

Romar Refuse Removal, Inc. and Local 813, International Brotherhood of Teamsters, AFL-CIO.
Cases 29-CA-15583, 29-CA-15788, 29-CA-16554, and 29-CA-16911

July 29, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND BROWNING

On January 28, 1994, Administrative Law Judge Steven B. Fish issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

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

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

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Romar Refuse Removal, Inc., Copiague, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(k) and reletter the subsequent paragraph.

“(k) Discharging, suspending, and reducing the work hours of employees because they support the Union, and because they participate in Board proceedings or refuse to withdraw charges filed with the Board.”

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

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

We have also reviewed the record and find no merit in the Respondent's contention that the judge demonstrated bias against the Respondent.

In the remedy section of the judge's decision, we note that the judge inadvertently stated that the physical confrontation between Supervisor William Rombauts III and employee David Bailey occurred “prior to” the discharge of Bailey, when in fact the confrontation occurred after the discharge.

²The judge's recommended Order failed to include a cease-and-desist order concerning the discriminatory discharge, suspension, and reduction in work hours of employees. We have modified the recommended Order to add this remedy.

APPENDIX

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

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

WE WILL NOT coercively interrogate our employees concerning their activities on behalf or in support of Local 813, International Brotherhood of Teamsters, AFL-CIO (the Union), or concerning information that our employees supplied to the National Labor Relations Board (NLRB), or concerning how our employees intend to testify at an NLRB trial.

WE WILL NOT confiscate union literature or authorization cards from our employees, or order and instruct our employees to turn over such material to us.

WE WILL NOT solicit grievances from our employees and implicitly promise to remedy such grievances.

WE WILL NOT threaten our employees with discharge, layoff, or other unspecified reprisals if the employees engage in activities on behalf of or in support of the Union, or if such employees testify at or participate in proceedings at the NLRB or the New York State Department of Labor (DOL).

WE WILL NOT condition the reinstatement of our employees on their agreement to refrain from engaging in activities on behalf of or in support of the Union, or to refrain from participating in or to withdraw from NLRB or DOL proceedings, or to furnish us with a copy of their NLRB statements.

WE WILL NOT promise or grant our employees wage increases or any other benefits, conditioned on the employees providing us with a copy of their NLRB statements.

WE WILL NOT order, demand, or instruct our employees to furnish us with a copy of statements given by employees to the NLRB, or to drop or withdraw charges filed with the NLRB, or to make changes in statements given to the NLRB.

WE WILL NOT inform our employees that any money they receive as a result of DOL or NLRB proceedings will be applied to child support payments.

WE WILL NOT order, demand, or instruct our employees to take off a few days and to refuse to testify at NLRB proceedings, and WE WILL NOT promise to keep jobs open for employees who do not testify.

WE WILL NOT assault our employees because they engage in activities on behalf of or in support of the Union, or participate in or testify at NLRB or DOL proceedings.

WE WILL NOT discharge, suspend, or reduce the work hours of employees because they support the

Union, and because they participate in Board proceedings or refuse to withdraw charges filed with the Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights under Section 7 of the Act.

WE WILL offer David Bailey and William Clark full and immediate reinstatement to their former positions of employment, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

WE WILL make whole Clark, Bailey, and King Sauls for any loss of earnings and other benefits suffered by them as a result of our discrimination against them with interest.

WE WILL expunge from our files any references to the discharges of Sauls, Bailey, and Clark, and notify them in writing that this has been done, and that evidence of these unlawful discharges will not be used by us as a basis for future personnel action against them.

ROMAR REFUSE REMOVAL, INC.

James P. Keams, Esq. and *Emily DeSa, Esq.*, for the General Counsel.

Edward L. Wolf, Esq., of Hauppauge, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

STEVEN B. FISH, Administrative Law Judge. Pursuant to charges filed by Local 813, International Brotherhood of Teamsters, AFL-CIO (the Union) in Cases 29-CA-15583, 29-CA-15788, and 29-CA-16554, the Regional Director issued complaints and notices of hearing on May 31, 1991,¹ July 15 and May 13, 1992, respectively, alleging that Romar Refuse Removal, Inc. (the Respondent) has violated various sections of the Act.

A trial with respect to the issues raised by the complaints was held before me on June 9 and 11, July 30, and October 1, 1992.

Thereafter, pursuant to charges and amended charges filed in Case 29-CA-16911 by the Union, the Regional Director issued a complaint and notice of hearing on November 25, 1992, again alleging that Respondent violated the Act.

By motion dated December 3, 1991, counsel for the General Counsel requested that Case 29-CA-16911 be consolidated with the prior cases, and the prior hearing be reopened in order to present testimony concerning the allegations in Case 29-CA-16911. The Respondent did not oppose this motion, which I granted by Order dated January 5, 1993, which set a date of March 18, 1993, for the reopened hearing, at which time the trial was resumed and concluded.

¹ All dates hereinafter are in 1991, unless otherwise indicated.

Briefs and/or memorandums in lieu of briefs have been filed, and have been carefully considered. Based on the entire record,² I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent is a New York corporation with its principal office and place of business at 55 Ralph Avenue, Copiague, New York, where it is engaged in the business of collection of trash from residential and business customers. During the past year, Respondent derived gross revenues in excess of \$500,000, and purchased and received at its places of business located in New York State, gasoline, truck parts and other products, goods, and materials valued in excess of \$50,000 from other enterprises located within the State of New York, each of which other enterprises had purchased and received the products, goods, and materials directly from points outside the State of New York.

Respondent admits, and I so find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted, and I so find that the Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

Respondent's two chief operating officers are Robert Marx, its president, and William Rombauts Jr., its vice president. William Rombauts III (the son of Rombauts Jr.) is an admitted supervisor of Respondent under Section 2(11) of the Act. Rombauts Jr. is sometimes referred to in the record as "Big Billy," or "Billy Senior." Rombauts III is sometimes referred to as "Little Billy" or "Bill Junior." For purposes of this decision, I shall henceforth refer to William Rombauts Jr. as Rombauts, and William Rombauts III as Rombauts III or "Little Billy."

Respondent employed approximately 28 regular full-time employees, as drivers or helpers, which job is also referred to as back man. Respondent also utilized the services of an undetermined number of employees who were employed on a "shape up" basis. They had no regular position, and would report to Respondent's premises at 5 a.m. in the morning, and would be employed only if one of Respondent's regular employees were unavailable or out of work.

William Clark was employed by Respondent as a driver on its Huntington route. King Sauls and David Bailey were employed as backmen or helpers. All three were under the direct supervision of Rombauts III, who was in charge of assigning the work to all of Respondent's full-time and shapeup employees.

On January 7, 1991, Robert Funk, a business agent for the Union and two other union agents distributed union literature and authorization cards to Respondent's employees outside of Respondent's entrance gate as the employees were enter-

² While every apparent or nonapparent conflict in the evidence may not have been specifically resolved, my findings are based on my examination of the entire record, my observation of the witnesses' demeanor while testifying, and my evaluation of the reliability of their testimony. Accordingly, any testimony which is inconsistent with or contrary to my findings is discredited.

ing Respondent's facility. The union agents handed out literature and cards to approximately 20 employees.

As employees were coming into the yard with the union literature and cards, Rombauts III confiscated the literature and cards from many of the employees. Rombauts III told employee Sauls to give him the card, and with a number of other cards in his hand, Rombauts III said to Sauls, something about these "blank, blank union people" while cursing, and added that whoever takes these cards would be laid off. Rombauts III also told Sauls that the employees didn't need the Union, and if there is anything they need, they can come to him.

Rombauts III then approached Funk and attempted to return to Funk the cards and literature that he had confiscated. Rombauts III said to Funk, "here, we don't need this, take this," referring to the union materials in his hand. Funk responded, "no, that's all right, I have plenty more." Rombauts III said nothing further, and walked away.

William Clark, after receiving the union authorization card, placed the card on a clipboard that he was carrying, when he entered Respondent's office later on that same afternoon. Rombauts and Marx were present. Rombauts said to Clark that if he was caught signing that union card, he would be automatically fired.

The above findings with respect to the events of January 7 are based on the mutually corroborative and credible testimony of Clark, Sauls, and Funk. I reject the contrived, generalized, and unconvincing testimony of Rombauts III that 15 employees voluntarily came to him and handed him the literature, saying "they are trying to bother us again." I find it highly improbable that this would happen, since if the employees felt they were "bothered" by the Union, they simply could have refused to accept the literature, or thrown it away themselves. I find no logical reason why 15 of them would have given the materials to Rombauts III. I also reject Rombauts III's generalized denials that he never spoke to anyone regarding union activities that day, or at an other time. It is noteworthy that he did not specifically deny telling Sauls, as I have found above, that whoever took cards would be laid off.

On January 8, the next day, Clark, while out on his route in Huntington, was approached again by Funk and given another authorization card for the Union. Clark read the card, signed it, and returned it to Funk.

On January 14, Sauls and Bailey were also approached by Funk while on their routes, and they both signed authorization cards for the Union at that time, and returned them to Funk.

Shortly thereafter, Sauls, Clark, and another employee were discussing the Union outside Respondent's office. Sauls was explaining why he felt that the employees needed a union in the shop, and as the conversation concluded, Sauls noticed Rombauts III standing behind him.

On January 17, 3 days after Bailey signed his authorization card, Bailey was informed by Rombauts III that he was fired. Bailey asked Rombauts III why, and Rombauts III replied that Marx had informed him that Bailey was fired, and "we don't need you anymore." Later on that day, Rombauts arrived and Bailey asked him how come he was fired. Rombauts answered that Bailey worked too fast, and that he got injured too much. Bailey replied that "that's the dumbest reason that I've ever heard." Rombauts told Bailey that he

would speak to Marx and see what they can do. The next day Bailey went to Respondent's premises and spoke to Marx. Marx refused to reconsider, and told Bailey that he was fired because he worked too fast and the guys didn't want to work with him, and because he got injured.

