

**Bestway Trucking, Inc. and Douglas McDaniel and John S. Bouchey and Michael R. Murphy and Edward Carney and Jimmie Story and Richard W. Stump and Donald Walker and Elijah Pasley.** Cases 9-CA-28843-1, 9-CA-28843-2, 9-CA-28843-3, 9-CA-29255-1, 9-CA-29255-2, 39-CA-29255-3, 9-CA-29255-4, and 9-CA-29255-5

March 12, 1993

#### DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT  
AND RAUDABAUGH

On August 7, 1992, Administrative Law Judge David L. Evans issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions<sup>1</sup> and brief and has decided to affirm the judge's rulings, findings, 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, Bestway Trucking, Inc., Jeffersonville, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

<sup>1</sup>The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Drywall 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.

The Respondent also has excepted, inter alia, to the judge's failure to make any findings of fact regarding the testimony of the Respondent's certified public accountant, Christopher J. Bechtler. Bechtler's entire testimony related to the Respondent's decision to discontinue one phase of its business (the "less than truckload" or "LTL" phase) because it was not profitable. We note that the judge specifically found that the Respondent's decision to discontinue the LTL business was not alleged as a violation of the Act. Thus, we find that Bechtler's testimony is immaterial to any issue presented in the case. Accordingly, we find that the Respondent was not prejudiced by the judge's failure to specifically address this testimony on a collateral matter and that he did not err in disregarding it.

*David L. Ness, Esq.*, for the General Counsel.  
*I. Joel Frockt, Esq. (Frockt & Klingman)*, of Louisville, Kentucky, for the Respondent.

#### DECISION

##### STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This matter before the National Labor Relations Board (the Board) was tried before me in Louisville, Kentucky, on March 18-20, 1992. On March 2, 1992, the General Counsel issued a consolidated complaint and notice of hearing (the complaint) which alleges violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by Bestway Trucking, Inc. (the Respondent). The complaint is based on charges filed by eight individuals, to wit: On August 20, 1991, Douglas McDaniel<sup>1</sup> filed the charge in Case 9-CA-28843-1; on August 23, John S. Bouchey and Michael R. Murphy filed the charges in Cases 9-CA-28843-2 and 9-CA-28843-3, respectively; and on January 22, Edward Carney, Jimmie Story, Richard W. Stump, Donald Walker, and Elijah Pasley filed the charges in Cases 9-CA-29255-1 through 9-CA-29255-5, respectively. The charges and the complaint allege that Respondent discharged, outright or constructively, the Charging Parties because of their union or protected concerted activities, including their memberships in, or activities on behalf of, General Drivers, Warehousemen and Helpers, Local Union No. 89, a/w the International Brotherhood of Teamsters, AFL-CIO (the Union). As well as by the discharges, the complaint alleges that Respondent violated Section 8(a)(3) by other forms of discrimination against the Charging Parties, including a written warning notice to Murphy and more onerous work assignments to all of the Charging Parties except McDaniel. Also, the complaint alleges that, by its supervisors and agents, Respondent interrogated one employee and threatened several employees, and the complaint alleges that Respondent conducted surveillance of an employees' organizational meeting, all in violation of Section 8(a)(1) of the Act.

Respondent duly answered the complaint, admitting jurisdiction of this matter before the Board and the status of certain supervisors under Section 2(11) of the Act, but denying the commission of any unfair labor practices as defined by the Act.

On the testimony and exhibits in the record,<sup>2</sup> on my observations of the demeanor of the witnesses, and on consideration of the briefs that have been filed, I make the following

##### FINDINGS OF FACT

###### I. JURISDICTION

Respondent is a corporation with an office and truck terminal in Jeffersonville, Indiana, where it is engaged in the business of hauling freight on a local and interstate basis. During the year preceding the issuance of the complaint, in

<sup>1</sup>All subsequent dates are between February 1, 1991, and January 31, 1992, unless otherwise indicated.

<sup>2</sup>Some punctuation of long quotations is supplied; extraneous usages of "you know," "okay," "uh," and the like are omitted. I also omit repeated usages of "I said" or "he said" where a witness is continuing a long quote. The following corrections to the record are ordered: p. 73, L. 2, "Hardy's" is "Carney's"; p. 86, L. 11, "meeting" is "needing"; p. 154, L. 6 (and elsewhere), "outlawed" is "out loud"; p. 186, L. 21, "personality" is "dramatis personae"; p. 277, L. 24, "alive" is "allied"; p. 453, L. 23, "write" is "drive"; and p. 481, L. 22, "oathes" is "those."

the conduct of that business, Respondent derived gross revenues in excess of \$50,000 for the transportation of freight from its terminal directly to points outside Indiana.

Therefore, Respondent is now and has been at all times material an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. FACTS OF THE CASE

### A. Respondent's Operations and the Discharge Allegations

Respondent began operations in 1983. Before July 15, Respondent operated its local and long-distance trucking services from a terminal in Louisville; about July 15, the terminal facilities were moved to Jeffersonville, Indiana, which is just across the Ohio River from Louisville. The coowners of Respondent are David Summitt and Henry Benningfield. Summitt is also company president and chief executive officer; Benningfield is corporate secretary-treasurer. Since May 1990, Hardy Bullock has been director of operations; he directly supervises Respondent's dispatchers and over-the-road truckdrivers; other drivers are directly supervised (or, at least, given their assignments) by the dispatchers. Respondent had two daytime dispatchers at the time that this case arose, Fred Chinn and John Thomas; its evening dispatcher was Louis Robertson. Respondent admits that all of these individuals, except Thomas, were supervisors within Section 2(11) and agents within Section 2(13).

Thomas was discharged by Respondent on August 10. He gave testimony that was extremely adverse to Respondent. The General Counsel introduced no evidence in support of the allegation that Thomas was a supervisor or agent of Respondent and does not discuss the point on brief. Thomas is not alleged to have engaged in any conduct which would bind the Respondent; his only role in this case was to give testimony about alleged conduct and admissions of admitted supervisors, testimony that would neither be enhanced nor diluted by a conclusion that Thomas was a statutory supervisor. Accordingly, I shall recommend dismissal of the allegation that Thomas was Respondent's supervisor within Section 2(11) (or an agent within Sec. 2(13)), rather than burden this decision with a pointless analysis of the (nonconflicting) evidence which might point one way or another.

On February 23, pursuant to a petition filed by the Union, the Board conducted an election among Respondent's employee truck drivers and mechanics. There were approximately 40 eligible voters; 9 voted for union representation; 36 voted against; and there were 4 challenged ballots.

At the time of the election Respondent's business consisted of three types of runs: over-the-road runs which were conducted by nonemployee owner-operators as well as employees, local runs, and "Bloomington runs." The over-the-road runs went anywhere in the United States; the local runs covered a 150-mile radius from Louisville; and the Bloomington runs were twice daily, 90-mile, runs between Louisville and a General Electric plant in Bloomington, Indiana. General Electric in Bloomington shuts down three or four times a year for periods of up to 3 weeks. During the "Bloomington shutdowns," as they were called, the "Bloomington drivers," as they were called by the witnesses

(including Summitt), were assigned to other truck driving duties as needed. The General Counsel contends that, before the events of this case, Bloomington drivers were never sent on overnight trips during Bloomington shutdowns. As I find, *infra*, the General Counsel failed to prove this contention.

The over-the-road runs performed by some of Respondent's employees (and owner-operators) required drivers regularly to be away from the Louisville/Jeffersonville area for several nights at a time; the local and Bloomington drivers were able to be home each night (or most of each night).

The complaint alleges that on August 7 Respondent discharged Murphy, Bouchey, and McDaniel in violation of Section 8(a)(1) and (3) of the Act. The activity about which most of the General Counsel's case revolves was the composition and sending of a letter from Murphy to Summitt; the letter was misdated, but it was received by Summitt on July 27, and I shall refer to it as the "July 27 letter."

On January 10, Respondent changed from the classification of local or Bloomington drivers, to the classification of over-the-road drivers, Carney, Story, Stump, Walker, and Pasley. The five employees quit rather than accept those changes in classifications. The General Counsel contends that the over-the-road jobs were so much more difficult and unpleasant than the local or Bloomington jobs that the five employees were forced to resign. The General Counsel contends that Respondent reclassified these five individuals, and then constructively discharged them, because of their known or suspected union or protected concerted activities or sympathies and that, by this conduct Respondent also violated Section 8(a)(3) of the Act.

### B. Background

Thomas testified that about 3 days before the February 23 election, Summitt asked him and Benningfield to write down the names of drivers whom they thought would vote for the Union. Thomas wrote 10 names, three of which are those of Charging Parties Pasley, Story, and Walker. Thomas testified that immediately after the election, he again met with Summitt and Benningfield. Summitt asked Thomas and Benningfield to list those whom they thought had voted for the Union. Benningfield and Thomas agreed on some, including Story and Pasley, but not on others. According to Thomas, Summitt concluded the discussion with the comment: "[W]ell, it don't matter. It's history; . . . we won by [a] three-to-one vote, and those drivers will have their day."

Summitt admitted going over the list of employees with Thomas and Benningfield before the election. He was not asked by Respondent if he, Benningfield and Thomas went over lists of voters after the election. Instead, on direct examination, Summitt was only asked, and he testified:

Q. Shortly after the election in February of 1991—and I mean that evening—did you make a statement to Mr. Thomas to the effect that, "those drivers will have their day?"

A. No, sir.

That is, rather than ask if there was another head-count meeting after the election, and what was said, and calling for a specific denial (if there was one to be made), Summitt was simply led to this denial, and Respondent left the matter at that. This came after repeated objections by the General

Counsel and warnings by myself that answers to such leading questions, and answers to questions that called for ultimate conclusions, would be difficult, or impossible, to credit.

John Thomas is not an individual who bears discernable traits of attractive character; he engaged in profanity to answer a question that did not call for a quotation; later he feigned confusion at my instruction about using, versus quoting, profanity. At another point, Thomas gave an answer which can only be categorized as insolent and insulting to forum.<sup>3</sup> Moreover, Respondent proved that Thomas bears a seething antipathy toward Summitt and Respondent; Thomas was not called in rebuttal to deny testimony that he threatened Summitt with bodily harm after Thomas's discharge. Because of these elements, and elements mentioned elsewhere in this decision, it is clear to me that Thomas was present for an agenda other than presenting the whole truth.

Therefore, I decline to credit Thomas except where his testimony is undenied or where I found Respondent's witnesses even more incredible than Thomas because of the objectional nature of the questions they sometimes answered, because of their demeanor, because of incredible claims of lack of memory,<sup>4</sup> or because of the extrinsic facts that otherwise belied their testimony.

On the instant credibility question, Thomas's testimony was more credible than Summitt's denial, especially in view of the objectional nature of the question that was put to Summitt, and I credit Thomas.

In February, Stanley Houghton was a (nonunit) billing clerk. Houghton credibly testified that a few days after the election Summitt asked him who he thought had voted for the Union. Houghton also named Pasley and Story, as well as two others. Summitt admits going over "yes" and "no" votes with Houghton after the election, but he testified that Houghton interrogated him, not the other way around. I credit Houghton.<sup>5</sup>

Bouchey and Stump were hired on February 3 and 4, respectively; Murphy was hired on March 4. Each was hired as a Bloomington driver. Bouchey and Murphy remained Bloomington drivers until their discharges on August 7. Stump was made a local driver in May, and he remained such until January 10.

In early May, Murphy, Bouchey, and Stump went to Summitt's office to ask for higher wages for the Bloomington drivers. Murphy was spokesman for the group. After Murphy had his say, Summitt replied that all drivers were evaluated each June and that he would be talking to the drivers after that evaluation.

About June 1, with the encouragement of Thomas, Murphy contacted a representative of the Union. Murphy was told that, because there had been an election among Respondent's truckdrivers in February, it would be too early to start circulating union authorization cards until October or November.

In mid-June, when no raises were forthcoming, Murphy, Bouchey, and Stump again went to see Summitt about wages and other employment benefits of the local and Bloomington drivers. Summitt told the employees that the matter was still

<sup>3</sup>I refer to Thomas' response to Respondent's question about which employees he placed on a "seniority" list.

<sup>4</sup>This is especially true about Bullock's testimony.

<sup>5</sup>The complaint does not allege this interrogation to have been violative of Sec. 8(a)(1).

being studied. At the time of this second meeting, Bouchey's wife was ill. Bouchey testified that he asked if he could be at home during a Bloomington shutdown that was scheduled for August 5. According to Bouchey and Murphy, Summitt acknowledged that in the past it "wasn't a problem" to assign the Bloomington drivers to nonovernight runs during previous Bloomington shutdowns. Further, according to Bouchey and Murphy, Summitt, in effect, promised that Respondent would not make over-the-road assignments to the Bloomington drivers during the scheduled August 5 Bloomington shutdown.

The General Counsel relies heavily on this testimony to support the allegation that Murphy, Bouchey, and Carney (another Bloomington driver) were unlawfully given over-the-road runs during the August 5 Bloomington shutdown.

Summitt testified that he told Bouchey that Respondent would do its best to make it possible for the drivers to be at home overnight during the Bloomington shutdown, but that he made no promises.

I do not believe that Summitt promised the employees that Respondent would not send the local and Bloomington drivers on overnight trips during the August 5 shutdown. If the matter had been certain, and there had been such an ironclad past practice that Summitt allegedly admitted to have existed, there would have been no point in asking about it, as the employees did. Moreover, it is undisputed that, at all times material in this case, Respondent needed over-the-road drivers. Without better evidence, I cannot find that Summitt, just for the asking, irrevocably cut Respondent off from the potential source of over-the-road drivers that the Bloomington drivers would present at the inception of the August 5 Bloomington shutdown.

However, this is not to say that I do not believe the testimony that Summitt said that Respondent had been able to assign nonovernight runs to Bloomington drivers in the past. Summitt did not deny that part of Bouchey's testimony.

### C. Murphy's July 27, 1991 Letter

During the week of July 22, Murphy drafted a four-page letter to Summitt. Murphy testified that, when he finished it, he took the letter to Respondent's office area where he met Benningfield. Murphy asked Benningfield if he could use the copying machine to copy a letter. Benningfield told Murphy that he could. Murphy did not know how to operate the copier; Benningfield showed him. When Murphy finished, he gave a copy to Benningfield. Benningfield did not deny this testimony.

Murphy sent the letter, certified, to Summitt. Summitt received the letter on Saturday, July 27. (Murphy also left a copy of the letter at the machine; the copy was found by a secretary, and then everybody knew about it, even before July 27.)

Murphy states in the letter, among other things, that: (1) he, Stump, and Bouchey had waited for answers to their mid-May requests<sup>6</sup> but had gotten nothing; (2) the three employees had done an "in-depth study" and found that Respondent was paying lesser benefits than three other lines handling Bloomington-Louisville freight; (3) the Bloomington and city drivers needed more money, better insurance, and better overtime pay; (4) the Bloomington and city drivers were

<sup>6</sup>Murphy did not mention the June meeting at this point.

working hard but being “neglected”; (5) when the other<sup>7</sup> employees had voted against the “TEAMSTERS” (capitalization original), they gave Summitt a chance to be fair; (6) “Rumor has it that the TEAMSTERS will return again”; (7) Summitt should meet with some of the employees and reach an agreement “allowing Bestway to continue on, without organized labor”; (8) Summitt should “feel free” to talk to Murphy about these topics, and Murphy will “make myself available, upon request, anytime”; and (9) “Union[s] can make companies and they can break companies.”

On July 30, when Murphy next reported to work, Summitt called him to a glass-enclosed space in the dispatch area. According to Murphy:

He asked me why I had to send a certified letter to him. . . . He asked me what I wanted. I said we had talked about money. And he says, “No.” He says, “What do you—What’s the idea behind the letter?” And I said, “I want better working conditions for the people at Bestway.” He was furious because I had sent the letter certified. And he says—He reminded me that we had an open-door policy. I told him that the open-door policy hadn’t worked thus far, that I had visited him in his office twice with no real response and he constantly avoided the issue. So, I wanted to document my efforts in letter form and make sure that he did receive it. . . . And [Summitt] says, “You’ve put a lot of pressure on me, Mike. This certified letter . . . I’ve never had anyone to ever send me something like that. I’m boiling mad. I’m not going to take this lightly. We’ve went through this union thing once already and I’m not going through it again. Don’t be foolish and back me into this corner ‘cause I’ll do things that . . . . When I’m backed in a corner, I’ll do things that I ordinarily wouldn’t do.” I asked him if that was a threat and he said, “Take it any way you want to. . . .”

