

Advance Detective Bureau, Inc. and Advance Claim Service, Inc. and Allied International Union of Security Guards and Special Police. Case 22-CA-6700

October 6, 1976

DECISION AND ORDER

BY CHAIRMAN MURPHY AND MEMBERS FANNING
AND JENKINS

On June 10, 1976, Administrative Law Judge Almira Abbot Stevenson 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 her 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, Advance Detective Bureau, Inc. and Advance Claim Service, Inc., Ramsey, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

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 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing her findings.

DECISION

STATEMENT OF THE CASE

ALMIRA ABBOT STEVENSON, Administrative Law Judge: This case was heard at Newark, New Jersey, on April 8 and 13, 1976. The original charge was filed and served on Respondent on November 21, 1975. First and second amended charges were filed and served on January 26 and February 3, 1976. The complaint was issued on February 9, 1976, and amended at the hearing.¹ The Respondent filed

an answer, portions of which were stricken on motion of the General Counsel.

The issues are whether or not Respondent violated Section 8(a)(3) of the National Labor Relations Act, as amended, by discharging Frank Bovino because of his membership in and support of the Union; and violated Section 8(a)(1) of the Act by coercively interrogating and threatening Bovino and James Agosta, and promising Agosta benefits to discourage his support of the Union. For the reasons fully set forth below, I conclude that Respondent violated the Act as alleged.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent, I make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

The amended complaint alleges, and Respondent admits, that Advance Detective Bureau, Inc., and Advance Claim Service, Inc., are New York corporations; they maintain an office and place of business at 145 North Franklin Turnpike, Ramsey, New Jersey, at 170 Broadway, New York, New York, and an office in the State of Florida, where they are engaged in performing adjusting, surveillance, and related services; during the preceding 12 months Respondent provided such services valued in excess of \$50,000 to enterprises in New York which in turn received revenues valued in excess of \$50,000 from the sale of insurance directly to customers located outside New York. Based on these admitted facts, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction in this proceeding.²

II. LABOR ORGANIZATION

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

¹ The name of Respondent given in the caption reflects amendments of the complaint made at the hearing.

² I can find no merit in Respondent's contention that it is inequitable to assert jurisdiction over what it terms a small enterprise such as this merely because it provides services to large insurance companies. In *Siemens Mailing Service*, 122 NLRB 81 (1958), the Board declared it had "concluded that it will best effectuate the policies of the Act if jurisdiction is asserted over all nonretail enterprises which have an outflow or inflow across State lines of at least \$50,000, whether such outflow or inflow be regarded as direct or indirect. . . . Indirect outflow refers to sales of goods or services to users meeting any of the Board's jurisdictional standards except the indirect outflow or indirect inflow standard." In *Metropolitan Life Insurance Company*, 141 NLRB 337 and 141 NLRB 1074 (1963), the Board ruled that an insurance company meets the Board's jurisdictional standards if it derives \$50,000 a year from the direct out-of-state sale of premiums. The inflationary process during the 18 years since the \$50,000 standard was adopted has undoubtedly resulted in the assertion of jurisdiction over smaller and smaller enterprises. However, the Board appears to be prohibited from raising that standard by Sec. 14(c) of the Act to the effect that "the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959."

III. UNFAIR LABOR PRACTICES

A. Evidence

David Richardson is president of Respondent and Joseph Levy is executive vice president. At times material, Anthony DeVito was a consultant vested with authority to hire and fire and to run the day-to-day operations of the business. I find that Richardson, Levy, and DeVito were supervisors and agents of Respondent.

More than 80 percent of Respondent's business is with insurance companies. In October 1975, it employed seven investigators, Pat Castoro, Alex Mancone, Eddie Rivers, Tony Linares, James Agosta, Lauri Carbone, and Frank Bovino, who engaged almost exclusively in activity checks of individuals drawing workmen's compensation and filing reports with their supervisors, on forms provided by Respondent, of activity they observed. James Agosta was hired in March 1975. Frank Bovino was hired in September 1975, on Agosta's recommendation, and received a \$10-a-week increase in his expense allowance on October 14, 1975. Two additional employees, Ivan Paris and Veda Solomon, were engaged exclusively in taking affidavit-type statements from individuals relevant to insurance matters. Activity-check and statement-taking employees were not interchangeable because the investigators engaged in activity checking had proved to be too deficient in spelling and English to take statements, and because activity-check work normally began quite early in the morning, at 5 or 6 a.m., while statements usually had to be taken in the evenings and on weekends when affiants were not at their jobs.

