

United Charter Service, Inc. and John Hubbard.
Case 20-CA-23397

January 24, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On May 22, 1991, Administrative Law Judge Jerrold H. Shapiro issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.¹

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 briefs and has decided to affirm the judge's rulings, findings, and conclusions² only to the extent consistent with this Decision and Order.

We agree with the judge's finding that Operations Manager Vieira did not unlawfully threaten to fire employee John Mead and that the Respondent did not unlawfully suspend or discharge employee John Hubbard. We do not agree, however, with the judge's finding that the Respondent did not unlawfully create the impression that its employees' protected, concerted activities were under surveillance by management. In determining whether a respondent has created an impression of surveillance, the Board applies the following test: whether employees would reasonably assume from the

statement in question that their union activities have been placed under surveillance. *South Shore Hospital*, 229 NLRB 363 (1977); *Schrementi Bros., Inc.*, 179 NLRB 853 (1969). In the instant case, the judge correctly stated the test, but erred in its application to the facts.

In late January 1990, some of the Respondent's bus drivers held a meeting at a restaurant to discuss their complaints against the Respondent. Employee Hubbard suggested that the drivers form an organization and confront the Respondent collectively. The other drivers agreed to organize and to draft a petition seeking recognition of the "Drivers Association" by the Respondent and setting forth certain job-related demands. In late January or early February, after this driver's meeting, Vieira was discussing scheduling with driver John Mead when Hubbard walked into the office. Vieira told Hubbard that he was tired of hearing the drivers complain about the Company and that, based upon what his many friends had told him, he knew the drivers wanted more money and improved employment benefits and were trying to organize some sort of committee or organization. Vieira further stated that the drivers thought they ran the Company and would not be happy until they bankrupted it, and that he intended to get rid of each and every driver who gave him any problems.

In February, Vieira told driver Lopata that he knew the drivers were trying to organize a drivers' association and wanted a pay raise and other employment benefits.

On May 23, during Hubbard's termination hearing, Vieira told Hubbard that he had "lots of friends" and knew about "the meetings" Hubbard had with drivers trying to get "a petition going." He also told Hubbard that he had received a copy of the petition a long time ago, and Vieira named some of the items that were listed on the petition. Vieira stated that he knew the drivers felt they had the right to have a say about what went on at the Company and threatened Hubbard that "every driver would be terminated if they did not get in line." Vieira also told Hubbard that Vieira knew about Hubbard's conversation with the drivers at Golden Gate Park and that Hubbard had not spoken kindly about Vieira and the Company.

The judge found that these statements by Vieira did not create the impression of surveillance of the drivers' union activities. He reasoned that the drivers had not made any effort to keep their activities a secret, and, considering the small size of the Respondent's business, it must have been clear to the drivers that the Respondent would have acquired knowledge of their activities by some legitimate means. The judge then noted that Vieira's words did not indicate that his knowledge came from other than a legitimate source and concluded that Vieira's comments did not create

¹The Respondent's motion to strike the General Counsel's exceptions is denied as lacking in merit.

²In agreeing with the judge that the Respondent did not unlawfully terminate John Hubbard, we rely on the judge's conclusion that Hubbard was fired for gross insubordination and that the Respondent would have discharged him for that even in the absence of the protected activity. We do not rely on the judge's conclusion that the other factors related to Hubbard's job performance during the 12-month period preceding his discharge contributed to the Respondent's decision to discharge him. Additionally, we do not rely on the judge's finding that the Respondent's rules provide for immediate termination for insubordination. The rules provided for immediate suspension. In fact, although Hubbard was given a termination hearing, the final termination decision was made only when the unrepentant Hubbard refused to accept a suspension proposed, after that hearing, as discipline for the insubordination.

In the absence of exceptions, we adopt the judge's findings that the Respondent unlawfully threatened employees with discharge when Operations Manager Vieira told Hubbard in late January 1990 that he would fire employees who were forming some sort of organization or committee, and when, during Hubbard's May 23, 1990 termination hearing, Vieira told Hubbard that "every driver would be terminated if they did not stay in line."

In light of our finding that the Respondent engaged in the above-described threats of discharge, we find it unnecessary to pass on the allegation that Vieira threatened Hubbard with discharge in early January 1990 before the drivers' meeting because such an additional finding would be merely cumulative and would not affect the remedy.

an unlawful impression of surveillance. Contrary to the judge, we find that all three of these statements would reasonably cause employees to believe that their protected concerted activities were under surveillance by the Respondent.

The Board does not require employees to attempt to keep their activities secret before an employer can be found to have created an unlawful impression of surveillance. Nor has the Board held that the smallness of an employer's plant will preclude the finding that the employer had created an impression of surveillance. Further, the Board does not require that an employer's words on their face reveal that the employer acquired its knowledge of the employee's activities by unlawful means.³

The Respondent's employees did not engage in their organizational activities on the Respondent's premises. Their meetings were held at a nearby restaurant. The judge correctly found that the employees had concluded among themselves that they probably could not keep their activities a secret, but this does not establish that they engaged in their activities openly. We therefore do not agree with our dissenting colleague's assertion that the judge's statement that the employees' activities were carried out openly provides a defense to the impression-of-surveillance allegation. As fully set forth above, the employees' activities were primarily conducted off the Respondent's premises. Furthermore, even if it were common knowledge that the employees were attempting to organize, Vieira's comments went beyond permissible limits. Not only did he tell the employees that he knew of their organizing efforts, he also went into detail about the extent of the activities and the specific topics they discussed at the meetings. He did so, even though the Respondent did not explain to the employees or show at the hearing that it ever was voluntarily given or had lawfully obtained a copy of the driver's petition.⁴ Thus, Vieira's statements on their face reasonably suggested to the employees that the Respondent was closely monitoring the degree and extent of their organizing efforts and activities.⁵ In addition, the record contains no evidence to suggest that Vieira had any legitimate basis for making the statements, and in fact the two of those comments to Hubbard were also found to include unlawful threats. Accordingly, we find that all three of Vieira's statements

³See *American National Stores*, 195 NLRB 127 (1972), enf. 471 F.2d 656 (8th Cir. 1972).

⁴In fn. 5 of his decision, the judge noted that employee Freund had told employee Asensio that Freund had shown Vieira a copy of the petition. The judge's notation in this regard was based on Asensio's testimony. Freund did not testify in this proceeding. This uncorroborated hearsay testimony is insufficient to prove that Vieira ever received a copy of the petition. Furthermore, the Respondent has not established that Vieira's statements were based upon information received through legitimate channels.

⁵*Emerson Electric Co.*, 287 NLRB 1065 (1988).

created the impression that the employees' activities were under surveillance⁶ and violated Section 8(a)(1) of the Act.⁷

ORDER

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

1. Insert the following as paragraph 1(b) and renumber the present paragraph 1(b) as paragraph 1(c).

“(b) Creating the impression that the employees' protected concerted activities are under surveillance.”

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

⁶For the reasons discussed by the judge, Member Oviatt would affirm the judge's dismissal of the impression-of-surveillance allegation. Member Oviatt notes in particular that the judge specifically found, relying on “the record,” that “Hubbard and the other drivers engaged in this [concerted] activity openly.” Member Oviatt observes that the judge relied in part on this finding to conclude that the employees would reasonably assume Vieira had been informed of their activities through legitimate means.

⁷The judge found that Vieira's comment to driver Asensio that he heard there was a petition circulating and he believed that Hubbard was the instigator did not create the impression of surveillance. We do not pass on this allegation since such an additional finding would be merely cumulative and would not affect the remedy.

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.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten to discharge you for engaging in activities protected by Section 7 of the Act.

WE WILL NOT create the impression that your protected concerted activities are under surveillance by management.

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.

UNITED CHARTER SERVICE, INC.

Donald R. Rendall, for the General Counsel.
James F. Flanagan (Heller, Ehrman, White & McAuliffe), for the Respondent.

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge. This proceeding, in which a hearing was held February 19–20, 1991, is based on an unfair labor practice charge and a first amended charge filed by John Hubbard (Hubbard) on May 25 and July 3, 1990, respectively, and on a complaint issued July 27, 1990, against United Charter Service, Inc. (Respondent) on behalf of the General Counsel of the National Labor Relations Board (Board) by the Board's Regional Director for Region 20 alleging that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act (Act).

The complaint, as amended at the start of the hearing, alleges that the United Charter Service Drivers' Association (Association) is, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act and further alleges that, in violation of Section 8(a)(1) of the Act, Respondent, by its Operations Manager Arnold Vieira, engaged in the following conduct: in January, February, and May 1990 created an impression among Respondent's employees that their Association activities were being kept under surveillance by Respondent; in January and February 1990, threatened employees with discharge because of their Association and/or protected concerted activities; and, in June 1990 threatened employees with the loss of their jobs because of their Association and/or protected concerted activities. The complaint also alleges that Respondent violated Section 8(a)(1) and (3) of the Act by suspending Hubbard on May 19, 1990, and discharging him on May 24, 1990, because of his Association and/or protected concerted activities.

In its answer to the complaint Respondent admits it suspended and discharged Hubbard on the dates set forth in the complaint, but denies engaging in any of the unfair labor practices alleged in the complaint.¹

On the entire record, from my observation of the demeanor of the witnesses, and having considered the General Counsel's and Respondent's posthearing briefs, I make the following

¹ Respondent's answer admits it is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act and admits it meets the Board's applicable discretionary jurisdictional standard.

