

Atlantic Limousine, Inc. and Teamsters Local Union No. 331, affiliated with International Brotherhood of Teamsters, AFL-CIO. Cases 4-CA-21505, 4-CA-21552, 4-CA-21697, 4-CA-21740, and 4-RC-18132

March 24, 1995

DECISION, ORDER, AND DIRECTION OF
SECOND ELECTION

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

On April 26, 1994, Administrative Law Judge Walter H. Maloney issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed exceptions, a supporting brief, and an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions only to the extent consistent with this Decision and Order.

1. We find merit in the General Counsel's exception to the judge's dismissal of the allegation that the Respondent's suspension of employee Joseph Pizzutillo for refusing a fare violated Section 8(a)(3) and (1) of the Act.

The Respondent operates a luxury limousine service in Atlantic City, New Jersey. It operates under contract to several casinos in order to provide round-the-clock service to the casinos' customers. The Respondent maintains dispatch centers and driver waiting rooms at these casinos, from which it assigns fares to the driv-

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

In adopting the judge's finding that the Respondent violated Sec. 8(a)(1), (3), and (4) by discharging Glenn Gerrity, we find it unnecessary to rely on the judge's characterization of the Respondent's claim that dispatchers did not notice Gerrity's alleged \$3 overcharge of his parking and other fees as "inherently unbelievable."

We find merit in the General Counsel's exceptions to the following inadvertent errors by the administrative law judge which do not affect the conclusions herein. The judge incorrectly stated that employee Henry Purcell worked continuously from 10 p.m. on April 23, 1992, until approximately that time on April 24. In fact, Purcell worked from 10 p.m. on April 22 until 7:30 p.m. on April 23. The judge also incorrectly stated that Purcell did not work the day after this long shift. Finally the judge incorrectly found that employee Louis Babich, as part of his solicitation of union authorization cards, had distributed cards to employees in the Respondent's dispatch office.

ers. Pizzutillo worked out of the Trump Castle casino, where Stan Kell acted as the dispatcher.

The judge found that Pizzutillo and the Respondent had an agreement that Pizzutillo would not be given assignments which would prevent him from arriving home by 1 a.m. in order to care for his invalid roommate. Around the end of April 1993, during the late afternoon, the Respondent assigned Pizzutillo to pick up a passenger at the Showboat casino and deliver him to the Jackson Heights area in the northern part of New York City's Queens Borough. However, upon Pizzutillo's arrival at the Showboat casino, the Respondent's dispatcher at that location, Gary Ng, informed him that the fare had been assigned to another driver and that he had been reassigned to a fare to John F. Kennedy Airport in southern Queens. Pizzutillo informed dispatcher Gary Ng that he was refusing the fare and going home.² Ng did not respond, and Pizzutillo returned to the Trump Castle, where dispatcher Kell suspended Pizzutillo for 4 days, a discipline which the Respondent, through Supervisor David Geiger Jr., subsequently affirmed.

While the judge found ample evidence of animus toward union activity, both in regard to Pizzutillo and others, he nonetheless concluded that the Respondent did not suspend Pizzutillo in reprisal for his union activity, but because he refused the run in an abrupt fashion, which made it difficult for the Respondent to fulfill its contract with the casino. We disagree.

The General Counsel clearly established the Respondent's union animus. As detailed in his decision, the Respondent committed serious unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, including an unlawful interrogation by Supervisor David Geiger Jr. of Pizzutillo, a known union activist, concerning his attendance at a union meeting and the size of this meeting. The Respondent suspended Pizzutillo a mere week after this incident.

In light of these unfair labor practices and the timing of Pizzutillo's suspension, we find that the General Counsel established a prima facie showing under *Wright Line*³ that the suspension was motivated by Pizzutillo's union activities. We further find, contrary to our dissenting colleague, that the Respondent failed to rebut this prima facie showing.

There is no support in the record for the judge's conclusion, with which our dissenting colleague agrees, that the abrupt fashion in which Pizzutillo refused the run to the airport was the motivating factor in the Respondent's decision to impose a 4-day sus-

²Pizzutillo testified that he refused the airport fare because he felt that the traffic patterns on New York City's road network would prevent him from reaching home by 1 a.m.

³251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983).

pension on Pizzutillo. As noted above, dispatcher Ng did not tell Pizzutillo at the Showboat, the scene of the incident, that he was being suspended. Further, Pizzutillo testified, without contradiction, that dispatcher Kell did not inform him at the time of his suspension why he was being suspended.⁴ General Manager Leon Geiger testified that when Pizzutillo subsequently appealed the suspension to him, he immediately referred him to his son, David Geiger Jr. It was only at this point that the Respondent gave an explanation to Pizzutillo for his suspension, i.e., David Geiger Jr. told him that he was sustaining the suspension because Pizzutillo had thrown a paper at dispatcher Ng. When Pizzutillo denied this action, Geiger then stated that Pizzutillo had shouted at the dispatcher. Furthermore, Geiger testified at the hearing that Pizzutillo was suspended for harassing the casino's marketing personnel regarding the change in assignment. And, most significantly, Geiger testified that Pizzutillo was not suspended for his refusal of a driving assignment.

From the above, it is clear that the Respondent has never asserted that Pizzutillo's suspension was based on the fact that Pizzutillo refused a driving assignment. It is equally clear that David Geiger Jr. responded both to Pizzutillo and at the hearing with shifting reasons for Pizzutillo's suspension.⁵ It is the Board's policy that a "respondent's inability to adhere with consistency to any explanation for its action in terminating an employee warrants an unfavorable inference against that respondent." *Laidlaw Transit*, 315 NLRB 509 (1994), quoting *P*I*E Nationwide*, 282 NLRB 1060, 1065 (1987). At the very least, such inconsistent explanations constitute unreliable proof of innocent motivation. See *Pincus Elevator & Electric Co.*, 308 NLRB 684, 695 (1992); *Reno Hilton*, 282 NLRB 819, 835 (1987).

Further, Geiger testified at the hearing that the Respondent's usual response to a driver's refusal to take a run was to send him home for the day. Such testimony clearly undercuts our dissenting colleague's conclusion that Pizzutillo's 4-day suspension was discipline "appropriate to the offense" or the judge's conclusion that it was "modest discipline."

Finally, we note, in response to our dissenting colleague, that although Pizzutillo did not raise his agreement with the Respondent as a defense to his refusal of the driving assignment, the fact remains that the Respondent never asked Pizzutillo why he refused the assignment but rather advanced shifting and internally inconsistent reasons for the suspension. Under these circumstances, we would not find that Pizzutillo's fail-

ure to mention the agreement, a fact of which Respondent was aware, constitutes rebuttal of the General Counsel's prima facie case.

Accordingly, we reverse the judge and find that the Respondent failed to establish that it would have suspended Pizzutillo in the absence of his union activity and that the Respondent's suspension of Pizzutillo violated Section 8(a)(3) and (1) of the Act.

2. We also find merit in the General Counsel's exception to the judge's apparent inadvertent failure to find that the Respondent's excessive deduction of taxes from a paycheck of employee Glenn Gerrity and its reduction of employee Walter Jenkins' hours violated Section 8(a)(3) and (1) of the Act, as alleged in the complaint.

In regard to the deduction from Gerrity's paycheck, the judge found that in late February and early March 1993 the Respondent committed a series of unfair labor practices against Gerrity, the employee who had initiated the Union's organizing campaign. In this regard, the judge found that the Respondent had unlawfully docked Gerrity's pay and charged him for the cost of three videotapes. In addition, the judge found that the Respondent had unlawfully cut Gerrity's hours and unlawfully discharged him. In this context, it is clear that the Respondent's admitted deduction of half of Gerrity's yearly bonus check for taxes was part of the Respondent's unlawful conduct toward Gerrity and thus constituted a violation of Section 8(a)(3) and (1) of the Act, as alleged.

In regard to the reduction of Jenkins' hours, the judge found that shortly after Jenkins' known union activities, the Respondent had reduced his hours of work despite the availability of work and that the Respondent's dispatcher, Ng, told Jenkins that the Respondent had told him not to give Jenkins work. The judge further found that Jenkins' subsequent discharge violated Section 8(a)(3), (4), and (1) of the Act. Under these circumstances, we find that the General Counsel established a prima facie showing that the Respondent's reduction of Jenkins' hours was motivated by his union activities. The Respondent asserts in its brief that the General Counsel failed to establish that Jenkins' hours were fewer than the average hours worked by other employees and that the alleged reduction occurring in an isolated 2-week period was statistically insignificant. Even if true, the Respondent's assertions do not constitute a defense to the reductions in Jenkins' hours. The Respondent has offered no other defenses, and, as it has failed to establish that it would have reduced Jenkins' hours in the absence of his union activities, we find that the Respondent violated Section 8(a)(3) and (1) by reducing Jenkins' hours, as alleged in the complaint.

