

Bay Refrigeration Corp. and Local 295, International Union of Operating Engineers, AFL-CIO. Cases 29-CA-19267, 29-CA-19317, 29-CA-19348, and 29-CA-19499

February 12, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND FOX

On November 1, 1996, Administrative Law Judge Robert T. Snyder issued the attached decision. The General Counsel filed a limited exception and a supporting statement.

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 exception and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.¹

ORDER

The National Labor Relations Board orders that the Respondent, Bay Refrigeration Corp., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees concerning their membership in, activities on behalf of, and sympathy for the Union.

(b) Directing its employees to identify for it those employees who joined, supported, or assisted the Union and directing them to refrain from engaging in activities on behalf of the Union.

(c) Creating the impression among its employees that it was keeping their union activities under surveillance.

(d) Threatening to discharge those employees who joined, supported, or assisted the Union.

(e) Promising its employees improved wages and benefits if they would inform the Board that they no longer wished to be represented by the Union.

(f) Discouraging membership in Local 295, International Union of Operating Engineers, AFL-CIO, or any other labor organization, by discharging any employees because they joined, supported, or assisted the Union, or engaged in other concerted activities for the purpose of collective bargaining, 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.

(g) Refusing to recognize and bargain with Local 295, International Union of Operating Engineers, AFL-CIO as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

All full-time and regular part-time service and maintenance employees, including technicians, cleaners, polishers, helpers, and drivers, employed by the Respondent at and out of its Brooklyn facilities, but excluding office clerical employees, guards and supervisors as defined in Section 2(11) of the Act.

(h) Failing or refusing to designate a representative for the purpose of engaging in bargaining with the Union with respect to wages, hours, and other terms and conditions of employment of the unit employees, who has authority to, and is available to, negotiate a final and binding collective-bargaining agreement with the Union.

(i) Conditioning its agreement to meet and bargain with the Union on the Union's agreement not to negotiate on behalf of all the employees in the unit, or the Union's agreement to exclude certain employees from the unit.

(j) Failing or refusing to provide the Union with information requested by it, including the Respondent's financial books and records, and financial statements, which are necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit employees, and in order for the Union to evaluate the Respondent's claim that it could not financially afford to enter into a collective-bargaining agreement with the Union covering the unit employees.

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

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

(a) Within 14 days from the date of this Order, offer Alphonzo Zeigler full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Alphonzo Zeigler whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Alphonzo Zeigler, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

¹ The General Counsel has excepted to the judge's failure to conform the recommended Order and notice to his factual findings and conclusions of law. We find merit in the General Counsel's limited exception, and we shall modify the recommended Order and notice accordingly.

(d) On request, bargain in good faith with Local 295, International Union of Operating Engineers, AFL-CIO as the exclusive collective-bargaining representative of the employees in the aforementioned appropriate unit and embody in a signed agreement any understanding reached.

(e) Designate a representative for the purpose of engaging in bargaining with the Union with respect to wages, hours, and other terms and conditions of employment of the unit employees, who has authority to, and who is available to, negotiate a final and binding collective-bargaining agreement with the Union.

(f) Provide the Union with the information requested by it in late August 1995 and about September 15, 1995, including the Respondent's financial books and records, and financial statements, which are necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit employees, and in order for the Union to evaluate the Respondent's claim that it could not financially afford to enter into a collective-bargaining agreement with the Union covering the unit employees.

(g) 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.

(h) Within 14 days after service by the Region, post at its Brooklyn, New York facilities copies of the attached notice marked "Appendix."² 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 June 14, 1995.

(i) 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.

²If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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 concerning their membership in, activities on behalf of, and sympathy for Local 295, International Union of Operating Engineers, AFL-CIO, or any other labor organization.

WE WILL NOT direct our employees to identify for us those employees who joined, supported, or assisted the Union and WE WILL NOT direct them to refrain from engaging in activities on behalf of the Union.

WE WILL NOT create the impression among our employees that we are keeping their union activities under surveillance.

WE WILL NOT threaten to discharge those employees who joined, supported, or assisted the Union.

WE WILL NOT promise our employees improved wages and benefits if they would inform the Board that they no longer wished to be represented by the Union.

WE WILL NOT discourage membership in the Union, or any other labor organization, by discharging any employees because they joined, supported, or assisted the Union, or engaged in other concerted activities for the purpose of collective bargaining, or in any other related manner discriminate against 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 with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All full-time and regular part-time service and maintenance employees, including technicians, cleaners, polishers, helpers, and drivers, employed by us at and out of our Brooklyn facilities, but excluding office clerical employees, guards and supervisors as defined in Section 2(11) of the Act.

WE WILL NOT fail or refuse to designate a representative for the purpose of engaging in bargaining with

the Union with respect to wages, hours, and other terms and conditions of employment of the unit employees, who has authority to, and is available to, negotiate a final and binding collective-bargaining agreement with the Union.

WE WILL NOT condition our agreement to meet and bargain with the Union on the Union's agreement not to negotiate on behalf of all the employees in the unit, or the Union's agreement to exclude certain employees from the unit.

WE WILL NOT fail or refuse to provide the Union with information requested by it, including our financial books and records, and financial statements, which are necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit employees, and in order for the Union to evaluate our claim that we could not financially afford to enter into a collective-bargaining agreement with the Union covering the unit employees.

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

WE WILL, within 14 days from the date of the Board's Order, offer Alphonzo Zeigler full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Alphonzo Zeigler whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Alphonzo Zeigler, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL, on request, bargain in good faith with Local 295, International Union of Operating Engineers, AFL-CIO as the exclusive collective-bargaining representative of the employees in the aforementioned appropriate unit and embody in a signed agreement any understanding reached.

WE WILL designate a representative for the purpose of engaging in bargaining with the Union with respect to wages, hours, and other terms and conditions of employment of the unit employees, who has authority to, and who is available to, negotiate a final and binding collective-bargaining agreement with the Union.

WE WILL provide the Union with the information requested by it in late August 1995 and about September 15, 1995, including our financial books and records, and financial statements, which are necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of

the unit employees, and in order for the Union to evaluate our claim that we could not financially afford to enter into a collective-bargaining agreement with the Union covering the unit employees.

BAY REFRIGERATION CORP.

Sharon Chau, Esq., for the General Counsel.

Eugene N. Turk, Esq., for the Respondent.

Michael J. Comerford, Esq. (Kennedy & Comerford), for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT T. SNYDER, Administrative Law Judge. This case was heard by me on March 25, 1996, in Brooklyn, New York. The consolidated complaint alleges that Respondent engaged in a variety of acts of intimidation and coercion of its employees in violation of Section 8(a)(1) of the Act during an organizing campaign, including unlawful interrogations, threats of discharge of union supporters, directing employees to ascertain and disclose to it union supporters, and to refrain from engaging in union activities, creating the impression among its employees that their union activities were being kept under surveillance, and promising its employees improved wages and benefits if they would inform the Board that they no longer wished to be represented by the Union. Also alleged is an unlawful discharge of an employee, Alphonzo Zeigler, in violation of Section 8(a)(1) and (3) of the Act.

