

**Consec Security and Teamsters Union Local 102
a/w International Brotherhood of Teamsters,
AFL-CIO. Case 22-CA-21682**

March 13, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND
HURTGEN

On August 20, 1997, Administrative Law Judge D. Barry Morris 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,¹ and conclusions and to adopt the recommended Order.

1. The Respondent contends that the judge failed to consider its defense under *Wright Line*,² that it would have taken the actions of removing and replacing its taxi dispatchers and unilaterally reimposing its original \$6.50/8.50 rates of pay regardless of whether the Union demanded recognition. It argues that in order to have a profitable contract with the Port Authority, it had to pay the lower rates at which it had initially hired the dispatchers and that it had decided well before any union involvement that it would replace all the existing dispatchers with dispatchers who would work for the lower rates. The Respondent also argues that it had begun to advertise for, hire, and train replacements before a union was even consulted by the employees.

We find no merit in the Respondent's arguments. There is no question that the Respondent had economic reasons for paying lower rates than its predecessor. There is also no question that the Respondent lawfully could have permanently replaced the taxi dispatchers when they engaged in a strike over wage rates. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938). However, the Respondent did not do that. Instead, it allowed the dispatchers to return to work, threatened to terminate them because they had engaged in a strike, reassigned them the day after receiving a representation petition from the Board's regional office, and told the employees that they were being reassigned because the Respondent had received

¹The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

²251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

"a letter or something" from the Labor Board and "didn't appreciate that." Instead of acting within its lawful right to replace the striking employees with employees who would accept the lower rates, the Respondent allowed the employees to return to work and then took adverse action against them because of their union and concerted activities. This, as the judge properly found, the Respondent was not permitted to do regardless of its legitimate economic concerns and regardless of its early intentions to replace the dispatchers with those who would work at the lower rate.

2. Contrary to our dissenting colleague, we agree with the judge's conclusion that employee Livsey was constructively discharged. Livsey had been employed by the Respondent as a taxi dispatcher at Newark airport where she earned \$8.50 per hour. The Respondent unlawfully transferred Livsey from the Newark airport job to a security guard position in Elizabeth, New Jersey which paid \$6.50 per hour. Livsey accepted the security guard position on November 7, 1996³ and then declined it on November 8 because the job paid only \$6.50 per hour. Acceptance of the security guard position would have resulted in a reduction of approximately 25 percent of Livsey's income.

As the judge noted, the Board has held that a significant reduction in income for an indefinite period of time, causing an employee to quit and seek alternative employment, when a motive for such treatment was protected activity will establish constructive discharge. *T & W Fashions*, 291 NLRB 137, 142 (1988); *La Favorita, Inc.*, 306 NLRB 203, 205 (1992); *Trumbull Industries*, 314 NLRB 360, 365 (1994). We find that the reduction of Livsey's wages by nearly 25 percent clearly meets this test. Thus, it can reasonably be inferred that such a large reduction in income would impair an employee's ability to meet living expenses to such an extent that the employee would be compelled to seek alternative employment.⁴

In this regard, we disagree with Member Hurtgen's view that Livsey should work for the lesser rate, file a charge with the Board, and be made whole for her loss, plus interest. That Livsey could be made whole at a future date does not address the question of how

³All dates are in 1996 unless otherwise indicated.

⁴Contrary to our dissenting colleague's opinion, this finding is not based on "pure speculation," but, rather is a reasonable inference that a reduction of income in the magnitude of 25 percent would impair an employee's ability to earn a living to such an extent that the employee would be forced to seek alternative employment. Constructive discharge cases involving reduction in income routinely require a showing that there was a substantial reduction for an indefinite period of time. It is inferred that the magnitude and duration of the reduction constitute so onerous a change as to force an employee to leave. Evidence concerning the actual impact of the reduction on the employee's livelihood is not required. See e.g., *T & W Fashions*, supra; *La Favorita, Inc.*, supra; and *Trumbull Industries*, supra. Chairman Gould notes, moreover, if it was required, a substantial tide of litigation would be promoted.

she meets her economic needs until her charge with the Board is fully litigated. The thrust of Board precedent on constructive discharge with regard to loss of income is that if the reduction of wages is significant and extends for an indefinite period, the reduction is so onerous as to force an employee to leave.⁵ In such circumstances, to “work then grieve” would result in immediate and severe economic hardship. To find a constructive discharge here does not reward Livsey for voluntary unemployment. Instead, it recognizes the onerous burden of reduced income that forced her to seek a higher paying job elsewhere.

Nor do we agree that Livsey’s action was inconsistent with a discriminatee’s obligation to seek to mitigate damages. The doctrine of mitigation of damages is a remedial issue⁶ and is not a factor in determining whether a violation is established. Thus, the elements to be proven to establish a constructive discharge, set out in the cases cited above, do not include the responsibility to mitigate damages. That responsibility is relevant only to a determination of the remedy in the event the constructive discharge is found, and it is typically raised at the compliance stage of a proceeding.