⁴Dispatcher Kell did not testify at the hearing.

⁵The judge mistakenly identified the Respondent's official promulgating the shifting explanations as Leon Geiger, instead of David Geiger Jr.

ORDER

The National Labor Relations Board orders that the Respondent, Atlantic Limousine, Inc., Pleasantville, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees concerning their union activities or the union activities of other employees.

(b) Threatening employees with layoffs, subcontracting of work, or plant closure if they select the Union as their bargaining representative.

(c) Promising employees benefits if they will abandon their union activities.

(d) Soliciting grievances from employees during an organizing campaign with a view toward adjusting the grievances.

(e) Discouraging membership in or activities on behalf of Teamsters Local Union No. 331, affiliated with the International Brotherhood of Teamsters, AFL-CIO, or any other labor organization, by discharging employees, denying them work opportunities, reducing their hours of work, suspending them, conditioning improvements in wages, hours, or working conditions upon the abandonment of union activities, or harassing employees with groundless complaints demanding financial restitution or through paycheck deductions.

(f) Discharging or otherwise discriminating against employees because they have filed charges or given testimony under the Act.

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

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

(a) Offer Glenn Gerrity, Louis Babich, Henry Purcell, and Victor Jenkins full and immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or to any other rights and benefits previously enjoyed, and make them whole for any loss of pay and benefits which they may have suffered by reason of the discrimination practiced against them, with interest, as provided in the remedy section of the judge's decision.

(b) Rescind its unlawful suspension of Joseph Pizzutillo and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest computed in the manner set forth in the remedy section of the judge's decision.

(c) Remove from its files any reference to their unlawful discharges, suspension, or unlawful discipline and notify the employees in writing that this has been done and that the discharges, suspension, or discipline will not be used against them in any way.

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

(e) Post at its Pleasantville, New Jersey place of business and at each of the hotel-casino dispatch offices in Atlantic City, New Jersey, from which it dispatches limousine drivers copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

IT IS FURTHER ORDERED that Case 4-RC-18132 is severed from the unfair labor practice cases, that the election conducted in Case 4-RC-18132 is set aside and that Case 4-RC-18132 is remanded to the Regional Director for Region 4 for the purpose of conducting another election at such time as he believes that a representation election can be conducted free and clear of the effects of intimidation and coercion found herein.

[Direction of Second Election omitted from publication.]

MEMBER COHEN, dissenting in part.

Contrary to my colleagues, I agree with the judge that the Respondent has sustained its burden of showing that driver Joseph Pizzutillo was lawfully suspended for 4 days because of his refusal to accept a driving assignment.¹

My colleagues state that, when Pizzutillo turned down his assignment at 5:30 p.m. in the afternoon, he was enforcing a private agreement with the Respondent. Under that agreement, the Respondent promised to release Pizzutillo by midnight each night in order that he could be at home by 1 a.m.² However, there is no record evidence that Pizzutillo said anything to the dispatcher about this agreement or his desire to leave

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹ The General Counsel does not allege that the assignment was unlawfully motivated.

² The agreement did not authorize Pizzutillo to refuse assignments.

work by midnight. Rather, Pizzutillo simply told the dispatcher: "Gary, I'm not taking this assignment. I'm going home early." Nor did Pizzutillo raise the agreement in his subsequent appeals to Respondent officials.

In sum, the Respondent was confronted with Pizzutillo's refusal to perform work, and there was no claim by Pizzutillo that the refusal was privileged by an agreement. The dispatcher, understandably irritated, immediately administered discipline in a measure appropriate to the offense.³

My colleagues argue that Respondent gave varying reasons for the suspension, and that this variance bespeaks a discriminatory motive. The argument has no merit. The fact is that all of the reasons given for the suspension are ultimately grounded in Pizzutillo's refusal to perform the assignment. After Pizzutillo refused the assignment, dispatcher Ng immediately informed dispatcher Kell of the refusal. Kell immediately suspended Pizzutillo. Although Kell did not explicitly tell Pizzutillo of the reason for the suspension, it was perfectly obvious that it was based on the conduct that had just occurred, viz., the refusal to perform the assignment.

Pizzutillo appealed the suspension to Geiger and he upheld it. Geiger told Pizzutillo that he was doing so because Pizzutillo had thrown a paper at Ng. My colleagues cite this as a shifting reason. The fact is that the paper was thrown as part of the altercation concerning Pizzutillo's refusal to perform the work.

Geiger testified that he upheld the suspension because Pizzutillo had harassed personnel at the casino. Again, this harassment was Pizzutillo's response to the assignment that he refused to perform.

In sum, the refusal to perform the assignment was the root cause of the suspension. Concededly, Pizzutillo committed other indiscretions in connection with the refusal, and Respondent took these into account as well. But these acts, themselves unprotected, can hardly be used to condemn the suspension as unlawful. The simple fact, found by the judge, is that the refusal to perform the assignment, including the manner of the refusal and the conduct associated therewith, was the reason for the suspension.

Finally, my colleagues argue that Pizzutillo was treated differently from others who refused assignments in the past. However, as shown, Pizzutillo did more than simply refuse a work assignment. He committed other unprotected acts as well.

In these circumstances, I agree with the judge that Pizzutillo was suspended for his refusal to perform an assignment, and not in reprisal for his union activities.

³There is no evidence that the Respondent had tolerated similar misconduct by excusing prior refusals of driving assignments by Pizzutillo or any other driver. Pizzutillo testified that he himself had never previously turned down an assignment.

Accordingly, I would dismiss the complaint allegation that he was disciplined in violation of Section 8(a)(3).

APPENDIX

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

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

WE WILL NOT coercively interrogate employees concerning their union activities or the union activities of other employees.

WE WILL NOT threaten employees with layoffs, subcontracting of work, or plant closure if they select the Union as their bargaining representative.

WE WILL NOT promise employees benefits if they will abandon their union activities.

WE WILL NOT solicit grievances from employees during an organizing campaign with a view toward adjusting the grievances.

WE WILL NOT discourage membership in or activities on behalf of Teamsters Local Union No. 331, affiliated with the International Brotherhood of Teamsters, AFL-CIO, or any other labor organization, by discharging employees, denying them work opportunities, reducing their hours of work, suspending them, conditioning improvements in wages, hours, or working conditions upon the abandonment of union activities, or harassing employees with groundless complaints demanding financial restitution or through paycheck deductions.

WE WILL NOT discharge or otherwise discriminate against employees because they have filed charges or given testimony under the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act. Those rights include the right to form, join, or assist labor organizations and to engage in other protected activity for their mutual aid and benefit.

WE WILL offer full and immediate reinstatement to Glenn Gerrity, Louis Babich, Henry Purcell, and Victor Jenkins to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or to other rights and benefits which they formerly enjoyed, and WE WILL make them whole for any loss of pay and benefits which they may have suffered by reason of the discriminations practiced against them, with interest.

WE WILL rescind our unlawful suspension of Joseph Pizzutillo and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination practiced against him, with interest.

WE WILL remove from our files any references to unlawful discharges, suspension, or unlawful discipline given to any employee and notify the employees in writing that this has been done and that the discharges, suspension, or discipline will not be used against him in any way.

ATLANTIC LIMOUSINE, INC.

Steven B. Goldstein, Esq., for the General Counsel.
Julius M. Steiner, Esq. and *Steven Steinberg, Esq.*, for the Respondent.
Walt DeTreu, Esq., of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

I. FINDINGS OF FACT

A. *Statement of the Case*

WALTER H. MALONEY, Administrative Law Judge. This case came on for hearing before me on a consolidated unfair labor practice complaint¹ issued by the Regional Director for Region 4, which alleges that Respondent Atlantic Limousine, Inc.² violated Section 8(a)(1), (3), and (4) of the Act. Con-

¹The Respondent admits, and I find, that it is a New Jersey corporation which maintains a facility at Pleasantville, New Jersey, where it has been engaged in providing limousine service in the Atlantic City area, principally to patrons of gambling casinos. During the past year, in the course and conduct of this business, it derived gross revenues in excess of \$500,000 and has provided services valued in excess \$50,000 to the Atlantic City hotels and casinos which are directly engaged in interstate commerce. Accordingly, the Respondent is an employer engaged in interstate commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. The Union is a labor organization within the meaning of Sec. 2(5) of the Act.

