

**ABF Freight System, Inc. and Local Union 701,
International Brotherhood of Teamsters, AFL-
CIO.** Cases 22-CA-21347 and 22-CA-21388

March 31, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX
AND LIEBMAN

On June 18, 1997, Administrative Law Judge Robert T. Snyder issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and the Respondent filed a brief in reply.

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 briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions, as modified, and to adopt the recommended Order as modified and set out in full below.²

1. We do not adopt the judge's finding that the Respondent's arrest of Union Business Agent Robert Dudik and its ejection of him from the Respondent's premises was a unilateral change in the scope of the contractual access provision, in violation of Section 8(a)(1) of the Act. No such unilateral change violation was alleged in the complaint or litigated at the hearing. Consequently, we shall modify the judge's recommended Order by deleting paragraphs 1(f) and 2(d), and we shall substitute a new notice accordingly.³

¹ The 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), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. We also find no merit in the Respondent's allegations of bias and prejudice on the part of the judge. Thus, we perceive no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated a bias against the Respondent in his analysis or discussion of the evidence. Similarly, there is no basis for finding that bias and prejudice exist merely because the judge resolved important factual conflicts in favor of the General Counsel's witnesses. *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949).

The complaint alleged that the Respondent's bypassing of the Union and dealing directly with an employee regarding a grievance was violative of Sec. 8(a)(5) of the Act, not Sec. 8(a)(1) as stated by the judge in the first paragraph of his decision. This inadvertent error does not affect the result.

² We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

³ A unilateral change allegation essentially rests on a theory that the employer has, in violation of Sec. 8(a)(5) of the Act, failed to comply with its statutory obligation to bargain with the exclusive representative of its employees. *NLRB v. Katz*, 369 U.S. 736 (1962). Had such a violation been alleged or fully litigated and established on the record, it would be appropriate to find both a violation of

2. In finding that the Respondent violated Section 8(a)(5) by refusing to furnish the Union requested information, the judge found that the employees' addresses and social security numbers were presumptively relevant and that therefore the Union was entitled to this information. While we agree with the judge that the Union was entitled to receive the addresses of these employees, the Board has held that employee social security numbers are not presumptively relevant and that the union must therefore demonstrate the relevance of such information. See *APX International*, 323 NLRB No. 208, slip op. at 1 fn. 2 (July 10, 1997), and cases there cited. We find that the Union has not demonstrated such relevance here. In this regard, the Union sought the social security numbers merely to provide ready and accurate identification of the names entered into the International Union's computer. Accordingly, we shall not require the Respondent to give the Union these employees' social security numbers and shall modify the judge's recommended Order. The new notice will reflect this modification.

3. We agree with the judge, for the reasons set out by him, that the Respondent violated Section 8(a)(5) and (1) of the Act by, inter alia, failing and refusing since about April 18, 1996, to apply the terms of the parties' April 1, 1994, to March 31, 1998 collective-bargaining agreement to all office clerical employees following the Respondent's transfer and relocation/consolidation of operations from its Linden and East Brunswick, New Jersey terminals to its Avenel, New Jersey terminal, effective April 1 and 15, 1996, respectively.⁴ In regard to this violation, the judge has implicitly recommended a make whole remedy. To clarify this aspect of his decision, we shall amend the judge's recommended remedy expressly to require the Respondent to make-whole any employees who suffered losses as a result of the Respondent's unlawful failure to apply the terms of the above-referenced collective-bargaining agreement to the office clerical unit employees following the Respondent's transfer and relocation of operations from its Linden and East Brunswick, New Jersey terminals to its Avenel, New Jersey terminal in April 1996. Specifically, and in addition to the remedial steps recommended by the judge, which we adopt except as noted elsewhere in this decision, we shall also expressly order that the Respondent make

Sec. 8(a)(5) and a violation of Sec. 8(a)(1)—the latter as a derivative of the 8(a)(5) violation rather than as an independent violation. The derivative finding would not, however, affect a respondent's obligations under the order. *NLRB v. Katz*, supra at 742 fn. 9. See also 3 NLRB Ann. Rep. 52 (1939) (derivative violations generally). We thus do not agree with the judge's statement that Sec. 8(a)(1) is "independently" violated in such a case.

⁴ In adopting the judge's 8(a)(5) findings arising from the Respondent's refusal to recognize and bargain with the Union as the collective-bargaining representative of all the unit employees at the Respondent's Avenel facility on April 18, 1996, Chairman Gould does not rely on the judge's "alternate analysis."

whole the office clerical unit employees for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful failure to apply the terms of the parties' April 1, 1994, to March 31, 1998 collective-bargaining agreement to them. We agree, however, with the judge's recommendation, as set out in paragraph 2(c) of his recommended Order, that to the extent that the Respondent's unlawful failure to apply the terms of the collective-bargaining agreement may have led to improved terms and conditions of employment for unit employees, the Order shall not be construed as requiring or permitting the Respondent to rescind any such improvements unless requested to do so by the Union.

AMENDED REMEDY

The Respondent shall be ordered to make whole the office clerical unit employees for any loss of earnings and other benefits suffered as a result of its unlawful failure to apply the terms of the parties' April 1, 1994, to March 31, 1998 collective-bargaining agreement to them. Any amounts of money necessary to make employees whole under the terms of this remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971), with interest thereon computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, ABF Freight System, Inc., Avenel, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Making statements to employees indicating that it would be futile to support the Union.

(b) Attempting to cause and causing the arrest of the Union's agent, Robert Dudik, and attempting to eject him from its facilities.

(c) Threatening employees with reprisals if they do not withdraw grievances.

(d) Prosecuting any state criminal complaints for trespass or related offenses against union agents engaged in the performance of union duties under its collective-bargaining agreement with the Union.

(e) Refusing to bargain collectively with Local Union 701, International Brotherhood of Teamsters, AFL-CIO, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, as the exclusive representative of its employees in the appropriate unit described below, by withdrawing recognition from the Union, by refusing to continue in effect all of the terms and conditions of its collective-bargaining agreement with the Union, ef-

fective from April 1, 1994, to March 31, 1998, which was in effect at the time of the relocation/consolidation of the Linden and East Brunswick facilities with the Avenel facility, by failing to apply said terms and conditions to all employees in the said unit, and by refusing to furnish relevant and reasonably necessary information for the Union's proper execution of its bargaining obligations as the exclusive representative of its employees in the following appropriate unit:

All office clerical employees and building property maintenance employees employed by the Employer at its Avenel, New Jersey facility, but excluding the following: Office Managers, Assistant Office Managers, Personnel and Payroll Managers, Traffic Supervisors, Terminal Service Manager, Dispatchers, Confidential Secretaries to the Terminal Manager and Safety Supervisor, General Supervisory Trainees and other salaried supervisory administrative and professional employees within the meaning of the Act and employees covered by existing labor agreements.

(f) Dealing directly with employees in the adjustment of grievances.

(g) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Furnish the Union with the names and addresses of all unit employees.

(b) Withdraw, with prejudice, the pending complaint in the Municipal Court of the Township of Woodbridge (Docket No. S-1996-000572-1225).

(c) Recognize Local Union 701, International Brotherhood of Teamsters, AFL-CIO as the exclusive collective-bargaining representative of the employees in the unit described above, and continue in effect all the terms and conditions of the agreement described above, by applying them to all employees in the appropriate bargaining unit described above, and, on request, bargain collectively with Local Union 701 as the exclusive collective-bargaining representative of the employees in the appropriate unit pursuant to the collective-bargaining agreement set out above. Nothing in this Order is to be construed as requiring or permitting the Respondent to rescind any improvements in terms and conditions of employment resulting from the Respondent's refusal to apply the contract terms to all of the unit employees at the Avenel facility, unless requested by the Union to make such rescissions.

