

Cable Car Advertisers, Inc. d/b/a Cable Car Charters and Freight Checkers, Clerical Employees & Helpers Local 856, International Brotherhood of Teamsters, AFL-CIO and Sheila Lambert. Cases 20-CA-25377 and 20-CA-25789

November 21, 1996

DECISION AND ORDER REMANDING

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND FOX

On March 29, 1996, Administrative Law Judge William L. Schmidt issued the attached decision. The Respondent filed exceptions and a supporting brief, the Charging Party filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief and answering brief.¹

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

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

Although we affirm the judge's decision in all other respects, we do not adopt his recommendation to dismiss the allegation that the Respondent violated Section 8(a)(1) of the Act by its surveillance of the employees' union activities. For the reasons set forth below, we shall sever and remand that allegation for further factual findings.

It is undisputed that the Respondent photographed and videotaped employees engaged in handbilling on behalf of the Union and that it maintained a written record of names and dates that employees engaged in handbilling. The Respondent contends that its surveillance was necessitated by employee misconduct.

After reviewing some of the testimony concerning alleged employee misconduct, but without making

¹ There are no exceptions to the judge's dismissal of the allegations that the Respondent violated Sec. 8(a)(3) by canceling the May 6, 1993 promotion that Sheila Lambert was scheduled to drive; by terminating Robin Boykin; by laying off Orlando Ramirez; or that the Respondent violated Sec. 8(a)(5) by failing to bargain over the closing of the shuttle operation.

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), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ In his recommended Order the judge inadvertently failed to include narrow cease-and-desist language. We shall modify the recommended Order accordingly and substitute a new notice. We shall also modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

credibility resolutions, the judge stated that because "the handbillers' and the ticket sellers' access to potential customers occurred in the same restricted space at the same time . . . Respondent had ample reason to believe that this situation could lead to conflict and there is some compelling evidence to believe that conflict and disruption eventually arose." The judge concluded that the Respondent did not violate the Act by attempting to maintain a written and photographic record of the employees' handbilling activities.

The General Counsel and the Charging Party have excepted to the judge's dismissal of the surveillance allegation and contend, inter alia, that the judge has failed to make explicit credibility resolutions regarding when the surveillance began; whether alleged employee misconduct occurred, and, if so, when the misconduct took place; and whether the Respondent was aware of the misconduct when it ordered the surveillance.

We find merit in these exceptions. Accordingly, the surveillance allegation is severed and remanded to the judge to make the necessary credibility resolutions.

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, Cable Car Advertisers, Inc., d/b/a Cable Car Charters, San Francisco, California, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees concerning their activities and sympathies for Freight Checkers, Clerical Employees & Helpers Local 856, International Brotherhood of Teamsters, AFL-CIO (Union) and the activities of other employees on behalf of the Union.

(b) Stating to employees that it would never negotiate with their representative so as to suggest the futility of representation by the Union.

(c) Threatening employees with harsh discipline, loss of employment, trouble, and the closure of any portion of its business if they support the Union, sign a union authorization card, or wear union insignia at work.

(d) Making implied promises of benefits in order to induce employees not to seek representation by the Union.

(e) Telling employees that it intended to close operations early because employees engaged in activities protected by the National Labor Relations Act.

(f) Telling employees that their work hours have been reduced because they selected the Union to represent them.

(g) Discharging, laying off, discontinuing employee assignments, or reducing the work hours of employees in order to encourage or discourage membership in the

Union or any other labor organization, except as provided in Section 8(a)(3) of the National Labor Relations Act.

(h) Refusing to bargain with the Union as the exclusive representative of the employees in the following appropriate unit:

All full-time and regular part-time tour drivers, ticket sellers, dispatchers, promotion and shuttle drivers, maintenance employees, and mechanics employed by the Company at its San Francisco, California location, excluding all office clerical employees, sales employees, guards and supervisors as defined in the Act.

(i) 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 Susan Chan, Porfirio Coyoy, Carl Hovdey, John Mozol, Victoria Mazariegos, Gholamreza Radpay, Rudy Ortiz, Mavilla Reyes, Andrea Terhune, Mauricio Valasco, and Jonathan Palewicz full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Susan Chan, Porfirio Coyoy, Carl Hovdey, John Mozol, Victoria Mazariegos, Gholamreza Radpay, Rudy Ortiz, Mavilla Reyes, Andrea Terhune, Mauricio Valasco, and Jonathan Palewicz 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 administrative law judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges or layoffs of the above-named employees, and within 3 days thereafter, notify the employees in writing that this has been done and that the discharges or layoffs will not be used against them in any way.

(d) Make whole Kent Bishop, Michael Buckey, Kohlee Gleffe, Douglas Horning, Sheila Lambert, Fred McKenzie, Diana Miles, John Modica, Randy Morrison, Luis Recinos, William Segen, Robert Telles, William Trulock, Michele Zimmerman, and all employees affected by the early closing of its shuttle and tour service between July 3 and July 11, 1993 for all losses incurred by them as a result of its unlawful conduct as found in the administrative law judge's decision in this case in the manner set forth in the remedy section of that decision.

(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 facility in San Francisco, California, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 20, 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 May 28, 1993.

(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 that the surveillance allegation is severed and remanded to Administrative Law Judge William L. Schmidt to make credibility determinations regarding when the surveillance began, whether employee misconduct occurred and, if so, when the misconduct took place, and whether the Respondent was aware of the misconduct when it ordered the surveillance.

IT IS FURTHER ORDERED that the judge prepare and serve on the parties a supplemental decision containing his credibility resolutions, findings of fact, conclusions of law, and a recommended Order. Following service of the supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

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."

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 coercively interrogate employees concerning their activities and sympathies for Freight Checkers, Clerical Employees & Helpers Local 856, International Brotherhood of Teamsters, AFL-CIO (Union) and the activities of other employees on behalf of the Union.

WE WILL NOT tell employees that we will never negotiate with the Union so as to suggest the futility of representation by the Union.

WE WILL NOT threaten employees with harsh discipline, loss of employment, trouble, and the closure of any portion of our business because they support the Union, sign a union authorization card, or wear union insignia at work.

WE WILL NOT make implied promises of benefits in order to induce employees not to seek representation by the Union.

WE WILL NOT tell employees that we intend to close operations early because employees engaged in activities protected by the National Labor Relations Act.

WE WILL NOT tell employees that their work hours have been reduced because they selected the Union to represent them.

WE WILL NOT discharge, lay off, discontinue employee assignments, or reduce the work hours of employees in order to encourage or discourage membership in the Union or any other labor organization, except as provided in Section 8(a)(3) of the National Labor Relations Act.

WE WILL NOT refuse to bargain with the Union as the exclusive representative of our employees in the following appropriate unit:

All full-time and regular part-time tour drivers, ticket sellers, dispatchers, promotion and shuttle drivers, maintenance employees, and mechanics employed by us at our San Francisco, California location, excluding all office clerical employees, sales employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related 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 the Board's Order, offer Susan Chan, Porfirio Coyoy, Carl Hovdey, John Mozol, Victoria Mazariegos, Gholamreza Radpay, Rudy Ortiz, Mavilla Reyes, Andrea Ter-

hune, Mauricio Valasco, and Jonathan Palewicz full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Susan Chan, Porfirio Coyoy, Carl Hovdey, John Mozol, Victoria Mazariegos, Gholamreza Radpay, Rudy Ortiz, Mavilla Reyes, Andrea Terhuayne, Mauricio Valasco, and Jonathan Palewicz whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, 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 discharges or layoffs of all employees named above and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharge or layoff will not be used against him or her in any way.

WE WILL make whole Kent Bishop, Michael Buckey, Kohlee Gleffe, Douglas Horning, Sheila Lambert, Fred McKenzie, Diana Miles, John Modica, Randy Morrison, Luis Recinos, William Segen, Robert Telles, William Trulock, Michele Zimmerman, and all employees affected by the early closing of our shuttle and tour service between July 3 and July 11, 1993, for all losses incurred by them as a result of our unlawful conduct plus interest.

CABLE CAR ADVERTISERS, INC. D/B/A
CABLE CAR CHARTERS

Eugene Tom, Esq. and Richard Fiol, Esq., for the General Counsel.

Michael P. Merrill, Esq. (Merrill, Arnone & Handelman), of Santa Rosa, California, and *Arnold Gridley, Robert Gridley, and Robert Sullivan*, of San Francisco, California, for the Respondent.

David A. Rosenfeld, Esq. and Jonathan Palewicz, of San Francisco, California, for Charging Party Local 856.

Michael Buckey, of San Francisco, California, for Charging Party Sheila Lambert.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. This case concerns the General Counsel's complaint alleging that Cable Car Advertisers, Inc., d/b/a Cable Car Charters (Respondent or Company) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (Act). Freight Checkers, Clerical Employees & Helpers Local 856, International Brotherhood of Teamsters, AFL-CIO (Union or Local 856) filed the charge in Case 20-CA-25377 on May 28, 1993,¹ and amended that charge six times between the date it was originally filed and December 16. Sheila Lambert filed the

¹ Unless shown otherwise, all further dates refer to the 1993 calendar year.

charge in Case 20-CA-25789 on December 3. On December 30, the Acting Regional Director for Region 20, National Labor Relations Board (NLRB or Board), consolidated the two cases and issued a consolidated complaint (complaint) on behalf of the General Counsel. Respondent filed a timely answer denying that it engaged in the unfair labor practices alleged.

I heard this matter over the course of 18 days between August 23 and October 26, 1994 at San Francisco. Having now carefully considered the record, the demeanor of the witnesses while testifying, and the posthearing briefs of General Counsel and Respondent, I conclude Respondent violated the Act as alleged in numerous allegations but did not violate the Act as to certain other allegations based on the following

FINDINGS OF FACT

A. Jurisdiction and an Overview

The Respondent, a California corporation, provides intrastate charters, tours, and shuttle services in and about San Francisco and environs utilizing motorized, rubber-tire vehicles designed to resemble San Francisco's signature municipal cable cars. Respondent's gross revenues in the calendar year preceding the filing of the charges herein exceeded the Board's discretionary standard for asserting its statutory jurisdiction over transit systems and its direct inflow exceeded a de minimus amount. Respondent concedes that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) and I so find. I also find that the Union is a labor organization within the meaning of Section 2(5).

Arnold S. Gridley (Gridley), the Company's founder and president, oversees the Respondent's operations from an office at 2830 Geary Boulevard in San Francisco.² The Company's maintenance and cable car storage facility (the barn) is located approximately 3 or 4 miles away at 1201 Sixth Street where the cable car fleet is stored, maintained, and repaired. All of the employees involved here normally report for work at the barn. In the spring of 1993, when the events described below began, the Company employed approximately 55 shuttle drivers, tour operators, ticket sellers, mechanics, maintenance workers, and other miscellaneous employees to operate and maintain its fleet of 55 motorized cable cars. A significant number of drivers and ticket sellers hold jobs with other employers and work with Respondent on a part-time basis.

Over the years, Arnold Gridley's late wife and children have participated in the management of the Company's operations. Thus, the late Mrs. Gridley worked in a managerial capacity until she suffered a stroke in December 1991. A daughter, Christine Bennett, served as Respondent's general manager for a period in the late 1970s and early 1980s before she left in 1983 to start a bakery business in the East Bay at Hayward. A son, Robert Gridley, also served as the Company's general manager but, of late, he has established his own real estate business in Louisville, Kentucky, where he lives. In recent times, however, he has divided his time between Louisville and San Francisco in order to assist with Respondent's operations. Following Mrs. Gridley's death in the summer of 1992, Robert Gridley assisted his father in the

operation of the business roughly through the end of the year and then returned to Louisville. In approximately February or March, Bennett returned to the Company to assist her father on a part-time basis, about 2 days a week, while continuing her own business in Hayward. As seen below, one of the key allegations in this case involves Bennett's conduct.³

In addition, the Company employs a group of professional managers, supervisors, charter sales employees, bookkeepers, and office clericals at both its Geary Boulevard office and the barn. Within the relevant period these individuals included Operations Manager John Legaspi, Assistant Operations Manager Carolyn Koo, and Sales Manager Lori (Jones) Colvin, and Barn Supervisors Hoa Van and Ty Van. In late June, Respondent employed Robert Sullivan as the assistant to the president. In early July, Gridley terminated Legaspi and Koo. Thereafter, he hired Patrick Nolan as the operations manager in early September.

When this dispute began, the Company offered three distinct types of motorized cable car services, referred to throughout as the shuttle, the tours, and the promotions. Its shuttle service provided round trip transportation between Macy's department store on Union Square in San Francisco's commercial and hotel district and A. Sabella's Restaurant on Taylor Street in the Fisherman's Wharf area. In addition to the driver, a ticket seller rode the shuttle back and forth between these two fixed locations and a combination ticket seller-dispatcher was positioned at Sabella's.

Pursuant to a joint agreement, the reverse side of shuttle tickets carried advertising promotions for Macy's and Sabella's, and the shuttle cars are outfitted with large signs advertising the shuttle service, Macy's, and Sabella's. A few years before these events, the Company and Sabella's successfully petitioned the City of San Francisco to dedicate a portion of the white-curbed passenger pickup zone in front of Sabella's for the exclusive use of the Company's shuttle service. After that, the Company arrived at a similar arrangement with Macy's officials and they jointly petitioned the City to redesignate a portion of the curbside passenger pickup space in front of Macy's as the parking location for the Company's shuttle. However, this petition encountered difficulties with City officials because of the tighter traffic control in this busy commercial area and because of an existing contract for curbside space at Union Square between the City and Grayline Tours, the Company's principal competitor. In the end, City officials tabled this petition but instructed traffic control officers not to interfere with the parking arrangement between Macy's and the Company. Hence, the Company essentially operated on the Union Square end of the shuttle through the sufferance of Macy's and the City's traffic control officials. This arrangement allowed company cable cars to park at or in the vicinity of Macy's Union Square entrance for up to 20 or 30 minutes without objection from Macy's or the City.

The tour operation provided customers with 1-, 2-, or 3-hour narrated cable car tours to a variety of sightseeing attractions in San Francisco and Sausalito. The Company and

³ Robert Gridley returned to San Francisco as a company consultant in mid-August. There are some indications that Robert Gridley pursued negotiations with the Union after his return which eventually resulted in an agreement. At the hearing, his father expressed considerable dissatisfaction with some portions of that agreement.

² This office also serves as the headquarters for a Gridley owned real estate firm.

the Red and White Fleet ferry service also maintained a joint arrangement designed to provide customers of both companies with a combined cable car tour and a ferry tour on San Francisco Bay. The Company conducted its tour operation from curbside space at Pier 41 (about three blocks from A. Sabella's Restaurant) which it leased from the Port of San Francisco. A specially outfitted cable car served as the tour ticket outlet at Pier 41. Shuttle drivers promoted the tours enroute to Sabella's and the Pier 41 ticket sellers promoted the tours to passersby.

The promotion operation provided wide variety services for groups utilizing this charter service including transportation to and from hotels, restaurants, and meeting places; mobile birthday, wedding, and bar mitzvah celebrations; and special event; transportation for such occasions as local football games, the State Fair in Sacramento, barhops, and the like. Sales personnel at the Geary Street office solicited and arranged this charter business.

In March, a group of Company employees met for the purpose of discussing ways and means to improve their benefits and working conditions. As a result of this preliminary meeting a committee of five employees, Doug Horning, Sheila Lambert, Randy Morrison, Jonathan Palewicz, and Robert Telles met later that month or in early April with Local 856 representative Julie Wall to discuss union representation. Wall provided the employees with blank authorization card forms and, between that time and April 22, these employees and others collected enough signed cards for the Union to file an NLRB representation petition. Shortly thereafter, several prounion employees began wearing and distributing pins provided by the Union bearing a "Union Yes" logo. Eventually, between 30 and 40 employees wore these pins at work.

After the Company and the Union entered into an NLRB Stipulated Election Agreement which provided for a June 17 election, the Company commenced its own campaign opposing unionization. Formally, this campaign consisted of letters distributed to employees explaining the disadvantages of union representation and a few so-called captive audience meetings. Philip Wright, another Gridley son who is a businessman in nearby Sonoma County, California, and two of Wright's associates conducted most of these small group meetings in early June. On June 14, Arnold Gridley, Wright, and at least one of Wright's associates met with a larger group of employees at the barn to further speak with employees about the upcoming election. Christine Bennett also attended this meeting at the request of Legaspi. This meeting, described in further detail below, became somewhat chaotic and claims are made in this case that Gridley, Wright, and Bennett made some forceful threats and promises. The following day employees learned for the first time that Bennett had taken control of employee scheduling. Several employees also claim that Hoa and Ty Van vocally opposed unionization throughout May and June.

At the June 17 election, the employees voted 43 to 7 in favor of union representation and the NLRB regional director subsequently certified Local 856 on June 28 as the representative of the following appropriate unit:

All full-time and regular part-time tour drivers, ticket sellers, dispatchers, promotion and shuttle drivers, maintenance employees, and mechanics employed by the Company at its San Francisco, California location,

excluding all office clerical employees, sales employees, guards and supervisors as defined in the Act.

