NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Allstate Power Vac, Inc. *and* Laborers International Union of North America, Local 78. Cases 29–CA–28264, 29–CA–28351, 29–CA–28394, 29–CA–28556, 29–CA–28594, 29–CA–28637, 29–CA–28683, and 29–RC–11505

August 5, 2011

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER AND PEARCE

On August 11, 2008, Administrative Law Judge Raymond P. Green issued a decision in this proceeding. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

On November 30, 2009, a two-member panel of the National Labor Relations Board issued a Decision and Order and Order Remanding in this proceeding.[1] On remand, the Board directed the judge to undertake a *Wright Line*[2] analysis in determining whether the Respondent violated Section 8(a)(3) and (1) by: subjecting Angel Rivera to more onerous working conditions; discharging Jose Adames when he failed to return to work following an excused absence; discharging Miguel Bisono for urinating into a coworker's drink bottle; and suspending William Dominich and Hector Soler, and discharging Rafael Bisono, for failing to wear safety equipment.[3] The Board directed the judge to consider all of the evidence relevant to such an analysis, to make additional findings of fact and credibility resolutions, and to issue a supplemental decision.

On January 22, 2010, Judge Green issued the attached supplemental decision. Contrary to his original decision, he found that the Respondent violated Section 8(a)(3) and (1) by subjecting Angel Rivera to more onerous working conditions because of his union membership or activities. The judge, however, reaffirmed his earlier findings that the Respondent's discharge of Jose Adames and Miguel Bisono; suspension of William Dominich and Hector Soler; and discharge of Rafael Bisono did not violate the Act. Accordingly, the judge again recommended the dismissal of those allegations. The General Counsel and the Respondent filed exceptions and supporting briefs to the judge's supplemental decision, and the Respondent filed an answering brief to the General Counsel's exceptions.

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

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[4] and conclusions as modified below, and to include an Order remedying the violations found.[5]

[1] 354 NLRB No. 111. In its November 30, 2009 decision, the Board adopted the judge's recommended dismissal of the allegation that the Respondent failed to hire and consider seven union applicants. In the absence of exceptions, the Board adopted the judge's recommended dismissal of the allegation that the Respondent threatened employees with the loss of bonuses and raises if they supported the Union. Also in the absence of exceptions, the Board adopted the judge's findings that the Respondent violated Sec. 8(a)(1) by prohibiting the wearing of union decals and insignia, and violated Sec. 8(a)(3) and (1) by laying off Jose Adames, Miguel Bisono, and Victor Vasquez, and by discharging Jose Castillo and Angel Rivera. Finally, as described in greater detail in this decision, the Board remanded to the judge for further analysis four alleged violations of Sec. 8(a)(3) and (1).

On June 17, 2010, following the issuance of the Board's decision, the United State Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB,* 130 S.Ct. 2654, holding that under Sec. 3(b) of the Act, in order to exercise the delegated authority of the Board, a delegee group of at least three members must be maintained. In light of *New Process Steel,* we have reconsidered the issues raised in the Board's November 30, 2009 decision and have reviewed the record in light of the exceptions and briefs. We adopt the Board's decision and its findings therein—including its remand of the four issues noted above—for the reasons stated in the decision, which is incorporated by reference herein.

[2] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[3] In his initial decision, the judge had recommended the dismissal of these four allegations.

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

[5] Although, as noted above, the judge found in his supplemental decision that the Respondent violated Sec. 8(a)(3) and (1) by imposing more onerous working conditions on employee Angel Rivera because of his union membership or activities, the judge inadvertently failed to include a remedy, Order, and notice to employees with respect to that violation. Thus, in adopting the judge's finding in this regard, we have included a remedy section, Order, and notice to employees relevant to that violation, as well as to the additional violations that we have found herein that were not found by the judge. We have also revised the judge's Amended Conclusions to include the aforementioned additional violation.

In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), the Order requires that backpay and other monetary awards shall be paid with interest compounded on a daily basis.

The Order provides for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010).

For the reasons stated below, we find, contrary to the judge, that the Respondent unlawfully suspended Dominich and Soler and unlawfully discharged Rafael Bisono.[6]

I. FACTS

The Respondent is a New Jersey company engaged in the business of hazardous waste cleaning and removal. The events at issue involved the Respondent's operations in Brooklyn, New York.

