

Orbit Lightspeed Courier Systems, Inc. and Local 840, International Brotherhood of Teamsters, AFL-CIO.

Orbit Lightspeed Courier Systems, Inc. and Local 840, International Brotherhood of Teamsters, AFL-CIO, Petitioner. Cases 2-CA-27842, 2-CA-27995, 2-CA-28016, 2-CA-28100, 2-CA-28376, 2-CA-28479, 2-CA-28547, and 2-RC-21473

March 31, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX
AND HIGGINS

On May 20, 1996, Administrative Law Judge Eleanor MacDonald issued the attached decision. The Respondent and the General Counsel each filed exceptions and supporting briefs, and each filed briefs opposing the other's exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs,¹ and has decided to affirm the judge's rulings, findings,² and conclusions as clarified below,³ and to adopt the recommended Order as modified.⁴

ORDER

The National Labor Relations Board adopts the recommended order of the administrative law judge as modified below and orders that the Respondent, Orbit Lightspeed Courier Systems, Inc., New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraphs 2(a) through (e) and insert the following in their place.

“(a) Within 14 days from the date of this Order, offer Jennifer Roesch and Robert Marshall 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.

¹ The Respondent filed a motion to reopen the record for submission of evidence concerning asserted postelection changed circumstances affecting the bargaining unit stipulated to be appropriate in the fall of 1994. We deny the motion as improperly raised at this time. The Respondent may raise these issues before the Regional Director at an appropriate time when he considers the circumstances for conducting a second election.

² The General Counsel and the Respondent have 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'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

“(b) Make Jennifer Roesch and Robert Marshall whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

“(c) Within 14 days from the date of this Order, remove from its files any reference to (1) the unlawful discharges of Jennifer Roesch and Robert Marshall and (2) the unlawful disciplinary notices issued to Roesch and Mostafa Ali, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges and disciplinary notices will not be used against them in any way.

“(d) 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.

“(e) Within 14 days after service by the Region, post at its facilities in New York, New York, copies of the attached notice marked ‘Appendix.’ Copies of the notice, on forms provided by the Regional Director for Region 2, 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 any facility involved in these proceedings, the Respondent shall duplicate and mail, at

³ Regarding the unlawful discharge of employee Robert Marshall in sec. IIF of the judge's decision, we find it unnecessary to rely on the reference in the judge's *Wright Line* analysis to a discussion between the Respondent's part owner, Frederick Katz, and Office Manager Douglas Bates concerning a conflict between Marshall's work assignment and a previously scheduled counseling session. The evidence does not support the judge's finding on this particular point. This does not, however, preclude our agreement with the judge that the Respondent did not rebut the General Counsel's prima facie case and that Marshall's discharge violated Sec. 8(a)(3) and (1).

With regard to discriminatee Jennifer Roesch, we conclude that the Respondent became aware of her support of the Union no later than September 6, 1994. Based on our review of the credited evidence and the judge's relevant findings, it was on this date, and not later, that the Respondent's supervisor, Philip Logos, engaged in an unlawful interrogation which clearly revealed such knowledge.

We find it unnecessary to pass on the judge's finding that the Respondent violated Sec. 8(a)(1) when its part owner Robert Wyatt threatened to kill employee Mostafa Ali, since this threat of physical harm found by the judge is cumulative of other unfair labor practices which we are affirming and does not affect the Remedy and Order in this case.

⁴ We will modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at such facility at any time since September 28, 1994.

“(f) 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.”

2. Substitute the attached notice for that of the administrative law judge.

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.

WE WILL NOT discharge, discipline, or otherwise discriminate against any of you for supporting Local 840, International Brotherhood of Teamsters, AFL-CIO or any other union.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT engage in surveillance of your activities in support of the Union and WE WILL NOT create the impression that your activities in support of the Union are under surveillance.

WE WILL NOT prohibit the distribution of union literature inside our offices.

WE WILL NOT prohibit discussion of the Union during working hours.

WE WILL NOT threaten you with physical harm because you support the Union.

WE WILL NOT harass you with vile language in connection with your activities in support of the Union.

WE WILL NOT threaten you with the imposition of new work rules if you select the Union.

WE WILL NOT convey the impression that it would be futile to select the Union.

WE WILL NOT threaten to refuse to bargain in good faith if you select the Union.

WE WILL NOT impliedly offer benefits as an inducement to you to abandon the Union.

WE WILL NOT threaten you with loss of benefits if you select the Union.

WE WILL NOT raise the fear of deportation if you select the Union.

WE WILL NOT threaten you with discharge and lay-off if you select the Union.

WE WILL NOT threaten to reduce your work assignments if you select the Union.

WE WILL NOT remove union literature from public property.

WE WILL NOT solicit grievances and impliedly promise to remedy them in order to induce you to abandon the Union.

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 Jennifer Roesch and Robert Marshall 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 Jennifer Roesch and Robert Marshall whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Jennifer Roesch and Robert Marshall, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against him or her in any way.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful disciplinary notices issued to Jennifer Roesch and Mostafa Ali, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the disciplinary notices will not be used against him or her in any way.

ORBIT LIGHTSPEED COURIER SYSTEMS,
INC.

James G. Paulsen, Esq., Donnell W. Turner, Esq., and Yvonne L. Brown, Esq., for the General Counsel.

Jedd Mendelson, Esq. and James A. Kiick, Esq. (Grotta, Glassman & Hoffman, P.A.), of Roseland, New Jersey, for the Respondent.

Robert M. Archer, Esq. (Meyer, Suozzi, English & Klein, P.C.), of Mineola, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was tried in New York, New York, on 16 days between July 17 and October 7, 1995. The complaint alleges that Respondent engaged in numerous violations of Section 8(a)(1) of the Act and that it discharged employees Mostafa Ali, Robert Marshall, and Jennifer Roesch in violation of Section 8(a)(3) of the Act because they supported the Union. The General Counsel alleges that the unfair labor practices were so serious and substantial as to render invalid the results of an election held on November 18, 1994, and that a rerun election is warranted. Respondent denies that it engaged in

any violations of the Act. In the representation case, excluding the two challenged ballots which are not sufficient in number to affect the election results, the revised tally of ballots showed that the vote was 89 for and 92 against union representation. The Union filed timely objections and these are at issue herein.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party, and the Respondent in December 1995, I make the following¹

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with offices in New York, New York, is engaged in the business of providing messenger and delivery services to business enterprises. Respondent annually derives revenues in excess of \$50,000 from commercial customers located within the State of New York, which customers are themselves directly engaged in interstate commerce. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The three owners of Respondent are Robert Wyatt, Jeremy Weinstein, and Frederick Katz. They operate a company which provides pickup and delivery services utilizing bicycle messengers, foot messengers, and trucks.² During the period of time relevant to the instant proceeding, the executive office of Respondent was located on the fourth floor of 185 Varick Street in New York City. Wyatt, Weinstein, and Katz had their offices there. Around the corner from the Varick Street office, at 68 King Street was a street level location from which messengers were dispatched. Two other street level dispatching locations were at 124 West 18th Street, and 136 East 31st Street. Generally speaking, each street level dispatching location contained a table at which telephone operators sat and received calls from customers and messengers who were out in the field and another table at which dispatchers sat and directed the movements of the messengers on their team. Each ground floor location also contained a messenger waiting area with seating for messengers. The messengers commonly congregated in the waiting area while they waited for work and they often gathered there after work to discuss matters of interest to them and to drink beer. It was not unusual for supervisors and managers of the Company to sit and talk with the messengers in the waiting area both during working hours and after work.

The parties stipulated that the owners of the Company, Wyatt, Weinstein, and Katz are supervisors and agents of Respondent. The following employees were also stipulated to be supervisors and agents of Respondent:

Keith Hann
Samuel McDuffie
Arnold Thomas (also called T)
Jeffrey Zimmerman
Marsha Stone
Dennis Moriarty
Douglas Bates
James Ruiz
Jesus Walle (also called Jay)
Philip Logos

Generally speaking, Respondent's business operated as follows during the period of the organizing campaign: When a customer called one of the Company's dispatching offices, the call was answered by a telephone operator who typed the information concerning the customer and the addresses for pickup and delivery of a package into a computer. A dispatcher retrieved the information from the computer and spoke directly to one of the messengers on his team, giving him information about the pickup and delivery he was to make. If the messenger was in the office, the dispatcher spoke to him directly. If the messenger was out of the office, he would be beeped.³ Messengers did not call their dispatchers directly; instead, their calls were answered by the telephone operators who put them on hold until the appropriate dispatchers could speak to them. Dispatchers attempted to give each messenger a number of assignments that "fit" together, that is, various pickups and deliveries that could be made in contiguous areas thus attempting to insure that a messenger was carrying more than one package at all times.⁴ When a messenger was beeped, it was his duty to telephone his dispatch office at once. Further, messengers were instructed to call the office any time a problem arose, for example if they were unable to effect a delivery or to pick up a package as their instructions specified. Messengers used public telephones or client telephones to call their dispatch offices. Messengers received commissions on each run they made. The commissions varied in accordance with the number of days worked in the week by the individual messenger and with the type of job involved.⁵ Rush jobs were more lucrative as were jobs covering long distances.

Some jobs were CODs, that is, the customer did not have an established account with the Company but instead paid in cash at the time of service. Many messengers were eager to take CODs because the Company allowed them to keep the cash as a credit against their weekly pay. The evidence shows that messengers were prone to be low on cash and that many messengers needed CODs in order to be able to eat lunch or dinner or to tide them over until payday. Indeed, some messengers often asked their dispatchers for CODs and some dispatchers kept a lookout for a COD in order to be able to give that run to a particular messenger who needed it.

Respondent maintained accounts at certain bicycle repair shops. Bicycle messengers who needed a repair or a new

³ Messengers carried beepers so that they could be called as they moved around the city.

⁴ An assignment to pick up and deliver a package was commonly referred to as a "run."

⁵ In order to encourage good attendance, Respondent reduced the percentage of a messenger's commission any time he did not work a full week.

¹ Certain errors in the transcript are noted and corrected.

² Some witnesses referred to the messengers as couriers. Bicycle messengers are commonly referred to as "bikers" and foot messengers are referred to as "walkers."

piece of equipment could go to a shop with which Orbit had an account and charge the item or repair to the company account, subject to company approval which could be obtained immediately by telephone. The amounts would then be taken out of the employees' paychecks. The evidence shows that the "bike shop credit" was viewed as a substantial benefit by bicycle messengers who otherwise might lose valuable worktime while they tried to find the money to pay for repairs.

The evidence shows that messengers value their independence and freedom. This led to frequent conflicts between employees and management. It was quite common for messengers to protest to their dispatchers about a run that was in the process of being dispatched. Messengers believe that they know the city well and they often told their dispatchers that a proposed run did not fit in with other jobs they were already holding because it required a considerable detour from other deliveries or pickups already scheduled. In addition, a messenger might try to "beg off" a run that required a very long trip or involved a heavy package. The evidence establishes that such begging off was common and was not viewed seriously and was not considered a refusal. For example, dispatcher Jesus Walle testified that messengers often gave him a hard time about runs that they did not want to take. Dispatchers often tried to find someone else to take a run that a messenger was attempting to beg off. Dispatcher Walle testified that if a messenger was complaining about a run he might hang up on that messenger if he had someone else he could send on the job. In most instances, if the dispatcher insisted that the messenger must take the run, then the messenger would comply. Dispatcher Walle stated that if a messenger was giving him a hard time but he really needed that messenger to complete the job, he would ask a manager to get on the phone and direct the messenger to do the run. Some dispatchers evidently prided themselves on having established a rapport with the messengers on their team and they stated that although messengers might try to beg off a job, none of their messengers would ever refuse a run outright. A messenger who had worked until his normal quitting time was permitted to tell the dispatcher that he would not take any more jobs; on occasion, the dispatcher might reply that he had no one else to do the job and he would ask the messenger to take the run as a favor. Often, the messenger would comply with such a special request, but a messenger who refused a run at quitting time was not disciplined by the Company. Office Manager Douglas Bates also testified that it was common for messengers to give their dispatchers trouble about taking runs; messengers often told dispatchers that a certain job was not correct for them and they tried to avoid doing that job.

Messengers did not all begin work at the same time. Although most messengers worked from 9 a.m. to 5 p.m., some messengers began earlier and some started work as late as 10 a.m. or even later. Most messengers thus worked during the busiest hours. The evidence shows that messengers established their starting and quitting times with their dispatchers. Once a starting time had been agreed on, then the messenger had to adhere to the set time until a different time was agreed on. It was common for Respondent to accommodate any employees (not only messengers), who had family or educational commitments during the day that necessitated later starting times or interruptions of the workday. Foot

messenger Chris Caggiano testified that if he had a reason to stop work before his normal quitting time he would tell his dispatcher or manager as soon as possible and he was always told that it was "no problem."⁶

Every year, between 100 and 200 former employees of Respondent file claims for unemployment insurance benefits. Owner Robert Wyatt testified that Respondent employs a system to control unemployment insurance premium costs. The premiums paid by Orbit are higher as more former employees are able to obtain unemployment benefits, and it is to the Company's advantage to have unemployment claims denied. It follows that the Company strives to prove that its employees quit or were terminated for cause so that their claims for unemployment benefits will be denied. The system employed by Respondent calls for the accumulation of three written warnings before an employee is discharged. Wyatt testified that if the Company can present to the unemployment system three written warnings for specific infractions to a former employee, then that employee will not be able to collect benefits after he is discharged.

The Union's organizing campaign was directed at the bikers and walkers. The campaign began in early September 1994. The Union's petition in Case 2-RC-21473 was filed on October 4, 1994. The election on November 18, 1994, was conducted in a unit consisting of:

All full-time and regular part-time bicycle messengers, walking messengers, and moped messengers employed by the Employer at and out of its 68 King Street, 136 East 31st Street and 124 West 18th Street, New York, New York facilities, excluding all other employees, truck drivers, office employees, clerical employees, dispatchers, assistant dispatchers, telephone operators, and guards, professional employees, and supervisors as defined in the Act.

The Union campaigned by demonstrating and soliciting in front of Respondent's offices, and by conducting meetings at union headquarters. Bernadette McCulloch and Alex Williams were the two union agents most active during the campaign. They appeared almost daily in front of the Company's offices.

The Company campaigned vigorously to convince its employees that union representation was not in their best interests. General Manager Jeffrey Zimmerman believed that he may have spoken to every messenger employed by Orbit at least once during the campaign in an effort to convey management's position. Antiunion literature was distributed together with the weekly paychecks. It was the responsibility of the supervisors and managers to campaign on behalf of the Company; they were to make themselves available to answer questions by employees and they were to explain the company position to employees at every opportunity.