In the meantime, Local 856 president Brad Tham submitted a contract proposal to Scott Rechtschaffen, the Company's labor attorney, on June 25. Julie Wall, the Local 856 organizer assigned to this matter described the proposal as a "pussycat" contract. Regardless of its character, Tham requested in his accompanying letter that the contract "be executed . . . no later than 5:00 p.m., Tuesday, June 29. . . ." Rechtschaffen replied in writing on June 29 expressing consternation at Tham's expectation that the Company execute an agreement without meeting to negotiate its terms. Nevertheless, Rechtschaffen stated that the proposal appeared "quite reasonable" and that provided a "sound basis for negotiation." To that end, Rechtschaffen offered to meet and negotiate "at any time and at any place" and expressed belief that the parties could arrive at a contract "within a two week period."

In late June, the company sales and operations managers were at work on the details of a large promotion charter arrangement providing for the transportation of delegates attending a convention of the National Education Association (NEA) in San Francisco. As originally contemplated, this promotion would require approximately 36 cable cars with drivers. After Union Agent Wall learned of this project, she spoke with NEA official Richard Nuanas in Washington, D.C. In their conversation, Wall asked for Nuanas' reaction to a Union plan to handbill the NEA delegates as they arrived at the Moscone Convention Center on the Company's cable cars. Although Nuanas expressed NEA's solidarity with the Union's cause, he prevailed on Wall to reconsider because he feared the NEA might have to forfeit a large deposit with the Company to reserve the cable cars. However, at a separate pre-convention meeting in San Francisco, Wall and the Company's driver-trainer, Lorenzo Cantino, apparently convinced Nuanas and the NEA's independent transportation coordinator that some newly hired company drivers were untrained. By the morning of July 1, the NEA had found alternate transportation and reduced its cable car requirements from 36 to 10 ostensibly because the Company failed to provide satisfactory documentation of driver qualifications. The Company canceled a bargaining session set for that afternoon and negotiations apparently did not resume until mid-August.

On Friday, July 2, the Union commenced boycott activities against the Company. On that date, Company employees appeared at the Pier 41 tour operation to handbill tourists and to urge them to urge them to "pass on by." This handbilling and the attendant demonstrations at Pier 41 continued on and off until the Company and the Union reached an agreement on December 9. As described later, some aspects of the activities at Pier 41 became very nasty business. On certain days early in this boycott effort, the Company ceased its tour and shuttle operation when the leafletters appeared at Pier but subsequently began conducting its tour operation in spite of the handbilling activity. At frequent intervals during this activity at Pier 41, company agents videotaped and took still photos of employee activity. Eventually, in October, the Company obtained a State court order which apparently created a buffer zone between the handbillers and the cable cars parked at the Pier 41 curb.

In addition, Union Agent Wall arranged through Walter Johnson, president of the San Francisco Labor Council, during the third week of July to speak with Mike Zorn, Macy's employee relations manager. Wall told Zorn of the Union's dispute with the Company and advised him that the Union may, from time to time, leaflet the shuttle operation at the Macy's stop. Zorn, who professed complete ignorance about the shuttle operation at that location, promised to investigate and speak further with Wall. However, on July 23, the chief of Macy's security force ordered the Company's shuttle cars out of its passenger pickup zone. Following a consultation with his attorneys, Arnold Gridley notified the Union that same day that the shuttle service would be closed until further notice. It never resumed until after the December 9 agreement. In the meantime, some drivers and ticket sellers received other assignments while others did not.

As detailed below, the General Counsel's complaint charges that Respondent engaged in numerous unfair labor practices after it acquired knowledge of the Union's organizing activity which continued until December when an agreement was concluded. That agreement, unfortunately, resolved none of the matters raised by the complaint and, hence, the General Counsel seeks a remedy for the alleged unfair labor practices.

Respondent defends against most of these allegations with claims that its actions were based on legitimate, nondiscriminatory business reasons, some arising from the exigencies resulting from the Union's boycott activities. In other instances, Respondent denied that the events alleged occurred at all and, in the case of one discharge allegation, Respondent claims that the individual was a supervisor who is not entitled to the Act's protection. Finally, in a few instances, Respondent failed to adduce any evidence contradicting accounts provided by the General Counsel's witnesses in support of certain complaint allegations.

B. *Credibility*

The findings detailed below reflect, in my judgment, the reliable evidence pertaining to the issues raised by the complaint and the Respondent's various defenses. As this case progresses, the aggrieved parties undoubtedly will cite testimony inconsistent with my findings and inferences. Suffice it to say that I have carefully reviewed and considered all of the evidence in making my findings and reaching my conclusions. However, in making my findings, I have taken into account the following considerations.

As noted, in a few instances the Company failed to address evidence adduced by the General Counsel in support of his complaint allegations. In no situation where that occurred could I find that the account of the General Counsel's witness so inherently incredible as to warrant disbelief altogether.

In resolving the conflicts in testimony, I scrutinized the conflicting accounts and credited those which I deemed plausible after considering the following factors. First, I accorded consideration to witness demeanor, including the degree to which the witness delivered an account without inappropriate leading questions, or testified in a convincing, straightforward manner without argument, evasiveness or obvious exaggeration. Second, I have weighed the ability of witnesses to recall events that a reasonable person would expect an individual to recall after the period of time involved. Third, I

have studied the magnitude and circumstances of inconsistencies found between a witness' testimony and any prior statements or reliable documentary evidence. Fourth, I have given significant weight to the lack of corroborative evidence when the circumstances indicated the availability and necessity of such evidence unless the absence of corroboration was apparent or explained. Fifth, I have considered the potential bias of a witness resulting from an interest in the outcome or a close identification with, or extreme hostility toward, one of the parties. Finally, I have been mindful of the probabilities inherent in a particular account provided by any particular witness when considered in the total context of the case.

Some more specific observations are necessary. When the organizing effort became a serious issue, Arnold Gridley's children, Christine Bennett and Philip Wright in particular, stepped forward to assist their father in the operation of the Company. Soon after their involvement, suspicions arose about the loyalty of Operations Manager Legaspi and those closely identified with him, namely Assistant Operations Manager Carolyn Koo and John Mozol. Mozol was terminated before the election and within a short period following the election, both Legaspi and Koo were terminated. In the period prior to his departure, Legaspi claims, without contradiction, that Arnold Gridley accused him of supporting the organizing drive or, at least, not doing enough to oppose it. Gridley's own suspiciousness of Legaspi in all likelihood stemmed at least in part from the fact that Legaspi's roommate was Fred McKenzie, a ticket seller-dispatcher with the Company, and one of the employees who eventually signified his support for the Union by wearing the pronoun pin widely distributed during the organizing effort. In view of Legaspi's involuntary departure and the potential for bias which is inherent in that situation, I have paid particular attention for evidence which corroborates his other relevant testimonial assertions. Koo's testimony on the other hand was limited in large measure to procedures she employed in performing her work and significant corroboration exists for most of her assertions.

By contrast, Supervisors Hoa Van and Ty Van obviously retained Arnold Gridley's trust throughout. Both appear as energetic, dedicated, and very loyal supervisors. The 1993 payroll records reflect that they frequently worked 80 to 90 hours a week through that summer and the record otherwise reflects Hoa Van's ubiquitous presence in particular.

I likewise view the testimony of Arnold Gridley, Christine Bennett, and Philip Wright with considerable skepticism. Gridley and Bennett's claimed inability to recall virtually any substantive remark at the June 14 meeting appeared contrived. Wright, in contrast, appeared determined to obfuscate the substance of that meeting to the point where it became quite difficult to distinguish between what he said and what his father said at the meeting. In addition their testimony suffers from a massive gap between their words and their actions. For example, in explanation of his unusual written order to Hoa Van and Carolyn Koo not to rehire seven particular employees again, Arnold Gridley appeared woefully vague and unacquainted with the underlying reasons for this stark directive. In addition, some of Gridley's account is totally inconsistent with the tone of this memorandum.

As for Bennett, her takeover of employee scheduling in mid-June had a significant impact on numerous employees.

To explain her sudden and critical intervention, she, like her father, accused Legaspi and Koo of favoring particular employees so that available work became unevenly distributed. However, a careful examination of the 1993 payroll led me to conclude that the distribution of work became unmistakably one sided only after Bennett assumed responsibility for the scheduling. Additionally, if I became convinced of anything over the course of this hearing, it is that the group of employees adversely affected by Bennett's scheduling would not stand by idly without making their concern about their livelihood known. Almost all recounted numerous futile attempts to contact Bennett. Bennett claimed that virtually no one attempted to reach her about this serious matter. I believe Bennett's assertion is patently false and I deem it extremely damaging to her credibility generally.

C. The 8(a)(1) Allegations

The General Counsel's complaint paragraphs 8 through 13 allege that Respondent violated Section 8(a)(1) by a variety of threats, promises, interrogation, surveillance, and solicitations to engage in surveillance, all designed to interfere with protected activities. Section 8(a)(1) prohibits employer interference, restraint or coercion of employees in the exercise of the Section 7 rights guaranteed under the Act. Section 7 of the Act guarantees employees the right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection. . . ."

In order to establish a violation under Section 8(a)(1), the General Counsel need not prove a coercive intent or effect. Instead, the Board and the courts employ an objective test that seeks to determine only whether the employer's conduct reasonably tends to interfere with employees' exercise of their Section 7 rights. *NLRB v. Hitchiner Mfg. Co.*, 634 F.2d 1110, 1113 (8th Cir. 1980). Beyond that, legal precedent applicable to most of the conduct involved here is well-settled and does not merit a lengthy discussion.

1. Complaint paragraph 8: The Gridley-Mozol telephone exchange

a. Relevant facts

John Mozol worked as a dispatcher-operations coordinator at the barn. He first noticed the prouion pins when he saw Sheila Lambert, Randy Morrison, and Robert Telles wearing them at work during the first week of May. Mozol promptly telephoned Operations Manager Legaspi at the Geary Boulevard office with a report about the pins. Legaspi suggested that Mozol could enhance his standing with Arnold Gridley if he reported this information directly which Mozol did in a separate telephone call to Gridley a few minutes later.

Upon listening to Mozol's report, Gridley professed to know nothing about employees wearing the union pins. He then asked Mozol to identify the employees wearing them and Mozol did so. Gridley next requested that Mozol "eavesdrop" further on the these employees' conversations, particularly Morrison's, as Gridley suspected Morrison to be the leader. In response, Mozol unctuously told Gridley that he "could not accommodate [Gridley's request] because [he] was not hired for that function, and [that he] was generally too busy doing the things [he] was hired to do rather than

to spy on the employees." Mozol claims that Gridley angrily slammed the phone down.

Arnold Gridley did not testify about this matter. Legaspi, whose desk was located near Gridley's, corroborates Mozol's account on incidental details but he did not testify about the substance of Gridley's purported remarks.

b. Further findings and conclusions

General Counsel contends that Arnold Gridley violated Section 8(a)(1) by interrogating Mozol to obtain the identity of the pinwearers and by soliciting Mozol to engage in surveillance of union activity. Respondent defends these allegations on two grounds: (1) Mozol lacks credibility, and (2) in any event Mozol was a supervisor throughout his employment and, hence, Gridley's requested reports from Mozol about employee union activity would not violate the Act.

Although I perceive some degree of duplicity reflected in Mozol's initial willingness to curry favor by reporting about and identifying the pin wearers, I credit his account of this conversation with Gridley especially in light of Gridley's own silence on the subject.

As for the supervisory defense, I conclude that Respondent failed to show that Mozol possessed or exercised any of the statutory indicia of a supervisor. Although Respondent implicated Mozol in the assignment and discipline of drivers, and adduced other secondary evidence showing that Mozol, unlike the unit employees, had keys to the barn and the office at the barn, I find that Mozol served fundamentally as an administrative employee who lacked supervisory authority. Instead, he served as a conduit for the transmission of driver assignments actually made by other supervisors. His factual reports concerning driver shortcomings contained no recommendations for disciplinary action. Moreover, the evidence concerning Mozol's enhanced access to the barn and the office there lends no support for a contrary conclusion where, as here, Mozol's hours frequently did not coincide with those of the barn supervisors. For these reasons, I find that Mozol was an employee within the meaning of Section 2(3) of the Act at all relevant times.

Finally, I find Gridley's efforts in his conversation with Mozol to obtain the identity of the button wearers and to secure Mozol's cooperation in providing further reports concerning protected employee activities are plainly coercive in the context found here even though Mozol initiated this conversation. Standing alone Gridley's conduct implicitly suggests that he sought such information for potential reprisal purposes especially in light of the anger Gridley he exhibited when Mozol declined to engage in surveillance. This conclusion is reinforced by the fact that the day after this conversation Gridley ordered Lambert removed from shuttle assignments without explanation and used Mozol as a conduit to convey that information to Lambert. Considering these circumstances together, I have concluded that Gridley's questioning of Mozol about the identity of the button wearers and his efforts to secure Mozol's cooperation to engage in future surveillance violated Section 8(a)(1), as alleged.

2. Complaint paragraph 9: Gridley's negotiating remark

a. Relevant facts

Following the start of the Union's boycott, tour driver Will Segen noticed Arnold Gridley parked near Pier 41 while

Segen handbilled there. He approached Gridley and started a conversation. Segen, who recalled that the handbilling had gone on for 3 or 4, stated to Gridley: "Mr. Gridley, you know, this nonsense has got to stop. When are you going to negotiate with us?" Segen claims that Gridley responded by saying that he would "never negotiate." Surprised at Gridley's reply, Segen told Gridley: "That really doesn't sound very good. "We could end this business." In response, Gridley again told Segen that he would "never negotiate with you people." Although Gridley admits that he occasionally spoke to the handbillers at Pier 41, he flatly denied that he ever told any of them that he would never negotiate with the Union or with "them."

b. *Further findings and conclusions*

Relying on Segen's account, General Counsel argues that Gridley's statement violated Section 8(a)(1) because it conveyed "the futility of union representation to an employee." Respondent contends Gridley never made the questioned remark.

I credit Segen's account. As a witness in general, Segen appeared to be making his best effort to recount fact without embellishment or fabrication. Moreover, in the overall context of his testimony, this exchange lacks any significant self-serving purpose and, hence, I find that Segen would have little motive to invent this story. Additionally, based on the time frame described by Segen, the exchange took place at a time when a hiatus in negotiations existed and, hence, the substance of the conversation as recounted by Segen is consistent with the existing circumstances. Accordingly, I find in agreement with the General Counsel that Gridley's remark conveyed a message of futility which violated Section 8(a)(1), as alleged. *Outboard Marine*, 307 NLRB 1333, 1335 (1992).

3. Complaint paragraph 10: The Hoa Van allegations⁴

a. *Relevant facts*

Supervisor Hoa Van Van's office is located near the timeclock at the barn. As a rule employees gather in the vicinity of the timeclock before they commence work. Hoa Van often provides last minute instructions during these gatherings and otherwise joins in their conversations.

Will Segen, a part-time tour driver and an early union supporter, often engaged employees near the time clock to sign authorization cards and to distribute the union pins. Segen, who speaks fluent conversational Spanish, directed some of these union organizing efforts toward the Spanish-speaking members of the maintenance crew. Segen attributed a number of coercive remarks to Hoa Van over the course of the preelection period from late April to mid-June.

Once while Segen passed out authorization cards in the timeclock area, Hoa Van told him that he was a "bad boy," that "Mr. Gridley doesn't like that" and that "Mr. Gridley's going to fire the people that go for the union." On another occasion Hoa Van told him that "Mr. Gridley's going to

shut down the company," and expressed fear that she would lose her own home because of the union organizing drive. In reference to the Hispanic maintenance employees on yet another occasion, Hoa Van told Segen that the "Mexicans shouldn't have anything to do with the union. It's not their [business] . . . they're going to get fired. We're going to get rid of them if they go for the union. You're making big trouble for them."

Michael Buckey, a ticket seller-dispatcher and an early union activist, recalled that Hoa Van told him on two separate occasions in the preelection period that he would get in trouble for wearing a union pin because Arnold Gridley did not like the union pins.

Fred McKenzie, a ticket seller-dispatcher, began wearing a union pin at work in early June. On two separate occasions in late May and early June, he overheard Hoa Van tell other employees wearing union pins that Gridley did not like the union pins and that they would get in trouble for wearing them. Four or five days after the last admonishment, McKenzie overheard Hoa Van make similar remarks to driver Michele Zimmerman in reference to her earrings made from the union pins.

Tour driver Robert Telles, another early union supporter, also distributed authorization cards and union pins to some of the Hispanic maintenance employees. Sometime in May, Telles confronted Hoa Van about a report he had just received from Orlando Ramirez that she prohibited the maintenance workers from wearing the union pins. Hoa Van told Telles that the order came from Gridley who did not want employees wearing union pins on the job.

Maintenance worker Porfirio Coyoy overheard a conversation in mid-June before the election between Hoa Van and driver Henry Schaeffer in which Hoa Van told Schaeffer that "if there were a union, Mr. Gridley could close down the company." Respondent called Schaeffer as its witness but did not question him about Coyoy's testimony.

