S & F Enterprises, Inc., d/b/a Lucky 7 Limousine *and* United Steelworkers of America, AFL–CIO, CLC. Cases 28–CA–10702, 28–CA–10702–2, 28–CA–10767–2, and 28–CA–10894

September 30, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On March 11, 1993, Administrative Law Judge Timothy D. Nelson issued the attached decision. The General Counsel, the Charging Party, and the Respondent filed exceptions and supporting and answering briefs, and the General Counsel and Charging Party also filed reply briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings as modified,[1] and conclusions[2] and to adopt the recommended Order as modified and set forth in full below.[3]

1. We agree with the judge's finding that the strike was an economic strike prior to the Respondent's unlawful withdrawal of recognition in late January 1991. Contrary to the judge, however, we find it necessary to decide whether the withdrawal of recognition converted the strike into an unfair labor practice strike because under Board precedent unfair labor practice strikers are entitled to special remedial provisions. See *Beaird Industries*, 311 NLRB 768 (1993).

An economic strike is converted into an unfair labor practice strike when an employer's unfair labor practices prolong the strike. *C-Line Express*, 292 NLRB 638 (1989). The Board has found that an unlawful withdrawal of recognition from a union prolongs a strike because it deprives the employees of their bargaining representative, thereby precluding the possibility of reaching agreement on a contract and impeding the settlement of the strike. *Rose Printing Co*., 289 NLRB 252, 253 (1988); *Valley Kitchens*, 287 NLRB 686, 690 (1987); and *Brooks & Perkins, Inc*., 282 NLRB 976, 981 (1987). Here, the Respondent unlawfully withdrew recognition of the Union during the last week of January. Based on the above-cited precedent, we find that the Respondent's withdrawal of recognition converted the economic strike to an unfair labor practice strike.

We accordingly shall order that all striking employees who were not permanently replaced prior to the date of the unlawful withdrawal of recognition be reinstated, on their unconditional request, to their former jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed, discharging, if necessary, any replacements hired after the unlawful withdrawal of recognition; and that the Respondent make such strikers whole for any loss of earnings and other benefits resulting from its failure to reinstate them within 5 days of their unconditional request, with backpay and interest, to be computed in the manner prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[4] Such employees for whom employment is not immediately available shall be placed on a preferential hiring list for employment as positions become available and before other persons are hired for such work. Priority for placement on such list is to be determined by seniority or some other nondiscriminatory test.

2. The judge credited employee Dial's testimony that on October 10, 1990, he overheard a conversation between Manager Brooks and employee Wardle in

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

The General Counsel also contends that remarks by the judge about the General Counsel's case evidence the existence of bias. We have carefully reviewed the record and the judge's comments and find no merit in the contention.

The General Counsel and the Union except to the judge's finding that the Respondent did not unlawfully fail to reinstate driver Jeff Moline. The judge credited Manager Edward Brooks' testimony that he repeatedly told Moline to contact Owner Willard Booth about reinstatement and Moline did not do so. Alternatively, the judge found that even under Moline's version of the events, Moline had abandoned his efforts to seek reinstatement before the Respondent's intentions were adequately tested. In adopting the dismissal of this allegation, we rely on Brooks' credited testimony and find it unnecessary to pass on the judge's alternative finding.

The General Counsel also excepts to the judge's failure to address the allegation that on December 29, 1990, Brooks violated Sec. 8(a)(1) of the Act by stating that he would never let the Union in. The record fails to show who made the alleged threat. Consequently, we find that the General Counsel failed to sustain his burden of establishing that an agent of the Respondent made the alleged threat.

[2] In adopting the judge's dismissal of the allegations that Supervisor Bobby Owens interfered with the protected concerted activities of employee Elias Stassinos by pushing him and that alleged Supervisor Janie Molandes unlawfully solicited the circulation of the decertification petition, Member Devaney notes that no exceptions were filed to these dismissals.

[3] We shall modify the judge's recommended Order to conform to the violations found.

[4] The Board has found that the 5-day period is a reasonable accommodation between the interests of the employees in returning to work as quickly as possible and the employer's need to effectuate that return in an orderly manner. *Drug Package Co*., 228 NLRB 108, 113 (1977), modified on other grounds 507 F.2d 1340 (8th Cir. 1978). Accordingly, if the Respondent here ignores or rejects, or has already rejected, any unconditional offer to return to work, unduly delays its response to such an offer, or attaches unlawful conditions to its offer of reinstatement, the 5-day period serves no useful purpose and backpay will commence as of the unconditional offer to return to work. *Newport News Shipbuilding*, 236 NLRB 1637, 1638 (1978), enfd. 602 F.2d 73 (4th Cir. 1979).

which Brooks said, ''I heard you joined the Union.'' The judge did not find a creation of the impression of surveillance violation based on this conversation because he found the conversation occurred before the 10(b) period commenced.

We find merit to the General Counsel's exception. The judge, based on a March 25, 1991 charge, found the 10(b) period commenced October 25, 1990. The correct date for the commencement of the 10(b) period is September 25, 1990.

Thus, contrary to the judge's finding, the incident occurred within the 10(b) period, extending back from the March 25, 1991 charge, which contains an impression of surveillance allegation.

Employees could reasonably assume from Brooks' remark that their union activity was under surveillance. We therefore agree with the General Counsel that Brooks' statement to Wardle created an impression of surveillance in violation of Section 8(a)(1). *Bert Wolfe Ford*, 239 NLRB 555, 564 (1978).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, S & F Enterprises, Inc., d/b/a Lucky 7 Limousine, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Creating the impression of surveillance of employees' union activities.

(b) Refusing to recognize or bargain with United Steelworkers of America, AFL–CIO, CLC as the exclusive representative of its nonsupervisory drivers, or from refusing to furnish information to the Union which is relevant and necessary to the Union's performance of its representative function.

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

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

(a) On request, meet and bargain with the Union as the exclusive representative of its drivers concerning their terms and conditions of employment and, if an understanding is reached, embody it in a signed agreement.

(b) On request, furnish the Union information relevant and necessary to the Union's performance of its representative function.

(c) Reinstate, on request, striking employees who were not permanently replaced on the date of the Respondent's unlawful withdrawal of recognition to their former jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging, if necessary, any replacements hired after the date of the Respondent's unlawful withdrawal of recognition, and make such employees whole for any loss of earnings or other benefits resulting from its failure to reinstate them on unconditional request in the manner set forth in the remedy section of the judge's decision.

(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 Industrial Road headquarters in Las Vegas, and at its ticket counter at McCarran International Airport copies of the attached notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

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

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

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 create the impression of surveillance of your union activities.

WE WILL NOT refuse to recognize or bargain with the United Steelworkers of America, AFL–CIO, CLC as the exclusive representative of our nonsupervisory drivers.

WE WILL NOT refuse to furnish to the Union information which is relevant and necessary to the Union's performance of its representative function.

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

WE WILL, on request, meet and bargain with the Union as the exclusive representative of our drivers concerning your terms and conditions of employment, and, if an understanding is reached, embody it in a signed agreement.

WE WILL, on request, furnish to the Union information which is relevant and necessary to the Union's performance of its representative function.

WE WILL reinstate, on request, striking employees who were not permanently replaced on the date of our unlawful withdrawal of recognition to their former jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed, discharging, if necessary, any replacements hired after the date of our unlawful withdrawal of recognition, and make such employees whole for any loss of earnings or other benefits resulting from our failure to reinstate them on unconditional request, with interest.

Our employees are free to engage in any of the rights guaranteed them by Section 7 of the National Labor Relations Act.

S & F ENTERPRISES, INC., D/B/A LUCKY 7 LIMOUSINE

Cornele A. Overstreet and *Mitchell S. Rubin, Esqs.*, for the General Counsel.

Norman H. Kirshman, Esq. and *Robert Zentz (Kirshman & Harris)*, of Las Vegas, Nevada, for the Respondent.

Martha D. Macomber, Esq. (Sabbath & Assocates), of Las Vegas, Nevada, for the Charging Party.

DECISION

STATEMENT OF THE CASE

I. PRELIMINARY ISSUES

A. *Overview*

TIMOTHY D. NELSON, Administrative Law Judge. These are consolidated unfair labor practice prosecutions now alleging that S & F Enterprises, Inc., d/b/a Lucky 7 Limousine (Lucky 7) violated Section 8(a)(1), (3), and (5) of the Act in a host of ways. They are brought by the Board's General Counsel, acting through the Regional Director for Region 28, who issued his ultimate and most comprehensive catalogue of alleged violations in an ''Amended Consolidated Complaint'' dated May 29, 1991, after having issued earlier complaints on March 12 and April 1. I heard the merits of the May 29 complaint only shortly after it issued, during 7 days of trial proceedings conducted between June 11 and 19, 1991, in Las Vegas, Nevada.

The cases arose within this overall setting: On August 9, 1990, United Steelworkers of America (the Union) started negotiations with Lucky 7 for a first labor agreement to cover the Company's drivers; the parties held five more bargaining sessions through January 8, 1991. Throughout their bargaining, Lucky 7 pleaded ''inability to pay'' when confronted with demands that it believed would result in increased costs. On November 7, the Union began a strike against Lucky 7 and certain other Las Vegas employers from whom it was also seeking first agreements, in separate negotiations. At the conclusion of their January 8 bargaining session, the Union and Lucky 7 were still at odds over important issues, prominently, wage and benefit provisions, binding third-party arbitration of grievances, and standards for discipline and discharge. In late January 1991, Lucky 7 effectively refused to deal further with the Union, first indicating this to the Union within days after a nonstriking Lucky 7 driver filed a petition for decertification election (the RD petition) on January 22, seeking a vote under Board auspices to determine whether the Union would remain the drivers' exclusive collective-bargaining representative. On April 3, the Regional Director for Region 28 dismissed the petition, based on his findings, evidenced in the two complaints he had by then issued, that Lucky 7 had committed various unfair labor practices which precluded the holding of an election unless and until those alleged violations were remedied.

As I describe below, the May 29 complaint realleged all previously alleged violations, and added many more in a single, integrated pleading; it was trimmed in some respects by post-May 29 developments,[1] but it was expanded to a greater net bulk as a consequence of additional amendments made by the General Counsel's trial attorneys[2] during the trial. Thus, the May 29 complaint alleged that Lucky 7's agents made unlawful threats or promises or otherwise coerced employees on seemingly no fewer than 36 separate occasions

[1] Here I record one trimming development, which explains why the caption to this decision includes only four of the five charge case numbers incorporated in the May 29 complaint: On June 11, apparently shortly before I opened the trial record at 9:18 a.m., the Regional Director issued an ''Order Severing Case 28–CA–10846, and Approving Withdrawal of Charge, Dismissing Complaint, and Vacating Notice of Hearing in Case 28–CA–10846.'' As counsel for the General Counsel acknowledged, the practical effect of this order on these proceedings was to sever and dismiss from issue the counts in pars. 9(a) and (b) of the May 29 complaint, counts anticipated by a distinct charge in Case 28–CA–10846, alleging that Lucky 7 violated Sec. 8(a)(3) and (1) by discharging employee Beth Wardle. I note that counsel for the General Counsel and for Lucky 7 have continued to include Case 28–CA–10846 in the caption to their posttrial briefs. Given the Regional Director's June 11 order, I have concluded that it should be deleted from this decision and from further captions.

[2] For simplicity's sake, I will refer to these prosecutors as a collective entity, i.e., as the ''General Counsel,'' except when it may be necessary to distinguish between them.

between September 7 and mid-February,[3] and ''discharged'' 55 strikers named in Appendix A of the complaint on ''various dates . . . presently unknown to the [Regional Director],'' and ''discharged'' 2 other named persons (Terefenko and Wardle[4]) on identified dates. The May 29 complaint marked the first appearance of any 8(a)(5) allegations, attacking Lucky 7's late January withdrawal of recognition from the Union in one count, and charging in a more extended set of counts that Lucky 7 had been bargaining in bad faith, with ''no real intent to reach any final agreement with the Union,'' ever since it had its first bargaining session with the Union on August 9, 1990. Finally, the May 29 complaint alleged for the first time that ''the strike . . . was at its [November 7] inception, and continues to date to be, in protest of, and has been caused and prolonged by, and continues to be caused and prolonged by, Lucky 7's unfair labor practices.''

The May 29 complaint was itself expanded during the trial by the General Counsel, to allege a refusal-to-furnish-information count under Section 8(a)(5) (concededly an afterthought, addressing Lucky 7's late January cancellation of what was to be the Union's second audit of its books, described, infra), and to allege roughly 12 additional 8(a)(1) counts. With regard to these new 8(a)(1) counts, the General Counsel stated that the alleged incidents they referred to were discovered only during the General Counsel's pretrial preparation of employee-witnesses who had previously given statements or affidavits which contained no references to the newly alleged incidents.[5] The May 29 complaint was trimmed by the General Counsel's eventual revising downward of the list of persons claimed to be strikers discharged by Lucky 7 for striking, a list of names which once totaled 57, but is now 48.[6]

Lucky 7 admits by answer or trial stipulation that it is an employer engaged in activities drawing sufficient revenues to affect commerce between and among the States, and that the Board's statutory and discretionary jurisdiction is properly invoked. Effectively conceding that it stopped recognizing or bargaining with the Union after the RD petition was filed, Lucky 7 avers that this was privileged, because it then had a good-faith doubt of the Union's continuing majority support, based on objective considerations. These prominently included its knowledge of the existence of the RD petition, and its having seen the signatures of 47 employees on handdrawn antiunion petition sheets used by the Petitioner to support the filing of the RD petition. Lucky 7 denies that it engaged in ''surface bargaining'' (it prefers the characterization, ''hard bargaining''), and it denies that its agents made any unlawful statements, or that it fired any strikers, and seeks full dismissal on the merits.

I have studied the parties' briefs[7] and the authorities they invoke, and I have independently studied the whole record.[8] This is a case in which the generally applicable legal principles are not in dispute, but the factual details are. And even the details of events at the bargaining table are not seriously in contest; rather the greatest amount of controversy surrounds the alleged incidents underlying the 8(a)(1) and (3) counts.[9] Nearly all these counts involve statements allegedly made by Lucky 7's agents to employees in group or individual settings away from the bargaining table, mostly during November–December ''driver meetings,'' and during post-November 7 encounters on the picket line between Lucky 7's supervisors and certain strikers.[10]

I will find that the complaint is supported by substantial evidence only insofar as it alleges that Lucky 7's late January withdrawal of recognition—and its associated cancellation of a second audit of its financial status—violated Section 8(a)(5). This finding is premised on a legal presumption that the Union enjoyed continuing majority support among Lucky 7's drivers in late January, and my judgment that Lucky 7 failed to rebut that presumption by the evidence it offered to support its ''good-faith doubt'' defense. I will find that the numerous other claims in the complaint have not been established by a preponderance of credible evidence in the record as a whole. I will set forth my findings and analyses of the merits of the General Counsel's contentions only after disposing of two preliminary issues.

B. *Lucky 7's Renewed Motion to Dismiss Based on Alleged Prosecution Misconduct*

In its brief, Lucky 7 renews a motion to dismiss the entire complaint, based on the pretrial actions of a Board field examiner, summarized below. (The General Counsel has likewise briefed the issue.) I initially denied the same motion on the first day of the trial, before litigation on the merits began. These are the main facts: On June 7, 1991, a Region 28 field examiner, Kevin Donnellan, who had investigated many of the Union's charges against Lucky 7, went to the Company's business offices to serve trial subpoenas on the General Counsel's behalf. While there, he somehow became involved

[3] The total is indefinite largely because many of the separate 8(a)(1) counts claim vaguely that Lucky 7's agents said or did the same thing on an indefinite number of occasions throughout a 4-month period. See, especially, the several wholly vague, ''catch all'' counts within par. 11 beginning with this phrase: ''In or about various dates in September, October, November and December 1990, more precise dates being presently unknown to the [Regional Director], but within the knowledge of the Respondent . . . .''

[4] But as to Wardle, see fn. 1.

[5] Tr. 808:4 through 811:11.

[6] The General Counsel contends that Lucky 7 unlawfully discharged all *of* its strikers, and now concedes that this class consisted of no more than 48 named persons. Relatedly, Lucky 7 has stipulated or otherwise acknowledged that 46 of the persons named in the General Counsel's current list of 48 discriminatees were, indeed, strikers who had been bargaining unit drivers for Lucky 7 immediately before joining the strike. The current contest is over the prestrike employee status of two persons, Vincent D'Amico and Barry Webb, whose status I shall not find it necessary to decide.

[7] Following the trial, I received staggered briefs from the General Counsel (113 pages) and Lucky 7 (68 pages), within the extended deadlines provided.

[8] I grant the General Counsel's unopposed motion to correct the record, appended to his posttrial brief.

[9] Some of the alleged 8(a)(1) statements are also alleged in the complaint to constitute evidence of unlawful ''bypassing'' of the Union and ''direct dealing'' with employees, and are therefore claimed to be 8(a)(5) violations, as well.

[10] The current 8(a)(3) counts (mass ''discharge'' of *all* strikers) are best understood as ''constructive discharge'' counts, where the General Counsel construes certain statements allegedly made by Lucky 7's agents to *some* striking picketers as being tantamount to declarations that *all* the strikers had been fired. This is also implicit in the field examiner's March 25, 1991 ''tentative decision'' letter to Lucky 7's counsel, infra.

in a conversation touching on settlement of these cases with Lucky 7's owner, Willard Booth. Attorney Norman Kirshman, Lucky 7's recognized attorney, had not authorized the June 7 conversation, was not present during it, and learned of it from Booth only later. The record would not permit a finding that Donnellan was the party who initiated the conversation, much less that he was dispatched on June 7 for the purpose of discussing settlement with Booth.

In support of its motion to dismiss, Lucky 7 Attorney Kirshman made a more detailed offer of proof which is not specifically challenged by the General Counsel, and which I accept as being substantially accurate for these purposes: He averred that Booth was prepared to testify that the field examiner,

> told Mr. Booth in sum and substance that it would be futile for him to proceed to litigate this case, because win or lose the case before the Board that the Steelworkers were dedicated to continuing to pursue Lucky 7 in that their image was at stake. If they couldn't get a contract from a small limousine company here in Las Vegas they would be severely embarrassed and [it] would have an adverse effect on their organizing. I'm paraphrasing now, Your Honor.[11] Mr. Booth responded to Mr. Donnellan[,] making certain statements to him concerning his feelings about dealing with the Steelworkers. He was upset by the conversation. And Mr. Donnellan parted by saying that you've got a good lawyer why don't you contact him and tell him to settle this case.

Kirshman's proffer avers, in addition, that Field Examiner Donnellan also said at some point that,

> he knew that the Steelworkers would accept a contract from Lucky 7 with no present economic increases and for a period of time, which would allow Lucky 7 to get on its feet, and that he knew that could be accomplished because the Steelworkers did not want to proceed with the [current cases].

Field Examiner Donnellan later reported at least some elements of this conversation to one of the two prosecuting trial attorneys in this proceeding, Overstreet, as the latter acknowledged. Precisely what was reported is not clear from the General Counsel's acknowledgements, but again, for these purposes, I will assume that it included the above elements represented by Kirshman, and whatever ''feelings about dealing with the Union'' Booth may have confided to Donnellan.

In renewing its motion to dismiss, Lucky 7 argues that the prosecution was tainted from a due-process standpoint by the field examiner's unauthorized conversation with Booth. Essentially, moving counsel proposes that the field examiner, and in turn, the General Counsel, must have gained from the June 7 conversation previously unavailable insights into Booth's character and behavior, and that these presumed insights must be presumed, in turn, to have aided and shaped the General Counsel's trial prosecution of these cases.[12]

I don't think the known circumstances justify any such set of presumptions; I cannot easily envision how the facts as represented by Kirshman could be expected to implicate adversely Lucky 7's due-process rights in this litigation, especially when whatever ''feelings'' Booth may have expressed to the field examiner were not made of record nor otherwise brought to my attention. I do not condone skipping of counsel, and Overstreet has represented that the Office of the General Counsel does not condone it either, and has reacquainted the field examiner with the General Counsel's policy proscribing contacts with an attorney-represented respondent without authorization or participation by the respondent's attorney. More to the point, Overstreet represented that what he learned second hand from the field examiner about the discussion with Booth had not affected the General Counsel's trial preparation or presentation; indeed, he affirmed that the information had provided nothing in the way of a leg up to the prosecution. After review of the full record with these questions in mind, I can find no indication to the contrary, nor any other plausible basis for finding that Booth's remarks to the field examiner—or vice versa—in any way prejudiced Lucky 7's interests as a litigant. Therefore, on reconsideration, I deny Lucky 7's renewed motion to dismiss.

C. *The 10(b) Issues*

Lucky 7 has also moved to dismiss the complaint—or at least some counts within it—on the ground that it attacks behavior by Lucky 7 occurring more than 6 months before the filing of any charge which was ''closely related'' to that allegedly unlawful behavior. The issue is more than normally difficult to address in the light of the tortured procedural history of this case, and is largely mooted by my eventual findings and conclusions, but I shall conclude contrary to the General Counsel that any events arising before October 25, 1990, are beyond prosecution, in the light of 10(b)'s 6-month ''limitations'' rule.

Procedural history in greater detail: These prosecutions now directly call into question the legality of the Company's behavior throughout the period starting August 9, 1990 (the date bargaining began between the parties), through mid-February 1991 (the last point at which it is alleged that a Lucky 7 agent committed an 8(a)(1) violation). And the litigation covered additional incidents, arising as early as 1989 and as late as March 25, 1991.

The current prosecutions *formally* emerged from the Regional Director's investigation into five, separately docketed charge cases, filed by the Union between January 15 and May 24, 1991.[13] In reality, however, the ultimate, May 29 ''Amended Consolidated Complaint,'' was informed by and

[11] Kirshman's ''paraphrasing'' reference was to the statements which follow it, not those preceding it.

[12] Lucky 7 Br. 3:

> It can fairly be presumed that Booth's responses to the Board agent's settlement overtures [sic] were factors in the development of the General Counsel's theory that [Lucky 7] entered negotiations in bad faith, and the questions posed during cross-examination. It is the General Counsel's burden to rebut that presumption.

[13] Formally, the May 29 complaint traced from investigations into charges filed in the following cases on the following dates: Case 28–CA–10702 filed January 15, Case 28–CA–10702–2 filed January 16, Case 28–CA–10767–2 filed February 15 and amended March 25, Case 28–CA–10846 filed April 3 (but see fn. 1), and Case 28–CA–10894 filed May 2 and amended May 24.

emerged from a more complex investigative background, a bewildering procedural stew, really, where at least 11 separately docketed—but sometimes overlapping—union charges against Lucky 7 were pending investigation at one time or another during the late December 1990-late May 1991 period.[14] It is clear that six of these charges had been dismissed or withdrawn before the point when the May 29 complaint issued, but to confuse matters further some of those charges were later refiled by the Union in identical or roughly similar terms, but were given a new docket number.[15] It appears from testimony offered by the Union's agent, Morris, that such devices were used to accommodate the Region's wish to ''dispose'' of already filed cases within its own administrative deadlines on the one hand, with the Union's need on the other hand to obtain additional time to marshal evidence to support the substantive claims within the charge in question.[16]

This confusing manipulation and proliferation of docket numbers makes it virtually impossible to be certain when any given specific claim of unfair labor practice was *first* made by the Union. And I thus resolve any confusion tracing to such matters against the General Counsel, who, through the Regional Director, controls his own docket. For purposes of a 10(b) analysis, I will ignore charges that once might have been, and will focus solely on the five charges contained in docketed cases which are listed in the May 29 complaint. It is clear that *those* charges started by addressing narrow and recent events, but became broader and more backward reaching the later they were filed. And so did the complaints and amendments thereto.

Thus, the Union's first two charges, filed on January 15 and 16, in Cases 28–CA–10702 and 28–CA–10702–2, respectively, alleged simply that Company Agent Owens threatened striker Terefenko on January 11, 1991 (Case 28–CA–10702), and made a statement to Terefenko on January 12 tantamount to a declaration that Terefenko had been fired (Case 28–CA–10702–2). And the first consolidated complaint in those cases, which issued on March 12, was identically narrow in its attacks on Lucky 7. The Union's next charge, Case 28–CA–10767–2, as initially filed on February 15, attacked another recent and quite discrete action by Company Agent Owens, in which he had ''physically shoved'' striker Elias Stassinos ''to the ground.'' It was not until *March 25*, after its recent settlement initiatives (described, infra) had not borne fruit that the Union amended this charge to allege a broader range of 8(a)(1) and (3) violations ''within the past six months.'' Thus it was that the Regional Director himself did not begin to attack any behavior by Lucky 7 in *1990* until he issued a separate, and much-broadened 8(a)(1) and (3) complaint in Case 28–CA–10702–1 on April 1, 1991.[17] The Union's next charge, filed on May 2 in Case 28–CA–10894—the first of the currently ''live'' charges to allege that Lucky 7's conduct implicated Section 8(a)(5)—had claimed that Lucky 7 committed 8(a)(5) violations ''within the past six months'' by allegedly ''bypassing'' the Union and ''directly dealing'' with employees ''since on or about November 4, 1991 [sic],'' and had committed independent violations of Section 8(a)(1), including by allegedly ''promising improved benefits,'' by telling employees that union representation would be ''futile,'' and by ''encouraging'' employees to circulate the RD petition. The Union's amended charge in that same case, filed on May 24, was the first to allege that Lucky 7 had been engaging in unlawful ''surface or sham bargaining'' under Section 8(a)(5), ''since on or about September 7, 1990.'' Thus it was that the May 29 complaint introduced corresponding 8(a)(5) allegations.

The General Counsel cites *Roslyn Gardens Tenants Corp*., 294 NLRB 506 (1989), as announcing the applicable stand-

[14] I do not include in this total a charge filed by the Union on July 31, 1990, in Case 28–CA–10447, which relates to a certain ''Limo 111'' incident involving employee Robert Terefenko. That charge was dismissed on September 6, 1990, and it has not since been revived in any other form in these proceedings. Neither do I include a seminal charge filed by the Union against Lucky 7 in September 1989 in Case 28–CA–9920, which the Union withdrew in January 1990, based on a private ''recognition agreement'' which the parties had executed in the meantime, on December 22, 1989.

[15] The following information, which recapitulates facts contained in Jt. Exh. 12 and surrounding stipulations and colloquy, will be almost impossible to digest, much less retain, but I narrate it to illustrate the complexities of the hidden process that lay beneath the issuance of the May 29 complaint, nominally issued ''pursuant to'' the five charge cases listed in its caption. The Union had filed four charges which it eventually withdrew: Case 28–CA–10683 filed 12/28/90 and withdrawn 1/28/91, Case 28–CA–10725–2 filed 2/6/91 and withdrawn 3/25/91, Case 28–CA–10754 filed 2/11/91 and withdrawn 3/25/91, and Case 28–CA–10779 filed 2/22/91 and withdrawn 3/22/91. However, in two of these four cases (Cases 28–CA–10725–2 and 28–CA–10779), the Union subsequently refiled the same charges, which were given new docket numbers (respectively, Case 28–CA–10767–2 and Case 28–CA–10864), and which were included in the May 29 complaint. (But as I have noted in fn. 1, the May 29 complaint counts associated with the charge in Case 28–CA–10864—the ''Beth Wardle'' case, earlier the subject of charges in Case 28–CA–10779 which were withdrawn—were short lived, for they were dismissed from these proceedings by the Regional Director's June 11 order; thus they were filed, then withdrawn, then refiled under a new case number, then found to have merit and included in the May 29 complaint, then withdrawn on the eve of the trial, and then severed and dismissed from the complaint moments before the trial opened.) The Union filed two other charges which the Regional Director dismissed for no merit: The first was Case 28–CA–10725 filed 1/25/91 and dismissed 3/22/91. (Remarkably, the General Counsel stated that the charge in this case was the ''same'' as another charge mentioned above (Case 28–CA–10683), which the Union had filed on 12/28/90, but had withdrawn on 1/28/91; thus, it appears that the Regional Office in this instance was carrying the ''same'' charge under two different ''live'' docket numbers simultaneously for at least 3 days (from 1/25 through 1/28), following which one was withdrawn, while the other remained alive until dismissed on March 21.) The second was Case 28–CA–10767–1 filed 2/15/91 and dismissed 4/1/91.

[16] Thus, as Morris explained:

> Well, we'd have—the Board puts you under a time restraint . . . . And they say, ''Okay, you filed this charge 15 days ago, 20 days ago. All the evidence has got to be in now.'' You know, they usually call you the last minute. They give you like three days, and you know, you're running around like a chicken with his head off trying to get witnesses together and everything else, get affidavits, and get things right. I know that in the Lucky 7 thing there was two, maybe three charges that withdrew and refiled.

[17] That complaint alleged, in substance, that Lucky 7 had been making unlawful statements to employees from as early as September 7, 1990, and continuing through February 3, 1991 (26 distinct 8(a)(1) counts), and had been discharging ''certain'' (unnamed) strikers on various dates ''unknown to the Director'' since the November 7, 1990 inception of the strike.

ard for determining the timeliness under Section 10(b) of complaint allegations. In substance, the Board in that case embraced the holding of *Redd-I, Inc*.,[18] that to be timely, a complaint allegation must address a respondent's conduct occurring within 6 months of the filing of a charge which is '''closely related' to and grow[s] out of the violations timely alleged in the charge.''[19] Somehow, the General Counsel finds, under *Roslyn Gardens*, that the charge filed by the Union on January 15, 1991 (claiming an 8(a)(1) threat made by Owens to Terefenko on the picket line on January 11, 1991), is ''closely related'' to any complaint allegation which targets any Lucky 7 behavior occurring within 6 months before that charge, i.e., any conduct occurring on or after July 15, 1990.