Owner Robert Wyatt took the lead on behalf of Respondent during the union campaign. He estimated that he personally spoke to 70 to 80 percent of the unit members and he told the dispatchers to speak to as many messengers as they could. Wyatt testified that he "hung out" in the messenger waiting areas and that he said the same things over and over

⁶Caggiano, a witness who listened to the questions and answered them carefully, had a most impressive demeanor; I shall credit all of his testimony and I have relied on it extensively.

during the campaign. Wyatt told the employees that they could lose and gain benefits during negotiations. For example, the Company tried to accommodate employees' requests for days off, but Wyatt told the employees that if the Union came in, Orbit might not be able to continue that policy; the employees might lose that benefit depending on the contract that was negotiated with the Union. Wyatt told the employees that if the Union asked for sick days, vacation days, and more money for the employees, the Company might respond by asking that employees wear uniforms and submit to drug testing and it might propose an end to bike store credits and CODs.⁷ Wyatt testified that he was trying to defeat the Union and so he gave examples of subjects that were not beneficial to employees and he emphasized that the employees might lose their highly valued freedoms. When employees asked Wyatt what he could give them if the Union were to lose the election, he responded that it would be illegal to discuss such matters during the campaign although he used to be able to talk about these subjects before the Union came around. Wyatt told the employees that negotiations could take 4 years. As the leader in Respondent's campaign to defeat the Union, Wyatt wrote and picked the illustrations for the literature distributed by Orbit to its employees and he decided what arguments the Company would use in attempting to convince the employees to vote against representation by the Union.

In early September, Respondent engaged labor counsel and Wyatt arranged for the owners and managers to meet with counsel in order to discuss the campaign. The owners, managers, and dispatchers attended this meeting. Counsel distributed a list of "do's and don'ts" and these were discussed; however, because Wyatt objected to an implied criticism of one of Respondent's competitors in the document, it was collected before the end of the meeting.

My observation of Wyatt convinced me that he was enthusiastic and hard working both in running the business and in directing the antiunion campaign. I am also convinced that Wyatt occasionally got carried away in his efforts and that he did not always use cool judgment when speaking to the employees about the Union. Wyatt perhaps was well versed in what he could and could not legally say and do during the campaign, but he permitted himself to exceed the legal limits and he was subject to bouts of intemperate behavior. For example, Wyatt testified that one day he saw employees Jennifer Roesch and Mostafa Ali distributing literature to other employees and heard them discussing the Union in the messenger area of a dispatch location.⁸ Wyatt denied at first that on this occasion he yelled at them that they would be fired if their union activity continued to interfere with business. Wyatt maintained that he told Roesch and Ali that they should not interfere with messengers coming in and out of the office and that they could not stop people from doing their jobs. Yet, Wyatt's affidavit establishes, and Wyatt conceded, that he did indeed yell to Roesch and Ali that he would fire them if their union activity continued to interfere with his business. Wyatt acknowledged that in his Company

⁷ There is no record evidence that drug use occurred during working hours nor that it interfered with Respondent's operations, yet Wyatt estimated that if drug testing were introduced he might lose 50 percent of his work force.

⁸ Roesch and Ali were early and outspoken supporters of the Union at Orbit.

"people yelling and screaming at each other is not out of the norm." Yet, Wyatt believed that when Mostafa Ali screamed at him and at other managers during the campaign this behavior passed the bounds of proper respect and decency. Although Wyatt testified that he tried to avoid Ali during the campaign, he acknowledged that he debated with Ali about the Union. Indeed, Wyatt often joined groups of employees talking about the Union and debated the merits of unionization with his employees and the union organizers. One evening, Ali entered a messenger waiting area where Wyatt was sitting with some messengers and he dropped his heavy bicycle chain a few feet from Wyatt's feet. Wyatt testified that he did not say anything to Ali on this occasion and that he did not think Ali was trying to hit him with the chain. The next day, however, Wyatt saw Ali chaining his bicycle to a parking meter outside the office and he lost his temper, threatening to kill Ali if he ever threw a chain at him again. On occasion, Ali confronted Wyatt and other managers about what Ali maintained were illegal campaign tactics. Wyatt disliked being confronted by Ali and he did not like Ali interrupting him while he was speaking to other messengers about the Union. Wyatt admitted that in November 1994, he called Ali a "f—king worm" and, with another expletive, ordered him to leave the office. I do not find that Wyatt is a reliable witness; indeed, his testimony is often inconsistent. I shall not credit Wyatt's testimony where it is contradicted by other more reliable evidence.

The November 1994 election was at first a tie of 89 to 89, but when challenged ballots were counted on February 21, 1995, the Union lost 89 to 92. In February 1995, the union campaign was revived when the Union began to sign up Orbit messengers again. Beginning at this time, union agents and Orbit employees again gave out literature and solicited signatures for the Union in front of the Company's offices. Ali was active in this continued union campaign, and he collected the majority of employee signatures obtained after the election. Wyatt testified that he saw Ali campaigning with the union agents after the election; he knew that the Union was still signing up the employees and he thought that the Union still had the potential to organize Orbit's employees. In fact, Wyatt said, the union campaign at Orbit never stopped and the Union was constantly active outside the offices. Wyatt expressed chagrin that the Union was behind a Christmas card that depicted him beating up Santa Claus.

B. The Beginning of the Organizational Campaign

Bernadette McCulloch was the lead organizer for Local 840. She testified that the Union held a meeting to organize employees of messenger companies in New York City on June 11, 1994, and that some employees of Respondent attended this meeting. According to McCulloch, the Union distributed leaflets at Respondent's three dispatching offices beginning in August 1994. McCulloch testified that when a bicycle messenger named James Duggan was killed, she called Respondent on Thursday, August 25, to inquire whether Duggan had been employed by Respondent. She spoke to a man who did not give his name but who asked her identity. McCulloch stated that she replied by giving her name, saying that she worked for Local 840 and that she was organizing the messengers. McCulloch learned that Duggan had not worked for Respondent. She prepared a flyer which was distributed by various messengers announcing a rally on a street

corner in memory of Duggan. The flyer said, "It is time to unite! Protest unsafe work conditions!" There was no mention of the Union on this document.

Jeremy Weinstein, one of the three owners of Respondent, testified that he received a telephone call from someone who identified herself as Bernadette asking to speak to Duggan's dispatcher. Weinstein said that he would call her back. Weinstein returned McCulloch's call to inform her that Duggan did not work for his Company. He could not recall whether the telephone was answered in any way that would identify it as belonging to Local 840. Weinstein asked McCulloch the purpose of her call and she said that she was just trying to help messengers. Weinstein recalled that before Yom Kippur he had been shown an article in *The Village Voice* that described a union attempt to organize the messenger industry but he could not recall whether Local 840 had been mentioned specifically.⁹ Further, pamphlets left in company bathrooms a day or two before Yom Kippur mentioned unions and the industry, but they did not specifically refer to Respondent.

Owner Robert Wyatt testified that he first learned that there was union activity in his industry in late August when McCulloch spoke to Weinstein. Wyatt is the president of the New York State Messenger and Courier Association and he stated that the subject of union organizing was discussed at meetings of the Association in August and September. On September 2, 1994, the Friday before Labor Day, he read an article in *The Village Voice* stating that a union was organizing another company in the industry. Wyatt asked Varick Street Office Manager Douglas Bates whether he knew anything about the organizing efforts. Bates replied that telephone operator Jennifer Roesch was politically active in the city and that Wyatt should ask her. Wyatt himself had engaged in political discussions with Roesch and he knew of her activism. When Wyatt asked Roesch what she knew about a union organizing the industry, she replied that she had no legal or moral obligation to answer his question; the conversation ended on this abrupt note when Roesch walked out of the room. Wyatt was taken aback by this answer; he testified that after he told Bates about it, the two of them joked about the language employed by Roesch. Wyatt stated that on this day he did not know that Respondent was a target of the organizing. Also on September 2, Respondent had been polling its messengers about the institution of an 800 toll free number. Respondent asked the messengers whether they would be willing to give up a certain portion of their commissions in return for the installation of a toll free number that would obviate the need for them to use their own money in calling their dispatch offices. When Wyatt returned to work after Labor Day and Rosh Hashanah, on Wednesday, September 7, 1994, he saw literature that had been distributed in the dispatch offices which said, "Say no the 800 scam." Wyatt said there was no mention of the Union on these documents. Wyatt testified that he learned that his Company was the target of a union drive on Wednesday or Thursday or Friday (the 7th, 8th, or 9th), but he was not 100-percent sure until September 15 when McCulloch and other Union supporters demonstrated outside his office.

⁹In 1994, Yom Kippur began on the night of Wednesday, September 14.

Owner Frederick Katz testified that on September 15 Wyatt called him at home to inform him that a group was demonstrating and making demands in front of Respondent's office. Before that he had heard "rumblings" about the Union, but he did not know that it involved his Company.

Telephone operator Jennifer Roesch testified that beginning in June 1994, she began participating in a Local 840 organizing drive for the New York City messenger industry. Roesch overslept on the morning of Thursday, September 1. She did not awake until Bates called her at home to ask where she was and as a result she was 1-1/2 hours late to work. When she arrived at work, Bates told her to see Wyatt in his office. Wyatt then asked Roesch if she knew anything about Local 840 trying to organize the messengers into a union. According to Roesch, she told Wyatt that she supported the organizing and was involved in the effort but that he had no right to ask her about it and she had no obligation to tell him about it. Wyatt went on to tell Roesch that he had seen a messenger discussing workers' compensation on television and he wondered why this was a union issue. Roesch replied that many employers did not inform their employees of their entitlement to workers' compensation. Then Wyatt said that McCulloch of Local 840 had called him to say that he had problems and his messengers should organize. Wyatt asked Roesch why McCulloch was going after him. Roesch testified that Wyatt concluded the conversation by telling Roesch that he liked her and thought she did her job well but that he had no trouble firing for this kind of thing. Roesch's affidavit given to a Board agent on October 4, 1994, placed this incident on August 30. However, Roesch stated that it is common for her to mix up dates and that she later realized that it actually took place on September 1. Roesch said that she wrote a memo to McCulloch concerning her encounter with Wyatt. This document was not produced at the hearing. Later in the day on September 1, Bates called Roesch into his office and said that he had to write her up for being late that morning and for excessive absences in the prior week. Roesch signed both of the warning slips which were dated September 1, 1994. She testified that Bates told her "this is just a little game we play."

Wyatt strongly disputed Roesch's version of their encounter when he asked what she knew about the Union. Wyatt stated that the discussion was limited to his question and to Roesch's answer that he had no right to ask about the campaign and that she had no moral obligation to tell him about it. Wyatt testified that he did not think Roesch would be involved in the organizational effort because it was directed at messengers and she was a telephone operator. He attributed her unexpectedly abrupt answer to her general political activism but not to any particular involvement in the Union. Wyatt denied that he said anything to Roesch about workers' compensation nor that he asked why the Union was targeting him. He did not tell Roesch that he would have no trouble firing her for this kind of thing. Bates supported Wyatt's version of the events; he testified that next day or the week after he gave Roesch the written warnings on September 1, Wyatt showed him *The Village Voice* article and Bates suggested that Wyatt ask her about it. Wyatt then reported back that Roesch had said she was under no legal or moral obligation to tell him anything. According to Bates, Wyatt was shocked at Roesch's brief and abrupt answer and he did not understand her attitude.

I credit Wyatt that when he asked Roesch whether she knew of any organizing in the industry, she told him that he could not ask her and that she had no legal or moral obligation to give him any information. I credit Wyatt that the conversation ended at that point and that he did not ask about workers' compensation, that he did not mention McCulloch and that he did not say he would have no trouble firing Roesch. It strains credulity that after Roesch's definite and firm answer that she had no legal or moral obligation to talk to him about the Union, Wyatt would nevertheless engage her in conversation and that she would reply to him and keep the conversation going. I do not believe that Roesch declared to Wyatt that she supported the organizing effort in the same breath that she told him she was under no obligation to answer questions about it. Further, Roesch admitted that it is common for her to mix up dates and she gave a different date in the affidavit than she gave in her testimony.

Roesch testified that the union drive began at Orbit on September 2, 1994; before that date the Union was attempting to organize messengers at another company. Roesch did not explain what particular step the Union took that would mark September 2 as the first day of its campaign at the Company. September 2 was a Friday and a regular payday; as the managers gave out paychecks on September 2 they asked messengers whether they would be willing to reduce their percentage of commission in return for a toll free 800 number on which to call their dispatchers. On September 6, the Tuesday after Labor Day, Roesch and McCulloch together with bicycle messenger Mostafa Ali and other employees gave out flyers in front of the King Street office urging the employees to say no to the 800 number.¹⁰ Roesch testified that this flyer urged employees to say "Yes to the Union," and announced a union meeting, but in later testimony she acknowledged that she did not recall whether the flyer mentioned a union at all.¹¹ On September 9, 1994, Roesch solicited signatures from Respondent's employees before working hours at the 18th Street office. Thereafter, she frequently solicited for the Union outside all of the company locations. The first mention of any overt solicitation on behalf of the Union in Roesch's affidavit refers to September 9. At the end of her testimony, Roesch tried to say that she had started to solicit before that, "I probably would have been trying to sign messengers up . . . any time during that week." I do not credit this testimony. Roesch kept saying what she would have done, and what she probably would have done. That is not reliable testimony. Manager Bates testified that on September 2 Mostafa Ali told him that he was against the 800 toll free number suggestion, but that Ali did not mention any union in his remarks. Bates later learned that Ali was distributing flyers in opposition to the toll free number.

Bicycle messenger Mostafa Ali testified that he began the union campaign by calling McCulloch in June 1994, and asking if she was interested in organizing the messengers. Ali participated in meetings at union headquarters beginning in

June and he was attempting to obtain his fellow employees' signatures for the Union from that time forward, speaking to them in the bathrooms and on the streets.¹² Ali testified that the union campaign at Orbit became open at the beginning of September. The Company had begun asking messengers what they thought of the 800 number suggestion on Friday, September 2. During the weekend that followed, Ali composed the flyers and they were distributed after Labor Day. Ali gave some testimony purporting to show that Bates immediately connected the flyers to "union bullshit," but after some further questioning Ali admitted that he could not recall what Bates said. I do not credit that portion of Ali's testimony. Bates testified that he learned that Ali was involved in the union campaign during the second or third week of September when other messengers related Ali's activities to him. Ali testified that while the flyers opposing the 800 number were being distributed, his dispatcher Phil Logos asked him if he knew Bernadette.¹³ When Ali asked which Bernadette Logos was referring to, Logos said it was someone from Local 840 and accused Ali of lying. In subsequent telephone calls throughout the day, Logos asked Ali whether he had made the flyer and said the Company knew he had done it and that Ali and Roesch were working for the Union. Logos said they were just trying to find out if there were more people inside the Company working for the Union. According to Ali, he repeatedly told Logos that he was calling him to get work and not to talk about the Union. I credit Ali's testimony about this series of conversations. I find that Respondent became aware that it was the target of an organizing campaign by the Union after Labor Day.