3. We find that the judge also properly determined that a *Gissel*⁷ bargaining order is a necessary component of the remedy in this case. The record shows that by November 4, 26 of the 32 unit employees had signed authorization cards on behalf of the Union. These cards were properly authenticated. Accordingly, we find that on November 4, the Union represented a majority of the unit employees. On November 4, the Union demanded by letter that the Respondent recognize the Union as the exclusive collective-bargaining representative of its employees. On November 6, the Respondent refused the Union’s demand by stating, “please be informed that the people you claim to be representing no longer work as taxi dispatchers for this company.”

In agreeing with the judge’s imposition of a *Gissel* bargaining order, we find that the Respondent’s conduct clearly demonstrates that holding a fair election in the future would be unlikely. In this regard, we note that the Respondent’s misconduct includes a threat by a high-level official that the employees would be terminated for engaging in a strike; the layoff, construc-

tive discharge or discharge of almost two-thirds of the unit employees; and the reduction of wages of the remainder of the unit shortly after the Union demanded recognition and the Respondent received notice that the Union had filed a representation petition. The enduring coercive effect of the Respondent’s misconduct, which touched virtually every employee in the unit, is clear.

During the second strike by the unit employees on October 29, Operations Manager Shawn Gilgallon threatened the employees with termination for engaging in a strike. On November 6, 2 days after the Union demanded recognition and only 1 day after the Respondent received notice that the Union had filed a representation petition, the Respondent told the entire bargaining unit that they had been reassigned. According to the credited testimony, Personnel Director Mack said in answer to an employee’s question about why everyone was being reassigned, “between you and me . . . Consec received a letter or something from the Labor Board or the lawyer’s office and they didn’t appreciate that so they reassigned everyone.” As a result of the Respondent’s reassignment of unit employees, 13 employees were laid off, 5 employees were constructively discharged, and 1 employee was discharged. Ten employees remained in their jobs as taxi dispatchers but at the reduced rate of \$6.50/8.50 per hour. Thus, 8 days after threatening to terminate employees for engaging in concerted activity, and almost immediately after the Union demand for recognition, almost two thirds of the bargaining unit was removed. Such action can only serve to reinforce employees’ fear that they will lose employment if they persist in union activity. *Electro-Voice*, 320 NLRB 1094, 1095 (1996); *Koons Ford of Annapolis*, 282 NLRB 506, 508 (1986), enfd. 833 F.2d 310 (4th Cir. 1987). Further, the impact of this action was magnified by its proximity to the Union’s demand for recognition and filing of a representation petition. *Electro-Voice, Inc.*, supra; *Astro Printing Services*, 300 NLRB 1028, 1029 (1990).

With this swift, massive dismantling of the bargaining unit, the Respondent sent its employees the unequivocal message that it was willing to go to extraordinarily lengths in order to extinguish the union organizational effort. It is reasonable to infer that such a severe message will have a lasting effect on the unit employees’ exercise of their rights to organize. Laying off, and discharging almost two-thirds of the bargaining unit is unlawful conduct that “goes to the very heart of the Act” and is not likely to be forgotten. *NLRB v. Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941).

Finally, the severity of the Respondent’s misconduct is compounded by the involvement of high-ranking officials. Operations Manager Gilgallon threatened striking employees with termination for engaging in con-

⁵*Dillingham Marine*, 239 NLRB 904 (1978), cited as authority by our dissenting colleague, is distinguishable. In that case, the judge found that the employee’s primary motivation for leaving his job was that he preferred the day shift because he was tired of working nights and his wife did not want to be left alone at night with the children. Livsey’s reason for declining the security guard position was solely because of the reduction of income. In contrast to *Dillingham Marine*, there was no question of mere preference in working conditions.

⁶See e.g., *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 199–200 (1941).

⁷*NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

certed activity. Eight days after this threat, Gilgallon removed the employees from their shift, personally telling them they had been reassigned. That reassignment resulted in nearly two-thirds of the unit losing their positions as taxi dispatchers. When the antiunion message is so clearly communicated by the words and deeds of the highest levels of management, it is highly coercive and unlikely to be forgotten. See *Electro-Voice*, 320 NLRB 1094, 1096 (1996), and *America's Best Quality Coatings Corp.*, 313 NLRB 470, 472 (1993), enfd. 44 F.3d 516 (7th Cir. 1995), cert. denied 115 S.Ct. 2609 (1995).

In light of the Respondent's swift, strong, and pervasive actions described above, we conclude that the possibility of erasing the effects of the Respondent's unfair labor practices by use of traditional remedies is slight and that holding a fair election is unlikely. Accordingly, we agree with the judge that a *Gissel* bargaining order is warranted.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Consec Security, Kearny, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER HURTGEN, dissenting in part.

I do not agree that employee Livsey's decision to quit was tantamount to a constructive discharge by Respondent.