I disagree. As my review of the procedural history makes clear, it was not until the Union amended its charge in Case 28–CA–10767–2 on March 25, 1991, that the Union had on file a now-''live'' charge which in any way made the kinds of broad attacks on Lucky 7's behavior in 1990 which the complaint now makes. Before the Union filed those March 25 amended charges, its only ''live'' charges were extremely narrow and recent in their focus, and dealt only with specific alleged 8(a)(1) ''threat'' incidents occurring on the picket line on January 11 and 12 (relating to striker Terefenko) and early February (relating to striker Stassinos). Moreover, it is clear that these pre-March 25 charges were similarly understood in such narrow terms by the Regional Director, for the complaints he issued pursuant to those charges were equally narrow in focus, and it was not until on and after March 25, associated with the filing of additional charges, that the Regional Director chose to expand those complaints, culminating in the ultimate ''amended consolidated complaint'' which the Regional Director issued on May 29, less than 2 weeks before the already scheduled trial was due to open.

It is therefore clear that the Regional Director's investigation into the Union's January 15 and 16 charges regarding Owens' recent statements to Terefenko would not and did not lead to the discovery of the 1990 events now being challenged in the complaint: it is equally clear that the Union's February 15 charge concerning Owens' shoving of Stassinos would not and did not lead to the discovery of such earlier events. Rather, it was only the Union's March 25 amended charge which was sufficiently ''related'' to 1990 events now in question to plausibly lead to the discovery of any such 1990 claims, and therefore it was that March 25 date which became the relevant date for purposes of computing the 10(b) cutoff. Accordingly, I will treat October 2 as the 10(b) cutoff date, and will consider as beyond the prosecution's reach any misconduct arguably committed by Lucky 7 before that date. However, I will examine evidence of what happened before October 25 as ''background,'' arguably useful in illuminating allegations in the complaint addressing Lucky 7's behavior on or after October 25.

[18] 290 NLRB 1115 (1988).

[19] 294 NLRB at 506–507 and cases cited at fn. 5.

II. FINDINGS AS TO ESSENTIALLY UNDISPUTED MATTERS

A. *Company Operations: Management Structure*

Lucky 7 is a Nevada corporation whose business is carrying passengers in limousines and vans in Las Vegas. In typical prestrike periods the Company employed some uncertain number of limo and van drivers—perhaps between 50 and 60—over the course of several shifts, many on a less-than-full-time basis.[20]

The corporation is owned and controlled by Willard Booth, who started shoestring operations in 1976, using the Small Business Administration as his primary financing source.[21] By Booth's uncontradicted and sometimes tearfully anguished account, the Company has been struggling ever since its formation to overcome heavy debt burden, undercapitalization, and various obstacles to profitability, such as unanticipated licensing restrictions which have effectively limited its passenger volumes, and the losses of revenues occasioned by the Union's strike.

Lucky 7's main business and radio-dispatching headquarters, and its vehicle storage and maintenance facilities, are on Industrial Road in central Las Vegas, but its main revenues come from passengers arriving and departing from McCarran International Airport (the Airport), some 6 miles away, where it maintains a business counter in the Airport baggage/arrivals area. There, Lucky 7's ticket agents, in competition with other private carriers,[22] solicit incoming travelers either to charter a limousine and driver for exclusive service for an agreed-on period, or to buy a seat on a hotel shuttle van, where payment is on a ''per capita'' basis. Waiting Lucky 7 drivers stage their vans or limos at a designated lower level of the Airport traffic and parking complex. When customers are secured, Lucky 7's ''Ground Controller'' at the Airport will summon a driver and vehicle by radio to the upper arrivals level, known as the ''Top,'' and will escort the customers and their baggage to a designated pickup space at the Top. (Airport authorities have designated certain spaces of the curb adjacent to the baggage/arrival area for limo charter pickups, and other spaces on a sidewalk island across the same roadway for per capita van pickups; these are known, respectively, as the ''charter side,'' and the ''per capita side.''[23])

[20] The uncertainty in the record about how many drivers Lucky 7 employed typically is unimportant. But I will find it to be of critical importance to Lucky 7's good-faith doubt defense as to its withdrawal of recognition that it failed to establish how many drivers (strikers and nonstrikers together) it employed at the time it withdrew recognition.

[21] Booth is black, as are two members of his top management group described below, Brooks and Owens and Lucky 7 qualify as a ''minority business enterprise'' for various purposes, such as SBA loans and other support.

[22] Lucky 7's principal competitor for Airport business is a company known as Bell-Trans, which employs 300 drivers, according to the Union's Morris.

[23] Lucky 7 has Airport permits for one van space and one limo space at the Top. Its competitor, Bell-Trans, has permits for eight van and limo spaces at the Top.

Booth runs the business actively from Industrial Road; he is followed in the hierarchy by Edward Brooks, nominally the ''Personnel Manager,'' whose overall function appears more akin to that of an ''operations'' manager. Mark Witham, Lucky 7's financial controller, also maintains personnel and payroll records, and was closely involved in the recruiting and hiring of striker replacements. At the next level are the ''Shift Supervisors''—Bobby Owens (days) and Bill Noller (nights)—who work from Industrial Road, but do a certain amount of roving the city and the Airport as part of their jobs. At the lowest supervisor-manager level are the ''Ground Controllers'' at the Airport, who typically station themselves on the van-loading island at the Top. They have direct supervisory authority over drivers and operations within the Airport, and they report to the shift supervisors.[24] During material periods, Lucky 7 regularly used three ground controllers at the Airport, Leroy Ainsworth (a cousin of Booth), Daniel Ross, and June Flahert. Every person named above except Ainsworth is by now alleged to have made one or more 8(a)(1) violative statements to drivers at some point during the August to mid-February period in question.

Janie Molandes and Rose Poma, who are also alleged to have made statements violative of Section 8(a)(1) similar to those attributed to other conceded managerial agents of Lucky 7, are the only persons whose supervisory or agency status is in dispute. Molandes is a driver who is irregularly assigned to perform ground controller functions on a ''relief'' or ''substitute'' basis, and who never joined the strike. Poma is Willard Booth's mother-in-law, who nominally works as a ''ticket agent'' at Lucky 7's Airport counter, but who sometimes plays a role in dispatching limo drivers. I will assume for all purposes below that Molandes at material times occupied status as a ''substitute supervisor'' whose statements and actions could potentially ''bind'' Lucky 7 to a finding of violation. I have greater doubts about Poma's status from that standpoint, for reasons I will eventually discuss. But in the end, I will not credit the driver-strikers who claim that Molandes and Poma made coercive statements and, therefore, their potential supervisory roles are moot points.

B. *The Steelworkers' Las Vegas Organizing Campaign; Initial Recognition of the Union by Lucky 7*

Carl Morris is an International representative of the United Steelworkers of America, headquartered in Pittsburgh, Pennsylvania: he also holds the title, assistant director of collective bargaining. The Union dispatched Morris to Las Vegas in early 1989 to head up a campaign to organize Las Vegas cab, van, and limousine drivers.[25] By March 1989, the Union had obtained ''certification'' (Morris' word) as the bargaining agent for drivers at one or more companies. Eventually, it established some form of bargaining relationship with a total of nine companies, according to Morris, including Lucky 7.

This is what the record shows about the background leading to Lucky 7's recognition of the Union: At some point in 1989, the Union had filed a petition for representation election among Lucky 7's drivers, and an unfair labor practice charge against Lucky 7 in Case 28–CA–9920. At some nearby point, Lucky 7 retained a local law firm, Kirshman & Harris, and has been represented by that firm continuously since that date, principally by Norman Kirshman and his spouse and partner, Carol Kirshman. On December 22, 1989, under Kirshman representation, Lucky 7 signed a ''recognition agreement'' with the Union. In exchange, the Union withdrew its pending charge and election petition, with the Regional Director's approval.[26] There is no evidence that this initial recognition was accompanied by any showing that a majority of Lucky 7's drivers wanted the Union to represent them.

C. *Bargaining Preparations by the Main Participants*

The parties did not begin negotiations until August 9, 1990, following the Union's ''formal letter'' requesting the same, mailed in ''July of 1990,'' according to Morris.[27] Before that first meeting, the Union had delivered to Lucky 7 or the Kirshman firm a 42-page proposed comprehensive labor agreement, which Norris had prepared in Pittsburgh, and carried with him back to Las Vegas. The proposal set forth a pay scheme whereby most drivers would receive 45 percent of their vehicle's shift revenue, but no less than $10 per hour, with the latter minimum to be raised by 7 percent at annual intervals thereafter; it also sought annual bonuses, computed as a percentage of each driver's annual gross wages, six paid sick leave days, six paid holidays, paid vacations (7 days after 1 year of employment, increasing to 28

[24] Booth's testimony when examined adversely as the General Counsel's first witness on June 11 adequately establishes that ground controllers are ''supervisors'' within the meaning of Sec. 2(11) of the Act: Thus, Booth acknowledged that they are generally responsible for ensuring that Airport operations are conducted according to company policy and applicable licensing requirements, and that they possess and exercise the right to discipline and discharge drivers based on their own discretion, subject to possible reversal or modification after review by higher management.

[25] Morris explained that the Union set its sights on organizing Las Vegas drivers after the Steelworkers held their international convention there in August 1988, and its officers detected interest in union representation among the drivers they encountered during their stay.

[26] There is a suggestion in Attorney Kirshman's exchanges with Morris on cross-examination that this settlement also included payment of ''backpay'' to one or more persons.

[27] I so find from Morris' testimony at Tr. 294:5-21. The General Counsel, relying on what I believe is a distortion of Morris' testimony, asserts (Br. 39) that ''the Union requested that Lucky 7 bargain with respect to Unit employees' wages, hours, and other terms and conditions of employment'' in ''*January* 1990.'' Morris did not say this. In response to the General Counsel's leading question,

> Did the Union request . . . that Lucky 7 bargain with them over employees' wages, hours, and working conditions?[,]
>
> Morris said [emphasis added below by judge],
>
> . . . the *first discussion* of that was in January 1990, as I recollect.
>
> But he quickly explained,
>
> There was an initial request for *information* made upon the Employer through . . . the Company's Counsel, and . . . there was *discussions* at that point *concerning* bargaining. The first formal letter that I'm aware of concerning negotiations officially starting was on or about July of '90.

And on cross-examination, Morris conceded that the delay between recognition and the first bargaining meeting between the parties ''was not attributable to any foot-dragging on the part of Lucky 7.'' To the extent that the General Counsel seeks to suggest otherwise in the version of the facts advanced on brief, he is not supported by the record.

days after 10 years), and health and welfare and pension benefit coverage at prescribed levels. Lucky 7 was then paying drivers $5 per hour, with no split of vehicle shift revenues; it was not providing bonuses nor health and welfare or pension benefits, nor any other emoluments or benefits such as those sought by the Union.

The Union's contract proposal also contained extensive provisions governing seniority, work rules, and job bidding systems, and six pages detailing a four-step grievance procedure culminating at the fourth step with final and binding arbitration by a third party, with the ''fees and expenses of the arbitrator[,] including stenographic expenses, if any, [to be] borne equally by the Employer and the Union.'' Within the proposed grievance system were special provisions for handling grievances involving the ''discharge of an employee''; these required, inter alia, that,

> [a]n employee shall not be peremptorily discharged, the Employer will suspend the employee for five working days and grant him a hearing before discharge.

And elsewhere, within a section labeled ''Discipline,'' the Union's proposal stated,

> Disciplinary action, including discharge, shall be for just cause only.

Also relevant for our purposes was the Union's proposal to establish a ''Labor/Management Committee,'' described as follows in the section labeled ''Purpose of Agreement'':

> The Company and the Union hereby establish a Labor/Management Committee to discuss matters of common concern that may arise from time to time during the term of this agreement. Each party to this agreement will designate four (4) people to represent them on the committee.

Before the first meeting of the parties, Booth had conferred twice with Carol Kirshman and Robert Zentz, a recent law graduate employed in the Kirshman firm. From Zentz and Booth,[28] I find that Booth told his representatives that the Company was financially unable to pay increased wages or provide Union-sought health and welfare and pension benefits, or otherwise to commit to demands which had a direct or indirect ''cost'' impact. He also told them that he opposed third-party arbitration, or a ''just cause'' discipline or discharge standard. He grounded his objections to these latter provisions on a common complex of fears—that arbitrations were costly, that the Union would harass him with grievances every time a driver was disciplined or fired, and would pursue these grievances to arbitration, and that the Company, already in precarious financial shape, could go under, if he were forced to divert cash and management time and resources to justifying management action in every termination or discipline situation.[29]

D. *Prestrike Bargaining Sessions*

Morris headed the Union's bargaining team at all but the first of the six meetings the parties eventually held through January 8. The Union's committee also typically included Robert Terefenko, a limo driver, who became the first Lucky 7 driver to join the strike on November 7. Booth did not attend any of these meetings; Lucky 7 was represented solely by Carol Kirshman, assisted by Zentz, who took extensive notes which all parties have generally relied on in their presentations and arguments.[30]

August 9: The meeting, conducted at the Union's expense in the Pharaoh Room of the Sahara Hotel, lasted 90 minutes. The union team at this first meeting was headed by the Union's staff representative, Henry Cano. Carol Kirshman asked the Union to provide copies of any agreement the Union had ''in the transportation or limousine business.'' Cano replied that he would ''check to see . . . but . . . to his knowledge USWA has no contracts in any transportation industry in any other city in the USA nor have they ever had any.'' Kirshman also questioned Cano about various elements of the Union's initial proposal, including the function and composition of the proposed ''Labor/Management Committee.'' Cano said in this latter regard, according to Zentz' notes, that

> the committee would be to address matters of mutual concern, such as health and safety and conditions of employment[, and] it could be a committee of two (union members).

[28] Carol Kirshman was not called to testify.

[29] The foregoing is a composite of Booth's and Zentz' somewhat fragmentary and summary recollections on these points. For example, this is what Booth stated when asked to recall what he said to Carol Kirshman during prebargaining ''strategy'' sessions concerning third-party arbitration:

> [T]he company is so fragile at this time that there's no way that I could spend any time taking off[,] taking care of the negotiating at this time or . . . any kind of binding arbitration. Because I've known and the union just loved things with all kinds of charges and whatnot, and you spent all your time defending yourself. And don't have that much energy. I don't have that kind of money to do—to follow up on these things. And I don't have the management team to do it. I have to do all this outside stuff. And if I do all the outside stuff my company will go down the drain.

[30] For my own findings below concerning these meetings, I will likewise rely chiefly on Zentz' notes, even though they do not purport to be a verbatim account of everything that was said at each session. I will also rely to a lesser extent on the supplementary testimony of Morris and Zentz, but with reservations about some of Morris' characterizations: Morris does not appear ever directly to contradict Zentz or the notes—indeed, he and counsel for the General Counsel used the notes as the matrix for his testimonial recollections of events at the bargaining table. But Morris professed to recall additional details; for example, he testified that that in the January 8 session, Kirshman declared that Booth ''wanted the right . . . to make the final decision on everything.'' I suspect here—and elsewhere—that Morris, a Board-savvy witness, was embellishing when he purported to recall details about the bargaining sessions which are not consistent with Zentz' notes or testimony. Morris admittedly made no notes of his own during these sessions. Moreover, developments on the Lucky 7 front could not have been the focus of Morris' energies or attention during the period in question, given his widespread responsibilities elsewhere. By his own account, Morris was involved in bargaining and/or other attempts to achieve first labor agreements with as many as eight other Las Vegas employers during the same period, and he was simultaneously running a widespread strike involving several hundreds of drivers citywide, and was supervising and administering the Union's strike payment fund for strikers, and was shepherding the investigation of an extraordinary number of unfair labor practice charges against Lucky 7 and other employers (upwards of 90 such charges, according to Morris).

The parties also reviewed the ''ground rules'' for future meetings. The Union suggested that meetings should be held at a ''neutral'' site, and stated that although it was willing to pay the costs of their first meeting at the hotel, these should be shared by the parties in the future. Kirshman expressed willingness to meet at the Kirshman firm offices, or at the Union's offices, but not in any commercial meeting setting where Lucky 7 might be expected to share rental or service costs.

September 7: Carol Kirshman presented Lucky 7's counterproposal, a 35-page writing largely geared in format to the Union's proposal, but quite different in content in many sections. The areas of greatest current concern to the General Counsel appear to be these: Lucky 7's counter had rejected the Union's proposed wage scheme, and had proposed the status quo instead (''Limousine and chauffeur drivers are paid at the rate of $5.00 per hour, after one day of training at minimum wage''); it had rejected the annual bonus demand with the counterstatement, ''There is no annual bonus.'' It had used similar, ''There is no'' language in responding to the Union's other ''cost'' demands, for paid sick days, holidays, bereavement days, jury service days, and fringe benefits—health and welfare and pension coverage. And in place of the Union's proposed grievance-arbitration scheme, Lucky 7 offered a three-step procedure in which at the third step a ''representative of the Union, the Manager, and a principal of the Employer'' would hold ''further discussion and attempt to resolve the grievance,'' but,

> [s]hould the parties be unable to resolve the grievance and the three steps are exhausted, the grievant shall be free to pursue any legal remedies and the Union and the employees will be relieved of their obligations under Article 24, the ''no-Strike Clause.''[31]

And separately, Lucky 7's ''grievance procedure'' language stated,

> Nothing contained herein shall be deemed consent by the Employer to binding arbitration of grievances.

Moreover, Lucky 7's counteroffer regarding ''Discipline'' contained no ''just cause'' language, and substituted a provision ending with this declaration:

> The parties acknowledge that the employment relationship between the Employer and Employee is ''At Will,'' and either . . . may terminate that relationship at any time, without prior notice to the other, and without liability to the other.

The parties reviewed Lucky 7's proposal: The subject of arbitration was ''tabled'' after Kirshman reiterated that the Company did not want arbitration and, relatedly, that it was not seeking a no-strike clause. Morris agreed to some of the Company's ''language'' in certain areas, and said he would prepare counterlanguage addressing Lucky 7's ''At-Will'' clause. When they reached the first of the ''cost'' elements, ''vacation,'' Kirshman replied, ''inability to pay.'' Morris asked if ''the Employer was pleading poverty, and if he was willing to open the books.'' Kirshman replied that ''the Employer owes hundreds of thousands of dollars and . . . was willing to open his books.'' Similar, more truncated exchanges occurred as the parties ticked off succeeding ''wage,'' ''bonus,'' and other ''cost'' sections. By the end of the meeting, Morris had agreed to accept some of Lucky 7's ''language'' proposals as to noneconomic issues (e.g., preamble, scope of agreement, union security), and the parties had agreed to conduct an audit of Lucky 7's books and records.

E. *The Audit*

At some point in later September or early October, the Union dispatched Paul E. Kennedy, identified as the ''Principal Researcher'' in the Union's research department, to conduct the audit. On October 8, Kennedy issued a typed report, stamped ''CONFIDENTIAL,'' containing this ''Note'' on its cover page:

> This report is the property of the United Steelworkers of America. It has been prepared for the exclusive use of Carl Morris and Staff
>
> Representative Henry Cano, District 39. Reproduction, in whole or in part for any other purpose, is prohibited.

In an introductory section, auditor Kennedy described the purpose of his review, and the materials he focused on, in the following terms:

> This company is alleging their inability to provide wage increases for their employees. As a consequence, they agreed to open their books for the purpose of determining whether or not they are financially able. Accordingly, this researcher went to Las Vegas, and the company provided him with audited financial statements by an outside certified public accountant, along with . . . federal income tax returns for the years 1988, 1989, and year to date information ending July 31, 1990. The information submitted was internally consistent and was sufficient to determine the overall financial condition of this company.

In a section captioned ''Financial Condition,'' the auditor referred to an attached tabulation of company assets and liabilities, and stated (emphasis added):

> As will be noted, the current assets are less than current liabilities by approximately $30,000. This indicates to us that the company may be experiencing difficulties in meeting their day to day financial obligations. A general rule of thumb is that *current assets should be at least twice as much as current liabilities in order for it to be considered in a sound short-term financial condition. Lucky 7 has only 80 cents available for each dollar of current liabilities*. This operation has considerable long-term debt totalling approximately $400,000 as of July 31, 1990. When this is compared to the capitalization of the company, which only totals $186,783, or twice as much, you can see that this is a significant

[31] This was a confusing textual misreference in several ways: In fact, the Union's ''Article 24'' proposal had included ''no-strike, no lockout'' provisions. But ''Article 24'' of Lucky 7's September 7 proposal referred to a different subject (''Union Bulletin Boards''). And in fact, Lucky 7 had elsewhere stated in its September 7 proposal (at ''Article 25'') that ''[t]he Company is not asking for a 'No-Strike' clause.''

> debt load for an operation this size. Additionally, the paid-in capital indicated of $105,000 is comprised of a personal loan taken out by the president of the company which the lender required be added to the balance sheet in order for this company to obtain the necessary funds for the expanded operations due to the per capita license.[32] The long-term debt is comprised principally of [an SBA] loan of approximately $75,000, the Valley Bank of Nevada in an amount of $262,934, and to the GMAC for seven Cadillac limousines. These three loan payments alone account for approximately $15,000 a month payments.

As I construe this, auditor Kennedy was describing in this section a business that was *not* in ''sound short-term financial condition,'' because it was deeply undercapitalized, was probably having ''difficulties in meeting . . . day to day financial obligations,'' and was burdened moreover by ''considerable'' long-term debt. However, in the next section, captioned ''Income Statement,'' the auditor found grounds for optimism in the fact that Lucky 7 had turned from a net loss of $31,000 in 1989 to a net income of about $91,800 in the year ending July 31, 1990, and from this he projected greater profit margins for the Company in the future. Thus, auditor Kennedy made these observations, among others, which are conspicuous for their emphasis on ''expectations'':

> for the period ending July 31, 1990, income between the limousine service and the per capita operations is over a million dollars per year. The expectation would be that these amounts would increase when a full year of per capita operation along with the limousine services are considered.[33]
>
> . . . .
>
> In any event, from income of $52,900 in 1988 and the loss of $31,000 sustained in 1989, the company has made a significant turnaround to a profit of $91,800 for the yearly period ending July 31, 1990. The expectation would be that this income would grow when a full year of limousine and per capita operations are reflected.[34]

Commenting more generally about the ''expense'' side of the ledger, auditor Kennedy stated:

> There appears to be no single item that stands out as being exaggerated. The officers' salaries appear to be reasonable, although from time to time loans or expenses are made to both the officers and to the employees, when necessary.

Having thus recapitulated the data, the auditor began his ''Conclusion'' section this way:

> The fact that this company has considerable debt when compared to its capitalization and the fact that they are just now beginning to realize their potential between . . . limousine activity and taxi activity, little can be derived from an analysis except as previously mentioned.

''However,'' he continued,

> for an operation of this size with its equipment and with its level of employment, the expectation would be that income should be higher than it presently is.[35] This may well happen in the near future.

He then analyzed the potential impact on Lucky 7's net income of a hypothetical ''$1 an hour increase in the employees' wages,'' using the ''net income'' of $91,800 for the year before July 31, 1990 as a base. He determined, in effect, that a $1-an-hour increase would eat up nearly three-fourths of that net income.[36] But ''[o]n the other hand,'' auditor Kennedy began, in his final sentence (emphasis added),

> [T]his researcher *feels* that some *modest* increases are indicated without putting the company in *extreme* financial jeopardy.[37]

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[32] In a ''Background'' section, auditor Kennedy had reported, consistent with Booth's testimony, that Lucky 7 had,

> acquired a per capita license in 1987. However, because of litigation initiated by another cab company, this license did not become effective until September 1989.

[33] It appears that the auditor, and the Union itself, could have tested this ''expectation'' against available, post-July 31 financial data, but chose not to. It is true that ''per capita'' (van) operations had begun in September 1989, and therefore records closing on July 31, 1990, would not reflect a full year of per capita operations. But clearly, records carried through September 1990 would have told the tale. And Morris acknowledged from the witness stand that such year-completing records were available to the auditor before he issued his October 8 report—in the form of more recent ledgers, driver trip sheets, bank statements, etc.—but that auditor Kennedy had chosen not to review or audit these more recent records as a matter of convenience. Morris further acknowledged that he could have directed Kennedy to review the recent records to get a more complete and current audit picture, but did not do so.

[34] See last fn.

[35] Here, the auditor appears to link an ''expectation'' of ''higher income'' not to assumptions about ''growth'' in *future* ''income'' streams (as in previous passages), but to assumptions about how much ''income'' an operation on Lucky 7's scale ''ought'' to be making, even at present. I observe that nothing in this record suggests that auditor Kennedy, or the Union, is uniquely qualified by experience in this particular industry to make any such assumptions. Indeed, Morris' testimony, and admissions made by Staff Representative Cano in the August 9 bargaining session, supra, strongly suggest that the Union's Las Vegas drive represented its first foray into this industry.

[36] The auditor put it this way:

> [T]he effect of a $1 an hour increase in the employees' wages would effectively reduce the net income of $91,800 by approximately $66,000.

[37] The passages preceding this vaguely stated final conclusion leave me in doubt as to precisely how the auditor arrived at it. The first passage, supra, ending with the phrase, ''little can be derived from an analysis except as previously mentioned'' is somewhat murky, but I think it means that the auditor found the ''previously mentioned'' facts and predictions to be largely uninstructive—or at least inconclusive—on the question which he was initially commissioned to answer, namely: Was Lucky 7 ''financially able'' to ''provide wage increases?'' If so, his ultimate ''feel[ing] that some modest increase'' was ''indicated'' would seem to involve backpedaling. In any case, I cannot help but conclude that the auditor was stabbing in the dark in expressing this ultimate ''feeling.''

F. *The Strike Begins; the November and December Bargaining Sessions*

On November 7, with the October 8 audit report in hand, the Union called a strike against Lucky 7.[38] The Union also struck other local companies on November 7, including Lucky 7's main competitor, Bell-Trans; however, the strike against Bell-Trans was called off almost immediately, and not because of any contract settlement.[39] Only about four of Lucky 7's drivers participated initially in the strike, led by Terefenko, and picketing against Lucky 7 was confined initially to the entrance to the Company's Industrial Road headquarters.[40]

November 8: The parties met the day after the strike began for about 2 hours. They first discussed the terms of a ''Discipline'' clause; Morris repeated the demand for ''just cause'' language; Carol Kirshman repeated that the company proposal was for ''at-will'' language; they argued the point briefly and inconclusively.[41] They turned to the Union's proposed arbitration provisions; Kirshman repeated that ''Management is not interested in arbitration.'' Pressed for a ''reason,'' Kirshman said, ''Abuse of the system, as evidenced by the Union's proclivity for filing charges with the NLRB.''[42] In further exchanges, they clarified that Lucky 7 was not seeking a no-strike clause, despite textual confusion in the Company's August 9 proposal, and that Lucky 7's proposal contemplated instead that the Union could ''grieve and then do what you want.'' They spent more time talking about job-bidding procedures and related subjects, and eventually appeared to reach agreement about language concerning bidding.

Finally, they addressed wages and benefits: Norris opened by stating that the Union was ''modifying'' its demands in these areas, and was proposing these terms instead:

> For the first year, $5.75 per hour, second year, an additional $1 per hour, and third year, an additional $1 an hour, with the following:
>
> > The Union shall have a continuing right, on not less than a 6 month basis to review and audit if necessary the employer's financial records. At such time as the . . . records indicate that the employer is financially viable to provide employees with benefits similar to those of competitors in the limousine industry in Las Vegas . . . the employer will extend such benefits to the employees[,] or the employer or the Union may serve notice to renegotiate this agreement.

Commenting on this new proposal, Morris stated:

> The employer is doing quite well,[43] but not to the level we feel comfortable demanding equal benefits. We are not willing to continue with the competitive advantage forever.

Carol Kirshman responded, ''The company is paying what it can afford to pay.'' Morris rejoined, ''We believe our demands are reasonable.'' Kirshman stated that she would ''present your new proposal to the company.'' They briefly discussed miscellaneous items, such as rules governing ''call-in time'' before an absence, and details pertaining to dress requirements, then closed the meeting.

December 4: In a meeting that lasted nearly all day, interrupted by a union caucus, the parties covered a lot of ground. They reviewed Lucky 7's prior offer, ''as revised from last meeting.'' They continued to probe and debate about various ''work rule'' issues, and agreed, inter alia, that a ''two-hour call-in time'' requirement would be adopted (Lucky 7 had initially demanded a ''4-hour'' advance notice of absence; the Union had proposed a ''one-hour'' rule). When Morris asked Carol Kirshman for the Company's ''position'' on ''discipline and discharge''; however, she replied, ''Our proposal[,] and no arbitration.'' They argued; Kirshman, apparently referring to the Company's ''at-will'' proposal, stat-

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[38] Morris for the Union repeatedly stated at the bargaining table—and on the witness stand—that he was ''not relying on the audit'' in calling a strike against Lucky 7, nor in continuing to press demands thereafter for wage increases, albeit more ''modest'' ones.

[39] Morris explained this during cross-examination in the following terms:

> Q. . . . do you recall approximately what percentage of Bell Trans' employees went out on strike?
>
> A. On November 7th, they went out, and they only picketed at the industrial plant site, and there was approximately 75 people out of 300 that withheld their services, [but] only about 50 or 60 of those actually picketed. . . . We put the Bell Trans people back to work almost immediately as a show of good faith . . . .

[40] From Terefenko, the only one of these early strike participants called to testify, and from other witnesses, I find that David Hauser, Jerry Skinner, and Urle Jones were also drivers who began striking on or shortly after November 7, and who picketed initially at the Industrial Road headquarters.

[41] Morris recalled that at one or more meetings when the ''just cause'' versus ''at-will'' dispute was the focus of discussions, Carol Kirshman made reference to ''turnover excess'' in the work force, and the fact that ''people [were] not working full-time,'' and likewise ''may have mentioned people that are temporary resident types.'' I find this probable, and therefore credit it. In addition, Morris recalled that Kirshman explained Lucky 7's wish for an at-will clause on grounds that Lucky 7 management ''did not have time to worry about the reason.'' I find this probable, despite the fact that Zentz' notes don't reflect this, given Booth's testimony citing similar reasons for directing his bargaining representatives to resist a ''just cause'' discipline or discharge standard, and to advance an ''at-will'' proposal instead.

