

SSC Corp. and Local 813, International Brotherhood of Teamsters, AFL-CIO. Case 29-CA-17776

May 19, 1995

DECISION AND ORDER

BY MEMBERS STEPHENS, COHEN, AND TRUESDALE

On December 23, 1994, Administrative Law Judge Jesse Kleiman issued the attached decision. The General Counsel filed exceptions with a brief in support and a statement in support of the judge's decision and the Respondent filed cross-exceptions with a brief in support and an answer to the General Counsel's exceptions.

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

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

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, SSC Corp., Holtsville, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

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 credibility findings and his further finding that the Respondent violated Sec. 8(a)(1) by unlawfully interrogating employee Romaniello, we find it unnecessary to rely on the judge's inference of antiunion animus arising from the conduct that was subject to the September 1993 settlement agreement. Accordingly, we do not rely on the judge's statements concerning the significance of the April 20, 1994 discharge and ejection of Dennis Romaniello and other employees from the Respondent's property. In particular, in finding that the Respondent violated Sec. 8(a)(1) of the Act through Supervisor Michael Tomanelli's interrogation of Romaniello concerning testimony that the latter might give at a Board representation hearing, we rely on the immediate circumstances of that interrogation, including Tomanelli's hostile remarks when Romaniello sought to avoid giving a specific answer to the inquiry.

Catherine Creighton, Esq., for the General Counsel.
Evan J. Spelfogel, Esq. (Epstein, Becker & Green, P.C), for the Respondent.
Michael Lieber, Esq., for the Union.

DECISION

STATEMENT OF THE CASE

JESSE KLEIMAN, Administrative Law Judge. Upon the basis of a charge filed on October 27, 1993, by Local 813, International Brotherhood of Teamsters, AFL-CIO (the Union), a complaint and notice of hearing was issued on December 10, 1993, against SSC Corp. (the Respondent), alleging that the Respondent had engaged in certain unfair labor practices within the meaning of Section 8(a)(1) of the National Labor Relations Act. By answer received December 22, 1993, at the Board the Respondent denied the material allegation in the complaint.

A hearing was held before me on September 12 and 13, 1994, in Brooklyn, New York. Subsequent to the close of the hearing, the General Counsel and the Respondent filed briefs.

On the entire record and the briefs of the parties, and on my observation of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, at all times material, is and has been a New York corporation with an office and place of business located at 971 Waverly Avenue, Town of Holtsville, County of Suffolk, State of New York, engaged in supplying sanitation services, including the hauling of refuse from residential and commercial sites. The Respondent annually in the conduct of its business operations performed services valued in excess of \$50,000 for various enterprises located in the State of New York, each of which enterprises, in turn, is directly engaged in interstate commerce and meets a Board standard for the assertion of jurisdiction, exclusive of indirect inflow or indirect outflow. I therefore find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

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

III. THE ALLEGED UNFAIR LABOR PRACTICES

The complaint alleges, in substance, that the Respondent violated Section 8(a)(1) of the Act by unlawfully interrogating its employees about their upcoming testimony at a National Labor Relations Board proceeding in Case 29-RC-8228 and by threatening its employees with bodily harm to them and to their families and damage to their property if they testified in that proceeding. The Respondent denies these allegations.

A. *The Evidence*

1. Background

The Union began its organizing campaign among the Respondent's employees in early April 1993. Employee Dennis Romaniello, employed by the Respondent as a truckdriver since April 1991, actively supported the Union in its campaign. On April 20, 1993, the Respondent discharged 13 of its employees (truckdrivers and helpers) among whom was

Romaniello. These employees were terminated by the Respondent's overall supervisor, Michael Tomanelli, who also told them at the time "to get the fuck off the property." The Union filed a charge with the Board in Case 29-CA-17293 and a complaint was issued by the Regional Director for Region 29 alleging, among other violations of the Act, the unlawful discharges of these employees. The Regional Director sought and obtained injunctive relief under Section 10(j) of the Act on July 23, 1993, whereupon the Respondent reinstated the 13 employees who had been terminated, including Romaniello, on July 26, 1993. Thereafter, in late August and early September 1993, the parties entered into a formal "Stipulation" agreement settling and remedying all the alleged unfair labor practices set forth in the complaint and containing a "nonadmissions" clause therein.

