

Vasaturo Brothers, Inc. d/b/a Vesuvio Foods Co. and Local 888, United Food and Commercial Workers International Union, AFL-CIO and Henry Abraham. Cases 29-CA-18502, 29-CA-18726, 29-CA-18941, 29-RC-8324, and 29-CA-18619

May 29, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND FOX

On November 28, 1995, Administrative Law Judge Robert T. Snyder issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,¹ findings,² and conclusions and to adopt the recommended Order as modified and set forth below.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Vasaturo Brothers, Inc. d/b/a Vesuvio Foods Co., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees about their membership in, activities on behalf of, and sympathy for Local 888, United Food and Commercial Workers International Union, AFL-CIO, or any other labor organization, threatening to discharge its employees, eliminate its night shift, burn down its Brooklyn facility and move its operations to New Jersey, impose stricter working conditions, that a strike was inevitable, and

¹ On p. 28, LL. 5, the date "November 19" should be "February 19." On p. 30, LL. 1, the date "February 9" should be "February 19."

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 392 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ Given the judge's findings regarding the seriousness and widespread nature of the unfair labor practices and the likelihood of recurrence, we shall modify the recommended Order to provide broad cease-and-desist language. See *Hickmott Foods*, 242 NLRB 1357 (1979).

We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

with other, unspecified reprisals if its employees selected the Union as their bargaining representative in a Board election, creating the impression among its employees that their union meetings and activities were under surveillance, soliciting complaints and grievances from its employees and promising them a straight salary, rather than an hourly wage, rehire from layoff, improved medical benefits, pay increases, better equipment, recognition of a night-shift employee to negotiate on their behalf, and promising and granting assistance in obtaining other employment and other unspecified benefits in order to induce them to abandon their union support and to vote against the Union, and by informing its employees that it would be futile for them to choose the Union as their bargaining representative.

(b) Discouraging membership in Local 888, United Food and Commercial Workers International Union, AFL-CIO, or any other labor organization, by eliminating its night shift and thereby discharging its employees on that shift, transferring employees from the night shift to the day shift and discharging employees because they joined and supported the Union, and because they gave testimony to the Board and filed a charge with the Board, granting cash payments to its employees to induce them to vote against the Union and to abandon their membership in and support of the Union, or in any other related manner discriminating against employees in regard to their hire or tenure of employment, or any terms or conditions of employment.

(c) Refusing to recognize and bargain in good faith with the aforementioned Union as the exclusive bargaining representative of its employees in the unit found appropriate. The appropriate unit is:

All full-time and regular part-time drivers, drivers' helpers and warehousemen employed by Respondent at its 722 64th Street, Brooklyn, New York location, excluding all office clericals, guards, and supervisors as defined in Section 2(11) of the Act.

(d) In any other manner interfering with, restraining, or coercing its 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) Within 14 days from the date of this Order, offer Henry Abraham and Daniel Cordova immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed.

(b) Make each of them, and each of the employees employed on the night shift on July 13, 1994, who were laid off on that date when the night shift was eliminated, whole for any loss of earnings and other

benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful transfer and discharge of Henry Abraham and the unlawful discharge of Daniel Cordova, and within 3 days thereafter notify the employees in writing that this has been done and that Abraham's transfer and discharge and Cordova's discharge will not be used against them in any way.

(d) Recognize, effective from the date beginning June 6, 1994, and, on request, bargain collectively and in good faith with Local 888, United Food and Commercial Workers International Union, AFL-CIO as the exclusive representative of all employees in the appropriate unit described above, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(e) Preserve and, within 14 days of a 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.

(f) Within 14 days after service by the Region, post at its Brooklyn, New York facility copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 2, 1994.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED in Case 29-RC-8324 that the challenges to Jose Rosales' and Anthony DePete's

ballots are overruled, that the challenges to Joseph Pionel's, Frank Diglio's, Anthony Scala's, Michael Rubino's, Lynton Brandt's, Ellio Chillo's, Wayne Rismo's, and Ralph Frasca's ballots are sustained, that the August 5, 1994 election is set aside, and that the petition is dismissed.

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 interrogate our employees about their membership in, activities on behalf of, and sympathy for Local 888, United Food and Commercial Workers International Union, AFL-CIO, or any other labor organization, threaten to discharge our employees, eliminate our night shift, burn down our Brooklyn facility and move our operations to New Jersey, impose stricter working conditions, that a strike was inevitable, and with other, unspecified reprisals if our employees selected the Union as their bargaining representative in a Board election; create the impression among our employees that their union meetings and activities were under surveillance, solicit complaints and grievances from our employees, and promise them straight salaries, rather than an hourly wage, rehire from layoff, improved medical benefits, pay increases, better equipment, recognition of a night-shift employee to negotiate on their behalf, and promise and grant them assistance in obtaining other employment and other unspecified benefits in order to induce them to abandon their union support and to vote against the Union, and inform our employees that it would be futile for them to choose the Union as their bargaining representative.

WE WILL NOT discourage membership in Local 888, United Food and Commercial Workers International Union, AFL-CIO, or any other labor organization, by eliminating our night shift and thereby discharging our employees on that shift, transferring employees from the night shift to the day shift, and discharging our employees because they joined and supported the

⁴If 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."

Union and because they gave testimony to the Board and filed a charge with the Board, granting cash payments to our employees to induce them to vote against the Union and to abandon their membership in and support of the Union or, in any other related manner, discriminate against our employees in regard to their hire or tenure of employment or any terms or conditions of employment.

WE WILL NOT refuse to recognize and bargain in good faith with the aforementioned Union as the exclusive bargaining representative of our employees in the unit found appropriate. The appropriate unit is:

All full-time and regular part-time drivers, drivers' helpers and warehousemen employed by us at our 722 64th Street, Brooklyn, New York location, excluding all office clericals, guards, and supervisors as defined in Section 2(11) of the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Henry Abraham and Daniel Cordova immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed.

WE WILL make each of them, and each of the employees employed on the night shift on July 13, 1994, who were laid off on that date when the night shift was eliminated, whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful transfer and discharge of Henry Abraham and the unlawful discharge of Daniel Cordova, and within 3 days thereafter notify the employees in writing that this has been done and that Abraham's transfer and discharge and Cordova's discharge will not be used against them in any way.

WE WILL recognize, effective from the date beginning June 6, 1994, and, on request, bargain collectively and in good faith with Local 888, United Food and Commercial Workers International Union, AFL-CIO, as the exclusive representative of all our employees in the appropriate unit described above, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is

reached, embody such understanding in a signed agreement.

VASATURO BROTHERS, INC. D/B/A
VESUVIO FOODS CO.

April Wexler, Esq. and *Henry Powell, Esq.*, for the General Counsel.

Joel Spivak, Esq. (Dinerstein & Lesser, P.C.), for the Respondent/Employer.

Patricia McConnell, Esq. (Vladeck, Waldman, Elias & Engelhard, P.C.), for the Union/Petitioner.

DECISION

STATEMENT OF THE CASE

ROBERT T. SNYDER, Administrative Law Judge. This consolidated proceeding was tried before me on May 30 and 31 and June 1, 1995, in Brooklyn, New York. The hearing closed on June 13, 1995, when I issued an order after Respondent counsel informed me and other counsel that Respondent had decided not to call witnesses in its defense. On charges filed by Local 888, United Food and Commercial Workers International Union, AFL-CIO (the Union or Local 888), and by Henry Abraham, a consolidated second amended complaint issued on April 28, 1995, alleging that Vasaturo Brothers, Inc. d/b/a Vesuvio Foods Co. (Respondent or Vesuvio) violated Section 8(a)(1) of the Act by numerous, specified acts of interference with and restraint of the Section 7 rights of employees; Section 8(a)(1) and (3) of the Act by terminating named employees for a 2-week period in June 1994, because of their support of the Union, granting cash payments to employees to induce them to vote against the Union, transferring and then discharging employee Henry Abraham, and discharging employee Daniel Cordova because of their union activities; Section 8(a)(1) and (4) of the Act by its conduct described against Henry Abraham because he gave testimony to the Board and filed a charge with the Board in Case 29-CA-18619; and Section 8(a)(1) and (5) of the Act by failing and refusing to bargain with the Union as the exclusive collective-bargaining representative of its employees in an appropriate unit.

Consolidated with this second amended complaint for hearing, ruling, and decision by order of the Regional Director of Region 29 are certain challenged ballots as well as certain objections the Union filed as Petitioner to conduct affecting the results of a representation election conducted on August 5, 1994, among employees in the same unit in which the complaint seeks a bargaining order, which appear in a Report on Objections and Challenged Ballots in Case 29-RC-8324 which the Regional Director for Region 29 issued on January 5, 1995. Respondent denied the commission of any of the unfair labor practices alleged.

The parties were provided full opportunity to participate, to introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Posttrial briefs have

been filed by counsel for the General Counsel, Respondent, and the Union and have been carefully considered. On the entire record in the case, including my observation of the witnesses and their demeanor, I make the following

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF RESPONDENT AND STATUS OF THE UNION

The Respondent, a New York corporation, with its principal office and place of business located at 722 64th Street, Brooklyn, New York (the Brooklyn facility), has been engaged in the nonretail sale of food and related products. During the year ending December 31, 1994, which period is representative of its annual operations in general, Respondent, in the course and conduct of its business operations, purchased and received at its Brooklyn facility goods valued in excess of \$50,000 directly from points outside the State of New York. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES AND OBJECTIONS

A. *The Union's Organizing Drive, Bargaining Demand, and Vesuvio's Responses, Including the Alleged Unlawful Conduct During the Critical Period Preceding and Leading to the Representation Election*

Henry Abraham, alleged discriminatee, was called as a witness by the General Counsel. He had been employed by Respondent from 1987 to November 30, 1994. Although he initially worked the day shift, he was assigned to the night shift when it was started in the summer of 1993. On the night shift he ran the hi-low and loaded trucks. He started work at 2 p.m. and continued to whatever time he and the others on the shift completed loading of the trucks, sometimes as late as 2 a.m. or later the next morning. He was paid by the hour. Through conversations with a fellow employee on the shift, Luis Ruiz, he learned about the Union. Abraham contacted the Union's business agent, Max Bruny, and a meeting was arranged for Bruny to meet employees at Abraham's house on a Monday in May, probably May 23, 1994.¹

At the meeting were Abraham and six or seven other workers along with Bruny. The employees spoke about their interest in the Union and Bruny described the Union's role in bargaining. He produced and distributed authorization cards, asked the attendees to read them, and explained that the signed cards gave the Union the right to represent them in bargaining with their employer. Abraham and three or four other employees signed cards at this meeting. Abraham's signed card, like all others introduced into evidence,² is headed "Authorization for Representation" in bold capital letters, followed by a printed statement "I hereby authorize Local 888, U.F.C.W.—AFL—CIO to represent me for the

purposes of collective bargaining." Underneath this statement are spaces for the signer to print his name, place his signature, the date, his home phone and address, employer's name and address, date of hire, type of work performed, department, hourly rate, day off, shift, and whether the signer would participate in an organizing committee. Abraham noted that he would.

At the meeting Bruny gave Abraham a batch of unsigned cards to distribute to other employees and return to him. In approaching other employees, Abraham invariably explained the purpose of the card was to have the Union represent the employees in bargaining with Vesuvio and that the more who signed the cards the more powerful the employees would be. In the succeeding days Abraham distributed at least 11 authorization cards, which he got back signed and gave to Bruny.