I agree that Respondent unlawfully transferred Livsey from the Newark airport to a job in Elizabeth, New Jersey. Although Livsey accepted the job on November 7, she changed her mind on the next day and quit. Her sole reason for doing so was that the job paid only \$6.50 per hour.¹ In my view, this reduction in pay was not "so onerous as to force [Livsey] to leave."² Rather, this is a classic case in which the employee can "work now and grieve later." That is, she can work for the lesser rate, file a charge with the Board, and be made whole for her loss, plus interest. If instead she chooses to quit, I would not reward her by paying her full backpay for the period of her voluntarily chosen unemployment. Her action is inconsistent with the principle that discriminatees must seek to mitigate their losses.³

My colleagues say that mitigation is an issue that arises only after a violation is established. However, a violation herein is established by Respondent's transfer of Livsey to Elizabeth. The issue is whether Livsey

should have kept that job (and sought the pay difference in this proceeding), rather than quit and seek full backpay for the period of her voluntary unemployment. I believe that mitigation principles preclude the latter choice.

My colleagues opine that Livsey was forced by economic circumstances to leave her job. In this regard, they say that her reduced salary would not permit her to meet her living expenses. There is not a shred of evidence to support this finding. The record is entirely devoid of any facts concerning Livsey's economic and family situation. I would not premise a finding on pure speculation.

The cases cited by my colleagues do not support their contrary view. In *T & W Fashions*, 291 NLRB 137, 142 (1988), the wage reduction was 50 percent. In *Trumbull*, 314 NLRB 360, 365 (1994), the unlawful suspension left the employee with no income at all. Most significantly, in *La Favorita*, 306 NLRB 203, 205 (1992), the Board repeats the relevant test from *Algreco Sportswear*, 271 NLRB 499, 500 (1984).

The test is, of necessity, an objective one, taking into account the circumstances of each case. The mere existence of discrimination is insufficient to warrant consideration of abandonment of employment as a constructive discharge.

In the instant case, there is only a showing of discriminatory reduction. The particular "circumstances" concerning Livsey are wholly missing from this record.

Richard E. Fox, Esq. and *Stacey McCauley, Esq.*, for the General Counsel.

John A. Craner, Esq. (*Craner, Nelson, Satkin & Scheer*), of Scotch Plains, New Jersey, for the Respondent.

Nancy Macirowski, Esq. (*Reinhardt & Schachter, P.C.*), of Newark, New Jersey, for the Charging Party.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in Newark, New Jersey, on March 12-14, and April 3 and 24, 1997. On a charge filed on November 12, 1996, and amended on January 13, 1997, an amended complaint was issued on February 28, 1997, alleging that Consec Security (Respondent) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed on May 28, 1997.

On the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

¹ At Newark airport, she earned \$8.50 per hour.

² *Dillingham Marine*, 239 NLRB 904, 915 (1978).

³ I distinguish Livsey from other employees who declined the job at the new location because of substantial transportation difficulties in getting there.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, with an office and place of business in Kearny, New Jersey, has been engaged in providing taxi dispatching and other related services for the New York/New Jersey Port Authority at Newark International Airport. Respondent has admitted, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, it has been admitted, and I find, that Teamsters Union Local 102 a/w International Brotherhood of Teamsters, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Background

On August 16, 1996,¹ Respondent submitted a bid to provide taxi dispatching services at Newark International Airport. On September 29 or 30 Respondent was advised by the New York/New Jersey Port Authority that it had been awarded the taxi dispatching contract and would succeed the present contractor, Haynes Security. Haynes had been paying its dispatchers \$8.50 per hour and its supervisors \$12.65 per hour. During October the dispatchers employed by Haynes were advised to contact Respondent and to fill out employment applications if they wished to continue to work at the airport. In a letter dated October 20 Consec welcomed the former Haynes employees to the new company, and stated:

As you know, the current rates of pay will be changing. The new rate per dispatcher will be in the \$6.50 range to start. Benefits are also available upon inquiry; and your questions and comments are welcome.

2. The October 26 work stoppage

Respondent commenced the taxi dispatch operation at Newark Airport at 12 midnight Saturday, October 26. Later that day, at approximately 3:30 p.m., 25 to 30 employees gathered at Terminal C, where they engaged in a strike to protest Respondent's rate of pay. After approximately 2 hours, Kenneth Johnson, Respondent's Operations Manager, distributed a memo to the employees. The memo, signed by Tim Shadle, Manager, stated, "There appears to be some questions regarding pay rates . . . Please accept this as a written guarantee that your current pay rate holds true with our company." After several striking employees expressed concern with the phrase "current pay rate," Shadle agreed to add the phrase, "the pay rate that you were making with Haynes Security." Thereafter, the striking employees returned to work.

3. The second work stoppage

On Monday, October 28, the dispatchers received a memorandum from Shawn Gilgallon, operations manager, which stated:

As you know, because of the "incident" that occurred on Saturday at 3 p.m., Consec Security has agreed to pay the rate of \$9.00 for taxi dispatchers and \$12.50 for dispatch supervisors.

This rate of pay will stay in effect until November 10, at which time we will evaluate the situation further and decide whether to extend again.