(d) Make the office clerical unit employees whole, in the manner described in the amended remedy section of this decision, for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful failure to apply the terms of the parties' April 1, 1994, to March 31, 1998 collective-bargaining

agreement to them following the Respondent's transfer and relocation/consolidation of operations from its Linden and East Brunswick, New Jersey terminals to its Avenel, New Jersey terminal.

(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, timecards, 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 Avenel, New Jersey facility copies of the attached notice marked "Appendix."⁵ 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 and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 18, 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 the Respondent has taken to comply.

⁵If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT make statements to employees indicating that it would be futile to support Local Union 701, International Brotherhood of Teamsters, AFL-CIO.

WE WILL NOT attempt to cause and cause the arrest of Local Union 701's agent, Robert Dudik, and WE WILL NOT attempt to eject him from our facilities.

WE WILL NOT threaten employees with reprisals if they do not withdraw grievances.

WE WILL NOT prosecute any state criminal complaints for trespass or related offenses against Local Union 701's agents engaged in the performance of union duties under our collective-bargaining agreement with the Union.

WE WILL NOT refuse to bargain collectively with Local Union 701 International Brotherhood of Teamsters, AFL-CIO, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, as the exclusive collective-bargaining representative of our employees in the appropriate unit described below, by withdrawing recognition from Local Union 701, by refusing to continue in effect all of the terms and conditions of our collective-bargaining agreement with Local Union 701, effective from April 1, 1994, to March 31, 1998, which was in effect at the time of the relocation/consolidation of our Linden and East Brunswick facilities with our Avenel facility, by failing to apply said terms and conditions to all employees in the said unit, and by refusing to furnish relevant and reasonably necessary information for Local Union 701's proper execution of its bargaining obligations as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All office clerical employees and building property maintenance employees employed by the Employer at its Avenel, New Jersey facility, but excluding the following: Office Managers, Assistant Office Managers, Personnel and Payroll Managers, Traffic Supervisors, Terminal Service Manager, Dispatchers, Confidential Secretaries to the Terminal Manager and Safety Supervisor, General Supervisory Trainees and other salaried supervisory administrative and professional employees within the meaning of the Act and employees covered by existing labor agreements.

WE WILL NOT deal directly with employees in the adjustment of grievances.

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

WE WILL furnish Local Union 701 with the names and addresses of all unit employees.

WE WILL withdraw, with prejudice, the pending complaint in the Municipal Court of the Township of Woodbridge (Docket No. S-1996-000572-1225).

WE WILL recognize Local Union 701, International Brotherhood of Teamsters, AFL-CIO as the exclusive collective-bargaining representative of the employees in the appropriate bargaining unit described above, and WE WILL continue in effect all the terms and conditions of the agreement described above, by applying them to all our employees in the appropriate bargaining unit described above, and WE WILL, on request, bargain collectively with Local Union 701 as the exclusive collective-bargaining representative of our employees in the appropriate bargaining unit described above pursuant to the above-described agreement. Nothing herein is to be construed as requiring or permitting us to rescind any improvements in terms and conditions of employment resulting from our refusal to apply the contract terms to all of the unit employees at the Avenel facility.

WE WILL make whole the unit employees for any loss of earnings and other benefits suffered by them as a result of our failure to apply to them the terms of our April 1, 1994, to March 31, 1998 collective-bargaining agreement with Local Union 701.

ABF FREIGHT SYSTEMS, INC.

Julie L. Kaufman, Esq., for the General Counsel.
Ronald H. DeMaria, Esq. (DeMaria, Ellis, Hunt & Friedman), of Newark, New Jersey, for the Respondent.
Edward A. Cohen, Esq. and Bruce D. Leder, Esq. (Schneider, Goldberger, Cohen, Finn, Solomon, Leder & Montalbano, P.C.), of Kenilworth, New Jersey, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT T. SNYDER, Administrative Law Judge. This case was tried before me on September 24-27, 1996, in Newark, New Jersey. The consolidated complaint alleges that ABF Freight System, Inc. (ABF or Respondent), withdrew recognition from Local Union 701, International Brotherhood of Teamsters, AFL-CIO (the Union or Local 701) as collective-bargaining representative of, and refused to apply the union contract to, all unit employees following its transfer and relocation of operations from its Linden and East Brunswick, New Jersey terminals to its Avenel, New Jersey terminal, and has failed to supply certain information requested by the Union, all in violation of Section 8(a)(1) and (5) of the Act. The complaint also alleges that Respondent caused the arrest of a union agent, later attempted to eject him and arrest him again when he sought to service a union contract, made statements to employees indicating it would be futile to support the Union, bypassed the Union and dealt directly with an employee regarding a grievance and threatened that employee with reprisals if the grievance was not withdrawn, in violation of Section 8(a)(1) of the Act.

Respondent filed timely answers, denying the acts alleged and that it has committed any unfair labor practices and asserted certain affirmative defenses which will be considered, *infra*.

The parties were provided full opportunity to introduce relevant evidence,¹ to examine and cross-examine witnesses, to argue orally, and to file briefs. Posttrial briefs have been filed by counsel for the General Counsel, Respondent, and the Union and have been carefully considered. Upon the entire record in the case, including my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

At all material times, Respondent, a corporation, with offices and places of business in Avenel, Linden, and East Brunswick, New Jersey (Avenel, Linden, and East Brunswick terminals), has been engaged in the interstate and intrastate transportation of freight. Annually, Respondent, in conducting its business operations described, shipped from its Avenel, Linden, and East Brunswick terminals goods valued in excel of \$50,000 directly to points outside the State of New Jersey. Respondent admits, and I find, that it has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

For many years the Union represented office clerical and building and property maintenance,² employees employed by Carolina Freight Carriers Corp. (Carolina Freight) at its freight terminal located at Avenel, New Jersey. The most recent collective-bargaining agreement between the two parties

¹In fn. 1 of his brief, for the first time, counsel for Respondent, claims he was denied an opportunity to present evidence in his case. The record, including the transcript references to which counsel refers, establish that after I denied his oral motion to recuse me, counsel refused to produce any witnesses or continue with his defense, instead insisting upon being provided time to seek special permission to appeal my ruling to the Board (Tr. 807, LL. 19-21). When I informed counsel I would not delay closing the hearing for that purpose, counsel failed to produce any witnesses. I then shortly afterward closed the hearing, but I specifically refrained from denying counsel leave to seek special permission to appeal, denying union counsel's request that I do so. (Tr. 814, LL. 18-22.) Counsel cites Sec. 102.26 of the Board's Rules and Regulations to support its argument that it should have been provided time to appeal before the record closed. That section merely sets forth the form and procedural steps a party must follow in seeking to make such an appeal. Nothing in the section precludes the Board from granting such a request after closing of the record and while the proceeding is still pending before the judge. No request for special permission to appeal my ruling has been made by Respondent.

²The agreement on its face is described as "Office Clerical Employee's Agreement." None of the employees involved in this proceeding are maintenance employees. Thus, for all practical purposes the unit in dispute is one employing office clerical employees, although the unit description includes maintenance employees.

was effective from April 1, 1994, through March 31, 1998. It contained a clause binding the Company's successors and the usual union-shop and dues-checkoff clauses; a grievance-arbitration clause providing for referral of unresolved grievances to the New Jersey-New York Joint Area Committee, and then to the New Jersey State Board of Mediation; a clause (art. 26, sec. 5) providing for union access to the facility during working hours to adjust grievances, investigate working conditions, collect dues, and ascertain that the agreement is being adhered to, providing there is no interruption in business and clauses providing that terminal seniority determines the order of layoff and recall with seniority rights to be retained for a continuous layoff up to 5 years; and provides rights to transfer to a new branch, terminal division, or operation in the order of the unit employees' company or classification seniority, with first preference to employees in those terminals or operations which are affected in whole or in part by the opening of the new facility and grants seniority based on the date of hire at the terminal into which the employee is transferring (art. 7, sec. 8(c)).

The agreement was described by Union Business Agent Robert Dudik as a white paper contract which is independent of, and has no ties to, any other contract covering employees represented by the International Brotherhood of Teamsters.

