

Airport Express, Inc. and Auto Truck Drivers Union Local No. 85, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Cases 20-CA-13673 and 20-RC-14501

November 30, 1978

DECISION, ORDER, AND DIRECTION OF
SECOND ELECTION

BY MEMBERS PENELLO, MURPHY, AND TRUESDALE

On October 11, 1978, Administrative Law Judge Stanley Gilbert issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Airport Express, Inc., San Francisco, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[Direction of Second Election and *Excelsior* footnote omitted from publication.]

¹ The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir., 1951). We have carefully examined the record and find no basis for reversing his findings.

DECISION

STATEMENT OF THE CASE

STANLEY GILBERT, Administrative Law Judge: Based upon a charge filed on February 21, 1978, as amended on March 30, 1978, by Auto Truck Drivers Union Local No. 85, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter referred to as the Union, the complaint in Case 20-CA-

13673 was issued on April 7, 1978. The complaint alleges that Airport Express, Inc., referred to herein as the Respondent and the Company (or as the Employer in Case 20-RC-14501), violated Section 8(a)(1) of the Act by statements made by J. G. van Heuven (Respondent's president) to its employees. Respondent, by its answer, denies that it committed the unfair labor practices alleged.

On February 10, 1978, the Regional Director for Region 20 issued her Report on Objections filed by the Union (Petitioner) to the election conducted in Case 20-RC-14501 on January 16, 1978, and an Order that a hearing be held to resolve the issues raised by four of the five objections filed. On April 7, 1978, said Regional Director issued an Order consolidating the CA and RC cases for the purpose of a hearing.

Pursuant to notice, a hearing was held in San Francisco, California, on June 22, 23, and 26, 1978, before me, duly designated as Administrative Law Judge. Appearances were entered on behalf of the General Counsel, the Union (Charging Party-Petitioner), and on behalf of the Company (Respondent-Employer). Briefs were received from the General Counsel and the Company on August 14, 1978. No brief was received from the Union.

Upon the entire record in this proceeding and my observation of the witnesses as they testified, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT-EMPLOYER

At all times material herein, Respondent, a California corporation with a place of business located at 206 Utah Street, South San Francisco, California, has been engaged in the transport of goods, materials, and supplies by truck. During the past calendar year, Respondent, in the course and conduct of its business operations, performed services valued in excess of \$50,000 for customers located within the State of California, each of which during the same time period, in the course and conduct of its business operations in California, made sales valued in excess of \$500,000 directly to customers located outside the State of California.

Respondent is, and has been at all times material herein, an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED HEREIN

The Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES ALLEGED

A. *The Bargaining Unit Involved*

Respondent admits the following allegation in the complaint:

All full-time and regularly scheduled part-time drivers, dispatchers, and clerical employees employed by Re-

spondent at its 206 Utah Street, South San Francisco, California facility; excluding all other employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

Although Respondent, by its answer, denies the allegation in the complaint that the Union "since on or about October 15, 1977, has been the exclusive representative of the employees" in the above-described unit, in its brief Respondent made the following statement:

The record apparently reflects that the Union had valid authorization cards from a majority of the employees [in the aforesaid bargaining unit] since October 15, with the exception of the approximate 7 days between November 24 and December 1.

In view of the above-quoted concession by Respondent, it appears that no purpose would be served in setting forth the evidence supporting the Union's majority status. Since the time material herein (the commencement of the unfair labor practices litigated herein) did not begin until approximately the third week in December 1977, the hiatus of "the approximate 7 days between November 24 and December 1," if it did exist, is of no consequence.

In view of the above concession and the fact that the record supports it,¹ I find that during all times material herein the Union has had valid authorization cards from a majority of the employees in the above-described bargaining unit.