One of the Respondent's primary functions is to clean transformers for its principal client, Consolidated Edison. The transformers, which convert electricity from higher to lower voltage, are located in underground vaults and are accessible through manholes.

Opening manholes to clean transformers creates a remote possibility that faulty wiring within the structure could cause an electrical spark known as an "arc flash," which has the potential to injure or kill anyone standing close to the open manholes. The Respondent trains employees in the use of, and requires them to wear, safety gear, including fire retardant suits, hardhats, steel-toe boots, protective gloves, and safety glasses when they are performing this type of work. The Respondent routinely monitors employees' compliance with the safety gear policy and has issued disciplinary warnings to employees who failed to wear safety equipment. It once issued a 2-day suspension to an employee who unloaded drums from a truck without using safety equipment.

In March 2007,[7] the Union began a drive to organize the Respondent's employees. On August 30, the Union filed an election petition and, pursuant to a Stipulated Election Agreement, an election was held on October 5. The Union designated employee Dominich as its election observer. Meanwhile, other employees, including Rivera, Adames, and Miguel Bisono, openly supported the Union by leafleting and/or wearing union jackets and shirts to work. Employee Rivera also placed union decals on his company-issued hardhats, which the Respondent unlawfully ordered him to remove.[8]

On October 4, the day before the election, the Respondent assigned employees Bisono and Dominich—who were wearing union shirts—and Soler to clean a transformer vault located a few blocks from one of the Respondent's facilities. The three employees wore the required protective gear as they cleaned the vault. Later that morning, however, they opened a second transformer vault that was on the same block but failed to wear the required gear. As the three employees stood around the second open vault, Operations Manager Chris Baran, who was in the area at the time, photographed them. Baran did not approach the employees or ask them to put on their protective gear. Baran later returned to the Respondent's facility and reported the incident to Respondent General Manager Glen Burke who, in turn, reported the events to Regional Corporate Safety Manager Kurtis Ross.

On election day, October 5, the Respondent suspended Dominich, Soler, and Bisono until further notice.[9] The following week, on or around October 10, Regional Corporate Safety Manager Ross interviewed Dominich, Soler, and Bisono, and had those interviews transcribed. On or about October 12, the Respondent discharged Bisono. On October 15, the Respondent called Dominich and Soler back to work from their suspensions.

II. THE JUDGE'S SUPPLEMENTAL DECISION

In his supplemental decision, the judge, applying *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), found that the General Counsel had established a prima facie case that the suspensions of Dominich and Soler and the discharge of Bisono (as well as the other three alleged discriminatory actions that the judge reviewed on remand) were unlawfully motivated. The judge noted that, in his prior decision, he found that the Respondent had unlawfully discharged or laid off other employees because of their union support or affiliation, and that the Respondent had unlawfully prohibited employees from wearing union decals and insignia.[10] The judge stated that, "[g]iven those findings, which evidence animus toward the Union and a demonstrated willingness to take

[6] Rafael Bisono's brother, Miguel Bisono, was unlawfully laid off by the Respondent on June 4, 2007. See fn. 1, supra.

[7] Dates are in 2007, unless otherwise noted.

[8] See fn. 1, supra (referencing the Board's finding that the Respondent violated Sec. 8(a)(1) by prohibiting the wearing of union decals and insignia).

[9] In his original decision of August 11, 2008, the judge found that the Respondent suspended Dominich, Soler, and Bisono on October 4. In its brief in support of exceptions, the General Counsel asserts that the judge's finding is an inadvertent error and points to the undisputed testimony of Dominich and Bisono that they were suspended following the election, on October 5. This testimony is consistent with other record evidence.

[10] In the absence of exceptions, the Board adopted these unfair labor practice findings.

adverse actions against employees who join or support the Union, I would conclude that the General Counsel has made out a prima facie case relating to all of the remanded allegations."

Nonetheless, the judge found that the Respondent met its burden of establishing that, even in the absence of the employees' union activity, it would have suspended Dominich and Soler and discharged Bisono for their failure to wear safety equipment. In so finding, the judge noted that "this conclusion is a close one and that reasonable people might reach a contrary result."

The judge reaffirmed his earlier finding that it was undisputed that Dominich, Soler, and Bisono had violated safety procedures by standing over an open transformer vault without wearing the proper safety equipment, and that such conduct "can pose a remote but real risk of serious injury resulting from an electric spark."