An office clerical seniority list prepared by Carolina Freight as of August 1, 1995, but received by the Union on September 25, 1995, lists seven unit employees, in order of their seniority, Robin Faust, Lee Marziali, Linda Catanzaro, Joan Blake, Barbara Lupton, Linda Hamlett, and Angelo Apruzzi. Faust was union shop steward and Blake was her assistant. The two least senior employees, Hamlett and Apruzzi were on layoff.

On or about August 11 or 12, 1995, Respondent purchased Carolina Freight, including its Avenel terminal. Until immediately prior to September 25, 1995, Carolina Freight continued to operate the Avenel terminal. By letter dated September 11, 1995, Respondent advised the Union that effective immediately, dues-checkoff billings were to be mailed directly to Respondent's Arkansas address for payroll processing. Also, in September 1995, Respondent, by its Linden terminal manager, Dan Smith, informed the Avenel clericals that they were employed by Respondent and began applying the terms and conditions of the collective-bargaining agreement to them.

B. The Evidence Adduced by Counsel for the General Counsel in Support of the Allegations of Withdrawal of Recognition and Refusal to Apply the Collective-Bargaining Agreement to All Unit Employees at Avenel or to Furnish Relevant Information to the Union, and the Arrest and Harassment of Union Agent Dudik

According to Union Agent Dudik, sometime in mid-August the Respondent filed a request for change of operations with the Multi-Region Change of Operations Committee established under the National Master Freight Agreement (NMFA), to which Respondent and Carolina Freight, among other employers, were parties, covering their drivers and other employees, but which did not include Respondent's office clerical and maintenance employees, who were covered under a separate, white paper agreement which did not incorporate any provisions of the NMFA. Among other changes

sought by Respondent, it applied to close and to move its Avenel operations to Linden.

The notice which Dudik received made reference to the transfer of the dock people and drivers at Avenel but not clericals employed there. Dudik contacted Steve Froias, Respondent's director of labor relations, on September 7, 1995, and learned that ABF did not intend to transfer the office clericals from Avenel to Linden because they had enough employees at Linden and didn't need any more office clericals or maintenance. Dudik explained that the Union's contract had a successor clause and other provisions for the employees to be transferred and he would file a grievance because of ABF's refusal to transfer them to Linden.

By cover letter dated September 12, 1995, Dudik forwarded a grievance to Froias and to Andrew Anderson, Carolina Freight director of labor relations, claiming a violation of various, described articles and sections of its labor agreement with ABC arising from ABF's refusal to offer employment at Linden to the office clericals, and sought an expedited arbitration.

On September 19, 1995, Dudik received a copy of the multipage decision of the Multi-Region Change of Operations Committee. That decision approved ABF's proposed change of operations, nationwide, but with modifications and clarifications regarding employment rights of employees covered by many labor agreements between Carolina Freight and Red Arrow, another carrier also purchased by ABF, and various locals of the International Brotherhood of Teamsters, paragraph 17 of that decision provided, inter alia, that "Union and non-union office employees shall be dovetailed as set-out in paragraph 1 of the decision." Paragraph 1, subparagraph A, makes reference to article 5, section 2(c) of the NMFA as the basis for dovetailing all bargaining unit employees affected by combining or eliminating ABF and Carolina Freight Carriers/Red Arrow facilities and includes all maintenance and office employees. Subparagraph A concludes by excluding from the requirements of the paragraph, local unions 673, 705, and 710 (dock and office) which are not signatory to the NMFA.

Dudik, who had appeared before the Change of Operations Committee, on September 14 or 15, opposing its exercise of jurisdiction over the Local 701 unit at Avenel on the basis of its white paper contract and the fact that he had a pending grievance which he was pursuing under his contract protesting the failure to transfer to Linden his bargaining unit employees, disagreed with the committee's decision. Dudik concluded that the committee's decision did not apply to the Local 701 unit and it did not address his particular problem which he was pursuing through his grievance procedure, in spite of the fact that his Union was not exempted from the reach of the decision as three other local unions were. According to Dudik the committee's decision was prepared and rendered as a blanket statement regarding union and non-union employees because it was covering facility transfers and closings taking place in many States, including some right-to-work states where union membership could not be compelled pursuant to employer/union agreement, under the Act.

Between September 19 and 25, 1995, Dudik spoke with Froias. In this conversation Dudik said he was aware from the office clericals that the Company had told them they were going to be allowed to transfer and, if this was so, he

would withdraw the grievance. Froias said he would recognize the Union as representative of the office clericals and maintenance at the Linden facility. Dudik waited until the actual transfer took place on September 25, and then by letter dated October 3, 1995, informed Froias that the Union was withdrawing the grievance dated September 12 pertaining to the recognition of the office clerical and maintenance employees without prejudice.

By letter dated September 22, 1995, Dudik had informed ABC that, effective September 25, Faust had been appointed to serve as shop steward and Joan Blake had been appointed alternate. By September 25, five of the seven Avenel office clericals had been transferred to Linden. The two least senior, Hamlett and Apruzzie, were still on layoff.

After the transfer of ABF's operations from Avenel to Linden, Local 560, Teamsters entered a claim to jurisdiction over the drivers, dockworkers, office clericals, and maintenance employees, Dudik acknowledged the Local 560 claim to the drivers and dock people in accordance with the NMFA and past practice, but insisted on continued representation to the office clerical and maintenance employees. By letter dated October 2, 1995, Dudik confirmed the Local 701 representation and retention of jurisdiction of these employees at Linden under white paper contracts. A copy was noted as being forwarded to ABF Terminal Manager Dan Smith. No company response was received, but Froias, in conversation with Dudik, agreed to abide by any internal union decision. Local 560 withdrew its claim to represent the office clericals.

Dudik now requested an updated seniority list of office clericals at Linden. In November he received from ABF a list entitled "Office Seniority Roster," containing the same seven names, in order of seniority with the last two noted on layoff, as he had on September 25, from Carolina Freight. The only other person Dudik knew to be employed in the office at Linden was Christina Knipe, and she was a confidential employee. Dudik was not informed, at this time, after the office transfer to Linden, that ABF employed any other office clericals at Linden, who were either on layoff or on temporary transfer to another site or, although not physically working at Linden, had a right of return to that facility. Dudik did become aware from the shop steward or her alternate, that Deborah Fee was in and out of the Linden facility for the first week. One day she was there and then the next she was not. Then she disappeared. Dudik learned of the nature of Knipe's employment on a visit to the Linden site on September 25, when Manager Smith informed him, on his inquiry seeking clarification of Knipe's job duties, that she was the office manager.

In later communication with Froias, in November 1995, Dudik raised issues regarding posting of bid start times, taking all-purpose leave days in half-day increments and vacations in 1-day increments, and installing a bulletin board. In a letter dated November 17, 1995, Froias responded to these issues concerning the "ABF, Linden, New Jersey Union office personnel." It was at this time that Froias forwarded an updated copy of the "Linden, New Jersey office seniority list." After filing a grievance dated November 29, under the union contract protesting the Company's refusal to honor a practice of utilizing vacations in 1-day increments, Dudik withdrew the grievance after learning the employees were not interested in pressing it. Another grievance, filed the same time, involving the all-purpose days, led to a compromise

settlement signed in August 1996, under which ABF agreed employees could utilize 3 of the 6 all-purpose leave days in half-day increments and the Union agreed to withdraw a submission of the grievance to the New Jersey State Board of Mediation.

On January 22, 1996, the Union filed another grievance that ABF was violating the contract subcontracting and wage and job classification clauses by laying off office clerical Barbara Lipton on January 15, 1996, while Christina Knipe was performing bargaining unit work on accounts payable and cost reports and Jim O'Donnell, operations manager, was making appointments for deliveries. The grievance, first submitted to the Joint Area Committee which deadlocked on the matter, was pending arbitration at the close of hearing.

