

We Can, Inc. and Bakery Drivers & Bakery Goods Vending Machines, Local 550, I.B.T., AFL-CIO. Cases 2-CA-26085 and 2-CA-26095

September 30, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND DEVANEY

On August 27, 1993, Administrative Law Judge Philip P. McLeod issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief. The Respondent also filed a motion to reopen the record; the General Counsel filed an opposition to the motion, and the Respondent filed a reply. The Respondent filed a supplement to its motion, and the General Counsel filed an opposition.

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, briefs, motion, opposition, and reply, and has decided to affirm the judge's rulings,¹ findings,² and conclusions as modified below and to adopt the recommended Order as modified.

The judge found that the Respondent violated Section 8(a)(3) and (1) by discharging eight of its employees and by reducing the size of its collection network

¹ The Respondent excepts to the judge's refusal to allow its counsel to cross-examine Anthony Steele regarding his failure to testify in Federal district court during earlier, related 10(j) injunction proceedings. We find no merit to this exception. The judge clearly stated that he considered Steele's decision not to testify in the 10(j) case—which seems to have been engendered by the Union's counsel's having told him that the Respondent would be calling him as a witness “against the employees”—to be irrelevant for purposes of evaluating his credibility. In any event, having established that Steele absented himself from the earlier proceeding under those circumstances, the Respondent had effectively made the point it was attempting to make concerning Steele's credibility; therefore, cross-examination on that point would not have materially enhanced the Respondent's case.

The Respondent further excepts to the judge's refusal to allow its counsel to ask Steele whether he talked to other employees about a warning he received from Supervisor Levy that the Respondent was going to lay off drivers. We find no merit to this exception. Steele testified that other employees were present when Levy made the statement, and therefore were aware of Levy's message.

The Respondent also excepts to the judge's rejection of an exhibit showing the volume of cans collected from each of its customers. Again, we find no merit to the exception. The judge explained that he was rejecting the exhibit because the information contained in it would be cumulative of earlier, un rebutted testimony.

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

because the employees had engaged in union activities. The judge recommended that, to remedy its unlawful conduct, the Respondent be ordered to offer to reinstate the unlawfully discharged employees and to restore the collection network to its size at the time of the discharges. We affirm the judge's finding that the discharges were unlawful, and we adopt his recommended remedy, with qualifications.

I. THE UNFAIR LABOR PRACTICES

The Respondent is a nonprofit organization that assists the poor and homeless by providing them a ready means of redeeming returnable cans and bottles and receiving refunds. One of the Respondent's operations is the collection network (CN). CN truckdrivers and helpers pick up bags of donated cans from clients in office buildings and apartment houses; the Respondent itself redeems the cans for the deposit. The CN does not help the poor and homeless directly. It is intended instead to generate operating profits that can defray some or all the Respondent's administrative costs and thus make the Respondent less dependent on charitable contributions. In practice, unfortunately, the results have been disappointing. Instead of generating operating surpluses, the CN incurred operating deficits exceeding \$30,000 in fiscal year 1989, \$149,000 in fiscal year 1990, and \$39,000 in fiscal year 1991. The CN realized a modest operating surplus of about \$5000 in fiscal year 1992. However, nearly all of that surplus was generated between August and December 1991; operating deficits were incurred in all but 2 months between January and July 1992.³

In the summer of 1992, the Union commenced an organizing drive among the CN drivers and helpers. On September 23,⁴ the Board's Regional Office faxed a copy of the Union's representation petition to the Respondent. By letter dated September 28, the Union demanded recognition on the basis of authorization cards signed by all employees in the petitioned-for drivers unit.

Almost immediately after it was informed of the Union's petition, as the judge found, the Respondent began to violate the Act. Between September 23 and 29, the Respondent's officers and supervisors unlawfully interrogated driver Gene DiMurro, threatened driver Jerry Medlin with discharge if he engaged in union activities, and discharged driver Joseph Malheiro for unlawful reasons under pretext of a legitimate ground.⁵ In the process, the Respondent's executive di-

³ The Respondent's fiscal year runs from August 1 through July 31.

⁴ Unless otherwise noted, all dates refer to 1992.

⁵ The judge found that the Respondent discharged Malheiro for the stated reason that he did not have a valid driver's license, even though the Respondent had known since Malheiro was hired that his license had been suspended, and that it also was aware at the time of his discharge that he had done everything necessary to have the

rector, Guy Polhemus, told DiMurro and others that “I don’t need to spend money for lawyers for this union bullshit.” Similarly, Supervisor Peter Levy told Medlin that he was “sick and tired of this bullshit” and “didn’t want to have to deal with lawyers and unions and all this other shit.”

On September 30, the Respondent’s CN program director, Angela Sylvestre, discharged 7 of the remaining 10 CN drivers, including DiMurro and Medlin. The judge found that those seven discharges, like that of Malheiro on September 24, were in retaliation for the employees’ union activities, and violated Section 8(a)(3) and (1). The Respondent excepts. We agree with the judge.

First, the judge correctly found that the General Counsel has established a prima facie case that the September 30 discharges were the result of discrimination. In affirming that finding, we emphasize the following factors which show that the drivers’ union activity played a prominent role in the decision to discharge them. The Respondent admittedly knew of the employees’ unionizing activities. It learned of the filing of the petition on September 23, and within a week it had fired nearly three-fourths of the drivers in the unit. In addition to interrogating DiMurro concerning the organizing activity and the identity of the employees who had signed cards, the Respondent’s supervisors indicated their displeasure at the prospect of unionization, and threatened Medlin with discharge if he took part in union activities. On September 24, Levy fired Malheiro for pretextual reasons. On September 25, when Polhemus told her the petition had been filed, Sylvestre said, “I don’t understand this. We have health benefits, we have good salaries. The drivers have representation through their driver manager. What more do you have to do to have unity, to have cooperation, to have a sense that you’re working together?” On September 29, while interrogating DiMurro about the drivers’ union activities, Levy made comments indicating that the drivers had been involved in union activity while their trucks were parked in the street. On September 30, at a meeting with the drivers, called because of the previous day’s truck parking incident, Sylvestre told the drivers that they were uncooperative and that she did not want to work with uncooperative people. That statement, read in conjunction with Levy’s remarks on September 29 and Sylvestre’s reference to cooperation when she learned of the orga-

nizing effort, indicates that Sylvestre considered unionization to constitute a lack of cooperation.

We also agree with the judge that Sylvestre’s stated reasons for discharging the drivers were pretextual. In this regard, the judge rejected the Respondent’s contention that economic conditions compelled the reduction in the scope of the CN and the layoff of most of the drivers. He found that, although the CN was losing money in mid-1992, the Respondent’s poor financial condition had existed for “quite some time.”

The Respondent argues, however, that even before the organizing campaign began, Sylvestre had made plans to restructure the CN. The Respondent asserts that Sylvestre planned to reduce the number of routes, trucks, and drivers and to focus on the 20 percent of the clients that provided the CN with 80 percent of its cans and, hence, of its revenue. By eliminating the stops that yielded only one or two bags, but which required the same amount of driver time as the large volume stops, the Respondent contends, it would reduce revenues only marginally while reducing expenses significantly, and thus turn the CN into a profit center.⁶ To that end, according to Sylvestre, in late August she performed a computerized ranking of the Respondent’s clients by the number of bags collected at each stop. Also during the summer, the management discussed abandoning the Respondent’s existing policy of accepting CN clients that had as little as one bag per pickup, and instituting a new requirement that clients have a minimum of five bags in order to join the CN. Sylvestre further testified that in early August she prepared a memorandum for the Respondent’s publicity agent, which stated that the Respondent would change its policy around September to require a minimum of five bags per stop.⁷ In fact, Sylvestre said she thought that the minimum requirement would be set at more than five bags. Also, according to Sylvestre, at about the same time the Respondent ceased to send out its old brochure, which stated that clients would be accepted that had only one bag per pickup. Finally, Sylvestre testified that she had planned to service the restructured CN (which would focus only on large volume clients and on buildings in which several small clients had combined to meet the five-bag minimum) with only 2 trucks and 3 drivers, rather than the 5 trucks and 11 drivers that covered the routes before the discharges.

suspension lifted. The Respondent argues that Malheiro was discharged for additional reasons—a bad attitude, rudeness to a customer, and complicity in the pilferage of cans. We find no merit to that argument. The Respondent admits that Malheiro was told that the reason for his discharge was that he did not have a driver’s license. We note, in addition, that Malheiro’s disciplinary record mentions neither rudeness, bad attitude, nor pilferage, and that Supervisor Jeff Dorsey testified that the (asserted) principal reason for Malheiro’s termination was his lack of a driver’s license.

⁶For several months before the discharges, the Respondent’s business consultant, Gerald Smith, had been encouraging the Respondent to restructure the CN and focus on large volume clients, albeit he did not propose the drastic layoff measures resorted to by the Respondent (see *infra*).

⁷Elisabeth Peery, the CN’s communications director, testified that a bag of cans typically produced about \$10 in revenue, and that it cost about \$50 to make one stop. Therefore, five bags was the volume required to “break even” on a given stop.

The Respondent argues that, for the foregoing reasons, the judge should have found that the real reason for the discharges and the reduction in scope of the CN was economic, and that, in any event, the Respondent showed that it would have discharged the eight drivers and restructured the CN as it did for economic reasons, even if the employees had not engaged in union activities.⁸

We are not persuaded. Even though Sylvestre had studied the makeup of the Respondent's client list and formulated preliminary plans for restructuring the CN, the Respondent has not shown that it would have done what it did, when it did, in the absence of the drivers' union activities.⁹ In addition to the factors relied on by the judge, we note that Sylvestre's memo indicating an upcoming change to a five-bag minimum pickup size states that the "target date" is September 1992, yet the restructuring decision was not made until the last day of September, and then on the spur of the moment and because of Sylvestre's personal pique at the drivers (a subject we shall return to below.) Moreover, Sylvestre admitted that the five-bag minimum had not been established on August 5 (the date of the memo), and that she actually felt confident that the minimum would be more than five bags. Finally, although Gerald Smith, the Respondent's business advisor, had suggested in the spring of 1992 that the CN be restructured to concentrate on large volume clients, he recommended that the number of trucks be reduced from five to three or four¹⁰ (rather than two, as Sylvestre decided). Smith also testified that he would never have recommended eliminating all the drivers who were discharged on September 30.¹¹

⁸ *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved by the Supreme Court in *Transportation Management Corp. v. NLRB*, 462 U.S. 393 (1983).