After the employees learned that the rate of \$9 for dispatchers and \$12.50 for dispatch supervisors would remain in effect only until November 10, they decided to engage in a second work stoppage. At approximately 7 p.m. on October 29 the employees engaged in a strike at Terminal C. Cheryl Henderson, who appeared to me to be a credible witness, testified that Shawn Gilgallon said to the employees "he could fire all of us because we walked off the job and we're not unionized." After several minutes of discussion between Shawn Gilgallon and the striking employees an agreement was reached whereby Respondent agreed to extend the prior rate of pay until January 1, 1997. In return, the striking employees agreed to return to work. In a memo dated October 29 from Shawn Gilgallon to the dispatchers, Respondent stated:

As you know, because of the "incident" that occurred on Saturday at 3 p.m., Consec Security has agreed to pay the rate of \$9.00 for taxi dispatchers and \$12.50 for dispatch supervisors.

This rate of pay will stay in effect until January 1, 1997, at which time we will evaluate the situation further and decide whether to extend again.

4. Union representation

On October 29, Sandra Lewis, a dispatch supervisor, contacted Paul Schachter, a labor attorney, to discuss union representation. On November 1 she met with Schachter and Jack Riley, secretary-treasurer of the Union, at Schachter's office. At this meeting Schachter and Riley gave Lewis union authorization cards to distribute to the bargaining unit employees. Between November 1 and November 4, Lewis and several other employees distributed the cards to the dispatchers and on November 4 Lewis delivered the signed cards to Schachter's office. Late in the afternoon of November 4, Schachter faxed a letter to Eileen Gilgallon, president of Respondent, demanding that Respondent recognize the Union as the bargaining representative of the Newark Airport dispatchers. On November 5 a representation petition was filed with Region 22 of the Board. At 1:57 that afternoon the Region faxed a copy of the petition to Respondent.

5. Reassignment of bargaining unit employees

On November 6 Respondent advised the entire bargaining unit that they had been "reassigned." At approximately 11 a.m. the dispatchers working on the morning shift were approached by Shawn Gilgallon, removed from their shift and told to report to Larry Mack, Personnel Director, for reassignment. Sandra Lewis, a dispatch supervisor, contacted Mack on November 6 to ask why the employees were being reassigned. Lewis, who appeared to me to be a credible witness, testified, and I so find, that Mack told her "between you and me . . . Consec received a letter or something from the Labor Board or the lawyer's office and they didn't appre-

¹ All dates refer to 1996 unless otherwise specified.

ciate that so they reassigned everyone.” The following day Lewis visited Respondent’s office to obtain her reassignment. She and several other employees asked Eileen Gilgallon why they could not return to the airport. Eileen replied that “none of us can go back to the airport and work because . . . we walked off our posts and we had no right to walk off our posts and we cost them \$4,000.”

6. Termination of Keisha Gifford

On the evening of November 6 the bargaining unit employees held a meeting with a union representative. As a result of that meeting the employees decided to report to Respondent’s offices on November 7 in order to receive their job reassignments. At that time Keisha Gifford was told by Mack that there was a position available at a parking lot in New Brunswick for \$6.50 per hour. Gifford told Mack “I have an excellent work record with Haynes Security and with me living five minutes away from the airport, why would I leave the airport making \$6.50 an hour, go all the way to New Brunswick, 45 minutes away, for \$6.50 an hour, when I can stay in the airport.” When Mack did not answer Gifford, she repeated the question. At that time Mack replied, “[Y]ou don’t have to worry about it anyway because you are fired.” Mack handed Gifford a termination notice which stated that she was discharged for insubordination.

7. Constructive discharges

a. Sandra Lewis

On November 7 Lewis was offered reassignment to a security position in Paterson, New Jersey, at a salary of \$8.50 per hour. Her shift at the Newark Airport had been 11 p.m. to 7 a.m. The hours of the shift offered to Lewis in Paterson were 8 a.m. to 4 p.m. Lewis declined the offer because the salary was \$4 per hour less than what she had been receiving; she would need an automobile to travel to Paterson and she did not have automobile insurance; and the new job would require a change in shift. When Lewis asked Mack if she could return to a position at the airport he replied that she could not. Several days later Mack gave Lewis a layoff slip.

b. Renee Livsey

On November 7 Renee Livsey was offered a security guard position in Elizabeth, New Jersey, which she accepted. On November 8, however, she advised Mack that she could not accept the position in Elizabeth because it paid only \$6.50 per hour. Mack did not offer to return Livsey to the airport and gave her a layoff slip.

c. Wendy Harris

On November 7 Wendy Harris was offered a security guard position in Paterson, New Jersey. The shift was from 8 a.m. to 4 p.m. Harris declined the position because she had worked a 4 p.m. to 12 midnight shift for 11 years and was dropped off each day at the airport by her niece. Harris testified that she did not have transportation to get to the Paterson job. Harris asked Mack if she could return to the airport and he replied that she could not. Mack provided Harris with a handwritten note which stated, “Miss Wendy

Harris has been placed in a temporary layoff status. At present there isn’t a site available for her.”