In a stipulation between the parties, it was agreed as follows: The five earlier named employees, employed at the Carolina Freight Terminal in Avenel, were transferred to Linden effective September 25. Immediately prior to September 25, there were four office clerical employees employed at the ABF Terminal in Linden: Maxine Kulinich, Arlene Pankiw, Christine Knape, and Debra Fee. Although not part of the stipulation the record establishes that these office clericals at Linden were unrepresented. Kulinich was laid off effective September 25. Pankiw was laid off on October 3. Fee commenced work in Newark at a Newark facility of ABF on October 9 and commended working in Linden again on February 12, 1996. From September 25, 1995, the first day of the combined operations, until sometime in April 1996, Knipe was a confidential employee. Knipe went on maternity leave on January 31, 1996, and returned from maternity leave sometime in April 1996, but to Avenel. As noted earlier, Lipton was laid off on January 22, 1996.

Aside from processing grievances with respect to unit employees employed at Linden, Dudik was aware that ABF was also applying other provisions of the 1994 to 1998 labor agreement to the employees, including making contractual benefit contributions, paying contractual wages, and providing contractual holidays and vacations. All of these employees were union members who had previously been employed in the bargaining unit represented by Local 701 when located at Avenel and owned by Carolina Freight.

By certified letter dated February 22, 1996, Dudik, among other union officials, received notice of a second change of operations involving its terminals at Linden and East Brunswick, New Jersey, and Local 560 and 701, which ABF submitted to the New Jersey/New York Joint Area Committee for placement on its March agenda. ABF proposed to transfer these entire operations to a "new" facility at Avenel, New Jersey. The Avenel facility was the one now owned by ABF, from which its operations had been transferred to Linden, as of September 1995 after the purchase of Carolina Freight in August. In its proposal ABF justified this change as giving the Company better utilization of an owned facility as opposed to based facilities and reducing fixed costs by eliminating one facility. ABF then noted the change will afford better service to its customers in that the combined terminals will be able to do more direct loading inbound and outbound. ABF proposed offering transfer opportunities to all employees at Linden and East Brunswick and dovetailing these two seniority lists, active to active, and inactive to inactive. The move from Linden to Avenel was to be made on April 1, 1996, and from East Brunswick to Avenel on April 15, 1996.

The proposal attached an "Office Seniority Roster" at Linden which now for the first time listed, in addition to the seven previously named Local 701 union members and unit employees, two of whom were on layoff, four additional named employees, to wit, Debra Fee, as second in seniority to Robin Faust, Christina Knipe, on maternity leave, Arlene Pankiw, on layoff since October 3, 1995, and Maxine Kulinich, on layoff since September 25, 1995.

As Dudik noted this list was different from the prior list he had received in November 1995. As to Fee, he understood that on her return to the Linden facility in February 1996, she was a confidential employee replacing Knipe, performing the same duties that Knipe had previously performed and occupying the same desk Knipe had previously occupied next to the terminal manager's office.

Among other lists attached to the Change of Operations proposed, was another seniority list of four nonunion office employees employed at East Brunswick, Rosemarie Todaro, Nancy Petruzzello, Linda Soltis, and Ed Dalley.

When the case was heard before the Joint Area Committee, Dudik objected to the four new names now appearing on the Linden office clerical employees seniority list. He also sent a letter, dated March 4, 1996 to ABF, asking for job duties, work and salary history, and payroll records on the four added to the Linden seniority roster as well as the four East Brunswick clerical positions. As the Change of Operations hearing was scheduled for March 7 he requested the information be provided timely. ABF did not reply to this request in writing, but Dudik did meet with Froias and Terminal Manager Tom Platt the evening of March 6 when they responded to his letter. That response did not satisfy Dudik and he protested at the March 7 hearing. Froias had told him on March 6 that Fee was not a confidential but that Knipe was.

On March 7, 1996, the Joint Area Committee issued its decision approving ABF's request, including dovetailing the three seniority lists on an active to active and inactive to inactive bases at the new Avenel terminal, but excluding C. Knipe. Todaro and Petruzzello from East Brunswick are to be dovetailed into the active list, but Soltis and Dalley, as part-time employees (also from East Brunswick) will remain in their seniority positions unto themselves. These East Brunswick clericals were unrepresented. By follow-up written request dated April 10, 1996, Dudik sought a current office clerical seniority list at the ABF Avenel terminal. Froias faxed Dudik the list dated April 15, 1996. It breaks the employees into three main groups, active full-time employees as of February 14, 1996, inactive full-time as of the same date, and active part-time roster as of the same date. The active full-time roster, in addition to union members, Faust, Marziali, Cantanzaro, and Blake, includes Fee, Todaro (misspelled Todard), and Petruzzello. The inactive full-time roster, in addition to union members Lipton, Hamlet, and Apruzzi, included Pankiw and Kullnich. The active part-time roster includes Soltis and Dalley.

The operations proceeded to move as proposed, with the office employees, "at Linden moving to Avenel as of April, 1996, and the office employees at East Brunswick moving to Avenel as of April 15, 1996.

In reviewing the new Avenel seniority list, Dudik noticed that Deborah Fee, who, he believed had been a confidential employee, was listed, and the employees were listed in three separate groupings, and were dovetailed, each of which was

inconsistent with the labor contract. The employees who came from other terminals should have been and failed, in accordance with article 7, sections 6A. and C. of the labor agreement. Nothing in the labor agreement permits setting up separate active and inactive seniority groupings, that principle comes from the NMFA. Dudik voiced his objections to Froias, and when they were unsuccessful the Union brought suit in Federal District Court under Section 301 of the Act claiming a breach of the agreement. That suit is presently pending.

By letter dated April 18, 1996, Dudik made an information request for the addresses and social security numbers of the seven employees ABF had added to the office clerical seniority roster at Avenel. They were Fee, Todaro, Petruzzello, Pankiw, Kulinich, Soltis, and Dalley. Earlier, Platt, the Avenel terminal manager, had turned down an oral request, Dudik wanted this information to forward Local 701 applications for membership and enforce the union-security clause of the contract. The social security number provides ready and accurate identification of all names entered on the International Union's computer. Dudik never received a response to this written request.

Also, on April 18, 1996, Dudik filed a written grievance with ABF alleging a breach of the contract arising from employing part-time workers Linda Soltis and Ed Dalley while full-time workers Barbara Lupton and Linda Hamlett are on layoff, relying on articles 7, Seniority and 26, General Provisions, section 1 Part-Time Workers of the office clerical agreement. The Union demanded 8 hours' pay for any day a part-time worker was employed when senior full-time employees are on layoff, plus health, welfare, and pension contributions and claimed a continuing liability.

By handwritten response on the grievance, signed by Branch Manager Platt on April 19, ABF denied the grievance in the following language:

The Office Clerical Agreement Referenced Above Applies *Only* to Members of Local 701. ABF Avenel Is A Non-Union Office That Happens To Employ Some Union Office Personnel As A Result Of The Consolidation Of ABF AND CFCC. The Office Clerical Agreement Applies To Those Individuals Wage Rate, HW & P, Vacation Benefits, And Seniority *Only!* It Is Otherwise Totally And Completely Un Recognized And Means Nothing Else At ABF Avenel. This Claim Is Denied.

Upon receipt of the denial, Dudik requested a meeting of the Company pertaining to the grievance.

On April 22, the date he received the Company's response, Dudik and the Union's president, Dan DeSanti, had been receiving the grievance. Dudik then called Shop Steward Faust, informed her of the Company's answer to the grievance and asked to be transferred to the terminal manager's office. He got Platt on the phone, briefly went over the grievance with him, and said he wanted to come down to discuss it. A time of 2 p.m. was scheduled for them to meet. When Dudik arrived at 2 p.m. Platt was not there and Knipe told him Platt had stepped out.

