Rochelle Waste Disposal, LLC *and* International Union of Operating Engineers, Local 150, AFL–CIO. Cases 33–CA–15298 and 33–RC–5002.

October 20, 2008

DECISION, ORDER, AND DIRECTION

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On June 27, 2008, Administrative Law Judge George Carson II issued the attached decision. The General Counsel filed a brief in support of the judge's decision. The Respondent filed exceptions and a supporting brief, the Charging Party filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Rochelle Waste Disposal, LLC, Rochelle, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting International Union of Operating Engineers, Local 150, AFL–CIO or any other labor organization.

(b) Discharging or otherwise discriminating against any employee because of that employee's testimony in a National Labor Relations Board proceeding.

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

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

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

(b) Make Jeff Jarvis whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision.

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

(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.

(e) Within 14 days after service by the Region, post at its facilities in Rochelle, Illinois copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized repre-

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

To establish a violation under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983), the General Counsel bears the burden of showing that union animus was a motivating or substantial factor for the adverse employment action. The elements commonly required to support such a showing are union or protected activity by the employee, employer knowledge of that activity, and union animus on the part of the employer. See, e.g., *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1064–1065 (2007). Chairman Schaumber notes that the Board and circuit courts of appeal have variously described the evidentiary elements of the General Counsel's initial burden of proof under *Wright Line*, sometimes adding as an independent fourth element the necessity for there to be a causal nexus between the union animus and the adverse employment action. See, e.g., *American Gardens Management Co*., 338 NLRB 644, 645 (2002). As stated in *Shearer's Foods*, 340 NLRB 1093, 1094 fn. 4 (2003), since *Wright Line* is a causation analysis, Chairman Schaumber agrees with this addition to the formulation, which the judge applied in analyzing the circumstances of employee Jeff Jarvis' discharge.

[2] We shall substitute the Board's standard language for certain provisions of the judge's recommended Order and notice.

Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[3] 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."

sentative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 24, 2007.

(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 the Respondent has taken to comply.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 14 shall, within 14 days from the date of this Decision, Order, and Direction, open and count the ballot of Jeff Jarvis. The Regional Director shall then prepare and serve on the parties a revised tally of ballots and issue the appropriate certification.

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 discharge or otherwise discriminate against any of you for supporting International Union of Operating Engineers, Local 150, AFL–CIO or any other labor organization.

WE WILL NOT discharge or otherwise discriminate against any of you because of your testimony in a National Labor Relations Board proceeding.

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

WE WILL, within 14 days from the date of the Board's Order, offer Jeff Jarvis 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 Jeff Jarvis whole for any loss of earnings and other benefits resulting from his 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 Jeff Jarvis, 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.

ROCHELLE WASTE DISPOSAL, LLC

Ahavaha Pyrtel, Esq., for the General Counsel.
Lori L. Hoadley, Esq. for the Respondent.
Bryan P. Diemer, Esq., for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. These cases were tried in Peoria, Illinois on March 12 and April 18, 2008. The complaint in the unfair labor practice case, Case 33–CA–15298, issued on March 28, 2007, and alleges that the Respondent discharged employee Jeff Jarvis in violation of Section 8(a)(1), (3), and (4) of the National Labor Relations Act.[1] On April 3, in representation Case 33–RC–5002, the Regional Director issued a second supplemental decision on a challenged ballot, the determinative ballot of Jarvis, and ordered that the representation case be consolidated with the unfair labor practice case.[2] I find that the Respondent did unlawfully discharge Jarvis, that he should be offered reinstatement and made whole, and that his ballot should be counted.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Rochelle Waste Disposal, LLC (the Company), is a corporation with facilities in Rochelle, Illinois, where it is engaged in the business of providing waste disposal

[1] All dates are in 2007 unless otherwise indicated. The charge was filed on January 25.

[2] The petition was filed on August 18, 2006, and, following two hearings that inter alia related to the eligibility of employee Jeff Jarvis, an election was conducted among employees of the Respondent in the following appropriate unit on February 1, 2007:

> All full-time and regular part-time heavy equipment operators including the scale operator and the landfill supervisor employed by the Employer at the Rochelle Municipal #2 landfill in Rochelle, Illinois; EXCLUDING temporary employees employed through a temporary agency, office clerical and professional employees, guards and supervisors as defined in the Act.

services. The Company annually purchases and receives goods and services valued in excess of $50,000 directly from points located outside the State of Illinois. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that International Union of Operating Engineers, Local 150, AFL–CIO (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background and Procedural Matters

The Company is one of several businesses involved either directly or indirectly in this proceeding. Clyde Gelderloos is a 50-percent owner and managing partner of the Company, Rochelle Waste Disposal, LLC. The other owner is Winnebago Reclamation Service, an entity owned by William Charles Waste Companies. Although it does not appear in the record of this proceeding, at a prior proceeding on June 25, 2008, Gelderloos explained that he is the owner of Rochelle Disposal Services, a waste hauling company that is one of the customers that provides waste to the landfill, Rochelle Municipal No. 2 Landfill. The landfill is owned by the City of Rochelle and has been operated by the Company since 1995.

At the relevant times herein, there were five permanent employees of Rochelle Waste Disposal and two temporary employees at the landfill. Employee Tracy Spires operated the scale house. The temporary employees picked up loose debris and performed other manual tasks. Employee Joe Nelson, who is limited to light duty, operated the tipper, a piece of equipment that tips enclosed trailers onto their ends so that the contents fall out upon the landfill. The other three employees, Landfill Supervisor Jeff Jarvis, Matt Cater, and Mike Grubic operated various other pieces of equipment including a bulldozer, a scraper, and a compactor.