d. Wanda Elysee

On November 7 Wanda Elysee was offered a security position in Paterson, New Jersey, at a welfare clinic. She testified that the rate of pay offered was between \$8 and \$8.50 per hour. After visiting the facility she declined to accept the offer because she would have had to take four buses to get to the facility at a daily cost of \$10. She testified that to get to her present job at Newark Airport she took one bus at a cost of \$1. Elysee asked Mack if she could return to a position at the Newark Airport to which he replied that she could not and he provided her with a layoff slip.

e. Rosetta Baron

On November 7 Mack offered Rosetta Baron a position as a security guard in a parking lot in New Brunswick at the rate of \$6.50 per hour. The position required her to sit in a car in the parking lot and Baron advised Mack that she did not own a car. Baron declined the position. She also stated that the position in New Brunswick would require that she travel on two buses and a train at a cost of \$62.50 per week compared with her previous commuting expense of \$10 per week. After advising Mack of the reasons why she could not accept the position Mack provided her with a layoff slip.

B. Discussion and Conclusions

1. Threat to discharge employees

The complaint alleges that Shawn Gilgallon threatened employees with discharge because they engaged in protected concerted activities. Cheryl Henderson credibly testified that during the work stoppage on October 29 Shawn told the employees “he could fire all of us because we walked off the job and we’re not unionized.” This was corroborated by Sandra Lewis, who credibly testified that Shawn told the employees “that we weren’t a union and that he could fire everybody on the spot.” Similarly, Renee Livsey credibly testified that Shawn told the employees “we had abandoned our posts and we all could be fired.” Indeed, Shawn, while denying that he mentioned “unionization,” conceded that he told the employees “if you don’t go back to work . . . I will terminate you . . . You walked off your job . . . You had no right to walk off your job . . . I find that Shawn Gilgallon told the employees that he could fire them because they walked off the job.

In *Baddour, Inc.*, 303 NLRB 275 (1991), the Board found that respondent’s statements to bargaining unit employees that “union strikers can lose their jobs” conveyed to the ordinary employee the clear message that employment will be terminated. Such a statement unlawfully implied a threat of job loss as a result of the strike and thus interfered with employees’ Section 7 rights. Although an employer is not required, in accordance with *Eagle Comtronics, Inc.*, 263 NLRB 515 (1992), to fully detail the protections of striker replacement enumerated in *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970), an employer remains barred from threatening employees, as a result of a strike, that employees will be deprived of their rights in a manner inconsistent with

Laidlaw. See *Trumbull Industries*, 314 NLRB 360, 363–364 (1994). Gilgallon’s threat to terminate the dispatchers is “not merely an inaccurate statement of law, it is a clear contradiction of the *Laidlaw* reinstatement rights afforded to economic strikers.” *Mediplex of Danbury*, 314 NLRB 470, 471 (1994). Accordingly, I find that Shawn Gilgallon’s threat on October 29 that he could terminate the striking employees constitutes a violation of Section 8(a)(1) of the Act.²

2. Reduction in salaries, layoffs, and reassignment of employees

On October 26 the employees engaged in their first work stoppage, protesting the reduction in pay. This resulted in a memorandum from Respondent on the same day stating “please accept this as a written guarantee that your current pay rate holds true with our company.” A handwritten note on the memo confirmed that the guarantee was for the “pay rate that you were making with Haynes Security.” On October 28 Respondent distributed a memorandum to the employees which stated that the prior rate of pay “will stay in effect until November 10, at which time we will evaluate the situation further and decide whether to extend again.” On October 29 the employees engaged in a second work stoppage, protesting Respondent’s commitment to retain the prior pay rate only until November 10. On the same day Respondent distributed a memo stating that the agreement to pay the rate of \$9 for taxi dispatchers and \$12.50 for dispatch supervisors “will stay in effect until January 1, 1997.”

Respondent contends that on October 30 it distributed a memo to the taxi dispatchers which stated “we have no alternative other than [to] hire personnel that will accept” a rate of \$6.50 per hour. The memo continued, “We are currently interviewing applicants to fill these positions. When they are trained, we will immediately start replacing you.” Cheryl Henderson credibly testified that she never saw this memo, that it had never been distributed by Respondent and that it was not posted. She also credibly testified that Respondent never told the employees that they would be replaced. The other employee witnesses similarly testified. No employee testified that he or she received this document. Respondent produced no witness who testified that he or she distributed this memorandum. The General Counsel maintains that this document is not authentic and was not produced on October 30. I do not believe it is necessary that

²The complaint also alleges that on November 7 Eileen Gilgallon threatened employees with reassignment. Lewis testified that on November 7, after the employees had been told that they would be reassigned, Eileen told them that they could not return to their airport jobs because “we walked off our posts.” I do not believe that Eileen was “threatening” the employees. Instead, she was explaining to them her reason why they had been reassigned. In addition, the complaint alleges that on November 6 Mack threatened employees with reassignment. On that day Lewis asked Mack why the employees were being reassigned. He replied, “Consec received a letter or something from the Labor Board or the lawyer’s office and they didn’t appreciate that so they reassigned everyone.” I also do not believe that Mack was “threatening” the employees. He instead was telling Lewis the reason it was decided to reassign the employees. In any event, even if this be determined to constitute a threat, I am ordering an 8(a)(1) remedy in connection with the threat to discharge made by Shawn Gilgallon.