⁹ See *Eddyleon Chocolate Co.*, 301 NLRB 887, 890 (1991). We do not rely, however, on the judge's statements that Sylvestre had thought about restructuring the CN for less than a day and that the decision lacked factual support. The record establishes that the Respondent had been considering reducing the size of the CN, with some urging from Smith, for some time before the start of the union organizing effort.

¹⁰ In his testimony at the 10(j) hearing, Smith stated that he recommended reducing the number of trucks to four. In his testimony in this proceeding, he said his recommendation was to have three or four trucks.

¹¹ We do not suggest that an employer that has retained the services of a business consultant must have any layoff decision approved by the consultant or follow the consultant's recommendations in order to avoid violating the Act. We do think, however, that the judge properly considered the Respondent's failure to consult Smith regarding the September 30 discharges and restructuring of CN as evidence that the Respondent's actions on September 30 were not motivated by economic considerations.

We agree with the Respondent that the judge incorrectly stated that Smith had been routinely consulted by the Respondent for several years. In fact, Smith had only consulted with the Respondent

Moreover, we find it significant that Sylvestre should have made a decision which, according to the Respondent, was necessary for economic reasons and had been under consideration for those reasons at least since early August, only after she had assertedly been provoked by the actions of the drivers—or some of them—on September 29 and 30. Thus, the Respondent argues that the drivers upset management by leaving trucks parked on the street on September 29, making them vulnerable to being ticketed and possibly towed at the Respondent's expense.¹² DiMurro compounded the offense by failing to answer his beeper when Dorsey attempted to find out what was happening. The next morning, at a meeting with the drivers, Sylvestre was unable to convince the drivers of the seriousness of the truck parking incident. She also testified that the drivers demonstrated a bad attitude by certain suggestions they made at the meeting regarding ways in which the CN's financial situation might be improved, by complaining about the lack of health insurance when coverage had been extended in July, and by DiMurro's refusing to answer questions about arbitrary discharges that took place when, in the past, he had been a supervisor and other matters that had been his responsibility. Further, the Respondent contends, after the meeting, Vice President Bennet Welikson reported to Sylvestre that the drivers were late picking up their trucks. Finally, Sorter Supervisor Raymond Vega informed Sylvestre that the drivers had said that the CN was going to be shut down and that it was the sorters' fault, but that the drivers did not care because they could collect unemployment compensation. It was the last event, according to Sylvestre, that triggered her decision to restructure the CN and discharge 7 of the remaining 10 drivers.¹³ Yet, as the judge found, Sylvestre did not ask which drivers made the assertedly offending statements, and thus did not know whether any of the drivers she chose to retain had been among those making the statements.

In sum, the Respondent appears to contend that Sylvestre's September 30 decision to restructure the CN to use only two trucks and three drivers had been under consideration for some time and was economically necessary, but was precipitated by a seemingly

for about a year prior to the discharges. This inadvertent error does not affect our decision.

¹² The trucks had permits allowing them to park in no-parking zones, or to exceed the time limit for parking, for up to an hour. On this occasion, the trucks were parked on the street for about 1-1/2 hours, beyond the period allowed by the permits. In fact, however, the trucks were neither ticketed nor towed and the Respondent suffered no financial expense as a result of the September 29 incident.

¹³ Sylvestre testified that the drivers' being late to pick up their trucks was not a factor in her decision to implement the mass discharge. She also testified that, although she indicated to the drivers at the September 30 meeting that there could be layoffs, she had not decided at the end of the meeting to lay off any number of drivers.

trivial event involving unnamed drivers and was implemented in such a fashion that Sylvestre could not have known whether she was discharging drivers who had been entirely innocent of the behavior she found so disconcerting. We find it highly implausible that Sylvestre actually engaged in the sort of eccentric decision-making she described in her testimony, and it comes as no surprise to us that the judge did not credit her explanation. On the basis of the entire record, then, we agree with the judge that the Respondent did not carry its burden of proving that it would have restructured the CN and discharged the drivers on September 30 if they had not engaged in union activities.¹⁴

The Respondent contends, for a variety of reasons, that at least some of the drivers who were discharged were inferior to the drivers it chose to retain—Anthony Steele, Ralph Brown, and Mark Castro—and thus that the judge erred in finding that performance was not shown to be a consideration in the Respondent’s September 30 decision. We find no merit to that contention. In the first place, it is clear that the judge did not find that performance played no role in the selection of drivers to be discharged. He specifically found that Sylvestre relied on the recommendations of Supervisors Levy and Vega in selecting Steele, Brown, and Castro for retention on the basis of their performance. When he stated that performance was not a consideration in the September 30 decision, then, the judge obviously meant that the decision to discharge seven drivers was not made because of the drivers’ performance, but because Sylvestre had decided to restructure the CN. Assuming that performance was considered in determining *which* drivers would be discharged and which retained,¹⁵ such a fact is beside the point. The question is not whether the Respondent, in selecting particular individuals for discharge, chose to get rid of more productive union sympathizers and to retain less productive employees who did not support the Union. (Indeed, all of the drivers had signed union authorization cards, including the three who were not discharged.) The question is whether, in the absence of union activity, there would have been a *mass discharge at all* on September 30. We answer that question in the negative. Consequently, it is immaterial that

¹⁴ In affirming the judge’s finding that the eight drivers were unlawfully discharged, we do not rely on his citation to *Northport Health Services v. NLRB*, 961 F.2d 1547 (11th Cir. 1992).

¹⁵ Sylvestre’s precipitate actions cast doubt on even that proposition, however. Sylvestre testified that after she berated Levy on September 24 for attempting to fire Medlin without sufficiently documenting the case against him, Levy told her on September 25 that he wanted to fire Medlin, Bastian, Mitchell, and Harrison. According to Sylvestre, she asked Levy to write up a summary of the reasons for the terminations before actually letting anyone go, so that she would be prepared for any questions they might have. Because Levy was out of the office until after September 30, he never provided Sylvestre with the requested documentation. Nevertheless, Sylvestre discharged these four named drivers on September 30.

the Respondent may have chosen relatively more productive drivers for retention.¹⁶

For all the foregoing reasons, as well as those relied on by the judge, we affirm his finding that the Respondent violated Section 8(a)(3) and (1) by reducing the scope of the CN and discharging the seven drivers on that date.

II. THE ALLEGED SUPERVISORY STATUS OF GENE DIMURRO

The Respondent has excepted to the judge’s failure to find that Gene DiMurro was a supervisor, and hence not a member of the unit, at the time of the events in question.¹⁷ We find no merit to that exception. Although the parties stipulated that DiMurro was a supervisor until August 11, when he resigned as driver/manager and became solely a driver, they did not stipulate as to which of his duties in the capacity of driver/manager conferred supervisory status. The Respondent correctly observes that when the driver/manager who succeeded DiMurro in that position resigned in early September, Levy asked DiMurro to put the manifests together and “get the trucks on the road” until another replacement could be found, and DiMurro did so until he was discharged. The record does not reveal, however, whether the duties DiMurro assumed in September, which apparently included assigning and/or directing employees, involved the use of independent judgment or were of a merely routine or clerical nature. Further, although Levy asked

¹⁶ The Respondent contends that Levy had decided to discharge Bastian for absenteeism, and would have done so regardless of the employees’ union activities. We find no merit to that contention. As we have noted, Levy had not processed the requested documentation when Sylvestre discharged Bastian on September 29; consequently, we cannot determine whether Sylvestre would have found the documentation sufficient to warrant discharge. Moreover, Bastian’s disciplinary record contains some 28 oral and written warnings between May and August 1992. Many of those warnings were for failure to report to work, tardiness, and failure to pick up his truck. Yet Levy did not decide to terminate Bastian until the day after the Respondent learned that the Union had filed a representation petition, a fact that indicates that it was the advent of the Union on the scene that triggered Levy’s decision. On this record, we do not find that the Respondent has shown that it would have discharged Bastian in the absence of the drivers’ union activities.

The Respondent asserts that it suspected Medlin of stealing cans. In this regard, the Respondent argues correctly that the judge erred in finding that Medlin could not have been guilty of this offense because the evidence in the Respondent’s possession showed that the apparent pilferage began long before Medlin was employed by the Respondent. As the Respondent notes, the same evidence indicates that the pilferage continued after Medlin was hired. However, Medlin was never identified as the alleged thief and, according to Smith, the Respondent had a persistent problem of cans being stolen by outsiders posing as CN drivers. Thus, although the alleged thefts occurred on Medlin’s route, it was not established that he was the thief.

¹⁷ The Respondent does not pursue this argument to its logical conclusion, viz, that if DiMurro was a supervisor, and not a statutory employee, his discharge did not violate the Act.

for DiMurro's opinion regarding Levy's desire to discharge Malheiro, Medlin, Mitchell, and Bastian on September 24, DiMurro's opinions appear to have carried no weight. DiMurro testified that he defended Bastian and Medlin and could not remember what if anything he said about Mitchell. Regarding Malheiro, DiMurro testified that he said only "you have to do what you have to do."¹⁸ Indeed, although all four drivers ultimately were fired—Malheiro for pretextual reasons on September 24, and the three others in the mass layoff for reasons wholly apart from Levy's desire to dismiss them—DiMurro's "opinions" clearly played no part in their dismissals. Thus, the evidence is insufficient to establish that DiMurro had the authority effectively to recommend either discharge or retention or to exercise independent judgment concerning any of the other types of authority listed in Section 2(11) of the Act. Consequently, the Respondent has not carried its burden of demonstrating that DiMurro was a supervisor.¹⁹

III. THE RESTORATION REMEDY

Having found that the Respondent unlawfully reduced the size of the CN and discharged eight of the CN drivers, the judge ordered the Respondent to restore the CN to its size as of September 29, 1992, and to offer to reinstate the eight discharged drivers. The Respondent has excepted to those portions of the remedy. It has also moved to reopen the record so that it may introduce evidence that did not exist at the time of the hearing and that the Respondent asserts will establish that restoration of the CN and reinstatement of the drivers are inappropriate.