The consolidated complaint further alleges that the charging union, Local 295, International Union of Operating Engineers, AFL-CIO, on becoming the certified exclusive bargaining representative of an appropriate unit of Respondent's employees, was recognized in writing by Respondent but that thereafter Respondent has refused to meet and negotiate or to designate a representative with authority to negotiate a final and binding collective-bargaining agreement with the Union, conditioned an agreement to meet and bargain on the Union agreeing to exclude certain employees from the unit, and failed and refused to provide the Union with certain financial information, necessary for and relevant to its performance of its bargaining duties, all in violation of its bargaining obligation under Section 8(a)(1) and (5) of the Act.

Respondent filed timely answer to the first consolidated complaint which consolidated Cases 29-CA-19267, 29-CA-19317, and 29-CA-19348 and which issued on September 28, 1995. In response to the second consolidated complaint, consolidating the three above-described cases with Case 29-CA-19499, which issued on February 28, 1996, Respondent filed a document dated March 20, 1996, it described as an "[a]nswer" but which reiterated and restated the responses it had previously provided in its first answer and which failed to respond to the new allegations in Case 29-CA-19499 which for the first time alleges violations by Respondent of its bargaining obligation under Section 8(a)(1) and (5) of the Act by the conduct briefly described above.

All parties were provided full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. On the entire

record, including my observation of the demeanor of the witnesses, and after considering the posthearing letter brief filed by counsel for the General Counsel, I make the following

FINDINGS OF FACT

I. PRELIMINARY ISSUES

At the outset of the hearing, counsel for the General Counsel filed a motion to strike as an answer the document dated March 20, 1996, and to deem the refusal to bargain allegations of the February 28, 1996 consolidated complaint deemed admitted because of its failure to comply with Section 102.20 of the Board's Rules and Regulations. Section 102.20 reads as follows:

Sec. 102.20 Answer to complaint; time for filing; contents; allegations not denied deemed admitted.—The respondent shall, within 14 days from the service of the complaint, file an answer thereto. The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

In its purported answer to the last consolidated complaint, Respondent answered by setting forth the responses it presented in its previous answer to the first consolidated complaint, which it attached, and made a part of, reiterated and restated therein. That prior answer no where answers or responds to any of the allegations in the second consolidated complaint, on the basis of which, the Respondent is charged in conclusionary allegations with unfair labor practices in violation of Section 8(a)(1) and (5) of the Act.

Counsel for the General Counsel, in her motion, cites Respondent's failure to specifically admit, deny, or explain each allegation of the second consolidated complaint. She also refers to the untimely filing of the purported answer, on March 20, 1996, to the second consolidated complaint, which issued on February 28, 1996, to which answer was due on March 13. Since no good cause is presented for the untimely filing, she argues it should be rejected for this reason as well.

In argument at the hearing Respondent defended by referring to and relying on a letter dated November 1, 1995, which its counsel, Eugene Turk, Esquire, submitted to counsel for the General Counsel and which it had attached to its purported answer. In it, Turk first refers to receiving a fax pertaining to the Union's allegation of his client refusing to negotiate. He then refers to his client's refusal to sign a union-proffered contract, because it had not been negotiated as well as his client's refusal to meet at the union's request to negotiate late in the evening at a remote conclusion. Turk later refers to his client informing the Union of the Respondent's poor financial condition, and his providing the Union with proof of President Milton Unger's personal investment in the Respondent to keep it operating, to which the Union has not responded. After asserting that one employee had

made a false complaint as to the date of his discharge, Turk closes the letter by questioning why the Board's Regional Office would even accept the complaint involving this employee. It is evident that portions of the letter are not relevant to the refusal to bargain allegations in the initial charge in Case 29-CA-19499 filed on September 21, 1995.

Respondent attorney's claim that this letter of November 1, 1995, specifically referred to or responded to the allegations of refusal to bargain contained in a complaint which issued on February 28, 1996, was rejected, and having failed to file either a timely or responsive answer, the General Counsel's motion to strike the purported answer was granted for the reasons urged by her. *Crest Ambulance Service*, 320 NLRB 800 (1996). Respondent's counsel, Turk, continued to insist that he had answered the last complaint in Case 29-CA-19499 by filing Respondent's purported answer and attaching its earlier answer filed to the first consolidated complaint. He also claimed that after he had received contact from a union representative it was his belief that once he had responded to the Union it was the Union's obligation to continue the dialogue and attempt to negotiate with him, presumably based on his submission of certain documents showing his client's reduced financial circumstances and thus any failure to respond to the Government's latest complaint was thereby excused.

Further questioning of Respondent's counsel revealed that he was aware of the second consolidated complaint from around the beginning of March 1996. Although Turk claimed he was incapacitated by illness around that time, he clearly was able to prepare and file the Respondent's purported, and now rejected, answer dated March 20, 1996. At no time did Respondent seek an extension of time to file timely and proper answer to the second consolidated complaint under Section 102.20 of the Board's Rules and Regulations.

On the basis of the foregoing, I granted the second branch of counsel for the General Counsel's motion deeming admitted the allegations in the second consolidated complaint set forth in paragraphs 1(e) and (f), 7, 9, and 25 through 30, and conclusionary allegation in paragraph 33 and those portions of conclusionary allegations in paragraph 34, all relating to the allegations of violations of Section 8(a)(1) and (5) of the Act. *Impressive Textiles*, 317 NLRB 8, 11 (1995); *American Steel Line Co.*, 253 NLRB 399 (1980); and *Schuykill Contracting Co.*, 271 NLRB 71 (1984).

II. JURISDICTION AND LABOR ORGANIZATION STATUS

At all material times, Respondent, a New York corporation, with its principal office and place of business located at 779 East New York Avenue, Brooklyn, New York (East New York facility, and places of business located at 2243 Fulton Street and 63 West End Avenue, Brooklyn, New York (collectively, Brooklyn facilities), has been engaged in the operation of rebuilding used appliances, including refrigerators and air-conditioners, and selling them at wholesale and retail. During the 12-month period preceding issuance of the first consolidated complaint, which period is representative of its annual operations generally, Respondent, in the course and conduct of its business operations described, purchased and caused to be transported to its Brooklyn facilities, supplies, goods, and other materials valued in excess of \$50,000, directly from points outside the State of New York. During the same period, Respondent, in the course and con-

duct of its business operation described, derived gross revenues in excess of \$1 million. Respondent admits in its answer filed to the first consolidated complaint, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent also admits, and I find, that Local 295, International Union of Operating Engineers, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. The Union's Decision to Seek Certification and the Facts Supporting a Refusal to Bargain in Violation of Section 8(a)(1) and (5) of the Act

It appears that the Respondent had for many years a collective-bargaining relationship with the Union as exclusive representative of its service and maintenance employees, but that as a result of an audit the Union conducted of Respondent's payroll during the course of a delinquency action review, the Union discovered that many more employees were being employed by Respondent at its various Brooklyn facilities than it was reporting to the Union on its remission of contributions which it forwarded to the Union periodically under its obligations to provide pension and welfare benefits to unit employees. As a consequence of this discovery, the Union decided to file an election petition and withdraw any claims it may have had to delinquent moneys due under the old collective-bargaining agreement. The following factual findings track those allegations of the second consolidated complaint deemed admitted by Respondent.