On June 6, Abraham reported to work early in the morning to load trucks. Bruny, accompanied by Tom Langford, another union business agent, came in and asked to speak to Anthony Vasaturo, the president and holder of 50 percent of the Respondent corporation's stock. Vasaturo saw them and took them back to his office.³ After a few minutes Vasaturo came out to Abraham and asked him "do you know these guys?" Abraham replied, "I don't know what you're talking about," and repeated it after Vasaturo asked, "do you know them, how good are they?" Vasaturo walked over to Michael Rubino, Respondent's warehouse manager, asked him who his visitors were, to which Rubino replied, "some stupid union."

After completing his early morning loading work, Abraham left and returned at his normal starting time in the afternoon. In the interim, he had loaded with tape and tested a small tape recorder which he secured in his pocket, anticipating, accurately, that Vasaturo would call him into his office to discuss the Union's approach to him earlier that day. When Abraham got to work on the afternoon of June 6, Rubino told him that Anthony Vasaturo wanted to see him and Luis Ruiz. Both employees went upstairs and went inside the office. In the office were the two employees, Vasaturo and Rubino and Frank Diglio, Vasaturo's brother-in-law and alleged night-shift manager. Abraham recorded the ensuing conversation on the tape recorder he carried into the meeting. After the recording Abraham listened to it and testified credibly that what he heard was an accurate representation of the conversation as it occurred. Shortly after making the recording, Abraham delivered it to Bruny, who gave it to union counsel. Ultimately, union counsel provided the tape to the General Counsel. Abraham heard it again about a week before the hearing at the offices of the Labor

³ Respondent initially denied in its answer, but later admitted on the record, that on or about June 6, 1994, in person at Respondent's Brooklyn facility, and continuing to date, the Union requested that Respondent recognize it and bargain with it as the exclusive collective-bargaining representative of Respondent's employees in the unit of all full-time and regular part-time drivers, helpers, and warehousemen employed at its Brooklyn facility, excluding all office, clericals, guards, and supervisors as defined in Sec. 2(11) of the Act.

The complaint alleges, and Respondent also initially denied, but later admitted on the record, that since on or about June 9, 1994, it has failed and refused to recognize and bargain with the Union as the exclusive representative of the unit. Respondent, in its answer, admitted the appropriateness of the bargaining unit.

¹ All dates shall refer to the year 1994 unless otherwise noted.

² Only one card, signed by employee Oscar Rivera on May 31, is printed in Spanish, but it too, provides most of the same basic information.

Board and affirmed it was still an accurate recording of the conversation as he recalled it. A transcript of the tape, certified as a true and correct record of the contents of the cassette by a transcriber for the Nation-Wide Reporting Coverage, official reporters for hearings conducted before the Board in various Regions, was offered and received in evidence over Respondent's objection, subject to the opportunity offered counsel to inspect the tape for authenticity and compare it with the transcript for accuracy. See *Savin Business Machines Corp.*, 242 NLRB 435, 436 (1979), *enfd.* as modified in other respects 649 F.2d 89 (1st Cir. 1981). The offer was made after counsel for the General Counsel sought to refresh the recollections of Vasaturo and Rubino after they were called as adverse witnesses by the Government pursuant to Section 611(c) of the Federal Rules of Evidence. Although the hearing was adjourned to provide Respondent the opportunity to have this tape, and another offered and received in evidence under similar circumstances, to be discussed *infra*, examined by an expert, Respondent's counsel ultimately declined to present any claim of tampering or altering of the tapes, the originals of which he was provided prior to the adjournment, by letter previously noted, and the hearing closed on its receipt.

During his direct examination by counsel for the General Counsel, Vasaturo could not recall calling Abraham and Ruiz into a meeting in his office the night after Bruny had earlier that day asked for union recognition. When next asked a series of questions dealing with his recollection of interrogating Abraham in his office about the Union because of his belief Abraham was the main guy, and then informing Abraham the Union wouldn't come into his shop, and threatening to end the night shift and ultimately carrying out that threat, and then offering Ruiz and Abraham straight salaries rather than an hourly rate, Vasaturo vacillated in his responses, at times denying any remembrance of such conduct, at other times being less sure by replying "I don't think so," "I don't believe so" or "not that I remember." (Tr. 54-55.)

In an effort to refresh his recollection, counsel for the General Counsel played the tape of the June 6 meeting recorded by Abraham. Vasaturo now acknowledged he must have had the meeting and he identified some of the voices he heard. Still, Vasaturo responded that what he now heard himself say, "Henry, don't play that game with me . . . I saw your man . . . I want to know, you're fucking with my life, my business," he didn't remember saying any of it. When confronted with a later statement attributed to him, "I go to the main guy. You work for me so many years," again his recollection was not refreshed.

Later in the tape, Vasaturo informs Abraham "I trust you Henry. I leave you there with all the fucking inventory. Your by yourself. I have no problem with that." Vasaturo then adds, "If you've got a bone to pick, you pick it with us, that's one thing." When Abraham denied having a bone to pick, Vasaturo responds, "I don't fucking believe it, you tell the guy I want a fucking union." Vasaturo then adds, "And you know I'm not afraid to do what I gotta do but I have to work. It's not gonna happen." There is no doubt this reference is to the Union becoming Abraham's and the other employees' bargaining agent.

The tape also shows that some of the conversation dealt with Abraham's complaints about the lack of respect and ill treatment he received from management and Luis Ruiz' com-

plaints about the loss of paid working hours, getting paid some days for only 4 hours of loading work even though they are full time.

At this point in the discussion, Vasaturo exclaims, "If you want to go on straight salary, if you want to do that I can handle that." When questioned about this statement, Vasaturo did not recall saying it 100 percent or exactly the way it appears on the tape. He also claimed his statement was taken out of context, although its plain meaning as an offer of a major change in the method of compensation is apparent. And its evident use as a means of influencing union adherence is strengthened by Vasaturo's offer made a few sentences later, "when you guys get your checks Thursday morning, what can I do to make you happy?"

Vasaturo did recall his own voice making a subsequent statement appearing on the tape, "I started the night shift, I could end the night shift . . ." Furthermore, Vasaturo also now recognized the voices of Mike Rubino, Frank Diglio, Abraham, and Ruiz also appearing on the tape.

After the June 6 meeting held in Vasaturo's office, Abraham testified that Vasaturo telephoned him at his home probably on June 10. Vasaturo told him, "Henry, somebody is lying to me. You're not being honest with me. Somebody signed something with these guys." Abraham replied, "I don't know what you're talking about" and Vasaturo hung up the phone.

On the morning of Monday, June 13, Abraham was working with a crew loading trucks. Mike Rubino came and told them that after they cleaned up, they had to go upstairs. Anthony (Vasaturo) wanted to see everybody. When Abraham arrived in the office upstairs, present were Vasaturo and Rubino along with a group of some of the employees with whom Abraham worked the night shift but who were working loading with him early that morning. Vasaturo said, "guys, I'm going to have to let all yous [sic] go. I don't have a guy to run the night shift. Things are coming back messed up from the trucks. Everything is coming broken, things aren't being stacked the right way." Abraham asked, "are you referring to me, too?" Vasaturo said yes, he was referring to everybody. Abraham then asked, "Anthony, are you doing this because of the Union?" Michael Rubino stepped in the way and said "Henry, were you honest with us?" and Michael told him, "shut up." None of the night crew were permitted to work the night shift that day or for the next 2 weeks.

Luis Ruiz testified, under subpoena, for the General Counsel. He had started working loading trucks on the night shift in 1993 and was still employed. Henry Abraham gave him a number of cards authorizing the Union to represent them. He took them away. Since he is not literate, his brother, and fellow employee, Edwardo Quintana, read him the contents and told him that the card was for the Union to represent the employees. Ruiz signed one and had his brother sign the other and returned them to Abraham on May 24.

Ruiz was present working with Abraham and others on the morning of June 6 when Bruny and Langford came to see Vasaturo and then when Vasaturo came out, showed the union business card he had received from Bruny to Abraham and Abraham denied any knowledge of the Union or its representatives. Ruiz was also present with Abraham when Vasaturo, Rubino and Diglio spoke to them later that day in the office and confronted them about the Union. Ruiz was

aware that Abraham made a recording of the conversations held at the meeting.

On another occasion shortly after the union agent demanded recognition on June 6, Vasaturo pulled Ruiz over in the warehouse with nobody else around and asked if he had seen the union card and did he have his telephone number. Ruiz responded no to each question.

On June 13, Ruiz received a telephone call at his house from Abraham who told him that they had fired everybody. When Ruiz came in to work he asked Mike, "why are you firing me, if you told me that I was day shift?" (Ruiz had been informed the day before that he was going to be shifted to days.) Ruiz now testified that Mike Rubino said that he's not sure if he, Ruiz, or Henry Abraham is the main guy or somebody on the night shift. So he blew the whole night shift off.

Ruiz testified that after Abraham's telephone call, he arranged to tape record the conversation with management which he anticipated would be held when he went in to work later in the day. Ruiz recorded the conversation which was held with Rubino, then listened to it, and reported it was an accurate representation of the conversation, gave the tape to Abraham who gave it to the union counsel who, in turn delivered it to the counsel for the General Counsel, and swore that he recently listened to the tape again and it continued to be the same accurate recording of the conversation. Just as with the transcript of the tape of the June 6 meeting, I held sufficient safeguards and custody had been established to warrant its receipt in evidence, subject to Respondent counsel having an opportunity to raise questions about its authenticity or accuracy, which said counsel failed to do, although provided with the original tape for a period of more than a week's recess of the hearing.

Warehouse Manager Mike Rubino had earlier been called as a witness by the General Counsel pursuant to Section 611(c) of the Federal Rules of Evidence. When asked directly why the night shift was laid off on June 13, Rubino said that shift was eliminated because the new night manager, Frank Diglio, who had been learning through on the job training with his predecessor, before he took over, wasn't doing the proper work, there were a lot of mistakes in loading and other areas and so Respondent went to a daytime loading operation. As the guys at night were hired specifically for a nighttime shift, their jobs were eliminated. Rubino denied that the layoff had anything to do with the Union, but his response was not completely clear cut, at first stating his denial was based on his recollection, then saying he didn't believe so, and finally responding, "No, not at all."

Rubino could not recall attending a meeting with Vasaturo, Abraham, and Ruiz where Vasaturo said, "I started the night shift. I can get rid of the night shift." Rubino did admit that after the shift's elimination, he had so much work he had to come in at 4 o'clock in the morning and load all the trucks himself. Rubino then denied having an individual conversation with Ruiz on June 13, the date of the layoff. Rubino could not recall any questioning of Ruiz about who was involved with the Union, if he'd seen the union representatives before, where Abraham got a union card and who gave it to him, asking Ruiz to swear no one approached him about the Union, and telling Ruiz that when things calm down with the Union he would get in touch with the night shift and give them their jobs back. Further, Rubino had no recollection of

telling Ruiz no one would get a union in at Vesuvio, that he couldn't tell him the truth about the layoffs, that he couldn't say it was because of the Union and would never admit it was because of the Union, or telling Ruiz that the Union would put them all out of business, the employees would never get any raises if the Union got in and, finally, that he let the whole night crew go because someone was lying about the Union.

