

The L. Suzio Concrete Company and International Brotherhood of Teamsters, Local 677. Case 34-CA-7001

February 27, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS LIEBMAN
AND HURTGEN

On September 23, 1997, Administrative Law Judge Steven Fish issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions¹ and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, The L. Suzio Concrete Company, Meriden, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ Member Hurtgen agrees that the AD position was not changed into a supervisory one on April 10. Consequently, he does not pass upon any suggestion by the judge that the decision to create a supervisory position is a mandatory subject of bargaining. See *Hampton House*, 317 NLRB 1005 (1995).

Rick Concepcion, Esq., for the General Counsel.
John A. Sabanosh, Esq. and *Justin K. Falco, Esq.* and *Andrew L. Houlding, Esq.* (*Rome, McGuigan, Sabanosh, P.C.*), of Bridgeport, Connecticut, for the Respondent.
Robert M. Cheverie, Esq. (*Robert M. Cheverie & Associates, P.C.*), of East Hartford, Connecticut, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN FISH, Administrative Law Judge. Pursuant to charges and amended charges filed by International Brotherhood of Teamsters, Local 677 (the Union or Charging Party), the Acting Director for Region 34, issued a complaint and notice of hearing on May 31, 1995,¹ alleging that the L. Suzio Concrete Company (the Respondent) has violated Section 8(a)(1) and (5) of the Act.

The trial with respect to the allegations raised by the above complaint was held before me on November 6 and 7, 1996, in Hartford, Connecticut. Briefs have been filed by the

¹ All dates herein referred to are in 1995, unless otherwise indicated.

General Counsel and Respondent² and have been carefully considered.

Based on the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent is a Connecticut corporation with an office and place of business in Meriden, Connecticut (its facility), where it is engaged in the business of selling ready mixed concrete, sand, stone, gravel, and asphalt.

During the 12-month period ending April 30, 1995, Respondent purchased and received at its facility goods valued in excess of \$50,000 directly from points located outside the State of Connecticut. Respondent admits, and I so find that it is and has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted and I so find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

Respondent is a family owned and operated business, with various members of the Suzio family serving in various supervisory and managerial capacities.

It employs approximately 40 drivers, 32 of which operate concrete trucks, and 8 drivers who drive aggregate trucks. All of these drivers have been represented by the Union since 1957, and a series of collective-bargaining agreements between the parties has been in effect covering the terms and conditions of employment of these drivers.

On December 5, 1994, the Union filed a petition in Case 34-RC-1302 seeking to represent employees employed in Respondent's dispatch office located at its Meriden facility. Pursuant thereto a hearing was held on December 15 and 20, 1994 in Hartford, Connecticut. At the hearing, Respondent contended that the positions of head dispatcher (HD) filled at the time by Sam Evangelista, and aggregates dispatcher (AD) at that time held by Stephen Riccitelli were supervisory and excludable from the unit. The Union contended that both

² On March 3, 1997, the General Counsel filed a motion to strike attachments A-K to Respondent's brief on the grounds that these attachments were not introduced into the record and should not be considered.

Respondent filed a reply to the General Counsel's motion, dated March 7, 1997. The Respondent argues that it has not attempted to submit any new evidence, and that its attachments are merely argument and cases, as well as public documents related to the above case, which are included as merely a convenience for the administrative law judge.

I essentially agree with Respondent's reply, and I shall deny the General Counsel's motion. For the most part the attachments consist of cases and position papers which I have construed as argument and perfectly appropriate as an attachment to a brief, as well as public documents related to the instant matter, including representation case documents. While attachment 1, Respondent's position paper submitted to the Region does contain exhibits in the form of affidavits, Respondent made no reference to these affidavits in its brief, and has not requested that these affidavits be made part of the record, nor considered as evidence. I have neither read, nor considered these affidavits in my decision.

Accordingly, for the above reasons, I shall deny the General Counsel's motion to strike.

the AD and HD positions should be included in the unit and were not supervisors under the Act. Additionally the Union asserted that one of the two order entry clerks employed in the dispatch office, Linda Manson, should be excluded from the unit based on her familial relationship with the Suzios.

The remaining employee in the unit, the only one whose status was not disputed at the hearing, was order entry clerk Denise Lucia.

On January 10, 1995, the Regional Director issued a Decision and Direction of Election (DDE) finding that the HD position should be excluded from the unit as supervisory as alleged by Respondent, and that Munson should be excluded from the unit as requested by the Union, because of her close family ties to the Suzios.

