

C. I. Whitten Transfer Co. and James Lafountain and Michael E. Fowler. Cases 3-CA-16034 and 3-CA-16052

November 27, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On May 29, 1992, Administrative Law Judge William F. Jacobs issued the attached decision. The Respondent and the General Counsel filed exceptions, supporting briefs, and answering briefs.

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,¹ and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, C. I. Whitten Transfer Co., Plattsburgh, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

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

Robert Ellison, Esq., for the General Counsel.
Robert G. Landes, Esq. of Briarcliff Manor, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM F. JACOBS, Administrative Law Judge. This case was tried before me on June 11 through 14, 1991, in Plattsburgh, New York. The charge in Case 3-CA-16034 was filed on December 6, 1990, and amended on February 1, 1991, by James La Fountain. The charge in Case 3-CA-16052 was filed on December 17, 1990,¹ by Michael Fowler. Complaint issued in Case 3-CA-16034 on January 18, 1991, and was amended on February 4, 1991. An order consolidating cases, amended consolidated complaint and notice of hearing in Cases 3-CA-16034 and 3-CA-16052 issued on May 10, 1991, alleging violations of Section 8(a)(1) and (3). More particularly, the amended consolidated complaint alleges that C. I. Whitten Transfer Co. (Respondent or Com-

pany) violated Section 8(a)(1)² by unlawfully interrogating its employees, threatening its employees with job loss and plant closure, creating among its employees the impression that their union activities were under surveillance and that it would be futile to select Teamsters Local Union 648 (the Union) as their collective-bargaining representative informing its employees that they could not discuss the Union at any time, and discriminatorily enforcing a rule preventing its employees from wearing union insignia; and violated Section 8(a)(1) and (3) by unlawfully terminating two employees, refusing to employ a third, and reducing the work hours of one of them before his termination. In its answer to the complaint, Respondent denies the commission of any unfair labor practices.

All parties were represented at the hearing and were afforded full opportunity to be heard and to present evidence and argument. Briefs³ were duly filed. Upon the entire record, my observation of the demeanor of the witnesses and after giving due consideration of the briefs, I make the following

FINDINGS OF FACT⁴

Chronology of Events

Respondent is a West Virginia corporation with terminals and offices in Plattsburgh, New York, and elsewhere, where it is engaged in the intrastate, interstate, and international transportation of explosives and other materials. In 1989 Respondent leased certain facilities in Plattsburgh from a company called X-Plo and at the same time purchased from X-Plo some 20 trucks and trailers. The president of X-Plo, Don Jerry, credibly testified that at the time of the agreement, X-Plo was in the business of buying and selling explosives but that he did not, by means of the agreement, become an owner of Respondent or a member of Respondent's management. The agreement did provide, however, that Respondent would continue to do all of the trucking that X-Plo had previously done prior to execution of the agreement. This trucking consisted, in part, of the transportation of raw materials to X-Plo's Plattsburgh facility, the transportation of explosives to X-Plo's customers, but mostly the hauling of cargo for X-Plo's customers. The agreement, which is in writing, is for 10 years but provides that X-Plo can unilaterally, at any time, take away Respondent's role as X-Plo's prime carrier and resume that role itself.

At the time of the agreement, Respondent did not employ a sufficient number of drivers to drive the trucks it had purchased from X-Plo. It, therefore, hired some or all of X-Plo's drivers. This occurred on or about January 15, 1989.

Michael Fowler had been a driver for Anchor Motor Freight, a unionized company, for approximately 13 years when he was laid off by that employer in 1988. At Anchor, Fowler enjoyed the benefits of a Teamsters, Local 648 collective-bargaining agreement, which included a valuable health insurance package. On the other hand, the over-the-

² Respondent's motion to dismiss the independent 8(a)(1) allegations citing *Nickles Bakery*, 296 NLRB 927 (1989), is denied. *Beretta U.S.A. Corp.*, 298 NLRB 232 (1990).

³ The motions to correct the transcript, unopposed, are hereby granted.

⁴ In its answer, Respondent concedes jurisdiction and the status of the Union as a labor organization.

¹ Hereafter all dates are in 1990 unless otherwise indicated.

road driving requirements of his employment at Anchor, kept him away from home four or five nights per week, and this he did not enjoy. After discussing with his wife, the consideration of the high income earned versus the loss of quality family time, they were in the process of deciding that the latter had a higher priority when the layoff came. They determined that in seeking new employment, he should emphasize remaining at home at the expense of higher wages.

In mid-March 1989, Fowler applied for work with Respondent. Although he was hired as a local driver, there was an understanding that he would occasionally have an overnight run.

Fowler performed his duties for Respondent in an acceptable manner and was considered by management to be a good employee. When Fowler was recalled by Anchor in the spring of 1989, he refused the offer of recall and informed Respondent's management that he intended to continue to work at Whitten.

Within a month of being hired, Regional Manager Aborn inquired of Fowler how he enjoyed working for Respondent. Fowler replied that he liked the job but could not live on the wages he was receiving, that he would need 60 hours per week to get by. According to Fowler, Aborn immediately arranged for Fowler thereafter to receive credit for 60 hours per week whether or not he actually worked that much. According to Aborn, however, he paid Fowler for over 60 hours only when he worked over 60 hours and for less than 60 hours when he worked for less than 60 hours. I credit Aborn.⁵

In June 1989, Respondent hired James La Fountain, an experienced driver and a member of Teamsters Local 648 for 24 years. La Fountain made no secret of his affiliation with the Union and wore a Teamsters hat around the terminal. La Fountain was assigned runs up into Canada including occasional trips to Halifax, Nova Scotia, and Newfoundland.

In early 1990, Fowler requested permission of Aborn to have his wife accompany him on trips to Canada. Aborn replied that he could do better than that. He suggested that if Fowler would get her an explosives permit, he would put her on the payroll. Fowler agreed. Under Canadian regulations, in effect at the time, trucks carrying certain classes of explosives were required to be manned by a guard or rider in addition to the driver. It was Aborn's idea to have Debra Fowler ride with her husband on trips requiring a rider. Shortly after this conversation, Debra Fowler obtained the requested permit and in March began to accompany her husband on trips into Canada as an employee of Respondent.

In January 1990, La Fountain engaged Aborn in a conversation about the inadequacies of the Respondent's employees' hospitalization coverage and the superior benefits of the Teamsters plan. La Fountain had already discussed these matters with some of the other employees. Aborn took notes and promised to bring up the matter with the president of the company.

When La Fountain heard nothing more about insurance from Aborn he began to discuss working conditions with Fowler and other employees. He later visited the union office and obtained authorization cards. In February and in months following he distributed a number of cards. He signed one

himself on February 27 and obtained the permission of one other employee to sign his name on a card, the same date.

Other signed authorization cards were obtained by La Fountain from other employees in March, April, and May and although he continued to discuss the Union's insurance plan with them, he did not strenuously advise them to vote for the Union. Fowler, and several other employees who had been union members before, voiced opinions favorable to the Union. In all, La Fountain distributed about 15 cards. Although not everyone signed cards, several did so, including the dispatcher, Brian Hart. La Fountain returned the signed cards to the Union. Some of the card signers were later excluded from the unit. Michael and Debra Fowler signed authorization cards on May 10 and Michael later returned them to La Fountain.

Michael Fowler credibly testified that he also distributed cards to as many as five other employees, at least one in the yard while at work. He also explained to one or more employees the benefits of being represented by the Union and together with La Fountain arranged for a meeting at the union hall which was attended by eight of Respondent's other employees.

Fowler testified that after it was found out that there was an organizational drive in progress, the atmosphere at work began to deteriorate. There was verbal abuse as employees took one side or the other. Fowler denied, however, that either Fuller, the terminal manager, or Aborn participated in this activity.

On May 16, the petition in Case 3-RC-9593 was filed. After receipt of the petition by Respondent, Aborn and Fuller separately approached Fowler, and asked him if he had heard anything about the union organizational attempt. Fowler replied that he was aware of the fact that some of the drivers had expressed interest in joining Local 648. He did not, however, identify himself, at that time, as one of them, although he might just as well have, since he added that they had no right to ask him that question. To Fowler's comment, Fuller replied, "That's all I need to know!"

A second discussion took place, about this time, between Fowler and Aborn, in Aborn's office. During this conversation, Aborn said, "If they get the Union in here, they're going to shut the doors.⁶ Don Jerry's going to take over the trucking. He has already told me that I have a job with him, but all the drivers are going to be gone. He said I can take over the management of the trucking end of it for X-Plo, and the drivers would be gone."

Fowler credibly testified about a third conversation which took place about this time. On this occasion, Fowler had just returned from a trip late one afternoon. Fuller engaged him in a lengthy talk about the Union. He said that he wanted some straight answers about the Union and asked him "what the guys were looking for." Fowler replied that the people that were involved were looking for a secure future with the Company with health and dental insurance and hospitalization. In reply, Fuller advised Fowler that he had once worked for Oneida, and that he had seen that company go down the drain because of the Union. He added that he had lost his job with Oneida and had ended up having to operate a jackhammer. Fuller told Fowler that he was afraid of losing his house because he was going to lose his job, as was Aborn.

⁵ Payroll records for the period May 25 through August 3 reflect that Fowler was paid for 60 hours half the time or less.

⁶ This threat of plant closure by Aborn was not alleged.

Fuller then expanded on what he had already said. He told Fowler that the Company was going to close its doors and that he would be out of a job and so would all the other drivers. He said that Don Jerry hated him, that he did not kowtow to Jerry, and Jerry did not like that. He said further that he would be gone but that since Aborn and Jerry were the best of friends, Aborn would find a job through Don and he (Fuller) would be out on the street right alongside Fowler.

Don Jerry testified that he learned sometime in May from one of his employees that certain employees of Respondent were attempting to obtain representation by the Teamsters. Jerry denied that he discussed this matter with any member of Respondent's management and specifically denied telling any of them that if the Teamsters came in, he would take over the hauling. On the other hand, Jerry admitted telling La Fountain that if the union organizational drive caused him any problems, he would just go back into the trucking business.

Both Fowler and La Fountain credibly testified concerning incidents involving Jerry which occurred in May, shortly after the union authorization cards had been turned in. During one of these, Jerry approached Fowler while he was working in the yard and told him to move his car, "Now!" Fowler said that he had no problem with that. Jerry retorted in a challenging manner, "You better have no problem with that!" He added that he no longer wanted Fowler to drive through his lot. Respondent's employees, in the past, had customarily parked and driven through X-Plo property. Fowler asked Jerry if the new rule applied solely to him and Jerry replied in the affirmative.

Fowler walked toward his car to comply with Jerry's request but then noticed Aborn nearby, in the shop. He told Aborn about Jerry's order but was told that since it was Jerry's property, nothing could be done about it. Fowler then moved his car.

La Fountain testified that on the same day that Jerry ordered Fowler to move his car, he earlier told La Fountain to move his car and not to come into the yard again. La Fountain later complained to Aborn about Jerry's "getting on them for no reason whatsoever." Aborn said that he would talk to Jerry about it.

La Fountain described a second conversation which he had with Jerry, probably the same day. In this conversation Jerry accused La Fountain of being to blame for bringing in the Teamsters. He said he had received a call from Whitten the night before. He threatened that if the Union got in, he would take over the trucking again and La Fountain would not have a job. Apparently La Fountain explained that all he wanted was better insurance. Jerry then called him a "dirty, rotten bastard of a liar," and a thief, accusing him of stealing. La Fountain got in his truck and left.

Pat Delaney, a Whitten employee who witnessed this incident, testified that Jerry also told La Fountain that Respondent was not going to stand for a Union and would pull out. He added that if Whitten pulled out, he would start up in the trucking business again. He called La Fountain a few nasty names and threatened that he would make sure that he never worked again. While the complaint does not mention either X-Plo or Jerry in its allegations, the incidents described above lend credence to the allegations involving statements made by Fuller.