The petition in the representation case was filed on August 18, 2006, and a hearing was held on September 1, 2006. On September 28, 2006, the Regional Director issued a Decision and Direction of Election in which, inter alia, he found that Landfill Supervisor Jeff Jarvis was not a supervisor as defined in Section 2(11) of the Act. On October 12, 2006, following the decisions of the Board in *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), *Croft Metals, Inc.*, 348 NLRB 717 (2006), and *Golden Crest Healthcare Center*, 348 NLRB 727 (2006), the Employer filed a request for review. On October 24, 2006, the Regional Director issued an order advising that he was treating the request for review as a motion for reconsideration. Thereafter, on November 28, 2006, the representation hearing was reopened. The only issue addressed was the supervisory status of Jarvis. On December 20, 2006, the Regional Director issued a Supplemental Decision in which he reaffirmed his prior determination that Jarvis was not a supervisor as defined in the Act. The Employer filed a request for review that was denied by the Board on January 31, the day before the election which was held on February 1.

The description of the appropriate unit identifies the position of Jarvis as "landfill supervisor" and includes him in the unit. Jarvis was terminated on January 24. The Union filed the charge herein alleging that his discharge was unlawful on January 25. Jarvis attempted to vote in the election and his ballot was challenged. The tally reflected two votes for the Union, two votes against representation, and the determinative challenged ballot of Jarvis.

The initial hearing in these cases was held on June 25 and 26. On the first day of the hearing, Jarvis, the alleged discriminatee in Case 33–CA–15298, failed to appear. The Union withdrew the unfair labor practice charge in that case, and the hearing proceeded with regard to the representation case, Case 33–RC–5002, which related to the determinative challenged ballot cast by Jarvis. Jarvis did appear on the second day of the hearing, and the Union moved to reinstate the charge. The administrative law judge denied the motion without stating a reason for the denial. The Union filed a request for special permission to appeal the denial of its motion. On August 1, the administrative law judge issued his decision relating to the representation case. On December 28, the Board, in an unpublished Order, granted the Union's request for special permission to appeal and reversed the administrative law judge's denial of the Union's motion to reinstate its previous withdrawal of the charge in Case 33–CA–15298. The Board remanded these cases, directed that the charge and complaint in Case 33–CA–15298 be reinstated, that the decision of the judge in Case 33–RC–5002 be set aside, and that Case 33–CA–15298 be reconsolidated with Case 33–RC–5002. The Board further directed that a new hearing in the consolidated proceedings be held before a different administrative law judge. By Order dated January 2, 2008, Associate Chief Administrative Law Judge William N. Cates assigned the case to me. The parties agreed to a trial date of March 12, 2008.

At the hearing on March 12, 2008, alleged discriminate Jarvis had a seizure while undergoing cross-examination. After a short recess, counsel for the Respondent moved for a mistrial citing concern that sympathy might affect my findings. I denied that motion noting that what had occurred at the hearing did not color my vision and that the facts upon which I would decide the case were the facts regarding what happened a year ago in January 2007. I hereby reaffirm my denial of the motion for a mistrial. I requested that counsel for the General Counsel present her remaining witnesses in order to assure that the hearing would be completed in 1 day upon its resumption. None of the parties objected to that procedure, and counsel for the General Counsel did present the witnesses. The parties thereafter agreed to reconvene on April 18, 2008. On April 18, cross-examination of Jarvis was completed, and the hearing concluded.

At the reconvened hearing on April 18, 2008, counsel for the Charging Party filed a motion in limine requesting that the Respondent be precluded from introducing any evidence that would constitute relitigation of the finding of the Regional Director that Jarvis was not a supervisor. I ruled that I was not going to preclude the Respondent from presenting its case, but that, insofar as I determined that the evidence presented by the Respondent did constitute a collateral attack upon the findings in the representation case, I would then address the matter. The Respondent, with its brief, filed a response to the Motion in

limine citing portions of the decision of the Regional Director and arguing that its evidence regarding the responsibilities of Jarvis are not inconsistent with the finding of the Regional Director that he was not a supervisor insofar as he did not exercise independent judgment. No probative evidence was adduced establishing that Jarvis was a supervisor as defined in the Act. The motion is now moot.

B. Facts

1. The operation of the landfill

Rochelle Municipal No. 2 Landfill covers approximately 80 acres of land, 62 of which have been authorized to receive waste, but of which only 32 are permitted to receive waste under current regulations. Of those 32 acres, 29 have been used, leaving only three. The Company applied for expansion in 2000 and 2002. The Company voluntarily abandoned the 2000 application and the 2002 application was denied. In 2006, the Company again applied for expansion and that application was approved but with conditions that the Company found unacceptable. The Company appealed the conditions. Although the hearings upon the 2006 application had concluded at the time of the relevant events herein, the Company contends that any violation would reinforce "any kind of concern" that the City of Rochelle might have regarding the expansion.