Insofar as accidents were concerned, Bailey was injured on August 10, 1990, when a piece of glass got in his eye. At that time he was out of work on 8/10, 8/21, 8/22, and 8/23 as a result of this injury. On October 3, 1990, Bailey pulled his shoulder on the job and was out of work on October 3, 4, and 5, brought in a doctor's note, and was also paid by Respondent for these days. In that connection, Bailey had given a doctor's note to Marx dated 10/4/90 saying that he would be out of work from 10/4/90 to 10/9/90. When Bailey returned to work on 10/10/90, Rombauts III told Bailey that he was fired because he hadn't let Respondent know what was going on. Bailey and Rombauts argued about the incident. Later on that day when Rombauts came in, Bailey showed Rombauts the note and explained the situation. Rombauts overruled Rombauts III's decision to fire Bailey, but Bailey was not paid for nor did he work on that day.

Respondent's policy is to give all employees 6 paid sick days per year, and after that the employees are generally not paid if they are out of work. If an employee is absent, Respondent simply replaces them with one of the shapeup employees that are usually at the facility, waiting for an assignment.

Marx testified that Bailey was terminated by Respondent on January 17 or 18, 1991, because of his personal problems, his excessive absences, and his being injured at times. Rombauts testified that Bailey was terminated because he was out 30 or 40 days throughout the year, he was late all the time, and he kept getting hurt all the time. Rombauts III testified that Bailey was out a lot of days, that he always got hurt, came in late, and was very unreliable. He added that employees had informed him that Bailey tried to work too fast and that's how he got hurt.

However, neither Marx, Rombauts, or Rombauts III testified as to who made the decision to terminate Bailey, or when it or how it was made. Respondent's records confirm that from May 8 to December 29, 1990, Bailey issued work for 40 days. However, the records also indicate that Bailey was not absent from work on any further days prior to his discharge on January 18, 1991, which was listed as Bailey's "last date employed." The records also show only a day of lateness for Bailey, on December 12, 1990, for 2 hours.

On or about Friday, January 25, Sauls informed Rombauts that his mouth was bleeding and he was in pain, and asked for a day off to go to the dentist. Rombauts replied that he could have the entire next week off. On Monday, February 4, Sauls was detained by the police because of a speeding ticket. He called Respondent and informed Rombauts III. Rombauts III told Sauls, "No problem, take care of your business." The next day, February 5, Sauls was informed by Rombauts III and by Marx that he was fired for taking too many days off.

Marx testified that Sauls was not fired, but that he just stopped coming to work and had had some drug problems. Rombauts on the other hand testified that Sauls was fired for

absenteeism.³ Rombauts III testified that Sauls missed a lot of days, came in late, was never there on time, and was very unreliable. Once again, no testimony was offered by any of Respondent's witnesses as to who, when, and how the decision was made to terminate Sauls.

While Sauls admitted that Marx had warned him on several occasions in 1990 that he should be coming to work on a regular basis, Respondent offered no evidence that Sauls was ever specifically warned that he would be disciplined or terminated if he continued to be absent, and no evidence of any discussion with Sauls by management officials concerning absence in 1991.

Respondent's records with respect to Sauls consist of two pages, which are somewhat overlapping and contain several crossouts. Thus, the first page, starts on 10/11/90, shows lateness for that day, and then shows absences on October 22, November 29, December 1, 20, and 18 with a notation "pay 1/2 day for that date per Bill." Then, on a line marked 2/4/91, the word "Fired" was written and crossed out, and replaced by the words, "didn't show up." Then on the same document, on lines after 2/4/91, eight additional absences are listed between 1/2/91 and 2/1/91, and one lateness on 1/10/91.

The second document starts on 1/10/91 and states that Sauls was late, listing 5:50 a.m. The next entry is for 1/8/91 and 1/24/91 as absences, and then another absence on 1/31/91 with a notation of fired next to that date, but then crossed out. Then, the document lists absences on 1/2, 3, and 4/91 and absent from 1/28 to 2/1/91. Then on 2/4/91, the word "Fired" appeared on that line, without any indication as to whether Sauls was out on that day. Respondent provided no explanations for the discrepancies in these records, or why there were two pages containing overlapping periods for Sauls, or by whom or why the crossouts were made.

On February 22, Clark was informed by Rombauts and Rombauts III that he was the last employee hired, and had to be the first one to be let go. Rombauts told Clark that Marx's nephew was coming out of college and needed a job.

According to Marx, Clark had informed Respondent that he intended to leave and go to Florida and gave it 2 weeks' notice. At some unspecified point, Marx added that Respondent replaced Clark as a driver. At another date also not specified by Marx, Clark changed his mind and told Respondent that he was not going to Florida. Marx further testified that after Clark told Rombauts that he wasn't going to Florida, "we offered him to stay and work at doing other jobs and he didn't want to do that." Significantly, Marx did not testify that he had made such an offer to Clark, or that he was present when this conversation allegedly occurred. Rombauts did not testify concerning the decision to discharge Clark. Rombauts III also furnished no testimony as to why Respondent decided to terminate Clark, although he did testify that Clark "had a lot of accidents, was unreliable, and didn't come to work a lot." He also added that Clark was 2 hours slower than normal in picking up trash, and Respondent received complaints from the town about Clark missing stops. Notably, no testimony was offered by Marx, Rombauts, or even by Rombauts III, than Clark's accidents, not coming to

work, slow work, or complaints from the town about him, had any bearing on Respondent's decision to terminate Clark.

The position paper submitted by Respondent's attorney states that in early February, Clark gave Respondent 2 weeks' notice of his intention to move to Florida. It further alleges that Respondent offered his position to a shapeup employee on February 8, and that on February 18, Clark told Rombauts III that he was not leaving, and that Rombauts III transmitted this message to Rombauts, who according to the position paper, on Friday of that week, terminated Clark "because we had hired a replacement and could not be left in a lurch while he was deciding if or when to go to Florida."

Clark's testimony is somewhat confusing with respect to the date of his having notified Respondent of his intent to move to Florida and when he retracted that position, as well as when he was removed from his route. Clark was not sure of the dates of the Florida discussions, although at one point he believed that he told Respondent in December 1990, that he did not intend to go to Florida.

Clark further testified that when he informed Respondent that he was not leaving (whenever that was), they removed him from his route, and told him that they had promised it to someone else. However, on closer examination of the record, I am persuaded that Clark was mistaken and confused with respect to this point. Thus, the testimony of Sauls, Rombauts III, and Marx are all consistent that Clark was a driver at the time of his discharge on February 22, 1991. Therefore, I conclude that it was not until after Clark was reinstated by Respondent several months later, that he became a helper and part-time driver and he was not given back his route, which had been assigned to someone else subsequent to Clark's termination.

Additionally, Rombauts testified that in Respondent's contract with the town of Babylon to pick up garbage in front of people's homes, Respondent is required to pay the prevailing wages and benefits set by the State of New York, which, according to Rombauts, are the same as the contractual wages and benefits in the Local 813 contract. Respondent did not introduce into the record either the Local 813 contract or its contract with the town of Babylon.

Also, Rombauts testified with respect to Respondent's view of the relationship between Bailey, Clark, and Sauls as follows: "Well, they were all kind of buddies, the three of them. It was like the three amigos there. Bailey, Clark and Sauls."

On March 18, 1991, the Union filed charges with the Region in Case 29-CA-15583, alleging that Sauls, Bailey, and Clark were discharged because of their union activity in violation of Section 8(a)(1) and (3) of the Act. Respondent received the charge by certified mail on March 22.

Thereafter in early April, Marx telephoned Bailey, and stated that he wanted to stop by Bailey's house. Bailey agreed, and on that day, Marx and Rombauts came to Bailey's home. Rombauts informed Bailey that the Union was charging Respondent with firing Bailey for union activities, and asked Bailey if he had said anything in his statement regarding that. Bailey replied that he hadn't said anything about union activities in his statement, and that all he had said was that Respondent fired him because he worked too fast and because he got injured. Marx then asked Bailey if he had the statement that he gave to the NLRB. Bailey re-

³ A position paper submitted by Respondent's attorney to the Region also asserted that Sauls was fired for absenteeism.

sponded that he had given it to his father to look over. Marx asked if Bailey could get the statement back from his father. After Bailey replied that he could get it, Marx asked if Bailey wanted to come back to work and inquired as to what Bailey's salary had been at the time of his discharge. Bailey replied that he was making \$317. Marx then offered to reinstate Bailey at \$375. Bailey agreed and, after some discussion, it was decided that Bailey would report to work on April 22.

During this same conversation, Marx and Rombauts told Bailey that they didn't want the Union, and that they didn't want the Union to take control of the Company. Furthermore, they told Bailey that the Union was just using Bailey to get into the Company.

Bailey reported to work on April 22, as agreed on. On his first day back, after he completed his work, Marx asked Bailey if he had brought the statement that he had filed with the Union. Bailey replied that he did not, and Marx repeated his demand that Bailey bring in the statement. Later that same week, Marx made two or three more requests that Bailey bring in the statement, and Bailey said he would do so.

About a week after his return to work, Bailey brought in a copy of the affidavit and gave it to Marx. Marx read it, and Bailey stated, "told you that I hadn't said nothing about being fired for union activities." Marx responded by complaining about how Bailey worded the statement, and asked why he could not have said that he was fired for absences instead of because he worked too fast and got injured. Bailey answered, "that's not true, this is what you told me when I came into the office." Marx asked if he could keep the statement and show it to Rombauts. Marx then requested that Bailey call Board Agent Kearns to have the affidavit dropped. Marx let Bailey use the phone in the backroom, and instructed him not to let Kearns know that he was calling from Respondent's facility. Bailey did call Kearns and informed Kearns that Marx wanted him to withdraw his affidavit. Kearns asked what Bailey was going to do, and Bailey replied that he was going to tell Marx that he was unable to reach Kearns, which he subsequently did.

The next day, Bailey was called into the backroom by Marx and Rombauts. Rombauts began by stating that, "I can't believe this crap of them saying that we fired you for union activities." They asked Bailey if he thought that he was fired for union activities? Bailey responded that he didn't know why Respondent fired him because they knew that he worked fast and it was never a problem before. Marx then handed back Bailey's affidavit, and told Bailey that he had written something on the back, which he wanted Bailey to read, rewrite, and mail it to Kearns. Marx's letter in effect retracted some portions of Bailey's prior affidavit, and states that he (Bailey) realized that he was dismissed for missing a lot of worktime.

