, Inc.*, 343 NLRB 1431 (2004) is misplaced. In *Overnight*, the employer had a zero tolerance policy for failure to disclose criminal records on employment applications, which policy the employer applied in an even-handed manner. That is not the situation here; the Respondent had no zero-tolerance policy, and there is no evidence the Respondent even-handedly discharged Mr. Diaz. The Respondent also argues that the General Counsel has not proved that its stated reasons for discharging Mr. Diaz were pretextual or that it disparately treated Mr. Diaz. Under *Wright Line*, the General Counsel does not have to prove either factor; the General Counsel meets his burden by proving the *Wright Line* elements, which the General Counsel did. Once the burden of proof shifted to the Respondent, it was the Respondent's burden to rebut the General Counsel's prima facie case by showing that it had imposed on Mr. Diaz justifiable disciplinary treatment reasonably equal to that afforded other similarly situated employees. The Respondent failed to make such a showing. The Respondent correctly points out that no evidence exists as to false-application/discharge comparators, but, given the relative burdens of proof, the absence of such evidence works to the Respondent's disadvantage not to the General Counsel's.

Inasmuch as the Respondent has not met its shifted burden to show that it would have fired Mr. Diaz notwithstanding his protected activity, I find that the Respondent fired Mr. Diaz in violation of Sections 8(a)(3) and (1) of the Act.

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<sup>52</sup> Mr. Diaz' omitted convictions do not clearly fit within the conviction categories that normally disqualified employees from continued employment, i.e., those related to theft, drugs, and aggressive behavior. If Mr. Fitzsimmons considered the nature of Mr. Diaz' convictions in deciding to discharge him, the Respondent did not see fit to provide evidence of it.

## 4. Salvador Gonzalez

5 The General Counsel has met his *Wright Line* burden as to the discharge of Mr. Gonzalez. Although Mr. Gonzalez was not a member of the Employee Committee, he had drawn attention to himself in the course of both Mr. Moyes' February 12 meeting and the teleconference. At the former meeting, Mr. Gonzalez audibly and visibly communicated his disagreement with Mr. Moyes' remarks to employees about the work situation, and at the latter meeting, Mr. Gonzalez asked why the company did not offer competitive wages and union packages to its employees. In those respective instances, Mr. Gonzalez engaged in open protected concerted activity and in union activity. Mr. Gonzalez' sarcastic "Yeah, right" remark was a comment on Mr. Moyes' explanation of the Respondent's stance on work issues that concerned employees generally and that had been the subject of employee complaints.<sup>53</sup> While the Respondent considered Mr. Gonzalez' remark and accompanying body language to be rude, his remark does not come close to meeting the stringent standard of "egregious conduct" that loses the Act's protection.<sup>54</sup> Far more serious discourtesies have been held insufficient to lose the Act's protection.<sup>55</sup> Consequently, Mr. Gonzalez' comment in the February 12 employee meeting was concerted and protected. As for Mr. Gonzalez' question about union benefits during the teleconference, such is clearly protected union activity.<sup>56</sup>

20 The Respondent's specific animus toward Mr. Gonzalez' February 12 protected activity is evidenced by Mr. Donahue's characterization of Mr. Gonzalez' conduct as rude and his widely disseminated report of the asserted rudeness to security management. The Respondent's general animus toward its employees' nonunion protected activity and their union activity has already been detailed.

25 The General Counsel having proved the requisite *Wright Line* elements: protected concerted and union activity by Mr. Gonzalez, employer knowledge of it, and employer animus toward the activity, the General Counsel has met his initial burden. Under *Wright Line*, the burden of proof shifts to the Respondent to establish persuasively that it would have discharged Mr. Gonzalez even in the absence of his protected activities.