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICE

A. *The Evidence*

1. The setting

Respondent, a corporation, with its place of business in San Francisco, California, owns and operates a fleet of tour buses. Its customers are primarily tourists from Japan. Its San Francisco facility consists of an office and an adjacent yard, where it parks and maintains its buses.

Respondent employs bus drivers, tour guides, office employees, mechanics, and yard personnel. It employs approximately 20 full-time and, depending on the time of the year, 15 to 20 part-time employees. They are not represented by a labor organization.

Respondent's president, Takayuki Itakura, is responsible for the overall operation of the business. During the time material there were three persons employed under his supervision, who were responsible for the day-to-day operation of the business: Mimi Yamamoto, Arnold Vieira, and Wayne Paradise. Yamamoto supervised the office personnel. Paradise supervised the mechanics. Vieira, Respondent's operations supervisor, supervised the bus drivers. Vieira had been employed in that position since November 1989 and immediately prior to that had been employed for over a year by Respondent as a bus driver. In its answer to the complaint Respondent admitted that at all times material Vieira was a supervisor within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act. I note that at the time of the hearing in this proceeding Vieira was no longer in Respondent's employ having terminated his employment on December 31, 1990.

During the time material the Respondent's bus drivers were governed by over 100 rules and regulations issued and published by Respondent in a booklet which was distributed to the bus drivers. Three of the rules, which are relevant to this case, are as follows:

30. It is understood that any misconduct or insubordination with any dispatcher/officer/manager of this Company will result in suspension with hearing.

39. It is expected that every employee will be neat and clean in appearance.

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53. **INSUBORDINATION:** Disobedience of written or verbal orders of any Company supervisory person, violations of rules and general instructions or neglect of duty will be considered insubordination and will be sufficient cause for immediate suspension with hearing.

One of the disputed issues herein is whether Respondent's bus drivers were required to wear ties. Respondent's published rule, *supra*, dealing with employee appearance does not mention this requirement. Respondent's President Itakura and its dispatcher Roger Morris testified Respondent requires

its drivers to wear ties while performing their duties, except when they drive a tour bus to Yosemite.

Morris was employed by Respondent "in the office" from January 1988 until November 1989, when he terminated his employment. He was rehired in August 1990 as Respondent's dispatcher. He testified that because he has been employed in Respondent's office, he was unable to testify whether the bus drivers complied with Respondent's tie requirement.

The General Counsel presented evidence that while Respondent may have preferred its drivers to wear ties, it did not require them to do so: John Hubbard and Zeno Lopata, bus drivers, testified that during the time material some of the drivers, including Hubbard, occasionally did not wear ties while on duty; Lopata further testified that in April 1990 several of the bus drivers, including himself, were informed by Operations Supervisor Vieira that, "he wanted the drivers to look presentable and preferably wearing a coat, jacket and a tie" and also told them, "he preferably would like to have the pants and jackets match or have colors . . . in gray, blue or black"; Nick Asencio, a bus driver, testified that in June 1990, after having observed that several drivers had not been wearing ties, he informed Vieira about this and asked, "is [the] policy now that we're not wearing ties," and Vieira answered that he knew drivers were not wearing ties and intended to issue a memo on the subject—no such memo issued;² and, when Hubbard applied for his job in March 1989, he was not wearing a tie, and Morris told him "we'd like for you to wear ties, but the main thing is to be neat. What you have on right now is fine."

The sole evidence that Respondent ever informed its bus drivers that they were required to wear ties is: Itakura's testimony that a few months after Hubbard's hire, in complementing him on the bow tie he was wearing, Itakura mentioned to Hubbard, "you know our company rule; we have to wear the tie all of the time"; and, Morris' testimony that it was his standard practice in interviewing applicants for employment during 1988 and 1989 to inform them that Respondent required its bus drivers to wear ties. I reject their testimony because it was disputed by Hubbard whose testimonial demeanor was good when he testified about this subject, whereas the testimonial demeanor of Itakura and Morris was not good when they gave their testimony.

Based on the foregoing, in particular the poor testimonial demeanor of Itakura and Morris when they testified Respondent required its bus drivers to wear ties, and Respondent's failure to have the drivers' immediate Supervisor Vieira corroborate that testimony, I find, as the testimony of drivers Hubbard, Lopata and Asencio shows, that during the time material Respondent preferred that its bus drivers wore ties and so informed them of this, but did not require that they do so and that occasionally drivers, including Hubbard, did not wear a tie while on duty and were not disciplined.

The alleged discriminatee, Hubbard, was employed by Respondent for approximately 14 months, from March 1989 through May 1990. During his employment management had no complaints about the manner in which he conducted himself with customers. Quite the opposite, management felt

Hubbard was "very good" with its customers and that they liked him. However, prior to his suspension and discharge in May 1990, during his last 12 months of employment, representatives of Respondent spoke to him about his work performance as follows:

1. In approximately May or June 1989, when Hubbard transported a group of tourists to the airport, he overlooked one of the passenger's luggage which had been stored in a side compartment. The tourist went to Hawaii and the tourist's luggage remained on the bus. Subsequently, Respondent's dispatcher told Hubbard he had forgotten to remove this luggage from the bus and told him to remember that in Respondent's buses, which were manufactured in Europe, that luggage was stored in side compartments, unlike the American manufactured buses.

2. During the first week in December 1989, in connection with a trip of several days to Los Angeles, Hubbard failed to maintain a daily log of his mileage, and was informed by Operations Supervisor Vieira that Respondent needed this type of documentation for purposes of billing the client and to comply with Department of Transportation requirements. Hubbard, who prior to this had not been informed of this requirement, stated that if this was company policy he would comply with it even though it was his understanding that Federal law did not require him to do this.

3. On or about February 1, 1990, in backing up a bus, Hubbard hit a light post and dented the bumper. Vieira spoke to him about this accident. He told Hubbard that Hubbard was responsible for the damage done to the bus, even though, as Hubbard had explained to Vieira, he had been following the directions of a parking lot attendant when he backed the bus into the light post.

4. On or about February 14, 1990, Hubbard, who, was scheduled to drive a group of tourists to the airport, was late for work and because of this another driver was assigned the job of driving those tourists to the airport.³ When Hubbard arrived for work, Vieira told him he was late and asked for an explanation. Hubbard replied the bus he took from his residence to work had been late that day and pointed out that usually he arrived at the yard for work early.

5. On or about February 3, 1990, Wayne Paradise, Respondent's shop foreman, informed Vieira he had observed Hubbard drive a bus into a pile of Hubbard why, in parking his bus, he had driven it into the tires. Hubbard replied he did not know what Vieira was talking about, and when Hubbard and Vieira looked at the tires in question, there was no sign that a bus had driven into them nor did the bus' bumper show signs of having bumped into the tires.

6. On March 8, 1990, in violation of company policy, Hubbard gave one of his friends a ride on the bus he was driving. He was observed doing this by Respondent's President Itakura who reprimanded him for this, and Hubbard apologized. Vieira also reprimanded him and Hubbard again apologized and stated he would not engage in this conduct again.

7. Respondent forbids its drivers from driving buses on one of the streets adjacent to its yard, 18th Street, because

²Lopata's and Asencio's above-described testimony was not denied by Vieira, a witness for Respondent. Lopata's and Asencio's testimonial demeanor was good when they gave this testimony.

³The record reveals it is very important to Respondent that its bus drivers be on time for work when they are scheduled to transport tourists to the airport, inasmuch as an important part of Respondent's service is to make sure that their customers get to the airport on time for their flights.

this street is a residential street whose residents have complained about the noise of the Company's buses. On March 31, 1990, in violation of this policy, Hubbard used 18th Street to drive a bus to its destination. Later that day, Vieira asked him why he had done this in violation of Respondent's policy. Hubbard in effect replied it was more convenient to use 18th Street, than to take another route. Vieira suspended him from work for 3 days because he had violated Respondent's policy by driving his bus on 18th Street.

2. Respondent's bus drivers talk about improving their terms and conditions of employment and about forming an association of employees for the purpose of persuading respondent to remedy their grievances and to improve their terms and conditions of employment

During the spring of 1989 some of Respondent's bus drivers complained to one another about being required by Respondent to come to Respondent's office, when they were not scheduled to work, in order to attend employee meetings and training sessions, for which they were not paid to attend. Hubbard, one of the complaining drivers, told the other complainants that this was a common gripe in the industry and that their complaints would never be remedied because bus drivers thought of themselves as independent agents and did not organize and that the employers in the industry took advantage of this.

Later in 1989 several of the drivers, including Hubbard, complained to one another about the fact that while there was a lack of work for them due to the October 1989 earthquake, that Operations Supervisor Vieira and Mechanics Supervisor Paradise were driving buses, even though Respondent had no work for its bus drivers. Hubbard told the other complaining drivers that the only way they could remedy their employment grievances was by organizing so that they spoke as one voice about the issues which affected all of them. He also stated that if they were unwilling to organize, then they had no right to complain because whatever they got from Respondent they deserved.

Subsequently, prior to the drivers' January 1990 meeting, *infra*, bus drivers Hubbard, Lopata and Mead distributed NLRB published pamphlets to Respondent's drivers, which Lopata had obtained from the Board's Regional Office. The pamphlets informed the drivers, among other things, of their legal right to organize a union.

In about the third week of January 1990⁴ and again in early February, between 10 and 12 of Respondent's bus drivers met at a restaurant located in the neighborhood of Respondent's office and discussed their employment grievances. All of the drivers who attended participated equally in the discussion and no one was designated as a spokesperson. However, bus drivers Hubbard, Mead, and Lopata were more outspoken than others.