Vice President Levy testified that he learned from an outside source sometime in October 1975 that his employees had become interested in exploring the possibility of bringing the Union in; and that he and Richardson had one casual conversation about it and decided to do nothing unless they heard from the Union. James Agosta's first contact with the Union was made at a meeting with officials he attended with other investigators when he signed a union-authorization card dated November 1, 1975. Frank Bovino signed an authorization card on November 3, 1975.

On November 4, 1975, the Union mailed a certified letter to David Richardson, Advance Detective Bureau, Inc., 170 Broadway, New York, New York, advising him that the Union had an active interest in unionizing his security employees and requesting a conference to secure recognition as their bargaining agent. The return receipt from the post office stated that the letter was delivered on the same day, November 5, 1975, and signed for by "J. Levy."

James Agosta testified that on a day between November 1, when Agosta signed an authorization card, and November 7, he telephoned Levy and Levy told him "he received a letter in the mail and . . . that he was going to call a meeting to discuss what he received in the mail." Vice President Levy denied this. He testified that the signature on the return receipt for the union letter was not his own. Although he professed that he could not remember exactly when the letter was received at the Ramsey, New Jersey, address where his and Richardson's offices are located, it

was not until after November 7, and he averred that it customarily takes approximately a week for mail to be transmitted from Respondent's New York address to its Ramsey office. He also testified that he believed President Richardson customarily answers his mail immediately. The record shows that Richardson answered the Union's letter on November 14, 1975.

Agosta testified that someone, he could not remember who, told him to be at the Ramsey office after work on November 7. Bovino testified that DeVito told him to come to a meeting on November 7. At or about 6:30 or 7 p.m. that day, investigators Bovino, Mancone, Castoro, Linares, Agosta, and Rivers assembled at the Ramsey office and began watching some films they had taken of insurance claimants' activities. Agosta and Bovino testified that Vice President Levy called Linares into President Richardson's office, and when Linares came out he told the other investigators that he had been fired. Bovino was called in next, and he found Richardson, Levy, and DeVito there. Bovino testified that the three officials told him that the Union could not operate in here, as most of the Company's business came from insurance companies and insurance companies will not deal with unions. They told Bovino, "We have enough votes to out vote you," and asked him how he found out about the Union and "how could I stand for the union." Bovino testified that he told the officials, "these guys have families and we are fighting for certain rights which I believe are due to us, things that are—normal everyday things." Bovino was then told, "we can't have this, get out, leave, hand in my camera, my badge."

Agosta testified that, when Bovino came out of Richardson's office and told the investigators he had been fired, Agosta was called in. Agosta testified that Levy asked him how he stood on the Union, and that he replied "look, Joe, I am doing what's best for myself, and what's best for the other—for the other guys." Richardson then "stood up and said how could you do this, you just had dinner over his house Sunday night, you had something to eat, he considered you a friend, you were going to Florida for him, you were going to help in the front office." At that point DeVito said something like, "it's not helping, this isn't getting anywhere," but Levy said, "you are fired." Richardson then stepped in again and told Bovino he was not fired, that Levy had merely lost his temper. Agosta conceded that during the interview he could have asked Levy, "what are you going to do for me if I don't support the Union?"

Agosta testified that all the other investigators present were thereafter called into Richardson's office, one at a time.

Vice President Levy denied the testimony recited above. He also denied that Bovino was discharged, and asserted he was laid off for lack of work.

Levy testified that sometime in October, probably the third or fourth week, he and President Richardson conferred together about the course of their business operations, and concluded that the number of activity checks was decreasing while the taking of affidavit-type statements was increasing. Levy put in evidence the following figures to support this contention:

	1974		1975	
	Activity	Statements	Activity	Statements
January	159	-	118	3
February	145	-	120	0
March	178	-	114	0
April	135	-	110	8
May	140	-	111	12
June	121	-	111	12
July	172	-	120	5
August	161	-	137	10
September	129	-	119	17
October	145	1	133	25
November	111	3	87	20
December	133	1	110	13

In addition to figures such as these, Levy said, they also took into consideration "the feedback that we were getting from our clients" as to the volume and type of business to be expected in the future. Asked on cross-examination to elaborate, Levy testified:

Q. How much warning do you have of a business downturn if you testified on direct that the insurance companies generally indicate to you what their expected volume of orders will be in succeeding months?