From the outset of the Union's campaign, ticket seller-dispatcher Randy Morrison actively engaged in the organizing activities. His sympathies were well known as he openly distributed authorization cards and union pins at the barn, and wore the prounion pin himself. One day in June, Hoa Van took Morrison aside and told him that employees should not vote for the union because "Mr. Gridley . . . would probably either sell the company or close the company [if the Union won] and [everyone would] be out of work."

One day shortly before the election, Hoa Van joined shop mechanic Gholamreza Radpay and two other employees at the lunch table in the barn. On this occasion, Hoa Van made inquiries about the Union, including the benefits it would likely seek. During this conversation, Hoa Van stated that Gridley would close the barn if the Union drive succeeded.

Hoa Van denied that she spoke about the Union to any employees apart from one occasion when Jonathan Palewicz and Michael Buckey explained one of the preelection notices to her and her husband, Ty Van. Specifically, Hoa Van denied speaking to any employees about the widely worn union pins or telling employees the Company might close if they chose union representation. There is no evidence that Respondent maintained a nondiscriminatory policy related to the wearing of insignia of any kind on work attire.

⁴ Complaint pars. 10(a) through (d) relate to Hoa Van's preelection conduct. Complaint paragraphs 10(e) through (h) pertain to Hoa Van's statements which have an intimate bearing on the complaint's 8(a)(3) allegations. Therefore, I have addressed these latter allegations in sec. D, below.

b. *Further findings and conclusions*

When it came to addressing the numerous antiunion statements attributed to her, Hoa Van simply stonewalled the subject. Apart from admitting an innocuous exchange about a preelection notice, Hoa Van even denied that she ever spoke to anyone about union matters to Arnold Gridley. Virtually every camp in the case, from Gridley himself to the ardent union supporters, to that small group of employees who either opposed the Union completely or at least its boycott tactics, contradicted Hoa Van on this score. Moreover, Respondent eschewed opportunities to buttress Hoa Van's credibility through other available witnesses such as Schaeffer. Hence, despite her charming and engaging demeanor, I credit the entire bulk of employee testimony about Hoa Van's numerous antiunion statements. Based on the foregoing employee accounts, I find that Respondent violated Section 8(a)(1), as alleged, by Hoa Van's interrogation of employees, and her numerous threats that the barn would be closed, that employees would be discharged, and that employees would get in trouble for supporting the Union or wearing a prounion pin.

4. Complaint paragraph 11: the Ty Van allegation

a. *Relevant facts*

Mechanic Radpay recalled that Ty Van approached him one morning about 2 weeks before his conversation with Hoa Van recounted above. On this occasion, Ty asked Radpay why he was wearing a union pin, which a driver had given him, and why he wanted to join the Union. In response, Radpay told Ty that he found the pin, that he liked wearing it, and that he joined the Union because the Company had no benefits. Radpay claimed that Ty then told him not to sign a card or join the Union and that if the Union got in "something bad" would happen to the Company. When Radpay asked Ty what he meant by that, Ty did not answer. Ty Van specifically denied speaking to Radpay about the Union or making the statements attributed to him above.

b. *Further findings and conclusions*

I find the remarks attributed to Ty Van by Radpay are similar in tone and character to those Radpay and others attributed to Ty Van's wife, Hoa Van. As I have previously credited Radpay's testimony concerning Hoa Van Van's remarks to him, as Radpay generally made no effort to embellish or exaggerate his testimony to his own advantage, and as Radpay provided a detailed account of the setting in connection with his testimony about Ty's remarks, I find his testimony on this point to be reliable. According, I find Respondent violated Section 8(a)(1) by Ty Van's inquiry about Radpay's reasons for wearing a union pin and supporting the union, Van's inquiry about where Radpay got the pin, and Van's vague threat that something bad would happen if the Union succeeded.

5. Complaint paragraph 12: surveillance of the handbilling

a. *Relevant facts*

Respondent concedes that it photographed and videotaped employee handbilling activities at Pier 41 on numerous occa-

sions. Indeed, Respondent introduced its September 17 videotape of employee activities at Pier 41 to buttress some of the testimony about the conduct of the handbillers. In addition, Respondent adduced testimony that it maintained a record reflecting the names and dates individuals engaged in handbilling on the advice of counsel to maintain a complete record of the handbilling activity. See Respondent's Exhibit 13(c) through (v).

Respondent argues that its so-called surveillance of the handbilling conduct at Pier 41 was "necessary and ordinary" in the course of dealing with anticipated unlawful activity on the part of the handbillers. The General Counsel argues Respondent failed to show any proper justification for its conduct especially in the early portion of the leafletting campaign. In support of his position, General Counsel relies on the testimony of two employees that the photographing and videotaping occurred throughout the entire course of the Pier 41 boycott campaign.

Allegations flew throughout this hearing about who did what during the course of the handbilling at Pier 41. Some accounts and characterizations, such as Arnold Gridley's assertion that the handbillers engaged in "storm trooper" tactics from the start, are obviously exaggerated but some of the claims made by Respondent's witnesses are troubling. Without attempting to recite all of the allegations, recounting some captures the flavor of the record on this point.

Ty Van claims that during the handbilling activities Randy Morrison directed vulgar epithets at him in the presence of customers who purchased tickets from him. Several leafletters, Van claimed, would step between him and customers as he attempted to sell tickets. Ty further claims that some leafletters made loud remarks about sending him and his wife, Hoa Van, back to Vietnam. Finally, he claims that Buckley distributed court documents involving a Gridley family dispute in probate court to the general public. Buckley claims that he only distributed these documents to a few his coworkers who were handbilling.

Steven Vogel, the senior ticket seller, normally traversed the length of the leased curbside space at Pier 41 selling tour tickets. He recalled that the handbilling began as a "simple affair" of leafletters quietly and courteously handing flyers describing employee grievances to passing tourists. However, Vogel claims, as the summer wore on (he rather imprecisely estimated this to be near "the end of July towards August and more towards September") the leafletters became particularly aggressive in their attempts to interfere with his ticket sales.

In time, Vogel said, a leafletter shadowed him wherever he walked and handed leaflets to customers as he spoke to them about buying a ticket. Vogel recalled that Randy Morrison frequently used vulgar and abusive language when shadowing him.⁵ Vogel claims that Morrison also taunted him while he worked at selling tickets by yelling such things as "[Y]ou will be the first asshole to be out the door [when the contract is signed] anyhow." On another occasion, Vogel recalled, that Morrison, Miles, Palewicz, Segen, and Telles became embroiled in a confrontation with an outspoken cus-

⁵To illustrate, Vogel recalled that Morrison told one family with small children from Illinois that riding the cable car was what he would expect an "asshole from Illinois" to do and expressed the hope customers would "die" during the ride.

tomers. At one point in this exchange, Palewicz purportedly asked the customer's wife why she stayed with "that piece of shit." Vogel further claimed that John Modica frequently lectured passengers awaiting for a car to depart on the lack of safety.

Patrick Nolan, hired as the operations manager on September 4, testified that Gridley asked him to help Ty Van at Pier 41 in an effort to calm the activities there. He recalled that some leafletters were courteous with customers but others were "threatening, harassing . . . the language was atrocious, and they were so physical towards potential clients, and especially people that had already purchased tickets." For example, Nolan claims that on one occasion Diana Miles told three elderly ladies that the car on which they were about to take a tour did not have any brakes and that they were going to "fucking die." Miles denied that statement.

On one occasion when Robert Sullivan observed the handbilling activities at Pier 41, he claims that Randy Morrison and Shiela Lambert embraced and engaged in suggestive gyrations which, Sullivan believed, would likely put off family visitors from places like Nebraska. Lambert and Morrison denied that they engaged in any such provocative conduct. Respondent attacked that denial with the video in evidence. In the video, Lambert and Morrison embrace but the conduct there is obviously a playful performance for the camera.

Near altercations also arose between employees at work at Pier 41 and those engaged in handbilling. Henry Schaeffer recalled one day when he worked at Pier 41, he and Robert Telles had a heated argument in which Telles invited Schaeffer to settle with fisticuffs. A few days later, according to Schaeffer, the two men resolved their momentary differences and renewed their longstanding friendship. Schaeffer also recalled that Legaspi joined the handbillers on one occasion and, while there, he referred to Schaeffer as a "killer" in front of customers, in apparent reference to an earlier fatal pedestrian accident Schaeffer had while driving a cable car.

Randy Morrison asserted that Ty Van began photographing and videotaping the handbilling activities "[a]lmost every time, especially in the beginning when we came out handbilling. . . ." Kohlee Gleffe claims that she observed Lori Colvin (Jones) and Mike Gridley taking still photos and videotapes of the leafletters in mid-July.⁶ Although Colvin testified, she did not address this issue. Mike Gridley did not testify.

However, Michael Buckley's more detailed account of the videotaping and picturetaking strongly indicates that it began around the Labor Day weekend and continued off and on thereafter. Buckley recalled that Karen Chiarenza, an office employee, and her son took still photos and videotaped at Pier 41 that weekend. At various times thereafter, he observed Wright, the Vans, and Nolan videotaping handbilling activities by one means or another.

In October Respondent obtained a restraining order in a state court action. The restraining order is not in evidence but it appears to have been designed to prohibit the leafletters from blocking access to the ticket car sales win-

dow at Pier 41 ticket car and to prevent the "harassment" of customers who had already boarded the tour cars.

b. Further findings and conclusions

Absent proper justification, the photographing of employees engaged in concerted activities violates Section 8(a)(1) "because such pictorial record keeping tends to create fear among employees of future reprisals." *F. W. Woolworth*, 310 NLRB 1197 (1993). In *Woolworth*, a panel majority concluded that the employer violated the Act by photographing consumer handbilling at the entrances to one of its retail stores because "the record provides no basis for [the employer] reasonably to have anticipated misconduct by those handbilling, and there is no evidence that misconduct did, in fact, occur." Although mindful that Respondent engaged in numerous contemporaneous unfair labor practices, I am satisfied that a reasonable basis existed for its notetaking, photographing and videotaping at Pier 41.

Even assuming that the photographing of the handbilling effort occurred early in the boycott effort as Morrison and Gleffe indicate, the concurrent operation and consumer appeals at Pier 41 presented a readymade conflict situation. While Respondent conducted its usual sales business there on the public thoroughfare, the Union utilized the same area (as it was legally entitled to do) to present its boycott appeal. Unlike the situation in nearly every reported case, the handbillers' and the ticket sellers' access to potential customers occurred in the same restricted space at the same time; by virtue of the nature of this operation, both made their respective competing appeals practically elbow-to-elbow. In these very unusual circumstances, I conclude that Respondent had ample reason to believe that this situation could lead to conflict and there is some compelling evidence to believe that conflict and disruption eventually arose. Accordingly, I conclude that Respondent did not violate the Act by attempting to maintain a written and photographic record of these activities, and I will therefore recommend dismissal of this allegation.

6. Complaint paragraph 13: the June 14 meeting

a. Relevant facts

Legaspi scheduled the drivers regular monthly safety meeting for June 14 at 3 p.m. By the various estimates, 25 to 35 employees attended that meeting held at the barn. For this particular meeting, Legaspi invited Christine Bennett to attend and she accepted. Legaspi began the meeting by discussing the monthly safety agenda. After about 30 or 45 minutes, Arnold Gridley, Phil Wright, and one or two of Wright's associates arrived. Within a few minutes, Gridley interrupted the meeting, introduced Wright as his son and asked Wright to say a few words.

Wright told the employees that he headed the new management team and that he was aware of the union election about to take place. Shortly thereafter, Wright asked the employees for a "four-month . . . postponement" of the union vote to allow the new management team an opportunity to show the employees how they could "improve their work lot." Everyone agrees that the employees greeted his postponement request with hostility and skepticism, and that the meeting became confrontational. For example, Sheila Lambert told Wright that she "wouldn't give [him] another four

⁶Michael Gridley is Arnold Gridley's son. He is described in one document as the chief assistant district attorney in Marin County, California. Apart from Gleffe's reference, Michael Gridley appears to have had no involvement in the events at issue here.

minutes let alone four months." Others pressed Wright to detail specific changes they could expect. Wright generally demurred concerning any specific details citing legal advice the Company had received, but some employees recalled questions about a medical plan and asserted that Wright stated "That's coming . . . You will get that" or words to that effect. Although Wright himself plead a faulty memory about specific statements at this meeting, he recalled telling employees that based on their discussions, his father was taking the position that: "If there's problems, I'll resolve the problems." Later, Wright purportedly characterized the Company as a loose, family-type operation and warned that if the employees selected the Union they would "wish [they] were in the Marines."

Subsequently, Gridley addressed the employees and reviewed the history of the Company at length. In the course of his talk, he too purportedly told employees that they would wish they were in the Marines if they selected the Union. Apparently Doug Horning, a very articulate prouion employee, responded to Gridley's talk with less than flattering words about Gridley's failure to acknowledge the role the employees played in building a successful company and threatened to vigorously resist stricter disciplinary measures. Bennett spoke last but her remarks appear to have been limited to expressing shock at the vehemence of the employees' remarks about her father.

Will Segen worked at the Company during the period when Bennett managed the operations but had no further contact with her when she left in the mid-1980s to start her own business. After the meeting, Segen approached Bennett to extend a personal greeting. Segen described Bennett as "livid" and shaking with anger apparently over Horning's speech. Segen claims that Bennett, pointing toward Horning, ask "Who is that guy? Who is that guy?" Segen provided Horning's name and explained that he was a young driver who tended to express his own ideas in a brash manner. In response, Bennett charged that Horning led the drivers "around by the nose" and that after the new management team got "a hold of this" the place would be run with some type of military discipline, albeit Segen could not recall if she referred to the Army or the Marines. Dispatcher Buckley recalled overhearing Bennett tell one of the employees (whose identity he could not recall) following the meeting that the Company would be run like the Marines if the employees chose the Union.

Both Wright and Gridley flatly denied the military discipline remarks attributed to them by the employee witnesses. Additionally, Wright denied that he promised employees any benefits if they agreed to delay the vote. Bennett claimed to have no recollection about threats of military discipline at the meeting by Wright or her father, or for that matter, the substance of anyone's remarks at the meeting. She claimed to have spoken only to driver William Trulock while at the meeting concerning some photographs of a promotion Trulock had driven for Bennett. Bennett did not testify at all about speaking at the meeting herself or the remarks attributed to her by Segen following the meeting apart from implicitly denying that she spoke to Segen by claiming that she spoke only to Trulock. Trulock testified during the General Counsel's case-in-chief but made no mention of any such conversation with Bennett. He did not testify on rebuttal.

b. Further findings and conclusions

I credit the employee claims concerning management threats to impose strict rules of conduct if the employees voted for the Union. Until I ruled that testimony on this point had become cumulative, all of the employee witnesses who attended the meeting recalled the Marine Corps discipline statements. That consistency together with the vividness of the accounts by some employees concerning this particular statement convinces me of the veracity of that claim.

The General Counsel claims that Wright also made specific promises to provide a health plan if the employees delayed the election. Although Legaspi and some of the employees claim that Wright made that explicit promise, other employees, notably Buckley, recalled that Wright meticulously avoided making any specific promises because of legal advice he received.⁷ Although I have concluded that Wright probably avoided any specific promises, I have concluded that his admission that he told employees that his father would "resolve the problems" amounted to an implied promise designed to persuade employees to abandon their organizing effort.

An employer violates Section 8(a)(1) by promising or implying during the course of an organizing campaign that it will resolve employee grievances in circumstances indicating that it is doing so to induce employees to reject union representation. *Presbyterian/St. Luke's Medical Center v. NLRB*, 723 F.2d 1468, 1474 (10th Cir. 1973). By first asking employees to delay the pending election and then suggesting that his father would "resolve the problems," Wright unquestionably suggested to employees that Respondent needed time to make improvements which would obviate any need for union representation. The fact that Bennett, Gridley and Wright subsequently threatened harsher discipline if employees chose otherwise lends force to the conclusion I have reached that the thrust of Wright and Gridley's remarks implied a promise of improved conditions by opting against unionization or harsher conditions by opting for unionization. Both the threat and the implied promise violated Section 8(a)(1). *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409-410 (1964).

D. The Remaining Allegations

Complaint paragraph 14 alleges that Respondent violated Section 8(a)(3) by a variety of personnel actions described below. Complaint paragraph 15 alleges that Respondent also violated Section 8(a)(5) by its failure to bargain with the Union over two matters alleged unlawful in complaint paragraph 14.

Section 8(a)(3) prohibits employers from discriminating in regard to an employee's "tenure of employment . . . to encourage or discourage membership in any labor organization." All adverse personnel actions against employees in-

⁷ On this point, Buckley recalled that he walked out of an earlier meeting between Wright and a smaller group of employees out of frustration over Wright's refusal to specify what he would do for the employees if they abandoned the organizing drive. As Buckley put it, he left that meeting because "no real constructive dialogue [was] being achieved at all." In view of Buckley's account about the motive for his conduct at this earlier meeting, I am satisfied that Buckley would have recalled an express promise by Wright at the June 14 meeting if such a promise had occurred.

spired by employer antiunion motives violate Section 8(a)(3). *Equitable Resources*, 307 NLRB 730, 731 (1992).