Bailey read the letter, but said he could not write what Marx had written because he would be perjuring himself. Marx replied that what Bailey said in his statement was why they were "hounding us," and again requested that Bailey copy what Marx had written, but stated that Bailey could make some changes if he liked. Bailey took the affidavit from Marx, and after a number of other requests by Marx as to whether Bailey had rewritten it and mailed it to Kearns, Bailey finally informed Marx that he had done so, although he actually had not done what Marx had requested.

In early May 1991, Clark heard that Bailey had been reinstated, so he called Rombauts on the telephone and asked about returning to work. Rombauts asked Clark if he was involved in any union activities. Clark replied that he was not. Rombauts instructed Clark to come down and speak to him. In early May 1991, Respondent agreed to rehire Clark but his regular route had been assigned to someone else. Therefore, Clark was offered and accepted a position as a part-time driver. He worked as a part-time driver, 2 or 3 days a week, whenever another driver was out of work or would call in sick. On June 7, 1991, Respondent had Clark sign a letter, which confirmed that on or about May 1, he was offered a position as a helper, but declined, and agreed to work part time as a driver, until the next opening as a full-time driver became available. At some point, several months later, Clark's status was changed to part-time driver and part-time helper. He would drive when a regular driver was out, sick, or on vacation or otherwise unavailable, and spend the rest of the time as a helper. He received from Respondent the same driver's pay that he had been receiving prior to his discharge.

Sauls was reinstated to his position as a helper sometime in May 1991. Shortly thereafter, Rombauts asked Sauls about his NLRB statement. Sauls replied that he didn't have it and didn't know where it was. Sauls added that when he found the statement, he would bring it in and let Rombauts see it.

On or about May 30, Marx and Rombauts, in Respondent's office, notified Bailey that Rombauts would be taking Bailey, Clark, and Sauls to a meeting with Board Agent Kearns, so that the employees could get their affidavits dropped or withdrawn. Rombauts also told Clark that Respondent had made an appointment with its attorney for Clark, Bailey, and Sauls to "change some statements we had written out." Rombauts also told Sauls at that time that the three employees were supposed to come down and tell Board Agent Kearns that "we didn't get laid off for these purposes" and tell him something else.

On May 31, Rombauts drove Bailey, Clark, and Sauls to the office of Respondent's attorney, where they met with Board Agent Kearns. However, they did not withdraw their charges, or change their affidavits.

Thereafter, as noted, complaints were issued on May 31 and July 15, 1991, and on May 29, 1992, in Cases 29-CA-15788 and 29-CA-16554, respectively. These cases were thereafter consolidated for hearing and, as detailed above, the trial commenced on June 9, 1992.

Meanwhile, sometime prior to May 1992, Funk enlisted a number of Respondent's employees including Bailey, Clark, and Sauls to file claims against Respondent at the New York State Department of Labor (DOL) for failure to pay prevailing wages. A hearing was scheduled to be held at the DOL on May 8, 1992.

About a week prior to the scheduled hearing at the DOL, Marx and Rombauts called Sauls and Clark into the office. Marx spoke, and told Clark and Sauls that whoever went down to the DOL or to court would be fired, and would no longer have a job with Respondent. Marx added that whoever went there didn't have to worry about coming back to the job because whoever dealt with the Union could stay with the Union and he didn't want to deal with them.

On May 8, 1992, Funk brought Saul and Clark to the DOL for the scheduled hearing, but learned that the hearing had

been postponed. No representative from Respondent appeared at the DOL on that day. The next working day, May 9, 1992, when Clark and Sauls reported for work, Rombauts III did not send them out and told them that there was no work for them. However, Rombauts III assigned two new employees to the routes that Sauls or Clark had previously been assigned to as helpers.

Later that day, Sauls and Clark went back to Respondent's facility. Sauls met with Rombauts in the back office, and asked why he hadn't gone out that day. Rombauts initially told Sauls that he and Clark had not told him that they were going down to the union hall. Sauls disagreed and insisted that he had notified Rombauts that the employees were going to the DOL on May 8. Rombauts responded that he didn't want anyone working with the Union, and that is why they didn't work that day. Rombauts added that if Sauls dealt with the Union, he had no job. Rombauts instructed Sauls to take time and think about "who do you want to work for, the Union or me." Sauls at that point told Rombauts that he would agree to drop all his charges, and to notify Respondent's attorney that he had so agreed.

At that point, Rombauts called Clark, who had been waiting outside, into the office. Sauls told Clark that he needed the job, and had to pay his bills, so he was going to drop all his charges. Clark said that he was not dropping his charges. Sauls then left the room, and Rombauts and Clark continued their discussion, by which time Marx was also present.

Rombauts told Clark that he had asked Sauls to drop all his charges. Clark asked if Rombauts thought Clark was "head ringleader," and Rombauts responded that Clark was like a "Malcom X" or a "head ringleader," and added, "I've had it up to here with you William." Rombauts then informed Clark that if anything was due to Clark from the NLRB or the DOL, it would go to child support anyway, and that Respondent's lawyer was looking into "all this anyway." Marx then asked Clark, "why did you tell them that I said you would get fired if you show up to Court." Clark replied that he couldn't tell a lie. Marx also told Clark, "I've had it up to here with you." Marx then informed Clark from then on, he would be employed on a shapeup basis, i.e., Clark would come in, and if Respondent needed him, he would be employed, otherwise he would not. Thereafter, Sauls continued to be employed on his regular route, while Clark commenced working on a shapeup basis.

At some point in early May 1992, Marx asked Clark to come into Respondent's office. Marx informed Clark that Bailey dropped his charges, showed Clark some papers from the NLRB, and suggested to Clark that he get in touch with Bailey, and Bailey would show him how to go about dropping them. Marx also gave Clark the phone number of Board Agent Kearns, and told Clark to let him know what happened once he called the NLRB. Several days later, Marx asked Clark if he got in touch with the NLRB and Clark responded that Board Agent Kearns was on vacation. During the initial conversation, Clark asked about the possibility of his becoming a full-time driver once again. Marx informed Clark that Clark would be assigned the next driver route that became available. At that time, a one-page document was prepared, dated May 5, 1992, in which it was agreed that Clark would continue to be employed as a driver operating helper routes, and filling in for driver vacations and sick

leave. The document also specified that Clark would be assigned the next driver route that becomes available. Further, the agreement was to remain in force as long as Clark came to work regularly and his accident record was satisfactory.

Meanwhile, sometime in May 1992, Marx called Bailey on the telephone and asked if Bailey wanted to come back to work on a full-time basis.⁴ Marx told Bailey that if he came back to work, he would have to keep "his mouth quiet." Marx did not elaborate at that time on what he meant by keeping "his mouth quiet. Bailey agreed and returned to work on June 1.

On Bailey's first day back at work, June 1, he met with Rombauts and Marx. Bailey asked Respondent if he could have Thursdays off, and occasionally on Tuesdays, to pursue a career in modeling. Marx and Rombauts agreed that Bailey would have a regular schedule of working 4 days a week, Monday, Tuesday, Wednesday, and Friday. Marx told Bailey at this meeting that the Union "was making an ass out of Bailey," and they were using Bailey as a "scapegoat." Rombauts added that the Union was not looking out for Bailey, and they were just trying to get into the Company. Bailey responded that he needed to work and take care of his family, and wasn't going to get himself involved with anything that is going on. Marx reiterated his prior statement to Bailey that as long as he comes in and kept his mouth quiet, there should be no problems.

Marx also made a reference to the NLRB trial scheduled for June 9. Marx asked what Bailey was going to say at the hearing, and whether or not he could say that the Union put him up to filling out an affidavit. Marx also told Bailey that he should tell the court that the Union had put him up to filling out an affidavit with the NLRB. Bailey replied that he didn't want to get involved with the Union or anything dealing with it any more, but he would not perjure himself, and that he didn't mention anything in his affidavit about being fired for union activities.

As noted, the NLRB trial was scheduled to begin on June 9, 1992. Sometime during the week prior to June 9, Marx informed Sauls that he didn't want Sauls to come to "Court." Marx told Sauls to "take a few days off," and he would keep Sauls' job for him. When the NLRB trial opened on June 9, as scheduled, Sauls did not appear, although he had received a subpoena from General Counsel returnable on that date. On June 9, testimony was taken from Funk, Marx (called as a 611(c) witness by General Counsel), Clark, and Bailey. The hearing was then adjourned from June 9 to June 11 to give Sauls another opportunity to appear. Sauls again was not present on June 11, and the trial was adjourned indefinitely, pending General Counsel's decision as to whether to enforce the subpoena against Sauls in Federal court.

Although the record does not fully disclose the circumstances, it appears that Sauls was either terminated from or quit his job at Respondent sometime in late June or early July 1992. The complaint does not allege that this separation of Sauls from Respondent in 1992 is violative of the Act. However, Sauls subsequently testified at the resumption of the hearing on July 30, 1992.

⁴ Apparently, Bailey had been working for Respondent since March 1992 on a periodic 1-or-2-day-per-week basis, off the books. The record does not reflect the circumstances of how Bailey's status had changed from a full-time employee in April 1991 to a casual employee in March 1992.

Similarly, the record indicates, although not clearly, that Clark was terminated by Respondent, at some undisclosed date, prior to June 9, 1992. This discharge of Clark was not alleged to be violative of the Act.⁵

Meanwhile, as noted above, Bailey returned to work for Respondent on June 1, 1992, and it was agreed that he work 4 days a week, with Thursdays off, so that Bailey could pursue modeling. For the week of June 1 through 5, Bailey worked the 4 days as had been worked out with Respondent. Bailey also worked on Monday, June 8. On Tuesday, June 9, the NLRB trial was held, and Bailey testified against Respondent. He worked on Wednesday, June 10, Friday, June 12, and Monday through Wednesday, June 15-17.

On Friday, June 19, Rombauts III called Bailey into the office before work. He asked Bailey to sign a paper that stated the agreement for him to work 4 days a week, Monday, Tuesday, Wednesday, and Friday. Bailey read the letter and as he was about to sign it Rombauts III asked to see it and stated the letter was wrong and handed Bailey another letter saying that he agreed to work 3 days a week, Monday, Tuesday, and Friday. Bailey refused to sign that document, and told Rombauts III that this wasn't the agreement he had made with both Marx and Rombauts. Rombauts III informed Bailey that unless he signed the paper, he wouldn't be working that day. Bailey still would not sign the paper, and Rombauts III sent him home without an assignment.