After his reinstatement, employee Romaniello remained active in the Union's ongoing organizational campaign soliciting signatures of employees on union authorization cards. In late September 1993, the Union filed a representation petition with the Board in Case 29-RC-8228 seeking to represent for the purposes of collective bargaining the Respondent's employees in an appropriate unit. A hearing was held in that case over several days from mid-October through early December 1993. Romaniello appeared at the hearing on October 18 and 27 and November 17, 1993, on behalf of the Union and testified as a witness in that proceeding on either October 27 or November 17, 1993. While attending the hearing Romaniello sat with the Union's "representative and the attorney." Romaniello testified that a few days prior to October 18, 1993, the first day he attended the hearing, he advised his supervisor, Tomanelli, that he was going to do so.

2. Interrogation

According to the testimony of Romaniello, who was the only witness called by the General Counsel, on Friday, October 22, 1993, after finishing his work for the day, Romaniello returned to the Respondent's shop and went into Supervisor Tomanelli's office to receive his paycheck. Romaniello testified that Tomanelli then closed his office door and asked Romaniello if he was going to attend the "union hearings" (Board hearing). After Romaniello replied that he was going on Tuesday or Wednesday, Tomanelli said, "[W]hy, what are you going to say about it." Romaniello stated that he told Tomanelli, "It all depends on what they ask me, Mike you know," to which Tomanelli retorted, "[A]re you being a wise guy, what are you playing stupid with me." Romaniello explained to Tomanelli that the Union had subpoenaed him as a witness and that he had to attend the hearing but would let Tomanelli know which day he was to appear to testify therein. Finally, Tomanelli said that it was "good" that Romaniello would attend the hearing on Tuesday or Wednesday because "I'll be there too." Romaniello then received his paycheck and left.

The Respondent's witnesses gave, however, a different account of what had transpired. Tomanelli testified that in the fall of 1993 he was approached by several employees, including Romaniello, Thomas Odietus, and Rich Catone, who asked him if they had to testify at the Board hearing because they were directed to do so by the Union.¹ According to

¹ Romaniello, Odietus, and Catone were among the 13 employees who had been terminated previously by Tomanelli and then rein-

Tomanelli, the employees indicated that they did not want to testify to help the Union. Tomanelli told them that he would ask his supervisor, Scott Hansen,² about this and get back to them. Tomanelli stated that after speaking to Hansen he met with these employees the next day and advised them that they did not have to testify at the hearing unless subpoenaed to do so by one of the parties. Tomanelli then asked the employees to let him know if they received subpoenas and the date they had to appear at the hearing, so that he could schedule replacement drivers and helpers for that day.

Tomanelli denied ever asking Romaniello or any other employee regarding what they would testify about at the hearing in the representation case, or that he ever had any conversation with Romaniello while distributing paychecks regarding the "National Labor Relations Board, subpoenas, testimony or union matters." Moreover, Tomanelli testified that "always on every occasion" he distributed employee paychecks only if the entire crew of a truck presented themselves together as a group in the office, otherwise Tomanelli waited to dispense the paychecks until all members of the particular truck crew were present, this being his office practice without exception. Moreover, Tomanelli related that it is his policy not to permit employees into his office except to pick up their paychecks.

Employee Robert Cornand, who worked as a helper on Romaniello's truck from July 26 until December 1993, testified that during this entire time he, Romaniello, and the second helper assigned to Romaniello's truck always picked up their paychecks together because this was standard procedure, that he never heard Tomanelli question Romaniello about the NLRB or about his testimony to be given at a Board hearing or about subpoenas, and that he had never observed Romaniello and Tomanelli alone together in Tomanelli's office.