As Section 8(a)(3) cases nearly always turn on the question of employer motivation, the Board and the courts employ a causation test to resolve such allegations. *Wright Line*, 251 NLRB 1083 (1980); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). The *Wright Line* test requires the General Counsel to make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated the employer's adverse action. Typically, the General Counsel meets this burden by presenting credible evidence showing a reasonable proximity in time between the adverse action in question and the employer's knowledge of, and hostility toward, the employee's protected activity. *Best Plumbing Supply*, 310 NLRB 143 (1993). Although not conclusive, timing is usually a significant element in finding a prima facie case of discrimination. *Equitable Resources*, supra.

If the General Counsel establishes a prima facie case, the burden then shifts to the employer who must persuade the trier of fact that the same adverse action would have occurred even absent the employee's protected activity. *Best Plumbing Supply*, supra. To meet this burden "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Roure Bertrand Dupont*, 271 NLRB 443 (1984). False defenses become a two-edged sword in that they may add weight to an ultimate inference of unlawful motive. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

Section 8(a)(5) provides in substance that it is an unfair labor practice for an employer to refuse to bargain collectively with a certified or recognized employee representative. Section 8(d) defines collective bargaining to include the mutual obligation of an employer and a union to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . and the execution of a written contract incorporating any agreement reached if requested by either party. . . ."

The 8(a)(5) allegations here implicate Respondent's duty to notify and provide the Union with an opportunity to bargain over two purported changes it made in June and July. Ordinarily, the law deems those matters which fall under the statutory penumbra of "wages, hours, and other terms and conditions of employment" to be mandatory subjects of bargaining. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 350 (1958). Under Section 8(a)(5), employers are generally not at liberty to unilaterally alter matters within the scope of mandatory bargaining subjects without first giving notice to the employee representative and providing an opportunity for bargaining over proposed changes. *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

1. Complaint paragraph 14(a): removing Lambert from the shuttle

a. *Relevant facts*

Complaint paragraph 14(a) alleges that Respondent violated Section 8(a)(3) by reducing Sheila Lambert's hours on or about May 7. Lambert began working at the Company in May 1992 as a shuttle driver. Before May 7, Lambert regu-

larly drove a shuttle car Saturdays and Sundays, and occasionally drove promotions.⁸

Lambert served as one of the initial employee organizers for Local 856. Among other activities, she contracted other employees by telephone to explain the purpose of the organizing drive, signed an authorization card, distributed cards to other employees, and wore a union pin at work. When she reported for work to drive a promotion on Thursday, May 6, she wore her union pin in plain view on her blouse at collar bone level. On this occasion, Hoa Van approached her and advised that the promotion she was scheduled to drive had been reassigned because it was a narrated tour which Lambert did not do. Lambert then went to the Geary Boulevard office to sign some papers. While at the office, Lambert wore her union pin in plain view on her cap.

The following day Mozol called Lambert at home and informed her that she was being taken off of the shuttle. When Lambert asked why, Mozol told her that Mr. Gridley had said there was "no apparent reason." Apart from a couple of promotions which Lambert arranged through Carolyn Koo, Lambert did not drive anymore for remainder of 1993.

Mozol said that Koo instructed him to discontinue Lambert's shuttle assignments the morning after his telephone report to Arnold Gridley about Lambert and two other employees wearing union pins. About an hour after Koo's call, Mozol spoke to Arnold Gridley about another matter and at that time he also inquired about Koo's direction concerning Lambert. After Gridley confirmed Koo's directive, Mozol asked Gridley if there was any particular reason. Gridley told Mozol, "[T]hat's the trouble with you John, you don't follow simple instructions; I said I don't want her scheduled." Mozol then asked if it had anything to do with her attendance or driving habits, and Gridley told him, "[N]o it's none of those reasons, I just don't want her to work anymore."

No management official provided any explanation for the sudden and precipitous termination of Lambert's regular shuttle schedule. Similarly no management official sought to contradict the foregoing accounts of Lambert and Mozol.

b. *Further findings and conclusions*

Contrary to Respondent's general claim pertaining to all of the 8(a)(3) allegations, I find that the General Counsel has established a prima facie case here. Thus, General Counsel presented evidence which stands uncontradicted reflecting Lambert's protected activity, Respondent's knowledge of Lambert's union sympathies and at least a portion of her activities, Respondent's union animus, and adverse employer action against Lambert immediately after learning of her union activities.

In view of General Counsel's prima facie case, Respondent became obliged under the *Wright Line* standard to prove that the adverse action taken against Lambert would have occurred even absent her union activity. As Respondent provided no explanation whatsoever in connection with its removal of Lambert from the shuttle, I find that it has failed to meet its *Wright Line* burden of persuasion. Considering these circumstances and the widespread unfair labor practices which followed in short order, I conclude that Respondent

⁸ On weekdays, Lambert worked for other employers as a ready-mix concrete truck driver.

violated Section 8(a)(1) and (3) by terminating Lambert's regular shuttle schedule on May 7.⁹

2. Complaint paragraphs 14(b), (c), and (e):
the June discharges

Complaint paragraph 14(b), (c), and (e) alleges that between June 7 and June 16 Respondent terminated Susan Chan, Andrea Terhune, John Mozol, Carl Hovdey, and Robin Boykin in violation of Section 8(a) (3).¹⁰

a. *Relevant facts*

(1) Background

Typically, the summer season is among the busiest periods for Respondent's business. During the summer months, Respondent supplements its work force with seasonal drivers and ticket sellers.

The shuttle and tour business operated on a regular daily basis albeit subject to the ebb and flow of the tourist business. Employees who worked this operation were scheduled on a weekly basis by Hoa Van at the barn. As a matter of practice, employees would notify Hoa Van when they would be available or unavailable for assignment. In cases of last minute exigencies such as an illness or some other emergency, Hoa Van would call for a substitute from the employee list.

Though a continuous and significant segment of the Company's operation, the promotion business lacks the regularity which characterizes the shuttle and tour segments of the business. Until the middle of June, Assistant Operations Manager Carolyn Koo assigned drivers for promotions. Procedurally, Koo received a copy of all promotion contracts after the sales staff closed a promotion sale. Based on the contract, Koo entered the promotion details in a log book which reflected, among other things, the date, time, number of vehicles required, and driver assignments for the various promotion events.

Every 2 weeks, Koo published a "barn schedule" reflecting the upcoming promotions with driving instructions for each event which she sent to Hoa Van for posting at the barn. In those instances where a driver already had been assigned to a promotion, the barn schedule also reflected that assignment. Such preposting assignments were not at all uncommon as it had become an established practice for the drivers to periodically call Koo in advance of the barn schedule publication to inquire about the pending promotions.

⁹ Although General Counsel contends that the cancellation of the May 6 promotion also violated the Act, I find the evidence insufficient to reach that conclusion. Hoa Van testified without contradiction that this promotion was narrated and that Lambert did not do narrated promotions. Her claim on this latter point has some support. See R. Exh. 12.

¹⁰ I have treated the Boykin allegation as abandoned by the General Counsel who did not call her as a witness nor address her allegation in his brief. Carolyn Koo identified Boykin as a promotion driver. Hoa Van spoke with Boykin on June 17 after Boykin voted in the NLRB election and learned that she was 8-months pregnant. The 1993 payroll records reflect that Boykin worked at least one pay period each month through June 1993 and then worked again in December 1993. See G.C. Exh. 26, pp. 4-5. Accordingly, her situation will not be addressed further and I will recommend dismissal of this allegation.

When that occurred, Koo informed the inquirer as to upcoming events which fit that particular driver's personal preferences and availability.¹¹ Consequently, a driver often obtained a promotion driving assignment months in advance. Where, however, no driver assignment was reflected on the barn schedule, the drivers knew they could contact Koo for those jobs. In those cases where an event did not attract volunteers as described above or time did not allow for that process to work, Koo selected an available driver and made the assignment herself.¹² For larger promotions requiring several drivers, Koo arranged to have Hoa Van to post an advance sign-up sheet at the barn designed essentially to elicit volunteers and later utilized this sign-up sheet in making promotion driving assignments.

(2) The *Excelsior* list issues

On May 26 the Regional Director for NLRB Region 20 approved the election agreement executed by Respondent and Local 856. That agreement specified that all employees in the appropriate unit described therein employed during the payroll period ending immediately prior to the approval of the agreement would be entitled to vote in the June 17 election. The agreement also required Respondent to furnish the Regional Director with an election eligibility list within 7 days after the agreement's approval containing the names and addresses of all eligible voters in accord with *Excelsior Underwear*, 156 NLRB 1236 (1966).

The election agreement makes no reference to any special eligibility formula addressing the amount of part-time work necessary for eligibility or those employees who work on a seasonal basis. However, the parties had a separate agreement that part-time employees employed in unit classifications who "averaged four hours per week during at least one calendar quarter during the 12 month period preceding the eligibility date" could vote in the election. See General Counsel Exhibit 31.

Union Agent Julie Wall received a copy of the *Excelsior* list on June 2. After reviewing the list with some of the employee organizers, including Jon Palewicz, Wall notified Kay Hendren at the NLRB Regional Office about the issues which surfaced concerning the adequacy of the voting list. Wall provided the names of 15 individuals and requested that Hendren obtain the Company's explanation for their omission from the voting list. Hendren telephoned Company Attorney Scott Rechtschaffen about the eligibility issues raised by Wall.

Rechtschaffen responded to Hendren in writing on June 7. His June 7 letter addressed all 15 individuals named by Wall. He agreed that Sheila Lambert and Mike Van had been omitted inadvertently and furnished the required information about them. He claimed that Lory Cantino and John Mozol were supervisors and therefore ineligible to vote. Rechtschaffen stated that seven others, including Chan, Terhune, and Hovdey, were no longer employed by the Com-

¹¹ For example, some drivers abhorred driving assignments for barhops because some patrons occasionally became loud and obnoxious; others liked the assignments because they often produced large tips.

¹² As this contingency always existed, Hoa Van furnished Koo with her shuttle and tour assignments which covered 2-week periods so Koo would be in a position to coordinate her driver assignment responsibilities with Van's.

pany and that the other four did not work sufficient hours to qualify under the parties' eligibility standard.

Hendren notified Wall concerning Rechtschaffen's response. In turn, Wall telephoned Rechtschaffen because she could not square the Company's position concerning the four conceded part-time employees with her perception of the eligibility formula. That call produced no resolution of the issue and Wall subsequently instructed those individuals to vote anyway. Although Respondent called Rechtschaffen to testify concerning other matters, he was not questioned about this aspect of the election matter including his June 7 letter.

(3) The Termination of Chan, Terhune, and Hovdey

Chan and Terhune worked nearly full time as shuttle ticket sellers during the 1992 summer season. Although both live in the Bay Area, they attend college during the academic year in San Diego. Before returning to college in August 1992, Hoa Van assured both Chan and Terhune that they would be welcome to return for the 1993 summer season. The General Counsel concedes that neither Chan nor Terhune engaged in any union activities while employed at the Company. Although Terhune recalled that she overheard talk about the union vote among other employees, no one ever spoke to her about the matter.

In May, Chan telephoned Hoa Van twice from San Diego to inquire about work opportunities for both Terhune and herself during their summer break period.¹³ On both occasions, Hoa Van assured Chan that work was available for both of them and that they should telephone her when they arrived back in the Bay Area.

Chan telephoned Hoa Van at the end of May after she arrived back in the Bay Area and on this occasion Van provided Chan with a work schedule. Based on that schedule, Chan began working again as a ticket seller on approximately June 1 and worked 3 or 4 days that week. On Monday, June 7, Chan called Hoa Van as instructed for her work schedule that week and learned that she was scheduled to work 3 days. The following day Chan received a message at her home to telephone Hoa Van immediately. When Chan returned Van's call later that day, Van told Chan that Mr. Gridley no longer needed her services and that she no longer worked for the Company. Subsequently, Chan received a letter from the Company explaining essentially that she had been terminated because too many people had been hired for the summer. Chan destroyed the letter in a fit of rage.

Terhune returned to her home in the Bay Area after Chan and telephoned Hoa Van who provided her with a work schedule. Terhune's 1993 timecards reflect that she worked June 4, 7, 8, and 9. On the last day with the Company, Hoa Van terminated Terhune at the end of the work day. The letter handed to Terhune at that time stated, in effect, that she was being terminated because the Company had "overhired" for the summer. Driver Palewicz claims that Terhune worked on his car the day she learned of her termination. He recalled that Terhune returned to the car in tears after telephoning the barn that afternoon. She explained to Palewicz that she had just been let go. Jack Chin, a newly hired ticket seller,

worked on Palewicz' car the following day. Chin told Palewicz that particular day was his first day of work.

Hovdey's situation somewhat similar to that of Chan and Terhune albeit the General Counsel adduced some evidence of protected activity on his part and employer knowledge of that activity. He commenced working for the Company in August 1991 as a shuttle driver. In May or June 1992 Hovdey switched to tour driving and by December 1992 he primarily drove promotions. Throughout his employment Hovdey remained enrolled in a graduate degree program at a Bay Area university. For this reason, Carolyn Koo fashioned his work schedule around his graduate studies so that he worked a nearly full time schedule in the summer months and in the range of 15 to 20 hours per week during the academic year.

Although Hovdey had some time available for work assignments in the first quarter of 1993, he received no assignments. By April, however, Hovdey's school schedule became increasingly intensive as he neared his mid-June graduation. In late May or early June, Carolyn Koo contacted Hovdey for upcoming assignments but he begged off until after graduation. Koo told Hovdey that she would be contacting him following his graduation and suggested that he also contact Hoa Van to get on the tour driving list. Hovdey followed Koo's advice by paying a visit to the barn in late May to speak with Hoa Van.

Before meeting with Hoa Van, Hovdey spoke with a number of other drivers. In the course of these conversations Hovdey learned about the organizing drive. As he put it, "Everybody was talking about it. Everybody seemed to be excited about it." When Hovdey later spoke with Hoa Van about his availability after his June 19 graduation, he told Hoa Van about the conversations concerning the Union and of his support for that cause. Hoa Van told Hovdey something to the effect, "Union no good. Union bad." Nevertheless, Hoa Van gave him no indication that the Company would not need his services.

Subsequently, Hovdey received several phone calls from the Union's supporters urging him to vote in the NLRB election which he did. However, when Hovdey appeared at the polling site, the NLRB agent told him that his name did not appear on the list of eligible voters. Accordingly, he voted by challenged ballot.

On June 21, Hovdey telephoned Carolyn Koo between 8:30 and 9 a.m. about potential work. At this time, Koo told him "I'm sorry to tell you this, but your name is on the list of people who Mr. Gridley said would never work for the company again." Hovdey received no explanation for Gridley's instruction.

(4) Arnold Gridley's June 16 memo

Koo's reference to a "list" relates to Arnold Gridley's June 16 memo. That memo is a directive to Koo and Hoa Van that seven "terminated employees," including Hovdey, Chan, and Terhune, "are not to be re-hired with Cable Car Charters for any position or duty for any reason." In an apparent effort to drive home the point, Gridley required Koo and Van to sign the memo (which he also signed) in order to "certify" that they would not rehire the named employees "under any circumstances."

Either Arnold Gridley himself or someone within his network of trusted advisors compiled the June 16 list. Oper-

¹³ Chan and Terhune roomed together in San Diego. Consequently, Chan specifically ask Van about opportunities for Terhune in order to avoid a separate call.

ations Manager Legaspi saw Gridley hand a draft of the memo to Koo for typing. At about the same time, Legaspi claims that he overheard Gridley instructing Hoa Van by telephone to prepare a list of everyone who supported the Union.

Gridley explained that the June 16 memo had been prepared after personnel at the barn (primarily Hoa Van) and the office had reviewed the employee lists. As for the purpose of the list, Gridley testified: "As close as I can remember, most of these people here were part-time, like coming in the summertime for three or four weeks or a month, and I guess the decision was made that some of these people were—we never knew if they were coming back or whether they—or exactly what was going to take place. And we took the position that we wanted to be able to count on people and not just have people that we couldn't count on."

Gridley further claimed that not enough work existed for Chan and Terhune even though they actually began working during summer 1993. As for Hovdey, Gridley explained his inclusion on the June 16 list by claiming that he simply was too unreliable. According to Gridley, Hovdey had turned down work offered by the office as many as 15 or 20 times. Neither Hoa Van nor Carolyn Koo, the two principal management officials directly involved in the assignment of employees up to that time, corroborated this assertion. Indeed, Koo fundamentally contradicted Gridley's claim about Hovdey's reliability.

Gridley's June 16 list names four other employees or former employees. They are: Carl Baisley, Joan Larsen, Heidi Luttjohann, and Thomas Willis. According to Gridley, Baisley had been reported several times for driving too fast and on his last outing it became necessary to replace him reportedly for drinking too much. Gridley asserted that Larsen had been terminated because she repeatedly failed to adhere to the times allotted for her tours and adopted, in effect, an insubordinate attitude when reprimanded for her untimeliness. Legaspi corroborated Gridley's assertions about Larsen's prior termination. Luttjohann only worked for a brief period but, apart from that, Gridley had no recollection about what may have occurred which caused her to land on his June 16 list. Gridley had only a vague recollection that Willis may have merited a "don't hire" designation for failing to report to work or for dangerous driving.