[42] Whether the Union has a ''proclivity'' for filing charges is a question I need not judge in the end. However, I note that Carol Kirshman's remark was not without arguable factual basis: Morris acknowledged as a witness on June 12, 1991, that the Union had by then filed a total of 90 charges against various employers during its Las Vegas campaign. And I assume that a substantial number of these had been pending as of November 8, and were known to Kirshman, whose firm represented at least one other employer locked in first-contract struggles with the Union. Moreover, I note that as of November 8, the Union had no currently pending charges against Lucky 7, but had filed one on July 31, 1990, in Case 28–CA–10447, concerning an incident when Terefenko was not assigned his regular limo, and this charge had been dismissed as nonmeritorious on September 6. Moreover, even if Kirshman could not know it on November 8, her belief that the Union would ''abuse the system''—by firing off charges without regard to the current availabity of evidence to back them—turned out to be rather prescient, as my findings at sec. I, C, make abundantly clear.

[43] This was obviously a bluff, given that the Union's auditor had implicitly described Lucky 7 as a business which was *not* in ''sound short-term financial condition,'' according to the ''rule of thumb'' measure applied by the auditor to Lucky 7's ratio of assets to debts.

ed, ''It is Nevada law. There is protection under the law.'' Morris rejoined, ''Not if there is a contract. I have 25 years of experience and have studied the law.''

They left that issue and turned to the matter of an ''annual bonus.'' Kirshman said that Lucky 7 ''can't afford'' one, and asked to see the Union's audit. Morris replied, ''I am not basing my position on the audit. We take the position you can afford it.'' They fenced further, and Kirshman said, eventually, ''[The] company has a lot of debt. So, until I can see the audit, I will not alter the economic proposals.'' Soon, Morris and Kirshman had this exchange, as reflected in Zentz' notes:

> CK—We won't change our economic proposals. The company can't afford to change.
>
> CM—That is an outright lie.
>
> CK—I resent that. If you have information that contradicts that[,] prove it.

Deflecting this by changing the subject, Morris hinted that he had heard a ''derogatory'' comment supposedly made by ''the owner'' (presumably, Booth) about the Kirshman law firm, but then said he would not repeat the comment. Carol Kirshman replied, ''I don't care.'' Morris again changed the subject, now asking for ''more specific language'' from the Company concerning ''leaves of absence.''

Thereafter, the parties returned occasionally to ''cost'' items in the Union's demands, but in each case, Kirshman invoked ''inability to pay,'' and the time spent on such matters was brief. They spent most of the remaining time on noneconomic matters. At one point, Morris said that the Union wanted to ''sit with the company and discuss our concerns.'' (Although the antecedent is unclear, it appears that Morris was at that point referring not to the Union's proposed formal grievance procedure, but to the Union's proposed ''Labor/Management Committee.'') Kirshman stated,

> Even now, the company would like to form a committee to meet and discuss gripes, concerns, and profitability[,] or put up a suggestion box.

Elaborating after further questioning and remarks from Morris, she stated,

> We would like 2 drivers, a dispatcher, and a NEDCO representative.[44]

Morris said he would need to ''study'' this proposal, and soon asked for discussions on the paired subjects, ''Dues Check-off/Management Rights.'' Carol Kirshman offered (my emphasis) to ''agree to *a* check-off, if you agree to *our* management rights clause.'' Morris replied (emphasis added), ''I can agree to *your* management rights clause if you agree to *our* check-off.'' Management then caucused, returning with an offer to accept the Union's proposed checkoff language if it were amended with a sentence to allow checkoff revocation after 30 days' notice. Morris agreed to that amendment, and the parties ''signed off management rights and check-off.'' They explored other issues at length, and ''signed-off'' on some of them, after further compromising.

Near the meeting's end, Norris asked, ''Your position on economics is in the negative?'' Carol Kirshman replied, ''Correct.'' Morris asked, ''Have you investigated our proposal regarding the review process?''[45] Kirshman replied that the Company ''would not agree to that,'' explaining, when pressed by Morris, that it had ''the potential to harass the employer.'' They then fenced again over Kirshman's demands to see the Union's audit. Morris first insisted that the Union's bargaining demands were ''not based on the audit,'' but Kirshman persisted, saying,

> I believe you are relying on the audit. My position is that the company is broke, if you have information to the contrary, prove it.

Morris agreed during and at the conclusion of these exchanges to ''look at'' the audit question, and to call Carol Kirshman after having done so.

G. *The Strike Expands on December 19–20; the Ensuing Bargaining Sessions*

On December 19, with most of his drivers still not participating in the strike, but confronted by a recent union handbill in which Lucky 7 was portrayed as a ''successful'' business, Booth conducted a regular drivers' meeting which is the subject of much testimonial confusion. I will discuss matters associated with that meeting in section IV, infra. Shortly after that meeting ended, upwards of 40 more Lucky 7 drivers joined the strike and were followed by additional drivers in the following days.[46] Lucky 7 responded by putting replacement drivers to work in growing numbers, who were usually persons referred by local employment services, then given a hurry-up orientation before taking over a vehicle on their own.[47]

The Union was paying substantial sums to strikers, apparently at least $300 a week, in exchange for a minimum of 15 hours per week of picket duty or other service to the

[44] NEDCO is an acronym for what Lucky 7's controller, Witham, stated was a ''national economic development company,'' an agency within the United States Department of Commerce, with which Booth had been involved in various dealings. Booth had advised his bargaining representatives that a certain NEDCO agent named Janet Stevenson, known to him from those previous dealings, would be acceptable as a ''neutral outsider'' on such a committee.

[45] Morris was apparently referring to the Union's November 8 modified proposal, under which the Union would have ''a continuing right, on not less than a 6 month basis to review and audit if necessary the employer's financial records,'' and which further contemplated that Lucky 7, if shown to be ''financially viable,'' would ''provide employees with benefits similar to those of competitors in the limousine industry in Las Vegas.''

[46] The testimony is harmonious that a substantial number of drivers either walked off the job, or did not report for their next shift, in the aftermath of Booth's December 19 meeting with the drivers. The exact numbers are uncertain; striker Jeffrey Moline estimated that about ''30 to 40'' drivers joined the strike after the December 19 meeting; the Union's Morris estimated that ''90 percent'' of the drivers walked out then, ''pretty well en masse.'' The parties have stipulated that the total number of strikers as of Lucky 7's late January withdrawal of recognition was at least 46, and the General Counsel now maintains only that the actual total was 48.

[47] It is not clear whether this replacement process began to operate before December 20, but Lucky 7 Controller Witham implied that plans for recruiting replacements were effectively in place before that date.

Union,[48] and was sometimes paying greater amounts.[49] In addition, the Union issued a separate, $150 ''Christmas Bonus'' check to strikers, apparently announcing this on or shortly after December 19–20.[50] And the December 19-20 swelling of the ranks of Lucky 7 strikers occurred at the nadir of the notorious tourism lull which befalls Las Vegas annually between Thanksgiving and New Year's Eve. For both the Company and the drivers, this is a period of reduced passenger volumes and incomes.[51]

At some uncertain point, probably after December 20, the Union extended picket lines for the first time to the Airport, at the sidewalk outside ''Door 10'' of the arrivals area, nearest to Lucky 7's van and limo pickup spaces at the ''Top.''[52] There, groups of strikers parading with picket signs[53] sought by various devices to induce arriving passengers not to patronize Lucky 7. These efforts would intensify when one of Lucky 7's agents would approach potential customers emerging from door 10, or would escort already signed-up customers to a waiting vehicle driven by a nonstriking driver. In such instances, some pickets would draw close to the scene, and would appeal to the potential or secured customers to honor their strike by patronizing a different carrier, such as Bell-Trans (against whom the Union was no longer striking, while still trying to get a contract). And these confrontations apparently became the occasion for several hostile exchanges between strikers and nonstrikers and company agents. In early February, as I further describe, infra, Lucky 7 obtained an injunction limiting the number of pickets outside door 10.

January 4 session: The parties met again for 2 hours. Morris had by then turned over a copy of the October 8 audit to Carol Kirshman, after requiring Booth first to sign a ''release'' authorizing this disclosure to his attorneys. The parties reviewed Kirshman's updated draft of agreed-on proposals and outstanding demands. Morris made a suggestion to include ''no lockout'' language within the section dealing with grievance procedures. Kirshman said that the Company would,

> agree to a no-lockout clause, but not to arbitration. Arbitrators have an apparent conflict of interest, as they were being paid by the parties. . . . [We] will not agree to arbitration.

Asked by Morris to ''suggest any alternatives to arbitration,'' Carol Kirshman replied, ''Mediation.'' Morris rejoined that this was ''not effective,'' and that it was ''inevitable that disputes will arise and there has to be some method of settling the disputes without resorting to a strike every time.'' Kirshman observed, ''That may be the only way to settle some disputes.'' They then argued about the Company's ''at-will'' language. Kirshman stated, ''We are satisfied with our position. I am not willing to change and have not been instructed to change our position.'' Turning again to ''Vacations,'' Kirshman said that Lucky 7's ''position on economic items is unchanged.'' This led to additional exchanges, including the following, as recorded in Zentz' notes:

> CM—If you are still claiming an inability to pay, we want to do another audit of the 2d half of 1990.
>
> CK—Then do it. I have been told, and believe that the company can't afford to change the economics.
>
> CM—It will be difficult to reach an agreement with the company's attitude.
>
> . . . .
>
> CM—Everyone knows that the Steelworkers will win eventually. Either the company will continue to loose [sic] drivers and hire replacements or it will cost us [sic] too much, but we will win in time.
>
> CR—The business is and will continue to operate.
>
> CM—No one should have misconceptions, I don't understand the stalemate, we will get a contract eventually. We are will [sic] to go for another audit.

Morris then brought up the ''Bidding'' language already agreed to by the parties, asking that ''work week'' be more precisely defined. Carol Kirshman made a suggestion in this regard, but the meeting broke off inconclusively when Morris retired to take a phone call from the Union's president, and Kirshman left the site 30 minutes later, with Morris still absent, saying she had another meeting scheduled.

January 8 session: The meeting lasted about 4 hours. At the start, Morris announced that the Union would ''try and schedule the audit for January 28 or 30.'' Carol Kirshman

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[48] Striker Scribner's testimony indicates simply that he was ''scheduled'' to picket at least 15 hours each week, and that he generally received about $300 per week in strike payments. Striker Moline described the ''15-hour'' weekly picket duty as a ''request'' made by the Union, implying that picket duty or other service was not intended to be a quid pro quo for the strike payments. Striker Webb likewise confirmed that he received $300 a week from the Union, and that he picketed at least 15 hours each week. Although this evidence is arguably equivocal as to whether the payments were made as quid pro quo for services to the Union, Morris, who supervised the Union's strike payment program, was not so equivocal; he described the Union's policy in these terms:

> We have always said [to strikers or potential strikers] that we have needs and you have needs, and if you expect us to meet your needs, then you have to meet our needs. . . . They [strike pay recipients] have to perform some kind of lawful services for us, unless they're sick or something.

[49] Deborah O'Neill, who joined the strike on or about December 20, testified that she generally received $1100 to $1200 per month in striker payments from the Union, and ''sometimes more,'' and that ''the most [she] ever got in a week'' was a check for $650. O'Neill did not regularly perform picket duty, however, but answered the phone and did clerical work in the Union's offices and strike headquarters.

[50] Striker Moline testified that he personally became aware of the Union's Christmas bonus for strikers the ''day after'' he had decided to join the strike, meaning on or about December 20–21.

[51] Drivers, though paid a $5-an-hour base rate irrespective of how many passengers they carry, can expect their supplemental tip (''toke,'' in Las Vegas) income to drop off substantially during this seasonal lull, especially the limo drivers. Booth, whom I credit for these findings, explained, moreover, that the nontourist limo customers to be found in this period (e.g., local high school prom parties) tend to tip less often, and to tip less, than do the typical tourist customers.

[52] Terefenko recalled that picketing at the Airport began in November; Moline said this was not until January; the sequences described by others suggest that Airport picketing did not begin until late December–early January.

[53] Exactly what language was on the picket signs in December is in doubt, Morris' testimony would permit a finding that at *some* point between late November and mid-January, Morris began to supply Lucky 7 striker picketers with ''unfair labor practice strike'' picket sign banners, replacing previous ''economic strike'' banners.

agreed, then submitted her most recent updated draft of company proposals, including her wording of items the parties bad already agreed to. The parties reviewed these, and Kirshman agreed in several instances that the Union was correct in pointing out that some elements in this draft did not adequately reflect what the parties had agreed to, or could stand further refining. Most of their discussion concerned ''work rules'' details, about which they reached further agreements. Toward the end of the meeting, the parties began to discuss questions relating to payment to drivers for ''doing paperwork at the end of the shift.'' Kirshman agreed to ''ask'' her principals about the amount of time it was taking drivers to complete this paperwork, but she added, ''This is economics and I'm not prepared to discuss that.'' Morris observed that, ''This brings us back to money[,] discipline[,] and arbitration.'' Morris then referred to his earlier ''overall statement regarding wages and benefits and the continuing right of the Union to seek an increase up to industry standards.'' He added,

> I have a local insurance guy looking into plans in detail. We have a strong interest in getting a medical plan, and are exploring ways to pay for it. When I get the details I will transmit them to you. Our position is that there is money available . . . . I can evaluate the cost per hour for the employer to meet the Union's proposals and project the impact on the company's income. I will provide that when it is done.

Carol Kirshman replied, ''OK,'' and the union team retired into caucus. The meeting ended not long after the Union's return, with these final exchanges, as recorded by Zentz:

> CM—We are not going to pursue our proposals regarding shape up time and end of shift paperwork. . . . Is there any change in your position regarding discipline/arbitration or an alternative?
>
> CK—No change, and I already proposed mediation.
>
> CM—That doesn't affect the company's ability to make the final decision. Where does it end?
>
> CK—Have to rely on the grievance procedure.
>
> CM—That would leave no alternative but to strike or go to court in limited circumstances.
>
> CK—Mediation would allow a disinterested party to get involved.[54]
>
> CM—The only other areas open are economic[.] Is there any change in your position?
>
> CK—No.
>
> CM—We are not relying on any audit but we will conduct another at the end of the month.
>
> CK—This ought to be an interesting couple of weeks.

H. *The RD Petition*

On January 22, Richard Baker, a nonstriking employee of Lucky 7, signed an RD petition, a Board form, and filed it with the Board's Las Vegas office, where it was officially docketed the next day.[55] Baker supported this with two unofficial, antiunion petition sheets, each topped by the same handwritten statement:

> We the undersided [sic] drivers of Lucky 7 Limousine do not wish to be represented by the United Steelworkers of America or Local 711A.

In all, the 2 sheets contained 47 signatures,[56] nearly all of them matching names of nonstrikers or persons hired as striker replacements currently on Lucky 7's payroll, although a few others matched names of persons stipulated by the parties to have been strikers.[57]

I. *Lucky 7's Awareness of the Decertification Activities and the Degree of Support for the RD Petition*

RD Petitioner Baker was not called to testify. I credit Lucky 7's controller, Witham, for the following findings: Witham was aware through conversations with Baker that Baker did not want union representation, and Witham had advised Baker that he must seek aid from the Board if he wanted to get rid of the Union.[58] Witham had independently witnessed Baker circulating antiunion petitions among the drivers in the period of a week or two before it was filed And Baker eventually gave Witham copies of the these signed petitions.[59] Being unsure whether he should be in possession of these petition copies, Witham turned them over to Carol Kirshman, without ever studying them closely.[60]

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[54] Originally, Zentz' typed notes had recited, ''Mediation would allow for a decision that is agreed to.'' But the words beginning with ''decision'' had been scratched out by hand, and the handwritten phrase, ''disinterested party to get involved'' had been substituted.

[55] The RD petition was officially docketed on January 23 because the Las Vegas office could not obtain docket number clearance from the supervising Region 28 office in Phoenix until the morning after it was filed.

[56] There are 48 names appearing on the 2 sheets, but the same name (Scot L. Beckman) appears twice, in printing and in script.

[57] Without purporting to recognize the signatures, Lucky 7 Controller Witham testified that all the signature names were those of persons known to him to have been on Lucky 7's payroll at the time of the filing of the RD petition. There is no contrary evidence, but it does appear that at least a few of the purported signers were strikers. Thus, I have compared the decipherable names (in signature form, all but a handful readable) appearing on these hand-drawn antiunion petitions (R. Exh. 7), with the names appearing on Jt. Exh. 13, which was initially attached as an appendix to the May 29 complaint, as a list of the 55 (now 48, as I explain elsewhere) strikers whom Lucky 7 is alleged to have fired for striking on dates ''unknown'' to the Regional Director. I can detect only three names common to both lists: Dennis Allington, Ricky Davenport, and Bob Werner. Lucky 7 has now stipulated that these three were strikers when the RD petition was filed. However, because there is no evidence when these latter three joined the strike, it is not certain whether they signed the antiunion ''showing of interest'' petition before, or after, they joined the strike.

[58] Witham credibly described a conversation with Baker at the Airport this way:

> I think his exact words were, ''How do we get rid of these ass holes?'' And I told him, like I said, all you can do is talk to the National Labor Relations Board.

[59] Witham was not asked to describe the circumstances under which Baker gave Witham these copies.

[60] Nevertheless, on review of these petition sheets on the witness stand, Witham testified that he recognized the names of all the signers as having been Lucky 7 employees at or around the time the petition was circulated. The prosecuting parties have introduced no evidence to the contrary, and I so find.

The precise timing of all this is uncertain. Witham recalls that Baker gave him copies of these petition sheets roughly a week before Lucky 7 received by mail an official notice of the filing of the RD petition from the Regional Office. The Regional Director mailed a notice of the filing of the RD petition to both Lucky 7 and the Union on January 23, and Lucky 7 would have received it in due course of the mails from 1 to 3 days later. Blending this with Witham's description of sequences, I deem it probable that Witham received copies of the showing-of-interest petitions from Baker on or shortly before the date Baker filed the RD petition, or perhaps on the same date that he filed it, i.e., on January 22. And I further infer from the sequence described by Witham that copies of the same showing-of-interest petitions containing 47 signatures were in Carol Hirshman's hands by no later than January 23.

J. *Lucky 7 Cancels Further Dealings with the Union*

I credit elements of Morris' uncontradicted testimony for the description of the parties' next contact: Morris called Carol Kirshman ''[a]round the last week of January,'' to discuss audit scheduling details. (This was at a point when Morris was already aware that the RD petition had been filed, and therefore, it must have been on or after January 23.) When Morris announced his purpose to Kirshman, she interrupted, and

> told [Morris] that a majority of the employees had filed a decertification petition. . . . And that because of that, they were not going to continue negotiations and they were not going to allow the audit.

K. *Further Developments on the Strike Front*

The Union's continuing strike and picket activity against Lucky 7 at the Airport was apparently effective in cutting into the Company's revenues from that mainstay source. Witham, Lucky 7's controller, testified without contradiction that the Company's ''cash flow'' had been barely ''positive'' in the months before December 20, but became ''negative'' after that point. Although I will not find this of critical relevance, I deem it quite believable in all the known circumstances.[61]

Starting in the last week of January or the first week in February, Lucky 7 agents Witham and Owens appeared at the Airport on several occasions with videotape cameras, and recorded picketing activities.[62] Witham and Ownes testified harmoniously, and I find, that they did so after they had witnessed or received reports from ground controllers about certain supposed picketing misconduct,[63] and then only after being directed to start videotaping by Company Attorney Norman Kirshman, who filed for and obtained an injunction from a local court on an uncertain date in early February. The injunction's principal effect was to limit the number of pickets at the sidewalk outside door 10 of the arrivals area to two.[64]

L. *The Union's Settlement Overtures in March; Lucky 7's Responses*

The Union initiated two additional meetings with Lucky 7's agents in March. The first was on March 13 in a coffeeshop. Following an exchange of correspondence, the parties met again on or about March 25, in the Las Vegas offices of United States Congressman Bilbray, with the congressman and his aide in attendance and participating. The only witness invited to testify about these events in any detail was Morris,[65] who did so elliptically, but left no doubt that the meetings and written exchanges were being pursued by each party for ''settlement'' purposes, without prejudice to any positions currently being taken by either party in pending Board or court proceedings.[66] Nevertheless, when the Gen-

[61] The Union's Morris apparently saw it the same way, as this trial exchange between Morris and Lucky 7's counsel illustrates:

> Q. You had a concern about keeping Lucky 7 in business on March 1? [The date refers to the first of Morris' ''settlement'' overtures to Company Counsel Norman Kirshman, the cross-examiner here.]
>
> A. Yes, I do [sic]. And when we are picketing the airport, and there's shifts when there's only six or eight cars or 10 cars roll off the airport in an 8–10 hour period, you're damn right I'm concerned. I know it's hurting him.
>
> Q. You knew you were kicking them in the stomach at the airport, didn't you?
>
> A. That's—hey, I've got to do my job.
>
> Q. But you knew that you were hurting them economically at the airport.
>
> A. Absolutely, absolutely.

[62] Witham recalls that he first started videotaping on or about February 6; Owens recalls that he had started about a week before that. The testimony of the General Counsel's witnesses likewise harmoniously indicates that such camera work did not begin before the last week in January. (E.g., Terefenko: Tr. 109–110; Jenkins: Tr. 845–846; and Busotti: Tr. 591.) One striker, Getter, recalled seeing Ground Controller Leroy Ainsworth at the Airport taking pictures with a still camera. (Ainsworth did not testify.) Getter never specified when this occurred; in fact, he was not asked to do so; rather, his descriptions of Ainsworth's activities were elicited by the General Counsel's question, ''How many times did you see Leroy taking pictures *during* the month of January?'' (As I shall discuss within sec. IV, the General Counsel's failure to question Getter more closely about the timing—indeed his leading reference to ''during the month of January'' itself—appears to have been part of a calculated attempt to obscure the precise timing of these events.)

[63] Witham referred to incidents where picketers allegedly had engaged in ''blocking entrances'' to Lucky 7 vehicles, or ''sticking their heads into'' vehicle windows, and even ''entering'' them on a few occasions. He also mentioned incidents where picketers or union agents would ''buy back'' tickets from already secured customers, in order to induce them to use other transportation services, and would then return those bought-back tickets to Lucky 7 for a refund.

[64] This much is acknowledged by Morris: other details of the injunction, if any, are not of record.

[65] Booth offered limited testimony concerning the meeting in Congressman Bilbray's office.

[66] In his brief, the General Counsel finds it important for some reason to use terms suggesting that these March meetings were mere extensions of the six bargaining meetings that had transpired through January 8. Thus, he refers to the March 13 meeting as ''the parties' seventh negotiation session,'' and the March 25 meeting with Congressman Bilbray as ''the parties' eighth bargaining meeting.'' If the General Counsel's intention is to suggest that by meeting with the Union in March, Lucky 7 had somehow agreed to ''re-recognize'' the Union as the drivers' 9(a) exclusive representative for collective-bargaining purposes, I am unpersuaded. Certainly, as my findings below reveal, these talks and exchanges related to prior contract bargaining issues, but just as certainly, they were understood by both

Continued

eral Counsel began to question Morris on these subjects, Lucky 7's counsel affirmatively waived objections potentially available under Rule 408, Federal Rules of Evidence, to the receipt of this evidence. These are the most pertinent details:

March 13 meeting: Morris and another agent of the Union, Jerry Mongello, met with both Norman and Carol Kirshman in a coffeeshop in the Kirshman & Harris law firm building. Matters concerning this meeting were introduced by the General Counsel's question to Morris, ''did the Union make any proposals or recommendations relating to the improvement of the Employer's economic situation?'' Morris eventually testified:

> A. We did suggest to the Company at that meeting that we would be willing to work with the Company in terms of some of the problems that they had with the regulatory agencies as to the number of passengers they were allowed to haul off of the airport, and that we would consult and use what influence we could to help at the Small Business Loans [sic] Administration or any other organization that might be willing to provide financial assistance to Mr. Booth.
>
> Q. And did you receive any response to this proposal?
>
> A. We discussed how that might be done. One of the things that we talked about was possibly having some discussions with a good friend of Mr. Booth's in Washington as a means to open up conversation between Mr. Booth and ourselves.

Morris eventually made it clear that the ''Washington'' person in question was ''Bob Bailey,'' who Morris understood was an official in the Small Business Administration whom Booth knew and trusted.[67] Invited from the bench to elaborate, Norris stated, inter alia:

> Well, we'd simply use what influence we could to—in terms of persuading them [i.e., the SBA] that—that Mr. Booth was someone they should give consideration, certainly nothing improper or illegal, but simply to discuss them and to help plead his case. That was simply it.
>
> JUDGE NELSON: Plead his case for what? . . . . Money, a loan?
>
> THE WITNESS: —additional financing or whatever.
>
> . . . .
>
> [W]e'd discussed possibly having someone from the Union, Mr. Leon Lynch, our Vice President,[68] meet with Mr. Bailey to establish some rapport between—since Mr. Bailey apparently was trusted well by Mr. Booth, and we thought that perhaps that might be a way to open up some dialogue.

On cross-examination, Norman Kirshman had this exchange with Morris, further clarifying the parties' mutual intentions:

> Q. It was suggested to you that Mr. Lynch, the Steelworker Vice President contact Mr. Bailey before any direct contact was made with Mr. Booth, isn't that right?
>
> A. That was our thoughts, your thoughts and mine at that time.

In addition, according to Morris, the Union's ''influence'' was offered to assist Booth in obtaining approval from the Nevada Public Utilities Commission (PUC) to carry additional passengers in vans which Lucky 7 had originally purchased and equipped for carrying 12 passengers, but in which the PUC was currently allowing the Company to carry only 8 passengers. Morris also recalled,

> oh, we discussed at that meeting that if we were able to put something together, that—I asked Kirshman, I said, ''If we're able to put something together, would all the court cases that you have filed against us, the lawsuit—would that disappear?'' And I said, ''We would—we would get rid of the charges we have filed against you.''[69] And he said, you know, that was normally what happened, and he didn't see a problem.

The Union's March 15 ''Suggested Settlement'' letter: Although Morris was inexplicit about this in his testimony, it is apparent that the Union contemplated in ''put[ting] this thing together'' that there would be a quid pro quo, that Lucky 7 would enter into a labor agreement as part of the deal. Thus, on March 14, Morris transmitted to Norman Kirshman by data facsimile a two-page ''Suggested Settlement'' letter, which outlined terms for a labor agreement which differed in some respects from the Union's proposal as it had been last revised by Morris' statements in the parties' November 8 meeting. This is how Morris outlined his proposal in an introductory paragraph:

> I am suggesting the following course of action to resolve our differences with the Company. The parties should agree on a six month agreement with a roll-over agreement of three years if the Company makes application and obtains additional financing during said six months. If an application for financing is pending at the end of said six months, the agreement would be extended pending the determination on the application and receiving of financing.

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parties as attempts to reach a much broader settlement of not just contract issues, but of pending Board charges and complaints, and civil court lawsuits, as well.

[67] In finding that Morris understood Bailey to be an official of the Small Business Administration, I rely on Morris' answers to my questions at Tr. 324:13–325:20, especially 325:17–20. Counsel for the General Counsel state in their brief, however (Br. 48 fn. 50), that Bailey was ''apparently a black employee of the U.S. Chamber of Commerce.'' That Bailey is black is not in question, but counsel for the General Counsel's supposition that Bailey works for the ''Chamber of Commerce,'' rather than for the SBA, is not supported in the transcript passages cited in their brief (ibid), nor elsewhere in the record, so far as I can determine.

[68] Morris stated that Lynch is black and holds the union title, ''Vice President of Human Affairs,'' with responsibilities for ''minority'' and ''civil rights'' issues.

[69] As of March 13, the Union had eight then-''live'' charge cases pending in the Regional Office against Lucky 7: Cases 28–CA–10702, 28–CA–10702–2, 28–CA–10725, 28–CA–10725–2, 28–CA–10754, 28–CA–10767, 28–CA–10767–2, and 28–CA–10779.

Substantively, Morris proposed that the ''six month agreement'' would include ''all items previously agreed upon,'' and would require that ''all outstanding non-economic items would be discussed and resolved.'' In addition, said Morris,

> A standard Arbitration clause, Discipline clause, and No Strike/No Lockout clause would be included.

The Union's proposal for terms to be included in the ''roll-over agreement'' were more detailed: It would have a 3-year duration, starting ''from date of the Company receiving financing.'' Prominent among its ''fixed'' economic provisions were these: Drivers would receive an immediate hourly pay raise to $5.75 an hour, with another $1-an-hour raise in each of the 2 succeeding years; drivers with 1 or more years of service would get a 1-week vacation with pay annually; and drivers would get an ''Annual Bonus,'' computed as ''2-1/2% of W-2.'' However, these economic provisions must be understood as ''floors,'' not ''ceilings,'' for Morris' proposal also contained another provision which effectively gave the Union rights to audit the Company's books on a continuing basis, and which left open the possibility that an ''interest arbitration'' process might require Lucky 7 to bestow even higher wages and benefits during the 3-year term. Thus, Morris wrote (emphasis added):

> The Union shall have the *continuing* right on not *less* than a six month basis to review and audit, if necessary, the Company's financial records. At such time as the . . . records indicate that the Company is financially viable to provide *wage and benefits* similar to those of competitors in the limousine industry in Las Vegas . . . the Company will *extend such wages and benefits to the employees to the level and extent possible based on the finances*. In the event the parties are unable to agree, *any differences would be submitted to interest arbitration in a timely manner*.

The ''roll-over'' agreement would also contain this provision suggested by Morris:

> The parties will work jointly to resolve any difficulties with the regulatory agencies.

Finally, Morris' proposal contemplated that when the 3-year agreement expired, any disputes over future contract terms would also be resolved by ''interest arbitration, and ''no strike or lockout would occur.''