Dudik then went to Faust, and asked her to accompany him to the other employees who were there to hand them applications for Local 701, Dudik then went to three employees

in turn, Debra Fee, Rosemarie Todaro, and Linda Soltis, handing them form letters listing the monthly dues and initiation fee amounts and requesting that they complete an application for membership and return with initiation fee and dues within 7 days or by the 31st day of their hire, whichever is later, and noting the Union's intent to enforce the collective-bargaining agreement and demand their discharge if the monies are not received timely. Dudik also gave them his business card and an application for union membership. Each letter had the employee's name, and date of hire. For Soltis and Todaro this date was April 15, 1996, and for Fee it was February 14, around the date she returned to Linden. After being introduced by Faust, to each employee Dudik explained he was giving her an application to join Local 1701 and a letter that's self-explanatory as to membership in Local 701, and said if she had any questions not to hesitate to call the number on his card. Dudik explained he was polite, did not raise his voice or threaten any of the employees. After these interchanges, the three employees continued working. They all worked at desks situated in an open room, with the terminal manager's office separated by a floor-to-ceiling partition with glass windows. Two of the employees, Fee and Soltis, thanked him, and Todaro referred to the misspelling of her name, which Dudik explained he had gotten off the seniority list.

Dudik next inquired when Platt would return. Knipe told him later in the afternoon. Dudik left at 2:10 p.m. and returned at around 3:45 p.m. He entered the facility into the ABF driver's breakroom from the dock and saw Platt who had his hand raised and said, "[G]et off the property." Dudik said he had an appointment to see him to discuss the grievances they had spoken about in the morning. Platt said, "[Y]ou didn't tell me that you were going to hand applications for the Union to the other nonunion clericals." Dudik explained he requested their addresses so he could mail these to the employees, but since "you refused to give me their addresses I have no alternative other than to hand deliver them."

Platt said, "[Y]ou're threatening my employees." Dudik asked in what manner. Platt said, "the letter you gave them is threatening." Dudik said he couldn't help that, "the contents simply say I'm enforcing the security clause in the contract." Platt repeated, "[G]et off the property, you're not coming in here." Dudik remained in the breakroom, but his request to see the shop steward was denied. When he refused to leave, after Platt told him to get off the property or he'd call the police, Platt called to another person in the office to call the Woodbridge Police. Platt was in a highly agitated state.

Two police officers arrived within minutes and Platt said he wanted Dudik off the property or he'd have him arrested. The policemen asked Dudik to step out into the vestibule where he explained he was the union business representative for the clerical employees, he had an appointment to see Platt, and he had union cards to hand to nonunion employees. He wanted to do his job and leave and he wasn't there to disrupt their business. The policemen asked to see the union contract and any access to the premises language in it, and Dudik showed him article 26, section 5. He said, "[I]t seems clear to me, let me talk to the terminal manager." After learning that Platt rejected his reliance on the contract and still wanted him off the property, Dudik proposed that

the Company either provide him with the addresses or permit him, accompanied by the police officer, to hand out the two remaining applications in 2 minutes. The officers left and returned to say, "[H]e wants you to leave or he's going to press charges." The policemen suggested Dudik call his boss, Platt was called back into the vestibule, and Dudik accompanied the policeman into Platt's office where a call was placed to Dudik's office. One policeman got Union President De Santi on the line, explained the situation, and Dudik then informed De Santi in the presence of the policeman and Platt that he intended to hand deliver the envelopes as his only alternative and hang up. When the police officer then asked Platt what he wanted to do, Platt said arrest him. Now standing in the general office next to Platt's office in plain view of certain of the office clerical employees present, Robin Faust, Joan Blake, and Debra Fee, handcuffs were placed on Dudik, he was arrested and taken out to the Woodbridge police station where he was booked.

During the incident Dudik testified he spoke in a business-like manner, and did not threaten Platt. Platt was highly agitated, waving his hands, expressing himself in a loud voice, repeating his intent to have Dudik arrested.

After being booked, Dudik was released on his own recognition and De Santi drove him back to the Avenel facility where he had left his car. The criminal complaint recites that "after notice against trespass was given by . . . Platt . . . [Robert Dudik] remained on the premises and refused to leave, in violation of N.J.S.A.2C:18-3B."

A criminal investigative report prepared and signed by a patrolman Hogan, the arresting officer, which union counsel had received from the Township of Woodbridge, corroborates the substance of the facts relating to the incident as testified to by Union Agent Dudik. The report describes Platt as being the complainant and the crime charged as being defiant trespass.

Dudik had two objectives in returning to Avenel. One was to complete the hand delivery of the union applications to the two remaining nonunion day clericals. The other was to see Louis Mastropasqua, the Local shop steward at Roadway Express, who had telephoned him that morning to report he had received a dues receipt of an employee not employed at this terminal. Dudik had then arranged to see him late in the afternoon about this receipt and to renew his reports on casual employment by Roadway Express which were used by the Union to check against contributions submitted by the employer to the various funds. While Local 701 did not represent the ABF drivers it did not represent the Roadway Express Drivers.

De Santi agreed to distribute the remaining applications to Dalley and Petruzzello and Dudik accompanied him to the top of the ramp leading to ABF's dock and waited there for De Santi to return. When he did, he and De Santi went out to the parking lot by fuel pumps near the Roadway Express dispatch office entrance about 50 feet from the Roadway entrance to wait for Mastropasqua to return from the road. Platt suddenly drove up quickly into the lot, stopped his car and hollered at Dudik, "I told you to get off the property, I'll have you arrested again." Dudik said, "I'm not here to see you, but to see Roadway, I'm the bargaining agent for Roadway." Platt responded, he didn't care, and repeated his order to leave or be arrested. Dudik said, "[D]o what you have to do." Platt drove off and within a short time two other police

officers drove up and went to talk with Platt who was now standing near the Roadway Express entrance. One police officer returned and told Dudik that "Platt wants you off the property. He's going to have you arrested."

Dudik explained about his prior arrest for trespassing, but now he had union business with Roadway and both he and De Santi presented their business cards. The officer left to speak to Platt, returned and said he owned the property Roadway leased from him and repeated Platt's threat. Dudik asked if it made sense that Roadway would leave a part of this facility and have to get clearance from ABF on who visits their property, and especially a union official. The officer said he would call his lieutenant, left, and returned to say he had been instructed to leave and asked how long he was going to be there. Dudik said it would take 15 to 10 minutes to half-an-hour to take care of his union business. In the meantime the shop steward had appeared. Now Dudik and De Santi went up to the Roadway office, obtained a positive response to an inquiry to the Roadway terminal manager that he had no problem with their being present, and Dudik provided to transact his union business with Mastropasqua and he and De Santi then left. The dues receipt the steward had received and which Dudik took for an employee employed at the Roadway Mount Holly, New Jersey terminal. After receiving the casual reports, Dudik instructed the steward on how to fill them out and went over some other matters.

During his cross-examination, Dudik agreed that ABF never made any welfare or pension contributions on behalf of employees Fee, Knipe, Pankiw, Kulinich, Petruzzello, Todaro, Soltis, or Dalley, nor did Local 701 ever receive any dues deductions made from their pay. Indeed, ABF never applied the Local 701/Carolina Freight collective-bargaining agreement to any of them.

Dudik also explained that Linda Hamlett and Angelo Apruzzi had been laid off in March and April 1995, but they retained their seniority positions and remained in the bargaining unit. During their layoffs they were not required to pay union dues. They can either obtain a withdrawal card and freeze their dues or accumulate arrears in dues which are only payable on recall. Under either option, the laid-off employees retain their seniority and inclusion in the unit. As to newly hired employees, Dudik waits 30 days before sending an application to join. But the new employees must complete a period of 60 days probation before obtaining seniority, which dates back to the first day of employment.