During their January meeting the drivers discussed their employment grievances and stated what they wanted in the way of improved terms and conditions of employment. Hubbard told them they would not succeed as individuals in persuading Respondent to remedy their grievances or to improve their working conditions, but would have to form an organization and confront Respondent collectively. The other driv-

ers agreed and also agreed to deal with Respondent through an association of employees which would be named the United Charter Service Drivers' Association, which would be open to all of the Company's employees.

During the January meeting, as the individual drivers listed the various improvements in the terms and conditions of employment that they wanted, one of the drivers, Mead, wrote them down. Hubbard agreed to take the list that Mead had compiled and type it up in the form of a petition which the drivers agreed would then be resubmitted to them for approval, and after being approved would be submitted to all of the Respondent's employees (drivers and nondrivers) for their signatures and then submitted to Respondent's management.

Following the above-described January drivers' meeting, Hubbard drafted a petition, which read as follows:

We, the Drivers Association, hereby request the following be agreed to by management of United Charter Service:

Management of said company will recognize the Drivers' Association and agree not to make any significant changes regarding the following until an agreement between the Drivers' Association and management can be agreed on.

(A) Policy and implementation of the hiring of full-time drivers thus ensuring that year-round drivers are given the maximum amount of hours available

(B) Any significant changing of Policies affecting Drivers which will give drivers the opportunity to consult and to be consulted in matters that directly affect them in the course of performing their duties.

(C) Assignment of Coaches should be made by seniority.

(D) Van Drivers are to be given first preference to upgrade when a bus driver position becomes available.

(E) Management to raise minimum pay scale to \$10.00 per hour for bus and van drivers and mileage pay to \$.35 per mile. This would also allow for yearly cost of living increases closely following the rate of inflation.

(F) Management to pay baggage pay equal to one hour pay on any job where baggage is handled by driver since clients are charged for these services

(G) Management to pay "chaining Fee" equal to one hour pay on any job which, due to its scheduling or route, requires driver to "chain up" the vehicle

(H) Except in the case of a time period in excess of four hours from the drop time to the next YARD time, management to pay hourly wages starting from first yard time lasting until driver leaves vehicle in yard.

(I) Bidding process to remain as stands with definition of terms as follows:

(1) Available Drivers: all drivers who are not "in the book" for a day off or who are not available due to an arranged sick leave or who are not already assigned to an on the road job

(J) Management to pay sick leave up to seven days per year for all drivers who have been with the company for at least six months. Sick Leave will be broken down as follows: one half day a month with an extra day given on the one-year anniversary of driver

⁴Unless specified otherwise all dates hereinafter refer to the year 1990.

(K) Management to provide vacation pay up to seven days a year broken down as one half day a month with an extra day being given on the one-year anniversary of driver

(L) Management to be prohibited from doing the drivers' work except in the following circumstances:

(1) Driving a shift for which the regularly scheduled driver is too late to be on time for his/her spot time or due to other unforeseen extraneous circumstances which incapacitates the driver from completing his/her job

(2) A situation where there are not enough available drivers to cover all shifts

(M) Management to continue payment of four hour minimum pay for any official function (including mandatory meetings)

(N) Over-Road rotation to remain as is. In the case of special equipment requests, driver in line for job should be given the option to switch vehicles as long as the equipment is available. In the case of Driver requests, requested driver should be given first option and if he/she is not able to comply, the job should return to the original rotation

(O) Management to advance cash needed for expenses on any job requiring travel outside a one hundred air mile radius of base or requiring driver to spend one or more nights on the road

(P) Drivers reserve the right to comment, review and approve any contract to be signed between management and drivers

(Q) Management will establish a review board comprised of management and drivers with the intent of properly and fairly reviewing any matters concerning a drivers' performance of his/her duties, i.e., accidents, client complaints that could result in company discipline and/or termination of employment

During the latter part of January or early February Hubbard distributed this petition to the approximately 12 drivers who attended the January meeting and to the four yard employees who cleaned Respondent's buses.

During the drivers' second meeting, which was held in February, Hubbard asked if they wanted to make any changes in the petition he had drafted. They agreed that the wording of the petition should remain as it was. They also agreed that all of Respondent's employees would be solicited to sign the petition and that it would then be formally presented to Respondent's president Itakura and if he did not agree to the items set forth in the petition, the drivers would cease work and strike. In addition, the drivers agreed that Vieira must have been aware of what they were doing inasmuch as they felt there was no way that such information could be kept from the office and agreed that if Respondent attempted to discharge any one of the drivers, after the drivers commenced their organization campaign, that they would all refuse to work.

Subsequent to the February drivers' meeting, most of the drivers lost their enthusiasm about forming the Association and submitting the above-described petition to Respondent. As a result the drivers and other employees were never solicited to sign the petition and it was not signed by a single employee and was never formally submitted to Respondent's

president, and the Drivers' Association was never formed. It was apparently due to this lack of employee interest that a meeting scheduled to be held at Hubbard's home in April was never held. Also, in an unsuccessful attempt to generate employee support for the petition, Hubbard and Lopata, in late March or early April, distributed a pamphlet published by the NLRB which, among other things, indicated to the employees that they were legally entitled to form a labor organization without fear of reprisals by their employers.

During the first week of May drivers Hubbard, Horton, and Freund, who were joined later by driver Ivanish, while at the Golden Gate Park parking area waiting for a group of tourists to return to their buses, had the following conversation. Freund stated Vieira had told him he knew the employees had organized, and drafted a petition and that he had received a copy of the petition.⁵ Freund also told them that since Operations Supervisor Vieira knew about the petition, Freund feared that President Itakura also knew about it and expressed concern that management would get rid of the employees if they continued with their efforts concerning the petition. Horton expressed his concern that Respondent would abolish its system of seniority. Ivanish, when he joined the group, stated he wanted to add another item to the petition in order to remedy what he considered to be a significant employee grievance. Hubbard told them that everything that had been stated by Freund, Horton, and Ivanish, provided even more reason for the employees to realize that the only way they could remedy their grievances was by joining together collectively and that as long as they failed to do this the existing state of affairs would continue.

3. Vieira's comments about the drivers' grievances and about their effort to improve their terms and conditions of employment

In January, about 1 or 2 weeks prior to the Drivers' January meeting, while riding home with Vieira after work, Hubbard was told by Vieira that he had been hearing complaints from drivers that they were upset about the fact that Vieira and Paradise had been driving the buses. Vieira declared that while many of the drivers felt they ran the Company, it was Vieira and Itakura who ran the Company. Vieira also told Hubbard that there were drivers who were demanding wage increases, improved health benefits and better hotel accommodations. Vieira stated those drivers would not be happy until they ran the Company into the ground, however, Vieira further stated, "as long as [Vieira] was sitting behind the desk that was not going to happen, and [Vieira] would see that every one of them were gone, first."⁶ It is undisputed that from the day Vieira assumed his position of operations supervisor in November 1989, continuously through at least May 1990, Vieira would comment out loud in the Compa-

⁵I note that shortly before the drivers' meeting held in February, apparently after Hubbard had distributed copies of the petition to the drivers, Freund told driver Asencio that Freund had shown a copy of the petition to Vieira.

⁶The description of this conversation is based on Hubbard's testimony. Vieira testified it was in late February or early March when he drove Hubbard home, gave a completely different account of the conversation, and denied making the above-described remarks attributed to him by Hubbard. I credited Hubbard's testimony because his testimonial demeanor was good when he testified about this conversation, whereas Vieira's was poor.

ny's office and yard, in the presence of employees, as follows: "[the drivers] are still making demands or trying to make demands"; "drivers are being too demanding"; "the drivers think they're running the company . . . and we're going to be getting rid of them"; or, "the drivers were trying to run the place and I won't let that happen."⁷

In late January or early February, after the first drivers' meeting, Hubbard entered the office when driver Mead was arguing with Vieira about the way in which the drivers were being scheduled. As Hubbard entered, Mead finished his argument with Vieira, but remained when Vieira commenced his conversation with Hubbard, and left while they were still talking. Vieira began his conversation with Hubbard by remarking that he was tired of hearing the drivers complain about the Company. Vieira told Hubbard he had many friends "out there" who kept him informed about what was going on and that he knew the drivers were trying to organize some sort of a committee and knew there were drivers who were upset because Vieira and Paradise had been driving the buses, and knew that there were drivers who wanted more money, baggage pay, better medical benefits, better hotel accommodations, and who were making other outrageous demands, and were forming some sort of an organization. Vieira stated that those drivers would not be happy until they ran the Company into bankruptcy, that they thought they ran the Company but Itakura had given him full responsibility and control and Vieira intended to get rid of each and every driver that gave him any problems.

Hubbard responded to Vieira's remarks by stating that he thought the drivers collectively had the same right to submit their grievances to Respondent for better wages and benefits as Respondent's owner had the right to set his own agenda and to maximize his profits. Hubbard also stated that since Vieira had been a driver with the same grievances as the current drivers, that Hubbard did not understand why Vieira did not understand their grievances, and that he thought Respondent should deal with the employees uniformly and that Respondent could do this by forming a drivers' review board composed of employer and employee representatives. Hubbard warned Vieira that until Respondent formed such a review board that what Vieira had complained about would continue, "because it was built into the system."⁸

In early or mid-May driver Nick Asencio was seated in the Company's office, approximately 15 feet from where Vieira was seated, when he overheard Vieira comment to another driver, who was turning in some paperwork, that he had heard there was a "petition" going around and felt that Hubbard was the "instigator."⁹

4. Itakura's conversation with Barahona

Respondent's president Itakura when asked if it was true that he preferred to operate his business without a union, tes-

⁷Based on Hubbard's testimony (Tr. pp. 187-188) which was not denied by Vieira.