The landfill operates Monday through Friday from 6 a.m. until 3:30 p.m. and on Saturday from 6 a.m. until 11 a.m. The equipment operators arrive at 5 a.m., prepare the equipment for the day, and move it to the area that is to receive waste. The scale operator arrives by 6 a.m. and, at 6 a.m., begins allowing vehicles to enter. Vehicles entering the landfill are weighed and, when the weight is recorded, a ticket is created that automatically reflects the time the vehicle entered. The vehicles are reweighed as they leave and, when their empty weight is recorded, the time they leave is automatically recorded on the ticket. The difference in weight is the amount of waste received. The remaining four full time employees operate the landfill using various pieces of equipment. A bulldozer is used to excavate what are referred to as "cells," pits into which waste is dumped. The scraper is used to move the excavated dirt and to stockpile nontoxic dirt received as waste but used to cover garbage. The employee operating the compactor spreads, shreds, and compacts the waste. The tipper, as described above, dumps trailers containing waste. The equipment operators also maintain the equipment and roads inside the landfill. At the end of the day, the waste is covered with dirt or an alternate daily cover such as foundry sand, contaminated but nontoxic soil, construction or demolition debris, or tarps if there is insufficient other cover material. The employee working in the garbage would apply the daily cover. Jarvis, who holds a certified landfill operator certification from the Illinois Environmental Protection Agency, would visually check, "[l]ooks good to me," to assure the cover complied with regulations.

At the relevant times herein, Joe Nelson, who had for many years worked for Rochelle Disposal Services, the waste hauling company, and who was and is limited to light duty, operated the tipper and occasionally the scale which was normally operated by Spires. Matt Cater, who had also worked for Rochelle Disposal Services before coming to the landfill in 2002, spent about 90 percent of his time operating the compactor. Jeff Jarvis, who had worked for Rochelle Disposal Services driving a truck for over a year, from August 1992 until December 1993, began working at the landfill on January 27, 2004. Jarvis could and did operate all pieces of equipment and performed maintenance. Mike Grubic had worked for Rochelle Disposal Services from 1984 until 1993 initially as a driver and then as a mechanic. Like Jarvis, Grubic operated various pieces of equipment and performed maintenance. Grubic was the least senior equipment operator, having been hired at the landfill in May 2005.

Jarvis and Gelderloos both were certified landfill operators, certified by the Illinois Environmental Protection Agency. Regulations require that one certified operator be on site or available at all times. Gelderloos typically came to the landfill twice a day for about an hour.

2. Citations and practices at the landfill

The Ogle County Solid Waste Management Department is responsible for assuring that the landfill complies with various environmental regulations and, in that regard, performs regular inspections at the landfill. Inspection reports from the Ogle County Solid Waste Management Department are sent to Thomas Hilbert, an employee of William Charles Waste Services, who is identified on the reports as the "Certified Operator" of the landfill, and to Clyde Gelderloos who is identified as the "Permitted Operator." An inspection on June 15, 2004, resulted in the landfill being cited for various deficiencies including recirculating leachate without a permit and not applying appropriate cover over areas which did not receive additional waste or final cover within 60 days. An inspection on July 20, 2004, revealed an additional violation in that there was "uncovered refuse remaining from any previous operating day or at the conclusion of any ongoing day." An inspection on April 11, 2005, resulted in a violation notice for inadequately maintaining a groundwater monitoring well. An inspection on March 30, 2006, resulted in a citation for failure to utilize a continuous methane detection device in all buildings on the site. On July 28, 2006, the landfill was cited for not inspecting loads of contaminated soil to be used as daily cover and not maintaining a log of the inspections. As a result of an inspection on September 15, 2006, the landfill received a violation notice dated November 6, 2006, setting out several violations including using construction or demolition material as daily cover that did not meet requirements in that it contained other waste and was not properly shredded. The Company responded to all of the foregoing citations and, with regard to the November 6, 2006, violation notice, the Solid Waste Management Department, on January 7, accepted a compliance commitment agreement prepared by Hilbert.

Jarvis, in uncontradicted testimony, denied that he was made aware of the violations resulting from the September 15, 2006, inspection. Employees Matt Cater and Mike Grubic confirmed that the Company never made them aware of any citations received by the landfill. Although Gelderloos claimed at this hearing that he had verbally warned Jarvis, at the representation hearing Gelderloos admitted that he had never disciplined Jar-

vis "because other employees did not do their jobs properly." Jarvis credibly testified that he had never been warned or disciplined.

With regard to the use of construction or demolition material, Jarvis noted that the landfill was not permitted to receive tires but that a large customer, Brackenbox, was bringing tires to the landfill. When Jarvis brought this to the attention of Gelderloos, Gelderloos told him, "[I]t just happens . . . have the laborers get them moved to the inside of the cell where they could be buried with garbage." Jarvis explained that, shortly after he began working at the landfill, he was in the process of hauling clean dirt to use as daily cover because there was insufficient sand or demolition material. Gelderloos told him that "that was enough dirt, to stop hauling it." On another occasion, after a heavy rainfall, Gelderloos directed Jarvis to pump contaminated water into a creek. Evan Buskohl, environmental compliance manager with William Charles Waste Companies, who works with Rochelle Waste and Winnebago Reclamation, visited the landfill and observed what was occurring. He called Jarvis, asked, "what we were doing," and pointed out that they could not pump the contaminated water into the creek. Jarvis answered that he "was told to by the man who signs my checks." Shortly after this, Gelderloos told Jarvis to stop the pump.