On October 31, 1977, the Union filed a petition for a certification election among the employees in the aforesaid unit and thereafter the parties entered into a Stipulation for Certification Upon Consent Election, which set January 16, 1978, as the date for the election. The tally of the votes discloses that the Union lost the election (5 for and 12 against).²

B. *The Issues in Case 20-CA-13673*

The allegations of Respondent's violations of the Act (Section 8(a)(1)), set forth in paragraph VI of the complaint, are as follows:

(a) On an unknown date in late November 1977, Respondent, by J. G. van Heuven, at Respondent's premises, threatened employees that Respondent would close its business if its employees voted for or otherwise supported the Union as their collective-bargaining representative.

(b) On unknown dates in late November 1977, and late December 1977, and on or about January 13, 1978, Respondent, by J. G. van Heuven, at Respondent's premises, pointed out to employees the futility of supporting the Union by telling them that Respondent would not negotiate a contract with the Union.

(c) On an unknown date in late December 1977, Respondent, by J. G. van Heuven, at Respondent's premises,

promised employees a pay raise in order to discourage their support for or activities on behalf of the Union.

(d) On an unknown date in late December 1977, Respondent, by J. G. van Heuven, at Respondent's premises, threatened to lay off employees if they voted for or otherwise supported the Union.

(e) On an unknown date in mid-December 1977, and on or about January 13, 1978, Respondent, by J. G. van Heuven, at Respondent's premises, offered to negotiate with its employees individually or in a group in order to discourage them from voting for or otherwise supporting the Union.

In his brief, General Counsel "concedes that the evidence adduced at the hearing does not support allegation VI(e) of the complaint." Inasmuch as I concur in General Counsel's quoted appraisal of the record, the issue with respect to this allegation will not be considered. Since Respondent denied the above allegations, the issues are whether there is credited testimony which supports said allegations (except VI(e) which, as above indicated, need not be considered).

C. *Resolution of the Issues*

There is no dispute that van Heuven conducted meetings with employees on three different dates in two sessions on each date to accommodate the hours of work of the various employees. There is conflicting testimony as to whether during the course of said meetings van Heuven made statements which violated Section 8(a)(1) of the Act. Thus, a resolution of the issues herein requires a resolution of the credibility of the witnesses and their conflicting testimony.

Respondent sent to each employee on the "Excelsior list" a series of five letters (signed by van Heuven) which are summarized as follows:

The first, dated December 12, 1977, explained that the Board would be conducting an election on January 16, 1978, and the procedure to be followed; urged the employees to vote; notified them that they could vote against the Union even though they signed authorization membership cards; expressed the opinions that "we do not need an outside union interfering with our lives here" and that it "can only be disadvantageous to you"; and explained that the Federal law "prohibits me [van Heuven] from discussing with you any increases in wages and benefits while the election is pending." The letter concluded with the "hope" that the employees would vote "NO" in the election.

The second letter, dated December 16, 1977, contained the title, "The Truth About Union Negotiations." It explained that if the Union gets "51% of the votes" it will be the employees' sole bargaining agent; that the Union could insist that all matters concerning wages, hours, and working conditions "must go through the Union"; that it would be a "cumbersome procedure"; that there would be no automatic increases in wages or other benefits if the Union won the election, contrary to what the Union "may have promised"; that, if the Union won, "all that means is that we have to bargain with it, and we will bargain in good faith as required by law"; that "it does not mean that we would have to agree to anything"; that it was "not unusual" for bargaining to take a long time and that until

¹ No purpose would be served in determining whether the record supports Respondent's claim with respect to the hiatus.

² Further details as to the facts and issues in Case 20-RC-14501 are set forth hereinbelow (after the disposition of the issues in Case 20-CA-13673).

agreement or impasse was reached "we cannot lawfully grant new wage increases" or benefits "on our own"; that the "Company has the right to *bargain from scratch*" and it could not be assumed that "all the things you now enjoy will automatically be continued"; that unions "are primarily interested" in collecting union dues and "oftentimes" were willing to give up benefits of individuals for "such things as union shop, union security and union dues check-off clauses"; that he (van Heuven) would be "willing to bet" that the union shop or union-security clause "will be one of the most important union demands"; and that if there were such a clause, the employee would "get fired" if he refused or was unable to pay union dues. Again the letter ended with a message to "Vote No."