While explaining, however, what happens after a truck returns at the end of the day, which is the truck is refueled by the driver, the helpers clean the refuse hopper and wash and dry the truck, the driver then garages the truck and fills out the necessary paperwork in the office, whereupon the men wash up and may change their clothes, this process taking about 30 minutes, Cornand acknowledged that when he might be washing up in the bathroom Romaniello could be in the vicinity of Tomanelli's office and Cornand would be unable to see if Romaniello had entered the office until Cornand exited the bathroom. Cornand also seemed to indicate that he was not with Romaniello "all the time when he goes into the office."

The Respondent's other witness, yardman Steven Sicari (a/k/a Sonny), testified that during conversations with Romaniello after Romaniello had been reinstated by the Respondent on July 26, 1993, and occurring through November 1993, Romaniello told him that "he never had any problems with SSC." Regarding Romaniello's alleged sentiments about the Union after his reinstatement, the Respondent made an offer of proof that Sicari would also testify that, in substance, Romaniello had told him on a number of occasions during September, October, and November 1993, that the

stated by court order. Neither Odietus nor Catone were called as witnesses to testify although both were still employed by the Respondent at this time.

² Although Hansen was present each day during the hearing in the instant case he was not called as a witness.

Union was “bothering and threatening” him to talk to the FBI, the Department of Labor, and the Board, but that he did not want to help the Union or “get involved in any of this.”

Sicari’s job duties are “like yard foreman.” He works from 5:30 a.m. to about 5 p.m., makes sure all the trucks have returned to the Respondent’s facility, monitors the premises after Tomanelli leaves about 4 p.m. using Tomanelli’s office where the T.V. monitors are situated, and locks up securing the premises before he leaves. Additionally, according to Tomanelli’s testimony, he and Sicari are lifelong friends and he babysits for Sicari’s children on occasion.

The record evidence also discloses that after an altercation with a fellow employee, helper Kevin Stevenson, Romaniello left the Respondent’s employ.

3. Threats

Romaniello testified that on Tuesday, October 26, 1993, he returned to the Respondent’s facility between 4 and 4:30 p.m., after completing his pickup route, his being the last truck in that day. Romaniello usually finishes his work about 2 p.m., but explained that his late arrival was due to the slow work pace of the helpers on the truck. Later in his testimony, however, Romaniello remembered that his late return to the shop that day might have been due to the fact that Tomanelli had directed him over the truck radio to return that afternoon to Bayshore to retrieve a missed pickup.

Tomanelli denied that he had ever called Romaniello over the radio to direct him to return to Bayshore for either a missed pickup or a followup visit. Cornand testified that during the time he worked on Romaniello’s truck as a helper, they had never gone back to Bayshore regarding a missed pickup stop, although he admitted that at times Tomanelli had directed a truck to return to a customer’s site if a pickup had not been done properly, and that he could not hear all the radio calls received in the truck cab from his position at the back of the truck as helper. Moreover, a Town of Islip dump slip shows that Romaniello was still out on the road at 2:18 p.m. on October 26, 1993.

Romaniello continued that by the time he returned to the Respondent’s shop that day, Tomanelli, who usually leaves work at 4 p.m., was gone and only Sonny Sicari was present at the shop. After refueling and parking the truck and with the helpers having left the premises, he completed his paperwork, and proceeded to his car that was situated in the parking lot on the side of the shop. As Romaniello neared his automobile, it being the only car remaining in the parking area, he observed two men sitting on the hood of his car. Although Romaniello described these two men in some detail, he did not know who they were, had never seen them before, and never heard from them again after this incident.

Romaniello related that as he was unlocking the car door, one of these men said to him, “Hey motherfucker, where are you going?” When Romaniello replied that he was going home, the man told him, “Let me tell you something. If you get on that fucking stand tomorrow and you say one fucking word, I’ll burn you and the fucking family of yours out of that house.” When Romaniello did not respond the man asked, “[D]o you hear me?” After Romaniello said that he had heard what was said, the man told him that he could

now leave, which Romaniello did.³ Romaniello did not report this incident to the Respondent or to any of his fellow employees at the time.