With respect to the AD position, held by Riccitelli at the time, the Regional Director concluded that the record did not establish that it was supervisory under Section 2(11) of the Act and included it in the unit. In that regard, the DDE states in pertinent part:

Aggregate Dispatcher Stephen Riccitelli reports generally to Head Dispatcher Evangelista. However, in scheduling and dispatching the 8 drivers who transport aggregate, Riccitelli functions independently. In this regard, in order to meet customer needs and limited by contractual seniority provisions, Riccitelli can schedule early delivery times, instruct drivers to alter their break and lunch times, and authorize overtime. While not entirely clear, it appears that Riccitelli can let drivers leave early as long as there are other drivers available. He does not, however, release or reassign employees during periods of inclement weather. When the workload is too heavy for the Employer's regular drivers, he can obtain additional trucks and drivers, if they are available, but only by using a pre-approved list of outside contractors prepared by the Employer's officers and owners. Although there was general testimony that he can warn drivers regarding their use of break times, it appears that Riccitelli's disciplinary authority is limited to major problems and customer complaints to higher management for resolution.

Based upon the above and the record as a whole, I find the authority of Aggregate Dispatcher Stephen Riccitelli is predominantly routine and clerical in nature and that he is not a supervisor within the meaning of the Act. [Footnotes omitted.]

On January 23, Respondent filed a request for review of the Regional Director's decision, arguing inter alia that the record established that Riccitelli exercised supervisory powers listed in Section 2(11) of the Act and his exercise of these powers requires independent judgment. The request cited among other cases, *NLRB v. Metropolitan Petroleum Co.*, 506 F.2d 616 (1st Cir. 1974) in support of its position that the authority of a dispatcher to hire extra trucks is sufficient to demonstrate his use of independent judgment and his exercise of supervisory authority.

On February 3, the Board issued an Order denying Respondent's request for review. In that Order the Board specifically discussed *Metropolitan*, supra, relied on by Respondent, and distinguished said case on several grounds. On that same day an election was held. Lucia and Riccitelli were

the only two voters, and the final tally was two votes for the Union and none against. On February 10, Respondent filed objections to the election, which were ultimately dismissed by the Regional Director, when he issued a Supplemental Decision and Certification of Representative on February 22.

On February 16, Respondent filed a motion for reconsideration of the Board's order denying review. In that document Respondent argued primarily that the Board had erred in its attempts to distinguish *Metropolitan*, supra, and contended that *Metropolitan* was controlling herein.

On February 24, the Board denied Respondent's motion for consideration, asserting that it "raises nothing not previously considered and is lacking in merit."

On March 10, Respondent filed a request for review of the supplemental decision and certification, principally arguing that its objections had been improperly dismissed.

Also on March 10, the Union's business representative, Louis Parisi, sent a letter to Respondent requesting meetings in order to negotiate a contract for the dispatch employees, and suggested four possible dates.

Respondent replied by letter dated March 16, from its attorney, asserting that since Respondent's request for review of the certification had not been acted upon, the demand to bargain was "premature."

On March 29, Respondent by Ric Suzio, its vice president and director of employee relations sent a letter to Parisi and the Union. In said letter, Suzio expressed shock that Riccitelli had testified at the representation hearing that he did not consider himself a supervisor and that the duties he performed were ministerial. Moreover, as a result of that testimony which the Regional Director relied upon, Suzio asserted that the Regional Director had changed Respondent's "organizational structure." Therefore, as a result, in order to run its business effectively, Suzio announced that Respondent planned to "reestablish the position of Aggregate Dispatcher as a supervisory position," and that he planned to post the position on April 3. Suzio added that the purpose of the letter was to notify Parisi as business agent for the drivers, that said employees should consider both the aggregate and head dispatcher to be their supervisors.

The letter also states that by posting the new position, Respondent does not concede that the National Labor Relations Board was correct in its determination of the supervisory status of aggregate dispatcher, and that "by providing this information to you in your capacity as Business Representative for the Teamster's Union representing drivers employed by Suzio, we do not in any manner intend to imply that we are recognizing the bargaining unit certified by the National Labor Relations Board in NLRB Case No. 34-RC-1302 or the Union as bargaining agent for such unit."

After receiving a call from Riccitelli expressing concern about his job status in view of the pending change, Parisi consulted with his attorney. He did not ask Respondent to bargain about the pending change, since Respondent had already declined to negotiate with the Union and he felt that such a request would be futile. However, the Union decided, in order to protect Riccitelli's job to send a letter to Respondent, which it did on March 31. The letter attempts to put in a bid for Riccitelli to "maintain his position as aggregate dispatcher. It remains the position of Local 677 that the dispatchers at Suzio are nonsupervisory, and we have filed

unfair labor practice charges concerning your attempt to eliminate the bargaining unit.”³

By letter dated April 3, Respondent’s attorney advised the Union that it does not accept the Union’s bid on Riccitelli’s behalf, and that Riccitelli must submit a bid himself for the position if he is interested, in accordance with the procedures set forth on the posting. The letter further states that “this letter does not constitute Suzio’s recognition of your union as bargaining agent for Mr. Riccitelli and should not be so construed.” On the same day, Respondent posted for the AD position with a “refined” job description and a new hourly rate of \$11.05, an increase of \$1.75 per hour over the former pay rate of \$9.30. Lucia submitted a bid for the job by signing the posting on April 3.