The third letter, dated December 24, 1977, is entitled, "Have You Thought About Strikes?" The letter explained that, if the Union won, "all that happens is that we will sit down and bargain with the Union." It further explained that if no agreement was reached the "Union could try to force us to agree to its demands" by resorting to a strike. It set forth some of the problems that might be caused by a strike, including the lack of unemployment insurance to strikers, the right of the Company to hire permanent replacements for them, the possibility of their being fined as union members if they worked during a strike, and the loss of pay they would suffer when out on strike. Again, the letter concluded with a message to vote "No."

The fourth letter, dated January 5, 1978, is entitled, "Everything You Always Wanted to Know About This Union (But Were Afraid to Ask)." This letter contained data about the salaries, expenses, and allowances which officials of the International and local received. Again, this letter ended with the message to vote "No."

The fifth letter, which is undated but which apparently was sent to employees after the fourth letter and prior to the election, contains excerpts from the International's constitution and the Union's bylaws to illustrate "the many duties YOU would OWE to it [the Union] as a union member." It also explains the legal difficulties involved if the employees desired to rid themselves of the Union. Again, the letter concludes with a message to vote "No," and a reminder that the employee had a right to vote no, no matter what union document he may have signed.

In the course of the hearing, General Counsel represented that there was no contention that anything in the letters, *per se*, constituted a violation of the Act but argued that they should be considered in context with statements allegedly made by van Heuven during his aforesaid meetings with employees. I am not persuaded that anything in the letters can be found to have converted an otherwise lawful verbal statement by van Heuven into an unlawful statement. However, the letters have been considered not only as background information but also because some of them were read to employees at certain of the meetings and have some bearing on determining the credibility issues.

Inasmuch as there were six sessions which were attended by various employees and because of disparities in the testimony as to the dates and times of day of the sessions attended by the witnesses, the record is something of a maze as to what occurred at each particular session. Nevertheless, in an attempt to present an orderly summary of my

findings of fact, I set forth hereinbelow said findings as they are related to each of the six sessions.

As stated hereinabove, there are disparities in the testimony as to both the dates and times of the day when each session was held. Based upon credited testimony and the dates of above-described letters, I find that the first two sets of meetings were in the week commencing December 19 and in the week commencing December 26, 1977, and that on each of said dates the first session was in the early part of the morning and the second toward the end of the morning. There appears to be little dispute that the date of the third sessions was January 13, 1978 (the Friday before the election on January 16) and the two sessions were between 5 and 7 p.m.

D. First Session, First Date

It appears that the only witness called by the General Counsel who testified to this session was David Lewis, an employee. Lewis testified that van Heuven read from one of the letters he sent to the employees and discussed it but could not recall any statement van Heuven made. Van Heuven credibly testified that he read the December 16 letter including the part to the effect that Respondent is obligated by law to bargain with the Union in good faith. Donald Clark, Jr., an employee, called as a witness by Respondent, testified that he was present at the meeting which Lewis attended on the first date. He corroborated van Heuven's testimony that van Heuven read the December 16 letter. Both van Heuven and Clark credibly testified, in effect, that van Heuven made no statement which would support any of the allegations in the complaint of unfair labor practices. Consequently, it is found that there was no violation of the Act by Respondent during this session.

