

Joy Recovery Technology Corp. and Local Union No. 673, International Brotherhood of Teamsters, AFL-CIO. Case 13-CA-32751

December 20, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS COHEN
AND TRUESDALE

On August 17, 1995, Administrative Law Judge Frank H. Itkin issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief to the Respondent'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,¹ and has

¹ The Respondent also filed a "Motion to Vacate Recommended decision and Order and for New Trial," to which the General Counsel filed an opposition. For the reasons stated in fn. 2 below, we deny the Respondent's motion as lacking in merit.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings. In adopting, we acknowledge that the testimony of the General Counsel's witnesses was not always "mutually corroborative," as stated by the judge, but we note that their testimony was generally consistent as they described the Respondent's response to the advent of the Union's organizing campaign. The Respondent further asserts that the judge demonstrated bias and prejudice in making his credibility resolutions. As stated, we have carefully examined the entire record, including the judge's decision, and we are satisfied that the judge's conduct here did not constitute legal prejudice or even the appearance of partisanship. Thus, there is no basis for finding that bias or partiality existed merely because the judge resolved important factual conflicts arising in this proceeding in favor of the General Counsel's witnesses or that, as the Respondent notes, he may have reached similar credibility resolutions in previous cases he decided.

Although the judge states under the heading "Findings of Fact," par. 5, l. 1, that Jose Lopez was "formerly an employee and supervisor" of the Respondent, we note that there is no record evidence to establish that Lopez was a supervisor within the meaning of the Act. We stress that, in any event, Lopez was a unit employee when the Respondent's supervisor, Roberto Baltazar, coercively interrogated him in violation of Sec. 8(a)(1) of the Act.

decided to affirm the judge's rulings, findings,² and conclusions³ and to adopt the recommended Order.⁴

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Joy Recovery Technology

³ We adopt the judge's finding that the Respondent violated Sec. 8(a)(5) by refusing to bargain about its decision to close the transportation department and outsource all the unit work. Contrary to the Respondent's argument, it is well established that an employer's subcontracting decision cannot be a legitimate entrepreneurial decision exempt from bargaining when, as here, antiunion considerations are at the heart of the alleged fundamental change in the direction of the corporate enterprise. See, e.g., "*Automatic*" *Sprinkler Corp.*, 319 NLRB 401 (1995).

Member Cohen agrees that the Respondent violated Sec. 8(a)(3) and (1) by discontinuing the work of its transportation department, subcontracting that department's work, and laying off or discharging certain employees. He therefore finds it unnecessary to decide whether these actions also violated Sec. 8(a)(5).

⁴ Although we agree with the judge that the Respondent's unfair labor practices were of such a nature that a bargaining order is required to remedy them, we find that he incorrectly dated the bargaining order. In *Peaker Run Coal Co.*, 228 NLRB 93 (1977), the Board held that where the union has not made a demand for recognition, the respondent will be ordered to bargain with the union as of the date on which the respondent initiated its campaign of unfair labor practices if, as of that date, the union had obtained majority status in the bargaining unit. The record in this case shows that the Union achieved majority status among the unit employees on July 9, 1994, and did not subsequently demand recognition from the Respondent. Therefore, we will date the bargaining order from the approximate date thereafter that the Respondent embarked on its course of unlawful conduct, that is, July 19, 1994, when the Respondent, at the latest, coercively interrogated employee Lopez about his union activities and those of other employees.

In ordering the restoration of the Respondent's Aurora, Illinois trucking operation, we emphasize that the Respondent continues to have an ongoing contractual relationship with Ameritech to provide trucking services, that the Respondent still owns all the equipment used to transport products for Ameritech, and that the Respondent can readily resume trucking operations after giving its subcontractors any required cancellation notice. See *Jay Foods*, 228 NLRB 423 (1977), modified in pertinent part 573 F.2d 438 (7th Cir. 1978). Although the Respondent estimates that it would cost \$361,465 to reestablish its trucking operation, we note that this figure includes salary costs for a salesman and a safety manager and that these jobs did not exist under the former operation. Furthermore, it is not inconsistent with the Respondent's burden to remedy the unfair labor practices found in this case for it to bear the cost or any hardship resulting from the restoration of the status quo, as long as the hardship is not unduly burdensome. We conclude in this case that it would not be unduly burdensome for the Respondent to resume its trucking operation. *Mid-South Bottling Co. v. NLRB*, 876 F.2d 458, 460-464 (5th Cir. 1989); *Teamsters Local 171 v. NLRB*, 863 F.2d 946, 957-958 (D.C. Cir. 1988). We will permit the parties to introduce at the compliance stage any evidence that may be pertinent to the appropriateness of the restoration remedy, provided that the evidence was not available at the unfair labor practice hearing. *Lear Siegler, Inc.*, 295 NLRB 857 (1989).

Corp., Aurora, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Librado Arreola and Daniel Pasternak, Esqs., for the General Counsel.

Donald W. Anderson and Mary E. Diczg, Esqs., for the Employer.

DECISION

FRANK H. ITKIN, Administrative Law Judge. Unfair labor practice charges and amended charges were filed in the above proceeding on August 30, 1994, and on February 17 and March 21, 1995. A complaint issued on March 30, 1995. The complaint was amended on April 25, 1995, and again at the hearing. The General Counsel alleged in the complaint, as amended, that Respondent Employer had interfered with, restrained, and coerced its employees in the exercise of their Section 7 rights, in violation of Section 8(a)(1) of the National Labor Relations Act, by coercively interrogating employees about employee union membership, activities, and sympathies; by asking employees to ascertain and disclose to the Employer the union membership, activities, and sympathies of other employees; and by threatening employees with layoff if they selected the Union as their collective-bargaining representative. The General Counsel further alleged that Respondent Employer had discriminated in regard to the hire or tenure or terms and conditions of employment of its employees thereby discouraging membership in the Union, in violation of Section 8(a)(1) and (3) of the Act, by disciplining and suspending employee Edward Kizior about August 5, 1994; and by later discontinuing its transportation department, subcontracting the work performed by these unit employees and laying off or discharging the seven unit employees named below on or about August 22, 1994.¹

In addition, the General Counsel alleged that about July 9, 1994, a majority of employees in an appropriate unit (see fn. 1, supra) had designated and selected the Union as their representative for the purposes of collective bargaining; that Respondent Employer's unfair labor practices, as alleged, are so serious and substantial in nature that the possibility of erasing their effects and conducting a fair and free representation election by use of traditional remedies is slight; and that, consequently, the employees' sentiments regarding representation having been expressed through union authorization cards would on balance be protected better by issuance of a bargaining order than by traditional remedies.

Further, the General Counsel alleged that Respondent Employer had failed and refused to bargain in good faith with

¹ The seven unit employees as named in the amended complaint are:

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| 1. David Fox | 5. Mark or Michael Watson |
| 2. Keith Kerr | 6. David Woodard |
| 3. Edward Kizior | 7. Roberto Zamora |
| 4. Pat Maser or Mazur | |

The unit involved, as alleged in the complaint and stipulated to be appropriate (G.C. Exh. 2) consists of:

All full time and regular part time drivers, spotters and mechanics employed by the Employer at its facility located at 701 N. Commerce, Aurora, Illinois, but excluding all office clerical employees, managers, production employees, dispatchers, guards and supervisors as defined in the Act.

the Union as the exclusive collective-bargaining agent of an appropriate unit of its employees, in violation of Section 8(a)(1) and (5) of the Act, by unilaterally and without notice or bargaining discontinuing its transportation department, subcontracting the work performed by its unit employees and laying off or discharging the seven named unit employees. The General Counsel seeks as part of his remedy for the above conduct an order requiring Respondent Employer to reinstitute its transportation department as it existed on or before August 11, 1994.

Respondent Employer denied, inter alia, violating the Act as alleged and that the requested remedial relief is proper.

Accordingly, a hearing was held on the issues thus raised on May 22–24, 1995, in Chicago, Illinois, and on the entire record in this proceeding, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

The Employer, Joy Recovery Technology Corp., reclaims and recycles Ameritech's used wire at its plant in Aurora, Illinois, and is admittedly engaged in commerce as alleged. The Union is admittedly a labor organization as alleged. On July 11, 1994, the Union filed a petition with the Board in Case 13–RC–18950 seeking to represent the Employer's transportation department employees at its Aurora plant. (See G.C. Exhs. 3 and 4.) Thereafter, on August 11, 1994, the Employer notified its transportation department employees (G.C. Exh. 7):

As we have discussed during three transportation meetings this past year, our transportation operation has continued to operate at a loss, and has a negative financial and customer impact on the Aurora operation as a whole.

Efforts to stop these financial losses have either been unsuccessful or resulted in poor customer service and customer complaints. In addition, we have been put on a thirty day cancellation notice for the transportation portion of our contract from our customer. This notice expires September 1, 1994.

Recent attempts at improving service and lowering operating costs have been successful with the use of independent transportation contractors. According to our consultant, who was hire[d] in February 1994, this is primarily due to an independent contractor's back-hauls, which Joy doesn't have, nor do we have the authority to negotiate them.

Given the above circumstances, in order for Joy to remain in this business, we have decided to close our Company-run transportation operation and rely solely on contract of common transportation carriers. This will become effective August 22, 1994.