A. Mr. Kennedy, it's feel. It's a feel that a businessman has. I don't know if you can quantify it or something. It's something—it's dated there—like a doctor putting his, you know, measuring someone's pulse. How do you measure that? That type of intuitive feeling.

Q. Was your decision in October to lay Bovino off prompted in part by your intuitive feeling?

A. Yes.

Q. When did you become certain that the intuitive feeling was strong enough to lay somebody off?

A. I was convinced in October that it was strong enough.

Q. When in October?

A. I don't remember the exact date.

After deciding to lay off an activity-check employee, Bovino was selected because he had the least seniority and was the least productive. To substantiate the latter assertion, Levy presented records of the credit in dollars allocated to the seven activity-check employees based on bills sent to customers for the period during which Bovino was regularly employed, as follows: Agosta, \$7,059; Mancone, \$6,910; Rivers, \$6,762; Carbone (who had only 1 month more experience on the job than Bovino), \$6,219; Linares, \$5,484; Castoro, \$5,291; and Bovino, \$3,382. Having decided to lay off Bovino, Levy said, he told DeVito he would like to see Bovino and surmised that DeVito told Bovino to come to the office on November 7.

With regard to the events of November 7, Levy gave an hour-by-hour account of his business activities that day. He testified that, toward the end of the afternoon, he telephoned Richardson and Richardson reminded him he had to come back to the Ramsey office because "today is the day we are going to be letting Bovino go." Levy said he would come and asked Richardson to call Agosta in also because "I think it's important to speak to Jimmy because

I don't want to lose him. I know he's very close with Frank and he may misinterpret this."

Levy said he arrived at the Ramsey office about 6 p.m. and found the investigators assembled there watching films. Although Levy did not know why so many of them were present, he said he did not inquire because such a gathering was not uncommon although he could recall only one prior occasion other than the Christmas party when this had occurred.

Levy testified that Bovino was the first employee called into Richardson's office. Levy gave the following account of the conversation with Bovino:

I told Frankie, and this was in the presence of Dave Richardson and Tony DeVito, I said, "Frankie, effective as of this date I am laying you off. There are reasons that I have to do it. There are good solid business reasons that I am doing this." I said, to Frankie, "that we are getting many statement type of jobs."

I just didn't feel he could handle that type of work. I didn't think his spelling was adequate or his English was adequate to handle it.

I said to Bovino that we have had a rough time, that the number of activity checks that we have gotten have decreased substantially. I said to him also that during the month of September, 1975, I went two weeks without drawing my own paycheck. I said I was not going to go through that period again.

We shook hands, and Frankie walked out.

According to Levy, as soon as Bovino left the office, Agosta came into Richardson's office, and angrily asked, "what are you going to do for me in comparison to the union"; that Levy "really lost my cool," and told Agosta he was fired, but Richardson spoke up and said, "hold on one minute now, you are not fired, Jimmy, Joe has lost his temper."

When asked on cross-examination how many of the other employees he spoke to on November 7, Levy responded, at first, that he was not sure except that he did remember speaking to Alex Mancone. Levy then added that he may have spoken to Linares, but did not fire him. Levy then testified that he believed he and Richardson both spoke to Castoro. Levy said he did not recall who came into the office after Agosta or who made the decision as to which employees came into the office in which order. Levy attributed the failure of his memory as to these events on November 7 to its being a difficult day in which he "was dealing with a business that was going down hill," "running around to various clients," and then having "to come back and lay a guy off."

Levy pointed out that although, as predicted, activity checks reached an alltime low in November 1975,³ by December 15 he received indications from his clients that this kind of business would increase after the first of the year, and he therefore requested Bovino to return to work. A letter to that effect dated January 13, 1976, was sent to Bovino.