In or around early May 1995, the Union commenced an organizing campaign among certain of Respondent's employees employed at its Brooklyn facilities. On May 24, 1995, the Union filed a representation petition in Case 29-RC-8484 with the Board, seeking to represent certain of Respondent's employees. On June 30, 1995, an election by secret ballot was conducted among Respondent's employees in the following unit:

All full-time and regular part-time service and maintenance employees, including technicians, cleaners, polishers, helpers, and drivers, employed by Respondent at and out of its Brooklyn facilities, but excluding office clerical employees, guards, and supervisors as defined in Section 2(11) of the Act.

On July 14, 1995, the Regional Director for Region 29 issued a Certification of Representative, certifying the Union as exclusive collective-bargaining representative of Respondent's employees in the unit described.

Since on or about July 6, 1995, the Union requested Respondent to recognize it as exclusive representative in the unit, and to meet and bargain with it with respect to unit employees' rates of pay, wages, hours of employment, and other terms and conditions of employment.

On July 17, Respondent, in writing recognized the Union as exclusive representative of its employees in the certified unit, and on or about July 24, 1995, Respondent and the Union agreed to meet on or about July 26 or 27, 1995, to negotiate a collective-bargaining agreement. On the date set for the initial meeting, and at all material times since, Respondent has failed and refused to meet.

Since on or about February 6, 1996, Respondent failed and refused to designate a representative for the purpose of engaging in negotiations with the Union, with authority to negotiate a final and binding collective-bargaining agreement with the Union, notwithstanding that its designated representative has been unavailable to meet with the Union.

On or about a date in late August 1995, Respondent conditioned its agreement to meet and bargain with the Union upon the Union's agreement not to negotiate on behalf of all the employees in the unit previously described, or the Union's agreement to exclude certain employees from the said unit. These subjects do not relate to wages, hours, or other terms or conditions of employment of the employees in the unit described and are not mandatory subjects for the purposes of collective bargaining.

On or about a date in late August 1995, verbally, and on or about September 15, 1995, in writing, the Union requested Respondent to furnish the Union with Respondent's financial books and records, including its financial statements. The information requested by the Union is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of Respondent's employees in the unit, and in order for the Union to evaluate Respondent's claim that it could not financially afford to enter into a collective-bargaining agreement with the Union covering the employees in the previously described unit.

Since on or about a date in late August 1995, Respondent has failed and refused to provide the Union with the information requested by it as described.

B. The Alleged Violations of Section 8(a)(1) and (3) of the Act

John Tutone, a respondent manager, testified that he contacted the Union when it began organizing Respondent's employees. In response to a request from Charles Clemenza, union business agent, to write something up so that he could have something to fight with, Tutone asked his sister to write a letter directed to the Union. Tutone signed the letter dated May 19, 1995,¹ and also attached copies of his corporate American Express card and New York State drivers license. Tutone affirmed to the truth of its contents.

In the letter Tutone outlined the grievances and poor working conditions he and coworkers encounter at their place of employment. Employees receive no paid sick leave, about three paid holidays per year, no vacation time, no raise, although Tutone had been employed almost 4 years. Employees are subject to abuse, being screamed at, and cursed by their Employer. Among other complaints enumerated, Tutone detailed Respondent's refusal to allow him to take sick time when injured on the job and a refusal to allow him to take paid time off to be present at a serious operation performed on his infant daughter for removal of a cancer tumor and to care for a 5-year-old son while his wife was at the hospital. After a second operation was scheduled on his daughter, Respondent ordered Tutone out of town on a business trip for 3 weeks, which, if he refused, would result in his discharge. On out-of-town trips, Tutone and other employees were not paid for any overtime they worked. Tutone ended the letter by asking for the Union's assistance to improve their working conditions.

¹ All dates hereinafter shall refer to 1995, unless otherwise noted.

Tutone next testified that he came to the Labor Board to provide an affidavit in connection with the Union's unfair labor practice charges. Tutone confirmed he was asked questions by counsel for the General Counsel, Sharon Chau, he was informed he would be asked to swear to the truth of the content of his affidavit, he would be given as much time as he needed to review the document to confirm its accuracy, and, finally, Tutone confirmed he read the affidavit, made corrections and then swore to its truth and signed it.

Tutone was then asked a series of questions based on the contents of his June 28, 1995 affidavit and confirmed that the contents stated as follows:

On or about June 9, his first day back from working in Virginia for a month, he had a conversation with Bruce Unger in the office. In its answer to the first consolidated complaint, Respondent admitted to the status of Bruce Unger as a supervisor of Respondent within the meaning of Section 2(11) of the Act, and an agent thereof, acting on its behalf. In the same answer Respondent admitted Milton Unger, Bruce's father, was president of Respondent and its agent at all material times. Present were Nick, the bookkeeper, and the secretary. Bruce told us that he was retiring soon because if the Union was voted in he would have to close down the shop. Bruce added that Tutone would not know anything about the Union because he was in Virginia. Bruce added he would not let the Union come in and that he would not pay the Union.

Later, on an occasion in June, when Milton Unger was going to his truck, he called Tutone to the side and said, he could not believe it, but there was a rat there. He said he was telling everyone that he would close his doors if the Union was there, and that someone turned around and told the Union or the Labor Board. He said that he had to find out who the rat was and then fire him. He told Tutone to speak to employee Edwin to see if he knew who the rat was.

Later that day, Milton told Tutone he thought employee John Marino was the rat, and he was going to find a round-about way to fire Marino. Milton also said he was going to speak to his lawyer about that. Milton called Tutone another time to tell him he was not joking, he was going to find out who the rat was and fire that person.

Within a few days after the first conversation during which Milton referred to a rat, Tutone returned to the shop from a delivery, and some of his coworkers told him that someone told Bruce that he was the one who started the Union and that Bruce wanted to speak to him. Tutone then went to the office downstairs and asked Bruce what was up. There was nobody else present at the time. Bruce told Tutone that someone had told him he was the one who called the Union, and that if he looked at the cameras in the shop, he would see Tutone talking to everyone about the Union. He asked if this was true.

Tutone responded he was in Virginia and out on deliveries and did not have the time to call the Union. Bruce said if he thought Tutone was the one who called the Union, he would set him up to be fired.

Since his return from Virginia, Milton has asked him about every other day whether he knew what was going on with the Union. Tutone's usual response was that he heard nothing.

On or about June 26, Milton again asked Tutone if he heard anything. Tutone said he did. Milton asked from

whom. Tutone replied they wanted the Union. Milton asked, "[W]ho, the brothers?" Tutone said, "[E]verybody wants the Union." Milton said then, "you know you are not voting." Tutone responded that he knew.