When an employer has curtailed operations and discharged employees for discriminatory reasons, the Board's usual practice is to order a return to the status quo ante—that is, to require the employer to reinstate the employees and restore the operations as they existed before the discrimination—unless the employer can show that such a remedy would be unduly burdensome.²⁰ We find that the Respondent has not shown, on the basis of the record made at the hearing, that it would be unduly burdensome for it to restore the CN to its size as of September 29, 1992, and to reinstate the eight discharged drivers.

First, although there was cause for concern over the performance of the CN, that operation was not the hopeless case the Respondent attempts to portray. As

we have seen, the CN chronically encountered economic difficulties, and sustained operating deficits in all but 2 months in 1992 prior to the September 30 restructuring. The fact remains, however, that for the first time, the CN turned a small profit for the 1992 fiscal year. The Respondent's financial advisor, Smith, testified that he would never have proposed eliminating all the drivers who were discharged on September 30. Smith did recommend that, in order to focus on high volume clients, the CN reduce the number of trucks from five to three or four, but not to two, as Sylvestre actually did. The testimony of the Respondent's own financial advisor, then, fails to establish that it would be unduly burdensome to require the restoration of the CN to its former size. Finally, we note that, at the time of the hearing, the Respondent still had all five of its trucks, three of which were leased for a period of several years; consequently, there would have been little if any capital outlay required as a result of an order to restore the CN and reinstate the drivers.

The Respondent contends, however, that regardless of the situation that existed on September 30, subsequent events have made it impossible to restore the CN to the size it was before the mass discharges. First, the Respondent argues, it has implemented a four-bag minimum pickup requirement that precludes many small clients from being members of the CN. Second, the Respondent claims that, in any event, numerous clients ceased to participate in the CN when the CN was effectively shut down by the strike during the last 3 months of 1992. According to the testimony of Elisabeth Peery, the CN's communications director, the combination of those circumstances caused 20 to 30 percent of the CN's clients to drop out of the network. Moreover, the bombing of the World Trade Center in February 1993 cost the CN a number of clients. Thus, the Respondent argues that it would literally be impossible to restore the CN to its pre-September 30 size. We find that argument unpersuasive.

Concerning the Respondent's contention that it cannot restore the CN to its former size because it has restructured the CN and imposed a four-bag minimum,²¹ we have already affirmed the judge's finding that the Respondent's economic rationale for discharging the drivers—which rationale encompassed the restructuring of the CN—was pretextual. Because adopting the four-bag minimum was not the real reason for the discharges, and would not have occurred (or at least would not have occurred when it did) if the drivers had not engaged in union activities, the Respondent's argument that it cannot abandon the four-bag minimum fails unless it is supported by other evidence. A pretextual argument fares no better as a defense to a

¹⁸ Supervisor Jeff Dorsey recalled that DiMurro said, "We have to let him go." Under either version, DiMurro did nothing more than agree with the two supervisors that Malheiro should be discharged, and thus his response does not constitute an effective recommendation of that action.

¹⁹ As the party contending that DiMurro was a supervisor, the Respondent bears the burden of proof on that issue. See, e.g., *Northcrest Nursing Home*, 313 NLRB 491, 496 fn. 26 (1993).

²⁰ See *Lear Siegler, Inc.*, 295 NLRB 857, 861 (1989).

²¹ According to Peery, the restructured CN originally had a five-bag minimum, but the minimum was lowered to four bags because of client protest.

restoration order than it does as an answer to the original allegations of unlawful conduct, particularly where, as here, the record does not indicate that any significant capital outlay would be necessary to restore the status quo ante.

Nor do we find merit to the argument that the loss of clients precludes a restoration order. When the Board orders the restoration of the status quo ante, it is understood that the order means “as far as possible, given the economic realities faced by the employer at the time of compliance.” The Board does not order the reinstatement of employees to nonexistent jobs. We recognize that, even with a good-faith effort, the Respondent may not be able to attract enough clients to enable it to expand the CN to its September 29 size. If that proves to be the case, the Respondent will be in compliance with our reinstatement order if it reinstates as many of the discharged employees—either as drivers or in substantially equivalent positions—as are needed to serve the clients it has been able to attract and retain.²²

We wish to stress that, although we are ordering the Respondent to restore the CN to its September 29 size and to offer to reinstate the unlawfully discharged drivers, our Order does not require the Respondent to operate the CN indefinitely at that size (or at all), especially at a loss. The Respondent may lawfully restructure the CN, or eliminate it entirely, if it can show that its decision is made for legitimate business reasons.

The Respondent has moved to reopen the record so that it can present further evidence, based on developments since the hearing, bearing on the appropriateness of the restoration order. The Respondent represents in its motion that it closed the CN entirely in June 1993, and that it is now impossible to reinstate any of the discharged drivers because there are no positions for them to fill. The Respondent further represents that it has defaulted on its leases of the three leased trucks formerly used by the CN and that those trucks have been repossessed.²³ In light of these representations, the Respondent urges the Board to remand the case to the judge to determine whether there is any basis for a restoration and reinstatement remedy.

We shall deny the Respondent’s motion to reopen the record, but we shall amend the judge’s rec-

ommended Order to provide explicitly that restoration and reinstatement will be required *unless* the Respondent can establish at compliance—on the basis of evidence that was not available at the time of the unfair labor practice hearing—that those remedies are inappropriate.²⁴ If, for example, the Respondent can demonstrate that it has closed the CN and did so for legitimate business reasons, it need not restore the CN to its September 29 size or reinstate the drivers. In that event, the appropriate make-whole remedy would be to award backpay until the date of the closing.²⁵

We are mindful that the Seventh Circuit Court of Appeals recently disapproved of a similar conditional restoration order. *NLRB v. Special Mine Services*, 11 F.3d 88 (1993). We find *Special Mine Services* distinguishable from this case. The court in *Special Mine Services* found that the Board had articulated no basis for rejecting the employer’s claim that a restoration remedy would be unduly burdensome. In this case, we have fully explained why, on the record established at the hearing, the Respondent has not demonstrated that a status quo ante remedy would pose an undue burden.

Another source of concern for the court in *Special Mine Services*, supra, however, was that the Board’s decision contained a statement that the employer would be allowed to introduce evidence in compliance proceedings, that was not available at the hearing, that might be relevant to the appropriateness of the restoration remedy. The court seemed to think that the Board might not have considered the subject of restoring the status quo ante at all, but simply had postponed the “real” decision to compliance. The court also worried that, were it to enforce the Board’s Order, the employer would be directed—unequivocally—to restore its earlier operations without being able to raise the issue of the cost of restoration, and that it would be put in jeopardy of contempt proceedings if it failed to do so.

With all due respect for the court, we think it misperceived the nature and consequences of the restoration remedy the Board imposed in *Special Mine Services*, supra. The Board did not “defer” decision in *Special Mine Services*, and we are not “deferring” decision here. We have found, on the basis of the record made at the hearing on unfair labor practices, that the Respondent has not shown that restoration of the CN to its size on September 29—the presumptively appropriate remedy for its discriminatory restructuring of the CN and the firing of the drivers—is inappropriate. Accordingly, we are ordering the Respondent to restore the status quo ante and to offer to reinstate the discharged drivers. That is our decision. We recognize, however, that in this case, as in almost any case, evi-

²² In finding that the Respondent has not shown that restoring the CN would be unduly burdensome, we do not rely on the fact that the CN’s operating deficits increased after September 30. As the Respondent contends, the larger deficits appear to be caused in part by factors unrelated to the size of the network. Clearly, however, the fact that the CN as restructured has encountered difficulties does not demonstrate that it would be unduly burdensome to restore it to its former size. In particular, we would assume that as the World Trade Center returns to normal operations, the CN might recover some of its lost client base at that facility.

²³ In the supplement to its motion, the Respondent states that more than a year has elapsed since the CN was closed, and that no charge has been filed alleging the closure to be unlawful.

²⁴ See *Lear Siegler, Inc.*, supra, 295 NLRB at 861–862.

²⁵ *Pacemaker Driver Service*, 290 NLRB 405 (1988), review denied 914 F.2d 92 (6th Cir. 1990).

dence may come to light after the close of the record in the unfair labor practice hearing that may, if credited and found sufficiently material, establish that some portion of the remedy imposed by the Board is no longer appropriate.²⁶ Indeed, the evidence proffered in the Respondent's motion is an example. Our directing the Respondent to restore the status quo ante, unless it can prove at compliance that restoration and reinstatement are no longer appropriate, is not a "deferral" of our decision. It is simply an explicit recognition of the reality that the appropriateness of almost any affirmative remedy may change over time, and an effective mechanism for amending this particular remedy should the need arise.²⁷

We turn now to the court's concern that enforcement of a provisional restoration order such as the one we impose today would, in practice, unequivocally require the Respondent to restore the CN to its September 29 size, and that its failure to do so might subject it to contempt penalties. With all due respect, we think the court's concern is unfounded. The Board addressed this very subject in *Lear Siegler, Inc.*, supra. Noting that several courts had refused to enforce restoration orders, the Board observed that in some of those cases, the restoration order had been unequivocal. The Board speculated that the reviewing courts might have thought that if those orders were enforced, the Board at compliance might ignore all evidence of changed circumstances, require restoration of operations even if that remedy was no longer appropriate, and bring contempt proceedings based on the literal terms of the orders.²⁸ The Board made clear in *Lear Siegler* that its order, which simply stated that the employer might introduce evidence at compliance concerning the continued appropriateness of the restoration and reinstatement portions of the remedy, clearly implied that if the employer could demonstrate that the restoration of its facility would be unduly burdensome, restoration would not be required. Thus, the Board went on to say, "court enforcement of the Order in this case will enable the Board to require restoration only if the [r]espondent cannot show that restoration would impose an undue hardship."²⁹ The Board also empha-

sized that contempt proceedings would not and could not be brought against the employer for failing to comply with its restoration order unless and until (1) the Board, in compliance proceedings, had finally determined that restoration was appropriate,³⁰ (2) the employer failed to comply with the restoration order, (3) the Board's Order was enforced, and (4) the employer refused to comply with the order as enforced.³¹ Thus, as in *Lear Siegler*, the Respondent will have the opportunity to present both the evidence adduced in its motion to reopen the record and any additional evidence that may bear on the appropriateness of the restoration and reinstatement remedy at compliance. If it fails to do so, or if the evidence it presents is unconvincing, the restoration and reinstatement order will stand, subject to court review. If, however, the Respondent presents evidence at compliance that convinces the Board that the restoration and reinstatement portions of the Order would be unduly burdensome because of changed circumstances and therefore are no longer appropriate, the Respondent will not be required to carry out those portions of the Order and, as the Board stated in *Lear Siegler*, will be in no danger of contempt proceedings if it declines to do so.³²

To be sure, the approach we take here is not the only course available. The Board, in its discretion, could grant the motion to reopen the record, remand the case to the judge, and leave it to him to evaluate the Respondent's newly proffered evidence.³³ As the Board found in *Lear Siegler*, however, leaving the issues raised in the motion to reopen the record to compliance is consistent with the Board's established practice of leaving the details of the remedy to the compliance process. It is also more efficient than remanding the case to the judge, waiting for his supplemental decision and any ensuing exceptions, and issuing a supplemental decision and order before compliance proceedings could even begin. Under the approach we took in *Lear Siegler*, and which we take again today, all compliance issues, including those involving reinstatement and restoration, will be decided in one compliance hearing.³⁴ Finally, we note that, even if we were to reopen the record and remand the case to the judge to evaluate the Respondent's new evidence, there is no guarantee that, after the judge has held a second hearing and rendered his supplemental decision, some party would not file yet another motion to reopen the record, based on evidence acquired since the record closed in *that* hearing. And so on, poten-

²⁶ For example, as we have already stated, even though our order directs the Respondent to restore the CN to its size as of September 29, in practice the Respondent will be required to do so, and to reinstate the discharged drivers, only to the extent that it has succeeded in a good-faith effort to attract and keep its CN clients.