Lucky 7's March 18 reply letter: Norman Kirshman responded in a letter dated March 18, stating pertinently as follows:

> The suggested settlement . . . is premature. Following receipt I checked with Mr. Booth and discovered that Mr. Lynch has not as yet initiated any contact with Mr. Bailey or Mr. Booth.
>
> As you are aware, discussion of a collective bargaining agreement at this time, with a decertification petition pending, is somewhat sensitive. However, as our discussions are designed to explore settlement of the pending unfair labor practice charges, nothing contained herein can be used by the USWA or Lucky 7 in any NLRB or other legal proceedings. Accordingly, I can make the following comments.
>
> From a legal standpoint, the signing by Lucky 7 of a labor agreement could be challenged. The pending decertification petition was filed by an employee and is supported by the signatures of a majority of the workforce. Although the petition will not be processed until the unfair labor practice charges are resolved, there is a question as to the legality of any labor agreement that might be signed while the petition is still pending. Notwithstanding allegations in the charges, the Employer has neither the ability nor the right to cause the petition to be withdrawn.
>
> As a practical matter, if Lucky 7 could legally sign an agreement with USWA at this time, doing so as you suggest entails too much risk. Six months or six years, once an agreement is signed, it takes on a life of its own. Termination of the agreement at the end of the six month period would not, as a matter of law, end the bargaining obligation. To the contrary, a rebuttable legal presumption that the USWA continues to represent a majority of the drivers would survive termination of the agreement, and we would be back to square one.
>
> One possible solution to that problem would be a definitive agreement which sets forth the financing and regulatory objectives as conditions to extending the sixth [sic] month agreement, with the proviso that should the conditions not be satisfied, the agreement would terminate and the USWA would disclaim interest in the bargaining unit and not attempt to organize for a specified period of time to be agreed upon, but in no event less than one year. At this time I would rather not comment on the terms of such an agreement.
>
> Perhaps when Mr. Lynch meets with Mr. Booth we will both be in a better position to evaluate the situation. In the interim, although I understand you have to do your job as you see fit, the filing of multiple unfair labor practice charges only tends to harden positions. The Employer is determined to litigate all charges which it believes lack merit.

March 25 meeting: At some point between March 13 and 25, Morris had telephoned Union Vice President Lynch and asked him to make contact with the SBA's Bailey on Booth's behalf. Bailey later called Morris back and said, according to Morris, ''that there were better ways to go about it,'' suggesting that Morris should ''see if the Congressman from this District would be willing to sit down and talk to the parties.'' Pursuing this suggestion, someone from the Union (presumably Morris or Lynch) arranged for the meeting in Congressman Bilbray's office on March 25, a date when Lynch would be in Las Vegas for a ''civil rights meeting or convention.'' The participants at the meeting, in addition to the congressman and his aide, were Morris, Lynch, and Attorney Dennis Sabbath for the Union, and Carol Kirshman and Booth for Lucky.

The parties discussed many topics at the meeting, most of them relating to Lucky 7's business woes, such as the PUC's restrictions on van occupancy, and Lucky 7's problems with ''finances.'' Morris reports that Congressman Bilbray offered

> assurances that he would do everything he could with his office to assist them in any way with the regulatory

> problems in getting the per cap restriction on the license changed and if there was anything he could do in terms of seeing that any requests by Mr. Booth to rearrange his finances or to obtain financing in any way, that anything he could do to assist Mr. Booth in such a request if it was made, that he would do so.

Morris also ''offered to bring in a representative from the Lezare [sic] firm at our expense to assist [Booth] with a business plan and so forth.''[70]

At some point, according to Morris, Booth stated that ''he didn't need any help with finances, that the restriction at the airport was his problem.'' Although I accept much of Morris' summaries of events at this meeting, I do not credit this one insofar as it might be relied on to suggest that Booth was admitting that ''finances'' were no longer a problem for him. I find it more probable that Booth stated that he was not interested in the *Union's* ''help with finances'' and, indeed, that he gravely doubted that the Union was genuinely interested in ''helping'' Lucky 7. This interpretation is rather clearly borne out by Morris' later concessions (conspicuously absent from the General Counsel's descriptions of this meeting in the prosecution brief) that Booth *also* said that *Morris*,

> was the one that was creating all the problems and that if [Morris would] put everybody back—I should put everybody back to work—was what he was saying, and that if I'd leave him alone, that in six to seven months, he could provide the insurance coverage.

And later, Morris conceded that Booth had ''jumped up'' to claim that the Union was ''threatening'' him, protesting further, ''You're striking me out there . . . you're killing me,'' and in this context, also said words to the effect,

> If you really wanted to help . . . put the people back to work.

M. *Other Events on and After March 25*

On March 25, the Union withdrew certain of its pending charges before the Board against Lucky 7,[71] but effectively supplanted many of the counts set forth in those withdrawn charges by amending its pending charge in Case 28–CA–10767–2, to allege that the Company had been committing widespread violations of Section 8(a)(1) and (3) throughout the ''last six months.''[72] On the same date that the Union filed that amended charge, the Region announced a ''tentative decision'' concerning many of the claims mentioned in it. (This was apparently a consequence of the Region's investigations into more narrow pending charges, perhaps including the ones the Union withdrew on March 25.) Thus, Field Examiner Donnellan, who had investigated these and prior cases against Lucky 7, wrote to Norman Kirshman on March 25, ''in furtherance of an agreement we reached . . . [on] March 8, 1991, in which I agreed to inform you at the earliest possible time if any decision or anticipated Regional decision involved potential back pay liability for your client.'' Field Examiner Donnellan then announced:

> A tentative Regional decision has been reached in this matter. Evidence has been obtained that supervisors [naming six] . . . have stated to individual employees and to groups that strikers would never be allowed to return to work. The decision to date is that these comments, beginning on or about December 11, 1990, constitute termination of striking employees. As they were ratified and repeated with frequency, the Region would hold that each striker was terminated as he began his strike and backpay is therefore coming to them even without an unconditional offer to return to work. [*Abilities & Goodwill*, 241 NLRB 27 (1979).]

Donnellan also advised Kirshman in this letter that the Region had received evidence that those same named supervisors had made other coercive statements to employees, and in one case had physically assaulted a striker. Donnellan closed this letter with an invitation for Lucky 7 to ''fully cooperate in this investigation by submitting evidence, statements, and witnesses from whom might take affidavits'' and a warning that ''[a]bsent the submission of such evidence, the Regional Director will make his decision on the basis of the evidence available.''

The next day, on March 26, a Kirshman firm secretary dispatched a letter on Lucky 7 letterhead over Owner Booth's signature to all striking and nonstriking employees, to their addresses as shown on company records.[73] This is the material text of that letter (emphasis in original):

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[70] Morris clarified that the ''Lezarel'' firm was an ''investment banking firm out of New York City.'' I presume he was referring to the firm that spells its name ''Lazard.'' He further estimated that the cost to the Union to ''bring in'' a Lazard consultant to ''assist'' Lucky 7 would be a ''Couple thousand dollars, I would imagine, minimum, at least $2,000, maybe more, plus the expenses of the guy flying out here.''

[71] These were Cases 28–CA–10725–2 (filed February 6) and 28–CA–10754 (filed February 11). In addition, only a few days earlier, on March 22, the Union had withdrawn a charge in Case 28–CA–10779 (filed February 22), and the Regional Director had refused to issue a complaint in yet another charge, Case 28–CA–10725 (filed January 25).

[72] The Union amended its originally narrow charge in Case 28–CA–10767–2 on March 25 to make such charges as these: ''for the last six months, the Employer has threatened to and has terminated employees because of their support for . . . United Steelworkers of America [and] . . . has made promises of benefits'' to ''discourage'' such ''support,'' and ''has encouraged and promoted the circulation of a decertification petition,'' and has engaged in ''unlawful surveillance of employees' union activities,'' and has ''threatened employees with reprisals because of their activities on behalf of the United Steelworkers of America.''

[73] In so finding, I rely on the parties' stipulation, proposed by Mr. Kirshman, that Norman Kirshman's secretary, Beverly Buy, would testify that she mailed the letter to all persons listed on a payroll run generated by the Company on March 26, received as an attachment to R. Exh. 1, the letter itself. I also note, pertinent to the question of the size of Lucky 7's striking and nonstriking work force, that 138 names appear on that payroll run, and that Norman Kirshman's representations—and Beverly Buy's ''certificate of mailing''—clearly indicate that copies of the letter were mailed to all 138 persons thus listed. The list admittedly includes the names of persons identified as supervisors in this case (Owens, Noller, Ross, Ainsworth, and Flahart) or as alleged supervisors (Molandes and Poma), and includes four persons identified as having been ''terminated'' (including Beth Wardle); and it may be further presumed to include an uncertain, but apparently small, number of other persons who held ''nonunit'' jobs. Even after making such allowances, however, it appears that Lucky 7's unit complement (including strikers) as of *March 26* was comprised of well over 120 employees.

TO ALL STRIKING LUCKY 7 LIMOUSINE EMPLOYEES AND ALL OTHER LUCKY 7 EMPLOYEES

> It has come to my attention that some of you and the United Steelworkers . . . are confused and have the impression that one or more striking employees have been fired. Lucky 7 is aware that employees cannot legally be fired or discriminated against in any way for withholding their labor in support of a lawful strike. Therefore, let me make this clear:

NO LUCKY 7 EMPLOYEE HAS BEEN (OR WILL BE) DISCHARGED, LAID-OFF OR OTHERWISE DISCRIMINATED AGAINST FOR SUPPORTING THE STEELWORKERS' STRIKE.

> As a businessman I have exercised my right to continue operating my business and have hired replacement workers for those employees who have chosen to withhold their services in support of the strike by the Steelworkers, however this action has no effect on the employment status of any striking employee.

I REPEAT:

> No Lucky 7 employee has been (or will be) discharged, laid off or otherwise discriminated against for withholding their services in support of the Steelworkers' strike. Lucky 7 has exercised its right to continue operations and has hired replacements for employees who have chosen to withhold their services . . . .
>
> I hope that this letter clears the confusion and eliminates some of the stress that we are all feeling in this trying period.

Very truly yours,
/s/ Willard Booth

III. ANALYSIS, SUPPLEMENTAL FINDINGS, AND CONCLUSIONS REGARDING SURFACE BARGAINING AND UNLAWFUL WITHDRAWAL OF RECOGNITION COUNTS IN THE COMPLAINT

A. *Alleged Surface Bargaining as Evidenced by Lucky 7's Bargaining Table Conduct*

1. Introduction; applicable principles

The General Counsel contends that Lucky 7 showed by its conduct at the bargaining table alone that it never intended to reach a final agreement with the Union, indeed, that Lucky 7's bargaining betrays an intention to frustrate the possibility of agreement with the Union. The General Counsel also argues that certain alleged conduct by Lucky 7's agents away from the bargaining table, yet to be examined, likewise betrays essentially the same ultimate unlawful bargaining pattern and underlying motive. I will find in section IV that Lucky 7's ''away-from-table'' conduct was not shown to be unlawful, and does not shed any new or different light on Lucky 7's bargaining behavior; therefore, I will dispose of the surface bargaining issue now, based on findings narrated in section II:

The broad principles to be applied here are familiar: The duty to bargain in good faith mandated in Section 8(a)(5) and Section 8(d) of the Act requires more than ''going through the motions of negotiating''; it requires instead that both parties approach bargaining with a ''serious intent to adjust differences and to reach an acceptable common ground.'' *NLRB v. Truitt Mfg*., 351 U.S. 149, 155 (1956). But Section 8(d) of the Act makes it equally plain that good-faith bargaining ''does not compel either party to agree to a proposal or require the making of a concession.''[74]

The determination whether a bargaining party has engaged in unlawful ''surface bargaining,'' or has instead merely engaged in lawful ''hard bargaining,'' is usually a difficult one, because (a) it involves, at bottom, a question of the ''intent'' of the party in question, and (b) usually such intent can only be inferred from the totality of the challenged party's conduct at the bargaining table, and not from any position it may take on any single bargainable issue or set of issues. Moreover, exactly what features within the challenged party's overall bargaining behavior may properly give rise to an inference that the party had no ''sincere desire'' to reach agreement has been the subject of ongoing debate within the Board.

Such questions were revisited by the Board in its original decision in *Reichhold Chemicals*, 277 NLRB 639 (1985). There, the Board reiterated that it is ''not the Board's role to sit in judgment of the substantive terms of bargaining,'' and stated further that,

> The Board will not attempt to evaluate the reasonableness of a party's bargaining proposals, as distinguished from bargaining tactics, in determining whether the party has bargained in good faith. [Id. at 640.]

But in a ''supplemental decision'' in *Reichhold Chemicals*,[75] a differently constituted Board reconsidered the original decision, particularly the dicta just quoted. Finding these dicta ''imprecise'' as a ''description of the process the Board undertakes in evaluating whether a party has engaged in good-faith bargaining,'' the Board (Member Dotson dissenting) stated:

> Specifically, the quoted sentence could lead to the misconception that under no circumstances will the Board consider the content of a party's proposals in assessing the totality of its conduct during negotiations. On the contrary, we wish to emphasize that in some cases specific proposals might become relevant . . . . The Board's earlier decision is not to be construed as suggesting that the Board has precluded itself from reading the language of contract proposals and examining insistence on extreme proposals in some instances. [Footnote omitted.]
>
> That we will read proposals does not mean, however, that we will decide that particular proposals are either ''acceptable'' or ''unacceptable'' to a party. Instead . . . we shall continue to examine proposals when appropriate and consider whether, on the basis of objective factors, *a demand is clearly designed to frustrate agreement on a collective-bargaining contract*. The Board's task in cases alleging bad-faith bargaining is

[74] And see, e.g., *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970), holding, inter alia, that it is not within the Board's remedial kit of tools to require parties to agree to any particular bargainable item to which they have not already assented.

[75] 288 NLRB 69 (1988) (*Reichhold II*).

> the often difficult one of determining a party's intent from the aggregate of its conduct. In performing this task we will strive to avoid making purely subjective judgments concerning the substance of proposals. [Emphasis added.]

See also, e.g., *88 Transit Lines*, 300 NLRB 177 (1990). There, the Board, reversing the administrative law judge's finding that the employer engaged in unlawful surface bargaining, cautioned on the one hand that,

> we risk running afoul of Section 8(d) if he predicate a finding of bad faith on a party's refusal to agree to the exact language of the other party's proposals. [Id. at 179.]

But on the other hand, the Board acknowledged (ibid.):

> Of course, if a party is so adamant concerning its own initial positions on a number of significant mandatory subjects, we may properly find bad faith evinced by its ''take-it-or-leave-it'' approach. [Citation omitted.] Furthermore, there may be cases where the substance of a party's bargaining position is so unreasonable as to provide some evidence of bad-faith intent to frustrate agreement. [Citations omitted.]

Applying these principles to these unique facts, I conclude that the General Counsel has not carried his burden of demonstrating that Lucky 7 sought by its conduct at the bargaining table to ''frustrate'' the possibility of an agreement with the Union; rather, in essential agreement with Lucky 7's position, I find that the Company engaged in no more than ''hard bargaining,'' and then only as to certain issues. I find further that the ''rigidity'' it arguably displayed as to these issues was adequately explained in terms of its honest perceptions of its legitimate business needs, with particular emphasis on the need to operate ''lean and mean,'' given the Company's undisputedly precarious financial condition. Therefore, its behavior was entirely consistent with the notion that it was prepared to conclude an agreement with the Union, provided that the Union was itself willing to accept an agreement consistent with those needs. I think these points are obvious on the facts already narrated with respect to Lucky 7's resistance to plainly ''economic'' issues, such as wages, bonuses, benefits, and other cost items, but perhaps less obvious as to Lucky 7's resistance to arbitration of grievances or a ''just cause'' discipline standard. Thus, I will return to the latter features after first disposing of the General Counsel's principal arguments for a surface bargaining finding.

2. The General Counsel's more specific contentions

The General Counsel's attorneys have offered a blend of arguments to sustain the proposition that Lucky 7's conduct at the bargaining table alone proves its bad faith. As we shall see, they variously attack three main elements in Lucky 7's overall behavior—its unwillingness to make any economic concessions, its refusal to agree to a ''just cause'' standard for discipline and discharge, and its refusal to submit unresolved grievances to binding third-party arbitration. As we shall also see, many of these arguments are presented in misleading or confusing ways, and many depend on an obvious misinterpretation or misrepresentation of the underlying facts, or the underlying law.

Many of these arguments strike me as being so obviously frivolous that I might comfortably ignore them, but I will identify such for illustrative purposes; they are found in the General Counsel's brief (Br. 87–88) under the (misleading) topic heading, ''*Kirshman's comments to Morris during the course of bargaining [sic] reveals Respondent's lack of real intent to reach any final agreement with the Union*.'' In that section, the General Counsel relies entirely on the contents of Norman Kirshman's March 18 letter to Morris, supra, replying to Morris' ''Suggested Settlement'' FAX transmission, supra. Somehow, the prosecutors find in Kirshman's reply an ''intent to entirely eliminate [Lucky 7's] bargaining obligation to the Union.'' (Br. 88.) Contrary to the General Counsel, I find it impossible to find in that letter any such message. Indeed, the prosecutors are being obtuse, at the least, in suggesting that Kirshman believed on March 18 that the Company was then operating under any such ''bargaining obligation.'' Rather, Kirshman's letter makes it plain that Lucky 7 felt that any such bargaining obligation had been extinguished months earlier, by the alleged ''majority'' showing against representation associated with the RD petition, but was nevertheless willing, for ''ULP settlement'' purposes, to continue exploring the Union's overall proposals if that could be done without compromising its employees' rights—a possibility which Kirshman implied was unlikely, but potentially worth exploring.[76]

Spurious prosecutory reasoning of a different character is also implicit in another passage. Thus, at 87, counsel for the General Counsel state (emphasis added):

> in response to the Union's *major concession in its March 15 proposal* to forego any additional economic benefits for six months, [Lucky 7] *completely failed to budge at all* from its no additional wages or benefits to employees position[,] *even to the extent of expressing a willingness to grant a minor economic benefit (such as a weekly $5 clothing allowance)* once [Lucky 7] became more economically viable.

Here the following observations are appropriate: Morris' March 15 proposals and Kirshman's responses arose in a ''ULP settlement'' context; these exchanges, as I have noted earlier, clearly were not mere ''extensions'' of the bargaining that went on between August 9 and January 8, and therefore it involves sheer bootstrapping for the General Counsel to invoke Lucky 7's failure to make ''concessions'' in *this* context as evidence that Lucky 7's earlier bargaining was undertaken in bad faith.

If that point were not fatal to the claim in question, I observe that what the General Counsel labels a ''major concession'' by the Union was accompanied by other, wholly new

[76] It is an entirely separate question, one which I address elsewhere below, whether Lucky 7 was entitled in all the circumstances obtaining as of late January to withhold recognition from the Union based on doubts of the Union's majority status. The point here is that it begs common sense to find in Kirshman's March 18 letter, made months after Lucky 7 had already declared that it would not deal further with the Union, evidence that the Company had all along ''inten[ded] to eliminate entirely its bargaining obligations to the Union.''

demands from the Union which an employer might reasonably find to be onerous, distracting, and potentially very costly. These demands, ignored by the General Counsel in referring to the Union's ''major concession,'' included the Union's demand for ''continuing audits'' and for ''interest arbitration'' of all future contract disputes (meaning here that Lucky 7 might forever surrender to a third party all decisions affecting the wages, benefits, and all other terms and conditions of employment within the drivers' unit). Accordingly, even if these exchanges had not occurred in the context of an effort to settle *all* outstanding disputes between the parties, including the Union's unfair labor practice charges against the Company, and the Company's lawsuits against the Union, I would find it not at all suspicious that Norman Kirshman did not offer ''concessions'' in response to Morris' March 15 offer.

And even setting aside those points, it is apparent that counsel for the General Counsel ''run afoul of Section 8(d)'' insofar as they presume a duty on Lucky 7's part to meet a supposedly ''major concession'' from the Union in the economic area with at least a ''minor'' concession of its own in the same area. Clearly, moreover, the General Counsel, who is not charged with the responsibility of operating a cash-short and debt-burdened business in the highly competitive Las Vegas market, has overreached by presuming to judge what would constitute a ''minor'' economic concession on Lucky 7's part. And to that extent, he is clearly relying on precisely the kinds of ''purely subjective judgments'' which the *Reichhold II* Board has told us we should ''strive to avoid.''

Other arguments advanced by prosecuting counsel partake of many of the same vices just mentioned. Thus, the General Counsel's brief contains a section headed by the caption (my emphasis), ''The *content* of the Respondent's proposals evidences Respondent's lack of real intent to reach any final agreement with the Union.'' In the passages that follow this assertion, the prosecutors remind us of Lucky 7's

> refusal to agree to a just cause requirement for discharges and its unwillingness to agree to binding arbitration, as well as [Lucky 7's] mediation proposal which completely omitted Union participation.

Clearly, of the three attacks made here, the first two are grounded not in the ''content'' of Lucky 7's proposals, but in its ''refusal'' or ''unwillingness'' to ''agree'' to certain *union* proposals. And to that extent, these first two attacks may be seen as again facially ''running afoul of Section 8(d).'' Only the third item in this list, the Company's ''mediation proposal,'' actually refers to the ''content'' of a Lucky 7 proposal, and the claim that this ''mediation proposal . . . completely omitted Union participation'' is patently contrary to the facts: Thus, as I have found, the undisputed record shows that Lucky 7's ''mediation proposal'' was made in response to the Union's query as to how grievances pursued under the Company's proposed three-stage grievance procedure might be resolved, absent agreement by the parties at the third stage. And I recall that the Company's proposed grievance procedure provided that either ''the Union'' itself, or ''an employee'' (or ''the Employer'') could initiate a grievance, and further expressly contemplated ''Union participation'' in the processing of grievances at the second and third stages. (Jt. Exh. 11, pp. 7–8.) Indeed, Lucky 7's proposal expressly provided (ibid, emphasis added) that ''[t]he Grievance *only* proceeds to Step 3 *if the International Union Representative* or the Employer *requests* it,'' and provided further that only a ''representative of the Union'' would be involved on the grieving party's side at the third stage, during which that union representative would conduct ''further discussion and attempt to resolve the grievance'' with a company ''Manager and a principal of the Employer.'' In these circumstances it is fatuous to suggest that Lucky 7's eventual ''mediation proposal'' could be understood to ''completely omit Union participation.'' (Between whom, exactly, if not the Company and the Union, was the mediator to ''mediate'' when presented with an unresolved grievance following a third-stage ''discussion'' between the Union and the Company?)

Expanding their attack, prosecuting counsel again confuse categories in succeeding passages under the same ''content'' heading. Thus, they state that Lucky 7 ''insisted on its employment-at-will proposal and repeatedly refused to accept binding arbitration.'' And in a footnote associated with this sentence, the General Counsel's lawyers state, without explaining the significance of this fact, that ''Morris informed the Respondents [sic] negotiators that he had never seen a contract in his 20 years as a negotiator without a just cause clause.''

I did not include this fact in my narration of the bargaining history because I found it irrelevant, and I still do. Counsel for the General Counsel apparently intend to suggest, however, that what Morris said at the bargaining table on this score was (a) true, and (b) proof that Lucky 7 was acting in bad faith by failing to conform to what Morris had come to expect from employers. As to (a), the General Counsel ignores the hearsay rule; if Morris' ''experience'' here was relevant, it needed to be proved by other than an out-of-court statement by Morris. As to (b), the suggestion again plainly ''runs afoul of Section 8(d),'' to the extent it suggests that Lucky 7 operated under some presumptive obligation to conform its bargaining position to that of other employers with whom Morris had dealt in his career.

All that aside, if Morris' ''experience'' with other employers were the measure of the lawfulness of Lucky 7's bargaining positions, then I must now record another fact I have not found until now to be worth mentioning, and which the General Counsel never acknowledges: Morris conceded from the witness stand that he has himself negotiated contracts with other employers, (e.g., the General Electric Company, the Westinghouse Corporation, and Miles Laboratories) which do not provide for binding arbitration of grievances, but permit the parties to resort to economic action as a means of ''resolving'' grievances not voluntarily composed by the parties. The General Counsel cannot have it both ways; if the fact that Morris had never before seen a contract without a ''just cause'' clause somehow suggests that Lucky 7's opposition to such a clause evidences bad faith, then the fact that Morris was no stranger to contracts that did not provide for binding arbitration of grievances must somehow exculpate Lucky 7 insofar as it opposed an arbitration clause. Obviously, however, each argument is frivolous.

In the end, the General Counsel seems to find it *inherently* inconsistent with an employer's good-faith bargaining obligations for an employer to insist on the right to discipline and

discharge employees ''at will,'' and to simultaneously refuse to allow his actions to be reviewed and possibly reversed by a neutral, third-party arbitrator. (Indeed, the General Counsel invokes a national labor policy favoring ''industrial peace'' as part of this argument.)[77] In an effort to support this per se view, the General Counsel cites certain dicta in the administrative law judge's decision in *Fetzer Broadcasting Co*., 227 NLRB 1377, 1387 (1977),[78] a pre-*Reichhold* decision, and other dicta in the administrative law judge's decision in a post-*Reichhold* case, *Prentice-Hall, Inc*., 290 NLRB 646, 669 (1988).[79]

I have just noted some threshold difficulties in relying on either *Fetzer* or *Prentice-Hall* as support for the General Counsel's se approach to these questions. But there are two more fundamental problems with the General Counsel's reliance on those cases: In each case, the employer had committed a variety of serious unfair labor practices away from the bargaining table which added fuel to the suspicion that the employer's bargaining position was calculated to frustrate the reaching of an agreement. Here, however, I will find no concurrent violations by Lucky 7 away from the table. More fundamentally, in both *Fetzer* and *Prentice-Hall*, the employer's refusals to accept binding arbitration over disciplinary issues was accompanied by demands for a ''no-strike'' clause. Indeed, this fact was expressly noted by the judge in *Prentice-Hall* as an additional ground for finding that the employer's bargaining proposals in those areas were not being advanced in good faith.[80] Here, obviously, Lucky 7's proposal contained no such additional restrictions; on the contrary, its proposals expressly contemplated that the Union could engage in ''self-help'' (strike action) in the event that mediation failed to result in agreement between the parties in a disputed disciplinary situation.

Admittedly, Lucky 7's proposals on these points would leave the Union in an awkward corner if it accepted Lucky 7's offer: If the Union (or the mediator under Lucky 7's proposed scheme) were unable to persuade Lucky 7 by sweet reason alone to change or modify its disciplinary action, the Union would either be required to fold its hand, or to play the strike card, thereby putting all the unit employees at risk in order to vindicate the interests of perhaps only a single employee or group of employees. But I see nothing in the Act, nor in *Reichhold's* teachings, which suggests that the Board must insulate the Union from being placed in such positions of awkwardness. At most, I see in *Reichhold II* an instruction that when an employer takes a combined set of positions like Lucky 7's, the employer's positions must be examined in terms of their apparent ''reasonableness'' in the light of the surrounding circumstances; and where the employer's positions are judged by that standard to be ''unreasonable,'' this *may* suggest an underlying intention on the employer's part to ''avoid reaching *any* agreement.''

Here, I cannot find that Lucky 7's position was ''unreasonable'' in the circumstances: The Company was in difficult financial straits: arbitrations *are* costly, and the Union's own proposal, from which *it* never budged, required the Company to share in the costs of all arbitrations, no matter who might prevail. Also, arbitrations would clearly have additional, indirect ''cost'' impact on Lucky 7, requiring the diversion of management time and resources in preparation for them. In addition, it was not frivolous for Lucky 7 to anticipate ''abuse of the system'' if it were to agree to arbitration, given the high turnover of employees in this industry, and given the Union's pattern of ''charge first—investigate later,'' revealed in the number of charges to the Board office which it was not prepared to support at the time it first filed them. Thus, given these unique reasons for opposing arbitration, most of which were explained to the Union at the bargaining table, and not merely promulgated at leisure after the fact, I am not persuaded that Lucky 7's resistance to arbitration, although insisting on an ''at-will'' employment standard, was calculated to ''avoid'' agreement, so much as it was calculated to achieve an agreement on terms which it deemed necessary to the Company's financial survival. I therefore find no merit to the ''surface bargaining'' counts in the complaint.

[77] Here the General Counsel cites dicta from the administrative law judge's decision in *J. P. Stevens & Co*., 239 NLRB 738, 765–766 (1978), in which the judge quoted a familiar passage from one of the cases comprising the ''Steelworkers Trilogy,'' *Warrior & Gulf Navigation Co*., 363 U.S. 574, 578 (1960). The Court's observation (ibid) that ''provision for arbitration of grievances'' is ''a major factor in achieving industrial peace'' is unexceptionable—arbitration is certainly a ''good thing'' under national labor policy—but the relevance of this passage otherwise eludes me. The Court did not there suggest that an employer must agree to arbitration provisions or be found to have violated the Act; nor did the judge in *J. P. Stevens* suggest any such thing.

[78] in *Fetzer*, the judge found evidence of the employer's ''adamant unwillingness to reach an agreement'' in the fact that the employer made combined ''offer(s) on discharge and nonbinding mediation'' which would leave the employer as the ''final decider of grievances.'' The judge reasoned that if the union had ''accepted this combination of proposals, it would, in effect, have abdicated its statutory obligation to represent the employees in the unit.'' In this regard, the judge invoked the First Circuit's comment in *NLRB v. Reed & Prince Mfg. Co*., 205 F.2d 139 (1953), cert. denied 346 U.S. 887 (1954): ''It is difficult to believe that the Company with a straight face could have supposed that this proposal had the slightest chance of acceptance by a self-respecting union . . . .'' However, my reading of the Board's decisions in *Reichhold I* and *II* persuades me that any rationale which depends on suppositions about what a ''self-respecting union'' might find ''acceptable,'' will no longer pass muster; rather, the Board will not take any such per se approach, but will examine the totality of the employer's bargaining conduct to determine whether the employer's ''intent,'' even in advancing a proposal which a union might find unpalatable, was to frustrate the possibility of agreement, or was merely advanced in support of the employer's own good-faith assessment of its business requirements.

[79] The General Counsel notes that *Prentice-Hall* is a ''case decided after *Reichhold*'' which found ''from the totality of the evidence that the employer had no real intent to reach agreement with a union.'' This is true, but not in itself useful. Indeed, in the light of the Board's ''disavowal'' passage (id. at 646, citing *Reichhold II*), it is uncertain whether the Board intended to adopt the judge's language relied on by the General Counsel. And for additional reasons noted below in main text, I find that *Prentice-Hall* does not genuinely support the prosecution insofar as it is contending that Lucky 7's wish to have the final say as to discipline and discharge provides per se evidence of bad faith.