The 1993 payroll records show that Luttjohann and Willis worked in some payroll periods between January and the end of March.¹⁴ Baisley and Larsen do not appear on the 1993 records.

Other Company's records reflect the hiring of four new ticket sellers in June following Chan and Terhune's termination. See General Counsel Exhibit 30 Thus, the Company hired Jack Chin on June 10, Teresa Sanchez on June 11, Vanessa Wong on June 22, and Judith Lewis on June 23. None of these ticket sellers testified nor did any management official testify about the timing of the hiring arrangements for these individuals. Those same records also reflect the hiring of nine new drivers between June 24 and July 12.

¹⁴Specifically, Willis worked in all six of those payroll periods albeit only 3 hours in the period ending March 31. Larsen worked in four of those payroll periods. She last worked in the period ending March 17.

(5) Mozol's termination

Mozol, originally hired in November 1992, worked at the barn. On May 22 Mozol slipped and fell on the barn floor. His fall resulted in injuries to his face, elbows, and knees that required medical attention. In the following weeks, Mozol remained under the care of his physician and unable to work. During this period, he regularly furnished the Company written estimates from his physician about his probable date of return for work. Mozol turned in the last of his doctor's estimates which indicated that he would likely be able to return to work on June 12 or 13.

On the following day, Arnold Gridley telephoned Mozol and left a message on his answering machine stating that he need not return to work anymore because "things were changing, and [he] didn't fit into [the Company's] plans anymore." Later that day Mozol spoke with Gridley by telephone. At this time Gridley told Mozol that the "drivers were costing him money, causing him problems, and [that] it was time for a fresh start" with "new blood." Gridley further told Mozol that he "wouldn't fit into their plans anymore, and that he needed someone else to do better spying for him at the barn." When Mozol pressed Gridley as to whether he was terminated, Gridley responded: "[W]ell, I'm not saying that, but I would encourage you to look for another job." Mozol again pressed for a clear-cut answer but Gridley again encouraged him to look for another job and hung up. Mozol never worked at the Company again. Indeed, by the time of the hearing, Mozol had undergone surgery on his knees twice and was receiving workers compensation.

Mozol also claims that he spoke with Hoa Van and Christine Bennett between the time he received Gridley's answering machine message and the time he spoke with Gridley later. Hoa Van's call related primarily to the procedures necessary to access the driver's schedule on the computer, a task regularly performed by Mozol. For whatever reason, Mozol was less than helpful and Hoa Van apparently became upset. Approximately an hour later, Bennett telephoned Mozol. In the course of their conversation, Bennett told Mozol that she "had begun to take over the operations of the [C]ompany and that [he] didn't fit into their plans anymore." Neither Gridley, Bennett, Hoa Van, nor any other company official addressed the reasons for Mozol's termination or the conversations alluded to above.

b. Further findings and conclusions

In my judgment the General Counsel has established a *prima facie* case that Chan, Hovdey, Mozol, and Terhune were discharged in violation of Section 8(a)(3). In Mozol's instance, the evidence indicates that Mozol's termination resulted from his refusal in May to engage in surveillance of employee union activities. With respect to Chan, Hovdey, and Terhune, I find that the timing and context of their terminations following the Union's inquiry about their eligibility to vote in the election would permit an inference, absent any reasonable explanation, that Respondent suspected these individuals favored the Union and acted precipitously to remove them from employment.

Respondent provided no explanation for Mozol's termination and I therefore conclude that it violated Section 8(a)(3) in light of my previous finding that he was not a supervisor and the clear indication in his June telephone con-

versation with Gridley that his unwillingness to engage in requested "spying" caused Gridley to be dissatisfied with Mozol. Nothing in the record would support a conclusion that this reference related to anything other than Mozol's refusal in May to engage in surveillance of employee Union activity.

Respondent's explanations in the cases of Chan, Hovdey, and Terhune are vague, conflicting, inconsistent and, hence, lack credibility. Although Gridley suggested that, as students, all three lacked reliability, this claim is entirely inconsistent with past policy as evident from Hoa Van's rehiring of Chan and Terhune for the 1993 summer season and the arrangement Hovdey made with Koo to return after he graduated in June. Moreover, there is evidence that other ticket sellers were college students. Further undermining the persuasiveness of Respondent's defense here is the fact that Chan and Terhune were told at the time of their layoff in June that the Company had overhired summer employees when, in fact, it hired additional ticket sellers immediately thereafter.

As Respondent provided no plausible explanation for terminating these three employees, I have concluded that the Union's inquiry about their potential eligibility triggered suspicions by Respondent's officials that they supported the Union and that it acted to terminate them in an effort to preclude them from voting in the election. Accordingly, I find that Respondent violated Section 8(a)(3) by discharging Chan, Hovdey, and Terhune.

3. Complaint paragraphs 10(e) and (f), 14(d), and (15): scheduling changes

Complaint paragraphs 10(e) and (f) allege that Respondent violated Section 8(a)(1) by Hoa Van's statements to employees that their hours had been reduced because they voted for the Union. Complaint paragraph 14(d) alleges that Respondent violated Section 8(a)(3) by changing its scheduling methods around June 14 in a manner which resulted in the reduction or elimination of work hours for 14 drivers and ticket sellers. Complaint paragraph 15, as amended at the hearing, alleges that Respondent failed to notify the Union and provide it with an opportunity to bargain concerning Respondent's changes in its scheduling practices.

a. *Relevant facts*

As noted above, Carolyn Koo and Hoa Van normally scheduled employees for work. Sometime in mid-June Christine Bennett either directly took over the scheduling function or supervised the scheduling process. Until Bennett became involved, drivers and ticket sellers collaborated closely with both Hoa Van and Koo about their schedules. Bennett claims that after her return in the Spring to assist her father on a part-time basis, she had an opportunity to see and overhear what was going on in the cable car operation at the Geary Boulevard office. This exposure let Bennett to the conclusion that all was not going as well as Legaspi assured her. According to Bennett, in late May or early June she began to notice that Koo, in effect, was playing favorites in making driver assignments and she consequently became interested in the scheduling.

In early July, Gridley relieved Koo of her duties in connection with assigning drivers for promotions. When that occurred, Koo prepared a memo to the drivers which she

sought to have posted at the barn. Koo's memo of July 6 notified the drivers that effective immediately she would no longer be assigning drivers for promotions and that they should contact Hoa Van or Christine Bennett for promotion assignments.

Contrary to Respondent's contention that Bennett became involved after discovering mismanagement of the scheduling process, the General Counsel contends that Bennett's involvement in those procedures was primarily motivated by union animus. With the exception of Michelle Zimmerman, each of the 14 employees named in complaint paragraph 14(d) testified. Virtually all of these employees actively supported the Union openly and there is ample evidence that Respondent knew of their sympathies by the time the events described below occurred.

Michael Buckey, hired in April 1991, spent about two thirds of his time as a ticket seller-dispatcher on the shuttle operation and the remainder on tours. Based on the posted schedule for that week, Buckey was off on Tuesday, June 15. However, that morning, the day after the chaotic safety meeting at the barn, Buckey learned from some unspecified individual that the work schedule had been changed. Accordingly, Buckey and another ticket seller went to the barn to check on the schedule change and Buckey found a new schedule posted. This new schedule, dated June 15, contained the notation "Prepared by Christine Bennett." Buckey recalled that Bennett's schedule, which superseded Hoa Van's schedule for the same period, reduced Buckey's workweek by 1 day. Buckey further asserted that the schedules in the succeeding weeks until the shuttle operation stopped in July reduced not only his days of work but also the number of hours of work on those days when he did work.¹⁵ In prior years, Buckey claims, he frequently was called to work for days beyond his regularly scheduled days during the peak summer season.

After Buckey saw the revised schedule on June 15 he went to Hoa Van's office and asked to speak with her. Hoa Van stepped out of the office, locked the door and told Buckey that employees were no longer permitted in the office as they routinely had been in the past. Buckey then asked Hoa Van why the schedule had been changed and Hoa Van responded that Bennett changed the schedule because the employees "had made the family very angry [at the June 14 meeting]." Hoa Van further told Buckey that he would have to speak with Bennett if he "wanted anything done with the scheduling."

When Buckey reported for work on Friday, June 18, the day following the election, he noticed that the scheduled had again been changed and again asked Hoa Van for an explanation. Hoa Van told Buckey that Bennett had made the added changes and then said "Union in, you out." From then until the shuttle ceased operating in July, the original weekly schedule, Buckey claims, was often revised two or three times during a workweek.

Fred McKenzie started working for the Company in June 1990 primarily as a ticket seller-dispatcher on the shuttle. As noted above, he is Legaspi's roommate. The posted schedule

¹⁵ The 1993 payroll records reflect that Buckey worked the following hours: PPE 5/12—63; PPE 5/25—71.25; PPE 6/10—82; PPE 6/23—72.75; PPE 7/8—54.75; PPE 7/21—35.50. See G.C. Exh. 26, p. 58.

assigned McKenzie for work on June 18, the day after the election. However, before he left home that morning, Hoa Van telephoned McKenzie to advise him that he should not come to work. Hoa Van explained, "Mr. Gridley said union in, you're out, no work."

Later, on June 19 or 20, Hoa Van called McKenzie back to work. When he reported, Hoa Van provided him with a small slip of paper containing his work schedule. McKenzie recalled that this revised schedule reduced his work from 5 or 6 days per week, which he typically worked during the peak summer season, to 2 or 3 days per week.¹⁶ McKenzie's reduced schedule continued until the shuttle operation closed on July 23.

Between July 23 and the resumption of the shuttle service in December, McKinzie called the barn intermittently inquiring about work but each time either Hoa Van or Patrick Nolan informed him that no work was available. McKinzie claims that on approximately three occasions he observed a company cable car bearing the distinctive shuttle signs in the Fisherman's Wharf area operated by driver Savage and newly hired ticket seller Chin.

Kohlee Gleffe has worked as a ticket seller-dispatcher primarily in the tour operation since March 1991. In July, Gleffe handbilled at Pier 41 along with other Company employees. She claims that the next schedule reduced her work by 1 day a week. Later, in September, Gleffe testified that her schedule was reduced another day. Gleffe recalled that in between those occasions the Company stopped posting schedules. After that Hoa Van verbally informed Gleffe of her schedule.¹⁷ Purportedly, Hoa Van told Michael Buckey on one occasion after Gleffe's schedule had been reduced that he might get Gleffe in "more trouble" if he spoke to her while she worked at Pier 41.

Randy Morrison began work for the Company as a ticket seller-dispatcher in August 1992. Morrison estimated that he worked 5 days a week during the first 6 months of 1993, about 35 hours per week. He recalled that on the schedule which was posted on June 14 when he attended the safety meeting he was scheduled to work 5 days. The following day when he reported for work, Hoa Van told Morrison that Bennett had prepared a new schedule and would handle the scheduling thereafter. This new schedule, Morrison recalled, reduced his schedule by 1 day that week. Morrison attempted to telephone Bennett several times a day throughout that week to discuss the schedule but Bennett did not return his calls. According to Morrison, no further schedules were posted after that. When Morrison asked Hoa Van about the following week's schedule, she told him that he would have to telephone in to find out if he was to work. In that following week, Morrison was scheduled for 2 days of work. After a few more weeks, Morrison began receiving his schedule from Hoa Van on a little slip of note paper.

John Modica began working for the Company in October 1992 as a ticket seller. Modica recalled that in the first 6

¹⁶ McKenzie's recollection about the drastic cut in his schedule appears to be off by about a month. The 1993 payroll records reflect that he worked the following hours: PPE 5/12—67.25; PPE 5/25—58.75; PPE 6/10—65.50; PPE 6/23—58.50; PPE 7/8—57.25; and PPE 7/21—21.75. See G.C. Exh. 26, p. 63.

¹⁷ When Gleffe testified as a rebuttal witness, however, she said that her schedule was reduced to 3 days in late August or early September. Later it later went down to 2 days.

months of 1993 he was regularly scheduled to work 4 days a week. Following the election, Modica noticed that he was scheduled for only 3 days. He immediately went to the office to ask Hoa Van why his schedule had been changed. Hoa Van pointed to the button on Modica's vest and told him, "That's what happens . . . when the union gets involved." About this same time, Modica noticed that new drivers and ticket sellers were being hired. Subsequently, Modica's scheduled hours on the days he did work were reduced and he later began receiving his schedule on small slips of paper from Hoa Van. When he first received his schedule in this fashion, Modica again ask Hoa Van why his hours had been cut and she again blamed it on the Union.

As noted before, Jon Palewicz, the Union's observer at the election, worked as a shuttle driver. Since February, Hoa Van scheduled Palewicz for work on Wednesday and Thursday to accommodate his employment elsewhere. About 2 or 3 days after the election, Hoa Van telephoned Palewicz to inform him that his schedule had been changed to Friday, Saturday, and Sunday, days which Palewicz could not drive.¹⁸ When Palewicz complained to Hoa Van about his revised schedule, she told him that he would have to speak with Bennett. Although Palewicz telephoned the office on several occasions seeking to speak with Bennett, he was never able to make contact with her.

Kent Bishop has worked as a driver since 1987. He primarily drove promotions although occasionally he received a tour assignment. Typically, Bishop called Carolyn Koo every other day or so to check on the available promotions. At the time of the election, Bishop claims that he had eight promotions scheduled for the latter half of July. Shortly after the election, Bishop telephoned Koo to check on additional promotions. On this occasion, Koo told him that she could not help, that she did not know who could, and that the promotions he already had scheduled were canceled. During his tenure, Bishop had never before experienced a wholesale cancellation of his promotions.

Bishop later learned from Hoa Van that Bennett had taken over the assignment of promotions. Thereafter, Bishop was unable to reach Bennett "for days" and had begun to think that he was out of a job. Subsequently, he was assigned to do one or two of the July promotions that he had previously been assigned but over all his assignments dropped off following the election. Bishop worked 322.75 hours in 1993. Of that amount, he worked 205 hours in the pay periods ending entirely before the election, i.e., through the period ending June 10.

William Segen works as a tour and promotion driver. He started in 1982 and worked 2 years. He was hired again in July 1989. In the 6-month period preceding the election, Segen worked a set schedule—arranged with Hoa Van—on Sunday, Monday, and Wednesday during the busier part of the year. In the slow season his set schedule would be reduced to Monday and Wednesday.

Segen recalled a schedule posted after the election which had been prepared by Bennett. Subsequently, Segen claims,

¹⁸ The 1993 payroll records reflect that Palewicz worked the following hours in the pay periods ending after the election: 6/23—31; 7/8—29.75. No work is reflected thereafter. According to Palewicz, he was once scheduled to work as a tour driver on a Wednesday and Thursday following the election. In the past, Palewicz only rarely worked as a tour driver because of problems with his voice.

the posted schedule was discontinued and Hoa Van began handing out little slips of paper with only the individual's weekly schedule. Beginning at this time Segen's schedule began to be reduced little by little. In 1993, Segen worked a total of 457 hours; 253.25 of those hours were worked in the pay periods ending prior to the election which would have included the slower months from January through April. In the period between October 1 and the signing of the Union agreement, Segen received no work. Segen further claims that the Company also reduced his hours even when he did work.

The Company hired Douglas Horning in October 1991. Initially, Horning worked as a shuttle driver but over the course of 1992 and 1993, he worked primarily as a tour driver and to a lesser extent as a promotion driver. Horning estimated that by the time of the election he had eight or ten promotions scheduled into August.

Following the election, Hoa Van told Horning that his scheduled promotions had been canceled and that he would have to speak with Bennett to reschedule any promotions. Although Horning had experienced situations where an individual promotion would be canceled, the wholesale cancellation of promotion assignments had never occurred before. In addition, Horning estimated that by July his tour driving had been cut in half even though he made himself available for added work.

Luis Recinos started with the Company as a promotion driver in September 1989. Beginning in 1990, Recinos became a ticket seller and continued in this capacity for about a year. Thereafter, Recinos worked primarily as a shuttle driver but occasionally he drove promotions until he left the Company's employ.

Recinos had numerous conversations with Hoa Van about the Union. In the context of these conversations regarding the Union, Hoa Van made some less than flattering remarks to Recinos about other employees. Thus, he recalled that she referred to Randy Morrison as a "loud mouth" and Douglas Horning as a "trouble maker."

Recinos worked a relatively set schedule as a shuttle driver prior to the NLRB election. He testified that "drastic" schedule changes occurred after the election. Although Recinos worked primarily on the shuttle which the Company discontinued on July 23, the first dramatic reduction in Recinos' schedule even before that event. Thus, in the pay period ending July 8, Recinos worked 59.25 hours but in the pay period ending July 21, he worked 25 hours.

Diana Miles began working for the Company May 1986 as a tour driver. In addition, she drives promotions. For about a year preceding the election, Miles worked a steady tour schedule which called for her to drive on Tuesday, Wednesday and Thursday each week. By the time of the election, Miles had also arranged to drive approximately 13 promotions on Saturday and Sunday during July and August. One of her prearranged promotion jobs involved driving a group to and from the popular free concerts at Stern Grove Park in San Francisco each Sunday in the summer.

