

**United Exposition Service Co., Inc. and James T. Gibson.** Case 14-CA-20188

September 28, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
CRACRAFT AND OVIATT

On June 27, 1990, Administrative Law Judge Robert W. Leiner issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order as modified.<sup>2</sup>

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, United Exposition Service Co., Inc., St. Louis, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Reappoint employee James (Terry) Gibson to any and all supervisory positions in out-of-town exhibitions on the same basis on which he was previously reappointed prior to September 18, 1988, and make him whole for any loss of earnings he may have sustained by reason of Respondent's unlawful refusal to reappoint him to supervisory positions commencing

<sup>1</sup>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), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In sec. III,D, "Unsuitable Temperament," par. 4 of his decision, the judge found that employee Gibson and Supervisor Kettlekamp had a dispute at a show in 1987. We note that Gibson did not work the show in question, and his dispute with Kettlekamp occurred in St. Louis at a later date in 1987. This factual error does not affect the judge's treatment of Kettlekamp's testimony.

In sec. III,D, "Unsuitable Temperament," par. 14 of his decision, the judge referred to "July 7, 1988." We correct this to read "July 7, 1989." Based on this incorrect dating, the judge erroneously concluded that two complaints regarding Gibson's work occurred after the filing of the unfair labor practice charge in this case, and the judge, in part, relied on this to discount some of Kettlekamp's testimony and Supervisor Griffith's testimony. We do not rely on this incorrect finding. The judge, however, detailed other bases for his credibility findings that do not depend on his factual error.

In sec. III,D, "Discussion and Conclusions," par. 10 of his decision, the judge referred to "(1994-1998)." We correct this to read "(1984-1988)."

We note that the correct cite to *Hitchiner Mfg. Co.* is 243 NLRB 927 (1979).

<sup>2</sup>We shall modify the recommended Order to provide for the payment of interest, as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), on any backpay which might be due.

September 18, 1988, with interest in the manner set forth in this decision."

2. Substitute the attached notice for that of the administrative law judge.

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT tell our employees that they will be denied reappointment to supervisory positions on out-of-town exhibitions because, as employees, they engaged in lawful union or other concerted activities protected by Section 7 of the Act.

WE WILL NOT deny reappointment to our employees as supervisors because, as employees, they have engaged in lawful union activities or activities protected by Section 7 of the Act.

WE WILL NOT discourage membership in Local Union No. 600, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, or any other labor organization, by denying reappointment to our employees as supervisors on out-of-town exhibitions because, as employees, they have engaged in union or other protected concerted activities.

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 reappoint employee James (Terry) Gibson to any and all supervisory positions in out-of-town exhibitions on the same basis on which we previously reappointed him prior to September 18, 1988, and WE WILL make him whole for any loss of earnings he may have sustained by reason of our unlawful discrimination against him, plus interest.

UNITED EXPOSITION SERVICE CO., INC.

*Frenchette C. Potter, Esq.*, for the General Counsel.  
*Ross A. Friedman, Esq. (Susman, Schermer, Rimmel & Shifrin)*, of St. Louis, Missouri, for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge. This matter was heard on October 24, 1989, in St. Louis, Missouri, on the General Counsel's August 29, 1989 complaint and no-

tice of hearing<sup>1</sup> alleging, in substance, that Respondent, United Exposition, Service Co., Inc., violated Section 8(a)(1) of the Act by telling an employee that another employee would not receive certain work assignments because of his activities on behalf of Teamsters Local Union No. 600, affiliated with International Brotherhood of Teamsters (the Union); and that Respondent violated Section 8(a)(1) and (3) of the Act by failing and refusing to assign James Gibson, the Charging Party, certain out-of-town work because of his activities on behalf of the Union. Respondent filed its timely answer to the General Counsel's complaint, admitting certain allegations, denying others, and then denying the commission of any unfair labor practices.

At the hearing, all parties were represented by counsel, were given full opportunity to call and examine witnesses, submit oral and written evidence, and to argue orally on the record. At the close of the receipt of evidence, the parties waived final argument and requested the opportunity to submit posttrial briefs. Thereafter, the General Counsel and Respondent filed timely posthearing briefs which have been carefully considered.

From the entire record, including the briefs, and from my most particular observation of the demeanor of the witnesses as they testified, I make the following

#### FINDINGS OF FACT

##### I. RESPONDENT AS STATUTORY EMPLOYER

The complaint alleges, Respondent admits, and I find that, at all material times, Respondent, a corporation with an office and place of business in St. Louis, Missouri, has been engaged in the operation of a convention and exposition decorating service. During the 12-month period ending July 31, 1989, Respondent, in the course and conduct of its business operations, derived gross revenues in excess of \$500,000; and purchased and received at its St. Louis, Missouri facility, products, goods, and materials valued in excess of \$50,000 which goods were shipped directly to Respondent's St. Louis, Missouri facility from suppliers located outside the State of Missouri. Respondent admits and I find that, at all material times, it has been and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

##### II. THE UNION AS STATUTORY LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that Teamsters Local Union No. 600, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union) is now, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

##### III. THE ALLEGED UNFAIR LABOR PRACTICES

###### A. Background

Respondent's exposition and convention business is nationwide. The Central Division, located in St. Louis, Missouri, nevertheless runs conventions, from time to time, in New Orleans, Louisiana; Nashville, Tennessee; Indianapolis,

Indiana; Las Vegas, Nevada; and Atlanta, Georgia. The clients for whom Respondent runs expositions include the Snack Food Association, The American Rental Association, The American Newspaper Publishers Association, The American Fishing Tackle Manufacturing Association, and National School Supply and Equipment Association. Certain of Respondent's supervisors (Account Executives) either singly or in combination, organize and operate individual shows. The Account Executives ordinarily decide which employees they will utilize to actually operate and man the erection and rigging of machinery at the out-of-town shows; and, through such Respondent employees, hire other local employees to assist in operation of the exhibits. The Account Executives ordinarily would check with other Respondent's supervisors to determine the eligibility and availability of its employees to work on its out-of-town jobs. These supervisors are principally in the decorating and freight-and-machinery ends of the business. Respondent employs nine Account Executives operating out of St. Louis.

In addition to the out-of-town business, Respondent operates and manages expositions in St. Louis, known as "in-town" work. In the operation of "in-town" work, Respondent maintained a collective-bargaining agreement with Local 600, IBT, for a unit of employees, employed in the St. Louis area, who "receive, load, unload, deliver by rigging or otherwise, and operate all material handling equipment for that purpose . . . to perform the work the Employer has been hired to perform." The recognized Teamsters unit work excludes work performed by Respondent's decorator employees under labor agreements with the Awning and Decorators Union, Locals 25 and 39, and also excludes maintenance and cleaning personnel, graphic arts personnel, guards, professionals, clerical, and supervisors as defined by the National Labor Relations Act (R. Exh. 3; art. 2.1).

Respondent's supervisor over employees in the hauling and rigging operation is Ray Griffith. At all material times, he has supervised eight regular, unit employees, the most senior of which is Cecil Hampton followed next by James (Terry) Gibson. The other unit employees, in order of seniority, are Steve Welch Jay Meyer, Robert Roth, Paul Nichols, Mike Lepping, and Mike Karl (R. Exh. 1).

There is no dispute that work is assigned to unit employees on the in-town jobs by seniority, but that contract seniority has no application in the selection or appointment of Respondent's employees to the "out of town" jobs. It was stipulated that, at all material times prior to an economic strike of unit employees, commencing September 7, 1988, the Charging Party, when employed by Respondent in St. Louis, was employed as a unit employee but when employed on out-of-town jobs, was employed only as a statutory supervisor (Tr. 101).

On March 31, 1988, the collective-bargaining agreement between the Teamsters and Respondent expired. Thereafter, in the period September 7 to 18, 1988, the Teamsters unit employees engaged in an economic strike which included picketing outside Respondent's St. Louis office and at other facilities where Respondent was working in the St. Louis area. On September 18, 1989, the parties executed a collective-bargaining agreement made retroactive for the period April 1, 1988, through March 31, 1991.

<sup>1</sup> The Charging Party's underlying unfair labor practice charge was filed and served on July 7, 1989.

### B. James (Terry) Gibson

As above noted, Gibson a unit employee since 1978, ranks number 2 in seniority to Cecil Hampton. Employed as a unit employee on in-town work for almost 12 years, he worked for 9 years (up through the September 7, 1988 strike) as a supervisor on out-of-town work. His duties, both in town and out of town, included driving tractor trailers and forklifts, rigging, loading, and unloading trucks. He moves freight to, and unloads freight at, the convention site and returns the freight to the trucks after the exposition. In his out-of-town work as a supervisor, he sometimes supervised work crews of up to 100 persons at which time there would ordinarily be more than one supervisor assigned by Respondent. Gibson, and other out-of-town supervisors, received an additional \$1 per hour for out-of-town work.