⁸The above-description of Vieira's late January or early February office conversation with Hubbard is based on Hubbard's uncontradicted testimony. Hubbard's testimonial demeanor, when he gave this testimony, was good. Vieira was not questioned about the conversation.

⁹Based on Asencio's testimony. Vieira denied making the remarks attributed to him. Asencio's testimonial demeanor was good, whereas Vieira's was poor, when they testified about this matter.

tified "I don't mind even union or not." This testimony is belied by what he stated to Respondent's bus driver Richard Barahona, when he interviewed him for his job. In October 1989 when Itakura interviewed Barahona for his job with Respondent, Barahona informed Itakura he had previously been employed by the Gray Line bus company. Itakura remarked that a union represented the employees employed by Gray Line. Barahona stated that he had been employed by Gray Line only for his probationary period, so he had never joined the union. Itakura responded, "we don't want unions, we're a family business." Barahona answered, he never had any experience with a union and did not know if they were good or bad.¹⁰

5. Vieira's conversation with Lopata

In February Zeno Lopata, one of Respondent's bus drivers, spoke with Operations Supervisor Vieira in the Company's office. Initially their conversation concerned a dispute between bus driver Mead and Vieira about the time of day Vieira had told Mead to show up for work on a certain day. Lopata took Mead's side and accused Vieira of giving Mead the wrong show up time. Vieira denied he had done this and stated Mead and Lopata were lying and that the drivers were "running a conspiracy against [him]" and were "trying to get him in trouble." He also told Lopata that he knew the drivers were trying to organize the Drivers' Association, which he stated was a very hard thing for them to do because of the difficulty in keeping the drivers together. Vieira also stated he knew the drivers wanted a pay raise and extra pay for handling luggage and mentioned a couple of the other items which, as described supra, had been set out in the petition drafted by the drivers. Lopata replied he knew it was hard to keep the drivers together in an organization, but they would try.

During this conversation Vieira commented that Mead was on "thin ice" and stated that Mead, who was number one on the seniority list, had a lot to lose, and that Lopata, who was number two on the seniority list, had a lot to gain.

Also during this conversation, Lopata brought up the subject of a letter of suspension which Vieira had previously issued to him in connection with his December 1989 suspension from work. Vieira told Lopata that this letter had been on file ever since the first day of Lopata's suspension. Lopata disputed this and called Vieira a "liar." It is undisputed that there was no one else in the office during this conversation.¹¹ Lopata was not disciplined for calling Vieira a liar.

6. Mead's argument with Vieira

Jon Mead was employed by Respondent as a bus drivers from August 1987 until March 15, 1990, when he was dis-

¹⁰The above description of Itakura's conversation with Barahona is based on the undenied testimony of Barahona, whose testimonial demeanor was good.

¹¹The above description of Lopata's February conversation with Vieira is based on Lopata's testimony. Vieira admits the conversation occurred. However, he testified he did not tell Lopata he thought there was a "conspiracy" against him or that he knew of a group called the Drivers' Association. He also testified that the topic of an employee group or association never came up during this conversation. I credited Lopata's testimony because his testimonial demeanor was good, whereas Vieira's was poor.

charged. In February, on a date not specified in the record, Vieira told Mead to report for work the next day at 8:45 a.m. The next day at approximately 7:30 a.m. dispatcher Bob Cerro telephoned Mead and told him he should have been at work at 7:30 a.m. Later that morning Mead complained to Vieira he had gotten to work late that day because Vieira, the day before, had told him to be at work at 8:45 a.m. Vieira denied this and stated he had told him to be at work at 7:30 a.m. Mead walked over to the radio used by the dispatcher to communicate with the drivers. Mead, using the radio, spoke to driver John Asencio, who Mead believed had heard Vieira instruct him to be at work at 8:45 a.m. Asencio acknowledged having heard Vieira tell Mead to be at work at 8:45 a.m. and stated that several of the other drivers also had heard Vieira say this. Vieira yelled for Mead to leave the office and stated that Mead and the other drivers had started a "conspiracy" to get him fired and stated the drivers had planned "this little thing" to get him into trouble and get him fired. Mead responded by stating the drivers did not have to do anything to get him fired, because Vieira was stupid enough to get himself fired. Vieira yelled that Mead should leave the office and threatened to get him fired for his conduct. As Mead left the area, on the way to the coffee machine, Mead declared under his breath, "fuck you, Arnie." Vieira stated, "I heard that" and accused Mead of being insubordinate and told him to leave the office, which he did. There is no evidence that this episode was witnessed or overheard by any of Respondent's other employees. Mead was not disciplined for engaging in this conduct. Nor was he ever spoken to about this conduct by management prior to mid-March, when he was discharged.

7. Hubbard's suspension and discharge

On May 19 Hubbard drove a group of geologists to the Santa Cruz Mountains for the day and on that occasion was dressed in denim slacks and a polo shirt. A month before, when he had taken the same group on this tour, he had worn slacks and a sports shirt and had been told by the groups' leader that he should wear jeans or something more comfortable, so that he could join the group in their hike through the hills the next time he took them on this tour.

On May 19, at 7 a.m. immediately before leaving the Company's yard with his bus, it is undisputed that Hubbard spoke with Vieira for approximately 5 minutes, at which time he received the paperwork for the trip and received directions on how to get to the location in San Jose, California, where he had been instructed to pick up the group he was taking to the Santa Cruz Mountains. It is also undisputed that Vieira said nothing to him about the way he was dressed.

On May 19, at the end of the workday, Vieira was sitting in the office at the desk used to dispatch Respondent's bus drivers and was preparing to dispatch the drivers to the next day's assignments. More specifically, he was reviewing the scheduled trips for the next day with the object of determining which of the bus drivers would be assigned to those trips, and after making that decision intended to telephone the drivers, who were waiting at their homes for him to call. Present at the desk were drivers John Hubbard, Nick

Asencio, and Shin Kase, all of whom remained there throughout Hubbard's argument with Vieira.¹²

When Hubbard came to the dispatch desk on May 19 Asencio and Kase were already there. Vieira asked him how his trip had gone that day. Hubbard told him that while it had gone well that he had gotten dirty walking through the mud. Asencio asked if he had gone to Yosemite National Park. Hubbard answered he had gone to the Santa Cruz Mountains. Asencio asked why he was not wearing a tie?¹³ Hubbard replied he did not always wear a tie and that on this particular day the person in charge of the group he was driving had told him to dress very casual for the trip. Vieira at this point asked, "since when do you not wear a tie?" Hubbard answered that during his employment with Respondent there had been many occasions when he had not worn a tie. Vieira asked, "who are you to change company policy?" Hubbard stated he did not understand what Vieira was talking about because no one had ever questioned how he had dressed since he began work for the Company, and pointed out that when he had spoken to Vieira earlier that day at 7 a.m., he had been dressed exactly like he was now and that Vieira had not commented on his casual dress. Vieira stated that Hubbard was violating company policy. Hubbard stated he did not realize there was such a policy. Vieira then stated that he did not want to continue with this conversation because he wanted to finish the dispatching. Hubbard replied that since Vieira had raised the issue, Hubbard wanted to get it resolved right then and there, and continued to question Vieira about Respondent's alleged policy of requiring drivers to wear ties. Vieira told Hubbard to "shut up" because he had to finish dispatching and told Hubbard he would discuss the matter with him later, and warned Hubbard that if he did not shut up and let him finish with the dispatching, that Hubbard would be suspended for 3 days. Hubbard responded by stating, he was not "a child" and told Vieira not to speak to him in that manner, and stated he wanted to discuss the issue of Respondent's dress policy now and, in saying this, pounded the desk with his fist. Vieira responded by stating he did not want to discuss the matter any further and told Hubbard he was suspended for 3 days. Hubbard continued to insist that Vieira discuss the issue of Respondent's dress policy with him right there and then, so that they could resolve the matter. Vieira stated he did not want to take anymore time to discuss the matter right then because he was busy dispatching. Hubbard, who, had been standing aside of Vieira's desk, reached over to a vacant chair, picked up the chair and set it down aside of the dispatch desk and, in doing so, accidentally hit the side of the desk with the chair, which made a noise. Hubbard sat down and told Vieira he intended to sit there and wait until Vieira had finished dispatching and that before he left he wanted to resolve the matter that they had been discussing. Vieira sat for a moment and said nothing and then, in the presence of the drivers, telephoned President Itakura and told him Hubbard was causing a commotion in the office, that he was disrupting the office and would not let Vieira do his job, and that Vieira wanted to terminate

¹² Asencio also places drivers Bill Silva as being present at the dispatch desk on May 19 during the time material. However, neither Hubbard, Vieira, nor Kase placed him there.

¹³ Although never told by supervision that he was required to wear a tie, Asencio, during his employment with Respondent, usually wore a tie by choice.

him, and asked that a termination hearing be scheduled for the next week. He then hung up the phone and told Hubbard he had been fired and that Vieira would telephone him and set a date for the termination hearing.