On April 4, Respondent received the Board’s denial of its request for review of the supplementary decision and certification, which was dated March 31.

On April 3, the Union sent another letter requesting bargaining meetings with Respondent, and again suggesting four dates for such meetings.

On April 5, Respondent’s attorney replied to the Union’s request for a meeting by stating that he was scheduled to meet with his client to determine Respondent’s position concerning the Union’s bargaining demand. The letter ads that “this letter is neither a recognition of your claimed status as bargaining representative for Suzio’s dispatch employees nor a denial of such status.”

On April 5, Riccitelli received a memo from Ric Suzio. This memo states that Respondent always felt that the AD position was supervisory, and was shocked to hear his contrary testimony at the hearing, which gave Suzio the impression that he (Riccitelli) might not want to be a supervisor. Thus as a result Respondent decided to post the job to give him a chance to make choice. Thus if Riccitelli wanted the AD job as a supervisory position, he was instructed to sign his name to the posting, and the position would be assigned to him. Riccitelli complied and signed his name to the posting.

On April 10, Respondent’s vice president, Leonard Suzio Jr. and Evangelista met with Riccitelli to review the redefined AD job description. The new job description was similar to the prior job description that Riccitelli had previously signed in 1994, with the addition of four new duties which had been added. These four new responsibilities included:

- (7) Investigate and process reports of employee misconduct, discipline employees as appropriate and effectively recommend termination of employees as appropriate; (8) Effectively recommend the hiring of employees; (11) Attend supervisors’ and other managerial meetings as scheduled; (16) Receive and process employee complaints and grievances and participate in Grievance Procedure as required.

Riccitelli initialed 14 of the 18 cited responsibilities on the new job description, but did not, however, initial the four above new duties, because as Riccitelli stated in his testimony, these were tasks which to date he had not yet per-

formed. After Suzio explained to Riccitelli that Respondent expected Riccitelli to perform these four new responsibilities, Riccitelli initialed the four new duties. With respect to the four new duties, however, Riccitelli noted on the job description that he initialed, “if asked to perform in supervisor position.”

On the same date, April 10, Respondent issued a memo to all drivers, entitled “Aggregate Dispatcher.” The memo reflects that as of April 1, 1995, the aggregate dispatcher position has been refined to “spell out more specifically its supervisory responsibilities, and that Riccitelli will continue in the position as redefined.”

Respondent has to date made no further responses to the Union’s requests to meet and bargain collectively.

Following the April 10 meeting, Riccitelli remained employed by Respondent as the AD until October 11, 1996, when he resigned to accept another position. On October 21, 1996, Denise Lucia was given the position of AD. Respondent at the time of the hearing herein was still in the process of filling Lucia’s prior position.

Four witnesses, Ric Suzio, Evangelista, Lucia, and Riccitelli provided testimony concerning the performance of Riccitelli (and Lucia during her brief tenure) as the AD subsequent to April 10. While their testimony diverges in some respects, all four witnesses substantially agree that there have been no significant changes in how that position has been performed after April 10, notwithstanding the “redefined” job description that Riccitelli initialed and agreed to on that date.

While as noted, the redefined job description added four “new” duties to the prior job description also initialed by Riccitelli, no record evidence was adduced that Riccitelli or for that matter Lucia, had exercised any of these four duties. Thus item number 7 requires the AD to “investigate and process reports of employee misconduct, discipline employees as appropriate and effectively recommend termination of employees as appropriate.” I note that Respondent’s position, as reflected in the testimony of its own witnesses was that those duties, as well as all the others in the redefined job description, were always part of the AD’s authority, and that the new description was issued in order to make sure that Riccitelli understood and agreed to perform these functions.

However, Respondent presented no testimony, nor does the record show any substantial difference between the AD’s performance of these duties, before or after April 10, 1995. In that regard, at all times, the AD’s primary involvement in driver discipline was the submission of “problem sheets” to management which report problems including employee misconduct, which problems are generally resolved by higher management. The use of these “problem sheets” was thoroughly litigated in the prior proceeding, and the record contains no evidence of any change in this procedure subsequent to April 10.

Riccitelli did admit however that in June 1995, he did make notations on a problem sheet, and that the sheet correctly reflects the fact that he met with each driver and “explained the importance of noting time schedules for deliveries. Also discussed their *breaks* and *routes* taken when going to jobs. *Time* spent loitering in the yards was also addressed. Trying to increase productivity.” Riccitelli further asserted however, that he had issued similar sheets and had

³ Indeed, on March 31, the Union filed the initial charge herein alleging that Respondent violated Sec. 8(a)(1)(3) and (5) of the Act by eliminating Riccitelli’s position and Sec. 8(a)(5) by failing to bargain with the Union by removing the position from the unit.

similar discussions with drivers about these matters prior to April 10. There is no dispute, that neither Riccitelli nor Lucia ever recommended "effectively" or otherwise the termination of an employee.