Prior to April 1988, Gibson, and all other employees, worked 8-hour days. In April 1988, Respondent closed its St. Louis warehouse and Gibson and all other employees (with the exception of the most senior Cecil Hampton) became employees on 24-hour call with a 4-hour-per-day guarantee.

From time to time, Gibson has received letters of commendation from out-of-town exhibitors because of his work as a supervisor on their out-of-town jobs. Other employees have been similarly commended. In 1986, he received a warning letter and lost a day's pay for failing to remain at his proper workplace (R. Exh. 2).

As above noted, Respondent selected Gibson to work on out-of-town jobs for a period of about 9 years prior to the strike. After the strike, he was never selected to work on any out-of-town jobs. For many years the more senior Cecil Hampton, originally offered out-of-town work ahead of Gibson, regularly rejected the opportunities because of his desire to remain with his children in the St. Louis area. Respondent then regularly offered the out-of-town assignment to Gibson. For the first 3 years of working out-of-town assignments, Gibson was the only employee offered the out-of-town work. After the 3-year period, the third Teamsters in seniority, Steve Welch, was also offered out-of-town work. Ordinarily, however, Gibson received the first offer of out-of-town work.<sup>2</sup>

### C. The September 7–18, 1988 Strike

As above noted, Respondent's unit employees covered by the Teamsters contract engaged in an economic strike commencing September 7, 1988, ending with the execution of a retroactive successor contract on September 18, 1988. All Respondent's unit employees had engaged in picketing during the strike, with Gibson picketing more than other employees, sometimes picketing as much as 18 hours a day compared to the 10 to 14 hours per day which the other employees picketed. Other employees followed Respondent's vehicles, sometimes cutting them off while en route. Respondent employees, including Gibson, called replacement employees "scabs" as they entered various Respondent premises. It is also uncontested that Gibson wiggled his ears and made funny faces at one of Respondent's Account Ex-

<sup>2</sup>Among the advantages of working out of town after the strike, there is a guarantee of 8-hour work day plus overtime Saturday and Sunday work. The "in-town" jobs are guaranteed at the rate of only 4 hours per day. Saturday and Sunday overtime work out of town is paid at premium overtime rates.

ecutives, Bob Hartzog, while Gibson was standing outside Hartzog's office window (Tr. 344).

After the strike, it is conceded that Respondent never again offered Gibson the opportunity to work out of town. Although the evidence (G.C. Exh. 2(D)) shows that in 1988, prior to the September strike, Gibson regularly worked out-of-town jobs, the first post strike out-of-town job (National Plumbing, Heating, Cooling and Piping; October 30 through November 1, 1988; New Orleans) was worked by employees Welch and Nichols. The next out-of-town job was in Orlando, Florida (American Rental Association) for the period February 7–10, 1989. On that exposition, employees Lepping, Nichols, Roth, and Welch were selected. The record also shows (G.C. Exh. 2(C)) that in the five succeeding expositions in 1989, Cecil Hampton worked either individually or in conjunction with other employees commencing with a Kansas City exhibition (American Feed Industries Association) in the period May 8–10, 1989. In particular, it should be noted that the first poststrike out-of-town exhibition in New Orleans, above noted (National Plumbing, Heating, Cooling and Piping) utilized two of Respondent's employees: Nichols and Welch (G.C. Exh. 2(B)) in the period October 30–November 1, 1988. The first 1989 exhibition (American Rental Association) in the period February 7–10, 1989, in Orlando, utilized four of Respondent's employees: Lepping, Nichols, Roth, and Welch (G.C. Exh. 2(C)).

There is no dispute that since the end of the strike, relations between Respondent's president, Thomas Tucker, and the Charging Party have been cool. Gibson testified that Tucker would not even acknowledge Gibson's presence in a room (Tr. 55). Tucker testified that Gibson is curt and avoids even exchanging salutations; and that, as a result of the strike there is now a feeling of animus between, on the one hand, Respondent's office and supervisory employees and, on the other hand, the unit employees.

### D. The Prima Facie Case

The parties are in dispute as to when the following conversations occurred: The General Counsel argues that they occurred in January–February 1989; Respondent asserts that it was in October 1988.<sup>3</sup>

#### 1. Gibson's testimony

Gibson testified that sometime in late January or early February 1989 he had a conversation with Cecil Hampton, the most senior unit employee, and the Union's alternate shop steward in the unit. Gibson recalled that before this conversation, two of the unit employees had been sent on out-of-town jobs but Gibson had not been offered the opportunity to work on those jobs. He never mentioned anything of this condition, he testified, because of the existing ill feel-

<sup>3</sup>The resolution of the date of occurrence determines whether the conversations occurred within or outside of the 10(b) period. If in January–February 1989, i.e., within the 10(b) period, then Tucker's conversation with employee Cecil Hampton constitutes evidence supporting a finding of an unfair labor practice in violation of Sec. 8(a)(1) of the Act. If it occurred outside the 10(b) period, i.e., back in October 1988, then the most that the conversation would indicate would be a basis for a finding of prima facie discriminatory Respondent motive. Since the charge was filed on July 7, 1989, the General Counsel's allegation of unlawful failure to assign Gibson out-of-town work asserts that it commenced on January 7, 1989, within 6 months prior to the filing of the charge.

ings resulting from the strike. In late January or early February, however, Gibson learned that Respondent, without offering the job to Gibson, was preparing to send four unit employees out on the American Rental Association exhibition in Orlando later in February 1989. Gibson and Steve Welch had worked the American Rental Association Exhibition 1 year before in Houston, Texas (G.C. Exh. 2(b)), a job which Tucker described as essentially a “rigging” job.

After the four individuals were actually offered the American Rental Exhibition job, Gibson spoke with Cecil Hampton. He asked Hampton why he had not been offered the out-of-town work on the American Rental Association job. Hampton asked him if he wanted Hampton to speak to President Tucker about the matter and Gibson requested that he do so. About a half hour later, Hampton returned and reported to Gibson on his conversation with President Tucker. Gibson testified that Hampton told him that Tucker had said that during the strike, Gibson did not show proper respect for Respondent’s strike replacements (“out-of-town guests,” Tr. 167) and had shown disrespect for Respondent’s equipment (Tr. 62–63). In later examination, Gibson recalled that Hampton told him that Tucker had said that because of Gibson’s disrespect for the strike replacements and Respondent’s equipment, Gibson “would never travel out of town again” (Tr. 149).

## 2. Testimony of Cecil Hampton

Hampton, most senior of the unit employees, is paid the \$1-per-hour extra pay of a leadman under the contract no matter what job he actually performs. As above noted, he historically had refused out-of-town work but ceased refusing to go out of town in March, 1989, when he spoke to President Tucker about being assigned out of town (Tr. 174–175). Since that time, he has worked out of town more than any other employee (Tr. 176).

Hampton testified that relations between the Union and Respondent which had been “pretty good” (Tr. 177) began to deteriorate before the negotiations commenced for the new contract in April 1988. With respect to the date of his above conversations with Gibson and Tucker, Hampton was undecided as to whether they were in February 1989 or as early as October or November 1988 (Tr. 195). Although he may have had more than one conversation with Gibson regarding being sent out of town, he did recall that the particular out-of-town assignment about which Gibson complained involved four employees (Tr. 199). President Tucker places the conversation in *October* 1988. In view of the fact that the *October* 1988 job in New Orleans (the National Plumbing, Heating, Cooling and Piping exhibition) used only *two* employees (G.C. Exh. 2(d)); since the American Rental Association job in February used *four* employees’ and since Hampton’s conversation with Gibson related to *four* employees, I conclude that Gibson’s recollection that the conversations in question occurred in February (the four-man American Rental job was in February) is more credible. Hampton recalled that the American Rental Association job required four men and occurred in February 1989 (G.C. Exh. 2(C)). (Tr. 199–203.)

Hampton testified that Gibson was concerned as to why he had not been offered the out-of-town assignment, why the four employees were being sent out and he was not. He

came to Hampton asking him if he knew why that had occurred (Tr. 200–203).

Consistent with Gibson’s testimony, when Hampton left Gibson, he went straight to Tucker’s office where he told Tucker of Gibson’s concern about not being assigned out-of-town jobs. Hampton asked Tucker to tell him the reason because he wanted to give Gibson the answer (Tr. 205). Tucker told Hampton that Gibson was:

not respectful to company equipment and replacement personnel during the strike and he no longer felt comfortable using him in that situation [a supervisory position].