30 The Respondent argues that it would have discharged Mr. Gonzalez on February 24 irrespective of his concerted protected activities because he had provided a false application in obtaining employment. In his October 2008 application for employment, Mr. Gonzalez omitted

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<sup>53</sup> As noted above, "concertedness...can be established even though the individual [speaking] was not 'specifically authorized'...to act as a group spokesperson for group complaints." *Herbert F. Darling, Inc.*, supra. Moreover, Mr. Gonzalez' disagreement with Mr. Moyes' remarks was a "logical outgrowth" of group concerns and thus concerted and protected. *Salisbury Hotel*, supra; *Compuware Corporation*, supra.

40 <sup>54</sup> The protections of Section 7 would be meaningless were the Board not to take into account the realities of industrial life and the fact that disputes over wages, bonus, and working conditions are among the disputes most likely to engender ill feelings and strong responses. *Consumers Power Company*, 282 NLRB 131, 132 (1986).

45 <sup>55</sup> See *Alcoa Inc.*, 352 NLRB 1222 (2008), (referring to supervisor as "egoistical f\_\_\_er"); *Tampa Tribune*, supra, (calling supervisor a "stupid f\_\_\_ing moron."). *NLRB v. Cement Transport Company*, 490 F.2d 1024, 1030 (6<sup>th</sup> Cir. 1974) (Employee referring to president of company as a "Son of bitch").

50 <sup>56</sup> The Respondent argues that its managers did not know Mr. Gonzalez supported the Union before the Respondent fired him. However, it is reasonable to find that the Respondent must have inferred from Mr. Gonzalez' scornful response to Mr. Moyes' February 12 remarks and from his question at the teleconference that he was most likely pro-union.

to include misdemeanor convictions that he had committed more than 12 years earlier: receiving and concealing stolen property, carrying a loaded firearm in a public place, and challenging to a fight in a public place. To the extent he had failed to detail the convictions, Mr. Gonzalez had submitted a false application to the Respondent, which was a potentially terminable offense.

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It is not sufficient for the Respondent simply to show it had a legitimate reason for discharging Mr. Gonzalez; the Respondent must prove that it would have implemented the discharge even in the absence of Mr. Gonzalez' protected activity. See *Yellow Ambulance Service*, supra. The Respondent has not met its burden. The analysis applied to Mr. Diaz' discharge is appropriate here. In discharging Mr. Gonzalez, the Respondent did not follow its stated policy of interviewing false applicants in order to assess the circumstances underlying the false applications. Rather, Mr. Fitzsimmons briefly informed Mr. Gonzalez of what its expanded background check had shown, discounted his proffered explanation without deliberation or discussion, and did not respond when Mr. Gonzalez said he knew Mr. Fitzsimmons had been instructed to get rid of people. Mr. Gonzalez' omitted convictions, related as they were to theft and aggressive behavior, fit within the categories of convictions that normally disqualify from employment the Respondent's applicants or employees. However, there is no evidence the Respondent even considered the fact that 12 years had passed since Mr. Gonzalez' convictions or that the crimes on which they were based were committed when Mr. Gonzalez was very young. Indeed, there is no evidence the Respondent weighed any of the circumstances underlying the false application before it terminated Mr. Gonzalez' employment.

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There is no question that the Respondent could reasonably view a false application as a terminable offense, and it is not the role of the administrative law judge to second guess the degree of discipline an employer chooses to impose on a rule transgressor. However, the Respondent bears the burden of rebutting the General Counsel's prima facie case that Mr. Gonzalez was fired because of his protected activities by showing that Mr. Gonzalez would have been discharged for making a false application notwithstanding those activities. The Respondent's apparent failure in Mr. Gonzalez' case to follow its policy of evaluating and considering the circumstances surrounding false applications, its failure to explain why Mr. Gonzalez' false application merited discharge, and its failure to show that it afforded Mr. Gonzalez reasonably equal disciplinary treatment to other similarly situated employees vitiates the Respondent's contention that it would have fired Mr. Gonzalez irrespective of his protected activities.<sup>57</sup>

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Inasmuch as the Respondent has not met its shifted burden to show that it would have fired Mr. Gonzalez notwithstanding his protected activity, I find that the Respondent terminated Mr. Gonzalez in violation of Sections 8(a)(3) and (1) of the Act.