He said repeatedly that he didn’t think that this was going to get any place, that I was headed for trouble and that I had broke the law in trying to get a union to come back in again. He said, “Did you know you have a waiting period? We’ve done went through this stuff. I could put your ass on the street today. It’s—I’ve done it once and I can do it again.” Then he got into this letter, that I had mailed him this “threatening”<sup>[8]</sup> letter, again, telling me that his attorney . . . had advised him to prosecute me for that letter and that he— he wasn’t for sure at this time what he was going to do about it, but we might have to have another meeting because he, too, had sent me a letter. And he said, “You might find it offensive, as well.” Then he . . . said to me that I was a union guy, trying to start some trouble with the people at Bestway; there’s going to be a lot of innocent people to lose their jobs. . . . I told him that I was going to press on for the union because I believed in what I was doing and I tried to show him that by sending the letter to him. . . . He said, “Well,

the issue . . . is there’s not a union at Bestway. Bestway will never be union and any employee trying to . . . trying to get a union to come in will be dealt with accordingly. I think you understand where I’m coming from. Don’t be the chicken that lays his head on the chopping block. . . . I said, “Is that a threat?” And he says, “You take that any damn way you want it. I’m just telling you. Don’t back me in a corner, Mike. I’m serious about this. Don’t back me in no corner.” That is. . . . That’s what took place in the meeting, sir.

Murphy was asked to think and see if he had left anything out. Murphy then testified:

Oh, yeah. There was one thing. I informed him at the meeting that I was going to try to take and get the opinion from the rest of the drivers and dock people there about what they wanted and try to . . . try to find out what they really wanted and what they were looking for that would make Bestway a better place to work. And I told him that we were going to have a . . . that I had planned on having a meeting with the men and he asked me. . . . He was concerned about this. He said, “Do you know where you’re going to have this meeting?” And I told him that a good possibility would be a restaurant very close to the terminal that drivers from Bestway frequent and I would probably use it, Jerry’s Restaurant. He said, “You got an idea when this meeting’s going to take place?” I said, “Well, I would like to get started on immediately. There’s a good possibility that we can get something done this week, Saturday.” He said, “Great.” I think you’re going to find out that I’m a fair person. You’re going to hear that from a lot of people.”

Then Murphy testified that his August 30 confrontation with Summitt ended at the reference to Jerry’s Restaurant.

Summitt was asked on direct examination, and he testified:

Mr. Murphy had asked me how things was going, casual talk to come into the meeting. I said that we was getting a little better organized from the [July 15] move. And he asked me . . . if I had received his letter. And I said, yes, I had received his letter. My next comment was, “Everybody in the office knew that I was getting the letter before I got the letter. . . . I told Mr. Murphy that two different people within the office, Ron Block and Beverly Raney, had told me that I was going to be getting a certified letter. . . . Mr. Murphy didn’t really have a comment on that. The next part of the conversation was, Mr. Murphy asked me what I thought of it. And I told him I felt that it was a forceful, threatening type letter. . . . He denied it. He said he thought the letter was . . . a normal type business letter.

Summitt further testified that he told Murphy that Respondent was paying the best wages that it could; Murphy said that the wages were not acceptable; Summitt replied that Murphy knew what the wages were when he took the job; further that:

<sup>7</sup>As noted, Murphy, Stump, and Bouchey were not employed by Respondent at the time of the February 23 election.

<sup>8</sup>As he admits, Summitt used the word “threatening” in this conversation. Also, see the word “threat” as used in Summitt’s reply letter quoted below.

[Murphy] said, "If you don't do some things around here to improve the pay and benefits, you're going to have a Union back in here. . . . I'm talking to you as your friend, that if you talk to me and tell me what you're capable of doing, I will talk to the drivers for you." And I told Mr. Murphy, "Mr. Murphy, I have an open-door policy. If the drivers have a problem, they can come see me."

Summitt further testified that he offered Murphy an over-the-road job if he wanted to make 2 cents per mile more, but Murphy declined stating that he had taken employment with Respondent "to run Bloomington." Summitt testified that, several times, Murphy stated that

[H]e felt that I was backing him into a corner, that I wasn't leaving him any way out, that he wasn't going to settle for what I had told him, that he was going to keep on until we increased our pay. We sat there for just a few seconds in conversation, general conversation. Mr. Murphy said, "I think you know I'm going to keep trying to get more money and better benefits for these drivers, that they deserve it." I said, "Mr. Murphy, I wouldn't expect anything less of you but to do so." He stood up and he said, "Well, a lot of people around here tell me I'm going to be fired for writing you this letter." And I said, "No, sir." I said, "I will tell you up front that I did not agree with the letter, especially since it was, in my opinion, a forceful letter." And [I commented that] certain words, like Union Local 89, were printed in a different print than normal print. And that he referred to other – that his working conditions were bad. And he referred to other carriers, non-Union carriers, as he put it in his letter. And I told Mr. Murphy, I said, "Two of these carriers are, in fact, Union carriers." We went on for a few minutes. And Mr. Murphy said, "Well, I don't think the letter is forceful. And people tell me I'm going to be fired for doing so." I told Mike, I said, "No, sir. I did take the letter personal. You [will] have my reply in the mail." I said, "Have you got it?" And he said, "No." And I said, "Well, then, I suggest you read my reply and get back to me at a later date."

Summitt further testified:

When Mr. Murphy had told me that he felt like he was being backed into a corner, and I told him in return, I said, "Well, I feel like you're backing me into a corner because I have no alternatives."

Summitt denied telling Murphy that he was "boiling mad"; that he would not take the matter lightly; that Murphy's approach would cause him to do things that he ordinarily would not; that he told Murphy that he would "put your ass on the street;" that Murphy could be prosecuted for sending the letter; that innocent people would lose their jobs as a result of Murphy's conduct (Summitt testified that he told Murphy that if Respondent had to raise its prices, the Bloomington run, and everyone's job, could be lost); that anyone who assisted the Union would be "dealt with accordingly"; or that he told Murphy not to be "a chicken with his head on the block."

Summitt denied that any drivers' meetings were mentioned in his conversation with Murphy.

Murphy was asked on cross-examination and testified:

Q. Did he say "I'm boiling mad?"

A. No, sir. I assumed that because of the way he looked and the way he spoke and . . . .

The entirety of the General Counsel's case for actual knowledge of McDaniel's union activities rests on Respondent's surveillance of the August 3 meeting, and Murphy assuredly knew it. If Murphy thought that his tipping Summitt off had caused McDaniel's discharge, it is unlikely that Murphy would have forgotten this in his first attempt to narrate his confrontation with Summitt. I believe that Murphy would have forgotten this part of the narrative on his first attempt only if it had not really happened. Moreover, I do not believe that Summitt would have said that he thought the Saturday drivers' meeting would be "great" because it would be an opportunity to find out that Summitt was a fair man. Nor do I believe that Summitt asked where the meeting was; and I certainly do not believe that Murphy told him. As Murphy testified, Summitt had already said that "innocent people" would lose their jobs over what Murphy was doing. Murphy, who is not unintelligent, would have been most unintelligent to have told Summitt where the meeting was going to be and potentially subject the other "innocent" drivers to what Summitt was threatening. (Also, being obviously fearless for himself, Murphy would not have had the least compunction about refusing to answer Summitt's question, or, at least, he would have attempted evasiveness.) Finally, there was a perceptible change in Murphy's demeanor as he started his previously forgotten, "oh, yeah," testimony about telling Summitt about the coming meeting at Jerry's Restaurant; Murphy assumed a seemingly feigned air of insouciance at that point, and he became incredible for this part of his testimony.

I found Summitt credible in his denials of a mention of an employee meeting while he and Murphy conversed, and Summitt credibly denied the statement about the "chicken." Otherwise, however, I credit Murphy's testimony, as amended by his acknowledgement of a seemingly honest confusion between his impression of Summitt being "boiling mad" and Summitt's saying that he was "boiling mad." Murphy had a more credible demeanor, except on his testimony about the coming driver meeting, and I do not believe Summitt approached the confrontation in the dispassionate mood that he sought to portray. I fully believe that Summitt, as he acknowledged on cross-examination, really did feel that Murphy's letter was "threatening and coercive." Moreover, Summitt's remarks, as quoted by Murphy, are fully consistent with the letter which Summitt sent Murphy and which, as I find and conclude infra, included a violative threat and written warning.

Summitt's letter to Murphy, dated July 29 begins:

This letter is written in response to yours of August 1, 1991.<sup>9</sup> The letter appears on its face to be a threat and [an] attempt to coerce the management of the corporation. This type of behavior is totally inappropriate

<sup>9</sup>Murphy had dated his letter "August 1"; however, he had mailed earlier, and Summitt had received it on July 27.

for an employee who has been with the company less than five (5) months.

Summitt then disputes certain figures in Murphy's letter and follows:

The employees of Bestway Trucking are not represented by a union. The company recently won an election regarding representation by a 3-to-1 margin. We believe that this entitles us to run our company using our best business judgment[,] and we will continue to do so.

Summitt then disputes other assertions made by Murphy, and explains certain business conditions; then he ends the main body of his letter with:

Finally, if the main thrust of your letter is that you desire to earn more money, the company would be glad to assist you with changing your position to allow you to earn additional money on a different route. If this does not meet with your satisfaction, then it would be more appropriate for you to seek employment elsewhere.

After this "closing," and his signature, Summitt adds:

P.S. It has come to our attention that you have been in the office disturbing and interrupting office personnel who are trying to work, and further that you made use of the company copying machine without prior approval in preparing your letter. Therefore, based upon these activities, you are receiving a write up to your personnel file.

Respondent offered no evidence that Murphy had adversely affected the work of any of the office personnel.

#### *D. Employee Meeting of August 3, 1991*

The complaint alleges that Respondent, by Sales Manager Richard Torp, conducted surveillance of an employee organizational meeting on August 3. The General Counsel also relies on the alleged surveillance as evidence of actual knowledge of the activities of those present.

Jerry's Restaurant is about 1 mile from Respondent's terminal. Murphy testified that on Saturday, August 3, he met with five other drivers there: Bloomington drivers Bouchey, McDaniel, and Carney; and local drivers Ron Underwood and Dennis Collins. At the meeting, the drivers discussed the issue of a second organizational attempt. At the time of the August 3 meeting, Respondent had four Bloomington drivers; the only one not present was Rick Oster.

Murphy testified that while the employee meeting was going on:

It was brought to my attention that somebody was standing there and I turned and looked and I saw a sales representative for . . . . Now, I don't know him personally, but he's a sales rep[resentative] for Bestway and his name is Dick Torp. He was at the counter as if to order something. I never saw him order anything . . . . [H]e acted like he was going to come back [our] way and . . . like he was shocked to see us all there. And then he turned around and went back to the counter . . . . I did see him through a window as he

was leaving, but I didn't pay a whole lot of attention to him while he was there.

Torp testified for Respondent; he denied that he had been in Jerry's Restaurant at any time during 1991.

On cross-examination, Murphy was asked to describe Torp. He did a poor job of it, as demonstrated when Torp testified. Moreover, Murphy raised a suspicion when he indulged in the passive voice to say that "it was brought to my attention" that Torp was there, rather than name whoever had pointed out Torp to him. Certainly, whoever brought the alleged presence of Torp to Murphy's attention was not asked to testify to the fact. Indeed, Bouchey, McDaniel, and Carney also testified that they were at the meeting, but none of them was asked by the General Counsel if they could identify Torp, or anyone who looked like Torp, at the restaurant. Carney remained employed by Respondent until January 10; McDaniel was discharged on August 7, but then was reinstated on October 14, and he is still employed; therefore, by time of trial, both McDaniel and Carney necessarily had been provided ample opportunity to identify Torp subsequent to the August 3 meeting, if they had seen Torp, or someone who looked like Torp, there. Because there is this suspicion about Murphy's testimony, and because the General Counsel did not attempt substantiation of Murphy's testimony even from the other of his witnesses who were present at the meeting (much less call Underwood and Collins, something else that the General Counsel did not do), and because I found Torp credible in his denial, I discredit Murphy's testimony that he saw Torp at Jerry's Restaurant on August 3.

#### *E. August 7, 1991 Assignments and Discharges*

##### *1. Assignment to and discharge of Murphy*

Murphy's discharge on August 7, was preceded by a relevant memorandum to Murphy's personnel file on August 6. Murphy's case is a quagmire of conflicting, overlapping, testimony. The scheme of the narrative is this: I first present the conflicts, in chronological order (necessarily including elements that touch on the August 7 discharges of McDaniel and Bouchey, but excluding, at this point, a relevant confrontation between Summitt and Thomas that occurred on August 6); then I state the respective positions of the parties; then I enter my credibility resolutions on the Murphy discharge.

##### *a. Conflicting testimony on Murphy's discharge*

###### *(1) Monday, August 5, 1991*

Thomas testified that he had taken a vacation in late July, and returned to work on August 5, the first day of the 3-week Bloomington shutdown. He examined the city and Bloomington dispatch boards and noticed that some city and Bloomington drivers, specifically Murphy and Bouchey, were not scheduled for shorter runs such as Cincinnati, Indianapolis, and other such runs. Thomas testified that he asked Operations Manager Bullock about it:

Well, I told Hardy that the Bloomington drivers in the five years that I'd worked there had always been given short runs, and, was he still going to keep them

on short runs. And he said that Mike Murphy—“just because Mike wrote David a letter doesn’t mean that I’m going to give him any special privileges.” I said, “Well, David told him that they’d be on short runs and [Boucheys] wife was sick, and he was promised to be home every night. They were promised to be home every night.” He said, “[W]ell, I don’t care what David says. They’re mine.” Bullock was called by Respondent. He testified that his reference to the Bloomington drivers being “mine” was simply as statement that they were needed for over-the-road driving.

Bullock was also asked on direct examination, and he testified:

Q. Yes. Did you ever make any statement to Mr. Thomas about Mr. Murphy and which related to the letter that Mr. Murphy sent to the Company?

A. Not that I can recall.

I shall discuss other credibility resolutions below. However, I am constrained to note at this point that, on August 5, as they testified, Murphy had been sent to another customer in Bloomington, and Boucheys had been sent to Indianapolis; that is, they both were on short runs that day. This factor necessarily erodes the premise for Thomas’ supposed editorial comments to Bullock about the history of what had happened during the previous 5 years during other General Electric shutdowns. That is, I do not believe that Thomas recited this history to Bullock, and I will draw no adverse inference against Respondent because Bullock did not deny or contest this part of Thomas’ testimony. (Moreover, neither Thomas nor any other of the General Counsel’s witnesses testified that, in fact, the local and Bloomington drivers were assigned only short runs during prior General Electric shutdowns.)

However, I credit Thomas’ testimony, over Bullock’s claim of lack of memory, that Bullock said that morning that the Bloomington drivers “are mine” and indicated Murphy was in peril because he “wrote David a letter.”

(2) Tuesday, August 6, 1991 (before 6 p.m.)

On Tuesday, August 6, Murphy had an assignment to drive, starting at 2 a.m., from Jeffersonville to Respondent’s terminal in Nashville, then to Lebanon, Tennessee, then back to Respondent’s terminal in Nashville where he was to drop one trailer and pick up another, and then drive to Elizabethtown, Kentucky; then he was to drive back to Jeffersonville (all of which he did). Drivers on such trips are required to call the terminal on specified occasions, one of which is when drops are made.

When he made the drop in Nashville, Murphy called the Jeffersonville terminal and spoke to Bullock. Murphy testified that he asked Bullock whether he should claim a \$10 drop pay premium when he finished the trip. Bullock told Murphy that he would talk to Murphy about that when he returned to Jeffersonville. When Murphy called Bullock from Elizabethtown, he again asked Bullock if he should claim the drop pay when he did the paperwork. Murphy testified that Bullock replied, “just bring it on to the house [the Jeffersonville terminal].” Murphy testified that no more was said on the matter, and he returned to Jeffersonville about 4:30 p.m.