Logos denied asking Ali about the flyer opposing the 800 number and he denied asking Ali about the Union or the activities of other employees in support of the Union. Logos testified that the owners and managers of the Company had directed him and other supervisors to be involved in Orbit's efforts to defeat the Union. In addition, Logos had seen a list of things that he could and could not do during the campaign. Because he is the type of person who talks off the top of his head, Logos testified, he said nothing about the Union from a fear of saying the wrong thing. Logos maintained that he did not care if the Union won or lost. He stated that the owners told him to tell the messengers why the Union was not a good idea but they never gave him specific points to make to the employees. As a result, Logos said, he did not discuss the Union in depth with messengers. All of this testimony is contradicted by other testimony given by Logos. First, Logos himself described many instances where he discussed the Union in detail with employees, informing them of specific benefits they might lose if the Union won an election.¹⁴ Second, once or twice a week from September to November 1994, Logos gave out company literature during the campaign; Logos stated that it was his task to explain each leaflet to employees. Third, Logos described how "gung ho" he and the other dispatchers were about beating the Union: Logos would ask the other dispatchers how it was going and whether they were campaigning against the Union, asking

¹⁰ September 6, 1994, was Rosh Hashanah and, among others, Wyatt, Weinstein, and Katz did not work that day.

¹¹ The flyer was introduced into evidence. It contains no mention of any union nor of any organizing activity. The flyer urges messengers to tell their managers that Orbit should pay for a toll free number and it asserts that the Company made over \$9 million profits last year.

¹² Ali signed a petition authorizing the Union to represent him on June 28, 1994.

¹³ In September 1994, Logos was the head dispatcher at the Varick Street office.

¹⁴ These specific occasions will be discussed below.

"Are you going against it like we're going to win this thing?" Then everybody would answer, "Yeah, yeah, we're going to win." Because of the many inconsistencies in Logos' testimony, I do not find that he is a credible witness and I shall not rely on his testimony where it is contradicted by other credible testimony.

Based on Ali's credited testimony, I find that sometime after September 6, 1994, Logos asked Ali whether he knew Bernadette from the Union and whether he was responsible for the flyer opposing the 800 number. Logos told Ali that he knew that Ali and Roesch were working for the Union and he said that the Company was trying to find out which other employees were working for the Union. When Ali did not supply the information Logos was seeking, he accused Ali of lying. This questioning by Logos was coercive. Logos was supervisor who could directly affect the extent of Ali's earnings and the difficulty of his daily work. Logos did not desist in his questioning about Ali's union activities when Ali refused to answer; he persisted and sought more and more detailed information, calling Ali a liar and saying that the Company already knew some facts. Thus, Respondent violated Section 8(a)(1) by interrogating Ali. *Rossmore House*, 269 NLRB 1176 (1984).

The General Counsel contends that two written warnings given to Roesch on September 1, 1994, were unlawful because Respondent was aware of her union activities and was seeking to dismiss her from the workplace in order to thwart the organizing campaign. The evidence shows that Roesch, who was hired in April 1994, was absent a total of 10 sick days and 1 vacation day by September 1.¹⁵ In addition, on September 1, she overslept and was awakened only when Bates telephoned to see where she was; as a result, Roesch was about 1-1/2 hours late to work. Wyatt testified that he had been alerted by the Company's controller that Roesch had been absent an excessive amount of days in the short time she had worked for Orbit. He had directed Bates to give her a warning note during the week ending August 26 a week during which Roesch did not come to work at all due to illness. Bates testified that during the week that Roesch stayed home sick, Wyatt had in fact told him to issue a written warning to Roesch but Bates knew that Roesch was ill and he felt bad about writing her up. Bates testified that Wyatt told him that they might be better off without Roesch and Bates said this meant to him that the Company had to start thinking about the unemployment insurance process. However, Bates had delayed following Wyatt's order until September 1 when Roesch was very late. On that day, Bates was annoyed that after being out sick for 5 days Roesch did not wake up for work so that he had to track her down, so he gave her a warning for excessive absence and another one for tardiness. Bates recalled telling Roesch, as he was giving her the written warnings, "it's a silly game I have to play." This referred to the fact that he had to make a record for the unemployment insurance proceedings and he felt childish dealing with people who could not show up for work and required written warnings. I have found above that Respondent was not aware of Roesch's activities in support of the Union on September 1, and I do not find that the issuance of the two warning notices to Roesch was unlawful.

C. The Union and the Respondent Campaign Openly

1. Surveillance

Once the Union campaigned openly, employees and union agents would stand outside the Company's offices and distribute literature and speak about the Union. Some employees would stand soliciting for the Union outside the offices before they were scheduled to begin work and after their working hours. Since messengers constantly went in and out of the three dispatching locations, the union agents and employees who openly supported the Union would try to speak to messengers about the Union throughout the day and they would hand employees literature and ask them to sign up with the Union. Foot messenger Chris Caggiano who has been employed by Orbit since May 1992 testified that before the union campaign he would commonly see dispatchers outside the offices trying to round up messengers to whom they wished to dispatch work and he would see dispatchers taking their smoking breaks.¹⁶ While they were smoking outside, dispatchers would speak to messengers. Once the campaign began, according to Caggiano, owners and managers of Respondent often stood in front of the Company's offices about 10 or 15 feet away from the group of union supporters and listened to what they were saying. Sometimes the owners and managers engaged in confrontations with the union organizers and messengers as the latter handed out literature and spoke to messengers. Caggiano said that Owners Robert Wyatt and Frederick Katz were the two individuals most often involved in these confrontations; they would begin by talking about the Union and in a few minutes it would end with name calling. Caggiano could not recall ever seeing Katz or Wyatt standing outside the offices before the campaign began. Other witnesses described numerous occasions outside the Company's offices when owners, managers, and supervisors were present while the Union was campaigning.

The General Counsel and the Respondent agree that, with certain exceptions, open observation of organizing activities conducted openly on or near company premises is not unlawful. See *Roadway Package System*, 302 NLRB 961 (1991); *Emenee Accessories*, 267 NLRB 1344 (1983). Here, the General Counsel contends, the Company's conduct was "out of the ordinary" and went beyond "mere observation" to disrupt and interfere with the organizing activity. The General Counsel contends that Orbit's representatives were consistently and perpetually present whenever the Union was under discussion and that the representatives inserted themselves into the discussion, interrupted the discussion, or stood nearby intimidatingly, thereby hindering the Union's ability to solicit support. I shall analyze those instances of company conduct that arguably fit into the exception to the rule that open organizing may be observed by an employer. The Union conducted much of its campaign directly in front of Orbit's three dispatch offices so that it could communicate with the messengers as they entered and exited the offices. I am convinced from the voluminous testimony on this issue that before the union campaign began it was common for dispatchers to go out into the street to look for messengers who might be congregating there and to summon them into the office to receive an assignment. Further, many of the dispatchers, managers, and owners smoked. Thus, several times

¹⁵ Employees of Respondent are entitled to 5 sick days per year.

¹⁶ Smoking is prohibited inside the dispatch locations.

a day or many times a day, depending on the degree of the individual's addiction to tobacco, a supervisor or manager would stand outside and smoke. I conclude that the evidence will not support a finding that a dispatcher who was outside summoning a messenger was engaged in surveillance; this conduct was part of the dispatchers' normal duties. Nor will the evidence support a finding of unlawful surveillance where a supervisor, manager, or owner was standing outside smoking even though he could observe the organizing; it is clear that this conduct was engaged in before the union campaign and was to be expected on a regular basis. If the Union and the employees did not wish to be observed by smokers they would have solicited and campaigned further from the Orbit offices. However, on some occasions managers and owners walked up to the group soliciting for the Union and actively joined the conversation, interrupting the union organizers and supporters and hindering their efforts to obtain signatures for the Union. I conclude that where the Company's conduct could reasonably be expected to interfere with Union efforts, then it was unlawful. The testimony shows that in the fall of 1994 while Ali was soliciting signatures from messengers in front of an Orbit office, Owner Katz walked over and got involved in the conversation. On another occasion, Ali was talking about the Union with employees when General Manager Zimmerman came over and asked the employees if they knew the truth about Union.¹⁷ On both of these occasions, the employees were taken aback by the intrusion and ended the conversation with Ali. The conduct of Katz and Zimmerman went beyond mere observation on a public street; once they approached the employees, Katz and Zimmerman could overhear the discussion of the Union and overhear the efforts to sign up employees. Indeed, they could have been standing next to an employee while he signed the union petition. I find that Respondent violated Section 8(a)(1) of the Act when Katz and Zimmerman walked over to groups of employees and effectively ended attempts to solicit signatures for the Union and to discuss the Union. Union Agent McCulloch testified, and I credit her, that she was speaking to employee Claudel Cherry on the street before the election, when Wyatt came over and said that he wanted to talk about soccer. Her discussion of the Union with Cherry ended while Wyatt spoke to Cherry. I find that by preventing Cherry from speaking to McCulloch, Respondent violated Section 8(a)(1) of the Act. McCulloch testified that twice at the end of October or beginning of November 1994, while employees Douglas Bradford and Calvin Hinton were helping her distribute leaflets and sign up employees, Owner Katz waved the employees over to him and began speaking to them. Katz testified generally that he called Bradford and Hinton only when there were service problems. I credit Katz and I do not find that Katz' actions were unlawful. Roesch testified that on September 15 she and McCulloch were speaking to a number of employees about the Union while Wyatt stood about 10 feet away and observed them. Then, Wyatt came over to the group, asked the employees why they wanted a union, and injected himself into the discussion. The next day, while Roesch was talking about the Union with a group of employees, Katz came over and joined the conversation, raising points about

¹⁷ Zimmerman testified that he went outside to smoke 5 or 10 times per day.

Orbit's profits and the cost of union benefits and whether the Union would be good for business. On both of these occasions, Wyatt and Katz did more than observe the street scene before them; they actively joined in a conversation that union supporters and agents were conducting with employees and prevented the organizing activities from continuing. Respondent thus violated Section 8(a)(1) of the Act. I have considered the other instances of surveillance alleged by the General Counsel, and I find that they are not supported by the record.

2. Rules against union activity

Ali testified that during the third week in September outside the King Street office, Wyatt told him that no union meetings could be held inside his offices. When Ali asked what he meant, Wyatt replied that he had heard that Ali had talked to messengers about the Union the night before. Ali protested that the managers were talking to the messengers in the office all the time about the Union and that employees had the right to organize, but Wyatt responded that if he wanted to talk about this "Union bullshit" he had to do it outside and not on private property. Wyatt went on to say that if he found out who put union flyers and stickers everywhere in the offices he would fire them right away. In his testimony, Ali recalled that there were always many flyers posted or distributed in the offices about items for sale or parties that were being held.

Roesch testified that she regularly distributed union literature to her fellow employees and solicited for the Union before and after her working hours and during her lunch hour. Roesch stated that she spoke to messengers in the waiting room. During the week of September 12, 1994, Wyatt asked Roesch whether she had put union literature on a bench in the office. When Roesch denied having put the literature on the bench, Wyatt insisted that she had indeed left literature on his property and that it was illegal for her to have done so. Wyatt said she had no right to do that and if she put union literature on his property she would be fired. Roesch denied that she had distributed union literature on company premises.

Ali testified that General Manager Zimmerman often came up to him while he was speaking to other messengers and told Ali that it was obvious that the messengers had work and that Ali was illegally delaying them by talking to them about the Union. Zimmerman warned Ali that he would be written up for that kind of activity. Zimmerman also warned Ali that he could be written up for talking about the Union while he was holding work. Ali testified that before the union campaign, employees could talk about anything they wanted without being cautioned by management. Respondent sponsored a soccer team and employees had many discussions about the team during work hours. In October 1994, employees who had work to do engaged in several lengthy discussions about the Knicks basketball team in Zimmerman's presence, and on one occasion Zimmerman himself participated in the conversation. Zimmerman acknowledged that he constantly saw Ali speaking about the Union to groups of messengers on companytime and he "probably" asked whether anyone in the group was holding work. But Zimmerman denied telling Ali that he could be written up or that it was illegal to speak to the messengers. I credit Ali that Zimmerman had often permitted messengers who were

holding work to engage in discussions about various subjects but that he prohibited such discussions about the Union.

Bicycle messenger Lorenzo F. Simmons testified that one day the manager of the 31st Street office, Dennis Moriarty, saw him talking to some other employees, whereupon Moriarty took him aside and told him that he was not supposed to talk about the Union while he was working and that he could only do that after work. Moriarty also told Simmons that he could not talk about the Union or distribute union literature inside the office. Simmons placed this incident at the beginning of August, a date that is manifestly incorrect. Moriarty testified that he knew that Simmons was a union supporter because of the union sticker on his helmet, but Moriarty denied ever hearing Simmons speak about the Union. My observation of Simmons as he gave his testimony convinced me that he listened attentively to each question and that he answered carefully, basing his answers on his honest recollection. I find that Simmons is a reliable witness, and I shall credit his testimony. As to the incident with Moriarty which Simmons placed in August, I do not find that the fact that Simmons gave an incorrect date necessarily invalidates his description of the incident itself. Rather, I find that Simmons did not have a clear recollection of the month the campaign began, placing the beginning of organizational activity in August instead of September, but that he had a clear recollection of the exchange with Moriarty.

Bicycle messenger Calvin Hinton testified that before the union campaign there had been no rules about what could be discussed in the messenger waiting area, but once the Union came around there was a rule that employees could not discuss the Union during business hours. Bates and the dispatchers enforced this rule in King Street; when a union supporter was in the waiting area, Bates would come over and send the men out to work. However, Bates did not interfere with a 15-minute discussion about constitutional rights that a number of messengers engaged in about 2 weeks before the election although Hinton had an assignment on him at the time. Hinton testified that Bates told him that he could not talk about the Union on companytime. Bates also told Hinton to come to him if he had any questions about the Union. According to Hinton, Manager Jeffrey Zimmerman told him to stop talking about the Union in the office 1 week before the election. When Hinton protested that he had no work on him but was just waiting for a COD, Zimmerman gave him \$5 for lunch. Zimmerman had never before offered Hinton lunch money. I observed that Hinton was a careful witness, listening attentively to the questions posed to him and answering precisely. I shall credit his testimony. Bates denied ever speaking to Hinton about the Union. Bates testified that during the campaign he saw messengers reading union literature on the company premises and talking about the Union in the office and that he never threatened messengers for this conduct. However, if he saw a messenger who was holding work actually stop and talk about the Union, he would instruct him not to talk about the Union. Bates gave testimony that contradicted his sworn affidavit, and I observed that he was easily led to change his answers depending on which counsel was posing questions to him. I have concluded that Bates had no firm recollection of the events surrounding the union campaign, and I shall not rely on his testimony where it is contradicted by other more reliable evidence. Therefore, I credit Hinton. General Manager Zimmerman testified that

messengers talked about and read anything they wanted on company premises and that he never directed them to stop talking about the Union in the offices. Zimmerman stated that if he saw messengers standing around he would always ask them whether they had work and if they did he might direct them to stop talking about the Union and send them on their way. Zimmerman said that even before the union campaign he asked messengers whether they were holding work and directed them to go do their jobs. Zimmerman testified that he frequently hung around the messenger waiting areas in all three dispatch locations during the union campaign so that he could answer questions and in order to initiate conversations about the Union. At first, Zimmerman maintained that he always asked a messenger whether he had work before he initiated talk about the Union, but on cross-examination Zimmerman acknowledged that he did not always make sure a messenger did not have a job to do before he initiated union talk. I credit Hinton that before the election Zimmerman told him to stop talking about the Union in the office on an occasion when Hinton had no work on him but was waiting for a COD; I note that Zimmerman did not testify to the contrary.