When Hampton asked Tucker what Gibson had done, Tucker said: “something about putting his nose to someone’s office window” (Tr. 206). Hampton told Tucker that he had no knowledge that anything like that had occurred (Tr. 206).

In addition, Hampton testified that Tucker told him that two other employees, Jay Meyer and Mike Lepping, had been improper in following one of the trucks and that they would not be utilized out of town (as supervisors) either (Tr. 206–207). Hampton then returned to speak to Gibson and told him what Tucker said. (Tr. 208.)

## 3. President Tucker’s testimony

President Thomas Tucker testified that he had this conversation with Hampton in October 1988, just prior to the Home Heating exposition in New Orleans immediately after the conclusion of the September 1988 strike (Tr. 345; G.C. Exh. 2(B)). I have already determined, above, on the basis of the credited testimony of Gibson and Hampton, putting the conversation in February 1989, because of the four-man February assignment to the American Rental Association show (rather than the two-man New Orleans show in October 1988) that Tucker’s testimony that it occurred in October should not be credited. Tucker testified that, without invitation, Hampton entered his office and they were talking about the strike (Tr. 346). Tucker said that Hampton “just walked in,” uninvited (Tr. 347). They spoke of the animosities that existed between the entire office staff and the Teamsters membership which they said would take time to heal (Tr. 347).<sup>4</sup> Tucker testified that they spoke of employee Nichols’ good performance and the fact that he should be rewarded with a second show (Tr. 349). In addition, however, Tucker admits that he told Hampton of the “Hartzog incident” (Gibson wiggling his fingers in his ears and pressing his nose up against Hartzog’s window) which Tucker said he thought was “rather funny” (Tr. 351). Tucker recalled that he told Hampton that the reason Gibson’s name was raised at all was merely to mention that no one Teamsters member did anything more or less during the strike than any other Teamsters (Tr. 351).

Tucker specifically denied telling Hampton that he was not going to send Gibson out of town because of his strike activities and also denied that he would not send employees

<sup>4</sup>The animosity resulted from Respondent’s supervisors, account executives and office clerical performing Teamsters work. Among the “problems” were that supervisors, Account Executives, and office clerical were crossing the picket lines, were hassled, and worked later than they should on jobs to which they were not accustomed (Tr. 348). There was mutual resentment on both sides (Tr. 348–349).

Lepping or Meyer because of their strike activities (Tr. 352). He also denied having any conversation with Hampton in or around February 1989 regarding Gibson's out-of-town assignments.<sup>5</sup>

I credit the testimony of Gibson as corroborated by Hampton. It is Hampton's testimony that I regard as decisive and pivotal. Not only are Gibson and Hampton current employees of Respondent, but Hampton is enjoying the fruits of consistent assignment as a supervisor on out-of-town jobs. The assignment of out-of-town jobs, as above noted, is not governed by seniority under the St. Louis are contract; rather, it is, as Tucker testified, solely a matter of the judgment of each account executive to decide which Teamster they want working with them on an out-of-town job (Tr. 358). Since President Tucker, as his testimony shows, also plays a part in the assignment of supervisors on out-of-town jobs, it would be wholly inconsistent with Hampton's economic interest to testify untruthfully in the face of his Employer's president and contrary to the economic interest of Respondent and each of the account executives. I therefore credit Hampton's and Gibson's testimony over Tucker's. Additionally, Tucker's testimony on other matters of defense does not bear scrutiny as will be seen hereafter.

I therefore conclude both (1) that Tucker's conversation with Hampton occurred within the 10(b) period, i.e., in late January or early February after the assignment of jobs were made to the four employees going to the American Rental Association job on February 7, 1989, in Orlando; and (2) that Tucker's statement to Hampton, that Gibson would not be appointed to out-of-town supervisory positions because of his picket line misconduct (discourtesy to strike replacements and his wiggling of his hands in his ears at Account Executive Hartzog's window), was a threat against promoting him to that job based on his activities as a unit employee on the picket line and engaging in other protected activities, which statement violates Section 8(a)(1) of the Act as alleged. Compare: *NLRB v. Bell Aircraft Corp.*, 206 F.2d 235, 237 (2d Cir. 1953); *Oil Workers v. NLRB*, 547 F.2d 575, 589 (D.C. Cir. 1976), cert. denied 431 U.S. 966; *Premier Rubber Co.*, 272 NLRB 466, 471-472 (1984), with *Reeves Bros., Inc.*, 277 NLRB 1568, 1569 (1986). In short, I find the violation turns on the fact that Tucker's statement to employee Hampton declared that Gibson's appointment as a supervisor was undermined by his protected union activities on the picket line and other concerted activities. This declaration by Tucker to Hampton was directed at a unit employee (Hampton) concerning the promotion of another unit employee (Gibson) to a periodic supervisory position. Such a declaration within the 10(b) period, as found, violates Section

<sup>5</sup>Tucker testified that a second conversation with Hampton occurred in August 1989, i.e., after the filing of the July 7 unfair labor practice charge. In that conversation (Tr. 354), Tucker testified that, inter alia Hampton asked him why Gibson was not being assigned to out-of-town jobs (Tr. 356). He said he told Hampton: "that it was strictly a lack of judgment matter on [Gibson's] part. That the account executives felt that [Gibson] had done things on shows to make the account executives feel that they should not take [Gibson]; that [Gibson] was not one who could supervise people and it was strictly because of [Gibson's] total lack of judgment that we felt he should not go on shows" (Tr. 357). He also told Hampton that Gibson showed a lack of judgment in meeting with clients and in being "very very boisterous and loud in socializing with exhibitors. Going around the floor as though he was the only person there" (Tr. 358). To this, Tucker said that Hampton answered only that he "understood" and that he would tell this to Gibson (Tr. 359). I do not give weight to Tucker's testimony on this point.

8(a)(1) of the Act. When Hampton relayed Tucker's message to Gibson, Tucker's message similarly unlawfully coerced Gibson.

#### 4. Prima facie 8(a)(3) violation

I further conclude that the General Counsel has proved a prima facie case of a violation of Section 8(a)(3) and (1) of the Act by Respondent's failure and refusal to appoint Gibson as an out-of-town supervisor on its jobs. The above credited testimony of Cecil Hampton and Gibson demonstrate the discriminatory motive per se. In addition, the surrounding circumstances also suggest the discriminatory nature of Respondent's failure to appoint Gibson as an out-of-town supervisor. He has been employed by Respondent for about 12 years, in the last 9 of which, regardless of his 1984 and 1986 conduct, Respondent has continuously appointed and re-appointed him as an out-of-town supervisor. His last out-of-town assignment as supervisor in late August 1988, immediately preceded the strike of September 7-18, 1988, after which he was never appointed a supervisor. On this record, as President Tucker admits, Gibson never received a warning from Tucker or any other supervisor concerning his out-of-town work or conduct on the job.<sup>6</sup> As far as he was concerned, therefore, his work was unblemished as an out-of-town supervisor over a 9-year period. On the basis, therefore, of timing, past good service, lack of warning or admonition concerning work or conduct, and the credited testimony above, which demonstrates a discriminatory motive, I conclude that the General Counsel has proved a prima facie case of a violation of Section 8(a)(3) and (1) of the Act in an unlawful failure to appoint Gibson as an out-of-town supervisor after September 18, 1988.

#### 5. Respondent's defenses

At the hearing, and again in its brief, Respondent's defenses with regard to the 8(a)(1) violation, were that President Tucker did not make the statement to Hampton and, in any event, it occurred outside the 10(b) period. I have disposed of those defenses by finding that President Tucker did make the incriminating remark in or about early February 1989, immediately after the assignment of jobs on the American Rental Association job in Orlando (February 7-10, 1989). I therefore concluded that the incriminating statement was made within the 10(b) period and unrelated Section 8(a)(1) of the Act.

With regard to the alleged 8(a)(3) and (1) violation, above, Respondent defends on three bases: (1) the incriminating statement by President Tucker never occurred; (2) Respondent, in any event, had good and sufficient business reasons for not appointing Gibson as out-of-town supervisor; and (3) Respondent's principal defense, as I understand it, is that in any event, Respondent's failure to appoint Gibson as an out-of-town supervisor, even if discriminatorily motivated, does not constitute a violation of the Act under *Parker-Robb Chevrolet*, 262 NLRB 402 (1982). With certain exceptions not relevant here, under *Parker-Robb*, the discriminatory discharge of a supervisor does not violate the Act notwith-

<sup>6</sup>The 1986 warning letter and 1-day suspension was for in-town work. It is clearly remote. I have nevertheless considered it as demonstrating that Gibson was not an ideal employee. However, Respondent thereafter repeatedly re-appointed him as an out-of-town supervisor.

standing that it is part of an overall plan to discourage its employees from supporting the Union.