Hubbard and Asencio for the General Counsel and Vieira and Kase for the Respondent testified about the above-described May 19 confrontation between Hubbard and Vieira. Hubbard, Asencio and Vieira testified at length about what occurred, whereas Kase's testimony was abbreviated. The above description is for the most part based on Hubbard's and Asencio's testimony, because in general they appeared to be sincere witnesses whose testimonial demeanor was good, whereas Vieira seemed to be an insincere witness whose testimonial demeanor generally was poor. However, I rejected Hubbard's and Asencio's testimony that Hubbard did not raise his voice and did not hit the desk with his fist. Instead, I credited Vieira's testimony on these disputed matters inasmuch as his testimony in this respect was corroborated by Kase's, whose testimonial demeanor was good when he gave this testimony, whereas the testimonial demeanor of Hubbard and Asencio while good generally was not so good when they testified about these two disputed matters.

On May 21, at Hubbard's request, President Itakura met with him at Respondent's office. Hubbard told Itakura that Office Manager Yamamoto had told him that he had been accused of pounding on the desk, yelling in the office and throwing furniture around the office on May 19. Hubbard stated he had not done any of those things. He also told Itakura that drivers Asencio and Kase had witnessed the entire incident and asked that Itakura speak to them. Itakura stated that bus driver Bill Silva claimed that Hubbard had pounded on the desk and thrown furniture. Hubbard stated he did not recall Silva being present and asked that Itakura give him a fair review. Itakura stated there was a conflict about what happened on May 19 between Hubbard and Vieira and that Itakura intended to interview Kase and Asencio.

During Hubbard's May 21 meeting with Itakura, Hubbard also told Itakura that during the 14 months of his employment with Respondent, he had not worn a tie dozens of times while at work and had never tried to conceal this. Itakura replied that he had not been aware of this. Hubbard responded by stating he had not worn a tie 2 weeks previously when Itakura was on his bus as a tour guide, and that Itakura had never said anything to him about his failure to wear a tie and that no one had ever told him it was company policy for the drivers to wear ties. Itakura told Hubbard he did not remember ever observing him at work without a tie.

On May 22 Respondent's Office Manager Yamamoto telephoned Hubbard at home and told him that the next day there would be a hearing concerning his case. She told Hubbard that present at the hearing would be Operations Supervisor Vieira, Mechanics' Supervisor Paradise, and President Itakura. Hubbard asked why Paradise, whom he described as Itakura's right hand man, would be present, and asked that drivers Asencio and Kase be present, since he explained that they had witnessed the entire "altercation" between himself and Vieira. Yamamoto stated that their presence was unnecessary because Itakura had spoken to them and that Kase would be out of town.

On May 23, as scheduled, Hubbard met with Itakura, Vieira and Paradise. The meeting was held at Respondent's yard in one of its buses. The meeting began with Vieira

handing Hubbard a letter dated May 22, signed by Vieira, which read as follows:

U.C.S. HEARING
1746 18TH. ST.
SAN FRANCISCO, CA. 94107
RE: JOHN HUBBARD
TERMINATION

YOU ARE CHARGED WITH INSUBORDINATION WHICH OCCURRED ON MAY 19 1990. YOU WERE IN VIOLATION WHEN YOU WERE TOLD BY OPERATION SUPERVISOR MR. VIEIRA THREE TIMES THAT THE BRIEF DISCUSSION ON YOUR NON COMPLIANCE TO COMPANY TIE REGULATION WOULD BE DISCUSSED LATER. YOU WERE ALSO TOLD TO LEAVE THE OFFICE FROM MR. VIEIRA WAS AMIDST HIS DISPATCH DUTIES AND THAT HE WAS NOT GOING TO RELINQUISH ANY MORE TIME TO THIS MATTER ON HAND AT THAT TIME.

YOUR BLATANT REFUSAL TO AUTHORITY AND RULES ARE OF FURTHER CONCERN TO THIS COMPANY AND A REFLECTION OF POOR CONDUCT.

THE FOLLOWING LIST REFLECT A UP TO DATE RECORD OF YOUR INFRACTIONS FOR THE PAST 12 MONTHS.

1. FEDERAL D.O.T. LOG VIOLATION & COMPANY INFRACTION 12/3/'89 TO 12/8/'89
2. BACKING ACCIDENT 2/1/'90 [CHARGEABLE]
3. UNAUTHORIZED TRANSPORTATION OF A PASSENGER 3/8/'90
4. DEMONSTRATED LACK OF CONCERN TO COMPANY PROPERTY 2/3/'90
5. VIOLATION OF COMPANY ROUTE 3/31'90 [3 DAY SUSPENSION]
6. LATE FOR WORK 2/15/'90
7. RETURNED FROM LOS ANGELES WITH PASSENGER LUGGAGE

THE RECORDING OF THE PREVIOUS 7 VIOLATIONS IN A PERIOD OF SIX MONTHS AND THE ATTITUDE REFLECTED ON THE PRIMARY CHARGE OF INSUBORDINATION SHALL DEEM THIS TERMINATION HEARING.

Attached to the termination hearing letter were six handwritten file memos, written by Vieira, concerning infractions "1" through "6" set forth in the letter.

Vieira explained to Hubbard that the reason for the hearing was that Respondent wanted to give him a fair chance to present his case and Paradise was present to add some objectivity, since he was not involved.¹⁴ Vieira stated he knew Hubbard had asked that Nick Asencio and Shin Kase be present as witnesses, but since Itakura had interviewed them and because Kase was out of town, they felt it was unneces-

¹⁴The record (Tr. p. 387) establishes that Respondent holds a termination hearing when someone in supervision or management concludes that because of the nature of an employee's misconduct, that absent some sort of excuse or justification, the employee will be discharged.

sary for them to be present. Vieira asked if Hubbard had any other witnesses, and Hubbard stated "no."

Hubbard reviewed the termination hearing letter, and the attachments to the letter, and Vieira asked him to give his response to the letter. Hubbard answered that after reading the letter he wondered why he was still employed and stated he had never seen any of the attached "write ups" or given a chance to respond to them. Vieira stated they were not "write ups," but were "company notes" and explained Respondent had the right to keep notes concerning their employees and to place those notes in the employees' personnel files. Vieira then went on to describe his version of what occurred on May 19. He stated he had only asked Hubbard why Hubbard was not wearing a tie and Hubbard had pounded on the desk and disrupted the office and was out of control. Hubbard denied this is what took place. Vieira stated that driver Silva had verified that Hubbard had conducted himself as described by Vieira. Hubbard stated he did not know that Silva had been present on May 19 in the office and asked if Asencio and Kase had verified Vieira's version of what occurred. Vieira answered he did not know because Itakura had spoken to them. Itakura acknowledged he had spoken to them, but did not say what they had told him.

Vieira and Paradise told Hubbard that Respondent could have fired him previously for all of the infractions set forth in the termination hearing letter. Hubbard disputed this. He stated he had a good work record and did not understand why he had been unable to satisfy Vieira, Itakura, and Paradise. He argued that usually if an employee was not doing his job satisfactorily it was not kept a secret from the employee. Hubbard asked how many times clients had complained about him during his 14 months of employment. Vieira replied, "none." Hubbard replied by stating it was interesting that in the time he had been employed he had been able to satisfy everyone except Itakura, Paradise, and Vieira.

Paradise stated that many of the drivers felt that since Itakura had new buses that he was very rich and they had the right to ask him for more money and better health benefits. Paradise stated that those drivers were being selfish because they did not realize that "this is a family operation" and that all of the employees had to look out for each other. Paradise asked when was the last time Hubbard, during one of his days off, had come to the Company's yard to work. Hubbard replied he had never done this because it was not a part of his job.

Also during the May 23 meeting, while Itakura was present, Vieira stated that "we knew about the meetings you have had with drivers trying to get a petition going," and told Hubbard that, "we think this is a good idea for the drivers to get together, to try to be concerned about their wages," and stated he did not want Hubbard to feel Respondent was holding this against him. Vieira also stated, "we also knew about a conversation you had with the drivers at Golden Gate park where you were not speaking kindly of the company or me and I want you to know that we are not holding that against you."

Hubbard asked Itakura what Itakura's impression was of his work performance. Itakura stated he could not answer that question right then, but would have to talk to Vieira and Paradise in private and would get back to him. Itakura at this

point left, leaving Hubbard in the bus with Paradise and Vieira.

After Itakura left, Vieira told Hubbard that Vieira had "lots of friends" and knew about "the meetings" and knew about the "document" and had received a copy of the "document" a long time ago and named some of the items which were listed on the petition drafted by the bus drivers, supra. Vieira stated he knew the following: that the drivers wanted to be paid for baggage handling; that there were drivers who wanted more money and wanted to be paid for all of the hours they worked; that there were drivers who were complaining about the seniority system; that drivers were mad because Vieira and Paradise had been driving buses; and, that he knew the drivers felt they had the right to have a say about what went on. However, with respect to the drivers' desire to have a say about what went on at Respondent, Vieira told Hubbard that that would never happen and warned, "every driver would be terminated if they did not get in line."

The May 23 meeting ended with Vieira stating that they wanted to be fair and did not want to hold Hubbard responsible for the behavior of other, more senior drivers, who, for their own selfish reasons, were complaining. Vieira stated that perhaps Hubbard had been misled into participating with them in some sort of organizing against Itakura. Hubbard assured Vieira this was not the case. He explained to Vieira that he was concerned about the general issues that affected all of the employees. Vieira told him they would make a decision and get back to him.