Evganelista did testify that Lucia in her performance as AD was more "aggressive" or forceful than Riccitelli in keeping track of the drivers whereabouts, and letting them know that the AD was paying attention to their whereabouts.

Item number 8 in the refined job description refers to effectively recommending the hiring of employees. The record reflects that Respondent's hiring process has not changed since April 10. The prospective employees are brought into the dispatch room by one of the Suzios and (after the Suzios had reviewed their applications) introduced to everyone in the room, including the order entry clerks. At that time the applicants are asked questions by the AD, HD, and the entry order clerks. Thereafter, Rick Suzio will come in and ask for an opinion on whether to hire the person or not. However, it is undisputed that Riccitelli had very little involvement in this process, asked very few questions, and rarely made any recommendations with respect to hire. Significantly, Evangelista conceded that 99 out of a 100 new hires of Respondent are mixer drivers and under his jurisdiction, and he would be asked for a recommendation by the Suzios.

Rick Suzio testified specifically to two instances where Riccitelli had made a recommendation to him concerning hiring an employee. One instance involved someone who Riccitelli had recommended who was working on a hired truck at the time.⁴ After reviewing this applicant's application and meeting with him, Rick Suzio agreed that the applicant was a good potential employee. However, Respondent did not hire this employee, because it did not believe that it was good practice to hire an employee from one of its customers.

The second instance described by Rick Suzio, admittedly occurred prior to April 10, 1995, when, according to Suzio, Riccitelli recommended that Respondent not hire an applicant named Charles O'Brien, and Respondent did not hire that individual.⁵

The third additional duty on the redefined description was "attend supervisors' and other managerial meetings as scheduled." The record contains no evidence that Riccitelli or Lucia ever attended or were asked to attend any supervisors' or other managerial meetings, either before or after April 10.

However, Riccitelli did admit that on September 26, 1995, Respondent sent him to attend a sexual harassment training program, for which he received a certificate from the Connecticut Business and Industry Association's supervisory training program.

Number 16 on the AD's "new" job description refers to receiving and processing employee complaints and grievances and participate in grievance procedure as required. With respect to this issue, Parisi credibly testified without contradiction, that the normal grievance procedure with respect to grievances involves only the shop steward, one of the Suzios and Parisi. Riccitelli, neither before or after April 10 ever became involved in receiving or processing griev-

ances. Nor did the record reveal that either Evangelista or Lucia ever participated in the grievance procedure.

However, Riccitelli did concede that on December 19, 1995, he met with Union Steward Joe Salerno and told him that (1) drivers were taking too long on trips, lunch, and breaks; (2) management was coming down hard on him for not doing his job of keeping drivers on track; (3) if it keeps up, Riccitelli would call drivers every 5 minutes to check their status; (4) he will keep track of their times and turn them into management for review; and (5) the drivers will be heavily scrutinized until the problem is corrected. Riccitelli reported this conversation in a problem sheet that he submitted to Respondent; and added that Salerno was going to talk to every dump driver and take heed himself.

Riccitelli credibly testified that both before and after April 10, he was primarily engaged in scheduling and dispatching Respondent's eight aggregate drivers, scheduling deliveries, and calculating price estimates on materials for customers. Additionally both before and after April 10, Riccitelli did authorize overtime, altered breaks and lunch hours, scheduled early delivery times, and hired outside truckers.

As of April 10, Riccitelli received an hourly rate increase of from \$9.30 to \$11.05 per hour. However, unlike Evangelista, Riccitelli remained an hourly paid employee who received time-and-a-half for overtime and was docked pay if he arrived late.

Although as noted, Riccitelli hired outside truckers both before and after April 10, there was a difference in his fulfilling that role subsequent to April 10. Prior to April 10, while Riccitelli did decide when to call in outside truckers, and in fact hired truckers, he used a preapproved list of contractors supplied to him by management. Subsequent to April 10, Respondent began getting busier, so Riccitelli added five contractors to the list that he used. However, both before and after April 30, he would check with Respondent's controller Paul Lubanow before hiring anyone for the first time and would clear that selection with Lubanow. Additionally, both before and after April 10, the trucker would speak to Lubanow before being hired to discuss the rates to be paid, and Riccitelli would try to hire as Lubanow suggested outside truckers who owed Respondent money.

Prior to April 10, when a driver requested early leave or vacation, he would fill out a request form which would be routed to Len Suzio for approval. However, in practice Suzio never denied any such requests, as Respondent was "always good" and did not "put up a fight," as far as time off is concerned. Subsequent to April 10, these requests for time off forms were routed to Riccitelli, which Riccitelli would normally grant as long as other drivers were available. However, Riccitelli testified, without contradiction, that Evangelista, as the overall supervisor of the entire dispatch operation, had the authority to overrule Riccitelli's decision to grant time off to a particular employee, although in fact Evangelista has never made such an objection.