³ As indicated in the table of cases set forth above, the Company did no statement work before October 1974. All cases received before that date, *Continued*

There is evidence of two subsequent conversations between James Agosta and Vice President Levy. The first occurred about 2 weeks after November 7, when Agosta brought Bovino's camera and equipment back to the office. We have two accounts of what was said: Agosta testified that he asked Levy "what was going on with the union," and that Levy replied he was not sure. Then Agosta asked, "what are you going to do for me that the union won't," or, "what can you do for me instead of the union," and Levy replied, "well, we will discuss it, we will restructure everything when it's all over, when this whole thing blows over, we will restructure everything, make it, you know, better working conditions, and different things like that, less hours." Levy testified that he replied to Agosta's question, "Jimmy, I can't discuss it with you, I have said it over and over, I cannot discuss it with you. I won't discuss it with anybody at this point."

Agosta testified that, during a lengthy telephone conversation with Levy on the evening of December 3, Levy told him, "before a union would come into Advance Detective he would go out of business, he has enough business to do in his adjusting and other things, that he doesn't need Advance Detective Bureau in New York." Levy denied making any such remark.

B. Conclusions

This case turns essentially on the resolution of the conflicting testimony outlined above. This being so, careful consideration has been given to the entire testimony of each witness, as well as the documentary evidence.

With regard to comparative demeanor, James Agosta's was the most impressive for apparent sincerity and truthfulness. While Frank Bovino and Joseph Levy were about equal in this respect, Bovino's testimony withstood cross-examination better than Levy's did. Analysis of the evidence, more or less chronologically, reveals the unpersuasiveness of Respondent's denial of Agosta's testimony that Levy told him over the telephone before November 7 that he had received a letter and was going to call a meeting to discuss it. Although I agree that the signature on the post office receipt does not appear to be Levy's, I am not inclined to believe his testimony that Respondent operates on the basis of permitting a delivery time for its mail of as much as a week between its New York City and Ramsey

offices, especially when the post office managed a 1-day intracity delivery from the Union in Flushing to Respondent's Manhattan office. Moreover, Levy's uncertainty about just when the letter was received and about President Richardson's business practice in answering his mail was obvious. I also note that no testimony by Richardson—to whom the union letter was addressed and who answered it and who therefore might be expected to have the specifics if anybody did—was offered. In the absence of more precise refutation, therefore, I discredit Levy in this instance and find that Respondent was in knowledgeable receipt of the Union's demand letter before November 7.

Levy's evidence to the effect that only Bovino and Agosta were summoned to the November 7 meeting, and the purported reasons therefor, fails to withstand analysis. Here again Levy was vague about just when the decision to lay off Bovino supposedly was made. Indeed, he seems to imply it was made about the time he gave Bovino an increase in his expense allowance, a most unlikely time. Bovino was the investigator with the least seniority, and the lowest production, doubtless attributable at least in part to his being the least experienced of the investigators. But the need to lay anyone off at that particular time, when Respondent had just completed its best month's business and had its second-best month of activity checks, in 1975, is not apparent. In these circumstances, Levy's intangible assertions about client feedback and intuitive feeling to the effect that business would fall off in November suggests a subsequently constructed rationale to account for volume figures.

Based on these findings, on Agosta's credited testimony that Levy expressed his intent to call a meeting to discuss the letter, the presence of six of the seven investigators, shown to be an uncommon event, in the Ramsey office, after the workday was over, and management's calling them into President Richardson's office one by one, I find that management did indeed summon the employees for the purpose of discussing the advent of the Union.

I also credit the testimony given by Bovino and Agosta as to what was said when they were called into Richardson's office for interviews by Respondent's top officials, which was essentially consistent with each other's and with the officials' purpose in summoning the investigators to discuss the advent of the Union found above. Although I have considered the fact that Bovino and Agosta are friends, I find this fact to be outweighed by Levy's lack of credence regarding events leading to his assembling the employees for individual interviews. Moreover, Levy's uncorroborated account of the Bovino interview does not ring true. His purported statement to Bovino that he had "good solid business reasons" for laying him off sounds more like another reconstruction after the fact than the kind of thing one naturally tells an employee in such a situation. I also note that Levy's alleged statement to Bovino, "that the number of activity checks that we have gotten have decreased substantially" was not shown to be true; and his alleged statement "that during the month of September, 1975, I went 2 weeks without drawing my own paycheck,"²² was extremely unlikely in view of the fact that September had been the Respondent's second-best month that year. Levy's account of the interview with Agosta was also

then, were activity-check cases. Respondent's business records for all types of cases handled on a yearly basis since 1972 show the following.