I find that the testimony of all the witnesses shows that messengers, dispatchers, and managers often talked about a myriad variety of subjects, from sports to politics, in the messenger waiting areas of the Company's offices. These discussions took place both during and outside of working hours and messengers who were carrying work had not consistently been prohibited from stopping to talk to other employees and managers. People sitting in the waiting areas might or might not be on duty at any particular time, depending on their own schedules; and a messenger who was holding a package might have been ordered to sit and wait for a further assignment before leaving the office. Further, the uncontradicted testimony shows that flyers and notices in the waiting areas dealt with a variety of subjects, and there was no testimony that before the union campaign Respondent had ever sought to limit the type of literature that was present in the waiting areas. Finally, the testimony of dispatchers and managers shows that many of them lost no opportunities to campaign against the Union once the organizing drive was open. Thus, Orbit's antiunion literature was given out with employee paychecks during working hours and the subject of the election was constantly under discussion by dispatchers and managers. There can be no controversy that if Respondent did not have any no-solicitation rules and no-distribution rules before the campaign, it could not institute such policies directed solely toward union activity. Further, Respondent could not institute a rule that prohibited employees from discussing the Union during their breaktimes or waiting times as such a rule would be overly broad. Finally, if Respondent's supervisors had permitted employees to pause for political or sports discussions even when they had work to do before the Union came around, then management could not crack down selectively on employees who were talking about the Union. See, generally, *Our Way, Inc.*, 268 NLRB 394 (1983); *Harrah's Marino Hotel & Casino*, 296 NLRB 1116, 1120 (1989). I credit Ali that Wyatt told him that he could not discuss the Union inside the offices and that Respondent would fire anyone who placed union literature inside the offices. I credit Roesch that Wyatt told her that if she put union literature in the company

offices she would be fired. I credit Ali that Zimmerman permitted working employees to engage in discussions but told Ali that it was illegal to discuss the Union during worktime. I find that Moriarty told Simmons that he could not talk about the Union nor distribute union literature inside the Orbit office. I find that Bates told Hinton that he could not talk about the Union on companytime and that Zimmerman told him to stop discussing the Union even though Hinton did not have work to do. By all of these actions, Respondent violated Section 8(a)(1) of the Act.

3. Threats of physical harm

As discussed above, Owner Wyatt admitted that the day after Ali dropped a bicycle chain near him in a messenger waiting area, he saw Ali in the street and threatened to kill Ali if he ever threw a chain at him again. Wyatt admitted that at the time Ali dropped the chain he did not think that Ali had tried to hit him and he did not say anything about it. Wyatt's antagonism to Ali arose from the fact that Ali was instrumental in bringing the union campaign to Orbit and that Ali was one of the most active campaigners. Indeed, Wyatt testified that if the Union won Ali would most likely be the shop steward. I find that Wyatt threatened to kill Ali, because Ali was organizing on behalf of the Union. Thus, Respondent violated Section 8(a)(1) of the Act by threatening Ali with physical violence because he supported the Union.¹⁸

4. Interrogations, threats, and other violations

Foot messenger Chris Caggiano testified that he began attending union meetings in August 1994. Caggiano was dispatched by Jesus Walle out of the King Street office. He testified that in October he was speaking to Walle from a telephone at Lexington Avenue and 68th Street. Walle asked Caggiano whether he had heard that Orbit was considering becoming an all walker company. Walle said that such a switch would be better for the foot messengers: the bikers cost too much in insurance claims because of their high rates of injury and if there were no bikers there would be more work for the others. Walle continued that if there were no bikers then the walkers would not need the Union because the Company could afford to give paid vacations and other benefits. Caggiano testified that in late October or early November, during another call, Walle told him that even if the Union could establish itself negotiations would go on for a minimum of 2 years: if the Union asked for a medical plan then Respondent would ask for drug testing of employees; if the Union demanded sick days the Respondent would ask that employees be required to wear uniforms. At the end of this 2-year minimum period of negotiations, according to Walle, conditions at the Company could remain the way they were before the campaign, in fact, they could end up being worse.¹⁹ Walle acknowledged that he spoke to messengers

on his team in an effort to persuade them to vote against the Union. He told them that negotiations can take years. When employees responded that the Union would get benefits for them, he replied that in return the Company might ask that messengers be required to wear uniforms and that drug testing be instituted. Walle said that everything was negotiable. Walle stated that he brought up the subject of drug testing as a result of discussion at the management meeting with labor counsel and pursuant to literature he received. Walle admitted that he told Caggiano that soon the Company would no longer employ bikers and that this would mean more money for the walkers. I have found above that Caggiano is a reliable witness and that he answered questions with great care. I find that Walle told Caggiano that negotiations would take a minimum of 2 years and that if the Union asked for insurance and sick leave, the Company would demand that employees wear uniforms and submit to drug testing. Walle was not merely saying that negotiations take time and that there would be give and take; such statements would have been entirely lawful. Instead, Walle was telling Caggiano that negotiations would take a minimum of 2 years and that if the Union sought benefits for the messengers then the Company would ask for conditions that were universally acknowledged to be repugnant to the employees. Such a prediction smacks of a threat of retaliation by the Company to impose new work rules if the employees should choose union representation and conveys the impression that it would be futile for them to select the Union because the Company could drag out the negotiations as long as it wanted. Respondent thus violated Section 8(a)(1) of the Act. *Great Plains Coca-Bottling Co.*, 311 NLRB 509 (1993); *Airtex*, 308 NLRB 1135 fn. 2 (1992). I find that Walle told Caggiano that the Company would rid itself of the bikers and offer benefits to the walkers thereby rendering a union unnecessary. Respondent thus impliedly offered benefits as an inducement for the employees to abandon their support for the Union in violation of Section 8(a)(1) of the Act.

Bicycle messenger Lorenzo F. Simmons testified that he worked for Orbit until December 1994, when he left due to an on-the-job injury. Simmons was a strong supporter of the Union; he wore a union sticker on his safety helmet and he handed out union literature without trying to hide his activities from management. Simmons testified that during the campaign, Owner Robert Wyatt initiated a conversation with him about the Union every time the two met. One evening in late October at the King Street office, Wyatt addressed a group of messengers. He told the employees that if the Union came in he would lose control over the Company and lose control over CODs. With the Union, bikers could no longer get bike store credit. If there is a problem now, Wyatt said, messengers could talk to him or the other owners, but if the Union came in they might not be able to do that; they would have to tell their problem to the Union and if the Union did not think the problem was big enough then it would not inform management. Simmons maintained that on this occasion, Wyatt did not mention the process of collective bargaining nor did he say that benefits and wages could go up or down or stay the same. Simmons testified that in mid-October 1994, dispatcher Logos told him that if the Union came in he would lose CODs and bike store credits; he would not be able to take time off and he would not be able to talk directly to management. On November 14, in the

¹⁸ The General Counsel also alleges that Zimmerman threatened Ali with physical violence and that dispatcher Marcia Stone harassed Ali in a threatening manner. I have read and considered all of evidence relating to these events and I do not credit Ali's testimony concerning the incidents.

¹⁹ The evidence is clear that most of Respondent's employees did not relish the thought of being required to wear a uniform and that they regarded the possibility of drug testing with great distaste.

afternoon, according to Simmons, he heard Wyatt talking to four or five West African bikers. Wyatt told them that they were not eligible to vote in the election because they were not U.S. citizens; if they voted it would be illegal and they could be deported. Wyatt did not tell these bikers that he believed that the union constitution excluded them from membership. On November 17, Simmons was using a telephone at 23d Street and 10th Avenue to speak to his dispatcher. Then, Wyatt came on the telephone and said, "Lorenzo, this is Robert Wyatt." He told Simmons that if the Union won the election, Simmons would be fired. Simmons laughed and hung up the telephone, but he was nervous because he was in debt. That evening, Simmons was in the messenger waiting area of the 31st Street office with a group of messengers. Wyatt was there. He told the employees that if the Union won the election, "We would lose control over the Company." Then Wyatt asked the men why they thought the Union was good for the Company and how they would vote individually. Wyatt said that the Union could not guarantee them anything. The next day when Simmons was on his way to vote at the 31st Street office, he saw Wyatt and Arnold Thomas standing on the corner of Lexington Avenue and 31st Street. Wyatt said, "Remember what I told you yesterday, Lorenzo, vote no." Wyatt denied the substance of Simmons' testimony. I credit Simmons. As I have noted above, Wyatt was subject to bouts of thoughtless action and loose talk and he often went beyond the bounds of what he knew was lawful behavior. I find that Wyatt told Simmons that if the Union won the election Wyatt would lose control over the Company and over CODs. Wyatt thus implied that employees would no longer have a significant benefit if they selected the Union as their representative in violation of Section 8(a)(1) of the Act. I find that Wyatt told employees that if they voted in the election they could be deported, thereby unlawfully raising the fear of deportation in the minds of the employees in connection with the advent of the Union in violation of Section 8(a)(1) of the Act.²⁰ I find that Wyatt unlawfully interrogated a group of messengers the night before the election by asking the individuals how they would vote in violation of Section 8(a)(1) of the Act. Finally, I find that Wyatt threatened Simmons with discharge if the Union won the election. Although Simmons may have laughed, this threat was no joking matter. Respondent thus violated Section 8(a)(1) of the Act. I also credit Simmons' testimony about Logos' comments. Although Logos denied talking to Simmons about the Union, I do not find his denial convincing. I find that Logos told Simmons that if the Union won he would lose CODs and bike store credits. This constituted a threat that employees would lose benefits if they voted for the Union. Respondent thus violated Section 8(a)(1) of the Act.

Bicycle messenger Patrick Gilles has been employed by Orbit for more than 3 years. Gilles, who is also referred to as "Sony," is a highly productive employee. Gilles testified that the 31st Street Office Manager Dennis Moriarty told him that he should not vote for the Union because he made good money and the Union would take money out of his check. Several times in October 1994, Moriarty asked Gilles if he was going to a union meeting and Gilles replied that he did not know; Gilles did not want to inform management that he

supported the Union. Moriarty told Gilles that he knew Gilles would not vote "yes" for the Union and that he knew he had his vote. Gilles testified that on November 17 at about 5:30 p.m., he was in the messenger area near the bicycle rack talking to Ali when Moriarty ran over from the dispatch area. Moriarty asked Gilles whether he was a citizen. Gilles laughed and said he had a green card. Moriarty said if he was not a citizen, then he could not join the Union and he would be fired.

Moriarty testified that he was in charge of giving out information in the 31st Street office during the union campaign. Moriarty did not favor the Union and his personal goal was to defeat the Union. Moriarty recalled that he spoke to Gilles about the Union, but he denied asking Gilles whether he supported the Union or whether he intended to vote for the Union. Moriarty asked Gilles to take an interest in the campaign and to vote. He and Gilles had been friendly for 2 years and he thought that Gilles was happy and would not want a third party involved to change anything, so he assumed that Gilles would vote "No." Moriarty admitted that he asked Gilles if he was going to a union meeting and he asked other messengers if they were going to union meetings by inquiring whether they were "going to check it out." Moriarty denied saying that the Union would cause the discharge of noncitizens. I have decided to credit Gilles whenever Moriarty's testimony is contradicted by that of Gilles; the latter impressed me as having a strong recollection that was unwavering and exact despite very vigorous cross-examination by counsel for Respondent. I credit Gilles that Moriarty implied to Gilles that, if the Union won the election, noncitizen employees would be fired. This statement constituted a violation of Section 8(a)(1) of the Act. I find that when Moriarty asked Gilles whether he was going to a union meeting and when Moriarty said he knew how Gilles was planning to vote, Respondent violated Section 8(a)(1) of the Act.

Gilles' dispatcher, Keith Hann, spoke to a group of messengers during the campaign. According to Gilles, he told them that if the Union was successful, employees would have no more bike credits and CODs would be cut down. Hann also said that dispatchers would stop making personal loans to messengers.²¹ Hann denied the remarks attributed to him by Gilles. Hann was not an impressive witness. Although Hann acknowledged that he went to the management meeting with labor counsel and was instructed to speak to the messengers about the campaign, Hann maintained that he was not told to persuade the messengers to vote against the Union and he professed not to know whether the owners of Orbit wanted the Union to win or lose. I shall not credit Hann's testimony because I find that he is not a reliable witness. Hann's remarks to Gilles constituted a threat that employees would lose their benefits if they voted for the Union and Respondent thereby violated Section 8(a)(1) of the Act.

Samuel McDuffie, a dispatcher who occasionally filled in for Gilles' regular dispatcher, told Gilles and a few other bikers that they should not want the Union because if the Union came in, they would be subject to drug and alcohol testing. According to Gilles, McDuffie did not say this would be negotiated; he said it would definitely take place. On the

²¹ The evidence shows that dispatchers and managers occasionally make loans to messengers out of their personal funds.

²⁰ *Great American Products*, 312 NLRB 962, 966-967 (1993).

day after a union meeting, McDuffie told Gilles that he had happened to pass the union headquarters the night before and that he had noticed a few walkers from the Company going in. He said it was too bad because they would not get any more work. McDuffie denied making any of these comments to Gilles; in fact, McDuffie said that he never made much conversation about the Union. Yet McDuffie acknowledged that he initiated conversations with his people concerning the Union, asking them why they wanted to bring in a third party when "you guys can form your own group and negotiate something with us." He urged the men to decide what they wanted and to conduct their own negotiations with the owners. Because of the contradictions in McDuffie's testimony, I do not credit McDuffie's denials. I find that Respondent violated Section 8(a)(1) of the Act by creating the impression of surveillance of employees' activities in support of the Union and by threatening to reduce the work assignments of employees who supported the Union.

During the campaign, Gilles heard Wyatt address a group of messengers. Wyatt said that the employees did not need the Union. He told them that negotiations could take 2, 3, or 4 years. Now bikers could make \$15 to \$20 per hour, but if he had to negotiate he would only give \$5 or \$8 per hour. Wyatt said it was all up to him; Gilles was sure that Wyatt was not referring to an offer he would make, instead Wyatt was saying what he would agree to. Gilles was sure that Wyatt did not tell the messengers that as a result of negotiations they could wind up with more or less. Wyatt said that if the Union were voted in, messengers would have to come to work at a certain time; if they were late three times they would be fired and they would also be fired after receiving three warnings. Gilles testified that Wyatt told them that with the Union, business would go down. I find that Wyatt threatened to impose stricter work and attendance rules, threatened to refuse to bargain in good faith, and threatened employees with a loss of work. Respondent thereby violated Section 8(a)(1) of the Act.