Michael Watson, an employee affected by the above discontinuance of Respondent Employer's transportation department, testified that he started working for Joy in November 1993 "as a spotter/mechanic" and about 1 month later "started driving." His employment ended during August 1994 as a result of the Employer's elimination of its transportation department. He now works for a company named Wood Dale, where he performs essentially the same services

for Ameritech which he had previously performed for Joy. He testified:

- Q. What is your position with Wood Dale?
 A. Truck driver, spotter, mechanic.
 Q. What are your duties?
 A. To do what is needed, spot, drive, go to Ameritech, pick up material and bring it back to Joy.
 Q. What kind of material do you pick up?
 A. Scrap.
 Q. You said you pick it up from Ameritech at what location or locations?
 A. Wisconsin, Ohio, Indiana and Illinois.
 Q. After you pick up the material what do you do with it?
 A. Take it back to Joy.
 Q. What kind of truck do you presently drive?
 A. GMC.
 Q. Before you drove that truck, what kind?
 A. Kenworth.
 Q. The trucks that you have driven while . . . employed by Wood Dale, who owns those trucks?
 A. Joy.
 Q. What do you deliver the materials in?
 A. Flatbeds, gondolas and vans.
 Q. Who owns that equipment that you deliver material in?
 A. Joy.
 Q. At the time that you were employed by Joy, how many trucks did the Company use?
 A. About eight I think.
 Q. Do you know who owned those trucks?
 A. Joy owned five of them and they leased three.
 Q. Do you know what has happened to those trucks?
 A. They leased them to other Joys [in other locations].²

Watson next testified that on July 9, 1994, he met with James Bowman, a transportation consultant previously retained by Respondent Employer. Bowman "asked how [he] could improve the Company, the transportation department," and Watson "gave him a few ideas." Bowman similarly interviewed a number of other unit employees. Later that same day, Watson, together with a number of his coworkers, met with Union Representative Robert or Ace Warren. There, the employees were given "pamphlets to read . . . told about the Union . . . and [given] cards." Watson identified General Counsel's Exhibit 8 as the union "application for membership" card which he then filled out and signed. He had been told "that I would be in the Union and we would have an election." He observed that all the employees present "signed cards that day."³

²Watson noted that Joy, before the discontinuance of its transportation department, had "used" various "trucking companies" or "outside carriers," including Wood Dale, to transport some of Ameritech's scrap. Watson generally claimed that "Joy would lose money on outside carriers" whereas the "Joy drivers would make them money." Watson recalled former Transportation Department Manager Paul Jensen stating that "he didn't like to use" "outside carriers" "because they cost too much money."

³Watson identified the other seven persons present who had similarly signed union cards that day as including:

Later, Company Manager Mark Matza had the following conversation with Watson while driving the employee to the plant:

Mark [Matza] asked me [Watson] if I knew anything about the Union and I said no. He said something is going to have to be done because he didn't want it to spread throughout the whole plant.

Watson later received a copy of the Employer's August 11 memorandum (G.C. Exh. 7) as quoted above. No company representative had previously stated that "Joy was going to dissolve the transportation department."⁴

Jose Lopez, formerly an employee and supervisor of Joy, testified that since October 1994 he has been working for Wood Dale as a truckdriver hauling Ameritech's scrap wire to Joy's plant and that he "hauls" these "materials" "in Joy's equipment." He recalled meeting with Company Consultant Bowman on July 9, 1994, where he was asked about his "feelings about" Joy and that, later, he attended the union meeting with his coworkers and signed a union "application for membership" card. (See G.C. Exhs. 9, 10, and 11.) He noted that "dispatcher" Chandler (see fns. 3 and 4, supra) helped him fill in the "card" because, as he explained, "I wanted people to understand my writing. I got sloppy handwriting. I cannot write good."

Lopez, as he further testified, was later questioned "about the Union" at work by Joy Supervisor Roberto Baltazar, as follows:

Well, he [Baltazar] asked me [Lopez] did I know about the Union, and I told him no. He asked me if a guy came by to sign a card and become a member . . . [in] the Union, and I told him no. Then he asked me if I

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| 1. Julia Chandler | 5. Jose Lopez |
| 2. Rick Fields | 6. Pat Mazur |
| 3. David Fox | 7. David Woodard |
| 4. Edward Kizior | |

Counsel for the General Counsel acknowledged (Tr. pp. 75, 86-88) that Julia Chandler, whose testimony is discussed below, was the "dispatcher" in the transportation department and, as stipulated, "would not be included in the unit." Counsel for Joy further argued that Chandler was in fact a "supervisor" beyond the protection of the Act.

⁴On cross-examination, Watson acknowledged that he had heard "rumors" that Ameritech was "dissatisfied with the performance of the trucking operation by Joy"; "just that other people were mad when they were late" "in making pick-ups and so forth." He was unaware of any "formal threat or warning of a possible elimination of this operation because of this type of thing." Watson also acknowledged that his claim that the trucks he drove for Wood Dale "were owned by Joy" was based on information acquired while working for Respondent Employer and that "he has no knowledge as to who owns them now." Watson also acknowledged that his claim "that trucks were leased to other Joy facilities after the subcontracting decision" was based on the fact that he had "clean[ed] one up" for Mark Matza who told him "that another guy from Joy was coming to get it." He had no "other knowledge as to what happened to the other trucks."

In addition, Watson further acknowledged that Chandler, one of the eight employees who had signed a union card on July 9, was in fact the "dispatcher" who determined what "runs" drivers were assigned, and who, as noted, has been excluded from the unit. See Tr. 38-41. Watson, however, denied that Chandler had encouraged any employees "to sign the cards."

knew who was the head of it and also told me . . . they don't need a Union here. . . . I told him . . . maybe the guys are looking for better treatment or better payment.⁵

Julia Chandler, presently employed by the Teamsters Union as a secretary, testified that that she previously had worked for Joy. She started working for Joy about September 1993 as a "general clerk, office help, and assisting in transportation." Paul Jensen was then "transportation manager and . . . also in charge of maintenance." Later, when Jensen was "terminated" about June 1994,

basically they put me [Chandler] in his position dispatching trucks out, although I was not allowed to hire or fire or make any permanent decisions in the transportation department. . . . I dispatched trucks . . . called outside carriers and would dispatch them to cover runs with the permission of [general manager] Simon Pawlenko . . . entered some trip sheets . . . [did] a little bit of the log checking . . . [and] handled all the petty cash.

Chandler noted that General Manager Pawlenko "was brought in" by the Employer about the time of Jensen's "termination"; "he was in charge of everything"; "basically he oversaw everything"; she "reported" to him; and "if I wanted to do something I would have to ask his permission." Her hourly pay rate was raised from \$8 to \$9 "when they gave me the transportation position to dispatch."⁶

Chandler testified:

He [Pawlenko] had stated to me [Chandler] that he was there to oversee the transportation department and possibly they were talking about expanding the transportation [department], hiring more drivers . . . making a drivers' room . . . [and] buying more trucks and more trailers. . . . It would be cheaper to have our own drivers do the work [at] MCV sites . . . as opposed to an outside carrier do the work . . . although [on] some of the long runs . . . [it] would be more beneficial to use [outside contractors] as opposed to our drivers. . . . An MCV site is where [Joy's drivers] go to a site, park their truck there, and the guys pull cable and slice it . . . then they load it on the truck, bring it back to our Company, splice it out and separate it into categories. . . .

⁵On cross-examination, Lopez acknowledged that his last day of work for Joy was July 19, 1994, when he was "fired" for "refusing to do two . . . jobs." He also explained that "dispatcher" Chandler was present at the earlier July 9 union meeting "because we invited her." He denied that she had "encouraged [him] or any of the employees to sign a card," explaining that she only "helped" him complete his card because "[he] asked her" as a result of his "difficulty writing English."

⁶Chandler identified the Joy transportation department employees in December 1994 as including, in addition to herself, a summer temporary, and General Manager Pawlenko,

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| 1. Rick Fields | 5. Jose Lopez |
| 2. David Fox | 6. Pat Mazur |
| 3. Keith Kerr | 7. Michael Watson |
| 4. Edward Kizior | 8. David Woodard |

We paid our drivers . . . around \$110 per day for each MCV site. An outside carrier would charge \$35–\$40 plus per hour to sit on the site. So, it would be cheaper for us to have our drivers at \$110 which was the set rate, as opposed to having an hourly rate driver at the site. [See also G.C. Exh. 12 and Tr. 72 to 73.]

In addition, Chandler noted that Pawlenko initially "want[ed] to hire more people [in the transportation department] to keep the price down for the MCV site and local runs."

Chandler, as she further testified, met with Company Consultant Bowman on July 9, 1994:

He [Bowman] had stated that he was brought there to figure out ways to make the transportation department run more smoothly. He wanted my [Chandler's] opinion on the transportation department and what I thought in my opinion would make the department run more smoothly, what would be beneficial for the department, for the guys.

See Respondent's Exhibit 1, Chandler's "comments" made to Bowman on July 9 pertaining to the operation of the transportation department.

Chandler, later that same day on July 9, also met with the Union's representative at a meeting attended by her and seven other transportation department employees. (See fn. 3, supra.) She noted that an eighth transportation department employee, Keith Kerr, was not present at the meeting. She was told there "that there were cards [to sign so] that we could go to the Employer [and] have a vote and an election to bring the Union in there." She signed a union "application for membership card." She also "filled out" "the address section" of Edward Kizior's card (G.C. Exh. 13) and assisted in filling out Jose Lopez' card (G.C. Exh. 9). She explained:

[Kizior] didn't know what the address was, so I just wrote it in for him. . . . [Lopez] had a hard time, he could not write English very well. . . . I read it to him and got the information and wrote it on the card.

Chandler insisted that she did not play "any role in setting up this union meeting" or "any role in attempting to bring the Union into this facility." All employees present that day "signed" their "cards." See also General Counsel's Exhibits 14, 15, 16, and 17, the signed union application cards of employees Fields, Fox, Mazur, and Woodard, respectively.

Chandler next testified that Company Manager Mark Matza later repeatedly discussed the transportation department and the Union with her during various lunch meetings. She recalled:

At first he [Matza] had stated that he was interested in knowing who brought the Union in. He asked me [Chandler] if Ed Kizior had brought the Union in, and I would not tell him. Then he made mention of Dave Woodard, if he brought the Union in, because Dave Woodard had prior to that made mention of getting a Union in there. He also asked if I knew anything that they would be able to offer the drivers to make them not seek Union representation. And he asked if they had offered them more money. He had even [talked

about] possibly bringing Paul Jensen . . . back if they would not seek Union representation.

He had also asked when the Union meetings were held, who attended them . . . who brought the Union in . . . if we had any literature from the Union . . . if I could possibly get a copy . . . and let him see it He asked if I would have any objections . . . to taking a tape recorder into one of the [Union] meetings and recording it so that they would know what took place.