In addition to the above-described conversations which Fuller had with certain employees, he also, one evening in May, called Fowler by telephone. He asked Fowler whether he or La Fountain had anything to do with passing out union cards to employees. Although Fowler stated that he did not have to answer such questions and immediately hung up, Fuller's identification of the two employee organizers establishes company knowledge.

As a result of the filing of the petition, Respondent sent Vincent Ammons and Robert Landes to Plattsburgh. Ammons is a labor relations representative with Intranet, Respondent's parent company and Landes is an attorney. They arrived on or about May 21 and remained in Plattsburgh until May 24. Ammons met with members of Respondent's Plattsburgh managerial staff including Aborn and Fuller and instructed them on what they could and could not do during the union organizational campaign. He warned them against harassing the employees but also advised them to take notes if anything was brought up about the Union by employees.

Following the meeting with management, Ammons held a number of meetings with employees in Aborn's office. Landes attended some of these meetings but not all. He invited them into the office one or two at a time. After introductions, Ammons asked them if they realized that there was a union election going to take place. He then advised them of their rights and asked them if they had been harassed by anyone up to that point, particularly by Aborn or Fuller. He then encouraged them to vote in the election but made it clear that he did not want to know how they voted or whether or not they belonged to a union.

All the meetings were conducted the same way. La Fountain and Delaney met with Landes and Ammons at the same time. After Ammons went through the above-described indoctrination, La Fountain asked him who he was. Ammons told him, identifying Intranet, the parent company, of whom La Fountain had never heard. Ammons then asked La Fountain if he understood how elections work and La Fountain replied that he did. Ammons asked if La Fountain had had any problems with Aborn or Fuller during the organizing campaign. As in all the meetings, he was sure that La Fountain and Delaney understood that no manager was to harass them. He furnished his phone number to the employees where they could reach him. He advised them that if there were any improprieties by any managerial personnel, that manager would be removed, and that included Aborn and Fuller. La Fountain stated that he had no problems with either Aborn or Fuller.

During the meeting, La Fountain volunteered that he was a member of the Teamsters. Ammons remarked that though this information was volunteered by La Fountain, it was something he did not wish to know because it was irrelevant. He tried to assure La Fountain that he had not come to Plattsburgh to intimidate anyone but rather to explain to employees their rights and to make sure that the election went well. He promised that if the Union won, Respondent would negotiate a contract in good faith just as it was supposed to do. He said that the Company was confident enough that it had treated its employees fairly and that they would not vote the Union in. He explained that he wanted to make sure that every employee voted because "if you treat people right, you know they sometimes don't vote" but "if you treat somebody badly they will go through snow, mud, and blood to get to the election poll to vote."

La Fountain testified with regard to this meeting in a confused and inconsistent manner. He placed the meeting variously on June 6 to 8 or 14. The record indicates that it occurred on or about May 21. La Fountain claimed that Landes, at one point during the meeting, announced that he knew how to break a contract whereupon Ammons told Landes to shut up. Ammons denied the incident and Delaney, who was present at the time, did not support La Fountain's description of this incident. Although it is possible that the incident might have occurred as La Fountain described it, I find it unlikely because there is no evidence that Landes made a similar statement during any of the several meetings held with the other employees with whom he and Ammons spoke.

Further, Landes had 16 years' experience as an employee with the NLRB and would not likely have made such a statement. Finally, although it is not likely that a layman, who is a stranger to labor law, could make up such a statement out of whole cloth and place it in the mouth of Respondent's attorney, La Fountain was no stranger to the Board's processes. Prior to his meeting with Ammons and Landes, on or about May 21, La Fountain had extensive dealings with the NLRB, having filed at least four charges. There is, of course, no quarrel with his right to file charges but when each of these charges was dismissed, La Fountain was necessarily advised of the reasons why each charge lacked merit. This is standard Board procedure, with which I personally have been familiar for over 30 years. When he appealed each dismissal, he was again advised by letter as to why his appeals were denied. Thus, I find that, as of May 21, La Fountain had sufficient experience and familiarity with the Act, to be able to pad the record in his favor. I find that he did so and that Landes did not make the statement attributed to him by La Fountain.

La Fountain testified that Landes and Ammons asked him "what he knew about the Union and stuff." Delaney did not support La Fountain with regard to this alleged interrogation and I do not believe it took place. Rather, I credit Ammons who testified that the question asked was, "Do you understand how elections work?" to which La Fountain replied, "Yes, yes, yes, yes." I find this question, of course, nonviolative.

La Fountain testified vaguely and confusedly about Landes and Ammons: "And they went on talking about everything, about moving the trucks out—or if they had to, they would negotiate. They were just trying to get, you know, information out of us that we didn't know . . . Yeah, they asked us everything. All about the Union and about the trucks. They asked us what we wanted, and I told them what we wanted was insurance."

Delaney was present during this meeting but did not support La Fountain's testimony with his own. Although Ammons held several meetings with other employees, numbering perhaps 12, none of them were called by General Counsel to testify to similar statements made to them which La Fountain claimed to have been made to him. I conclude that La Fountain confused the statements about moving the trucks made earlier to him by Fuller and Jerry with the conversation he later had with Ammons and Landes and wrongly attributed said statements to the latter two individuals. I find that neither Ammons nor Landes made the remarks quoted immediately above, and attributed to them by La Fountain.

At one point, La Fountain testified that he and Delaney told Ammons and Landes that they were both in the Union. Subsequently, counsel for the General Counsel asked the leading question:

Q. Do you recall whether either Mr. Landes or Mr. Ammons asked you or Mr. Delaney if you were in the Union?

La Fountain replied:

A. Yeah they asked us that.

Subsequently, La Fountain again reversed himself on this question:

Q. Did you volunteer to myself [Landes] or Vinny [Ammons], or both of us that you and Pat Delaney were members of the Union.

A. Yeah. We told you we were members.

Q. You volunteered that though, right?

A. Yes, sir.

Elsewhere, concerning this meeting, La Fountain testified:

A. They [Landes and Ammons] asked us what we really wanted and I told them we wanted insurance.

However, later during the hearing, La Fountain again contradicted himself:

Q. I didn't ask you what you really—what the employees really wanted?

A. Well, I told you what we wanted.

Delaney also testified concerning the meeting attended by himself, La Fountain, Ammons, and Landes. He stated that Ammons, at one point, said that he knew who had signed cards. Although La Fountain did not support Delaney's testimony with regard to this statement, Ammons never denied having made it and I therefore credit Delaney.

On or about May 21, Ammons also met with Fowler and conducted the same kind of meeting which he had had with La Fountain and the other employees.⁷ He encouraged Fowler to vote and told him that how he voted was his own business. He also encouraged Fowler and the other employees to discuss the Union among themselves. He said if the Union got in, he would come up and negotiate a contract because that is how he made his living.

Employee Art Pelkey testified concerning his meeting with Ammons, which I find was also on or about May 21. Pelkey testified generally in support of Ammons's testimony offering no evidence of 8(a)(1) violations. Where Pelkey stated that Ammons asked him if he had any problems, I find that he was referring to Ammons's question which he admitted asking all of the employees concerning possible problems with

⁷Fowler testified that Ammons asked him if he knew anything about attempts at union organization. However, since Ammons credibly testified that he made the same statements at each of the meetings, and no other employees testified to being asked a similar question, I conclude that Fowler confused this question with the one that Ammons admitted asking, i.e., "Do you know how a union election works?"

Aborn, Fuller, or other members of management during the union organizing campaign.

Within a day or two of the meetings with employees, described above, both Ammons and Landes left Plattsburgh. The record indicates that they met only once with the employees and not thereafter. This fact indicates that Landes and Ammons were in Plattsburgh, on or about May 21, for the limited purpose of advising Respondent's management and employees of their rights and to explain the election process. If their purpose had been to participate in a prolonged antiunion campaign, they would surely have visited Plattsburgh several times and spoken to the employees on numerous occasions prior to the election.

On May 23, the Resident Office issued a notice of representation hearing scheduling the hearing for June 6. Landes and Ammons arrived in Plattsburgh a day or two before the scheduled hearing to participate in it. The hearing did not take place, however. Instead, the Union and Respondent executed a Stipulated Election Agreement calling for a June 22 date for the election and a unit which excluded helpers (riders) and guards. Both Landes and Ammons left Plattsburgh after the election conference, Landes on the afternoon of June 6, Ammons on the morning of June 7. There is no indication of contact between them and the rank-and-file employees on or about that date.

About the first week in June, Respondent gave an employee appreciation dinner attended by Respondent's employees and their wives and, of course, members of management. Safety awards and gifts were distributed to employees. During the course of the evening, Fuller engaged Debra Fowler in conversation several times. In one of these conversations, toward the end of the evening, Fuller told Fowler that he did not know how much influence she had with her husband but that he strongly suggested that she encourage him to back out of "this union business" because he would be without a job one way or another. He said that if the Union came in, the doors would be closed and if the Union did not get in, he would be the first one down the road. Fuller indicated that he was aware that Michael Fowler was one of the individuals who "instigated the union campaign" and that "he and La Fountain were the culprits." Fuller admitted that he had attended the dinner, sat with Debra and Mike Fowler and Mr. and Mrs. La Fountain at the same table and that he had conversations with Mr. and Mrs. Fowler. He denied, however, that he made any mention of Fowler or La Fountain in connection with the union organizing or the union campaign. I found Debra Fowler a convincing witness and credit her testimony with respect to the content of her conversation with Fuller.

La Fountain testified concerning an incident which occurred on June 11. On that day, La Fountain pulled out of the terminal after giving his truck a full check inspection including brakes and tires. After driving a mile or two, he happened to look out the window of his cab and noticed, through his right rearview mirror, a spot on his right rear tire. La Fountain pulled over to the side of the road, about 200 feet from Nadim's, a combination luncheonette and convenience store, and got out to examine the tire. He found that he had gone through a water puddle which had made a spot on the tire. He then got back in his truck and drove on, never having gotten 5 feet from the truck.

According to Fuller, on June 11 or 12, Brian Hart,⁸ the dispatcher, reported to him that he had seen La Fountain in Nadim's. Upon hearing this report, Fuller typed up an employee warning report. On the document he stated:

Unit 323 TrL 58131 was parked with class A explosive at Nadim's store Plattsburgh, N.Y. This is a definite work rule violation per A posted notice.

According to Fuller, when La Fountain returned from his trip, he gave him the warning. La Fountain claimed that he had stopped the truck to check the air in the tire which he found to be soft. Fuller did not believe La Fountain, however, because he should have discovered any tire problem during the obligatory pretrip inspection, and if the tire suddenly turned soft within a mile or two of the terminal, he should have returned to the terminal and not proceeded on a soft tire to Champlain, New York.

When Fuller gave La Fountain the warning report on June 12, he was upset, but made no comment. He did, however, write on the form, in space provided for an employee statement:

Stop to check out tire. I put air in tire at Champlain, NY.

According to La Fountain, when he received the warning, Fuller told him that somebody had called up and told him that La Fountain was at the store. La Fountain replied that there had been an emergency, that he had to check his trailer's right rear tire, and that he was not in the store's parking area but on the side of the road. La Fountain denied going into Nadim's. He asked Fuller, "Did you see me there? Did you come around the trailer?" He argued, "You would have seen me, if you had come around the trailer." He then explained to Fuller that he had not parked the trailer but had merely stopped to examine the tire and found the wet spots. La Fountain testified that as he explained what had occurred, Fuller wrote it down "on that paper." Then La Fountain "wrote on the paper the same thing I told you, that I had to stop and check my tire on the right-hand side. If they would have walked around, they would have found me there."