E. Second Session, First Date

Five witnesses, all employees, were called by General Counsel who testified with respect to this session: Richard Hawkes, Brent Yoshifuji, Thomas Laurinaitis, Terry Walker, and Jeffrey Brown.³

Hawkes testified that the first meeting he attended was in the middle of December at 6 p.m. On direct examination he testified that van Heuven read from and discussed the letter dated December 12, and that he could not remember any specific statements made at the meeting. On redirect examination, however, after it was pointed out by me during cross-examination that Hawkes had not testified to any statement that could be construed as being violative of the Act, Hawkes testified that van Heuven stated during the first meeting, "We don't need the Union in here and we can work without it." Then, when it was apparent that he could not remember any other statement, Hawkes was asked by General Counsel if he remembered van Heuven making any statement about what he would do with his

³ Although there is considerable confusion in their testimony as to the date and time of the "first meeting" they attended, based upon an analysis of the testimony of the various witnesses as to who was present at the "first meeting" they attended, I am of the opinion that these five were all present at this session.

business if the Union won, to which he responded, "Not honestly. I could not tell you." Hawkes was then asked if he remembered any statements made "about closing the business down," to which he responded that he remembered hearing statements about it but could not remember in which of the three meetings he attended that he heard it. He further testified as to the statement he heard as follows: "He goes, 'I don't want the Union in here. We can work without it.' and he said, 'I'd close my business down and I'd sell it.'" After he was shown his pretrial statement he testified that his recollection was refreshed and that the above-quoted statements were made at the first meeting he attended.⁴

Yoshifuji testified that the "first meeting" he attended was in the first or second week of December, and that it was the second session of the day and was scheduled for 11 a.m. He further testified that he believed both the December 12 and 16 letters were read and discussed by van Heuven at the session he attended. After he indicated that his recollection was exhausted, he was asked by the General Counsel if any questions were asked at the meeting, and Yoshifuji testified that he asked van Heuven "if he can guarantee us a raise, and he replied, 'No, but we do deserve better wages.'" Then, when his recollection appeared to be exhausted again, he was asked by the General Counsel if anything was said on the subject of not continuing the business, to which Yoshifuji replied, "He [van Heuven] did say he would be forced to negotiate with the Union, but that he would not sign a contract that called for \$8.00 or \$9.00 an hour."

Laurinaitis testified that the "first meeting" he attended was in the first week in December in the "early afternoon" and that Hawkes and Yoshifuji were among those present. He testified that van Heuven made the statement, "If the Union wins the election, I will have to bargain with the Company Union." Laurinaitis was unable to remember any other statement made by van Heuven.

Walker testified that the "first meeting" he attended was at 11 a.m. but could not remember the approximate date, except that it was after he received the December 12 letter which van Heuven read. At first he testified that van Heuven made a statement to the effect that if the Union won the election he would not negotiate with it and that he would not have to negotiate with it. Subsequently, he testified that van Heuven stated, in addition, that "We can negotiate for ourselves as a whole" and "I will shut down the business."

Brown testified that the "first meeting" he attended was held at 10:30 a.m., approximately 4 days after he received the December 12 letter. He further testified that van Heuven read the letter of December 12, that he did not remember any questions being asked, that van Heuven strongly urged a no vote, and that he stated employees could vote no even if they signed authorization cards. He remembered no other statements that might have been made.

Respondent called as witnesses to testify with respect to this session: van Heuven, James Buhs, the dispatcher; and

Cathy Farrar, a clerical worker and wife of Michael Farrar, Respondent's general manager.

Van Heuven testified that he read the letter of December 16; that Yoshifuji asked a question about whether or when a wage increase could be expected; and that he answered, "That under the law at this time it is not possible for me to discuss wages and benefits." Further, he categorically denied that he ever read any portion of the letter of December 12 at the meeting of employees and denied all of the above-summarized testimony of General Counsel's witnesses attributing statement to him which could be construed as violative of the Act. Both Buhs and Farrar substantially corroborated van Heuven's testimony and denials.

The General Counsel's witnesses to this session were not convincing, and, in contrast thereto, Respondent's witnesses were. Therefore, I credit the testimony of Respondent's witnesses. General Counsel's witnesses displayed poor recollection and much of their testimony had to be elicited by leading questions or, in one instance, by refreshing the witness' recollection by reference to his prehearing statement. More striking evidence of the unreliability of their testimony, however, is that there was little corroboration of the testimony of one witness by that of another and that with regard to some elements they were contradictory.⁵

Consequently, I find that the General Counsel failed to prove by a preponderance of the evidence any violation of Section 8(a)(1) of the Act during this session.