Dudik now was asked and disclosed that even before he filed the January 1996 grievance on behalf of Barbara Lupton, he had some information that Christina Knipe was performing bargaining unit work about a week after the September 25, 1995 transfer from Avenel to Linden. However, he didn't pursue a grievance then because during the first few weeks there was chaos as the newly transferred Avenel employees arrived and the preexisting ABF Linden employees were being laid off or transferred out. Dudik refrained from grieving to give everyone an opportunity to get orientated during the transition and because it was difficult to obtain information, the steward, Robin Faust, having been kept back in the old Avenel terminal for a few weeks to finish up certain work while the other four employees, including the alternate steward Joan Blake were immediately transferred. In October, Dudik did inform the Company that it

could not perform bargaining unit work with supervision and office confidantials.

Dudik also understood from his members that on the transfer on September 25, 1995, the prior Linden, ABF office clericals were transferred to other terminals. He was aware that Fee remained at Linden, off and on for a week, went to Newark, then came back, until she was transferred after a week to Newark to train the people there. And he had no problem with that. He was also unaware that Pankiw worked in Linden until October 3, 1995. Dudik explained that in addition to the confusion in Linden, where 80 drivers were showing up every day for work for only 40, there was great hostility and friction between the two groups of office clericals, with the group from Avenel replacing the prior Linden group. The Linden group did not accept the Avenel employees readily.

While Dudik became aware of the prior Linden nonunion clericals being transferred out, he acknowledged that ABF never informed him that they had left or where they had gone. But it will be recalled that the "office seniority roster" he received from ABF in November 1995, referred to in Froias' letter as the "Linden, New Jersey office seniority list," listed only the seven Local 701 union members, with two on layoff.

Dudik also acknowledged learning that Fee had returned to Linden in February 1996, but believed, based on the report of Steward Faust and other employees, that she was performing the duties of confidential employee Knipe who was then on maternity leave. Yet, when he received ABF's change of operations application on February 23, Fee was included in the Linden office seniority roster without any indication of a confidential status. (On the same roster, Christina Knipe's name also appeared now for the first time, without any indication as to status other than being then on maternity leave. And Dudik's March 4, 1996 request made of ABF as to their job classification and work and salary history went unanswered.)

Dudik agreed that when he approached the nonunion employees at the Avenel office in April 22 to sign them up as members of the Union he knew that ABF was not applying the union contract to them. By this time the Union had brought suit to contest ABF's refusal and failure to apply the white paper contract to the unit clerical employees now employed at the Avenel terminal. Dudik also acknowledged that he never informed Platt that he was coming to his office to distribute membership applications. And when Platt confronted him on his second visit to the facility on April 22, he did not tell Platt that he had returned, in part, to distribute the last two union applications. He also had never been arrested, expelled, or threatened with arrest on any prior or subsequent occasion when he visited the Avenel office to conduct union business.

Dudik's very next visit to Avenel was the next morning, April 23, when he spoke to Platt about the part-time grievance which he had wanted to discuss the day before. Other matters were also discussed and resolved, including starting times and vacation scheduling, but Platt would not agree on the grievance and Dudik left after informing Platt he would submit it to the Committee.

Dudik also sent identical letters dated May 21, 1996, to ABF requesting discharge of Debra Fee, Nancy Petruzzello, Rosemarie Todaro, Linda Soltis, and Ed Dalley. Under the

union-security clause of the labor agreement for failure to tender dues and initiation fees. When ABF failed to comply with these requests, the Union filed another grievance which is presently pending.

In later testimony Dudik responded that by October 1995, only the Avenel employees the Union had previously represented in bargaining with Carolina Freight were performing the office clerical work at the Linden terminal. He was aware of only one other employee, Christina Knipe, but Manager Smith told him she was an office confidential. At no time before its second change of operations application filed in February 1996, did ABF advise him that there were other, nonunion employees with seniority rights to return to Linden.

Donato (Don) De Santi, the Local 701 President, corroborated Dudik's testimony that he telephoned ABF in the morning of April 22, 1996, and when he heard Dudik say to Platt on the phone he wanted to come down to discuss the grievances. Before making the call he had agreed that Dudik should also go to ABF that day to hand deliver letters and union applications to office clerical employees who were not members of the union but whose addresses Dudik had sought, unsuccessfully to secure from the Company. Since Dudik had to go to the terminal to discuss the grievances he had instructed him to go with cards and hand deliver the letters.

De Santi corroborated Dudik's arrest, his receipt of the telephone call from Dudik while at the terminal, their joint return to the ABF and Roadway Express Avenel terminals later in the afternoon and Platt's direction to Dudik to leave the area or face a second arrest. De Santi recalled Platt being very agitated when, in spite of their informing him they had union business with Roadway, he told them that if they didn't leave, he's going to call the police. Neither he nor Dudik raised their voices, threatened Platt with physical assault, or cursed or used obscenities.

De Santi agreed on cross-examination that the Union could have mailed to the Avenel office the letters and applications directed to the employees, but chose not to do so.

Robin Faust also testified for the General Counsel. She was a clerk who performed credit and collection work for ABF. She had been a Local 701 member, and shop steward for 13 years. While employed by Carolina Freight at Avenel prior to October 1995, the office clerical work performed included payroll, tracing of freight shipments, customer service, including taking pickup orders, and LS & D (handling insurance claims arising from damage to freight shipped out from the terminal). The clerical duties remained pretty much the same after the purchase by ADF and their transfer to Linden. The employees different shift hours also remained the same. With respect to service areas covered, they remained basically the same after the move.

A couple of weeks prior to the move to Linden, Dan Smith, the ABF terminal manager at Linden spoke to the office clericals working days at the Avenel Terminal. Faust, Cantanzaro, and Marziali were present. He told them they, the office clericals, would be going over to the Linden facility and not be upset. It wasn't a friendly atmosphere because "the girls were upset about you coming in, but they would train you and help you in any way they could." Smith also told them the Company was trying to place the Linden clericals in other ABF facilities. Faust's impression, as a consequence of these remarks, was that there weren't enough

jobs for everybody, from both the Avenel and Linden offices, and the Linden employees were going to be placed in other terminals.

When she arrived at Linden, and started working there in October 1995, the only new employee Faust saw was Christina Knipe. No ABF representative told her there were office clerical employees other than those on the list the Union received in November, 1995, or there were any others who were in layoff or had a right to return to Linden or were on a temporary transfer from Linden to another facility.

Knipe's desk was right outside Manager Smith's office. When Knipe later left on maternity leave, none of the unit employees picked up her work. Faust also corroborated the union complaint in October 1995, of bargaining unit work of appointments and payroll preparation being done by management. A meeting was held with Smith at which he responded that payroll was never performed by unionized people. At Linden, Knipe was preparing the payroll.

Faust first testified she never saw Debra Fee working at Linden. She later noted that in February 1996, Fee did come into the office, working at the desk Knipe had previously occupied and performing the office payroll just as Knipe had done. No one informed Faust that Fee was a unit employee at Linden.

Faust corroborated Dudik that after receiving his phone call the morning of April 22 and discussing part timers working there, she transferred him to Platt, and after Platt transferred the call back to her, was told by Dudik that he had a meeting with Platt at 2 p.m. and would be in to see her. She later took Dudik around after lunch, and introduced him to nonunion employees Fee, Soltis, and Todaro and corroborated their interchanges and the short time he was in the office. When Knipe told Dudik that Platt would be back later he left later, around 4:15 or 4:30 p.m. she saw Dudik in handcuffs in front of Platt's office standing with a police officer. Two other employees, Fee and Cantanzaro, could see him. After a few minutes, Dudik was taken away and Platt then walked through the general office wiping his hands and making comments which she didn't hear.

Under cross-examination, Faust did not recall seeing Fee at Linden before February 1996, or Kulinich, or Pankiw. She had only been at Linden for about 5 minutes in the morning of September 25, before returning to Avenel for 2-1/2 weeks, before returning to Linden. She only knew that ABF Linden employees were at Linden during the first week to train the Avenel transferees and assumes Fee was there and knew Pankiw was. She did not inform Dudik about these nonunion office clericals, and Joan Blake told her about these employees training the newcomers.