[80] In discussing *Prentice-Hall* the General Counsel fails to disclose that the judge pointed out that the company was simultaneously seeking a ''[broad] no-strike article'' which left the union without even the power to engage in ''*self-help* or a contract action to enforce the just-cause standard or correct an alleged breach of it.'' (Ibid; emphasis added.)

B. *Lucky 7's Defense to Withdrawal of Recognition Based on Claimed Good-Faith Doubt of Majority Status*

The General Counsel correctly identifies *Royal Coach Lines*, 282 NLRB 1087 (1987), as setting forth the circumstances under which an employer, like Lucky 7, may withhold recognition from and refuse to bargain further with a union which it had voluntarily recognized earlier, but with which it has not yet reached a labor agreement. Thus, the *Royal Coach* Board held that,

> where, as here, an employer has validly extended voluntary recognition to a union,[81] the union is entitled to an irrebuttable presumption of majority status until a reasonable time for bargaining has elapsed. [Id. at 238, citations omitted.]
>
> . . . .
>
> Once a reasonable time for bargaining has elapsed, the union enjoys a rebuttable presumption of majority status. This presumption can be rebutted by the employer's showing that at the time of its refusal to bargain, the union did not have majority status in fact, or that the employer had a good-faith doubt based on objective factors.

The General Counsel argues that in this case, the Union's presumption of majority status should be considered irrebuttable because a ''reasonable time'' had not elapsed before late January, when Lucky 7 refused to recognize or deal further with the Union. He bases this argument on three grounds: ''the parties were bargaining for their first contract . . . the Respondent was not bargaining in good faith, and the parties had not reached impasse in negotiations.'' I have rejected the claim that Lucky 7 was not bargaining in good faith, and I do not find it necessary to address the General Counsel's other two arguments, for I will find that even if a ''reasonable time'' had elapsed, and the Union's presumption of ''majority status'' was ''rebuttable'' as of late January, Lucky 7 has failed to advance evidence sufficient to rebut the presumption of the Union's majority status at that time.

Lucky 7 asserts that it has rebutted the union majority presumption in both of the ways suggested by the *Royal Coach*, i.e., by proving no majority ''in fact'' or by proving ''objective factors'' warranting a ''good faith doubt.''[82] In this regard, Lucky 7's counsel asserts simply on brief,

> Here, a majority of Respondent's drivers signed the decertification petition, all of the replacement employees continue to cross the picket line, and dismissal of the decertification petition was for purely administrative reasons.

As to the first assertion, that a ''majority'' signed the RD petition, I can discern no evidence in the record to support this. More specifically, because Lucky 7 never established how many unit employees (strikers and replacements) were employed in late January, it is impossible to know whether the 47 signers of the ''showing of interest'' petition associated with the RD petition represented a ''majority'' of that total, or some considerably smaller percentage. Indeed, as I have previously noted, Lucky 7's March 26 letter to employees reassuring them that they had not been and would not be discharged or discriminated against for striking or other union activities was mailed to 138 persons, all but a handful of whom appear to have been unit employees. Thus, it appears that the 47 petition signers may only have amounted to approximately 30–35 percent of the unit of strikers and nonstrikers.

Lucky 7's assertion that ''replacement employees continued to cross the picket line'' is not meaningful in this context, even if true. The Board will not ''maintain or create any presumptions regarding the [ ] union sentiments'' of replacements, but ''will require 'some further evidence of union non-support' before concluding that an employer's claim of good-faith doubt of the union's majority is sufficient to rebut the overall presumption of continuing majority status.''[83] Indeed, that replacements may have continued to cross the picket line is particularly irrelevant information where, as here, Lucky 7 failed to show how many replacement employees it had hired, much less what percentage of the total of strikers and nonstrikers they reflected. And the mere fact that an RD petition was filed, but ''was dismissed for purely administrative reasons'' does not provide the ''further evidence of union nonsupport,'' for the Regional Director's initial processing of the RD petition implied only that at least ''30 percent'' of the employees in the combined unit of strikers and nonstrikers had evinced a wish no longer to be represented by the Union.[84]

Because Lucky 7 has failed to present valid objective considerations for entertaining its claimed good-faith doubt as to the Union's majority status, I find that the presumption of the Union's majority status has not been rebutted, and that Lucky 7 violated Section 8(a)(5) by admittedly refusing to

[81] There is no contention made by Lucky 7 that its initial recognition of the Union in December 1989 was invalid. Nor can the validity of that recognition be challenged at this late date, where no one challenged the validity of that initial recognition within 6 months after it occurred. Rather, under *Machinists Local 1424 (Bryan Mfg.) v. NLRB*, 362 U.S. 411 (1960), the validity of that recognition must now be conclusively presumed.

[82] I think that the ''no majority in-fact'' defense is essentially an illusory one, notwithstanding that it is repeated ritualistically in literally hundreds of Board and court cases, whenever an employer's right to withdraw recognition is in issue. See my more extended expositions on these points in *Manna Pro Partners*, 304 NLRB 782 (1991), which the Board found unnecessary to rely on. Id. at fn. 1. In any case, exactly what it may take for an employer to make out an ''in fact'' showing remains a mystery to me, for I am unaware of any cases where the Board has found that an employer successfully made such a showing. But in this case, for reasons noted below, I find that when Lucky 7 failed even to make out a ''good faith doubt'' defense, a fortiori, it could not have made out an ''in-fact'' defense.

[83] *Station KKHI*, 284 NLRB 1339, 1334 (1987).

[84] In agreement with Lucky 7, I may presume that the Regional Director determined, in allowing the RD petition to be filed in the first instance, had made an ''administrative determination'' that at least ''30 percent'' of the total of strikers and nonstrikers had signed the accompanying ''showing of interest'' petition. But, in agreement with the General Counsel, that presumption does not come close to establishing grounds for a good-faith doubt of the Union's ''majority'' status. See cases cited in Administrative Law Judge Wieder's dicta in *Champ Corp.*, 291 NLRB 803, 877–878 (1988), a case decided on other grounds (employer not free to raise good-faith doubt defense where unfair labor practices precluded any reliance on alleged ''objective considerations'').

recognize or bargain further with the Union in and after late January. It follows, therefore, that when Lucky 7 canceled the previously scheduled second audit of its financial situation based on these same inadequate grounds, Lucky 7 violated its obligations under Section 8(a)(5) by refusing to furnish information to the Union which was necessary for the Union to adequately investigate Lucky 7's claims of ''inability to pay.''

IV. CONDUCT BY LUCKY 7'S AGENTS AWAY FROM THE BARGAINING TABLE

A. *General Introductory Remarks*

The General Counsel's complaint, as variously amended before or during the trial, is dense with individual counts which suggest in the aggregate that throughout the period in question, Lucky 7's agents barraged its employees away from the bargaining table with an ongoing series of unlawful statements. The complaint characterizes these alleged statements in various terms of opprobrium; some are called ''interrogations,'' others are assigned as ''threats'' concerning Lucky 7's intentions regarding the Union and/or its striking drivers; yet other alleged company statements are characterized as amounting to unlawful inducements or blandishments to cause employees to abandon the Union as their bargaining agent. All these alleged statements are cited as independent violations of the Act under Section 8(a)(1); some of them (the ''termination'' statements) are also cited as evidencing violations of Section 8(a)(3), and other statements are cited as instances of ''direct dealing'' with employees, in violation of Section 8(a)(5). Moreover, all the alleged-to-be-unlawful statements are cited in the complaint as alternative or additional grounds for concluding that Lucky 7 was engaging in unlawful surface bargaining. Clearly, allegedly unlawful company statements to employees are expected to perform multiple duty in service of the General Counsel's case.

In the General Counsel's brief, in instances too numerous or subtle to be worth extensive detailing, the much-amended complaint has been further revised, sub silentio. Indeed, the factual contentions currently made in the prosecution brief often bear little resemblance to many of the complaint's original counts regarding statements made by Lucky 7's agents. But the General Counsel on brief continues to depict Lucky 7 as an employer determined to rid itself of an unwanted union presence by resorting to widespread unlawful statements to employees away from the bargaining table calculated to repress or discourage employee support for the Union.

This harsh portrayal of Lucky 7, I observe, is one that draws little support from my findings in sections II and III, except insofar as Lucky 7's withdrawal of recognition itself might be invoked. Indeed, if it can be supported at all, I would be required to find that Lucky 7's managers and supervisors did, in fact, make the kinds of unlawful statements to employees with which they are charged, and did so with the frequency which is suggested in the complaint and in the General Counsel's brief. In the circumstances, it is understatement to observe that significant parts of that case will survive only if the General Counsel's witnesses to allegedly unlawful company statements are themselves found to be largely credible reporters of the events in question.

The General Counsel sought to sustain the ''company statement'' counts in the complaint by calling 14 Lucky 7 drivers, all strikers. I cannot remember ever before having encountered as many prosecution witnesses to alleged company statements as were presented in this one whose testimony left me with so many doubts about their ability to recall statements with reasonable accuracy, and about their sincerity or candor in recounting them.[85] With only a few exceptions, to be noted in due course, I will be unable to credit the General Counsel's witnesses in their various recountings of statements allegedly made by company agents. In resolving most of the credibility disputes against the prosecution witnesses, I have been influenced by the generally unimpressive testimonial demeanor most of them displayed, by the typically vague and impressionistic quality of much of their testimony (a quality which was often encouraged by the leading or suggestive style of questioning employed by the prosecuting attorneys), by the fact that their versions are often mutually inharmonious concerning important details of commonly witnessed events, and by the inherent improbability of many of their accounts in the light of known surrounding events. In addition, my suspicions about the accuracy or honesty of some of these witnesses' recollections of certain events have been aroused because those recollections do not appear to have ''surfaced'' until months after the fact, mostly in and after late February 1991, as part of an admitted union effort to marshal evidence to support resubmitted charges which the Union had not been not able to support when earlier-docketed versions of the same or similar charges were first submitted, then dismissed or withdrawn.[86] There is more than a little flavor in much of this evidence of ongoing attempts by the witnesses and their sponsors to re-tailor their recollections to suit the evolving theories of statutory violation advanced by the Union, which were eventually embraced in the General Counsel's May 29 complaint.

Having listed in general terms the factors which have caused me to doubt many of the General Counsel's claims now being advanced, I will attempt to be more concrete below. The fairest way to do this is to try to address systematically the General Counsel's own recitation on brief of the facts concerning Lucky 7's away-from-table statements, and in a few instances, its actions by conduct other than statements. In doing so, I will follow the General Counsel's own

[85] Similarly extraordinary in my experience are the number of instances in which an allegation in the complaint bears only faint resemblance to the actual proof eventually offered—usually through the vague or dubious recollections of a single witness, even when the allegation concerns statements allegedly made to or in the presence of many employees. Extraordinary, moreover—and revealing of the frailty of many of the prosecution's contentions about disputed ''company statement'' events—are the number of occasions where the General Counsel has been forced on brief to resort to exaggeration or misrepresentations of the record, or to commit other lapses of candor or fairness.

[86] Indeed, as the General Counsel acknowledged with respect to a variety of counts amended into the complaint after the trial record opened, these amendments derived from witness recollections which did not ''surface'' until after the Regional Director had issued his ultimate pretrial complaint on May 29, 1991, even though all these witnesses had furnished at least one affidavit or declaration about related events before May 29, and more typically had furnished two or more such statements, without ever disclosing the supposed facts on which the posttrial amendments were based.

briefing sequence and format, and will borrow his own topic headings, which are identified below by quotation marks.[87]

B. *Pre-October 25 ''Background'' Incidents*[88]

1. *Booth and Owens' animus toward the Union prior to September 1990*: The General Counsel relies on the vague or equivocal testimony of witnesses Ralph Scribner, Ronald Lorick, and Jeffrey Moline for claims made within this topic section. Scribner, whose testimony was fragmentary and impressionistic in tenor, claimed that in a drivers' meeting in or around ''May 1990'' Booth stated, ''I don't mind if you have a union down the road, as long as it's a good one,'' and that a union's presence would force him to ''close the doors.'' Lorick claimed that during a drivers' meeting in the ''summer'' of 1990, Booth stated that he would ''never let the Union in,'' and made a similar statement during another meeting prior to September 1990. Strikingly, although both Scribner and Lorick were coworkers during the periods just described, and presumably attended the same meetings, neither corroborated the other in their separate recollections of these events; nor did other driver-witnesses employed in the same period corroborate either Lorick or Scribner.[89] I formed the impression that both of these witnesses had no distinct recollections of these events, but were improvising.[90] Moreover, I find their accounts in these respects inherently improbable. The Union was already ''in'' at the time booth allegedly made these statements. I discredit both witnesses on these points.

Separately, Lorick described occasions when Booth made hopeful predictions in various contexts to the general effect that ''things would get better'' around or after ''the first of the year.'' Booth admittedly made such remarks frequently—he says he did so to deal with the kinds of recurring questions or complaints from drivers which most witnesses agree were being made during the period in question, including complaints about poorly maintained vehicles, low wages, absence of benefits, and other problems which were traceable to the Company's ongoing financial and cash-flow difficulties. Lorick's own accounts here were vague, and not obviously inconsistent with Booth's testimony. And Booth insists, with some support from the General Counsel's witnesses, that any remarks about the possibility of improvements after the first of the year were linked expressly to expectations of possible increased revenues, especially following the Thanksgiving to New Year's Eve lull previously described. Lorick's testimony was too impressionistic and contextually vague to support a finding that the ''things will get better'' remarks he attributed to Booth were linked to the Union's presence or absence.

Moline, without describing the context in any significant detail, testified that in October 1990, not long after he had been hired in September as a van driver, Owens told him that ''things would get better around the first of the year.'' (Nothing in Moline's description would suggest that the Union's status or tenure was at issue in this conversation.) Owens admits making some such remark, but I credit him in his explanation of the context—that Moline was asking to be transferred from a van driving position to a limousine job. Owens testified that in this context, he encouraged Moline to ''be patient,'' saying that ''things'll probably get better by the end of the year.'' I specifically credit Owens' more detailed description, including that he also told Moline in this connection that he thought it likely that normal turnover in the next few months would yield additional openings for limo drivers.

Thus, contrary to the General Counsel, I am unable to find in such remarks any distinct suggestion of antiunion ''ani-

[87] Following the General Counsel's briefing format has its own hazards from an organizational standpoint: For one thing, the prosecutors, although attempting overall to recapitulate the facts chronologically, are often forced to skip forward or back in time as they attempt to portray a ''pattern'' of unlawful behavior by Lucky 7's agents; for another, their chronology sometimes reflects nothing more than a guess, based on vague or conflicting accounts of their own witnesses, as to when a certain alleged incident may have occurred. I have nevertheless chosen to follow the format employed by the General Counsel because I have reluctantly concluded that this is the only way to fairly and systematically address the General Counsel's *current* prosecutory claims, as distinguished from those which have been advanced in summary and often misleading or overblown terms in the May 29 complaint. Moreover, by following the General Counsel's briefing format, I will avoid the need to comment extensively about certain witness testimony presented at trial by the General Counsel which he has now chosen to ignore.

[88] As previously noted, the General Counsel believes, based on the false supposition that the Union's January 15, 1991 charge in Case 28–CA–10702 was ''closely related'' to the events in 1990 which are now targeted by the complaint, that any unlawful statements made by Lucky 7 agents on or after July 15, 1990, are legally reachable as violations, and are not barred from prosecution by 10(b)'s 6-month limitations' rule. However, for reasons I explained in my preliminary findings as to 10(b) questions, I have concluded that the first union charge which was neither withdrawn or dismissed which called into question Lucky 7's actions in 1990 was the Union's amended charge in Case 28–CA–10767–2, filed on March 25, 1991. Accordingly, I will treat October 25, 1990, as the 10(b) cutoff date, and will treat with events before that date only as arguably relevant ''background,'' useful only insofar as they may illuminate allegations in the complaint addressing Lucky 7's behavior on or after October 25.

[89] Most striking of all, in my view, was the fact that the General Counsel did not invite driver Terefenko to report his own recollections of any statements made by company agents during drivers' meetings held in the period before Terefenko joined the strike on November 7. Terefenko, despite testimonial failings mentioned elsewhere below, was the Union's chief employee bargaining committee member, and seemingly its strongest in-house supporter, having immediately joined the strike on November 7 even though most of his fellow drivers chose to continue working for at least another 6 weeks. Thus, Terefenko could be expected to have been sensitive to any antiunion or coercive statements made by company agents at drivers' meetings arising before November, and to have promptly passed along his awareness of such company statements to the Union. So far as this record shows, however, Terefenko had no memories about company statements at drivers' meetings which would support the versions so vaguely advanced by witnesses such as Lorick, Moline, or Scribner. And with this in mind, I infer that the reason the General Counsel failed to invite Terefenko's testimony about company statements during drivers' meetings before November 7 was that Terefenko would have failed to corroborate the witnesses whom the General Counsel did choose to examine on such matters.

[90] Scribner's ''close the doors'' version emerged only belatedly in his recital, and seemed to me to reflect subjective interpretation posing as recollection. The same was largely true of the testimony offered by other employee-witnesses called by the General Counsel to testify about statements made by Booth or other management agents during drivers' meetings.

mus,'' much less an attempt on Booth's part to encourage employees in the belief that they would be more likely to receive improved wages or benefits if they were to get rid of the Union.[91] Rather, I find, consistent with Booth's testimony, as supported by elements within the testimony of other prosecution witnesses, that when he made such remarks, he did so in terms which did not convey a promise so much as a hope, moreover, a hope linked solely to the expectation of increased revenues, unrelated to whether or not the Union were still around.

2. *Booth solicits volunteers for grievance committee. Brooks threatens to ''deal with'' union plants*: As to the ''Union plants'' claim, the General Counsel relies on the fragmentary and shifting testimony of Vincent McCoy about statements made by Booth and Top Manager Brooks in a September drivers' meeting. Booth and Brooks denied ever having made such statements. McCoy was not corroborated, even though at least some of the other drivers called as witnesses for the prosecution must have attended the same meeting. I discredit McCoy on this point. I further discredit McCoy insofar as he claims that Booth stated in that meeting (or elsewhere) that the Union was ''hindering the progress of the company,'' and insofar as his testimony might suggest that Booth blamed the Union's presence for the Company's inability to grant wage increases or other benefits.[92]

The issues surrounding Booth's ''grievance committee'' statements are more complicated, and have little to do with McCoy's testimony about ''September'' events in any case.[93] Rather, the General Counsel now relies on Booth's own admissions that he had made comments about a ''grievance committee'' not just in the September 1990 meeting, but had been making them since sometime in 1987, and continued to make them in meetings after September 1990, particularly in the December 19 meeting, where he admittedly outlined a more specific plan. I will find it easier to reach ultimate findings and conclusions on ''grievance committee''-related matters at a later point, after narrating other relevant facts associated with the December 19 meeting. For now, I simply note that I find no real suggestion of ''animus'' in such remarks, whenever made.

3. *Brooks threatens to close the Company down before allowing the Union in*: Under this caption heading, the General Counsel cites two alleged incidents, both reported by striker Deborah O'Neill. As to the first incident, he has misread and/or misrepresented the testimony. Thus, on brief (Br. 13), he claims (added emphasis), ''On a date in late September or early October, O'Neill asked *Brooks* what he thought of the Union,'' and that *Brooks* replied that the Company ''could not afford them and does not believe in them.'' However, the testimony of O'Neill cited by the General Counsel for this assertion of fact refers to an alleged conversation with *Booth*; thus (emphasis added):

> Q. Prior to November 7th, 1990, did you have any conversations with someone other than your fellow employees?
>
> A. Yes, I did.
>
> Q. Who did you have these conversations with?
>
> A. With Mr. Willard Booth and with Mr. Ed Brooks.
>
> Q. Approximately when did you have *this conversation with Mr. Booth?*
>
> A. Later part of September, first part of October.
>
> . . . .
>
> A. I said hello to Mr. *Booth* and asked him what he thought of the Union or what was going on with the Union, and because I had been approached and asked to sign up with the Union. And he said that *there would be no Union*, that he didn't believe in them—he couldn't afford them, he couldn't afford it, and he didn't believe in them.
>
> Q. What happened next?
>
> JUDGE NELSON: Let me just understand what you're telling me. Was his reply simply he can't afford them and doesn't believe in them?
>
> THE WITNESS: Yes.
>
> JUDGE NELSON: He did not say, ''There will be no Union''?

[91] Br. 13, the General Counsel recapitulates Lorick's rather perfunctory recollection that during a drivers' meeting sometime in the ''summer'' of 1990, Booth responded to a driver's question about ''benefits'' by stating that he would ''look into those for you after the first of the year, that everything would be okay.'' Clearly, this testimony alone, even if given more weight than I believe it deserves, given Lorick's generally unimpressive demeanor and the absence of corroboration, is indefinite in its significance. And it is apparently with the same recognition in mind that the General Counsel finds it necessary within this description of Lorick's testimony to first introduce a supposition which permeates the General Counsel's theory of violation, but which is not supported by the record, namely, that, ''Booth . . . believed that he was only obligated to recognize the Union for a year.''

This is a remarkable assertion, and it clearly drives much of the General Counsel's case insofar as it depends on various references Booth admittedly made to employees about the possibility of improvements in employee benefits at some future point. But this assertion about Booth's supposed subjective ''belief'' as to the duration of his union recognition obligations is without substantial record support. As support for this claim at Br. 13, prosecuting counsel cite Booth's testimony at Tr. 1294:14–18. But in fact, Booth's testimony in the cited passages contains no admission of any such ''belief.'' Neither do other passages in Booth's testimony cited later in the prosecution brief support the proposition that Booth believed that he was only obligated to recognize the Union for a year. (And see further findings on this point in my discussion of the December 19 drivers' meeting.)

[92] As I incidentally narrate below, Booth conceded that he had probably used the expression, ''my hands are tied'' in attempting to discourage direct discussions with employees about possible improvements in benefits, particularly in one such discussion with Jenkins on December 19, described infra. Such admissions do not establish what the General Counsel clearly wished to show in the end—that Booth at various points tried to persuade employees that such improvements would be possible, or likely, only if the Union were not in the picture.

[93] McCoy did not attribute to Booth any remarks about a grievance committee in September 1990; rather, he recalled that in an ''October'' drivers' meeting (''at the beginning of the month[,] I'm not sure'') a driver named ''C.J.'' complained in ''general'' terms about being treated ''unfairly'' by certain ''managers under Mr. Booth'' and that Booth replied that he would ''deal with'' (or ''talk to'') the managers about this ''and, you know, if we had any problems he could deal with them.'' I again find this testimony too generalized and fragmentary to be reliable, much less significant, and the General Counsel apparently does too, for he now seizes on elements in Booth's testimony, as I discuss next in main text.

> THE WITNESS: No, not at that—that time he didn't, no.

It is apparent that the General Counsel is confused about whom O'Neill was referring to in describing this first conversation; it is equally apparent that O'Neill significantly trimmed her account by abruptly withdrawing her initial assertion that Booth had said that there ''would be no Union,'' as soon as I interrupted with a clarifying question.[94] What is not apparent is why the General Counsel chose to refer at all to this first incident in a section of his brief supposedly dealing with alleged ''closure'' threats, much less closure threats by *Brooks*.

Later, focusing on Brooks, O'Neill recalled that in a one-on-one conversation in ''October,''[95] she asked Brooks, ''What do you think about the Union?'' Brooks replied, says O'Neill, that ''there would never be a union at Lucky 7,'' and that ''they would close the company down first before they would allow a union in.'' Brooks denies the statement and even the encounter. O'Neill's version of this alleged conversation would require me to believe that roughly 10 months after Lucky 7 had already signed an agreement to recognize the Union, and roughly 3 months after the parties had already begun to negotiate, the Company was still acting as if the Union were not already ''in.'' O'Neill's testimony is elsewhere shot through with retracted assertions, modifications, and other suspicious indications of improvisation. She was one of the least demeanorally impressive witnesses, and one of several prosecution witnesses whose most damaging recollections about Lucky 7's behavior seem to have been sought out and tendered by the Union at a suspiciously late date. Although she joined the strike on or about December 20, and worked in the Union's offices on a regular basis thereafter, it appears that she gave no written statements to the Union until months after the alleged ''October'' conversation with Brooks.[96] I cannot credit her here, nor in other cases where she is the witness on whom the General Counsel has relied to support a count in the complaint.

4. *Brooks gives the impression of surveillance*: The prosecutors rely on the testimony of driver Harold Dial, who testified that he overheard a brief exchange between Brooks and driver Beth Wardle on or about October 10, at the ''sign-in window'' at Industrial Road. According to Dial's initial version, Brooks said to Wardle, ''I heard you joined the Union,'' then Wardle asked, ''Is that bad or good?'' and then Brooks said, ''I want to see you. I want to talk to you.'' (Dial amended this latter formulation almost immediately, saying that Brooks replied to Wardle's question by saying, ''I'll speak to you later.'') Dial also states that shortly afterward, he saw Brooks leave the office and join Wardle in the garage area.

I found no basis in Dial's demeanor nor elsewhere in the record to doubt Dial, whose recollection concerning the essential details of this overheard transaction seemed firm and sincere. It arouses my curiosity that Wardle was not called to testify about this event. But I find it more significantly curious that Brooks was never invited during Lucky 7's defensive case to specifically comment about this alleged incident.[97] In the circumstances, I credit Dial.

Arguably, this evidence of an October 10 ''impression-of-surveillance'' (or veiled ''interrogation'') statement by Brooks might have sustained a finding of an 8(a)(1) violation, had it been made the subject of a timely charge, which it was not, or had it been ''closely related'' to a timely charge, which it was not. But even if Brooks' remarks to Wardle were unlawful under Section 8(a)(1), it does not follow that Brooks' remarks establish genuine antiunion ''animus'' on Lucky 7's part, which is the General Counsel's topic thesis.[98] Indeed, I find that Dial's credited testimony about this single exchange deserves very little weight insofar as it is relied on to show Lucky 7's ''animus,'' and deserves no weight whatsoever in revolving questions raised about the lawfulness of Lucky 7's behavior on or after October 25.

5. *Booth remarks about his hands being tied*: The General Counsel here relies on striker McCoy's testimony, in which McCoy quotes Booth as having made ''hands are tied'' statements in a variety of contexts. As noted earlier, McCoy summarily recalled, inter alia, that in a drivers' meeting in ''early

[94] I interrupted because it seemed evident from O'Neill's demeanor that she was overly eager blending her own subjective characterizations of these transactions with her actual recollections of what was said. And in the end, I continued to doubt that anything she reported reflected anything more than subjective impressions and distorted ones at that.

[95] O'Neill's testimony will not support a finding that this alleged incident occurred on or after October 25.

[96] O'Neill gave two written statements to the Union; the first on January 18, the second on January 30. These statements were later attached to an affidavit to a Board agent signed by O'Neill on March 1. The respective contents of each statement were not disclosed in the trial, but I note that the Regional Director's first complaint, which issued on March *12* contained no allegation relating to the supposed statements made by Brooks to O'Neill in October—rather, it alleged only that striker Terefenko had been unlawfully threatened by Owens on January 11 and again on January 12. (It was not until April 1—following the Union's March 25 amendments, which broadly charged the Company with violations dating back to 1990—that the Regional Director issued a second complaint which addressed allegedly unlawful statements made by company agents in 1990, including counts which might arguably match up with O'Neill's testimony.)

[97] Brooks stated generally that he ''avoid[ed]'' having union-related conversations with employees, but Lucky 7's counsel was careful to elicit denials from him in other instances where employees attributed union-coercive remarks to him. Thus, his failure to comment on the Wardle episode invites an inference adverse to Lucky 7, that if he had been questioned about it, he would have corroborated Dial. By contrast, the General Counsel's failure to call Wardle to corroborate Dial invites no inference adverse to the General Counsel, because Wardle was, presumably, ''equally available'' to both parties, and there is no basis for assuming that Wardle would be ''favorably disposed'' toward either the Union or the General Counsel. See, e.g., *International Automated Machines*, 285 NLRB 1122, 1123 (1987). (And here I recall further that only minutes before this trial opened, the Regional Director had approved the Union's withdrawal of a charge alleging that Wardle had been unlawfully discharged, and had severed and dismissed a counterpart allegation from the May 29 complaint. But for that set of facts, there might have been stronger basis for drawing an inference adverse to the General Counsel for failing to call Wardle as a witness concerning this incident.)

[98] ''Animus'' is not a necessary element in proving a violation under Sec. 8(a)(1); rather, it is the reasonable tendency of even an ''innocently'' motivated employer statement or question to ''interfere with, restrain, or coerce'' employees in the exercise of Sec. 7 rights which will establish the violation. Thus, Brooks' exchange with Wardle, although arguably ''coercive'' in its effect on Wardle, does not automatically imply Brooks'—or Lucky 7's—hostility toward the Union.

October,'' Booth discussed the current status of the business and indicated regret that employees were forced to resort to ''passing the hat'' for collections to help out an employee who was sick or injured. McCoy further recalled that Booth spoke about the possibility that business would improve with the advent of more ''international trade'' in the future. Booth agrees that he made such remarks at this meeting, but neither of these statements necessarily implicates Section 8(a)(1). Apparently recognizing this, the General Counsel emphasizes McCoy's additional testimony that Booth also said in this ''early October'' meeting that he ''couldn't do anything because his hands were tied for a year because of the Union bargaining thing.'' Booth materially disputed having said this, but admitted that in a meeting in December, he had sought to avoid responding substantively to questions about benefits by saying that his ''hands were tied because negotiation was going on . . . that [he] couldn't do anything, the negotiator was taking care of that,'' and he ''didn't want to get into anything like that cause [he] had to focus on trying to get this thing stabilized.''