He had on one occasion asked my opinion of closing the transportation doors, and I had stated to him my concern about what would happen to my position and to me if we did indeed close the doors. And he said that I would be fine . . . they were thinking about having Werner Enterprises put in a terminal so that way I could dispatch the work out at that point. I did ask him if the reason they were thinking about closing the transportation doors was due to the Union, and he stated yes that it did play a major part in their decision of closing the transportation doors.

Further, Company Manager Pawlenko issued employee Edward Kizior a "written warning with a three day suspension," dated July 18, 1994 (G.C. Exh. 6), stating:

On July 13, 1994, a Company truck was taken by you [Kizior] and Jose Lopez without prior authorization for the personal use to have Jose Lopez take a driver's test. For breaking a Company policy you will be suspended for three days without pay effective July 19, 1994.

Chandler, however, explained the events culminating in the above disciplinary action, as follows:

Approximately one month prior [to July 13] . . . I [Chandler] had stated to Pawlenko that Lopez needed to get a CDL license because he was a spotter for Joy . . . taking the truck[s] off the premises to the gas station [and] to get other trailers [and] he had been stopped at times. . . . I stated to [Pawlenko] that he [Lopez] needed to get a CDL to go out on the open road It was scheduled that he would use one of our trucks and Kizior would assist him in taking the truck and receiving his CDL.

[On July 13] Kizior and [Lopez] came in and [Pawlenko] was in the room. They stated that they were going to go and try to obtain a CDL for Lopez. I had told Kizior to go ahead and punch in, and he made mention of it to [Pawlenko], because [Pawlenko] stated that he would be paid for the day. . . . I had reminded [Pawlenko] after they left, I had told [Pawlenko] they were leaving now to go get his CDL and that he did give me permission a month ago to allow them to do so.

In addition, Chandler testified that she also had the following conversation or conversations with Pawlenko at work:

He [Pawlenko] made mention of the Union. They thought that I [Chandler] was the one that brought the Union in . . . because the drivers got along with me, and he thought that I would have the influence on

bringing the Union in. At first he was talking about expanding the transportation department, and then all of a sudden they were talking about closing the department down. . . . He asked that I use more outside carriers and fade out using our own drivers . . . after it was known that the Union was being brought in.

Chandler explained that, before July 9, 1994, no company representative had ever told her "that they were going to dissolve the transportation department."

Finally, Chandler, after August 22, 1994, "continued dispatching . . . until [Pawlenko] took [her] out of that position and put [her] into another position." This all occurred, as Chandler explained, about 2 weeks prior to her subsequent termination of employment. Pawlenko had then faulted her work and "asked" her to "resign." She, at the time, had refused, and was given "a 30 day probation." She later left the Employer and went to work for the Teamsters Union.⁷

Edward Kizior, previously employed by Respondent Employer in its transportation department, similarly testified that he too had met with Company Consultant Bowman on July 9, 1994, and, later that same day, met with the union representative where he and his coworkers signed their union application for membership cards. Kizior previously had "set this [Union] meeting up"; he previously had "called" the Union "to see what we had to do to have a union represent us"; and he also had discussed obtaining union representation with his coworkers. The union representative explained to the employees at the July 9 meeting that "we needed to sign the cards so we could get a Union election." Chandler, also present at the union meeting, "filled out the address and phone number of the Company" on his card "because [he] didn't know it."

Kizior identified General Counsel's Exhibit 6, a "written warning with a three day suspension" dated July 18, 1994, as quoted above. Kizior, in fact, had received this document on August 5. He corroborated Chandler's testimony, as summarized above, indicating that he had previously obtained permission to take Lopez on July 13 "to get his CDL." Kizior explained:

[On July 13] Jose [Lopez] and I [Kizior] told Julia [Chandler] that we were going to get the license . . . I asked Simon [Pawlenko] if I was getting paid for it. . . . I was told yes . . . then we left.

⁷On cross-examination, Chandler acknowledged that during August 1994, she had an "argument" with employee Kerr and thereafter Pawlenko "said I could suspend him" "for three days." She explained that this disciplinary action was taken "with [Pawlenko's] permission"—"because this was the second time [the employee] had thrown something at me." Chandler also acknowledged that she "had requested another employee [Fields] be terminated because of a false kidnapping" charge by the employee, "but nothing I did was a decision I could make on my own . . . it had to be under Pawlenko . . . anything that I did . . . I had to get his permission first."

In addition, Chandler acknowledged that she had attended "Saturday drivers' meetings" where management "conveyed to the drivers that there were some problems with . . . Ameritech's . . . lack of happiness with Joy's service to them." Chandler noted:

I had always attended those meetings. I was an employee with the drivers. . . . I never had attended the meetings [of] the managers . . . so I attended as an employee.

Kizior next identified General Counsel's Exhibit 7, the Employer's August 11, 1994 notification to its employees that it was closing its transportation department, as quoted above. And, Kizior similarly testified that he had not previously been told by any company representative "that they were going to dissolve the transportation department."⁸

Mark Matza, Respondent Employer's manager, testified that Joy is engaged at its Aurora plant in reclaiming and recycling scrap wire and related materials for its only customer, Ameritech. Ameritech retains title to the scrap during this entire process, that is from reclamation and recycling to ultimate resale. Joy primarily performed production operations at its plant as part of the recycling process, however, "there [was] a transportation operation in conjunction with the production operation." Joy, in transporting this scrap, used its own transportation equipment and personnel as well as those of independent carriers, such as Wood Dale Trucking and later Werner Enterprises or Transportation. Initially, before the events in issue here, Joy utilized its own equipment and personnel to transport about 75 percent of this scrap; independent contractors hauled the remaining 25 percent. Ameritech then and now compensated Joy for the transportation of its scrap at a set "per pound rate."

Matza claimed that, although Joy made a profit on its "production operation," "as of the fall of 1993" it "was losing money every month" on its "transportation operation." Consequently, "we had meetings and tried to analyze what we were doing wrong." A "reason" for this "unprofitability" in the "transportation operation" "related to the per pound rate" Joy was "receiving from Ameritech" for its transportation services.⁹ In October 1993, Joy requested from Ameritech a "rate increase," and Joy was then granted a rate increase effective December 1, 1993. (See R. Exh. 2.)

Later, during February 1994, as Matza further recalled, Paul Jensen became Joy's plant manager, "and was allowed to hire a dispatcher" to assist in the "transportation operation." Matza explained that, although "the transportation [operation] was losing money,"

our feeling at the time [was] that by providing additional [transportation] services we could influence or control the amount of material coming into our facilities . . . if someone else [were] contracting the hauling . . . it would be too easy for [Ameritech] to ship the material elsewhere [for production processing].

⁸In addition to the above testimony and related documentary evidence, counsel for the General Counsel also introduced into evidence, without objection, inter alia, G.C. Exh. 26, Respondent Employer's "employee separation record" for Roberto Zamora, an alleged discriminatee, showing that this employee was "discharged" on or about September 20, 1994, because he "did not call in for seven consecutive work days" (see Tr. 140-141); and G.C. Exh. 27, Respondent Employer's notification to Keith Kerr, another alleged discriminatee, indicating that the employee was terminated effective August 9, 1994, as a result of his "abusive and threatening conduct" (see Tr. 141 and also G.C. Exhs. 31 and 32).

⁹Matza also cited "a number of [additional] different problems that came up in [his] transportation operation" including, inter alia, "response time" and equipment "requirements of Ameritech"; however, admittedly, these "problems," like the rate deficiency discussed above, had existed for some time prior to the events in issue here. See Tr. 169-179.

In addition, Joy also retained during February 1994 the services of a "transportation expert" or "consultant," James Bowman. Bowman was to be provided with various company documents and reports "so that he could make a judgment on the [transportation] operation." According to Matza, Bowman thereafter encountered delays in obtaining requested company documents and reports. About May 1994, Plant Manager Jensen was terminated and replaced by Simon Pawlenko. Pawlenko, according to Matza, during May, "was able to get everyone together to generate" the "information" previously requested by Bowman.

Matza next testified that, throughout this period, "outsourcing the transportation portion of the business" had "always been" a "consideration." However, he explained:

I [Matza] can't say it was total outsourcing, but the use of common carriers was always a consideration throughout the contract [with Ameritech].

Matza then identified Respondent's Exhibit 4 as a "work-sheet" or "study" which he assertedly had prepared in May 1994. Matza assertedly determined, based on his "study," that "had we used Werner [Trucking] for these sites . . . [we] would have made money Werner charged \$450 per load . . . our own costs were well over \$800 per load." (See Tr. 185-201.) Matza assertedly concluded from his "study":

By using common carriers we would have less of a loss in our transportation department [and] in fact [made] a profit.

Matza claimed that "this [conclusion] was contrary to what [he] had believed at that time."

Joy, as noted, had been using for some time a number of independent contractors to haul Ameritech's scrap. Initially, Joy used independent contractors to haul the scrap about 25 percent of the time. Thus, in December 1993, as Matza explained, Joy's "first choice" was "using" its "own trucks"; later, however, it started increasing the use of independent contractors, principally with respect to long hauls. And, according to Matza, "as of May 1994," Joy was only using its equipment and drivers for "about" 50 percent of its Ameritech hauling jobs. This percentage did not significantly change from May to July 1994.

Matza next shifted over to complaints which he assertedly had received about Joy's "transportation operation" from Ameritech representatives starting about March or April 1994.¹⁰ Matza assertedly passed on these complaints to Joy drivers. Later, about July 29, Matza received the following memorandum from Ameritech (R. Exh. 5):

¹⁰I note that no Ameritech representatives were called as witnesses to substantiate these and related complaints made by Ameritech to Joy. Counsel for Joy asserted that "we cannot" "call anybody from" Ameritech "to testify here about any of these things." According to Matza, Ameritech representatives assertedly told Joy representatives that "should [the Ameritech] representative be subpoenaed . . . it would seriously jeopardize [Joy's] chance of securing future business or renewal of this contract." See Tr. 206-210 and 236-237.

Recently there has been a lot of dissatisfaction regarding scrap pick ups. . . . [T]he following immediate corrective action was promised

1. Mark Matza . . . has been appointed the temporary transportation manager of Aurora . . . until a professional replacement is hired

2. A new pro-active communication policy is in effect which includes daily phone contact to all regularly scheduled Ameritech locations.