The judge also observed that before there was any union activity at the Respondent's operations, the Respondent had disciplined at least five employees for failing to wear safety equipment, and that one of those disciplines was a short 2-day suspension. The judge stated that, "[w]hile the instant case does not present precisely the same set of facts as past situations, the evidence leads me to conclude that the Company's decision to suspend Dominich and Soler was not substantially inconsistent with past practice." He further found that, because three employees were involved in the incident, it was reasonable "that the Company would have viewed this collective infraction as being more serious and therefore warranting more serious discipline."

As to the discharge of Bisono, the judge found that although the Respondent had not previously discharged an employee for failing to wear safety equipment, the Respondent showed that it would have discharged Bisono even in the absence of his union activities "because of his attitude during the disciplinary interview." Specifically, the judge found that during the disciplinary interview "Bisono essentially said that he could do as he wished and did not need to be told how to do his job."

III. DISCUSSION

Contrary to the judge, we find that the Respondent violated Section 8(a)(3) and (1) by suspending Dominich and Soler and discharging Bisono.

Under *Wright Line,* supra, the General Counsel has the burden of establishing that the employee's protected activity was a motivating factor in the adverse employment action. The elements commonly required to support such a showing are union and or other protected activity by the employee, employer knowledge of that activity, and antiunion animus on the part of the employer. See, e.g., *Willamette Industries,* 341 NLRB 560, 562 (2004). Once the General Counsel makes that showing, the burden of persuasion "shift[s] to the employer to demonstrate that the same action would have been taken even in the absence of the protected conduct." *Donaldson Bros. Ready Mix, Inc.,* 341 NLRB 958, 961 (2004).

We agree with the judge that the General Counsel carried his initial burden under *Wright Line*. To begin, it is clear that the General Counsel has established the Respondent's overall antiunion animus. As the judge stated, the Respondent had previously demonstrated animus when it unlawfully discharged and laid off employees because of their union support or affiliation, and when it unlawfully prohibited employees from wearing union decals and insignia. In addition, the Respondent further demonstrated animus when it unlawfully imposed more onerous working conditions on an employee because of his union membership or activities.

Next, the General Counsel has established that the Respondent knew that two of the three employees it disciplined for failing to wear safety equipment had engaged in union activity or that they were supporters of the Union. As noted above, Bisono regularly wore union T-shirts to work. Moreover, the record indicates that both Dominich and Bisono were wearing union shirts at the time of the infraction in question, and the Union had designated Dominich as its election observer. Indeed, General Manager Burke testified that he knew before the election that Dominich supported the Union. Although the record does not establish whether the Respondent had knowledge that Soler supported the Union, it is reasonable to conclude that, at the least, Soler became "caught up" in the unlawful discipline issued to known union adherents Dominich and Bisono. Thus, in these circumstances, we infer knowledge for the purpose of the General Counsel's initial showing. See *Adam Wholesalers, Inc.*, 322 NLRB 313, 327 (1996) (finding antiunion animus surrounding a disciplinary warning to a driver whose union support was unknown, where the respondent told the driver that, by associating with the known instigator of the union organizing drive, he was seen "with the wrong person at the wrong time").

Finally, in finding that the General Counsel has met his initial burden, we place significant weight on the timing of the Respondent's actions. On the day before the election, the Respondent photographed the employees

violating the safety rule, and the rule infraction was discussed by members of senior management. The next day, following the election in which a majority of the employees voted in favor of union representation, the Respondent suspended the employees and discharged Bisono a week later. See *Bliss Clearing Niagara, Inc.*, 344 NLRB 296, 306 (2005) (timing of adverse action shortly after an employee has engaged in known union protected activity provides "reliable competent evidence of unlawful motive"); see also *NLRB v. Rubin*, 424 F.2d 748, 750 (2d Cir. 1970) (endorsing Board's analytical approach and noting the "stunningly obvious timing").

Because the General Counsel met his initial *Wright Line* burden, the burden then shifted to the Respondent to demonstrate that it would have taken the same adverse employment actions against Dominich, Soler, and Bisono, even in the absence of the employees' protected activity. We find, contrary to the judge, that the Respondent has failed to make this showing.

To begin, the Respondent takes the position that the stringent discipline imposed on the employees was justified as a result of the seriousness of the employees' breach of the safety policy. Indeed, in support of this position, the Respondent's answering brief states that, "if Con Edison representatives had observed the manner in which the three men were working, they would have closed down the job." The Respondent further asserts that, "given the fact that Con Edison is a major client of the company," it "could not afford to lose [it] as a customer."