Finally, Riccitelli conceded that subsequent to April 10, that he wrote a suggested memorandum to be distributed to drivers concerning personal calls, and gave it to management. After being edited by the Suzios, a memorandum containing the substance of Riccitelli's complaint was prepared and distributed by Respondent to all drivers. The memo was also discussed by Riccitelli with Evangelista, since it also affected all of Respondent's drivers.

⁴ Suzio did not testify whether this incident was before or after April 10, 1995.

⁵ Riccitelli denied that he ever recommended that Respondent not hire a particular individual, and did not recall anyone named Charles O'Brien.

III. ANALYSIS

A. *The Alleged Refusal to Recognize and Bargain with the Union*

The complaint alleges that since on or about March 10, 1995, Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees in an appropriate unit of dispatch employees.

Respondent has raised a number of defenses to this allegation which I deal with seriatim.

Initially it argues that it did not refuse to recognize and bargain in response to the Union's March 10 bargaining request, since it responded that the Union's request was premature, inasmuch as Respondent was awaiting the Board's response to its request for review of the certification of representatives issued by the Regional Director on February 27. Respondent further argues that the Union acquiesced in Respondent's position by failing to object and not making another immediate demand. I disagree.

Respondent's obligation to bargain ripened on the date of the certification, and by failing to agree to the Union's demand for bargaining on the basis of its filing a request for review, Respondent acted at its peril.⁶ There is no basis for concluding that the Union acquiesced in Respondent's position, since Parisi's testimony makes clear that there was nothing more the Union could do, pending the Board's action.

Moreover, once the Board denied Respondent's request for review on March 31, the Union made another bargaining request on April 4, to which Respondent responded that it was still considering its options, and pointedly stated that the letter was "not a recognition of your claimed status as bargaining agent for Suzio's dispatch employees nor a denial of such status." Respondent has made no further responses to the Union's bargaining demands, and has never explicitly informed the Union, as promised in its April 5 letter of its position. More importantly it has never agreed to recognize or bargain with the Union as requested.

It is therefore clear and I find, that Respondent has refused to recognize and bargain with the Union as the collective-bargaining representative of its dispatch employees.

Whether that refusal to recognize and bargain is violative of Section 8(a)(1) and (5) of the Act is a different question, the resolution of which I shall now consider.

It is well settled that absent an allegation of newly discovered or previously unavailable evidence, or the existence of some special circumstance requiring the Board to reexamine its decision made in the representation case, Respondent cannot relitigate the issues decided in that proceeding in the instant unfair labor practice proceeding. *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146 (1941); *Venture Packaging*, supra at 548.

Respondent argues however that the presence of special circumstances in the instant case, warrant reconsideration of the unit issue previously decided by the Board based on a consideration of all the evidence presented in both the representation and unfair labor practice proceedings. *Burns Electronic Services, v. NLRB*, 624 F.2d 403 (2d Cir. 1980). According to Respondent, as in *Burns*, the record in the rep-

resentation case was "deficient," and the testimony in the unfair labor practice proceeding establishes that fact. Respondent contends in that regard that the representation decision was based primarily on "Riccitelli's "inaccurate" and "misleading" testimony, and that the testimony of Evangelista and Lucia in the instant case which was "not available" to Respondent in the underlying representation case so establishes.

However, apart from the fact that I am bound by the National Labor Relations Board decision in *Burns*, supra, (245 NLRB 742 (1979)), I believe that Respondent's reliance on *Burns* is misplaced, and that the circumstances do not warrant the reconsideration of the representation issue as of the certification date.

Initially I disagree with Respondent's assertion that Lucia and Evangelista were effectively "unavailable" to it during the representation hearing, because they were both part of the unit, and any attempt to interview them could have placed Respondent in jeopardy of an 8(a)(1) violation. Whether or not Lucia and Evangelista were both part of the unit, Respondent had full opportunity to call them as witnesses, and chose not to do so, deciding instead to rely on the testimony of various Suzios. The possibility of an 8(a)(1) violation if Respondent improperly interviewed them is no defense to Respondent's failure to call these witnesses, since Respondent could have either called them as witnesses without previously interviewing them, or simply followed appropriate safeguards under Board law while discussing their prospective testimony with them. To permit Respondent to relitigate the representation issues because it chose not to call certain witnesses at the hearing is precisely the kind of relitigation that Board rules and *Pittsburgh Plate Glass*, supra, is designed to prevent.