I determine that question. I do find, however, that the alleged October 30 document was not distributed to the employees.

In the late afternoon of November 4 the Union attorney faxed a letter to Respondent demanding recognition on behalf of the Union. At 1:57 p.m. on November 5 the Region faxed a copy of the representation petition to Respondent. At 11 a.m. on November 6 Respondent reduced the salary of its employees, laid them off and reassigned them.

Under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board requires that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer’s decision. Once this is established, the burden shifts to the employer to demonstrate that the “same action would have taken place even in the absence of the protected conduct.”

I believe that General Counsel has made a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in Respondent’s decision to take the action that it took on November 6. In its October 29 memo Respondent agreed to pay the rate of \$9 for dispatchers and \$12.50 for dispatch supervisors until January 1, 1997, at which time “we will evaluate the situation further and decide whether to extend again.” The demand for recognition was faxed to Respondent’s office on the afternoon of November 4. A copy of the representation petition was faxed to Respondent’s office at approximately 2 p.m. on November 5. The very next morning, despite Respondent’s commitment of 1 week earlier to maintain the pay rate until January 1, 1997, it reduced the salaries, laid off and reassigned its employees. Indeed, Mack told Lewis that “Consec received a letter or something from the Labor Board or the lawyer’s office and they didn’t appreciate that so they reassigned everyone.”

Respondent contends that it took the actions that it did on November 6 because it could not afford to pay dispatchers at the rate of \$9 per hour. Shawn Gilgallon testified that pursuant to the bid, the Port Authority pays the company \$8.45 per hour for dispatchers and \$9.90 per hour for supervisors. Respondent argues, therefore, that if it were required to pay dispatchers \$9 per hour it would be losing 55 cents per hour. In addition, Shawn testified that the Company was losing \$4000 per week in having to pay the employees at the Haynes Security rate.

An employer has the right to discharge employees, so long as the employer is not violating the National Labor Relations Act or any other applicable statute. See *Airport Aviation Services*, 292 NLRB 823, 827 (1989). It is understandable that at some point Respondent would wish to reduce the salaries of its employees so that it would be more in line with the payments it receives from the Port Authority under its contract. However, what Respondent is not permitted to do is to take adverse action against the employees because of their Union activities. Larry Mack testified that the Company would have needed approximately 25 replacement employees when it began its replacement program. Yet, on November 6, when Respondent replaced the employees, it did it with a mere 12 replacements. Considering Respondent’s commitment a week earlier to pay its dispatchers \$9 per hour until January 1, 1997, and in view of the fact that it did not have sufficient replacements available on November 6, I find that Respondent has not satisfied its burden of showing that the

action that it took on November 6 “would have taken place even in the absence of the protected conduct.”

3. Constructive discharges

The complaint alleges that the reassignments on November 7 resulted in the constructive discharges of several employees. The two elements necessary to establish a constructive discharge are, first, that the burdens imposed on the employee must cause a change in working conditions so difficult or unpleasant as to force an employee to resign, and second, that the burdens were imposed because of the employees’ union activities. *Grocers Supply Co.*, 294 NLRB 438, 439 (1989). A significant reduction in income for an indefinite period of time, causing an employee to quit and seek alternative employment, when a motive for such treatment was protected activity will establish constructive discharge. *T & W Fashions*, 291 NLRB 137, 142 (1988); *Trumbull Industries*, supra, 314 NLRB at 365.

Wendy Harris was forced to resign since she did not have an automobile and could not get to her new job without one. Sandra Lewis could not accept reassignment since she needed an automobile to travel to Paterson, New Jersey, and she did not carry automobile insurance. Rosetta Baron was told that her new position as a security guard required her to sit in an automobile in a parking lot and she declined the position after advising Mack that she did not own an automobile. Wanda Elysee declined an offer to work as a security guard in Paterson, New Jersey, since she could not get to the job without taking four buses at the rate of \$10 a day. In addition, each of the five employees would have suffered a substantial reduction in pay. The Board has held that a constructive discharge will result from an employer’s decision to cut the pay of its employees. See *T & W Fashions*, supra, 291 NLRB at 142; *Williamhouse of California, Inc.*, 317 NLRB 699, 715 (1995). Accordingly, I find that Respondent constructively discharged its employees Rosetta Baron, Wanda Elysee, Wendy Harris, Sandra Lewis, and Renee Livsey, in violation of Section 8(a)(1) and (3) of the Act.

4. Discharge of Gifford

On November 6 Keisha Gifford placed a call to Larry Mack to ask where the employees were being reassigned. Mack told Gifford that he did not want all of the employees calling him and they should pick one representative to do so. Later that day Gifford telephoned Mack and told her that she was the chosen representative. On November 7 Gifford went to the office to pick up her check. She told Mack:

I have an excellent work record with Haynes Security and the job at the airport is five minutes away from my house. He said he had a position for me available in New Brunswick. I told him New Brunswick was too far, that would ruin my work record. Why send me to New Brunswick for \$6.50 an hour, a 45 minute drive, when I can go to the airport and make \$6.50 an hour?