Murphy’s personnel file contains the following memorandum, a “Driver Write-Up” that is dated August 6, at 2 p.m.; it recites:

Mike Murphy . . . called in from [Elizabethtown] wanting to get drop pay for dropping empty trailer [at Nashville] yard [and] picking preload[ed] trailer to [go to Elizabethtown]. Tried to explain drop pay to him. He stated [that] I was unreasonable [and] didn’t pay right. Got irritated when told to drop his trailer at RC [abbreviation unexplained]. Demanding trip pay.

The only testimony that Bullock gave about the Elizabethtown incident was on the General Counsel’s first asking him why Murphy was discharged. Bullock testified:

It’s just a bad attitude that he had about helping out Bestway in a rough time. . . . The decision—or the straw that broke the camel’s back was he was in Elizabethtown, Kentucky, and wanted to get stop pay for picking up a preloaded trailer. Then he was requested to drop the empty [trailer] after he got through in Elizabethtown, in to a customer of ours in Louisville, and he wanted stop-off pay for that, which, plans—our plans was for him to pick up a preloaded trailer, which, we already [had] loaded for him. There’s no pay for that. . . . It was somewhere in regards that “Bestway don’t pay right.” He was showing his dissatisfaction.

On cross-examination, Bullock testified that driver writeups were issued only for “serious” offenses.

On Murphy’s arrival at the terminal, he was given an assignment to drive to Big Rock, Virginia. The complaint alleges that, by this assignment, Respondent “imposed onerous and rigorous terms of employment” on Murphy in violation of Section 8(a)(3). Respondent discharged Murphy the next day and, as noted, the complaint alleges Murphy’s discharge also violated Section 8(a)(3). Respondent defends the discharge on the ground that Murphy refused the Big Rock run as assigned. On brief, Respondent does not offer a reason for the assignment of the Big Rock run to Murphy; Bullock’s testimony on that separate issue is quoted below.

Big Rock, Virginia, is 245 miles from Jeffersonville. It is a community which *Rand-McNally* lists as having an approximate population of 450. It is located in the Cumberland Mountains that divide far southeastern Kentucky and far southwestern Virginia.<sup>10</sup> It is, according to an American Automobile Association map of the area, on a secondary road, about 1 mile off U.S. Highway 460; U.S. Highway 460 is two lanes from Shelbiana, Kentucky, to the turnoff to Big Rock, a distance of 29 miles. Shelbiana appears to be the closest point that a driver could pick up a more easily driveable four-lane highway.

Respondent’s customer in Big Rock is a warehouse for storage of barrels of oil. There are no potential pickups in the area, so a driver who is assigned to the Big Rock run, just gets back on the road and calls in for another destination when he gets to a telephone, if he was not assigned another

<sup>10</sup> Bullock described the location of Big Rock, Virginia: “It’s not on the Atlas. You can’t find it anywhere. It’s in the Appalachian Mountains. It’s by Pennington Gap, if you’re familiar with that area.”

destination before leaving the Jeffersonville terminal. Bullock admitted that the Big Rock run is almost always done by an owner-operator, or an over-the-road, driver.

Murphy testified that on his 4:30 p.m., August 6, return to the Jeffersonville terminal he went to the dispatch area to get his next day's assignment. Present in the dispatching office, an area separated by a glass window from the drivers' room, were dispatchers Chinn and Thomas, and Bullock. According to Murphy:

I just simply asked [Chinn] what was the line-up for tomorrow and he said, "Hang on." . . . He went over and he had to walk next to Hardy [Bullock] and he come back to the window and he had a thing and he says, "I've got something special for you. . . . Big Rock, Virginia."

I said, "That's an overnigher. . . ." And he says, "Well, look at it this way, the more driving you do, the less time you've got to write." And then he started to smile. . . .

I said to Fred Chinn, "Who gave this to you?" And he said, "This is from Hardy [Bullock] to you."

The complaint alleges that Respondent violated Section 8(a)(1) by Chinn's statement to Murphy that the arduous assignment was being given because of Murphy's letter-writing activities. The shipment was due in Big Rock at 8 a.m. on August 7. Murphy testified that at some point in their exchanges, Chinn told him that he should leave by 10 p.m.

Thomas also testified that Bullock, as well as Chinn and he, were present, on the office side of the glass that separates the drivers' room from the office, when Murphy appeared at the window to get his next day's assignment. According to Thomas:

[Murphy] came to the window and says, "[D]o you know, Fred, where I'm going tomorrow?" Fred told him, "Let me ask Hardy." Mike said, "Well, I'm going to sit down and get caught up on some of my paper work." So he kind of went over [to] the driver's room. . . . Fred asked Hardy, "Where you got Mike Murphy going?" [Bullock] said, "I want to send him on the longest run we got." Fred said, "Which one's that?" [Bullock] said, "I want him to go on the Big Rock, Virginia. That's about the longest and roughest run I got." And at that time, Fred kind of smiled, and Hardy smiled. And Fred called Mike back to the window . . . Fred Chinn said, "Hardy saved a special run for you." Mike said, "Well, what does that mean? Does that mean I'm getting screwed or what does it mean?" [Chinn] said, "Well, he's sending you to Big Rock, Virginia." Mike says "that's not [sic] an over-overnight run. You don't have anything any shorter?" And Fred says, "all I can tell you is Hardy told me to save this run especially for you, and this is where you're going. Look out on a positive point of view." Mike said, "How can I look at this in a positive point of view? I feel you're screwing me." [Chinn] said, "Well, look at it this way. By you going on this long run—it's two hundred and forty-eight miles—it's going to do a couple things for you. You can make some money, and you can stay out of trouble. At least this

way, Mike, you won't have time to write no more letters to David.

Chinn testified for Respondent about the assignment of the Big Rock run to Murphy and Murphy's response:

And I come out onto the dock, because [Murphy] was out there with some of the fellows out on the dock. They was a loading a trailer. And I told him that Hardy had a load—a good load for him. And that he needed to get on going so he could get down there, because it—we'd missed a load the day before getting it down there. And he needed to be sure and be down there by eight o'clock the next morning. [Murphy] said that, "Well, I might—might get sick." And then I walked on back into the office after that.

Chinn acknowledged that, "from time to time," drivers make sarcastic remarks like, "Maybe I just won't show up," when they get unfavorable assignments.

Murphy, however, does not claim that he made a remark about the possibility of becoming "sick" when Chinn gave him the Big Rock run; Murphy flatly denies that he made any such remark; Thomas supports Murphy in this denial.

Chinn was further asked and testified on direct examination:

Q. Did you make any statements to Mr. Murphy about a letter he may have written the Company?

A. I don't recall making any statements about that.

Chinn testified that he could remember no discussion of the Big Rock assignment to Murphy that occurred in the dispatch area; he could remember only an exchange with Murphy on the dock.

On cross-examination, Chinn acknowledged that the Big Rock run was one of the five that the drivers complained about the most. But he added: "There's nothing really bad about the run." When asked why he referred to the Big Rock run as a "good load" when he gave the assignment to Murphy, Chinn replied: "Well, it's a good load. It's 245 miles. You can get down there and back in one day, basically."

Night dispatcher Robertson testified for Respondent that he was in the dispatch area when Murphy got the Big Rock assignment. Robertson agreed with Murphy and Thomas that Murphy got the Big Rock assignment in the dispatch area, not on the dock as Chinn testified. On direct examination, Robertson testified:

Well, he took the assignment. And I think it was in a joking manner or some way; he said, "The runs are getting a little longer every day—that the runs were getting a little longer, that he could get sick that night or something."

Bullock was asked if he was in the dispatch area when Chinn informed Murphy of the assignment; Bullock replied: "Not that I can recall."

Robertson testified that he was sure that Bullock was not in the dispatch area when Murphy got the Big Rock assignment, although he testified that he believed that Bullock was still in the building.

(3) Tuesday, August 6, 1991 (after 6 p.m.)

Murphy testified that when he got home on August 6 his elderly father appeared ill, and it appeared that he would have to take his father to the hospital. (More particularly, Murphy testified that the nurse had put too tight support hose on his father and his leg was becoming discolored.) Murphy further testified that he called back to dispatch and spoke to Robertson.

According to Murphy, Robertson said that Murphy's son had called just after Murphy had left the terminal; and Robertson asked Murphy what was going on. Murphy told Robertson about his father's apparent illness, and further told Robertson to "mark me off." Murphy further testified that Robertson replied "just keep me posted. . . . The main thing is to take care of Dad."

Murphy then testified that later in the evening of August 6 he called Robertson again and reported that his father was all right, and that he would be able to take the Big Rock run out. Murphy testified:

[Robertson] says, "Don't worry about it. It's [the Big Rock load is] not hot, so just take and do like I told you in the beginning. Just call Hardy in the morning around nine, nine-fifteen, and get a new dispatch." And he was tickled to death to hear that Dad was all right.

Murphy did not go to the terminal that night.

A "hot" load is one that requires special attention, such as next-day delivery.

Thomas, who worked that evening, corroborated Murphy. Thomas testified that Robertson told him that Murphy had called in and reported that his father was ill. Thomas further testified that Robertson told him that he had told Murphy not to worry about it. Thomas further testified that later in the evening Robertson told him that Murphy had called in again and stated that he could take the Big Rock run, but that Robertson had told Murphy not to worry about it because it was not a "hot" load.

Robertson testified that after Murphy left the premises about 6 p.m. on August 6, Murphy's adult son telephoned the dispatch office, but that Murphy did not call him that night. Robertson was asked by neither counsel what the person purporting to be Murphy's son said.

Robertson further testified that, later in the evening, after Murphy's son called, "John [Thomas] had told me that Mike [Murphy] had called and said he couldn't go out because he was taking his father to the doctor or hospital, something."

(4) Wednesday, August 7, 1991

Thomas testified that during the morning of August 7 Bullock approached him. Bullock asked Thomas what had happened to Murphy. Thomas testified that he told Bullock that Murphy had called in and Robertson had given Murphy permission to miss the Big Rock run. Bullock told Thomas to reschedule the Big Rock run.

On direct examination, Bullock testified that he did not remember Thomas telling him on August 7 what had happened to Murphy the night before. Bullock was further asked, and he testified:

Q. Did you—all right. When do you first recall finding out that Mr. Murphy did not make the run?

A. When some young man called me on the phone to tell me that his father had been in the hospital, or something was wrong with his father. . . .

Q. Okay. When did you take that call?

A. It was in the morning sometime. I don't know what time. It's very possible that I would have found out about it earlier, during a lot check.

On cross-examination Bullock, on a line of questioning that began with Bullock's first writeup of Murphy, Bullock was asked, and he testified:

Q. What else is bad about his attitude as far as this thing in Elizabethtown? By the way, he didn't refuse to finish that run, did he?

A. I can't recall if he did what he was told to do or not.

Q. Well, was that the reason he was fired?

A. Not totally. There was a . . . We was going to put him back out that afternoon on a load and I didn't hear it but a dispatcher, he referred to going home and getting sick. So. . . .

Q. You didn't hear that yourself?

A. No, I did not.

Q. Who told you that?

A. My dispatcher, Fred Chinn.

Q. Where were you at the time that this comment was made?

A. I was probably in another office.

Q. Did you ever ask Murphy about that comment before he was fired?

A. I can't remember.

Q. Well, didn't you want to get his version of the situation before you fired him?

A. I think, from the past history and the attitude that he had shown, I could plainly see in my mind what his attitude was.

Bullock was not asked when Chinn told him of the "might get sick" remark by Murphy.

Thomas testified that after his exchange with Bullock about the Big Rock run he called the customer and blamed "equipment failure" for the delay. The customer's representative told Thomas that the delay did not matter. (As discussed below, Respondent's records indicate that the load went out at 6 p.m. the next day, August 8, for delivery at 8 a.m. on August 9.)

Thomas testified that shortly after Bullock told him to reschedule the Big Rock run Summitt arrived. Thomas testified:

Then Hardy [Bullock] told David [Summitt], "We seem to have a problem with some of the Bloomington drivers Douglas McDaniel, supposedly, his car broke down, and he couldn't make it. Mike Murphy, supposedly, his dad is sick, and he may have to go to the hospital, but he didn't show up either. John Bouchey has been complaining about his runs and bitching and complaining about his assignments. You know, we really got a problem. It seems like these Bloomington drivers—we got a conspiracy going on." What do you want to do?" And David [Summitt] looked at him and

kind of smiled and said . . . “fire all three of the son[s] of bitches. I didn’t like them anyway, and that way we won’t have no more problems with them. . . .” Hardy said, “That’s all I needed to know. That’s all I need to hear. It’s done.”

Summitt denied making this statement; Bullock was asked, and he testified:

Q. Did Mr. Summitt ever say to you on the morning of the 7th to “fire all three of the sons-of-bitches?”

A. Not that I can recall.

Murphy testified that he called the terminal about 9 a.m., as Robertson had instructed. Chinn answered the telephone. According to Murphy:

[Chinn] said, “How’s your Dad doing?” And I said, “Well, he’s doing a lot better.” He said, “Did they have to take him to the hospital?” I said, “No.” And I explained to him what it was and I said, “What am I going to do today?” And he said, “Well, hang on and I’ll let you talk to Hardy.” Hardy got on the phone, real nice in the beginning. He said, “How’s your Dad?” I said, “He’s doing fine.” He said, “What hospital is he in?” I said, “He didn’t have to go to the hospital.” He said, “He didn’t have to go?” I said, “No.” And he said, “Mike, I’ve got something to tell you.” And then he paused and I was put on hold for a little while and then he come back to the phone and he said—And I mean I was on the phone for five minutes, at least. And then he got back on the phone and he said, “You’ve been terminated, Mike.” And I said, “For what?” And he says, “I was just told to fire you.” And I said, “Have you. . . . Are . . . you the one firing me?” He says, “I’m the one firing you.” And I said, “Well, what’s the reason?” He said, “You turned down the Big Rock run.” I said, “That’s not true. You know that’s not true. I’ve never missed”—I was going to tell him that I’d never missed a day with Bestway, ever, and he slammed the phone down. That was the end of it.

Bullock testified that he made the decision to discharge Murphy, and that he discharged Murphy, but he could not remember what he told Murphy when he did so.

Bullock testified twice that he first learned that Murphy had not taken the Big Rock load when a “young man” called the terminal during the morning and stated that Murphy had taken his father to the hospital. Bullock testified that Chinn told him of Murphy’s “might get sick” statement, but he did testify when Chinn told him about it.

Murphy testified that after Bullock hung up on him, he called Summitt. Murphy was asked and he testified:

I said, “David, this is Mike Murphy. Hardy says I’ve been discharged and I’d like to know why.” And he says, “Talk to my lawyer.” And I said, “Well, did your lawyer fire me or did you fire me?” And he says, “I fired you.” I said, “For what?” And he said, “For turning down the Big Rock run.” I said, “I didn’t turn down the Big Rock run.” And he said, “Well, Mike, you know, you’ve missed a lot of time at Bestway.”

I said, “I think you’re wrong.” I said, “I’ve never missed a day with Bestway.”<sup>11</sup> He says, “Well, I’m not going to argue about it. You turned down the Big Rock run and you’ve been discharged.” And [he said that] if I wanted to know anymore about it, I had to talk to his lawyer.

Summitt was asked what was said in his telephone call with Murphy, and he testified:

[Murphy] asked me why he had been fired. I told him for refusal of work. And he said something to the extent about that he didn’t refuse anything.

And my reply was that dispatch had informed me that Mr. Murphy did not take the load, and that he had made a statement that he was going to call in sick, or that he was going to be sick. And the load never got moved. We never received a phone call later that night. Therefore, it was my opinion that he should be terminated.

Summitt did not deny that he told Murphy that he had missed a lot of time.

Summitt testified that he did not direct Bullock to discharge Murphy and that he first learned of the discharge when Bullock informed him of it afterwards. Summitt testified that he had learned from Bullock the information that he gave to Murphy about the discharge.

#### b. *Reasons advanced for Respondent’s actions*

Respondent did not ask Bullock why Murphy was discharged, even though Bullock and Summitt stoutly maintained that Bullock made the decision. Bullock was asked several times by the General Counsel why Murphy was discharged. The response that Bullock gave the first time the General Counsel asked is quoted above (in reference to the August 6 driver writeup).