3. The January 13 inspection and immediate aftermath

On Saturday, January 13, the landfill closed at 11 a.m. Three vehicles entered the landfill during the last half hour. A large truck from Brackenbox containing over 18 tons of construction or demolition debris arrived at 10:34 a.m. and departed at 10:56 a.m. One vehicle carrying less than a ton of household trash entered at 10:35 a.m. and departed at 10:47 a.m. Another vehicle carrying less than a ton of household trash entered at 10:46 a.m. and departed at 10:53 a.m. The employee timecards for January 13 reflect that Nelson punched out at 11 a.m., Spires at 11:01 a.m., Cater at 11:07 a.m., Grubic at 11:09 a.m., and Jarvis at 11:09 a.m. Grubic, who had been working in the garbage, would have been the employee responsible for applying the cover. Jarvis, Grubic, and Cater all testified that the cover left over the waste that day was adequate.

Joy Bliton, a solid waste management specialist/environmental engineer for the Ogle County Solid Waste Management Department, performs regular inspections at the landfill and also receives complaints. She received two complaints late in 2006 regarding uncovered garbage after the landfill closed. On November 28, 2006, she called Tom Hilbert regarding the first complaint. On December 29, 2006, she spoke with Gelderloos regarding the second complaint. On the afternoon of January 13, Bliton went to the closed landfill and, from its fenced perimeter, took photographs of the landfill with a digital camera. Several of the photographs depict waste that was not fully shredded and compacted as well as the presence of a tire.

I concur with the argument in the Respondent's brief that the time designations relating to the arrival and departure of vehicles in the last half hour before the closure of the facility on January 13, coupled with the timecard departure times of the employees, contradicts their testimony that adequate cover was applied that day. The photographs taken by Bliton confirm that adequate cover was not applied. I find that the testimony of the employees with regard to January 13 was inaccurate. As hereinafter discussed, it is also immaterial to the issues herein.

Monday, January 15, was the Martin Luther King Jr., holiday, but the landfill operated that day. On that day, Engineering Manager Hilbert received a call either from Steve Rypkema, Bliton's superior, or Bliton in which he was told of "concerns over the complete lack of cover over the weekend," and that a violation notice would be issued. Hilbert was informed that photographs had been taken, and he requested to see them. On Wednesday, January 17, administrative assistant Sandy Golan attempted to e-mail some of the photographs that Bliton had taken to Hilbert. The e-mail stated that Bliton "asked me to e-mail these pictures," and requested that Hilbert let her know if he did not receive them. Although Hilbert testified that he received the pictures on that Wednesday, I find that he was mistaken in that regard because, on January 22, Golan sent Hilbert a second e-mail stating, "I'm sorry it has taken so long to email these pictures to you." On January 31, Hilbert sent the photographs to Gelderloos giving the subject of the e-mail as "FW: Pictures from Inspection on January 13" and stating

> This was sent from Ogle County. It is a follow up to a verbal notification from the Ogle County Waste Department that an inspection was performed on Saturday afternoon on Jan. 13, 2007. It shows a clear lack of adequate daily cover. The other thing that was a concern for the county was that the areas uncovered faced away from the road giving the appearance that was an intent to hide the areas which were not adequately covered.
>
> Any question please call.

Hilbert testified that he recommended to his boss, whom he did not name, and Gelderloos that there be a "change in personnel at the landfill because we needed to ensure . . . we were operating in compliance with . . . requirements."

As already noted, Evan Buskohl is employed by William Charles Waste Companies as an environmental compliance manager with responsibilities for Rochelle Waste and Winnebago Reclamation. Winnebago Reclamation owns 50 percent of Rochelle Waste. Buskohl did not work on the January 15 holiday. On the morning of January 16, Buskohl testified that he met with Hilbert, who is his superior, and the manager of a sister landfill, presumably Winnebago Reclamation, although that was not stated in the record. Buskohl was informed that "we have had cover issues" at the Rochelle landfill and was asked if he would be willing to "go down there and run the landfill." Buskohl agreed to do so and went to the landfill that afternoon. Jarvis recalled that Gelderloos introduced Buskohl as operations manager; however, he signed the letter discharging Jarvis as "Operations Supervisor." He did not identify himself as landfill supervisor, the term by which Jarvis is identified in the description of the unit.

Gelderloos testified that "Well, when Mr. Jarvis decided he was not a supervisor, I had to hire a supervisor," and that Evan Buskohl was brought on. When asked whether Buskohl was brought on as a result of some event, Gelderloos responded; "As a result principally of the incident on Saturday . . . where the waste was left uncovered." Gelderloos did not testify from

whom he learned of the January 13 inspection, when he learned of it, or what deficiencies were being claimed by Ogle County. The e-mail from Hilbert to Gelderloos is dated January 31.

The Company introduced its payroll for February 9 which does not include the name of Jarvis. The payroll also does not include the name of Buskohl. Buskohl, unlike hourly employee Jarvis, was salaried. The absence of his name on the Company payroll suggests that he continued to be paid by William Charles Waste Companies. Contrary to his testimony, Gelderloos did not "hire a supervisor." Buskohl was sent by Hilbert. Although Hilbert testified that he was told of "concerns over the complete lack of cover over the weekend," the only information to which Buskohl testified was that there were "cover issues."