²The principal docket entries in the complaint cases are as follows:

Charge filed in Case 4-CA-21505 by the Union against the Respondent on March 3, 1993; charge filed in Case 4-CA-21522 by the Union against the Respondent on March 22, 1993, and amended on April 19, 1993; consolidated complaint in the aforementioned cases issued against the Respondent by the Regional Director for Region 4 on April 19, 1993; Respondent's answer filed on April 27, 1993; charge filed in Case 4-CA-21697 by the Union against the Respondent on May 1, 1993; charge filed in Case 4-CA-21740 by the Union against the Respondent on May 26, 1993; consolidated complaint including all cases issued against the Respondent by the Regional Director for Region 4 on July 16, 1993; Respondent's answer filed on July 21, 1993; amended charge in Case 4-CA-21697 filed by the Union against the Respondent on December 15, 1993; amended consolidated complaint issued against the Respondent by the Regional Director for Region 4 on December 17, 1993; Respondent's answer filed on December 28, 1993; hearing held in Philadelphia, Pennsylvania, on January 3-5, 1994; and briefs filed with me by the General Counsel, the Charging Party, and the Respondent on or before March 2, 1994.

The principal docket entries in the representation case are as follows:

Petition filed by the Union in Case 4-RC-18132 on May 26, 1993, seeking an election in a unit of the Respondent's full-time and part-time drivers, detailers, and mechanics; Regional Director's Decision and Direction of Election issued on July 9, 1993; election held on August 9, 1993; corrected tally of ballots filed on August 18,

solidated with the complaint are objections filed by Teamsters Local Union No. 331, affiliated with the International Brotherhood of Teamsters, AFL-CIO (the Union) which allege that the Respondent performed acts of coercion and intimidation within the *Ideal Electric*³ period which warrant setting aside the election that took place on August 9, 1993.

More particularly, the consolidated complaint alleges that the Respondent solicited employee complaints and grievances during the period when an organizing drive was in progress and did so with a view toward adjusting those grievances. It further alleges that the Respondent promised an employee increased benefits and improved terms and conditions of employment, including a good job reference, if he would withdraw an unfair labor practice charge that had been filed on his behalf; that it interrogated employees concerning their union activities and the union activities of other employees; and that it threatened to subcontract work and to close the business if employees unionized. The consolidated complaint further alleges that the Respondent harassed certain employees because they had become active in organizing the Union, that it discharged employees Glenn Gerrity, Louis Babich, Henry Purcell, and Victor Jenkins because they had supported the organizing drive and suspended employee Joseph Pizzutillo because he had been an outspoken union member. The consolidated complaint also alleges that the discharges of Gerrity and Jenkins took place because they had been the subject of unfair labor practice charges filed on their behalf or had sought the assistance of the Board in resolving grievances. The independent objection to the election alleges that, on the day of the election outside the polling place, a supervisor discouraged an employee from voting by telling him that the Company had won the election and that it would be futile for him to vote.

The Respondent denies the commission of any independent violations of Section 8(a)(1) of the Act and objectionable conduct and asserts that each of the alleged discriminatees was discharged or suspended for cause. In the case of Gerrity the asserted cause was the padding of an expense reimbursement voucher. For Babich, it was an unsafe driving record resulting in an excessive number of insurance company chargeable points. In the case of Pizzutillo, the suspension was for a dispute with a dispatcher and its attendant insubordination. Purcell was assertedly discharged for showing up late for work without calling in, while Jenkins was assertedly discharged because he had become a disgruntled employee. On these contentions the issues here were joined.⁴

B. *The Unfair Labor Practices and Objectionable Conduct Alleged*

1. Background

Since about 1978, the Respondent has operated a luxury limousine service in Atlantic City, New Jersey. A majority of its business is devoted to servicing three major casinos—Trump Castle, Caesar's, and Showboat. A subsidiary limousine company called Enchantment, organized and operating

1993; Union's objections to conduct of election filed on August 19, 1993; and order consolidating objections with complaint case issued on December 10, 1993.

³*Ideal Electric Co.*, 134 NLRB 1275 (1961).

⁴The General Counsel moved to correct the transcript in certain particulars. No objection was lodged to the motion so it is granted.

under an affirmative action program aimed at stimulating minority-owned businesses, functions under the Respondent's general supervision and services a fourth casino, Resorts International.

The Respondent is a contractor of the casinos it services. These contracts are virtually terminable at will. The Respondent is obligated to provide customers of the casino-hotels with limousine service around the clock, 7 days a week. To fulfill contracts, it has not only a principal business office 7 miles away in Pleasantville, New Jersey, but also maintains a dispatch desk and drivers' room at each hotel where drivers report for work and from which runs are normally assigned.⁵ The vehicles in question are so-called "stretch limos" which are equipped with television sets and VCRs. Customers are typically chauffeured to airports in Philadelphia and New York but many, regarded by the drivers as "high rollers," frequently request other destinations, often at much greater distances. All drivers are required to dress either in tuxedos or in conservative suits which they must provide at their own expense. As might be expected, tips form an important part of a driver's compensation since each driver's base wage is only \$2.38 an hour. At the time of the events here in issue, the Respondent employed about 14 dispatchers and about 100–110 drivers.⁶

The Respondent is a family-owned and operated concern. Some 90 percent of its stock is owned by Daniel Geiger, who is president of the corporation and an active operating officer. Geiger spends the bulk of each week at the dispatch offices, principally the office at Trump's Castle. The general manager at the Pleasantville office is Daniel's half-brother, Leon. Leon's children—Carl, Louis, and David Jr. are also

⁵Limousines used by the Respondent are rented, not owned. However, it maintains a garage in suburban Atlantic City where it gasses and lubricates these vehicles and performs various kinds of first-line maintenance.

⁶There is a dispute between the parties in this case as to whether dispatchers are supervisors within the meaning of the Act. The dispute was first aired at the representation case hearing which took place on June 15, 1993. The Respondent insisted that dispatchers be included in the bargaining unit while the Union contended that they were statutory supervisors. In his Decision and Direction of Election, dated July 9, 1993, the Regional Director concluded that dispatchers were supervisors. In coming to this conclusion, he noted that dispatchers were paid either on a salaried basis or at hourly rates greatly in excess of the rate received by drivers and have different and more generous vacation allowances. He noted further that they remain at the dispatch desk throughout shifts and only 1 out of 14 dispatchers possessed a requisite operator's license enabling him to drive a limousine. Personnel decisions are based in part on facts obtained from dispatchers, who are empowered to adjust driver time-cards and tip allowances. Dispatchers make work assignments, can grant time off, and are responsible for sending drivers home if they are unfit to drive. During most of the operating hours of most of the casinos, the dispatcher is the highest ranking Respondent representative on the premises. It also appears that, if the Respondent's contention were to prevail, the Respondent would have only 3 or 4 supervisors to manage a work force of 100–110 people located at several dispersed jobsites. There is nothing in the record in this case which would warrant disturbing the Regional Director's determination. Accordingly, I also conclude that the Respondent's dispatchers are supervisors within the meaning of the Act.

employed by the Respondent. Louis is in charge of the service facility and David Jr. and Carl are dispatchers.⁷

2. Events in 1992 and the first half of 1993

Throughout 1992 the Respondent was hearing what it called rumblings of employee dissatisfaction and interest in union organization, so it retained labor counsel to advise it regarding a proper response. There is no question that it opposes and has opposed the idea of the unionization of its work force. Nothing concrete occurred until January 1993 when driver Glenn Gerrity⁸ happened to chauffeur a passenger who tried to interest him in joining the Teamsters. The customer put Gerrity in contact with Union Business Agent Pat Quinn. Quinn gave Gerrity union cards, one of which he signed on January 12. He then began passing out other cards to various drivers of his acquaintance, doing so both in the dispatcher's office and out on the road.

Among those who received a card from Gerrity was Louis Babich, who signed one on February 16. Babich had applied for a job with the Respondent in 1992 but was turned down when he disclosed that he had 10 points on his driving record. He applied again in August 1992, and was hired. At that time, he disclosed to David Jr. that he had eight points. Notwithstanding this disclosure, he was hired and was told to go to the Pleasantville office to meet Leon. At that office, he filled out a new application and was told by Leon not to fill in the portions thereof relating to his driving record. He did disclose on the form that, at one time, his license had been revoked.

Babich was assigned to the Resorts International Hotel, which was then being serviced by the Respondent. In October, Leon visited the dispatch office and told Babich and presumably others that the contract with Resorts International was being given to Enchantment and that they would thenceforth be working for Enchantment. Babich continued working for Enchantment until December when he quit to go home to Mexico for the holidays. When he returned, he applied to and went to work for the Respondent and was assigned to drive out of the Showboat, where he continued to work until he was discharged on February 26.