When the General Counsel asked Bullock again, Bullock testified that Murphy was discharged solely for the matters covered in two driver writeups. The second driver write up which, according to Bullock, formed the basis of Murphy’s discharge is dated August 7, 7:50 a.m. It recites as the “occurrence”:

Mike Murphy . . . [on] trip 67734 . . . was assigned Big Rock VA, on 8-6-91 [at 4 p.m.] for deliver 8-7-91 [at 8 a.m.] [Murphy] made the comment to Fred Chinn, “Don’t be surprised if I come down with a cold or something.” [Murphy’s] son called in [at 7 p.m.] on 8-6 [and] said [that] they took their father to the hospital. Called in [at 7:50 a.m.] 8-7 asking for Ron Block. Made the comment that he only had 10 hours available on his log book.

Under “Suggestion,” Bullock entered:

Failed to service our Customer; missed del. app. [H]as been running Bloomington only & has gotten spoiled. We ask for their help on road runs for 3 weeks

<sup>11</sup> Here lies another problem with Thomas’ credibility. Thomas testified that in arguing with Bullock about Murphy’s excuse for not taking the Big Rock run, he told Bullock that Murphy had often taken off to take his father to the hospital.

while Bloomington is down. Lack of dedication to Bestway's interest is the reason I decide [sic] to discharge this man.

On cross-examination, Bullock was asked about the Big Rock run and how it was handled:

Q. Aren't there often occasions where this delivery for Big Rock, it'll wait at you all's terminal for a day or two before it gets there . . . if you don't have available drivers?

A. It has happened before, yes. . . . Because a lot of drivers don't like the run because it's very mountainous country and hilly.

Q. You've heard various drivers talk about that?

A. Right.

Q. The drivers consider that one of the most unpleasant runs, don't they?

A. Well, some of them like it. They like the scenery, you know. They like to get out in the country.

Q. But if you don't like to drive through the mountains, it's not considered very pleasant, correct?

A. Correct.

I was constrained to ask:

JUDGE EVANS: Do you know why Mr. Murphy got the Big Rock assignment? If you had twenty-five over-the-road drivers and fifty . . . owner-operators, why would Mr. Murphy have got the assignment like that?

THE WITNESS: Well, we move between—throughout our system between a hundred and a hundred and forty loads a day, truckloads of freight. If—And we try to stagger these drivers on long runs, short runs, long runs, short runs, so they can be rested enough to satisfy customer needs.

During the day when freight is booked, the opportunity to take more business, you know, if you've got more drivers in the fleet that you know about that should be lending support, then more business can be handled.

So, we assumed that we were going to have a larger amount of support on the road with the Bloomington shut-down, so more business was attained.

No other reason for assigning the Big Rock run has been advanced by Respondent.

Although Summitt, Thomas, and former dispatcher Houghton testified that the Big Rock run was normally not a "hot" run, or a run that had special priority, Chinn testified that the Big Rock load that was assigned to Murphy was "hot" because it had been ready for shipment on August 6, and it should have gone then, but there were no drivers to take it. Also Chinn testified that at 8:30 a.m., on August 7, a salesman (otherwise unidentified) got a call from the warehouse in Big Rock complaining that the scheduled 8 a.m. delivery to the warehouse was one-half hour late.

### c. *Credibility resolutions*

Taking the last-mentioned testimony first, Chinn testified falsely as he attempted to aggrandize the alleged dereliction of Murphy by insisting that it was this load to Big Rock, of all loads to Big Rock, that had to be there the next day. Certainly, Chinn did not testify that when he gave Murphy the

dispatch or when Murphy said that he "might get sick," he told Murphy that the load was "hot." But, more importantly, Bullock identified Respondent's dispatch records for the week of August 5. Contrary to Chinn's testimony, the Big Rock load had not been listed as originally scheduled for departure on August 6.<sup>12</sup> Also, Respondent's records show that the load that Murphy was originally scheduled to deliver (load number 67734) was not rescheduled as "out bound" until 6 p.m. on August 8, for delivery at Big Rock at 8 a.m. on August 9. This factor completely disproves Chinn's testimony that there was any priority to the load. Moreover, even when rescheduled, the trip is not marked "hot," although others are.

Thomas' testimony that he called the customer and explained an "equipment failure" is not denied. Also, I found to be absolutely incredible Chinn's testimony that a salesman had received a complaining telephone call from the customer about 8:30 a.m. Aside from the fact that Chinn's testimony (about what some salesman said that someone who identified himself as the customer said) was double hearsay, warehouses are unlikely to waste long distance tolls to complain about half-hour delays.

All of which is to say that the Big Rock run had no special priority on August 6; there was no call from the customer on the morning of August 7; the only contact with the customer was the telephone call that Thomas made to the customer to give the "equipment failure" explanation for the delay, and the customer replied that it did not matter.

Moreover, Chinn testified falsely when he stated that he used the term "good" to describe the Big Rock run because a driver could get down and back in a day. Bullock admitted that the Big Rock run was one which the driver goes to a third point to pick up another load, that no one knew where Murphy would be assigned to go after he unloaded in Big Rock, that the driver who ultimately did take the load did, in fact, stay out a second day, and that Murphy would have been on the road another night before returning to Jeffersonville.

On most all other points, Bullock was generally incredible. As the above quotations reflect, for about every critical question put to him, Bullock replied "I don't remember" or "I don't recall." Assuredly, Bullock was a busy man, and most of the vicissitudes of life at the terminal would not be retained in his memory. However, Murphy's letter and his almost immediate discharge are probably two of the most dramatic events that Bullock has experienced while serving as Respondent's operations manager. It is unlikely to the point of disbelief that Bullock's above-quoted claims of memory failure are genuine, and I discredit all of them, and hold them to constitute admissions, except for Bullock's claim that he did not remember if he was in the area when Murphy got the Big Rock assignment; this exception is because Robertson, as I discussed *infra*, was more credible than either

<sup>12</sup> After the documentary refutation of Chinn's testimony was brought out, Respondent recalled Summitt (not Chinn or Bullock who would have had first-hand knowledge) to state why the Big Rock load *might not* have been listed as ready for dispatch on August 6. This testimony was probative of nothing.

Thomas or Murphy, and Robertson credibly testified that Bullock was not there.<sup>13</sup>

Chinn testified that he could not remember if, when he gave the Big Rock assignment to Murphy, he referred to Murphy's letter writing activities. Again, Murphy's letter likely was one of the most exciting things that had ever happened around the terminal; Chinn would have remembered, one way or another, if he had mentioned the letter when giving the Big Rock assignment to the letter's author. Like Bullock, Chinn was using a claimed inability to remember to avoid an even more blatant lie. I credit Thomas and Murphy on the point.

Bullock's claimed inability to remember that which assuredly would be remembered, one way or another, serves to discredit Summitt on a most important point. Thomas testified that on the morning of August 7, referring to Murphy, McDaniel, and Bouchey, Summitt told Bullock to "fire all three of the sons of bitches." Respondent's counsel did not ask Bullock why Murphy, McDaniel or Bouchey were fired; when counsel for the General Counsel asked Bullock about Murphy's discharge the first time, Bullock did not even mention the Big Rock incident. Finally, Bullock testified that he could not remember what he told Murphy when he discharged Murphy, even though the decision to discharge Murphy was solely his, and even though he had written the elaborate driver writeup of August 7 that is quoted above. All of which is to say that: (1) Bullock and Summitt testified falsely when they claimed that Murphy's discharge was Bullock's decision; (2) Summitt told Bullock to discharge Murphy (and Bouchey and McDaniel); and (3) Summitt told Bullock to discharge Murphy (and Bouchey and McDaniel) in the categorical, and profane, terms described by Thomas.

The one witness whom I consistently found credible was Robertson. As we shall later see, McDaniel was fired for supposedly turning down an assignment on August 7. However, Robertson testified that McDaniel did not do so. Also Bullock testified that Bouchey was fired, in part, for allegedly for insubordinate behavior when Robertson gave him an assignment on August 6 and for abusing Robertson in a telephone conversation on August 7; however, Robertson testified that neither such thing occurred. Although Murphy would have been more of a thorn in the side of this, as I find, virulently antiunion, antiprotected concerted activity, Respondent than either McDaniel or Bouchey, I nevertheless do not believe that Robertson would tell the truth in the cases of McDaniel and Bouchey, and then flatly lie about not talking (at all) to Murphy on the evening on August 7. But more than that, I found Robertson to have a completely credible demeanor, and I do credit his testimony that he did not talk to Murphy on the evening of August 6 and give him permission not to take the Big Rock run on August 7.

Even without Robertson's testifying, I would discredit Murphy's testimony that on August 6 he received permission from Robertson to miss the Big Rock assignment on August 7. Murphy testified that when he called in on the morning of August 7, both Chinn and Bullock indicated that they be-

lieved that Murphy had taken his father to the hospital. Unless an elaborate contrivance, involving the credible Robertson, was concocted overnight (through the exercise of a degree of sophistication that is not apparent), Chinn and Bullock would not have made these remarks if they had received word (from Thomas or Robertson) that Murphy had made a second call and stated that his father was all right, that his father was not in the hospital, and that Murphy would be able to take the Big Rock load. That is, Murphy's testimony of what Chinn and Bullock said on the morning of August 7 is perfectly consistent with Respondent's theory of the case, that the last information it had was that Murphy had called in and stated that he could not take the Big Rock run because his father was ill and Murphy had to take him to the hospital. Further to be noted in Murphy's testimony is the statement that, when Bullock hung up on him on the morning of August 7, he was cut off from arguing the merits of his attendance record; Murphy did not testify that he was cut off from saying anything like, "Hey, Robertson said not to worry about it." Murphy then got Summitt on the telephone; he did not attempt such an explanation then, either. If Murphy had been in anything like the righteous position that he and Thomas sought to portray, Robertson's purported permission would have been the first thing out of his mouth when Bullock told him that he was he was fired for turning down the Big Rock run; it would have been the second thing out of his mouth after he got Summitt on the telephone.

Additionally, as he gave it, I found incredible Murphy's testimony of Robertson's granting him, in elaborate and effusive terms, permission to decline the Big Rock assignment. My original impression has not left me. Moreover, I do not believe Thomas' too-complementary testimony that, when Robertson got off the telephone after the "second" call from Murphy, Robertson stated that he had given Murphy permission not to take the Big Rock assignment; nor do I believe Thomas's testimony that on the next morning he told Bullock that Robertson had given Murphy such permission.

I believe, and find, that Murphy called the terminal on the night of August 6, but he talked only with Thomas, as Robertson testified.<sup>14</sup>

I further credit Robertson that he heard Murphy, at the dispatch window, say during the afternoon of August 6, "in a joking manner" that he "could get sick" rather than take the Big Rock run. Again, Robertson was more credible than Murphy (or Thomas, who supported Murphy's version of what Murphy said). Moreover, although Respondent committed rather crude violations of the Act, as found here, and although I am confident that, because of his exercise of Section 7 rights, Respondent was more than eager to seize on anything Murphy might do as a "reason" for discharging him, I do not believe that Respondent created, out of whole cloth, the "I could get sick" response by Murphy when he was given the Big Rock assignment. I also believe that Chinn also heard this remark by Murphy; his placing Murphy on the dock when he said it is inexplicable, except in terms of honest misrecollection (in this one instance).

Finally, in regard to Murphy's conversations on the morning of August 7 with Bullock and Summitt, I fully credit

<sup>13</sup> Most assuredly, I do not believe Thomas' testimony that, when giving the Big Rock dispatch to Chinn (to give to Murphy), Bullock said (as if for Thomas' benefit, once, much less twice) that Big Rock was the "longest," or "longest and roughest" run that Respondent had available.

<sup>14</sup> I do not believe Thomas' testimony about him telling Bullock on the morning of August 7 that Robertson had told him that Robertson had given Murphy permission to miss the Big Rock run.

Murphy's testimony over the denials of Bullock and Summitt (to the extent that Summitt's testimony, and Bullock's claimed memory loss, can be said to constitute denials).

*d. Evidence of discriminatory treatment*

The General Counsel introduced into evidence seven such writeups issued to employee Robert Summers who was hired on February 13 (or about the same time as Murphy, McDaniel, and Bouchey) and who was still employed at the time of the hearing. The first writeup is dated May 23; the last is dated October 25. Five of the writeups are for failure to keep in touch with dispatch. (As noted, drivers on longer trips are required to call dispatch after each delivery.) One of those five writeups recites that Summers replied "f—k you" when the dispatcher asked why Summers had not called in; for that, Summers was given a 1-week suspension by dispatcher Williams. Another of the five writeups that Summers received for not calling in recites that Summers replied "just because" when asked why he had not called in; for that failure to call in, or the retort, Summers received a "strong verbal rep[rimand]." Another of the seven writeups issued to Summers is for backing into a pole and damaging the truck's fuel tank; the final one is for "running late" and, when asked why, replying, "Don't start on me." This last one was signed by Bullock. Bullock testified being cursed by drivers does not bother him.

Driver Tony Lupo was issued six writeups between June 22 and July 19, 1990, all while he was on indefinite probation for other offenses. Lupo had been discharged by the time of the hearing.

On cross-examination, dispatcher Williams was asked, and he testified:

Q. And drivers, from time to time, complain about the runs they have to make, don't they?

A. Correct.

Q. And just about every driver has complained about their runs, haven't they?

A. At one point in time, yes.

Q. And from time to time, drivers will make comments about how they don't like the run they're assigned; correct?

A. Correct.

Q. That's a common occurrence?

A. Correct.

Q. And it's a fairly common—strike that. From time to time, drivers will miss their runs; is that correct?

A. Correct.

Q. And from time to time, it's because they've overslept; is that right?

A. Correct . . . .

Q. And some of those occasions are when a driver has already been assigned a run, and he just doesn't make the run; is that correct?

A. That has happened, correct.

Q. And they don't even call in; is that right?

A. Correct.

Q. And those drivers are still working for the Company; is that right?

A. They get wrote up. . . . Then, after a certain amount of times that they're wrote up, they're talked to or let go or whatever.

Respondent offered no evidence in conflict with this testimony by its witness Williams.

1. Discharge of McDaniel

McDaniel was hired as a Bloomington driver on May 7. He attended the August 3 driver meeting at Jerry's Restaurant (but, as noted, could not identify anyone whom he believed was a member of management).

On Monday and Tuesday, August 5 and 6, McDaniel was assigned short runs out of Jeffersonville.<sup>15</sup> He returned to the terminal about 3:30 p.m. on August 6 and was told by a dispatcher (unnamed, but probably Robertson) that his run for the next day would be to the Indianapolis area, and that he should leave the Jeffersonville terminal about 4:30 a.m.

After getting this assignment, McDaniel left the terminal. Within an hour he called back to the terminal and spoke to Robertson. McDaniel testified that he reported to Robertson that the automobile that he was driving had become disabled, that he would have to spend the next day getting license and insurance for another automobile, and that he would have no way to get to work the next morning to take the Indianapolis load. Robertson did not dispute this testimony. Robertson further admitted that he told McDaniel that "I would get his load covered for him."

As he was instructed by Robertson, McDaniel called the terminal the on August 7, about 5 p.m., to ask what his assignment for August 8 was to be. According to McDaniel, Robertson put him on hold and:

That's when Mr. Bullock got on the phone and he says, "As of now, you are terminated. . . ." I asked him why. He didn't give me no answer. I tried to tell him that I had permission to be off that day to get my car tagged and insured and he said something about I could have got a cab; and before I could say anything, he slammed the phone down in my ear.

Respondent placed in evidence the following "Driver Write-Up," dated August 7, that is signed by Bullock:

Doug McDaniels [sic] . . . on GE load [to] Cambridge City, IN [and] Richmond, IN—for del[ivery at] 0830 [on] 8-7—called in [at] 1900 [on] 8-6 [and] was having trouble with his car. Couldn't go out.—Terminated.

On direct examination Bullock was shown this document. He admitted signing it. Nothing else of significance was asked of Bullock about the document or the discharge.