Faust also agreed that Linden didn't serve the Staten Island, Hillside, and Brunswick areas which Avenel had, and these areas went to East Brunswick and Monmouth facilities after the move in September 1995. Faust later described the common geographic areas serviced by Avenel and Linden in 1995 as Linden, Elizabeth, Roselle, Carteret, and Woodbridge, all in New Jersey. These commonly served areas were larger in number of deliveries than those three areas which were not delivered from Linden after the transfer. However, when the transfer back to Avenel was made in April 1996, the Monmouth and Staten Island work did not come back to Avenel.

Joan Blake testified that on the transfer from Avenel to Linden on September 24, 1995, she saw Deborah Fee on and off for a few weeks and then not at all. Arlene Pankiw continued to work for a week and a couple of days and then went to ABF's northern New Jersey terminal. Knipe went to the front of the office outside the manager's office when Fee left and continued to the end of January 1996. Blake corroborated Faust, that about a week or so before the transfer Dan Smith had told the Avenel office clericals that they shouldn't expect the girls (at Linden) to really welcome them because they were crying and very upset. Blake worked on bills of lading and all the clerical work was really no different after the move. After the transfer back to Avenel in April 1996, the clericals continued to perform the same work and the areas served remained the same.

C. The Evidence Relating to the Allegations of By-Passing the Union and Threatening an Employee with Reprisals for not Withdrawing a Grievance and Informing Employees it Would Be Futile to Support the Union

Prior to January 1996, Blake had worked a 12 noon to 8 p.m. shift. When Lupton was laid off in January 1996, she was placed on the 4 p.m. to 12:30 a.m. shift. She continued on this shift on the transfer back to Avenel on April 1, 1996.

After arriving at work on April 22, she saw Dudik on the telephone in Platt's office. She heard he had been arrested and as he left, Deborah Fee got up from her desk, went to the window and said she wanted to see Bob Dudik taken out in handcuffs. Shortly after Dudik left, Tom Platt came out of his office, wiped his hands, said, "Well, I got rid of that one," and then as he passed Blake's desk, told her she no longer had a leader, that he got rid of him.

At the end of April 1996, starting times were posted for bidding. Article 16, section 9 of the contract requires that the employer shall bid all starting times on a quarterly basis in accordance with seniority. Blake bid for the 8:30 a.m. to 5 p.m. time slot and was assigned that time. After working 3 days on her new shift, Blake was called in by Platt and told that there was a girl out on vacation and he was changing her hours to a shift running from 1 to 9 p.m. Blake next complained to Faust that after just starting on days she was back on nights. Faust said she would call Dudik. Faust reported back that Dudik had filed a grievance on her behalf. Article 16, section 9 provides, inter alia, that no change of designated starting time shall be made unless mutually agreed to by the Union and the Employer. Absent agreement, the issue may be submitted to arbitration. Section 7 provides for an additional \$1-per-day night differential in pay for work starting at 12 noon.

Within a few days, Blake found a copy of the grievance on her desk with a message from Platt to see him. When she went in to his office Platt said, "[W]e had an agreement." Blake replied that she was there for 8 hours, and had to do what he told her to do and Platt agreed. The following day, Platt called her into his office and told her he wanted her to withdraw the grievance. Blake told him she didn't file it and she wouldn't withdraw it, because he was wrong. Platt responded he wasn't wrong, that this isn't a union office, and he would do it again if the situation occurred again. She told him if he changed her hours again, she would have to file another grievance. At the time Blake was back working days

after having been assigned the 1 p.m. starting time the week of the employee's vacation.

D. Respondent's Presentation in Opposition to the Complaint Allegations

Respondent called only one witness to counter the allegations of unfair labor practice. Thomas Platt testified that he had been ABF branch manager at Avenel terminal from April 1, 1996, until leaving the Company's employ on September 13, 1996, a few weeks before testifying. Prior to April 1, he had been branch manager of ABF's north New Jersey location.

When Avenel terminal closed effective September 25, 1995, some of the areas that were covered by that terminal went to terminals other than Linden. The service area at ABF in Linden was about half the size of the Carolina Freight service area at Avenel. Even when the transfer was made back to Avenel from Linden in April 1996, not all the work previously done by Carolina Freight when it was at Avenel ended up there. The ABF Avenel Terminal thus serviced a smaller geographic area.

Platt was at Avenel in September 25, 1995, from 7:30 a.m. for about 45 minutes and recalls seeing Fee, Knipe, and Kulinich among other office clerical people. He was also introduced to Dudik, although he had seen him previously at grievance hearings.

On April 22, 1996, Bob Dudik called at 8:30 a.m. to tell him he wanted to come down to see Robert Faust but did not make an appointment to see him. Around 2 p.m. he called the terminal and learned from Deborah Fee that Dudik had gone around with Faust to nonunion employees handing them a letter with a union membership card. Fee told him everyone in the office was upset and couldn't concentrate on their work. The employees perceived the letter which she read to him as being intimidating and threatening their jobs if they didn't join the Union. When she told him Dudik would be returning at 4 p.m. to see the nonunion clerks who start them Platt said he would returning right away.

On his return to the terminal, Platt tried, but was unsuccessful in reaching Steve Froias, so he called his boss, Regional Vice President of Operations Phil Naw from the dispatch office and they got ABF's corporate attorney at headquarters in Fort Smith, Arkansas on the line. As a result of this consultation, Platt was to tell Dudik on his return that the Company questioned the legality of the letters and would like to review them before they were distributed to any employees. While Platt was still on the phone, Dudik entered the driver's room and Platt told Dudik not to hand out the letters. Platt got off the phone, told Dudik what he and the other ABF executives had decided and Dudik became very belligerent, and began cursing in a loud voice. During this argument, drivers were returning to the terminal at the end of their shift. Platt told him he was not to hand out the letters and asked him to leave. Dudik refused and said he was not leaving until he handed out these letters.

Platt now told him if he didn't leave, "we're going to have to call the cops." When Dudik said, "Do what you have to do," Platt instructed Jim O'Donnell, operations supervisor, to call the cops.

Dudik argued his right under the union contract to have access to service bargaining unit employees, Platt pointed out he had access as long as he didn't disrupt and interfere with

operations. Before the police arrived Dudik went around the corner to use the pay phone and Platt kept watch on him. After the police arrived the officer called Dudik outside into the vestibule, and then returned with the contract and referred to the provision on a union access. Platt countered that he had access so long as he didn't interfere with the operation, which was what was then happening, and he'd like him to leave.

Some time elapsed while Dudik waited for his office to return a phone call. The police officer suggested he call his office and received approval from Platt for Dudik to use his office phone. After making the phone call, when the police officer asked him what he was going to do, Dudik asked Platt if he would be allowed to hand out the petitions. When Platt said no, Dudik said, "[Y]ou'll have to arrest me, because I'm not leaving." The officer then did so and asked Platt to come to police headquarters in 20 minutes. Platt went there, and swore out the complaint which was still pending at close of hearing.

After Dudik was removed from the office, Platt denied making any gestures of any kind indicating his happiness with Dudik's removal and arrest. But he was not asked and consequently did not address whether he made any comments about the arrest in front of employees.

Upon his return from police headquarters, Platt saw Dudik in the yard standing near the ABF fuel tank with Dan De Santi and an ABF driver. Platt rolled down his car window and asked what he was doing here. Dudik responded with cursing and an offer to Platt to get out of his car and "we'll fix you." Platt left, parked, was going into the office when he saw Brian Amicucci, an operations supervisor and another police officer and learned that the supervisor had called the police earlier when Dudik had returned, accompanied by De Santi who had gone into the ABF offices and served the remaining union letters with union cards.

Platt now approached Dudik and De Santi accompanied by the police officer and learned that the union agents claimed to be servicing the bargaining unit at Roadway and had a right to be there. He felt that they still should leave. When, after some extended discussions, he was informed that they were going inside and that they were going to behave, there was nothing he could do. But when asked about the police officer calling his lieutenant, Platt said even after the call he felt that they should still leave. When the officer came to him and explained, "you know they lease from you, and they can't tell someone you lease to what company they can have and that sort of thing, and I agreed with him. I realized that there wasn't anything that I could do about that." (Tr. 675.) Platt denied he ever said he wanted the union agents rearrested. And on the very next day, and thereafter, he made no attempt to interfere with Dudik in his visits to the Avenel facility.