With regard to the first defense, I have concluded that the General Counsel has proved that a prima facie case of unlawful discrimination in Respondent's failure to appoint Gibson as a supervisor on the out-of-town jobs. I conclude, in particular, that Respondent has not shown the absence of a discriminatory motive and has thus not rebutted this prima facie case, *NKC of America*, 291 NLRB 683 fn. 4 (1988). Rather, Respondent, in attempting to establish the second half of the *Wright Line* defense (*Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981) cert. denied 455 U.S. 989 (1982)), has attempted to establish that it would have taken the same action regardless of the existence of the protected activity and the Prima facie case, *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400-401 (1983), *NKC of America*, supra, fn. 4. In the establishment of the asserted good and sufficient reasons not to appoint Gibson as out-of-town supervisor, regardless of the existence of a prima facie case, Respondent bears the burden of proof.

#### 6. Unsuitable temperament

In support of its defense, under *NLRB v. Transportation Management Corp.*, supra, the record shows that Cecil Hampton, on several occasions during the 5-year period preceding the strike, had conversations with President Tucker regarding Gibson. In those conversations, Hampton told Tucker that Gibson was excitable and had trouble communicating with crews under his supervision and, sometimes, with his superiors on the job. Although Hampton's testimony was vague as to the number of conversations and when they occurred, he was particular on the fact that these conversations, before the strike, concerned Gibson's performance as an *in-town leadman*. They did *not* concern his performance on out-of-town jobs. (Tr. 230-231.) Hampton did not recall any Tucker response in these conversations. With regard to out-of-town assignments of supervisor, Hampton recalls only one such conversation. That occurred in August 1989, after the strike (Tr. 233) when *Tucker told him* that he did not want to utilize Gibson because other account executives did not want Gibson to run their shows (Tr. 232-233). This August 1989 conversation occurred, of course, after the filing of the unfair labor practice charge (Tr. 233-234). In particular, with regard to the earlier *in-town* assignment conversations with Tucker, *Hampton told Tucker* that he thought Gibson should not be assigned in-town assignments working alone. Hampton testified, however, that *after* these earlier conversations with Tucker, Gibson was assigned *both* to leadman positions in town and to supervisory positions out of town (Tr. 236). Thus, President Tucker was aware of Hampton's repeated negative observations concerning Gibson's temperament but Gibson, nevertheless, was thereafter repeatedly selected as a supervisor in out-of-town exhibitions and a leadman in in-town exhibitions.

Further defending on the ground that, independent of the prima facie case, Respondent found Gibson to be unsuitable for appointment as a supervisor, Tucker testified that each of the nine Account Executives in the St. Louis Central Division makes the decision as to which employees the Account Executive wants on out-of-town jobs. Tucker testified that prior to the strike, Respondent had "problems for years"

with Gibson on his performance out of town (Tr. 294). According to Tucker the first major problem occurred in November 1984 when Gibson and a freight manager in a New Orleans show had a dispute over the use of trailers at the freight loading dock. Because Gibson's method of utilizing the trailer was not followed, Tucker said that Gibson became angry and stormed off. He says he did not talk to the freight manager for a long period after that (Tr. 294). He testified, however, that Gibson's conduct at the New Orleans show became a "standard joke" in the office (Tr. 294). Neither Tucker nor any other supervisor ever mentioned this problem to Gibson, much less admonished him.

In the same year, Gibson also got into a dispute with one of Respondent's office clerical because Gibson wanted to change the paperwork system and this resulted in a big argument with Gibson again storming off (Tr. 295). Tucker testified that when Gibson did not get his way on a particular item, he became peevish, would not talk to people and sulked (Tr. 296). On the other hand, Tucker testified that Gibson could perform work if he were properly directed in a specific function (Tr. 296). Neither Tucker nor any other supervisor remonstrated with Gibson over this incident.

In addition, in July 1987, at the exposition of the American Fishing Tackle Manufacturers Association, Gibson had a dispute with Account Executive Steve Kettlekamp. Kettlekamp, now general manager of the St. Louis facility, told Tucker that Gibson's judgment was not sufficient to permit him out on the show floor in that exhibition (Tr. 306). As in all other cases, neither Kettlekamp nor Tucker mentioned this alleged defect to Gibson or to any other employee. The record shows (G.C. Exhs. 2(a) and (b)) that while Gibson was not assigned as a supervisor to out-of-town shows in the period commencing July through November 1987, he was assigned to shows three times beginning in February 1988 and ending in late August 1988, immediately prior to the commencement of the strike. With regard to these 1988 assignments, Tucker testified that they were principally exhibits requiring an expertise in the supervising of rigging of machinery utilizing big forklifts, cranes, and other large equipment. Tucker acknowledged that that was the area of Gibson's expertise and that he was good in performing that work out of town as a supervisor (Tr. 307).

Kettlekamp testified that in January 1987 he told President Tucker that he would take any Teamsters along on the American Fishing Tackle Manufacturers show in Atlanta except Gibson (Tr. 386). He told Tucker that he did not want Gibson because of Gibson's work practice and behavior at local shows in the St. Louis area which Kettlekamp had worked on during a 5-year period (Tr. 386). In the 10 road shows that Kettlekamp performed as Account Executive, in 1987 to 1988, he never took Gibson on any of those shows.

Further examination reveals, however that Kettlekamp and Gibson had not spoken to each other for 2 years (Tr. 388). This was a result of Gibson, at that time, having "verbally assaulted" Kettlekamp (Tr. 388). Kettlekamp admitted that he had no particular love for Gibson (Tr. 389). Furthermore, Kettlekamp admitted that in the 10 shows that he had in 1987 and 1988, not all of them required Teamsters.

In addition, Respondent placed in evidence (R. Exh. 4) a May 11, 1987 interoffice memorandum from Account Executive Grasso to Tucker. In that memorandum, Grasso told Tucker that she had decided to take Steve Welch as the

Teamsters to her Digital Equipment Show in Nashville because she felt: "I needed someone who would deal with both the customers and crew in a more diplomatic and cooperative manner than Terry Gibson." Grasso did not appear to testify at the hearing.

As I understood Respondent's testimony, perhaps the most significant reason not to appoint Gibson as an out-of-town supervisor was a June 1988 conversation between Tucker and one Jack Ford, a representative of one of Respondent's largest clients, the American Newspaper Publishers Association (Tr. 296-297). Although Tucker placed this conversation as occurring in the first week of June 1988 (Tr. 300), it apparently occurred on Saturday, June 11, since the American Newspaper Publishers Association Show did not begin until June 11 and ran through June 13 (Tr. 325-326). Tucker testified that Ford asked him not to have Gibson on any future ANPA shows because he was excessively socializing with the exhibitors and not doing his job (Tr. 298). On that day, Saturday, June 11, Tucker testified that he told his Account Executives running that job, Grasso and Marshall, what Jack Ford had told him about Terry Gibson's performance (Tr. 330). Though this occurred before the September 1988 strike and any hard feelings, he never told Gibson of the Ford conversation nor did he warn Gibson of improving his further performance on out-of-town jobs or even on in-town jobs. Tucker also admitted (Tr. 370-371) that he sometimes discussed employment problems with employees and that other Account Executives discussed employment problems with employees but none of them ever discussed any problem with Gibson. In the instant case, Jack Ford did not testify.<sup>7</sup> The General Counsel did not interpose an objection that the conversation was hearsay (Tr. 291).

In any event, Tucker's June 11, 1988 conversation with Account Executives Jerry Marshall and Mikealee Grasso in Atlanta concerning Jack Ford's statement to him of Gibson's "socializing," apparently spawned two memoranda, one from Account Executive Jerry Marshall and the other from Account Executive Mikealee Grasso, neither of whom testified at the hearing.

Bearing date of June 24, 1988, Grasso sent the following inter office memo to Tucker:

Subject: ANPA June 15-18, 1988 in Atlanta

F Y I, during ANPA's June 15-18, 1988, I overheard conversation by ANPA staff relating to Terry Gibson's attitude. While nothing was said directly to me, I know there were some ill feelings insofar as Terry not being where he was supposed to be and "socializing" with exhibitors when he was supposed to be working. [R. Exh. 5.]

<sup>7</sup>Tucker testified that he utilized Gibson on jobs where he would not interfere with people but would use his best talents (Tr. 336). He admitted that on in-town jobs, he made him leadman from time to time, especially when Cecil Hampton was not available. In the cases that Gibson was appointed as leadman, he sometimes supervised as many as 10 persons (Tr. 336-337). In short, Tucker testified that in dealing with subordinates, Gibson was not appropriate on big jobs but was good on small jobs (Tr. 337). With regard to out-of-town jobs, Tucker said that he did not send Gibson out, even on small jobs, because with regard to out-of-town job, "we tried to keep Terry away from people" notwithstanding that Gibson was useful in supervising the erection of machinery (Tr. 339).