Gifford credibly testified that Mack did not answer her question, “so I persisted in asking him why would I go to New Brunswick for \$6.50 an hour when I can go to the airport for \$6.50 an hour?” “He told me I do not have to worry about it because I was fired.” Respondent contends that Gifford was discharged on November 7 for “insubor-

dination.” Mack testified that Gifford was loud, that she called the company an “unprofessional, rinky-dink organization,” and that she referred to him as an “Uncle Tom.” Both Mack and Shawn Gilgallon conceded that the “Uncle Tom” remark was made after she was terminated. I find that Respondent has not satisfied its burden of showing that the “same action would have taken place even in the absence of the protected conduct.” *Wright Line*, supra, 251 NLRB at 1089. Respondent failed to introduce any evidence to show that it had ever terminated an employee for engaging in “insubordination” or for being loud or referring to the company as an “unprofessional, rinky-dink organization” or something similar. I find that Respondent’s discharge of Gifford violated Section 8(a)(1) and (3) of the Act.

5. Refusal to bargain

Between November 1 and 4 a majority of the dispatchers signed authorization cards on behalf of the Union. The cards were properly authenticated by the employees who witnessed the signing or who received the signed cards from the signatories. See *Don the Beachcomber*, 163 NLRB 275 fn. 2 (1967). Of a unit of 32 employees, 26 employees signed authorization cards. On November 4 the Union’s attorney faxed a letter to Respondent demanding that the Company recognize the Union as the exclusive collective-bargaining agent of the employees. In a reply dated November 6 Eileen Gilgallon stated, “[P]lease be informed that the people you claim to be representing no longer work as taxi dispatchers for this company.”

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614–615 (1969), the Supreme Court authorized the Board to issue a bargaining order in certain factual contexts, including those meeting the tests set forth below:

In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer’s unfair labor practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by the bargaining order, then such an order should issue.

The standard quoted above has been adequately substantiated on this record. By dismantling the bargaining unit less than two days after having received the Union’s letter, there can be no doubt that Respondent intended to undermine any chance that the Union had to organize the dispatchers. Furthermore, by laying off, cutting the salaries of employees who chose to remain and constructively discharging other employees, Respondent made it virtually impossible for the Union to prevail by filing for a Board election. The Board has repeatedly held that the unlawful discharge or transfer of a group of employees shall be considered a “hallmark” violation, which will by itself support the need for a bargaining order. See *Sumo Airlines*, 317 NLRB 383, 393 (1995); *Garney Morris, Inc.*, 313 NLRB 101, 103 (1993). Accordingly, as the unfair labor practices found herein render it un-

likely that even with the aid of conventional remedies a fair election could be held in the future, I find that "employee sentiment once expressed through cards, would, on balance, be better protected by a bargaining order." As the Union's majority is clear, I find that on November 5, 1996,³ Respondent violated Section 8(a)(1) and (5) of the Act by refusing to recognize and bargain in good faith with the Union as the representative of the employees in the appropriate unit.

CONCLUSIONS OF LAW

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

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

3. All full-time and regular part-time taxi dispatchers and supervisors (nonstatutory) employed by Respondent at Newark International Airport, Newark, New Jersey, but excluding all other employees, including managers, statutory supervisors and guards within the meaning of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times since November 4, 1996, the Union has been, and now is, the exclusive representative of the employees in the above-mentioned appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By threatening employees with discharge because they engaged in protected activities Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

6. By reducing the salary of its employees Larry Blaylock, Michelle Conrad, Yonette Gilmore, Sheryl Henderson, Randy Henderson, Robert Moore, Beatriz Pillot, Oreena Rivera, Waffa Shedid, and Jim Siebert; by laying off its employees Crystal Bland, Blanyon Davis, Seaundell Gilmore, Danett Hinds, Lamont Jordan, Yolanda Lucas, George Marucha, Thomas Orange, David Orioki, Kelly Rivera, Mamie Timmons, Harry Tucker, and Lavonne Williams; by reassigning its employees; by constructively discharging Rosetta Baron, Wanda Elysee, Wendy Harris, Sandra Lewis, and Renee Livsey; and by discharging Keisha Gifford, for activities protected by the Act, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

7. By refusing since November 5, 1996, to recognize and bargain collectively with the Union as the exclusive representative of the employees described above, while engaging in conduct which undermined the Union and prevented a fair election, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

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

³Inasmuch as Schachter faxed the demand for recognition late in the afternoon of November 4, it is not certain that Respondent was aware of the demand until the following day. I have therefore found that the refusal to bargain took place on November 5. See *Trading Port, Inc.*, 219 NLRB 298, 301 (1975).