I do not credit McCoy insofar as his testimony may contradict Booth as to ''hands are tied'' remarks. I find it entirely plausible that Booth would discourage any attempts by drivers to discuss directly with him the possibility of increased benefits, and that he would have cited the ongoing bargaining over such matters as the reason he did ''not want to get into anything like that.'' I specifically disbelieve McCoy insofar as he claims that Booth said at any time that his ''hands were tied *for a year* because of the Union bargaining,'' viewing this as gilding the lily on McCoy's part, and finding it improbable, given McCoy's overall vagueness, that he could reliably recall precisely how, or in what context, Booth may have made a ''hands are tied'' statement.[99] Indeed, I would not rely on any element in McCoy's testimony which might suggest that Booth *ever* conveyed the message that he was only obliged to recognize the Union for a ''year,'' or that he was prepared to grant increases in wages or benefits only if the Union were no longer in the picture.

C. *Alleged Incidents After October 25*

6. *Respondent's immediate response to the November 7, 1990 strike*: Here, I have bypassed certain introductory recitations of fact advanced by the General Counsel which I have covered in findings in section II, and I focus on assertions made by the General Counsel under the topic heading, ''(b) Brooks informs an employee of Respondent's termination policy.''

In this section, the General Counsel supposes that Lucky 7 had an unlawful ''policy'' of ''terminating'' strikers, as distinguished from a lawful policy of ''permanently replacing'' them, without prejudice to their rights, on unconditionally offering to return, to be reinstated to positions if and as they became available.[100] I will take the opportunity here not just to discuss Jenkins' testimony, but to make more general findings about Lucky 7's ''policy'' regarding the respective employment rights and status of replacements and strikers.

In this section at least, the General Counsel's supposition that Lucky 7 had an unlawful ''policy of ''terminating'' strikers rests on testimony from driver Clarence Jenkins about an alleged conversation between Jenkins and Brooks occurring only a few days after the November 7 strike began. Thus, Jenkins reported that Brooks told him that the striking drivers ''had three days to come back to work or they were terminated.'' Jenkins also recalled that Brooks told him during this conversation that ''Bell [Lucky 7's competitor] . . . had 280 employees outside of town in motels ready to *replace* the drivers.'' (Emphasis added.)

How did Brooks come to make these alleged remarks? On direct examination, Jenkins stated that he—not Brooks—had initiated the conversation, and that he ''was asking him [Brooks], you know, like about the employees that was out on strike . . . what was going to happen to them.'' I observe that this question from Jenkins did not necessarily invite Brooks to comment about ''what was going to happen to'' the handful of *Lucky 7* drivers who were then participating in the multiemployer strike, making it possible that Brooks' alleged replies were focused on how *Bell-Trans* intended to deal with the strike. And further doubts on this score were raised when Jenkins was pressed on cross-examination to be more specific about the alleged conversation with Brooks. Here, Jenkins began to backpedal, stumblingly—he now said that he had initiated the conversation with Brooks by asking Brooks more generally, ''What do you think about the strike?'' Then, asked whether he had ''been more specific'' in his question to Brooks, Jenkins replied (emphasis added),

> No. That's—that was—you know, like how it—you know, like it led out. And then we started talking discussing other things, you know, pertaining to the strike and the people that were out on strike. *So in what order or in what form it came in, You know, I couldn't say that*.

Brooks believably denied making any remarks to Jenkins or anyone else to the effect that Lucky 7 strikers would be ''terminated.'' Jenkins here and elsewhere showed much tendency to embellish, to disguise his own subjective interpretations of the meaning of company statements as his actual recollections of what was said, and to shift ground with each retelling. Even assuming, contrary to Brooks, that some conversation resembling the one described by Jenkins actually took place between the two men shortly after November 7, I have great doubt that Jenkins could genuinely recall whether Brooks made a ''termination'' statement, as distin-

[99] Perhaps most revealing of McCoy's tendency to mishear and/or misreport important elements of Booth's statements in drivers' meetings was McCoy's insistence—contrary to the recollections of every other prosecution witness—that in the December 19 meeting Booth stated that, ''he would not put 10 cents of his money or our money into anything *involving a union*.'' McCoy was admittedly ''not as attentive as [he] should have been,'' however, and he was not corroborated by any other witness. Rather, although differing about Booth's precise formulations in making such remarks, all other employee-witnesses (and Booth himself) recall that Booth was here talking about the possibility of providing insurance benefits in the future, and in that context stated his unwillingness to put his own money or his employees' money into any jointly contributory plan that would benefit neither the Company nor the employees. And it is this latter version of Booth's remarks that the General Counsel adopts on brief. (G.C. Br. 21–22, citing Booth, Scribner, Lorick, Moline, and O'Neill, but *not* McCoy.)

[100] See generally *Laidlaw Corp*., 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969).

guished from a ''replacement'' statement, especially so long after the fact.[101]

If any such conversation took place between Jenkins and Brooks, I find it as likely as not, given Jenkins' admitted difficulties with recalling the ''order'' and ''form'' of Brooks' statements, that Brooks made no statement about the ''termination'' of strikers, but rather spoke of the possibility that strikers would be ''replaced. Moreover, I would find it difficult in any event to infer from Jenkins' overall testimony about this alleged transaction that Brooks was then referring in any way to *Lucky 7's* ''policy'' respecting the few of its own drivers who were then participating in the strike. Rather, it is again as likely as not from Jenkins' account that Brooks was simply referring to *Bell-Trans'* plans to ''replace'' strikers in the near future. Accordingly, Jenkins' testimony does not persuade me that Brooks made an unlawful threat to Jenkins that strikers would be ''terminated.'' Much less would I rely on Jenkins as providing plausible support for the notion that Lucky 7 had a ''policy'' of ''terminating'' strikers.

Moving beyond the unreliability of Jenkins, I find that the record contains no reliable independent evidence that Lucky 7 had a ''policy'' of ''terminating'' strikers.[102] Rather, the record contains substantial affirmative evidence that the Company's intention (or ''policy'') was at all times to hire permanent replacements for the strikers, without prejudice to the right of strikers to return, if they offered to do so, if and as job openings were available for them. Booth testified in substance that (a) he never made any statement to his managers or to anyone else suggesting that strikers were ''terminated,'' and (b) to the contrary, he instructed his managers that strikers wishing to return to work would be allowed to return as job openings became available, but that he wanted any such would-be returnees to be referred directly to him to ensure consistency of treatment. Managers Brooks and Owens substantially corroborated Booth on these points.

In addition, three striker-witnesses called by the General Counsel gave testimony tending to support the inference that the Company's ''policy'' respecting the rehire of strikers was consistent with *Laidlaw* requirements. Two such witnesses, Barry Webb and Vincent D'Amico, have in common that they interviewed for striker-replacements positions in late December, and claim to have been ''hired'' before they elected instead to join the strike. Most significantly, D'Amico testified, concerning a conversation with Owens at the time he was assertedly ''hired,'' as follows (emphasis added):

> I wanted to question Bobby Owens what was to guarantee my job when the strike was over, and *his words were that the [striking] drivers did have a job, but now they're out; they're not fired; they're just replaced, and the only way that they were going to be able to get the jobs back is if there was an opening and they went toward the back of all the new guys*. That's how I understood it for myself, cause at the time that was a big decision for me of taking a job or going with the Union, cause I'd been out of work for a while myself.

Webb recalled that Booth made an essentially similar statement while addressing a group of applicants for striker replacement positions; thus:

> Mr. Willard Booth spoke to us at this meeting and told us that the drivers were on strike. He told us, ''You will keep your jobs after the strike is settled. The strikers will be brought back on an availability basis only.''

Finally, prosecution witness Emfinger admittedly wrote a ''To whom it may concern'' memo regarding a December 20 conversation with Night Manager Don Noller, in which Emfinger paraphrased Noller as saying, inter alia,

> that anyone who worked for Lucky 7 that went out on strike would only have the job back (when the strike was over) if they needed anyone extra besides the newly hired people because of the strike, which would mean that the ones that went out on strike would not have any work if they did not need any extra help.

Clearly, and allowing for Emfinger's awkwardness of expression, Noller's remarks as thus reported were consistent with a lawful ''replacement'' policy, and quite inconsistent with a supposed ''policy'' of ''terminating'' strikers.

7. *Poma remarks that strikers will not be getting their jobs back*: To support this claim, the General Counsel relies on Gene Busotti, who started as a Lucky 7 per capita van driver in October 1990, and joined the strike shortly after the December 19 drivers' meeting. He claims that some time around ''the beginning of December,'' before he joined the strike, he was at the Airport, and because business was ''slow,'' he strolled over to Poma, Booth's mother-in-law, who was then working at Lucky 7's ticket counter. He testified that he asked Poma generally ''what she thought of the strike,'' and that she replied, ''I'll tell you one thing. Those drivers that went out on strike will not be getting their jobs

[101] It appears that Jenkins was not tendered to the Board as a witness until he gave an affidavit to the Board on March 28, 1991. The charge-filing and investigative history discussed previously, supplemented by Morris' testimony, indicates that the Union was scrambling rather feverishly (in Norris' words, ''running around like a chicken with his head off'') in the period after the RD petition was filed—particularly in and after late February—to uncover evidence of company wrongdoing in the months preceding the RD petition-filing. (In this regard, I recall again that the only charges the Union filed prior to March 25 which were not withdrawn or dismissed were the narrow charges filed in Cases 28–CA–10702 and 28–CA–10702–2 concerning an alleged set of threats made by Company Agent Owens to striker-picket Terefenko on January 11 and 12, and a separate charge in Case 28–CA–10767–2 asserting that Owens had ''shoved'' striker-picket Stassinos ''to the ground'' in mid-February.) Clearly, therefore, Jenkins surfaced rather belatedly as a witness to alleged wrongdoing by the Company in ''early November.'' Clearly, moreover, Jenkins had been readily ''available'' to the Union since at least late December, when he admittedly joined the strike and went on the Union's $300-per-week payroll as part of its regular picketing team.

[102] As described in due course below, many striker witnesses besides Jenkins (Busotti, Terefenko, Emfinger, O'Neill, Moline, and Getter) testified that in a variety of individual confrontations on the picket line with certain supervisors or alleged supervisors after December 19, these company agents made statements that implied, directly or indirectly depending on the statement, the supervisor's own belief that some or all of the strikers had been fired or would not be rehired. However, for reasons individually noted below, I would not rely on any of the above-listed witnesses for a finding that a supervisor made any such statement in any of the alleged settings they variously described.

back.'' He says he asked her why she was ''so sure of that,'' and that she replied, ''Believe me when I tell you.''

Poma, who is 73 years old, and who works only a few days each week, denied ever once having spoken to a striker; beyond that she denied making any ''termination''-type statements to strikers, and claimed that she was unaware of the status of strikers in the eyes of company managers. Although I was impressed by her demeanor, and the vehemence with which she uttered these general and specific denials, neither did I find anything in Busotti's demeanor, nor in the balance of his brief testimonial presentation, which would cause me to doubt his own veracity. But I discredit Busotti in this instance because I find his testimony improbable; I can imagine no plausible reason why Poma would make such a statement, given the evidence described in the immediately preceding section that company ''policy'' allowed for strikers seeking to return to work to be reinstated if and as jobs were available. In any case, it was the General Counsel's burden to establish in this instance that, on balance, Busotti was more believable than Poma. I can find no persuasive basis in the record for such a finding.[103] Accordingly, I find that the General Counsel did not carry his burden of establishing by a preponderance of the credible evidence that Poma made the remarks in question.

Moreover, at the time of his alleged conversation with Poma, Busotti was admittedly unaware that Poma was Booth's mother-in-law. Neither was he shown to have any awareness that she was other than a ''ticket seller.'' Busotti also admitted that in questioning Poma, he was merely seeking her opinion, and took her alleged remarks as an expression of her opinion. Poma's role as a ticket seller did not involve the exercise of supervisory authority; at best, she exercised a form of arguably supervisory ''discretion'' only in those occasional instances where she found it necessary for one reason or another to ask the Company's dispatcher to call a waiting limo driver to the Top, rather than have the ground controller do that summoning. And even then her discretion was confined to a yet smaller number of such instances where she was shown to have asked for a specific driver outside the normal rotational order for such limo charter calls. I am not persuaded that this quite limited exercise of arguably supervisory discretion made Poma into a figure of such status that employees would give special weight to any arguably ''coercive'' statements she might make. Accordingly, even if she had made the remarks attributed to her by Busotti, I find it doubtful that Busotti would have taken them as expressions of Lucky 7's intentions or policies, as distinguished from an opinion uttered by another nonstriking fellow worker who had no special insights into the Company's thinking.

8. *Booth communicates his animus toward the Union*: Under this topic heading, counsel for the General Counsel state simply,

> Booth testified that on more than one occasion he told an employee that, ''I would not have a union or nobody else run my business.''

I observe that such a remark certainly indicates Booth's hostility toward ceding to any outsider the right to ''run his business,'' but does not necessarily indicate any hostility toward the Union in its role as the collective-bargaining agent for his employees. This is only one of several instances in which the General Counsel has sought to build a case based on legally innocuous statements admittedly made by Booth.

9. *The December 19, 1990 drivers' meeting*:[104] Under the above-quoted topic heading, the General Counsel covers a lot of ground in a highly confusing way. And it is in this section of the prosecution brief that the difficulties in addressing its contentions point by point are most obvious, largely because the ''points'' are often elusive, or inconclusive. I will eventually do my best to attempt to address these in the sequence in which they appear, but not before presenting some additional background facts, and some general comments relevant to my eventual findings:

Background and Overview

To intelligibly discuss the General Counsel's current claims about what Booth allegedly did wrong during the December 19 meeting itself, I must record these relevant background events.

On October 22, before the strike began, a local newspaper, the Las Vegas Sun, had published a ''human interest'' piece about Booth and Lucky 7 in the Sun's ''Profile'' section, under the headline, '''Grand Plan' finally catches on.'' In summary, the article described how Booth, in 1976, after working for 25 years as a bellman in a local hotel, had gotten SBA assistance and had acquired a defaulting SBA borrower's PUC permit and two limousines, only one of them in running condition, and had since built Lucky 7 into a business which now operated ''27 vehicles'' and used ''90 employees.'' The article quoted Booth as feeling ''blessed,'' and as saying, ''When I look at the payroll, I can't believe my eyes. It's wonderful.'' But it went on to include Booth's accounts of the various tribulations he had experienced and was continuing to experience in trying to ''make it,'' including his difficulties in getting rights from the PUC to carry more than eight passengers in his vans, and his continuing problems with debts and other encumbrances on his ''working capital.'' Nevertheless, Booth was depicted near the article's conclusion as being grateful to a local Cadillac dealer for accepting his credit and selling him additional limos even after he had been ''turned down by everyone else.'' And in this context, Booth was quoted as saying, ''They [the dealership] knew of my success . . . and knew me. They figured if I could stay alive with the vehicles I had, I would be even more successful with good equipment. They made sure I got the financing and were very helpful.'' The article further stated, ''He [Booth] speaks highly of his employees, and

[103] As described below, other striker-witnesses testified that Poma made statements on later occasions implying that strikers generally, or that certain strikers, had been discharged. Those witnesses were, in each case, particularly unimpressive, and their versions suffered from other frailties, and therefore what they claimed to recall about Poma's statements does not make me more inclined than I might otherwise be to resolve the Busotti-Poma credibility dispute in favor of Busotti.

[104] Although some of the General Counsel's witnesses recall the timing differently, everyone agrees that Booth conducted a regular drivers' meeting in December, just as he typically did once each month. All parties now accept as fact, and I find, consistent with Booth's testimony, that the December meeting was held on the afternoon of December 19, and was attended by approximately 40 drivers.

says they have done a great job for him. Because of them he wants to keep the business going and expand again. Booth plans to go back soon and try to get restrictions taken off his airport permit.''

The Union found in this article much fuel for propaganda. Shortly before December 19, it began to circulate a handbill among Lucky 7 employees bearing the caption, ''Lucky 7 Limo, is this the Company's 'Grand Plan?'''[105] Beneath that caption, the handbill set forth the Union's negotiating demands in the following terms, advising that Lucky 7 had said ''NO'' to each of them:

NO FIRE AT WILL
ARBITRATION OF DISPUTES
WAGE INCREASE
MEDICAL, EYE & DENTAL INSURANCE
VACATION AND BONUS[106]

The handbill went on to refer to the Sun article, selectively quoting or paraphrasing from it,[107] and concluded with these words:

> Our proposals are more than reasonable. Why does the company insist on being so UNREASONABLE? IT'S TIME FOR LUCKY 7 TO SETTLE A CONTRACT. SUPPORT YOUR UNION NEGOTIATING COMMITTEE TODAY.

Someone gave Booth a copy of this handbill on December 19, as he was entering the meeting area, where about 40 drivers were waiting for him. He was admittedly dismayed by it, and voiced this dismay in the hallway as he was about to enter the meeting, saying words to the effect, ''How in the world do they hang a newspaper story on me that I'm the richest person in the world and everybody knows what my bank account is?'' The General Counsel somehow finds this ''outburst'' to be significant to issues in this case, but I remain puzzled about his point. To me, all it reveals is Booth's alarm and frustration over the Union's attempts to suggest in the handbill that the Company was prospering, when he had already turned over records to the Union which plainly showed otherwise.[108]

As to Booth's conduct in the meeting itself, I must observe that nowhere was the record made so confused, dubious, and contradictory than by the attempts of the prosecution to depict through the perfunctory and erratic summary testimony of several witnesses what actually happened during it. It became evident that no one of the General Counsel's witnesses was able to present a contextually coherent account of how and when Booth made certain alleged remarks now claimed to be violations, and that they only rarely provided anything resembling corroboration of one another as to these critical points. Moreover, the General Counsel pointedly avoided questioning at least one of the prosecution witnesses who had attended this meeting (Busotti) about December 19 events.[109] The General Counsel's efforts yielded a crazy quilt of materially contradictory versions, a grab bag from which the General Counsel might selectively draw to support any number of claims—including contradictory ones. Noting these problems at the conclusion of the trial, I directed counsel for the General Counsel to sift through their evidence and to set forth with clarity in their brief precisely which versions they intended to rely on to support complaint allegations addressed to Booth's conduct at this meeting.

The General Counsel's brief reflects a grudging compliance with this direction, and reveals implicitly that the prosecution no longer would rely on rather substantial chunks of testimony introduced though its witnesses at trial.[110] Rather,

[105] In all quotes from the Union's handbill, emphasis appears as in the original.

[106] The General Counsel makes much of Booth's supposed ''disingenuousness'' in connection with December 19 events, as I show below. With that in mind, I observe that the Union was exaggerating the facts considerably by suggesting in this handbill that its *current* demands at the bargaining table included ones for ''Medical, Eye & Dental Insurance,'' or for ''Vacation and Bonus.'' As I have found on an undisputed record, the Union had withdrawn specific demands in those particular areas on November 8, and had instead substituted a far more indefinite demand respecting ''benefits''—for a ''continuing right, on not less than a 6 month basis to review and audit'' Lucky 7's books, further contemplating that if the ''financial records'' showed that Lucky 7 was ''financially viable to provide . . . *benefits similar to those of competitors*,'' Lucky 7 would either ''extend such benefits,'' *or* the ''employer or the Union may serve notice to renegotiate this agreement.''

[107] For example:

> Willard Booth announces HIS LUCKY 7 BUSINESS SUCCESS STORY to the City of Las Vegas! He says that his employees have done a GREAT JOB for him. Because of them he wants to keep the business going and expand again. Booth exclaims: ''When I look at the payroll, I can't believe my eyes. It's wonderful.''

[108] Prosecuting counsel accept Booth's testimony about this ''outburst,'' and strain to use it as evidence that Booth had a ''tendency to misstate the truth when it suited his purposes.'' They find it darkly significant in this regard that,

> Not only did the flier nor the newspaper not call Booth the richest person in the world, but Booth conceded that an interested member of the public could only know about his Company's finances if they read Respondent's yearly report at the Public Service Commission.

The first point is trivial; the second is both trivial and disingenuous, given that Booth's ''outburst'' was a reaction to the Union's own propaganda, and that the Union had by then conducted an audit which fully revealed the desperate financial condition of the business and Booth's own personal liability for much of the Company's heavy debt burden.

[109] Hearkening back to earlier discussions of the adverse inference rule, here I would find that an inference adverse to the General Counsel is warranted based on the General Counsel's failure to question Busotti about events at the December 19 meeting. I thus infer that if Busotti had been invited to offer such testimony, he would have contradicted the claims made by other prosecution witnesses, and would have supported Booth's own version of December 19 events, thereby toppling the shaky pillar of sticks and straws on which the prosecution has founded most of the allegations associated with Booth's conduct at that meeting.

[110] Among the more obvious examples are these: As previously noted, McCoy's certainty that Booth had vowed on December 19 never to put ''ten cents'' of his own or his employees' money into anything ''involving the Union'' is no longer shared by the General Counsel, even though other aspects of McCoy's recollection continue to nourish the General Counsel's claims. In addition, in their brief (Br. 18 fn. 17), the prosecution has expressly (and with good reason) disavowed any reliance on *any* testimony offered by Calvin Getter concerning the December 19 meeting (Getter testified, among other things; that Booth threatened in this meeting ''never to sign a contract'' with the Union, a threat never alleged in the complaint).

Continued

the prosecuting attorneys now borrow heavily on Booth's own testimony to sustain the surviving claims, in the process exaggerating it, or mischaracterizing it, or stripping it from context. From my review of all the testimony about the December 19 meeting, I am persuaded that Booth's version conveys the most reliable overall sense of what happened, even though Booth made no systematic attempt to describe it start to finish. Even the more fragmentary accounts of the employee-witnesses can be largely harmonized with Booth's version, and the recollections of Company Controller Witham are substantially harmonious with Booth's own testimony about material incidents. I therefore credit Booth's account of its length (about 1 hour), its structure and tone (informal, interrupted by various questions from employees and impromptu responses from Booth), and the overall themes recurringly emphasized by Booth (that the Company was still struggling, contrary to the Union's depiction in its handbill, and did not feel presently able to commit itself to providing any fringe benefits (specifically, health insurance), but hoped for increased revenues in the following year which might then allow such questions to be revisited, simultaneously emphasizing that such matters were subject to the ongoing negotiations with the Union). In addition, as I shall find, Booth admittedly spoke of his wish to form a ''grievance committee'' (which, although inartfully so characterized in Booth's statements to employees, was clearly the same type of ''committee'' which his negotiators had already proposed for the Union's consideration at the bargaining table). Moreover, Booth admittedly made reference to the possibility that employees themselves might choose to vote out the Union, but did so in a way which I shall find was entirely lawful and noncoercive, despite the General Counsel's claims to the contrary.

Prosecution Claims

The greatest uncertainty stems from the confusing variety of assertions contained in the General Counsel's introductory paragraphs, i.e., those preceding subheadings ''a'' through ''c.'' Near the beginning of this section in their brief (fn. 17, appearing on Br. 18), the prosecutors have conceded that they are no longer ''contending'' that Booth made any unlawful ''closure'' or ''bankruptcy'' threats in the ''December 19'' meeting. However, invoking the shifting recollection of driver Ralph Emfinger, they now claim that Booth made such statements in the ''November'' drivers' meeting.[111] They neglect to mention, however, that in a pretrial affidavit, Emfinger had attributed some such remarks to Booth in the ''December'' drivers' meeting, and that Emfinger's testimony was so shifting as to the timing of these alleged remarks that, in the end, one would be only guessing to suppose that his testimony refers to a ''November'' meeting. They also neglect to mention that Emfinger introduced his account of the ''meeting,'' whenever it was, with the statement, ''Well, to tell you the truth, I really don't recall a whole lot from that meeting.'' Emfinger acknowledged at certain points that his testimony reflected his subjective interpretation of statements made by company agents which he could not actually recall. The impressionistic, shifting, and often reckless quality of Emfinger's testimony thereafter showed Emfinger's introductory disclaimer to be an understatement. He was not corroborated by any other witness in testifying that Booth made a ''bankruptcy'' or ''closure'' statement during either the ''November'' or the ''December'' meeting. So poor was the overall quality of Emfinger's testimony, and so improbable were so many of his vague memories about transactions involving Lucky 7's agents, that I would not credit him even in the absence of a specific denial from a company agent. Thus, if the General Counsel relies on Emfinger to sustain any element of the complaint, I find that the prosecution has failed to carry its prima facie burden as to any such element.

The next matter addressed by the General Counsel under the ''December 19 meeting'' topic heading is one which arose on December 19, but before the meeting began: Here, the prosecutors cite Booth's testimony that as he was about to enter the meeting, driver Clarence Jenkins approached him and sought to engage him in discussion about some ''insurance package,'' which Jenkins characterized to Booth as ''the best insurance package that ever come down the pipe,'' adding that the package was ''cheap; we can afford it . . . .'' Booth testified that he rebuffed Jenkins, saying, ''Look, I don't care how cheap it is[,] the negotiations going on . . . would take care of this. I cannot do anything now cause my hands are tied by the negotiations going on.''[112]

Prosecuting counsel find that Booth's admitted reply to Jenkins was ''disingenuous,'' based on their own dubious interpretation of the significance of an ''admission'' made elsewhere by Booth.[113] But the accusation is irrelevant, even if true, unless the General Counsel is now contending that disingenuousness in an employer's statements to employees is itself a violation of the Act, a claim which I do not detect being made, and which would require a more careful elaboration from the prosecution before I would trouble to deal with it. Moreover, I agree with the observation made by Lucky 7 counsel on brief—that if Booth had done what the

However, the General Counsel continues to depend substantially on Getter's memory to support claims that company agents made unlawful ''termination'' threats to striker-pickets at the Airport.

[111] In fn. 16 of their brief—also appearing on Br. 18, but actually appended to text appearing on Br. 16 (text itself which, incidentally has nothing to do with the ''November'' drivers' meeting)—the prosecutors had characterized Emfinger's testimony in the following terms:

> At the November 1990 drivers' meeting, the first drivers' meeting since the strike began, Booth informed drivers that if the Union came in and the Company had to do everything the Union asked, the Company would either go bankrupt or have to close down.

[112] Jenkins, who never reported any such December 19 exchange with Booth during his appearance on the witness stand, was not recalled to comment on Booth's testimony in this respect after Booth offered it.

[113] In a footnote (Br. 19 fn. 19), prosecuting counsel elaborate on the ''disingenuousness'' claim, saying that Booth ''misled Jenkins [and] other employees'' by such remarks. How so? Because, say the prosecutors, ''Booth admitted that . . . he knew that the company was not going to make a proposal during negotiations for health insurance.'' It is true that Booth made essentially that ''admission,'' although I note that the Company's intention not to make a proposal concerning health insurance certainly did not mean that the subject of health insurance would disappear from the bargaining table. Thus, it was hardly an exercise in ''disingenuousness'' for Booth to tell Jenkins (or other employees) that he was not free to discuss ''insurance'' issues directly with them, so long as the issue was subject to negotiations.

General Counsel appears to say he should have done, that is, to take up a discussion with Jenkins about a specific insurance plan, the General Counsel would have charged Lucky 7 with unlawful ''direct dealing'' with employees, as he has done in a number of other wholly dubious instances described below. Again, I find that Booth's admission about this exchange in no way advances the prosecution's case.

It is not always clear from the General Counsel's recitals of fact which aspects of Booth's behavior are claimed to involve violations of the Act. In this regard, I note that the prosecutors cite Ralph Scribner's unique testimony that at some point in the December 19 meeting, Booth made some kind of two-handed gesture toward the ''outside'' of the building, and simultaneously stated that his mother used to tell him, ''when you're bad, I'll whip your butt. Now I'm telling you, when you do something wrong, I'll whip your butt.'' No one corroborated Scribner, and Scribner's own account of events at the December 19 meeting was so fragmentary and shaped that one can gain no sense of the context within which Booth supposedly made these remarks and gesture.[114] Moreover, Scribner conceded that Booth often used allegory and anecdote when he spoke during drivers' meetings, and dramatized his points with similar hand gestures.

The suggestion apparently advanced by the General Counsel is that, because there was then picketing going on ''outside'' the building, Booth's words, joined to his ''gesture,'' amounted to a threat that he intended to deal harshly with prounion employees. Contrary to any such suggestion, I cannot find in Scribner's descriptions any substantial basis for concluding that Booth made a threat to retaliate against employees who exercised Section 7 rights.

Having disposed of miscellaneous matters discussed in the General Counsel's introductory remarks about the December 19 meeting, I now turn to his more clearly stated attacks on Booth's behavior therein:

a. *Booth proposes jointly paid health insurance for the upcoming year*: Under this caption, the General Counsel sets forth supposed ''facts'' which will be used to undergird an ultimate claim that Booth used the December 19 meeting to engage in ''direct dealing'' with employees, and to induce them to abandon representation by the Union. The proposition (actually at least two propositions) advanced by the quoted topic sentence remains entirely unsupported by the record. As I shall explain below, the evidence does not come close to establishing that Booth's remarks about ''insurance'' amounted to a ''proposal,'' and it involves an equally egregious distortion of the record to assert that Booth was ''proposing'' an insurance plan ''*for* the upcoming year.''

In passages which the General Counsel embraces, Booth testified on direct examination that he responded to a driver's question by saying to the effect that ''negotiations'' were ''going on and the . . . negotiators would work out whatever . . . arrangement for insurance that we would have[, and] that the company for the first time may come out of this year with a little bit of piece of money left over if we're lucky.''[115] Elaborating, Booth said he told employees that,

> whether it's a small company or a big company I hope you understand that whatever insurance thing would come up I really believe that the workers are going to have to share into it and the—and the employer going to have to share into it. And that would not put a dime of my money or your money into any package that we could not secure.[116]

On cross-examination, during which Booth adopted additional suggestions from the General Counsel, Booth's testimony was substantially consistent with the foregoing. Thus, (emphasis added):

> Q. And you told drivers that at that time you didn't have a reserve [for insurance]?
> A. That's right.
> Q. Did you tell drivers at that point that you *thought that some time in the future you might* get to the point where you would have such a reserve?
> A. Yes.
> Q. *Perhaps some time* in the next year, the upcoming year.
> A. That's right.