Hubbard, Vieira and Itakura testified about the May 23 meeting. The above description of the meeting is based, for the most part, on Hubbard's testimony. I reject Vieira's and Itakura's testimony that nothing was said about the Drivers' Association or about the drivers' petition or about employee meetings. I also reject Itakura's testimony that Vieira started the hearing by asking if Hubbard wanted to bring any witnesses to the hearing and that Hubbard answered by simply stating he did not have anyone to bring to the hearing. I credited Hubbard's disputed testimony about this meeting and his other undisputed testimony about the meeting, because his testimonial demeanor, which in general was good, was better than the testimonial demeanor of either Itakura or Vieira, which was generally not good. I did not, however, credit Hubbard's testimony given for the first time during rebuttal, that when the numbered infractions set forth in the termination hearing letter were brought up at the meeting that he verbally answered each one of them. During his detailed testimony about the meeting given during direct and cross-examination, Hubbard omitted this testimony and when he so testified during rebuttal examination did not seem to be sincere. It is also significant that he failed to describe how he responded at the meeting to any one of the alleged infractions.

Following the May 23 meeting Vieira recommended to Itakura that Hubbard be suspended for 10 days and placed on probation for 90 days. Itakura accepted the recommendation, even though, as he indicated to Vieira, he thought Hubbard should be terminated.

Vieira testified that his main reason for recommending the above punishment, rather than termination, was that Hubbard was very good with clients and the clients liked him, but on the other hand Vieira felt some disciplinary action was war-

ranted so that the other employees would understand the seriousness of Hubbard's offense, namely that Vieira would not tolerate gross insubordination. Vieira also testified that the infractions "1" through "7," set forth in the termination hearing letter, had no bearing on his decision and further testified that absent Hubbard's insubordination on May 19, Vieira would not have recommended he be suspended and placed on probation.

On May 24 Vieira telephoned Hubbard and told him Itakura and Paradise had already made their decision, but the committee's decision was being held up because he had not made his decision. Vieira stated it was his opinion that the numbered list of infractions set forth in the termination hearing letter issued to Hubbard were not serious because of the fact Hubbard had never repeated any of the infractions after they had been called to his attention. Vieira also stated he knew Hubbard had made derogatory remarks to drivers about Vieira and Respondent at the Golden Gate park, but did not hold those remarks against him and that was not involved in the decision to punish him for his misconduct. Vieira remarked that it was his policy to save the job of a good driver and that Hubbard had done a good job for Respondent, and that Respondent's customers were all very pleased with him. On the other hand, Vieira stated that the nature of Hubbard's insubordination was so severe that it was something Vieira could not tolerate and he felt it was necessary to make an example of Hubbard because of this. Vieira stated he was thinking of giving Hubbard a 10-day suspension with a 90-day probationary period, and asked how Hubbard felt about that.

The above description of Vieira's May 24 conversation with Hubbard is based on Hubbard's testimony which was not disputed by Vieira. The only part of this conversation in dispute is Hubbard's answer when Vieira told him that he was considering punishing him for his insubordination with a 10-day suspension and a 90-day probationary period. Hubbard testified he replied by telling Vieira that he felt the punishment was too severe, but that it was Respondent's decision to make and he would accept the punishment, and Vieira told him he would get back to him. Vieira, on the other hand, testified that when he told Hubbard he was considering suspending him and placing him on probation for his insubordination, that Hubbard simply stated it was too severe of a penalty, and that Vieira told him the only alternative was termination and Vieira would talk to Itakura one more time. I credit Vieira's testimony. Although Vieira generally impressed me as being an insincere witness, when he testified about this conversation with Hubbard he impressed me as being a more reliable witness than Hubbard. His testimonial demeanor was good and he impressed me as being a more sincere witness than Hubbard when they testified about this portion of the May 24 conversation.

Later on May 24, Vieira informed Itakura that Hubbard had stated the punishment of suspension and probation was too severe. Itakura and Vieira, at that time, decided to terminate Hubbard. Vieira was not questioned about Respondent's reasons for deciding at this time to terminate Hubbard and did not offer the reason or reasons. Itakura testified Respondent's reasons for deciding to terminate Hubbard were set forth in the May 24 termination letter, which he instructed Vieira to write, and further testified that the incident which triggered Hubbard's discharge was his insubordination on

May 19 and that if he had not been insubordinate he would not have been discharged.

On either May 24 or May 25 Vieira telephoned Hubbard and told him he had been terminated. Subsequently, Hubbard received a written notice of his termination signed by Vieira and dated May 24, which read as follows:

It has been decided by United Charter Service, Inc. that it would be in our best interest, we sever your relationship with United Charter Service, Inc.

Based on your hearing on 5/23/90 and after a considerable time in review we found that you offered United Charter Service, Inc. on the eight charges that was brought forth, no recourse.

My recommendation for a plea bargain of a ten day suspension with a 90 day probation without a hearing in your words, was a too sever of a penalty.

Attitude and the significant's [sic] of the Insubordination, remains apparently portrayed as if there was no guilt. This letter reverts to your termination hearing letter dated 5/22/90, which you recieved [sic] at the hearing.

B. Discussion

1. Respondent allegedly created an impression among its employees that their association activities were under surveillance by Respondent and allegedly threatened employees with discharge because of their association and/or protected concerted activities

The complaint alleges that in 1990 during January, February, and May, Respondent "created an impression among its employees that their Association activities were under surveillance by Respondent," and, as amended during the hearing, alleges that in late January 1990 and late February 1990 Respondent "threatened employees with discharge because of their Association and/or protected concerted activities," and alleges that by engaging in the aforesaid conduct Respondent violated Section 8(a)(1) of the Act.¹⁵ The facts relevant to these allegations, which have been set forth in detail supra, are briefly summarized herein.

Once in late January and again in February a group of approximately 12 of Respondent's bus drivers, including Hubbard, met for the purpose of discussing how they could remedy their employment grievances and improve their existing terms and conditions of employment. They decided that to remedy their grievances and to persuade Respondent to improve their terms and conditions of employment, they would join together and form an association of employees to deal with Respondent. They drafted petition language for Respondent's employees to sign which requested that Respondent recognize the Drivers Association as the employees' collective-bargaining representative and which asked Respondent to improve the drivers' terms and conditions of employ-

¹⁵The complaint also alleges that in early June 1990 Respondent threatened employees with loss of jobs because of their Association an/or protected concerted activities, thereby violating Sec. 8(a)(1) of the Act. Counsel for the General Counsel in his posthearing brief has not pointed to evidence which supports this allegation and my review of the record fails to undercover such evidence. Accordingly, I shall recommend the dismissal of this allegation for lack of evidence.

ment in several significant respects, set forth in the petition. Hubbard played a leading role in persuading the drivers to join together and form an association and in drafting the petition. He spoke up at the two meetings, he finalized the language of the petition, typed it and then distributed it to the drivers and to other employees and subsequently, in March or April, distributed literature published by the Board in an effort to encourage the employees to support the idea of a drivers' association and to sign the petition. Finally, in early May, while at the Golden Gate Park parking area with several other drivers, he attempted to persuade them that the only way the drivers could expect to remedy their employment grievances was to join together collectively and form an association.

There is no evidence that when the drivers, including Hubbard, engaged in the above-described concerted activities, that they made an effort to keep those activities a secret. Quite the opposite, the record shows that Hubbard and the other drivers engaged in this activity openly. In view of this and due to the small size of Respondent's business, Hubbard and the other drivers, who were present at the January and February meetings, agreed that there was no way that they could keep the information about their above-described concerted activities from reaching Respondent's office and its Operations Supervisor Vieira. They accepted, as a fact, that Vieira was probably aware of what they were doing and would not only find out about the petition but would end up with a copy of the petition (Tr. pp. 143-144, 281-282).

Early in January, 1 or 2 weeks prior to the drivers' January meeting where they discussed their grievances and the formation of the Association, Vieira told Hubbard he knew there were drivers who wanted wage increases, improved health benefits, and better hotel accommodations, and stated that those drivers would not be happy until they ran the company into the ground, but that as long as Vieira was operations supervisor this would not happen, because Vieira stated, "[he] would see that everyone of them was gone, first."

Late in January or early February, after the drivers' first meeting where they discussed their grievances and the formation of the Association, Vieira told Hubbard he was tired of hearing the drivers complain about the Company. He informed Hubbard he had many friends "out there" who kept him informed about what was going on and knew the drivers were trying to organize some sort of a committee and knew there were drivers who wanted more money and better employment benefits, who were forming some sort of an organization, and that those drivers thought they ran the Company and would not be satisfied until they had bankrupted it. Vieira warned Hubbard he intended to get rid of each and every driver that gave him any problems.

In early or mid-May Asencio, one of Respondent's drivers, overheard Vieira comment to another driver that Vieira had heard there was a "petition" being circulated and he believed Hubbard was the "instigator."

In February Vieira told Lopata, one of Respondent's drivers, that he knew the drivers were trying to organize a drivers' association and wanted a pay raise and other employment benefits.

On May 23, during Hubbard's termination hearing, Vieira told him that Vieira had "lot of friends" and knew about "the meetings" Hubbard had with drivers trying to get "a petition going." He also told Hubbard that he (Vieira) had

received a copy of the petition a long time ago and named some of the items that were listed on the petition. Vieira stated that he knew the drivers felt they had the right to have a say about what went on at Respondent, but warned Hubbard "every driver would be terminated if they did not get in line." Vieira also told Hubbard that Vieira knew about Hubbard's conversation with the drivers at Golden Gate Park, where, Vieira said, Hubbard had spoken unkindly about Vieira and Respondent.