Bearing date of June 22, 1988, Account Executive Marshall sent the following memorandum to President Tucker:

Re: ANPA '88 Atlanta

F Y I and future out-of-town shows in particular ANPA. I have watched Terry Gibson this year and even to some extent on the ARA show in Houston. There has also been some talk on the floor that Terry is spending too much time B S and not paying attention to what he should be doing. I feel that the time has come to take someone else on the jobs. I believe Terry feels that the jobs would not happen without him being on the shows.

Terry was never my first choice for working the shows in or out-of-town. I have no particular incident to talk of. I just feel for the Company's business and well being we should not take Terry out of town any more. I would like to talk Cecil into traveling. I think Cecil will do a better job. If not we can decide on someone else or recruit from one of the other offices if necessary. [R. Exh. 6.]

Tucker testified (Tr. 368) that he decided, on Saturday, June 11, 1988, after his conversation with Jack Ford, that Gibson would not go on any show that Tucker was associated with but that the other Account Executives were free to take him if they wished. As above noted, Tucker testified that Gibson was very good at handling machinery (Tr. 372) and that Gibson was satisfactory in dealing with subordinates provided they were fewer than 10 on the particular job and that the job was a predominantly rigging job.

Thereafter, in further testimony, Tucker added a further condition to assigning Gibson as an out-of-town supervisor (Tr. 373-375): the job had not only to be a predominantly rigging job, but, Tucker added, there had to be no other Respondent employees available who could do the job as well. Indeed, in his further testimony, Tucker said, in substance, that if he could find any one among Respondent's 600 employees who could do the job, he would assign that person rather than Gibson (Tr. 374). He testified that even in a predominantly "rigging" job, Gibson would have to still contact employees and exhibitors and that his judgment was poor that he would not send him out. He then changed his testimony and denied having said that he would not send him out as a supervisor but would first seek to get any employee from any of Respondent's offices throughout the nation to see if they could equal Gibson's expertise (Tr. 375). He also amended his testimony with regard to searching through the 600 employees by stating that some of the employees were secretaries and that with Respondent's 17 nationwide offices, at least 5 employees per office would be able to do the job. Thus 85 employees were potentially able to do the same job as Gibson and he would assign them work on out-of-town jobs as a supervisor before assigning Gibson (Tr. 376). And that would be true even if it were solely a rigging job (Tr. 376).

In addition, Respondent presented testimony concerning events *after* Gibson's filing the unfair labor practice charge on July 7, 1988. Thus, Account Executive Kettlekamp testified with regard to a May 1989 show in St. Louis. Kettlekamp testified that he observed Gibson walking around

the show floor doing no work and talking to other Teamsters and exhibitors and not getting anything done (Tr. 383). Kettlekamp informed Supervisor Ray Griffith of Gibson's conduct and Griffith said he would take care of the problem. He further testified that a representative of the exhibitor came to him and complained about Gibson's disrupting the flow of the operation and Kettlekamp again complained to Griffith. Griffith told him, according to Kettlekamp that they were either going to send Gibson home or correct the problem (Tr. 385). After that, Griffith spoke with Cecil Hampton, the foreman on the job, and thereafter Gibson's work improved (Tr. 385).

Lastly, the supervisor of the Teamsters unit, Ray Griffith testified that in March 1989 Gibson got into a dispute regarding whether other trades were performing Teamsters' freight handling work (Tr. 401). Griffith testified that Gibson entered his office and spoke to him in a loud and boisterous manner and said that he would file a claim for the work performed by the other trades. In a warning letter that Griffith wrote to Gibson on March 21, 1989, he reminded him that there was a grievance procedure under the contract and that Gibson should not engage in outbursts particularly against supervisors. He warned Gibson that the next time Gibson yelled at him, he would be facing suspension proceedings for this "gross insubordination." In fact, as Griffith pointed out, the work which Gibson disputed was not work which Respondent's employees were hired to perform (R. Exh. 7). The face of the warning letter shows that a copy was sent to Respondent's attorney.

#### 7. Discussion and conclusions

The sole issue with regard to violation of Section 8(a)(3) and (1) of the Act is whether Respondent unlawfully discriminated against Gibson in the assignment of out-of-town supervisory position after the September 1988 strike. Gibson has been employed for 12 years, during the last 9 of which Respondent repeatedly appointed him as a supervisor on out-of-town jobs. The last such job was in late August 1988, 2 months *after* the alleged conversation between exhibitor Jack Ford and President Tucker (after which Tucker allegedly said that on no job that Tucker was associated with would Gibson be named as supervisor).

Moreover, Account Executives Grasso and Marshall were also associated with the ANP job in Atlanta. As their post-show memoranda of June 22 and 24 indicate, they had for a long time allegedly not preferred to work with Gibson on their out-of-town shows. In any event they were associated with Tucker in running this large Atlanta ANPA show (Tr. 321). Tucker testified that ANP was his client but that he permitted Grasso and Marshall actually to produce the show (Tr. 321). There is no question that the Grasso and Marshall memoranda were generated as a result of the alleged Tucker-Ford conversation at the ANP meeting (Tr. 321-322). In fact, however, Tucker testified that he really did not rely on the documents submitted by Account Executives Grasso and Marshall; rather he considered them superfluous but they justified his own personal decision which he made on June 11 (Tr. 324). Tucker testified that he would no longer rely on Gibson's judgment and would not bring him on any further ANP meeting thereafter (Tr. 325).

The three reasons that Tucker testified to justifying *why* Gibson was sent out as a supervisor on an out-of-town job

as late as August 1988 after his alleged prior June 11 promise not to send him again were (1) the first job was an Atlanta job which could not be handled by the Atlanta office. The Atlanta office requested four Teamsters from St. Louis to help them with the show (International Woodworking Fair, Atlanta, August 27 through 30, 1988 (Tr. 331)). The Atlanta office asked for each of the employees, including Gibson, *by name*. (2) The Union, during contract negotiations, took the position that the employees could go out of town only on a leave of absence (Tr. 332). (3) There was an outstanding grievance by Paul Nichols, a unit employee, complaining that he had not been given the right to travel. Tucker testified that his solution to all three of these problems was to include Gibson along with the three other employees. On the one hand, it is difficult to credit Tucker's testimony of the depth of Gibson's bad judgment and his concern over it when Tucker permitted him to attend a large job in Atlanta, as a supervisor, where he would be dealing with coemployees, account executives and exhibitors. On the other hand, the assignment of Gibson is consistent with Tucker's testimony that if the out-of-town office requested Gibson by name, he would send him out. But if Gibson's presence was such a danger, why credit Atlanta's insistence and only appoint Gibson even in the face of the Nichols' grievance?

In terms of deciding whether Respondent supported its burden of proof to show persuasive business reasons for not assigning Gibson as an out-of-town supervisor, the principal issue is whether there has been proof of the "business reason" advanced by Respondent: that Gibson's temperamental outbursts prevented him from being an effective supervisor in dealing with coemployees, subordinates and supervisors. The one eyewitness who testified to any such defect was Account Executive, now general manager, Kettlekamp. I do not credit his testimony concerning Gibson's poor performance because of his manifested personal dislike of Gibson resulting from an alleged prior assault. My observation of Kettlekamp when he testified, along with the record on review, demonstrates a bias against Gibson because of personal antagonism. I therefore discount this testimony and do not rely on it.

Tucker's testimony, itself, ranged from an initial position wherein Gibson's personality and temperamental defects were an insufficient impediment to sending him out on rigging jobs requiring contact with 10 or fewer subordinates, to later, progressively extravagant positions, that he would comb all of Respondent's nationwide 600 employees before sending Gibson out as a supervisor. To comb 600 employees in Respondent's nationwide offices obviously suggested a degree of animus sufficient to reflect on Tucker's judgment and credibility and to raise the possibility that Gibson's mere defects were not an explanation for Tucker's vehemence. He then switched his testimony to stating that he would comb all of Respondent's offices for some 85 qualified employees before sending Gibson out as a supervisor.

Such testimony demonstrated an animus against Gibson not explicable on the basis of Gibson's poor personality characteristics (temperamental outbursts, sulking, etc.). Such passion from Respondent's president, it seemed to me, flowed from another source. Tucker, as he admitted, was aware of these personality traits at least since 1984 through 1987 when he had various memoranda concerning Gibson's actions as a supervisor on out-of-town jobs. If Gibson's personality was

known as a disabling defect in the period 1984 through 1987, Gibson would not have been reappointed to all the out-of-town jobs which the record shows he was appointed to in 1987 and 1988 (G.C. Exhs. 2(a), (b)). In those supervisory jobs, he worked singly, with one other employee, or with several other employees.