²⁷ In this regard, almost any Board Order might be characterized as provisional, in that all parties understand that, should events overtake some portion of the order, that portion can be modified at compliance to reflect the changed conditions. The only difference here is that the Respondent asserts that such changes already have occurred. Our Order simply takes account of the Respondent's contentions and assures the parties that those contentions will be fully explored in the compliance process.

²⁸ 295 NLRB at 862.

²⁹ Id.

³⁰ In other words, after the employer had had the opportunity, at compliance, to present newly acquired evidence regarding the continued appropriateness of the restoration remedy, and either failed to do so or presented evidence that was not persuasive.

³¹ 295 NLRB at 862 fn. 33.

³² Id. at 862.

³³ Id.

³⁴ Id. at 861-862.

tially ad infinitum. Although this scenario, with its attendant delay, is unlikely to eventuate often, we deem it advisable to avoid this kind of piecemeal approach to disposing of the issues of restoration and reinstatement. In our view, it will be more efficient to leave to the compliance process the task of evaluating any evidence—both that proffered by the Respondent in its motion and any that may come to light between now and the time of the compliance hearing—that may reflect on the continuing appropriateness of the status quo ante remedy.

ORDER

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

1. Insert the following after “as of September 29, 1992,” on line 4 of paragraph 2(a):

unless it can show at compliance, on the basis of evidence that was not available at the time of the unfair labor practices hearing, that those actions would be unduly burdensome,

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

IT IS FURTHER ORDERED that the Respondent’s motion to reopen the record is denied.

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT threaten to discharge our employees because they engage in activities on behalf of Bakery Drivers & Bakery Goods Vending Machines, Local 550, I.B.T., AFL–CIO, or any other labor organization.

WE WILL NOT interrogate our employees regarding employee activity on behalf of a labor organization.

WE WILL NOT warn our employees not to engage in union activities.

WE WILL NOT imply to our employees that we have discharged employees because of their union activities.

WE WILL NOT discharge our employees because of their union activities.

WE WILL NOT reduce the size of our collection network because of our employees’ union activities.

WE WILL NOT refuse to recognize and bargain with Bakery Drivers & Bakery Goods Vending Machines, Local 550, I.B.T., AFL–CIO as exclusive collective-bargaining agent of our employees in the below described collective-bargaining unit:

All collection network drivers and driver assistants employed by Respondent at its facility, excluding all clerical employees, and guards, professional employees and supervisors as defined in the Act.

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

WE WILL offer immediate and full reinstatement to Joseph Malheiro, Gene DiMurro, Jerry Medlin Jr., Clifton Harrison, Scott Stockdale, Anthony Velez Jr., Lance Mitchell, and Parris Bastian and WE WILL restore our collection network to its size as of September 29, 1992, unless we can show in compliance proceedings, on the basis of evidence that was not available at the time of the unfair labor practices hearing, that those actions would be unduly burdensome.

WE WILL make Joseph Malheiro, Gene DiMurro, Jerry Medlin Jr., Clifton Harrison, Scott Stockdale, Anthony Velez Jr., Lance Mitchell, and Parris Bastian whole for any loss of earnings they suffered by reason of our discrimination against them, with interest.

WE WILL rescind our discharges and refusals to rehire Malheiro, DiMurro, Medlin, Harrison, Stockdale, Velez, Mitchell, and Bastian.

WE WILL, on request by the Union, recognize and bargain with the Union as the exclusive collective-bargaining agent of our employees in the above-described unit.

WE CAN, INC.

Richard De Steno, Esq. and *Eric Brooks, Esq.*, for the General Counsel.

Andrew W. Hays, Esq., for the Respondent.

Roy N. Watanabe, Esq. and *Rebecca Weston, Esq.*, of New York, New York, for the Charging Party.

DECISION

PHILIP P. MCLEOD, Administrative Law Judge. I heard this case on April 26, 27, 28, and 29, 1993, in New York, New York. The charge in Case 2–CA–26085 was filed on Septem-

ber 29, 1992. The charge in Case 2-CA-26095 was filed on October 1, 1992. An amended complaint issued on February 12, 1993.

At the trial herein, all parties were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Following the close of the trial, Respondent and the General Counsel filed timely briefs with me which have been duly considered. Upon consideration of the entire record and briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent admitted that it is a domestic not-for-profit corporation with an office and place of business in New York City. The parties stipulated that during a material 12-month period, Respondent derived in excess of \$50,000 from redemption of beverage cans and bottles directly from Sound Distributing. Sound Distributing is a beverage distributor in Yonkers, New York, that has, during the past 12 months, purchased and received at its facility goods valued in excess of \$50,000 directly from Newark, New Jersey.

Respondent's attorney stated on the record that Respondent did not admit the conclusionary allegations as to jurisdiction, but Respondent does not dispute the factual allegations. In addition to the above matters which were admitted or stipulated, the amended complaint contains an allegation that Respondent derives annual gross revenue in excess \$1 million. Respondent's attorney does not dispute that allegation and records introduced during the hearing proved that Respondent does derive annual gross revenue in excess of \$1 million.

I find, in view of the stipulations, admissions, and the entire record, that Respondent is and has been at material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (the Act).

II. LABOR ORGANIZATION

The parties stipulated that Bakery Drivers & Bakery Goods Vending Machines, Local 550, I.B.T. is, and has been at all material, a labor organization within the meaning of Section 2(5) of the Act.

III. SUPERVISORS

The parties stipulated that at material times, while employed by Respondent, Guy Polhemus, Philip (Peter) Levy, Bennett Welikson, Angela Sylvestre, Jeff Dorsey, and Raymond Vega have been supervisors within the meaning of Section 2(11) of the Act.

Executive Director and Founder Guy Polhemus testified that Program Director Angela Sylvestre and Vice President Bennett Welikson reported directly to him and that he delegated the running of Respondent to them in large measure. Supervisors, including Jeff Dorsey, Gene DiMurro (while he was a supervisor), and Peter Levy, reported to Sylvestre and Welikson.

Gene DiMurro was stipulated to have been a supervisor while he was driver manager. DiMurro resigned from that position on August 11, 1992. After that date until his discharge, DiMurro was a driver.

IV. THE UNFAIR LABOR PRACTICES

Evidence was unrebutted that 11 drivers and assistant drivers signed union authorization cards on August 29 and September 5, 8, and 29, 1992.

The parties stipulated that on September 23, 1992, Respondent received a fax from the NLRB Regional Office which included a copy of a petition filed by the Union seeking to represent Respondent's drivers.

Most of the events involved in the complaint allegations occurred during the week of September 23 through 30, 1992.

A. Events of September 24

Driver Gene DiMurro testified credibly that on September 24, when DiMurro returned from his route, Executive Director Guy Polhemus asked him if "you guys are starting up a union again." DiMurro replied that he didn't know what Polhemus was talking about. Polhemus admitted that he did ask DiMurro, "Are you guys trying to unionize again." Polhemus recalled that conversation occurred on September 23, after he received the fax from the NLRB notifying him of the Union's petition. Polhemus recalled that the Teamsters had tried to organize the drivers in 1991.

On that same afternoon, Supervisor Peter Levy called DiMurro to come into the office. Assistant director for the collection network, Jeff Dorsey, was also present. DiMurro testified credibly that while he was in Levy's office, Guy Polhemus dropped by, listened to their conversation, and said, "I don't need to spend money on lawyers for this union bull shit." Polhemus then walked out. Polhemus denied that he said anything about a union during this particular meeting, but I do not credit his denial. During this same conversation, Levy told DiMurro that he was going to discharge four drivers—Parris Bastian, Lance Mitchell, Joseph Malheiro, and Jerry Medlin. Levy said he was going to fire Bastian and Mitchell because of lateness and a poor attitude, Malheiro because he didn't have a driver's license, and Medlin because he was stealing cans. DiMurro testified that Levy showed him a paper from Merrill Lynch stating from January 1991, cans were being stolen from one stop. This Levy blamed on Medlin.

Joseph Malheiro was discharged. Jerry Medlin Jr. was also discharged, then reinstated on the same day when DiMurro confronted Levy with the fact that Medlin could not be guilty of theft as accused by Levy because the alleged theft of cans started before Medlin was hired. The other two named by Levy, Lance Mitchell and Parris Bastian, were not discharged then. Jerry Medlin testified credibly regarding his discharge that when Levy gave Medlin his job back, Levy told Medlin that if he messed up in any way, he would be fired. Levy said that he was "fucking sick and tired of this bull shit" and he "didn't want to have to deal with lawyers and unions and all this other shit."

B. Events of September 25

Polhemus testified that he met with Angela Sylvestre on September 25, and, for the first time, informed her of the Union's petition with the NLRB. Levy was also present. Polhemus recalled that both Angela Sylvestre and Peter Levy commented during the September 25 meeting about collection network problems. According to Polhemus, Sylvestre mentioned that the collection network "was still losing

money,” or “it was losing more money than it had before apparently.” Levy complained about the drivers’ attitude.