F. First Session, Second Date

It does not appear that any of the witnesses called by General Counsel testified as to what occurred at this session. The record does not reveal any evidence of a violation of the Act being committed at this session.

G. Second Session, Second Date

Although there is some confusion in their testimony as to the date and time of the "second meeting" they attended, it appears that the following of General Counsel's witnesses testified to what occurred at this session: Hawkes, Yoshifuji, Laurinaitis, Walker, Lewis, and Brown.

Hawkes testified that the "second meeting" he attended was held the "weekend before Christmas" at 6 p.m.⁶ Hawkes first testified that he had received the letter of December 24 prior to the meeting but subsequently changed his testimony to that he had not. He further testified that van Heuven said "a couple of things like, 'We can work it out by ourselves. We do not need the Union'"; that Yoshifuji asked, "How much would we get?" and that van Heu-

⁵ For example, Hawkes did not testify to any statement that van Heuven made with regard to negotiating with the Union; Yoshifuji testified that van Heuven said he would be forced to negotiate with it; Laurinaitis testified that van Heuven stated that he would have to bargain with "the Company Union"; Walker testified that van Heuven stated he would not negotiate with the Union; and Brown's testimony was silent on the subject.

⁶ As indicated hereinabove, I am of the opinion, based upon credited testimony and particularly that a number of witnesses credibly testified that the letter of December 24 was read at the meeting, that the date was between Christmas and New Year's Day. Also based upon credited testimony, I am of the opinion that it was held at approximately 11 a.m.

⁴ It is noted that in his pretrial statement, he placed the date of the first meeting in "late November," which he testified was incorrect because the date of the first letter was December 12.

ven replied, "I can't say the amount, but it would be substantial."

Yoshifuji testified that the letter of December 24 was read and discussed by van Heuven at the "second meeting" he (Yoshifuji) attended; that he believed he asked one question, whether "he [van Heuven] could bring in permanent replacements [ostensibly in the event of a strike]"; and that van Heuven replied, "Yes. We could all be out of a job." After Yoshifuji testified that his memory was exhausted as to any further statements van Heuven made, he was asked by General Counsel whether there was any discussion about layoffs. His answer thereto is as follows:

A. Yes. I raised a question that if the Union won the election would there be layoffs?

And he replied, "Yes. Some of you can expect to be laid off as we can't afford to pay the Union's high demands. Our employer couldn't afford to pay the Union's high wages if they asked for \$8.00 or \$9.00 an hour."

Q. (By Ms. Spencer) Was there any discussion as to what those wages would be, those Union wages?

A. Well, no, there was no discussion on that.

Laurinaitis testified that the "second meeting" he attended was in the second week in December, about 2 p.m.; that Yoshifuji was among those present; that van Heuven read a letter that dealt with strikes (obviously the letter dated December 24); and that the "second meeting is very vague to me." He was unable to remember any statements made by van Heuven.

Walker testified that the "second meeting" he attended was before Christmas, but he displayed and admitted very poor recollection with respect to the meeting and testified that he did not remember any statement made by van Heuven.

Lewis testified that the "second meeting" he attended was held a few days before Christmas, but he also testified that van Heuven read the letter dated December 24. He further testified that all he remembered of what van Heuven said was that "if we did strike that he could replace us with permanent replacements."

Brown testified that the "second meeting" he attended was held "right before Christmas" in the morning. He further testified that van Heuven read portions of the letter dated December 24; that he (Brown) asked him "if we would be permanently replaced if we had a strike"; and that van Heuven responded "we could be permanently replaced." After Brown testified that he remembered no other statements made by van Heuven, General Counsel asked him if there was any question or discussion about "layoffs." He testified, in response, that he was "pretty sure" that Lewis was present and asked a question regarding layoffs. Brown's testimony continues as follows:

A. He [Lewis] asked if the Union won the election would certain drivers with lower seniority be laid off.

Q. And do you remember how Mr. van Heuven answered that question?

A. Yes, He said that we would not be able to afford everybody—no, he said we would not be able to afford to pay everybody these high wages, referring to Union wages.