4. The discharge of Jeff Jarvis

Jarvis, with Cater and Grubic, contacted the Union in August 2006 and signed authorization cards. At the initial representation hearing held on September 1, 2006, those three employees sat together immediately behind the union organizer, Mike McCaffrey, and the attorney representing the Union. They again sat together behind McCaffrey and the attorney representing the Union at the supplemental hearing on November 26, 2006. The Company contended that Jarvis was a statutory supervisor and not eligible to vote. The Union contended that that he was not a supervisor and was eligible to vote. Jarvis testified regarding his duties and responsibilities. Gelderloos admitted that the testimony of Jarvis was not consistent with the position of the Company.

Jarvis was a certified landfill operator and could and did operate all of the equipment at the landfill, including, when necessary, the scale. Buskohl was not a certified landfill operator and, according to his testimony, "mostly" operated the tool carrier which he utilized as a "means for transportation." Buskohl testified that he also operated the tipper, which was employee Nelson's job and, on a few occasions, the scraper and also the bulldozer, "pushing piles of dirt," but that he had "no skill level of grading." He never operated the compactor. He admitted that he "wasn't a very good operator." As found in the representation proceeding, Jarvis spent the "vast majority of his time operating equipment or working in the shop."

On January 16, as the employees were preparing to leave after Gelderloos introduced Buskohl, Buskohl recalls that Jarvis commented that he guessed he was "not the supervisor anymore." Buskohl responded, "Well, you indicated that you weren't."

The following morning, Buskohl informed Jarvis that demolition material was no longer acceptable as cover, and the Company purchased more tarps. Employee Cater observed that, soon after Buskohl arrived, the landfill began receiving contaminated but nontoxic soil and they "could actually prepare for the next day with as much cover as we were getting at that time."

Thereafter, Buskohl evaluated the work force by observing the employees and, on Monday, January 22, had each employee evaluate himself regarding his competence in operating the various pieces of equipment. Nelson operated only the tipper and, occasionally, the scale. Jarvis operated everything and, on a scale of 1 to 10, rated himself no lower than 8. Neither Grubic nor Cater rated themselves higher than 7 on any piece of equipment.

Buskohl claims that he determined that the landfill was overstaffed and that he had to select one employee for discharge. He did not consider discharging scale operator Spires. He did not select Joe Nelson for termination because Nelson had previously worked for Rochelle Disposal Services and, with the two companies, had 20 years of service. Due to Nelson's workers compensation injury, "whether we had him on site or not we were going to pay him either way." Buskohl considered Cater to be the best compactor operator although he never observed Jarvis operate the compactor. On the self evaluation, Cater rated his skill level on the compactor at 7 and Jarvis rated himself at 9. He did not select Grubic, the least senior employee, claiming that Grubic "had good mechanical skills," noting welding but then acknowledging that welding did not "come to play too often," and that Grubic "had some electrical skills" and "was very important to the site in my mind."

At the hearing, prior to when Buskohl testified, employee Matt Cater testified that on the afternoon of January 24, the afternoon that Jarvis was discharged, he was offered a job as a driver for Rochelle Disposal Services. He explained that Buskohl requested Cater to come with him, and that they went to the offices of Rochelle Disposal Services and met in an office with Clyde Gelderloos and his son Chad Gelderloos, who manages Rochelle Disposal Services. Buskohl said that the landfill was overstaffed and that someone needed to be let go. He stated that "Clyde Gelderloos and Chad Gelderloos were offering me a packer route position," i.e., driving for Rochelle Disposal Services. Cater, like both Grubic and Jarvis, had previously driven for Rochelle Disposal Services. Cater asked whether he had to take the position, and Buskohl answered that he did not. Cater then asked whether he was still employed at the landfill. Buskohl answered that he was. Cater stated that he felt that he was a good employee and that "I would take my odds and I would go back to the landfill." As they were returning, Buskohl commented that "he thought it would be a lot easier if I did not say anything to the other employees about what was said at the meeting."

In testimony that I can only characterize as bizarre, Buskohl acknowledged the foregoing meeting and explained that it took place because he was concerned about Cater "jumping ship," and he "wanted to verify that he wasn't going to work at the hauling company." He noted that if Cater "was going to go to the hauling company at a position, then I may have kept Jeff [Jarvis] or Grubic." Buskohl then claimed that there were no vacant driving positions at Rochelle Disposal Services and that, even if one did come open, he would not have considered either Jarvis or Grubic "because they hadn't proven their desire in the past to operate at the hauling company." Buskohl knew that Jarvis had driven a truck for Rochelle Disposal Services for 1-1/2 years because Jarvis told him so during his self evaluation interview, and Buskohl recorded that answer on the form relating to Jarvis.

Cater credibly testified that Buskohl stated, in the presence of Clyde and Chad Gelderloos, that they were offering him a job. Clyde Gelderloos did not address this meeting, and Chad

Gelderloos did not testify. The fact that Buskohl would untruthfully represent to an employee that there was a position when in fact there was no such position is disturbing. Insofar as the position did not exist, it would appear that the trip to Rochelle Disposal Services, at which Buskohl announced that Rochelle Waste was overstaffed and that he was going to have to let someone go, was a diversionary tactic to obfuscate his intentions regarding Jarvis. Insofar as it did exist, the failure to offer the position to Jarvis is consistent with a finding of a discriminatory motive.

Buskohl acknowledged that Jarvis had a good working knowledge of all pieces of equipment, "may have been the best dozer operator," had a good working knowledge with the site pumps, and he had some safety training." Buskohl decided that Cater and Grubic "were the two people I wanted to work with going forward." Thus, Jarvis would be discharged. With regard to "going forward," there is no evidence that Buskohl's assignment to the landfill was expected to be permanent. He left in June.