Cornand’s testimony as relevant to the issue was that although Romaniello’s truck usually returned to the Respondent’s facility about 3 p.m., this varied, and that he could not with any certainty say what time the truck returned on any given day. Cornand stated, however, that while he worked on Romaniello’s truck, they had never been the last truck to return to the shop. Cornand testified that he had never seen any strangers in the Respondent’s parking lot where his and Romaniello’s automobiles were parked. Interestingly, Cornand related that after he and Romaniello began to work on the same truck, Romaniello had asked him to “watch me go to my car, can you watch my back for me,” and had told Cornand that he was involved “with a labor dispute,” and “having a problem.” Sicari also testified that during the months of September, October, and November 1993 he had never observed any strangers on the parking lot or sitting on the hood of a car, although he acknowledged that the parking lot cannot be seen by anyone situated in Tomanelli’s office where he spends a good deal of his time monitoring the Respondent’s premises after Tomanelli leaves for the day at 4 p.m.

B. Analysis and Conclusions

1. Credibility

The resolution of the issues presented in this case requires a determination of the credibility of the respective witnesses. After carefully considering the record evidence, I have based my findings on my observation of the demeanor of the witnesses, the weight of the respective evidence, established and admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Parkview Furniture Mfg. Co.*, 284 NLRB 947 (1987), and cases cited therein.

I credit the testimony of Dennis Romaniello over that of the Respondent’s witnesses for the reasons set forth below. Romaniello testified in a direct, believable, and forthright manner and, on analysis, seemed to have no apparent reason to concoct the events he testified about unless they had actually occurred.⁴ The Respondent in its brief points to certain

³ Initially, Romaniello had testified that the man had said, “[L]et me tell you something . . . you don’t understand. If you say one word, just one word I’ll burn you and your family and you and your mother f—king family in that house with you. . . . I’ll burn you all down.” Moreover, in an affidavit given to a Board agent during the investigative stage of these proceedings, dated October 27, 1993, Romaniello stated that this man had said, “[H]ey mother-fucker, where do you think you’re going?” After Romaniello said that he was going home and asked who the man was, he was told, “[N]ever mind who the fuck I am. Let me tell you something, you open your mouth one time, you get on the stand and say one thing, I’ll burn you, that house and that rat-bastard family in it.”

⁴ There is no allegation in the complaint of unlawful discharge that if proven by the General Counsel could require reinstatement with backpay and interest. Additionally, Romaniello left the Respondent’s employ voluntarily under circumstances from which I cannot infer that he might be seeking to get back at the Respondent or for revenge. Also, it seems to me that considering his now credited account of what occurred, it took some courage for him to testify as he did in this case.

“discrepancies” between Romaniello’s testimony on direct and cross-examination and with an affidavit he gave to a Board agent regarding the account of his conversation with Tomanelli on October 22, 1993, and the threats made against him on October 26, 1993, by two unknown persons. In reviewing these “discrepancies,” however, I found that although there was some change in the wording, Romaniello basically gave similar accounts of what occurred on these occasions and that the “discrepancies” or inconsistencies present are insufficient to warrant the discrediting of his testimony.

Furthermore, the testimony of the Respondent’s witness, Michael Tomanelli, also contained some inconsistencies and, although I found these to be insufficient in and of itself to engender disbelief, when considered along with his probable bias in this case, and the questionable plausibility of some of his testimony influenced my finding that he was not a credible witness. Tomanelli is the Respondent’s overall on-the-job supervisor of its employees, he appears from the evidence not to be favorably disposed towards the Union, and he is admittedly is a lifelong friend of the Respondent’s owners and their families.

Moreover, Tomanelli’s testimony was framed in absolute terms seemingly designed with the sole purpose of advancing the Respondent’s contention. For example, Tomanelli testified that he never allowed employees to enter his office to speak to him and never distributed paychecks to employees unless all the workers on an individual truck came into his office together to receive their pay. It would seem incredible that circumstances arising in the course of a workday and over a period of months would not give rise to exceptions to Tomanelli’s rules or prohibitions and that this never had occurred. Although, Robert Cornand, a helper on Romaniello’s truck and a witness for the Respondent, testified that he had never observed Romaniello alone with Tomanelli in his office or received his paycheck without Romaniello being present, in a somewhat changeable and contradictory manner Cornand also testified that he was not always present when Romaniello was in Tomanelli’s office or constantly with Romaniello after they returned to the shop.⁵