	1972	1973	1974	1975	1976
January	131	176	159	121	126
February	101	134	145	120	119
March	161	164	178	114	182
April	141	148	135	118	
May	145	138	140	123	
June	155	120	121	123	
July	109	124	172	125	
August	143	145	161	147	
September	134	129	129	136	
October	172	153	146	158	
November	158	135	114	107	
December	164	142	134	123	
	1714	1708	1734	1515	

flawed, in my view, by its inconsistency with his testimony that he summoned Agosta in order to explain the Bovino layoff because Levy did not want Agosta to quit over it.

Accordingly, I find that on November 7, 1975, Respondent coercively interrogated Bovino and Agosta, threatened to discharge Agosta, and discharged Bovino because they voiced support for the Union. I conclude that such conduct violated Section 8(a)(1) and (3) of the Act.

Having credited Agosta as against Levy above, I also credit him with regard to what Levy said to him on the two subsequent occasions. I conclude that Respondent violated Section 8(a)(1) on or about November 21 when Levy in effect promised to improve working conditions to weaken Agosta's support of the Union;⁴ and on December 3 when Levy threatened to go out of business if the employees chose union representation.⁵

IV. REMEDY

In order to effectuate the policies of the Act, I recommend that Respondent be ordered to cease and desist from the unfair labor practices found and, in view of the nature thereof, to cease and desist from infringing in any other manner on its employees' rights guaranteed by Section 7 of the Act. *N.L.R.B. v. Entwistle Mfg. Co.*, 120 F.2d 532 (C.A. 4, 1941).

Having found that Respondent discriminatorily discharged Frank Bovino, I also recommend that it be ordered to offer him immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority and other rights and privileges, and to make him whole for any loss of earnings suffered by reason of the discrimination against him, plus interest at 6 percent per annum. *F. W. Woolworth Company*, 90 NLRB 289 (1950); *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

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

ORDER⁶

The Respondent, Advance Detective Bureau, Inc. and Advance Claim Service, Inc. of Ramsey, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against any employee to discourage membership in or support of Allied International Union of Security Guards and Special Police, or any other union.

(b) Threatening to discharge or discipline employees because of their union activities, or threatening to go out of business if the employees choose union representation.

(c) Promising benefits in order to discourage membership in and support of the Union.

(d) In any other 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) Offer Frank Bovino immediate and full reinstatement to his former job or, if his job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges, and make him whole for his lost earnings in the manner set forth in the section of this Decision entitled "Remedy."

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

(c) Post at its place of business in Ramsey, New Jersey, copies of the attached notice marked "Appendix."⁷ Copies of said notice, on forms provided by the Regional Director for Region 22, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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

⁴ Even though Agosta admittedly asked Levy on this and other occasions in effect what Levy would give him in exchange for dropping his support of the Union, the Board has held it to be no defense to an 8(a)(1) allegation that an employer's statement was prompted by questions from the employee concerned. See *H. L. Meyer Company, Inc.*, 177 NLRB 565, 566 (1969), *Viking of Minneapolis, Division of the Telex Corporation*, 171 NLRB 1155, 1156 (1968).

⁵ *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575, 618 (1969).

⁶ 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.

⁷ In the event that the Board's 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 discharge or discriminate against any employee to discourage membership in or support of Allied International Union of Security Guards and Special Police, or any other union.

WE WILL NOT threaten to discharge employees for their union activities, or threaten to go out of business if our employees choose union representation.

WE WILL NOT promise benefits in order to discourage membership in or support of Allied International

Union of Security Guards and Special Police, or any other union.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed to them by Section 7 of the National Labor Relations Act, as amended.

WE WILL offer Frank Bovino immediate and full reinstatement to the job he had prior to his discharge on November 7, 1975, or if his job no longer exists, to a

substantially equivalent job, without prejudice to his seniority or other rights and privileges.

WE WILL make Frank Bovino whole for any loss of pay he may have suffered as the result of his discriminatory discharge, plus interest at 6 percent per annum.

ADVANCE DETECTIVE BUREAU, INC. AND ADVANCE
CLAIM SERVICE, INC.