3. Joy will record all scheduled pick ups, chart success and failure rates and apply driver disciplinary action on missed schedules as required.

4. Weekly driver update meetings will be held and additional driver training administered.

5. Joy will use more common carriers to meet the needs of the business.

My plan is to allow Joy to handle the transportation needs unhindered for an additional 30 days. If by September 1, and upon evaluation from the field forces, it is determined that there has not been significant improvement, I will work with Ameritech's transportation group to put in place alternative transportation processes

Matza claimed that he had first "learned of the attempt by the drivers to organize" from Plant Manager Pawlenko on July 13, 1994, and "as of . . . July 29" no "decision had been made by the Company with respect to total outsourcing of transportation operations." In fact, earlier, on or about July 9, Consultant Bowman had scheduled, with Matza's approval and assistance, "employee interviews," "to try to get as frank and honest opinion as possible from the drivers on what their problems were, what improvements they would like to see."

Elsewhere, Matza claimed that he had received from Consultant Bowman during early July some 50 pages of graphs, charts, and a distribution study which affected the Employer's total outsourcing determination (see R. Exh. 6). However, these graphs, charts, and study contain no specific recommendations with respect to the Employer's "transportation operation." Matza testified:

Q. Do you recall approximately when this document [G.C. Exh. 6] was received by the Company?

A. I saw the graph the first week of July during meetings with Bowman.

Q. When did you receive the entire document [referring to R. Exh. 6], if you know?

A. I believe it was the end of that week.

Q. When was the decision made, if you know, to contract out the transportation operation entirely?

A. It was after Bowman's report was given to Nick Young, after we reviewed the complaint from Ameritech, the written complaint, and before I went on vacation.

Q. When did you go on vacation?

A. Which was August 12

Q. Did the Company at some point communicate with its employees regarding the decision?

A. Yes [identifying G.C. Exh. 7, dated August 11 and quoted above]

Elsewhere, Matza acknowledged that "there was another memo that came out" from Ameritech later stating that Joy's "performance during the 30 day period is acceptable" and, consequently, the "30 day transportation trial [invoked on July 29] will end on September 1." (Cf. R. Exhs. 8 and 5.) Matza, however, generally denied that the Union's "petition" or "organization of the employees" had "any bearing on either the content or timing of the decision to subcontract the transportation operation."¹¹

Matza next addressed himself to the testimony of "dispatcher" Julia Chandler. He generally claimed that the Employer "considered" her to be a "supervisor"; "unless she requested assistance she had complete control over assigning" "trucks to drivers" and "approving overtime"; she was given a pay "increase" after Plant Manager Jensen had left the Employer although she continued to be paid overtime for "hours worked in excess of 40 hours per week"; she "was invited to participate" in "management meetings"; she could authorize cash advances to drivers "within a \$300 limit"; and she reported to Plant Manager Pawlenko. Matza testified:

Q. Did she have anything in the way of factors to consider in determining whether or not to approve an absence or tardiness [of a driver]?

A. In some cases she wouldn't have any choice, it was just a matter of reporting. But if there was a request she would look at the dispatcher's log what the needs were for that day.

Matza insisted that she "could institute discipline or a recommendation for discipline on her authority alone." He cited in support of this claim the disciplinary actions taken against employees Kerr and Fields.¹²

¹¹ Matza also claimed that, following the subcontracting of Joy's total "transportation operation," its "power equipment" was "leased" to Wood Dale and Joy Metal; and that if Joy had to restore the "transportation operations," it would "have to replace the power units . . . leased out." Matza, however, acknowledged that these "leases" are "subject to termination by either party." Elsewhere, when asked "how much notice" is required to terminate these leases, he claimed that "I didn't come prepared to answer a question like that." In addition, Matza claimed that Joy's contract with Ameritech has a "30 day cancellation notice" provision and thus Ameritech in any event "could cancel at any time with a 30 day notice." Further, Matza also claimed that the arrangement between Joy and Ameritech has also changed, noting that "prior to November 1, 1994," Ameritech "would call the Joy dispatcher at Aurora" to make "transportation arrangements," however, "after November 21,"

[W]e had to provide them [Ameritech] with a list of approved vendors [contractors] . . . and that would leave them with the option of calling whichever one they thought would provide the best service. . . . The billing arrangements remained the same, and we are making a profit on transportation now. [Cf. G.C. Exh. 33 and R. Exh. 22.]

¹² Compare fns. 7 and 8, supra, and G.C. Exhs. 31 and 32. Manager Pawlenko had apprised Kerr:

Your verbal assault and near physical assault posed a threat to my safety and possible future threat to other Joy employees which necessitates your employment termination action.

And, Fields was fired for "being absent for three days" in connection with a false kidnapping and hostage claim made to the Employer.

Matza also denied various testimony of Chandler and Watson, as detailed above, pertaining to the number of meetings he and Chandler had and coercive statements or conduct attributed to him. He claimed, inter alia, that Chandler in fact had “volunteer[ed] information” to him pertaining to the Union’s organizational effort at Joy, and he tried to “convince her that we were not concerned with what the Union was doing.” He assertedly told her “[I]t doesn’t make a difference what the employees are doing . . . it is not going to help us one way or the other for you to go out and get information.” He also insisted that he had “no knowledge” of whether or not “she was a Union adherent” or “interested in the organization of the Union.”¹³

Nick Young, president and chief executive officer of Joy, testified that he first discussed Joy’s “transportation operations” and its “problems” with James Bowman about August 1993; that the “main problem is we had been losing money on the transportation operation”; that Bowman “first related . . . outsourcing” as a possible solution “during October 1993”; and that Bowman was later retained to prepare a “study” of the “transportation operations.” Young next recalled that “as of the spring of 1994” “we were losing money every month” on the “transportation services” and Ameritech’s “level of satisfaction” with Joy’s performance of the “transportation services” was “not good.” Thereafter, on July 13, 1994, Young was apprised by Plant Manager Pawlenko that the Union was attempting to organize the transportation employees. Young, “as of July 13,” admittedly had not received any “reports” from Bowman pertaining to the total outsourcing of Joy’s “transportation department.”

Young recalled that he had received Respondent’s Exhibit 5 from Ameritech about July 30. As noted above, Ameritech restated in Respondent’s Exhibit 5 what steps would be taken by Joy over the ensuing 30-day period in an attempt to improve its “transportation processes.” Young asserted that, despite the fact that Respondent’s Exhibit 5 does not propose

¹³ On cross-examination, Matza testified with respect to the Employer’s decision to subcontract out all its transportation department, in part as follows:

Q. Now earlier you testified that you had made some sort of calculations sometime in May 1994 . . . and according to those calculations . . . it was your impression that the transportation department would be more profitable [if the Employer used] an outside vendor?

A. I received two impressions and that was one of them. . . .

Q. However, your decision to subcontract the transportation work was not made until after the Company received the report from James Bowman?

A. Correct. . . . That was the first week of August.

Q. The decision was made in the first week of August?

A. To subcontract transportation, yes.

Elsewhere, Matza acknowledged that he had been concerned that “if they [the Employer] went to other vendors” and did not provide this “transportation service” for Ameritech, the Employer “would also lose the production end of it” as well. In addition, Matza also acknowledged that his “daily log” (G.C. Exh. 30) shows for on or about July 25, 1994, that the Employer’s “options” included “we can accept and bargain hard” and “we can fight off the election.” His “daily log” later shows for on or about July 29 that we can “spread out over six months [the transportation work] to more common carriers if Nick Young [Joy’s owner and CEO] says so.” Matza explained that this means: “I had six months more to utilize more common carriers.”

total outsourcing of Joy’s “transportation services,” “his first preferred option would [now] be outsourcing.” Elsewhere, Young claimed that he later received on August 8 a “report” from Bowman. (See R. Exh. 11.) Young assertedly then “made a decision” that Joy’s “transportation operation will be outsourced entirely.” Young repeatedly denied that “the fact that the Union had filed a petition for representation of the drivers” had any “bearing whatsoever on either the timing or the content of the decision,” and he claimed that he “would have made the same decision in the absence of the petition.”

James Bowman, a transportation consultant, testified that Joy President Nick Young had informed him “in December 1993” that “he [Young] was having problems with his transportation department and would like someone to just take a look . . . and offer some suggestions as to how to remedy the problem.” Bowman assertedly made some “general comments or suggestions” to Young at that time. Later, about February 1994, Bowman was formally retained by Young as a “consultant” to prepare “a process improvement study . . . to write some procedures for [Joy’s transportation] fleet and . . . to do a distribution study.” Bowman claimed that it took from February until July 1994 for him to obtain from Joy information necessary for his studies.¹⁴ Subsequently, about July 22, Bowman prepared an extensive set of “procedures” for Joy’s transportation operation. (See R. Exhs. 19, 20, and 21.) Concededly, at this time, there was no “contemplation . . . that the [transportation] operation would be outsourced or subcontracted out”—he was there “to see if he could improve” the transportation operation. And, Bowman assertedly “first heard the word Union” at Joy’s shop on July 28, 1994, at a management meeting.¹⁵

Bowman next testified that his “distribution study” (R. Exh. 6) was ultimately “completed on August 7, 1994.”¹⁶ Bowman at first acknowledged that, “when [he] issued this report in early August,” he was “thinking in terms of reducing the [transportation] operation . . . continuing it with some outsourcing.” Elsewhere, he asserted that “based upon the data” he “really thought that the operation as it was running should not be continued”; “they just had too many problems”; and “it would probably be best just to outsource everything.” I note, as stated supra, that Respondent’s Exhibit 6 contains no specific recommendations in this respect. However, Bowman, as he further testified, later made a “written recommendation” to Company President Young dated August 8, 1994, stating in part as follows (G.C. Exh. 11):

After reviewing the distribution study and connecting it with the income statement and what I have seen and

¹⁴ Cf. R. Exh. 16 and Tr. 349–350, pertaining to certain information which Bowman in fact had obtained from Joy as early as December 14, 1993.