Q. Was that his complete answer to Mr. Lewis' question that you remember?

A. That is as much as I remember of it.

It is noted that while Lewis, who Brown testified asked the question which elicited the above-quoted statements attributed to van Heuven, testified that all he remembered van Heuven stating was a reference to replacement of strikers, Yoshifuji testified that he asked a question about layoffs, as above-noted, which elicited a somewhat similar response by van Heuven.

The only above testimony of General Counsel's witnesses which would support a finding of a violation of Section 8(a)(1) of the Act is the following:

1. The testimony of Hawkes to the effect that no union was needed, that "we can work it out by ourselves." Cathy Farrar, who credibly testified that she attended the meeting, and van Heuven categorically denied that van Heuven made such a statement. It is noted that none of the other above-mentioned five witnesses called by General Counsel testified that van Heuven made such a statement at this session. Moreover, Farrar and van Heuven were more convincing witnesses than Hawkes. Consequently, their said denials are credited.

2. The testimony of Hawkes to the effect that, in answer to a question by Yoshifuji about an increase in wages, van Heuven stated that it would be substantial. While Yoshifuji testified that he asked two questions during the session, neither was about wages. Hawkes was the only one of the above-mentioned witnesses called by General Counsel to testify about this session who testified that van Heuven made such a statement. Van Heuven categorically denied that he made such a statement, and Farrar denied that he made any promise of increased wages or benefits. Moreover, van Heuven and Farrar were more convincing witnesses. Consequently, their denials are credited.

3. The above-quoted testimony of Yoshifuji and Brown as to a statement by van Heuven with regard to layoffs. It is noted that said testimony of each of the two witnesses was elicited by a leading question after his recollection was exhausted. It is further noted that none of the other four above-mentioned witnesses called by General Counsel testified to such a statement by van Heuven. Both Farrar and van Heuven denied that he made such a statement. The latter two were the more convincing witnesses as to this session, and their denials are credited.

Consequently, it is found that General Counsel failed to prove by a preponderance of the evidence that Respondent violated Section 8(a)(1) of the Act during this session.

H. First Session, Third Date

It appears that the General Counsel presented no witnesses who testified with respect to this session. Van Heuven and employees James Buhs, Greg Cruickshank, and Mike Cruickshank were witnesses called by Respondent to testify as to this session. It is noted that the two Cruickshanks testified on behalf of General Counsel that they signed valid authorization cards. It does not appear that any of the testimony of said four witnesses would support a

finding that Respondent violated the Act during this session.

I. Second Session, Third Date

The following witnesses called by General Counsel testified with respect to this session: Hawkes, Yoshifuji, Laurinaitis, Walker, Lewis, and Brown.

Hawkes testified as follows:

Q. (By Ms. Spencer) And what happened at this last meeting?

A. He [van Heuven] discussed a few things. I really didn't pay attention to what he was discussing at this point, but at the end of the meeting he discussed the thing that said—he did say “I will not negotiate a contract, I will not sign a contract. We do not need the Union in here at Airport Express. And I don't want anybody to tell me how to run my business.” That is what he said at the end of the meeting.

Yoshifuji also apparently attended this session. Although Yoshifuji testified that Hawkes was not present, he testified that Mike Farrar, Jim Farrar, Brown, and Laurinaitis were present. Laurinaitis testified that both Hawkes and Yoshifuji were at the session he attended; and Hawkes testified that Yoshifuji and Laurinaitis were present at the session he attended. Therefore, I find that Yoshifuji was mistaken as to his testimony that Hawkes was not present at the session he attended. Yoshifuji testified that the meeting “dealt with the history” of Respondent (as was testified to, without contradiction by other witnesses). Yoshifuji testified further, “There were no questions or comments at this meeting.”