While *Burns*, supra, did rely in part on its assessment that the representation record was "deficient," I would note that such a claim can always be made by a Respondent when it seeks to introduce evidence that it did not offer in said case, and consistent precedent requires that such evidence be newly discovered or previously unavailable. To conclude that a "deficient" representation case record is a sufficient to establish special circumstances would eviscerate this long-established precedent. A close examination of *Burns*, supra, reveals the existence of several other factors, which are not present herein. Thus, the Court in *Burns* concluded that the hearing officer in the representation case had improperly excluded evidence of functions engaged in by nearby facilities of the Employer, and that the Board's decision in finding the employees therein not to be guards, was inconsistent with three other Board decisions involving the same Employer.

Aside from its reliance on *Burns*, Respondent also contends that no preclusive affect should be given to the underlying decision, since it was based primarily on Riccitelli's testimony and his inaccurate view of the position of AD, and he no longer occupies that position, having been replaced by Lucia. I do not agree. The Regional Director's decision was based as it normally is on testimony of witnesses, in this case Riccitelli, as to what functions he performs and what kinds of authority he exercises in his performance of the AD position. The fact that a different employee presently occupies that position is not a "special circumstance" that precludes reliance on the representation decision, since it is not unusual for one employee to replace another, and to allow

⁶ *Venture Packaging*, 294 NLRB 544, 549 (1989).

relitigation on that basis would cause administrative problems and permit inordinate delay. The purpose of the Board's rules is to encourage finality and administrative efficiency, and the mere turnover of employees cannot be allowed to unduly delay the disposition of the fully litigated issue of supervisory status.

Respondent makes several other additional arguments that it believes demonstrates the existence of "special circumstances" warranting reopening of the representation decision. They include the contention that if the AD is not a supervisor, there is no one to supervise the dump drivers, which can cause severe safety and operation problems; that the Union already represents the drivers, and their representation of the dispatchers would cause a conflict of interest and severely hamper Respondent's operations; the absence of union animus by Respondent toward the Union; and Respondent's harmonious relationship with the Union which has been used against it in the underlying case. These contentions either could have or in fact were already made in the underlying representation case, and were rejected by the Board. In any event I do not believe that these factors either singly or collectively establish special circumstances warranting reopening of the representation decision.

Accordingly, I conclude that Respondent has failed to establish the existence of any special circumstances which are sufficient to overcome the longstanding well-established prohibition against relitigating issues previously litigated in the representation case.

I therefore find that since Respondent has refused to recognize and bargain with the Union, notwithstanding the Union's certification on February 27, and two requests for bargaining on March 10 and April 5 by the Union it has thereby violated Section 8(a)(1) and (5) of the Act.

However, this conclusion does not end the inquiry. Thus on April 10, Respondent "redefined" the position of AD, posted for the job as a supervisory position, and Riccitelli accepted the "redefined" position, as well as initialing the "redefined" job description. This raises the question of whether or not by these actions, Respondent has established that as of April 10, the AD position became supervisory under the Act, thereby rendering the unit no longer appropriate for bargaining, since it became reduced to a one-person unit.

There are several problems with this alternative defense that Respondent has raised. First, since as will be discussed more fully below, these alleged "changes" in the AD's job functions and responsibilities, even if it could be said to have transformed the position to a supervisory one, was done unilaterally without bargaining with the Union. In such circumstances, these postcertification changes would be further evidence of a refusal to bargain with the Union, and cannot be used as a basis for rendering the unit inappropriate. *Telemondo of Puerto Rico*, 113 F.3d 270 (1st Cir. 1997); *Super K-Mart*, 322 NLRB 583 fn. 3 (1996); *Indeck Energy Services*, 318 NLRB 321 fn. 5 (1995); *East Michigan Care Corp.*, 246 NLRB 458, 459-460 (1979); *Highland Terrace Convalescent Center*, 233 NLRB 87, 88 (1977).

Secondly, even apart from the above line of cases, I do not believe that Respondent has adduced sufficient evidence to establish that the changes that it instituted in the AD's position as of April 10, rendered the position as supervisory under Section 2(11) of the Act. It is significant in this re-

spect that Respondent's own witnesses concede that no "changes" were made in the authority or responsibilities of the AD, but that its actions in April were merely an attempt to "redefine" the position, and make it clear to Riccitelli that by accepting the newly defined job, he was agreeing to be a supervisor. Thus by in effect conceding that the "changes" on April 10 were not changes at all, Respondent undercuts any argument that the April 10 action constitutes postcertification changes which render the original certification invalid. Cf. *Frito Lay*, 177 NLRB 820 (1969) (Board vacated a certification based on changed circumstances which affected the validity of the certification, which consisted of a "Reorganization," which had been planned prior to the representation proceeding).

Finally, the mere fact that Riccitelli initialed a "redefined" job description is not determinative since the record does not establish that he engaged in any of these "redefined" responsibilities subsequent to April 10, sufficient to find supervisory status under the Act. This job description consists of conclusory statements, and do not necessarily involve the use of independent judgment. It thus becomes necessary to examine how the "redefined" position has been performed by Riccitelli or for that matter Lucia in her brief tenure in that position. In my view Respondent has not established that such performance of the AD's position has transformed it into a position deemed supervisory under the Act.