On May 24 Vieira again remarked to Hubbard he knew Hubbard had made derogatory remarks about Vieira and Respondent to the drivers at Golden Gate Park.

a. The alleged unlawful impression of surveillance

The law is settled that where management makes a statement to an employee that creates an impression that the employer learned of the employee's union or concerted activities through surveillance, it constitutes a violation of Section 8(a)(1) of the Act. *NLRB v. Long Island Airport Limousine*, 468 F.2d 292, 297 (2d Cir. 1972). In determining whether an employer created an impression or surveillance the test applied is whether, under the circumstances, the employee would reasonably assume from the statement in question that the employee's union or protected concerted activity had been placed under surveillance by the employer. *Schrementi Bros.*, 179 NLRB 853 (1969). For the reasons below, I am of the opinion that none of the above-described comments by Operations Supervisor Vieira, under the circumstances of this case, were reasonably calculated to lead the employees to whom they were made to reasonably believe that their Association or other protected concerted activities had been placed under surveillance by Respondent.

In view of the fact that Respondent's drivers, including Hubbard, who had engaged in the Association and other protected concerted activities herein, engaged in that conduct openly and made no effort to keep their activities a secret, and considering the small size of Respondent's business, it must have been abundantly clear to Hubbard and the other drivers that Respondent's supervision would be informed by legitimate means, i.e., by one of the employees, of the Association and other concerted activities engaged in by Hubbard and the other drivers. In fact, as found supra, Respondent's drivers, including Hubbard, agreed that because of the lack of secrecy involved in their concerted activities herein, there was no way that they could keep the information about their activities from reaching supervision and accepted the fact that Vieira, because of this, was probably aware of what they were doing and would in all probability not only learn about the petition but would end up with a copy of the petition. The foregoing circumstances, plus the fact that the words used by Vieira, when he indicated to the drivers he was aware of their protected concerted activities, did not indicate this information came into his possession by means of surveillance, have persuaded me Vieira's above-described comments to drivers Lopata, Asencio and Hubbard were not reasonably calculated to lead those drivers to believe Respondent had been or was keeping their Association or other protected concerted activities under surveillance. I shall therefore recommend the dismissal of this complaint allegation.

b. *The alleged unlawful threats to discharge*

Counsel for the General Counsel contends that Respondent violated Section 8(a)(1) of the Act when, in early January, Vieira threatened Hubbard he would discharge those drivers who were running the Company into the ground by demanding pay raises, improved health benefits and better hotel accommodations. I disagree for these reasons. The threat was made before Hubbard and the other drivers had commenced their Association and other protected concerted activities involved in this case. The threat on its face was not specifically directed against drivers who, in demanding improved wages and benefits, were engaged in concerted activity. The threat was identical to the continuing threats Vieira had been making to the drivers ever since he assumed his position of operations supervisor in November 1989. In view of these circumstances, Hubbard would not have reasonably associated Vieira's threat to discharge drivers who he said he felt were running the Company into the ground by demanding improved wages and benefits, with a threat directed toward drivers who were engaged in protected concerted activity. It is just as likely that when Hubbard, in early January, heard Vieira's threat to discharge drivers, that Hubbard associated it with activity which was not concerned within the meaning of Section 7 of the Act, as with Section 7 activity. I therefore find that Vieira's above-described threat to discharge drivers was not reasonably calculated to interfere with, restrain or coerce employees in the exercise of their right to engage in activities encompassed by Section 7, and for this reason did not violate Section 8(a)(1) of the Act.

Also without merit is counsel for the General Counsel's contention that Respondent violated Section 8(a)(1) when Vieira, in February, in talking with Jon Mead, one of Respondent's drivers, "referred to the driver's union activities as a conspiracy to get him fired and threatened to terminate Mead." This conversation has been described in detail supra. Vieira, contrary to counsel for the General Counsel's representation, did not expressly or by implication refer to Mead's Association or other protected concerted activities, nor to the drivers' Association or other protected concerted activities, as a part of the conspiracy to get Vieira fired. Nor did Vieira expressly or by implication threaten to discharge Mead because of his Association or other protected concerted activities.

Respondent violated Section 8(a)(1) when, in late January or early February, Vieira told Hubbard he would discharge the drivers who were forming some sort of an organization or committee in connection with their desire for better wages and improved employment benefits. In this regard, as described in detail supra, in late January or early February, Vieira told Hubbard he was tired of hearing the drivers complain about the Company and explained to Hubbard that, based on what his many friends told him, he knew the drivers wanted more money and improved employment benefits and were trying to organize some sort of committee or organization and that the drivers thought they ran the Company and would not be happy until they bankrupted it, but that Vieira intended to get rid of each and every driver that gave him any problems. I am persuaded that, when viewed in context, this constituted an express threat to discharge drivers if they formed an association of employees in conjunction with their efforts to persuade Respondent to grant them pay raises and improved employment benefits. I further find that this

threat was reasonably calculated to interfere with, restrain or coerce Hubbard from exercising his right under Section 7 of the Act to join together with the other drivers to form such an association of employees in an effort to improve their wages and benefits. Accordingly, when Vieira made this threat to Hubbard, Respondent violated Section 8(a)(1) of the Act.

Likewise, I find Respondent further violated Section 8(a)(1) when, during Hubbard's May 23 termination hearing, Vieira warned Hubbard that "every driver would be terminated if they did not stay in line." More specifically, Vieira informed Hubbard he knew Hubbard had met with with drivers in an effort "to get a petition going" which asked that the drivers' terms and conditions of employment be improved, and Vieira warned Hubbard that while the drivers felt they had the right to have a say about what went on at the Respondent, that "every drivers would be terminated if they did not stay in line." Viewed in context this threat of discharge was reasonably calculated to interfere with, restrain or coerce Hubbard from exercising his right under Section 7 of the Act to join together with other drivers in an effort to persuade Respondent to improve the drivers' terms and conditions of employment. Accordingly, when Vieira made this threat to Hubbard, Respondent violated Section 8(a)(1) of the Act.¹⁶

2. Respondent suspends Hubbard on May 19 and discharges him on May 24, allegedly because of his protected concerted activities

It is undisputed, as I have found supra, that Respondent suspended Hubbard on May 19 and discharged him on May 24. It is also undisputed that prior to his suspension and discharge Hubbard in 1990 had been engaged in activities protected by Section 7 of the Act. These activities have been described in detail supra and may be summarized briefly, as follows. In January and February about 12 of Respondent's drivers, including Hubbard, met and decided to form an association of employees (the Association) in order to deal with the Respondent for the purpose of remedying the employees' employment grievances and to improve their terms and conditions of employment. They also drafted a petition for Respondent's employees to sign. The petition requested Respondent to recognize the Association as the employees' bargaining agent and to improve the drivers' terms and conditions of employment in several significant respects, set forth in the petition. Hubbard played a leading role in persuading the drivers to join together to form the Association and in drafting the petition. Even though most of the drivers lost their enthusiasm for the Association after the February meeting, Hubbard, in the months prior to his suspension and discharge, continued to try to persuade the drivers to support the Association in order to remedy their grievances and to improve their working conditions. It is undisputed that Hubbard was engaged in concerted activities protected by Section 7 of the Act when he engaged in the above-described activities.

The complaint alleges that, in violation of Section 8(a)(1) and (3) of the Act, Respondent suspended Hubbard on May

¹⁶I need not decide whether this violation is encompassed by the Complaint's allegations, inasmuch as the violation found was fully litigated.

19 and discharged him on May 24 because of his protected concerted activities. The question for decision is whether Hubbard's suspension and discharge was motivated by his above-described protected concerted activities.

In *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400–405 (1983), the Supreme Court approved the Board's procedural analysis, first set forth in *Wright Line*, 251 NLRB 1083 (1980), for resolving questions of motivation in alleged unlawful discrimination cases. Under this analysis, the Board's General Counsel has an initial burden to show that the employee's protected conduct was a "substantial or motivating factor" in the employer's decision to take the adverse action against the employee. Once the showing of an unlawful motive has been made, the employer has the burden of establishing, as an affirmative defense, that there were also legitimate reasons for its decision and that those reasons would have caused the employer to take the same action against the alleged discriminatee irrespective of the alleged discriminatee's protected activity. *NLRB v. Transportation Management Corp.*, 462 U.S. at 400–403.

Applying *Wright Line* I find that the counsel for the General Counsel has made a prima facie showing that Hubbard's protected concerted activity was a motivating factor in Respondent's decision to suspend and discharge him. However, I further find that Respondent has established it would have suspended and discharged Hubbard even in the absence of Hubbard's protected concerted activity. Accordingly, I find Hubbard's suspension and discharge did not violate Section 8(a)(3) and (1) of the Act. Therefore, I shall recommend the dismissal of the complaint allegations that Respondent unlawfully suspended and discharged Hubbard.

a. The General Counsel's prima facie case

Prior to Hubbard's May suspension and discharge, Respondent knew about the drivers' Association activities and knew about Hubbard's leading role in those activities. This is demonstrated by the following: in late January or early February, Operations Supervisor Vieira informed Hubbard that Vieira's friends told him the drivers were trying to form some sort of committee or organization in connection with their efforts to get more money and better employment benefits from Respondent, and Hubbard indicated to Vieira that he was in favor of the drivers' activities; in February Vieira told driver Lopata that Vieira knew the drivers, who wanted pay raises and other improved benefits of employment, were trying to organize a drivers' association; in early or mid-May driver Asencio overheard Vieira tell another driver there was a "petition" being circulated and that he felt Hubbard was the "instigator"; and, during Hubbard's May 23 termination hearing, Vieira told him he knew about "the meetings" Hubbard had with the drivers trying to get "a petition going" and also stated he had received a copy of the petition a long time ago, and further commented that he knew about Hubbard's conversation with the drivers at Golden Gate Park, where, Vieira alleged, Hubbard had spoken unkindly about Vieira and Respondent.¹⁷

¹⁷ As described supra, early in May, while at the Golden Gate Park parking area with several other drivers, Hubbard attempted to persuade them that the only way the drivers could expect to remedy their employment grievances was to join together and form an association.