The next working day was Monday, June 22, 1992. Bailey arrived for work at the usual time of approximately 5:05 a.m. Rombauts III told Bailey that he didn't need him that day and again sent him home. However, on both Friday, June 19, and Monday, June 22, Bailey noticed that shapeup employees were going out to work, even though Bailey was not a shapeup employee. Later on that evening, Bailey spoke to Marx and complained about the fact that he was now working only 3 days, instead of the agreed-on 4 days. Marx responded that Bailey should just go to work and do what he had to do, and that his lawyer instructed him not to talk to Bailey over the phone.

Thereafter, Bailey continued to work the 3-day schedule until July 14, when he injured himself on the job, and was out on compensation until his return on Friday, August 7, 1992. On Saturday, August 8, Bailey telephoned Marx and informed him that he had received a paper from the DOL stating that he had to appear at a hearing there on Monday, August 10, 1992. Marx replied that he couldn't talk to Bailey about it, and he should do whatever he wanted.

On Monday, August 10, 1992, Bailey appeared at the DOL in Hempstead, New York, and testified along with Clark and William Terrell (both Clark and Terrell were no longer employed by Respondent as of August 10) that Respondent had underpaid them and owed them money. Marx and Rombauts were present at the DOL. The next day, August 11, the DOL hearing continued, and although Bailey was scheduled to attend, he did not come because his car broke down.

Bailey's next scheduled day of work was August 14, 1992, and he arrived and punched in, as usual. Bailey said good

⁵In this connection, I sustained General Counsel's objection to the attempt of Respondent's attorney to litigate this discharge of Clark, although the attorney asserted that Respondent had been told that Clark was going to file another charge concerning this discharge.

morning to Rombauts III, but Rombauts III ignored him, and did not assign him to a truck, which was the normal practice. Bailey was not assigned to a specific truck, although Rombauts III would normally assign him each morning to a particular truck. Bailey noticed that all the trucks had gone out, except for one.

Rombauts III started to walk towards the remaining truck, and Bailey thinking that he would be going out on the truck with Rombauts III, started walking alongside him towards the truck.⁶ Bailey said something to Rombauts III about Rombauts III's tire in his car looking flat. At that point, Rombauts III turned to Bailey and said, "Get out of here, you caused enough problems for us, why don't you go with your union buddies." Bailey responded that he was tired of Respondent pulling this crap and added that he was supposed to work that day.

Rombauts III asked where Bailey was on Monday and Tuesday. Bailey answered that he was at the (DOL) hearing, and he had notified Marx about it on Saturday. Rombaut III then stated that Bailey was not working, "we don't need you any more, why don't you go find another company to work for." As they continued to walk towards the truck, Rombaut III pushed Bailey twice, which caused Bailey to lose his balance. Rombauts III then placed his keys between his fingers in a ready "fist like position." Bailey asked if he needed his keys, and picked up his bag in an attempt to ward off a possible punch. Rombauts III replied "what keys," and removed the keys from between his fingers. At that point, after some additional words, Rombauts III lunged forward and head-butted Bailey on his lip, causing Bailey's lip to bleed. When Bailey felt his lip and saw the blood, he said to Rombauts III, "that was your best shot." They began circling one another, and Bailey punched Rombauts III in the mouth. Rombauts III grabbed his mouth and walked away without saying anything.

Later on that day, Rombauts III filed a complaint with the Suffolk County police department. As a result of that complaint, Bailey was arrested and arraigned on a charge of assault. On that day, the judge issued a temporary order of protection against Bailey, which ordered him to stay away from Rombauts III and from Rombauts III's place of employment or home. The order of protection was to remain in effect until the final disposition of the charge. Neither Rombauts nor Rombauts III were present at the arraignment, and apparently no testimony was taken at that time from any witness. The judge also told Bailey that he was not allowed to go near Rombauts III, and could not go to Respondent's facility.

Later on that same evening, Bailey spoke to Marx on the telephone. Marx called Bailey an "asshole" because he hit Rombauts III in the mouth. Bailey replied that Rombauts III had pushed him and head-butted him. Marx responded that Bailey should have walked away. Bailey answered that Rombauts III should have walked away and stopped playing games about him working on the truck. After some more words were exchanged, Marx told Bailey to "stay away from the yard," "you're not wanted . . . don't go up to the company any more" and "go somewhere else." Neither Marx nor Rombauts III used the words fired or discharged. Marx,

⁶Rombauts III, although a supervisor of Respondent, also drives a truck, and Bailey had been assigned to work as a helper with Rombauts III as a driver on prior occasions.

during his conversation with Bailey, did not mention the order of protection, or the criminal trial. Nor did he tell Bailey that he could or might be able to return to work, after the criminal trial was completed.

The record does not disclose the final disposition of the criminal proceeding. Bailey has not returned to work for Respondent, nor has he been offered his job back by Respondent.

Respondent's attorney sent letters to the Region during the course of the investigation of the charges filed with respect to Bailey's 1992 termination, dated October 22 and November 13, 1992, asserting that Bailey was discharged because of Bailey's unprovoked, vicious, and criminal assault on his supervisor. However, at the trial, and in its brief, Respondent's attorney asserts that Bailey was never fired by Respondent, and he was not working at Respondent only because of the order of protection and the instructions by the Suffolk County judge to Bailey not to go near Rombauts III or to go to the Respondent's facility.

My findings above, with the respect to the events subsequent to January 7, are based on the credible and often mutually corroborative testimony of Bailey, Clark, and Sauls. In most areas, Respondent adduced no contrary testimony at all, and much of the above testimony was uncontroverted, including Bailey's testimony concerning the events of August 14, 1992. To the extent that Rombauts, and Rombauts III disputed some portions of the testimony of the employees, I reject the Rombauts versions of events, because I found the accounts of Sauls, Clark, and Bailey to be more believable, consistent, and persuasive.

III. ANALYSIS

A. *The Alleged 8(A)(1) Violations*

1. The events of January 7, 1991

I have found above that on January 7, after employees received authorization cards and literature from union representatives, Rombauts III confiscated the literature and cards from a number of such employees, while specifically ordering Sauls to give him the material. Such conduct constitutes an unlawful attempt by Respondent to interfere with its employees protected right to receive union literature and is violative of Section 8(a)(1) of the Act. *Farm Fresh*, 305 NLRB 887, 888 (1991); *Alson Knitting, Inc.*, 301 NLRB 758, 760 (1991); *Filene's Basement Store*, 299 NLRB 183, 209 (1990); *Southland Knitwear, Inc.*, 260 NLRB 642, 655 (1982).

During this incident, Rombauts III also informed Sauls that the employees did not need a union and if there is anything they need, they can come to him. By these remarks of Rombauts III, Respondent has unlawfully solicited grievances from its employees, and impliedly promised to remedy them, without the need for a union, and has thereby further violated Section 8(a)(1) of the Act. *Columbia Mills*, 303 NLRB 223, 227 (1991); *General Wood Preservative Co.*, 288 NLRB 956 fn. 2 (1988).

During this same conversation, Rombauts III, while cursing about the blank union, told Sauls that whoever takes the union cards would be laid off. Similarly, Rombauts told employee Clark on the same day that if he was caught signing that union card, he would automatically be fired.

Both of these statements constitute clearly unlawful threats of discharge or layoff in reprisal for employees engaging in protected union activity, and by such conduct Respondent has once again violated Section 8(a)(1) of the Act.

2. Events of March through May 1991

As noted above, Respondent discharged employees, Clark, Sauls, and Bailey on various dates in January and February.⁷ On March 18, the Union filed charges in Case 29-CA-15583 with the NLRB, alleging that these terminations were violative of the Act.

As I have found above, Respondent thereafter embarked on a campaign of conduct in response to the filing of these charges, and the employees participation in the processing of such charges.

Thus, Respondent's owners, Marx and Rombauts, initiated a meeting at Bailey's home. Rombauts informed Bailey about the aforementioned charge, and asked Bailey if he said anything in his statement about being discharged for union activities. Such questioning by Respondent concerning what information Bailey provided to NLRB investigators, constitutes coercive interrogation in violation of Section 8(a)(1) of the Act. *Bradford Coca-Cola Bottling Co.*, 307 NLRB 647 fn. 3 (1992); *Astro Printing Services*, 300 NLRB 1028, 1029 fn. 6 (1990); *Dayton Typographical Service*, 273 NLRB 1205, 1206 (1984). I so find.

Marx then asked Bailey to provide a copy of the statement to Respondent. By such a request, Respondent has also violated Section 8(a)(1) of the Act. *Astro Printing*, supra at 1035; *Frascona Buick*, 266 NLRB 636, 647-648 (1983); *GEX of Colorado*, 250 NLRB 593, 596 (1980).

After Bailey replied that he could get the affidavit, Marx asked Bailey if he wanted to come back to work and offered him a raise of \$58 per week. In these circumstances, I conclude I find that Respondent has further violated Section 8(a)(1) of the Act by conditioning Bailey's reinstatement on his furnishing Respondent a copy of his affidavit, and by promising and granting him a wage increase for the same reason.

Bailey agreed to Respondent's reinstatement offer, and on his first day back at work, April 22, and on two or three more occasions, Respondent by Marx, made several more demands that Bailey bring in the affidavit that he had executed. These additional requests for the affidavit further violated Section 8(a)(1) of the Act.

Finally, about a week after his return to work, Bailey submitted the affidavit to Marx. After reading it, Marx complained about how Bailey had worded the statement, and asked why Bailey could not have said that he was fired for absences. Marx then asked Bailey to call the Board agent to arrange for his affidavit to be dropped. The next day Marx handed Bailey back a copy of his affidavit, and told Bailey that he had written something on the back, which he wanted Bailey to read, rewrite, and send back to the Board agent. The additional material written by Marx retracted portions of Bailey's prior statement, and states that Bailey realized that he was dismissed for missing worktime. By demanding that Bailey "drop" his affidavit (in effect, withdrawing the charge with respect to him), and by instructing Bailey to make certain changes in his affidavit, Respondent has unlaw-

⁷The lawfulness of these actions will be discussed below.

fully interfered with the Board's processes, and with its employees Section 7 rights, and has thereby violated Section 8(a)(1) of the Act. *Eddyleon Chocolate Co.*, 301 NLRB 887, 903 (1991); *Cave Springs Theatre*, 287 NLRB 4, 11 (1987); *Holiday Inn Glendale*, 277 NLRB 1254, 1275 (1985).