Moreover, I consider it a matter of disparate treatment that Tucker and his Account Executives spoke to employees about their employment problems but never spoke to Gibson. I find the record uncontradicted that the frigid atmosphere between Gibson and Tucker commenced with the strike and not because of any personality or business failings of Gibson demonstrated while he was the supervisor on any out-of-town jobs. Furthermore, Tucker never spoke to Gibson of his temperamental failings on the job, not because the failings did not exist, but because, over a period of several years at least, Tucker knew of them but did not think them so significant as to warrant any admonition to Gibson in order to change his conduct on the job.

While it is true that Respondent need not suffer incompetence or misconduct in a supervisor when Respondent's discrimination against an employee commences, as here, with the employee engaging in protected concerted or union activities, it is necessary to view with some skepticism the reasons advanced by Respondent for the discriminatory conduct.

In the instant case, the alleged Gibson supervisory misconduct on out-of-town jobs occurred over a period of years, and was never the subject of admonition, much less warning, by Tucker or any other supervisor concerning such alleged misconduct. Furthermore, Gibson was repeatedly appointed and reappointed as a supervisor to out-of-town jobs over a period of years and received commendations for his work. I therefore do not credit Tucker's testimony that Gibson suffered from such a total lack of judgment, was boisterous, and loud so that he could not supervise people and could not be trusted further as a supervisor.

There is no question in my mind, based on this record, that Gibson was not free of defects in performing his work and his handling of people. The testimony of employee Cecil Hampton and Supervisor Griffith demonstrate that Gibson was capable of temperamental outburst directed both at superiors and subordinates. What I conclude, however, is that Respondent by its silence over a period of years did not believe that these outburst were of sufficient merit to even speak to Gibson in order to change his functioning. In addition, Respondent's actions bespeak its satisfaction with Gibson's performance because, even knowing of the alleged gravity of his defects, especially in the period (1994-1998) for which there is evidence, it continually reappointed him to all sorts of out-of-town jobs as supervisors, whether working alone, with a single other teamster, or with several other unit employees. In short over a period of 12 years, with a negative report as early as 1984, Respondent knew of the alleged Gibson defects but never did anything about it (Tr. 228-230) except to repeatedly thereafter reappoint him as supervisor.

#### 8. The Grasso and Marshall memoranda

Neither Mikealee Grasso nor Jerry Marshall, both Account Executives, apparently currently employed by Respondent, was produced as a witness by Respondent. Instead, Respondent seeks to erect or support a history of Gibson's misconduct as a supervisor, or at least his inability to properly

act as a supervisor, based on memoranda entered into evidence as business records rather than producing the authors of the memoranda.

The record contains the complaint of Tucker's client, Jack Ford, regarding the June 1988 ANPA exhibition. As above noted, the General Counsel interposed no hearsay objection (Tr. 297). The admissibility of such conversation rested on the apparent conclusion that it was not an exception to the hearsay rule but because it was not hearsay in the first place; that it was not admitted for the truth of the facts contained therein but only for the fact that Jack Ford uttered those words to President Tucker, whether or not the Ford statements were true.<sup>8</sup> The General Counsel at no time requested a continuance to seek the presence of Jack Ford by subpoena or otherwise to see if such a complaint was made and to test the basis on which it is made. Thus, on the theory that Jack Ford was equally available to the General Counsel, as to Respondent, makes the nonappearance of Ford not the subject of an adverse inference. *Hitchiner Mfg. Co.*, 234 NLRB 927 (1979).

On the other hand, Account Executives Grasso and Marshall are Respondent's own supervisors and under Respondent's control. I draw an adverse inference from Respondent's failure to have Grasso and Marshall testify with regard to the basis on which they issued their June 1988 memoranda (immediately following Ford's alleged complaint to Tucker) highlighting Gibson's supervisory defects. This adverse inference stems from the fact that Respondent, in possession of the testimony of Grasso and Marshall, clearly relevant, favorable evidence to Respondent, should have produced their live testimony (rather than memoranda) on Respondent's own initiative. The failure to do so supports the inference that Respondent preferred not to present Grasso and Marshall for examination and cross-examination because, ultimately, their testimony would not support the memoranda or would be unfavorable to Respondent. The fact that the General Counsel did not seek their presence, of course, is immaterial. The obligation to produce stronger, rather than weaker, evidence is for Respondent, on its own initiative. Respondent should have produced them as live witnesses. *Auto Workers (Gyrodyn Co.) v. NLRB*, 459 F.2d 1329 (1972). To not produce them as live witnesses defeats the whole purpose and strength of cross-examination, that great engine for truth-telling. To substitute papers for witnesses is here an unconvincing evidentiary device.

What makes their appearance on the witness stand more than desirable, perhaps imperative, flows from President Tucker's progressively extravagant testimony (demonstrating substantial animus against Gibson inconsistent with Gibson's mere alleged incompetence as a supervisor), and from the following defects in the memoranda themselves:

(a) The June 24, 1988 Grasso memorandum (R. Exh. 5) the subject of much discussion on the record concerning the accuracy of Grasso's dating of the ANPA Atlanta meeting in June 1988 (the meeting at which Jack Ford complained to Tucker; on June 11, Tucker told of these complaints to Grasso and Marshall), brings into play the genuineness of the document. For, as the transcript shows and the face of the

<sup>8</sup>Even on this latter ground, Tucker's testimony—that Ford uttered the words concerning Gibson's conduct—is pure hearsay. While unobjected hearsay is admissible, I conclude that the record constrains me to give such testimony little weight.

document demonstrates, the ANPA meeting was not June 15 through 18, 1988; rather, it was on June 11 through 15, 1988 (G.C. Exh. 2(b)). While oral testimony of witnesses to events *long past* is often mistaken with regard to the day, date and even sequence of events, without effecting the credibility of such oral testimony, *Plumbers Local 195 (Stone & Webster)*, 240 NLRB 504 (1979), *enfd.* 606 F.2d 320 (5th Cir. 1979), when a memorandum is allegedly produced *within a week* or 10 days of the event, the author of the memorandum, present at the event, ordinarily knows when it occurred. In short, without making too fine a point of the matter, the authenticity of the memorandum (i.e., was it produced in June 1988 or at a much later time) is thrown into doubt by the misdating of the occurrence on the very face of the memorandum allegedly written a week thereafter. Account Executive Grasso should have been produced as a witness and the failure to produce her leads me to draw an adverse inference concerning the statements in the document.

(b) The Grasso and Marshall memoranda, dated June 22 and 24, 1988, respectively, were generated, according to Tucker's testimony, by his conversation with Grasso and Marshall in Atlanta following Jack Ford's alleged complaints to him over Gibson's conduct in "socializing" with exhibitors at the ANPA exhibition. As Tucker pointed out, this was a serious matter to Tucker because ANPA was Tucker's own client, one of Respondent's largest clients, and Tucker had not personally produced the show but had permitted his two account executives, Grasso and Marshall to do so. Neither memorandum mentions, much less discusses, the occurrence or the subject of the alleged June 11 Jack Ford complaint to Tucker which had occurred only a week or so prior to their allegedly executing their respective memoranda. This is surprising in view of the statement by Grasso (R. Exh. 5) that nothing was said directly to her but she knew of ill feelings concerning Gibson's conduct. It is surprising that she did not mention the Ford complaint to Tucker as either corroborating the statements which she allegedly overheard or noting *that* complaint in addition to what she heard. Furthermore, Marshall's memorandum explicitly states that although he has been observing Gibson's conduct both on in-town and out-of-town jobs over a period of years, he knew of "no particular incident to talk of." The June 11 Jack Ford complaint to Tucker, which Tucker allegedly mentioned to Marshall on June 11, was a particular incident. If Tucker had indeed mentioned this incident to Marshall, it should have been and would be expected to have been recorded in that memorandum as a "particular incident" to either corroborate or talk about. In short, the failure of both the Grasso and the Marshall memoranda to mention the Jack Ford incident which, according to Tucker had been the subject of their June 11 conversation, only a week before, leads to a conclusion that (1) either Tucker never told them about it, either because it was insignificant or because it never occurred; or (2) that Tucker did tell them about it but it happened so long before the drafting of their respective memoranda, that they forgot about it. While neither of these conclusions is necessary, Grasso and Marshall should have been produced as witnesses to explain why, in memoranda devoted to Gibson's shortcomings as a supervisor on out-of-town trips, they did not mention a conversation with their president in which one of Tucker's most important clients allegedly complained of Gibson's misconduct. When Marshall adds that he knows of

no particular incident of Gibson's misconduct, he places in jeopardy Tucker's testimony. This is because the Ford complaint was a particular concern to Tucker (Tr. 231), and, as noted at the hearing, it is not alluded to in either of the Account Executives' memoranda of a week later.