In that regard, Respondent places substantial reliance on the admitted change in Riccitelli's method of hiring outside contractors. Thus Riccitelli admitted that subsequent to April 10, he rather than relying solely on the list of contractors supplied him by Respondent, added to the list by including five additional names. While it is true that the Regional Director's decision did rely in part on the fact that Riccitelli used such a list, such finding is not determinative of supervisory status. Indeed Respondent places substantial reliance in this proceeding, as it did in its request for review to the Board, on *NLRB v. Metropolitan Petroleum Co.*, 506 F.2d 616 (1st Cir. 1979). There the Court refused to enforce a Board order finding dispatchers to be employees, in part because of their authority to hire outside trucks, even though the dispatchers were required to hire from a prearranged list. However the Board in its denial of Respondent's request for review, distinguished *Metropolitan* on three specific grounds, and it is undisputed that Respondent did not change the nature or authority of the AD's position, so as to comport with the facts in *Metropolitan*.

Moreover, the discretion of the AD in hiring outside truckers is limited by having to clear each initial hire with Respondent's controller, and by Respondent's instructions to attempt to hire outside truckers who owe Respondent money. Therefore I do not believe that the AD exercises sufficient independent judgment in that function to establish that it is a supervisory position under Section 2(11) of the Act.

Respondent also relies on the role played by Riccitelli in authorizing time off, which was admittedly changed, subsequent to April 10. Thus after that date, the employees form requesting time off was routed to Riccitelli, rather than the Suzios for approval. Significantly, these requests had been normally approved without question when the Suzios made the decision prior to April 10, and after April 10 Riccitelli would also grant his approval in most cases, unless after checking the records, he concluded that there were other

drivers who had already been granted time off on the day requested. The discretion that Riccitelli exercised in this regard is merely routine and clerical, and does not involve the exercise of independent judgment. *NLRB v. Bakers of Paris*, 929 F.2d 1427, 1446 (9th Cir. 1991); *Azusa Ranch Market*, 321 NLRB 811, 812 (1996); *Providence Alaska Medical Center v. NLRB*, 156 LRRM 2001, 2004–2005 (9th Cir. 1997); *Providence Hospital*, 320 NLRB 717, 732 (1996).

I also note that the Regional Director's decision already considered the fact that Riccitelli could let drivers leave early as long as there are other drivers available, which involves a similar exercise of limited discretion, without the use of independent judgment.

Respondent also relies on the fact that subsequent to April 10, Riccitelli held meetings with drivers during which he explained the importance of limiting break-times in order to increase productivity; met with the shop steward to complain about this problem to him; threatened to call each driver every 5 minutes to check on their status; and reported his actions in this regard to management. However there is no evidence in the record that Riccitelli, ever made any recommendations to the Suzios to discipline any employees, or that any employees received any disciplinary actions from Respondent, based on Riccitelli's reprimands or warnings. In such circumstances, the authority to issue oral reprimands or even written warnings to employees without more, is insufficient to establish supervisory status, but is instead considered little more than a reporting function. *Children's Farm Home*, 324 NLRB No. 13, slip op. at 1 (July 25, 1997); *Azusa Market*, supra, 812, 813; *Ten Broeck Commons*, 320 NLRB 806, 812 (1996); *Northcrest Nursing Home*, 313 NLRB 491, 497–498 (1993); *Ohio Masonic Home*, 390, 393–394 (1989).

Therefore, I conclude that the reprimands and warnings issued by Riccitelli do not establish that the AD is a supervisory position under the Act.

Finally, Respondent also relies on the facts that Riccitelli was sent to a sexual harassment training session for supervisors; that he was given a \$2 increase because of these additional responsibilities; and that he developed a memorandum concerning personal phone calls. In my view none of these factors, either singly or collectively establish the exercise of independent judgment sufficient to render the position supervisory.

Accordingly, based on the foregoing analysis and authorities, I conclude that Respondent has not established that its actions on and after April 10 in regard to the AD position, has changed the position to a supervisory one under Section 2(11) of the Act. Therefore its continued refusal on and after April 10 to recognize and bargain with the Union is violative of Section 8(a)(1) and (5) of the Act.

B. *The Alleged Unilateral Assignment of Unit Work to Nonunit Employees*

The complaint alleges that Respondent since April 10, unilaterally assigned unit work to nonunit employees without affording the Union an opportunity to bargain. The General Counsel concedes that this allegation is an alternative position, and becomes moot, once I have found as I have above, that the alleged changes instituted by Respondent in the AD position have not established supervisory status. Thus in that event no bargaining unit work has been assigned to nonunit

employees as the position of AD has remained at all times a unit position.