The problem with this position, however, is that if the employees' failure to wear safety equipment was truly critical, one would suppose that the Respondent would have taken immediate action to correct the employees' breach. This, however, did not happen. Rather, when Operations Manager Baran witnessed the employees not wearing their safety gear, he did not take any corrective action. Instead, he photographed the employees committing the safety violation at issue—apparently for the purpose of obtaining evidence that would ultimately be used to discipline them—and left the area.[11] Thus, the Respondent's own actions contradict its position that the employees' failure to wear safety equipment presented a significant risk, either to the Respondent or to the employees themselves. See *Detroit Plastic Products Co.,* 121 NLRB 448, 500 (1958) (employer's failure to take corrective action or "to present an obvious solution" to employee's allegedly problematic conduct indicated that employer was not really concerned about the employee's "welfare or interested in keeping her at work," but rather wanted to eliminate her quickly "on any pretext"), enf. sub nom. *NLRB v. Erikson,* 273 F.2d 477 (6th Cir. 1960).

The Respondent's attempt to meet its *Wright Line* rebuttal burden is also undermined by the fact that the Respondent did not follow standard procedures in responding to the employees' failure to wear safety gear. To begin, Baran's photographing of the employees was unusual; the record reflects that the Respondent had not photographed employees for disciplinary purposes in the past. Similarly, the manner in which this safety policy breach advanced through the Respondent's chain of command was unusual. Baran reported the safety violation directly to General Manager Burke, thereby bypassing Safety Manager Guerrero, whom Baran testified he typically informs of safety violations. Then, the reporting of the safety incident went straight to the corporate level, and Regional Corporate Safety Manager Ross became personally involved in the investigation and interviewing of the three employees involved. At this point, the Respondent made transcripts of the disciplinary interviews; the Respondent presented no evidence that this was a common practice at its Brooklyn facilities.

Finally, we find, contrary to the judge, that the discipline imposed by the Respondent on Dominich, Soler, and Bisono—a week-long suspension of all three employees followed by the termination of Bisono—was harsher than the mere warnings and the lone 2-day suspension that had previously been given to employees for failure to wear safety equipment. Significantly, there is no evidence on the record that, prior to Bisono's discharge, the Respondent had ever discharged an employee for failing to wear safety equipment. Such disparate treatment undermines the Respondent's assertion that the employees' discipline was based solely on their failure to wear safety equipment. See *Bliss Clearing,* 344 NLRB at 307–308 (inconsistent treatment of union activists compared with others similarly situated "cast legitimate doubt" on the employer's assertion that its discipline was based on the employees' poor performance).[12]

[11] Baran's testimony that he did not approach the employees because of the upcoming union election is not convincing. It is difficult to imagine that, if Baran's primary concern upon encountering the safety violation was the serious injury or death of the employees or the public, he would have allowed that violation to continue merely because he did not want to confront employees before the election. Given the totality of the Respondent's numerous preelection violations, Baran's assertion that the preservation of a neutral preelection atmosphere was his foremost concern rings hollow.

[12] The judge suggests that it was reasonable for the Respondent to have viewed the safety violation at issue to be more serious because it was a "collective infraction." This distinction is unavailing, however, because the record indicates that some of the past infractions involving a failure to wear safety equipment referenced above—for which lesser sanctions were issued—also involved more than one employee. Further, as discussed above, the Respondent's assertions of the seriousness of the violation are undermined by the fact that Operations Manager

When the stated motives for a respondent's actions "are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal." *Fluor Daniel, Inc.,* 304 NLRB 970, 970 (1991) (citing *Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d 466, 470 (9th Cir. 1966)), enfd. mem. 976 F.2d 744 (11th Cir. 1992). For all of the reasons stated above, we find that such an inference is appropriate here. Accordingly, we find that the Respondent has failed to establish that it would have suspended Dominich and Soler and discharged Bisono even in the absence of union activity, and we therefore find that the Respondent's actions in this regard violated Section 8(a)(3) and (1).[13]

AMENDED CONCLUSIONS OF LAW

1. The Respondent violated Section 8(a)(3) and (1) of the Act by imposing more onerous working conditions on Angel Rivera because of his union membership or activities.