After Clark heard that Bailey had been reinstated, he called Respondent Rombauts on the phone and asked about returning to work. Rombauts asked Clark if he was involved in any union activities? I find this interrogation to be coercive, and further violative of Section 8(a)(1) of the Act, particularly in view of the fact that the questioning occurred in the context of Respondent's other unfair labor practices described above. *EDP Medical Computer Systems*, 284 NLRB 1232, 1265 (1987).

Sauls was also reinstated, sometime in May 1991. Shortly thereafter, Respondent once again violated the Act, by Rombauts asking Sauls about his NLRB statement. *Eddyleon Chocolate*, supra; *Bradford Coca-Cola*, supra; *Astro Printing*, supra.

Finally, on May 30, Respondent's officials told employees that Rombauts would be transporting Clark, Bailey, and Sauls to a meeting with the Board agent, so that the employees could get their affidavits dropped, or withdrawn, or to "change statements we had written out," or to tell the Board agent that they were not laid off for "these purposes" (union activity) and to tell him something else. In fact, Rombauts did drive the three employees to a meeting with the Board agent at the offices of Respondent's attorney. Once more, Respondent has committed several violations of Section 8(a)(1) of the Act, by instructing employees to withdraw, or drop, or change statements previously given to the NLRB. *Eddyleon Chocolate*, supra; *Cave Springs*, supra.

3. Events of May and June 1992

Notwithstanding the above-described unlawful conduct of Respondent, designed to pressure employees to withdraw their charges or change their statements, the employees did neither, and the NLRB eventually issued complaints and notices of hearing against Respondent, with a trial scheduled for June 9, 1992. Meanwhile, the Union had enlisted a number of Respondent's employees, including Bailey, Clark, and Sauls to file complaints with the DOL alleging that Respondent had failed to pay prevailing wages. A hearing at the DOL was scheduled to be held with respect to these complaints on May 8, 1992.

Respondent, as these hearings were approaching, continued with its unlawful campaign that had been unsuccessful in 1991, to intimidate and coerce employees in connection with the NLRB proceeding, and now added coercive conduct concerning the DOL hearing and the employees participation in that matter. Thus, Respondent further violated Section 8(a)(1) of the Act by the following remarks by its officials: (1) Marx telling Sauls and Clark, in early May 1992, that whoever went down to the DOL or to court (i.e., the NLRB) would be fired and would no longer have a job with Respondent. (2) The day after the DOL hearing, when Rombauts informed Sauls that he hadn't worked that day because Rombauts didn't want anyone working with the Union, if Sauls dealt with the Union, he had no job, and that Sauls should think about, "who do you want to work for, the Union or me."

As a result of these remarks, Sauls agreed to drop all his charges. Respondent then asked Clark to drop his charges, as did Sauls, and when he refused, Rombauts told Clark, "I've had it up to here with you William." This comment of Rombauts is an implied threat of reprisal in retaliation for Clark's refusal to withdraw his charges. Rombauts also informed Clark that anything that was due from the DOL or the NLRB would go to child support. This statement by Rombauts I find to be another unlawful attempt to coerce Clark to withdraw his NLRB or DOL charges, and is further violative of Section 8(a)(1) of the Act.

In early May 1992, Marx called Clark into the office, informed him that Bailey had dropped his charges, and suggested that Clark get in touch with Bailey to do the same. Marx also gave Clark the phone number of the Board agent and continued to press Clark to call and withdraw his charges.

Also, in May 1992, Marx called Bailey and offered to reinstate him on a full-time basis, as *controls packing* as long, as "he keeps his mouth quiet." Although Marx did not explain what he meant by "keep his mouth quiet," it is clear from statements made to Bailey both before and after this remark what Marx was referring to by this condition. Thus, on Bailey's first day back, on June 1, 1992, Bailey was told by Marx that the Union was "making an ass" out of Bailey and using Bailey as a "scapegoat," and repeated Marx's prior warning to keep his mouth quiet. Marx also made reference to the NLRB trial, asked what Bailey was going to say at the hearing, and whether he could say that the Union put him up to filling out an affidavit with the NLRB. Bailey said that he didn't want to get himself involved with the Union, or anything dealing with it, but he would not perjure himself. Based on the foregoing, I conclude that Respondent by offering to reinstate Bailey if he "kept his mouth quiet," was clearly referring to Bailey's potential testimony at the NLRB trial and his continuing to engage in union activity, and that it unlawfully conditioned his reinstatement on Bailey agreeing not to participate in or to withdraw the NLRB charges, and not to engage in union activities, in violation of Section 8(a)(1) of the Act. *Contris Packing Co.*, 268 NLRB 193, 212 (1983).

Additionally, Respondent further violated Section 8(a)(1) of the Act, during the June 1 conversation with Bailey, by instructing Bailey to tell the court that the Union put him up to filling out his affidavit, *Eddyleon Chocolate*, supra, and by asking him what he was going to say at the NLRB hearing. *Bradford Coca-Cola*, supra; *Astro Printing*, supra.

Shortly before the NLRB trial began on June 9, 1992, Marx told Sauls that he didn't want him to come to court, instructed Sauls to take a few days off, and promised to keep Sauls' job for him. This conduct is further violative of Section 8(a)(1) of the Act by Respondent. I so find.

B. The Alleged Discriminatory Conduct

1. The discharges in January and February 1991

The appropriate standard for analyzing all the alleged discriminatory conduct alleged here, is set forth by the Board in *Wright Line*, 251 NLRB 1053 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), and approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). The General Counsel must first establish that a motivating

factor in Respondent's decisions to discharge or engage in the other alleged discriminatory conduct towards its employees was the employees' protected activities. Once the General Counsel has made such a showing, the burden then shifts to Respondent to demonstrate that it would have taken action against the employees absent their protected conduct.

In applying these principles to the allegations in the instant matter, I shall first consider the discharges of Sauls, Clark, and Bailey in January and February 1991. In that regard, the Union's organizing campaign commenced on January 7, at which time union organizers distributed cards and literature at Respondent's facility. On that very day, Respondent violated Section 8(a)(1) of the Act by confiscating union cards from employees, including discriminatee Sauls, made unlawful threats of discharge and/or layoff to Sauls and discriminatee Clark, and made an unlawful promise of benefit to Sauls.

Sauls, Clark, and Bailey all signed authorization cards for the Union within a week of January 7. Bailey was terminated 3 days after he signed his card, and Clark and Sauls were fired within weeks after they executed their authorization cards.

Thus, a compelling prima facie case has been made that the union activities of these employees motivated their discharges. Knowledge of their union activities is firmly established by the extensive 8(a)(1) conduct directed towards these employees as described above. Moreover, Rombauts conceded that Respondent considered Sauls, Clark, and Bailey to be buddies and "like the three amigos." It is thus clear that it considered these three employees as acting together in supporting the Union's organization activities. The extensive animus directed towards these employees as demonstrated by the unlawful 8(a)(1) statements, particularly the threats to discharge and lay off, plus the fact that the discharges occurred in close proximity to the signing of the cards, all point to a showing that the discharges were motivated by the employees' union activities.

Therefore, the burden then shifts to Respondent to demonstrate by a preponderance of the evidence that it would have taken the same action against the employees, absent their protected conduct. *Wright Line*, supra; *Transportation Management*, supra.

Respondent initially places significant reliance on the testimony of Rombauts that Respondent under its contract with the town of Babylon was obligated to pay "prevailing wages" and benefits to its employees, and that these prevailing wages and benefits are the same as in the Local 813 contract. However, I would note that Respondent did not introduce into the record either its contract with the town of Babylon, the Local 813 contract, or any other documentary evidence to support Rombauts' testimony that signing a union contract would not result in any additional costs to Respondent. Moreover, even if I were to accept Rombauts' testimony in this respect, Respondent's argument that this proves that Respondent would have no motive to fight unionization has not been established.

Thus, the extensive evidence of unlawful statements directed towards its employees efforts to support unionization that I have found above, dispels any contention that Respondent did not object to signing a union contract. It is also noteworthy in this respect, Marx's statement to Bailey that Respondent didn't want the Union, and didn't want the

Union to take control of the Company. These statements indicate a strong motive for Respondent to resist unionization, even if as Respondent asserts, it was already paying the same wages and benefits included in the Local 813 contract.

Turning to the specifics of the discharges, it is significant that Rombauts III informed Bailey at the time of his discharge that he was fired and "we don't need you any more," which infers a lack of work for him. Later on that day, Rombauts told Bailey that he was discharged because he worked too fast and got injured too much. The day after his discharge, Marx added still another reason, that the "guys didn't want to work him."

At the trial, Marx testified that Bailey was terminated because of his personal problems,⁸ his excessive absences, and his being injured. Rombauts testified that Bailey was out 30-40 days throughout the year, was late all the time, and kept getting hurt. Rombauts III testified that Bailey was out a lot of days, always got hurt, and was unreliable. Thus, when one combines the various and different reasons given to Bailey by Respondent's officials, when he was discharged, and testified to by its officials at trial, Respondent has asserted seven different reasons for its decision, ranging from not needing him, personal problems, to absences and lateness. In this regard, the Board has long held that when an employer vacillates in offering a consistent explanation for its actions, an inference is warranted that the real reason for its actions is not among those asserted. *Robin Transportation*, 310 NLRB 411 (1993); *Resolute Realty Co.*, 297 NLRB 679, 687 (1989); *Abbey's Transportation Services v. NLRB*, 837 F.2d 575, 581 (2d Cir. 1988).

I conclude therefore that it is appropriate to draw such an inference, which substantially detracts from the validity of Respondent's defense and its attempt to meet its *Wright Line* burden of proof.