On October 11, by letter of that date, counsel for Respondent notified McDaniel:

I have had an opportunity to review the circumstances surrounding your termination with Bestway Trucking. After conference with Mr. Summitt, it would appear that the absence from work which led to your termination was for valid and reasonable grounds, and, therefore, upon specific authorization of Mr. Summitt, you are here by notified that your termination is re-

<sup>15</sup> These short runs for McDaniel further belie Thomas' testimony that he asked Bullock, on August 5, why all the Bloomington drivers had all gotten long runs.

scinded. You should immediately report to Bestway Trucking in order that you may be put back to work.

McDaniel returned to work immediately, reporting to work on October 14. McDaniel testified that when he reported to work he gave Safety Director Block certain documentation of the troubles that he had experienced with his automobile on August 6. McDaniel was placed back on the Bloomington runs; an assignment that he kept until he suffered an injury later in the autumn.<sup>16</sup>

Bullock did not advance any reason for firing McDaniel, although he insisted that it was his decision, not Summitt's. Summitt testified that he thought the documentation on McDaniel's automobile had been given to Block before the offer of reinstatement, and hinted that the discharge was rescinded only after that documentation was produced. Block did not testify about the matter.

### 3. Assignment to and discharge of Bouchey

Bouchey was hired as a Bloomington driver on February 3; he also was discharged on August 7.

As noted previously (in discrediting Thomas), Bouchey was given short runs for August 5 and 6. On the evening of August 6, Robertson assigned Bouchey an August 7 run to Indianapolis.

On August 7, Bouchey left the Jeffersonville terminal about 5 a.m., and made the Indianapolis delivery at 8:30 a.m.

Thomas testified that, during the morning of August 7, after Summitt had told Bullock to fire "all three of the sons of bitches," referring to Bouchey, Murphy, and McDaniel, Bullock asked those in the dispatching area if anyone had heard from Bouchey. Glen Williams, a new dispatcher, asked why Bullock was looking for Bouchey. Bullock replied, "he's mine." Further according to Thomas:

Then Glen said, "[W]ell, what do you mean?" [Bullock] said, "when Bouchey calls, he's mine. I want to talk to him. I have a special run for him. I'm going to send him to Carmel, Indiana to pick up this long run, and then I'm going to make him drive." Then Glen said, "[W]ell, why are you going to send him to Lexington, Tennessee. [Bullock] says, "because—just because . . . he thinks complaining a little bit or being friends with Mike Murphy and that he's going to get special treatment. He's not going home with his wife. He's going to Lexington, Tennessee." Shortly after that, Joan [an office clerical employee] answered the phone, and it was John Bouchey. He was at Indianapolis.

Williams testified on direct examination that he did not hear Bullock ask about Bouchey's whereabouts or say "he's mine" in reference to Bouchey. Williams was not asked whether he heard the reference to Bouchey's as a friend of Murphy.

On direct examination, Bullock was asked, and he testified:

<sup>16</sup>The General Counsel does not contend that McDaniel received anything less than full reinstatement on October 14.

Q. On the morning of August the 7th, did you come in and make an inquiry about Mr. Bouchey's whereabouts?

A. Not that I can recall.

Q. Do you recall making a statement to Mr. Thomas, and referring to Mr. Bouchey, saying, "He's mine?"

A. No. . . .

Q. Did you make a statement to Glenn Williams that you had picked the run from Carmel to Lexington for Mr. Bouchey to show him that complaining to the Company and being friends with Mr. Murphy wouldn't solve his problems?

MR. NESS: [for the General Counsel] Objection.

A. Not that I can recall.

JUDGE EVANS: Overruled.

THE WITNESS: Not that I can recall.

After he made the Indianapolis delivery, Bouchey called the Jeffersonville terminal and was told, by an unnamed dispatcher or office clerical, to go next to Carmel, Indiana, which is located on the outskirts of Indianapolis. Bouchey went to Carmel and got reloaded, a process which took until about 2 p.m. He called the terminal again and spoke to Joan\_\_\_\_, a clerical, and asked where he was to take the Carmel load. Bouchey testified:

I told her I was loaded and gave the load information, which was normal. And she said to take the load to Lexington, Tennessee. I replied, "I hope not." She said, "Why? Are you a Bloomington driver?" I said, "Yes." She said, "All right, just a minute," and put me on hold. After being on hold for about five minutes, Hardy Bullock picked up the phone and said, "What's the problem?" Well, I told him that David had told us we'd be home at night, we'd get the short runs during this shutdown. I think what he recalled [sic] was, "Well, I'll call Nashville and see if we can drop it there." [He] put me on hold again. I was on hold for approximately another five minutes. After about five minutes of being put on hold, the phone picked up again. Fred Chinn was on the phone. He tells me, he says, "Well, what's wrong with it?" I said, "Well, what do you mean?" He said, "Take it to Lexington." I said, "Well, wait a minute now. Hardy's calling Nashville to see if we can take it there. What's the deal here?" He said, "Well, hold on a minute." So, I was put on hold again. Hardy picked the phone back up a few minutes later and said, "Bring it to the yard," and slammed the phone down.

Bouchey did return to the Jeffersonville terminal with the load; when he got there, he asked Robertson what his assignment was for the next day. According to Bouchey:

[Robertson] says, "Hardy says he doesn't need you anymore." So, I asked, I said, "What's this mean? I'm fired?" He goes, "I guess so." So, I went and cleaned my truck up and went home.

Contained in Bouchey's personnel file is the following "Driver Write-Up" that is dated August 7 and signed by Bullock:

John Bouchey . . . did not want to take a load to Indy (GE)—got hostile with Louis [Robertson] and threatened to quit! He stated that according to the wage and labor board he didn't have to run anything but Bloomington—Terminated.

Joan did not testify. Chinn, as I have noted, testified, but not on this issue.

Bullock was first called by the General Counsel and asked about Bouchey's discharge. Bullock claimed that he could remember nothing about Bouchey or the discharge. When shown the driver writeup on Bouchey and asked if it stated the reasons for the discharge, Bullock replied, "Obviously."

Bullock was then asked about the discharge on direct examination. Bullock agreed that when Bouchey first talked to him on August 7, Bullock made an attempt to call Nashville to see if someone could take the load from there (if Bouchey would deliver it there). The Nashville dispatcher told Bullock that there would be no one there who could take the load from Nashville to Lexington. Bullock was then asked, and he testified:

Q. And after you learned that, then did you get back on the phone with Mr. Bouchey?

A. Yes.

Q. All right. What did you tell him?

A. That it had to be run to Lexington.

Q. What did he say after that?

A. I can't recall.

Q. Did he agree to make the run?

A. No.

Q. So, what did you say to him?

A. To bring it into our yard.

Q. Was there anything further said?

A. Not that I can remember.

On cross-examination, Bullock testified that he, alone, made the decision to discharge Bouchey, and that the reason for the discharge is what is stated in the above-quoted driver writeup. Bullock further testified that Robertson had been upset by the Bouchey's remarks described in the writeup; and Bullock testified that Robertson recommended issuance of a writeup.

When called by Respondent, Robertson denied that Bouchey had argued with him about the original Indianapolis assignment on August 6. He also denied that he and Bouchey had any telephone conversation on August 7. He further testified that, when Bouchey returned to the Jeffersonville terminal, the only thing said by Bouchey was to ask what he should do. Robertson was not asked if, and he did not testify that, Bouchey had made the remarks attributed to him in the above-quoted driver writeup. Moreover, Robertson did not testify, as Bullock claimed, that he recommended that Bouchey be disciplined.

Bouchey denied refusing the Lexington load, or saying anything to indicate that he was refusing that load. Because no one has testified to anything that would constitute such a refusal, there is really no credibility resolution to make; however, to resolve any question about the matter, I state here that I found Bouchey credible in his testimony about what he said about the Lexington assignment to Joan, to Chinn, and to Bullock.

The complaint alleges that the Lexington run was an assignment that was "more onerous work; i.e., lengthier and [more] undesirable" and that, by making the assignment to Bouchey, Respondent violated Section 8(a)(3). Robertson testified that the Carmel-Lexington run could have been made a 2-day trip and that had Bouchey accepted the assignment he could have driven from Carmel to Jeffersonville on August 7, arriving about 5 p.m. (as he did) and then after approximately 6 hours at home he could have left the Jeffersonville terminal at midnight and delivered the load to Lexington, as scheduled, at 6 a.m. on August 8. Respondent further points out that Bouchey did not testify that Joan, Chinn, Bullock, Robertson, or anyone else told him to drive straight through from Carmel to Lexington.

According to Respondent's records, the driver who did take the load, one Blaho, an over-the-road driver or owner-operator,<sup>17</sup> did not return to the Jeffersonville terminal until August 9.

#### F. August 12–14, 1991 Assignments to Carney

The complaint alleges that, in violation of Section 8(a)(3), Respondent assigned to Carney "an over-the-road driving assignment lasting approximately 1 week," thereby imposing more "onerous and rigorous terms and conditions of employment." At trial, the General Counsel clarified the allegation to confine it to assignments that kept Carney away from home on the successive nights of August 12 and 13.

Carney was hired as a Bloomington driver on May 6; the complaint alleges that Carney was constructively discharged on January 10. Relevant to both the instant allegation and the constructive discharge allegation is certain testimony by Stanley Houghton (again, the former employee who was once a billing clerk and then, in late August, became a dispatcher).

Houghton testified that on August 9, 2 days after Murphy, Bouchey, and McDaniel were discharged, he had a conversation with Benningfield at the terminal. Houghton observed that Carney was the only Bloomington driver left. Benningfield said that Carney "seemed like a trouble maker."<sup>18</sup> Houghton responded that Carney "looks like a union steward." Benningfield, as he admitted in his testimony, replied, "Yes, he does."<sup>19</sup>

During the first week of the August 5 Bloomington shutdown, Carney was assigned two overnight trips. Those assignments are not the subject of any allegation of the complaint.

On Monday, August 12, Carney was dispatched to Cincinnati, then to Newport, Kentucky, just across the Ohio River from Cincinnati. He called the Jeffersonville terminal from Newport. Dispatcher Williams told him to take his load to Cleveland. Carney protested that would force him to stay (again) overnight and that he did not have a change of

<sup>17</sup>I make this finding because Blaho is never mentioned as a city or Bloomington driver.

<sup>18</sup>This was not accurate; Oster was still employed. Houghton could have meant that Carney was the only prounion driver left, but that is not what he said.

<sup>19</sup>On brief, the General Counsel represents the transcript as indicating also that Benningfield also stated carney "wouldn't last long"; however, Houghton's testimony is not clear that remark was an assertion by Benningfield or a speculation by Houghton.

clothes with him. Williams told him to go anyway, which Carney did, sleeping in the truck on the way.

When Carney unloaded in Cleveland on Tuesday, August 13, he called the terminal again. That time he was told by a dispatcher (unnamed by Carney) to drive a load from Cleveland to West Elizabeth, Pennsylvania, near Pittsburgh.

When, during the afternoon of August 13, Carney got to West Elizabeth, he unloaded and reloaded. He called the terminal again and was told to drive the load to Nashville.

Carney got as far as Cincinnati when he "ran out of hours." He slept in the truck again.

On the morning of August 14, Carney continued on to Jeffersonville where he changed clothes at home. Then he continued on to Nashville where he made the delivery as assigned. He returned to Jeffersonville at 7 p.m. on August 14.

Houghton testified that when a second Bloomington shut down occurred in December he was present in an office area with Benningfield and Summitt when Carney walked into sight. According to Houghton:

Well, Ed Carney walked in the office, and Hank [Benningfield] turned to me and said, "here comes the Union steward." David [Summitt] was in the office also. He looked up and said, "what do you mean by that?" or "who's that?" Hank pointed at [Carney]. [Summitt] said, "He seems like the kind of guy that would be."

Summitt and Benningfield denied this testimony, but I found Houghton credible.

Carney testified that when he returned from Cincinnati on August 16 he was told by someone that he would not be receiving drop pay for work he had done there. He questioned Summitt about it. Summitt affirmed that Carney would not receive the drop pay. As he left the room in which they met, Carney turned and, further according to Carney:

I stopped at the door and asked him if he was going to hire Mr. Murphy and Mr. Bouchey back, and he said not unless he got a federal court order. He said there wouldn't be no Union at Bestway as long as he's an owner. So I turned around and left.

Summitt denied this testimony; however, I found Carney credible on the point.

Carney further testified that he continued to be assigned long-distance (but, apparently not overnight) runs after the August shutdown by General Electric was over, but other drivers were assigned the Bloomington runs. He went to see Bullock about the matter. Carney testified:

Well, we talked about the Bloomingtons. I had told him that I married—I remarried my wife. We have two small kids, and I do not want to go out on the road. That's why I was at Bestway. That's why I hired on for Bloomingtons. I wanted my Bloomington runs back, that they were there, and I should have them. Mr. Bullock replied that if I was more for the Company and not my other activities, then I probably wouldn't have this problem.

The complaint alleges that by Bullock's remark, Respondent violated Section 8(a)(1).

Bullock was asked on direct examination whether Carney had discussed his Bloomington runs with him. Bullock replied, "Not that I can recall." I credit Carney.

At some point in September, Carney was reassigned to the Bloomington runs. (The complaint does not allege that the delay in reassigning Carney to the Bloomington runs was violative.)

On direct examination, Bullock confirmed Carney's description of his August 12-14 itinerary, but he was not asked why Carney, rather than one of Respondent's 75 regular over-the-road drivers were not given those assignments, although Bullock did testify, generally, that during that period of time Respondent did not have enough over-the-road drivers.

#### G. Other Evidence of Animus

Thomas testified that on August 6, after Murphy received the Big Rock assignment, Chinn and Murphy had left the terminal to go home, Summitt called Thomas to Summitt's office. According to Thomas, Summitt then told him: that he had not liked Murphy's letter; that Summitt had sent Murphy a reply, a copy of which Summitt showed Thomas; that he had already written up Murphy twice (which, if true, is not borne out by the documents in evidence); that he was going to write Murphy two "more" times before firing him; that he had learned about the drivers meeting on August 3 from driver Glenn Wyatt; that he had sent Torp to spy on the meeting; that Torp had reported to him that Murphy, McDaniel, Stump, Carney, Underwood, Bouchey, and Collins were at the meeting; that Thomas knew how Summitt felt about unions; and that, "I'll deal with Mike [Murphy] in my own way."

Summitt denied this testimony, but strictly by answers to the most blatantly leading questions imaginable (rather than answering to a proper question calling for a narrative, then, if possible, following with denials). Because of the strictly leading nature of the questions utilized by counsel to adduce the denials by Summitt, I credit Thomas over Summitt about what was said between the men on August 6.

August 10, when Thomas was discharged by Bullock, he went to see Summitt and asked for the reason:

I said, "What are the reasons you're firing me?" [Summitt] said, "well, you know you got a big mouth. You said something about the Union vote to the newspaper; you shouldn't have said that. You told the drivers that they should get together and have a meeting about problems that they were having. I don't think you should have told them that." If you hadn't have told them, they might not have had the meeting. It's caused problems." I told him, "well, I was just telling them what—they asked my opinion, and I just gave them my opinion, that they should have a meeting and get together and talk. I didn't tell them to see the Union. I told them to come see you first. And then if they couldn't work things out, that they could go and see Mr. Shaw at the Union." He said, "Well, I don't think you should have told them. You opened your big mouth about it."

Thomas also testified that Summitt stated as reasons for Thomas' discharge two other factors not relevant here.

On direct examination, Summitt was asked if he met with Thomas after Bullock had discharged Thomas; Summitt responded that he did. However, Summitt was not asked what was said; therefore, Thomas's just-quoted testimony stands undenied, and I credit it. Bloomington driver Stump was injured in late August, before the August 5 shutdown. In late August, he returned. He testified that he met with Block and Summitt in Block's office at which time he presented a physician's request that Stump be placed on light duty. Summitt said Stump could have light duties such as cleaning rest rooms and floors. Stump replied that he thought such assignments were unsuitable. When asked what Summitt replied, Stump testified:

He said, "I know your name was mentioned in the letter. You're the only one that's still working here that's— who was mentioned in the letter." I told him that I really wasn't there to discuss the letter, that I was just there to let him know what my doctor said. . . . He said that he'd done fired my buddies, is what he said.

The complaint alleges that this response by Summitt was a violation of Section 8(a)(1). Summitt denied the remark; however, I found Stump credible.