The State of New Jersey maintains and issues motor vehicle reports (MVRs) listing infractions of the law by holders of New Jersey licenses. In addition, the Reliance Insurance Companies, the Respondent's carrier, acting in conjunction with a local insurance broker, monitors drivers' records and maintains its own motor vehicle record, which includes not only driving infractions but accident records as well. It assigns points to these records, just as the State does, and also charges drivers points for accidents for which it believes the driver to be at fault. This process involves an exercise of

⁷Daniel's brother, David, is also an employee of the Company but he did not figure greatly in the events described in the record.

⁸Gerrity was first hired as a driver in January 1992, and worked out of Caesar's, the Respondent's largest customer. During the month of February, Gerrity lodged a complaint with Daniel, whom he had come to know well and with whom he had a cordial working relationship. He told Daniel that full-time drivers were not getting enough hours because dispatcher David Jr. was giving too much work to part-timers. Daniel agreed and said he would speak to David Jr. A few days later, Gerrity complained again, saying that nothing had been done about his first complaint. Daniel, who was getting ready to go on vacation, said he would leave a note for David Jr.

judgment on its part (or on the part of its local broker or risk management agent) and often results in discussions between the Respondent, the driver, and the broker aimed at reducing the number of insurance company points on a driver's record by reevaluating fault for a charged accident. Both the State MVRs and the insurance company MVRs are "rolling records" in that points remain on a driver's record only for a period of 3 years from the date of infraction or chargeable accident and then are automatically removed at the expiration of that time. If a driver has no violations and no accidents for a 3-year period, his record becomes completely clear, regardless of how many points he might have had at one time.

On or shortly after February 18, Respondent received from its insurance broker, Ulrich Voorhees Warner Associates, a document entitled "Loss Control Advisory." This report is periodically obtained by the broker from information supplied by DAC Services, a company which has direct computer access to New Jersey motor vehicle files. It was a list of employee MVR points. Also included were a list of six drivers, including Gerrity, for whom no records could be found. One individual, Frank Torres, was listed as having had his driver's license suspended. Listed with six or more points were drivers Letitia Gordon, Joseph Pizzuttillo, Richard Negron, Louis Rivera, Robert Starr, and Louis Babich. A great many others were listed as having 4-5 points. On February 25, Kenneth White, Assistant Vice President of Ulrich Voorhees and the executive in charge of the Respondent's insurance account, wrote Louis a letter concerning Negron and Starr, noting that they had six or more points and that "Reliance has indicated that an individual with more than 6 points over a 3 year period should be prohibited from driving your vehicles." On the following day, he wrote a letter specifically directed to the fact that the driver's license of Torres had been suspended. On the same day he wrote Louis a letter concerning Babich, indicating that "this individual has 'eight points' on this evaluation system and Reliance has indicated that any individual with more than six points over a three-year period should be prohibited from driving your vehicles."

On February 26, when Babich called his dispatcher at Showboat to inquire whether he should come to work,⁹ the dispatcher transferred the call to David Jr. at Trump's Castle. David Jr. told Babich that he had too many MVR points to drive. Babich said that there must be some mistake and that the report must have been referring to his son, who had the same name. David Jr. insisted that there was no mistake and told Babich he had too many points to work. He referred Babich to Louis at the garage in Pleasantville. Louis was the Company's official who was in charge of Company's relations with its insurance company and the local broker.

Babich immediately called Louis, who asked Babich for police reports concerning his charged accidents. He also referred Babich to White at the insurance brokerage who, in the next few days, held several phone conversations with both Babich and Louis¹⁰ concerning this problem. As noted, this procedure is commonplace between the broker and its customers and is aimed at adjusting the insurance carrier's

⁹The standard operating procedure followed by the Respondent's drivers is to call their dispatcher an hour or so before their expected reporting time to inquire if work will be available.

¹⁰Louis did not testify in this proceeding.

MVR point list, whenever possible, so as to permit a driver to continue to work.

As a result of these conversations, the insurance company or its agent reevaluated Babich's MVR and removed from that record a two-point accident which it felt was not his fault and not properly chargeable. However, it retained one accident on his MVR, leaving Babich with six points. On March 3, White again wrote Louis and stated:

After review of the Motor Vehicle Accident Reports that you sent me, it still appears that Mr. Babich does not meet the criteria of your insurance carrier. Specifically, based upon the facts of the accidents, it appears that one of them still is "at fault" and he still has "6 points" on the evaluation system which would prohibit him from driving any of your vehicles. Should Mr. Babich clear up any more points, we would be able to reconsider his status.

Thus, Babich's discharge was reaffirmed. However, none of the other drivers listed in the February 18 loss control advisory with six or more points was discharged. The Union filed an unfair labor practice charge relating to Babich on March 22.

In late February or early March, dispatcher David Jr. asked to see Gerrity's driver's license. Gerrity felt that this was a peculiar request since he and all other driver applicants must exhibit their drivers' licenses to the Company when they are interviewed for a job. (When he was hired, Gerrity presented his license to Leon, who photostatted it.) Gerrity received a yearly bonus check for job performance at or about the same time. The sum of \$75 had been deducted. He asked David Jr. for the reason for the deduction and was told it was for a cash job. He did not know which job it was. Gerrity protested the deduction and the amount was later restored.¹¹

During this same period of time, David Jr. claimed that Gerrity had failed to turn in some movies at the end of a specially contracted run which he had driven the previous June or July. Gerrity reminded David Jr. that the incident in question had resulted in an arrest of himself and underage passengers who had been drinking and that the films had been confiscated by the police, along with the Respondent's van. At that point the matter was dropped. Gerrity was concerned because his hours had been cut during late February,¹² so he filed the first of several charges in this case, alleging that he was being harassed because of his union activities. The charge was filed on March 5 and was served on the Respondent on March 10.

Gerrity was discharged on March 10, the day the charge arrived, because he had assertedly falsified two expense reimbursement vouchers in the aggregate of \$3. On one voucher, submitted at the end of a run on January 29, he asked for \$4 when the attached receipt showed that he was entitled to only \$3. On another voucher, dated February 8, he asked for \$8 but submitted receipts showing that he was entitled to only \$6. On each occasion he was paid the requested

¹¹Most trips are paid for by the customer in advance, usually by credit card. Occasionally, a customer pays the driver in cash at the completion of a run.

¹²The parties agreed that Gerrity, who normally worked 50-55 hours a week and often more, worked 36-1/4 hours during the week ending February 28 and 27 hours during the week ending March 7.

amounts by the dispatcher at the end of the run.¹³ Early in March, these vouchers were audited and the errors were discovered. Gerrity had not been given any work at all on March 7, 8, or 9, although he had called in to see if work was available. On March 10, he called to see if work was available and spoke to Daniel, who had just returned from vacation. Daniel told Gerrity in the course of the phone call that he had been fired for overcharging the Company \$3 on a Philadelphia Airport run. Gerrity protested, saying he had not had a Philadelphia run in a long time. Daniel admitted that the overcharge had occurred some time ago. Gerrity asked him "You mean you are accusing me of stealing \$3.00?" Daniel said, "You explain it to me," adding that he was sorry, but he had to fire him.

On March 15, Gerrity went to Caesar's to pick up his final paycheck and spoke with Daniel in the driver's room at the casino. I credit Gerrity's testimony to the effect that, in a private conversation, he asked Daniel if Daniel was really firing him for stealing \$3. Daniel admitted that he was not. Gerrity put the question to Daniel, "You know I started the Union?" Daniel admitted that he knew this was true and also knew that Gerrity had filed charges against the Company.

Gerrity asked Daniel what he wanted Gerrity to do. Daniel asked Gerrity to sign what amounted to a withdrawal slip. Gerrity replied he could not do so because he had "started all this" for his wife and kids and for the wives and kids of all the other drivers. Daniel told Gerrity that he had been doing a fine job, was one of the Company's best drivers, and offered to transfer him to the Showboat and give him a good schedule if he would stay. Gerrity mentioned that he could not get another job if he had a reference showing that he had been fired for stealing, so Daniel also offered to give him a good reference or to give him the hours he wanted if Gerrity would only withdraw the unfair labor practice charge. Gerrity again said he could not do so and they parted company. On April 19, the Union filed another charge against the Respondent, alleging this time that Gerrity had been discharged in violation of Section 8(a)(1), (3), and (4) of the Act.