Tutone relayed that he had found out about the Union when Sam and Carol, secretary, told him that they had been instructed to tell the Union if they came that the boss was not there. Tutone then called the Union, only to find out that the Union did not even know that they had other locations. Tutone then got a copy of the contract the Union has with Bay Refrigeration and he started talking to his coworkers about the benefits of having a Union.

On July 12, Tutone returned to the Board's offices to give a second affidavit. In it Tutone now describes certain events which took place on July 3. On that morning, Tutone arrived at the shop at the East New York Avenue location at approximately 9:30 a.m. and saw some of his coworkers outside the shop including Louise Hernandez; Leroy Moore; Kurt Davis; Walter, a sprayer; Carlos Negrillo, a polisher; a mechanic whose last name was Barbados; Edwin, a helper; Junior, a driver; and Jesus Gerarro. They told him that the Company was firing everybody. Tutone went into the shop and spoke with Milton Unger in the first-floor office. Present were Nick, bookkeeper, and a mechanic whose name he did not recall. Tutone told Milton he was with the Union, and that he was sticking with the guys in the Union.

Milton responded that he could not believe it and that Tutone was the one all along and that his son was right. Milton asked why he was with the Union. Tutone responded that the working conditions were terrible, and we would be fired for no reason if he came in a bad mood, and we get no overtime pay. Milton asked why did he bring in the Union. Tutone said it was just not him and that everyone wanted a union. Tutone asked if he was still working. Milton replied, "[No.]" Tutone asked, "[A]re you firing me?" Milton said, "[N]o, you are quitting." Tutone told him he was there to work, and was ready to work.

After Milton continued to insist he was quitting, Tutone called the National Labor Relations Board and then returned to his coworkers outside the shop. Milton Unger was also present. Tutone announced he was going to the National Labor Relations Board on Wednesday, July 5, and also said that what Milton did was illegal, that he could not just fire us. Milton then said he was "not firing nobody [sic]." Tutone asked if Milton was "letting all of us to return to work," and Milton said, "[Y]es."

The workers all went back inside the shop and Milton spoke to them. He said he would see what he could do for them moneywise and that he would recognize the holidays. Milton also said he wanted them to go to the Labor Board and tell them that they wanted to overturn the Union. Some of the employees told Milton that they would wait to see what he had to offer.

On July 5, at 9 to 9:30 a.m. Tutone went upstairs at the shop and had a conversation with Milton in the office. Nobody was around. Milton said he would give every employee \$20 per week, plus holidays. Tutone said he would tell the guys. He went downstairs and repeated the offer. The employees said they wanted to hear it from Milton and Tutone told Milton. Milton shortly came down and announced to the workers he was offering \$20 a head per week, plus holidays, and if things were better he would offer more.

The workers then got together and took a vote on the offer. Afterward, Tutone informed Milton that the employees had voted and the majority wanted to stick with the Union. Milton then said he was closing down, and he told Tutone to bring the appliances that were on the sidewalk back into the warehouse.

It took Tutone an hour to bring everything inside, and when he was done Milton told him everyone wanted to work. He also told Tutone employees were going to the Labor Board to say they wanted to change their votes. Milton asked if Tutone was going with them. He said, "[N]o." There was a group of employees around at the time and Milton was asking everyone individually if he was going. Two employees he asked, Charles Coozar and Charles Harris, responded, "[N]o." Of others, some said, "[Y]es," and some said, "[N]o." When Tutone was asked again and told Milton again he was not going, Milton now said he would have to fire Tutone if he was not going and added he was sorry to lose him.

Milton also told Coozar and Harris that they were fired. These two and Tutone went outside the shop, and waited for the Union to come. Clemenza arrived and they told him and wrote out what had happened. As they were leaving, Milton came out and told them to stay to work. It was 2 to 3 p.m. They went inside the shop and went to work.

Tutone acknowledged that, just as with the first affidavit, he had read and initialed the bottom of each page and then swore to the truth of the affidavit and signed it.

On or about January 12, 1996, Tutone admitted he provided a third affidavit to Eugene Turk, Esquire, attorney for Bay Refrigeration. In it, he claimed he had provided certain evidence to the Labor Board during the investigation because he was afraid. After that affidavit, Tutone came to the Labor Board again and provided another affidavit on February 28, 1996. Tutone agreed that before being questioned again by counsel for the General Counsel, Chau, she had asked him why he provided different evidence in the past to the Board. Tutone now testified that he had done so because Union Agent Clemenza had told him, "[L]et's get some evidence against Bay Refrigeration. You could extend the truth and nobody would know." He was a little afraid. You hear about the Union and Mafia. But Tutone agreed the Union never told him what to say. Chau now asked Tutone what was not accurate about his first affidavit, dated June 28, 1995. In the February 28, 1996 affidavit, Tutone reviewed the earlier affidavit, which was attached, and stated his conclusions as to its accuracy. Tutone now swore that his earlier attribution to Bruce Unger of the statements made on June 9 on his return from Virginia, that he was retiring soon because if the Union was voted in he would have to close down the shop, was not accurate. Tutone also reneged on the similar statement he had heard Bruce Unger make a few days after June 9 to three named employees, and also set forth in the June 28 affidavit, when he told them that if the Union was voted in, he would close down; he would not let the Union come in; and he would not pay the Union. Now he could not recall Bruce telling this to the three employees, although he did recall Bruce telling them, *inter alia*, a lot of unions could be crooked and can hurt them.

As to his earlier statement regarding the occasion later in June, when Milton Unger, going to his truck, called Tutone to the side, it was true insofar as Unger said he could not

believe someone was speaking to the Union but that someone did, and when he said he was telling everyone he would close his doors if a union was there, but was not true when he attributed to Milton Unger a threat to fire the person speaking to the Union. Tutone, on February 28, 1996, also swore, similar to his earlier statement, that Milton told him later the same day that he thought there were certain employees who might be with the Union, including Edwin, John (Marino), and himself. (G.C. Exh. 7.)

As to his conversation with Bruce Unger a couple of days later, on his return to the shop from a delivery, set forth in paragraph 8 of the June 28 affidavit, when Bruce accused him of being the instigator of the Union, Tutone reaffirmed everything in it except Milton never referred to employees as "rats" in his presence and Bruce did not state if he thought Tutone was the one who called the Union he would set him up to be fired. Tutone also reaffirmed an earlier sworn statement in which he explained that since his return from Virginia, Milton has asked him about every other day whether he knew what was going on with the Union. In the February 28, 1996 affidavit, Tutone closed by disclosing that he provided certain inaccurate information to the Board because Charlie Clemenza told him to tell the Board how bad Bay was and to make Bay sound as bad as possible, including stretching the truth. Tutone noted he did not like his boss and he wanted to do everything for the Union, but the Union did not tell him what to say to the Board. Nowhere in this affidavit does Tutone claim, as he did in his testimony given in broad and vague language at the hearing, that he was placed in fear by the Union. Tutone read, corrected, initialed, and swore to the truth of the new affidavit.