Fuller testified that he gave La Fountain the warning because he violated Federal regulations and a company notice prohibiting any truck, carrying a load of explosives, from parking within 300 feet of a populated area. He stated that La Fountain was aware of this regulation because it is contained in the Federal Regulation Handbook which was issued to him and to all drivers, but ignored the regulation, parked his truck within the prohibited area, and went into Nadim's, presumably to order something at the restaurant which was well known and used by Fuller and other employees of Respondent.

La Fountain testified that he knew of the rule: "You don't stop nowhere when you're carrying explosives" but that he did so because he thought he might have a problem with his tire, an emergency which justified his stopping to investigate. He pleads that although the tire proved to be only wet and not defective, he should not have been given a warning.

⁸Hart was not called to testify.

The June 12 warning to La Fountain was not alleged in the complaint as a separate violation of the Act. However, Aborn testified that it was a consideration in his ultimate decision to discharge La Fountain for an otherwise unrelated incident. It may also be considered in terms of evidence of animosity toward a known union adherent or as part of a plan to build a case against him as pretext for his ultimate discharge.

The incident poses several difficult questions. According to Fuller, Brian Hart⁹ told him that he had seen La Fountain in Nadim's. La Fountain denied this and testified that he never was more than 5 feet from his truck. The record is silent as to why Hart was never called to testify. He should have been called by Respondent to support Fuller's testimony or by General Counsel to support La Fountain's testimony.

A second consideration is La Fountain's testimony that when he was given the warning report and he explained his position as to what had occurred, Fuller wrote it down "on the paper" and La Fountain did the same. However, the only exhibit in the record is the warning report itself. It does not bear any handwriting other than La Fountain's, and that does not mention wet spots which would imply that the tire was in good condition but, on the contrary, states that La Fountain put air in the tire at Champlain which would imply that the tire was soft and that is what he told Fuller at the time. Thus, it would appear that he told Fuller one thing at the time he received the warning, which Fuller rejected, and offered a different set of facts during his testimony. This consideration would tend to support Respondent.

A third consideration is that Respondent placed in the record all of the warnings to employees that it had in its files. There was only one that predated the June 12 warning to La Fountain and that concerned an accident in which one of Respondent's drivers damaged another company's equipment and was found to be at fault. Of five warning reports issued by Respondent in its entire history, three of them were issued against the alleged discriminatees, during the union campaign or within 2-3 months after the election. This third consideration favors General Counsel's case.

With regard to the warning to La Fountain dated June 11, I find that standing alone, the evidence is inconclusive as to whether it better supports the General Counsel's case or that of Respondent. Either La Fountain was in Nadim's, a clear breach of regulations, and the warning given to him based on legitimate grounds and for legitimate purposes, or he stopped momentarily by the side of the road for the purpose of checking a tire and was undeserving of the warning which may have been given to him for the purpose of building a case against him to be used later as a pretext for his discharge for discriminatory reasons. I conclude that the warning was based on Fuller's honest belief that La Fountain had parked his truck and gone into the restaurant.

On June 21 Ammons and Landes arrived in Plattsburgh to attend the election scheduled for the following day. In advance of his visit, Ammons advised local management that he did not wish to have any meetings with the employees and none were held.

The polls opened at 2 p.m. La Fountain was the Union's observer and the Employer's observer was an employee

named William Shoemaker. The Board agent conducting the election was Jon B. Mackle. The election went without incident and the tally of ballots indicated the Union had lost 12 to 4. La Fountain, Shoemaker, and Mackle signed both the tally of ballots and the certification on conduct of election.

According to La Fountain, after the count, and after he signed the two documents, he went over to Landes, shook his hand and congratulated him on Respondent's victory, whereupon Landes allegedly said, "I wish you luck, Jim, but you won't be here long." La Fountain testified that he just looked at Landes and "that was it."

La Fountain acknowledged that besides Landes, Ammons, and Aborn were present at the election. He also testified, at one point, that he did not notice if a lot of other people were standing around besides Landes and, at another point, that "Everybody was just moving around, talking. I know I didn't keep track of where everything [sic] was Everybody was shaking hands." La Fountain testified that he could not remember, when he shook Landes' hand, whether they were in the lunchroom where the election had taken place or in the next room. Elsewhere in the record he testified that they were in the election room when the handshake and remark occurred and he remembered that clearly. La Fountain said that at the time, everybody was shaking hands with everybody and he did not think anybody else heard Landes' words.

La Fountain testified that in the days following the election, he probably told a couple of employees what Landes had said. General Counsel called no witnesses to substantiate this testimony. La Fountain also testified that what Landes had said was very important but he did not advise the union representative about it because "I just don't let nothing bother me like that."

Landes denied making the statement attributed to him by La Fountain and stated that he could not recall shaking hands with him. He pointed out that having worked for the Board for 16 years, his experience has taught him that it is not good practice to talk to employees, particularly to an observer for the Union, and he knew that La Fountain was the Union's observer. Landes testified that once the ballots had been counted, within less than a minute, he exited the lunchroom voting area and proceeded to Aborn's office with no conversation with La Fountain taking place. Landes said that he spoke to none of the employees except perhaps Shoemaker, the Company's observer and may have shaken hands with him as well.

Among those present for the count were the two observers, Landes, Ammons, several employees, members of management, a union official, and, of course, the Board agent. Ammons testified that during the election he, Landes, Aborn, Fuller, and, for a time, Jerry, all remained physically in Aborn's office and none of them except Jerry was permitted to leave. Ammons also had the windows facing the drivers' room and dispatch office papered over so that no one could see in or out.

According to Ammons, at the conclusion of the election, the Board agent counted the ballots and there were a lot of people there for the count. At the table, in the lunchroom were the Board agent with the observers on either side. In Aborn's office, at the door, looking into the lunchroom were Landes, Ammons, Aborn, Jerry, and numerous drivers. After the count and the announcement of results by the Board

⁹Hart is not alleged to be a supervisor.

agent, the members of management began to retreat back into Aborn's office, as Ammons had previously instructed them to do, in order to avoid problems. As Ammons started back into Aborn's office, he physically reached up and grabbed Aborn's hand and started to take him along. La Fountain stood up from the table, turned and shook Aborn's hand. There was no verbal exchange. Aborn then shook Shoemaker's hand as Ammons once again grabbed Aborn by the arm and pulled him along. By this time, Landes had moved away to the door between the dispatch office and Aborn's office. Ammons, Fuller, Aborn, and Landes all went into Aborn's office. The door was shut and the management officials and their representatives, by themselves, except for Jerry, discussed the outcome of the election.

Aborn testified, with regard to the election, that he was not in the room where the election took place while the ballots were being counted and the results announced. Rather, he was in the doorway watching the proceedings. When the Board agent announced that the Union had lost the election, La Fountain reached up from the table where he was still seated to shake Aborn's hand. La Fountain said, "Back to work," nothing further. Aborn then stepped into the election room to shake Shoemaker's hand. Ammons then grabbed Aborn's arm and they went to Aborn's office as did Landes. According to Aborn, Landes was not in the election room during the count.

Driver Art Pelkey¹⁰ was called to testify as to the events of June 22. Pelkey testified that he was not in the room where the count took place but watched the count from the adjoining room. He also testified that he believed that Landes was in the same room as La Fountain, Shoemaker and the Board agent, "right by the wall, right there by Mr. Aborn's office" while the ballots were being counted. After the count, everyone in management including Landes went into Aborn's office.

Pelkey testified that he did not see Landes talk to La Fountain and that if Landes had done so, Pelkey would have noticed it. On the other hand, Pelkey also testified that he did not see La Fountain speak to Aborn or anyone else. According to Pelkey, La Fountain left, immediately after the count, with another driver who gave him a lift in his pickup truck to the other parking lot.

After the count, Pelkey joined the management personnel in Aborn's office. He remained for just a minute, however, to let them know that he was leaving.

Taking all of the testimony offered by the above witnesses into consideration, I conclude that Landes did not make the threatening statement attributed to him by La Fountain in his uncorroborated testimony.

According to La Fountain and Delaney, a day or two after the election, there was supposed to be a group meeting of drivers which apparently was never held. Delaney entered Aborn's office to ask about the meeting. Aborn said that there was no meeting and he was lucky he had not been fired for signing a card. A similar discussion between Delaney and Aborn occurred about 2 weeks later.

Back on May 31, Harold Parker, an acquaintance of Fuller and Fred Marks, an employee of Respondent, filed an application for employment with Respondent. On June 22 he visited the offices of Ron Fuller and Brian Hart, the dispatcher,

and filled out tax forms and similar forms required for employment. The position for which he applied was laborer/rider/guard. Fuller told him he would be hired on a part-time basis.

On June 25, Parker started working for Respondent. On this, his first day on the job, Aborn told him what his schedule was, then asked him how he felt about unions. Parker replied that he had been raised in Saranac Lake, worked in nonunion jobs while going to high school and college, then spent the rest of his years in the air force. He said that he was unfamiliar with unions and had no feeling, one way or the other about them. Aborn did not ask Parker any more questions and the conversation ended.

La Fountain was disappointed in the outcome of the election but did not give up. He talked to several employees in the unit who had attended meetings with Ammons and Landes back in May, similar to the one he had attended along with Pat Delaney. He asked them what had occurred. Although he was told that some of them did not like having to meet one on one with Landes and Ammons, none of them offered any specifics as to what had occurred.

Not satisfied with the results of his investigation, and still angry with Landes and Ammons for holding the meetings with employees, which La Fountain felt had undermined the Union's efforts, La Fountain, on June 25, contacted five state senators concerning Landes whom he identified in his letters as a former employee of the NLRB and a union buster. He accused Landes of using skills learned while employed by the Board from which he had retired, to bust unions and cause employees their jobs. He urged an investigation of both Landes and the Respondent and argued that Landes should not be able to draw retirement. He sent copies of his letters to both New York senators and to his congressman. One or more of these contacts resulted in a complaint being filed with the New York State Department of Labor in Albany and the NLRB in Washington which forwarded it to the Buffalo Regional Office. The complaint against Landes was eventually dismissed on the grounds that after being out of the Agency for 2 years, he was free to practice law. Before sending the letters, La Fountain told several employees what he intended to do, and according to his testimony, they agreed that it should be done.

Shortly after La Fountain wrote to his representatives about Landes, a representative of the New York State Labor Department, called Aborn to inquire what Landes' affiliation with Respondent was. Aborn told the investigator that Landes was Respondent's attorney. The same representative called Aborn a second time for a reason forgotten by Aborn, but not thereafter.

About this time, probably at the next union meeting, which would have been Saturday, July 14, La Fountain asked the president of the Local, Kenneth Ramsey, to check up on Ammons to see if he was a retired Teamsters member. There is some evidence that La Fountain intended to try to interfere with Ammons' pension rights but he denied it. These efforts eventually came to Respondent's attention.

A week or two after the election, according to La Fountain, Aborn called him into the office. He said, "Jim, I walked the floor for two weeks and I hadn't slept for two weeks, all because you tried to get the Union in." Aborn went on to say that both he and Fuller would have lost their jobs if the Union had won the election. He explained that the

¹⁰ Sometimes identified in the record as Scott Pelkey.