C. September 28: the Union’s Demand for Recognition

By letter dated September 28, 1992, the Union made a demand for recognition to Respondent.

D. Events of September 29

Gene DiMurro testified that when he returned to the office after work on the afternoon of September 29, Vice President Bennett Welikson questioned him about how many bags he had that day. DiMurro testified credibly that Welikson then asked, “Who signed the union cards?” DiMurro replied to Welikson that he had no idea what Welikson was talking about.

DiMurro testified that all the drivers met in the union attorney’s office around 4:30 p.m. on September 29, 1992. While the meeting was going on, three of the trucks were parked on the street at Respondent’s office. DiMurro was beeped on a pager while in that meeting. The beep was from Peter Levy. After the meeting, DiMurro called Levy about 6:15 p.m. Levy asked DiMurro what was going on with the trucks outside. DiMurro told Levy that the drivers wanted to get something to eat and then they were going to bring the trucks down to where they are normally parked for the night. DiMurro testified credibly that Levy then asked, “What is going on, you know what I mean, if you know anything that is going on, why don’t you just tell me.” Levy asked DiMurro if he started the union campaign. DiMurro replied, “No.” Levy then asked if Jerry Medlin started the union thing and DiMurro replied, “No.” DiMurro then told Levy that he had to go because he was going to a ball game. Levy said, “How can you go to a ball game when all this is going on?” DiMurro replied, “Well, what is going on?” Levy said again, “When all this is going on.” DiMurro replied that he had to go and hung up.

Jerry Medlin attended the meeting at the union lawyer’s office on September 29. After Medlin returned and parked his truck, Program Director Angela Sylvestre said she was disappointed that the trucks were left outside. Medlin testified that it was not unusual for the drivers to leave the trucks outside. Medlin told her they (the drivers) just went to have something to eat.

Guy Polhemus testified that he was at Respondent’s office on the evening of September 29, and the office was “pandemonium” over the trucks being left on the street. While he was there efforts were being made to locate the drivers. Finally, Angela Sylvestre was able to talk to one of the drivers. Sylvestre told Polhemus that she was meeting with the drivers the next morning.

E. Events of September 30

On the morning of September 30, Program Director Angela Sylvestre had a meeting of all the drivers other than Ralph Brown and Anthony Steele, who worked the night shift. The events of this meeting are largely undisputed. Sylvestre testified that she decided to call the meeting because the drivers left three trucks parked on the street for over an hour on the previous evening. Sylvestre expressed anger and frustration about the fact that drivers had left trucks parked on the street the previous afternoon, even

though trucks had been parked on the street temporarily on previous occasions. Sylvestre said that the drivers were uncooperative and that she did not want to work with uncooperative people. Sylvestre told the drivers Respondent was in the red and “there might not be a collection network when you come in this afternoon.” Driver Scott Stockdale told Sylvestre that recycling would become compulsory in March 1993 and that she could take some of the money from the redemption network and hold the drivers until then. Sylvestre said that was against her morals or standards. Sylvestre said that the redemption and the collection networks each have to be self-sufficient.

Sylvestre admitted that during this meeting she and the drivers also discussed a number of issues, including fringe benefits. One of the issues discussed was medical benefits. Sylvestre testified that driver Parris Bastian complained about their not having medical benefits. At the end of the meeting, Sylvestre told the drivers that they could go on their routes “if you want or, if you don’t want, you can go home.” All the drivers went on their routes.

At the end of the workday on September 30, Respondent terminated all of its drivers and driver assistants except three. In all, Respondent terminated seven drivers and driver assistants: Gene DiMurro, Jerry Medlin, Clifton Harrison, Scott Stockdale, Anthony Velez, Lance Mitchell, and Parris Bastian. Harrison had signed a union authorization card on September 8. Stockdale, Velez, and Mitchell signed authorization cards on September 29, 1992. Bastian dated his authorization card August 29, 1992. Only three drivers/helpers were kept: Brown and Steele, who worked the night shift, and Mark Castro.

Gene DiMurro was notified of his termination by Vice President Bennett Welikson and Program Director Angela Sylvestre. DiMurro testified Sylvestre told him Respondent was closing down the collection network and was going to get rid of all the drivers. DiMurro asked when they were going to reopen the collection network and did he have a position. Sylvestre said that in due time the collection network would open again, that DiMurro was a good worker, and that they would notify DiMurro.

Medlin testified he was called to the office and handed a slip for unemployment purposes. Medlin told them that he didn’t want to hear their reason for the layoff. Medlin testified that he was walking down a hall talking with Mark Castro when they walked near Angela Sylvestre. Sylvestre told Medlin to “take your campaign somewhere else.” Sylvestre admitted telling Medlin to take whatever he had to do outside that office, but she testified she responded to Medlin’s threat that they were going to shut down the entire operation.

As mentioned above, only Steele, Brown, and Castro were kept. Steele testified credibly he was told the other drivers were fired because they weren’t satisfied with their jobs. Steele also testified that after the drivers were laid off on September 30, 1992, he and Ralph Brown were working the night shift. After they were out on their route, Gene DiMurro beeped them and told them to return with their trucks. After returning they were approached by Bennett Welikson and Jeff Dorsey who asked why they were back. Steele and Brown replied they had been beeped by DiMurro. They were told to park the trucks and return to the office. In the office, Angela Sylvestre and Bennett Welikson asked them if they still wanted to work. Brown and Steele said they would, but

somebody had thrown an object into their truck. At that time Angela Sylvestre said, "That's it! We're going to shut down the network."

After Sylvestre discharged the employees on September 30, the Union began picketing Respondent. Although Respondent retained drivers Steele, Brown, and Castro, those three did not report for work after the evening of September 30. Instead, they joined the other employees on the picket line and Respondent was shut down for some time.

F. Events of October 16 and 17

On October 16, when Anthony Steele returned to pick up his girl friend, Raymond Vega, the supervisor over sorting, approached Steele and asked Steele if he had signed a union card. Steele replied, "What Union card? No. I ain't signed no union card." Vega then asked Steele if he would be willing to sign "an affidavit against the drivers." On cross-examination Steele testified that Vega asked him would he sign an affidavit because they want to hire you back—"They want you to come back to work if you sign an affidavit form." Steele agreed to sign the affidavit.

The following day, as Steele approached the picket line on 52nd and 11th Avenue, Raymond Vega called him across the street to the redemption center and asked Steele if he was still willing to sign the affidavit. Steele replied, "Yes." Steele went with Vega into Vega's office where Vega phoned Guy Polhemus. Vega told Polhemus that Steele did not sign a union card and had nothing to do with the Union. Vega said that Steele was willing to sign an affidavit. Vega's call was transferred to Program Director Angela Sylvestre and Sylvestre told Vega a specific day to have Steele come in. Angela Sylvestre agreed that she was phoned by the sorter supervisor, Raymond Vega, and asked to take Steele's affidavit. Sylvestre testified that she then talked with Steele and told him the NLRB was investigating the matter and that she did not need an affidavit from Steele. I found Steele to be open and responsive under both direct and cross-examination. Much of Steele's testimony was not rebutted, and Respondent did not call Raymond Vega to testify. I credit Steele's testimony. After the picketing ended, Steele received a certified letter from Respondent stating that he was welcome to come back to work. Steele testified that he returned to work on January 4, 1993. Steele continued working for Respondent until March 1993, when he took a leave of absence.

Gene DiMurro testified that on October 16, he phoned Respondent, disguised his voice, and pretended to be from Camera Printing, one of Respondent's accounts. Assistant director in collection network, Jeff Dorsey, answered the phone. DiMurro asked Dorsey when he was going to get his pickup. Dorsey mentioned that they were having a problem with the Teamsters and Dorsey said, "You can get a pick up anywhere from tomorrow to three months from now." DiMurro asked what he was to do with the cans. Dorsey responded, "Please store them and when we get back into operations again, we will pick them up. And if you can't store them, just put them outside for the homeless and just throw them out." I credit DiMurro's testimony.

G. Events of November 18

On November 18, DiMurro was near We Can when he stopped and talked with two employees, Chad Callous and John Altidore. As they were talking Guy Polhemus walked up and said, "I hope you are not signing union cards." Neither of the employees responded. Polhemus then asked how they were doing. Polhemus recalled saying, "I hope you have your union cards." Guy Polhemus testified that picketing was going on at the time, and that he intended his comment to be humorous.

Analysis and Conclusions

The General Counsel alleges that Respondent violated Section 8(a)(1) and (3) of the Act by several acts and statements, by discharging its drivers on September 30, and by temporarily reducing the scope of its collection network operations. As more fully discussed below, the General Counsel contends that Respondent engaged in conduct violating the Act so serious and substantial in character that the possibility of erasing the effects of those unfair labor practices and of conducting a fair election by use of traditional remedies is slight, and the employees' sentiments regarding representation, having been expressed through authorization cards would, on balance, be protected better by issuance of a bargaining order than by traditional remedies alone.

I found the testimony of Gene DiMurro to be credible. In large measure DiMurro's testimony was either corroborated or un rebutted. For example, his testimony regarding comments by Respondent's executive director, Guy Polhemus, was substantially supported by Polhemus with the exception of comments allegedly made by Polhemus in Peter Levy's office on September 24. Polhemus testified in substantial accord with DiMurro regarding alleged comments in violation of Section 8(a)(1) shortly after Respondent received a fax from the NLRB Regional Office and again during October 1992. Peter Levy did not testify, and the conversations DiMurro recalled with Levy were not rebutted. In short, I was impressed with DiMurro's demeanor and I fully credit his testimony. The credited evidence shows that Gene DiMurro was interrogated by Polhemus, Levy, and Welikson. Both Polhemus and Levy, linked their comments to their opposition to the Union.

I also found Jerry Medlin to be a credible witness and I credit his testimony. The credited evidence shows that both Guy Polhemus and Peter Levy coupled their displeasure with the appearance of the Union. As shown above, on September 23, 1992, the NLRB Regional Office faxed a copy of the union petition to Respondent. Under the circumstances, especially in view of the fact that Medlin was first fired, then warned that he could be fired again, and Levy's comments that he was tired of having to deal with lawyers and unions, I find that Medlin was threatened with discharge if he messed up by involving himself with the Union. Levy's comments constitute a violation of Section 8(a)(1) of the Act. *Evans St. Clair, Inc.*, 278 NLRB 459 (1986); *Port East Transfer*, 278 NLRB 890 (1986); *Ryder/P.I.E. Nationwide*, 278 NLRB 713 (1986); *Precision Founders*, 278 NLRB 544 (1986).