Stump further testified that in early January he met with Summitt, again in Block's office. Stump testified:

I was asking him about the shortages on my checks, and he said that there wasn't a whole lot he could do about it, that I would have to talk to worker's compensation about it. He . . . said that if me and Ed Carney didn't—if we kept up our Union stuff, we'd be out on the street with our buddies. I told him that I was not there to discuss that, that I was there just to find out about my workmen's compensation checks. And he said that he just wanted to get a point across. I said, "I hear you," and I left.

Carney testified that he was at a water cooler outside Block's office when Stump was inside the office talking to Summitt about Stump's disability checks. According to Carney:

Yeah, I heard Ricky Stump's voice asking about his disability checks on—he hasn't received some certain ones, and I heard Mr. Summitt's voice . . . he said that if Ricky and Ed didn't start—didn't quit this Union stuff, that we'd both be out in the street with our buddies.

The complaint alleges that, by Summitt's remark to Stump, which Carney overheard, Respondent violated Section 8(a)(1) of the Act.

Again, Summitt denied this testimony, but I found Stump and Carney credible.

#### H. *The January 10, 1992 Alleged Constructive Discharges*

##### 1. Selections of Carney, Story, Stump, Walker, and Pasley for reclassification

Before January 24, as well as full truckload contracts, Respondent accepted less-than-truck-load, or "LTL," shipping contracts. These contracts involved freight that was picked up (or delivered) in the Louisville-Jeffersonville area before (or after) long hauls by other carriers. (Then the revenue was split between Respondent and the other carriers.) Respondent discontinued accepting LTL business on January 24. The discontinuance of the LTL business is not alleged as a violation of the Act; it is part of this case because it is Respondent's assigned reason for changing the classifications local and Bloomington drivers Carney, Story, Stump, Walker, and Pasley to over-the-road drivers on January 10.

On January 10, eight of Respondent's local and Bloomington drivers received copies of the following letter that was signed by Summitt:

The Company has made a decision to discontinue its LTL hauling and local cartage effective January 13, 1992. As a result, it is necessary to reassign drivers. Therefore, effective January 11, 1992, you are to report to dispatch for a road assignment for January 13, 1992.

Five of the eight drivers who got this letter were Carney, Story, Stump, Walker, and Pasley. The other three drivers who got this message were Ronald Underwood, Eudell Hackley, and James Woodson. As Summitt testified, Hackley and Underwood were not actually assigned to over-the-road driving; Hackley and Underwood were made Bloomington drivers on January 13, replacing Carney and Stump.

Also on January 10, 11 of Respondent's then-local and Bloomington drivers got letters from Summitt stating that although the local and LTL business was being discontinued their jobs were not affected. The only Bloomington driver in the latter group was Oster.

The local cartage operation continued through time of trial, despite what the January 10 letters announced.

Rather than accept the over-the-road reclassification, Carney, Stump, Story, Walker, and Pasley resigned, the only alternative admittedly offered by Respondent. The complaint alleges that the reclassification of those five employees constituted impositions of more "onerous and rigorous terms and conditions of employment," that the reclassification were made because of the known or suspected union or protected concerted activities or sympathies of those five employees, and that the forced resignations constituted constructive discharges in violation of Section 8(a)(3).

Over-the-road assignments are more difficult than local or Bloomington assignments because over-the-road drivers are required to stay away from home, many times, over night; and Respondent does not provide special pay for motel usage, so a driver is required to sleep in his truck or pay for his motel use out of the same per diem allowance that Re-

spondent provides drivers who sleep in Respondent's trucks (which have accommodations for sleeping).

Summitt made the final decision on which drivers to select for reclassification to the job of over-the-road driver. Summitt testified that he conferred with different supervisors on which drivers to select. Summitt, Bullock, and Block, but no dispatchers, testified about why Respondent selected Carney, Story, Stump, Walker, and Pasley.

a. *Carney*

Summitt testified that, in regard to the reclassification of Bloomington driver Carney:

[Bullock] felt that Mr. Carney did not have a very good attitude and was not willing to work with Dispatch as others would. . . . He described that Mr. Carney constantly complained about trucks. If there was not enough Bloomingtons and we asked him to do something else, that he always attempted to refuse work.

Summitt testified that Carney "especially" refused to be cooperative during the August Bloomington shutdown. Summitt admitted that Carney had no accident problem, and that there were no problems with Carney other than those related to him by Bullock.

Bullock testified that he could not remember making any recommendation on whether to reclassify Carney to the job of over-the-road driver; Block was not asked about Carney's reclassification.

b. *Stump*

When asked why Stump was selected for transfer from Bloomington to over-the-road assignments, Summitt replied:

Just his overall attitude was bad, sir. When he come [sic] in, he was in a bad mood. He made rude comments to the dispatch [such as], "I'm not taking this load," or, "I'm not driving that truck." It was common knowledge among everybody in dispatch.

Bullock testified that he could not remember making any recommendation on whether to reclassify Stump to the job of over-the-road driver; Block was not asked about Stump's reclassification.

c. *Walker*

Summitt testified that Walker was reclassified from local to over-the-road driver because Respondent knew that Walker was looking for other employment anyway, and because Walker had received two customer complaints, and because he was not as cooperative in taking loads as Respondent would have wanted. The two customer complaints were received in a prior period of employment; Walker had quit for other employment and rehired by Respondent in February 1991. The only example of Walker's being uncooperative that Summitt could cite was one unspecified time that Walker refused a load because the load contained hazardous materials and the proper paperwork was not provided to him; Summitt conceded that Walker was justified in his refusal on that occasion.

Bullock testified that he could not remember making any recommendation on whether to reclassify Walker to the job of over-the-road driver; Block was not asked about Walker's reclassification.

d. *Pasley*

Summitt testified that Pasley was reclassified from local delivery to over-the-road because he had been too slow in his work and Respondent had received two customer complaints about him. Summitt acknowledged that no supervisor had mentioned the customer complaints to Pasley and that Pasley continued to be assigned to do the trucking for those customers.

Bullock testified that he could not remember making any recommendation on whether to reclassify Pasley to the job of over-the-road driving; Block was not asked about Pasley's reclassification.

e. *Story*

Summitt testified that Story was reclassified from city driving to over-the-road because he had indicated in December to Bullock and Block that he might not get a commercial drivers license (CDL) by April 1 as required by Federal statute. Summitt also testified that "[i]t was also our opinion that Mr. Story was not as cooperative as others, as far as taking work assignments." (Bullock's and Block's testimony about Story's expressed unwillingness to get his CDL is discussed below.) Summitt could not cite any examples of an uncooperative attitude, other than demurring when give Bloomington assignments, something, Summitt admitted, that many local drivers did.

One of Respondent's two largest local accounts was Kurfee's Coating Company. Summitt was asked on cross-examination, and he testified:

Q. At the time of this decision, Mr. Story was primarily doing local cartage work for Kurfee's, isn't that correct?

A. That's correct.

Q. And as far as you knew, he was doing a great job for Kurfees, isn't that correct?

A. That is correct.

Summitt was further asked about Story's performance prior to his alleged December indications to Block and Bullock that he would not get his CDL:

Q. Up to that point, in your mind, he was one of your best employees, wasn't he?

A. Yes. He had done a good job.

Summitt further acknowledged that he once made Story the "employee of the month" when Respondent had such a program in effect. Summitt further identified a glowing appraisal of Story's work by a customer; according to this record, no other employee ever received such a letter.

On cross-examination, Bullock acknowledged that Story's performance had received complaints neither from customers nor dispatchers. Bullock testified that the only reason that Story was transferred to over-the-road driving was that he had stated to Bullock in December that he would not get a CDL.

Block testified that twice during December he asked Story when he was going to get his CDL. According to Block, the first time Story replied "sometime"; the second time: "He basically said to me, sir, that I should probably hire a more professional driver in his place." Block testified that he reported these remarks to Summitt at some point before Story was assigned to over-the-road driving.

On cross-examination, Block acknowledged that there were still some drivers who had not gotten their CDLs; they had received written or verbal reprimands and they would be suspended if they did not have their CDLs by April 1, 1992. Block testified on March 20, 1992.

Story was hired in December 1988. He testified that he was first interviewed by Summitt who, during that interview, asked him what he thought of unions. Story testified that he told Summitt he had worked for a unionized company (that had gone out of business) and

I said I had no hard feelings for the Union 'cause the Union done me—I had a good life with the Union 'cause I had five kids and a wife. They had asthma, and the benefits was great. And I couldn't down the Union for no reason whatsoever.

Summitt did not dispute this testimony.

Story testified that he called Summitt after he got the January 10 letter. He asked to be retained on city runs, or Bloomington runs. Summitt refused. Story asked Summitt whether he could return to city driving later if he took the over-the-road assignment then; Summitt replied that he could, if business got better. Further according to Story, Summitt asked him if he had told Block that he would not get his CDL. Story told Summitt that he had not. Story testified that he told Summitt that he had told Block:

That I would take the CDL when I was waiting for Saturday, because if I took the CDL to the off time, I would lose money for paying for the CDL and work too, so I was anticipating this Saturday like Indiana had, so I wouldn't miss any work.

Summitt did not dispute this testimony.

Story testified that in December Block asked him when he was going to take the CDL examination and he replied that he did not know. Story flatly denied that he ever told Block that he would not get his CDL or that Respondent "should get a professional driver." Story denied that he told Bullock that he would not get his CDL; Story testified that he only told Bullock that he did not know when he would be getting his CDL.<sup>20</sup>

Summitt was asked on direct examination what effect Story's alleged statements to Block and Bullock had on his decision to reclassify Story to over-the-road driving; Summitt replied:

If Mr. Story was not going to have a CDL license, and we knew it at that point, that he was going to be a short-term employee, then we was going to put him

<sup>20</sup> Story further testified to an exchange with Block, in the presence of Houghton, on January 13. The effect of this testimony was that Block had not even know of Story's discharge at that point. Houghton failed to corroborate Story on the point, and I credit Block's denial.

in an over-the-road position where it would not affect the long-term city client [Kurfee's Coating Company]. Story testified that he did receive his CDL on January 21, and I do not believe the testimony of Block and Bullock that Story told them that he would never get the CDL, although, Story's admitted responses to Block and Bullock reasonably would have conveyed an impression that, in December, Story did not consider the matter to be urgent.

## 2. Reactions to the reclassifications

Story testified that he refused the over-the-road assignment, and accepted Respondent's single alternative of resignation, because all five of his children have asthma and both he and his wife need to be at home nights because one of them may have an attack. He did not testify that he told this to Summitt in their final interview (although he did testify that this was his thinking during his interview with Summitt).

Stump testified that when he got the January 10 letter, he went to see Summitt. Stump was asked, and he testified:

Q. Okay. Tell us what you said and what he said to you.

A. I asked Mr. Summitt what the letter was about, and he said it was necessary to reassign drivers, that LTL was being discontinued. I told Mr. Summitt that did not affect me, that I was hired to run Bloomingtons.

. . . I told Mr. Summitt that I didn't see why Rick Oster got to stay on [as a Bloomington driver]. . . . And Mr. Summitt replied to me that Rick Oster was doing him a fine job.

I asked Mr. Summitt how [Oster] could be doing a fine job when he's had two accidents that I know of, one of them was major, and I haven't had any. I told Mr. Summitt that the reason I took this job, in the first place, was that I would be home with my wife and kids. Mr. Summitt told me that, if I did not take the [over-the-road] job, that we had nothing further to discuss.

Summitt was asked about his exchange with Stump and he testified:

I said . . . that we desperately needed over-the-road drivers; and that the Bloomington and city drivers was all going to be affected by it. . . . And [Stump asked] how come [Oster] had been here such a shorter time than he has, and he was still on the run.

I told Ricky, "You know, it's your attitude, Rick. We've had you in on the—in the office. I know Ron Block has talked to you on numerous occasions about your attitude. It had just been like two weeks or three weeks prior to this that your name came up about having a problem with your attitude." Mr. Stump said . . . "I don't have a bad attitude problem. I have . . . a good attitude." And I said, "Ricky," I said, "I'm not going to argue with you."

Summitt did not deny that Stump alluded to Oster's accident record in the interview.

Carney testified that when he got the January 10 letter, he went to see Summitt and

Well, I had told him that there was no way I could run the road. I was married. I had two little kids, and my wife would not put up with me being gone for a week or two at a time with raising the kids like that.

I didn't hire on as a road driver and that I don't know why he's taking my Bloomington runs when the Bloomingtons are still there. Mr. Summitt replied, "well, that's—that's what we have for you." I told him that I was going to file for unemployment and left.

Summitt did not dispute any of this testimony.

Pasley did not confront Summitt about his transfer; he simply did not show up for work on January 13. Pasley was asked on direct examination why, and he testified:

Well, I hadn't been never drove on the road, and I didn't want to do it for that reason. And I didn't want to be away from my home at night from my family. And I wasn't hired in as a road driver.

Pasley denied that any dispatcher, or anyone else, ever told him that he had been too slow in his work.

Walker also did not report for over-the-road assignments. He was asked, and he testified:

Q. What were your reasons [for not taking the over-the-road assignment]?

A. I have two small girls. My wife works at nights. That's number one. And number two is I told the, uh, dispatchers before about talking to his own company road drivers. He'd taken away the detention time of loading or unloading where they were just paying the road drivers when the truck was moving and that was it. And number three. I didn't trust their equipment. It was prone to breakdowns.

Q. Did the Company know you didn't want to go over the road before January tenth?

A. Yeah, they knew it.

Q. How did they know that?

A. 'Cause I'd tell them all the time at the end of my day. "I ain't going. Don't even think about it. I won't do it. That's not my job."

JUDGE EVANS: Who'd you tell that to?

THE WITNESS: My dispatcher.

JUDGE EVANS: And who was that?

THE WITNESS: Fred Chinn.

Q. And did you tell him reasons why you didn't want to?

A. He knew. It was like I said. First of all, I'd tell him. I'd say, "Look. Believe it or not. I have a personal life, and you people ain't part of it. I come in. I do my job, and I go home. Leave me alone."

Walker testified that he made such statements to dispatchers when they attempted to get him to take over-the-road runs (such as Kansas City).

### 3. Drivers not selected for reclassification

Although Summitt testified that he did not consider length of service a factor in deciding which drivers to keep on local or Bloomington runs, Bullock was asked and testified:

Q. Did Mr. Summitt ever make any statements during those meetings about the factors upon which he was going to make his decisions regarding re-assignments?

THE WITNESS: Yes, if I can recall. It was judged on dedication, longevity and productivity.

Among the Bloomington drivers, Oster had the least seniority, or "longevity"; Oster had also had a major accident, neither Carney nor Stump had.

Story had more seniority than Thomas Harbin, Dennis Collins, Steven Satterfield, George Stevens, Bruce Arnold, and James Ross, all local drivers who were retained. Pasley had more seniority than Harbin, Collins, and Satterfield, and was hired on the same date as Stevens. Walker, who was hired for the second time on February 12, 1991, had more seniority than Harbin.

### I. OTHER EVIDENCE OF ANIMUS

Stanley Houghton testified that on January 22, 2 days before his termination, he rode to lunch with Benningfield in Benningfield's automobile. According to Houghton:

I'm not really sure how the topic of Mike Murphy came up, but [Benningfield] was telling me that they might have to hire Mike Murphy back, or they'd have to pay him severance pay. . . . Hank said he was the one probably tried to—he would start the Union before—last February, whenever the Union was. And I asked Hank "What would happen to Bestway if they became a Union?" He said they would drop the name Bestway Trucking and reopen as Bestway Services. I asked Hank, "Can you do that?" He said, "Yes." That's all that was said.

The complaint alleges these statements by Benningfield to be violative of Section 8(a)(1).

Benningfield denied this testimony; however, I found Houghton credible.