Respondent was hostile toward the drivers' efforts to remedy their employment grievances and to improve their terms and conditions of employment by means of the Association. In late January or early February, in violation of Section 8(a)(1) of the Act, Vieira told Hubbard he would discharge drivers who caused problems by joining together to form an organization or committee to get better wages and better employment benefits. Subsequently, during Hubbard's May 23 termination hearing, Vieira in effect repeated this threat, in violation of Section 8(a)(1). Vieira's threats to discharge drivers for forming or supporting the Association was consistent with the Respondent's policy concerning union representation as expressed by Takayuki Itakura, Respondent's president. In October 1989, President Itakura informed an applicant for employment that "we don't want unions, we're a family business."

Also significant in evaluating Respondent's motivation for suspending and discharging Hubbard is that contemporaneously with his termination, during his May 23 termination hearing, Vieira gratuitously brought up the subject of Hubbard's efforts to persuade the other drivers to deal with Respondent about their grievances as a group, through an association of employees, and threatened to discharge the drivers for engaging in this kind of conduct.

Respondent's knowledge of Hubbard's efforts to persuade the drivers to form an association of employees to deal with Respondent for the purpose of improving their terms and conditions of employment, Respondent's belief that Hubbard was the "instigator" of the drivers' activity on behalf of the Association, Respondent's mention of Hubbard's Association activity during Hubbard's termination hearing, Respondent's threats to discharge drivers who joined together to form the Association, and Respondent's statement that "we don't want unions, we're really a family business," altogether, establish that in suspending Hubbard on May 19 and in discharging him on May 24, Respondent was motivated at least in part by Hubbard's Association activity, which as found supra, was protected by Section 7 of the Act. Accordingly, the question presented is whether Respondent has proven it would have suspended and discharged Hubbard even in the absence of his Association activity.

b. Respondent's defense of Hubbard's May 19 suspension

It is undisputed that on May 19 Hubbard was suspended for 3 days by Operations Supervisor Vieira when he refused on that day to obey Vieira's instruction to stop questioning him about Respondent's tie wearing policy, so that Vieira could get back to his work of dispatching Respondent's bus drivers to their work assignments for the next day. The facts, as I have found supra, establish that Vieira suspended Hubbard for refusing to obey his instruction only after Hubbard had engaged in the following conduct: (1) ignored Vieira's order to stop questioning him about Respondent's tie wearing policy, even though Vieira explained he wanted to get back to his dispatching work; (2) ignored Vieira's warning that Vieira intended to suspend him if he did not obey Vieira's instruction to stop talking, so that Vieira could concentrate on his dispatching work; (3) ignored Vieira's order even though Vieira had assured him he would talk later with him about Respondent's tie wearing policy, when he had the time; (4) pounded with his fist on the top of the desk, where

Vieira was seated, in order to emphasize his refusal to obey Vieira's instruction; and (5) engaged in the aforesaid insubordinate conduct in the presence of two other employees.

In view of the aforesaid circumstances, Hubbard's May 19 insubordination constituted gross insubordination and ranks among the most flagrant and egregious type of employee misconduct for which an employee would ordinarily expect to be disciplined. This is especially true in this case because Respondent's published rules provide that an employee's disobedience of an order issued by supervision would be considered insubordination, which would result in immediate suspension. Also there is no evidence that the kind of insubordination engaged in by Hubbard or insubordination of a similar nature has been condoned by Respondent or punished less severely.¹⁸ It is for these reasons that I find Respondent has established Hubbard would have been suspended for 3 days on May 19, even absent his protected concerted activity.

I considered that prior to May 19 Respondent had allowed Hubbard to work without a tie with no objection. There is insufficient evidence, however, to warrant the conclusion that Vieira spoke to Hubbard on May 19 about his failure to wear a tie that day in order to provoke him into engaging in insubordinate conduct. In this regard, I note that the subject of Hubbard's failure to wear a tie that day was brought up by driver Asencio, not by Vieira, and Vieira, when he spoke to Hubbard about his failure to wear a tie, did not indicate he intended to discipline him for this omission. Moreover, when Vieira told Hubbard to stop questioning him about Respondent's tie policy, Vieira assured him he would be amenable to discussing the policy with Hubbard when Vieira did not have work to do. Also, on May 19 prior to suspending Hubbard, Vieira twice ordered him to stop talking because he explained it was preventing him from concentrating on his dispatch work and warned Hubbard that if he did not stop he would be suspended. Under the circumstances, when Hubbard ignored this warning and was suspended by Vieira for doing so, it cannot be said that Hubbard's suspension was the result of a spontaneous exchange which was reasonably calculated to provoke the insubordinate conduct which resulted in his suspension.

*c. Respondent's defense of Hubbard's
May 24 discharge*

My conclusion that the record shows that Respondent would have discharged Hubbard on May 24 for being insubordinate toward Vieira on May 19, even absent Hubbard's protected concerted activity, is supported by the following factors: (1) Respondent's published rules provide that an employee's disobedience of an order issued by a supervisor would be considered insubordination and would result in immediate termination; (2) on May 19 Respondent lawfully suspended Hubbard for 3 days because he had been insubordinate when he refused to obey an order issued to him by Vieira that day; (3) on May 19 after having been suspended

¹⁸Driver Lopata calling Vieira a "liar" and driver Mead swearing at Vieira, as described in detail supra, differs significantly from Hubbard's insubordination. There is no evidence that either Lopata or Mead were insubordinate toward Vieira in the presence of other employees or that by engaging in their conduct they prevented Vieira from doing his work or that they refused to obey an order issued by Vieira.

for 3 days by Vieira for being insubordinate to Vieira, Hubbard, in the presence of other employees, continued being insubordinate to Vieira by still refusing to obey his order; (4) on May 23 Hubbard rejected Vieira's offer of a 10-day suspension and a 90-day probationary period as being too severe of a punishment for his insubordination,¹⁹ leaving Respondent with no realistic alternative but to discharge him for his insubordination; (5) there is no evidence that the type of insubordination engaged in by Hubbard or insubordination of a similar nature has been condoned by Respondent or punished less severely; and (6) although Respondent valued Hubbard as an employee, because he was very good with customers and was liked by customers, it is undisputed that during his last 12 months of employment Respondent had spoken to him about, among other things, the following:²⁰ overlooking a passenger's luggage which resulted in the passenger going to Hawaii without the luggage; failing to maintain daily mileage logs as required by law and by Respondent; damaging a bus by backing it into a post; giving one of his friends a ride on the bus he was driving, in violation of Respondent's published rules; and, driving a bus on 18th Street, a residential street, in violation of Respondent's announced policy prohibiting this. For violating Respondent's policy prohibiting drivers from using 18th Street, which violation occurred less than 2 months prior to his discharge, Hubbard was suspended for 3 days. The above-stated factors, viewed in their totality, have persuaded me that Respondent has established it would have discharged Hubbard on May 24 because of his gross insubordination toward Vieira on May 19, even absent his protected concerted activity. The fact that Respondent may have been glad to be presented with the opportunity to discharge Hubbard is legally inconsequential. *Klate Holt Co.*, 161 NLRB 1606, 1612 (1966); *P.G. Berland Paint City*, 199 NLRB 927, 927-928 (1972). As the Board explained in *Berland Paint City*:

On the record it is fair to assume that the Respondent entertained a desire to get rid of [the alleged discriminatees, whose union activities it resented, and was pleased to have an opportunity present itself for doing so. But that alone is not enough to establish that the discharge was in violation of Section 8(a)(3). The mere fact that an employer may want to part company with an employee whose union activities have made him *persona non grata* does not per se establish that a subsequent discharge of that employee must be unlawfully discriminatory. If the employee himself obliges his employer by providing a valid independent reason for discharge—i.e., by engaging in conduct for which

¹⁹It is undisputed that at no time, including the May 23 termination hearing, did Hubbard apologize to either Vieira or Itakura for his insubordination nor did he ever admit or even acknowledge to either of them that he had in fact been insubordinate to Vieira on May 19.

²⁰It is undisputed that Respondent would not have discharged Hubbard on May 24, absent his May 19 insubordination. However, Hubbard's May 24 termination letter, which was issued by Respondent contemporaneously with his discharge, shows that one of Respondent's considerations in deciding whether Hubbard's May 19 insubordination warranted the severe penalty of discharge, was that while Hubbard was very good with customers, he had not been an altogether satisfactory employee in certain other respects, as set forth above.

he would have been discharged anyway—his discharge cannot properly be labeled a pretext and ruled unlawful.

CONCLUSION OF LAW

By threatening to discharge its employees for engaging in protected concerted activities, Respondent violated Section 8(a)(1) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²¹

ORDER

The Respondent, United Charter Service, Inc., San Francisco, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to discharge employees for engaging in protected concerted activities.

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

²¹ 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.

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

(a) Post at its San Francisco, California facility copies of the attached notice marked "Appendix."²² Copies of the notice on forms provided by the Regional Director for Region 20, 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.

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

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges that Respondent violated the Act other than found herein.

²² 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."