Relying on this latter exchange, in which Booth merely affirmed the General Counsel's own suggestions, themselves clearly phrased in tentative and conditional terms, the prosecutors nevertheless have sought to portray Booth as having made a kind of *promise* to the drivers. Thus, they assert (Br. 21; emphasis added) that,

> Booth testified that he told the drivers that the Respondent didn't have a reserve at the present time to meet insurance premiums but that some time in the next year, the upcoming year it *would*.[117]

Clearly, even ignoring this mischaracterization of the facts, the evidence falls far short of sustaining the dual propositions sought to be established by the General Counsel—that Booth

[114] Moline recalled that Booth made a hand gesture toward the outside of the building, but did so in a different context—while he was bemoaning the fact that every time he had been able to get a little money set aside, some new development interposed itself which required a diversion of such resources.

[115] Witham, like Booth, recalled that Booth's remarks on the subject of insurance were made in response to an employee's question; Witham more specifically recalled that the question was asked by a woman driver.

[116] Elsewhere, Booth explained that in making this reference, he also told employees to the effect that there was no sense embarking on an insurance program without an adequate ''reserve'' on hand to cover months when company revenues and employee earnings might not be sufficient to cover the monthly premium copayments. Witham's testimony is harmonious; he recalls in substance that Booth replied to a woman driver's question by saying, inter alia, that he could not consider getting involved in an insurance plan until the Company had built up a ''reserve'' amounting to ''three months'' of employer premium contributions, as a hedge against hard times when the Company's current revenues might not be enough to cover premiums.

[117] I emphasize that the General Counsel's brief supports this distortion of the true state of the record with a citation to the very testimonial exchange I have quoted immediately above it. Thus, I agree with Lucky 7 counsel's comment on brief that in this instance the General Counsel's ''mischaracterization of the record'' was ''inexcusable.'' Other terms also leap to mind, with ''desperate'' being the first.

''proposed'' an insurance plan ''for'' the ''upcoming year.'' Clearly instead, the evidence now invoked by the prosecution establishes something far less dramatic, that in response to continuing expressions of employee concern about the lack of insurance coverage, Booth emphasized on December 19 that he could not presently afford to add such coverage, but held out the ''possibility'' that ''some time in the future,'' ''perhaps in the upcoming year,'' Lucky 7 might be able to have salted away enough of a cash reserve to reliably cover monthly premium costs, and in any case, that such matters were the stuff of collective bargaining with the Union. To the extent that any other testimony might contradict my finding that these were the messages Booth communicated regarding the matter of insurance coverage for the drivers, I specifically discredit it as unreliable.[118]

b. *Booth plants the idea of a decertification election*: As previously noted, prosecuting counsel have mistakenly convinced themselves that Booth made an ''admission'' that *he* ''believed he was only obliged to recognize the Union for a year.'' Certainly no such admission could be found in the passages first cited by the General Counsel for this claim. (Tr. 1294:14–18.) Rather, in the cited passages and elsewhere, Booth admitted only that in the December 19 drivers' meeting, he made a statement to the effect that nearly a year had elapsed since he had first recognized the Union, and that he did not know what the ''procedures is [sic] after that.'' Indeed, at transcript 1245, again describing his remarks at the December 19 meeting, Booth had even more plainly testified that he told employees that he had,

> recognized the Union the union for a year. In fact the year's almost up on the time that we have recognized the union. . . . and I [says] that I don't know how long my signing for recognizing for the union is; I said but whenever your time to—for an election or whatever, I don't know how the process work, it's left up to you what you want to do.[119] You have to do whatever is best for yourself and your families.

Citing this latter testimony, the General Counsel again finds it to contain an ''admission'' by Booth ''that his one year with the Union was almost up.''[120] Clearly, however, the General Counsel has simply toyed with Booth's actual testimony by substituting the formulation, ''*his one* year with the Union,'' for the phrase Booth actually used in his testimony.[121] Clearly, moreover, although purporting to rely on Booth's ''admission,'' the General Counsel has distorted the entire sense of Booth's testimony, for Booth himself made it clear that he told employees that he did *not* ''know how long my signing for recognizing for the union is . . . .''

Booth's statement that it was ''up to the employees'' themselves to do whatever they wished to do regarding any possible ''election'' arguably could be characterized as ''plant[ing] the idea of a decertification election.'' But ''planting'' such an ''idea'' is not itself unlawful.[122] Rather, the cases make clear that an employer unlawfully intrudes in this area when the employer itself ''initiate[s] a decertification petition, solicit[s] signatures for the petition, or lend[s] more than minimal support and approval to the securing of signatures and the filing of the petition,'' but that an ''employer does not violate the Act by rendering what has been termed 'ministerial aid''' to employees conducting a union decertification effort.[123] The General Counsel's overall suggestion that Booth's remarks in the December 19 meeting amounted to an unlawful ''initiation'' of a decertification petition, or in some other way amounted to unlawful support for such a petition, is either based on a wholly distorted understanding of the facts,[124] or on a misunderstanding of the applicable precedents. I therefore dismiss the prosecution claim that Booth's remarks on December 19 amounted to unlawful assistance or encouragement of a decertification movement.

c. *Booth again solicits employees for a grievance committee*: The witnesses called by both parties generally agree that Booth mentioned the subject of a ''grievance committee'' in the December 19 meeting. The General Counsel's trial witnesses concerning this subject (Moline, O'Neill, Scribner, Jenkins, and Lorick) offered various versions of how Booth couched these references, some clearly inharmonious with others as to details, but overall, they are not distinctly different from the versions advanced in greater detail by Booth and Witham from the witness stand. Again, judging Booth's version to be the single most reliable one, I find as follows:

First, as to background, I credit Booth, who testified without contradiction that since as early as ''the first part of '87'' he had periodically mentioned to drivers in vague terms his wish to have some sort of committee in which employee-rep-

[118] The General Counsel again inconclusively refers to certain testimony from McCoy and Moline that Booth said that his ''hands are tied.'' He neglects to mention that in the passages of McCoy's and Moline's testimony which are cited on this point, neither of those witnesses was attempting to describe Booth's remarks about the possibility of providing insurance coverage in the future, but were, rather, seeking to characterize in general terms the tenor of Booth's remarks about a variety of subjects. These generalized recollections are not necessarily inharmonious with Booth's own admissions.

[119] Prosecution witness Scribner likewise recalls that Booth told employees in this regard that it was ''up to'' the employees to ''do what [they] gotta do.''

[120] G.C. Br. 22 fn. 24, purporting to rely on Booth's testimony just quoted.

[121] In fact, it is apparent that the prosecution is relying not on Booth's testimonial admissions, but on formulations of Booth's remarks as recalled by Moline, Scribner, and Lorick, whom I find unworthy of credence on such close points of phrasing.

[122] See, e.g., *Sofco, Inc*., 268 NLRB 159, 160 (1983), disavowing judge's implication that employees' decertification effort must be ''spontaneous'' (id. at fn. 9), or that an employer may not prime the pump by generalized expressions of his desire for no union (id. at fn. 10). The General Counsel, arguing that ''planting the idea of decertification'' is itself unlawful, mistakenly relies on *Lomasney Combustion*, 273 NLRB 1241 (1984), and *Sperry Gyroscope Co*., 136 NLRB 294 (1962). Neither case genuinely supports that proposition; both cases depend for a finding of violation on evidence that, apart from ''planting the idea,'' the employer engaged in acts of ''unlawful assistance.'' Indeed, in citing *Lomasny*, the General Counsel has ignored the Board's statement that ''Supervisor Hoffman's signing of the petition was the *critical factor* supporting the finding of a violation.'' 273 NLRB 1241 fn. 2 (emphasis added).

[123] *Eastern States Optical Co*., 275 NLRB 371, 372, and cases cited (1985).

[124] Booth's telling employees that it was ''up to them'' to decide whether they wish to pursue an ''election'' obviously negates any inference that Lucky 7 intended either to ''initiate'' such a petition, or to meddle in any employee-initiated decertification movement.

resentatives and employer-representatives could discuss common concerns, and that he would periodically invite drivers to ''come forward'' to serve on such a committee, without success. And Booth admitted that in the December 19 drivers' meeting, he again raised this subject, for the first time being more specific about what he contemplated in this regard, i.e., a ''committee'' which might consist of ''some drivers . . . some dispatchers, [and] . . . someone from management to get together.'' Booth further states that he elaborated in the December meeting that

> SBA and NEDCO, Janet Steven[son], had a mediator type person that will come in [and] will sit and kind of keep the thing orderly and whatnot. [But] that I will have the final say on it.

I note that Witham summarily agreed on cross-examination with one other detail, one recalled by Moline and Scribner, but not by Booth himself—that Booth's suggested grievance committee could be formed ''sometime after the first of the year.'' Assuming that Booth made some such remark, I do not find this to be as significant as the General Counsel does, given that the current ''year'' was nearly over, and necessarily, if such a grievance committee were actually to be formed, it could not likely be put together until ''sometime after the first of the year.'' Again, I would not find in this detail any real support for a finding that Booth's proposal for a grievance committee was intended to become operative only if the Union were no longer in the picture.

In this latter regard, I note finally that Booth's description of his idea for a ''grievance committee'' was essentially similar to the proposal his bargaining representatives had advanced to the Union during the December 4 bargaining meeting.[125] This proposal, as I have found, was one which the Union had agreed on December 4 to ''study,'' and was one which the Union never thereafter explicitly rejected. Accordingly, it appears obvious that Booth *was* not proposing a ''deal'' with the drivers ''directly,'' but was merely describing to the drivers a ''deal'' which he had already suggested for the Union's consideration, and therefore one which was not conditioned on the employees' rejection of the Union as their bargaining agent. Accordingly, I find no illegality in Booth's remarks on December 19 concerning a possible ''grievance committee.''

10. *Booth interrogates a driver and threatens to ''close the doors'' if the Union comes in*: With this topic heading, the General Counsel passes beyond the December 19 meeting, and returns to claims which are supported only by striking driver witnesses and which are substantially contradicted by company witnesses. And here, the General Counsel relies entirely on Emfinger's description of a supposed exchange with Booth on the afternoon of December 20, shortly before Emfinger decided to join the strike, during which Booth supposedly asked Emfinger if he intended to join the strike and during which Booth supposedly made some reference suggesting that the Company might ''close the doors.''

Preliminarily, I note that the General Counsel's topic sentence relies on Emfinger's initial account of his exchange with Booth (i.e., that Booth used the expression ''if the Union *comes in*''), but ignores that Emfinger adopted a quite different formulation during cross-examination. Thus (emphasis added):

> Q. So all you can recall [Booth] saying is that *if you went on strike and everybody went on strike*, it might force him out of business.
>
> A. Yes sir. That's more or less—you know, as far as being able to have—to give us the benefits that we wanted. Yes sir, that's—that's more or less what—(pause).[126]

Because Emfinger here and elsewhere proved to be singularly unreliable, I cannot accept his testimony about this alleged exchange, which, following a typical pattern, varied substantially with each retelling. Accordingly Emfinger's testimony will not support any complaint count or prosecution argument that Booth made an unlawful shutdown threat or that Booth unlawfully interrogated Emfinger on December 20.[127]

11. *Noller interrogates and threatens a driver with reduced work hours*: Again, the General Counsel relies solely on Emfinger's description of a supposed later conversation with Night-Shift Supervisor Noller, during which Noller supposedly asked Emfinger if he intended to join the strike, and made some remark to the effect that if Emfinger joined the strike, he would be ''put on an on-call basis'' for work. Emfinger's description was so muddy and equivocal in its legal implications that I might dismiss the General Counsel's topic sentence claim on that ground alone. However, Emfinger was not reliable enough in his testimonial descriptions of this alleged conversation with Noller to even consider those possible legal implications. It is clear, moreover, that Emfinger wrote a note to himself in early January concerning this same alleged encounter with Noller, in which he quotes Noller as saying something quite different from what Emfinger narrated on the witness stand.[128] Again, I reject Emfinger as unreliable and reject, as well, any contentions

[125] Thus, I have found that Carol Kirshman told the Union's Morris on December 4

> Even now, the company would like to form a committee to meet and discuss gripes, concerns, and profitability [, or put up a suggestion box. . . . We would like 2 drivers, a dispatcher, and a NEDCO representative.

[126] Emfinger never completed these ramblings, he simply petered out; and in subsequent questioning he admitted that Booth's alleged remarks—whatever they were—''might have'' been triggered by his own question to Booth, in which it was ''very possible'' that Emfinger asked Booth something to the effect, ''what do you think's going to happen because of this strike?''

[127] In the General Counsel's brief (Br. 66), the prosecutors now seem to be limiting themselves to the claim that on December 20 Booth unlawfully ''interrogated'' Emfinger. I dismiss that contention, which, I note, did not appear in the complaint until the General Counsel offered amendments on June 17—after Emfinger had testified.

[128] Thus, as previously noted, Emfinger's ''To whom it may concern'' memorandum quotes Nolles as saying,

> that anyone who worked for Lucky 7 that went out on strike would only have the job back (when the strike was over) if they needed anyone extra besides the newly hired people because of the strike, which would mean that the ones that went out on strike would not have any work if they did not need any extra help.

which suppose that Noller unlawfully ''threatened'' or ''interrogated'' him on December 20.[129]

(I will not comment on the General Counsel's assertions under topic heading ''12'' in his brief; they are either consistent with findings I have already made, or are irrelevant to the questions raised by the complaint.)

13. *Molandes informs Moline about Respondent's decertification plans*: Here, we confront the first instance of an allegedly unlawful statement by Molandes, a nonstriking driver who substituted periodically as a ''Ground Controller,'' a supervisory position, as I have found.[130] The General Counsel's particular focus is on a certain telephone conversation between Moline and Molandes which Moline recalled as having taken place sometime in the period December 19–25, after Moline had joined the strike. As I shall discuss below, the General Counsel's topic caption is significant in two respects: First, it embodies the General Counsel's recognition that he has not proved through Moline what the complaint originally alleged as to the same conversation—that Molandes ''on or about December 20 . . . promoted and encouraged employees to circulate a petition to decertify the Union . . . .'' Second, the caption again reflects a gross distortion of the overall sense of Moline's descriptions of the conversation in question.

Background: Moline admits that before he joined the strike on or about December 19, he and Molandes had been maintaining a close, ''very friendly'' personal relationship, marked by frequent telephone calls to one another (at least thrice weekly), and by other, less frequent after-work social meetings. That relationship continued for at least a month after Moline joined the strike, but began to taper off, says Moline in the following months.

On the night in question, Moline called Molandes, who said that she ''missed'' Moline. Moline replied that she could join him on the picket line; she replied that she did not feel free to do so, because she was ''considered part of management.'' But it is Moline's next recollection which the General Counsel deems most significant, where Moline recalled Molandes saying words to the effect,

> all the new drivers have to do is send around a decertification petition, and then we could decertify the Union, or all the new drivers have to do is work for 30 days, and we could send around a decertification petition and decertify the Union. Then she asked me what I would do, and I told her I'd go out and find another job.[131]

Clearly, Molandes' statements, as described by Moline,[132] cannot be taken as an attempt by Molandes to enlist Moline to join any ''decertification'' drive which she described might take place, and which she apparently feared might leave Moline, as a striker, vulnerable in some way. And it is only through much straining that one could imagine that Molandes' remarks conveyed the message suggested by the General Counsel's topic caption—that Molandes was describing ''*Respondent's* decertification plans,'' as distinguished from commenting to Moline about the possibility that decertification efforts could easily be initiated or supported by newly hired striker replacement drivers. In the end, to see this transaction the way the General Counsel does would require me first to accept as literally accurate Moline's recollection that Molandes used the word ''we,'' in conjunction with the word ''decertify.'' Moreover, I would then be required to assume that ''we,'' as used by Molandes, could only mean company ''management,'' as distinguished from its rank-and-file drivers. I am unwilling to place that much reliance on Moline's ability to recall precisely which pronoun Molandes may have used. I therefore find that the claim in the topic caption is not supported by Moline, and that Moline has not in any case described a violation of the Act, even assuming that Nolandes was a supervisor.[133]

14. *Brooks' failure to reinstate Moline*: The complaint, even after extensive amendments during the trial, contains no distinct allegation either that Moline offered to return to work, or that Lucky 7 refused any such offer. However, during the latter stages of cross-examination of Moline on June 11, Moline described transactions which might arguably support such a claim. Thus, in substance, Moline testified that, on or about December 21 or 22, he thought better of his decision to join the strike, and called Brooks, and asked to meet with him. They met the next day, says Moline, and Moline asked whether he could come back to work. Brooks replied, says Moline, ''Probably not,'' adding that he would have to check with Booth, also mentioning something about

[129] The prosecutors concede (Br. 66 at fn. 58) that ''[t]he December 20 allegation'' (of unlawful interrogation of Emfinger by *Noller*) is ''not specifically mentioned in the Amended Consolidated Complaint.'' In this regard, I note again (see last footnote) that the complaint made no allegation whatsoever about either a ''threat'' or an ''interrogation by Noller on December 20 until after Emfinger testified. And even after re-tailoring the complaint with amendments on June 17 linked to Emfinger's most recent restructuring of his memory (see, especially, G.C. Exh. 7 at pars. 11 (cc) and (dd)), the amendments did not include reference to any ''interrogation'' of Emfinger by Noller on December 20. Thus, the ''interrogation'' claim now being made by the General Counsel based on Emfinger's testimony is clearly one promulgated at leisure, long after the evidence on which it was based came to the General Counsel's attention.

[130] Nolandes periodically performed ''substitute'' ground controller functions at the Airport during the period most closely in question here, during weeks in late November through December, and at other times in the same period, she worked simply as a driver. Arguably, therefore, any statements she may have made during this period would be understood as coming from a company supervisor. I will assume for these purposes that Lucky 7 must take responsibility for any 8(a)(1) violative statements she may have made during this period.

[131] Moline so testified on my invitation, after he had previously offered substantially the same testimony on direct and cross-examination, but with some differences of phrasing. He also testified that he understood her question, ''What would you do?'' to refer to his plans in the event the Union became decertified. I thus find that Molandes' question cannot be interpreted as an invitation for Moline to become part of any decertification effort.

[132] Molandes, agreeing that she had a conversation with Moline similar to the one he described, denied saying to Moline that she was ''part of management.'' I do not detect any other elements in her testimony which contradict Moline's description in any material way. Accordingly, without supposing that Moline quoted Nolandes with literal accuracy, I credit the substance of his description.

[133] Moreover, given the unique context and personal relationship between Molandes and Moline, I doubt seriously that Moline could reasonably have taken Molandes' statements as reflecting anything other than her own personal anxieties or speculations about what might occur if a decertification effort were to arise or become successful.

the need to review ''Nevada law'' concerning the rehire rights of strikers. Moline called Brooks back ''a couple of days'' later, but states that Brooks then told him to ''call back in five minutes.'' Moline says he did call Brooks back 5 minutes later, only to be told by Brooks to call back in another ''fifteen minutes.'' Moline, sensing that he was getting the brushoff from Brooks, chose not to place another call back, and thereafter remained on strike.

Brooks admits that Moline approached him about the possibility of his returning to work, but denies other details of Moline's account, asserting instead that when Moline first approached him, he advised Moline that Moline would have to speak directly with Booth about returning to work,[134] and that Moline agreed that he would do so. Brooks admits that Moline called him directly ''quite a few times after that,'' and that, each time, Brooks continued to instruct Moline to call Booth directly, and that, each time, Moline said that he would. Brooks also testified, in substance, that in fact, there was no need for additional drivers at the time Moline made these inquiries. The General Counsel offered no evidence which might contradict Brook's assertion in this respect.

If a credibility resolution were necessary, I would credit Brooks over Moline, based on my generally favorable impressions of Brooks' testimonial demeanor, and my continuing doubts about Moline's sincerity or reliability. But Moline's version does not itself persuasively show that the Company was unwilling to rehire strikers wishing to return, particularly where Moline himself admittedly abandoned his efforts before the Company's intentions were adequately tested. In this regard, although Moline may have sensed a brushoff from Brooks, his description does not unmistakably show that this is what Brooks was attempting. Moline's account is just as consistent with the notion that the Company was attempting to give serious consideration to Moline's inquiries, until Moline himself dropped them. In any case, where the record does not affirmatively indicate that the Company needed additional drivers at this time (a slow business period, as I have previously found, and after the Company had already begun to hire striker replacements) it is merely speculative to infer from Moline's account that the Company was determined not to rehire strikers wishing to return.

15. *Molandes tells strikers they no longer have their jobs*: The General Counsel relies entirely on striker O'Neill's descriptions of certain events which took place on Christmas Eve, when O'Neill was admittedly part of a group of strikers (as many as four others) who were picketing in front of Lucky 7's Industrial Road headquarters building. As previously noted, I found O'Neill to be a generally unreliable witness, and I place no credence in her testimony about Christmas Eve events. Her various descriptions of remarks allegedly made by Molandes to the picketers were commonly mushy, and with each retelling, she contradicted herself concerning details. It remained unclear at the end whether she was describing a single conversational transaction between Molandes and the picketers or a series of discrete ones. No one was called to corroborate O'Neill.[135] Molandes denied making any of the remarks attributed to her by O'Neill and did so believably, but in discrediting O'Neill here, I am less influenced by Molandes' denials than by O'Neill's own shortcomings. The topic caption and any allegations in the complaint or elsewhere which are related to it have not been supported by credible proof.

16. *Witham explains strikers' job status as well as booth's purpose in supporting the decertification petition*: Here, the General Counsel relies primarily on O'Neill's description of another event on Christmas Eve at the Industrial Road picket line, when Witham admittedly came out with a pot of coffee for the picketers and engaged them in brief conversation. O'Neill's own descriptions of Witham's remarks were no more believable in this instance than were her descriptions of Molandes' remarks, supra, for all the same reasons. Witham credibly and emphatically denied making any remarks on this occasion resembling those which O'Neill attributed to him.[136] The General Counsel's claim has not been reliably proved.

17. *Respondent's surveillance of pickets*: It will be apparent that if the General Counsel intended to follow a chronological sequence in his factual assertions, he has introduced the subject of ''surveillance of pickets'' prematurely. Here, the General Counsel collects the testimony of several striker witnesses into a generalized description of actions taken by Lucky 7 agents to record picketing activities at the Airport, using video or still cameras. He asserts at the outset (Br. 31; emphasis added), ''*During* January 1991, Respondent's supervisors and agents engaged in *intensive* videotaping and photographing of *pickets* at the Airport.'' I will conclude, contrary to the General Counsel, that such activities did not violate Section 8(a)(1), but I will explain my reasons only after first addressing the misleading manner in which the General Counsel has sought to portray not just the timing of Lucky 7's conduct in this regard, a point which Lucky 7's counsel himself has emphasized, but also the nature and focus of the Company's camera work.

Lucky 7's principal objection to the General Counsel's factual descriptions is based on the General Counsel's failure to identify *when* the Company began such videotaping and photographic efforts; its attorney charges the General Counsel with ''blatant misrepresentation'' in this respect, and seeks ''censure by the ALJ'' for such ''inexcusable'' conduct. Without agreeing that the General Counsel engaged in ''blatant misrepresentation'' here, I nevertheless find merit in Lucky 7's objections. As I have previously found, the record contains no reliable evidence that Lucky 7 agents brought cameras to the Airport picket line until on an uncertain date in ''late January'' or ''early February,'' and then did so on

[134] Booth, Brooks, and Owens harmoniously and credibly testified that Booth had issued general instructions that any strikers offering to return to work should be referred directly to Booth. I therefore find it especially likely that Brooks so advised Moline.

[135] O'Neill claimed not to recall the name of any other of the Christmas Eve picketers who witnessed any such remarks by Molandes, which might explain the General Counsel's failure to seek out corroborative witnesses. But I find it significant that O'Neill's memory was so selective concerning the events in question, and I suspect that her failure to ''recall'' the names of other picketers was calculated to avoid being contradicted by any of them.

[136] In another instance of misrepresentation of the record (here, probably due to sloppiness rather than calculation), the General Counsel (Br. 31, first par., L. 8) appears to claim that ''Witham'' testified that he told the group of picketers that the strikers ''don't have jobs anymore.'' In fact, the transcript citation refers to O'Neill's testimony on cross-examination, where she engaged in one of many material shifts in her testimony, after being confronted with an affidavit she gave on January 30, 1991, concerning these events.

advice of counsel, for the purpose of recording activities, such as mass picketing and blocking of the ''door 10'' exit, which might support an application by Lucky 7 for a restraining order by a local court, an order which Lucky 7 sought—and received—on or about February 8 or 9. Indeed, the witness testimony cited by the General Counsel is entirely harmonious with these findings concerning the Company's initiation of its videotaping and photographing. In addition, the General Counsel's witnesses never offered testimony which would support the characterization that the videotaping and photographing was ''intensive,'' as distinguished from ''intermittent''; neither would their testimony allow a finding that individual ''pickets'' were the focus of Lucky 7's cameras, as distinguished from picketing *activities*, which clearly were being recorded.[137]

Thus, I agree that the General Counsel has been coy, to say the least, in failing to note that the Company's recording of Airport picketing activities did not begin until ''late January'' at the earliest, and in ignoring, more fundamentally, that the timing of such camera work on Lucky 7's part was closely associated with Lucky 7's seeking and obtaining of a restraining order limiting the number of pickets and manner of picketing at ''Door 10.'' In disagreement with Lucky 7's counsel, however, I would characterize the General Counsel's statement as obscurantist in character, but not a ''blatant misrepresentation.'' Such attempts at obscurantism—and this is hardly the only, nor even the most blatant example—are indeed deplorable and deserving of censure; they are wholly inconsistent with an attorney's duties as an officer of the court. Moreover, as I have noted in many other sections involving even more egregious examples of misrepresentation or misleading statements by the General Counsel, they cast doubt on the overall credibility and fairness of the General Counsel's prosecutory efforts.

These very failings in the General Counsel's efforts likewise underscore the legal frailty of the General Counsel's contention that the Company's picket line camera work constituted unlawful ''surveillance.'' Contrary to the General Counsel's misleading characterization of the facts, there is no reason to suppose that Lucky 7's actions were intended to identify *who* was on the picket line, as distinguished from what the pickets, without regard to identity, were *doing* on the picket line. And there is every reason to suppose on this record, that Lucky 7 was seeking to preserve evidence of arguable picket line misconduct, to be used to obtain and enforce an injunction against picketing activities which exceeded those protected by the Act. Moreover, what the record shows about the *manner* in which such camera work was done (no more than intermittently, and then confined to picketing activities at the Airport) provides no basis for a finding that employees would be chilled in their exercise of any rights protected by Section 7 of the Act.[138]

18. *Poma informs strikers that they are fired and threatens to have pickets beaten up*: The General Counsel relies on McCoy's improbable description of an event sometime in ''early January,'' when, seemingly without any antecedent provocation, Poma supposedly burst forth from inside door 10 at the Airport and told McCoy and others that they were ''all fired'' and would get ''beaten up'' if they didn't stop ''talking to customers.''[139] McCoy states that Ground Controller Dan Ross was likewise present. Poma credibly denied that any such incident had taken place. I have already described McCoy as unreliable and given to recollections which other prosecution witnesses either have contradicted or have failed to corroborate. His testimony was not enough to persuade me that Poma did anything resembling what he described. The complaint remains unproven insofar as it relies on McCoy.

19. *Owens threatens to permanently shut up striker Terefenko*: This section concerns an incident between Owens and Terefenko on or about January 11, witnessed by Scribner. Terefenko, the first to describe these events, gave what proved to be a highly tailored and misleading account of the context: He stated simply that he and striker Scribner were picketing together at the Airport, and ''making notification to the public that the union drivers were on strike,'' when Supervisor Owens

> *came to* . . . within a foot or two of me . . . and stated . . . for me to shut up and that if I didn't shut up, he would shut me up permanently. [Emphasis added.]

By this description, Terefenko clearly tried to leave the impression that Owens emerged from out of the blue, as it were, and confronted Terefenko with this alleged threat. Scribner essentially corroborated Terefenko that Owens eventually threatened to ''shut [Terefenko] up permanently,'' but in many other ways Scribner's account is inharmonious with Terefenko's. Thus, on cross-examination, Scribner more candidly admitted what Terefenko had tried to conceal—that Terefenko had been patrolling with a picket sign on the ''stretch [limo] side'' when he saw Owens some distance away, escorting customers to a waiting vehicle on the ''per cap [van] side,'' whereupon Terefenko walked over (apparently across the roadway dividing the two separate loading areas) and came up to about 1 foot behind Owens and his customers, and in a ''pretty loud'' voice began to ''shout in Owens' ear,'' something to the effect, ''Lucky 7 drivers on

[137] I do not think the General Counsel's use of the words ''pickets'' in the sentence on which we have focused was merely casual, for in other passages, as well, he seems to have strained to avoid the expression ''picketing activities'' at every turn, and to use ''pickets'' or ''picketers'' instead as supposedly being the targets of Lucky 7's cameras. Indeed, the distinction likewise seems to have been important to the General Counsel when he states, in his concluding arguments (Br. 64; emphasis added), that,

> The Respondent . . . unlawfully engaged in *continuous* videotape and photographic *surveillance* of *strikers* at the Airport . . . .

[138] Essentially for these reasons, I find the cases cited by the General Counsel (Br. 64) to be entirely inapposite.

[139] Striker-picket Webb, testifying for the General Counsel, offered testimony which arguably corroborated McCoy in one respect, but differed significantly as to timing and other details. Thus, Webb claimed to recall an incident sometime in or after the ''third week in January'' when he overheard Poma tell McCoy that he had ''better shut up, or you're going to get your ass kicked.'' Webb does not report, however, that Poma made any ''termination''-type statement. Significantly, the General Counsel fails to mention Webb's testimony in recounting the alleged Poma-McCoy statements, neither does he discuss Webb's testimony separately. Webb was not himself a convincing witness, and I suspect that most of his claimed recollections were, like McCoy's, either invented or grossly distorted.

strike.''[140] It was only then, concedes Scribner, that Owens ''turned around'' and ''finally said, 'Shut up, or I'll shut you up permanently.'''[141]

Owens offered yet a third version: In substance, Owens states that not only did Terefenko follow him and his customers up to a waiting vehicle, but also that he stood so close behind them that he blocked Owens' efforts to open the door so that the passengers could get into the vehicle. At this point, Owens testified that he said to Terefenko, ''Hey look, these people have made their choice, you know. Why don't you let me load them up . . . . Why don't you get out of the way?'' Then, says Owens, a more heated exchange ensued, during which each called the other ''motherfucker,'' and each told the other to ''shut up.'' Continuing his description, Owens recalled that he,

> probably told [Terefenko], ''Fuck you. Fuck off.'' or something like that. And then he backed off, and then I put the people in the door.