At this point the counsel for the General Counsel played the tape recording of the June 13 conversation to seek to refresh Rubino's recollection. Now, Rubino acknowledged that his recollection was "somewhat" refreshed regarding a conversation he had held on June 13 with Ruiz. Yet Rubino continued to deny that he had told Ruiz that the layoff of the night shift was because of the problems with the Union. At this point in the transcript of the tape Rubino had first interrogated Ruiz: "Luis, can you find these guys and try to find out what's going on? Try and find out what's going on with these guys, because somebody is fucking lying. I don't want to see somebody lose their fucking jobs. But, a few guys are innocent, but there's something that's going on. Somebody had to contact them to bring them in. They just didn't fucking do it on their fucking own." Rubino then related the layoff to the Union's organizing effort and approach to Respondent to bargain, expressed Respondent's adamant refusal to permit unionization, although he would publicly deny it and the possibility of restoring the night shift if the union effort ends, "That thing caused Anthony (Vasaturo) a lot of grief, a lot of money and we're all gonna hurt by it. Nobody gonna get a fucking union here believe me. If you guys are involved in it or not I don't know. You know, somebody fucking instigated this union talk shit. Maybe we just have to wait till it blows over you know what I mean? I'm fucking nervous now. You should have told them, like they were telling you, you should have told them, it was because of the union, it wasn't because of the night. We can't get into that, we can't say that, and between me and you, I'll never admit to this shit. A Union here would fucking probably put us all out of business. You would never see fucking raises . . ." In spite of these statements Rubino incredibly denied that the layoff of the night shift had anything to do with the Union. Rubino shortly returns to and pinpoints the reason for the layoff in the following exchange:

LUIS: I don't know. Like I told you I had nothing to do with no union. Why the other day I was on the day shift, now I'm part of the night shift and got fired.

MIKE: Yeah, but how do I know who's to blame and who isn't.

LUIS: So I'm the blame right?

MIKE: No. Because this way you gotta let the whole crew go. Because somebody's lying.

After listening to the tape Rubino did recall asking Ruiz who signed cards with the Union, telling Ruiz that the Union was going to hurt everybody, asking who was involved with the Union, and repeatedly asking Ruiz if somebody was approached by the Union. But Rubino balked at agreeing that when he said on the tape "They were never before? You never saw those guys before?" he was referring to the union representatives. Rubino even maintained that when he pressed Ruiz as to "That day when . . . the union came in

. . . what prompted them to come down? . . . What prompted them to come down that morning?" He didn't think he was referring to the Union or to union delegates, or that when he said the whole crew had to be let go because someone's lying, he didn't know what he meant or what somebody was lying about. Rubino is most inane when he suggested that in his question to Ruiz, "You never signed nothing?," he could have been referring to Ruiz' timecard rather than a union card. Yet Rubino could not explain how the sentence quoted refers to timecards. Even Rubino expressed the view that his inability to explain what he was talking about with Ruiz on June 13 makes him seem like an idiot. Rubino's denials are not credited.

Rubino did also now agree that he told Ruiz that when things calmed down he would try and get in touch with the night shift, they could be reinstated. Rubino's exact words were: "All I could do at this point Luis is I gotta hope that things calm down, things blow over. You know what I mean? Then I get back in touch with you guys." It is abundantly clear that the things which he hoped would calm down were the union drive to organize Respondent's business and seek a bargaining relationship.

Rubino also agreed that he asked Ruiz to please find the guys and try to find out what's going on, with respect to the Union, and told Ruiz "that nobody is going to get a fucking union here, believe me."

When not grudgingly admitting to certain of his statements appearing in the transcript of the tape, Rubino continually fenced with the counsel for the General Counsel, was non-responsive, evasive, and feigned ignorance of the clear impact and intent of his remarks all dealing with Respondent's extreme agitation and opposition to the organizational rights of its employees and its intent to maintain a union-free environment through layoffs, adamant refusal to acknowledge or recognize the Union, never provide raises if the Union was successful, and in seeking to identify and isolate the union ringleaders.

When confronted with a pretrial affidavit sworn to on October 27, 1994, Rubino was hard pressed to explain his affirmation there that on or about June 13, 1994, he did not question or interrogate employees with respect to whether they signed a union authorization card, supported Petitioner, how they intended to vote, or anything relative to any activities any or all of said employees may have engaged in for Petitioner. Rubino admitted having "discussions" and "there was a grey area," but he didn't think he interrogated anybody. I find that Rubino impeached himself by the direct conflict between his affirmations in the sworn affidavit and his statements appearing in the tape and transcript as well as the admissions appearing on the record. They cannot be reconciled. As a consequence Rubino's denials cannot be credited, and the record is left with the multiple interrogations, coercive and threatening statements, and admissions against interest, in for example, describing the unlawful motive for the night-shift layoff, appearing on the tape.

Further direct conflicts between his pretrial affidavit and the tape concern his sworn denial of his June 13 promise to recall employees "when the union problem is over." While in a third sworn statement in his affidavit Rubino denied on or about June 6 threatening to terminate or lay off any employee "if they chose the union," his taped statements on June 13 clearly implying the layoff was made because the

employees (who brought in the Union) were lying and admitting it was done because of the Union, and also telling Ruiz that a union at Vesuvio would probably put them out of business, clearly contradict this sworn denial, albeit made a week later than estimated.

Abraham testified that after the June 13 layoffs, on June 24 while at home he received a telephone call from Vasaturo. Vasaturo asked to see him and Abraham agreed. Vasaturo came by in his car, parked nearby, and the two sat in the car. Vasaturo said, "You know, things got a little messy ever since I let you guys go." Abraham said, "That was wrong, what you did was wrong." Vasaturo said, "When an apple is spoiled, either you cut what's spoiled on it or you dump the whole apple. I got money, and know you guys are coming back to work, and I'm going to fight this to the end, if it takes what it takes. You guys do what you have to do." Vasaturo also physically checked Abraham three times to see if Abraham was recording him, even after Abraham said he didn't have anything. As noted earlier, the night shift was reinstated on June 28.

On Thursday, July 28, payday, when Abraham reported for work he went to Lenora, an employee who handles payroll, who told him that Anthony would be giving them the checks today. At first Vasaturo was not in. When Abraham went up to the office a second time, Vasaturo was there and told him to come in, have a seat and close the door. He asked, "What is it that you want?" He added, "You know, if the Union comes in, it's going to be the Union on one side, the Company on one side and you guys in the middle." Vasaturo took the paychecks out of a drawer, gave Abraham his check and said, "Henry, I'm going to give you a \$1.00 raise." He rose from his chair, took two \$20 bills from his pocket, and gave them to Abraham, then asked Abraham what was going to be his vote. Abraham replied, "Look, I don't know." Vasaturo said, "[W]ell you guys do what you have to do, and I'm going to do what I've got to do."

In early August, Anthony Scala, described by Abraham as Vesuvio's salesman manager, was standing near Abraham by the loading platform. Eddie Diaz, another employee, was next to Abraham. Scala said, "If the Union doesn't come in, you've got a surprise coming to you." Abraham responded, "what are you doing? That's a threat." Scala said, "Take it as you want." Eddie Diaz also asked why was he threatening Abraham. The loading employees and Scala almost got into a fight. During his 611(c) examination, Vasaturo described Scala as Respondent's sales manager who received a starting weekly salary in February 1994 of \$1250, since increased by the end of the year to \$1299, significantly greater than the pay received by the warehouse and driving employees who are paid by the hour. When asked where Scala's office is located, Vasaturo avoided a direct answer, instead denying there was any real office with a desk, contrary to the facts, and claiming he was mostly on the road dealing with customers. In addition, Abraham testified, without contradiction, that he saw Anthony Scala presiding over and directing salesman meetings which were conducted periodically at the upstairs offices in the Brooklyn facility, attended by both local and regional salesmen located in Albany, New York, and Pennsylvania. Abraham also saw Scala's name posted on the outside of an office upstairs at the facility. Abraham never saw Scala in the warehouse (except on the occasion of his uttering the veiled threat), he deals with customers, does

runs to stores and, when at the facility is on the phone with customers. It is apparent from this description of Scala's job, that he performs managerial functions, that he shares significant economic interests with Respondent's owner, Vasaturo, and General Warehouse Manager Rubino, is closely associated and aligned with them, and not with Respondent's rank-and-file employees, and that his comments made to Abraham in the presence of other employees are binding on Respondent as Respondent's agent, or one who was clothed with apparent authority to speak for Respondent. See *West Bay Maintenance*, 291 NLRB 82, 83 (1988); *Davlon Engineering*, 283 NLRB 803 (1987). While concluding that Scala was held out by Respondent as its agent here, I will dismiss that portion of paragraph 7 of the consolidated complaint alleging him as a 2(11) supervisor in the absence of evidence in support of that claim.

Max Bruny, a union delegate and organizer, testified that he visited the Brooklyn facility on the afternoon of August 3 and passed out union flyers outside the employee entrance. Henry Abraham passed by on his way in. Paul Cole, a driver was present at the entrance when Scala came by and told Bruny he was sure Bruny was wasting his time because even if the Union came in, the Company was going to be moving to Jersey. Bruny and Scala exchanged heated words and Rubino came out and told Scala "you have no business doing this, screaming and threatening people outside." He then pulled Bruny to the side, told him to calm down and in Abraham's presence said to him that "guys who want the Union should understand that when the Union comes in everything is going to be done by the book." Bruny asked Abraham what Rubino meant and as Rubino stood there Abraham responded, "Max, what he means by 'the book' is that anybody who is getting money under the table will no longer get it once the Union comes in." Rubino did not respond. Bruny's recital of these events, particularly in the absence of any conflicting testimony, is credited.

Thursday, August 4, the day before the scheduled election, and also a payday. When Abraham came in to work and went upstairs for his pay, Vasaturo again called him into his office and told him to close the door. Vasaturo asked "what are you going to do"? Abraham understood Vasaturo to be asking him who he was going to vote, and replied he didn't know. Vasaturo said "you guys know that I don't have to give you what you guys ask for. You know that if you guys go on strike, I can go out and hire guys. What's the union got to offer you?" Abraham asked what Vasaturo had to offer. Vasaturo now said "You guys do what you've got to do, but I'm going to fight this until the end, if it takes what it takes." Later that day, when Abraham learned that other employers were receiving extra money along with their paychecks, and Abraham had not received any with his paycheck, he went upstairs and asked Vasaturo, "Anthony, where's my dollar, the \$40.00 you gave me?" Vasaturo gave him \$40 and Abraham left.

Later that day, August 4, at somewhere between 7 and 8 p.m., Vasaturo came downstairs and called all the workers together for a meeting. The whole night shift was present plus a couple of drivers. Frank Diglio was also present. Vasaturo started by saying, "Well, guys, you know that I've got only 24 hours. I'm not supposed to be talking to you. Guys, I swear to my mother that none of you are going to lose your job if the union doesn't come in." He repeated

this, and then said there was a better insurance coming in, it's going to be a lot cheaper. Vasaturo then spoke with the employees about buying ladders to climb, and buying freezer coats. Ruiz had testified about a meeting which Vasaturo had addressed toward night to which he and Abraham had been called and at which Diglio was also present where he had voiced complaints about the poor quality of the ladders in the warehouse which employees had to climb to pick orders. Both Vasaturo and Diglio had said they needed more ladders. Ruiz believed a recording had been made by Abraham of this meeting. The tape of the June 6 meeting recorded by Abraham does not contain any such references. It is likely that Ruiz was confused and was referring to the interchange and Respondent's offer of new ladders made at the August 4 captive audience meeting.

Abraham continued describing Vasaturo statements made at the August 4 meeting. He accompanied the offers of an improved insurance plan and ladders and the like with the statement that we learned a lot from this, and to give us a chance. At this point Vasaturo said, "Look, guys, if shit comes to shovel, boom." Accompanying the work "boom," Vasaturo had his hands up and opened his fingers. Abraham understood that Vasaturo was talking about burning the place up. It is evident Vasaturo was physically describing and simultaneously uttering the sound of an explosion.