¹³At the beginning of each day, a driver is given a beeper and three videotaped movies which customers are entitled to watch in the limousine while they are driven to their destination. These items, along with the keys to the vehicle, must be returned to the dispatcher at the end of the workday. Drivers are also required to carry with them personal funds sufficient to pay tolls, parking fees, and related charges which they incur during the day. At the end of each day, they turn in receipts for out-of-pocket expenditures and attach them to a slip of paper on which they itemize and total their expenses. At this point the dispatcher reimburses the driver in cash and forwards the voucher and the receipts to the main office. There is a conflict in testimony as to whether dispatchers regularly look at the receipts to see if they support the voucher before giving cash to the driver. Some drivers who testified said they do and two company witnesses said dispatchers do not because they are not obligated to do so and do not have time to do so. I feel it is incredible that dispatchers would disburse company funds without performing a routine check to see what a driver's receipts amounted to during a given day, especially when the task is so routine and perfunctory. (Some drivers even use an adding machine if the voucher has several entries.) I credit the testimony in the record which establishes that dispatchers regularly verify driver-submitted receipts before giving out reimbursements.

Joseph Pizzutillo worked as a driver out of the Trump Castle location from September 1992 until he was discharged on November 7, 1993.¹⁴ He learned about the Union from driver Victor Jenkins and had occasion to discuss the organizing drive with Babich before Babich was discharged. Pizzutillo signed an authorization card on February 25.

The Union effort continued into the spring of 1993. One event it sponsored was a meeting at the Holiday Inn in Atlantic City which was attended by several drivers, including Jenkins, and by Local 331 President Joseph Yeoman. After the meeting, Pizzutillo reported for work at Trump Castle and was questioned about the event by David Jr. in the presence of driver Richard Negron. I credit Pizzutillo's testimony that David Jr. asked him if he had attended the Union's meeting. Pizzutillo replied that he had, whereupon David Jr. then asked him if there had been a good turnout. At that point they had a sharp exchange. Pizzutillo told David Jr. that he was not allowed to ask such a question and that he (Pizzutillo) was not allowed to answer it. David Jr. allowed that it was only a simple question but Pizzutillo retorted that his simple question was against the law. "What law?" David Jr. asked. "Federal law," Pizzutillo replied, "You're not even allowed to ask if I attended a Union meeting." With that remark the conversation ended.

About a week later, Pizzutillo was sent on a late afternoon dispatch from Trump Castle to Showboat to pick up a Showboat customer who wanted to go to Jackson Heights on the far side of New York City. When he arrived at the Showboat, the customer in question was getting in a limousine that regularly worked out of that casino. Gary Ng, the dispatcher at Showboat, walked over to Pizzutillo's limousine, told him that his assignment had been changed and that he was to take a customer to JFK Airport on the other side of Long Island instead. Ng then handed him a document relating to the trip. I credit Pizzutillo's testimony that he returned the assignment sheet to Ng and told him that he was not going to take the trip.¹⁵ He then returned to Trump Castle. In the interim, Ng had phoned Stan Kell, the dispatcher at Trump Castle, and had reported to him that Pizzutillo had refused an assignment. When Pizzutillo arrived at his home base, Kell instructed him to get his stuff out of the car. He then told Pizzutillo, "I think you need some time off. I'm going to give you four days off." Pizzutillo asked Kell why Kell had given away a long run to driver Mark Marowitz earlier in the day, arguing that he would have been able to take a long run at that time. Kell replied that the decision to give the run to another driver had been made by David Jr. and he told him that it was his prerogative to give him 4 days off. As a result, Pizzutillo missed two scheduled days of work. Later,

¹⁴The circumstances surrounding Pizzutillo's discharge are not at issue in this case, although a temporary suspension given to Pizzutillo by the Respondent in late April is one of the allegations in the consolidated complaint.

¹⁵Pizzutillo did not want to take the late afternoon trip to JFK Airport because he felt that the outbound commuter traffic on the road leading to the airport would delay his return beyond his normal quitting time. I credit his testimony that he cares for an invalid at his home and that, when he was hired, had disclosed this fact to Leon and possibly to others in the Respondent's management that he had to be home at a certain hour each evening in order to care for her. I further credit his testimony to the effect that the Respondent agreed to this condition when it hired him.

Pizzutillo complained to Leon about this action. Leon told him that he was sustaining the suspension because Pizzutillo had thrown a paper across a desk at Ng. Pizzutillo denied the accusation, asserting that he was never even inside the building at the Showboat. Leon revised his comment to say, "Well, you were shouting at him."

Henry Purcell was hired as a driver in August 1992, and worked out of the Showboat until he was discharged in late April 1993. He signed a union card in mid-March and passed out several cards to other drivers in the dispatch area. Some time in April, his dispatcher, James Bennett, handed him his paycheck along with a piece of antiunion literature. Bennett told Purcell to make sure that he read it.

The document in question, addressed "Dear Employee," was a 2-1/2 page, double-spaced typewritten letter. It began:

As most of you are aware, an outside organization, a labor union, is attempting to represent our employees.

We do not believe that joining such an organization would be in your best interests. Our principal concern is your loss of individual freedom and the right to speak for yourself in important matters relating to your employment.

Unions often attempt to get employees to sign authorization cards without the person really knowing what he or she is signing. Before signing a union authorization card, you should be aware of its legal significance.

The letter went on to discuss the nature of an authorization card, indicating that a signed card could make an employee contractually liable to a union and subject to union dues, fines, assessments, initiation fees, rules, and regulations. It indicated, among other things, that an authorization card was revocable and outlined the procedure to be followed in revoking one. The letter ended:

The main thing I want you to realize is that the signing of a card is a very meaningful and binding legal act, because it assigns your individual rights to the union. You should not sign a card unless you are willing to accept *all* the consequences and obligations of union membership, including union trials, picket duty, fines, initiation fees, dues, strike fund assessments, and any other legal obligations which the union might force upon you.

For many years, through good times and not so good times, we've all worked together. I believe that all of us at Atlantic Limousine can continue to work together as a team without the need of a union.

On receiving this document, Purcell told Bennett, "This is crazy. Aren't we supposed to have an interest in protecting ourselves?" Bennett did not reply but simply put his head down.¹⁶

Purcell worked a straight 24-hour shift from about 10 p.m. on April 23 until approximately the same hour on April 24. As he left the casino he asked Bennett what time he should report the following morning. Bennett told him to report at

9 a.m. Purcell told Bennett he was tired and asked if he could report later. Bennett said he had to have the cars filled by 9 a.m. but Purcell insisted. Bennett relented, saying, "Ok, if you're too tired. Just come in later."

About 9:10 a.m. on April 25, Purcell received a call from the morning dispatcher, Ng, who reminded him that he was supposed to report for work at 9 a.m. Purcell informed Ng that he had worked 24 straight hours the previous day and had overslept. Ng told him to be in by 10:30 a.m. He then called back half an hour later and told Purcell not to report at all. When Purcell asked why not, Ng replied that Carl had said so. Purcell asked to speak with Carl but was informed that Carl was not available and that he should speak with David Jr. When the call was transferred to David Jr., Purcell repeated the story about working 24 straight hours. David Jr. said that he was supposed to report in, and that they had local runs scheduled to go to Pomona, which had to be farmed out. Purcell repeated that he was tired and that Bennett had told him it would be all right if he came in later. David Jr. then told Purcell to call back at 4 p.m. when the cars were back at the casinos from morning runs and he could go to work at that time.

As instructed, Purcell called Ng at 4 p.m. but was told to call back when Bennett came in to dispatch later on in the evening. Purcell did so, telling Bennett that Ng was giving him a hard time and reminding Bennett that he had said it would be all right for him to report in late. Bennett disputed the statement, saying that he had never given Purcell permission to report late. Purcell did not work that evening.

Purcell came to the casino the following day about noon to pick up his check and saw a note on the bulletin board instructing him to "see Carl." Carl was not present so Purcell phoned him the following day. Carl told Purcell in the course of their phone call that he did not want to use him any longer without giving him any reason for the discharge. On May 24, the Union filed a charge, alleging that Purcell had been discharged illegally.

Victor Jenkins was a driver who worked out of Trump Castle. He was hired in January 1992, and was fired on May 31, 1993. On February 7, 1993, he signed a union authorization card which he had received from Gerrity. He also passed out cards to other drivers to seek their support for the Union. In early February 1993, Jenkins had occasion to discuss the impact of the organizing drive on the Company with a number of other drivers. The conversation took place in the immediate presence of dispatcher Ng. One employee voiced a concern that the union drive would mean the elimination of annual bonuses. Jenkins replied that the Company could not do that. The unnamed employee then went on to charge that the organizing effort would result in sloppy runs and would possibly cause drivers to be fired. He also asserted that the drivers were scared. Jenkins replied that they had a constitutional right to organize and that "we would win the vote."