Additionally, an examination of the defense most frequently mentioned by Respondent's officials, and urged in its brief, that of excessive absences, further detracts from its defense. While the record does reveal that Bailey missed 40 days of work from May 8 to December 29, 1990, he did not miss any days of work between that date and his discharge on January 18, 1991. Thus, Respondent tolerated 40 absences of Bailey in 1990, prior to his union activity, without any disciplinary action against him. Yet in January 1991, after Bailey's union activity, and in fact 3 days after he signed a card, and when he had not been absent for 23 days, Respondent fired him. The only logical conclusion that can be drawn from these facts, is that Bailey's protected activities accounted for Respondent's decision to assert that it would no longer tolerate his absences. *Kosher Plaza Supermarket*, 313 NLRB 74 (1993). Indeed in this connection, Respondent pointed to no specific precipitating event that occurred shortly before the discharge that motivated its decision. In fact, Respondent adduced no evidence as to precisely when or whether Marx, Rombauts, or Rombauts III, singly or collectively decided to discharge Bailey, or how such a decision was made.

Accordingly, based on the above, I conclude that Respondent has not met its burden of establishing that it would have terminated Bailey on January 18, 1991, absent his protected

⁸Marx did not explain what personal problems of Bailey motivated Respondent's decision.

activity, and that it has thereby violated Section 8(a)(1) and (3) of the Act.

Respondent's efforts to meet its burden of proof with respect to Sauls and Clark, suffers from many of the same deficiencies as did its attempt to do so in connection with Bailey. As for Sauls, he was informed at his termination by Rombauts III and Marx that he was fired for taking too many days off. However, Marx testified in this proceeding that Sauls was not fired at all, but he just stopped coming to work and had some drug problems. Rombauts testified that Sauls was fired for absenteeism, and Rombauts III testified that Sauls missed a lot of days, came in late, was never on time, and was very unreliable. Moreover, Respondent's records which it introduced in an attempt to bolster its defense, actually further undermines its already shaky and inconsistent position. Thus, it produced two separate documents for Sauls, which cover overlapping periods, and which reveal different reasons for his separation from Respondent's employ. One document indicates that he was fired on February 4, 1991, while the other lists "didn't show up" that date, after having crossed out the words fired. On the latter document, eight additional absences are listed after February 4, but allegedly covering prior absences. These discrepancies and crossouts were never explained by any of Respondent's witnesses.

With respect to Clark, he was informed on the date of his discharge by Rombauts and Rombauts III that he was the last one hired, and had to be the first one to be let go. Clark was told that Marx's nephew was coming out of college, and needed a job.

Marx testified at the trial that Clark was not terminated, but that after Clark had notified Respondent about a move to Florida, it had hired someone else for his route. Marx further testified that Respondent offered Clark the opportunity to stay and work at other jobs, but he refused. Rombauts III testified that Clark had a lot of accidents, was unreliable, didn't come to work a lot, and was slower than normal in picking up trash. Respondent's attorney in a position paper submitted to the Region during the investigation, asserted that Clark was terminated by Rombauts because it had hired a replacement for Clark (because of his prior notification that he was leaving for Florida), and "it could not be left in a lurch." Notably, I have found above that while Clark had notified Respondent of his intent to quit, that he had retracted that notification prior to his discharge, and he was still employed as a driver when he was terminated.

Thus, as was the case with respect to Bailey, Respondent has once again, offered vacillating and inconsistent explanations for its treatment of Sauls and Clark, which once more warrants the inference that the real reasons for its actions with respect to these employees are not among those asserted. *Robin Transportation*, supra.

Also as was the case with Bailey, no testimony was offered by Respondent as to which of its three supervisory officials decided to terminate Clark or Sauls, or as to the circumstances or dates when such decisions were made concerning the status of these employees.

Accordingly, I conclude that Respondent has failed to meet its burden of proof under *Wright Line*, supra, that it would have taken the same action against Clark or Sauls absent their union activities, and that it has violated Section

8(a)(1) and (3) of the Act by discharging them in February 1991.

2. The suspensions, changes in job status, and discharge in 1992

Notwithstanding Respondent's substantial and egregious unfair labor practices described above, which were designed to pressure employees into withdrawing their charges, and/or their participation at the NLRB hearing, Bailey and Clark testified at the NLRB hearing on June 9, 1992, in support of the various allegations in the complaint.

As was also noted above, Respondent was initially successful in persuading Sauls not to testify on that date or on the scheduled resumption date on June 11, 1992, by virtue of several unlawful statements to Sauls by Respondent referring to the loss of his job if he testified at the Board or the DOL, and Marx's unlawful instruction to Sauls not to come to the NLRB and to "take a few days off," at the time of the Board hearing.

In addition to these unlawful acts, also discriminated against Sauls and Clark on May 9, 1992, by not sending them out for work, in effect suspending them for that day. Thus, on May 8, 1992, Sauls and Clark were brought by Funk of the Union to a scheduled hearing at the DOL on claims that had been filed against Respondent by a number of its employees, at the instigation of the Union. Although the hearing had been postponed, the employees were not notified of the postponement, until they appeared at the DOL with Funk on that day.

The very next day of work, May 9, 1992, Rombauts III did not send Sauls and Clark out for work, and told them that there was no work for them. However, Rombauts III sent two men, shapeup employees, out on the routes that Sauls and Clark had been regularly assigned as helpers. Later that day, Rombauts admitted to Sauls that the employees had not worked because Respondent didn't want anybody working with the Union, after criticizing them for going to the union hall. Rombauts also asked Sauls who he wanted to work for, "the Union or me."

In these circumstances, a strong *facie* case has been established that Respondent's decision not to assign work to or in effect suspend, Sauls and Clark on May 9, 1992, was motivated by union activities, as well as their protected concerted conduct in appearing at the DOL proceeding. In that connection, the employees group action in participating in the DOL proceeding is independently concerted activity, even apart from the fact that the Union was also involved in the employees actions, which transforms it to union activity as well.

Thus, the burden shifts to Respondent to establish that it would have taken the same action against Sauls and Clark, absent their protected conduct. Inasmuch as Respondent has adduced no evidence, nor made any contentions as to why it did not assign work to these employees on that day, I find that Respondent has thereby violated Section 8(a)(1) and (3) of the Act.

As I have noted above, Respondent finally succeeded, at least in part in its unlawful campaign to dissuade employees from engaging in protected activity, and participating in NLRB proceedings, when Sauls after the aforementioned 8(a)(1) and (3) conduct, refused to appear at the NLRB trial

on June 9 and 11.⁹ However, this unlawful conduct, including the 1-day suspension, was not successful in persuading Clark to take the same action as Sauls. Even after Respondent informed Clark of the fact that Sauls had agreed to drop his charges, and made other unlawful comments to Clark, such as informing him that any backpay he may receive from the DOL or the NLRB would go to child support, Clark refused to agree to withdraw or drop his charges. Marx finally told Clark "I've had it up to here, with you," and informed him that from then on he would be employed as a shapeup employee only. Thereafter, until Clark was subsequently discharged, on a date undisclosed by the record, Clark continued to work on a shapeup basis.

Based on the above facts, it is clear that the General Counsel has established that motivating factors in Respondent's decision to change Clark's status from a full-time to a shapeup employee, were Clark's union and protected activities, including his participation in the DOL proceeding, as well as his involvement in the NLRB proceeding and his refusal to agree to drop such charges and/or refuse to participate in the pending NLRB hearing.

Once again since Respondent has offered no explanation as to why it changed Clark's status, it has failed to meet its *Wright Line* burden, and has violated Section 8(a)(1), (3), and (4) of the Act by such conduct. *Aspen*, 298 NLRB 401, 407 (1990).

As also detailed above, Respondent reinstated Bailey to a full-time position in May 1992, after unlawfully conditioning his reinstatement on his agreement not to participate in the Board proceeding, and not to engage in future protected conduct. It is also noteworthy that Respondent reinstated Bailey in May 1991, unlawfully conditioning his reinstatement at that time and promising him a raise, on his agreement to furnish Respondent with a copy of his NLRB statement.

Moreover, on the first day of Bailey's reinstatement on June 1, 1992, he was unlawfully interrogated about his potential testimony at the NLRB hearing, and unlawfully instructed by Respondent on what to say at such hearing.

However, although Respondent's unlawful activities did prove partially successful in connection with Sauls, since Sauls refused to appear at the June 9 Board trial, because of Respondent's unlawful conduct towards him as outlined above, it was not so successful with respect to Bailey. Thus, notwithstanding the intense unlawful campaign by Respondent to convince Bailey either to withdraw his charges or to testify favorably to Respondent and contrary to his prior affidavit, Bailey nevertheless testified at the NLRB trial on June 9, 1992, consistent with his statement, and adverse to Respondent's interest.

A little more than a week after Bailey so testified, he was informed by Rombauts III that his work schedule was now reduced from 4 to 3 days a week, adding Wednesday as an additional day off. When Bailey protested that this was not the agreement he had made with Rombauts and Marx,¹⁰

Rombauts told Bailey to sign a paper agreeing to the change or he would not work that day. When Bailey refused to sign the paper, he was sent home without an assignment on that day, and on the next working day, Monday, June 22, 1992, Bailey was again sent home without an assignment, after being told by Rombauts III that Respondent didn't need him on both June 19 and 22, shapeup employees were sent out by Rombauts III to work, even though Bailey who was not a shapeup employee, was sent home. Thereafter, Bailey continued to work the 3-day schedule (Monday, Tuesday, and Friday), except for a period of being out on compensation, until his termination on August 14, 1992.

In these circumstances, I conclude that the General Counsel has made a compelling prima facie showing that Respondent's decision to reduce Bailey's schedule from 4 to 3 days, and its actions in not assigning him work (in effect suspending him on June 19 and 22) were motivated by protected conduct. Thus, despite the intense unlawful campaign by Respondent described above, to convince Bailey as well as other employees, to either withdraw charges, change testimony, or not appear at the NLRB hearing, Bailey defied Respondent's instructions, as well as violating Respondent's prior unlawful instructions to "keep his mouth quiet" by testifying against Respondent on June 9, 1992. Therefore, the substantial animus directed towards Bailey and other employees because of their union activities, as well as their participation in NLRB or DOL proceedings, plus the timing of the reduction in hours, coming a little more than a week after Bailey's testimony, more than justifies the inference that protected conduct of Bailey, motivated Respondent's actions.