Tutone returned to the Labor Board on March 20, 1996, and told Counsel Chau that he wanted to recant all his prior affidavits except the one he gave to Turk. He wanted an affidavit that said, in effect, "[A]ll prior affidavits were false, except the one he gave to Mr. Turk." When Chau asked him how that was possible when, as recently as February 28, she had spent 2 hours with him preparing that affidavit, Tutone told her that Turk's affidavit summarized the whole thing in one affidavit. Chau then asked him to look at the February 28 affidavit and tell her what was no longer accurate about it.

Tutone's initial response was disjointed. He complained he was not an attorney, that he lacked higher education, and did not finish high school. Tutone claimed one or two things in his February 28, 1996 affidavit are not true and that he did not see them as he did a quick read through and of only a portion of the June 28 affidavit. Yet, Tutone was compelled to agree that everytime he came to the Board to give an affidavit he was informed that if he later found changes that need to be made to his affidavits he should contact Counsel Chau immediately who would honor his request, and, further, that he was always reminded that these affidavits were to be sworn to and that when he signed them he was swearing that he was not perjuring himself and the information contained in the affidavits was true.

Tutone was asked again to review his June 28 affidavit, starting with paragraph 7. Tutone now reaffirmed that, Milton Unger called him to his truck, said he could not believe someone is talking to the Union and asked if Tutone knew who was doing it. Tutone denied any knowledge and Milton said he did not know if he could afford to stay in business

if the Union did come in. Tutone did not answer. Milton said he would like to know who did and Tutone again denied knowledge. Tutone was next given an opportunity, off the record, to look through the rest of the June 28 affidavit to report what was not accurate about his February 28, 1996 affidavit. Now Tutone testified, "[E]verything is correct" in the February 28 affidavit. (Tr. 48.)

Counsel for the General Counsel, Chau, next asked Tutone with respect to his March 20, 1996 affidavit, to review the July 12, 1995 affidavit again. Tutone was also reminded that on March 20 when he came in to correct his July 12 affidavit Chau crossed out items he claimed were not accurate and inserted new information in his new affidavit. Tutone initialed all changes, swear to its truth, and signed it. Chau now asked Tutone to agree that she told him everytime he came back to the Board to give an affidavit and then recant it, in effect he was perjuring himself. Tutone agreed and further agreed that on such occasions he had lied, and in particular had lied on both February 28 and March 20, 1996.

All four affidavits taken by Board Attorney Chau as well as Tutone's May 19, 1995 letter to the Union and his affidavit taken by Respondent's counsel, Turk, were then offered and received in evidence, over objection by Respondent's attorney, Turk, who argued that the two earlier affidavits had been recanted. I noted in my ruling that the Board law permits me, after reviewing the total testimony of the witness, to exercise my discretion to determine what is truthful or not in his testimony or affidavits and that I may credit the affidavits now recanted as representing the truth.

During his cross-examination by Respondent's counsel, Tutone confirmed that after Clemenza told him to list the working conditions about which employees were concerned, he had composed his letter to the Union which contained a truthful summary of these conditions. On providing his first affidavit to the Board on June 28, 1995, he had been accompanied there by Clemenza but was alone in the room with the Board agent when his statement was taken. Clemenza had told him to try and build a case against Bay by saying negative things. For the July 12, 1995 affidavit, Tutone believed he had called the Board and gone there alone after a prior conversation with Union Agent Clemenza.

Tutone said he went to the Board in June and July because he felt intimidated, they, the union agents, were making good promises, making good salaries, and promising the world. At Respondent counsel's suggestion Tutone now added that he felt fear because of certain things the agents said, such as we never have a problem, we take care of our problems, and Milton is nothing to them, and he felt nervous because of things he'd heard about mafia and unions.

Tutone testified on cross-examination that he had called Counsel Turk to come to his office. In the affidavit he executed there on January 12, 1996, Tutone swore that although he was never present when any such statement were made to any employees, he personally had knowledge that fellow employees were placed in fear that if the Union was not voted for, there would be physical harm to them and their families. But Tutone could not state he had any personal knowledge as to who placed them in fear. The record contains no evidence that Respondent filed any objections to the results of the elections, which led to the Union's certification on July 14, 1996.

The affidavit continues, that about a month after the election, on a visit to Bay Refrigeration, Clemenza spoke to employees at a meeting, telling them he was getting a hard time from Milton Unger and was going to straighten Unger out. Clemenza wrote various statements and although Tutone told him the one he prepared for himself was not truthful, on Clemenza's insistence he was prepared to sign it because he was in fear but after subsequently making an appointment with Counsel Chau at Clemenza's directions to make the same statements to her, he then met with Chau and, instead, provided the July 12 affidavit.

Clemenza later told him to go ahead and negotiate for himself on a promotion or job security. Clemenza also told him his cousin, Peter Clemenza, was taking over and did not always negotiate for the workers and, further, that he did not have a case.

After coming to the belief that the Union was not interested in supporting and benefiting the employees but only themselves, he spoke with Milton Unger who suggested he could contact and meet with Turk, which he did, and which meeting resulted in the January 12, 1996 affidavit. After sending a copy to Counsel Chau she contacted him to see her, and he did so on February 28.

Tutone stated he became nervous when Chau told him that he could be responsible for perjury and for lying, and as a result went along with her request that he provide another affidavit instead of merely renouncing his earlier statements and relying on the statement he gave to Turk.

During his redirect examination by counsel for the General Counsel, on being pressed as to whether the Union told him to lie in his affidavits given to the Board, Tutone testified as follows. Counsel Chau's questions are followed by Tutone's answers:

Q. Did the Union ever tell you to lie to the Board?

A. They—they never mentioned a word. I don't—I don't really recall, they said, say negative things. To stretch a lot of things. I don't know if they actually used the word lie or not.

Q. But you do not recall, as you sit here today whether the word lie was used or something along that line?

A. I—I— it might have, I really don't recall. I—I—I would say, yes. I would say, yes.

Q. Do you recall or don't you recall?

A. Like, small white lies was used.

Q. Well, what exactly did the Union tell you. Did they say to—to lie, or did they not tell you to lie?

A. They said to use—to stretch the truth make the Union look good and Bay Refrigerator look bad, in any way.

Q. That's what he—they told you to do?

A. Right.

[Tr. 71, LL. 8-24.]

Following these startling and abrupt changes in his testimony, Tutone almost immediately reversed himself again. After being asked if they (the Union) said anything else, aside from telling him to say negative things about the employer and to stretch the truth any way he saw fit, Tutone now testified, "I would have to say, yes. I would have to say they did tell me to lie." (Tr. 72.) Tutone now added,

after a followup question, asking what they said, "To stretch the truth, if you have to make a lie, lie, yeah." (Tr. 73.)

In spite of the foregoing, Tutone continued to maintain that the information he provided to the Board was what he decided to tell it and that the Union never told him specifically what to say.