Company had told him that they would have lost their jobs because the Union was trying to get in and they should have known about it. La Fountain replied that Aborn knew that La Fountain was going to try to get the Union in because he had told him that he was going to do it. Aborn then said that he did not want to hear La Fountain talk union again¹¹ and added, "You're not wearing that union hat around here." La Fountain, who had been wearing the Teamsters hat since he was hired, replied that Aborn should then buy him a hat to replace the Teamsters hat and suggested that Aborn get him "one of them C. I. Whitten hats, one of the white ones with the red trim in the front. Aborn subsequently got La Fountain the hat he requested, and he wore it thereafter.¹²

In denying that he discussed the Union with La Fountain after the election, Aborn testified that there would not have been any basis for it, that he felt that Respondent had won the election and as far as he was concerned, it was over and it was business as usual. Since I have found La Fountain's version of the conversation to be credible, I also find that the subject of his involvement in union activity was still very much alive in Aborn's mind as it was in La Fountain's.

Harold Parker testified that during his employment with Respondent, which began June 22-25, he had several discussions with Fuller about the Union. On one occasion, shortly after he started working, he and Fuller had just returned from a trip when Fuller asked him whether he had been briefed about the Union by La Fountain and Fowler. Parker replied that he had not. At the time, there was a lot of talk among the employees about the election and about the Union. Shortly after this conversation occurred, a second conversation took place between the same two individuals. The same question was asked by Fuller and the same response given by Parker. The interrogation of Parker as to the union activities of La Fountain and Fowler must be considered in terms of Aborn's earlier prohibition against discussion of the Union.

La Fountain testified that 2 or 3 weeks after the election, which would make it on or about July 13 through 20, Jerry approached La Fountain near the X-Plo garage just as he was about to leave on a trip and said to him, out of the blue, "Jim, I want to know exactly if you're to blame for the Union trying to come in here." La Fountain replied, "I'm going to tell you like I told you before, that we are hard up for insurance. We need insurance. We don't have no insurance." Jerry said, "Well, that's it." La Fountain got into his truck and drove away.

Although there is no evidence to indicate that Jerry's questioning of La Fountain was at the behest of Respondent and the complaint does not allege interrogation by Jerry in violation of the Act, in light of the fact that both X-Plo and Respondent have demonstrated a mutual interest in keeping the Union out, I find it more likely than not that any information about Respondent's employees' union activities obtained by Jerry would certainly be passed on to Respondent's manage-

ment. Thus, I find that La Fountain's statement to Jerry was not only an admission that he was responsible for the union campaign, which was no great revelation, but also an indication, since the employees still had no insurance, that he intended to continue his campaign to seek union representation.

On July 20, Aborn put an ad in the help wanted section of the Press-Republican for a local driver. He had done so frequently in the past. Sometimes the ad was for "local drivers," sometimes it was just for "drivers" and sometimes it was for "team operation drivers." Aborn testified that the ad he placed in the paper on July 20 was designated "local driver" because in the past the designation "driver" had not been effective. He believed by designating the help wanted ad as "local driver," he would attract those drivers who would not accept cross country hauling jobs or jobs where they would be away for 30 days at a time, but would accept the kind of jobs Respondent had to offer. According to Aborn, he was just trying to see who would apply.

Sometime in July, driver Art Pelkey had a conversation with Aborn about long-distance trips, in particular trips to Halifax, about 2000 miles turnaround. He had been assigned a number of them recently, in fact two-thirds of them, so he asked Aborn if there was not someone else who could do these trips too. He complained that it was basically Trombley and himself, together, taking the long trips. He complained to Aborn that of the last dozen trips to Halifax, he had been on every one and he thought it was about time somebody else should take a turn. Aborn agreed with Pelkey that they were all drivers and they should all take a few more of the longer trips. He said that he would see to it that others did take a turn. He reasoned further that the longer trips were no hardship because they paid a lot more. Trombley was present during this conversation.

Pelkey testified that he could not refuse to take the runs or he would be discharged. He had been hired to do whatever was required and he had been told this by Aborn when he was first hired. He had never refused a load nor had any other driver unless it was a matter of sickness or something like that. He also testified that he or any driver could easily find out where the other drivers were going and that he was unaware that Fowler was a local driver or even that there existed a classification called "local driver."

After this conversation with Aborn, Pelkey testified, he made fewer long trips to Halifax and Newfoundland, while others made more than they had before. The number of local trips which Pelkey was assigned increased after his discussion with Aborn.

On July 26, prompted by rumors that he would be having to go on more road trips, Fowler went in to talk with Aborn about a proposed trip to Halifax. Previously, there had been several discussions during which Fowler had been requested to take several long trips which he declined and which were subsequently reassigned to other drivers while Fowler drove locally.

On this occasion, Fowler objected to being sent to Halifax and asked Aborn, "What about my status as a local driver?" Aborn replied, "We never made that agreement." Fowler said, "That's not true and you know it." Aborn continued, "Besides, we never hire local drivers. Local, to us, is east of the Mississippi." He said that everyone was going to take road trips.

¹¹ Aborn denied making this statement. I credit La Fountain.

¹² Aborn admitted having a conversation with La Fountain about his wearing a Teamsters hat but he placed the conversation in May and described it in far more friendly terms. Neither General Counsel nor Respondent called witnesses to testify as to when La Fountain first began wearing the Whitten hat but I cannot believe he would suddenly do so in May during the union campaign. I credit La Fountain.

Also on July 26, during the same or another conversation, according to Fowler, Aborn advised him that he was no longer going to be paid as he had been up until then. That is, he would no longer be paid a minimum of 60 hours per week even when he actually worked fewer hours. From then on, he was going to be paid strictly by the timeclock as would be the other drivers. Since Aborn denied, throughout his testimony, that he ever agreed to pay Fowler a straight 60-hour-per-week wage and, in fact, had never done so, Aborn, by implication, denied Fowler's version of this conversation. Since the payroll records do not support Fowler's claim that he received a guaranteed 60 hours per week, I do not credit Fowler with regard to this conversation. I do credit his testimony, however, with regard to his claim that Aborn warned him that he and the other drivers would be henceforth paid by the clock.

On August 1, Respondent issued a memorandum "To All Employees." It contained 13 rules. The issuance of the memorandum was not unusual. The Respondent had issued many such memoranda in the past containing rules, guidelines, and reminders. Two rules contained in the August 1 memorandum are relevant to the instant case. Rule 1 provided for all employees doing local work to punch in and out on the timeclock. This rule adversely affected Fowler who had occasionally been permitted to go home when he arrived back early from a trip and who also had been permitted sometimes to report late. Rule 9 provided that all team loads be divided among the drivers. This rule also adversely affected Fowler because it meant that he would henceforth have to take long-distance trips along with the other drivers whereas prior to August 1, he had been assigned very few overnight trips.

Under rule 1, all employees doing local work, that is everyone coming in and going out during the day, was required to punch the clock; in the morning, going on and returning from breaks, before and after lunch, and in the evening. This was for yard personnel. In addition, drivers were initially required to punch in and out when they came in or left on trips. Eventually, after about 8 months, drivers were taken off the clock and they used their logs to keep track of time.

Aborn testified that he had hired certain employees to run the complete system. They would leave Plattsburgh and drive to various places, taking sometimes 30 days. Toward the first of August, Pelkey and Trombely had made close to six back-to-back trips to Halifax. Finally, as noted earlier, they came into Aborn's office and complained that they were always doing all of the long hauls. They wanted to be home and asked why some of the other drivers could not take some of the long hauls. Aborn agreed, and stated that from then on, team loads would be divided.

Aborn testified that issuing rule 9 of the memorandum did not constitute a change in policy. He always tried to accommodate the drivers, particularly Fowler, who he knew liked to be at home as much as possible. He said he accommodated Fowler until the other employees complained about their doing all the long runs and Fowler not doing any. At this point, he felt that he had no choice but to distribute the longer trips more equitably.

After August 1, Aborn tried to rotate the long trips among all the drivers and divide those trips equally, as much as possible. Much, however, depended on the availability of drivers at the time assignments were made. Assignments on an even

basis were also made difficult by the fact that, about August 1, a large number of trips to Halifax and Newfoundland had to be scheduled. Some of the Newfoundland trips were to places that Respondent's drivers had never been before. In order to better understand the demands of the new trips on the drivers, Aborn decided to take some of these trips himself along with other drivers. He took three back-to-back loads to Newfoundland because he did not want to send drivers who had never been there before, without being able to tell them in advance what they might encounter. So, after making three trips himself to Newfoundland, to gain personal experience, Aborn was in a position to tell them almost "hour for hour," barring any breakdowns, how many miles the trip was, how long each segment would take, and what the various expenses would be.

La Fountain testified that in early August, he received a phone call at home from Fuller. It was about 10:30 p.m. and he had just gotten in from a run. Fuller sounded intoxicated. He told La Fountain that he did not want the Union in and he did not want to hear La Fountain talk about the Union. La Fountain replied, "Ronnie, just hang up, forget about it. I'm going to bed." Fuller told La Fountain that if he discussed the Union anymore, it would mean his job.

La Fountain went in to talk with Aborn concerning Fuller's call. He complained that he did not think it was right for Fuller to be harassing him and he did not want it to happen again. Aborn said he would have a talk with Fuller.

On August 7, La Fountain was instructed to use a particular yard tractor to shuttle trailers to the magazine. He was given this instruction in written form. The reason for the instruction was to keep Respondent's road units from being used off the road. Contrary to the instruction, La Fountain used a different tractor, a road tractor, off the road. As a result, Fuller gave Fountain an employee warning report containing the statement, "This originates as a warning, that failure to comply with instructions, disciplinary action up to and including discharge will result."

In the space provided on the employee warning report for the employee's statement, La Fountain checked the box marked: "I do not agree with the company statement," and added, "I was not told about not using over-the-road tractors to move trailers from the mag. to the yard or from the yard to the mag. 324 tractor didn't T round right, so I used 323 and the brakes gave but the mechanic in the shop put a red tag on after he checked it out." This was the first warning given to La Fountain since June 12. The record contains at least two previous incidents of discipline, one resulting in a warning to a driver for damaging another company's vehicle and one discharge of a driver for abandoning his vehicle out on the highway.

Fuller testified that the warning was given to La Fountain because he disobeyed instructions and failed to notify Fuller that there was a problem with carrying them out.

The question again is whether this warning was a legitimate reflection of Fuller's concern that his orders be followed and that over-the-road vehicles not be used between the magazine and the terminal on that secondary road, or whether, in light of the demonstrated evidence of animus on the part of Fuller toward La Fountain and his union activities, the warning should be considered pure harassment or a further attempt to build a pretextual case against La Fountain for discharge at a later date. This warning was not alleged

as a violation in the complaint and I find that there is insufficient evidence to warrant the conclusion that its issuance was discriminatorily motivated.

By late August, according to Fowler, the atmosphere had continued to deteriorate. There remained a certain amount of animosity among individuals and he felt that there was no sense to it since the Union had not been voted in. He went to see Aborn about it. He suggested that they put the matter of the Union behind them. He explained that the only reason he tried to get the Union in was to get security for his family. He commented that he hoped that Aborn did not feel any animosity toward him. Aborn replied sarcastically, "Animosity? Why should I feel any animosity? I didn't sleep for three weeks. It cost the company twelve thousand dollars to fight this union thing, and I almost lost my job. Why should I feel animosity?" Fowler replied that he was sorry that Aborn felt that way and said that he would continue to do the best job that he could.

In early September, one morning about 5 a.m. La Fountain was scheduled to go out on a run. When he arrived at the terminal, however, he could not find the tractor that had been assigned to him. It was not in the yard. He then called Fuller at home. He told Fuller that he was going to call the main dispatch office in West Virginia, to find out what happened to his truck. Fuller told La Fountain not to do that but to just take another tractor. As La Fountain was checking out a second tractor, one of the other employees stopped him and told him not to take that one because it had been set up for someone else. At this time, Fuller arrived at the yard and, clearly upset about La Fountain's threat to call the home office, told La Fountain that he was fired. He gave no explanation or reason why he was firing La Fountain but apparently he was displeased with La Fountain's threat to call the home office. La Fountain went home.