2. The Respondent violated Section 8(a)(3) and (1) of the Act by suspending William Dominich and Hector Soler, and by discharging Rafael Bisono, because of their union membership or activities.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(3) and (1) by discriminatorily suspending William Dominich and Hector Soler, we shall order it to make them whole for any loss of earnings and other benefits suffered as a result of their unlawful suspensions. Backpay shall be computed in accordance with *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010).

Further, having found that the Respondent discriminatorily discharged Rafael Bisono, we shall order it to offer him reinstatement and to make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of the his discharge[14] to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.,* supra, with interest as prescribed in *New Horizons for the Retarded,* supra, plus daily compound interest as prescribed in *Kentucky River Medical Center,* supra.

ORDER

The Respondent, Allstate Power Vac, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Imposing more onerous working conditions on employees because of their membership in, support for, or activities on behalf of, Laborers International Union of North America, Local 78, or any other labor organization.

Baran failed to take any corrective action at the time that he witnessed the employees working without their protective gear.

[13] Given our finding that the Respondent's alleged concern about safety was not the real reason for the actions it took against the three employees, it follows that Bisono's "attitude" displayed during the disciplinary interview—in which he apparently suggested that he would not change his ways with respect to safety—was also not the real reason for his discharge. Indeed, the record indicates that the Respondent typically responded to acts of insubordination and or poor attitude by giving offending employees lesser forms of discipline than discharge. Moreover, but for the unlawful suspension and unusual manner in which it was meted out, there would have been no occasion for Bisono to display his attitude.

Thus, we reverse the judge's finding that the Respondent showed that it would have discharged Bisono, based on this "attitude," even in the absence of his union activity.

In finding the 8(a)(3) violations, we do not find it necessary to rely on the undisputed testimony that Safety Manager Al Guerrero made statements to Dominich on October 10 and to Bisono following his discharge suggesting that the discipline was discriminatory. Although the judge discounted the testimony, we find that it should be credited and that, if considered, it further supports our conclusion. Specifically, before the employees' investigatory interviews on about October 10, Safety Manager Guerrero told Dominich, in the presence of Soler, that the Respondent had torn up Guerrero's report of employee Felix Rodriguez' safety goggle violation because Rodriguez was believed to be "pro-company," and that Dominich's suspension "hadn't been equitable." Additionally, following Bisono's discharge, Guerrero told him that the Respondent would not give him a reference "because of the union."

Contrary to the judge, who disregarded Guerrero's statements as expressions of personal opinion by a manager not involved in the disciplinary decisions, we find that, as safety manager, and the person to whom safety violations were typically reported, Guerrero's statements to Dominich were certainly within his range of knowledge and responsibility. Further, since Guerrero was a 2(11) supervisor, the Respondent was responsible for his statements. Accordingly, we find that, although the evidence cited in our analysis above supports our finding that the Respondent's discharge of Bisono and suspensions of Dominich and Soler violated Sec. 8(a)(3) and (1), Guerrero's statements, if considered, provide further evidence in support of this finding.

[14] We note that, since Bisono had been suspended a week prior to his discharge, the make-whole period should commence from October 5, the date of the suspension that preceded his discharge.

(b) Suspending or discharging employees because of their union membership, support, or 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.

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

(a) Make William Dominich and Hector Soler whole for any loss of earnings and other benefits suffered as a result of their unlawful suspensions, in the manner set forth in the remedy section of the supplemental decision.

(b) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful suspensions of William Dominich and Hector Soler, and within 3 days thereafter, notify them in writing that this has been done and that the suspensions will not be used against them in any way.

(c) Within 14 days from the date of the Board's Order, offer Rafael Bisono full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority rights or any other rights or privileges previously enjoyed.

(d) Make Rafael Bisono whole for any loss of earnings and other benefits suffered as a result of his unlawful discharge, in the manner set forth in the remedy section of the supplemental decision.

(e) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Rafael Bisono, and within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

(f) 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.

(g) Within 14 days after service by the Region, post at its Brooklyn, New York facilities copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken 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 facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all employees and former employees employed by the Respondent at any time since May 30, 2007.

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

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

Dated, Washington, D.C. August 5, 2011

Wilma B. Liebman, Chairman

Craig Becker, Member

Mark Gaston Pearce, Member

(SEAL) 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

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Choose not to engage in any of these protected activities.

WE WILL NOT impose more onerous working conditions on you because of your membership in, support for, or activities on behalf of, Laborers International Union of North America, Local 78, or any other labor organization.