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## VI. CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent violated Section 8(a)(1) of the Act by interrogating employees about their protected concerted and/or union activities, by impliedly threatening employees with termination if they engaged in protected activity or supported the Union, by threatening employees with plant closure, and by informing employees of the futility of supporting the Union.

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<sup>57</sup> The Respondent's arguments regarding pretext and disparate treatment apply to Mr. Gonzalez' termination as well as to Mr. Diaz', as does my evaluation of those arguments.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by discharging Marco Diaz and Salvador Gonzalez because they engaged in union or other concerted, protected activities.
5. The unfair labor practices set forth above affect commerce within the meaning of Sections 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

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Remedy

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

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The Respondent having unlawfully discharged Marco Diaz and Salvador Gonzalez, it must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed on a quarterly basis from the dates of their discharge to the 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 Respondent will be ordered to make appropriate emendations to Marco Diaz and Salvador Gonzalez' personnel files. The Respondent will be ordered to post an appropriate notice.

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The General Counsel's request that the Respondent be required to read the notice to employees is denied. The Respondent's violations, while serious, can be adequately remedied by the Order herein.

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On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>58</sup>

ORDER

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Respondent, Swift Transportation Co., Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

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(a) Interrogating employees about their protected concerted and/or union activities, threatening employees with termination for engaging in protected activity or supporting the Union, threatening employees with plant closure, and informing employees of the futility of supporting the Union.

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(b) Discharging any employee for engaging in union or other protected concerted activities.

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

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

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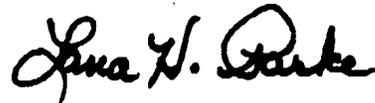
<sup>58</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

- 5 (a) Within 14 days from the date of this Order, offer Marco Diaz and Salvador Gonzalez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.
- 10 (b) Make Marco Diaz and Salvador Gonzalez whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.
- 15 (c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Marco Diaz and Salvador Gonzalez and within 3 days thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way.
- 20 (d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- 25 (e) Within 14 days after service by the Region, post at its facility in Wilmington, California copies of the attached notice marked "Appendix."<sup>59</sup> Copies of the notice, on forms provided by the Regional Director for Region 21 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the 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 Respondent at any time since February 2009.
- 30 (f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

35 IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated: Washington, D.C. December 9, 2009

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Lana H. Parke  
Administrative Law Judge

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<sup>59</sup> If this Order is enforced by a Judgment of the 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."

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** do anything that interferes with these rights. More particularly,  
**WE WILL NOT** question employees about their protected concerted and/or union activities.  
**WE WILL NOT** threaten to fire employees for engaging in protected concerted activity or for supporting the International Brotherhood of Teamsters (the Union) or any other union.  
**WE WILL NOT** threaten to close the Wilmington facility if employees support the Union or any other union.

**WE WILL NOT** tell employees it is useless to support the Union.

**WE WILL NOT** discharge any employee for engaging in protected concerted activity or for supporting the Union or any other union.

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

**WE WILL** offer Marco Diaz and Salvador Gonzalez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or to any other rights or privileges previously enjoyed.

**WE WILL** make Marco Diaz and Salvador Gonzalez whole for any loss of earnings and other benefits suffered as a result of our unlawful discharge of them.

**WE WILL** remove from our files any reference to the unlawful discharges of Marco Diaz and Salvador Gonzalez and notify them in writing that this has been done and that the discharges will not be used against them in any way.

SWIFT TRANSPORTATION CO., INC.

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Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

888 South Figueroa Street, 9th Floor  
Los Angeles, California 90017-5449  
Hours: 8:30 a.m. to 5 p.m.  
213-894-5200.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**  
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 213-894-5229.

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

SWIFT TRANSPORTATION CO., INC.

and  
Case 21-CA-38735

INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS

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