Tutone's performance as a witness was an incredible and pathetic portrayal of an individual who was seeking, at any cost, even to his own integrity and honor, to uphold a renunciation of his detailed and scrupulous recital of the Respondent's consistently hostile and coercive response to the Union's organizing drive among all of its service and maintenance employees, appearing in his first two affidavits given to the Board. Tutone's first writing, his May 19, 1995, five-page handwritten and admittedly truthful letter to the Union, detailing in heart wrenching detail, his grievances against Respondent's mistreatment of its employees, one can see the honest feeling made manifest in Tutone's cry for help, ending with a plea for the Union's aid in making their, the employees', working conditions better. Tutone's first two affidavits, recount in vivid and striking detail, in conversations they held with Tutone during the period from June 9 to July 5, 1995, covering events alleged as violations in the consolidated complaint, the Ungers' unvarnished and untutored slashing, imperious, and intimidating reaction to the knowledge it has just acquired of the Union's reappearance on the scene and their employees' union adherence and affiliation. Tutone's recitals on June 28 and July 12 have the ring of truth. They were taken within a few days to a few weeks of the events they recount, attribute precise language to the Ungers and contain Tutone's own corrections and initials. They are also consistent with his portrayal of the Unger's negative and unresponsive dealing with employee working conditions appearing in the May letter.

It is also noteworthy that when Tutone later seeks to repudiate his earlier recitals, he continues to adhere to, and reaffirm many portions of those affidavits, except for certain outright threats and the more blatant language and conduct. Significantly, Tutone retains the threat Milton Unger uttered during June about telling everyone he would close his doors if the Union was there and Unger's obsession with finding the employee who contacted the Union. In this context, Tutone's disavowal of his earlier attribution of a threat by Unger to fire the culprit is not worthy of belief and is rejected. I reach the same conclusion as to Tutone's disavowal of Bruce Unger's threat to fire Tutone himself if he thought Tutone was the one who called the Union appearing in paragraph 8 of the June 28 affidavit, the last sentence of which Tutone corrected and initialed before swearing to it truth.

Similarly, Tutone's attempt to reject his July 12 affidavit is unavailing. In great detail, Tutone vividly recounts the events of July 3, when he arrives at the shop to find a whole group of employees assembled outside, learns that they have been terminated and then confronts Milton Unger with the truth of his union advocacy, and on July 5 continues to deal with Unger for the employees, refuses to lead employees to the Labor Board to renounce their union affiliation and confers with Union Agent Clemenza on his arrival at the shop. On his March 20, 1996 visit to the Board, Tutone reviews and makes wholesale corrections and deletions to his July 12 affidavit. Significantly, even here, Tutone leaves intact Milton Unger's individual questioning of assembled employees

as to whether they were going to the Labor Board to change their votes after he had closely questioned Tutone as to why he wanted the Union and why he brought in the Union.

Tutone's asserted reasons for repudiating and recounting his earlier affidavits, are weak, unconvincing, and tortured. He claims to have been placed in fear by the Union but fails to provide any alleged threats or intimidating conduct which would make rational such behavior. His reliance on the "mafia" with relation to unions in general is particularly implausible. Further, it is entirely rational and appropriate for the Union to have requested Tutone, as he testified, to supply statements to the Board which would support the allegations he had made in his letter and was now supplementing in conversation with Clemenza at the shop site as he recounted the Unger's reaction to the Union's petition and organizing drive.

Rejected as false are Tutone's insinuations about being asked by the Union to stretch the truth, and to fabricate events to the Board. If Tutone had not been previously impeached by recanting his earlier affidavits in his later ones and the one he supplied Respondent's counsel, and his conversations at the Board offices, which I find he was, then his utterly inconsistent and dishonest responses to counsel for the General Counsel's attempts to pin him down on his attributing an effort by the Union to get him to lie to the Board clearly establish Tutone as a deceptive and deceitful witness. Tutone's true reasons for repudiating his earlier statements to the Board have not been disclosed, but a clue to his "turning" may lie in the fact that Tutone, as senior supervisor and manager probably feared for his job and, in spite of all of the union related events in which he personally participated, Tutone was continued in his employment, at least to the close of hearing, without lay off or interruption in his pay of other benefits.

Under Board law, in the appropriate circumstances, I may consider the two earlier affidavits of Tutone as substantive evidence and credit them over Tutone's testimony and his subsequent two affidavits in which he attempted to repudiate substantial portions of them or to repudiate them in totality in the December affidavit taken by Respondent's counsel. See Federal Rules of Evidence 801(d)(1), and the advisory Committee's notes on subdivision (d), accompanying the Federal Rule, Federal Rules of Evidence, 1996-1997 edition, West Publishing Company, at 119-121. In all of the circumstances presented on this record, in particular the circumstances surrounding the witnesses' swearing to the series of sworn statements now part of the record, as well as his testimony presented on the record, I will accept as substantive evidence Tutone's affidavits of June 28 and July 12, 1995, and reject his testimony and subsequent affidavits which are inconsistent therewith. *Snaider Syrup Corp.*, 220 NLRB 238 fn. 1 (1975); *Starlite Mfg. Co.*, 172 NLRB 68, 72 (1968); *California v. Green*, 399 U.S. 149, 155 (1970); and *DeSisto v. United States*, 329 F.2d 929, 933 (2d Cir. 1964), cert. denied 377 U.S. 979 (1964). See also *Three Sisters Sportswear Co.*, 312 NLRB 853, 865 (1993). May not these earlier affidavits also comprise a series of admissions against Respondent's interest uttered by a respondent manager whose statements are legally binding on his principal. See *Weco Cleaning Specialists*, 308 NLRB 310, 314-315 (1992).

Alphonzo Zeigler, called by the Government, testified that he began working for Respondent sometime in 1994 as a truck helper, but also performing diversified duties including stocking, cleaning, and deliveries. In the fall of 1994, Zeigler stopped working for Respondent and began collecting unemployment benefits. According to Zeigler, about a month or two after ceasing work, he returned to work at Bay Refrigeration performing the same type of work. He received \$175 a week in pay, but unlike his first tour with Respondent, he was now paid in cash. He never received a W-2 document or any form from Respondent showing how much he had been paid.

When Zeigler received his first pay on returning to work, he asked Milton Unger why he was being paid cash now. Unger said, "[D]on't worry about it." Zeigler also spoke to Nick, the bookkeeper, who also told him not to worry about it. Both Milton and Nick said, "[Y]our [sic] collecting unemployment from us and you're getting paid cash, so don't worry about nothing [sic]."

Zeigler further testified that around May 22, outside the East New York facility, he asked if he could speak to Milton Unger. He wanted to ask for a raise. Unger told him he did not want to. However, later that morning he called Zeigler to him and said he had heard that there's rumors running around that Zeigler was filling out cards for the Union. Zeigler replied that he did not know what he was talking about, Unger said let him know if anybody around here was filling out cards for the Union and they won't have no jobs, no longer. If he found out who these people are, no one's gonna have a job. Zeigler said he did not hear nothing of that. Unger told him to just go about his business and do his work.

A week later, on May 27, while Zeigler was at Respondent's West End Avenue facility loading up air-conditioners on the truck, he received a telephone call from Milton Unger. Unger told him, "[T]here's an Italian Union guy coming around to have people fill out applications for the Union, and to take pictures, and you're not to talk to them—just go inside and find some work to do." Zeigler told Unger, "[T]here was no Italian guy coming around for no union."