¹⁵ Bowman, in his prehearing affidavit, had claimed that “I only first became aware that a Union was organizing in the midst of the terminations on or about August 12, 1994.”

¹⁶ As noted supra, Manager Matza had claimed, inter alia, that he had received from Bowman during early July some 50 pages of graphs, charts, and a distribution study which affected the Employer’s total outsourcing determination. As stated, these graphs, charts, and study contain no specific recommendations with respect to the Employer’s “transportation operation.”

heard at the Aurora facility, I can confirm what I originally had suggested in February and late last year in informal conversations that Joy should outsource their trucking needs to contract or common carriers

With this information, I have made a case to outsource the entire operation.

Bowman insisted that the Union “was not a factor considered in any of my determinations.”¹⁷

Simon Pawlenko, plant manager of Joy’s Aurora plant from June until October 1994, denied, inter alia, various statements and conduct attributed to him by Julia Chandler in her testimony as summarized above. Pawlenko claimed that Chandler was a “supervisor” “in charge of the transportation department,” and that she possessed various indicia of “supervisory” status, citing her “discretion” with respect to “customer pickups” of wire scrap, “use of subcontractors,” “routing,” and “writing up truckdrivers for their conduct.” He insisted that there were no “limitations on her discretion as far as contracting and using outside contractors.” He specifically recalled, “I [Pawlenko] can say this, she [Chandler] asked me directly can she write up truckers for infractions and I said definitely.” He then cited “Keith Kerr’s discipline.” He acknowledged, however, “initially she [Chandler] had a confrontation . . . I [Pawlenko] wound up disciplining him.” (See G.C. Exh. 31 and R. Exh. 12.)¹⁸ He then cited “an incident involving Ricky Fields.” He recalled: “She [Chandler] informed me [Pawlenko] that he didn’t show up” and recommended “termination.” Pawlenko also terminated Fields.

Pawlenko identified General Counsel’s Exhibit 18 as his notes of a meeting with management representatives during late July 1994, where Company President Nick Young stated that Joy’s labor relations attorney “does not recommend . . . immediate outsourcing . . . spread over six months . . . our aim is to go through elections and set up a plan of action . . . our position is to hold steadfast to . . . \$10 hourly rate [and] continue to use outside sources.”

Pawlenko next identified Respondent’s Exhibit 13, a letter from Pawlenko to employee David Fox, an alleged discriminatee here, stating:

This is to give you notice that Joy has decided to terminate your employment effective August 15, 1994. Our decision to terminate you arises as a result of your being absent 10 working days without notification dating from August 2 . . . through August 15, 1994.

Finally, Pawlenko asserted, with respect to the Employer’s disciplinary action taken against employee Edward Kizior, as discussed above,

What really happened is that after Lopez took the test I was notified that he took the test and so forth. What perturbed me at that point was the fact that the Com-

¹⁷ Bowman also prepared a study for this litigation pertaining to the costs of restoring the transportation operation if a violation was found and such a remedy was invoked. See R. Exh. 23. He estimated that such a restoration would cost the Employer over \$500,000 for a 15-month period.

¹⁸ R. Exh. 12 shows that Kerr, one of the alleged discriminatees, was “terminated” on August 10 for his misconduct on or about August 9, 1994. See fn. 8, supra.

pany vehicles were taken off the premises without authorization.

Roberto Baltazar, now plant manager for the Employer, testified that during July 1994 he was a “supervisor for production and quality” at Joy’s Aurora plant with no “responsibility for supervising the drivers.” Baltazar next claimed that he had the following conversation at work with employee Jose Lopez “at the beginning of July”:

I [Baltazar] was looking for [Julia Chandler] because we need the paper work in order to unload the trailer . . . I couldn’t find her. . . . I went to the unloading docks and the only person I saw was Jose Lopez. So I asked him . . . where is Julia and everybody. . . . [Lopez] said . . . I think they went to a bar . . . they tried to bring a Union to the Company . . . I asked Jose why do you guys need a Union for [and] he said well they are just a bunch of lazies.

Baltazar insisted that he did not thereafter “mention” his “conversation” with Lopez to Plant Manager Pawlenko or “anyone in Company management.” Baltazar could not “recall” “ever” having “another conversation with Jose [Lopez] in which the Union was mentioned.”

Daniel Kinsella, a labor relations attorney, testified that he was first retained to represent Joy on July 20, 1994, following the Union’s filing of the representation petition in this proceeding. Thereafter, on August 12, 1994, he sent to counsel for the Union a letter, stating in part (R. Exh. 14):

This will confirm our conversation of yesterday afternoon in which I [Kinsella] advised you that Joy has decided to contract out all of its transportation effective August 22, 1994. As a result, Joy would be notifying its drivers, spotters and mechanics of its decision and terminating their employment as of that date.

As I told you on the telephone, Joy sees no need to go through the NLRB election process. If the Union has authorization cards from a majority of the unit Joy will meet with the Union and bargain over the effects of the decision.

Please contact me regarding the Union’s desire to bargain over the effects of Joy’s decision.

I also advised you [that] Keith Kerr has been terminated by Joy effective immediately. If you wish to discuss this decision with me please call.

Tinsella assertedly received no “response” to his letter. I note that the initial unfair labor practice charges were filed in this case on August 30, 1994.

I credit the testimony of Michael Watson, Jose Lopez, Julia Chandler, and Edward Kizior as detailed above. Their testimony was in significant part mutually corroborative. Their testimony withstood the test of thorough cross-examination and was substantiated in part by acknowledgments and admissions of Respondent Employer’s witnesses. And, relying also on demeanor, they impressed me as reliable and trustworthy witnesses.

On the other hand, I was not impressed with the testimony of Mark Matza, Nick Young, James Bowman, Simon Pawlenko, and Roberto Baltazar. Their testimony, as demonstrated above, was at times unsubstantiated, incomplete,

contradictory, shifting, vague, and unclear. I find incredible the general denials by Matza, Pawlenko, and Baltazar that they engaged in the various coercive statements and conduct attributed to them by the employee witnesses. I find equally incredible Pawlenko's attempt to justify on lawful grounds his disciplinary action belatedly taken against suspected union protagonist Kizior and, in addition, the related attempts of Matza and Pawlenko to attribute to Chandler indicia of "supervisory" status so as to privilege their coercive statements and conduct and thus deprive her of the protection of the Act. And, I reject here as equally incredible the assertions by Matza, Young, and Bowman that the Employer's sudden decision on August 11 to resort to total outsourcing or total subcontracting of its transportation services was not in response to or caused by the transportation department employees turning to the Union to represent them. The credible evidence of record, as discussed below, demonstrates that Respondent Employer had operated its transportation department at a financial loss for many months; had instituted comprehensive studies and actions then under way to improve its services in this department; and had not taken any steps to totally outsource or totally subcontract its transportation services until the employees sought union representation. I am persuaded on this record that the Employer's sudden August 11 decision to totally outsource or totally subcontract this work was in response to this employee protected activity and would not have occurred had the employees not sought union representation.¹⁹

In sum, as discussed below, I am persuaded here from the mutually corroborative and credible testimony of Watson, Lopez, Chandler, and Kizior that the Employer, in response to the transportation department employees' attempt to seek union representation, engaged in the coercive conduct attributed to it, discriminatorily disciplined suspected union protagonist Kizior and discriminatorily outsourced or subcontracted its entire transportation services. I reject as incredible and pretextual management's assertions that Kizior was disciplined for lawful nondiscriminatory reasons or that its sudden total outsourcing or total subcontracting determination would have been made regardless of the employees' union and statutorily protected activities. And, with respect to Chandler's claimed "supervisory" status, as discussed below, I am persuaded here from the credible evidence of record that Chandler did not in fact possess these claimed indicia which would deprive her of the protection of the Act.

Discussion

A. *The 8(a)(1) and (3) Violations*

Section 7 of the National Labor Relations Act guarantees employees the "right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right "to refrain from any or all such activities." Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain or coerce employees in the exercise of" their Section 7 rights. The "test" of "interference, re-

straint and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed . . . [t]he test is whether the employer engaged in conduct, which it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." See *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946). And, Section 8(a)(3) of the Act, in turn, forbids employer "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." An employer clearly runs afoul of Section 8(a)(3) of the Act by discriminatorily disciplining suspected prounion adherents and by discriminatorily discontinuing and subcontracting out its business operations and discharging the unit employees involved because the employees have sought union representation. See *Pollution Control Industries*, 316 NLRB 135 (1995), and cases cited.

The credited evidence of record recited above makes it clear that management's representatives resorted to proscribed interference, restraint, and coercion in violation of Section 8(a)(1) of the Act in an attempt to defeat the Union's organizational effort among its transportation department employees. The Employer first became aware of the Union's organizational effort among its transportation department employees on or about July 13, 1994. Thereafter, as employee Watson credibly testified, Company Manager

Mark [Matza] asked me [Watson] if I knew anything about the Union, and I said no. He said something is going to have to be done because he didn't want it to spread throughout the whole plant.

Employee Lopez also credibly testified that Supervisor Baltazar

asked me [Lopez] did I know about the Union, and I told him no. He asked me if a guy came by to sign a card and become a member . . . [in] the Union, and I told him no. Then he asked me if I knew who was the head of it, and also told me . . . they don't need a Union here.

And, employee Chandler credibly testified:

He [Matza] asked me [Chandler] if [employee] Ed Kizior had brought the Union in, and I would not tell him. Then he made mention of [employee] Dave Woodard, if he brought the Union in, because Dave Woodard had prior to that made mention of getting a Union in there. . . . He had also asked when the Union meetings were held, who attended them . . . who brought the Union in . . . if we had any literature from the Union, . . . if I could possibly get a copy . . . and let him see it He asked if I would have any objections . . . to taking a tape recorder into one of the [Union] meetings and recording it so that they would know what took place He had on one occasion asked my opinion of closing the transportation doors . . . [and] I did ask him if the reason they were thinking about closing the transportation doors was due to the Union, and he stated yes that it did play a major part in their decision of closing the transportation doors.