Respondent has adduced absolutely no testimony or any evidence as to why it reduced Bailey's hours on June 19, or why it suspended him on June 19 and 22, while sending out shapeup employees in his place. Respondent's only argument concerning these allegations, is its contention that Bailey had himself testified that he asked for only 3 days of work, and wanted 2 days' off to pursue a modeling career. Therefore, Respondent argues that any incident where Respondent reduced his workload from 4 to 3 days could not have happened. However, I have found above, based on uncontradicted testimony of Bailey that such a reduction did happen. While Bailey did admit that he had asked for Thursdays off and *possibly* Tuesdays (emphasis added), it is clear that Respondent had agreed on a 4-day schedule for Bailey, which Bailey worked for his first week of employment after his return to full-time status. Significantly, at no time, had Bailey ever even raised the possibility of wanting Wednesday off. Yet, when Respondent changed his schedule from 4 to 3 days, it gave him Wednesday off, not Tuesday as he had previously mentioned only as a possibility. Thus, it is clear that Bailey's initial request for possibly Tuesday off, in addition to Thursday had no effect on Respondent's action, and was nothing but a pretextual attempt by Respondent to justify its discriminatory action, after the fact. It is notable that no witness from Respondent testified that Bailey's prior requests for *possibly* Tuesday off, motivated its decision to unilaterally give him Wednesdays off instead. Nor did Respondent adduce any evidence, or witnesses, or other evidence to explain why it failed to assign work to Bailey, for 2 days, after he refused to agree to its unlawful reduction of his hours. In these circumstances, Respondent has failed to meet its *Wright Line* burden that it would have reduced Bai-

⁹ Sauls eventually did testify on July 30, 1992, after he had been discharged once again by Respondent.

¹⁰ Indeed, Bailey worked the 4-day schedule (Monday, Tuesday, Wednesday, and Friday) for his first week back employed full time, the week of June 1 through 5. The second week of his return, he worked Monday, June 8, testified at the Board on Tuesday, June 9, and worked Wednesday and Friday; as well as Monday to Wednesday June 15-17.

ley's work schedule or suspended him on June 19 and 22, 1992, and has thereby violated Section 8(a)(1), (3), and (4) of the Act by such conduct. *Shelby Memorial Home*, 305 NLRB 910, 920-922 (1991); *Aspen*, supra.

Subsequently, after Bailey's return to work after being out on compensation, he appeared at the DOL and testified against Respondent on Monday, August 10, 1992. On Friday, August 14, 1992, Bailey appeared at Respondent's premises, on his scheduled day of work. Bailey was not given an assignment by Rombauts III, as was the normal practice, and Rombauts III told Bailey, "get out of here, you caused enough trouble for us, why don't you go with your union buddies." After Bailey protested his lack of an assignment, Rombauts III questioned where Bailey was on Monday and Tuesday, Bailey responded that he was at the DOL hearing and that he had notified Marx about it on Saturday. Rombauts III at that point told Bailey that he was not working, and "we don't need you any more, why don't you go find another company to work for."

The first question to be determined, is whether Respondent had discharged Bailey at that point, by the conduct of Rombauts III, prior to their altercation. In that connection, Respondent argues strenuously that Bailey was not terminated by Respondent either before or after the altercation with Rombauts III, principally because Respondent never used the words fired, discharged, or terminated. However, it is well settled that the test for determining whether an employer's statements or actions constitute a discharge, depends on whether such statements or conduct would reasonably lead employees to believe that they had been discharged. *Statewide Transportation*, 297 NLRB 472, 478 (1989); *Ridgeway Transportation Co.*, 243 NLRB 1048, 1049 (1979); *NLRB v. Hilton Mobile Homes*, 387 F.2d 7, 9 (8th Cir. 1967). The fact of discharge does not depend on the use of formal words of firing, discharge, or termination. *Statewide*, supra; *Ridgeway*, supra. *NLRB v. Trumbull Asphalt Co. of Delaware*, 327 F.2d 841, 843 (3d Cir. 1964). Moreover, once an employer's conduct creates an ambiguity or confusion as to an employee's employment status, it is incumbent on the employer to clarify and remove any implication that the employee has been terminated. *Tubari Ltd.*, 287 NLRB 1273, 1285 (1988); *Pennypower Shopping News*, 253 NLRB 85 (1980).

The application of the above principles to the facts of the instant case, leads to inescapable conclusion that Bailey was discharged by Respondent on August 14, 1992, as alleged in the complaint. The statements made by Rombauts III to Bailey, such as "get out of here, you caused enough trouble for us, why don't you go with your union buddies . . . we don't need you any more, why don't you find another company to work for," coupled with Rombauts III's refusal to assign Bailey work on that day, are more than sufficient to lead a prudent person to believe that his tenure had been terminated. *Ridgeway*, supra; *Statewide*, supra. Indeed, much less ambiguous statements by employers have been found by the Board to constitute a discharge. See *Shenandoah Coal Co.*, 305 NLRB 1071, 1073 (1992) (Statement to employee, "I think it's time for you to leave.") *Tubari*, supra ("Go home").

Moreover, even if Rombauts III's conduct could be construed as ambiguous, which in my view it is not, Respondent was obligated to clarify or correct any impression that Bailey

was discharged. *Tubari*, supra; *Pennypower*, supra. However, to the contrary, Marx merely reinforced Bailey's reasonable belief that he had been discharged, by his statements later on that evening, that Bailey "was not wanted," should "stay away from the yard, not to go to the company any more," and should "go somewhere else."

Respondent argues, however, that all the statements made by Respondent's officials were consistent with the order of the Suffolk County judge that Bailey stay away from Respondent's premises, because of the order of protection that was issued. However, Respondent conveniently ignores the fact that all the statements made by Rombauts III, such as "get out of here," "find another company to work for," and "we don't need you any more," as well as his refusal to assign Bailey work on that day, all occurred prior to the altercation, and prior to the court order of protection.

Finally, I note that Respondent produced no witnesses on this matter, and therefore no one from Respondent gave any testimony that it did not intend to fire Bailey by its conduct on August 14, 1992.

Accordingly, I conclude that Respondent did terminate Bailey on that date. The evidence is overwhelming that Respondent's decision to discharge Bailey was motivated by his protected activities on behalf of the Union, his testimony at the DOL, and his testimony at the NLRB. Thus, in addition to the above-described evidence of Respondent's numerous unfair labor practices in retaliation for such activities directed towards Clark, Sauls, as well as Bailey, himself, at the time of the discharge, Rombauts III criticized Bailey for appearing at the DOL hearing, mentioned that Bailey had "cause enough trouble for us," (an obvious reference to the NLRB and DOL proceedings), and told him to "go with your union buddies." Moreover, Bailey was terminated on his first day back at work, after he testified at the DOL hearing.

Having concluded that a strong prim facie of discriminatory motivation has been established, it is once again incumbent on Respondent to establish that it would have taken the same action against Bailey, absent his protected conduct. It has once more failed to meet that burden, particularly inasmuch as it asserts that it never fired Bailey and produced no evidence that it would have taken the same action against Bailey, absent his protected activities, or in fact any reason for the discharge. It is noteworthy that a position paper by Respondent's attorney asserted that Bailey was terminated because of his alleged assault on Rombauts III. However, even apart from the absence of any evidence from Respondent's witnesses that Bailey was fired because of the assault, I note that I have found that Bailey was fired by Respondent before the physical altercation with Rombauts III took place.

Accordingly, I conclude that Respondent has violated Section 8(a)(1), (3), and (4) of the Act by discharging Bailey on August 14, 1992.

The complaint also alleges that Respondent by Rombauts III physically assaulted its employee David Bailey in retaliation for Bailey's protected conduct. In that connection I have found that after Rombauts III terminated the employment of Bailey, Rombauts III placed his keys between his fingers in a "fist" like position, pushed Bailey twice, and head-butted Bailey on the lip, causing his lip to bleed. In these circumstances, particularly in view of the timing of the assault, coupled with the numerous prior unfair labor practices directed against Bailey by Respondent, I conclude that the as-

sault was motivated by Bailey's protected activities, including his union activities, his testimony at the NLRB trial, and his testimony at the DOL hearing. Therefore, Respondent has violated Section 8(a)(1) of the Act, by such conduct. *Kenrich Petrochemicals*, 294 NLRB 519, 534-535 (1989); *Studio S.J.T. Limited*, 277 NLRB 25 1189, 1194 (1985); *Graves Trucking*, 246 NLRB 344 (1979), enfd. in pertinent part 692 F.2d 470 (7th Cir. 1982).

REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1), (3), and (4) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I have found above that Respondent discriminated against employees David Bailey, William Clark, and King Sauls in various ways and at different periods of time. Moreover, the appropriate remedies for each of these employees present different issues, which warrants separate consideration and discussion for each employee.

The first and most serious issue that needs to be decided, is the question of whether it is appropriate to order Bailey's reinstatement. Thus, while I have concluded above that Bailey was discharged on August 14, 1992, for discriminatory reasons, and that the physical confrontation between Bailey and Rombauts III occurred prior to the discharge, this finding does not preclude consideration of such a confrontation and Bailey's conduct in connection therewith, in assessing his rights to reinstatement.

Thus, an employee, even though discriminatorily discharged, can be denied the Board's traditional remedy of reinstatement, if the employee engages in acts of serious misconduct which renders the employee unfit for future service with the Employer. *Family Nursing Home*, 295 NLRB 923 fn. 2 (1989); *Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 444 (1984). However, the Board looks carefully at the nature of the unlawful conduct committed by the employer, to see whether the misconduct of the employee was provoked by or was an emotional reaction to the employer's own discrimination against the employee. *Precision Window Mfg. Co.*, 303 NLRB 946 (1991); *Olympic Limousine Service*, 278 NLRB 932, 943 (1986); *Blue Jeans Corp.*, 170 NLRB 1425 (1968). In this regard, an employer cannot provoke an employee to the point where the employee commits misconduct, and then rely on this to terminate his employment. "The more extreme an employer's wrongful provocation the greater would be the employee's justified sense of indignation and the more likely to excessive expression." *NLRB v. MLB Headwear Co.*, 349 F.2d 170 (4th Cir. 1965).