Shortly after the Union held a meeting at the Quality Inn which was discussed, *supra*, Jenkins began to lose working hours. On April 15 he was not given work when he called in,¹⁷ being told by the dispatcher that no car had been as-

¹⁶Bennett did not testify. The driver's log pertaining to Purcell which was placed into evidence by the Respondent contains so many internal contradictions and scratchovers that it is worthless as evidence.

¹⁷Like all other drivers, Jenkins had a particular reporting time on specified days of the week. He worked 6 days a week and on those days he was supposed to be available to go to work at 7 a.m. He had a further obligation to call the dispatcher an hour in advance of his scheduled reporting time to find out if in fact he should report.

signed to him. Jenkins immediately heard from a driver named James Jones that Jones did not want to go to work that day so Jenkins again called the dispatcher, Ng, and asked Ng if he could take Jones' place. Ng told Jenkins to call back in an hour. When Jenkins called back, he was told that no car was available and that there would be no work for him that day. On Friday, April 16, and again Saturday, April 17, no work was available although these are traditionally busy days at the casinos. Jenkins was not given any assignments on April 22 or 28. On May 6, another date on which Jenkins was not given an assignment, he asked dispatcher Ng why he kept "putting him off." I credit Jenkins statement that Ng replied that management had told him to do so. Ng did not tell Jenkins why he had been given this instruction.

In early May, Jenkins had another conversation with drivers in the dispatch area in which he was outlining what he felt were the benefits of unionization. The conversation took place in the presence of dispatcher Isaiah Stevens. Stevens interrupted the conversation and told Jenkins that he (Stevens) was management and did not want to hear any more union talk.

In mid-May, Jenkins requested and received 2 or 3 days off to attend a custody hearing concerning his children. When he returned, David Jr. told him that he was placing him in an "on call" status rather than on a regular driver status because he had missed several days work in April and in May. On May 26, the Union filed a petition for a representation election. Two days later, Jenkins wrote the Company a series of two letters which led to his discharge as a "disgruntled" employee.

On May 28, Jenkins wrote to Leon complaining that his May 25 paycheck had included a copy of an overdue traffic ticket dating back to October 1992. He claimed that it was impossible for him to pay the ticket on a wage of \$2.38 an hour, since child support was being deducted from his check. He requested several things from the Company—revocation of his original written agreement to work for \$2.38 an hour, backpay from January 1992, payment in accordance with the minimum wage, and backpay for time that he had worked for Enchantment Limousine. He also asked the Company to respond to his request in writing on or before June 5. Copies of the letter were sent to Yeoman at the Union, to the NLRB field examiner who was investigating pending charges, and to an official of the wage and hour division of the Department of Labor. This fact was noted at the bottom of his letter.

On the following day, Jenkins sent a second letter to the Company. His second letter featured a complaint against dispatcher John Bannegan concerning snide remarks which Bannegan assertedly was making about him arising out of an objection which Jenkins had made to a long run which had been assigned to him. The letter also recited other disputes with David Jr., noted problems which Jenkins had been experiencing concerning custody of his child which necessitated taking time off, and the fact that he had been taken off a regular schedule and had been given "on call" status. The letter concluded:

If no work was available, he was given the day off, without pay, but was obligated to call in the next morning to see if work was available at that time.

It is obvious that Atlantic Limousine is not sensitive to personal situations. It is also obvious that I am being undermined and that my livelihood is being sabotaged. I want it to stop. I want John to be spoken to and I want Dave to stop saying he has told me things of which in fact he hasn't.

A copy of this letter was also sent to Yeoman and to the Board agent investigating pending charges and this fact was also noted at the bottom of the letter.

Within hours after the second letter had been turned into the Company office, David Jr. phoned Jenkins and criticized him for complaining that he had not been given time off when in fact he had. David Jr. asked who Yeoman and O'Neill, the Board agent, were. Jenkins replied that this was self-explanatory. David Jr. told Jenkins that he should not have involved outsiders and proceeded to scream at him until the end of the conversation.

Two days later, Leon called Jenkins at his home and mentioned that he had received Jenkins' memo. Jenkins replied that, since the Company had written employees a letter urging them to revoke their authorization cards, he thought that it would be appropriate for him to write the Company a letter seeking to revoke the written wage agreement he had made when he was hired. Leon informed Jenkins at that point that, since they had a disagreement over wages, the Company was going to terminate him. Jenkins asked Leon if it would be possible to withdraw his memo. Leon said no. About 10 days later, Jenkins sent to the Company a written withdrawal of his attempted revocation of the original wage agreement. However, the Company did not respond and Jenkins' termination was left undisturbed.

3. Events immediately preceding and during the election of August 9

I credit the testimony of former driver Roy McAllister that, two or three days before the election, Bannegan spoke to him and a couple of other drivers about the election. The conversation took place at the dispatcher's desk at Showboat. Bannegan told the employees who were present to go ahead and vote for the Union if they wanted to but warned them that, if the Union won, the Company had nothing to worry about because it had plenty of drivers and other companies to fulfill their contract with Showboat. On the Sunday before the election, Daniel visited the Showboat and had a personal conversation with McAllister. He told McAllister that he felt that the Union would be bad for the Company and informed McAllister that he had to borrow \$100,000 to keep the business going. He went on to state that, if the Union did come in, he felt he would have to close the doors.

The election was held at three separate 1-hour sessions on August 9 at the Quality Inn. Drivers would drive to this location, often in company limousines, park in the parking lot, enter the hotel, go up to the second floor where the polling place was located, and, after voting, return to their vehicles and drive away. During the third and last voting session, Yeoman was standing in the parking lot not far from Leon, who had been shaking hands and talking with drivers as they entered or left the hotel. While the third session was still in progress, an unidentified driver drove into the parking lot in a company limo and stopped. I credit Yeoman's testimony that the driver asked Leon, "When do I vote?" Leon pointed

out the polling place but, in a short exchange, told the driver, "You don't have to worry about voting. We're going to win anyway and we know it." He then suggested to the driver to drive off and the driver did so.

The Union lost the election by a vote of 50 to 37. Challenges were not determinative of the outcome. Timely objections to the conduct of the election were filed by the Union.

C. Analysis and Conclusions

1. Animus and independent violations of Section 8(a)(1) of the Act

Several of the members of the Geiger family admitted on the stand that the Company was opposed to the unionization of the Company. Indeed, when the first rumblings of unionization took place, and long before the incidents at issue in this case occurred, it had retained labor counsel to assist it in this regard. In evidence is a lengthy letter, written by the Company to employees in mid-April, urging them not to sign a union card or to revoke any cards which they may already have signed, together with detailed instructions as to how to go about revoking a union authorization card. While none of these acts have been challenged as illegal, they demonstrate animus and provide the background against which to evaluate other words and deeds of the Respondent which have been challenged by the General Counsel.

(a) When, during a final interview, Daniel told Gerrity that he would arrange for a transfer to a more agreeable location, would guarantee Gerrity better working hours, and would provide him with a good job reference if he would withdraw the pending unfair labor practice charge which had been filed on his behalf, the Respondent made an unlawful promise of benefit which violated Section 8(a)(1) of the Act. These actions also constitute an illegal solicitation of grievances during a union campaign with a view toward adjustment in violation of Section 8(a)(1) of the Act. Because these actions also conditioned Gerrity's employment, they constituted a discouragement in hire or tenure based on union considerations which violated Section 8(a)(3) of the Act.

(b) When, following a union meeting which had been held at the Holiday Inn, David Jr. interrogated Pizzutillo, who had attended the meeting, as to whether in fact Pizzutillo had attended and also asked the latter the size of the turnout, the Respondent engaged in coercive interrogation which violated Section 8(a)(1) of the Act.

(c) Just before the election in August, Bannegan told several employees that if they voted for the Union, the Company could transfer their jobs to other companies who would utilize other drivers. This statement constitutes a threat to discharge in the event of unionization and violated Section 8(a)(1) of the Act. This statement also constituted objectionable conduct which warrants setting aside the election of August 9.

(d) Just before the election, Daniel told McAllister that, if the Union won the election, the Respondent would probably close its doors. This is a flagrantly illegal threat which violated Section 8(a)(1) of the Act and was objectionable conduct warranting the setting aside of the election.

2. The Union's objection relating to Leon's statement to an unnamed driver on election day

Following the election and service of the corrected tally of ballots on August 18, the Charging Party here filed objections to the conduct of the election. These objections, filed on August 19, stated:

1. The employer conducted illegal surveillance and engaged in unlawful campaigning outside the polling places, creating a coercive atmosphere.
2. The Employer conducted an unlawful poll of employees on their union sentiments.
3. The Employer used threats, intimidation, and promises to influence the votes of employees.