The parties stipulated that the representation election was held on August 5 between the hours of 6:30 to 9 a.m. and 11 a.m. to 1 p.m. Abraham served as the Union's observer during the election.

Employee Nelson Hernandez testified he started working for Vesuvio loading trucks on the night shift in March 1994. He signed a union authorization card on May 23 at Abraham's house given to him by Max Bruny who told him that with this card the Union would represent him. He was among the night-shift crew let go from June 13 to 27. Hernandez corroborated Abraham's testimony that at the meeting called by Vasaturo on the morning of June 13 to announce the firing of the night crew when Abraham stated, "[Y]ou're letting us go because of the Union," Mike Rubino asked Abraham "were you honest with us?" and Anthony Vasaturo told Rubino to shut up.

On payday, Thursday, July 28, Hernandez went to get his paycheck in the evening. After Lenora told him Anthony had their checks, he went with two other employees, Danny Cordova and Eli Abraham, to Vasaturo's office. Vasaturo said he wanted to see Hernandez privately and asked the other two to step out. During their private conversation in the office, Hernandez received pay for a sick day, and \$80 cash. Hernandez had not asked for the sick day pay; he was not then employed a sufficient amount of time to be eligible for such a benefit, having worked only about 5 months. Vasaturo asked Hernandez how he was going to vote in the upcoming election and Hernandez told him, "honestly I don't know."

Hernandez also corroborated other testimony about the union meeting Vasaturo called later on August 4, shortly before the August 5 election. The meeting, near the loading dock, was called by Vasaturo, and was held at about 8 p.m. Present were the night crew and some daytime drivers. Some employees were talking about ladders, freezer suits, and masks when the meeting turned to a discussion of employment conditions and then Vasaturo said he was going to get them the ladders, freezer suits, and other stuff the guys had

wanted. Vasaturo also mentioned two types of strikes by employees. There was one type where the employees could be replaced for good. Vasaturo told the assembled employees to choose one guy to go upstairs to speak to him about any problems that they have.

During his cross-examination Hernandez noted that the August 4 meeting came about when Vasaturo came down when the employees were actually starting to load trucks, stopped and told them, "guys, I have a couple of minutes with you." It was when Vasaturo asked the assembled employees if they had any gripes, why were they getting the Union involved, that a couple of the men, Hernandez himself and Henry Abraham, complained about the ladder situation, previously described by Ruiz as lacking feet and being uneven, having no freezer suits for going into the freezer for goods, and having no masks when they did the sweeping.

Daniel Cordova, also called as a witness by the counsel for the General Counsel, testified that he had worked for Vesuvio as a hi-low operator, loaded trucks, and cleaned the grounds, from May 31, 1992, until November 12, 1994, and was later recalled from early January to February 9, 1995. His February 9, 1995 discharge is separately alleged as an 8(a)(3) violation and will be discussed infra. He signed a union authorization card on June 8. On July 28, when he went to pick up his paycheck, Vasaturo asked to speak with him in his office. Alone with Cordova in his office, Vasaturo questioned Cordova as to who brought the Union in, and asked if Henry (Abraham) did. Cordova replied he did not know. When Vasaturo asked if Cordova ever worked before with the Union Cordova told him, no. When asked about his skill, Cordova said he was a skilled welder. Vasaturo offered to find Cordova a job next door with a company. Cordova reported that after that Vasaturo told him he called a couple of places, but none of them had any openings. When Vasaturo gave him his paycheck while in his office on July 28, he questioned Cordova about how he was going to vote in the upcoming election and Cordova replied he wasn't sure, that he wanted to hear both sides. Vasaturo held on to Cordova's paycheck until they were done and Cordova was about to leave. Then, he went into his drawer, took out \$50 or so, put it inside the pay envelope and told Cordova he knew how to vote. Vasaturo questioned him one last time about the Union and Cordova said he wasn't sure about what he was going to do. After Cordova left the office, he saw Nelson Hernandez follow him into the office to speak with Vasaturo. That conversation has been described, supra.

On August 4, Cordova was again called to Vasaturo's office and given additional cash along with his paycheck. Cordova was again asked how he was going to vote and he still didn't know. The entire night shift was called to a meeting with Vasaturo later that evening. On August 1, Cordova saw Vasaturo in the warehouse talking with Angel Vega, a driver on the day shift. They were talking about the Union. He heard Vasaturo say if the Union won that he would just burn down the place and move to Jersey.

Cordova also testified to a meeting Vasaturo held with the night-shift employees in his office at about 5 p.m. on August 3. Vasaturo spoke about the union election, asking the employees to give him a second change, that they could work things out with him, and "there's no need for a union." If the Union won the election, contract negotiations would have to go through him and if he wouldn't agree with union pro-

posals they wouldn't get an agreement and there would be a strike.

At sometime between 7 and 8 p.m. on August 4, Vasaturo called another meeting of night-shift employees in the warehouse. He started by asking for a second chance, that he had learned a lot in the previous 2 months, and that if we could just give him another chance, to talk to him about it. He asked what it is that we want, there's no need for a union, that if more money is what we wanted, then all we had to do was ask him. Cordova said that the Union promised to put everything on a contract, medical coverages, money, and job security. He asked Vasaturo to put his promises in a contract. Vasaturo replied he wouldn't do it because he might incriminate himself.

During his cross-examination, Cordova described walking into room 1 in the warehouse and seeing Vasaturo and Angel Vega talking about 8 feet away when he heard the portion of the conversation to which he previously testified. He had gone there to get the items he was sent for. Cordova repeated the conversation he heard, Vasaturo saying if the Union wins, he's going to burn down (the Brooklyn facility) and move to Jersey. Vega just told him, "you do what you have to do."

Neither Anthony Vasaturo nor Mike Rubio nor any other person was called as a witness for Respondent. On the conclusion of their examinations by counsel for the General Counsel as adverse witnesses called pursuant to Section 611(c) of the F.R.E., in each case, Joel Spivak, Esquire, counsel for Respondent, reserved his right to cross-examine them and to call them as Respondent's own witnesses. They were never called as witnesses again, and, as noted earlier, after a continuation in the hearing was granted by me on June 1, 1995, at Respondent's counsel's request to enable him to analyze the tape recordings (Tr. 465), the said counsel advised me and all counsel by letter dated June 12, 1995, and faxed the same date that "the Respondent is not calling any additional⁴ witnesses" and requested the maximum time for the filing of briefs.

I have previously demonstrated the lack of credibility of Respondent's two chief executives, Anthony Vasaturo, owner and president, and Michael Rubino, warehouse manager, in denying, and denying any recollection of, many of their activities in illegally seeking to thwart the Union's drive to organize Vesuvio's employees and to bargain on their behalf. Where they have denied their statements and their culpability arising from their statements appearing on the transcripts of the cassette tapes of June 6 and 13, I have discredited them. In particular, I have found Rubino to have impeached himself as a consequence of the fatal variances between statements appearing in his pretrial affidavit and his admissions at trial and the credited statements he made, particularly at the June 13 meeting with Ruiz, transcribed from the tape of that date. I also credit employees Abraham, Ruiz, Hernandez, and Cordova as to their testimony, corroborative of each other in those instances where they have testified to the same incidents, attributing coercive and discriminatory statements, conduct, and activity to Respondent's chief executives, rep-

⁴ This is a misnomer. Respondent called no witnesses. Counsel's letter is received in evidence as Jt. Exh. 1 and my Order of the following day, June 13, 1995, closing the record and setting a briefing schedule is received in evidence as Jt. Exh. 2.

representatives, and agents, including Vasaturo, Rubino, and Scala, particularly in the absence of any contrary testimony.

Respondent has denied Frank Diglio's position as night-shift manager, and his status as its supervisor and agent, and its conduct, on or about June 6, by Diglio, in interrogating employees as to their union activities. As noted earlier, Diglio was present, for Respondent, along with Vasaturo and Rubino, when Abraham was directed to the office at the facility when he reported for work on the afternoon of June 6. Diglio's participation in that meeting, along with that of all the other attendees, was recorded by Abraham and is part of the record. Diglio is quoted as saying, *inter alia*, "okay, Pivo is not here anymore. From now on, I'm gonna be here at night. Nobody has the same style of management, nobody. I expect you [addressing himself to Henry Abraham] to be the foreman downstairs to get things done without anybody being on your back constantly telling you what needs to be done . . . I'm telling you this man-to-man right now, I'll give you respect downstairs the way I talk to myself and everybody else downstairs . . . your's [sic] is to keep the guys in line, make sure things get done, nobody drags their ass, sometimes I send guys for things they come back ten minutes later." Rubino testified that the night shift was eliminated when, after Frank Diglio took over as night manager he couldn't overcome or eliminate the mistakes in loading. While I have discredited Rubino's explanation for the elimination of the night shift, Diglio's status as night manager is clear. Abraham testified, without contradiction, that Diglio held the same job as Patrick Adams succeeded to after the election, giving orders on the job, disciplining employees by directing them to perform their assignments properly or be sent home, and calling them back to work after lunchbreaks. Diglio called out the orders and directed the warehouse employees to fill them and load the trucks. While Abraham had never seen him actually suspend an employee, he got close to that point by informing Abraham himself to be careful in performing a work assignment and telling Abraham and other employees he was not going to tolerate certain conduct on the job. There was no question Diglio was his boss and in charge of the night shift. Hernandez corroborated Abraham as to Diglio's status as night-shift manager, that he ran the whole night crew, made sure the trucks were loaded right, and assigned Hernandez to particular jobs.

It is evident based on Diglio's full participation in the management meeting at which Abraham was confronted with his alleged participation in union organizing and directed to explain it, his own statements made at the meeting and the status and function attributed to him by employees, in responsibly directing their work and having the authority to discipline them, that Frank Diglio was a manager, agent, and Respondent supervisor within the meaning of Section 2(11) of the Act. While he did not personally interrogate Abraham on June 6, his presence and participation in all aspects of the interchanges occurring at the meeting, with the tacit approval of Respondent's owner and main manager, make him an agent equally responsible for the illegal conduct which took place there.

I thus conclude that Respondent, by its named officers, agents, managers, and supervisors committed all of the acts of interference and restraint of employees' Section 7 rights alleged in the complaint as occurring during the critical preelection period. These acts included repeated interroga-

tions, threats related to the employees' union activities, solicitation of grievances from employees, and promises and grant of benefits to employees to induce them to discontinue their support of the Union and to vote against the Union at the upcoming election. It is also uncontroverted that Respondent threatened to burn down its facility if the Union won the election, threatened to move to New Jersey, threatened to discharge its night shift, promised to rehire its night shift after things calmed down, promised its employees straight salaries in place of hourly pay, improved insurance benefits, and items of work apparel and equipment, and granted them bribes in the form of cash supplements and increases in their weekly pay in order to discourage their support of the Union and win their votes in the representation election. All of this conduct violated Section 8(a)(1) of the Act. *Southwire Corp.*, 282 NLRB 916 (1987). *Baptist Memorial Hospital System*, 288 NLRB 1160 (1988); *Sears, Roebuck & Co.*, 305 NLRB 193 (1993); *Eddyleon Chocolate Co.*, 301 NLRB 887 (1991).

I further conclude that by terminating the night shift, thereby discharging its employees employed on that shift, for the period June 13 to on or about June 27, Respondent has violated Section 8(a)(3) and (1) of the Act.