I also credit the testimony of Anthony Steele. Raymond Vega did not rebut Steele's testimony and his testimony was

substantially corroborated by Angela Sylvestre. Anthony Steele was interrogated by Sorter Supervisor Raymond Vega. Raymond Vega made comments in obvious opposition to the Union during his interrogation of Anthony Steele.

In view of the full record and especially those matters noted above, I find that Respondent engaged in pervasive and coercive interrogation of its employees at a time when no employee had openly revealed support for the Union. Additionally, the record shows that Respondent's highest ranking official, Polhemus, involved himself in interrogation of an employee regarding the Union. After questioning DiMurro whether the employees were trying to unionize, Polhemus commented before DiMurro that he did not need to spend money on lawyers and this "union bull shit." I find that Respondent's activities constitute interrogation in violation of Section 8(a)(1) of the Act. *Rossmore House*, 269 NLRB 1176 (1984); *Kona 60 Minute Photo*, 277 NLRB 867 (1985); *Hearst Corp.*, 281 NLRB 764 (1986); *WXON-TV*, 289 NLRB 615, 619 (1988); *Southwire Co. v. NLRB*, 820 F.2d 453 (D.C. Cir. 1987); cf. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

Unrebutted testimony of Gene DiMurro also shows that he was interrogated by Supervisor Peter Levy after the employees met with the union attorney after work on September 29. Levy's comments to DiMurro at that time illustrated that Respondent suspected the employees were involved in union activity while the trucks were parked on the street. In view of that evidence, the comments by Angela Sylvestre that she was disappointed in the drivers, the drivers were uncooperative and she did not want to work with uncooperative people, implies a warning to the drivers not to engage in union activities. Sylvestre's warning violated Section 8(a)(1) of the Act.

Anthony Steele testified that after the drivers were laid off on September 30, 1992, he and Ralph Brown were working the night shift. After they were out on their route, Gene DiMurro beeped them and told them to return with their trucks. After returning they were approached by Bennett Welikson and Jeff Dorsey who asked why they were back. Steele and Brown replied they had been beeped by DiMurro. They were told to park the trucks and return to the office with Ralph Brown. In the office, Angela Sylvestre and Bennett Welikson asked them if they still wanted to work. Brown and Steele said they would but somebody had thrown an object into their truck. At that time Angela Sylvestre said, "That's it! We're going to shut down the network." Steele testified credibly he was told the drivers were fired because they weren't satisfied with their jobs.

Regarding the discharges of employees, the record shows that on September 24, after Respondent learned the Union had petitioned the NLRB to represent Respondent's drivers, Peter Levy told Gene DiMurro that he was going to fire four employees. Joseph Malheiro was discharged. Jerry Medlin Jr. was also discharged, then reinstated when DiMurro told Levy that Medlin could not be guilty of theft as accused by Levy because the alleged theft of cans occurred before Medlin was hired. Levy then gave Medlin his job back and told Medlin that if he messed up in any way, that he would be fired. Levy said that he was "fucking sick and tired of this bull shit" and he "didn't want to have to deal with lawyers and unions and all this other shit."

Joseph Malheiro worked for Respondent from June 1991 until he was discharged on September 24, 1992. Malheiro admitted that at the time of his employment, from his first hiring, his driver's license was suspended. He talked with Angela Sylvestre about a week after he was hired. Sylvestre told Malheiro that he had a suspended license. Sylvestre told Malheiro they had run a check which revealed the suspension. Malheiro told Sylvestre that he would pay off his tickets as soon as he had a chance and that would serve to revoke the suspension. Subsequently, on a couple of occasions, Sylvestre told Malheiro to take care of the suspension.

The parties stipulated into evidence a printout dated June 21, 1991, showing that Malheiro's driver's license was suspended. That printout was included in Malheiro's personnel file. Another printout dated April 7, 1992, showing that Malheiro's license remained suspended, was included in his personnel file. A third printout dated September 1992, showing Malheiro's suspension continued, was also included in his personnel file.

In December 1991, Malheiro was told by Peter Levy that Levy had just found out that Malheiro had a suspended license. Levy told Malheiro to take care of the suspension. Malheiro told Levy that he owed a lot of money in tickets and that he would take care of that as soon as he could. Again, around April 26, 1992, before Malheiro took a trip to Portugal, Levy told him that he did not have to take care of the suspension before he went to Portugal but he would appreciate Malheiro taking care of the matter as soon as he returned. Malheiro said, "No problem. As soon as I had the money and I'd come back I would start taking care of it."

After Malheiro returned from Portugal, he talked with Levy. Levy told him he would have to start taking care of his suspended license. Gene DiMurro gave Malheiro a letter requesting a restricted license for Malheiro to be able to drive during work. Malheiro testified that he started paying off his tickets in order to restore his license.

Also, he was given a letter stating for him to go down to the Department of Motor Vehicles with the letter stating that Malheiro needed a restricted drivers license in order to work the weekend. The letter was dated June 27, 1992.

Angela Sylvestre was asked about her knowledge of Malheiro's suspended license. Sylvestre testified that she knew of the suspended license after Malheiro started to work and she heard of a process whereby Malheiro could get a restricted license in order to work. She was unaware that Malheiro was not operating with a restricted license after he applied for that license in order to work.

Malheiro recalled that he had about two conversations with Levy after June, regarding his suspended license. Levy asked him where he stood. Malheiro first told Levy around August 1992 that he had the tickets almost paid off. Then, during the second conversation, Malheiro told Levy that he had paid off his tickets and was just waiting for his license in the mail. Malheiro testified that he was never told that anything would happen to him regarding the suspended license.

Gene DiMurro testified he conducted a license check in early January which showed that Malheiro's license was suspended. Peter Levy was not at Respondent when Malheiro started work but Levy knew of Malheiro's suspended license from the time Levy first started working for Respondent. After that Peter Levy told DiMurro on a couple of occasions

that Malheiro had to get his license. Malheiro was going to Portugal for family reasons and Malheiro told Levy in the presence of DiMurro, that he would take care of his license when he got back.

Malheiro testified that in September 1991, his partner on his truck, Ethan Weinberger, told Angela Sylvestre that he needed to return to school. Sylvestre said, "[N]o problem." From then, rather than work until 4 p.m., as usual, Malheiro dropped Weinberger off at a train station at 12:30 or 1 p.m., and Weinberger would go to school. On Fridays, Weinberger did not have school and he worked the full day. Malheiro was asked by Sylvestre to finish the route on those occasions when Weinberger went to school. On those occasions, after that, Malheiro finished the route alone and he drove the truck.

After his September 24 discharge, Malheiro received his driver's license in the mail but he has not been offered reinstatement by Respondent. The license was restricted to driving during work.

Malheiro's testimony regarding conversations he had with Peter Levy was not rebutted. Levy did not testify. I credit Malheiro regarding those conversations. Although Angela Sylvestre testified that she assumed that Malheiro had received a restricted license, she admitted that she was never told that Malheiro had his license reinstated. As to the evidence of avenues available for restricted license, the record showed that Malheiro and Respondent took steps beginning in June 1992, to acquire a restricted license which would allow Malheiro to drive while at work. Malheiro did receive a restricted license after he was discharged.

In view of the record, I find that Respondent knew, from early in Malheiro's employment, that Malheiro's driver's license was suspended and Respondent was never informed that Malheiro had received a license, restricted or otherwise, while he worked for Respondent. I also find that Malheiro's lack of a driver's license was a mere ruse, a smoke screen employed by Respondent to attempt to justify terminating Malheiro. The real reason for discharging Malheiro was Respondent's plan to begin cleaning house as soon as Respondent learned of employee union activity. I find that Malheiro was discharged in violation of Section 8(a)(3) of the Act.

Joseph Malheiro was one of the four named as September 24 discharges. I find herein that Malheiro was discharged and that a pretextuous reason was advanced as the grounds. The evidence illustrated that Respondent moved too fast in deciding to discharge those four employees. Respondent clearly acted too hastily in the September 24 discharge of Jerry Medlin Jr. When confronted with the weakness in its position, Medlin was reinstated on that same day, but Medlin was warned that he would be discharged if he messed up again and that Respondent did not want to deal with lawyers and the unions. Guy Polhemus had also said on September 24, that he didn't "need to spend money on lawyers for this union bull shit."

It appears that after learning of the union campaign Respondent decided to discharge four employees that appeared vulnerable to discharge. There was evidence in the form of a memo from a customer, that a driver was pilfering cans. Respondent seized on that to discharge Medlin. Shortly thereafter Peter Levy was confronted with un rebuttable evidence that Medlin could not have been guilty of the pilferage

alleged in the memo because he was not first employed until over a year after the alleged pilferage started.

Malheiro appeared vulnerable because he did not have a current drivers' license and Respondent was fully aware of that situation. However, the record showed that Malheiro had done everything necessary to reinstate his license and Peter Levy knew that it was simply a matter of time before the State mailed Malheiro's license. Respondent had known of Malheiro's license situation for over a year but had never warned Malheiro that he had a deadline to secure his license. At the time of his discharge Malheiro had done everything Respondent has asked him to do and he was closer to getting his license renewed than at any time during his employment with Respondent.

Joseph Malheiro had signed an authorization card for the Union on September 5, 1992. The credited evidence which was un rebutted, shows that, at the time of his discharge Peter Levy knew that Malheiro had removed all impediments to his license suspension and was awaiting his license in the mail. However, Respondent seized on that longstanding situation to discharge Malheiro. I am convinced that Respondent used Malheiro's suspension as a pretext. He was actually discharged because of the employees' union activities. *Northport Health Services v. NLRB*, 961 F.2d 1547 (11th Cir. 1992); *Control Services*, 305 NLRB 435 (1991).

After consideration of the above evidence, along with the credited evidence showing that Respondent first learned of the union campaign on the day before Malheiro's discharge and the animus established by Respondent's illegal action on the day of Malheiro's discharge, I find that the General Counsel proved, prima facie, that Malheiro was discharged because of the employees' union activities. Respondent has offered no evidence that Malheiro would have been discharged even if it had not been for pretextual reasons.