Laurinaitis testified that the “third meeting” he attended was “the Friday before Christmas weekend”; that he could not remember when it was held with relation to the election; and that it was in the afternoon about “two and three o'clock.” It is apparent, however, from his testimony as to who was present (and the testimony of those who were present) that he must have attended this session, i.e., the second session on January 13. Laurinaitis testified that van Heuven stated that he would not “negotiate with the Union,” would “fight it all the way” and “would rather close the doors than go Union.”

Walker testified that he attended the third meeting; that Yoshifuji, Mike Farrar, Jan Farrar, and Hawkes were present; that van Heuven talked about “the history of Airport Express”; and that no statement made by van Heuven “stands out” in his memory.

Lewis testified that he attended the second session on January 13 and that Walker and Hawkes were among the employees present. Further, Lewis testified that after van Heuven related the history of Respondent, “he said that he would not have anybody telling him how to run his business . . . that he would not negotiate with the Union, and . . . would not pay Union wages.”

Brown testified that, after van Heuven related a history of Respondent, he asked if the employees had read his letter dated January 5, 1978 (citing the amounts of money received by union officials) and indicated he did not approve of the high wages union officials were paid. Brown

further testified that after van Heuven “said that the Company and the Union could never agree, he said that he would not negotiate with the Union.”

Although Mark and Greg Cruickshank testified that they attended a meeting on January 13, 1978, at which both of them were present as well as Lewis (according to the testimony of both) and also Hawkes (according to Greg's testimony), I credit the testimony of Lewis and Hawkes as to who was present at the session they attended and infer therefrom that they (Hawkes and Lewis) attended the second session.⁷

The only witnesses who testified on behalf of Respondent with respect to this session (the second on January 13) were van Heuven and Michael Farrar, Respondent's general manager. Van Heuven categorically denied the above-quoted or summarized testimony of Hawkes, Laurinaitis, Lewis, and Brown as to statements made by van Heuven. Farrar, in effect, corroborated van Heuven's denials of the four said witnesses.

Although there were variations in the testimony of Hawkes, Laurinaitis, Lewis, and Brown, all four testified to the effect that van Heuven stated at the “third meeting” they attended that Respondent would not negotiate a contract with the Union. Although Yoshifuji testified that there were no questions or comments at this meeting, I do not credit his testimony, since the record reveals that his recollection was poor and confused. Also, even though the other of General Counsel's witnesses, Walker, testified that no statement made by van Heuven stands out in his memory, I find that Hawkes, Laurinaitis, Lewis, and Brown were convincing witnesses with respect to this session⁸ (particularly Hawkes and Brown as to their version of what van Heuven stated) and more convincing than van Heuven and Farrar.

Therefore, I find that Respondent violated Section 8(a)(1) of the Act by indicating to the employees that he would not reach an agreement with the Union, thus creating the impression that it would be futile for them to support the Union.

J. Re The Objections to the Election

Following are the four objections to the election filed by the Union-Petitioner which are required to be resolved in this proceeding:

1. During the election campaign the Employer threatened employees that the business would be shut down if Petitioner won the election.

2. During the election campaign the Employer informed employees that he would not negotiate with Petitioner if it were selected as the representative of the employees.

⁷ As noted hereinabove, I found that the Cruickshanks attended the first session on January 13. It is noted that both Cruickshanks testified that they were at the session which Buhs attended; and that, according to Michael Farrar's testimony, he attended the second session on January 13, Buhs, whom he appelled as dispatcher, attended the first session, and Hawkes was among those present at the second session. Buhs testified that he attended the first session.

⁸ Except I do not credit the testimony of Laurinaitis that van Heuven stated he “would rather close the doors than go Union.” There is no corroboration of this portion of his testimony, and that aspect thereof was not convincing.