One morning in early June, around 9:30 a.m., Zeigler called Respondent, got Milton Unger and said he was going to be late. Unger told him don't bother coming in, and Zeigler asked, "[W]hy." Unger said, "[T]here's no need to explain, you just don't have to bother coming in." Then he hung up the phone on Zeigler. Zeigler called back, asked Unger what was going on, and Unger said he heard that Zeigler was filling out cards for the Union. Zeigler then told him, "[K]iss my butt and keep my job." Zeigler was not thereafter called back to work by Respondent.

Zeigler explained that because of personal problems he had been late on occasion in the past and on one occasion a short time before his firing he did receive a warning.² The warning did not threaten a discharge for any repetition of the conduct for which he was criticized. He was not late again until the day he called in and was fired by Milton Unger.

² My final notes reflect, but the transcript fails to note Zeigler's acknowledgment of a prior warning, although a question at p. 83, L. 22 shows he did do so. The transcript is corrected to reflect this omission.

At the representation election held on June 30, Zeigler served as union observer and voted by challenged ballot.

During his cross-examination Zeigler acknowledged that he thought he had been discharged by Respondent the first time in October 1994, started collecting unemployment compensation in the sum of \$91 per week as of November 6, 1994, and continued receiving that amount weekly through April 23, 1995, for most of which time he was reemployed by Respondent.

In response to questions as to whether he had ever informed the New York State Department of Labor that he was employed, which Zeigler denied that he had done, Zeigler noted that it was up to his boss to tell the State that he was collecting his unemployment benefits and working for him also. Zeigler also noted that he reported to the State unemployment office by periodically calling in to the computer. Since his most recent firing, Zeigler has not been collecting any unemployment benefits.

Zeigler further recalled that he had been contacted by either Milton Unger or John Tutone to return to work after his initial separation.

Charles Clemenza, the Union's vice president, also testified for the Government. On July 5, 1995, Clemenza had gone to the East New York facility after having been beeped by John Tutone to come there. On his arrival, around noon, Clemenza was informed by Tutone, and a few other employees who were out on the street that Milton was able to persuade the men to go to the Labor Board to seek to overturn their vote in favor of the Union by giving them \$20 more in their pay and holidays. Tutone added that he had told the employees that the Union was here to help them, and that he had then called Clemenza to come down.

Milton Unger and his son, Bruce, then came out of the building about 20 feet away and Milton screamed out to Tutone, "[W]hat are you talking to him for, your a f—ing dummy." Clemenza told Milton he could not discriminate against people that work for him. Clemenza then asked Tutone and the three other fellows present to put down on a piece of paper exactly what happened before he got there and date it so he can show it to the office or to Chau and she can instruct him what direction to go in.

On being refreshed by reviewing his pretrial affidavit, Clemenza also recalled that in the course of his diatribe, Milton turned to Clemenza and told him that he was able to convince the people to turn against the Union. He also said he would fire his employees or close his doors and only create hardship for them for being with the Union. During all this time, Tutone and the other employees were present, standing right next to Clemenza by his car.

In its defense, Respondent called Milton Unger as a witness. Although Respondent had previously admitted in its answer to the first consolidated complaint that Bruce Unger was its supervisor and agent, Milton Unger now testified that Bruce was just an employee without any title.

Milton further testified that Zeigler had been discharged in October 1994 for stealing. Both Zeigler and his driver, Pat D'Amico, admitted it. From that date until the present, Zeigler had never worked for Bay Refrigeration again. Employees are all paid by check.

Milton Unger had never met Clemenza prior to the Union's filing of its election petition. Unger did meet Clemenza on the street in front of his facility, he believed

either in April or May. As the record shows that the Union did not file its representation petition until May 24, 1995, the meeting had to occur later.

On his cross-examination, President Unger was shown his pretrial affidavit which he admitted was taken on August 7, 1995, with Respondent's counsel, Turk, present and asked whether he had not stated therein that with respect to the theft incident, he then told Zeigler that he would not fire him and he could not steal from Bay, and that Zeigler thanked him for not firing him. The affidavit continues, that D'Amico at first denied being involved, and later said he could not really say anything because he was the only one. Unger concluded this portion of his affidavit by stating that in fact Zeigler was not fired as a result of the alleged theft. Unger replied that Zeigler was being questioned and he would not admit it, but he was fired after further questioning and did admit it after D'Amico and Negrillo admitted it. When next asked whether at some later point he had questioned Zeigler, Zeigler admitted it and he was fired as a result, Unger answered, "No, I have never seen him since." (Tr. 114, L. 23.)

After being pressed further about his response, Unger again referred to Zeigler's first denying that he committed a theft, at the time he provided the affidavit, in early August 1995, and he did not have enough evidence to fire him then for the theft, but after Pat D'Amico and Geramari Negrillo came clean, Zeigler admitted the theft and he, too, was fired.

As a consequence of these responses, it is evident that Milton Unger's testimony is confusing and contradictory, at first testifying that Zeigler was discharged in October 1994, for stealing, then admitting Zeigler was not fired at the time, and was told he would not be, and then asserting Zeigler was later fired after being confronted with the admissions of two other employees and admitting his participation. Yet, as the counsel for the General Counsel's questioning makes clear, 10 months after the theft, in August 1995, when Unger was asked during the preparation of his affidavit, why Zeigler had been fired, Unger denied firing him and did not inform Chau and, consequently, did not include in his affidavit, any reference to firing Zeigler later. However, as is clear from the evidence, and as admitted by Respondent, Zeigler was permitted to file for and receive unemployment compensation benefits without any lengthy waiting period, after his separation from employment in October 1994. Unger also admitted that while he was not overjoyed with Zeigler's performance while working for Respondent, he always granted him the benefit of the doubt for his past instances of tardiness and always having problems, because of Zeigler's sincerity and promise to correct that, and he was not discharged for that reason.

In his affidavit, Milton Unger for the first time provides the circumstances surrounding Zeigler's initial firing. In October 1994, after D'Amico refused to say anything about the theft aside from stating he was the only one, he failed to show up for work on a Monday and Tuesday. On Wednesday, Zeigler called and gave an excuse for not coming in. Unger told him if he did not want to work, he should let him know so that he could get someone to fill in and he was fouling up the operation. Zeigler's response was to curse Unger and hang up. Unger did not hear from Zeigler again until the election, held June 30, 1995. Unger's own sworn statement thus undermines his claim made during his con-

flicting testimony, that he had fired Zeigler for theft in October 1994 or at any time later.

Unger now added in his testimony that Zeigler's call to Respondent was on a Tuesday, and during it he told Zeigler he thought it is better we just forget about this job, said goodbye, and hung up the phone. Shortly after, Zeigler called him back and told Unger what he could do with his job. Unger claimed that he had received information from a real estate account that D'Amico had delivered the stolen product to him and that he had been doing business with these guys, presumably including Zeigler. Yet, at this point Unger failed to testify to any confrontation with Zeigler over the theft after his discovery and fails to attribute to Zeigler any admission of involvement.