Within a couple of weeks following the election, Miles' steady tour schedule ended abruptly. At that time, Hoa Van informed Miles that Bennett was now preparing the tour assignment schedule and instructed Miles to call the barn each day around 8:30 a.m. to find out if she had work for the day. If so, Hoa Van would then tell Miles what time to report for

work. Miles asked for an explanation of this change and Hoa Van informed her that she would have to speak to Bennett about it. Miles, like others, made several unsuccessful attempts to reach Bennett. However, on one occasion Miles picked up an extension phone in the barn and Bennett happened to be on the line. When Miles asked Bennett about the schedule, Bennett told her that she would have to go through "channels" and speak to Hoa Van. Later, Miles complained to driver Savage about this new call-in procedure. Savage, who gave no public indication that he supported the Union, told Miles that he never had to call because he always knew about his schedule. After this call-in procedure went into effect, Miles estimates that her tour driving dropped at first to 2 days a week and subsequently to 1 day a week.

In this same period, Carolyn Koo left a message on Miles' answering machine advising that all of her July and August promotion assignments had been canceled. When she spoke to Koo the following day about this development, Koo informed Miles that Arnold Gridley had instructed Koo to cancel the assignments. Although Miles later saw others driving the Stern Grove assignment, she never received that assignment further in 1993. Miles estimates that she subsequently received a couple of the promotion driving assignments. Miles assumed that she received one of those assignments, a 10-1/2 hour wedding promotion, because no other driver would take it due to its very undesirable length.

Robert Telles began working as a tour driver in August 1988. Suffice it to say from the findings above that Telles participated actively in the organizing campaign and that his sympathies were known to management.¹⁹ For about 2 years prior to the election Telles worked a relatively regular schedule of 3 or 4 days a week totaling 28 and 30 hours. Telles claims that after handbilling at Pier 41 his hours were cut drastically; he testified that he went a couple of weeks without any work at all and then he began to get assignments for a day a week. Telles also began receiving his schedule on a small slip of paper.

William Trulock started with the Company in August 1989. Trulock worked primarily as a tour driver but from time to time he also drove the shuttle and drove promotions. In fact, by the time of the election Trulock had 11 promotions booked. Prior to the election, Trulock drove a relatively regular schedule of days but his hours of work would vary.

Following the election, Trulock noticed that the schedule was missing and spoke to Hoa Van about it. At that time, Hoa Van told Trulock that employees no longer had "hours" and that Bennett was now in charge of scheduling. Hoa Van further told him that "Mr. Gridley had dictated that" and that was the "way it worked when you had a union." She told Trulock to contact Bennett about the scheduling which he attempted to do by calling her at her bakery but Bennett never returned his calls. According to Trulock, all of his previously scheduled promotions were canceled and that he was "basically de hired."

¹⁹ In fact, Telles claims that he even attempted to interest Hoa Van in joining the Union but she was definitely not interested. On another occasion, Philip Wright and Telles had a personal discussion unionization during the organizing drive in which Telles made his support of the Union quite clear and declined Wright's invitation to "come over to management." The General Counsel makes no claim that the Telles-Wright exchange was unlawful.

Michele Zimmerman started with the Company as a shuttle and promotion driver. In March or April, Legaspi arranged for Zimmerman's promotion to the part-time position as its driver administrator. Although Zimmerman continued to drive 2 or 3 days a week, an additional 2 or 3 days were added to her schedule for these new duties. As the driver administrator, Zimmerman essentially served as the driver liaison with the Department of Motor Vehicles. In this role she had access to the drivers files as she was required to be familiar with the driver certifications and qualifications.

Zimmerman was not involved initially in the organizing campaign. In fact, Legaspi testified that Zimmerman once complained to him about drivers harassing her to take a position on the Union. Legaspi further testified that Zimmerman subsequently obtained a couple of the union pins distributed at the barn, made them into earrings and began wearing them at work more as a joke than as an indication of her support for the Union.

In a sequence of events which began a short while after Zimmerman wore the earrings, Bennett removed the driver files which Zimmerman used, told Zimmerman that she was not to come to the barn until further notice. In the middle of June, Zimmerman complained to Legaspi about the cut in her driving hours. Legaspi claims that he took these matters up with Arnold Gridley after Zimmerman's hours were reduced. According to Legaspi, Gridley alluded to Zimmerman's wearing union pins, referred to Zimmerman as one of Legaspi's "foul mouthed family," and informed him that her hours had been cut because she was a union organizer. When asked if he had made this union organizer statement attributed to him by Legaspi, Gridley testified, "Not to my knowledge."

Bill Mar, a part-time ticket seller, began working for the Company in 1991. He works primarily in the summer as he too is a student. Mar, called as a witness by Respondent for other reasons, noticed that when he worked during the 1993 summer season he "hardly ever [saw some of the union activists]."

In view of the foregoing anecdotal evidence by employees and Bennett's claim that Koo in particular favored certain drivers to the detriment of others, I have analyzed the 1993 payroll records in evidence. Table 1, below, lists that group of drivers named in the General Counsel's complaint, except for Michelle Zimmerman.²⁰ Table 2 lists a group of drivers identified as either opposed to the Union or essentially neutral.²¹

²⁰Zimmerman was excluded because she had nondriving hours added to her schedule and removed from her schedule during relevant times.

²¹Palewicz, who described himself as the Union's "bean counter" during the organizing drive, identified drivers Bleyle, Loeffler, Schaeffer, Travers, and Whitsell as individuals who expressed opposition to the Union during the organizing campaign. McKenzie testified that he never observed William Savage wearing a union pin. Even though Buckey believed Vradenburg voted for the Union, he described Vradenburg as essentially neutral toward the Union and testified that he never participated in the leafletting. Bleyle and Schaeffer testified for Respondent. Both said they supported an employee organization but opposed outside representation. Although Schaeffer claims he voted for the Union in order to participate in the process, he obviously has developed a special relationship with the Gridley family over the years as evidenced by his inclusion in their business trips to Japan and Hawaii, and his other efforts on be-

If, as I believe, Buckey's recollection is accurate, the first schedule reflecting Bennett's involvement in that process appeared on June 15. Accordingly, the first period runs from the beginning of the year through the last full pay period before a Bennett schedule appeared which is the period ending on June 10. The second period runs from the next pay period (the one ending on June 23) through the last full pay period ending before the collective-bargaining agreement went into effect which is the pay period ending on December 9.

Twenty-four periods are reflected in this combined time span, 11 in the first period and 13 in the second.²² The parenthetical references appearing in the hours columns show the number of pay periods the employee worked in that time span. The hours in the first column reflect at most one or two pay periods in the busy season (said to run roughly from the Memorial Day weekend through the Labor Day weekend) while the second column reflects six or seven pay periods in the busy season.

Table 1

<i>Drivers Identified with the Union Organizing</i>	<i>1993 Average Hours PPE 1/20 Thru 6/10</i>	<i>1993 Average Hours PPE 6/23 Thru 12/9</i>
Kent Bishop	18.63 (11)	9.81 (12)
Douglas Horning	45.80 (11)	32.46 (12)
Diana Miles	44.50 (11)	34.66 (12)
Jonathan Palewicz	23.55 (11)	30.38 (02)
Luis Recinos	50.39 (11)	24.47 (04)
William Segen	31.66 (08)	23.69 (08)
Robert Telles	49.89 (09)	23.69 (10)
William Trulock	44.84 (11)	21.89 (11)

Table 2

<i>Drivers Opposed to or Neutral About the Union</i>	<i>1993 Average Hours PPE 1/20 Thru 6/10 1993</i>	<i>Average Hours PPE 6/23 Thru 12/9</i>
John Bleyle	30.43 (10)	47.48 (13)
Joan Loeffler	40.33 (06)	51.21 (12)
William Savage	37.50 (11)	60.94 (13)
Henry Schaeffer	66.73 (11)	85.21 (13)
Brendan Travers	45.61 (11)	71.94 (13)
Gary Vradenburg	46.36 (11)	72.10 (13)
George Whitsell	51.57 (11)	71.37 (13)

Additionally, the Company hired 25 new drivers in the period between June 13 and November 19. See General Counsel Exhibit 30. In the pay periods reflected in the June 23 through December 9 period, the 25 new drivers worked an aggregate total of 2092.25 hours.

Table 3 sets forth the impact on the ticket sellers during the same two time spans. However, their situation (with the

half of the Company. Savage also testified for Respondent but did not address his views concerning the Union.

²²The Company pay periods are roughly biweekly. For whatever reason, the only pay period in January occurred on the 20th. In some instances, pay adjustments appear to have occurred up to a week after the pay period. If no hours of work are reflected in these adjustments, they have not been included in the computations reflected in the tables.

exception of Gleffe, who worked primarily as a tour ticket seller) is obviously affected to a greater degree by the discontinuance of the shuttle operation on July 23 addressed below.

Table 3

<i>Ticket Seller</i>	<i>1993 Average Hours PPE 1/20 Thru 6/10</i>	<i>1993 Average Hours PPE 6/23 Thru 12/9</i>
Michael Buckey	65.59 (11)	44.06 (04)
Kohlee Gleffe	51.89 (11)	42.12 (13)
Fred McKenzie	57.00 (11)	38.88 (04)
John Modica	40.70 (11)	35.75 (04)
Randy Morrison	54.41 (11)	36.25 (04)

In the period from June 10 through October 14, the Company hired 10 new ticket sellers. In the pay periods ending from June 23 through December 9, those new ticket sellers worked an aggregate total of 1060 hours. The payroll records show that ticket sellers Buckey, McKenzie, Modica, and Morrison did not work at all after the shuttle closed. Hoa Van explained that they were not called because they were shuttle employees.

There is no evidence that the Union was ever notified of Respondent's change in scheduling practices.

b. Further findings and conclusions

Based on the testimony of Buckey, McKenzie, and Modica, I find that Supervisor Hoa Van violated Section 8(a)(1) by informing them that their work hours had been reduced because the employees had selected the Union. As previously noted, I do not credit Hoa Van's claim that she never discussed the Union with virtually anyone.

In addition, I find that the General Counsel established a *prime facie* case that the change in scheduling which began in mid-June resulted from an antiunion motivation. This conclusion is supported by the remarks of Hoa Van found unlawful in the preceding paragraph and the empirical evidence reflected in the Company's payroll records. That evidence unmistakably reflects that after mid-June work for the prounion drivers significantly decreased and work for those drivers who either opposed the Union or who were not closely identified with the Union significantly increased. Moreover, despite the steady decline in hours for the prounion drivers and ticket sellers, the Company continued to hire new drivers and ticket sellers. In the instance of Palewicz, one of the most visible prounion employees, the mere change in his work schedule to different days of the week virtually resulted in his constructive discharge from the Company as the new schedule conflicted with his work elsewhere. Hence, even though Table 1 above shows that he was the only prounion driver whose hours increased after the election, that was short lived as he was essentially put out of work altogether.

I find further that Respondent has failed to meet its *Wright Line* burden of persuasion in connection with the changes in scheduling at issue. In fact, Respondent's defense is virtually limited to Christine Bennett's self-serving claim that Koo was favoring certain drivers over others. Respondent made no effort to establish that Koo's alleged favoritism was ever raised as an issue by any driver or ticket seller. All things

considered, the distribution of hours which resulted from the scheduling by Koo and Van prior to Bennett's involvement indicates some degree of evenhandedness not reflected thereafter. Moreover, I do not credit Bennett's assertion that she never received calls from employees seeking an explanation about the scheduling. On the contrary, I find in accord with the testimony of several employees that numerous repeated attempts were made to contact Bennett in order to obtain an explanation for the scheduling changes and conclude that her secretiveness in connection with the changes she made further illustrates its vindictive character. Finally, Respondent made no attempt to explain the necessity for incidental changes such as occurred with respect to Palewicz and I can perceive of no legitimate reason for that change from the record before me. I therefore find that commencing on June 15, Respondent deliberately reduced the hours of work for employees who openly supported the Union and thereby violated Section 8(a)(3).

Respondent became legally obliged to bargain with the Union at the time of the election when the employees overwhelmingly voted in favor of representation. *Livingston Pipe & Tube*, 303 NLRB 873, 879 (1991). Based on the evidence in this record, I find that the changes in the promotional scheduling, including the wholesale cancellation of assignments previously made by Koo and the system whereby employees volunteered for assignments, occurred after the employees selected the Union as their representative. I further find that Respondent's discontinuance of its posted schedule procedure, the imposition of the requirement that some employees call in on a daily basis to determine if they were required for work, and the disregard for information about employee availability which the drivers and ticket sellers previously furnished to the Company and which it had always considered in making assignments also occurred following the election. As all of these matters had a clear impact on the hours and terms of employment, I conclude that they were mandatory subjects of bargaining and that Respondent was obliged to provide the Union with prior notice of these changes and an opportunity to request bargaining about those matters before they were implemented. As Respondent failed to do so, I find that it violated Section 8(a)(5), as alleged.

4. Complaint paragraphs 10(g), (h), and 14(f):
the early closings

Complaint paragraph 10(g) and (h) alleges that Hoa Van violated Section 8(a)(1) by telling employees that no work was available because the Union had closed the shuttle and that the shuttle had been closed in retaliation for employee leafletting. Complaint paragraph 14(f) alleges that on various dates in July, Respondent closed its shuttle and tour operations for the day because employees had engaged in handbilling on behalf of the Union. Respondent contends that the closings referred to by the General Counsel occurred because of a lack of business which resulted from the Union's boycott activities.

a. Relevant facts

On July 2, the Union commenced handbilling at Pier 41 and continued this activity off and on but with some degree of frequency until an agreement was reached in December. On a few occasions, the Union also leafleted the shuttle op-

eration at Sabella's Restaurant in the Fisherman's Wharf area and Macy's on Union Square, and on a couple of occasions handbilling occurred at the Geary Boulevard office. The handbills described the Union's grievances with Respondent and the handbillers asked potential customers to boycott Respondent's cable cars.

Respondent closed its tour and shuttle operations early on July 3, 4, 5, and 9. The shuttle did not operate at all on July 10 and 11. The tour operation appears to have operated for a brief period on July 10 and not at all on July 11. The Respondent claims that these closures resulted from the adverse effects of the handbilling on its business. The General Counsel claims that the closures resulted from the fact of handbilling alone and amounted to retaliation by Respondent for the Union's protected handbilling activity.

On July 3, between 6 and 6:30 p.m., Hoa Van ordered Mike Buckey to close the shuttle and return to the barn after he informed her that handbillers had appeared at Sabella's. Buckey protested claiming that it was very busy. In response, Hoa Van told Buckey that Arnold Gridley wanted the shuttle shut down and that in the future whenever the handbillers arrived Buckey was to call her and shut the shuttle down.

On July 4 at about 3 p.m., some leafletters again appeared at Sabella's. Following instructions, Buckey radioed Hoa Van to inform her of the renewed handbilling. She again ordered Buckey to shut the shuttle down even though it was July 4, typically one of the busiest days of the year. Repeating the essence of her instruction on the day before, Hoa Van told Buckey: "Mr. Gridley said that whenever they show up, you close down." Hoa Van denied that she ever gave Buckey such an instruction.

On July 5, Randy Morrison worked as the dispatcher at Sabella's. Shortly after 1 p.m. Hoa Van ordered Morrison to close the shuttle because handbillers had appeared at Pier 41.²³ On either the next day or the following day as Morrison prepared to leave the barn for work at the Sabella's shuttle station, Hoa Van instructed him to call if the leafletters showed up "because Mr. Gridley said he will not run the operation if there are leafletters out there." Morrison called Hoa Van after the handbillers arrived at Sabella's that day and she ordered him to close down. Morrison claims that it was a busy day.

Buckey dispatched again on July 9 at Sabella's and the shuttle was completely closed by 2 p.m. that day after the handbillers arrived. Buckey claims that Hoa Van called him at home before he left for work on July 11 told him that no cars would be leaving the barn because Arnold Gridley was upset with the handbilling the day before.

Douglas Horning recalled that Ty Van told him that Arnold Gridley ordered the tour operation shut down early on the July 4th weekend because of the handbilling activity. John Bleyle testified that his assignments on a tour car were

canceled after he arrived at the barn ready for work over the July 4th weekend. Bleyle claims that either Hoa Van or Ty Van told him that they were closing the tour operation because of the handbilling at Pier 41.

Ty Van—the supervisor who normally oversaw operations at the Fisherman's Wharf area—acknowledged that the tour and shuttle operations were closed early on some occasions after the handbilling began. However, contrary to the on-the-scene observations of Buckey and Morrison, Ty Van asserted that the tour and shuttle business became so slow on those occasions that continued operation was not warranted. He recalled that on one of those days he spoke to his wife about the lack of business. Later Hoa Van relayed instructions to him from Arnold Gridley to close down if business was slow. Hoa Van did not testify about the circumstances surrounding the early closings.