In early November 1994, Gilles was at the King Street office looking for work when Logos gave a run to another biker; after the other man left, Logos gave Gilles two rush jobs. Gilles expressed satisfaction at receiving two lucrative jobs. Logos replied that he had dispatched the good runs to Gilles because he was not carrying all those Teamsters stickers on his helmet and that he had given the other man only one job because "he had all those stickers on him." I have found that Gilles is a reliable witness, and I credit him that Logos gave Gilles two relatively high paying jobs while informing him that this was a benefit for not supporting the Union. By implying that employees would receive benefits if they did not support the Union, Respondent violated Section 8(a)(1) of the Act.

Bicycle messenger Calvin Hinton testified that managers and dispatchers discussed the Union with him and other messengers at every opportunity both inside and outside the office. In early October 1994, Hinton was in Owner Frederick Katz' office discussing some paperwork when Katz asked him how he felt about the Union. Hinton said he was leaning toward supporting the Union. A few weeks later, Katz spoke to him and other messengers in front of the King Street office. Katz said that if the Union came in he would have to raise the Company's rates to pay for union benefits and he would lose part of his work force. When Hinton said that the

employees were due for a raise and asked what the Union had to do with client rates, Katz said that Orbit could not afford medical benefits. Hinton testified that just before the election Katz asked him how he planned to vote in the election. Hinton recalled that during the week of November 4, when he and other messengers were standing outside the King Street office, Wyatt told them that he did not have to negotiate with the Union and that he would not negotiate. Wyatt asked the workers why they needed a union when they could negotiate for themselves. Then the employees asked Wyatt what he could promise them, and Wyatt replied that he could not promise anything but that it would be better for all of them if the Union did not win the election. Wyatt stated that if the Union lost he could still talk to the messengers; however, if the Union won he would not be able to speak to them but instead would have to talk to the Union through the shop steward. And, Wyatt told them, the steward would be Mostafa Ali. Hinton testified that Head Dispatcher Logos constantly spoke to him about the Union in the King Street dispatch area. During the week of November 14, Logos asked Hinton if he was a citizen. After Hinton replied that he was, another dispatcher named James Ruiz said that foreigners would be in trouble because under the union constitution they could not be part of the Union. On November 17, Logos was dispatching a run to Hinton who had called him from a telephone in the 70's. Logos told Hinton that he had better make his money now; once the Union came in it would be all over and if his bike broke down there would be no more bike shop credit. When Hinton asked what the Union had to do with the credit, Logos said he would be on his own if his bike broke down. Katz testified that he spoke to messengers about the Union as often as he could and anywhere he could, including the dispatch area, the messenger waiting area, and the street. Katz told the employees that the Company could not afford to give medical benefits: clients would not pay higher charges and the cost of benefits could not be passed along to them. Katz stated that he told the employees that if Orbit had to raise its rates it might lose customers, but he denied saying that if the Union came in the Company would lose customers. Katz knew that Hinton supported the Union, but he denied asking him how he would vote. I observed that Katz was an angry witness: his attitude to counsel for the General Counsel was antagonistic and he cursed under his breath while he was testifying. I believe that Katz' anger directed to the Union and to the counsel for General Counsel colored his answers under oath, and I shall not credit his testimony where it is contradicted by other reliable testimony. Therefore, I credit Hinton that Katz asked him how he felt about the Union and later asked how he planned to vote. Katz was an owner of Respondent and his questions sought specific information about Hinton's sympathies. I find that the questioning was coercive and that Respondent violated Section 8(a)(1). Katz' statement that if the Union won he would have to raise his rates to pay for benefits and would lose part of his work force was not based on objective facts and demonstrably probable circumstances beyond his control. Instead, Katz made a definite link between a union victory and a layoff, in other words a threat of reprisal, without knowing the cost of any benefits that might be demanded by the Union or the value of any concessions that might be offered. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). Respondent thereby violated Section 8(a)(1)

of the Act. As set forth above, I have found that Wyatt's recollection about what he actually did and said during the campaign is not accurate, and I shall not rely on his testimony. Therefore, I credit Hinton that Wyatt said that he did not have to negotiate with the Union and that he would not negotiate. I credit Hinton that Logos told him that noncitizens would be in trouble and that there would be no more bike shop credits if the Union won. By these statements, Respondent violated Section 8(a)(1) of the Act.

Mostafa Ali testified that at about the time the Union filed its representation petition on October 4, 1994, dispatcher Logos said he had heard that there was a big meeting the next day and he asked Ali whether they were going for an election or for a strike. Ali told Logos that he should stay out of it. After the union meeting took place, Logos asked him what had happened the night before. Ali replied that he did not want to talk about this. Then Logos said he heard that only 12 people attended the meeting. Again, Ali told Logos that he did not want to discuss this. Logos denied asking Ali anything at all about union meetings. I credit Ali that Logos asked Ali to tell him about events taking place at the union meeting and asked how many employees had attended. This questioning, even of an outspoken union adherent, was coercive, because it was not merely a conversational gambit; Logos asked his questions while he was dispatching work to Ali and, in essence, determining his earnings for the day, and the questions sought specific information about the union activities of employees. Thus, I find that Respondent violated Section 8(a)(1) of the Act.

Bicycle messenger Robert Marshall testified that dispatchers Logos and Walle frequently asked his opinion of the Union. Marshall was an open supporter of the Union, and I do not find that Respondent violated the Act by interrogating Marshall.

General Manager Zimmerman testified that during the campaign he saw union stickers all over the bathrooms, walls, and furniture in the Company's offices. Zimmerman had seen Ali post such stickers outside the office and he assumed that Ali was also responsible for the stickers on Respondent's premises. Zimmerman was constantly removing the stickers by scraping them with a coin or putty knife. On one such occasion, Zimmerman did not stop when he had finished inside the office, he went outside and removed union stickers from the lamp post in the street. Removal of union literature posted on public property is a violation of Section 8(a)(1) of the Act.

5. The survey

It was stipulated on the record that on May 26 or June 2, 1995, a written survey in the form of a questionnaire was distributed to messengers and drivers at the Company. The survey, which could be returned anonymously filled out, asked questions such as whether there was fair and respectful treatment by dispatchers and managers, whether dispatchers and managers answered questions, whether the pay was better at Orbit than at other messenger companies, and what changes should be made at the Company. Zimmerman testified that no survey had been given out at Orbit in at least 8 years. Wyatt testified that there had been a survey in around 1990, but no copy of it was produced and no other employee of the Company testified that he had ever seen it. As discussed above, the messengers had been polled in Sep-

tember 1994, concerning the idea of reducing their commissions in exchange for the institution of a toll free 800 telephone number. The General Counsel argues that the 1995 survey was an unlawful solicitation of grievances in that it took place during the pendency of the instant case when there was a strong likelihood that the election would be set aside and a new election would be ordered. The Respondent urges that the survey was a response to operational changes that had been made at Orbit in February 1995, including changes in the method of receiving telephone calls and dispatching runs. Respondent argues that the survey was necessary to determine what impact the changes had on customer service and overall efficiency. I find that the questionnaire asks no such operational questions as are suggested by Respondent's arguments. The survey is about working conditions and about the employees' satisfaction with their superiors and their rates of pay. The survey echoes the Company's theme during the union campaign that Orbit's managers had always been available to listen to and adjust complaints, that the employees did not need a third party to intercede on their behalf with management and that the pay scale was as much as the market would bear. I find that no similar survey had been taken of Respondent's employees in the past. The survey is clearly a solicitation of grievances. It is well settled that such surveys conducted during the pendency of an election violate Section 8(a)(1) of the Act by impliedly promising to remedy employee grievances and thus interfere with the employees' choice whether they wish to be represented by a union. *Weather Shield of Connecticut*, 300 NLRB 93, 104 (1990). In *Reliance Electric Co.*, 191 NLRB 44, 46 (1971), the Board said:

Where, as here, an employer who has not previously had a practice of soliciting employee grievances or complaints, adopts such a course when unions engage in organizational campaigns seeking to represent employees, we think there is a compelling inference that he is implicitly promising to correct those inequities he discovers as a result of his inquiries and likewise urging on his employees that the combined program of inquiry and correction will make union representation unnecessary.

Here, the solicitation of employee grievances took place after the election was held. However, the Union was openly campaigning again among the employees and signing up the messengers, and a massive unfair labor practice case had been filed and was about to be tried together with the many objections to the election. Clearly, the campaign was not over and it was not unlikely that a second election would be held. Indeed, Wyatt's affidavit admitted violations such as threatening to fire two leading employee organizers for conducting union activities on the premises and threatening to kill one leading employee organizer for dropping a bicycle chain too near to him. These admissions should have alerted Respondent that a second election was in the offing. Under these circumstances, where a union campaign was being conducted and Respondent had reason to anticipate the holding of a second election, I find that the distribution of the survey violated Section 8(a)(1) of the Act.

D. Jennifer Roesch

Jennifer Roesch was hired as a telephone operator in mid-April 1994. She worked full time from 9 a.m. to 5:30 p.m., Monday through Friday. Her starting wage of \$250 per week had been raised to \$275 per week before her termination. Roesch was politically active, especially as a member of the International Socialist Organization, and she often discussed her views and activities with Owner Robert Wyatt and Office Manager Douglas Bates.

Roesch solicited openly for the Union in front of the 18th Street office before her working hours on September 9, 1994. Later that day, as she was using her computer to try to help a client with a problem, she found that her access to much of the information on the computer had been blocked. Bates came over to assist her and he telephoned Wyatt who was at that moment busy limiting his employees' access to the computers. Wyatt stated that until the union campaign began any employee had access to a great variety of computerized information about the Company. Once the Union came around, he decided to curtail the availability of information to employees according to their job duties. During the process of changing the computer access, Wyatt made a number of errors and many employees, including Roesch, lost their ability to see information they needed. After a while, Wyatt was able to correct the problems and restore access to information that was necessary to each employee's job functions. Eventually, Roesch found that her access was restored so that she could perform her job duties but her access to certain information such as names and addresses of messengers was never restored. I credit Wyatt's explanation that he did not single out Roesch when he was limiting employee access to computer information and that he made certain that each employee retained the ability to use the computerized information necessary to job performance.

On September 15, while Roesch was speaking on the telephone at the end of the day, dispatcher Jesus Walle asked Roesch how the union meeting had gone the night before. When Roesch replied that he had no right to ask her about that, Manager Douglas Bates said "that's right." Then Walle and dispatcher James Ruiz began complaining that the Union was disturbing things in the office. Ruiz asked Roesch why she could not let well enough alone saying that ever since the Union came around everything had been a mess, and Ruiz concluded by saying, "you bitch, you're messing everything up. You f—king pussy why are you doing this?" Roesch responded with an obscenity whereupon Bates called her into his office and told her to watch her language. Ruiz denied speaking to Roesch about the Union; in fact he testified that he had no opinion about the union campaign, that he took no position about the Union, and that he was not paid to comment on the Union. I do not credit Ruiz. I find that Ruiz, a supervisor of Respondent, castigated Roesch and called her vile names because she was a leader of the organizing campaign. This was done in the presence of Manager Bates who did not repudiate the comments. Although gross language was common at Orbit and was used by many of the supervisors and employees, it became unlawful when it was coupled with disparaging remarks about protected activity. In that instance, rather than being merely the usual "shop talk," it was an attempt to degrade an employee because of her union activities. Used in that manner, obscenities reasonably tend to discourage and interfere with union activities. I find

that Respondent violated Section 8(a)(1) of the Act. *Domsey Trading Corp.*, 310 NLRB 777, 793 (1993), *enfd.* 16 F.3d 517 (2d Cir. 1994).

On September 16, Katz joined a conversation Roesch was having with other employees in the evening by calling Roesch a liar and saying the Union lied when it told employees that Orbit had made a \$9 million profit. Katz said that the messenger industry was highly competitive and the Local 840 health fund costs were exorbitant. Katz said if the Union won, then the Company would have to raise rates; it would be less competitive and would lose customers. As a result, the Company would have to restrict its operations or shut down in some way.

Bates testified that during the third week in September, Roesch wrote some customer orders incorrectly and Bates thought he saw a pattern in which Roesch was not taking all the information a customer gave her. Bates said that for one run, Roesch had failed to note that the customer "needed change."²² When he confronted her with the mistake, Roesch apologized. On a run for a customer named Bob Cole where neither the pickup nor the delivery were at the customer's own office, Roesch forgot to write down the information that the messenger was to pick up a portfolio so that when the messenger arrived to pick up the item there was confusion over what should be given to him. Bates tried to issue a warning to Roesch about this incident but she refused to sign it. For another job, Bates testified that Roesch transposed the pickup and delivery addresses, but Roesch denied to Bates that it was her mistake ascribing it to the customer. Finally, for a job for Presentation-Harris, the customer called in the run as a direct rush but Roesch did not note this. Roesch denied that she had made an error but Bates said that he verified the information with the customer directly. Bates gave Roesch a written warning after the second mistake on September 21. An examination of the documentary evidence shows that two of the purported mistakes took place late in the afternoon of the September 22; this makes them suspect, in my view, because this was late in the afternoon on Roesch's last day of work and I do not believe that Bates would have had enough time to verify the information and confront Roesch as he testified. I have found above that Bates' recollection is not always reliable and I do not credit his testimony that Roesch made two more mistakes after he issued her a warning notice on September 21. According to Bates, before these incidents Roesch had been very accurate. He stated that other phone operators made mistakes and that he had issued written warnings and a termination for such mistakes in the past. However, no documentary evidence was introduced to support this assertion; there were such warnings, Respondent could certainly have produced them from its files. According to Bates, a normal rate of errors company-wide is three or four mistakes per week.

Roesch recalled that on September 12, Bates had spoken of issuing her a written warning for failing to note that a client had called in a direct rush job, but that she had protested that the client had not asked for a rush. During the week of September 19, Bates accused her of taking information incorrectly and transposing the pickup and delivery addresses. Bates showed Roesch a warning slip for that job, but she re-

²² When the customer needs change, the messenger is told to have change on hand.

fused to sign it because she had taken down the information just as the customer had given it to her. Roesch could not recall any incidents where she had failed to enter the fact that the customer needed change, nor that a pickup involved a portfolio, not any of the other problems mentioned by Bates. Roesch stated that it was her opinion that most operators make at least one or two mistakes per week and that she made fewer errors than most.