During his cross-examination, Milton Unger also testified that for 40 years he had had a bargaining relationship with the Union covering four of his employees, during which time he made contributions to the union funds. But when the Union asserted claims for failure to cover and make contributions on behalf of other employees claimed to be included in the bargaining unit, Unger balked on financial grounds. At the time of the election, on June 30, 1995, according to Respondent's counsel the unit included 32 employees, but that at the time of hearing Respondent was down to 8 to 10 unit employees.

Respondent also called Tutone who briefly testified that after Zeigler left Respondent's employment, he never worked for it again. But Tutone could not recall when Zeigler left, and, according to Zeigler, he was only off a month or two in the fall of 1994 before returning to employment off the books.

Analysis and Conclusions

In view of Unger's contradictory and confusing testimony, as well as his failure to deny on the record any of the threats, interrogations, or other illegal acts attributed to him by Tutone and Zeigler, I do not credit Unger's denial that Zeigler never worked again for Respondent after his termination in October 1994. Zeigler is credited as to his return to work within a month or so thereafter, during which time he continued to work off the books until his final discharge on June 5, 1995, when Unger learned of his participation in the union drive. Milton Unger's immediate and massive coercive response to the Union's organizing drive independently supports Zeigler's testimony, to which Unger failed to respond, that as soon as he learned that Zeigler was filling out cards for the Union, when Zeigler called, in early June 1995, to report he would be late to work, Unger took the occasion to fire him, for his union activity. It is probable that Unger has confused his firing of Zeigler in June 1995, with his firing of him in October 1994. On both occasions, the first recounted by Unger and the second by Zeigler, Unger took Zeigler's call, and told him he was letting him go, but Unger places the single call in October 1994 well before commencement of the union drive, and denies ever speaking to Zeigler again. Consistent with the strong evidence of Unger's intemperate and coercive threats of discharge, other acts of interference, with his employees' union activities³ and his

³ It is noteworthy that Milton Unger failed to respond at all to Clemenza's testimony of the events on July 5 when the union agent

Continued

obsession with identifying and punishing the ring leaders in the union movement, I find that Milton Unger, on behalf of Respondent took the occasion of Zeigler's telephone call in June 1995, to inform him he was being discharged for soliciting union memberships and support among unit employees, in violation of Section 8(a)(1) and (3) of the Act. It is clear that under the Board's *Wright Line* formulation, the General Counsel has made a prima facie showing that Zeigler's discharge was motivated by his union activities and, further, that Respondent has failed to establish as an affirmative defense that it would have discharged him the second time absent such activities. *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Wright Line*, 251 NLRB 1083 (1980), enfd. as modified 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

I have previously credited Tutone's first two affidavits, which, along with portions of his testimony, as well as that of Clemenza and Zeigler establish a pattern of serious unfair labor practices engaged in by Respondent, including threats of discharge and shutdown, illegal interrogations, directing employees to identify union supporters, stay away from them and refrain from engaging in such activities, creating the impression of surveillance of its employees' union activities, and promises of benefits in violation of Section 8(a)(1) of the Act. See *Minnesota Boxed Meats*, 282 NLRB 1208 (1987); *NLRB v. E. I. du Pont Co.*, 750 F.2d 524 (6th Cir. 1984).

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. By interrogating its employees concerning their membership in, activities on behalf of, and sympathy for the Union, directing its employees to identify for it those employees who joined, supported, or assisted the Union, directing its employees to refrain from engaging in activities on behalf of the Union, creating the impression among its employees that it was keeping their activities on behalf of the Union under surveillance, threatening to discharge those employees who joined, supported, and assisted the Union, promising its employees improved wages and benefits, including a wage increase of \$20 weekly and holiday pay, and other unspecified benefits, if they would inform the Board that they no longer wished to be represented by the Union, Respondent has restrained and coerced its employees in the exercise of the rights guaranteed by Section 7 of the Act, and has thereby engaged in and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.
4. By discharging its employee, Alphonzo Zeigler, on or about June 5, 1995, because he joined, supported, and assisted the Union and in order to discourage employees from engaging in such activities, or other concerted activities for the purpose of collective bargaining, or other mutual aid or protection, Respondent has been discriminating in regard to the hire and tenure and terms and conditions of employment of its employees, in violation of Section 8(a)(1) and (3) of the Act.

arrived at the East New York facility in response to Tutone and the other employees' plea for help. Clemenza's recital of these events is credited.

5. The following employees constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

All full-time and regular part-time service and maintenance employees, including technicians, cleaners, polishers, helpers, and drivers, employed by Respondent at and out of its Brooklyn facilities, but excluding office clerical employees, guards and supervisors as defined in Section 2(11) of the Act.

6. At all materials times since June 30, 1995, the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the employees in the unit described in paragraph 7, for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment of all employees of Respondent in the bargaining unit described above in paragraph 5.

7. On July 14, 1995, the Regional Director for Region 29, issued a Certification of Representative, certifying the Union as the exclusive collective-bargaining representative of Respondent's employees in the unit described above in paragraph 5.

8. By failing and refusing to meet with the Union, since on or about July 26 or 27, 1995, as the exclusive collective-bargaining representative of the employees in the unit described above in paragraph 5, by failing and refusing, since on or about February 6, 1996, to designate a representative for the purpose of engaging in negotiations with the Union with respect to wages, hours, and other terms and conditions of employment of the employees, with authority to negotiate a final and binding collective-bargaining agreement with the Union, notwithstanding that its designated representative has been unavailable to meet with the Union, by conditioning, on a date in late August 1995, its agreement to meet and bargain with the Union on the Union's agreement not to negotiate on behalf of all the employees in the exact described above in paragraph 5, or the Union's agreement to exclude certain employees from the unit, and, by failing and refusing, since on or about a date in late August 1995, to provide the Union with information, including its financial books and records and financial statements, requested by it, necessary for, and relevant to the Union's performance of its duties as the exclusive representative of its employees in the unit, and in order to evaluate Respondent's claim that it could not financially afford to enter a collective-bargaining agreement with the Union covering the unit employees, Respondent has been failing and refusing to bargain collectively with the representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

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

THE REMEDY

Having found that Respondent Bay Refrigeration Corp. has engaged in violations of Section 8(a)(1), (3), and (5) of the Act, I shall recommend that it cease and desist therefrom, and take certain affirmative actions necessary to effectuate the purpose of the Act. Having found that the Respondent unlawfully terminated employee Alphonzo Zeigler, I shall recommend that it be ordered to offer him reinstatement to

his former position or, if no longer available, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges, and to make him whole for any loss of earnings and other benefits he may have suffered as a result of Respondent's unlawful discrimination against him. 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 computed in accordance with *New Horizons for the Retarded*,

283 NLRB 1173 (1987).⁴ I shall also recommend that in accordance with the time restraints set forth in *Indian Hills Care Center*, 321 NLRB 144 (1996), Respondent remove from its files any references to Zeigler's unlawful discharge and notify him in writing that this has been done and that the discharge will not be used against him in any way.

[Recommended Order omitted from publication.]

⁴Under *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.