During the week that followed Malheiro's discharge, Respondent interrogated several of its employees whether Gene DiMurro and Jerry Medlin had started the union activity. Just 6 days after Angela Sylvestre first learned of the Union's campaign on September 25, Sylvestre told the drivers that she found them to be uncooperative and that she did not want to work with uncooperative people. Respondent terminated Gene DiMurro, Clifton Harrison, Jerry Medlin Jr., Scott Stockdale, Anthony Velez Jr., Lance Mitchell, and Parri Bastian.

Angela Sylvestre testified that she decided to terminate the seven employees on September 30 to restructure the collection network. Sylvestre testified that she made that decision after talking with sorter supervisor, Raymond Vega, and being told that the drivers had told Vega that they were being laid off by Sylvestre and they did not care because they could draw unemployment. I do not credit the testimony of Angela Sylvestre regarding the reason why seven employees were terminated on September 30, 1992. The record evidence supports the General Counsel's contention Respondent terminated all eight employees because of its employees' union activities. All the terminated employees signed union authorization cards before their termination. Malheiro, DiMurro, and Medlin signed their cards on September 5, 1992. Clifton Harrison signed an authorization card on September 8, 1992. Velez, Mitchell, and Stockdale, all signed authorization cards on September 29. Bastian dated his authorization card August 29, 1992.

The credited testimony of Gene DiMurro shows that Respondent suspected Jerry Medlin with starting the Union. Gene DiMurro was questioned, as shown above, as to whether Medlin started the union activity. As shown above, Respondent was correct. Medlin was the employee that started the union activity.

I have credited the testimony of Gene DiMurro. DiMurro appeared to testify candidly on both direct and cross and I was impressed with his demeanor. I credited DiMurro's testimony regarding events on September 24. On that day DiMurro was questioned about the Union by first, Guy Polhemus. Then DiMurro was called into Peter Levy's office where Levy told him that he was going to discharge four drivers.

It is apparent, and I find, that Respondent had made a hasty decision to discharge four employees after learning of the employees' union activities. That finding is supported by the record which shows that Respondent had not bothered to investigate its alleged basis for discharging the four employees. Jerry Medlin, was not even employed when the alleged pilferage began.

Two others were not discharged after Peter Levy told DiMurro that he planned to discharge them. Only Malheiro was actually discharged that day and, as shown herein, Respondent based Malheiro's discharge on pretextuous grounds.

The terminated employees all attended a meeting at the union attorney's office on September 29. The credited testimony of Gene DiMurro shows that Peter Levy questioned him about what was going on that night and Levy's questions illustrated that he suspected the employees were involved in union activity while the trucks were parked. Angela Sylvestre met with the employees the next morning and stated that the drivers were uncooperative and that she did not want to work with uncooperative employees. I find that the General Counsel proved a prima facie case that Respondent terminated all eight employees because of their union activities. *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Respondent, at various points, argued that the discharges were caused by a number of factors. As to the September 30 discharges, Angela Sylvestre testified that she decided to discharge the employees after talking with Sorter Supervisor Raymond Vega. Vega told her, among other things, that the drivers had told him they did not care whether Sylvestre laid them off because they could draw unemployment. Sylvestre decided after hearing that, to lay off seven employees.

Sylvestre did not question which drivers made those statements to Vega, however, and she decided to retain three employees without knowing whether those three made comments about not caring if they were laid off.

Sylvestre also testified that she decided to consider reducing the size of the collection network after the drivers left three of the trucks parked on the street after work on September 29. However, there was no showing that Respondent made an effort to determine which employees were responsible for that action.

Angela Sylvestre testified that upon discovering three trucks were still on the street around 5:30 p.m. on September 29, there was consideration to having the trucks towed. When the parking area was phoned to tow the trucks the drivers had arrived there with the three trucks. She spoke with Jerry Medlin and Medlin told her the drivers wanted to

eat together and they had waited to park the trucks until they finished dinner. At that time Sylvestre discussed the situation with Guy Polhemus, Bennett Welikson, and Jeff Dorsey.

On redirect examination Sylvestre testified that she felt the drivers were acting as a group when they left the trucks parked on the street on September 29. The evidence regarding another of Respondent's supervisory agents shows more. Peter Levy talked with Gene DiMurro after 6 p.m. Levy's comments established that Respondent felt the employees were involved in union activity while the three trucks were parked on the street.

Respondent points to testimony of Anthony Steele that Peter Levy told him they may have to lay off people if performance did not improve and that Respondent would keep Steele, Brown, and Castro. However, Respondent failed to show that performance was a consideration in its September 30 decision.

Sylvestre testified that she did not consider employee performance in deciding to lay off the seven employees on September 30. She terminated the employees because she had decided to restructure the collection network. However, in consideration of retaining Mark Castro, she did consider recommendations from Peter Levy and Raymond Vega that Castro was a good worker as well as comments by Levy that he was happy with Brown and Steele's performance. On cross-examination Sylvestre was shown a prior deposition she made where she stated that Levy had recommended DiMurro, Stockdale, Castro, Brown, and Steele as good workers. She testified that she was mistaken in that deposition as to DiMurro and that she now recalls that Levy did not recommend DiMurro but he may have recommend Stockdale as well as the three retained drivers.

Sylvestre also contended that the discharges were caused by economic difficulties.

Angela Sylvestre testified that expenses were increasing and it was necessary to implement a five-bag minimum in late summer 1992 as opposed to the former one-bag minimum. The record proved that Sylvestre was disappointed and felt the drivers were uncooperative, because of their union activities. However, despite testimony from Sylvestre that it was necessary to cut expenses, Respondent's records illustrated that, at the time Sylvestre made the decision to reduce the size of the collection network, Respondent was in no worse fiscal shape that it had been on other occasions.

During August 1991 Respondent had a surplus of over \$7500; in September 1991 the surplus was \$4500; in October there was a \$6800 surplus; in November a surplus of \$3300; in December 1991 the surplus was \$3200; in January 1992 there was almost a \$6000 deficit; in February the deficit was over \$11,600; in March there was a \$4700 surplus; in April the surplus was over \$4400; in May there was a \$14,316 deficit; in June the deficit was \$14,671, and in July 1991 the deficit was reduced to \$3560. In August 1991 Respondent reduced the deficit to \$369.13. In September the deficit was increased to \$5627 but Respondent did not have the September figures or the final August figures, available for consideration at the time it discharged the seven employees on September 30.

Additionally, Respondent argued that it was advised by Gerald Smith, its financial advisor, to lay off drivers. The record showed that Smith made that recommendation in the spring of 1992. However, there was never a showing that fi-

nancial records supported eliminating three, two, or even one, of Respondent's trucks. In fact the evidence showed that Respondent had several years remaining on 6-year leases of the trucks and, at the time of this hearing, Respondent had retained all five of its trucks.

Sylvestre admitted that she did not consult with Respondent's financial advisor, Gerald Smith, about the restructuring decision. Sylvestre testified that she decided to focus on the large clients rather than the small clients that may have one bag of cans or less on occasion. Sylvestre admitted that she did not examine her list of clients before laying off the seven employees. Sylvestre also admitted that she had not decided what to do with the extra trucks when she decided to lay off the employees on September 30. She testified that she was planning on using only two of the five trucks. She planned to use two drivers on one truck and one driver on the second truck.

Sylvestre admitted that she met with Guy Polhemus after receiving the fax with the Union's petition to the NLRB. She admitted that she commented to Polhemus that the employees had been given benefits and "what more do you have to do to have unity, to have cooperation, to have a sense that you're working together." Sylvestre also admitted giving a deposition that included a statement that she considered their loyalty in deciding to retain Castro, Brown, and Steele.

The evidence shows that Angela Sylvestre was the agent of Respondent that made the decision to discharge seven collection network employees during the workday of September 30, 1992. On September 23, just 1 week earlier, Sylvestre admittedly walked out of an office because she was angry that Peter Levy had decided to discharge four collection network employees.

Two days later, Sylvestre admittedly first learned of the Union's 1992 campaign to organize the collection network employees. She had not known about the union campaign when she became angry over Levy's decision to fire four collection network employees. Five days after being told by Polhemus of the union campaign, it was Sylvestre, not Levy, that decided on short notice, to discharge seven collection network employees. Only one thing had changed since Sylvestre became angry at the thought of discharging employees Jerry Medlin Jr., Lance Mitchell, and Parris Bastian—three of the four employees that Levy wanted to discharge on September 24. On September 30, Sylvestre discharged those three plus four more collection network employees. That one change was Sylvestre's learning of the drivers' union campaign.

In view of the above, it is obvious, that although Respondent may have been in poor financial condition, that condition had existed for quite some time. Sylvestre, after thinking about the issue, according to her testimony, for less than a day, decided to take an action that had angered her during the previous week. She took that action without fully examining Respondent's situation. For example, she did not check out Respondent's obligations under its leases of its trucks. She did not check with Respondent's financial consultant even though Respondent had routinely consulted Gerald Smith for several years.

In view of the full record including Sylvestre's testimony which shows that she decided to terminate seven employees on September 30, because she found them uncooperative, I

find that economics was not the actual reason behind the decision to lay off the employees.

I am convinced that Respondent used its economic condition as a pretext to lay off seven of its employees on September 30, 1992, because of their protected union activities and that those employees would not have been laid off in the absence of their union activities. *Northport Health Services v. NLRB*, 961 F.2d 1547 (11th Cir. 1992); *Control Services*, 305 NLRB 435 (1991); *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Moreover, Respondent's advisor, Gerald Smith, testified that Respondent could not maintain fixed expenses with only one or two trucks. Smith testified that more volume was needed to support Respondent's infrastructure. He testified that the figures continue to show that Respondent must either reduce its infrastructure (which had not occurred at the time of Smith's testimony), or the revenue represented by volume must be increased. In order to increase volume it is necessary to increase the number of trucks. Additionally, Smith testified that operation of each truck with less than two employees was not shown to be efficient.

The full record does not support Respondent's contention that its September layoffs were motivated by Respondent's economic condition. I find that the record evidence did not show that Respondent would have discharged the eight alleged discriminatees in the absence of its employees' union activities.

In its answer, Respondent contended there were licensing impediments to Malheiro, Mitchell, Harrison, Bastian, DiMurro, Medlin, and Velez driving a commercial vehicle in the city of New York. The evidence herein failed to establish that Respondent discharged any of those employees for that reason. I find that Respondent failed to prove that it would have discharged any of the eight employees in the absence of protected activities.