### III. ANALYSIS AND CONCLUSIONS

#### A. *Alleged Violations of Section 8(a)(1)*

##### 1. Summitt's conduct

###### a. *July 30 statements to Murphy*

The General Counsel argues that Summitt's calling Murphy into the office section of the dispatch area on July 30 "was calculated to elicit information regarding the extent of Murphy's union activities."<sup>21</sup> Murphy wanted to tell Summitt what was going on; that is why Murphy wrote the letter. In the circumstances, Murphy was hardly being sound-ed out, as were the employees in the cases cited by the General Counsel on the point. Murphy invited the inquiry, at least to the extent that I have found that an inquiry took place. (After all, Murphy, in his July 27 letter to Summitt, had told Summitt to "feel free" to talk to Murphy about the topics of his letter.) Accordingly, I shall recommend dismissal of this interrogation allegation of the complaint.

However, as I have found, in the same meeting Summitt told Murphy that he was not going to take the letter lightly;

<sup>21</sup> Br. p. 22.

that Murphy should not back him into a corner because Summitt might do things he otherwise would not do; that Murphy was headed for trouble; that Murphy had broken the law; that Summitt's attorney had advised him to prosecute Murphy; that Murphy was a "union guy" who was trying to start trouble at Bestway; that a lot of innocent people would lose their jobs over the effort that Murphy was making; that there would never be a union at Bestway; that employees who tried to organize a union would be dealt with accordingly; and that Murphy could take what Summitt was saying anyway he wanted to, meaning that, yes, Summitt was threatening Murphy.

In composing and sending (even by certified mail) his July 27 letter, Murphy was seeking better terms and conditions of employment for other employees, as well as for himself. Therefore, the actions of Murphy, which prompted this verbal reaction by Summitt, were statutorily protected concerted and union activities; and by Summitt's fusillade of multitudinous and multifarious threats against Murphy because of those protected activities, Respondent violated Section 8(a)(1) of the Act, as I find and conclude.

*b. August 14 statement to Carney*

As I have found, on August 14, when Carney returned from his run to Cincinnati, he discussed drop pay with Summitt. At the conclusion of the discussion, Carney asked Summitt if Bouchey would be reinstated. Summitt told Carney that Bouchey would not, and that as long as he was the owner there would "be no union at Bestway."

Such telling employees that organizational attempts a doomed to failure are expressions of futility that violate Section 8(a)(1), as I find and conclude that this one did.

*c. Late August statement to Stump*

As I have found, in late August, when Stump was asking for (nondemeaning) light duty, Summitt replied by pointing out that Stump had been mentioned in Murphy's July 27 letter. Summitt also noted that the other employees, Murphy and Bouchey, had been discharged. The point could not have been missed; Stump was asking for something, and Summitt was replying that he should not be asking for anything. The reason that Stump should not be asking for anything was his involvement, if only by reference, in the protected concerted activity of Murphy's July 27 letter. This was a threat in violation of Section 8(a)(1), as I find and conclude.

*d. January 6 statements to Stump and Carney*

As I have found, on January 6, when Stump and Summitt were in Block's office, and Carney was outside listening, Summitt told Stump that if he and Carney did not desist in their continuing union activities they would be "out on the street." This was another threat in violation of Section 8(a)(1), as I find and conclude.

2. Surveillance of the August 3 meeting by Torp

I have found that Murphy's testimony, standing alone, is insufficient to find that Torp was at Jerry's Restaurant on August 3, especially in view of Torp's credible denial that he was there.

However, I have further found credible Thomas' testimony that Summitt told him that Summitt had sent Torp to the res-

taurant on that date, and that he had learned who had attended the meeting. The two findings are not inconsistent: Summitt lied to Thomas about who told him who was present.<sup>22</sup> Perhaps it was Wyatt; perhaps it was another employee whom Summitt wanted to protect from possible re-terminations as an informant; I need not speculate.

The immediate issue before me is whether Summitt found out about the meeting by conducting surveillance; specifically, whether he actually sent Torp to surveil the August 3 meeting. I have found insufficient facts to conclude that Summitt did so; accordingly, I shall recommend dismissal of this allegation of the complaint.

3. Chinn's August 6 statement to Murphy

As I have found, on August 6, as he gave it to Murphy, Chinn told Murphy that the Big Rock assignment had come from Bullock (as Bullock acknowledges it did) and that it would give Murphy less time to write letters to Summitt.

Chinn's statement that the assignment would diminish Murphy's letter-writing time shows that Respondent's motive in giving the Big Rock assignment to Murphy was, at least in part, retaliatory; the assignment was made in retaliation for Murphy's protected concerted activity of writing the August 27 letter. However, assuming that the Big Rock assignment had been given to Murphy for perfectly legitimate considerations, Chinn's statement would give any reasonable employee the impression that the assignment had actually been made in retaliation for protected concerted, or union, activities. As such, the statement violated Section 8(a)(1), as I find and conclude.

4. Bullock's late August statement to Carney

As I have found, in late August, Carney complained to Bullock that other drivers were getting the Bloomington assignment but he was not. Bullock replied that if Carney were "more for the Company" and not "other activities," he would be getting the Bloomington assignments.

The logical alternative to being "for" a company is being "for" a union. And, in this case, there is no other permissible explanation for Bullock's comment than that Bullock knew, or at least suspected,<sup>23</sup> Carney of union or protected concerted activities. As such, Bullock's statement that Carney's "other" activities deprived him of the desired Bloomington runs was a statement that Carney's known or suspected involvement in union activities had deprived him of the more desired runs.

And, by the comment, Respondent further violated Section 8(a)(1), as I find and conclude.

5. Benningfield's January statement to Houghton

Of course, Benningfield's January statement to Houghton that Respondent would go out of business and reopen under another name if the employees selected the Union as their

<sup>22</sup> When Thomas, undoubtedly, later told Murphy about what Summitt had said on August 5, Murphy made a post hoc construction, possibly honestly, of his image of Torp's actually being at the restaurant on August 3.

<sup>23</sup> By this time Benningfield and Summitt had adopted Houghton's observation that Carney looked like a union steward; Bullock apparently had done so too.

collective-bargaining representative was a blatant violation of Section 8(a)(1), as I find and conclude.

#### B. Alleged Violations of Section 8(a)(3)

The law is that the General Counsel has initial burden of establishing a prima facie case sufficient to support an inference that union or other concerted activity that is protected by the Act was a motivating factor in a respondent's action that is alleged to constitute discrimination in violation of Section 8(a)(3) or (1). Once this is established, the burden shifts to a respondent to come forward with evidence that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. If a respondent goes forward with such evidence, the General Counsel "is further required to rebut the employer's asserted defense by demonstrating that the [alleged discrimination] would not have taken place in the absence of the employee's protected activities." *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). "For a finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied on, thereby leaving intact the inference of wrongful motive established by the General Counsel," as stated in *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enf. 705 F.2d 799 (6th Cir. 1982). If a pretext has been advanced, the inference of unlawful motivation is logically reinforced.<sup>24</sup>

To meet its burden under *Wright Line*, it is not enough for an employer to show that an employee, for whom the General Counsel has presented a prima facie case of discrimination, engaged in misconduct for which the employee *could have* been discharged or otherwise disciplined. The respondent must show that it *would have* discharged, or otherwise disciplined, the employee for the misconduct in question. *Hrasco Corp.*, 304 NLRB 729 (1991).

Therefore, the first inquiry is whether the record contains a prima facie case of discrimination, or credible evidence that a respondent knew or suspected that the alleged discriminatees had engaged in union or other protected concerted activity, and that a respondent's decisions to discharge or otherwise discipline the employees were motivated, at least in part, by animus toward that activity. *Chelsea Homes*, 298 NLRB 813 (1990). If such a prima facie case is held to have been established, an inquiry will be made whether the defense has been rebutted, either by showing that it is without factual basis or by a showing that it is pretextual.

The above findings of independent violations of Section 8(a)(1) clearly demonstrate that the Respondent (here) possesses a virulent animus toward employees who would exercise their rights guaranteed by Section 7 of the Act. Other factors and admissions demonstrate this animus as well, including those contained in the above-credited testimony by Thomas.

Knowledge of the union sympathies is also clear. The May and June meetings with Summitt, as well as Murphy's July

<sup>24</sup> *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

27 letter, established actual knowledge for Murphy, Bouchey, and Stump. In August, Houghton ascribed a union steward's looks (whatever a union steward looks like) to Carney; Benningfield adopted Houghton's ascription immediately, and Summitt did so later. Benningfield also identified Carney as a "troublemaker," a common shibboleth that antiunion employers use for actively prounion employees.<sup>25</sup> As Thomas testified, McDaniel was identified to Murphy (by someone) as being at the initial organizational meeting on August 3. In the preelection and postelection reviews conducted by Summitt, Thomas, Benningfield, and Houghton, Story, Pasley, and Walker were identified as probable, or certain, prounion votes if another election were to be held after the anniversary of the February 23, 1991 Board election.

All of which is to say that the General Counsel has presented a prima facie case on all eight alleged discriminatees, and Respondent's defense on each must be examined.

#### 1. Warning notice to Murphy

Benningfield gave Murphy permission to use the office copier; he even showed Murphy how to use it. However, Summitt appended a warning notice to his reply to Murphy's July 27 letter because Murphy had used the machine without permission and because he had supposedly disturbed the office personnel, neither of which factor Respondent has sought to prove. In the circumstances, it can only be concluded that the warning notice was created, at least in part, in retaliation for the protected concerted activity of Murphy's sending the (certified) letter to Summitt, and that Respondent has not met its burden under *Wright Line* of coming forward with evidence that it would have issued the warning notice even absent Murphy's protected concerted activity.

#### 2. Assignment of the Big Rock run to Murphy

The Big Rock run was a grueling chore; whether there were longer or more grueling assignments available is irrelevant. Respondent had 75 over-the-road drivers, but Murphy was chosen for this run on August 6. Bullock selected Murphy; when asked why, Bullock gave the long, convoluted nonanswer that is quoted above. Conspicuous in its absence from Bullock's circumlocution was any statement that, specifically on August 7, there was no over-the-road driver available for the Big Rock run, and Respondent has not attempted to defend the assignment on that basis. Moreover, Chinn told Murphy that the Big Rock assignment would afford him a diminished opportunity to write further letters to Summitt, a virtual admission that Murphy's protected activity of sending the July 27 letter was part, if not all, of the reason for the assignment. Therefore, Respondent has not met its burden of going forward with a defense under *Wright Line*, and I find and conclude that Respondent violated Section 8(a)(3) and (1) of the Act by giving the Big Rock assignment to Murphy, as alleged.

#### 3. Discharge of Murphy

Summitt's July 30 fulminations, as described by Murphy, and Summitt's August 7 imperative to Bullock to "fire all three of the sons of bitches," as described by Thomas, amply demonstrate specific animus toward Murphy's (and

<sup>25</sup> *Perth Amboy Hospital*, 279 NLRB 42 (1986).

Boucheys and McDaniel's) activities that are protected by the Act. Additionally, I have credited Thomas' testimony that on August 5 Summitt said that Respondent would write up Murphy before discharging him. But, even discounting Thomas's testimony, Bullock's August 6 writeup of Murphy shows that Respondent was out to get Murphy on any pretext that it could manufacture, and that documentation was part of the process. Bullock testified that driver writeups are used for serious offenses; however, the August 6 writeup was issued only because Murphy "was showing his dissatisfaction." Murphy did not curse Bullock, other drivers did; Murphy did not even argue with him. But Murphy got written up. This was an exercise in case-building in its rawest form.

Then Murphy missed the Big Rock run. Murphy's father may have been ill early in the evening of August 6 (and Murphy's bizarre description of his father's malady and its etiology may even have been true). But rather than call in to night dispatcher Robertson (as McDaniel did when he had early evening car problems), Murphy called Thomas, as Robertson described. Murphy and Thomas did not, at that point, concoct the excuse (Robertson's permission) for Murphy's absence that was asserted at trial; if they had, Murphy would have at least mentioned it in his (albeit brief) exchanges with Summitt and Bullock on the morning of August 7.

The only scenario that makes sense, given my above-credibility resolutions and the few indisputable facts, is: (1) as Bullock testified, someone (a "young man") called in early on August 7 and explained Murphy's absence by stating that Murphy's father had been taken to the hospital; (2) Then Murphy called in and, without asking why they were asking, replied to Chinn and Bullock that his father had not gone to the hospital after all. (The apparent reason that Murphy did not ask why they asked was because Murphy knew of the preceding young man's call to Bullock, and Murphy further knew that he had not told Robertson the night before that his father was all right and that Murphy would be able to take the Big Rock run.); (3) When Bullock heard from Murphy that, contrary to what the "young man" had told him, Murphy had not taken his father to the hospital, Bullock put Murphy on hold and consulted with Summitt; (4) Summitt told Bullock to fire Murphy; (5) Bullock got back on the telephone and told Murphy, as undisputed, "I was told to fire you." (The reason that it is undisputed is because, at this most critical point, Bullock again invoked his tactic of claiming memory loss.)

The law is that, even if an employer seeks to discharge an employee for violative considerations, if the employee commits an offense for which the employee would have been fired even absent his protected activities, a discharge is non-violative if the employer discharges him for that conduct.<sup>26</sup> Murphy provided Respondent with a reason that some employers would discharge some employees on the spot, but the issue is whether this Respondent would have done so absent Murphy's protected activities.<sup>27</sup> I conclude that it would not have done so.

If the single missing of a delivery was the reason that Murphy was discharged, it was a Bestway first. As Williams testified, when drivers do not show up a few times, and miss

deliveries, "They get wrote up. . . . Then, after a certain amount of times that they're wrote up, they're talked to or let go or whatever."

Murphy was not talked to; he was not even written up before the discharge; he was fired outright, without a chance to explain. Perhaps Respondent would have accepted Murphy's explanation;<sup>28</sup> perhaps not.<sup>29</sup> But the evidence shows that other employees were, at least, listened to.<sup>30</sup>

Bullock testified that he did not give Murphy a chance to explain his absence because, "I think, from the past history and the attitude that he had shown, I could plainly see in my mind what his attitude was."

That is, Murphy's attitude would have prevented consideration of any valid reason that Murphy might have had for missing the Big Rock. The fact that Murphy may have had no acceptable reason was inconsequential; Respondent was not going to listen to it, anyway. Of course, by Murphy's "attitude," Bullock was not referring to anything other than his protected concerted, and union, activities. Murphy's asking from Nashville and Elizabethtown whether he could claim drop pay, which is the only other conduct Respondent appears to have noticed, ordinarily would not be considered unusual; it is precisely the sort of thing that one would expect of a truckdriver.

Respondent went to great lengths (disingenuously, I believe) to insist that Bullock made the discharge decision, not Summitt. But when Bullock was asked the first time why Murphy was discharged, Bullock gave an expansive answer which did not even mention the Big Rock run or Murphy's missing it. Instead, Bullock answered that the "straw that broke the camel's back" was the incident covered in the August 6 driver writeup which, itself, was a raw exercise in case-building, as I have found above.

Bullock did not make the decision to discharge Murphy; Summitt did. (There is no other explanation for Bullock's keeping Murphy on hold for 5 minutes other than that Bullock was conferring with Summitt.) Even by time of trial, Bullock did not seem to have the story straight. (There is no other explanation for Bullock's citing, only, the August 6 telephone calls from Murphy the first time he was asked at trial for the reason for Murphy's discharge.) If Bullock had made the decision to discharge Murphy, and, if Murphy's avoidance of the Big Rock run really had anything to do with the discharge (other than to serve as a pretext), Bullock would not have omitted it on his first try to explain the discharge. And Bullock would have cited that reason, and only that reason in that final exercise in creative documentation, the December 7 driver writeup. Instead, Bullock there indulged in amorphous considerations such as "Lack of dedication to Bestway's interest" to document why Murphy was discharged without inquiry, without warning, without suspen-

<sup>28</sup> Respondent, ultimately, accepted McDaniel's explanation of "car trouble," even without documentation. McDaniel's taking care of his car was hardly more sympathetic than Murphy's taking care of his father (if that's what happened).

<sup>29</sup> Bullock may have been as suspicious as I about Murphy's tale of what had happened the night before; however, Bullock had not heard the tale at the time he hired Murphy.

<sup>30</sup> Driver Summers was talked to (and presumably listened to) many times; Lupo was issued six writeups while he was on indefinite probation.

<sup>26</sup> See *A & T Mfg. Co.*, 276 NLRB 1183 (1985), as it discusses *Wright Line* and cites *Klate Holt Co.*, 161 NLRB 1606, 1612 (1966).