THE REMEDY

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

Respondent having unlawfully reduced the salaries of Larry Blaylock, Michelle Conrad, Yonette Gilmore, Sheryl Henderson, Randy Henderson, Robert Moore, Beatriz Pillot, Oreena Rivera, Waffa Shedid, and Jim Siebert, I shall order that Respondent restore the rates in effect prior to November 6, 1996, and make the employees whole for any loss of earnings they may have suffered by reason of the discrimination against them, with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).⁴

Respondent having unlawfully laid off Crystal Bland, Blanyon Davis, Seaundell Gilmore, Danett Hinds, Lamont Jordan, Yolanda Lucas, George Marucha, Thomas Orange, David Orioki, Kelly Rivera, Mamie Timmons, Harry Tucker, and Lavonne Williams; and having unlawfully constructively discharged Rosetta Baron, Wanda Elysee, Wendy Harris, Sandra Lewis, and Renee Livsey; and having unlawfully discharged Keisha Gifford; I find it necessary to order Respondent to offer them full reinstatement to their former positions, or if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings that they may have suffered from the time of their layoffs or discharges to the date of Respondent's offers of reinstatement. Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, supra.

Since I have also found that Respondent unlawfully refused to bargain with the Union, I shall order that Respondent bargain collectively with the Union as the representative of the bargaining unit employees.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, pursuant to Section 10(c) of the Act, I issue the following recommended⁵

ORDER

The Respondent, Consec Security, Kearny, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge because they engage in protected activities.

(b) Reducing the salary, laying off, reassigning, constructively discharging, and discharging employees for activities protected by Section 7 of the Act.

(c) Refusing to bargain in good faith with Teamsters Union Local 102 a/w International Brotherhood of Teamsters, AFL-CIO as the exclusive representative of the employees in the appropriate unit described below.

⁴Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

⁵If 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.

(d) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

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

(a) Upon request, recognize and bargain collectively with the Union as the exclusive representative of the employees in the following appropriate unit, concerning 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 taxi dispatchers and supervisors (nonstatutory) employed by Respondent at Newark International Airport, Newark, New Jersey, but excluding all other employees including managers, statutory supervisors and guards within the meaning of the Act.

(b) Restore the salary rates as they existed prior to November 6, 1996, for Larry Blaylock, Michelle Conrad, Yonette Gilmore, Sheryl Henderson, Randy Henderson, Robert Moore, Beatriz Pillot, Oreena Rivera, Waffa Shedid, and Jim Siebert and make them whole for any loss of earnings as a result of the discrimination against them, with interest, in the manner set forth in the remedy section above.

(c) Within 14 days from the date of this Order, offer Rosetta Baron, Crystal Bland, Blanyon Davis, Wanda Elysee, Keisha Gifford, Seaundell Gilmore, Wendy Harris, Danett Hinds, Lamont Jordan, Sandra Lewis, Renee Livsey, Yolanda Lucas, George Marucha, Thomas Orange, David Orioki, Kelly Rivera, Mamie Timmons, Harry Tucker, and Lavonne Williams full reinstatement to their former positions, or if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings with interest, in the manner set forth in the remedy section above.

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

(e) Preserve, and within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time-cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Kearny, New Jersey, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 22, 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 Respond-

ent 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, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since November 12, 1996.

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

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 threaten employees with discharge because they engage in protected activities.

WE WILL NOT reduce the salary, lay off, reassign, constructively discharge and discharge employees for activities protected by Section 7 of the Act.

WE WILL NOT refuse to bargain in good faith with Teamsters Union Local 102 a/w International Brotherhood of Teamsters, AFL-CIO as the exclusive representative of the employees in the appropriate unit described below.

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

WE WILL, upon request, recognize and bargain collectively with the Union as the exclusive representative of the employees in the following appropriate unit, concerning 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 taxi dispatchers and supervisors (nonstatutory) employed by Respondent at Newark International Airport, Newark, New Jersey, but excluding all other employees including managers, statutory supervisors and guards within the meaning of the Act.

WE WILL restore the salary rates as they existed prior to November 6, 1996, for Larry Blaylock, Michelle Conrad, Yonette Gilmore, Sheryl Henderson, Randy Henderson, Robert Moore, Beatriz Pillot, Oreena Rivera, Waffa Shedid, and Jim Siebert and make them whole for any loss of earnings as a result of the discrimination against them, with interest.

WE WILL, within 14 days from the date of the Board's Order, offer Rosetta Baron, Crystal Bland, Blanyon Davis, Wanda Elysee, Keisha Gifford, Seaundell Gilmore, Wendy Harris, Danett Hinds, Lamont Jordan, Sandra Lewis, Renee Livsey, Yolanda Lucas, George Marucha, Thomas Orange, David Orioki, Kelly Rivera, Mamie Timmons, Harry Tucker, and Lavonne Williams full reinstatement to their former positions, or if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or

⁶If 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."

other rights and privileges, and make them whole for any loss of earnings, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful layoffs or discharges, and within 3 days thereafter notify the

employees in writing that this has been done and that the layoffs and discharges will not be used against them in any way.

CONSEC SECURITY