WE WILL NOT suspend or discharge any of you because of your union membership, support, or activities.

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

WE WILL make William Dominich and Hector Soler whole for any loss of earnings and other benefits suffered as a result of their unlawful suspensions, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspensions of William Dominich and Hector Soler, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the suspensions will not be used against them in any way.

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

WE WILL make Rafael Bisono whole for any loss of earnings and other benefits suffered as a result of his unlawful discharge, less any net interim earnings, plus interest.

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

ALLSTATE POWER VAC, INC.

Brent E. Childerhose, Esq. and *Linda Crovella, Esq.*, for the General Counsel.

Robert Ziskin, Esq. and *Richard Ziskin, Esq.*, for the Respondent.

SUPPLEMENTAL DECISION

RAYMOND P. GREEN, Administrative Law Judge. On November 30, 2009, the Board issued its decision in these cases at 354 NLRB No. 111. In pertinent part, the Board remanded certain allegations for further consideration. The allegations involved were:

1. That the Respondent subjected Angel Rivera to more onerous working conditions because of his union membership or activities.

2. That the Respondent discharged Jose Adames because of his union membership or activities.

3. That the Respondent discharged Rafael Bisono and suspended William Dominich and Hector Soler for their union membership or activities.

4. That the Respondent discharged Miguel Bisono for his union membership and activities.

In my previous decision, I concluded and the Board affirmed, that the Respondent violated Section 8(a)(1) and (3) of the Act by (a) discharging or laying off certain employees because of their membership in or support for the Laborers International Union of North America, Local 78 and (b) by prohibiting employees from using or wearing union decals on their hardhats or wearing union T-shirts, hats, or jackets.

Given those findings, which evidence animus toward the Union and a demonstrated willingness to take adverse actions against employees who join or support the Union, I would conclude that the General Counsel has made out a prima facie case relating to all of the remanded allegations.

The legal question as defined by the doctrine set out in *Wright Line*, 251 NLRB 1083, (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), is whether the Respondent has satisfied its burden of showing that "it would have taken the same adverse action even in the absence of union activity."

I. IMPOSITION OF MORE ONEROUS WORKING CONDITIONS ON ANGEL RIVERA

Angel Rivera, along with Jose Castillo, started working at the Company on April 16, 2007. They were, unbeknownst to the Respondent, covert salts and did not engage in any organizing activity until May 30, 2007, when they commenced handing out union literature. Both were laid off on June 4, 2007. I have already concluded that their layoffs were unlawful because they were motivated by their union activities.[1]

Between May 30 and June 4, 2007, Rivera was assigned to do a number of essentially useless tasks. These included loading and then unloading a truck on two or three occasions. It also involved digging, refilling, and then re-digging two holes in the yard. Given the timing of these assignments, the nature of the assignments, and the lame reasons given by the Respondent for these assignments, I conclude that the General Counsel has established a prima facie case of discrimination and that the Respondent has not met its burden of showing that these assignments would have been made but for Rivera's coming out as a union supporter. I therefore conclude that in this respect, the Respondent has violated the Act and I would amend my recommended Order to reflect this finding.

II. THE OCTOBER 1, 2007 DISCHARGE OF JOSE ADAMES

I previously concluded that by laying off Adames on June 4, 2007, the Respondent had violated Section 8(a)(1) and (3) of the Act. He was recalled to work on July 24, 2007.

[1] I also concluded that the June 4, 2007 layoffs of Miguel Bison, Victor Vasquez, and Jose Adames were violative of the Act.

Having already determined that the layoff on June 4, 2007, violated the Act, it is obvious that the General Counsel has made out a prima facie case that Adames' later discharge on October 1, 2007, was also a violation of the Act. The question then is did the Respondent meet its burden of showing that it would have taken the same action notwithstanding Adames' union activities? I conclude that it did.

The facts are not in dispute and there are no material credibility issues.

The evidence shows that the Company had given Adames permission to take time off and expected him to return to work on September 24, 2007. Nevertheless, Adames remained in the Dominican Republic until September 30, 2007, and did so without notifying the Company where he was or when he intended to return to work. According to the credited testimony of Burke, he called Adames' home, spoke to his wife, and she stated that she did not know where he was or when he was returning to the United States.[2]

By letter dated September 25, 2007, the Respondent advised Adames that if he did not report to work by September 27, his employment would be terminated.

Adames finally showed up for work on October 1, 2007, and was told that there was no work for him.