Therefore I shall not issue an order, or make a finding that Respondent has violated the Act as alleged in this complaint allegation.

However, in the event that a reviewing authority disagrees with my conclusion and concludes that the April 10 action of Respondent has changed the supervisory status of the AD position, I do deem it appropriate to express my views on this alternative complaint allegation.

Respondent does not quarrel with well-settled law that where the creation of a new supervisory position results in a loss of bargaining unit work, this change in the bargaining unit's terms and conditions of employment, requires notice to and bargaining with the Union. *Legal Aid Bureau*, 319 NLRB 159 fn. 2 (1995); *Hampton House*, 317 NLRB 1005 (1995); *Brunswick Electric Membership Co.*, 308 NLRB 361, 396 (1992).

Respondent argues however, that the Union waived its rights to bargain over the removal of unit work by failing to make a request to bargain with Respondent after receiving timely notice of such a change, *Jim Walter Resources*, 289 NLRB 1441, 1442 (1988); *Clarkwood Corp.*, 233 NLRB 1172 (1977); *Globe Union, Inc.*, 222 NLRB 1081, 1082 (1976); *Burns Ford*, 182 NLRB 753, 754 (1970).

Initially, I agree with the contention of the General Counsel that although Respondent did notify the Union by letter of March 29 of its intention to "reestablish" the AD position as supervisory, it did not in that letter inform the Union that the AD would continue to perform clearly bargaining unit work, such as ordering and scheduling customer deliveries. Thus, it did not afford the Union clear and unequivocal notice that it intended to remove work from the unit by its action.

More importantly, however, I conclude that it would have been futile, as Parisi testified, to have requested bargaining about these matters, in view of Respondent's prior conduct. Thus the Union had previously made two requests to meet and bargain with Respondent pursuant to the certification. These requests were refused by Respondent, while informing the Union in effect that it was pursuing its appeals of the certification decision. Indeed even in the "notification" letter that Respondent sent to the Union, Respondent specifically stated that it was providing this information to the Union, solely in the Union's capacity as representative of the drivers, and Respondent does not imply that it is recognizing the Union as representative of the unit of dispatchers certified by the Board. Moreover the letter asserts further that Respondent intends to pursue all remedies to vindicate its belief that the Regional Director wrongly determined that the AD is not a supervisor.

Therefore, in these circumstances, it would have been a futile gesture for the Union to specifically request bargaining about the removal of unit work. *Peat Mfg. Co.*, 261 NLRB 240 fn. 2 (1982); *Sunnyland Refining Co.*, 250 NLRB 1180, 1181 fn. 2 (1980); *B. F. Goodrich Co.*, 250 NLRB 1139, 1140 (1980).

Accordingly, I conclude that in the event that it is found that the "reestablishing" of the AD position on April 10, transformed it to a supervisory position, I would find that Respondent has violated Section 8(a)(1) and (5) of the Act

by unilaterally removing bargaining unit work. *Legal Aid*, supra; *Hampton House*, supra.⁷

REMEDY

Having found that Respondent has violated Section 8(a)(1) and (5) of the Act by refusing to bargain with the Union, I shall recommend that it cease and desist, to bargain with the Union, and if an understanding is reached, to embody the understanding in a signed agreement. To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, I shall recommend that the certification year to be extended, and that the initial period of the certification begins on the date that Respondent begins to bargain in good faith with the Union. *Super K-Mart*, supra; *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962).⁸

CONCLUSIONS OF LAW

Respondent by refusing to recognize and bargain with the Union on and after March 10, 1995, has violated Section 8(a)(1) and (5) of the Act.

Based upon the foregoing findings of fact and conclusions of law, and on the entire record, I issue the following recommended⁹

ORDER

The Respondent, The L. Suzio Concrete Company, Inc., Meriden, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with International Brotherhood of Teamsters, Local 677 as the exclusive bargaining representative of the employees in the bargaining unit.

(b) 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) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

All full-time and regular part-time dispatchers and entry order clerks, including the aggregate dispatcher, but excluding all other employees, the head dispatcher, and

⁷In that event, the appropriate remedy would require Respondent to revoke the reclassification and return the work to the unit.

⁸I also note that the certification year commences on the date of the parties' first bargaining session. *Van Dorn Plastic Machinery Co.*, 300 NLRB 278, 279 (1990).

⁹If 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.

guards, professional employees and supervisors defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Meriden, Connecticut, copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 34 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 3, 1995.

(c) 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.

¹⁰If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

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

WE WILL NOT refuse to recognize or bargain with International Brotherhood of Teamsters, Local 677, as the exclusive bargaining representative of the employees in the bargaining unit.

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, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

All full-time and regular part-time dispatchers and entry order clerks, including the aggregate dispatcher, but excluding all other employees, the head dispatcher, and guards, professional employees and supervisors defined in the Act.

THE L. SUZIO CONCRETE COMPANY