3. During the election campaign the Employer informed employees that he would negotiate only with a company union.

5. The Employer made promises of wage increases and other benefits if the employees would defeat the Union in the election.

Since the above-quoted objections coincide with certain of the allegations in the complaint, counsel for the Union-Petitioner represented that it would rely on the evidence introduced by the General Counsel and offered no additional evidence. Therefore, the findings of fact hereinabove will be considered to determine which, if any, of the above objections were sustained.

Re Objection No. 1. Inasmuch as there is no credited evidence which would support this objection, it should be overruled.

Re Objection No. 2. The findings as to statements made by van Heuven during the second session on January 13, 1978, appear to support this objection. Therefore, it should be sustained.

Re Objection No. 3. Inasmuch as the testimony which would appear to relate to this objection has not been credited, this objection should be overruled. It is noted that the only allegation in the complaint which can be considered similar to this objection is in paragraph VI(e), and in his brief General Counsel concedes that the evidence adduced does not support said allegation. As stated hereinabove, I concur with General Counsel's said appraisal of the record.

Re Objection No. 5. Inasmuch as there is no credited evidence which would support this objection, it should be overruled.

In view of the recommended ruling with respect to Objection No. 2, it is further recommended that the results of the election held on January 16, 1978, be set aside and that a new election be conducted at a time and date deemed to be appropriate.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICE UPON COMMERCE

The unfair labor practice of the Respondent set forth in section III, above, occurring in connection with its operations set forth in section I, above, has a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tends to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. THE REMEDY

It will be recommended that the Respondent be ordered to cease and desist from engaging in the unfair labor practice found herein and take affirmative action, as provided in the recommended Order below, designed to effectuate the policies of the Act.

It is noted that the General Counsel has urged that an appropriate remedy herein would be to require Respondent to bargain in good faith with the Union in accordance with doctrine and guidelines set forth in *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969). I am of the opinion

that the sole unfair labor practice found herein does not warrant imposing the so-called *Gissel* remedy sought by the General Counsel.

Upon the basis of the foregoing findings of fact and upon the entire record in this proceeding, I make the following:

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce and in operations affecting 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 regularly scheduled part-time drivers, dispatchers, and clerical employees employed by Respondent at its 206 Utah Street, South San Francisco, California facility, excluding all other employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. During all times material herein the Union has had valid authorization cards from a majority of the employees in the above-described bargaining unit.

5. Respondent violated Section 8(a)(1) of the Act by indicating to employees on January 13, 1978, that it would not reach an agreement with the Union even though the Union should win the election.

6. The General Counsel has failed to prove by a preponderance of the evidence that Respondent violated Section 8(a)(1) of the Act by the conduct alleged in paragraph VI(a), (c), (d), and (e) of the complaint, and with respect to the dates other than January 13, 1978, alleged in paragraph VI(b).

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

ORDER ⁹

The Respondent, Airport Express, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Indicating to employees that it would be futile for them to support Auto Truck Drivers Union Local No. 85, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, because it would not reach an agreement with the Union.

(b) 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 which is deemed necessary to effectuate the policies of the Act:

⁹ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Post at its place of business in South San Francisco, California, copies of the attached notice marked "Appendix."¹⁰ Copies of said notice, on forms to be furnished by the Regional Director for Region 20, shall, after being duly signed by an authorized representative of Respondent, be posted by Respondent immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that said notices are not altered, defaced, or covered by any other material.

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

All allegations of unfair labor practices in the complaint other than the one found hereinabove to have been proved are hereby dismissed.

¹⁰ In the event that 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

WE WILL NOT indicate to employees that it would be futile for them to support Auto Truck Drivers Union Local No. 85, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, because we would not reach an agreement with said Union.

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

WE WILL bargain with the aforesaid Union in good faith, in the event it is certified by the National Labor Relations Board as the exclusive bargaining representative of our employees.

AIRPORT EXPRESS, INC.