In his notice of hearing on objections to an election, the Regional Director noted that the Charging Party later withdrew Objections 1 and 2 and a portion of Objection 3. He then referred to hearing the remaining portion of Objection 3 which read: "The Employer used threats and intimidation to influence the votes of employees." Accordingly, I must view the evidence presented in this regard somewhat narrowly, determining only whether the activities of the Respondent here constituted "threats and intimidation," not whether those activities violated wider-ranging Board rules regarding electioneering at a representation election. See, for example, *General Dynamics Corp.*, 181 NLRB 784 (1970).

The gist of the credited evidence is that the general manager of the Respondent stood in the parking lot of the hotel where the election was taking place and, during voting hours, spoke with an employee whom, I conclude, was a prospective voter. The prospective voter was driving a company limousine and had just arrived at the parking lot to vote. The Respondent's general manager told the employee in question that there was no point in voting since the Company already had enough votes to win the election, whereupon the employee drove away without voting.

While the general manager made no threats or promises in his remarks to the employee, he clearly conveyed to the prospective voter the futility of participating in the representation election and was successful in doing so, since the individual in question drove off without accomplishing the purpose which brought him to the hotel in the first place. Since the Board does not observe the niceties of common law pleading in determining whether an alleged objection to an election describes with precision the conduct found to have occurred, the allegation referred for hearing here is broad enough to address the conduct found. *Seneca Foods Corp.*, 244 NLRB 558 (1979).

In other contexts, conveying to employees the idea that engaging in protected or union activity would be futile has been held to be unlawful interference within the meaning of Section 8(a)(1) of the Act.¹⁸ Even though the thoughts conveyed here by the Respondent's general manager to a prospective voter were not as heavy handed as the messages involved in these cited cases, they still were aimed at discouraging protected activity, namely, voting in an election. As

¹⁸ See, for example, *Trane Co.*, 137 NLRB 1506 (1962); *American Telecommunications Corp.*, 249 NLRB 1135 (1980).

such, his statements were objectionable and warrant the setting aside of the election.

3. The disciplining of Pizzutillo

Pizzutillo was a union activist and was known by the Respondent to be such. As noted above, he was coercively interrogated by a supervisor concerning his attendance at a union meeting and about the size of the meeting. His response was an abrupt one. He flatly told his supervisor that the latter had no business asking the questions he had been asking.

Two weeks later, Pizzutillo was assigned to a run late in the afternoon at a different casino from the one where he was domiciled. When he arrived to pick up the passenger, he found that the trip had been given to a different driver and that he had been assigned to another one. Leaving aside the embellishments on his behavior which were placed in the record by Respondent's witness, it is clear that, on receiving the substitute assignment, Pizzutillo refused it, returned the paperwork associated with the assignment to the dispatcher, and returned to his casino of origin. As soon as he arrived, he was suspended for 4 days by his own dispatcher for refusing a run. Two of those days were normal workdays. Apparently the other two were scheduled days off.

I credit Pizzutillo's testimony that, at the time he was hired, he had an agreement with Leon that he would not be given assignments which would prevent him from arriving home by approximately midnight so that he could care for an invalid who was living with him. Apparently Pizzutillo felt that this agreement with upper management privileged him to refuse a run in an abrupt fashion and leave the Respondent in a predicament where it would have difficulty in fulfilling its casino contract. The punishment which was meted out was not only modest discipline but was imposed immediately by his dispatcher, who had just received word from the other casino about what had happened and who was understandably irritated. There is no suggestion that suspending a driver for refusing a run and driving off amounted to disparate treatment or that the Respondent was lying in wait for Pizzutillo to make a mistake. I conclude that the Respondent's asserted reason for suspending Pizzutillo was its real reason for doing so and that he was not disciplined in reprisal for his union activities. Accordingly, I will recommend that so much of the consolidated complaint which alleges that the Respondent disciplined Pizzutillo in violation of Section 8(a)(1) and (3) of the Act be dismissed.

4. The discharge of Gerrity

Glenn Gerrity was the initiator of the organizing movement at the Respondent's company. During their final conversation, the president and the owner of the Company admitted to Gerrity that he had been aware of this fact. Gerrity signed a union authorization card, passed out cards to other employees, and urged them to sign. Some of this activity took place at the dispatch office in the presence of dispatchers.

Late in February, the Respondent began engaging in conduct toward Gerrity which he interpreted as harassment on account of his union activities and in-house leadership. On or about February 20, the Respondent received a loss control advisory form from its insurance broker stating, among other

things, that there was no record of Gerrity's driver's license with state authorities. David Jr. asked to see Gerrity's license, a request which Gerrity felt was most peculiar since he and all other drivers exhibited their drivers' licenses to Respondent's management at the time they were hired. What had apparently happened is that the numbers on Gerrity's license had been transposed either by the Respondent or by the insurance brokers in preparing a written record so that a request to state authorities for an MVR resulted in a reply that no license had been issued. With the supplemental information obtained as a result of David Jr.'s inquiry, the problem was cleared up. Accordingly, I would dismiss so much of the consolidated complaint that alleges that the Respondent was harassing Gerrity in reprisal for his union activities by checking up on his driver's license.

Gerrity's other complaints regarding the Respondent's activities and attitude toward him in late February and early March 1993 are not so easily resolved. Gerrity's pay was docked \$75 for a stale charge going back several months that he assertedly failed to turn in a cash fare which was paid to him by a customer. When his dispatcher, David Jr., was pressed by Gerrity for details about the unpaid fare, the dispatcher could not respond and ultimately the Company refunded the money. David Jr. also told Gerrity that he owed the Company three videotapes that he had checked out and had never returned. When Gerrity reminded David Jr. that the police had confiscated the films when they arrested both him and the teenage customers he was chauffeuring, David Jr. changed his mind and told Gerrity to forget about it. In both instances, the Respondent was reaching back into Gerrity's employment history for periods of several months in order to find a basis for both criticism and a financial imposition. The fact that the Respondent was directing stale, petty, and groundless complaints at the known leader of the Union's organizing drive within a few weeks after he had begun the campaign to sign up limousine drivers cannot be explained on the basis of accidental error and was not adequately explained at all. Accordingly, by directing groundless complaints calling for financial restitution at Gerrity because of his membership in and activities on behalf of the Union, the Respondent here violated Section 8(a)(1) and (3) of the Act.

The record establishes that Gerrity's hours were cut in late February and early March. When he called in for work on several regularly scheduled days, he was told there was none. However, the Respondent provided no explanation of why there was no work for Gerrity on those occasions but work for other drivers. When a respondent who gives independent evidence of animus takes such action against the known leader of an organizing drive, does so in the context of other discriminatorily motivated harassment, and gives no credible explanation for its actions, it must be concluded that it also took these actions for discriminatory reasons. Accordingly, I conclude that, by denying work opportunities to Gerrity in reprisal for his membership and activities on behalf of the Union, the Respondent here violated Section 8(a)(1) and (3) of the Act.

On March 5, the Union filed a charge directed at the alleged harassment of Gerrity. His name appeared in the body of the charge. On the day the charge form arrived at the Respondent's office, Gerrity was fired. These two simultaneous actions cannot be attributed to coincidence. The asserted rea-

son again involved a reaching back into Gerrity's employment history to find justification for a personal action. In this instance, Gerrity overcharged the Respondent a total of \$3 for reimbursement for parking fees incurred during trips taken in late January and early February. The claim that these payments, made at the end of each day, went unnoticed by the dispatchers who paid out Respondent's cash when presented with receipts and reimbursement requests is inherently unbelievable. It was not established in the record by the dispatchers who, in fact, made the payments here in question. Gerrity did not believe the proffered excuse either and when he confronted Daniel on or about March 15 with the reason that had been given him a few days earlier by Daniel, Daniel admitted that it was not true. When Daniel went on to bargain with Gerrity and offer him reinstatement or other benefits if Gerrity would withdraw the charge, Daniel made it abundantly clear that the Respondent had discharged Gerrity because of his union activities and because an unfair labor practice charge had been filed on his behalf. Such a discharge violates Section 8(a)(1), (3), and (4).

5. The discharge of Louis Babich

Babich was discharged by the Respondent just a few days before Gerrity. Respondent would have us believe that the two events were also coincidental. Babich was turned down for employment in 1992 when he told the Respondent that he had 10 points on his driving record. In August 1993, he reapplied and was hired, notwithstanding the fact that he disclosed at that time that he had eight points on his record and also disclosed on his employment application that, at one time, his license had been revoked. In the fall of 1992 he was "reassigned" to the Enchantment Limousine, quit to go to Mexico for Christmas, and was rehired by the Respondent on its own payroll in January 1993. A few weeks later, he was discharged by the Respondent for a reason which had posed no obstacle to his employment in August or to his reemployment the month before. In the interim between Babich's reemployment in January and his discharge on February 26, a union drive had begun, Babich had signed an authorization card, and he had openly distributed cards to other employees in the dispatch office.