<sup>27</sup> *Hrasco Corp.*, supra.

sion, or, in other words, without any of the indulgences that were shown to other employees who missed deliveries.<sup>31</sup>

Murphy was not discharged because he did not perform the (discriminatorily assigned) Big Rock run. Again, if the Big Rock incident was anything other than the pretext that Summitt invoked, it would have been cited to Murphy, before Bullock put him on hold. The only logical reason that Bullock would not have mentioned the "might get sick" retort to Murphy as he was firing Murphy is that Bullock did not yet know about it.<sup>32</sup> Summitt did testify that he mentioned the "might get sick" remark to Murphy when Murphy got him on the telephone later in the morning of August 7. But that call did come later in the morning, by which time Summitt could have learned of the retort from Chinn, and, by then, Murphy's discharge had already been implemented.

However, I do not believe that Summitt knew about the "might get sick" remark until after his telephone conversation with Murphy; Summitt fabricated his account of what he told Murphy in that conversation. Summitt testified that he told Murphy, "We never received a phone call later that night." The information about what calls Respondent had and had not received the previous evening could only have come from Robertson. The apparently truthful Robertson testified that he had no contact with the terminal until he got to work that afternoon. And, if Summitt had talked to Robertson before he formed "my opinion that he should be terminated," Robertson most likely would have told Summitt that Murphy had, in fact, called in, but he spoke only to Thomas; and, when Robertson did so, he further would have told Summitt that Murphy had reported that he could not take the Big Rock load.<sup>33</sup>

In this state of the record, it must be concluded that Respondent has failed to come forward with evidence that it would have discharged Murphy even absent his protected activities. To the extent it can be said that Respondent has attempted to come forward with such evidence, the General Counsel has shown that Respondent's asserted reason for the discharge of Murphy was a pretext.

I therefore find and conclude that, by the discharge of Murphy on August 7, Respondent violated Section 8(a)(3) and (1) of the Act.

#### 4. Discharge of McDaniel

Respondent offers no reason for discharging McDaniel; therefore, under *Wright Line*, the General Counsel's prima facie case on McDaniel has not been met, and I therefore find and conclude that, by the discharge of McDaniel on August 7, Respondent violated Section 8(a)(3) and (1) of the Act.

<sup>31</sup> As Williams admitted, some of those drivers missed their runs without so much as calling in. Even assuming any degree of urgency to the Big Rock run, Murphy's conduct left Respondent in no worse position than had the conduct of the other nonappearing drivers.

<sup>32</sup> I do not believe Bullock's timing of the discharge memorandum at 7:50 a.m.; Murphy credibly testified that his call was much later in the morning, and, as I have found, Bullock did not know about the "might get sick" retort then.

<sup>33</sup> And, at that point, Murphy's circumstances would have been no different from McDaniel's, except that McDaniel called in early enough that Robertson could get another driver to "cover" for him.

#### 5. Discharge of Bouchey

Respondent contends that Bouchey was discharged because he refused the Lexington run. Rather than testify about what Bouchey did or said that constituted a refusal to accept the Lexington assignment, Bullock employed his tactic of memory-failure.<sup>34</sup> As a result, Bouchey's testimony stands uncontradicted, and it must be concluded that he did not refuse the Lexington assignment.

Therefore, Respondent has not met its burden under *Wright Line*, and I find and conclude that, by the discharge of Bouchey on August 7, Respondent violated Section 8(a)(3) and (1) of the Act.

#### 6. Assignments to Carney and Bouchey

Both Carney and Bouchey did not want over-the-road runs, and they had both previously told Summitt why. The General Counsel has failed to prove that, by word or deed, Respondent had guaranteed the Bloomington drivers that they would never be assigned over-the-road runs. However, it is admitted that Summitt told Bouchey, Stump, and Murphy, in their June meeting, that Respondent would not assign Bloomington drivers to longer runs during the forthcoming Bloomington shutdown if it could be avoided. Respondent gave Bouchey and Carney over-the-road assignments on revelation that they had been at the August 3 organizational meeting, the meeting cited as late as August 10, when Summitt fired Thomas, as the specific object of Respondent's animus.

Respondent offered no explanation for the assignments to these drivers for whom a prima facie case has been presented.<sup>35</sup> Respondent offered generalized testimony that it was short of over-the-road drivers at the time, but Respondent offered no testimony that none of its 75 over-the-road drivers was available when Carney and Bouchey were given their over-the-road assignments.<sup>36</sup> By its failure to offer such evidence, if any such evidence existed, which I doubt, Respondent has failed to meet its burden of going forward under *Wright Line*.

Accordingly, I find and conclude that by making the over-the-road assignments to Bouchey and Carney on August 7 and 12, respectively, Respondent violated Section 8(a)(3) and (1) of the Act.

#### 7. The January 10, 1992 reclassifications

The allegation is that Respondent reclassified Carney, Stump, Story, Pasley, and Walker because of their known or suspected union sympathies, and that the reclassifications caused the constructive discharge of each. As clearly stated

<sup>34</sup> Even if a refusal of the Lexington run by Bouchey could otherwise be divined, Bouchey suffered discrimination; R. Exh. 18 shows that, on August 16, or 9 days later, driver Hibbs was given the opportunity to take an unwanted assignment or resign. (Also note what Walker Told dispatch when they asked him to take long-distance loads, as quoted above.)

<sup>35</sup> The facts that (the nonunion) driver Oster got another long run on another day, a factor upon which Respondent appears to rely, is irrelevant.

<sup>36</sup> The Lexington run given to Bouchey was an overnight trip; even if he had stopped in Jeffersonville on the night of August 7, there is no suggestion that Bouchey would have been returned to Jeffersonville any faster than Blaho did on August 9.

in *Manufacturing Services*, 295 NLRB 254 (1989), the test for determining a constructive discharge is:

First, the burdens imposed upon the employee must cause, and be intended to cause, a change in working conditions so difficult *or* unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's activities. [Emphasis in original.]

Respondent does not dispute that over-the-road driving is more difficult *and* unpleasant than local or Bloomington driving; the employees are required drive for extended hours (to places like Big Rock, Virginia), and they are required to stay away from home many nights in a row and sleep in the trucks. Thus, the only issue is whether the burdens were imposed because of the employees' union activities or sympathies. I conclude that they were.

Immediately after the February 23 Board election, Summitt told Thomas that the nine drivers who had voted for the Union would "have their day." That day came on January 10. In a recrudescence of the degree of animus that caused the discharges of Murphy, McDaniel and Bouchey on August 7, Respondent reclassified to over-the-road driving positions the likely "yes" voters who would otherwise have remained for the second Board election that Murphy had forecasted in his July 27 letter. Any doubt that Respondent sought terminations, not just more over-the-road drivers, is destroyed by Summitt's telling Stump, when Stump pointed out that the cessation of the LTL business should not affect Bloomington drivers such as he, that Stump had a bad attitude, and it was really for that reason that Respondent was reclassifying him.

Summitt gave his alternative reasons for reclassifying drivers at trial, as well: According to Summitt, Carney was a complainer; Stump had a bad "overall" attitude; Walker was uncooperative, had received customer complaints, and was looking for another job; Pasley was too slow; and Story had said that he would not get his CDL. All of these reasons were, as I find, false; but their assertion proves that Summitt's intent was to cause terminations, not get more over-the-road drivers; Summitt did not want such purportedly derelict drivers in his employ. Any other conclusion leaves only the illogic that the supposedly derelict drivers were acceptable for over-the-road jobs, but not local or Bloomington assignments. (It is unlikely that Summitt would share that line of reasoning with Respondent's over-the-road customers.)

If Respondent had a better local driver than Story, there is no evidence of it in the record. Story had gotten a letter of commendation from a customer; had once been made "Employee of the Month," and Summitt admitted that Story had done a "great" job for one of Respondent's two principal customers.

Although he was apparently unenthusiastic about the process, Story did not tell Block or Bullock that he would not get his CDL by the deadline of April 1. But, even if Story had said that he would not get his CDL, other drivers had failed to get their CDL's even at time of hearing, which was 2 weeks before the deadline. Those other drivers had gotten verbal and written warnings from Block; Respondent suggests no reason why Story would not have been given the same chance. Even as he was being terminated, Story dis-

puted Summitt's claim that he had stated (to Block and Bullock) that he would never get his CDL; Respondent suggests no reason why, at least then, Story was not afforded the second chance that other procrastinating drivers received. Story's attitude about his CDL was not the reason that his employment was put to the sword; the sole reason, as I find and conclude, was his forecasted "yes" vote in the feared 1992 NLRB election.<sup>37</sup>

Respondent's trial tactic for answering the prima facie cases on Stump, Carney, Walker, and Pasley was this: Summitt would claim that he made the decisions on the recommendations of other supervisors, principally Bullock; then Respondent would not ask the other supervisors what they recommended, and Bullock would claim that he did not remember anything; this would leave everybody impervious to cross-examination. This is not how a charged employer's burden under *Wright Line* is met, and the violations were established when Respondent rested without more. However, I will note that: the falsity of Respondent's stated premise for reclassifying the drivers is demonstrated by its nonexplanation for simply giving Hackley and Underwood the Bloomington jobs of Carney and Stump;<sup>38</sup> and the written statement that the local cartage business was being discontinued was an outright lie. Moreover, Carney was "especially" (Summitt's word) cooperative during the Bloomington shutdown and, afterwards, taking several long-distance assignments when others were sent on local drives (a fact about which Carney complained to Bullock who, in effect, told Carney that his union activities were the cause for the assignments); there was no testimony from "everybody in dispatch" that Stump had a bad attitude—nobody in dispatch testified to such;<sup>39</sup> if Pasley had really been slow, it seems like someone would have mentioned it to him;<sup>40</sup> and if Walker was "uncooperative" because he would not haul hazardous materials without proper paperwork, more truck-drivers should be thusly "uncooperative."

Therefore, the 8(a)(3) constructive discharge allegations have been proved.

#### CONCLUSIONS OF LAW

By the following acts and conduct, Respondent Bestway Trucking, Inc. has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

(a) Respondent violated Section 8(a)(1) of the Act:

(1) By Summitt, on July 30 and January 6, threatening an employee with discharge and unspecified reprisals because he had engaged in union or protected concerted activities.

(2) By Summitt, on July 30 and January 6, threatening an employee that other employees would lose their jobs because they engaged in union or protected concerted activities.

<sup>37</sup> As well as the specific predictions by Thomas and Houghton, Summitt likely remembered Story's answer in his preemployment interrogation of Story.

<sup>38</sup> The only Bloomington driver left unaffected by the January 10 purge was the crash-veteran Oster (who was also the only Bloomington driver who did not attend the August 5 organizational meeting).

<sup>39</sup> Obviously, the attitude of Stump that caused his reclassification was that reflected in Murphy's letter, as Summitt's first threat to Stump discloses.

<sup>40</sup> Assuming that Pasley was slow, he still had to be faster than Ron Standiford who could not even drive a semitractor-trailer.

(3) By Summitt, on August 14 and January 6, telling an employee that it would be futile for Respondent's employees to engage in union or protected concerted activities.

(4) By Summitt, in late August, telling an employee that other employees had been discharged because of their union or protected concerted activities.

(5) By Chinn on August 6, and by Bullock in late August, telling employees that they had received undesirable assignments because of their union or protected concerted activities.

(b) Respondent violated Section 8(a)(3) and (1) of the Act by:

(1) Issuing a warning notice to Murphy on July 29.

(2) Imposing more onerous and rigorous terms and conditions of employment on Murphy and Bouchey on August 6 and 7, respectively.

(3) Discharging Murphy, Bouchey, and McDaniel on August 7.

(4) Imposing more onerous and rigorous terms and conditions of employment on Carney on August 12 and 13.

(5) Constructively discharging Carney, Stump, Story, Pasley, and Walker on January 10.

#### THE REMEDY

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

The Respondent, having discriminatorily discharged employees Douglas McDaniel, John Bouchey, Michael R. Murphy, Edward Carney, Jimmie Story, Richard W. Stump, Donald Walker, and Elijah Pasley, must offer them reinstatement (except McDaniel whom Respondent has previously reinstated) and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>41</sup>

#### ORDER

The Respondent, Bestway Trucking, Inc., Jeffersonville, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge or other discrimination because they have become or remained members of General Drivers, Warehousemen and Helpers, Local Union No. 89, a/w the International Brotherhood of Teamsters, AFL-CIO (the Union) or because they have given assistance or support to that labor organization.

(b) Threatening any employee that other employees would lose their jobs if they engaged in union or protected concerted activities.

(c) Telling any employee that it would be futile for Respondent's employees to engage in union or protected concerted activities.

(d) Telling any employee that other employees had been discharged because of their union or protected concerted activities.

(e) Telling employees that they had received undesirable assignments because of their union or protected concerted activities.

(f) Issuing warning notices to employees because they have become or remained members of the Union, or because they have given assistance or support to it, or because they are in sympathy with it.

(g) Imposing more onerous and rigorous terms and conditions of employment on employees because they have become or remained members of the Union, or because they have given assistance or support to it, or because they are in sympathy with it.

(h) Discharging employees, or constructively discharging employees, because they have become or remained members of the Union or because they have given assistance or support to it or because they are in sympathy with it.

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

(a) Offer Douglas McDaniel, John Bouchey, Michael R. Murphy, Edward Carney, Jimmie Story, Richard W. Stump, Donald Walker, and Elijah Pasley immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions of employment, without prejudice to their seniority or any other rights or privileges that they previously enjoyed, and make them whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination against them, all in the manner set forth in the remedy section of this decision.

(b) Remove from its files any reference to the unlawful discharges of Douglas McDaniel, John Bouchey, Michael R. Murphy, Edward Carney, Jimmie Story, Richard W. Stump, Donald Walker, and Elijah Pasley, and notify them, in writing, that this has been done and that their discharges will not be used against them in any way.

(c) Remove from its files any reference to the unlawful written warning notice issued to Michael R. Murphy, and notify him, in writing, that this has been done and that the warning notice will not be used against him in any way.

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

(e) Post at its facility in Jeffersonville, Indiana, copies of the attached notice marked "Appendix."<sup>42</sup> Copies of the notice, on forms provided by the Regional Director for Region 9, 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 employ-

<sup>41</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>42</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ees 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.

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

#### APPENDIX

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT threaten you with discharge or other discrimination because you have become or remained a member of General Drivers, Warehousemen and Helpers, Local Union No. 89, a/w the International Brotherhood of Teamsters, AFL-CIO (the Union), or because you have given assistance or support to that labor organization, or because you are in sympathy with it.

WE WILL NOT threaten you that other employees would lose their jobs if you engaged in union or protected concerted activities.

WE WILL NOT tell you that it would be futile for you to engage in union or protected concerted activities.

WE WILL NOT tell you that other employees have been discharged because of their union or protected concerted activities.

WE WILL NOT tell you that you have received undesirable assignments because of your union or protected concerted activities.

WE WILL NOT issue warning notices to you because you have become or remained a member of the Union, or given assistance or support to it, or are in sympathy with it.

WE WILL NOT impose more onerous and rigorous terms and conditions of employment on you because you have become or remained a member of the Union, or given assistance or support to it, or are in sympathy with it.

WE WILL NOT discharge you, or constructively discharge you (that is, force you to quit), because you have become or remained a member of the Union, or because you have given assistance or support to it, or because you are in sympathy with it.

WE WILL, to the extent that we have not already done so, offer to Douglas McDaniel, John Bouchey, Michael R. Murphy, Edward Carney, Jimmie Story, Richard W. Stump, Donald Walker, and Elijah Pasley immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions of employment, without prejudice to their seniority or any other rights or privileges that they previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits that they may have suffered as a result of the discrimination against them.

WE WILL remove from our files any reference to the unlawful discharges of Douglas McDaniel, John Bouchey, Michael R. Murphy, Edward Carney, Jimmie Story, Richard W. Stump, Donald Walker and Elijah Pasley, and WE WILL notify them, in writing, that this has been done and that their discharges will not be used against them in any way.

WE WILL remove from our files any reference to the unlawful written warning notice issued to Michael R. Murphy, and WE WILL notify him, in writing, that this has been done and that the warning notice will not be used against him in any way.

BESTWAY TRUCKING, INC.