The union petition for certification was filed on June 6 and in all likelihood a copy was served on Respondent within a few days. Also on June 6, two union representatives personally demanded recognition and collective bargaining when they appeared at the Brooklyn facility. Immediately, later the same day, Vasaturo confronted Abraham as the "main guy" who brought the Union in and was emphatic in informing him that union recognition was "not gonna happen." Within 1 week the night shift was discontinued, ostensibly because of dissatisfaction with too many mistakes in night loading, even though its elimination required Warehouse Manager Rubino to come to work at 4:22 a.m. to load trucks. The real reason for the shutdown is disclosed on the June 13 tape, when, after complaining about the Union's demands and presence and continually pressing Diaz to disclose his and Abraham's role in bringing the Union in, Rubino informs Diaz that it was because of the Union although he would never admit it, that to punish the instigators on the night crew who lied about their instigation, the whole crew had to be let go. Respondent's true, unlawful motive is also made evident in the interchange earlier, on the morning of June 13, credibly testified to by Abraham and corroborated by Hernandez when, in response to Abraham's statement accusing Vasaturo of letting the night-shift employees go because of the Union, Rubino asks Abraham "were you honest with us?" and Vasaturo tells Rubino to "shut up." Two weeks later, Vasaturo visits Abraham and admits his mistake in terminating the shift although he continues to approve the tactic of dumping the whole "apple" because a part of it is spoiled and vows to fight the union drive to the end using whatever tactics are necessary. The shift is then reinstated. The testimony and evidence cited, included the suspicious timing, the inadequate and irrational justification for the action taken, the virulent hostility and threats to defeat the union organization, and finally, the admissions that the extreme tactic of termination of the shift was designed to ferret out and stop the protected activity of unknown, but suspected shift employees, overwhelmingly warrants the conclusion that the union activity of its employees was the motivating factor in the shift's discontinuance in violation of the Act. It is also clear that

absent the employees' protected concerted activity, Respondent would not have taken such action and, thus, it is unable to meet its burden of proof under the Board's Wright Line test, established in *Wright Line*, 251 NLRB 1083 (1980), affd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and affirmed by the Supreme Court in *NLRB v. Transportation Management Corp.*, 461 U.S. 393, 400 (1983).

B. The Consolidated Objections and Challenged Ballots and Their Impact on the Election

The objections consolidated for hearing in the Regional Director's report include Objections 1 through 5 which track and duplicate unfair labor practice allegations in the consolidated complaint. Objection 1 alleges the employer paid the employees a substantial wage increase 1 and 8 days before the election. Objection 2 alleges that in the weeks preceding the election the Employer told employees that it would never bargain with Local 888 in the event the Union won majority support in the election. Objection 3 alleges the June 13 termination of all employees in the night shift because of their support for Local 888. Objection 4 alleges that during the preelection period, the Employer threatened employees with adverse employment consequences because of their support for the Union and in the event it won the election. Objection 5 alleges that during the preelection period, the Employer promised inducements to employees.

The facts supporting each one of these five objections has been presented and their legal consequences analyzed in the prior section. Each of these objections, alleged as unfair labor practices, has been sustained. As they represent conduct all occurring between the filing of the petition and the election they may be considered as bases for setting aside the election. *Ideal Electric & Mfg. Co.*, 134 NLRB 1275, 1278 (1961).

In determining whether conduct encompassed by objections justify setting aside an election, the Board focus is on the degree to which the conduct has sufficiently impaired the employees' freedom of choice of representative. Generally, conduct violative of Section 8(a)(1) is, a fortiori, conduct which interferes with the exercise of a free and untrammelled choice in an election. *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786-1787 (1962).

In addition to Objections 1 through 5, the Union filed Objections 7 and 9, also consolidated for hearing. Objection 7 alleges that on or about August 3, the Employer assigned unit employees Angelo Sanchez and Tom Polito to an out-of-town, overnight work assignment that precluded their return to the facility before the close of the election polls on August 4. Objection 9 alleges that by these and other acts, the Employer prevented a fair election from being held.

As earlier noted, the election was scheduled for Friday, August 5, and was held between the hours of 6:30 to 9 a.m. and 11 a.m. to 1 p.m.

Abraham described an Albany, New York run to which he had once been assigned. The truck assigned is loaded on Tuesday night and leaves the Brooklyn facility on Wednesday morning. The truck is loaded with multiple bags of flour and containers of cheese. In Abraham's experience there are 2 to 3 hours' traveltime between stores where the goods are delivered. The truck is manned by a driver and helper. Sometimes, a pickup of cheese is made in Vermont before the

truck returns to the facility. On Abraham's trip, he did not return until early Sunday morning. Abraham loaded the truck which left Brooklyn for the Albany run on Wednesday morning, August 3. The load was large, and the many bags of flour and containers of cheese had to be stacked for delivery to the customers in proper order. Tom Polito, the steady driver on that run, also made that run. Angel Vega, not usually assigned, was put on that run as the assistant. Vega's usual assignments were on local New York City and Long Island routes. The truck did not return until Friday afternoon after the close of the polls.

According to Abraham's uncontroverted testimony the Albany run is usually a 2-night trip, with the truck returning as late as a Friday night or early Saturday morning. Only trucks with very light loads return by Thursday evening and when the driver is sent from Albany to Vermont to pick up cheese for return in the empty truck even a lightly loaded truck will return on Friday.

Abraham also asserted, without any contrary testimony, that employees not eligible to vote in the election because they were new hires, could have been assigned to the Albany run in place of the two eligible employees. While on cross-examination, Abraham limited the new hires who could have been assigned to the classification of helpers. In his experience, Vasaturo normally had no difficulty finding drivers in the past when he needed them, and, even without experience on this run, specific directions could have been provided as they were to drivers on trucks in which Abraham assisted as helper.

As to Objection 9, the complaint alleges a number of unlawful acts and conduct engaged in by Respondent, not specifically alleged in Objections 1 through 5, which were disclosed by the independent investigation, and on which the Regional Director ordered consolidated hearing in his January 5, 1995 report. These include interrogating its employees about their union activities, creating the impression it was keeping their union meetings and activities under surveillance, promising to rehire discharged employees if they ceased their union activities, soliciting complaints and grievances, and impliedly promising employees increased benefits and improved terms and conditions of employment to induce their abandonment of the Union, promising employees assistance in obtaining other employment in order to induce them to cease union activities and to vote against the Union, threatening to burn down its facility if its employees voted in the Union, and threatening that a strike would be inevitable if the employees selected the Union as their bargaining representative. I have previously credited the employee witnesses' testimony which related the statements, attributed to Vasaturo and Rubino, establishing the interrogations, impression of surveillance, solicitations, promises of benefits and other jobs, threats to burn down the facility, and the inevitability of strikes if the Union was successful in the election. These items of objectionable conduct, as well as one more to be discussed, shortly, even though not specifically alleged may, if established, constitute objectionable conduct to the election. See *White Plains Lincoln Mercury*, 288 NLRB 1133 (1988).

The final item of objectionable conduct disclosed by the investigation of the petitioner's objections and presented at the hearing, was the meeting to which a number of employee witnesses testified having been called by Vasaturo among the

night-shift employees, attended as well by some day drivers, and which was held sometime between 7 and 8 p.m. on the evening of August 4, well short of 24 hours prior to the election scheduled for the following day. The credited testimony of employee witnesses show that Vasaturo was well aware of the Board rule interdicting such meetings and apparently was prepared to undergo the risk that holding the meeting entailed. Not only did the timing of the meeting violate the Board rule announced in *Peerless Plywood*, 107 NLRB 427 (1954), but the statements he made there independently have been found to have violated the Act. These include his promises to provide improved insurance and pay, ladders, and freezer costs in the context of asking for another chance to avoid unionization, as well as his threat to burn the facility if the employees voted in the Union, made explicit in his earlier threat of August 1 to Angel Vega, overheard by Cordova, and his threat that a successful union vote would lead to strikes.

Turning to the challenged ballots, I have previously noted they were 10 in number and were sufficient in to affect the results of the election. Jose Rosales was challenged by the Board agent because his name did not appear on the payroll eligibility list provided by the Employer. The ballots of Joseph Pionel, Frank Diglio, Anthony Scala, and Michael Rubino were challenged by the Union because they were alleged to be supervisors. The ballots of Anthony DePete, Lynton Brandt, Ellio Chillo, Wayne Rismo, and Ralph Frasca were challenged by the Union because they were alleged to be employed in job classifications outside the stipulated unit.

The parties stipulated on the record that the challenge to the ballot of Jose Rosales should be overruled and his ballot should be counted. The parties further stipulated that Michael Rubino is the warehouse manager and a supervisor and the challenge to his ballot should be sustained. Also, the parties stipulated that for purposes of this proceeding the ballots of Brandt, Chillo, Scala,⁵ and Frasca shall not be counted.

Uncontested testimony by Abraham disclosed that besides working for Respondent as night manager and supervisor until the election or shortly afterward, Frank Diglio also operated a personal business he had purchased delivering Pollyo Ricotta cheese from his own truck out of Respondent's Brooklyn facility. According to Abraham, Anthony DePete was employed in running Diglio's private business from the facility. Abraham never saw DePete performing any work for Vesuvio. He always came in and picked up Diglio's products, got in the truck and left, and later returned to store goods in a refrigerator that Abraham avoided. As against this testimony, Respondent's payroll shows an employee, Anthony DePete, receiving wages of \$412 a week based on a 40-hour workweek, with a rate of \$10.30 per hour, and with all the usual deductions being made from his gross weekly pay, as well as entries for holiday and sick pay. Vasaturo described DePete as a driver. It would make little sense for Respondent to incur a continuing obligation for DePete as an

⁵I have previously found Anthony Scala, Respondent's sales manager, to be a managerial employee, and/or sufficiently closely aligned with Respondent's management and held out to be such to its employees, such that his implied threat of adverse consequences uttered to Abraham if the Union was defeated, as well as his threat in the presence of employee Cole of a move to Jersey, are binding on Respondent.

employee with the wages and benefits he received, if DePete was solely employed by Diglio. During the period up to the election Abraham spent most of his working hours on the night shift, usually starting early at 2 or 2:30 p.m. with some additional morning hours performing loading assignments. I am not convinced that Abraham was available to track DePete's working schedule, which shows some weeks in 1994 of 8, 16, 24, and 36 hours. It is likely that DePete performed outside work for Diglio from the facility in those weeks during which he worked fewer than 40 hours for Vesuvio. Since I am prepared to credit Respondent's payroll in this matter, I conclude that the challenge to DePete's ballot be overruled and that his ballot be opened and counted.

Abraham also testified, without contradiction, that Respondent left its trucks parked out on the street overnight, and that Wayne Rismo's job was to take turns along with another employee, in watching and guarding the trucks while parked overnight. Inasmuch as Respondent offered no evidence to dispute this testimony, I conclude that the objection to Wayne Rismo's ballot be sustained as he performs work for Respondent in an excluded, nonunit classification. Neither Rismo's Chillo's, or Francona's names appear on Respondent's payroll covering the period January 1 to September 30, 1994, received in evidence as General Counsel's Exhibit 5.

I have previously determined that Diglio was a night manager and supervisor through the date of the election, and, accordingly, the objection to his ballot should be sustained. As to Joseph Pionel, Vasaturo agreed, in accordance with the notation appearing on his personnel record, that Pionel was assistant manager for the warehouse, at least by the time he was approved for an increase in salary from \$525 to \$551 per week as of May 1, 1994. Pionel also participated in Respondent's 401(k) savings and investment plan in 1994 through payroll deductions. All of management, along with only a few warehouse employees, Abraham and Walter Nelson, were participants in the plan.