The fact that Babich had eight points on his MVR was called to the Respondent's attention late in February by White, its insurance broker and risk management agent. Five other drivers fell into the same category. At Louis' suggestion and request, Babich got in contact with White and provided White with police records detailing two of Babich's accidents. As a result of this action and a reevaluation of Babich's record, his point total was reduced from eight to six. According to the Respondent and White, this was still too many points to satisfy the insurance carrier, Reliance, although there is no evidence in the record that Reliance ever knew of the Babich case or had ever made any comment about it. In New Jersey, as noted before, a carrier cannot refuse to insure a fleet of vehicles on the basis of the record of an individual driver nor condition coverage on the discharge or the transfer from driving status of a named driver.

White testified at the hearing that an informal agreement between the Respondent and the carrier required the Respondent to remove from its list of drivers anyone having "six or more" points. A letter written by White to Louis on March 3 pertaining specifically to Babich also stated that

Babich should be prohibited from driving because "he still has '6 points.'" However, two other letters placed in evidence by the Respondent, written by White to Louis on February 25 with regard to drivers Negron and Starr, stated that "Reliance has indicated that an individual with *more than six points* over a 3 year period should be prohibited from driving your vehicles." (Emphasis added.) While Babich still had six points after his record was reevaluated, he did not have more than six points, the rule applied by White (and presumably by Reliance) with regard to Negron and Starr. Babich's MVR indicates that one of the points still charged to him arose out of a speeding violation which had occurred on July 7, 1990. According to the practice both of the insurance carrier and the State of New Jersey, that point would automatically have been expunged from Babich's record on July 7, 1993, after the expiration of 3 years, leaving Babich at that time with only five points, unless he were to have another chargeable accident or violation within the 4 months following his February discharge.

None of the other drivers with six or more points whose records were brought to the Respondent's attention in late February by White were either suspended or discharged for this reason, notwithstanding the insurance company rule. Far from discharging them, the Respondent retained a safety director who initiated a safety program aimed at helping them reduce the points on their records and remain in its employ.¹⁹ In short, the Babich case presents a scenario in which an employer with demonstrated animus discharges a known union adherent for reasons which did not preclude his employment when he was originally hired and rehired but which made him unacceptable shortly after his union activities began. The scenario includes not only disparate application of a supposed standard for continued employment but the application of a unique standard (six points versus more than six points) applicable only to Babich. Accordingly, I conclude that Louis Babich was discharged because of his membership in and activities on behalf of the Union and that the discharge violated Section 8(a)(1) and (3) of the Act.

6. The discharge of Henry Purcell

Purcell had signed an authorization card, had distributed cards to other drivers, and had engaged in a small verbal exchange with Bennett, his supervisor, in which he clearly displayed his union sentiments. Two weeks thereafter, he was discharged. After working 24 straight hours driving a limousine over the streets and highways of New Jersey, Purcell asked Bennett for permission to come in late the following morning because he was tired. I credit Purcell's testimony that such permission was reluctantly given.

The following morning Purcell received a call from another supervisor 10 minutes after his normal starting hour to ask why he had not reported for work. Purcell replied that he had received permission from Bennett to sleep late because of his extraordinary tour of duty the previous day. However, he volunteered to report for work in an hour and a half. After checking with his own supervisors, the morning dispatcher told him not to do so but to call in about 4 p.m. to see if work was available. When he called, Purcell was

¹⁹I do not know what success, if any, was enjoyed by the safety program. The record is clear that none of the requested participants in this program was discharged because of a poor safety record.

told at 4 p.m. not to report by the same individual, Bennett, who on the previous evening had extended permission to come in late. Bennett then denied to Purcell that he had done so and declined to ask Purcell to come in to work the evening shift. Two days later, Purcell was fired. No reason was given to him at the time of the discharge for the action which was taken, although the Respondent was able to come up with several reasons for the discharge during the ensuing months when it disputed Purcell's claim for unemployment compensation. These facts make out a solid case of discriminatory treatment applied for a putative infraction of company rules when the employee in question had advance permission to do exactly what he was fired for doing. When, despite permission to sleep late, he offered to come to work anyhow and was denied such permission, it became abundantly clear that the Respondent was not at all concerned with Purcell's lateness but was merely using it as a pretext for removing another union adherent from its payroll. Accordingly, I conclude that the Respondent discharged Henry Purcell because of his membership in and sympathies on behalf of the Union and that the discharge violated Section 8(a)(1) and (3) of the Act.

7. The discharge of Victor Jenkins

Like the other discriminatees, Victor Jenkins had signed a union authorization card, had passed out cards to other drivers, and had disclosed his sympathies to management on more than one occasion by championing the union cause to other drivers in the presence of dispatchers. He also attended the union meeting held at the Quality Inn on April 12, a meeting which the Respondent was aware of and about which it had expressed more than routine curiosity. Both letters written by Jenkins to management in late May and which admittedly triggered his discharge contained indications that he had sent copies to a Board agent and to the Union. Indeed, he was questioned and criticized by David Jr. for bringing "outsiders" into his dispute with the Company. The reason given him for his discharge by Leon was that he was a "disgruntled" employee, as evidenced by the complaints he voiced in each letter.

Whether or not "disgruntled" has become a term of art in labor relations like the term "troublemaker," in this instance it was used by Leon as a code word for voicing complaint concerning wages and working conditions and enlisting the support of the Board and the Union by sending them copies of the complaint letters. It is clear that Jenkins was discharged for bringing "outsiders" into his dispute with the Company and because of that motivation, the Respondent here violated Section 8(a)(1), (3), and (4) of the Act. I so find and conclude. Since this discharge fell within the *Ideal Electric* period, it constitutes conduct warranting the setting aside of the August 9 election.

On the foregoing findings of fact and on the entire record here considered as a whole, I make the following

CONCLUSIONS OF LAW

1. Respondent Atlantic Limousine, Inc. is now and at all times material has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Teamsters Local Union No. 331, affiliated with International Brotherhood of Teamsters, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Glenn Gerrity and Victor Jenkins because they were named in an unfair labor practice charge or otherwise sought redress from the Board, the Respondent violated Section 8(a)(4) of the Act.

4. By discharging Glenn Gerrity, Victor Jenkins, Henry Purcell, and Louis Babich because of their membership in and activities on behalf of the Union; by denying work opportunities to Gerrity because of his membership in and activities on behalf of the Union; by conditioning reinstatement, transfers to more agreeable work locations, and regular working hours for Gerrity on the withdrawal of an unfair practice charge; and by directing groundless complaints involving financial restitution to employees because of their union membership or union activities, the Respondent violated Section 8(a)(3) of the Act.

5. By the acts and conduct set forth in Conclusions of Law 3 and 4; by coercively interrogating employees concerning their union activities and the union activities of other employees; by threatening employees with layoffs, subcontracting of work, and plant closure if they selected the Union as their bargaining representative; by promising employees benefits if they would abandon their union activities; and by soliciting grievances from employees during an organizing campaign with a view toward adjusting the grievances, the Respondent violated Section 8(a)(1) of the Act.

6. By discouraging employees from voting by telling them that it would be futile to vote because the Company had already obtained sufficient votes; and by engaging in those acts and conduct recited above in Conclusions of Law 3, 4, and 5 which took place on or after May 26, 1993, the Respondent committed objectionable conduct warranting the setting aside of a representation election which was conducted by the Board among certain of the Respondent's employees on August 9, 1993.

7. The aforesaid acts and conduct have a close, intimate, and adverse effect on the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I will recommend to the Board that it be required to cease and desist therefrom and to take certain affirmative actions designed to effectuate the purposes and policies of the Act. Since the violations of the Act found here are serious and pervasive and evidence an attitude on the part of the Respondent of total disregard for its statutory obligations and the rights of its employees, I will recommend a so-called broad 8(a)(1) remedy designed to suppress any and all violations of that section of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979). I will recommend that the Board offer to Glenn Gerrity, Louis Babich, Henry Purcell, and Victor Jenkins full and immediate reinstatement to their former or substantially equivalent employment, without prejudice to their seniority or to other rights and privileges formerly enjoyed by them, and that it make them whole for any loss of pay or benefits which they may have suffered by reason of the discriminations practiced against them in accord-

ance with the *Woolworth* formula,²⁰ with interest thereon at the rate prescribed by the Tax Reform Act of 1986. *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I will also

²⁰ *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

recommend that the Respondent be required to post the usual notice informing its employees of their rights and of the results in this case.

[Recommended Order omitted from publication.]