Tomanelli also testified that the only conversation he had with employees regarding the Board’s representation case and their attendance therein was when employees Romaniello, Tommy Odietus, and Rich Catone came to him to seek advice about how to avoid testifying on behalf of the Union in that proceeding. Tomanelli spoke to his supervisor, Scott Hansen, about this and then told these employees that they did not have to testify unless subpoenaed to do so and to notify him if this occurred. The plausibility of this happening as testified to by Tomanelli is placed in question when considered in the light that these three employees had been terminated by Tomanelli previously, allegedly because of their union activities, in a somewhat vicious manner, and reinstated by court order. Romaniello attended the representation hearing on several occasions, sitting with the Union’s at-

⁵ It is reasonable to assume that if Tomanelli wanted to question Romaniello about his testimony to be given at a Board hearing, he would do so without any other employee being present and in a surreptitious manner, especially in view of the prior case of unfair labor practices involving the Respondent and himself, the outcome of that case and its eventual settlement, and his obvious hostility towards Romaniello’s union activities.

torney and its representative, and he testified therein in support of the Union. Also, although Hanson was present on each of the hearing days in the instant case he was never called as a witness to corroborate the part of Tomanelli’s testimony applicable to him.⁶

With regard to the Respondent’s two other witnesses, employees Robert Cornand and Steven Sicari, I do not credit their testimony when it conflicts with Romaniello’s. Cornand’s testimony contained some inconsistencies that again could be interpreted as seemingly designed specifically to support the Respondent’s case. Cornand testified that while working as a helper on Romaniello’s truck they never returned to the shop later than 3 p.m., this being offered to contradict Romaniello’s testimony that on October 26, 1993, he had returned to the shop shortly after 4 p.m., and thereafter experienced an encounter with the two unknown persons who threatened him. On cross-examination Cornand admitted, however, that while 3 p.m. was the usual time Romaniello’s truck returned to the shop, it did vary, and Cornand could not with exactness state the time of return of the truck on any given day because he does not record his time. Moreover, this latter testimony by Cornand was contradicted by the Respondent’s own witnesses, Tomanelli and Sicari, who testified that employees were required to punch a timeclock when they reported for work and at the end of their workday.

And, as set forth hereinbefore, Cornand testified that he could recall no time when he observed Romaniello alone with Tomanelli in Tomanelli’s office and without the presence of himself and the other helper assigned to Romaniello’s truck. Yet Cornand also testified that when the truck returns to the shop the helpers wash it down and then they clean up and change their clothes in the bathroom outside the presence of truckdriver Romaniello, who is elsewhere on the premises, and that Cornand was not present at all the times while Romaniello was in Tomanelli’s office, although he maintained that this had never happened during the time he was assigned to Romaniello’s truck as far as he had observed.

Sciari, who acts as “yard foreman” monitors the Respondent’s premises and oversees the return of any trucks still out on their collection routes after Tomanelli leaves work at 4 p.m. Sciari then closes and locks the shop before leaving the facility at 5 p.m. Although Sciari testified that he had never observed any strangers sitting on a car in the Respondent’s parking lot during the months of September, October, and November 1993, he acknowledged that from Tomanelli’s office, where he is situated after 4 p.m., you cannot see the parking area where Romaniello customarily parks his vehicle. Moreover, Sciari admitted to a lifelong friendship with Tomanelli, who on occasion babysits for Sciari’s children. In addition it appears that Sciari’s testimony in part supported Romaniello’s account of what oc-

⁶ In support of Tomanelli’s testimony regarding this the Respondent made an “offer of proof” that its witness, employee Steven Sicari would testify that Romaniello had told him that the Union was “bothering or threatening” him to make Romaniello talk to the Department of Labor, the NLRB, and the FBI, but that Romaniello said that he did not want to help the Union. Romaniello’s conduct in support of the Union at the representation hearing, however, would contradict this and, as indicated hereinafter, I found Sicari to be a biased witness.

curred on October 26, 1993, when he was threatened by the two unidentified men. Note that according to Romaniello's account Tomanelli had already left the premises because it was after 4 p.m., and Sciari testified that part of his duties entailed making sure that all the trucks had returned to the facility and were secure after Tomanelli had left at 4 p.m., and before he closed up at 5 p.m., which would indicate to me that trucks did return to the Respondent's premises on occasion after 4 p.m. and why not Romaniello's.