About 10 a.m., Aborn called La Fountain to come in to the terminal office. When La Fountain arrived, Aborn called Fuller in also. He told Fuller, in La Fountain's presence, that he had no business firing anybody. He told La Fountain that any problems with vehicles or anything else was to be solved locally. La Fountain then returned to work and was paid for that day.

On September 5, about 7:30 a.m., Brian Hart reported to work and informed Fuller that he had seen Fowler's truck parked unattended at a local store. Fuller told Hart to fill out an employee warning report, which he did. When Fowler returned from his trip on September 7, Hart handed him the warning. It states:

On 9/5/90 Mr. Fowler stopped [at] local store, down the street from terminal with hazardous material. The load was unattended while Mr. Fowler was in the store.

Fowler refused to sign the warning.

Fuller testified credibly that to park a placarded vehicle where Fowler's truck had been parked was a violation and a company could only sustain so many such infractions within a certain period of time before the government would pull its permit to haul explosives or hazardous materials. Other than receiving the warning report, no other disciplinary action was taken against Fowler either for the incident or for his refusal to sign the warning.

After the posting of the August 1 memorandum about all team loads being divided among the drivers, Fowler was required to take only one trip, that to Nova Scotia. Then, on or about Thursday, September 20, Aborn became aware of a trip to Newfoundland. It was to be delivered Wednesday of the following week, so he called Fuller into his office and told him that since most of the drivers had been on long loads, back to back, he and Fuller were going to have to start splitting up the longer trips among the other drivers. He said that he was going to put Michael Fowler on the Newfoundland trip and asked Fuller to bring him in. Fuller did so.

When Fowler came in, Aborn told him that he was putting him on the Newfoundland trip in order to split up the long loads among the drivers. When Fowler asked what the trip entailed, Aborn told him that he would be leaving at 2 a.m. the following Monday and would arrive at Sidney at 6 a.m. the following day. That afternoon he would purchase his ticket and would be loaded on a freighter. The freighter was scheduled to sail at 8 p.m. and dock at Port of Bass about 1 o'clock. He was then to drive almost 500 miles across Newfoundland to his destination where he would be met by people who would take him to the site where he would help them unload. He was to return empty, taking the ferry back, and was expected back at the terminal Friday at midnight.

In addition to giving Fowler directions for the trip, Aborn told him how he would be paid. He told him that he would be paid from the time he left until the time he got back, including sleeping time on the freighter. He was also to receive money to eat on the freighter. When Aborn was through with his instructions to Fowler, he asked him if he understood. Fowler answered noncommittally, "I understand what your saying," then walked out.

That evening, Fowler discussed the Newfoundland assignment with his wife. They decided that since Fowler had determined not to return to Anchor Motor Freight in order to avoid over-the-road trips, accepting the Newfoundland assignment would set a dangerous precedent. They agreed that he would not take the trip.

About 6 a.m., Friday, September 21, Fowler reported to the terminal for work. No one was there so he wrote a note which said, "I cannot go to Newfoundland," then signed it and dropped it in the mailbox. He then drove off on a trip for which he had been scheduled.

When Fowler returned early that afternoon, Fuller approached him and verified the fact that he had written the note. Fuller had already shown it to Aborn. He then told Fowler that Aborn wanted to see him. Fowler and Aborn discussed the problem briefly. Fowler stated bluntly that he was just not going to Newfoundland. He said he was a local driver and did not want to be away from his family that long. Aborn replied, "Notwithstanding, your refusal to go is perceived as a voluntary quit. Go clean out your truck." He added that Fowler was a good driver and he would write him a recommendation if he needed one. He said he was sorry things happened like this but that was his policy. He then sent someone along to watch Fowler clean out his truck. Before he left, Fowler asked for a discharge notice and Aborn advised him that he would receive one in the mail.¹³

¹³ Richard Veen a part-time driver, testified that normally he would leave and return the same day but occasionally would have

Continued

Fowler had been scheduled to go to Newfoundland with either La Fountain or Witherbee because those were the other two drivers that had sufficient hours to complete the run. When Fowler refused to take the run, La Fountain and Witherbee took the trip together.

La Fountain testified that as late as 4-6 months after the election his fellow employees were still asking him about the possibility of the Union getting in. He advised them that they would have to wait another year or two before they could have another vote. La Fountain did not name any of the employees with whom he had these conversations.

Another incident occurred in mid-November. According to driver Richard Veen, he and Aborn were returning from Belle Isles. A stretch of road was closed and they had to drive on the service road which was rough. Veen happened to mention to Aborn, at that time, that La Fountain had once told him that he was driving too fast on that stretch of road. Aborn commented, "Well, I don't know about Jim La Fountain, whether this union bullshit is going to start up again or not." This statement is alleged in the complaint as interrogation in violation of Section 8(a)(1).

On November 20, La Fountain was scheduled to make a delivery from Plattsburgh to 10 miles on the other side of Montreal. He left the terminal about 7:15 a.m. and arrived at the border in about half an hour. About 8 a.m., when the broker's office opened, La Fountain called up and asked for a runner to be sent over to pick up his paperwork. The runner is supposed to take the driver's paperwork to the Livingston Broker's office where the clericals work on it, then clear it through customs. They then receive the processed papers back from customs and return them to the driver, thus enabling him to pass on through to Canada to deliver his load.

On this occasion, the runner came over and picked up La Fountain's paperwork and returned with it to the office of Livingston Brokers. When La Fountain had not gotten his papers back from Livingston by 9:30 a.m., he called his dispatcher and reported to Brian Hart that he had not yet gotten his papers back. Hart advised La Fountain to go to customs and see if Livingston had yet presented them to customs. La Fountain did so and was told that the papers had not yet been presented. When La Fountain reported this fact back to

overnight trips. He had made one trip to Newfoundland and six to eight trips to Nova Scotia. On one occasion Fuller asked Veen if he wanted to go to Newfoundland. Veen declined, that ended the conversation, Fuller made other arrangements and Veen was not disciplined. He could not recall, however, if this incident occurred prior to or after the issuance of the August 1 memorandum. Veen testified that if Fuller had told him that he had no other driver available, Veen would have taken the trip. He told this to management at the time.

The record reveals that Respondent, in February 1989, discharged another employee, Lee Sabin, for refusal to take an assignment.

La Fountain testified that he had never been present when a driver refused an assignment but that driver Billy Shoemaker, in October, told him that he had refused a trip to Newfoundland because he was afraid of the water and had not been disciplined for his refusal. Shoemaker was not called to testify and I choose not to rely on La Fountain's hearsay testimony for the truth of the matter.

I conclude that the evidence is insufficient to warrant the conclusion that Fowler was receiving disparate treatment. On the contrary, it would appear that whereas Fowler had received more favorable treatment before August 1, thereafter, at the behest of other drivers, and for good cause shown, he was treated more like them.

Hart, Hart said, "That's funny. They [Livingston] told me your papers were already cleared." La Fountain commented that somebody was lying.

La Fountain then returned to the Canadian customs office and told the official there that his dispatcher had been informed by Livingston that his papers had already been cleared by customs. The customs official said that La Fountain should not believe the people at Livingston because "they lie like hell." He said that customs did not have his papers.

La Fountain telephoned Hart again who told him to wait until 10:30 a.m. and if he did not have his papers by then, to call him back. At 10:20 a.m., La Fountain called Hart for the third time. As he was about to hang up, the runner came over with his papers. As he checked through them, however, he noticed that his bill of lading was missing.

Ordinarily, a driver only has two contacts with the broker. First, when he gives his paperwork to the runner, then when he gets it back. In this case, however, La Fountain called the Livingston office, which though not unheard of, is not the usual procedure and is against Respondent's rules.¹⁴ La Fountain should only have contacted Hart. On other occasions when drivers have called the Livingston office they have usually said something like they had been waiting an hour and still do not have their release, in which case they're told that their release was put in 30 minutes ago and it could be another 30 minutes before they get it. If customs has blocked the paperwork, the drivers are advised of this fact and told that it will be resubmitted.

According to the credited testimony of Sheryl Orr, an employee of Livingston, on the morning of September 20, La Fountain's papers were promptly picked up from him, processed by Livingston and submitted to customs. Customs then blocked the processing of the papers because they either wanted a further description of the load or they were questioning the permit. This blockage took the form of questions written out and returned to the broker by the runner. Whatever customs was looking for was then supplied to them and resubmitted.

About 9:45 a.m. was when La Fountain called the Livingston office and inquired where his release was. The woman who answered La Fountain's call put him on hold. She then contacted the runner who advised her that she was still waiting for the release and that was all she knew. Orr explained that once a set of papers gets into the system at customs, its very difficult to trace them because there may be 50 trucks passing through at the same time and customs is too understaffed to take time out to look for individual sets. When the office worker returned to answer La Fountain's question, she found that he had hung up.

¹⁴La Fountain denied that he was ever instructed by Aborn or Fuller that if he had a problem on the border, not to get into any discussions with anybody, but just to call Brian or dispatch. Fuller testified, however, that drivers are never to personally call the broker concerning problems but rather have the dispatcher do this. Fowler supported La Fountain's testimony, that he was never told not to contact the broker directly. He added, however, that he knew he was not supposed to get into arguments with personnel at the border. Pelkey supported Fuller's testimony as did Aborn. I credit Respondent's witnesses on this matter but find that occasionally, drivers did, in fact, contact Livingston's office.

Ten minutes later, La Fountain called the Livingston office again. A second office worker answered this call. She listened to La Fountain for a couple of minutes, then asked him to hold. She turned to Orr and said, "All this driver wants to do is argue. Would you take the call?" Orr picked up the phone. She opened, "Sheryl speaking, may I help you?" Then according to Orr, "He came on yelling in my ear, saying that he had been there for, I don't know how long. I think he said for a couple of hours, and he didn't have the release yet, and he wanted to know what the problem was, and he said he always had a problem with Livingston, that they were slow. He never had to wait for releases from anyone else, from the other brokers and he also told me that the problem must be with the runner. It was all her fault, and he didn't want to see her face again at customs."

According to Orr, La Fountain then said, "I'm going to get to the bottom of this. We're going to get this sorted out. I have people, important people in high places, with the Department of Transport." Orr testified, "He said he was going to stop down the road and see these Department of Transport people and get this sorted out, and someone's head was going to roll for it. He would find out what the problem was and make sure it didn't occur again." Orr listened to La Fountain while he repeated many of the things he had already said. She told him if he could get someone in higher authority that could get customs to release shipments faster, more power to him, everybody would appreciate it, including the brokers. With that, La Fountain hung up. The conversation had taken at least 10 minutes.

After the conversation concluded, the office manager, Spec, who had heard part of it, asked Orr about it. Orr described its contents. She remained upset for the rest of the day. The runner pleaded with Orr not to send her back to the driver's room until La Fountain had gone. Orr was under the impression that La Fountain, if he had the authority, intended to initiate an inquiry, to make trouble either for herself, her company, or for customs.

After Orr had explained to her manager what La Fountain had been saying to her, Livingston received a call from Wendy, an employee at X-Plo who had apparently heard from Whitten that La Fountain had not yet cleared. She asked if there was some way she could be of assistance. Spec informed Wendy what was happening, the holdup with customs, as well as the content of La Fountain's diatribe.

Wendy, in turn, called Hart and informed him of La Fountain's behavior. Hart then called Orr at the Livingston office to discuss with her, her conversation with La Fountain. After she described it to him, he asked her if she would fax the content of her conversation with La Fountain to him because this had not been the first complaint he had received about La Fountain. Orr agreed to do so and subsequently did, that day at 1:55 p.m. During the conversation, Hart apologized for La Fountain giving her a hard time. He mentioned that there was a possibility that he might be terminated.