In applying the above principles to the facts at hand, it is useful to briefly review the flagrant, pervasive, and continuous campaign of unlawful conduct directed towards Bailey by Respondent from January 1991, after Bailey signed a card for the Union, until his discharge on August 14, 1992. These unfair labor practices included an unlawful discharge in January 1991, twice conditioning his reinstatement on his agreement to refrain from exercising protected conduct, including participation in NLRB proceedings (April 1991 and May 1992), and numerous other instances of interference with Board processes, such as ordering Bailey to make changes in his affidavits and or testimony at the NLRB (1991 and

1992). Notwithstanding this conduct of Respondent, Bailey courageously testified at the NLRB trial on June 9, 1992. This conduct of Bailey, as well as his subsequent testimony at the DOL, resulted in further unfair labor practices by Respondent, of reducing his workweek by 1 day, suspending him for 2 days, and ultimately terminating and assaulting him on August 14, 1992, in retaliation for his protected activities, including participation in NLRB proceedings.

It is obvious from evaluating the above events, that Respondent's provocation of Bailey was extreme and substantial, particularly the interference with NLRB processes. Since the Board is always very concerned that employees access to the NLRB to protect their statutory rights is insured, these kinds of unfair labor practices would seem to be particularly significant in the Board's balancing the employer's conduct against the reaction of the employee in assessing reinstatement obligations.

Most importantly, however, is the fact that the physical confrontation was started by Rombauts III's conduct of pushing and head butting Bailey, and causing his lip to bleed. In such circumstances, Bailey was acting in self-defense when he retaliated by punching Rombauts III in the mouth. *Whitesville Mill Service Co.*, 307 NLRB 937, 946 (1992). See also *American Door Co.*, 181 NLRB 37 (1970).

Accordingly, it is concluded that because of the extreme provocation of Respondent's severe and pervasive unfair labor practices, most particularly its unlawful assault of Bailey which immediately precipitated Bailey's reaction, that Bailey's punching of Rombauts III, in self-defense, does not render him unfit for future service with Respondent, and does not disqualify him from receiving the Board's traditional remedies of backpay and reinstatement. *Whitesville Mill*, supra; *American Door*, supra; *Precision Window*, supra; *Olympic Limousine*, supra.

Nor does the fact that the State Court judge issued an order of protection, forbidding Bailey from appearing at Respondent's premises or having any contact with Rombauts III, preclude an order of reinstatement. It is well settled that where a state court law or proceeding conflicts with the Board's exclusive statutory mandate to enforce and remedy unfair labor practices, the NLRB takes precedence. *Field Bridge Associates*, 306 NLRB 322, 323 (1992); *NLRB v. State of Florida*, 868 F.2d 391, 394 (11th Cir. 1989); *Peninsula Shipbuilders' Assn. v. NLRB*, 663 F.2d 488, 492 (4th Cir. 1981); *San Diego Bldg. Trades Council v. Garmon* 359 U.S. 236, 242-243 (1959). Moreover, "the preeminence of the congressional policy in favor of remedying unfair labor practices is reflected in Section 10(a) of the NLRA, which states the Board's power to prevent such practices shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise." *NLRB v. Yellow Freight Systems*, 930 F.2d 316, 321 (3d Cir. 1991).

Additionally, it is also noteworthy that the order of protection was issued here, without the benefit of any testimony or witnesses, and was apparently granted solely on the basis of the police officer's hearsay report of the alleged incident. Therefore, I conclude that the issuance of the order of protection does not change my recommendation that Bailey's conduct was the result of Respondent's provocation and did not render him unfit for future service. See *American Door*, supra at 38 fn. 2, where although an employee was convicted

of assaulting a supervisor, the Board nonetheless ordered reinstatement of the employee.

Bailey shall be entitled to backpay from the date of his initial discharge in January 1991 to his first reinstatement on April 22, 1991, from the date of his second discharge on August 14, 1992, until he is properly reinstated or declines a proper reinstatement offer from Respondent, for the 2 days of work that he missed because of his unlawful suspension on June 19 and 22, 1992, and finally for any loss of work that resulted from his unlawful reduction in hours subsequent to June 19, 1992.

As for William Clark, I have found that he was unlawfully discharged by Respondent on February 22, 1991. In early May 1991, Clark was reinstated by Respondent, but not to his regular position as a full-time driver. He was initially employed in May 1991 as a part-time driver, and then after several months switched to a position as a part-time driver and part-time helper. Then on May 9, 1992, Clark after refusing to drop his NLRB charges or change his testimony, was unlawfully changed to a shapeup employee. Thus, at no time was Clark ever properly reinstated to his former position of employment of a full-time driver, to which he was entitled because of the discriminatory discharge on February 22, 1991.

Therefore, although the record does disclose some evidence that Clark may have been terminated again by Respondent at some point prior to June 9, 1992, this matter was not litigated here, and the record is insufficient to make any findings with respect to that question. I shall accordingly, leave to the compliance stage of this proceeding, the effect, if any, of Clark's subsequent termination by Respondent, on his reinstatement rights, as well as his entitlement to backpay for any periods after his final separation from employment from Respondent.

It is appropriate to order that Clark be made whole for losses suffered as a result of the discrimination against him, which includes his loss of wages between his discharge on February 22, 1991, until his reinstatement in May 1991, any loss of pay that resulted from Respondent's employing him on a part-time basis in 1991 and on a shapeup basis in 1992, and the loss of pay caused by his unlawful 1-day suspension on May 9, 1992.¹¹

As for Sauls, it is not appropriate to order him reinstated, since insofar as this record discloses, he was properly reinstated to his former position of employment sometime in May 1991. His backpay period runs from the date of his discharge on February 5, 1991, until his reinstatement in May 1991. He shall also be entitled to be reimbursed for his loss of pay resulting from his unlawful 1-day suspension on May 9, 1992.

Backpay for all three employees shall be computed with interest in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987). It is also appropriate to recommend that Respondent remove from its files any reference to the discharges of Clark, Bailey, and Sauls, and notify them in writing that it has done so, and that evidence of these discharges

¹¹ As noted above, Clark's entitlement to backpay, if any, subsequent to his separation from Respondent's employment shall be determined at the compliance stage.

will not be used as a basis for future personnel action against them. *Sterling Sugars*, 261 NLRB 472 (1982).

CONCLUSIONS OF LAW

1. The Respondent, Romar Refuse Removal, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 813, International Brotherhood of Teamsters, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By coercively interrogating its employees concerning their activities on behalf of or support for the Union, or concerning what information its employees supplied to the National Labor Relations Board (NLRB) or concerning how its employees intended to testify at an NLRB trial; by confiscating union literature and authorization cards from its employees and ordering and instructing employees to turn over such material to it; by unlawfully soliciting grievances from employees and impliedly promising to remedy such grievances; by threatening employees with discharge or layoff or other unspecified reprisals if its employees engaged in activities on behalf of or supported the Union, or if such employees testified at or participated in proceedings at the National Labor Relations Board or the Department of Labor (DOL) by conditioning the reinstatement of employees on their agreement to refrain from engaging in activities on behalf of the Union, or to refrain from participating in or to withdraw from the NLRB or DOL proceedings, or to furnish Respondent with a copy of the employees' statements given to the NLRB; by promising and granting its employees a wage increase conditioned on the employee supplying Respondent with a copy of the statement given by the employee to the NLRB; by demanding and instructing that its employees furnish it with a copy of the statements that the employees gave to the NLRB, that the employees drop or withdraw their charges with the NLRB, that employees make changes in their affidavits given to the NLRB; by informing an employee that any moneys due that employee from the DOL or the NLRB would go to child support; by instructing its employees not to testify at an NLRB proceeding, and promising to keep the job open for employees who did not so testify; and by assaulting its employee because the employee engaged in activities on behalf of the Union, and participated in NLRB and DOL proceedings, Respondent has violated Section 8(a)(1) of the Act.

4. By discriminatorily discharging, suspending, and reducing the work hours of its employees, because of the employees activities on behalf of the Union, and their participation in or refusal to withdraw NLRB or DOL charges, Respondent has violated Section 8(a)(1), (3), and (4) of the Act.

5. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹²

¹² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Romar Refuse Removal, Inc., Copiague, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating its employees concerning their activities on behalf of or support for Local 813, International Brotherhood of Teamsters, AFL-CIO (the Union) or concerning what information its employees supplied to the National Labor Relations Board (the NLRB), or concerning how its employees intended to testify at an NLRB trial.

(b) Confiscating union literature or authorization cards from its employees, or ordering and instructing its employees to turn over such material to Respondent.

(c) Soliciting grievances from employees and impliedly promising to remedy such grievances.

(d) Threatening its employees with discharge, layoff, or other unspecified reprisals, if the employees engage in activities on behalf of or in support of the Union, or if such employees testify at or participate in proceedings at the NLRB or the New York State Department of Labor (the DOL).

(e) Conditioning the reinstatement of its employees, on their agreement to refrain from engaging in activities on behalf of or in support of the Union, or to refrain from participating in or to withdraw from NLRB or DOL proceedings, or to furnish Respondent with a copy of employees' statements given to the NLRB.

(f) Promising or granting its employees a wage increase or any other benefits, conditioned on the employees supplying Respondent with a copy of statements given by the employees to the NLRB.

(g) Ordering, demanding, or instructing its employees to furnish Respondent with a copy of statements given by the employee to the NLRB, or to drop or withdraw charges filed with the NLRB or to make changes in their statements given to the NLRB.

(h) Informing its employees that any moneys the employees would receive from the DOL or NLRB proceedings, would have to be applied to child support payments.

(i) Ordering, demanding, or instructing its employees to take off a few days and not to testify at an NLRB trial, and promising to keep the employees job open for such employees who did not so testify.

(j) Assaulting its employees because the employees engaged in activities on behalf of or in support of the Union, or participated in or testified at NLRB or DOL proceedings.

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

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

(a) Offer David Bailey and William Clark full and immediate reinstatement to their former positions of employment, or if these jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

(b) Make whole Clark, Bailey, and King Sauls for any loss of earnings and other benefits suffered by them as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(c) Remove from its files any references to the discharges of Sauls, Bailey, or Clark and notify them in writing that this has been done, and that evidence of these unlawful discharges will not be used as a basis for future personnel action against them.

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

(e) Post at its facility in Copiague, New York, copies of the attached notice marked "Appendix."¹³ Copies of the notice, on forms provided by the Regional Director for Region 29, 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.

¹³ 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."