¹⁹The significance of Attorney Daniel Kinsella's brief and essentially undisputed testimony will be discussed below.

Further, Chandler credibly testified that Plant Manager Pawlenko similarly

made mention of the Union. [Pawlenko] thought that I [Chandler] was the one that brought the Union in . . . because the drivers got along with me, and he thought that I would have the influence on bringing the Union in. . . . At first he was talking about expanding the transportation department, and then all of a sudden [he was] talking about closing the department down. . . . He asked that I use more outside carriers and fade out using our own drivers . . . after it was known that the Union was being brought in.

These repeated and unwarranted efforts by management to pry into the protected activities of the employees, accompanied by threats of retaliation, plainly tended to impinge upon employee Section 7 rights in violation of Section 8(a)(1) of the Act. Respondent Employer, by these statements and conduct, had thus 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, by coercively interrogating employees about employee union membership, activities, and sympathies; by asking employees to ascertain and disclose to the Employer the union membership, activities, and sympathies of other employees; and by threatening employees with layoff if they selected the Union as their collective-bargaining representative, as alleged.

Respondent Employer argues that Chandler was not an “employee,” but was instead a “supervisor” and, accordingly, beyond the protection afforded by the Act. Section 2(11) of the Act defines a “supervisor” as

any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

As restated in *Amperage Electric*, 301 NLRB 5, 13 (1991),

Actual existence of true supervisory power is to be distinguished from abstract, theoretical or rule book authority. . . . What is relevant is the actual authority possessed and not the conclusory assertions of witnesses. . . . [T]he enumerated powers listed in Section 2(11) of the Act are to be read in the disjunctive . . . [and] Section 2(11) also states the requirement of independence of judgment in conjunctive with what goes before The performance of some supervisory tasks in a merely routine, clerical, perfunctory or sporadic manner does not elevate a rank and file employee into the supervisory ranks. . . . [T]he decisive question is whether [the individual involved] has been found to possess authority to use [his or her] independent judgment with respect to the exercise by [him or her] of some one or more of the specific authorities listed in Section 2(11) of the Act. . . . In short, some kinship to management, some empathetic relationship between employer and employee, must exist before the latter be-

comes a supervisor of the former. [Citations and quotations omitted.]

Chandler credibly testified that she started working for Joy about September 1993 as a “general clerk, office help, and assisting in transportation”; Jensen was then “transportation manager and . . . also in charge of maintenance”; later, when Jensen was “terminated” about June 1994,

basically they put me [Chandler] in his position dispatching trucks out, although I was not allowed to hire or fire or make any permanent decisions in the transportation department. . . . I dispatched trucks . . . called outside carriers and would dispatch them to cover runs with the permission of [general manager] Pawlenko . . . entered some trip sheets . . . [did] a little bit of the log checking . . . [and] handled all the petty cash.

Chandler credibly noted that Manager Pawlenko “was brought in” by the Employer about the time of Jensen’s “termination”; “he was in charge of everything”; “basically he oversaw everything”; she “reported” to him; and “if I wanted to do something I would have to ask his permission.” Her hourly pay rate was raised from \$8 to \$9 “when they gave [her] the transportation position to dispatch,” and she was paid “overtime” for all hours worked over a 40-hour week. Chandler, during cross-examination, was confronted with disciplinary actions taken against drivers or spotters while she worked as a “dispatcher” in the transportation department. She credibly explained that disciplinary action was taken against employee Kerr “with [Pawlenko’s] permission” “because this was the second time [the employee] had thrown something at me.” Chandler similarly acknowledged that she “had requested another employee [Fields] be terminated because of a false kidnapping” charge by the employee, “but nothing I did was a decision I could make on my own . . . it had to be under Pawlenko . . . anything that I did . . . I had to get his permission first.” In addition, Chandler also acknowledged that she had attended “Saturday drivers’ meetings,” credibly explaining “I had always attended those meetings. I was an employee with the drivers. . . . I never had attended the meetings [of] the managers . . . so I attended as an employee.”

On this record, I find and conclude that Chandler—although employed as a “dispatcher” and thus excluded from the appropriate unit as stipulated—was not a “supervisor” under the Act. The credited evidence of record makes it clear that she was not in fact vested with the requisite indicia of “supervisory power”; she performed, at most, limited “supervisory” tasks “in a merely routine, clerical, perfunctory and sporadic manner” and even then under Manager Pawlenko’s close control and direction; she did not in fact effectively “possess authority to use [her] independent judgment with respect to the exercise [by her] of some one or more of the specific authorities listed in Section 2(11)”; and clearly there was “no kinship to Management, some empathetic relationship between Employer and employee,” required to change her status from “employee” to “supervisor” and thus deny her the protection of the Act.

Turning to the related 8(a)(1) and (3) allegations, the credited evidence of record shows that employee Kizior was chiefly responsible for the Union’s attempt to organize the

Employer's transportation department employees. A representation petition had been filed on July 11. Shortly thereafter, management made clear to the employees its strong opposition to the employees' attempt to exercise their Section 7 rights, resorting to repeated acts of interference, restraint, and coercion. For, as Manager Matza then apprised employee Watson, "something is going to have to be done because he [Matza] didn't want it to spread throughout the whole plant." Matza, during his repeated coercive interrogations of employees, revealed that he suspected "Kizior had brought the Union in."

As the credited evidence of record shows, on July 13, 2 days after the representation petition had been filed, employee Kizior, with management's permission, accompanied coworker Lopez in a company vehicle to get Lopez an operator's license so that he could lawfully perform his job. Pawlenko later issued Kizior a "written warning with a three day suspension," dated July 18, 1994, stating:

On July 13, 1994, a Company truck was taken by you [Kizior] and Jose Lopez without prior authorization for the personal use to have Jose Lopez take a driver's test. . . . For breaking a Company policy you will be suspended for three days without pay effective July 19, 1994.

Kizior credibly noted that he did not receive this document until August 5, 1994, shortly prior to the Employer's announced decision to totally outsource or totally subcontract its transportation department. I find and conclude here that management belatedly issued Kizior this disciplinary warning and suspension because of his suspected prouion activities, in violation of Section 8(a)(1) and (3) of the Act. I reject as incredible Pawlenko's assertions to the effect that Kizior had acted without company approval.

In addition, I find and conclude that the Employer's August 11, 1994 determination to totally outsource or totally subcontract its transportation department was also discriminatorily motivated. As demonstrated above, Respondent Employer has been engaged for some time at its Aurora plant in reclaiming and recycling scrap wire and related products for its only customer Ameritech. It primarily performed production operations at its Aurora plant and these operations were and are profitable. In conjunction with these production operations, it also maintained a transportation department, using both its own transportation personnel and equipment as well as the services of independent contractors. According to Company Manager Matza, since the fall of 1993 it had been "losing money every month on the transportation operations." Nevertheless, it continued to operate its transportation department because, as Matza explained,

our feeling at the time [was] that by providing additional [transportation] services we could influence or control the amount of material coming into our facilities . . . if someone else [were] contracting the hauling . . . it would be too easy for [Ameritech] to ship the material elsewhere [for production processing].

And, later, during early 1994, it even retained the services of a transportation consultant, Bowman, who thereafter engaged in extensive studies aimed at improving the Employer's transportation services. Admittedly, before the Union

had filed its representation petition in this case, no decision had been made by Respondent to totally outsource or totally subcontract its transportation services.

Thus, Consultant Bowman acknowledged that about February 1994 he had been formally retained by Company President and Chief Executive Officer Young as a "consultant" to prepare "a process improvement study . . . to write some procedures for [Joy's transportation] fleet and . . . to do a distribution study"; thereafter, about July 22, Bowman prepared an extensive set of "procedures" for Joy's transportation operation; and, concededly, at this time, there was no "contemplation . . . that the [transportation] operation would be outsourced or subcontracted out"—he was there "to see if he could improve" the transportation operation. Indeed, when his extensive "distribution study" was ultimately "completed" during early August 1994, he was still thinking of "continuing [the transportation department] with some outsourcing." However, lightning first struck shortly after the Employer was apprised that its transportation employees were seeking union representation. As detailed above, the Employer initially resorted to threats and coercive interrogations aimed at chilling the transportation department employees' exercise of their Section 7 rights. Then, it discriminatorily disciplined and suspended suspected chief union protagonist Kizior. It promptly followed up this unlawful conduct with the sudden August 11, 1994 announcement that it was totally outsourcing or totally subcontracting all transportation operations.

I am persuaded here that the Employer's sudden decision on August 11, 1994, to totally outsource or totally subcontract its transportation services was in retaliation for the employees' exercise of their Section 7 rights. Respondent Employer has cited various "problems" unrelated to employee Section 7 activities in justification for this sudden action. As demonstrated above, these cited "problems" had existed for many months and management, until the very end, was engaged in extensive efforts to continue and to improve its transportation department services. Significantly, the July 29, 1994 memorandum from Ameritech to the Employer, expressing Ameritech's "dissatisfaction" with the Employer's transportation services, made specific recommendations to improve these services and not to totally outsource or totally subcontract them. And, as Manager Matza further acknowledged, "there was another memo that came out" from Ameritech later stating that Joy's "performance during the 30 day period is acceptable" and, consequently, the "30-day transportation trial [invoked on July 29] will end on September 1."

In sum, I reject Respondent Employer's cited nondiscriminatory reasons for its sudden total outsourcing or total subcontracting determination as incredible and plainly pretextual. I find and conclude, as stated, that the real reason for this conduct was to defeat the employees' exercise of their Section 7 rights. Further, on this record, I reject as incredible management's related assertion that it would have in any event totally outsourced or totally subcontracted this transportation work for lawful nondiscriminatory reasons. The credible evidence of record does not support this claim.

I therefore find and conclude that Respondent Employer discriminated in regard to the hire or tenure or terms and conditions of employment of its employees thereby discouraging membership in the Union, in violation of Section

8(a)(1) and (3) of the Act, by disciplining and suspending employee Edward Kizior about August 5, 1994; and by later discontinuing its transportation department, subcontracting the work performed by these unit employees, and laying off or discharging the unit employees on or about August 22, 1994.²⁰

B. *The Bargaining Order and 8(a)(5) Violation*

The General Counsel argues that Respondent Employer's unfair labor practices as found above are so serious and substantial that the possibility of erasing their effects and conducting a fair representation election by use of traditional remedies is slight and, consequently, a bargaining order should issue here in accordance with the principles stated by the United States Supreme Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). For the reasons stated below, I agree.