Abraham considered him a manager, because on the night shift, in the absence of Diglio or if Diglio was otherwise engaged, Pionel was in charge, directing the warehouse employees in their assignments and telling them when to go and where. Pionel did not load trucks but called out directions to warehouse employees to fill the orders for flour and cheese, in the same manner as Diglio and, after Diglio left, Patrick Adams. On the occasions that Mike Rubino was out, for vacations and the like, Pionel took over and ran the day shift in the warehouse and exercised the same authority as Rubino had. When Rubino is present, Pionel also continues to call orders and direct employees, particularly when Rubino is otherwise occupied. Pionel also opens and closes the facility. Unlike other longtime employees who may merely assist Rubino on occasion in passing along the orders to the men, Pionel can take disciplinary action on his own and if Rubino is present Pionel will report such actions to Rubino. Such actions include sending a worker home or otherwise disciplining him. Abraham never saw Pionel fire anyone. Hiring authority by Pionel will usually be subject to Rubino's approval.

Based on the foregoing evidence, and, in the absence of any contrary evidence, I find and conclude that at last on Joseph Pionel's promotion to assistant manager of the warehouse on May 1 and with a \$26-a-week increase in salary,

he became a supervisor under Section 2(11) of the Act with authority to responsibly direct employees requiring the use of independent judgment, and that employees understood that Pionel possessed such authority and related authority to discipline them while in sole, or joint (with Rubino) charge of the warehouse operation during the day, and, on occasion, solely in charge at night. Accordingly, I will recommend that the challenge to his ballot be sustained.

Based on the foregoing discussion and analysis of the objections to conduct affecting the results of the election and the challenges to ballots cast in the election, I rule as follows. I conclude that the objections, which include most of the serious unfair labor practice allegations arising under Section 8(a)(1) of the Act, the suspension of the night shift and cash bribes given to employees alleged as violations of Section 8(a)(3) and (1) of the Act, have all been sustained and, alone, warrant setting aside the election. There is no question but that Respondent's overwhelming pattern of threats of burning down and moving the facility, warnings, interrogations, creating the impression of surveillance of employee union activities, solicitation of grievances, promises and grants of benefits, raising the specter and inevitability of strikes if the Union was successful in the election coupled with the futility of selecting the Union, and its discharge of the night crew to punish the employees when it could not induce the suspected ringleaders to step forward, destroyed the laboratory conditions necessary for the Board's conduct of an election, and compel the setting aside of the election.

Aside from the foregoing conduct, Respondent engaged in other conduct which should nullify the election. Because Vasaturo called and held a meeting of the night-shift employees, and day employees then present at the facility, within 24 hours of the election, Respondent knowingly violated the Board's Rule forbidding election speeches on companytime within 24 hours of the scheduled election to massed assemblies of employees, *Peerless Plywood*, supra, and the election must be set aside for this reason alone.

Finally, it is apparent that Respondent assigned two employees eligible to participate in the election to an out-of-state work assignment which it knew would in all probability make it impossible for them to return timely to vote in the election. And they did not. The votes of these two employees was, or would likely be determinative of the outcome in the sense that the winning margin for the Employer was only 3 votes and 10 votes were cast under challenge, themselves determinative of the outcome and thus, clearly subject to determination after hearing. Under these facts, the Board law requires the setting aside of the election on this ground alone. As held by the Board, "Where the conduct of a party to the election causes an employee to miss the opportunity to vote the Board will find that to be objectionable if the employee's vote is determinative and the employee was disenfranchised through no 'fault' of his own." *Versail Mfg.*, 212 NLRB 592, 593 (1974). Here, the employer's conduct removed the 2 affected employees from any opportunity to cast their ballots in a unit of approximately 34 eligible voters. Such conduct must result in setting the election aside.

Turning to the challenges, I will recommend, in accordance with my preceding discussion and analysis, and the parties stipulations, that the challenges to ballots cast by Pionel, Diglio, Scala, Rubino, Brant, Chillo, Rismo, and Frasca are sustained and that the challenges to ballots cast by Rosales

and DePete be overruled. However, inasmuch as the remaining two unresolved ballots are no longer determinative of the outcome of the election, I will not recommend that those two ballots be opened and counted, but instead, will recommend that the election be set aside. Whether a rerun election is held will depend on my ruling on the General Counsel's application for a *Gissel* remedy, to be discussed infra.

C. The Alleged Unlawful Conduct by Respondent Following the Election, Including the Transfer and Discharges of Employee Abramson and the Discharge of Employee Cordova

On October 17, Vasaturo and Rubino approached Abraham and Vasaturo told him he was going to go to day shift. Abraham asked why. Vasaturo replied, "[B]ecause your giving Patrick a hard time." Abraham asked, "In which way? What are you talking about that I'm giving him a hard time." Vasaturo said, "You've got a loud mouth, and you run your mouth too much."

As to Patrick Adams, he is alleged as night manager and supervisor in the consolidated complaint. The General Counsel clarified that this status only began after the election; Adams was eligible to vote in the election. Vasaturo claimed that Adams was a night loader, loading trucks 90 percent of the time, and making sure the trucks are parked the right way, the men show up for work, and keeping the warehouse organized, stocked properly, and inventory the night supply 10 percent of the time. When pressed then as to who supervises the night shift Vasaturo at first feigned a lack of understanding of the meaning of supervisor, but then answered that Adams was in charge of the night shift. He approves employees leaving the shift early because of illness; he is the one to receive calls from employees who report they are not coming in to work. The personnel records show that Adams received a salary increase from \$584 to \$650 a week on September 14, made application to join Respondent's 401(k) plan on October 28, and by November was a participant in the plan. Adam's weekly salary is in contrast with all warehouse and driver employees who receive an hourly wage, varying between \$6 and \$17.50 an hour. Vasaturo also agreed that Adams gives orders to employees to pick merchandise and load the trucks. Abraham noted that Adams made sure the trucks were loaded and the guys were working. He had the authority to discipline employees by giving work orders which, if not followed, could result in the employee being sent home. On one occasion, according to Nelson Hernandez, Adams sent employee Daniel Cordova home early from work after he told Adams that the product he was supposed to get from a warehouse shelf was too high and he couldn't climb to get it. On this record I conclude that beginning in mid-September, Patrick Adams has been a supervisor within the meaning of Section 2(11) of the Act.

On the day shift, Abraham was put to work on a truck unloading products and making deliveries to pizzeria's and restaurants. On Tuesday, October 25, Abraham had just returned from a run to New York City with Paul Cole, the driver, when Vasaturo approached him and asked, "What was wrong with the election?" Vasaturo said he had seen Abraham's signature again. Abraham replied, "What are you talking about? What signature?" Vasaturo again asked what was wrong with the election and again Abraham said he didn't know what Vasaturo was talking about. On October 14,

Abraham had filed the charge in Case 29-CA-18619 alleging the June 13 termination of the employees on the night shift as violative of Section 8(a)(1) and (3) of the Act. A copy of the charge was served on Vesuvio between Thursday, October 20, the date stamped on a postmark on the green certified receipt and Tuesday, October 25, the date of this conversation.

On Friday, November 25, Abraham reported in to work for the day shift, clocked in, and heard Rubino, who was standing nearby, make some remark that "I can't wait to get rid of some assholes here." Later, in the morning, Abraham asked Rubino for the day off. He asked "if you don't got nothing I can use the day. I've got some errands to do with my wife, if you don't have nothing [sic]." Vasaturo said he would check the sheet for the day's assignments for the drivers and helpers. He said, "Let me go and see if I've got everybody filled in. If I don't need you, I'll give you the day." A few minutes later, Rubino came and told Abraham if he wanted the day he could take it. Rubino said, "I've got everybody filled in. I'll see you Monday." As explained by Abraham, Friday is the lightest workday for deliveries. Abraham has seen other employees ask for time off if it's a light day, or just take the day off, and has seen Rubino send employees home if it's a light day. Note that employees are only paid for working hours, not the hours comprising a normal workday. Ruiz complained about this in his and Abraham's June 6 meeting with Vasaturo and Diglio.

On Monday, November 28, Abraham was sent out on a truck with Oscar (Rivera) for the day. On Tuesday, November 29, after clocking in, Rubino told him Anthony wanted to see him. Abraham went upstairs to the office. Vasaturo told him he was being terminated. Abraham asked, "What are you talking about, why are you letting me go? Vasaturo said, "You don't want to go to Albany, and Mike said that you came in drunk Friday." Abraham had gone to Albany on a run a week before Thanksgiving, but had expressed misgivings at the time of the assignment because his wife, who was pregnant, had a high risk of miscarriage because of an asthmatic condition and Abraham didn't want to leave her alone for the 3 or 4 days of the trip. Abraham went after Vasaturo told him he was the perfect person for the route, but told Vasaturo as for the next week, he didn't know if he was going to be able to go again. On that trip, Abraham didn't return until Sunday morning. While he was away, his wife came to the job and Vasaturo told her she didn't look good and looked sick. Later, Abraham told Vasaturo that when his wife had her checkup with her doctor he would bring in a letter from him informing his employer that his patient should be attended to during her pregnancy and not be left home alone.

At their November 29 meeting, Abraham now questioned Vasaturo, asking, "Why is Mike telling you that I'm drunk? What is he talking about?" Abraham also went over the health problem of his wife and his promise to bring a letter from her doctor. Vasaturo's only response was to tell Abraham, "Do what you got to do. I've got a lot of things on you."

When Abraham returned home after being fired, his wife had returned home from her visit to her doctor with a letter from him describing her condition and asking that her husband not be transferred at this time. The letter, dated November 29, on Dr. Robert H. Molsen's letterhead, confirmed that

Diane Blas (Abraham's wife) was presently under his care for maternity. Due to her condition and her severe asthma, he requested that her husband not be "transferred" at this time. Abraham returned to the facility and gave the letter to Mike Rubino who said, "Oh, I've got more than this on you. I've got a lot of things on you."

Abraham never received any complaints, written warnings, or suspension from Respondent regarding his work. Following his discharge Abraham has not received an offer to return to work for Vesuvio.

On June 6, after the union representatives had visited the facility and made their bargaining demand, Mike Rubino told Abraham and Ruiz, "There's four guys out there I would keep. The rest I'd let go in a heart beat. You two I would keep Nelson, I would keep Sam . . ." Frank Diglio added: "If they're not good workers they gotta go." I have also previously quoted Vasaturo's positive comments about Abraham's work performance appearing on the June 6 tape.

When Abraham started as an employee in 1987 there was no night shift. He went to the night shift when it started in the summer of 1993 and remained on it, through the June 1994 suspensions until October 17. In his estimation, Abraham had been assigned to the new shift because he ran the hi-low pretty good and he knew basically everything on the job. He drove the hi-low, cut things down, loaded trucks, and stacked. When Abraham was transferred to the day shift he now was put on a truck making deliveries. The counsel for the General Counsel alleges that the transfer was both retaliatory and a change to a more onerous job. In terms of pay, there was basically no change except the overnight trips received extra pay. There is no evidence that any other employee was transferred to days. When Vasaturo explained to Abraham when he asked for reason for the transfer that he had a loud mouth and ran his mouth too much, Vasaturo's implication was clarified within days when he asked Abraham, in violation of Section 8(a)(1) of the Act, what was wrong with the election and told him "I saw your signature again," referring to the charge Abraham had signed and filed on October 14. (The Union had earlier on June 13, filed a charge alleging the night-shift elimination as a violation, but had withdrawn it on June 27 when the shift was restored.) There was no Respondent witness, not Patrick Adams, nor Vasaturo, nor Rubino to testify just what Abraham had done or said to Adams to cause his transfer. In the absence of any rational explanation from Adams or the others the record is left with only the reasonable inference I have found based on Respondent's antiunion animus, its conduct and actions designed to unlawfully thwart the union drive, and the discriminatory conduct it had already taken against Abraham himself at the time of the termination of the night shift. The day shift required deliveries to be made in basement storage areas, and in bad weather conditions and thereby subjected the truck helpers to a greater physical risk than the night loading. It also made Abraham subject to assignment to the 2- to 4-day out-of-state deliveries to Albany and other locations with the attendant lengthy hours and separation from home. I therefore find it was more onerous than the night shift. Aside from these factors, it is evident that Respondent singled out Abraham for this change, thereby removing him alone from daily work association with the employees on the night shift who Respondent believed were the core group which instigated the union organizing drive and making clear

to his cohorts the price of union leadership. Abraham himself didn't feel comfortable with the transfer because he expected that Vasaturo, somehow, was going to find a way to discharge him, and he was proven right just over a month later.