2. Interrogation

In *Rossmore House*, 269 NLRB 1176 (1984), aff'd. 760 F.2d 1006 (9th Cir. 1985), the Board reiterated the basic test for evaluating whether interrogations violate Section 8(a)(1) of the Act established in *Blue Flash Express*, 109 NLRB 591 (1954): whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. The Board then stated in *Rossmore House*, supra at 1177:

Our view is consonant with that expressed by the Seventh Circuit, Court of Appeals in *Midwest Stock Exchange v. NLRB* [635 F.2d 1255, 1267 (7th Cir. 1980)]:

It is well established that the interrogation of employees is not illegal per se. Section 8(a)(1) of the Act prohibits employers only from activity which in some manner tends to restrain, coerce or interfere with employee rights. To fall within the ambit of Section 8(a)(1), either the words themselves or the context in which they are used must suggest an element of coercion or interference.

Thus, the surrounding circumstances of the interrogation determines its unlawfulness and the Board will consider the time, place, personnel involved, and the known position of the employer, in making such a determination. *Teamsters Local 633 (Bulk Haulers) v. NLRB*, 509 F.2d 490 (D.C. Cir. 1974); *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985); *Rossmore House*, supra.

According to the credited testimony of Romaniello, a few days before he was scheduled to testify at a Board representation hearing, his overall supervisor, Tomanelli, questioned him alone in Tomanelli's office, about whether he was going to attend the Board hearing and about what he was going to say as a witness therein. When Romaniello answered in a vague manner to the latter question, Tomanelli accused him of being a "wise guy" and playing "stupid" and then Tomanelli advised Romaniello that he would also be present at the hearing on the same days as Romaniello. Under these circumstances, I find that Tomanelli's questioning of Romaniello about his cooperation with Board processes had a reasonable tendency to coerce Romaniello within the meaning of Section 8(a)(1) of the Act and was therefore violative thereof.⁷ *Bradford Coca-Cola Bottling Co.*, 307 NLRB 647

⁷It should be noted that Tomanelli had previously discharged Romaniello allegedly for his union activity with the admonition to "get the fuck off the property," which implies some antiunion animus. Thus Tomanelli's adding that he would also be present at the Board hearing on the days that Romaniello was to appear further adds to the coercive nature of this interrogation and tend to both in-

(1992); *Metalite Corp.*, 308 NLRB 266 (1992); *Windsor Castle Health Care Facilities*, 310 NLRB 579 (1993).

3. Threats

Having credited Romaniello's testimony in this case, the threats of bodily harm and property damage to himself and his family, should he testify at the Board representation hearing would, clearly be a violation of Section 8(a)(1) of the Act if it could be shown that the two unidentified men who had threatened Romaniello were acting as agents of the Respondent at the time the threats were made. The question of an employer's liability under the Act for the conduct of another is determined in accordance with the "ordinary law of agency." See *Longshoremen ILWU (Sunset Line)*, 79 NLRB 1478 (1948). Also see *Longshoremen ILA (Coastal Stevedoring)*, 313 NLRB 412 (1993).

In *D.G. Real Estate*, 312 NLRB 999 (1993), the Board stated:

In determining apparent authority, the Board applies the standard endorsed in *Dentech Corp.*, 294 NLRB 924, 925 (1989), quoting from *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82 (1988):

Apparent authority is created through a manifestation by the principal to a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the acts in question. *NLRB v. Donkin's Inn*, 532 F.2d 138, 141 (9th Cir. 1976); *Alliance Rubber Co.*, 286 NLRB 645, 646 fn. 4 (1987). Thus, either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or the principal should realize that this conduct is likely to create such a belief. Restatement 2d, Agency Section 27 (1958), Comment. Two conditions, therefore, must be satisfied before apparent authority is deemed created: (1) there must be some manifestation by the principal to a third party, and (2) the third party must believe that the extent of the authority granted to the agent encompasses the contemplated activity.