When he testified on sur-rebuttal, Ty Van recalled additional detail. Thus, he said that after he returned to the barn on the evening of July 9, he discussed the lack of business with Christine Bennett. According to Ty, Bennett decided to shut down tour and shuttle operations for a couple of days to see what developed. Bennett did not testify about the closing of the shuttle or tour operations on these 2 days.

Arnold Gridley testified that he received word about the handbilling from some unspecified person at the barn at some unspecified time over the July 4th weekend and that he personally went to Pier 41 to observe what was going on for 2 or 3 hours. Gridley claims that the leafleteers were acting like "storm troopers," yelling, using profanity, and otherwise interfering with the ticket sellers. However, he provided no testimony about ordering the operation to close early.

Company records reflect that the shuttle ticket sales by 6 or 6:30 p.m. on July 3 exceeded by far the sales for any single day in June. More shuttle tickets were sold on only one other day in July. The sales by 3 p.m. on July 4 exceeded most days in June. In light of the fact that more sales appear to occur later in the day, even the 78 shuttle tickets sold by 1:20 p.m. on Monday July 5 and the 91 shuttle tickets sold by 2 p.m. on July 9 indicates a reasonable amount of shuttle activity.

b. Further findings and conclusions

I have concluded that Hoa Van's instructions to Buckey and Morrison to close when the handbillers appeared reflects an unlawful retaliatory purpose that violates Section 8(a)(1) rather than sematical shorthand to close if the handbilling caused business to fall off. Based on these unlawful statements as well as the firsthand evidence of Buckey and Morrison about the state of business which is supported by Company records, I find that the General Counsel has established a prime facie case that operations ceased early on those dates in retaliation for the handbilling activity.

The explanations provided by Respondent are self-serving and not supported by its own records. Accordingly, I find Respondent claim that the early closings resulted from a lack of business activity unpersuasive. Instead, I have concluded that Respondent's early shutdowns and interruptions of service between July 3 and 11 were motivated by a retaliatory purpose rather than a business motive. As such, I find that this action and the instructions to Buckey and Morrison to

²³ This credited account appears in Morrison's rebuttal testimony. I give it some credence solely because it appears to be corroborated to some degree by the contemporaneous dispatch record Morrison prepared and the Company's revenue sheet for July. See G.C. Exhs. 34 and 51. In his testimony during the General Counsel's case-in-chief, Morrison provided a different account with his unabashed aura of self-confidence. In this account, he said he was not assigned to work that day. Instead, Morrison claimed to be leafletting at Sabella's when Ty Van drove up in the ticket car and closed the shuttle operation.

carry it out violated Section 8(a)(1) and (3) of the Act, as alleged.

5. Complaint paragraph 14(g): Gholamreza Radpay's layoff

Complaint paragraph 14(g) alleges that Respondent violated Section 8(a)(3) by laying off Gholamreza (Ray) Radpay on about July 21, in the alternative, by failing to recall Radpay from the layoff. Respondent contends that it laid mechanic Radpay off for lack of work and that it chose Radpay for layoff because he was the least senior mechanic.

a. *Relevant facts*

Arnold Gridley hired Radpay as a mechanic in October 1992. Radpay earned a Mitsubishi certification as a factory trained mechanic and, prior to his employment by Respondent, he spent 30 years employed in that trade. Radpay joined Respondent's other two mechanics, Loi Ton Thoi and Hung Tran, in performing mechanical work on the cable car fleet as well as miscellaneous other vehicles and watercraft owned by the Company or Gridley.

Radpay typically worked Monday through Friday from 8:15 a.m. until 4:30 or 5 p.m. The Company's payroll records reflect that Tran worked similar hours but Thoi worked considerably less hours during the first half of 1993 and then his hours abruptly increased after Radpay was laid off. Both Radpay and Thoi earned \$13 an hour; Tran earned \$12 an hour. At one point, Thoi alluded to Tran as one of his assistants who helped with heavy work.

Radpay claims that he worked for Respondent as the lead mechanic. In this connection Radpay received work orders from Hoa Van describing the cable car mechanical problems and he, in turn, divided the work among the other two mechanics and himself. Although Radpay did not criticize the work of the other two mechanics, he claimed that neither exhibited the skills one would expect of mechanics with considerable experience or training.

During the Union's organizing drive Radpay signed an authorization card provided to him by Lory Cantino and, as noted above, wore a union pin provided to him by Randy Morrison. Radpay solicited authorization cards from, and offered union pins to, Loi and Tran but they refused to sign the cards or wear the union pins. In addition to the unlawful interrogations and threat by Hoa Van and Ty Van discussed above, Radpay asserted that Phil Wright also questioned him about his reasons for supporting the Union and promised Radpay that the Company would establish at least some of the benefits which Radpay cited to Wright as reasons for supporting the Union.²⁴

Radpay claims that he never received any criticism of his work until after the election. Following the election, Radpay noticed that Hoa Van no longer permitted him to distribute the mechanics work. Instead, she divided the work herself and, to Radpay, it appeared that most of the work went to the other two mechanics. Radpay spoke to Hoa Van about this development and mentioned that it appeared as though she was attempting to run everything like she was a member

²⁴Although Wright acknowledged that he spoke with some of the employees, he did not testify about speaking with Radpay specifically. The General Counsel makes no claims that Wright's remarks to Radpay are unlawful.

of the Gridley family. Hoa Van told Radpay that, if she was a member of the Gridley family, she would have "kicked [him] out a long time ago." When Hoa Van testified in connection with the Radpay allegation, no inquiry was made of her concerning this exchange.

Around July 12, Radpay came to work as usual and met Ty Van as he approached the barn entrance. Ty stopped Radpay and sent him home saying that work was slow and there was nothing for him to do. That afternoon Radpay returned to the barn and noticed Thoi and Tran's personal autos parked inside the barn. This struck Radpay as extremely unusual as employees nearly always parked in the lot outside the barn. When Radpay entered the barn, he saw Thoi and Tran working.

Radpay promptly sought an explanation from Hoa Van and Ty Van as to why he had not been called for work. Hoa Van told Radpay that Arnold Gridley had given the order to call Thoi and Tran back to work. Radpay requested that they call the office and ask if he too could be put to work but they refused. Instead, Radpay was told to call the office himself which he did. When Radpay reached the office, he asked to speak with either Arnold Gridley or Christine Bennett. After waiting on the phone for about 15 minutes, Radpay finally left his home telephone number and ask for a return call but his call was never returned. Respondent never recalled Radpay for work.

In effect Hoa Van disputed Radpay's claim that he served in the lead mechanic's role. She claimed instead that she assigned all of the mechanics' work. Apart from that, neither Hoa Van nor Ty Van testified concerning detailed assertions made by Radpay about the events and exchanges which occurred on the day he was laid off. According to Hoa Van, all three mechanics were laid off on July 2 and that approximately 3 days later the two senior mechanics, Thoi and Tran, were recalled. Radpay, she said, was not recalled because he was the least senior mechanic and there was not enough work for all three mechanics. Although Hoa Van conceded that Radpay was hired by the "office," she asserted that no one else was involved in the decision to lay off or recall the mechanics in the scenario she depicted.

b. *Further findings and conclusions*

I am satisfied that the General Counsel established a *prima facie* case of unlawful discrimination against Radpay. Clearly, Radpay's prounion activities caused him to stand out as a known union sympathizer among Respondent's three mechanics. In addition, Respondent's hostility toward Radpay's union activities are evident from the instances of interrogation, threats and promises made directly to him by the Vans and Wright. The General Counsel further established that following the election Hoa Van reduced Radpay's work responsibilities and indicated, apparently for the first time, displeasure that Radpay had not been let go previously. Within a short time later, Radpay was let go and the specific circumstances he described concerning his layoff and his efforts to get back to work strongly suggest a lack of forthrightness on Respondent's part.

Again I find Respondent failed to meet its *Wright Line* burden. I do not find Hoa Van Van's account of Radpay's layoff persuasive. She claims that she first laid off all three mechanics and then recalled only the two most senior mechanics about 3 days later. Although the pay records reflect

some slight reduction in the typical hours of Radpay and Tran in the pay period ending July 8 and an increase in Thoi's hours, the records do not indicate an across the board layoff of mechanics later when Radpay's termination occurred. Radpay's assertion that he observed Tran and Thoi working on the very afternoon of the day of his layoff appears more consistent with the pay records than does Hoa Van Van's account. In addition, the fact that Respondent made no attempt to corroborate Hoa Van Van's account of this layoff, or to dispute Radpay's conflicting account, when it called Ty Van, Tran, and Thoi as witnesses further detracts from the convincing quality of Respondent's explanation.

Although Tran and Thoi clearly had worked for Respondent longer than Radpay, little else supports Respondent's claim that seniority played a key role in the determination to retain them over Radpay. While Radpay's assertion that Tran and Thoi appeared to lack long experience as mechanics might be viewed standing alone as very self-serving, Thoi's characterization of Tran as one of his "assistants" and Tran's lower pay rate tend to lend support to Radpay's claim. Moreover, Respondent's payroll records strongly suggest that prior to the union campaign, Respondent relied principally on Radpay and Tran. Thus, in the early months of 1996, Thoi worked virtually half of each pay period. The fact that Respondent apparently gave seniority little or no weight when considering the distribution of work while it employed all three mechanics detracts from the claim made now that it accorded determinative weight to seniority for layoff purposes especially where little other evidence in this case suggests that Respondent relied heavily on seniority for any purpose.

Moreover, the brusqueness evident in Radpay's layoff also suggests the pretextual nature of the explanation now given for that layoff. Even though Radpay sought an explanation at the time, no one in Respondent's hierarchy apart from Hoa Van Van provided an explanation for Radpay's layoff in mid-summer at the typical peak of Respondent's business either at the hearing in this matter or earlier when Radpay called Respondent's office.

Safety considerations dictate that mechanics occupy a key operational role in every public transit business. The fact that Arnold Gridley himself hired both Thoi and Radpay, who judging by their higher pay rates were the two most experienced mechanics, suggests that they occupied key slots in this organization. Hence, I am convinced that the decision about Radpay's layoff occurred above Hoa Van Van's level, her contrary testimony notwithstanding, and that her explanation for Radpay's layoff does not fully reflect the decision-making process which occurred.

For the foregoing reasons, I find Respondent's evidence concerning the claimed business reasons behind Radpay's layoff weak, unconvincing, and insufficient to establish that Radpay would have been laid off notwithstanding his protected union activities. Hence, I have concluded that Respondent singled out mechanic Radpay for layoff in mid-July because of his union activities. Accordingly, I find that Radpay's layoff violated Section 8(a)(3), as alleged.

6. Complaint paragraphs 14(h) and 15: termination of the shuttle

Complaint paragraph 14(h) alleges that Respondent closed its shuttle operations on July 23 in violation of Section

8(a)(3). Complaint paragraph 15 alleges Respondent failed to notify the Union and bargain over the July 23 action. Respondent admits that it ceased the shuttle service until after the parties reached a collective-bargaining agreement but it asserts that the Union caused the shuttle to be closed by its boycott activities.

a. *Relevant facts*

As noted above, Union agent Julie Wall spoke with Mike Zorn about the possibility of handbilling the Company's operation at the Macy's terminus of the shuttle operation. Wall acknowledged that the Union leafleted on "two or three occasions" at the Macy's Union Square location but when that handbilling occurred is not known specifically.²⁵ However, I find that it is reasonable to infer that it occurred on or before July 23.

On the morning of July 23, a Macy's security chief ordered the shuttle out of its passenger pickup zone. Randy Morrison was the only witness who provided a first hand account of what occurred at Macy's that morning. Morrison, the ticket seller on the first shuttle car out of the barn that morning, testified:²⁶

Q. Well, first of all, when you say you pulled up in front of Macy's, where exactly were you?

A. Alongside the curb—

Q. I see.

A. —at Macy's.

Q. Directly in front or—

A. Directly in front of—it was another name in front of Macy's. They had a specialty store.

Q. Would you recognize the name if you heard it?

A. Yes, I would.

Q. Was it Armani (phonetic) Exchange?

A. Thank you, Armani Exchange.

Q. I see.

A. It was part of Macy's. That's the entrance that we like to find a parking spot for.

Q. All right. Are there awnings or something like that that are immediately in front of the Macy's location on Geary?

A. Yes.

Q. All right. Where were you in relation to the awnings?

A. We were right in front of the door to Armani Exchange.

Q. I see, and then what happened?

²⁵ General Counsel argues in its brief that "[i]t is uncontroverted that neither the Union nor the employees ever leafleted at Macy's." I beg to differ with that bold claim. The finding I have made here is based on Union Agent Julie Wall's testimony early in her cross-examination. Although Wall subsequently hedged somewhat on redirect she never fully recanted her earlier answer.

²⁶ I cite Morrison's testimony in haec verba as the General Counsel's brief seems to characterize Respondent's claims about the action taken by Macy's as hearsay and criticizes Respondent for failing to call a Macy's witness. Morrison's first-hand account obviated the need for Respondent to call a Macy's official concerning this matter as both he and the shuttle driver would have been agents of Respondent with respect to matters, such as this, which arose in the course of their regular employment. Respondent makes no argument on this matter grounded on an account which differs in the least from Morrison's story.

A. When we pulled into the curb we were greeted by a gentleman who had introduced himself as the head of Security for Macy's and told us that we could no longer park in front of his store.

Q. Did he say why?

A. Yes, we asked him why and he said that he knew that there were union problems and was informed that there were going to be picketers there and he didn't want anybody to think that anybody was picketing against Macy's. So, he told us until this whole problem was cleared up that we could no longer park in front of his store.

Q. Did he say what problem, though?

A. Union problems.

Q. Okay. Now, when you were told this what, if anything, did you do?

A. We call Hoa Van on the radio and told her that we could not park in front of Macy's and explained why. Again, she said stand by when we asked her what we should do. Then she came back on the radio and asked if there was spots—if there was a spot across the street, and I said, "In front of the parking garage." And she told us to move and park over there.

Q. And did you?

A. Yes, we did.

Q. Had that happened before, that the shuttle cars in its operation in the Union Square area parked across the street in front of the Union Square Garage?

A. We parked lots of different spots—

Q. Yes.

A. —in Union Square.

Q. But including this particular spot?

A. Yes.

Q. I see, and what happened after that when you parked in front of the Union Square Garage?

A. We parked in front of the Union Square Garage, we remained at that spot, and Hoa Van called us and told us to return to the barn.

Q. Did she offer any explanation?

A. We had been approached by an officer at the spot who told us that he didn't want us to park there, and we radioed that into Hoa Van, and then she told us to come back to the barn.

Hoa Van in turn consulted with the Company's labor attorney, Rechtschaffen, who happened to be meeting with Arnold Gridley's transportation attorney at the barn that morning. Rechtschaffen in turn tried unsuccessfully to reach Macy's security chief and then spoke with Arnold Gridley. Refusing to risk the considerable goodwill the Company had developed with Macy's over the years, Gridley decided to terminate the shuttle operations indefinitely. Rechtschaffen composed a letter notifying the Union of this decision and his associate personally delivered the letter to the Union that afternoon.²⁷

The regular shuttle operation never resumed until after the collective-bargaining agreement was concluded in December. However, on several occasions in November and December, Respondent provided an irregular shuttle service from Wharf restaurants to the Union Square area and on occasion this in-

terim service parked in front of Macy's apparently without incident. Nonetheless, on these occasions Respondent never utilized those drivers and ticket sellers who openly and continuously signified their support of the Union through their preelection campaigning and postelection handbilling. In effect, the shutdown of the regular shuttle service ended the driving assignments for Recinos as well as assignments for ticket sellers Buckey, McKenzie, Modica, and Morrison. In fact, Hoa Van conceded that the latter four were never called for work after shutting down the regular shuttle service.

Union Agent Wall conceded that the Union received Respondent's notice about closing the shuttle on July 23. When General Counsel asked Wall if the Union requested to bargain about the closing of the shuttle, she answered that the Union was attempting to negotiate with Respondent all through this period. Wall testified that the shuttle was discussed in subsequent negotiations until the Company's attorney asked in a private aside that the union negotiators quit talking about the shuttle apparently because his law firm feared its own implication in the shuttle closure charge the Union had filed against the Company. The union negotiators acceded to that request. However, prior thereto the union negotiators had attempted to convince the Company that it could pay for the health plan the Union sought in negotiations if it reopened the shuttle service.

b. Further findings and conclusions

The General Counsel argues that Respondent precipitously ended the regular shuttle service on July 23 in order to retaliate against the Union and its employee supporters. In the General Counsel's view, the Respondent's reason's for closing down the shuttle "are no more than a pretext." Accordingly, the General Counsel argues that when this action is considered in the context of other contemporaneous retaliatory actions Respondent took against its employees for their protected union activities, the conclusion that the July 23 closing of the shuttle was unlawful is warranted.

Respondent contends that it lawfully closed down the shuttle on July 23. It asserts that an "employer is not obligated to operate its business in part or in toto and may cease operations so long as the ceasing thereof is not motivated by antiunion animus." Respondent argues that the shutdown was the intended result of the Union's unlawful handbilling activities and that it had "justifiable business reasons for not jeopardizing its relationship with Macy's. . . ." I find some merit in both arguments.