(c) I found it particularly difficult to accept the failure of Account Executive Marshall to allude to the June 11 conversation which he allegedly had with President Tucker on Jack Ford's complaint on the ANPA exhibition merely reciting that there had been "some talk on the floor that Terry is spending too much time B S and not paying attention to what he should be doing" (R. Exh. 6). It is not a question of "some talk on the floor" that Gibson was misconducting himself; rather, Marshall had been told by Respondent's president of the same fact and it nowhere appears in the memorandum. It seems to me that Tucker's statement to Marshall, if made, was not significant enough for Marshall to recall it. Marshall and Grasso should have been produced as witnesses and I draw an adverse inference both on Respondent's failure to produce them. In any event, under these circumstances, even if the memoranda are in evidence I can assign them little evidentiary *weight*.

With particular regard to any testimony from Tucker, Kettlekamp and Supervisor Griffith concerning their observations of Gibson's misconduct after he filed the unfair labor practice charge, I do not give such testimony particular weight. Any misconduct described by Kettlekamp, possessed of personal dislike for Gibson, in my judgment, is entirely suspect. Griffith's memorandum (R. Exh. 7) I regard as genuine and reflects Gibson's temperamental and personal shortcomings, a man with a short fuse. Respondent, admittedly knowing of this condition for years, did nothing to restrain Gibson. Rather, Respondent continually reappointed him to supervisory positions out of town.

I conclude, therefore, that Respondent has failed to support its burden of proof: to show that, notwithstanding Respondent's prima facie case, it failed to reappoint Gibson as an out-of-town supervisor for other reasons. In this regard I specifically find that Gibson, from time to time, was a temperamental and not an ideal employee or supervisor. Over a period of 9 or more years, Respondent was well aware of his condition and never questioned or admonished him about his supervisory conduct. Rather, it continually reappointed him. On the other hand, as Tucker admitted, Respondent, from time to time, has talked to other employees about their employment problems but has never spoken to Gibson. The internal memoranda generated by Account Executives over a period of years, even if given full weight against Gibson, did not affect Respondent's contemporary or subsequent *actions*: it reappointed him. It *acted* against him only after his actions on the picket line.

The Act does not protect only ideal employees; it protects all employees. That Gibson was not a paragon as a supervisor and showed unhappy temperamental outbursts with persons on the job is not to be a matter lightly taken. But the preponderant credible evidence of Respondent's historical treatment of Gibson's shortcomings shows that Respondent would not have taken the discriminatory action against him apart from the protected activity in which he engaged during the September 1988 strike. Under such an evidentiary condition, I conclude that Respondent has not supported its *Wright Line* and, in particular its *Transportation Management Corp.*,

supra, burden to show that it did not appoint him to the supervisory out-of-town jobs for reasons other than the protected activity in which he engaged. *NKC of America*, supra.

I specifically conclude, contrary to President Tucker's testimony, that Respondent, commencing January 7, 1989, has continuously failed and refused to reappoint Gibson to supervisory positions in out-of-town jobs, as it had historically done, because of his activities on the picket line (calling strike replacements "scabs") and his wiggling his ears to, and in front of, Account Executive Bob Hartzog. I further specifically conclude that Respondent's defense, that Gibson, an employee who, despite a boisterous personality, had been historically reappointed to supervisory positions for 9 years, was no longer to be reappointed because of a "total lack of judgment," a boisterous, loud, and socializing propensity, commencing before the strike was not credible. Assuming, arguendo, that Jack Ford, on behalf of the American Newspaper Publishers' Association, did complain to Tucker over Gibson's performance, the preponderant credible evidence showed that in spite of this allegedly alarming complaint from a prized client, President Tucker nevertheless sent Gibson out as a supervisor, along with other Teamsters employees as supervisors, in late August 1988. Gibson's personality defects that Tucker alluded to, if substantial, failed to explain why an employee, like Gibson, allegedly possessed of a total "a total lack of judgment" (Tr. 356-358) would be repeatedly sent out in a supervisory position, even with other supervisors. If Gibson was as defective as Tucker sought to establish, Tucker would not have sent him as a supervisor to the August 27-30, 1988 Atlanta job, with or without other supervisors, whether or not Atlanta alone could handle the job. Not only is a 3-day job long enough for a supremely defective supervisor to cause considerable mischief, but the Atlanta office asked for Gibson *by name*. Again, this was 2 months *after* Ford's complaint to Tucker, a complaint which Tucker allegedly specifically mentioned to Marshall, which Marshall apparently could not remember in his concurrent memorandum on Gibson's inadequacies. The fact is that appointment and reappointment of Gibson, for 9 years, was always the result of Respondent's *voluntary* evaluation of Gibson's supervisory ability. No contractual obligation required such action, much less continually giving him preference not required by contractual seniority.

#### 9. The defense of Gibson's supervisory status

While I have found, based on the preponderant evidence, that Respondent's factual defense is without merit, I conclude that the problem of Gibson's stipulated status as a supervisor on being appointed to out-of-town positions on Respondent's exhibitions, presents a closer issue. Citing *Parker-Robb Chevrolet*, 262 NLRB 402 (1982), and its progeny (R. Br. 11 et seq.), Respondent argues: "The Employer submits that even if the Administrative Law Judge finds that the General Counsel has made a *prima facie* case that the alleged protected conduct was a motivating factor in the Employer's decision not to use Gibson for out-of-town work, said conduct would not be unlawful since his supervisory status is not protected under the Act."

In the first instance, it must be noted that Respondent's citation of and reliance on *Parker-Robb Chevrolet*, supra, is inappropriate. For that case involved the discharge of a supervisor for engaging in union or concerted activities as a super-

visor, a factual pattern not present here. More important, however, is that this case does not involve the discharge of a supervisor; rather, an accurate statement of the issue is: whether Respondent should be absolved from its discriminatory conduct because it failed to *reappoint* to supervisory positions an employee whom it historically appointed and reappointed to supervisory positions (out-of-town jobs) over a 9-year period because of the employee's protected activities *as an employee*.

The legal precedents are reviewed in *NLRB v. Ford Motor Co.*, 683 F.2d 156 (6th Cir. 1982), *enfg.* as modified 251 NLRB 413 (1981). Cf. 266 NLRB 633 (1983).

In *NLRB v. Bell Aircraft Corp.*, 206 F.2d 235, 237 (2d Cir. 1953), the court stated:

Under Section 2(3) of the Act "employee" as defined does not include foremen or other supervisory personnel; and, it is urged, the denial of a supervisory position is for that reason not within the protection of the Act. But, even if we assume, *arguendo*, that an applicant for a supervisory position who was not already an employee of this particular employer would not have been a protected employee under the Act, it does not follow that Finch was similarly not protected. At the time the discrimination took place he was clearly a protected employee, and his prospects for promotion were among the conditions of his employment. The Act protected him so long as he held a nonsupervisory position, and it is immaterial that the protection thereby afforded was calculated to enable him to obtain a position in which he would no longer be protected.

The court, in *NLRB v. Ford Motor Co.*, supra, analyzing *Golden State Bottling Co. v. NLRB*, 467 F.2d 164 (9th Cir. 1973), notes that in that case, the court favorably cited *Bell Aircraft*, supra, in holding that a wrongfully discharged employee was to be reinstated notwithstanding that corporate restructuring had turned the position (in which he was being reinstated) into a supervisory position. The court of appeals holding, including backpay at the supervisory scale, was affirmed by the Supreme Court, 414 U.S. 168, 188 (1973).

Similarly, in *Oil Workers v. NLRB*, 547 F.2d 575 (D.C. Cir. 1976), as the court in *NLRB v. Ford Motor Co.* supra, noted, the court of appeals there ordered the *reinstatement into a supervisory position* of an employee discriminated against while that position was *nonsupervisory*.

The court in *NLRB v. Ford Motor Co.*, supra, 683 F.2d at 158-159, was faced with a more difficult question. The Board order, in that case, required Ford Motor Company to offer to employees, who had never been supervisors, supervisory positions. The court noted (683 F.2d at 159) that in the above-cited cases, the "obvious distinguishing factor of all these cases" is that the employer was not ordered to promote an employee to a supervisory position. In *NLRB v. Ford Motor Co.*, supra, the court states:

In *Bell*, the employee was promoted voluntarily, while in *Golden Bottling* and *Oil Chemical*, the position from which the employee was discharged became supervisory after the discharge. We do not believe that the intent of the Act goes so far as to include Court enforcement of Board Orders that require management to

promote a specific employee to a position within the supervisory ranks.