Orr testified that if Hart had not requested the fax, most likely Livingston would not have done anything about the incident. If, however, La Fountain had repeated the incident, there definitely would have been a complaint filed.

After La Fountain found his bill of lading missing, he testified, he called back the Livingston office and said, "Lady, my bill of lading is not with my paperwork. I got to have it. D.O.T. is setting right in front of you. You can look right

through your windows and see them. They will stop me, sure as heck, and they are going to ask me where my bill of lading is and I don't have it." According to La Fountain, 10 minutes later, they came over with his bill of lading, all crumpled up.

Orr contradicted La Fountain stating that there was no discussion about a bill of lading and no talk about the D.O.T. except in the context of her own description of the conversation wherein La Fountain talked to her about his friends in high places.

La Fountain denied swearing, being rude, or threatening anyone at Livingston. On the Contrary, he testified that some of the women swore at him and called him names.

When La Fountain returned to the terminal on the evening of November 20, no one from Respondent mentioned any customers, brokers, or anyone complaining about him.

Aborn had been away from the yard on November 20 but called the terminal early in the afternoon. Fuller spoke with him and advised him that there was trouble between one of the drivers and a broker up at the border. Fuller, at this time, had not yet seen the fax. Later in the afternoon, however, Fuller received the fax and advised Aborn of its content when he called back again.

The following morning, Aborn arrived at the terminal between 4:30 and 5 a.m., went out on a run in a three-truck convey which included La Fountain, then returned to the terminal in the evening. Aborn and La Fountain rode in separate trucks on this trip and spoke briefly only once but not about the previous day's events. When he returned to the terminal that evening, Aborn advised Fuller that he was leaving for Connecticut for the long weekend. He told Fuller to put everything concerning the border incident of the previous day, and La Fountain's file on his desk and to lock his office. He said that he would review it when he got back Tuesday, November 27.

On Aborn's return, Tuesday morning, November 27, he read over the fax which contained Orr's description of the events of November 20. He called her and apologized for the incident. He told her that it was not C. I. Whitten's policy for its drivers to contact them and harass them in any way. He said he could not express how sorry he was that the incident had happened and assured her that he was going to take care of the situation. He did not specifically tell Orr that he was going to fire La Fountain nor did she ask him to do so. Although Orr expressed some concern as to what would happen to the driver because of this incident, Aborn had already made up his mind to fire him after reading the fax.

After reading the fax and deliberating over what to do about the incident, Aborn decided that by La Fountain's behavior, he had jeopardized the Company's working relationship with Livingston. He felt that if an incident like this could happen with a broker, given La Fountain's temper, it could also happen with a customer. After reviewing all the materials including La Fountain's file,¹⁵ Aborn advised Fuller of his decision. Fuller, in essence, agreed with Aborn's decision noting that problems had arisen before and that Aborn was aware of them. Aborn acknowledged that he was.

¹⁵ Review of an employee's file is standard procedure before a contemplated discharge.

In discussing these past problems that were under consideration, at the time of the decision to discharge La Fountain, Aborn emphasized La Fountain's confrontational nature. He testified that, "Every time, it seemed like we had Mr. La Fountain in for a talk, that he was going to get a lawyer" and he "was going to take care of this, and he was going to take care of that." Aborn testified that although, at the time of such statements, he considered them idle threats, this attitudinal history played a part in his deciding that Orr's description of events was true, that the incident occurred as she reported and that La Fountain should be terminated without the necessity of first asking his version of the incident. Moreover, any broadening of the investigation would probably involve additional confrontations and complications which Aborn understandably wished to avoid. For this reason, Aborn preferred not to divulge the reason for his decision to terminate La Fountain and subsequently refused to do so.

In discussing past problems which the Company had with La Fountain, Aborn also testified concerning a number of incidents which he witnessed during which Fuller attempted to explain something to La Fountain who would not listen but would take the attitude, "I know that; you ain't got to tell me." La Fountain's attitudinal problems as well as his prior conduct and work history were discussed in light of the November 20 incident by Aborn and Fuller before La Fountain was invited into Aborn's office to be advised of his discharge. They discussed La Fountain's warnings of June 12 and August 7, described supra, the incident when he threatened to call the home office and Fuller fired him, as well as the effect of the November 20 incident on Respondent's business.

On the date of his discharge, La Fountain had been out on two trips and returned about 4:30 p.m. Aborn asked Fuller to bring La Fountain into the office. When La Fountain entered, in Fuller's presence, Aborn said, "Jim, an incident has occurred, and after reviewing it, I have no alternative but to discharge you." When La Fountain asked what it was about, Aborn replied that he did not have to explain it. La Fountain demanded a written statement. Aborn refused. La Fountain replied that Aborn was not a man if he could not give him a statement concerning why he had fired him. As La Fountain started to leave, he asked, "Has this got anything to do with what happened at the border the other day?"¹⁶ Aborn replied, "It may." La Fountain then stated, "I'll get to the bottom of this. I'll call Ron Stafford. He is the lawyer for the Union and we'll get the Union to take care of this situation."¹⁷ Aborn then asked La Fountain for certain credentials. La Fountain gave Aborn these documents, then left. He came back briefly and asked Hart what he knew about it. Hart denied any knowledge and La Fountain left.

La Fountain filed his charge on December 6, 9 days after his discharge. Fowler filed a charge on behalf of himself and his wife on December 17.

¹⁶ La Fountain denied asking this question but I credit Aborn.

¹⁷ La Fountain denied making this statement but I again credit Aborn. Senator Ronald Stanford, the union attorney, was one of the several government officials whom La Fountain contacted on June 25 to get Landes investigated.

Michael Fowler's Reduction in Wages

One allegation contained in the complaint, paragraph VII(b), not covered by the above-outlined chronological description of events concerns Michael Fowler's alleged reduced work hours, beginning July 26.

As noted above, Fowler was promised as close to a 60-hour week as possible, early in his employment, and was kept on local trips with only occasional overnight runs. He estimated that he had been on fewer than 10 overnight trips and had been on only 1 long trip, that to Halifax, Nova Scotia, that one in June.

Although it is alleged that Respondent discriminatorily reduced the work hours of Fowler, beginning July 26, the record does not support this contention. The pay period ending July 20 (2 weeks) indicates that Fowler earned \$20 less than the previous pay period meaning he worked 2 fewer hours than the previous period. During the same period, however, other drivers also received decreases in wages: Trombly—\$71, Pelkey—\$2, La Fountain—\$25. Moreover, Respondent hired a new driver during this period at \$7 per hour: Vernon Witherbee who drove about 47 hours for plus \$325.50. Thus, there is no evidence of discrimination against Fowler during this pay period.

As noted above, Pelkey and Aborn testified that Pelkey complained that he and Trombly were being forced to take too many of the long trips and other drivers were not taking a fair share. Fowler admitted to having heard that the two were "miffed" about it. Payroll records support the truth of this matter because they reflect that Pelkey earned the most and therefore drove the most, in each pay period in July and August, of any of the drivers and that Trombly was second in these categories, three out of the five pay periods. When Pelkey earned \$1436 during the pay period ending August 3, the highest amount of record, his complaint would appear to Aborn to be justified.

Thus, in late July and early August, four things combined which would affect the wages of the hourly paid drivers. First, long trips were to be distributed more evenly. Second, all drivers were henceforth to be paid by the clock. Third, because of the timeclock, the close to 60-hour week previously promised to Fowler was no longer in effect. Fourth, still another driver was hired to share the payroll.

The pay period ending August 3, the last one before the above described measures were implemented, indicates that Fowler's wages increased \$4 reflecting an increase of about a half hour. As for the other drivers, their wages were affected as follows: Trombly + \$162, Pelkey + \$149, La Fountain \$184, Witherbee + \$892 (his first full paycheck), Carlton Smart + \$920 (new employee). Thus, whereas four hourly paid drivers were paid \$4708 for the pay period ending July 20 and six hourly paid drivers were paid \$5298 for the pay period ending August 3, Fowler did not lose a penny, but continued to earn approximately the same wages as he had before.

According to Fowler, before August 1, he was being paid for 60 hours per week and was told by Aborn to fill out his logs for 12 hours per day using line 4: "on duty, not driving," to indicate time, in excess of the actual time worked, to make up the difference so as to be paid for a full 12-hour day. Often Fowler would return early from a trip and ask Aborn if he could go home. Frequently, he would obtain per-

mission to do so and would fill out his log as indicated above.

Although Aborn testified that he basically paid Fowler for the hours he actually worked, there were times when he let him leave early or come in late and paid him for it.

The payroll records, for the period ending August 17, indicate the first serious drop in Fowler's wages. This is easily explained by the fact that Fowler took his vacation during the week of August 10 and was therefore paid like all hourly paid drivers, for a 40-hour week, or \$360. The week ending August 17 he earned \$535.55 for just under the usual 60 hours' work. There was, therefore, no discriminatory wage reduction. Aborn testified that early August is a slow period because many Canadian companies close down for vacation. The payroll records support Aborn's testimony because they reflect that all but one of the drivers had a decrease in wages this pay period as compared to the previous one: Trombley—\$140, Pelkey—\$263, La Fountain—\$14, Witherbee + \$106, Smart—\$272.

The payroll records for the period ending August 31 indicate that for the first week, Fowler earned \$394.05 reflecting actual hours on the clock. Testimony indicates that Fowler was given several days off at approximately this time of his employment to attend a relative's funeral. If this were the week he took off for that purpose, and it appears to be, that would account for his lower wages. In the second week of that payroll period, Fowler earned \$504, close to his average. Analysis of the August 31 payroll period for all hourly paid drivers indicates that total wages increased for most drivers.

The payroll records for the period ending September 14 indicate that Fowler received \$1035 or about two 60-hour weeks, taking Labor Day (8 hours) into consideration. He received a larger paycheck than three of the five other hourly paid drivers.

Fowler would have received wages far in excess of the near 60-hour week for the payroll period ending September 28, had he not chosen to refuse the assigned Newfoundland trip. On that single 5-day trip he would have earned around \$900.

Refusal to Employ Debra Fowler

As indicated earlier, Debra Fowler was not hired independently of her husband but as a direct result of her husband's request of Aborn that she be allowed to accompany him on trips to Canada.

Debra Fowler's only union activity was the signing of a union card proffered to her by her husband on May 10. She was eventually excluded from the unit and did not vote in the election. Her relationship to her union activist husband would, however, also be a consideration in determining the reasons why Respondent ceased using her services.

Debra Fowler applied for work with Respondent on March 15. On her application, she noted that she was applying for the position of rider, that she was not physically capable of heavy manual work and that, in any case, the question of heavy manual work was not applicable to the position she was seeking. Fowler explained that she stated that she was not capable of heavy manual work because before she applied for the job, her husband explained to her the duties she would be performing including lifting, loading and unloading the materials he was hauling and she did not consider that kind of work, heavy manual work.

Once hired, Debra Fowler performed the duties of a rider/helper. As a rider, she accompanied her husband on about 10 runs and helped him unload his truck, on all trips, "in some form or another," primarily the more manageable items, when they arrived at their destination. They hauled black powder, dynamite caps, and similar materials which were boxed or in sausage rolls which weighed between 50 and 80 pounds. As a helper, she felt that unloading was part of her duties and both she and her husband worked together. Neither her husband nor any member of management, however, instructed her to unload. While performing her work she wore jeans, a sweatshirt, and sneakers. While unloading she also wore gloves with grippers on the inside. Although she did help with the unloading, she was still primarily a rider because there was not that much work to do on these types of trips. The duties performed by Debra Fowler, as a rider, were similar to those performed by other riders who accompanied Michael on other occasions on similar trips, including other drivers, working as riders.