I find and conclude that the following unit, as stipulated, is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full time and regular part time drivers, spotters and mechanics employed by the Employer at its facility located at 701 N. Commerce, Aurora, Illinois, but excluding all office clerical employees, Managers, production employees, dispatchers, guards and supervisors as defined in the Act.

The Union initiated its campaign to represent the above unit employees on or about July 9, 1994. On that same day, as demonstrated above, seven of the some eight or nine unit employees voluntarily signed clear and unambiguous union application for membership cards designating the Union as their collective-bargaining representative.²¹ Here, as in *Bakers of Paris*, 288 NLRB 991 (1988), "Respondent's unlawful conduct warrants the imposition of a *Gissel* . . . bargaining order to protect the employees' majority selection of a bargaining representative based on authorization cards" because,

given the swiftness, severity and extensiveness of Respondent's unfair labor practices . . . it [is] highly un-

²⁰ As noted above, fn. 1, the seven unit employees involved as named in the amended complaint are Fox, Kerr, Kizior, Mazur, Watson, Woodard, and Zamora. However, uncontroverted evidence of record shows that Fox was discharged effective on or about August 15, 1994, for lawful nondiscriminatory reasons (being absent 10 working days without notification from August 2); that Kerr was terminated effective on or about August 9 for lawful nondiscriminatory reasons (abusive and threatening conduct); and that Zamora was not discharged until on or about September 20 for lawful nondiscriminatory reasons (not calling in for 7 consecutive days). Under the circumstances, I would dismiss the 8(a)(3) and (5) allegations of the complaint as they pertain to these three employees, finding instead that their discharges were not unlawfully motivated or, alternatively, would have occurred in any event for lawful nondiscriminatory reasons.

²¹ I reject as unsupported by the credible evidence of record Respondent Employer's contentions that "dispatcher" Chandler was a "supervisor" and/or her conduct on July 9 in some manner "tainted" the Union's majority. The credible evidence of record shows that Chandler was not a "supervisor" and, in any event, did not engage in conduct which "tainted" the Union's card majority obtained that day.

likely that its employees would be willing or able to freely express their choice in [a Board-conducted representation election].

As found above, the Employer, in prompt response to the employees' attempt to obtain union representation, resorted to proscribed coercive interrogations, threats, and discrimination by coercively interrogating employees about employee Union membership, activities, and sympathies; by asking employees to ascertain and disclose to the Employer the union membership, activities, and sympathies of other employees; by threatening employees with layoff if they selected the Union as their collective-bargaining representative; by discriminatorily disciplining and suspending the suspected chief union protagonist; and, finally, by discriminatorily discontinuing its transportation department, subcontracting the work performed by these unit employees, and laying off or discharging the unit employees. For, as Company Manager Matza had made clear to one employee, "something is going to have to be done because he [Matza] didn't want it to spread throughout the whole plant."

The above are clearly "hallmark" violations of the Act designed to defeat the employees' attempt to obtain union representation in a Board-conducted election. Upper management participated in this coercive conduct. The unit employees, under the circumstances, would not be able to readily forget the results of their attempt to obtain union representation. For, as the Board stated in *Q-1 Motor Express*, 308 NLRB 1267, 1268 (1992),

We find that these 8(a)(1) and (3) violations, which threaten the very livelihood of the employees, are likely to have a lasting impact which is not easily erased by the mere passage of time or the Board's usual remedies, especially given the small size of the bargaining unit and the fact that the unfair labor practices affected each of the employees.

See also *T&J Trucking Co.*, 316 NLRB 771 (1995).

I therefore find and conclude that a bargaining order is warranted here and July 9, 1994, is the appropriate date to use for the remedial order because by that date the Union had obtained a clear majority status.

There remains the question of whether or not under the circumstances present here Respondent Employer's discriminatory total outsourcing or total subcontracting of its transportation department also constitutes a violation of Section 8(a)(5) of the Act as alleged. Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." Section 8(d) of the Act explains that "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment." In *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964), the United States Supreme Court, in an opinion by Chief Justice Warren, held:

[T]he type of "contracting out" involved in this case—the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—

is a statutory subject of collective bargaining under Section 8(d).

In a separate concurring opinion, Justice Stewart noted:

Analytically, this case is not far from that which would be presented if the employer had merely discharged all its employees and replaced them with other workers willing to work on the same job in the same plant without the various fringe benefits so costly to the company. While such a situation might well be considered a Section 8(a)(3) violation upon a finding that the employer discriminated against the discharged employees because of their union affiliation, it would be equally possible to regard the employer's action as a unilateral act frustrating negotiation on the underlying questions of work scheduling and remuneration, and so an invasion of the duty to bargain on these questions, which are concededly subject to compulsory collective bargaining.

Later, in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), the Supreme Court, in an opinion by Justice Blackmun, held:

We conclude that the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business *purely* for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision . . . and we hold that the decision itself is not part of Section 8(d)'s "terms and conditions" . . . over which Congress has mandated bargaining. [Emphasis added.]

The Court, in "order to illustrate the limits of [its] holding," pertinently noted, *inter alia*, that the "union [had] made no claim of anti-union animus." See also *Dubuque Packing Co.*, 303 NLRB 386 (1991), and cases discussed.

In the instant case, a clear majority of employees in an appropriate unit had voluntarily designated the Union as their collective-bargaining agent on July 9, 1994. Respondent Employer, by its unlawful conduct, thereafter prevented the holding of a fair and free representation election and, consequently, an obligation to bargain with the Union arose as of July 9, 1994. Subsequently, on August 12, 1994, Company Attorney Kinsella sent to counsel for the Union a letter, stating:

This will confirm our conversation of yesterday afternoon in which I [Kinsella] advised you that Joy has decided to contract out all of its transportation effective August 22, 1994. As a result, Joy would be notifying its drivers, spotters and mechanics of its decision and terminating their employment as of that date.

As I told you on the telephone, Joy sees no need to go through the NLRB election process. If the Union has authorization cards from a majority of the unit Joy will meet with the Union and bargain over the effects of the decision.

Please contact me regarding the Union's desire to bargain over the effects of Joy's decision.

Kinsella assertedly received no "response" to his letter. I note, however, that the initial unfair labor practice charges were filed in this case on August 30, 1994, alleging that the Employer, by its conduct, had violated Section 8(a)(1), (3), and (5) of the Act.

Counsel for Respondent Employer argues (Br. pp. 37-39) that the Union, by not thereafter requesting bargaining, "waived any right to bargain it may have had." However, it is well established that a waiver of statutory bargaining rights must be clear and unmistakable. See *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); and *Dubuque Packing Co.*, *supra*. Here, Respondent Employer on or about August 11 summarily notified the Union's counsel that it had determined and was implementing its determination to totally outsource or totally subcontract its transportation services. This determination was thus presented to the Union as a fait accompli. The Union was not afforded any opportunity to bargain over this determination. Any subsequent request by the Union to bargain over this determination would have been an exercise in futility. The Union instead promptly filed unfair labor practice charges protesting the Employer's conduct. Under these circumstances, the Union did not thereby waive its right to bargain over the Employer's determination to totally outsource or totally subcontract its transportation services.

Accordingly, I find and conclude that Respondent Employer also violated Section 8(1) and (5) of the Act by its conduct as alleged.²²

CONCLUSIONS OF LAW

1. The Charging Party Union is a labor organization as alleged, and Respondent Employer is engaged in commerce as alleged.

2. The Respondent Employer 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 Na-

²²Counsel for Respondent Employer argues (Br. pp. 64-67) that the "allegations of the first and second amended charges" filed in the above proceeding are time-barred by Sec. 10(b) of the Act. The initial charge was filed timely on August 30, 1994 (G.C. Exh. 1(a)), alleging violations of Sec. 8(a)(1), (3), and (5) of the Act, particularly,

That after the filing of the [representation] petition [on July 11, 1994], [the] Employer discontinued its trucking operation effective August 21, 1994, and subcontracted out all unit work and that such action was taken to avoid dealing with the Union

An amended charge was later filed on February 17, 1995 (G.C. Exh. 1(c)), again alleging violations of Sec. 8(a)(1), (3), and (5) of the Act, repeating the above-quoted language, and alleging specific coercive conduct engaged in by the Employer. A further amended charge was filed on March 21, 1995 (G.C. Exh. 1(e)), again alleging violations of Sec. 8(a)(1), (3), and (5) of the Act, repeating the above-quoted language and specific coercive conduct, and also alleging the discriminatory disciplinary action against employee Kizior "on or about July 18, 1994 because of his Union activities and/or support of the Union."

Here, as restated by the Board in *Fiber Products*, 314 NLRB 1169 ((1994), it is clear that "all allegations relate to the same alleged animus and pattern of reprisals against [the unit employees] for their perceived roles in encouraging concerted activities [and] Union organizing activity" and all allegations "involve . . . the same factual sequence" as a result of the Union's organizational effort. Accordingly, I find that the amended charges are not time-barred as alleged.

tional Labor Relations Act, by coercively interrogating employees about employee union membership, activities, and sympathies; by asking employees to ascertain and disclose to the Employer the union membership, activities, and sympathies of other employees; and by threatening employees with layoff if they selected the Union as their collective-bargaining representative.

3. The Respondent Employer has discriminated in regard to the hire or tenure or terms and conditions of employment of its employees thereby discouraging membership in the Union, in violation of Section 8(a)(1) and (3) of the Act, by disciplining and suspending employee Edward Kizior about August 5, 1994; and by later discontinuing its transportation department, subcontracting the work performed by these unit employees, and laying off or discharging employees Kizior, Mazur, Watson, and Woodard (see fn. 20, supra) on or about August 22, 1994.