While I find that Respondent did not have actual knowledge of Abraham's October 14 charge on October 17 when it transferred him, it did have knowledge on that date of Abraham's outstanding participation in the union drive, including his acting as union observer at the election and challenging the ballots of Pionel, Diglio, Scala, and Rubino, among others, because of their alleged supervisory functions. Respondent also had received by on or about September 20, the initial charge, filed by the Union in Case 29-CA-18502, which alleges violations of Section 8(a)(1) and (3) by Respondent in paying substantial wage increases, threatening adverse employment consequences, telling employees Respondent would never bargain with the Union, and promising inducements. Most of this conduct, while it was repeated with others, first took place in conversations and dealings with Abraham by both Vasaturo and Scala. Respondent then would have concluded that Abraham was providing information to the Board in support of the charge. Thus, I also conclude that the transfer was motivated by not only Abraham's protected concerted activity but also by his filing charges and giving testimony under the Act. See *Atlantic Limousine*, 316 NLRB 822 (1995); *Douglas Aircraft Co.*, 308 NLRB 1217 (1992); *Marshall Durbin Poultry Co. v. NLRB*, 39 F.3d 1312 (5th Cir. 1994).

As to Abraham's discharge, I conclude that the reasons provided Abraham for his dismissal were pretextual and shielded Respondent's real reason, his known leadership of the union movement. Vasaturo had recognized Abraham's union role starting on June 6 when he suggested providing Abraham and Ruiz with straight salaries, and continuing thereafter including the June 13 dismissal of the night shift and the June 24 visit to near Abraham's home, the allegation that he had a loud mouth, and Rubino's asking whether Abraham had been honest with Respondent after Abraham suggested, rightly, that the union movement was the true motivation for the shift termination. When Vasaturo questioned Abraham on October 25 as to why he was raising questions about the validity of the election and made known his awareness of Abraham's new charge alleging the shift layoff as a violation, Respondent was publicizing its concern and hostility to Abraham's union role as well as his use of Board processes. It was only a matter of time until, as Rubino so crudely put it, "I can't wait to get rid of some ass holes," that Respondent manufactured two reasons, for Abraham's discharge, neither of which can withstand close scrutiny and neither of which did Respondent support by the offer of any evidence. The testimony credibly attributed to both Vasaturo and Rubino that Respondent had a lot of things on Abraham show an employer groping for a rationale to support Abraham's discharge where no legitimate basis existed. Vasaturo's statement that Abraham didn't want to go to Albany ignores Abraham's performing such a trip a week earlier under a severely limiting condition—the serious health risks faced by his wife and the need for Abraham's daily attendance to her—which Vasaturo became aware of both through conversations with Abraham and seeing his wife at the facility and which should have been sufficient to warrant Respondent's selection of another employee for the Albany

assignment. In fact, the record does not show that Abraham refused a particular Albany assignment but only that he advised Vasaturo in advance that the following week he didn't know if he would be able to do it because of his wife's condition. Abraham's expressions of doubt about the problematic nature of the assignment were corroborated by the letter from his wife's doctor which he delivered to Respondent later on the same day of his discharge.

Vasaturo's other reason for the discharge is equally suspect. Rubino never mentioned anything about Abraham's physical condition or his being drunk on Friday, November 25, and even excused him for the day after checking the schedule and telling him he'd see him on Monday. Nothing was said on Monday about his condition. Vasaturo's claim that "Mike said you came in drunk on Friday," was not supported by Mike Rubino or by Joseph Pionel, also available to Respondent as a witness, in any testimony even after Abraham credibly denied any drinking or physical signs of drinking or that Rubino ever mentioned his alleged inebriated condition to him. Abraham did acknowledge having three beers with his Thanksgiving dinner but strongly denied any signs of intoxication or illness on the day after. Rubino was impeached as a witness, so any reliance Vasaturo may have placed on his credibility in judging Abraham's condition on Friday is completely undermined. We are left with the Respondent's strong motivation to rid itself of Abraham at any cost while the results of the representation election remained clouded by multiple objections and determinative challenges and unfair labor practice charges with probable merit against it continued to be filed. In firing Abraham Respondent was only following through on its threat to keep the Union (and its chief advocate) out of its Brooklyn facility. Its conduct in doing so violates Section 8(a)(1), (3), and (4) of the Act. Neither has Respondent sustained its burden that it would have transferred and fired Abraham in the absence of his Section 7 conduct.

Daniel Cordova was hired as a night-shift warehouse employee on June 6, 1994, and continued in that capacity until November 13, 1994, when he left voluntarily because of dissatisfaction with lack of overtime and lack of respect. He then was rehired on January 3, 1995, and was terminated on or about February 19, 1995. While employed on the night shift Cordova operated a hi-low, loaded trucks, and cleaned the grounds. He never received any written or verbal discipline or warning. Cordova signed a union authorization card given to him by Abraham, on June 8 while both were in the back of the warehouse near the employee lockers. As recounted earlier, on July 28 Vasaturo confronted him in his office as to who brought the Union in and as to whether it was Abraham. In the same conversation Vasaturo offered to assist Cordova in obtaining a welding job, a skill he disclosed, with a firm located next store and pressed him as to how he was going to vote in the upcoming election. When Cordova said he wasn't sure, Vasaturo placed \$50 in his paycheck envelope. The following payday, on August 4, Cordova found extra cash already in his pay envelope. At the captive audience meeting the evening of August 4, Cordova asked Vasaturo to put his promises of more money, among other improvements, in writing just as the Union promised to put everything such as medical coverage, money, and job security in a contract. Vasaturo publicly declined and in all likelihood interpreted Cordova's question as an unwarranted

cross-examination and as showing his leanings in favor of the Union. Cordova voted in the representation election held on August 5, 1994. After leaving work in November, Cordova returned to the facility in December during the holidays to visit with friends among his prior coworkers. While standing in the warehouse waiting for the friends to come down, Rubino now questioned him, asking if Henry (Abraham) brought the Union in. By doing so, Respondent engaged in an unlawful interrogation of an employee in violation of Section 8(a)(1). When Cordova said he didn't know, Rubino said he was lying and didn't want to get any of his friends in trouble. This last accusation establishes, if Respondent's earlier conduct toward him did not, that Respondent considered Cordova a union adherent closely associated with Abraham and others on the night shift and not to be trusted as an employee.

In late December 1994, when Cordova sought to return to Respondent, Rubino told him he would call him when there was an opening. A week or two later Rubino called him and said to come in after learning Cordova wanted to work. Rubino did not tell him the job was temporary or conditional. Starting January 3, 1995, Cordova performed the same job at night he always had. When he asked Night Manager Patrick Adams about his status Adams told him his job was full time and he had nothing to worry about. Adams, who I have found to be a statutory supervisor, was not called as a witness to dispute Cordova's testimony and Cordova is credited on this exchange as well as all others to which he testified with Vasaturo and Rubino. On or about February 19, 1995, Cordova reported to work at about 6 p.m. Rubino pulled him over to the side and told him due to cutbacks, he was the last guy hired and had to be the first one let go.

Cordova disputed Rubino's assertion. Two employees, working that day, were hired after Cordova. They were Cesar Rodriguez and Miguel Fernandez. Rodriguez was hired a week after Cordova and Fernandez was hired the same day he was fired. The two were standing nearby and Cordova told Rubino these two guys were hired after he was. Rubino replied that Cordova had no authority to question him. Cordova then asked Rubino just to tell him the truth as to why he was being fired. Rubino just walked away from Cordova. As Cordova kept after Rubino, Patrick Adams came over, pulled him aside and told him "I know the reason why your being fired. It's not due to cutbacks. It's due to what happened last year." Cordova said what happened last year was just the Union. Adams nodded his head up and down, indicating yes, and walked away. Cordova has not been recalled to work since that date.

Vasaturo testified during his examination by the General Counsel that Cordova was hired back on a temporary basis and then was let go when it got slow. Vasaturo claimed Rubino told Cordova his status was temporary but he did not. Respondent did not produce any document showing its claimed characterization of Cordova's rehire. In fact, a number of night-shift warehouse employees performing the same work as Cordova were hired after Cordova was let go and others, hired after Cordova was rehired but before his discharge, were continued on the payroll after his separation. Thus, Jeff Monsegut started February 21, 1995, as a helper/loader on the night shift and worked through March 12. Miguel Hernandez, another night loader, hired on January 30, 1995, continued to work until April 2. Cesar Rodriguez,

previously identified by Cordova, was hired on January 16, 1995, as a night-time loader and was still working on the date of the hearing. Carlos Ramos was hired on March 20, 1995, after Cordova's discharge and was still working at the time of the hearing on May 30.

According to Rubino, on his 611(a) examination, Cordova was hired in November to meet a temporary need on the night shift in a strictly shapeup position "until I found the right people that I wanted to work for me." According to Rubino he told Cordova on the phone that he had a few guys the last couple of nights who didn't show up for work and he needed an extra body. If he came back it was going to be strictly temporary, fill-in position. He then asked if Cordova wanted to come back for a week, 10 days' worth of week and Cordova agreed. In fact, Cordova worked for more than 6 weeks before he was let go. Rubino expressed disbelief and surprise when told of the length of Cordova's last work term. Although Rubino had no problem with Cordova's work performance, and, indeed, had called him back in January, he now attempted to explain that "I guess the situation was where I was bringing in other people. I tried other new people, and I told him that the conditions on which I brought him, these conditions have now been fulfilled, that it was a temporary position, that I no longer needed his particular service and, you know, if the need arises again, I would call him back again." (Tr. 109.)

When confronted with the hires of new night loaders in light of his acknowledged promise made to Cordova, Rubino now turned hostile, exclaiming "Okay, what's the question. Because now we'll take the gloves off" and asked his own question, "Am I obligated to call him back?" (Tr. 115-116.) Rubino did not explain this apparent discrepancy in employment practice. I have previously discredited Rubino and confirm that judgment anew in light of his evident hostility and inability to reconcile his narrative of the circumstances of Cordova's rehire and his hire thereafter of new night shift loaders. Clearly the new hires also undercut the reason—the necessity for cutbacks—given to Cordova at the time of his discharge.

I conclude that Respondent's discharge of Cordova on or about November 19 violated Section 8(a)(1) and (3) of the Act. Respondent's antiunion animus has been shown again and again on this record. In particular the credited testimony shows Cordova's exercise of Section 7 rights, Respondent's knowledge of the same and its coupling of Cordova with Abraham and other night-shift union advocates. Vasaturo and Rubino came to understand that they could not successfully buy off or threaten Cordova, and they continued, into the new year, to harbor vindictive and retaliatory motives toward his union adherence and associations, only making use of his labor services when it suited their selfish interests. Adams' comments to Cordova on the day of his discharge only serve to confirm Respondent's unlawful motivation. In the absence of Cordova's union activities, it is clear that Respondent would have continued to employ him.