The trips on which Debra Fowler accompanied her husband required the presence of two individuals at all times because the cargo consisted of certain classes of explosives and Canadian regulations provided for this requirement. But for this regulation, Michael Fowler could have driven the truck and unloaded it without the aid of a helper.

While Debra Fowler was employed by Respondent she never assisted any of Respondent's other employees with loading or unloading at the Plattsburgh terminal or, insofar as the record indicates, anywhere else. She did, however, on at least two occasions, work with employees of customers doing this type of manual labor.

In the usual course of her employment, Debra Fowler did not accompany other drivers as a rider on their trips. One exception, however, occurred when she and her husband were driving back from a trip to Canada. When they reached within a few miles of the terminal, their truck broke in half. Michael managed to get the truck safely stopped near a gas station. Both got out of the tractor and Michael called Aborn from the station. Aborn, Shoemaker, and another of Respondent's employees drove to where the Fowlers and their truck were waiting. They separated the tractor and trailer. Michael stayed there with Aborn and the other employee while Debra got in the truck with Shoemaker and they took the trailer to the magazine which was only a half hour away. After dropping the trailer off, Debra waited for her husband at Respondent's office until he picked her up to take her home. This incident occurred about a month before the election.

Although Respondent employed regular full-time guards to stand watches at the magazine, Debra Fowler was never hired in that capacity, nor was it contemplated that this would be one of her duties. She was not requested to perform in that capacity and she never asked for that job.

On two occasions, however, when Respondent was short of personnel, Debra Fowler was asked to help out, just sitting in a truck watching over some trailers loaded with explosives. One such occasion occurred in late April or early May when a U.S. bound shipment was unloaded from a ship in the port of Montreal. For some reason, the containers did not have the proper export licenses to clear the border but they had to get off the ship. After 2 days, arrangements were made to have the shipment hauled down to a particular yard

just across the border on the Canadian side where the shipment could remain parked until the proper papers were obtained. The owners of the parking area, however, required that Respondent furnish a guard and a driver with a tractor to remain with the trailers full of explosives while they remained at the site. The purpose of this stipulation was to have someone there to be able to move the trailers into the woods or elsewhere within the confines of the area, out of danger, in case of emergency. Fred Marks, an employee who was capable of moving the equipment, though not an over-the-road driver, was sent up as driver and Debra Fowler was sent up as guard because of the shortage of men at the time.

Fowler and Marks remained all day on duty at Marcel's yard in Le Cole, Quebec, until a company team was sent up to relieve them. They each then went home to eat and sleep for several hours until 2 or 3 a.m. at which time Fowler drove over to Marks' home in her personal vehicle. They drove back to Le Cole to continue their watch through the following day until permits were obtained and the containers moved across the border to Plattsburgh.

Although Debra Fowler apparently did not recall it, Aborn remembered a similar situation where he and Fowler just sat in the cab of a tractor guarding trailers loaded with explosives. This was their sole duty. They chatted while she knitted.

The last time Debra Fowler worked in any capacity for Respondent was before the election. Respondent offered several reasons for this, primarily that there was no work available for her.

Counsel for the General Counsel, through his questioning of Respondent's witnesses, implied an obligation on Respondent's part to call Debra Fowler back as a guard at the magazine. Aside from the fact that she was not originally hired as a guard, Aborn credibly testified that he would never have allowed her to be assigned to the magazine, especially not alone, at night. He testified that the place is isolated with just a couple of lights and an outhouse. Though isolated, it is accessible to anyone who may approach by car or on foot by road or through the woods. Aborn offered two vignettes, as examples, as to why he would not assign a woman to the post, one involved a bear standing outside the shack, which petrified the guard on duty, the second involved an incident one night, about 2 a.m., when two four-wheeled vehicles drove onto the magazine property from the runway of the nearby county airport and kept racing around the shack until the guard called the state police. I credit Aborn's expressed concern for Debra Fowler's safety and believe he never considered assigning guard duty at the magazine to any woman.

The incidents where Debra Fowler was asked to stand watch with Marks on one occasion and with Aborn on another occasion were isolated and not part of her regular duties as a rider. She would not have been used for that purpose had regular employees been available, and there is no evidence similar circumstances have arisen since the two isolated incidents described above.

Moreover, Aborn testified that 2 days after Marks and Debra Fowler spent the 2 days in Le Cole together watching the trucks, Marks asked that he not be sent out with Fowler again because his wife threatened to throw him out of the house if it happened again.

Aborn testified that after her assignment to stand watch with Marks at Le Cole, he used Debra Fowler again as a rider a couple of times, but only with her husband. According to Aborn, when Debra was hired, he asked Michael about her riding with other drivers and his response was, "I prefer she rode with me." Michael did not deny making this request. According to Aborn, he never knew until he heard Debra Fowler testify during the hearing that she helped unload when she accompanied her husband as a rider on trips. From her application, he assumed that she would not be picking up 60-pound boxes of dynamite, carrying them, and stacking them five or six high. He made the same assumption based on her slight build and her high-fashioned appearance. He testified that he had never seen her doing any loading or unloading and Debra Fowler admitted herself that she never did any of this kind of manual labor at the terminal or in the presence of any of Respondent's employees. Aborn testified that as he understood Debra's job, it was to meet the demands of the regulation requiring the presence of two individuals on trips in trucks carrying certain types of explosives, to go for anything that Michael might need or to make a phone call for him in case of a problem, while he remained with the truck. He testified further that he expected that Debra might help Michael keep the truck clean. I credit Aborn's testimony as to his understanding of the duties being performed by Debra when accompanying her husband on the road. Since Aborn hired Debra primarily as a favor to Michael, it is understandable that he did not expect her to perform all the duties expected of regular helpers. He never asked her if she was helping unload and she never told him.

Neither Respondent nor General Counsel offered into evidence any payroll records or pay stubs indicating the last date that Debra worked for Respondent. Thus, it can not be seen, relative to the Fowlers' union activity just when Respondent ceased using her services. She worked sporadically for about 2 or 3 months. Michael Fowler placed their last trip together on about May 22.

According to Aborn, it was during this period of time when he decided to hire an additional helper to help with unloading the full shipments which Respondent expected from its customers in the near future. The shipments would require the lifting of 40- to 80-pound boxes of explosives, carrying them and stacking them five or six high on a handcart. He felt he needed helpers who could manhandle these explosives. Aborn never considered Debra Fowler for this kind of work and she admitted in her testimony that she could not perform it.

After Debra Fowler had not been called to work for several days she discussed the matter with her husband. She wondered why she had not been used and if she had been terminated. Michael said he thought it might have something to do with the union activity. Subsequently, after the election, Michael asked Fuller if his wife could accompany him on a particular trip. Fuller replied that he did not know, but would ask Aborn. Thereafter, Fuller returned and told Michael that Debra could not make the trip. Michael attributed the decision to Aborn but could not recall if he was given a reason for the refusal of his request. Neither could he recall if someone else accompanied him on this trip.

After Aborn, through Fuller, refused to let Debra ride with Michael, Michael approached Aborn in his office, and asked him, "Can I assume that my wife is no longer employed by

C. I. Whitten Transfer?" Aborn replied, "No, she's still an employee at C. I. Whitten, part time. If the need arises, I wouldn't hesitate to call her." Michael then asked, "Well, why isn't she working?" Aborn responded that there just was no work for her to do. Michael Fowler made no further requests or inquires concerning the subject.

Prior to May 31, Respondent was contacted by a customer and asked to quote a price on certain shipments. The entire contract provided for the shipment of Eastman Kodak products from Rochester, New York, to Simsbury, Connecticut, where they were to be converted and put with explosives, then packaged in containers. These containers were then to be picked up by Respondent's units and vans in Simsbury. When loaded on the vans by electric trucks, the containers, referred to as "coffins," were to weigh between 240 and 260 pounds and were to be stacked in the van four or five high. The shipment was then to be transported to the Plattsburgh terminal. In the meantime, Respondent was to pick up an empty sea-going container in Montreal and bring that to the terminal in Plattsburgh where the coffins were to be transferred from the vans, across a flatbed and stacked seven high inside the container for further shipment to Halifax.

Aborn testified that he was uncertain that Respondent could successfully perform the requirements of the proposed agreement but determined to give it a trial run. He knew that he could not use a tow motor to transfer the coffins at Plattsburgh from the van to the container because the coffins contained class A explosives. He concluded that some heavy physical labor would therefore be involved. He already had two very large and muscular yardmen working at the terminal but decided he would need a third to physically lift the coffins and stack them one on top of the other and stuff the sea-going container to its capacity before shipment to Halifax.

To perform the labor connected with the transfer of the coffins from the van to the container in Plattsburgh, to perform the duties of rider, and accompany the newly increased full loads being sent to Ormstown and to perform guard duties for 12-hour periods at the magazine, Aborn decided to hire an employee who could satisfactorily perform all of these duties. This individual turned out to be Parker.

On May 31, Harold Parker applied for work with Respondent as a laborer/rider/guard. Parker was 44 years old, 6 feet 3 inches tall, and 230 pounds. He claimed, on his application, unlike Debra, to be physically capable of heavy manual work. Parker was interviewed for work on June 22 and was hired on June 25. He had already been an acquaintance, on a social level, of Fuller, before he applied for work with Respondent. Though, coincidentally, Parker was interviewed on the day of the election, Fuller did not mention the election or the union to him, nor did anyone else. Parker was not told that he was being hired to replace anyone.

On obtaining employment with Respondent, Parker was advised that he would be riding with the drivers, accompanying them on their deliveries, mostly to Canada, and helping them load and unload, both at the home terminal and elsewhere. Immediately on being hired, Parker began working in excess of 40 hours per week. As a rider/helper he rode with most all of the drivers on their trips including both La Fountain and Fowler. None of these trips were of the overnight type which required him to drive since he did not possess

a class 1 driver's license. Thus, he would normally return the same day as he left.

Parker testified to the type of lifting he was required to do. Normally, the weight of the objects which he handled were 50 to 60 pounds. Occasionally, he would have to lift and carry individual boxes, but normally he would stack the boxes six high and transport them on handtrucks. This would depend on how the trailer was loaded.

The work performed by Parker at the terminal sometimes involved heavier items. These were the boxes previously referred to as "coffins," which were being shipped on the Rochester-Simsbury-Plattsburgh-Halifax run, the subject of the newly acquired contract discussed above. As Parker described his work, the coffins would arrive at the terminal stacked five high. One individual would unload them from the trailer by means of a forklift. He would transfer them to where two other yardmen, using a hydraulic hand truck, would move them around within a sea-going container in which they would be stacked seven high. When the men eventually would run out of room, they would have to move the coffins by hand, sometimes with the assistance of the forklift operator. The two yard men who together with Parker worked on transferring the coffins, are very large, muscular men referred to by Aborn during his testimony as "gorillas." It is as clear to me as it was to Aborn, and eventually, admittedly, to Debra Fowler, that she was not capable of performing this kind of work.

Patrick Delaney had been employed by Respondent prior to the hiring of Debra Fowler and prior to the union organizational drive. He was a known union adherent, but, nevertheless, continued to be employed on a part-time basis by Respondent after the election and after Parker was hired. Although Parker occasionally would see Delaney, it was not often since they were both riders and rode in different trucks with different drivers. Parker testified, however, that on one occasion, at the magazine, he saw Delaney lifting and moving 50-pound cans but never saw him working with the coffins. Delaney was also occasionally employed as a guard at the magazine.