Bates testified that Roesch continued to come in late even after the written warning for tardiness was issued to her on September 1. After a few more instances, on September 7, he told Roesch the he was giving her a final warning for lateness and that if it happened again, she would be discharged. Again, Roesch was late on a few occasions but Bates did nothing because each incident involved a tardiness of less than 10 minutes. Finally, Roesch came in at 9:12 on the morning of September 23, and he discharged her. Bates testified that he fired Roesch because she had come to work late and she had not called to say that she would be late to work. Roesch testified that on September 23 she was running to the office because she knew that she was late. After she arrived, she was called into Bates' office where he told her that she was fired for being late that morning and for her overall work performance.

Roesch's time records show that she was often tardy: during the week of May 13, she was 12 minutes late on one occasion; during the week ending May 27, she was 1 hour late on Monday, and 17 minutes late on Thursday, but no warning was issued because she had called the office; in almost every week during the summer of 1994, Roesch was late from 3 to 15 minutes once or more per week. No warnings were issued until September 1.

When asked to give the reason for Roesch's discharge, Bates cited tardiness in combination with other factors. Bates said that at the beginning of the summer, he and Wyatt had noticed that she took fewer telephone calls than the other operators. After he told Roesch that he expected more from her and moved her seat away from a colleague to whom she was often speaking, she improved "immensely." Bates said he had also considered the customer complaints against Roesch for making various mistakes, her excessive absences, and the fact that a coworker had complained that she wore a bathing suit in the office while he was forced to wear a shirt. Bates had not actually seen Roesch in the bathing suit, and it is not clear what the actual facts are concerning this issue. However, Bates' affidavit gives only two reasons for Roesch's discharge, the fact that there were customer complaints against her for mistakes and the fact that she was 12 minutes late on September 23, 1994. I shall rely on these two reasons; I believe that any other purported considerations have been cited to bolster Respondent's case but do not have a high probability of accuracy. Bates' affidavit was given closer in time to the actual event and I find that it reflects Bates' and Wyatt's intentions at the time.²³

Bates testified that right after he fired Roesch he told the employees at the dispatch table that he had just fired her and that he was going to have to deal with Ali. Bates testified that knowing that Ali and Roesch were roommates and knowing that Ali always complained to him, he knew that

he would hear from Ali about her termination and would have to deal with him. Messenger Chris Caggiano recalled that the day Roesch was fired he was approaching the King Street office when Roesch came up to him and asked what time it was.²⁴ Then Caggiano went into the office and over to the dispatch table where he saw Bates, Logos, Ruiz, Walle, and others. Bates stood up and said to all of them that they would go on as if nothing had happened. As Bates began walking toward his office, Caggiano heard him say, "Now, we're going to deal with Mostafa." I have found above that Caggiano was a particularly impressive and reliable witness and I credit him as to Bates' remarks. I find that Bates said exactly what Caggiano testified.

The record shows that other employees of Respondent were tardy on a fairly regular basis but were not discharged. For instance, phone operator Miguel Ortiz was 15 minutes late twice during the week of September 2, 1994, but was not given any written warnings.²⁵ However, Ortiz did have two written warnings in his record; on March 2, 1994, he was warned for being late on two occasions, once by 15 minutes and once by 10 minutes, and on October 25, 1994, Ortiz was given a written warning for tardiness. Bates testified that he used written warnings to help Ortiz correct his "bouts of lateness." According to Bates, Ortiz cleans offices and works weekends for Orbit and he was willing to stay late when requested. Telephone operator Maurice Floyd is often late yet the record shows that he has never been issued a written warning. For the week ending July 22, 1994, he was 15 minutes late on one occasion; for the period ending July 29, he was late 18 minutes and 11 minutes on different occasions; the week ending August 19, he was 13 minutes late one morning; the week ending September 16, he was 49 minutes late one day. Bates explained that Floyd lives with an invalid mother and his tardiness is caused by the fact that her caregivers are often late or do not show up at all. Floyd always calls Bates and informs him when he has to come to work late. Floyd is a long-service employee who is entitled to 15 paid days off per year and he was not issued a warning for taking 9 sick days in 1994. Respondent's records show that employee Eladio Tagle was 1 hour late twice in August 1994, and was not issued any warning or other discipline.

Bates testified that he uses warning slips for two different purposes. The first purpose is to inform an employee that a situation must be corrected. The second purpose is to prepare for discharge of the employee and make a record for unemployment proceedings. Bates first gives the employee a verbal warning; if the problem continues he issues a written warning and if a second written warning is given soon afterwards, then Bates tells the employee that it is a final warning and that termination may ensue if the problem is not corrected. But Bates acknowledged that written warnings are not issued automatically if a problem persists; he considers whether the employee is a good employee before he writes him up, and past performance is a factor. Bates admitted that

²⁴ Caggiano thought it was about 9:07, but he did not check his watch against the timeclock in the office, and he did not testify that he was sure of the actual time.

²⁵ I do not rely on counsel for the Respondent's attempt to use leading questions to change Bates' testimony by suggesting that Ortiz may not have been late but may have changed his starting time.

²³ Bates spoke to Wyatt about firing Roesch before he actually did so.

his practice concerning written warnings varied from employee to employee.

I find that the General Counsel has shown that Roesch's union activities were a motivating factor in her discharge and in the issuance of warnings on September 7 and 21. The record shows that Respondent harbored a strong antiunion animus and that the managers and owners resented the employees' efforts to organize the Company. By his own admission, Owner Wyatt threatened to fire Roesch if her union activity continued to interfere with his business. Owner Katz called Roesch a liar during a discussion of the Company's financial condition in relation to possible union demands. Roesch began campaigning in front of Orbit's offices from the first day that the campaign was brought out into the open and she was known to Respondent as an ardent activist who had strong political beliefs. At most, only 2-1/2 weeks elapsed between Respondent's realization that Roesch was helping to lead an organizing campaign and her discharge. Further, after Bates fired Roesch he said, "Now, we're going to deal with Mostafa," a statement whose most likely purport is that one strong union supporter had been ousted and that Respondent would then see about firing the next one. I must now determine whether Respondent would have warned and discharged Roesch even in the absence of her support for the Union. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1981), cert. denied 455 U.S. 989 (1982). Bates, the author of Roesch's warning slips and the manager who discharged her, admitted that his practice in issuing written warnings varied among employees. Bates considered whether the employee was a "good employee" and he took into account whether the warning was for the purpose of helping the employee improve performance or for the purpose of preparing the way to a discharge. But Bates could not articulate any rule that Respondent used to decide if an employee should be rehabilitated or fired. Thus, Ortiz was given written warnings for tardiness in March and October 1994, but although he was 15 minutes late twice during the week of September 2, he was not disciplined. Tagle was not disciplined for his tardiness in the month before Roesch was discharged, purportedly for coming to work late. Roesch herself was not disciplined for tardiness until Bates' annoyance was aroused by her oversleeping. I find that Respondent's practice with respect to written warnings for tardiness was so unpredictable and capricious as not to be subject to any discernible pattern. In essence, it depended on Bates' subjective feeling that certain employees were, as he put it, good employees. Bates thought that Ortiz was a good employee despite his bouts of tardiness because he stayed late and performed extra chores. At some point during her 5 months of employment with Respondent, Bates must have thought that Roesch was a good employee because her wages were increased from \$250 to \$275 per week. The record supports a finding that after Roesch was discovered to be a strong union supporter she ceased to be a good employee in Bates' estimation. Roesch was issued a final warning on September 7 for tardiness, a day after she openly distributed flyers in front of a company office with Union Agent McCulloch and other employees. Then, Roesch was given written warning notices for purported errors she made in recording jobs called in to her in mid-September. The record does not show conclusively whether Roesch made fewer or more errors than other phone operators, but it does show that Roesch received a

warning while it does not show warnings issued to any other operators who made mistakes. Further, the record shows that Bates was quick to fire Roesch as soon as she came to work more than 10 minutes late. Bates was waiting for Roesch and fired her the moment she walked into the office on September 23. It is clear that Respondent had determined to discharge Roesch as soon as it had a colorable reason to do so. I conclude that Respondent treated Roesch differently from its other employees because she was a leader in the campaign to organize the messengers and that it would not have issued warning notices to her on September 7 and 21 nor would it have discharged her in the absence of this activity. Thus, Respondent violated Section 8(a)(3) and (1) of the Act by its discharge of Roesch and by its issuance to her of the September 7 and 21 warning notices.

E. Mostafa Ali

Bicycle messenger Mostafa Ali testified that a few days after he helped to distribute the flyer opposing the 800 number proposal, he gave out union information in front of the King Street office. At around 10 or 10:30 a.m. when Ali went into the office to begin working, Bates spoke to him and said that he would have to set his hours on a definite basis and that he could no longer begin work at varying times. Bates told Ali that he could work from 9 to 5 or 10 to 6, but that the hours had to be definite. Ali protested that he would comply as long as others did the same and he was not being picked on. Finally, Ali told Bates that he would begin work at 10 a.m. The next day, he called his dispatcher from home at about 10 a.m. to say he was ready to start work. Bates spoke to him by telephone and told him to come to the office and receive a written warning for failing to report in person at 9 a.m. Ali protested that messengers did not punch in and maintained that they did not have to appear at the office to begin work, but Bates insisted that Ali had to come to the office. When Ali went arrived at the office, he refused to sign the warning slip, and Bates called Wyatt over to deal with the matter. Ali testified that Wyatt said, "If I wasn't sure it was illegal to fire you for this union bullshit, I would f—king fire you right now." Ali testified that pursuant to his arrangement with his dispatcher, Phil Logos, he did not have to report to the office, but instead he could telephone Logos when he was ready to go to work and receive his first assignment. According to Ali, he never had any set hours and he was permitted to call Logos at different times to say he wanted to start work. Logos' testimony supported Ali in significant respects. Logos testified that Ali did not have any set time to begin work and that when he started late he would also work late. However, Logos expected Ali to begin work by 10 a.m. and when Ali failed to call by that time he warned Ali concerning his tardiness. Before the union campaign, Logos had never issued a written warning to Ali; he had warned him verbally and complained to Bates. After the union drive began, Ali stayed outside soliciting for the Union beginning at 8:30 a.m. and he was still not ready to work at 10 or 10:30 so Logos complained to Bates and they told him that he had to have a set time. It was agreed that Ali would be ready for work by 10 a.m. Bates recalled the incident a bit differently from Logos. In addition, he denied calling Wyatt over to confront Ali, and he denied issuing a warning. Bates maintained that he did not know that Ali supported the Union at the time of the incident. I have

found above that Bates did not have a very clear recollection of many events. Further, in this instance, Logos' testimony supports Ali's testimony about his arrangements concerning his work schedule. I credit Ali that Bates tried to issue a warning for failing to report at 9 a.m., contrary to the arrangement that Ali could telephone his dispatcher at 10 a.m. This was a violation of Section 8(a)(3) and (1) of the Act. Although Wyatt denied cursing at Ali and mentioning the Union, I credit Ali that Wyatt said, "If I wasn't sure it was illegal to fire you for this union bullshit, I would fucking fire you right now." It is clear that because Ali was standing outside Orbit offices distributing union literature Respondent was aware that Ali supported the Union at the time that Bates tried to issue a written warning. I do not find any violation in Respondent's requirement that Ali have a set time for reporting to work. This was a requirement for all of the employees: they might commence work at different times, but they were indeed required to have a definite time for beginning. I find that Wyatt's comment to Ali contained a veiled threat of discharge for engaging in union activities. Respondent thus violated Section 8(a)(1) of the Act.

Ali testified that during the third week in September 1994, Bates spoke to him by telephone and instructed him to come into the office to be written up because a walker named Victor Vasquez had complained that Ali had delayed him by speaking to him about the Union while he was actually holding work. Ali denied delaying anyone and he denied knowing Vasquez. Bates said that he would investigate further, and it was decided that Ali would report to the King Street office before 10 a.m. so that he could be confronted with Vasquez. When Ali arrived at the King Street office the next day, Vasquez was not there and Bates explained that he was out on a run. Ali refused to sign the written warning which states that Ali had stopped "to do other things while working." Ali accused Bates of picking on him because he engaged in union activity. Ali denied that he ever detained employees with work to do; he always asked first whether they were carrying work and, if they were, he merely gave them a flyer and let them go. If an employee told Ali to leave him alone, he would comply, but he might try to talk to this employee again on another occasion. Bates testified that Vasquez complained that Ali was harassing him while he was trying to do his job. Bates recalled telling Ali that he could not persist in talking to messengers who were holding work or who did not want to speak with him about the Union. Bates could not recall that he took any action against Ali on this occasion until he was shown the written warning in evidence. Vasquez did not testify here. I do not believe that Bates had a firm recollection of the relevant events. The written warning does not say that Ali was harassing another employee nor does it say that Ali was preventing the other employee from performing his duties. Respondent did not produce any witnesses who saw Ali harassing other employees or preventing them from continuing their rounds. I credit Ali that he did not keep other employees from doing their jobs. Thus, I find that Respondent issued the warning to Ali because he supported the Union in violation of Section 8(a)(3) and (1) of the Act.

On April 21, 1995, Ali was getting off his bicycle outside the King Street office, when he encountered dispatcher Terence Goodwin. Ali testified that Goodwin accused him of riding on the sidewalk and told him that next time he would

have Ali written up. Ali denied that he was riding on the sidewalk. One-half hour later Ali was talking to fellow employee Claudel Cherry at the corner of King and Varick Streets when Goodwin walked up to them. Goodwin said that Ali was carrying work and that he was not supposed to talk to other employees. He directed Ali to deliver the package or he would have him written up. When Ali told Goodwin to stop harassing him, Goodwin said, "I have people who can take care of you." That evening, Charles Harrison, the night manager of the King Street office, asked Ali to sign a warning slip for riding on the sidewalk. Ali refused to sign. Goodwin testified that he saw Ali ride the length of the street and that he reprimanded him and told him to go deliver his package. Later, Goodwin told Frederick Katz that he had seen Ali riding on the sidewalk and Katz called Harrison to issue the written warning. Goodwin stated that he only had one conversation with Ali on this day and he denied saying that he had people to take care of Ali. Harrison recalled that when he tried to give Ali the warning slip Ali refused to sign it, stating that he had not been riding on the sidewalk.²⁶ I do not find that Goodwin is a credible witness. Goodwin testified that he did not want to have anything to do with the Union and that he knew nothing about it, even testifying that during the campaign, "I was totally unaware of what position the company was taking." But Goodwin also testified that during the campaign he sat around with other employees discussing the Union and trying to figure out what it could do for them, and he recalled five conversations with Ali about the Union. Goodwin received campaign literature from the Company with his weekly paycheck and, after first maintaining that he threw away all the pieces of paper he was given with his paycheck, he acknowledged that he read the "headlines." Goodwin voted in the election which was held before he became a dispatcher. It is beyond belief that anyone working at Orbit could be unaware that management opposed the Union. As I observed Goodwin, I formed the definite impression that Goodwin did not want to testify about the events material to the instant case and that he was determined to proclaim his ignorance so that he could avoid searching his memory in response to the questions posed to him where the answer might not favor Respondent. I shall not rely on Goodwin's testimony where it is contradicted by other credible evidence. I find that Goodwin's statement to Ali that he had people who could take care of him was a threat of physical violence in retribution for Ali's organizational activities; Respondent thus violated Section 8(a)(1) of the Act. I find that Ali was not riding on the sidewalk and that the written warning issued to him on April 21 was without foundation. Since the record amply establishes the hostility of the owners and management of Orbit to Ali because of his union activities, I find that Respondent thus violated Section 8(a)(3) and (1) of the Act.