D. The Alleged Majority Bargaining Demand and Request for a Bargaining Order

I have previously alluded to the parties' stipulations of fact that on or about June 6 and continuing to date the Union requested Respondent to recognize and bargain with it in the unit of all full-time and regular part-time drivers, drivers'

helpers, and warehousemen employed at its Brooklyn facility, an admittedly appropriate unit, and that since on or about June 9, Respondent has failed and refused to do so. The unambiguous, single purpose wording on the authorization cards which were distributed in this case has also been described in detail.

By oral amendment granted during the hearing the consolidated complaint now alleges that since on or about June 14, 1994, a majority of the unit employees designated and selected the Union as their representative for the purpose of collective bargaining with Respondent. The counsel for the General Counsel produced and offered into evidence, on their identification by the solicitor or the card signer, and the undersigned received in evidence, in some cases over the objection of Respondent counsel, having been convinced by the nature of the solicitation and the authenticity of the signatures that the cards may be used to show the employees' designation of the Union as their bargaining representative, authorization cards signed by 21 unit employees between May 23 and June 14, in support of the General Counsel's complaint allegation. In no instance did Respondent establish that the solicitations were other than directed to seeking authority to represent the signers for purposes of collective bargaining. *Cumberland Shoe Corp.*, 144 NLRB 1268 (1963). Respondent's objections to the authenticity of certain of the cards because the solicitor was not present at the signing were rejected since the cards themselves were unambiguous on seeking bargaining authorization, the solicitations were all for the purpose of representing the employee in bargaining and the signatures, in one case, even printed, were not attacked as lacking authenticity.

The bargaining unit on June 14, 1994, consisted of 32 employees. The total number of employees whose names appear on the payroll for that week are 35. However, three of those employees shall be excluded from the unit. Lynton Brandt was among a group of five employees, including Elio Chillo, Anthony Scala, Ralph Frasona, and Michael Rubino whose ballots Respondent agreed shall not be counted. Thus, for whatever reason, Respondent agreed Brandt was not a part of the unit, at least on August 5. There is no evidence that his job changed between June and August. Abraham testified after Vasaturo had identified Brandt as holding many jobs, including loading, office work and going on a truck, that Brandt was solely an office worker who runs the customer bills through the computer, and does no warehouse or delivery work. I credit this testimony, and conclude that based on it, as well as Respondent's stipulation, that Brandt is excluded from the unit. I have previously determined at least since May 1 that Joseph Pionel has been a warehouse supervisor on the day shift who also sometimes supervises the night and thus he is also excluded from the bargaining unit. Based on the payroll record of Charles Giraldo, whose job Vasaturo could not identify, he worked for Respondent from January 24 to May 31, 1994. He had no earnings listed beyond the second quarter of 1994. Thus, I find that Giraldo was not an employee of Respondent at the time of the Union's bargaining demand or when it is alleged to have achieved majority designations and is thereby excluded from the unit.⁶

⁶The names of four other employees whose ballots, Respondent agreed, should not be counted, Elio Chillo, Ralph Frasona, Anthony

Inasmuch as the Union had designations and authorizations as bargaining agent from 21 unit employees out of a total unit complement of 32 on June 14, I conclude that as of that date, under its continuing bargaining demand, the Union represented a majority of the unit employees. Even as early as June 6, the date of its bargaining demand, the Union had a majority of 17 signed authorization cards in the unit of 32 employees.

The issue remains to be determined as to whether Respondent should be ordered to bargain with the Union as alleged by General Counsel in the consolidated complaints. A necessary predicate to granting such relief is an order setting aside the election based on meritorious objections filed in the consolidated representation Case 29-RC-8324. *Irving Air Chute Co.*, 149 NLRB 627, 630 (1964). I have concluded that the objections warrant setting aside the election based on the employer's egregious unfair labor practices, its preventing two employees from voting, and addressing a captive audience of employees within 24 hours of the election. Thus, the election is no impediment to directing a bargaining order.

I conclude that a bargaining order is justified because from the outset of the Union's approach to Respondent's owner and president Respondent committed unfair labor practices of such an "outrageous" and "pervasive" nature "that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had. *NLRB v. S. S. Logan Packing, Co.*, 386 F.2d 562, 570 (4th Cir. 1967); see also *NLRB v. Heck's, Inc.*, 398 F.2d 337, 338." Quoted with approval in *NLRB v. Gissel Packing, Co.*, 395 U.S. 575, 614 (1969). From that first day on June 6, 1994, at least until February 9, 1995, the pattern of Respondent's unlawful, intimidating, punitive, and vindictive reaction to the union organization among its employees was consistent and pervasive and has been established on this record by overwhelming and unanswered evidence. Commencing June 6, and continuing thereafter, Respondent never stopped questioning its employees to confirm the identity of the suspected union leaders among its night crew. The blatant and coercive interrogations were accompanied by threats of serious and devastating reprisals, including the burning of the Brooklyn facility and its transfer to New Jersey, vows never to recognize the Union, accompanied by statements of the futility of selecting the Union and threats that if the Union became their bargaining agent a strike would surely follow. Respondent created the impression of surveillance of their activities by identifying their "main guy" and, as the election date drew closer, sought to bribe employees by distributing cash increases along with their paycheck, promising insurance and other work condition improvements, meanwhile pleading for a second change. The height of Respondent's punitive reaction to the employees' exercise of their Section 7 rights was the termination of the night shift and discharge of its full employee complement because it was a hotbed of union agitation and in the absence of the ring leader coming forward all shift employees had to be taught a lesson and made to suffer for the activities of a few. The evidence supporting this conduct came from the recorded mouths of the owner and warehouse manager

Scala, and Michael Rubino who I have found are managers and, in the case of Rubino, also a statutory supervisor, do not appear on Respondent's January 1 through September 30, 1994 payroll list.

whose attempts to avoid responsibility and liability bordered on the ludicrous. Many of the unfair labor practices I have cited are deemed "hallmark violations," including threats of plant closure, discriminatory discharges and layoffs, and are more likely to destroy election conditions for a longer period of time than other unfair labor practices, and almost all were committed by the two individuals at the top of management hierarchy, including its owner and president. The Board, with a similar record before it, had no hesitancy in issuing a category 1 bargaining order. *Eddyleon Chocolate Co.*, supra, 301 NLRB at 891, and cases cited at fns. 24 through 27.

Even if the conduct I have described is deemed less extraordinary, it is particularly appropriate to order Respondent to bargain inasmuch as the unfair labor practices I have described show "a tendency to undermine the Union's majority strength and impede the election process," *Gissel* at 614 and, accordingly, they fall within the second category of cases in which such a remedy is appropriate.

For the latter category of cases, the Supreme Court in *Gissel* approved the Board's weighing the extensiveness of Respondent's unfair labor practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. When Vasaturo announced that he was aware of the prohibition against speeches within 24 hours of the election (under the *Peerless Plywood* rule) yet was nonetheless going to violate it and present again his coercive message the evening before the election, and then proceeded to expressly violate the rule with impunity, going so far as to repeat his unlawful promises, threat to burn the facility and stress the inevitability of strikes if the Union was successful the next day, not only did Vasaturo demonstrate a continued, pervasive and unrelenting attack on legality to the very eve of the election, but, of equal moment, he demonstrated that Respondent could not be trusted to respect limits on its conduct or to avoid similar unlawful conduct in the future. That Respondent continues to have no desire or reason to respect the Board's election procedures is most evident in its post-election transfer and ultimate discharge of the employee union leader and later 1995 discharge of a cohort who demonstrated continued adherence to the Union. Vasaturo and Respondent were not going to let the Board processes determine the status of the Union as bargaining agent; the union leadership in the work force still had to be eradicated and removed regardless of the consequences. With an employer who engages in such conduct the possibility of erasing the effects of its past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and employee sentiment once expressed through cards, would, on balance be better protected by a bargaining order. *Gissel*, supra; *Great Atlantic & Pacific Tea Co.*, 230 NLRB 766 (1977). Because of its continued post-election unfair labor practices, Respondent cannot be heard to claim that the passage of time could warrant withholding a bargaining order. See *Hedstrom Co. v. NLRB*, 629 F.2d 305 (3d Cir. 1980). Such a bargaining order shall be dated as of June 6, 1994, the date on which Respondent "embarked on a clear course of unlawful conduct." *Trading Post*, 219 NLRB 298, 301 (1975).

CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time drivers, drivers' helpers and warehousemen employed by Respondent at its 722 64th Street, Brooklyn, New York location, excluding all office clericals, guards, and supervisors as defined in Section 2(11) of the Act constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act.

4. Beginning on June 6, 1994, the Union represented a majority of the employees in the above-described appropriate unit, and has been, and is, the exclusive representative of all said employees for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. By refusing to recognize and bargain collectively with the Union with respect to the employees in the appropriate unit on and after June 6, 1994, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. By granting cash payments to it employees in order to induce them to vote against the Union in a Board election and to abandon their membership in and support of the Union, and eliminating its night shift and discharging its employees Henry Abraham, Eli Samuel Abraham, Daniel Cordova, Luis Ruiz, Eddie Diaz, Nelson Hernandez, Eduardo Quintana, Chris Ortiz, and David Concepcion from on or about June 13, 1994, until on or about June 27, 1994, and by subsequently transferring from the night shift to the day shift and then discharging Henry Abraham and by discharging Daniel Cordova, because they joined and supported the Union and in order to discourage employees from engaging in such activities, and because Henry Abraham gave testimony to the Board and filed a charge with the Board in Case 29-CA-18619, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1), (3), and (4) of the Act.

7. By interrogating its employees about their membership in, activities on behalf of, and sympathies for the Union, by threatening to discharge its employees, eliminate its night shift, burn down its Brooklyn facility and move its operations to New Jersey, impose stricter working conditions, that a strike was inevitable, and with other, unspecified reprisals if its employees selected the Union as their bargaining representative in a Board election, by creating the impression among its employees that their meetings and union activities were under surveillance, by soliciting complaints and grievances from its employees and promising them straight salary, rather than an hourly wage, to rehire laid-off employees, improved medical benefits, pay increases, better equipment, recognition of a night-shift employee to negotiate on their behalf, and promising and granting assistance in obtaining other employment and other unspecified benefits in order to induce them to abandon their union support and vote against the Union, and by informing its employees that it would be futile for them to choose the Union as their bargaining representative, Respondent has been interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed in Section 7 of the Act and Respondent thereby has engaged in, and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Inasmuch as I have recommended that the election be set aside and I have determined that a bargaining order is appropriate, I shall recommend that the Respondent be ordered to bargain with the Union in the appropriate unit, effective as of June 6, 1994. Having also found that the Respondent unlawfully laid off its night crew for a 2-week period, and then unlawfully transferred and discharged employee Henry Abraham and unlawfully discharged employee Daniel Cordova, I shall recommend that Respondent offer Henry Abraham reinstatement to his former position on the night shift and offer reinstatement to Daniel Cordova to his former position or, if those positions are no longer available, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and make them whole, and make whole all of the employees on the night shift who were laid

off on June 13, 1994, including Abraham, Cordova, all other employees named in Conclusion of Law 6, and any other employees so assigned who may not have been previously named or identified in the proceeding. All of these employees shall be made whole for any loss of earnings and other benefits they may have suffered as a result of Respondent's unlawful discrimination against them. Such amounts shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and shall be reduced by net interim earnings, with interest thereon computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).⁷ I shall also recommend that Respondent expunge from its files any references to Abraham's transfer and discharge and Cordova's discharge and notify them in writing that this has been done and that the transfer and discharges will not be used against them in any way.

[Recommended Order omitted from publication.]

⁷Under *New Horizons*, interest is computed at the "short term" Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.