Also see *Great American Products*, 312 NLRB 962 (1993); *Allegany Aggregate*, 311 NLRB 1165 (1993). The burden of proving any type of agency relationship is on the party asserting the relationship. *Millard Processing Services*, 304 NLRB 770, 771 (1991).

Applying these principles to this case, I find that the General Counsel did not meet the burden of establishing agency, apparent or otherwise, or management responsibility for the acts of the two unidentified men. Nevertheless, in my mind, the circumstances present in this case does give rise to a strong suspicion that these men engaged in such unlawful conduct with the Respondent's knowledge, sponsorship, or approval. The record evidence shows that the Respondent was aware of approximately when Romaniello was to testify at the representation hearing and also of Romaniello's union sentiments, despite its denial of the latter. The Respondent acknowledged that strangers were not permitted to loiter on

hibit Romaniello's attendance and testimony at the hearing interfering with his right to participate in Board processes.

its premises and has surveillance cameras placed on the property as a security measure. Additionally, the Respondent's facility is located in a fairly isolated area and is not the type of business enterprise wherein customers will come and go on the premises. Moreover, the employees including Romaniello generally park their cars in the same location daily in the parking area and are aware of who owns which car. Although the area surrounding the Respondent's facility, including the parking areas, are unfenced and open to anyone wishing to come thereon, Romaniello's automobile was the only car left in the parking area at the time the threats were made against him. Interestingly, prior to this incident, Romaniello had asked Cornand to "watch my back for me" when he went to his car at the end of his workday and whenever Cornand was present, indicating a fear on Romaniello's part that harm could come to him because of his involvement in the "labor dispute."

Suspicion, however, even if present to a significant degree, is not evidence. Importantly, no member of management or any supervisor was witness to this event, nor did Romaniello report the incident to the Respondent so that it could be shown that the Respondent in some way had knowledge of the unlawful act, had acknowledged it and indicated sponsorship or disavowal thereof, or approved or disapproved of such action. Although it can be argued that Romaniello might believe from what had transpired that the Respondent was responsible for the acts of the two unidentified men who had threatened him and his family, yet the General Counsel has failed to show some actual manifestation on the part of the Respondent to establish the apparent authority of those men to act on its behalf at the time of this occurrence. *Farm Fresh, Inc.*, 301 NLRB 907 (1991); *D.G. Real Estate*, supra. Also note, *Conair Corp.*, 261 NLRB 1189 fn. 464 (1982).

Accordingly, because of the failure of proof in this regard, I am constrained to conclude that the General Counsel has not proved a violation of Section 8(a)(1) of the Act by the conduct of the two unidentified men in threatening Romaniello and his family with physical harm and property damage.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent, set forth in section III above, occurring in connection with the Respondent's operations described in section I above, have a close and intimate relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. THE REMEDY

Having found that the Respondent has engaged in certain 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.

Because of the nature of the unfair labor practices found herein, and in order to make effective the interdependent guarantees of Section 7 of the Act, I recommend that the Respondent be ordered to refrain from in any like or related

manner abridging any of the rights guaranteed employees by Section 7 of the Act. The Respondent should also be required to post the customary notice.

CONCLUSIONS OF LAW

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

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

3. By interrogating its employees concerning their upcoming testimony to be given to the National Labor Relations Board, the Respondent has interfered with, restrained, and coerced its employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act.

4. The Respondent has not otherwise violated the Act.

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

ORDER

The Respondent, SSC Corp., Holtsville, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees concerning their upcoming testimony to be given to the National Labor Relations Board.

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

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

(a) Post at its Holtsville facility, Suffolk County, State of New York, copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

⁸If 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.

⁹If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

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 interrogate our employees concerning their
upcoming testimony to be given to the National Labor Rela-
tions Board.

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

SSC CORP.