4. On July 9, 1994, a majority of employees in an appropriate unit (see fn. 1, supra) had designated and selected the Union as their representative for the purposes of collective bargaining; Respondent Employer's subsequent unfair labor practices, as found above, were so serious and substantial in nature that the possibility of erasing their effects and conducting a fair and free representation election by use of traditional remedies is slight; and, consequently, the employees' sentiments regarding representation having been expressed through union authorization cards would on balance be protected better by issuance of a bargaining order than by traditional remedies.

5. The Respondent Employer also has failed and refused to bargain in good faith with the Union as the exclusive collective-bargaining agent of an appropriate unit of its employees, in violation of Section 8(a)(1) and (5) of the Act, by unilaterally and without notice or bargaining discontinuing its transportation department, subcontracting the work performed by its unit employees, and laying off or discharging the unit employees.

6. The unfair labor practices found above affect commerce as alleged.

REMEDY

To remedy the unfair labor practices found above, Respondent Employer will be directed to cease and desist from engaging in such unlawful conduct and like and related conduct, and to post the attached notice. Affirmatively, to effectuate the purposes and policies of the Act, Respondent Employer will be directed to reinstitute its transportation department as it existed on or before August 11, 1994, thus restoring the status quo ante with respect to its discriminatorily motivated and unilateral total subcontracting out of its unit transportation department, as found unlawful above. Counsel for Respondent Employer argues (Br. pp. 61-64) that such a restoration order "would be highly inappropriate" and unduly burdensome. Counsel for Respondent Employer cites and relies on its claimed past and projected "financial losses" in the transportation department; a claimed "large expenditure of money" for restoration; a claimed "risk [of] losing [its] one customer"; and a claimed "serious safety risk to its drivers." These and related factors cited by counsel for Respondent Employer, as demonstrated above, had existed for many months prior to the events in issue here and management, until the very end, was still engaged in exten-

sive efforts to continue and to improve its transportation department. Thus, the July 29, 1994 memorandum from Ameritech to the Employer, expressing Ameritech's "dissatisfaction" with the Employer's transportation services, made specific recommendations to improve these services and not to totally outsource or totally subcontract them. And, Company Consultant Bowman acknowledged that about February 1994 he had been formally retained by Company President and Chief Executive Officer Young as a "consultant" to prepare "a process improvement study . . . to write some procedures for [Joy's transportation] fleet and . . . to do a distribution study"; thereafter, about July 22, Bowman prepared an extensive set of "procedures" for Joy's transportation operation; and, concededly, at this time, there was no "contemplation . . . that the [transportation] operation would be outsourced or subcontracted out"—he was there "to see if he could improve" the transportation operation. Indeed, when his extensive "distribution study" was ultimately "completed" during early August 1994, he was still thinking of "continuing [the transportation department] with some outsourcing."

Thus, these and related factors cited by Respondent Employer only became a problem when the unit employees sought the assistance of the Union to represent them. Moreover, this record shows that Respondent Employer can readily reacquire its leased out equipment in order to sufficiently handle its somewhat diminished level of unit transportation services as of August 11, 1994. Further, Respondent Employer's claim and related testimony to the effect that its transportation operation and relationship with Ameritech has since changed (see fn. 11, supra) does not sufficiently or credibly establish here that there is no longer unit work available for the four remaining unit employees (see fn. 20, supra). A restoration remedy, accompanied by a bargaining order, will now enable the Employer and the Union to bargain, on request, with respect to these and related cited problems affecting the four remaining unit employees' terms and conditions of employment.

Accordingly, Respondent Employer will be directed to reestablish and resume its transportation department as it existed prior to August 11; offer immediate and full reinstatement to its unlawfully discharged four transportation department employees (see fn. 20, supra) to their former jobs or, in the event their former jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges, and make whole the employees for any loss of earnings they may have sustained by reason of Respondent Employer's unlawful conduct, by making payment to them of a sum of money equal to that which they normally would have earned from the date of Respondent's unlawful action to the date of its offers of reinstatement, less net earnings during such period, with backpay to be computed as provided in *F. W. Woolworth Co.*, 90 NLRB 651 (1977), and interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See generally *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). Respondent Employer will similarly be directed to make whole employee Kizior for any loss of earnings he may have sustained by reason of Respondent Employer's earlier discriminatory suspension of him, with interest, as provided above.

Respondent Employer, for the reasons state above, will be directed to, on request, bargain in good faith with the Charg-

ing Party Union as the exclusive bargaining agent for its unit employees and, if an understanding is reached, embody that understanding in a signed agreement. The Respondent Employer will also be directed to preserve and make available to the Board or its agents, on request, all payroll records and reports and all other records necessary to determine backpay and compliance under the terms of this Decision and Order. And, Respondent Employer will be directed to expunge from its files any references to the discriminatory discharges of its four transportation employees and the earlier discriminatory suspension of employee Kizior, and notify said discriminatees in writing that this has been done and that evidence of these discriminatory actions will not be used as a basis for future personnel action against them, in accordance with *Sterling Sugars*, 261 NLRB 472 (1982).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²³

ORDER

The Respondent, Joy Recovery Technology Corp., Aurora, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed to them in Section 7 of the Act, in violation of Section 8(a)(1) of the Act, by coercively interrogating employees about employee union membership, activities, and sympathies; by asking employees to ascertain and disclose to the Employer the union membership, activities, and sympathies of other employees; and by threatening employees with layoff if they selected the Union as their collective-bargaining representative.

(b) Discriminating in regard to hire, tenure, and terms and conditions of employment to discourage membership in the Union, in violation of Section 8(a)(1) and (3) of the Act, by disciplining and suspending employee Edward Kizior about August 5, 1994; and by later discontinuing its transportation department, subcontracting the work performed by these unit employees, and laying off or discharging employees Edward Kizior, Pat Mazur, Michael Watson, and David Woodard on or about August 22, 1994.

(c) Failing and refusing to bargain in good faith with Local Union No. 673, International Brotherhood of Teamsters, AFL-CIO, the exclusive bargaining agent of its employees in the appropriate bargaining unit described below, by unilaterally and without notice or bargaining discontinuing its transportation department, subcontracting the work performed by its unit employees, and laying off or discharging the unit employees. The appropriate bargaining unit consists of:

All full time and regular part time drivers, spotters and mechanics employed by the Employer at its facility located at 701 N. Commerce, Aurora, Illinois, but excluding all office clerical employees, Managers, production

employees, dispatchers, guards and supervisors as defined in the Act.

(d) In any like or related 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) Reestablish and resume its transportation department as it existed prior to August 11, 1994; offer immediate and full reinstatement to its unlawfully discharged four unit transportation department employees (Edward Kizior, Pat Mazur, Michael Watson, and David Woodard) to their former jobs or, in the event their former jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges, and make whole the employees for any loss of earnings they may have sustained by reason of Respondent Employer's unlawful conduct, with interest, as provided in the Board's decision.

(b) Make whole employee Edward Kizior for any loss of earnings he may have sustained by reason of Respondent Employer's earlier discriminatory suspension of him, with interest, as provided in the Board's decision.

(c) On request, bargain in good faith with the Union as the exclusive bargaining agent for the above unit employees and, if an understanding is reached, embody that understanding in a signed agreement.

(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 and compliance with this Order.

(e) Expunge from its files any references to the discriminatory discharges of its transportation department employees and earlier discriminatory suspension of employee Kizior, and notify the discriminatees in writing that this has been done and that evidence of these discriminatory actions will not be used as a basis for future personnel action against them.

(f) Post at its facilities in Aurora, Illinois, copies of the attached notice marked "Appendix."²⁴ Copies of the notice, on forms provided by the Regional Director for Region 13, 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.

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

²³If 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.

²⁴If 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."

IT IS FURTHER ORDERED that the amended complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT interfere with, restrain, and coerce our employees in the exercise of the rights guaranteed to them in Section 7 of the Act, in violation of Section 8(a)(1) of the Act, by coercively interrogating employees about employee union membership, activities, and sympathies; by asking employees to ascertain and disclose the union membership, activities, and sympathies of other employees; and by threatening employees with layoff if they selected the Union as their collective-bargaining representative.

WE WILL NOT discriminate in regard to hire, tenure, and terms and conditions of employment to discourage membership in the Union, in violation of Section 8(a)(1) and (3) of the Act, by disciplining and suspending employee Edward Kizior about August 5, 1994; and by later discontinuing our transportation department, subcontracting the work performed by these unit employees, and laying off or discharging employees Edward Kizior, Pat Mazur, Michael Watson, and David Woodard on or about August 22, 1994.

WE WILL NOT fail and refuse to bargain in good faith with Local Union No. 673, International Brotherhood of Teamsters, AFL-CIO, the exclusive bargaining agent of our employees in the appropriate bargaining unit described below, by unilaterally and without notice or bargaining discontinu-

ing our transportation department, subcontracting the work performed by our unit employees, and laying off or discharging the unit employees. The appropriate bargaining unit consists of:

All full time and regular part time drivers, spotters and mechanics employed by the Employer at its facility located at 701 N. Commerce, Aurora, Illinois, but excluding all office clerical employees, Managers, production employees, dispatchers, guards and supervisors as defined in the Act.

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

WE WILL reestablish and resume our transportation department as it existed prior to August 11, 1994; offer immediate and full reinstatement to the unlawfully discharged four unit transportation department employees (Edward Kizior, Pat Mazur, Michael Watson, and David Woodard) to their former jobs or, in the event their former jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges, and make whole the employees for any loss of earnings they may have sustained by reason of our unlawful conduct, with interest.

WE WILL make whole employee Edward Kizior for any loss of earnings he may have sustained by reason of our earlier discriminatory suspension of him, with interest.

WE WILL, on request, bargain in good faith with the Union as the exclusive bargaining agent for the above unit employees and, if an understanding is reached, embody that understanding in a signed agreement.

WE WILL 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 and compliance with this Order.

WE WILL expunge from our files any references to the discriminatory discharges of our transportation department employees and earlier discriminatory suspension of employee Kizior, and notify the discriminatees in writing that this has been done and that evidence of these discriminatory actions will not be used as a basis for future personnel action against them.

JOY RECOVERY TECHNOLOGY CORP.