General Counsel drew attention, during the hiring, to the fact that Delaney is only 5 feet 7 inches and weighs only 140 pounds. The implication apparently to be drawn is that Debra Fowler's lack of size should not be a consideration in determining the reason why she was no longer employed since Delaney was not much bigger. General Counsel's argument is noted but not given much weight. Parker worked with the coffins and was hired, in part, to do so. Neither Delaney nor Debra Fowler was capable of performing this work. Since Delaney had been employed by Respondent before Debra Fowler was hired, there is no reason he should not be given preference over her for whatever work was available.

In addition to performing his duties as rider/helper, Parker has also, on occasion, been assigned guard duty at the magazine. There, he would pull both 12- and 8-hour shifts. Parker confirmed Aborn's description of the magazine area as isolated in the woods with nobody around most of the time. Parker's being able to handle guard duty at the magazine was clearly a consideration at the time of his hire, as is noted on his application.

After Debra Fowler was no longer being called to work as a rider, Respondent did not hire any new employees classified as a rider or rider/helper other than Parker. New driv-

ers and new guards for stationing at the magazine were hired and one of them occasionally was assigned as helper. He reportedly did heavy manual labor. The hiring of these new employees to perform duties, for which Debra Fowler had never been considered, has no hiring on the failure of Respondent to continue to employ her.

Michael Fowler testified and Aborn confirmed that after Respondent ceased using Debra Fowler's services as Michael's rider, he continued to make trips similar to those he made with Debra. Riding with him on trips of this type, as well as others, were Parker, La Fountain, Delaney, Veen, and Aborn. Some of these trips were of a new type which required two drivers. There is no evidence or claim that Fowler was accompanied by a newly hired part-time rider. All employees who accompanied Michael Fowler, after Debra's services were no longer being used, were either full-time employees or part-time employees with more seniority.

Fuller testified that Parker was not hired to replace Debra Fowler or anyone else. He stated that she was never terminated and is still eligible for employment. He testified that although he and Hart are still responsible for making assignments to guards, riders and drivers, he has given no consideration to calling Debra Fowler to work since her last trip, which was before the election. When asked the reason, his reply was, "Well, the reason that Debra was put on . . . was to assist Mike—to be with Mike." Counsel then followed up with the question, "And is your understanding that since Mike is no longer there, there is no work for her on that basis?" Fuller replied, "I wouldn't say that that would be the basis for it, no. . . . Just nothing available to do."

According to Aborn, the Canadian government, in 1989, began to consider removing the regulation which required that two individuals occupy a truck carrying certain classes of explosives. New legislation was approved, in that year, that the regulation was no longer in effect provided the truck was radio equipped. In May of that year, after doing considerable research, Aborn sent a letter to the main office in Huntington recommending that the trucks in Plattsburgh be so equipped. Although Aborn's suggestion was rejected by the home office in 1989, that decision was later reversed and Aborn began purchasing and installing CBs in all of Respondent's trucks. This made the employment of riders on runs covered by the regulation no longer necessary after October or November 1990. Although this new legislation would have adversely affected Debra Fowler's employment as of October, it would not have had much to do, of course, with the failure to employ her during the period, June through September.

Conclusions

The 8(a)(1) Allegations

Within the above-described chronology of events,¹⁸ I find the following incidents violative of Section 8(a)(1) of the Act.

¹⁸The dates ascribed in the complaint to various incidents of alleged 8(a)(1) violations may sometimes be in error. Respondent was not thereby prejudiced since testimony of witnesses at the hearing clarified matters sufficiently to adequately apprise counsel of the circumstances and factual content of the incidents being alleged as violative. Respondent was afforded adequate time to correct these inadvertent errors.

1. Fuller's interrogation of Fowler, following the receipt of the petition, as to whether he had heard anything about the union organizational attempt. After Fowler told Fuller that he had no right to ask him that question, Fuller's statement, "That's all I need to know," converted the question, in this context, into a threat.

2. Fuller's threat to Fowler that the Company was going to close its doors and that he and all the other drivers would be out of a job if the Union succeeded in organizing Respondent's employees.

3. Fuller's telephone call to Fowler during which he asked Fowler whether he or La Fountain had anything to do with passing out union cards to employees.

4. Ammon's statement to Delaney and La Fountain that he knew who had signed cards. This statement created the impression that Respondent was keeping their union activities under surveillance.

5. Fuller's threat of termination of Michael Fowler as conveyed through Debra Fowler.

6. Aborn's informing Delaney that he was lucky he had not been fired for signing a union card.

7. Aborn's interrogation of Parker on June 25.

8. Aborn's prohibiting La Fountain from discussing the Union.

9. Aborn's prohibiting La Fountain from wearing the union hat.

10. Fuller's interrogation of Parker as to whether he had been briefed about the Union by La Fountain and Fowler.

11. Fuller's phone call to La Fountain in early August during which he told him that he did not want the Union in, did not want to hear La Fountain talk about it, and threatened him that if he discussed the Union anymore, it would mean his job.

12. Aborn's statement to Veen, "I don't know about Jim La Fountain, whether this union bullshit is going to start up again."

The 8(a)(3) Allegations

With regard to the allegation that the termination of Michael Fowler was discriminatorily motivated, I find that General Counsel has failed to prove by a preponderance of the evidence that this allegation is meritorious.

The record is replete with evidence that Fowler was a union sympathizer and activist, that Respondent's management was aware of this fact, that Fuller and Aborn bore him a great deal of animus because of his union activity and demonstrated this animus by stating their feelings openly and threatening him on a number of occasions with discharge. Yet, when certain incidents occurred which might have been used as pretexts to carry through their threats, Fowler received only warnings.

The record further indicates that months after Fowler's union activity was discovered and acknowledged, he was still being given preferred treatment, mostly local runs with very few overnight trips. It was not until the other drivers complained about their having to take too many back-to-back, long trips, and Aborn decided that their complaints were legitimate, that he assigned Fowler to the Newfoundland run. Though not entirely free from doubt, I conclude that Aborn assigned Fowler the Newfoundland run to better spread out the long trips among all the drivers in response to their reasonable requests and not for the purpose of punishing Fowler

because of his union activity or to place him in such a position that he would be forced to quit.

When Fowler refused to take the assignment, he refused an order which was in furtherance of the new policy of the company as announced in the August 1, memorandum. When Aborn discharged Fowler, it was because Fowler refused to follow Aborn's order to accept the assignment, not because of his union activity. I therefore recommend dismissal of this allegation.

With regard to the allegation that the termination of James La Fountain was discriminatorily motivated, I find that, as in the case of Michael Fowler, General Counsel failed to prove by a preponderance of the evidence that this allegation is meritorious.

Clearly, La Fountain was the most active prounion employee. Just as clearly, Respondent's managerial personnel were aware of his activities and were outwardly hostile toward him because of them. The numerous incidents of 8(a)(1) violations and threats against La Fountain would tend to support the allegation.

On the one hand, I have found that La Fountain had broken certain company rules and breached certain government regulations prior to his discharge which might have been used as pretexts for discharge but which resulted merely in warnings. When La Fountain threatened Fuller that he intended to call the home office with regard to his missing truck, and Fuller got angry enough to fire him, Aborn called him back to work and, the next morning, paid him for his lost time and berated Fuller in La Fountain's presence. Respondent's overall treatment of La Fountain from his initial involvement with the Union in February through his termination on November 27 does not reflect an intention to terminate him because of his known and acknowledged union activities and sympathies, notwithstanding the various incidents of 8(a)(1) violations and threats against him.

I believe that, but for the incident at the border on November 20, La Fountain would still be employed by Respondent.

I believe that Aborn took the incident of November 20 very seriously and would have terminated La Fountain because of it and because he feared a possible repetition of it, even if La Fountain had not been previously engaged in union activities.¹⁹ In short I find that La Fountain was discharged for cause.

With regard to the allegation that from about July 26 until September 21, Respondent reduced the work hours of Michael Fowler because he engaged in union and concerted activities, I find that the allegation is without merit.

I have thoroughly analyzed the payroll records and studied the testimony and conclude that there was no substantial reduction in Michael Fowler's work hours which were discriminatorily motivated. I recommend dismissal of this allegation.

With regard to the allegation that Respondent has, from on or about June 22 to date, refused to employ Debra Fowler, because she engaged in union or protected concerted activity, I find the allegation to be without merit.

I find that Debra Fowler was hired by Respondent solely as a personal favor to her husband, to permit him to enjoy her company on certain specific types of trips where due to

the cargo being hauled, government regulation required the presence of two individuals on the run.

I find that the number of trips of this nature available for Debra decreased after June. This was due, in part, to changes in the nature of the cargo shipped. The number of boxes per load increased in many cases and the boxes shipped were much larger in other cases. The hiring of Parker as a fulltime laborer/rider/guard made fewer rider jobs available to assign to occasional and part-time employees of limited capacity like Debra Fowler. Finally, when Michael was terminated in mid-September, there was no longer any reason to consider calling Debra since Michael had made it clear that he preferred that she just ride with him and not with other drivers. Moreover, since she wanted the rider's job, in the first place, solely to be with her husband, having her drive off into the sunset, with some other guy, would hardly achieve that purpose. I recommend dismissal of this allegation.

CONCLUSIONS OF LAW

1. C. I. Whitten Transfer Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating employees concerning their union activity and the union activities of other employees, by threatening employees that the company would close its doors and that all of the drivers would be out of a job if the Union succeeded in organizing Respondent's employees, by threatening an employee with termination if he continued his union activities, by creating the impression among its employees that it was keeping their union activities under surveillance, by telling an employee that he was lucky he had not been fired for signing a union card, by informing an employee that he could not discuss the Union at any time and by discriminatorily enforcing a rule preventing its employees from wearing union insignia, Respondent has interfered with, restrained and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

4. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent has not engaged in any of the other unfair labor practices alleged.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁰

ORDER

The Respondent, C. I. Whitten Transfer Company, Plattsburgh, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees as to whether they have heard anything about a union organizational campaign.

¹⁹ *Wright Line*, 251 NLRB 1083 (1980).

²⁰ 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.

(b) Threatening employees that the Company is going to close its doors and its drivers will be out of a job if the Union succeeds in organizing its employees.

(c) Interrogating employees as to whether they or certain other employees had anything to do with passing out union cards to employees.

(d) Creating the impression of surveillance by telling employees that management knows who have signed cards.

(e) Threatening employees' wives that their husbands will be terminated unless their husbands cease their union activities.

(f) Telling employees that they were lucky that they had not been fired for signing a union card.

(g) Interrogating employees as to their union sympathies.

(h) Prohibiting employees from discussing the Union.

(i) Prohibiting employees from wearing union insignia.

(j) Interrogating employees as to whether they have been briefed about the Union by certain other employees.

(k) Threatening employees that if they discuss the Union it will mean their jobs.

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

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

(a) Post at its Plattsburgh, New York facility copies of the attached notice marked "Appendix."²¹ Copies of the notice, on forms provided by the Regional Director for Region 3, 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.

²¹ 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."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT interrogate employees as to whether they have heard anything about a union organizational campaign.

WE WILL NOT threaten employees that the Company is going to close its doors and its drivers will be out of a job if the Union succeeds in organizing its employees.

WE WILL NOT interrogate employees as to whether they or certain other employees have had anything to do with passing out union cards to employees.

WE WILL NOT create the impression of surveillance by telling employees that management knows who have signed union cards.

WE WILL NOT threaten employees' wives that their husbands will be terminated unless their husbands cease their union activities.

WE WILL NOT tell employees that they are lucky that they have not been fired for signing union cards.

WE WILL NOT interrogate employees as to their union sympathies.

WE WILL NOT prohibit employees from discussing the Union.

WE WILL NOT prohibit employees from wearing union insignia.

WE WILL NOT interrogate employees as to whether they have been briefed about the Union by certain other employees.

WE WILL NOT threaten employees that if they discuss the Union it will mean their jobs.

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.

C. I. WHITTEN TRANSFER CO.