Ali testified that on April 21 or 22 he was trying to make a delivery at 1290 Sixth Avenue, near 51st Street. He also was carrying a package to be delivered on Second Avenue at 52d or 53d Street. There was no answer when Ali tried

²⁶ Although the warning slip states that two employees witnessed Ali refuse his signature and that they witnessed Ali's admission that he had indeed been riding on the sidewalk, neither of these named employees supported this statement in their testimony here. I do not credit the supposed admission.

to deliver the package at 1290 so he went downstairs to find a phone in order to call his dispatcher, Charles Harrison, in accordance with the policy that a messenger must immediately telephone if there is any problem in making a delivery. While Ali was on the way down, his beeper sounded. Ali soon telephoned Harrison, described his problem and asked whether he should proceed to his next job on Second Avenue. Harrison told Ali that the last customer was there and would meet him in the lobby of the building and he instructed Ali to return to 1290 Sixth Avenue. According to Ali, he did as directed by Harrison and then proceeded to complete the Second Avenue delivery. Ali testified that 3 or 4 days later, Zimmerman confronted him at the King Street office in the evening and asked him to sign two warning slips. One warning stated that Ali had a problem but did not call the office and the other warning slip concerned riding on the sidewalk near the 31st Street office. Ali refused to sign the warning slips. Although Zimmerman accused him of failing to call in and instead proceeding directly to Second Avenue, Ali maintained that he had indeed called Harrison with his problem at 1290 Sixth Avenue. Further, Ali denied riding on the sidewalk.

Harrison testified that he believed that Ali had wrongfully left the delivery point and was heading over to the East Side to make the Second Avenue delivery without telephoning him as he was supposed to do. Harrison reached this conclusion because he believed that 1290 Sixth Avenue was between 54th and 55th Streets and Ali told him that he was telephoning from a phone on the street at Fifth Avenue and 52d Street. Harrison believed that all buildings have telephones in the lobby and that there are telephones on all corners of Sixth Avenue.²⁷ Thus, Ali should have telephoned him from Sixth Avenue and 54th or 55th Streets unless he had already abandoned his effort to make the delivery at 1290. However, Harrison did not testify that he had inspected the location and that he had personally seen the lobby or street telephones. In fact, 1290 Sixth Avenue is located at between 51st and 52d Streets and it is entirely reasonable that, given conditions in New York City, the first telephone Ali could have found from which to call Harrison would have been one block away at Fifth Avenue and 52d Street.²⁸

Zimmerman testified that riding on the sidewalk is unlawful and that messengers who hit pedestrians while riding on the sidewalk are inviting lawsuits against the Company. In fact, Zimmerman stated, Respondent may immediately terminate an employee who is found riding on the sidewalk. Zimmerman recounted an occasion when he had seen Ali riding on the sidewalk near the 31st Street office; Zimmerman called Ali's name and said he would be written up for this infraction. Zimmerman could not recall what Ali said in response. A few days after this incident, Zimmerman was at the Varick Street office when he heard that Ali had failed to call his dispatcher while encountering a problem making a delivery on Sixth Avenue but instead had gone on to his next job. Zimmerman decided to issue a written warning to Ali for that failing and also for riding on the sidewalk a few

days before. According to Zimmerman, Ali protested to him that he had indeed called his dispatcher with the problem and as a result Zimmerman discarded the warning slip for that offense. However, Zimmerman insisted that Ali sign the warning for riding on the sidewalk and he recalled that he was outraged when Ali refused to sign. Zimmerman testified that the slip was signed by Harrison and Torres, two witnesses who were present when Ali at first admitted the infraction but then denied it. This is the same warning slip, dated April 21, 1995, that was purportedly issued at the behest of Goodwin for an occasion when Goodwin saw Ali riding on the sidewalk. As I noted above, neither of the two purported witnesses testified in support of the supposed admission by Ali. The same document cannot logically support both stories about two different events testified to by Respondent's witnesses. I do not credit Zimmerman that he saw Ali riding on the sidewalk. Zimmerman contended that this was a dischargeable offense yet he waited a few days before deciding to issue a written warning; the delay hardly bolsters his version of the incident. Instead, I find that Respondent was actively seeking occasions to issue written warnings to Ali who was still a thorn in the side of Orbit management. I find that Respondent was trying to build a paper record of written warnings to Ali so that it could discharge him. Thus, I find that the warning was issued because Ali supported the Union in violation of Section 8(a)(3) and (1) of the Act.

Ali testified that on June 22, he called his dispatcher, Lionel Greene, from a location at Park Avenue South and 16th Street to inform him that he had picked up a package and was on his way to deliver it to 55th Street and Seventh Avenue. Greene told Ali that he wanted him to pick up a rush job at 45th Street and Third Avenue and deliver it to Eighth Avenue in the low 50s. Ali reminded Greene that he was heading West. Greene retorted that Ali should not give him a hard time. Ali said he was not giving Greene a hard time, merely reminding Greene where he was. Ali denied that he told Greene that he was not going all the way up there to pick up the package. Nevertheless, according to Ali, Greene told him to go get empty, that is, deliver his remaining package, and then Greene hung up. Ali called Greene back and asked Greene not to hang up; he said he was writing down the run and that he really needed work. But Greene again told him to go get empty and hung up on him again. At that point, Ali rode to the 18th Street office, about 5 minutes away, and he looked for Bates who had recently been made general manager. In Bates' absence, Ali spoke to Logos and told him that Greene was not giving him work and had hung up on him. Ali believed that Greene was not giving him as many runs as in weeks past and that Greene was making him wait a long time between runs. Logos looked at Ali's runs for the day on the computer and said he would speak to Greene. Then Logos told Ali to get some work from the 18th Street dispatcher. Logos recalled that Ali was screaming and ranting that his dispatcher was not giving him any work and that he was sending him uptown with only one run. After Logos told the 18th Street dispatcher to give Ali a job, Greene informed him that Ali had just refused a run and that Ali should not have been given any other work.

Greene had worked for Orbit as a dispatcher for about 9 months ending in December 1993, and after an interruption in his employment, returned to work as a dispatcher in March 1995. Greene claimed to be unaware of any union or-

²⁷ Both of these assertions are incorrect.

²⁸ There is no way of establishing from the instant record whether or not there were lobby telephones in April 1995, at 1290 Sixth Avenue or whether these were available for use when Ali needed them.

ganizing campaign and unaware that there had been an election in 1994. Greene testified that he did not know that Ali supported the Union. However, he testified that Ali had tried to talk to him about the Union but that he had said, "Don't come to me with that mess." Greene stated that he had been dispatching work to Ali since the beginning of June 1995, and that he had formed the opinion that Ali was a complainer and wanted everything to be easy. On June 22, Greene was giving Ali information about a run when Ali said that he was not going all the way up there. Greene told Ali that the package was a rush and that Ali had to pick it up, and Ali asked whether Greene knew where he was. According to Greene, he and Ali went back and forth, with Ali saying he would not go and Greene saying that Ali must go because it was a rush. Then, he instructed Ali to "go get empty." Eventually, the call was disconnected for some reason. Head Dispatcher Freddie Santos, who sat across the dispatch table from Greene, asked him who was arguing with him. Greene told Santos that Ali did not want to take a run, but Santos said that Ali could not refuse a run. At this point, Ali called Greene back and Greene told him that he had to take the run. Greene testified that he was still trying to persuade Ali to take the run even though at the end of the first conversation, he had, in a feeling of frustration, told Ali to get empty. But Ali again said that he was not going all the way up there, so Greene again instructed him to go get empty. Then the call was disconnected again. Some time after this, Logos called Greene and told him that he had given Ali another run. Greene protested that he had been trying to give Ali a rush but that Ali did not want it. Logos said he had not known that. Then Bates called Greene and asked whether Ali had refused a run; Greene confirmed that he had. Bates told Greene not to give Ali any more work. The next morning, Greene saw Ali and Bates in the latter's office. Bates told Greene that Ali's version of the events was that he had been begging for work. Greene said that, to the contrary, Ali had refused to do the run, and, in fact, Ali had been giving him a hard time for 3 weeks. I find that Greene is a credible witness and I shall rely on his testimony.

Bates testified that Ali always complained about his dispatchers and complained that he was not getting enough work. Bates transferred Ali to Greene for dispatching because Greene is quiet and unassuming and he thought it would be a good match for Ali. Bates recalled that on June 22, he saw on the computer that there was a rush pick up and delivery that had not been dispatched in the 25 minutes since it had been called in by the customer. Bates considered this an old job that should have been dispatched by then and he called Head Dispatcher Santos to ask about it. Santos told Bates that Greene had tried to give the job to Ali but that Ali had refused it. Bates next spoke to Greene who informed him that Ali did not want the run because it was too far away. Greene said he had informed Ali that it was a rush. Greene told Bates that Ali had called back a second time and that he had again tried to dispatch the run to Ali, but Ali would not accept the run and Greene told him to get empty. A short while later, Bates heard from Logos that Ali had been at 18th Street complaining and looking for work and that Logos had given Ali a job. Bates testified that he was upset and called Wyatt to say that Ali should be fired for refusing the job. Bates told Wyatt that the run Greene had attempted to dispatch to Ali fit in very well with the work

he was already carrying. Wyatt instructed Bates to make sure that the story was correct and that Ali had in fact refused the run several times; if everything checked out, Bates could discharge Ali. Bates testified that the next day, after checking the facts with Greene, he called Ali into the office and discharged him. When Bates told Ali why he was being fired, Ali denied that he refused the job and maintained that Greene had hung up on him and that he called back a second time and said he would take the run. Then Greene was called to Bates' office to confront Ali. Greene stated that Ali had not only refused the run twice, but, instead of delivering the package he was carrying, Ali went to the 18th Street office to complain. After Greene left Bates' office, Ali asked him for another chance and offered to sign a warning slip because he needed the job. After Bates called Greene on the telephone to go over the facts again, he decided to adhere to his decision to fire Ali.

Head Dispatcher Wilfred Santos testified that he overheard Greene speaking on the telephone and saying, "what do you mean you're not going to do it?" Santos also heard Greene ask, "what do you mean you refuse?" Then Santos saw Greene hang up the telephone. Ali called back and Santos spoke to him. Santos asked Ali what he was doing. Ali responded that they were trying to give him a pickup and that he did not want it because he thought it was out of his way. Santos said the run fit in perfectly with the work he had already been assigned and he informed Ali that the run had been held for him and was now considered old. Santos told Ali that he must do the job. But Ali said he would not do the job, and when Santos asked whether Ali was refusing, Ali said yes he was. Santos put Ali on hold and presumably Greene then picked up the call. After a while, Bates called Santos and asked why he had an old run on the table. Santos replied that it had been held for Ali but that Ali had refused the job. Bates then asked to speak to Green; Santos had no further conversation with him on this matter. I find that Santos is a credible witness and I shall rely on his testimony.

Ali testified that Bates told him he was being fired for refusing a run. Ali denied that he had refused the work and he explained to Bates that Greene had hung up on him. Ali told Bates that he could not fire him because he had never refused work before. Bates replied that he had given Ali enough chances and that he had warned Ali verbally on prior occasions for turning down work. According to Ali, when Greene came in to Bates' office, he agreed with Ali that he had called back a second time to ask for the run. However, Bates did not waiver in his determination to discharge Ali and Ali accused him of firing him because he supported the Union. Bates replied that the Union had nothing to do with it.

Ali testified that after he was discharged he stood outside the office and discussed his situation with other Orbit employees. Dispatcher Arnold Thomas came outside to smoke a cigarette and, according to Ali, told a walker named Alvin who was standing there that Ali had been raising hell for a long time in the Company about wages and the conditions of work and that he just had to go. Then dispatcher Jesus Walle came out and told Ali that everyone knew he was fired for union activities, but that Ali was stupid since management was looking for an excuse to fire Ali and he gave them that excuse. Thomas denied the comments attributed to him by Ali. He testified that he was outside the office smok-

ing when a messenger named Alvin asked him why Ali was fired. Thomas stated that he and Alvin were standing about 15 feet from Ali and that he spoke very quietly and told Alvin that there was talk that Ali had refused a run. Thomas had observed Ali arguing with others about the Union and he did not want to get into a discussion with Ali. I credit Thomas in this instance. Walle testified that he had dispatched Ali on occasion and that Ali would give him a hard time if Walle tried to send him to a location that he did not like. If Walle had someone else for the job, he would just hang up on Ali. But if Walle really needed Ali to do the work, he would ask Bates to speak to Ali and instruct him to take the run. Walle recalled that he was on his way home the day of Ali's discharge when Ali called him over from across the street and asked Walle to tell him why he was fired. Walle told Ali he was fired because he refused to do a run. Ali said the real reason he was fired was his support of the Union. Walle denied that Ali was fired because of the Union. He admitted mocking Ali, saying that Ali had refused to do a run and calling Ali a cocky "son of a bitch" who thought he was untouchable. I credit Walle's testimony about this occasion.

Although I have found Ali to be a credible witness in other instances, I do not credit him about the events of June 22. First, it is clear from the testimony of all of the witnesses that Ali often tried to refuse work that was being dispatched to him. Some dispatchers were forceful and succeeded in getting him to take a run he really did not want. Second, I observed that when Ali testified he did not always recall events exactly and there were instances when his testimony contradicted his affidavit given earlier to a Board Agent.²⁹ Third, I have found that Greene and Santos were credible witnesses concerning the events of June 22. The fact that their recollections vary to some extent leads me to believe that their stories were not carefully rehearsed and that they were testifying from their true memories of the events. I credit both Greene and Santos that Ali refused to take the job that Greene was trying to dispatch to him.

It is abundantly clear that Respondent harbored animus against Ali and it cannot seriously be contended that Orbit was not happy to find a reason to discharge Ali. The record shows, and it need not be repeated at length here, that Wyatt and the other managers resented Ali's union activities and I find that Ali's support for the Union was a motivating factor in his discharge. *Wright Line*, supra. The General Counsel having met the burden of proof to this extent, the Respondent must show that even if Ali had not engaged in union activities he would have been discharged for refusing the run that Greene wanted to give him. As stated above, I credit Greene and Santos that Ali refused to perform the run that they wished to assign to him. I credit Greene that Ali refused the run twice in two separate telephone calls on June 22, 1995. I credit Santos that Ali told him that he was refusing the run despite Santos' urging that the location of the pickup and delivery fit in with Ali's other assignment and despite the fact that Santos informed him that the run was a rush, that it was now considered "old" and that it had been held

expressly for Ali. Santos instructed Ali that he must do the job, yet Ali refused. I am convinced, based on the abundant testimony on this subject, that during a messenger's regular hours he is not privileged to refuse a run once he is told with finality that he must do it. Messengers do on occasion argue with dispatchers and try to avoid a certain run, but once they are told in a definite way that the job must be done, they comply. On this occasion, Ali was not merely "begging off" his work and trying to convince his superiors that they should give the job to someone else. Ali had already been informed that the run had been held for him and that it was getting old. Thus the dialogue was past the point of argument and cajolment and had reached the point where Ali had been given a direct order. I am convinced that Ali refused the direct order. In these circumstances, I am convinced that even if Ali had never been involved in bringing the Union to Orbit, he would have been fired. Thus, I do not find that Respondent violated the Act when it discharged Ali.