However, in approving *Oil Workers v. NLRB*, supra, where the court enforced a Board order of reinstatement to a supervisory position, the court, in *NLRB v. Ford Motor Co.*, states (at 159):

We reiterate, however, that that case involved *reinstatement* into a supervisory position, and not coerced promotion. Here, the Board assumes the managerial responsibility of weighing a wide variety of factors involved in a decision of whether an employee is suitable for a more responsible position with additional duties.

On the basis of the distinction raised by the court in *NLRB v. Ford Motor Co.*, supra, it appears that here, as in *Oil Workers*, supra, and *Golden State Bottling*, supra, and unlike *NLRB v. Ford Motor Co.*, supra, we are not faced with the “coerced promotion” of an employee to a supervisory position on the basis of the Board usurping Respondent’s weighing a “wide variety of factors” in making that decision. Rather, here we are faced with Respondent’s interruption of its historical *reappointment* of an employee to supervisory positions over a period of 9 years. In the *Ford Motor* case, the court of appeals stresses that in that case, unlike *Oil Workers*, supra, it was not involved in *reinstatement* into a supervisory position, but rather “coerced promotion.” In the instant case, in my judgment, we are faced only with the issue of *reappointment* to a supervisory position to which Respondent has historically *reappointed* Gibson. But for his engaging, as an employee, in protected and union activities, he would have been reappointed to supervisory position as he had been for 9 years. Thus, again, unlike *Ford Motor Co.*, supra, we are not here faced with a “coerced promotion” involving the Board in the “managerial responsibility of weighing a wide variety of factors involved in a decision” as to whether Gibson is suitable for supervisory position. On the contrary, Respondent has historically—and repeatedly—made that decision and but for Gibson’s employee-based union activities, would have reappointed him. Based on the distinctions raised in *NLRB v. Ford Motor Co.*, supra, I conclude that Respondent’s failure to reappoint Gibson to the supervisory out-of-town positions presents a stronger case than in *Oil Workers*, supra, where the reinstated employee in a supervisory position had never been tested as a supervisor *Oil Workers v. NLRB*, 547 F.2d 575, 588–590 (D.C. Cir. 1976). In the instant case, Gibson has been tested as a supervisor by Respondent and found suitable over a 9-year period. Therefore, in the instant case, I find that the court’s per curiam distinction between “coerced promotion” and “reinstatement” applies a fortiori to the instant case of historical *reappointment*.

In view of the above-cited precedents, therefore, I conclude that Respondent’s discriminatory failure to *reappoint* Gibson to the position of out-of-town supervisor, a reappointment which Respondent had historically followed over a 9-year period, interrupted only because of Gibson’s protected union activities as an employee, violated Section 8(a)(3) and (1) of the Act. In reaching that conclusion, I further conclude that the failure to reappoint him as a supervisor occurred while Gibson was an *employee* and on account of lawful union activity in which he engaged as an employee. There-

fore the discrimination violated his rights as an *employee*. As the court of appeals noted in *NLRB v. Bell Aircraft Corp.*, 206 F.2d 235, 237 (2d Cir. 1953):

At the time the discrimination took place he was clearly a protected employee, and his *Prospects for promotion were among the conditions of his employment*. The Act protected him so long as he held a nonsupervisory position, and it is immaterial that the protection thereby afforded was calculated to enable him to obtain a position in which he would no longer be protected. [Emphasis supplied.]

I have concluded, above, that Respondent unlawfully discriminated against Gibson, consistent with Tucker’s factual admission to Hampton, in their conversation of February 1989, because of Gibson’s disrespect to strike replacements and his wiggling his fingers in his ears at account executive Hartzog, both activities protected by Section 7 of the Act. Respondent, however, at the hearing, and in its brief, has taken the position that not only did it not discriminate against Gibson, but that one of the key elements showing its failure to discriminate was that Gibson’s union activities on the picket line and elsewhere differed in no degree from the activities of other employees. In particular, Respondent notes that other employees, unlike Gibson, served on the Union’s negotiating committee. I have found against Respondent on the basis of the preponderant credible evidence concerning its discriminatory motive in failing to appoint Gibson to supervisory positions. His union activities were different than other employees. If they appear insignificantly different, they nevertheless irritated Respondent during the strike to ensure lasting, unlawful enmity against Gibson.

If Respondent, under my recommended order to the Board is being “asked to grasp a viper to its bosom,” it has only itself to blame. *NLRB v. Advertiser’s Mfg. Co.*, 823 F.2d 1086 (7th Cir. 1987). In this respect, if Respondent, here, is not ordered to continue in its historical reappointment of Gibson because of lawful union activities in which he engaged as an *employee*, then other unit employees, who are regularly appointed as out-of-town supervisors, will clearly be deterred from exercising their Section 7 rights *as employees* by the fear that if they engage in protected or union activities as employees, Respondent will retaliate against *them* by not appointing them to supervisory positions on out-of-town exhibitions. Such retaliatory conduct flies in the face of the protection of employees as particularly delineated in *NLRB v. Bell Aircraft Corp.*, 206 F.2d 235, 237 (2d Cir. 1953).<sup>9</sup> In any event, Respondent has created and abided by a system in which it regularly makes temporary supervisors out of its unit employees. It cannot, in part, now repudiate the system by discriminating against its unit employees for engaging in lawful union activity.

<sup>9</sup> Individuals holding “temporary” supervisory positions are normally found eligible to vote in Board elections because, in most situations, temporary supervisor assignments may properly be viewed as relatively insignificant interludes in regular employee assignments. Compare: *Westinghouse Electric Corp.*, 163 NLRB 723, 727 (1967), and *Great Western Sugar Co.*, 137 NLRB 551 (1962), with, i.e., *Dupont Co.*, 210 NLRB 395, 396 (1974).

## CONCLUSIONS OF LAW

1. United Exposition Service Co., Inc., the Respondent, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Teamsters Local Union No. 600 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. By telling employees that they will be denied reappointment to supervisory positions because they engage in lawful union activities, Respondent violated Section 8(a)(1) of the Act.

4. By denying reappointment as supervisors to its employees who have been repeatedly appointed supervisors by Respondent because they engaged in lawful union activities as employees, Respondent violated Section 8(a)(1) and (3) of the Act.

## THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Among the affirmative obligations I shall recommend to the Board that it order Respondent to perform will be the posting of a notice, refraining from unlawfully discriminating against employees on account of their union activities, and offering to employee Gibson of supervisory positions on its out-of-town exhibitions on the same basis on which it selected him in the past. Consistent with the discussion appearing in the text, above, and the distinctions drawn by the several courts of appeals in the above-cited cases, particularly *NLRB v. Ford Motor Co.*, supra, *NLRB v. Bell Aircraft Corp.*, supra, and *Oil Workers v. NLRB*, supra, and mindful of the fact that Respondent is not being coerced into promoting an untested employee to a supervisory position but is merely being directed to follow its historical, 9-year course of reappointing the long-tested employee to the same supervisory positions he held during the 9-year period, I shall follow the Board's order in *Ford Motor Co.*, 251 NLRB 413, 424 (1980), rather than the order on remand as reported in *Ford Motor Co.*, 266 NLRB 633 (1983).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>10</sup>

## ORDER

The Respondent, United Exposition Service Co., Inc., St. Louis, Missouri, its officers, agents, successors, and assigns, shall

<sup>10</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

## 1. Cease and desist from

(a) Telling Respondent's employees that they will be denied reappointment to supervisory positions because of lawful union activities engaged in as employees or other concerted activities protected by Section 7 of the Act in which they engaged as employees.

(b) Denying reappointment to Respondent's employees as supervisors because, as employees, they have engaged in lawful union activities or activities protected by Section 7 of the Act.

(c) Discouraging membership in Local Union No. 600, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, herein called the Union, or any other labor organization, by denying reappointment to Respondent's employees to supervisory positions because, as employees, they engaged in union or other protected concerted activities.

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

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

(a) Forthwith promote employee James (Terry) Gibson to any and all supervisory positions in out-of-town exhibitions on the same basis on which he was previously reappointed prior to September 18, 1988, and make him whole for any loss of earnings he may have sustained by reason of Respondent's unlawful refusal to reappoint them to supervisory positions commencing September 18, 1988.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its facilities in St. Louis, Missouri, copies of the attached notice marked "Appendix."<sup>11</sup> Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

<sup>11</sup>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."