When asked whether, in making the decision to discharge Jarvis, he had taken into consideration the participation of Jarvis in the representation hearing, Buskohl answered," I really did not. I was aware of some poor judgment on the covering on the 13th. I was aware of prior hearings, but I did not—it was me running the landfill and who was going to best operate the landfill going forward." Buskohl conducted no investigation to determine the responsibility for cover on January 13. If he had done so, he would have learned that Grubic was in the garbage and, therefore, was the employee responsible for applying the cover.

On January 24, Buskohl informed Jarvis that he had evaluated the workforce which was overstaffed, that he had to terminate someone and "that someone was going to be me." Jarvis asked why. Buskohl repeated that he had "evaluated the workforce, and I was the one he had chosen." A letter to Jarvis, dated January 24 and signed by Buskohl as Operations Supervisor, states that he was terminated pursuant to "a necessary permanent reduction in force."

After discharging Jarvis, Buskohl admitted that he "did allow" a temporary employee "to become familiar with the loader, and he would occasionally operate the tipper." Employee Grubic noted that, after Jarvis was discharged, maintenance was not "getting done when it was supposed to get done" and that, "[i]n the past, Jeff [Jarvis] did a lot of maintenance."

Gelderloos denied any involvement in the decision of Buskohl to discharge Jarvis. I find it incomprehensible that the newly arrived operations supervisor would not consult with the 50-percent owner of the Company and managing partner who had been at the landfill an average of twice a day for over 10 years, since 1995, when the Company began operating it, regarding the skills and competence of the employees who worked there.

Gelderloos admitted that prior, to January 24, although there had been fluctuations in the workload, he had never laid off any employee. As set out in the briefs of the General Counsel and Charging Party, documentary evidence establishes that the volume of waste received at the landfill in 2007 exceeded that received in 2006.

C. Analysis and Concluding Findings

The complaint alleges that the Respondent discharged Jarvis because of his union activities and testimony at the representation case hearing in violation of Section 8(a)(1), (3), and (4) of the Act. As with alleged 8(a)(3) violations, an analysis pursuant to *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). cert. denied 455 U.S. 989 (1982), is applicable in cases involving the 8(a)(4) allegations. *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). Although the Respondent points out that Jarvis never informed the Respondent that he had signed a union authorization card, the Respondent does not deny that he twice sat with Cater and Grubic behind union organizer McCaffery and the union attorney, and Gelderloos admitted that the testimony of Jarvis was not consistent with the position of the Respondent. The discharge of Jarvis was an adverse employment action. The evidence adduced by the General Counsel established "a motivational link, or nexus, between the employee's protected activity and the adverse employment action.

Although there are no independent 8(a)(1) allegations in the complaint, "motive may be inferred from the total circumstances proved." *Fluor Daniel, Inc*., 304 NLRB 970 (1991), enfd. 976 F.2d 744 (11th Cir. 1992). Furthermore, "[t]iming alone may suggest antiunion animus as a motivating factor in an employer's action." *Sears, Roebuck & Co.*, 337 NLRB 443 (2002), citing *Masland Industries*, 311 NLRB 184, 197 (1993), quoting *NLRB v. Rain-Ware, Inc*., 732 F.2d 1349, 1354 (7th Cir. 1984).

The Respondent argues that there is no basis for inferring animus insofar as Jarvis was not terminated until some 5 months after he first testified. I note that an immediate termination would virtually assure a finding that the termination was retaliatory. At the representation case hearings, Jarvis "testified prominently and adversely to Respondent's positions." *Success Village Apartments,* 348 NLRB 579, 599–600 (2006). Gelderloos characterized that testimony as being "when Mr. Jarvis decided he was not a supervisor." The Board, not Jarvis, determined that he was not a statutory supervisor and was, therefore, eligible to vote. The Respondent does not address the fact that removal of a known union adherent from the unit shortly before a representation election "would materially reduce its [the union's] prospect for a majority" and is evidence of a discriminatory motive. *Hapsco, Inc.*, 196 NLRB 936, 939 (1972); see also *Super Tire Stores*, 236 NLRB 877, 883 (1978). The termination letter given to Jarvis 8 days before the representation election refers to "a necessary permanent reduction in force," thereby forestalling any claim of a reasonable expectation of recall. I find that the foregoing wording was not accidental."

The testimony of Gelderloos that Jarvis decided that he was not a supervisor and that he therefore had to hire a supervisor establishes the nexus between the testimony of Jarvis at the representation hearings and his termination. The hostile tone in which Gelderloos stated, "Well, when Mr. Jarvis decided he was not a supervisor, I had to hire a supervisor," revealed animosity towards Jarvis that appears not to have moderated since those hearings. Those hearings established that Jarvis was not a supervisor. He had been employed since January 23, 2004. Although the Respondent had been cited for multiple environmental viola-

tions after his employment, Jarvis was not held responsible for any of those violations. He had never been warned or disciplined.

Gelderloos claimed that he "had to hire a supervisor" and that Buskohl was "brought on" because "the waste was left uncovered on January 13." The record establishes that no one was hired. William Charles Waste Companies, the owner of the Respondent's other 50-percent owner, Winnebago Reclamation, sent its Environmental Compliance Manager Buskohl to the landfill. Buskohl's name does not appear on the payroll of Rochelle Waste that the Respondent placed into evidence.