But Owens specifically denied having made any threat to Terefenko to ''shut him up permanently.''

I credit Owens that his exchange with Terefenko was more elaborate than Terefenko admitted, and I further believe Owens' recital of additional details, including that Terefenko was intentionally and mischievously trying to obstruct Owens' efforts to open the car door. However, I found both Terefenko and Scribner convincing in recalling, however selectively, that Owens' statements included a threat to shut Terefenko up ''permanently,'' which plausibly explains why, as Owens recalled, Terefenko then ''backed off.''[142] But in so finding, I cannot accept what the General Counsel ultimately claims—that Terefenko or any other witness to the incident would reasonably construe Owens' outburst as anything resembling a threat to do harm to Terefenko for engaging in protected picketing activity or for engaging in protected vocal appeals to customers. Rather, they would have understood it for what it was, a threat borne out of Owens' frustration that Terefenko was shouting at him at close range, while obstructing his ability to load his passengers. Given the heated and extraordinary circumstances, I cannot find that Owens' ''threat'' had any reasonable tendency to coerce employees in the exercise of *protected* activities.

20. *Owens tells striker Terefenko that he will never drive again*: This section concerns another run-in between Terefenko and Owens the next day, January 12, under similar overall circumstances, and with a similar variance between Terefenko and Owens regarding the context and details. Here, however, although Terefenko's account suggests that the incident took place in the presence of other striker-pickets, Terefenko did not identify who those were, and the General Counsel made no effort to corroborate Terefenko's version.

Terefenko initially again sought to portray Owens as having somehow emerged from out of the blue with a threatening remark. Thus,

> while picketing, doing the same exact thing[,] telling the *general public* that we were on strike, Mr. Owens *again came to me* . . . .

However, this time Terefenko immediately backtracked (''let me retract here a little bit''), admitting that he had ''just made mention of the fact that the vehicles were getting pretty beat up.'' Having already instructed Terefenko to be ''plain'' in his speech, I interrupted Terefenko, pressing him as to what he meant by ''made mention of,'' and whether his remarks about the ''beat up'' condition of the vehicles were part of his ''pitch to the public.'' Then, he admitted that his remarks had actually been directed to *Owens*. Continuing his narrative, Terefenko said,

> And Mr. Owens *approached me again*, and in a very loud voice told me right to my face that I did not have to worry about it because that [sic] I would never drive again.

Considering Terefenko's plain tendency to tailor his account selectively, I don't accept for a minute that Owens ''approached'' Terefenko with any such remarks. And, indeed, Owens told quite a different story—that Terefenko had made some remarks about ''dents and scratches'' on one of the vehicles while Owens was busy loading passengers into the vehicles. Owens further stated that he ''didn't say anything'' to Terefenko in reply, although he later allowed the possibility that he ''could have said, ''Don't worry about the dents and scratches.''' He emphatically denied, however, that he made any statement to the effect that Terefenko ''could not get his job back.'' I treat this as effectively a denial of Terefenko's testimony.

For reasons which I think are obvious, Terefenko's accounts leave much to be desired in terms of candor and completeness. And especially where, as here, Terefenko was not corroborated by any other witness concerning Owens' supposedly ''very loud'' statement, I would not rely on Terefenko to find that Owens made any such statement.[143] Therefore, I find that the General Counsel has not presented substantial evidence warranting a finding that Owens in any way ''threatened'' Terefenko on January 12; much less did he convince me that Owens said anything tantamount to a statement that Terefenko had been discharged.

21. *Ross tells Emfinger that he didn't have a job*: The General Counsel relies on Emfinger's rambling and seem-

[140] Tr. 704:7–14.

[141] This latter quotation is from Scribner's direct examination. I have emphasized the word ''finally'' because it implies, consistent with Owens' own testimony, discussed next in main text, that Owens did not make any such ''threat'' until after he had said other things to Terefenko.

[142] Owens, formerly a Las Vegas police officer, is tall, heavy, and solid—a powerful-appearing man, bigger and more imposing by far than Terefenko. Terefenko presented on the witness stand as a feisty and argumentative sort, given to gestures of bravado (he claimed that he was not ''intimidated'' in the least by Owens), but not a fool. I suspect that it would have taken something more than name-calling on Owens' part to get Terefenko to ''back off.'' I thus find it probable that, ''finally,'' Owens succeeded in getting Terefenko to back away from the car door by resorting to a threat such as that described by Terefenko and Scribner.

[143] Although I found Owens to be more impressive from a demeanoral standpoint than Terefenko in uttering their respective versions of this January 12 incident, my unwillingness to rely on Terefenko has far more to do with Terefenko's demonstrable weaknesses as a witness than with Owens' seemingly sincere demeanor in his denials. It is sufficient that I do not believe Terefenko's account.

ingly improvised recollections about two (or perhaps ''several'') conversations with Ground Controller Ross in ''early January'' while Emfinger was picketing at the Airport (indeed, he says he had been appointed ''Picket Captain''). Emfinger testified, improbably, that Ross said ''about the same same thing'' each time—to the effect that Emfinger did not ''have a job'' with the Company. Ross denied ever saying anything like that to Emfinger. I discredit Emfinger for all the reasons previously mentioned, noting further that his testimony is not corroborated. Again, the topic claim has not been reliably sustained.

(I skip past facts asserted by the General Counsel under item ''22,'' because I have previously made findings thoroughly addressing the same fact questions.)

23. *Ross tells striker that Booth would only hire pickets back over his dead body*: The General Counsel's sole witness is Moline. Moline testified that Ground Controller Ross, a ''friend'' of Moline's, approached him on or about January 28 at the Airport picket line and, in the presence of fellow striker picket James Cavanaugh, engaged in conversation with Moline. This is the material text of Moline's account of the conversation:

> He [Ross] said to me that—we talked and I—I asked him I said what's this rumor about the drivers trying to decertify the union? He stated to me that it's no rumor it's a fact. And then he went on to explain that he—he said there was 61 people driving for Lucky 7 at this time, and there was approximately—I think he said 28 original drivers that are on strike, and he said that 61 people don't want the union, and that's why they're sending around the petition. I then asked him what would happened—I said what would happen if—excuse me for a minute. Let me get my train of thought here. The conversation led to if we could go back individually and apply for our jobs, and then at that time Daniel said that Mr. Booth had stated at the staff meeting that day that over his dead body would he hire any of the picketing drivers back, and that if he dies tomorrow his wife knows exactly how he feels.

Cavanaugh was not called as a witness. Ross denied having ever had any such conversation, or ever having made any such remarks to Moline or anyone else. (He stated that, although ''friendly'' with Moline before the strike, he pointedly refrained from talking to pickets, including Moline, other than to say ''Hi,'' when his path crossed with theirs.) He further denied knowing how many drivers had signed the ''petition.'' (I observe that this is consistent with Witham's credited testimony, supra, at sec. I,I, that Witham immediately turned over the copy of the hand-drawn ''interest'' petition Baker had given to him—containing *47* signatures—to Carol Kirshman, without showing it to anyone else.)

Moline, unlike many other witnesses presented by the General Counsel, did not betray by his demeanor or style in testifying any obvious indications of unreliability, but the same may be said of Ross. To resolve this credibility dispute, therefore, I am left to my sense of the probabilities, in the light of known surrounding facts. I doubt Moline to begin with because his version of Ross' remarks is difficult to square with what I have elsewhere found was Booth's declared ''policy'' with respect to striker rehire rights, a ''policy'' which three of the striker-witnesses called by the General Counsel—D'Amico, Webb, and Emfinger—have essentially confirmed was communicated to them, respectively by Owens, Booth, and Noller. Separately, even if, contrary to his own ''policy,'' Booth had, indeed, told Ross and other supervisors in a ''staff meeting'' that strikers would be rehired only ''over [his] dead body,'' I cannot imagine any plausible motivation which would have led Ross to choose to share such ''inside'' information with Moline. My doubts about Moline are heightened by these collateral considerations: (a) Ross apparently had no way of knowing how many drivers had signed the informal, ''interest'' petition circulated by Baker; and (b) if he did somehow have such knowledge, it is improbable that, having chosen to confide in Moline, he would have incorrectly reported to Moline that ''61'' drivers did not ''want the Union,'' when, in fact, only 47 drivers had signed the petition. These doubts about the reliability of Noline's testimony might have been dissipated had Cavanaugh been called to corroborate Moline, but he was not.[144] It was the General Counsel's burden to establish by a preponderance of the credible evidence in the record as a whole that Moline's account was more reliable than Ross'. I find that the General Counsel did not in the circumstances sustain that burden.

(Claims set forth as items ''24,'' ''25,'' and ''26'' in the General Counsel's brief, all tracing to Jenkins' testimony that Witham, Owens, and Molandes each made statements to Jenkins implying that strikers had been terminated): I have elsewhere commented about Jenkins' various infirmities as a witness. He was the least demeanorally impressive in describing alleged ''termination'' statements made serially to him on the Airport picket line by Witham, Owens, and Molandes—all in the ''late January-early February'' period. His style of testifying about these alleged incidents was again glibly summary in character, and his descriptions of each conversation contained inherently improbable elements.[145] Moreover, as to the Witham's and Owens' episodes, he stated on the one hand that these were each ''one-on-one conversations,'' even though he had a ''picket partner at the time'' (whose name he did not ''remember,'' because ''It was, you know, several people out there at that particular time'').[146] He specifically testified, however, that Moline was his ''picket partner'' and was ''present'' when *Molandes* allegedly made an implied threat that strikers would not be

[144] Contrary to an argument made by Lucky 7's counsel, I do not find it appropriate to draw an ''adverse inference'' against the General Counsel for failing to call Cavanaugh as a witness, any more than I would find it appropriate to draw such an inference from Lucky 7's failure to call Cavanaugh. Instead, I simply note that Cavanaugh's absence from the witness stand required me to place full credence in Moline in order to sustain the General Counsel's claim that Ross made an unlawful ''termination'' threat. But for the reasons just listed, I remain dubious about the reliability of Moline's account, especially where he was contradicted by Ross, who was at least as equally believable as Moline.

[145] E.g., he testified that Owens told him that ''Mr. Booth was not going to hire any of us back,'' whereupon the conversation turned to the subject of ''basketball.''

[146] Too conveniently, I think, Jenkins explained that even though he was generally picketing with a least one ''picket partner,'' if not a larger group, his conversations with Witham and Owens each occurred at a point when he had separated himself from his fellow pickets.

rehired. (Jenkins here claimed that Molandes quoted Booth as having made an ''over my dead body'' statement.) Significantly, however, Moline was not invited to corroborate Jenkins on this point, and I therefore draw an inference adverse to the General Counsel based on this omission. Equally significantly, Jenkins' pretrial affidavit (he first recorded these alleged recollections in an affidavit given to Board on March 28, 1991) contains no reference to *any* remarks by Molandes. I think that Jenkins was trying to beef up the prosecution's case—and his own prospects for a backpay award—by belatedly claiming that company agents made ''termination''-type statements directly to him.[147]

Witham, Owens, and Molandes each credibly denied having made any statements such as those recalled by Jenkins, but my doubts about Jenkins' reliability preceded their appearance on the witness stand, and their denials therefore merely tended to cement those doubts. I discredit Jenkins on all matters now under discussion and find that the ''termination'' statement claims made by the General Counsel which depend on Jenkins' recollections have not been sustained by reliable proof.

27. *Owens explains the relationship between (Booth's) remarks about the first of the year and about Respondent's year being up and decertification*: Here, the General Counsel relies on Moline's testimony about an alleged admission made by Owens to Moline at the Airport. These are the material portions of Moline's testimony on direct examination concerning the incident (emphasis added, for later reference):

> Q. When did you have a conversation with Robert Owens?
>
> A. . . . I believe it was February 1st. . . . 4:30 in the afternoon.
>
> Q. Where?
>
> A. At the per capita side of the airport.
>
> Q. Who was present?
>
> A. Myself, Bobby Owens and Mr. Cavanaugh.
>
> Q. What was said?
>
> A. I asked Mr. Owens what was up with the decertification. He then said to me, he said, I can't believe that you're one of the people that went out on strike. You look like the type of person that reviews everything before they jump into something. And then he said to me, he says, do you remember how I used to tell you hang in there until after the first of the year things were going to get better? *And he said that's what Mr. Booth was talking about when he said that his year was almost up with the union. That the decertification would come after the first of the year.*

Owens agreed that a conversation resembling this took place between him and Moline; thus:

> A. He came up to me, and he said, ''Can we talk?'' And I said, ''Sure.'' I talked to strikers all—I mean, the striking employees all the time. And I said, ''Yeah.'' So we talked. . . . He asked me—Jeff asked me something to the effect—I don't know the exact wording of it, but he asked me about the decert, did I know anything about it. And then I told him I heard rumors about somebody passing a—having a decert petition, but I wasn't a hundred per cent sure. . . . I probably asked him—I think I told him why did he have to—why did he go out on strike, because I told him at the end—by the end of the year things would probably get better. . . . He—I believe he just—he just said, ''Well, I had to do it,'' or something like that.
>
> Q. Anything else you can remember about that particular conversation?
>
> A. No.

Obviously, the italicized portion of Moline's version is missing from Owens' version, and that italicized portion is the only one having any genuine evidentiary value to the prosecution's case.[148] This conflict in versions raises the same essential problem discussed earlier in connection with the Moline-Witham conflict as to whether or not Witham disclosed to Moline that Booth had made an ''over my dead body'' statement. For essentially similar reasons, I can find nothing in Moline's demeanor, as compared to Owens', nor in the ''probabilities,'' which would persuade me to favor Moline's version over Owens'. Indeed, when probability assessments come into play, I again become more suspicious of Moline's version. Here, as in the Moline-Witham dispute, to credit Moline, I would be required to assume, improbably, that a company agent would somehow be motivated to confide to a striker a revelation that would plainly betray the illegality of behavior by the Company which was otherwise unremarkable, or, at worst, was ambiguous in its legal implications. Thus, if Moline were credited concerning the underscored element of his version, his account would neatly supply evidence so obviously missing from the prosecution's proof about Booth's alleged remarks at the December 19 drivers' meeting. But here, as previously, Moline's testimony is almost too convenient in this respect. And here, as previously, for whatever reason, the General Counsel chose not to call Cavanaugh, the third witness, but to rest on Moline's powers to persuade the trier of fact. I remain unpersuaded by Moline, and I therefore find that the General Counsel has not sustained his evidentiary burden of proving, as claimed, that Owens made an admission about ''the relationship between [Booth's December 19 remarks] and decertification.''

28. *Owens tells picketers that he was going to ''kick'' their ''asses''*: The General Counsel relies on Getter's extraordinarily hazy, shifting, and confused testimony, within which, at one point, Getter claimed that Owens threatened a group of pickets, Getter among them, at the Airport. Getter

[147] I note that by March 25, 3 days before Jenkins appeared to give an affidavit to the Board agent, that same agent had already written to Company Attorney Kirshman, announcing the Region's ''tentative decision'' that company agents had made statements implying that strikers had been terminated, and that these statements would give rise to a backpay liability on Lucky 7's part.

[148] I do not find it significant by itself that Owens *admittedly* reminded Moline of Owen's statement (in ''October,'' discussed, supra) that ''things would probably get better by the end of the year.'' I have found that Owens' remarks in October could not reasonably be understood as having any connection to the Union's expected status or tenure, but rather were predictions about the likelihood that a limo driver opening would arise for Moline by the end of the year and, therefore, that Moline should ''be patient.'' It is only if the underscored portion of Moline's version were credited that Owens' admitted remarks would take on a different, arguably unlawful coloration.

could not name the others present. No one else corroborated Getter's testimony about this supposed episode. Getter's accounts were so murky, self-contradictory, and suspiciously improvised in character that I do not believe him in this instance even though I do not detect in Owen's testimony any specific denial that he made the threat recalled by Getter.[149] Accordingly, I find that the General Counsel's claim is not supported by any reliable evidence.

29. *Poma tells striker that he no longer worked for the Respondent*: The General Counsel relies on Lorick's and Webb's testimony that in either early February (Lorick), or the third week in January (Webb), Poma scolded Lorick for talking to a nonstriking Lucky 7 driver. Lorick initially testified that Poma said in this regard, ''If you're on strike, you're not allowed to talk to any of our drivers *because you no longer work here*.'' He repeated this in the same words on cross-examination. I found the underscored portion to be an inherently improbable formulation of Poma's words, and suspected that Lorick was gilding the lily, particularly in interposing the words ''no longer,'' which have so attracted the General Counsel's interest. And Lorick admittedly had described Poma's words in different terms in a pretrial affidavit, given to the Board agent on March 7, in which he quoted Poma as saying, instead, ''You're not an employee.''

Webb's initial testimony likewise suggested careful, but improbable shaping; thus he claimed to recall that Poma told Lorick, ''you're not allowed to talk to our drivers, *and* you're *no longer employed* by Lucky 7 Limousine.'' On cross-examination, however, Lucky 7's attorney suggested to Webb that Poma had instead said,

> While you're on strike, you're not allowed to talk to our employees. You are not an employee.

And, significantly, Webb replied,

> Yes, I did hear that statement. . . . And that statement was directed at Ron, a fellow striker.

This latter concession by Webb illustrates just how unlikely it was that Poma ever said explicitly that Lorick ''no longer'' worked for Lucky 7. Moreover, I suspect that Webb had no genuine recollection whatsoever of these events, but had been induced at some recent stage to lend ''corroboration'' to Lorick's testimonial version. Thus, Webb admittedly signed a statement on January 30 which contained no reference to any transaction involving Poma. And the Union's attorney later prepared a memorandum, apparently on February 19, based on a telephone interview with Webb which likewise contained no reference to any transaction involving Poma.[150] Considering all this, I assign no weight whatsoever to Webb's testimony.

As previously noted, Poma generally denied ever having talked to any strikers; moreover, she specifically denied having made any statement such as that attributed to her by Lorick or Webb. I found her to be demeanorally impressive, at least in her latter, more specific denial. I found Lorick unconvincing insofar as he claimed that Poma told him that he ''no longer'' worked for Lucky 7. I remain in doubt only as to the possibility that Poma may have told Lorick that he was not an ''employee'' of Lucky 7. Given Lorick's general unreliability, I am unwilling to credit him over Poma even as to that possibility. For all these reasons, I find that the General Counsel has not met his burden of proving that which in the end he sought to prove in this instance—that Poma made an unlawfully ''coercive'' statement to Lorick.

30. *Owens physically assaults striker Stassinos*: In this section, we deal with an incident which appears to have flared and subsided within less than 30 seconds, during which Owens roughly pushed striker Elias Stassinos, after Stassinos tried to block Owens' attempt to videotape picketing at the Airport. The incident was the subject of much testimony, from five striker-witnesses—Webb, McCoy, Stassinos, Emfinger, and Busotti—and from two company witnesses, Owens and Ross. Predictably, each witness recalled certain details differently, but there is no dispute about the overall course of events. These are my findings, based on a composite drawn from the harmonious elements of testimony:

On February 6, around 9 p.m., Owens appeared at the Airport with a video camera, and placed himself next to or within the van loading and unloading area used by Bell-Trans, which was about 20 feet down the median sidewalk strip from Lucky 7's van loading and unloading area. Owens focused his camera on activities of pickets across the roadway, next to the terminal building, near door 10. (There were then at least two strikers, McCoy and Webb, picketing in the area of door 10.) Nearer to Owens, on the ''per capita'' side of the roadway, were at least three more pickets (Stassinos, Emfinger, and Busotti), who were patrolling in a roughly oval pattern on the median sidewalk near Lucky 7's own van parking space.

When Owens began to operate the camera, Stassinos left his fellow pickets and walked over to where Owens had stationed himself, and then placed his hand in front of Owens' camera lens, blocking the view. Owens, still shouldering the camera then used his free arm to deliver an open-handed shove to Stassinos' chest,[151] and Stassinos fell backwards, rolling over at least once before coming to rest.[152] The other pickets in the area began to run toward the scene. McCoy and Webb ran from across the roadway toward Owens, and McCoy challenged Owens to pick on someone his own size. Owens, responding to McCoy's and Webb's advances, asked if they wanted a ''piece of [him] too,'' and pushed Webb

[149] I have already noted that the General Counsel disclaimed reliance on Getter's account of the December 19 drivers' meeting, a rambling and fantastic discourse during which Getter claimed to recall that Booth threatened that he would ''never sign a contract'' with the Union. Getter was no more believable in other areas of his testimony.

[150] The union attorney's memorandum was disclosed by the General Counsel to Lucky 7 counsel for cross-examination purposes under the Board's ''little *Jencks* rule, Section 101.118 of the Board's *Rules and Regulations*.'' Implicitly, the General Counsel acknowledged by surrendering this memorandum that it had been ''adopted'' by Webb. In any event, Webb admitted from the witness stand that the union attorney's memorandum had accurately recorded what he had told her during the telephone interview.

[151] Some witnesses described Owens' as having ''lunged forward'' to push Stassinos. Emfinger uniquely recalled that Owens used ''both hands,'' which was clearly mistaken, given that Owens, by Emfinger's account, was using one hand to hold the camera.

[152] Emfinger's claim that Stassinos went airborne, and did a one-and-a-half gainer before colliding with the pavement, was clearly fantastic, and not supported by anyone else.

back, as Webb tried to knee Owens in the groin. Emfinger interposed himself and urged everyone to calm down. Then Owens himself walked away from the scene, with parting words to McCoy (''You ain't nothing''), and into an Airport security office. As Owens withdrew, the strikers turned to attend to their fallen comrade.

The sharpest dispute among the witnesses concerns whether or not Stassinos himself pushed the camera with his hand before Owens pushed him. Owens states that his view suddenly went dark, and at the same time, the camera eyepiece was pushed back into his eye; Stassinos states that he merely ''waved'' his hand at a distance of ''1–2 feet'' from the camera lens; other witnesses recalled that Stassinos' hand appeared to be closer to the camera lens (e.g., Busotti, who described the distance as ''six inches''). Most witnesses (other than Owens and Stassinos) acknowledged that from their respective vantages, they could not be sure whether or not Stassinos' hand came into contact with the camera. I will not find it necessary to determine whether Stassinos' hand actually touched the camera, but if it were necessary to do so, I would credit Owens over Stassinos on this point. I found Stassinos' descriptions to be the least candid of all the accounts, and discredit him insofar as he claimed (uniquely) that Owens was ''filming me,'' and that, ''while . . . Owens was filming me, I waved my hand in front of the camera.'' I further discredit his claim on cross-examination that he was *not* ''trying to put [his] hand in front of the camera,'' and his attempt to suggest instead, that he was merely following a ''usual'' practice of ''wav[ing] *at* the camera'' when company agents would bring one to the picket line.[153] Nevertheless, because it does not affect my analysis, I will assume for all purposes that Stassinos' hand did not touch Owens' camera before Owens pushed him, but merely blocked out the view through the camera lens.

The General Counsel seeks a finding that when Owens pushed Stassinos, Lucky 7 violated Federal law. His theory is that Owens' action would inherently tend to restrain and coerce striking Lucky 7 employees in the exercise of statutorily protected rights, namely, to picket peacefully without being bullied or pushed around by a company agent. However, I do not find that Owens' action implicated Section 8(a)(1). The General Counsel ignores Stassinos' own mischievously provocative behavior immediately before Owens pushed him. More fundamentally, he ignores that Stassinos was not engaging in ''protected,'' much less ''concerted,'' activity when he tried to interfere with Owens' attempts to videotape the scene across the roadway. Rather, Stassinos had distanced himself from his fellow picketers, and had ventured on a frolic of his own before he was pushed. Because of this, Owens' pushing of Stassinos, however arguably ''assaultive'' from a civil tort standpoint, would not be likely to cause employees witnessing the incident to fear that they risked similar assaults at the hands of Lucky 7's agents as punishment for lawful picketing activities. In my view, the General Counsel has again misspent his credibility by attempting to make a Federal case out of this isolated and short-lived dustup.

31. *Flahart tells customers that pickets no longer have jobs*: With this caption, the General Counsel reaches the end of his recitation of facts relating to Lucky 7's actions away from the bargaining table. He relies on Emfinger's description of an incident in mid-February, at the Airport, where Ground Controller June Flahart, supposedly piqued by Emfinger's and Getter's vocal appeals to customers not to patronize Lucky 7, announced to some waiting customers that ''These guys don't even work for Lucky 7 *anymore*,'' supposedly adding that Emfinger and Getter ''*no longer* have a job.''[154] Flahart denied making any such statement, saying that the only time she ever made a remark in Emfinger's presence was in response to a provocation from Emfinger. On that occasion, she recalled, Emfinger ''told me that the Union was out to get me and that I was first on the list and that my fat ass was grass.'' She says she replied, ''Well, it is rather large, Ralph, but it's not made of grass.''

I unhesitatingly credit Flahart in all these respects, and I don't believe Emfinger for a moment, for all the reasons previously cited, and for these additional ones: Emfinger gave an affidavit to a Board agent on a date in early March (the recorded date is difficult to decipher, but is a single digit), to which was attached two earlier written notarized affidavits he had given to the Union's attorneys, respectively, on January 18 and 30. None of these affidavits contain any reference to the incident in question involving Flahart. Significantly, Emfinger admitted that the ''Flahart'' incident had occurred before he gave his March affidavit to the Board agent. But implausibly, Emfinger sought to explain the absence of any reference to the incident from that March affidavit on the ground that he ''didn't feel like it was important at the time.'' Later, on examination from the bench, he tried to straddle the fence, stating on the one hand, ''to tell you the truth, I didn't think it was that important,'' but on the other hand, ''I knew it was upsetting to me on the line.'' Indeed, so ''upsetting'' was the incident, in Emfinger's now-emerging explanation, that he supposedly ''discussed it'' with Getter, remarking, ''Man, I can't believe she's saying stuff like that.'' Finally, explaining *when* and *how* he came to ''recall'' the incident, and *why* he then concluded that the incident was ''important'' enough to report to a Board agent, Emfinger admitted that he was not moved to recall the matter until ''about three weeks ago,'' during preparation for testimony in this trial by Rubin, one of the General Counsel's trial attorneys. In this regard, Emfinger explained that he and Rubin ''were reviewing my statements that I had signed,'' and Rubin said,

> ''If there's anything else you can think of, I'd appreciate you telling me,'' because you know, we—you know . . . you might need all the things that you can remember.

[153] Even Emfinger, who typically sought to portray company actions in the worst light possible, volunteered that he interpreted Stassinos' behavior as ''a little silly. He was just jacking around.'' He further stated that even before Owens pushed Stassinos, he had ''started'' to ''walk over'' to say, ''Elias, you know, you shouldn't be doing that just because the guy is taking—you know, you shouldn't be playing with the camera like that.''

[154] I have emphasized these expressions for reasons which by now should be obvious; they are clearly attractive to the General Counsel (see discussion under item ''29,'' supra). Moreover, as I discuss below, it is clear from Emfinger's admissions that he was first prodded to ''recall'' Flahart's supposed statement only during his pretrial preparation for testimony by one of the prosecuting attorneys.

It was only after this invitation, says Emfinger, that he was moved to ''recall'' the above incident involving Flahart.

I regard Emfinger's testimony as to the Flahart incident as a recent invention, offered up to enhance the prosecution's case, and in turn, his own chances for backpay through a Board Order.[155]

CONCLUSIONS OF LAW

1. I have found that the Union was entitled to a continuing presumption of majority status as the 9(a) representative of Lucky 7's drivers as of late January 1991, when Lucky 7 refused further to recognize or bargain with it as such representative. I have further found that Lucky 7 did not establish valid grounds for discontinuing recognition and bargaining with the Union. Accordingly, I find that Lucky 7 violated Section 8(a)(5) and (1) by such action.

2. Inasmuch as Lucky 7 was continuing to maintain an ''inability to pay'' defense to the Union's demands for pay increases and benefits and other contractual terms, and nevertheless canceled a union audit previously scheduled to investigate the bona fides of Lucky 7's claims of inability to pay, I find that Lucky 7 failed and refused to furnish information relevant and necessary to the Union's representative function by canceling the audit, and thereby additionally violated Section 8(a)(5) of the Act.

3. Except as specifically found in the foregoing, Lucky 7 has not violated the Act in any other respect, and the complaint is without merit to the extent it alleges any such additional violations.[156]

4. The Union's strike against Lucky 7 was at all times prior to Lucky 7's late January withdrawal of recognition an economic strike. Because the record contains no evidence showing that any striker made an unconditional offer to return to work after Lucky 7's withdrawal of recognition, the question whether or not Lucky 7's violations converted what had been an economic strike into an unfair labor practice strike is purely hypothetical, and I do not decide it.

[Recommended Order omitted from publication.]

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[155] In this regard, Emfinger was asked by company counsel whether it had been ''explained to you by anybody that if the Company loses this case, then you would be entitled to monies, back pay from the time that you first went on the picket line? Were you told that there was a bunch of money in it for you?'' Emfinger replied (squirming as he did so),

> It might have—it might have been mentioned to me. I don't know. I don't really—even if there was, I don't think it's going to be—I'm not looking for—I don't think there's anything going to come of it anyway as far as the gentleman having any money to pay it to start with. But . . . I might have heard it, but I don't know. You know, it's just—I don't even—what's that got to do with—(Pause).

[156] This conclusion is intended to dismiss any or all contentions made by the General Counsel which go beyond my specific findings of violation on Lucky 7's part, without regard to whether those contentions are embodied in the ultimately amended version of the May 29 amended consolidated complaint.