Gerald Smith made financial recommendations to Respondent. In November 1991 Smith submitted a report to Respondent showing that based on 4.5 trucks in use, the addition of more trucks would result in improved revenue. Each truck contributed \$11,500 per month with a margin of 2000 per month. Therefore, each new truck added should have contributed approximately 24,000 margin per year. Smith testified that his recommendation continued to hold true through the fall of 1992.

Smith made a November 1991 recommendation to reorganize the collection network, but that recommendation did not involve the reduction in the number of drivers or other employees. Smith testified that his recommendation was for the collection network to grow rather than to reduce the number of employees. According to Smith, however, the volume decreased and expenses continued to increase resulting in him changing his recommendation to one of reducing the number of trucks. Smith admitted that he did not examine leases on the trucks and was unable to determine what costs would be involved in a reduction of use of trucks. Smith made recommendations to Respondent in the spring of 1992. Smith made written reports on April 21, June 2, and July 1 and 27, 1992.

The record failed to show that anything occurred which significantly changed Respondent's economic condition. Smith testified that he may have said that Respondent could

benefit from changing to high density routes and that Respondent may have benefited from following that advice and changing to four or three trucks. However, there was no showing that a study was made into that situation. There was no showing of facts supporting a change to high density routes with a reduction of one or two trucks and there was no showing how the leases of the trucks would have impacted on such a consideration. Smith admitted that he was not aware of the details of the leases.

In consideration of Smith's recommendations, there was no recommendation that would have resulted in elimination of 8 of the 11 drivers and assistants. His comments indicated a possible reduction of one or two trucks. If implemented that would have resulted in a 20- to 40-percent reduction. At the end of September Respondent reduced its drivers and assistants by over 77 percent.

Smith testified that he was surprised by Respondent's action in laying off 8 of its 11 drivers in September. Smith recalled that at that time Polhemus told him "that he had a problem with the drivers and the fracas that had occurred, and it was a surprise to me." Smith found a note in his diary on October 1, 1992, that the drivers had gone on strike, they want to be unionized.

The Bargaining Order and Other Appropriate Remedies

I find that Respondent did temporarily reduce its collection network operations on September 30 because of its employees' union activities. Despite evidence that Respondent continued to have economic problems, the full record proved that was not the reason for Respondent's September 30 decision to temporarily reduce the size of the collection network. Respondent took that action because of its collection network employees' union activities.

Such a finding is significant in regard to the remedy. Normally in a discharge situation, the employer is directed to reinstate the employee but, in the event the employees former job no longer exists, the employer is directed to reinstate the employee in a substantially equivalent position. Here, Angela Sylvestre admittedly decided to restructure the entire collection network by reducing its size from 11 to 3 employees. I have found herein that she made that decision because of the employees' union activities and that she would not have made that decision on September 30 absent the employees' union activities. In view of that finding it is proper and necessary to direct Respondent to restore the collection network to its size as of September 29, 1992. *MPC Plating, Inc.*, 295 NLRB 583 fn. 2 (1989)

The complaint alleged that the following described bargaining unit was an appropriate unit:

All collection network drivers and driver assistants employed by Respondent at its facility, excluding all clerical employees, and guards, professional employees and supervisors as defined in the act.

Gene DiMurro testified on cross-examination that Parris Bastian, Ralph Brown, Mark Castro, Tina Murrow, Clifton Harrison, Joseph Malheiro, Jerry Medlin, Lance Mitchell, Anthony Steele, Scott Stockdale, and Anthony Velez were in the bargaining unit in September 1992.

Jerry Medlin Jr. identified authorization cards signed in his presence by Gene DiMurro, Joseph Malheiro, himself, Mark

Castro, Clifton Harrison, Ralph Brown, Anthony Velez, Anthony Steele, Lance Mitchell, Scott Stockdale, and Parris Bastian. All those employees were drivers and driver assistants for Respondent. That evidence shows that the Union sought to organize employees in the bargaining unit alleged as an appropriate unit.

Counsel for the General Counsel argued that the above-described bargaining unit is an appropriate bargaining unit. Respondent contended that an appropriate unit should include the sorters. The credited evidence proved that the Union engaged in organizing activity among the drivers and driver assistants. There was no evidence that the Union sought to organize among the sorter employees. The Union may petition for an appropriate unit as opposed to the appropriate unit. See *Omni Dunfey Hotel*, 283 NLRB 475 (1987). The Board has consistently held that a unit limited to truckdrivers is an appropriate unit. *Mc-Mor-Han Trucking Co.*, 166 NLRB 700 (1967). The evidence showed that the unit sought by the Union is an appropriate unit.

As shown above, the Union made a demand for recognition on September 28, 1992. On September 29, 11 drivers and driver assistants had signed authorization cards to be represented by the Union. Ten of those drivers and driver assistants were employed on September 11 and another had been discriminatory discharged on September 24 because of his union activities. That evidence proved that the Union represented substantially more than 50 percent of the employees in the unit found appropriate.

In view of my findings herein that Respondent engaged in significant and pervasive unlawful conduct beginning shortly after it learned of its employees' union activities and continuing until after the Union made its bargaining demand, I find that Respondent's unlawful activities did tend to undermine the Union's majority status and it is unlikely that the employees will be able to express their true sentiments in an election. I find that a bargaining order should issue requiring Respondent to recognize and bargain with the Union as representative of the employees in the above-described collective-bargaining unit. *Gissel Packing Co.*, 395 U.S. 575 (1969); *MPC Plating, Inc.*, 295 NLRB 583 (1989); *Salvation Army Residence*, 293 NLRB 944 (1989).

CONCLUSIONS OF LAW

1. Respondent engaged in conduct in violation to Section 8(a)(1) of the Act by threatening its employees with discharge because of their activities on behalf of Bakery Drivers & Bakery Goods Vending Machines, Local 550, I.B.T., a labor organization; by coercively interrogating its employees about their activities on behalf of the Union; by warning its employees against involving themselves in union activities and by implying to its employees that it had discharged employees because of their union activities.

2. Respondent by discharging and refusing to reinstate its employees Joseph Malheiro, Gene DiMurro, Jerry Medlin Jr., Clifton Harrison, Scott Stockdale, Anthony Velez Jr., Lance Mitchell, and Parris Bastian, and by reducing the size of its collection network, because of its employees' activities on behalf of the Union, has engaged in conduct in violation of Section 8(a)(1) and (3) of the Act.

3. Respondent by refusing to recognize and bargain with Bakery Drivers & Bakery Goods Vending Machines, Local 550, I.B.T., following demand for recognition from the

Union at a time when the Union represented a majority of the employees in the below-described collective-bargaining unit, while it engaged in conduct in violation of provisions of the Act, engaged in conduct in violation of Section 8(a)(1) and (5) of the Act:

All collection network drivers and driver assistants employed by Respondent at its facility, excluding all clerical employees, and guards, professional employees and supervisors as defined in the Act.

THE REMEDY

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

Having found that Respondent has illegally reduced the size of the collection network, and has illegally discharged its employees Joseph Malheiro, Gene DiMurro, Jerry Medlin Jr., Clifton Harrison, Scott Stockdale, Anthony Velez Jr., Lance Mitchell, and Parris Bastian, I shall order Respondent to offer Malheiro, DiMurro, Medlin, Harrison, Stockdale, Velez, Mitchell, and Bastian full and immediate reinstatement to their former positions and to restore the collection network to its former size. I further order Respondent to make Malheiro, DiMurro, Medlin, Harrison, Stockdale, Velez, Mitchell, and Bastian whole with interest, for any loss of earnings they suffered as a result of the discrimination against them and that Respondent remove from its records any reference to the unlawful actions against Malheiro, DiMurro, Medlin, Harrison, Stockdale, Velez, Mitchell, and Bastian, and notify each of them in writing that Respondent's unlawful conduct will not be used as a basis for further personnel action. Backpay shall be computed as described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that Respondent has illegally refused to recognize and bargain with the Union as representative of the employees in the below described collective-bargaining unit, I shall order that on request by the Union, Respondent must recognize and bargain with the Union:

All collection network drivers and driver assistants employed by Respondent at its facility, excluding all clerical employees, and guards, professional employees and supervisors as defined in the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, it is ordered that Respondent, We Can, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

¹If 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.

(a) Threatening its employees with discharge because of their activities on behalf of Bakery Drivers & Bakery Goods Vending Machines, Local 550, I.B.T., or any other labor organization; coercively interrogating its employees about their union activities; warning its employees not to engage in union activities and implying to its employees that it has discharged its employees because of their union activities.

(b) Discharging and refusing to reinstate its employees, and reducing the size of its collection network, because of its employees union activities.

(c) Engaging in conduct in violation of Section 8(a)(1) and (5) of the Act by refusing to recognize and bargain, upon request, with Bakery Drivers & Bakery Goods Vending Machines, Local 550, I.B.T. as the exclusive collective-bargaining agent of the employees in the below described unit:

All collection network drivers and driver assistants employed by Respondent at its facility, excluding all clerical employees, and guards, professional employees and supervisors as defined in the Act.

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

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

(a) Offer employees Joseph Malheiro, Gene DiMurro, Jerry Medlin Jr., Clifton Harrison, Scott Stockdale, Anthony Velez Jr., Lance Mitchell, and Parris Bastian, immediate and full reinstatement, and restore the collection network to its size as of September 29, 1992, and make Joseph Malheiro, Gene DiMurro, Jerry Medlin Jr., Clifton Harrison, Scott Stockdale, Anthony Velez Jr., Lance Mitchell, and Parris Bastian, whole for any loss of earnings plus interest, they suffered by reason of its illegal actions.

(b) Rescind its discharge of Joseph Malheiro, Gene DiMurro, Jerry Medlin Jr., Clifton Harrison, Scott Stockdale, Anthony Velez Jr., Lance Mitchell, and Parris Bastian, and remove from its files any reference to those actions and notify each of those employees in writing that this has been done and that evidence of its unlawful actions will not be used against them in any way.

(c) On request, recognize and bargain with Bakery Drivers & Bakery Goods Vending Machines, Local 550, I.B.T. as the exclusive collective-bargaining agent of the employees in the below-described unit:

All collection network drivers and driver assistants employed by Respondent at its facility, excluding all clerical employees, and guards, professional employees and supervisors as defined in the Act.

(d) Post at its facility in New York, New York, copies of the attached notice.² Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained

²If 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."

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.

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