The Respondent, in its brief, asserts that the January 13 violation was "blatant and intentional" and that the Respondent "could no longer trust that Jarvis would keep the landfill in compliance" and that "its only reasonable choice was to place a responsible Site Supervisor at the landfill." I disagree. As of January 15, the Respondent had only one verbal report, "concerns over the complete lack of cover over the weekend," which was substantively no different from the violation notice of July 20, 2004, that revealed "uncovered refuse remaining from any previous operating day or at the conclusion of any ongoing day," or the November 6, 2006, violation notice predicated upon the September 15, 2006, inspection that cited the Respondent for multiple infractions including using construction or demolition material as daily cover that did not meet requirements in that it contained other waste and was not properly shredded. There was, on January 15, no evidence of a "blatant and intentional" violation. The photographs taken by Bliton were not received by Hilbert until January 22 and were not sent to Gelderloos until January 31. There is no evidence that Buskohl ever saw them. The Respondent conducted no investigation to determine responsibility for cover on January 13. If an investigation had been conducted, the Respondent would have learned that Grubic was in the garbage and, therefore, was the employee responsible for applying the cover.

If, as the Respondent argues, the problem were trusting Jarvis, the Respondent would have discharged him for failure to perform his job duties, duties that did not involve 2(11) supervisory authority. There would be no reason to engage in the charade of claiming that the landfill was overstaffed and then purportedly evaluating the personnel. Neither on this occasion or on any previous occasion did the Respondent warn or discipline Jarvis for his own conduct or the conduct of one of his fellow employees. The Respondent had received violation notices in 2004, 2005, and 2006 but did not appoint Buskohl as operations supervisor. Bliton had reported complaints of uncovered garbage to both Hilbert and Gelderloos in November and December 2006. Bliton did not report complaints to Jarvis. Jarvis was never advised of the multiple violations cited as a result of the inspection on September 15.

The denial by Clyde Gelderloos that he was involved in the decision to terminate Jarvis is suspect in view of his involvement in the offer of what Buskohl claims was a nonexistent job as a driver for Rochelle Disposal Services to employee Cater. Chad Gelderloos, the son of Clyde Gelderloos, was present when Jarvis was discharged. Chad Gelderloos did not testify.

The landfill was not overstaffed. Buskohl did not replace Jarvis. He did not regularly operate heavy equipment, and there is no evidence that he performed maintenance. Although asserting that he operated equipment for approximately 4 hours a day, Buskohl admitted that at least two of those hours was driving the tool carrier which he utilized as his "primary mode of transportation." He claims to have operated the tipper, but that was employee Nelson's job, a job not regularly performed by any of the other equipment operators. He states the on a few occasions he operated the scraper and also the bulldozer, "pushing piles of dirt," but that he had "no skill level of grading." He never operated the compactor. In short, Buskohl was an environmental compliance manager, not a heavy equipment operator. As observed in the brief of the Charging Party, Buskohl was "engaged in supervisory functions that had never been performed at the landfill" and "was not operating equipment to a degree or extent that would have made it necessary to lay off one of the other equipment operators." Buskohl's testimony regarding the need to reduce staff is contradicted by his admission that, following the discharge of Jarvis, he put a temporary employee on the loader and tipper. The absence of Jarvis left a gap that Buskohl had to fill, and he did not fill it himself. He took the unprecedented action of assigning the operation of equipment to a temporary employee. Employee Grubic noted that, after Jarvis was discharged, maintenance was not "getting done when it was supposed to get done" and that "[i]n the past, Jeff [Jarvis] did a lot of maintenance. Jarvis, as found in the representation proceeding, spent the vast majority of his time operating heavy equipment and "in the shop" where maintenance was performed. Buskohl did not have those skills.

As pointed out in *Success Village Apartments,* supra at 599–600:

> When a respondent's stated motives for its actions are found to be false, the circumstances warrant an inference that the true motive is an unlawful one that the respondent desires to conceal. *Flour Daniel Inc.*, 304 NLRB 970, 971 (1991); *Fast Food Merchandisers*, 291 NLRB 897, 898 (1988); *Shattuck Denn Mining Co.*, 362 F.2d 466, 470 (9th Cir. 1966). Thus, proof that a respondent's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, from which the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose, as the Supreme Court phrased it, as "affirmative evidence of guilt." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

The offer of what Buskohl claims was a nonexistent position to Cater was a ruse. Cater's testimony regarding the offer of the position was uncontradicted by either Clyde or Chad Gelderloos. I do not accept the testimony of Buskohl that the offer was to determine whether Cater might "jump ship." There is no evidence that Cater would "jump ship." When employed at the landfill, Cater had driven for Rochelle Disposal Services on occasions that he was asked to do so because "I got to do what they say." As the Charging Party points out in its brief, if Cater had taken the position, the Respondent would have removed a union supporter from the unit and achieved the objective of remaining union free. I need not address or determine what would have occurred if Cater had accepted the position. He did not. On this record it appears that the offer was designed to

obfuscate the Respondent's intentions with regard to Jarvis. Confirmation of my conclusion in that regard is the fact that the Respondent did not offer the position to Jarvis after Cater declined it. Jarvis had driven for Rochelle Disposal Services for a year and a half, and Buskohl knew that as a result of the self evaluation interview in which he recorded that answer on the form relating to Jarvis.