F. Discharge of Robert Marshall

Robert Marshall was employed by Orbit as a bicycle messenger for about 2-1/2 years. In early 1994, Marshall took a leave of absence to enter a drug treatment program: he returned to work in June 1994. Marshall supported the Union and he began distributing union flyers and soliciting signatures on a union petition in October 1994. Following his return to work at Orbit after the drug treatment program, Marshall attended counseling sessions every Tuesday and Thursday at 11 a.m. His dispatcher, Logos, gave him runs that would take him downtown near the location of the sessions.³⁰ When a counseling session was over and Marshall was ready to resume work, he would telephone Logos to ask for more assignments. A few days after the election in November 1994, the Company made the arrangement more formal when Bates instructed Marshall to furnish a written schedule of his counseling sessions showing dates and times when he would be off duty attending the sessions. On Tuesday, December 13, 1994, at about 10:30 a.m., Marshall spoke to Logos by telephone from a location at Sixth Avenue and 41st Street, and Logos told him to head downtown with three packages he was carrying. Marshall started to go downtown; pursuant to his arrangement with the Company, he would deliver the packages and then take time off to attend a counseling session. Five minutes later, at Fifth Avenue and 34th Street, Marshall was beeped and the dispatcher to whom Marshall spoke when he called the office in response to the beep gave him another run to be picked up at 12th Avenue and 44th Street. Marshall thought that Logos might have forgotten that he was on his way to his 11 a.m. counseling session downtown so he asked to speak to Logos. The dispatcher said that Logos was out whereupon Marshall said that he would not take the run. Marshall proceeded downtown and on his way stopped at the Varick Street office to see Wyatt and discuss the apparent conflict between the job at 12th Avenue and 44th Street and his scheduled counseling session. Marshall was told that Wyatt was not in. As Marshall left the office and entered the elevator, he was con-

²⁹For example, Ali insisted that a customer at the Museum of Natural History was satisfied with his actions in a problem delivery and was going to call the Company to defend him, when his affidavit states that the customer was upset and was yelling at him.

³⁰Logos testified that he was careful to assign downtown runs to Marshall so that he could attend counseling sessions. Logos said that Bates had helped with this arrangement for Marshall, because, "this was a big thing, that he had to go to these counseling sessions."

fronted by a person whom he did not recognize and who did not identify himself; this person prevented the elevator door from closing and asked Marshall his name.³¹ Marshall said, "don't worry about this." The person asked whether he would deliver the packages he was holding and Marshall repeated several times, "Don't worry about it." Marshall also said he would not deliver any packages until he spoke to Wyatt. As the doors of the elevator closed, Marshall heard the person say that he would be fired. Then Marshall opened the elevator doors and said that if he would be fired he would take the work home. Marshall left the Varick Street office and proceeded to deliver the three packages he had been holding. Later in the day, when Marshall returned to the office, Bates told Marshall he was fired for refusing to take a run. Marshall testified that he was unaware of a company policy concerning messengers who refuse runs. Marshall stated that he had once before refused a job and that no discipline had been imposed on him. Orbit had issued prior written warnings to Marshall; one dated October 1993, for failing to call when he was going to be absent from work, and two warnings dated June 28, 1994, for failing to follow a dispatcher's instructions and failing to pick up a package.

Bates testified that he knew Marshall was a strong supporter of the Union when he was fired. Bates stated that Marshall was fired for "threatening not to deliver the packages, for insubordination." According to Bates, as Marshall was heading downtown with several packages, dispatcher Spear tried to give Marshall another job but Marshall refused it and hung up. Head dispatcher Logos told Bates that Marshall had refused a run and Bates instructed Logos to call Marshall into the office. Before Marshall arrived, Frederick Katz telephoned Bates and asked what work Marshall was carrying. Bates consulted the computer and saw that Marshall had three packages. Katz told Bates that Marshall had said he would not deliver the packages until he spoke to Wyatt. Katz instructed Bates to make sure that Marshall's packages were delivered and then to fire him for insubordination. Bates acknowledged that he knew Marshall had a counseling session at the time he refused the job. Bates testified that Marshall had never refused work before this incident.

Katz testified that Marshall was one of the employees who was most vocal in favor of the Union. Katz was in his office one day when Marshall walked in asking to speak to Wyatt. Upon hearing that Wyatt was not there, Marshall walked out saying, "I'm not delivering these packages until I talk to Wyatt." Katz followed Marshall to the elevator and asked him what he had said; Marshall replied that he should not worry about it. Then, Katz held the elevator door open and asked Marshall whether he would deliver the packages; Marshall again responded that he should not worry about it. When Katz again asked whether Marshall would deliver the packages, Marshall asked him to let the elevator door go. Katz said he would not release the elevator until Marshall told him whether he would deliver the packages whereupon Marshall asked if Katz was going to try to take the packages away from him. Katz finally let the elevator go. According to Katz he called Bates immediately and told him to discharge Marshall even if he did deliver the packages because he had threatened not to deliver the work and was insubordi-

³¹ Later that day, someone informed Marshall that the person was a manager named Rick.

nate. Later, Katz found out that Marshall had indeed made the deliveries but he decided that Marshall should be fired anyway.

It is clear from Katz' testimony that he made the decision to discharge Marshall and that his reason was Marshall's threat not to deliver work he was carrying until he could speak to Wyatt. Based on Katz' testimony I find that Marshall's refusal of a run that would divert him from going downtown to his counseling session was not a factor in Katz' decision. It is clear that Respondent was aware that Marshall was a strong supporter of the Union when it made the decision to discharge him. It is also well established that Respondent had a strong antiunion animus and that Respondent fought vigorously to defeat the Union. I find that Marshall's support for the Union was a motivating factor in the decision to discharge him. *Wright Line*, supra. Thus, I must determine whether Respondent would have fired Marshall even if he had not supported the Union. It is Respondent's burden to show that it would have taken the same action in the absence of union activity by Marshall. The record shows that it was common for people to yell at each other at Orbit. There was also a frequent absence of civility and cursing was commonplace. Indeed, that everyone from the top down engaged in intemperate behavior and threats is shown by the example of Wyatt who threatened to kill Ali when he was annoyed over the bicycle chain incident, an incident he admits posed no danger to him. I find that in normal circumstances, if Marshall had not been an ardent and vocal union supporter, Katz would have been influenced by learning in his discussion with Bates that Marshall was upset because he had been given an assignment that conflicted with his previously scheduled counseling session. It is well established in the record that Respondent makes accommodations for various employees who need time off during the day. Katz would have realized that Marshall was trying to talk to Wyatt about his problem, in accord with Wyatt's well publicized policy of being always available to talk to the messengers about their problems without the intervention of a third party.³² Further, although Marshall said that he would not deliver his packages until he could speak to Wyatt, Marshall did not repeat this threat when Katz several times asked him about it and instead he told Katz not to worry about it. Katz did not identify himself to Marshall when the latter was looking for Wyatt and he did not offer to help Marshall with his problem. Instead, he challenged a person who was already visibly upset. I am convinced that had not Marshall been a union supporter, Katz would not have ordered Marshall's firing for a single statement that he would not do his run until he spoke to Wyatt, especially where Marshall proceeded to complete his assignment without further incident or further delay. I find that Respondent seized on this single statement by Marshall in order to rid itself of a union supporter. There is no evidence in the record that Respondent has disciplined employees for similar incidents; but there is ample evidence in the record that many employees at first refuse to do runs and fulfill assignments and have to be convinced and cajoled into doing their work. It is of no moment that the election

³² Katz himself testified that during the campaign he often told messengers that the Company had an open door policy and did not need anyone to speak for them; employees could bring to him their complaints concerning the type of dispatching they were getting.

had already been held when the incident occurred: Marshall was fired before the final tally of ballots issued and Respondent was well aware that the Union was seeking to organize the entire messenger industry in New York City and was engaged in a sustained and long-lasting effort. I find that Respondent discharged Marshall because he supported the Union and that Respondent thus violated Section 8(a)(3) and (1) of the Act.

III. OBJECTIONS TO THE ELECTION

The Union filed 49 objections to the election. Objections 17, 18, 21, 41, 42, 45, and 48 were withdrawn. Objection 36 was amended to assert that Moriarty engaged in the conduct on behalf of the Company. The following objections are based on conduct discussed above which was found to constitute unfair labor practices and I shall recommend that they be sustained: Objections 1, 2, 5, 7, 8, 10, 11, 12, 15, 19, 25, 27, 28, 30, 35, 36, 37, 40, and 49.

I find that the record does not contain sufficient evidence to support the following objections and I shall recommend that they be dismissed: Objections 3, 4, 6, 9, 13, 14, 16, 20, 22, 23, 24, 26, 29, 31, 32, 33, 38, 39, 43, 44, 46 and 47. Objection 34 states:

The Employer, by its agents and/or representatives, Robert Wyatt and "T" at the 31st Street location, and Doug Bates and Rick Katz at the King Street location, stationed themselves on the day of the election at subway exits approximate to the King Street and 31st Street voting locations. These efforts were intended to intercept prospective voters in an effort to coerce, induce and intimidate them into voting against the union.

There is no evidence that Bates and Katz were near the King Street office on the day of the election. Both Wyatt and Thomas testified that they stood on the corner of 31st Street and Lexington Avenue on the day of the election and said hello to employees passing by on the way to vote. Wyatt and Thomas could not see the office nor could they be seen by voters inside the office. The estimates of the distance from the office where the voting was going on to the corner of 31st Street varied widely and it is not possible from this record to say anything more accurate than that the office was more than 20 feet from the corner where Wyatt and Thomas were standing. As discussed above, I have credited Simmons' testimony that the day before the election, Wyatt told him that he would be fired if the Union won the election and I have credited Simmons' testimony that when he saw Wyatt and Thomas on the corner on the day of the election, Wyatt said, "Remember what I told you yesterday, Lorenzo, vote no." Thus, right before Simmons went to vote, Wyatt reminded him of the threat of discharge if the Union should win the election. On this basis, the Objection should be sustained.

The actions engaged in by the Employer in the objections found above to be valid occurred during the critical preelection period and reasonably tended to interfere with the employees' free and untrammled choice in the election held on November 18, 1994. Accordingly, I recommend that the election be set aside and that Case 2-RC-21473 be remanded

to the Regional Director for Region 2 to conduct a new election when he deems the circumstances permit.

CONCLUSIONS OF LAW

1. By discharging Jennifer Roesch and Robert Marshall because they supported Local 840, International Brotherhood of Teamsters, AFL-CIO, Respondent violated Section 8(a)(3) and (1) of the Act.

2. By issuing warning notices to Roesch on September 7 and 21, by issuing a verbal warning to Mostafa Ali in mid-September 1994, and written warnings to Ali on September 22, 1994, and April 21, 1995, Respondent violated Section 8(a)(3) and (1) of the Act.

3. By coercively interrogating its employees, by engaging in surveillance of its employees' activities in support of the Union, by creating the impression that employees' activities in support of the Union were under surveillance, by prohibiting the distribution of union literature inside its offices, by prohibiting discussion of the Union during working hours, by threatening employees with physical harm because they supported the Union, by harassing employees with vile language in connection with their union activities, by threatening employees with the imposition of new work rules if they selected the Union, by conveying the impression that it would be futile to select the Union, by threatening to refuse to bargain in good faith, by impliedly offering benefits as an inducement for the employees to abandon the Union, by threatening employees with the loss of benefits if they selected the Union, by raising the fear of deportation if the employees selected the Union, by threatening employees with discharge and layoff if they selected the Union, by threatening to reduce the work assignments of employees if they selected the Union, by removing union literature from public property, and by soliciting employees' grievances and impliedly promising to remedy them, Respondent violated Section 8(a)(1) of the Act.

4. The General Counsel has not proved that Respondent engaged in any other violations of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³³

³³If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Orbit Lightspeed Courier Systems, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Discharging, disciplining, or otherwise discriminating against any employee for supporting Local 840, International Brotherhood of Teamsters, AFL-CIO.
 - (b) Coercively interrogating its employees.
 - (c) Engaging in surveillance of its employees' activities in support of the Union and creating the impression that employees' activities in support of the Union are under surveillance.
 - (d) Prohibiting the distribution of union literature inside its offices.
 - (e) Prohibiting discussion of the Union during working hours.
 - (f) Threatening employees with physical harm because they support the Union.
 - (g) Harassing employees with vile language in connection with their activities in support of the Union.
 - (h) Threatening employees with the imposition of new work rules if they select the Union.
 - (i) Conveying to employees the impression that it would be futile to select the Union.
 - (j) Threatening to refuse to bargain in good faith if the employees select the Union.
 - (k) Impliedly offering benefits as an inducement for the employees to abandon the Union.
 - (l) Threatening employees with loss of benefits if they select the Union.
 - (m) Raising the fear of deportation if the employees select the Union.
 - (n) Threatening employees with discharge and layoff if they select the Union.
 - (o) Threatening to reduce the work assignments of employees if they select the Union.
 - (p) Removing union literature from public property.
 - (q) Soliciting employees' grievances and impliedly promising to remedy them.
 - (r) 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) Offer Jennifer Roesch and Robert Marshall immediate and full reinstatement to their former jobs or, if those jobs

no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharges of Jennifer Roesch and Robert Marshall, and remove from its files any reference to the unlawful disciplinary notices issued to Jennifer Roesch, Robert Marshall, and Mostafa Ali and notify them in writing that this has been done and that, respectively, the discharges and disciplinary notices will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facilities in New York, New York, copies of the attached notice marked "Appendix."³⁴ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

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

IT IS FURTHER RECOMMENDED that Objections 1, 2, 5, 7, 8, 10, 11, 12, 15, 19, 25, 27, 28, 30, 34, 35, 36, 37, 40, and 49 be sustained and that Objections 3, 4, 6, 9, 13, 14, 16, 20, 22, 23, 24, 26, 29, 31, 32, 33, 38, 39, 43, 44, 46, and 47 be overruled, and that the election conducted on November 18, 1994, be set aside and that Case 2-RC-21473 be remanded to the Regional Director for Region 2 to conduct a new election when he deems the circumstances permit.

³⁴If 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."