In connection with his argument that Respondent's reasons for the cessation of the shuttle operation are pretextual, the General Counsel contends that Respondent had other choices available which it utilized in the past that would have allowed it to continue the shuttle operation notwithstanding Macy's prohibition against parking in front of its stores. Thus, the General Counsel asserts that Respondent could have: (1) operated a one-way shuttle from the Wharf to downtown as it did when the shuttle operation first began; (2) conducted a "trolling" operation in the downtown area without the need for a parking zone similar in manner to the trolling which occurred even while the regular shuttle operated; or (3) secured a new parking location in another downtown location for shuttle parking.

I cannot rationally conclude that Respondent closed the shuttle on July 23 for pretextual reasons. The evidence plain-

²⁷ Everyone agrees that the letter, dated June 23, should have been dated July 23.

ly reflects that Respondent lacked ultimate control of the parking arrangement at Macy's and that Macy's obviously withdrew its permission for Respondent to park in its "white zone" to distance itself from this labor dispute. To label this reason a pretext would require, in my judgment, some complicity on Macy's part in devising a scheme to justify closing the shuttle operation. No such evidence exists.

The General Counsel's argument that the pretextual character of Respondent's action on July 23 is evident from its failure to alter its method of operation in order to keep the shuttle open lacks merit. Numerous practical problems stood in Respondent's way of conducting business as General Counsel speculates it could have operated. Even assuming Gridley's claim that he subsequently but unsuccessfully attempted to find alternate space at hotels in the Union Square area lacks veracity, he unquestionably had every reason by that time to expect that the Union would engage in similar appeals and activities wherever it went so that the shuttle would be just as unwelcome at an alternate location as it had become at Macy's. And although Company always had used a trolling technique on a limited basis around the Union Square area and had earlier relied exclusively on this method for some time before negotiating a parking arrangement with Macy's, this approach obviously risks running afoul of the strict traffic control in this busy area.²⁸ Finally, the one-way shuttle concept appears to have been implemented throughout this period on a limited basis as some tour cars carried passengers from the Wharf to the Union Square area enroute back to the barn at the end of the day. However, a regular one-way service obviously would have economic disadvantages.

But practical considerations aside, when faced with the extraordinary circumstances resulting from Macy's action on July 23, I can perceive of no reason why Respondent should become legally obliged to resort to extraordinary means for continuing operations during the Union's boycott. This situation is no different than that of a subcontractor removed from a construction project by a general contractor who does not want to become embroiled in the subcontractor's labor dispute. Nothing requires the subcontractor to continue operations in such a case. None of the cases cited by General Counsel suggests a principle of this sort. Quite to the contrary, the principle that the parties should be left to select their own economic weapons in the course of a labor dispute would seem to suggest a corollary principle that a party is likewise free to devise rational defenses or reactions to the weapons used against it. *American Ship Building v. NLRB*, 380 U.S. 300, 317 (1965). Costly though it may have been to his business Gridley's decision to close the shuttle after Macy's ended their existing parking arrangement on July 23 also served to prevent the shuttle from being perceived as an anathema by other businesses in the area and by City officials.

Although I have concluded that the closing of the shuttle standing alone did not violate the Act, I cannot agree with Respondent's assertion that this situation rationally compares to those other instances found unlawful above when Re-

spondent closed its shuttle and tour operations early. Those situations involved no actual impediment to continued normal operations and even those early closings might well have been justified if Respondent provided persuasive business reasons for doing so. However, the early closing situations are characterized by blunt statements that they resulted solely from the handbilling activity coupled with convincing evidence of customer availability at the time.

However, I have concluded that General Counsel has established a prime facie case that Respondent, following the shuttle's closure, unlawfully discriminated against the high profile union sympathizers who worked on the shuttle. Although some of the shuttle drivers and ticket sellers worked in other parts of Respondent's operation after July 23, or worked on the ad hoc shuttle operation in November and December, Buckey, McKenzie, Modica, and Morrison, who were among the Union's more active supporters, received no further assignments and Recinos, also a union activist who had one of the more diverse work records at the Company, received only minimal assignments and no assignments during the period when Respondent commenced intermittent shuttle operations in November and December.

Hoa Van explained that Respondent did not utilize these individuals in other parts of its operations after the shuttle closed because they had normally worked for the shuttle operation. This explanation essentially begs the question where, as here, Respondent used other shuttle employees not closely identified with the Union and newly hired employees in other operations after the shuttle closed. For this reason, I find Respondent's explanation for virtually ending the employment of these employees after July 23 unpersuasive and insufficient to meet its *Wright Line* burden. Accordingly, I conclude that Respondent violated Section 8(a)(3) by its failure to offer all shuttle employees employment in other parts of the operation after July 23.

I have also concluded based on Wall's testimony that Respondent did not refuse to bargain in connection with the closure of the shuttle operation. Instead, the evidence discloses that the Union wove its discussions about the shuttle into the larger bargaining picture in an effort to achieve an overall agreement at least until it agreed to forego those discussions in deference to the Company's negotiators. Accordingly, I will recommend dismissal of this 8(a)(5) allegation.

7. Complaint paragraph 14(i): the maintenance crew layoff

Complaint paragraph 14(i) alleges that Respondent terminated its cleanup maintenance crew on about July 30 in violation of Section 8(a)(3). The complaint names the following six employees affected by this allegation: Mauricio Valasco, Orlando Ramirez, Porfirio Coyoy, Victoria Mazariegos, Mavilla Reyes, and Rudy Ortiz. Respondent contends that these workers, with the exception of Ramirez, were temporary employees hired to refurbish the cable car bodies who were terminated when the project was completed.

a. Relevant facts

At the outset, General Counsel proffered no evidence that Respondent ever terminated Ramirez. Respondent's payroll records and the testimony of virtually every witness who provided evidence relevant to this issue establishes clearly that

²⁸ McKenzie's testimony that a traffic control officer soon flushed the shuttle out of the parking location across the street from Macy's on July 23 illustrates the point that the City frowns on anything other than momentary stopping in this highly congested area.

Ramirez continued to work at least through the end of 1993. The payroll records reflect that the employment of the other five employees ended in mid-July.²⁹

Porfirio Coyoy, the only maintenance employee who testified, worked for Respondent primarily at the barn for over 2 years. Although Coyoy primarily performed maintenance work, which included washing and cleaning the cable cars before they left the barn, he also engaged in a variety of other jobs which included cleaning inside and outside the shop, performing incidental repairs and preventative maintenance on the cable car bodies, cleaning at Arnold Gridley's apartment and working on the Gridley-owned watercraft. Ramirez, Valasco, Mazariegos (Coyoy's wife), Reyes, and Ortiz all performed work similar to that performed by Coyoy. Ramirez and Coyoy appear to have worked full-time; Valasco, Mazariegos, Reyes, and Ortiz worked part time.³⁰ Respondent included the names of all six on the *Excelsior* list submitted in connection with the election.

During the organizing campaign, Ramirez gave authorization cards and union pins to Coyoy for both himself and his wife. Coyoy returned the signed cards to Ramirez the following day. Thereafter, both Coyoy and Mazariegos frequently wore the union pins to work. Drivers William Segen and Robert Telles, who speak Spanish, talked with the maintenance employees about the Union, occasionally in the presence of Hoa Van. As found above, Hoa Van once made unlawful threatening remarks to Segen about getting rid of the Hispanic maintenance employees if they supported the Union.

Shortly after the election, Respondent reduced Coyoy's work schedule and that of his wife by 1 day a week. Previously, Coyoy had consistently worked 5 days a week and his wife worked 3 days a week. As a part of his regular schedule, Coyoy typically worked Saturday as he regularly attended church on Sunday. Following the election, Coyoy claims that his weekend day of work was switched from Saturday to Sunday.

At the time Hoa Van laid off the maintenance employees, she informed them that they were being laid off because the "company was having business problems and that there was no work." She told Coyoy that she would call him when there was more work but Coyoy did not work again until after the Union and the Company reached an agreement in December. In the meantime, Coyoy telephoned the Company and visited the barn on several occasions to inquire about work. He was always told that no work was available. On some occasions when he visited the barn following his layoff, he observed Ramirez and the Vans engaged in cleaning the cable cars. Robert Telles also observed the Vans and another Asian couple he had never seen before cleaning the

²⁹ The pay records show that none of the remaining five, with the exception of Coyoy, received pay after the pay period ending July 21. During that period, Valasco worked 19 hours; Coyoy worked 21 hours; Mazariegos worked 16 hours; Reyes worked 11.75 hours; and Ortiz worked 17.25 hours. As the previous payroll period ended on Thursday July 8, these records would suggest that Respondent terminated these employees around July 12 or 13. See G.C. Exh. 27.

³⁰ This finding is based on Hoa Van's testimony. In addition, Coyoy testified that Mazariegos regularly worked 3 days a week prior to the election.

cable cars following the layoff of the maintenance crew.³¹ In the period following the election until the end of October, Hoa Van and Ty Van averaged 150 and 144 hours per pay period, respectively.

Robert Gridley testified that Respondent employed Ramirez as its principal maintenance helper and, when work warranted, Coyoy, Mazariegos, Ortiz, Reyes, and Valasco were in the next group called upon to perform maintenance functions. For large projects additional maintenance personnel were hired essentially on a temporary basis. One such project occurred in the spring when the Company undertook a refurbishing project that involved sanding and revarnishing the wooden cable car bodies. Although Robert Gridley implicitly suggested that the six regular maintenance employees involved here performed some of that work, he indicated that the regular maintenance personnel mostly performed the regular cleaning work and other tasks while the refurbishing job was underway. Robert Gridley recalled that this refurbishing project began late in 1992 and was still going on in April but began to taper off in May and June.

Hoa Van characterized Ramirez and Coyoy as full-time maintenance employees. She characterized another group which included Mazariegos, Reyes, and Valasco as part-time employees and a third group as temporary employees. The part-time and temporary employees, she said, "were laid off after the refurbishing project because there was not enough business." Hoa Van never denied the claims made by Coyoy and Telles that she and her husband as well as others engaged in maintenance work after she laid off Coyoy and the other part-time maintenance workers.

The barn payroll records reflect that 14 employees were hired in the Spring whose work, for the most part, ended in early June or before. In this group, one—Phuong Tran—first worked in the pay period ending March 31 and last worked in the pay period ending June 10. Ten others (almost all of whom have Hispanic surnames) first worked in the pay period ending April 14 and the remaining three (who likewise have Hispanic surnames) first worked in the pay period ending April 28. Of this entire group, only three other than Tran worked into a June pay period. None of these individuals appear on the *Excelsior* list.

b. *Further findings and conclusions*

The General Counsel proffered sufficient evidence to establish a *prima facie* case. At least three of the maintenance workers were shown to have openly engaged in union activities. Further, it was shown that Hoa Van made a threat to get rid of the maintenance workers if they supported the Union. Within 3 weeks after the election and during the same period when Respondent unlawfully altered the driver and ticket seller assignments and laid off mechanic Radpay, Respondent also laid off its entire maintenance crew except for Ramirez. Although the maintenance crew layoff ostensibly occurred because Respondent lacked work for them, Coyoy and Telles observed the Vans and others subsequently performing the work which the maintenance crew normally performed.

Respondent argues that the maintenance workers layoff resulted from the completion of the refurbishing project. This

³¹ Before becoming a manager, Hoa Van worked at the barn as a maintenance employee cleaning the cable cars.

argument presupposes that the maintenance workers at issue here worked primarily on that project. I find this claim unconvincing. Even Robert Gridley's testimony indicates otherwise. Moreover, the five laid-off maintenance workers were all included on the *Excelsior* list, a fact that strongly indicates that Respondent regarded them as a part of its regular crew when the list was prepared rather than temporary employees hired for a single project. Coyoy's tenure of nearly 2 years and Mazariegos tenure of more than 1 year lends further support to that conclusion. Finally, Respondent's failure to meet the General Counsel's evidence that others performed maintenance work after this layoff further detracts from the convincing character of the defense.

Accordingly, I find that a preponderance of the evidence supports the conclusion that Respondent laid off five maintenance crew employees because of their support for the Union. I conclude, therefore, that Respondent violated Section 8(a)(3), as alleged, of the Act by laying off its regular maintenance crew in mid-July.

CONCLUSIONS OF LAW

1. 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, and is the exclusive collective-bargaining representative of the following appropriate unit of employees under Section 9(a) of the Act:

All full-time and regular part-time tour drivers, ticket sellers, dispatchers, promotion and shuttle drivers, maintenance employees, and mechanics employed by the Company at its San Francisco, California location, excluding all office clerical employees, sales employees, guards and supervisors as defined in the Act.

3. By coercively interrogating employees concerning their union activities and sympathies and the activities of other employees; by stating to employees that it would never negotiate with their representative so as to suggest the futility of union representation; by threatening employees with harsh discipline, loss of employment, trouble, and the closure of its business if they supported the Union, signed a union authorization card, or wore pronion insignia at work; by making implied promises of benefits in order to induce employees not to seek union representation; by telling employees that Respondent intended to close operations early because of the handbilling activities of their representative; and by telling employees that their work hours had been reduced because they selected the Union to represent them, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By discontinuing Shiela Lambert's shuttle assignments on May 7; by discharging or laying off Susan Chan, Porfirio Coyoy, Carl Hovdey, John Mozol, Victoria Mazariegos, Gholamreza Radpay, Rudy Ortiz, Mavilla Reyes, Andrea Terhune, and Mauricio Valasco in June and July; by constructively discharging Jonathan Palewicz in July; by reducing the work hours of Kent Bishop, Michael Buckey, Luis Recinos, Kohlee Gleffe, Douglas Horning, Fred McKenzie, Diana Miles, John Modica, Randy Morrison, William Segen, Robert Telles, William Trulock, and Michele Zimmerman commencing in June through revisions in its scheduling pro-

cess; by failing to consider Michael Buckey, Fred McKenzie, John Modica, Randy Morrison, and Luis Recinos for employment after July 23; and by closing its shuttle and/or tour operations early, or not operating them at all, on July 3, 4, 5, 9, 10, and 11, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

5. By failing to notify the Union and provide it with an opportunity to bargain about the changes it implemented in its scheduling procedures after June 17 Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (5) of the Act.

6. The General Counsel failed to prove that Respondent violated the Act as alleged by maintaining a written and photographic record of the handbilling activities at Pier 41; by terminating Robin Boykin and laying off Orlando Ramierez; by terminating its shuttle service on July 23; and by refusing to bargain with the Union concerning the July 23 termination of its shuttle service.

7. The unfair labor practices found in 3 through 5, above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent engaged in certain unfair labor practices, my recommend order requires that Respondent cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The order requires Respondent to offer in writing to reinstate Susan Chan, Porfirio Coyoy, Carl Hovdey, John Mozol, Victoria Mazariegos, Gholamreza Radpay, Rudy Ortiz, Mavilla Reyes, Andrea Terhune, Mauricio Valasco, and Jonathan Palewicz to their former or substantially equivalent positions and to make them whole for the loss of earnings they suffered as a result of their discharge or layoff found unlawful herein. The order further requires Respondent to make whole Kent Bishop, Michael Buckey, Kohlee Gleffe, Douglas Horning, Shiela Lambert, Fred McKenzie, Diana Miles, John Modica, Randy Morrison, Luis Recinos, William Segen, Robert Telles, William Trulock, and Michele Zimmerman for the discriminatory actions of Respondent found unlawful herein. In addition, the order requires Respondent to make all employees affected by the early closing of its shuttle and tour operations between July 3 and July 11 whole for the losses suffered by them resulting therefrom.

Backpay, if any, for all employees found to have been unlawfully discharged or laid off herein shall be computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Backpay, if any, for those employees whose work hours were reduced for any cause found unlawful herein shall be computed in accord with *Ogle Protection Service*, 183 NLRB 682 (1970), plus interest as provided in the *New Horizons* case. As the evidence suggests that John Mozol may have received worker compensation payments as a result of injuries he suffered at the barn, any worker compensation benefits he actually receives shall analyzed and treated in accord with *Canova Moving and Storage*, 261 NLRB 639 (1982).

My order also requires Respondent to expunge from any of its records any reference to the discriminatory discharge or lay off of Susan Chan, Porfirio Coyoy, Carl Hovdey, John

Mozol, Victoria Mazariegos, Gholamreza Radpay, Rudy Ortiz, Mavilla Reyes, Andrea Terhune, Mauricio Valasco, and Jonathan Palewicz, and notify each of them in writing that such action has been taken and that any evidence related to their unlawful discharge or lay off will not be considered in any future personnel action affecting him or her. *Sterling Sugars.*, 261 NLRB 472 (1982).

In view of the fact that Respondent and the Union have concluded a collective-bargaining agreement which contains procedures related to the assignment of employees which ob-

viously supersedes those placed in effect in June and July, and as this decision finds such conduct was also discriminatory under Section 8(a)(3), I have concluded that an affirmative remedy for Respondent's violation of Section 8(a)(5) is unnecessary.

Finally, the order requires Respondent to post the attached notice in order that employees with learn of the outcome of this matter and to inform employees of their rights.

[Recommended Order omitted from publication.]