The Respondent argues that Buskohl determined to discharge Jarvis after evaluating the skills and situations of the employees and concluding that Cater was the best compactor operator. Buskohl never observed Jarvis operate the compactor. After observing the employees for a week and, purportedly, without any input from Gelderloos, he concluded that Grubic "was an exceptional mechanic" and that his skills "were more important to the landfill operation that those of Jarvis." Jarvis was a certified landfill operator who could operate all of the equipment at the landfill. Insofar as Grubic "exceeded . . . expectations" as a scraper operator once Jarvis was gone, Buskohl questioned whether Jarvis was the best scraper operator although he acknowledged that Jarvis "may have been the best dozer operator." He admitted that Jarvis had a "good working knowledge with the site pumps, and . . . safety training," qualifications that Buskohl did not claim Cater or Grubic possessed.

Buskohl did not testify that he disagreed with the self ratings of the employees regarding their competence upon the machinery they operated. Neither Cater or Grubic rated themselves higher than Jarvis with regard to competence in the operation of any piece of heavy equipment. Although Buskohl considered Cater to be the best compactor operator, he never observed Jarvis operate the compactor, and Cater rated himself at 7 whereas Jarvis rated himself at 9.

The Respondent argues that the determination to discharge Jarvis was a business decision. I disagree. The decision was a retaliatory decision made against Jarvis for his support of the Union and his testimony at the representation hearing at which Clyde Gelderloos felt that "Jarvis decided he was not a supervisor." I find the claim of noninvolvement by Gelderloos in the decision to discharge Jarvis to be incredible in view of the reality that he had managed the landfill for over a decade and purportedly continued to do so after Buskohl was sent there by William Charles Waste Companies. The failure of Gelderloos to address the meeting at which Cater was offered a driving position further confirms my finding that the offer was a ruse designed to obfuscate the determination of the Respondent to discharge Jarvis.

I need not speculate with regard to what would have occurred in the absence of the serendipitous occurrences of the January 13 inspection and telephone call to Hilbert on January 15 which gave the Respondent the excuse of ostensibly overstaffing the landfill by sending Buskohl. If the Respondent had terminated Jarvis shortly after either the first or supplemental representation case hearing, its motivation would have been obvious. I find it equally obvious that, following the serendipitous occurrences, the termination of Jarvis 8 days before the election purportedly because of "a necessary *permanent* [emphasis added] reduction in force," was motivated by his protected activity.

Buskohl was not a truthful witness. I have found that the credible testimony of Cater, undenied by either Clyde or Chad Gelderloos, establishes that a position was offered to Cater. Thus, Buskohl either was untruthful to Cater when offering to him what he now contends was a nonexistent position, or untruthful at the hearing when he testified that no position existed. With regard to the decision to discharge Jarvis, when asked whether he had taken into consideration the participation of Jarvis in the representation hearing, Buskohl answered, "I really did not. I was aware of some poor judgment on the covering on the 13th. I was aware of prior hearings, but I did not." His dismissive, "I really did not," was not credible. His gratuitous reference to alleged but uninvestigated "poor judgment" on January 13 seemed contrived and was not responsive. His responsive answer acknowledged his awareness of the "prior hearings." I find that the testimony of Buskohl that consideration of the prior hearings "really did not" relate to his discharge decision was incredible and that the truth is the opposite of that testimony. *NLRB v. Walton Mfg. Co.,* 369 U.S. 404, 408 (1962).

At the representation case hearings, Jarvis "testified prominently and adversely to Respondent's positions" and Clyde Gelderloos felt that Jarvis, not the Board, "decided he was not a supervisor." The Respondent thereafter seized upon the verbal report of a cover violation to assign Environmental Compliance Manager Buskohl, who did not operate heavy equipment, to the landfill. Buskohl, claiming that the landfill was overstaffed, evaluated the employees and, purportedly with no input from Gelderloos, retained Cater and Grubic, the least senior employee, neither of whom had rated themselves higher than Jarvis with regard to their competence in operating equipment that Buskohl did not operate. Buskohl, acting for the Respondent and purportedly with no involvement by Clyde Gelderloos, took the unprecedented action of discharging Jarvis pursuant to a reduction in force. Clyde Gelderloos had never laid off any employee notwithstanding fluctuations in the workload. Jarvis was not offered the position of a driver for Rochelle Disposal Services, the position offered to Cater in the presence of Clyde Gelderloos shortly before Jarvis was discharged.

The General Counsel has established that the removal of Jeff Jarvis from the unit by discharging him 8 days before the representation election was motivated by his union activity and testimony adverse to the position of the Respondent. The Respondent has not established that he would have been discharged in the absence of that activity and testimony. By discharging Jeff Jarvis, the Respondent violated Section 8(a)(1), (3), and (4) of the Act.

D. The Representation Case

I have found that the Respondent unlawfully discharged Jarvis because of his union activity and testimony at a representation case hearing. But for the unlawful discharge, Jarvis would have been employed on February 1. His position as landfill supervisor is specifically included in the unit. I shall recommend that the challenge to his ballot be overruled and that it be opened and counted.

CONCLUSIONS OF LAW

1. By discharging Jeff Jarvis because he engaged in pro-

tected union activity, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

2. By discharging Jeff Jarvis because of his testimony in a National Labor Relations Board representation hearing, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (4) and Section 2(6) and (7) of the Act.

REMEDY

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

The Respondent having discriminatorily discharged Jeff Jarvis it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from January 24, 2007, to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]