One might argue that the Company's action of discharging Adames was too harsh given his relatively long tenure as an employee. But this is not an arbitration case. The evidence shows that the discharge was consistent with past practice and the Company demonstrated that in 2005 another employee, Michael Young, was terminated for identical reasons. As such, I reiterate my previous findings as I conclude that the Respondent has met its burden of showing that it would have discharged Adames notwithstanding his union activities.

III. THE INCIDENT INVOLVING RAFAEL BISONO, WILLIAM DOMINICH, AND HECTOR SOLER

There is no dispute that on October 4, 2007, the day before the election, these three employees were discovered together, violating safety procedures by standing around an open Con Ed transformer vault without wearing proper safety clothing. There is no real dispute that the failure to wear safety equipment when standing at or near an open vault can pose a remote but real risk of serious injury resulting from an electric spark.

In my opinion, the Respondent has met its burden of showing that it would have taken the actions against these employees notwithstanding their union membership or activities. I note, however, that it is also my opinion that this conclusion is a close one and that reasonable people might reach a contrary result.

As indicated in my previous decision, the Company's records show that in the past and before any union activity, at least five other employees had received disciplinary actions for their failure to wear protective gear; one of which was a short suspension. While the instant case does not present precisely the same set of facts as past situations, the evidence leads me to conclude that the Company's decision to suspend Dominich and Soler was not substantially inconsistent with its past practice.[3] Therefore, I would conclude that the Respondent has met its burden of demonstrating that it would have taken this action notwithstanding the employees' union activities.[4]

With respect to Rafael Bisono, while the Company's records do not show that any employee had ever been discharged for failing to wear protective clothing, it is my opinion that in this instance, the Respondent has shown that it would have discharged Bisono notwithstanding his union activities, because of his attitude during the disciplinary interview. From all the evidence presented in this case, I conclude that Bisono essentially said that he could do as he wished and did not need to be told how to do his job.

IV. MIGUEL BISONO

Again, there is no material dispute regarding the facts. In this case, the Company was angrily advised by another employee, that an employee had urinated in his not empty juice bottle. Upon investigation, it was discovered that the culprit was Miguel Bisono and he was discharged.

It is of no consequence as to whether Bisono thought the bottle was empty. It wasn't. And this resulted in a serious complaint by a fellow employee regarding what can only be described as disgusting conduct. It is true that the Company cannot point to any prior case where it discharged an employee for this kind of conduct. But neither can the General Counsel point to any prior case where similar conduct engaged in by a known or knowable culprit, was condoned.[5] In my opinion, this clearly is beyond the pale. I simply cannot imagine any employer that would be willing to tolerate such behavior. Therefore, although the General Counsel has made out a prima facie case regarding the discharge of all of these employees, including Miguel Bisono, I conclude that the Respondent has met its burden of showing that it would have discharged Bisono notwithstanding his union activities.

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[2] Although the General Counsel asserts that Adames' wife told Burke that Adames could not return by the September 27 deadline, there is no competent evidence to support this contention. I note that she was not called to testify in this case.

[3] I do not think it is reasonable to expect different managers, over time, to impose discipline in accordance with a precise mathematical formula. No two situations are ever identical and no sets of employees or managers are quite the same. The question is whether the present disciplines are within the range of past practice. In this case, the incident involved three employees, all of whom ignored safety procedures at the same time. As such, it is reasonable to me that the Company would have viewed this collective infraction as being more serious and therefore warranting more serious discipline. Had all three employees been discharged, I would have reached the opposite conclusion.

[4] The General Counsel relates certain conversations that Bisono and Dominich had with Guerrero. Guerrero was, at the time, the safety manager for the Company and may have been an agent for certain purposes. There is no evidence that Guerrera had anything to say about the decision to either suspend or discharge these three employees. I therefore do not rely on any statements that he allegedly made that the disciplines were unfair, or that "pro-company" employees were treated differently. Rather than constituting "admissions," I would view these statements as his personal opinions.

[5] There was an incident involving Jose Mota. But in that case, Mota could not say, and no one else could prove, who the alleged culprit was.

Amended Conclusions

By imposing more onerous working conditions on Angel Rivera, because of his union membership or activities, the Respondent has violated Section 8(a)(1) and (3) of the Act.

As to the other remanded allegations, the Respondent has not violated the Act.

Dated: Washington, D.C. January 22, 2010