As to the change in Blake's hours and the resulting grievance Platt testified as follows. He had a billing clerk who was going to be out 4 days. She started at 4 p.m. Since Blake had some billing experience he sat down with her and said that since she was the junior most person and no one else wanted to work at night, he'd like her to do the billing. She could even start at noon. Blake was perfectly agreeable. When he told her it would be 4 days, she corrected him and said their contract required all 5 days. He agreed.

After that week of Blake's change in hours he received a grievance by certified mail from Local 701, claiming he had changed Blake's starting time and seeking additional pay. He believed there was some mistake. The Company had a non-union office with union people in it and he had never taken the contract to apply to office policies. He was also surprised since Blake had never indicated any problem with her change.

He then had a conversation with Blake in his office. He told her, "your probably as surprised as I am to get this, because I see you didn't sign it." Blake said no, she agreed with that. Platt responded, "[B]ut you agreed to do this. I don't understand." Blake explained she couldn't tell him "what's wrong with it. I just have to go along with what you say." Platt countered, "[S]o this is your grievance. You think this is right." And she said, "Yes." "And I said 'Okay.' And that was the end of that." (Tr. 679.)

Platt denied he ever threatened anyone, including Blake, with any kind of retaliation for engaging in any kind of union activities. But Platt was not asked on direct examination, and as a consequence, did not deny a second conversation the following day during which Blake testified Platt tried to get her to withdraw the grievance and told her this wasn't a union office and he would transfer her again if the situation occurred again.

Under cross-examination, Platt agreed the type of work of the ABF office clericals remained the same on the move first to Linden and then back again to Avenel.

Platt did not agree Blake would have automatically been insubordinate if she had refused the change in her hours, but if she refused they would then have discussed her reasons and probably come to a meeting of the minds. He had been very surprised about her filing the grievance without talking with him. He didn't know at the time that it was a violation of the Local 701 agreement to ask an employee directly to change times when the agreement provided for designated starting times for each employee and he was aware that just a week before Blake had successfully bid on a day-shift starting time when the starting times had been placed up for bid for the office clericals.

Platt permitted Dudik to walk around the corner and use a payphone outside the office at the Avenel Terminal on April 22, even though Dudik was becoming increasingly belligerent and was using foul language. Further, although Platt claimed that when he returned to the Terminal after swearing out a complaint against Dudik, Dudik again cursed him, screamed vulgarities at him and even threatened to physically assault him, at no time did he ask the police officers who arrived shortly afterward, to have Dudik arrested, again.

Platt disclosed that he had been terminal manager at Linden from April 1991, to September 24, 1995. During that period he had used Deborah Fee to type his work and both Fee and Chris Knipe had typed warning or suspension letters he had issued to drivers during that period. Platt also conceded the Local 701 clerical contract contained nothing in article 16, the relevant article, about requiring the same starting time for 5 days. He just accepted Blake's representation without looking at the contract.

As to his discussion with Blake about the grievance, Platt admitted whenever he received a grievance, mostly involving the drivers, he always talked to the employee about it. Yet

he never discussed the change in Blake's hours with Dudik, or informed him she had agreed to the change. He also may have told Blake that if this happened again, he might have asked her to switch her hours, and that they had office policies in this nonunion office. Platt asserted that in the past he had explained to Dudik and the union employees in the office that they had a nonunion office, and the union contract applies to them where it deals with them on an individual basis.

Although Platt acknowledged that Dudik had visited the terminal on other occasions, he could not recall receiving another phone call like the one at 8:30 a.m. on April 22 when Dudik asked if he could see Robin Faust. On April 22, someone else would have had to answer the phone first since it doesn't ring in his office. Later that day, Platt left the office to visit a mortgage company in Princeton and was gone 2 to 4 hours. Although, he was 10 years in the trucking industry and dealt with the Teamsters representing drivers the words on Dudik's letter to the nonunion employees did not sound familiar. He had heard of a union-security clause before, he knew drivers had to join the Union, but the subject of the letter was a new experience for him.

On his return to the facility on April 22, and as a result of his phone call to management and corporate counsel, they decided not to allow the intimidation factor to go on by the handing out of the union letter until the legal department could review it. The intimidation tactics to go by the handing out of the union letter until the legal department could review it. The intimidation tactics Platt described as the threat of loss of employment for the nonunion clerks set forth in the letter, in which Dudik described the enforcement of the union-security clause.

Platt asserted he never lost his composure in his confronting Dudik, but that he told Dudik to calm down because he was ranting and raving and causing a commotion. Yet, Platt had not so testified when asked to describe what happened that day with Dudik on his direct examination.

When the police arrived, and both of them had an opportunity to explain their position to the police, Dudik was not unruly and he allowed Dudik to use his office phone at the request of the police officer. When the police left with Dudik through the front entrance Platt recalled some employees being present nearby in the office. Now, Platt who had earlier refrained from testifying about comments to employees immediately following Dudik's arrest, testified he could not recall entering the clerical area and speaking to any of the clericals.

When asked by union counsel about his reaction to Dudik's and De Santi's screaming and cursing at him and making a threat of physical harm on their confrontation on Dudik's second visit to the terminal, Platt again denied asking the police to arrest them or telling them he had been physically threatened. When pressed as to whether he ever mentioned the physical threats, Platt changed his testimony to now state he didn't recall. Still later, after being asked if he knew that one person couldn't threaten another person, that to do so was a violation of criminal law, Platt now changed his testimony again to assert that he probably did tell the police officer about it but he also claimed that he did not know that the union agents' threat was a violation of law.

E. *Credibility Resolutions*

Wherever Platt's and Dudik's testimony is at variance I credit Dudik's version. Platt's testimony struck me as not being credible on the matters in which he and Dudik differed. In a number of instances one of which I have highlighted, Platt manifested an indecisiveness and suggestions which undermined his credibility. Further, Platt, conveniently was unable to recall certain facts regarding his absence from the Avenel facility on April 22, such as the times of his departure or return, the identity of the mortgage company he visited, how long he remained at the Woodbridge Police Station or whether he informed Dudik that the clericals were so upset by the Union's application letters that they allegedly could not function. Yet he recalled the precise times of Dudik's call to the facility that morning and his later call to the facility. When he spoke to Fee, although he later changed this time from 2 to 3:15 p.m. Although Platt relied on Dudik's alleged disruptive behavior and interference with ABF's operations as justifying his removal from the facility in discussions with the police, Dudik never heard Platt make reference to this argument and Platt never insisted on Dudik leaving the area or the vicinity of the employees while he was insisting on his arrest by the police. In fact, Platt permitted Dudik to use his office telephone. The fact that Platt could point to no harassing behavior on the part of Dudik when he distributed the letters and union cards and he deemed the Avenel facility a nonunion operation with some union members employed support the conclusion I reach that Platt's concern expressed to the police officers was with Dudik's approach to nonunion employees and not on disruption in business Dudik's presence may have allegedly occasioned. As to Dudik making an appointment to meet Platt at 2 p.m. on April 22, Dudik's version not only appears to conform with his practice of only contacting the terminal manager on visits to meet with him, aside from the shop steward, but is supported by Faust's testimony that she transferred Dudik's call to Platt and then on a transfer back to her line was told by Dudik he had an appointment with Platt at 2 p.m. and would be in to see her.

I credit Dudik as to Platt's agitated state when he confronted Dudik on both of his visits. While their versions of the substantive interchanges between them do not vary substantially, apart from the alleged cursing and threats attributed to Dudik, Platt is not credited in his denial that he sought Dudik's rearrest on his second visit to the terminal. De Santis corroborated Dudik here and Platt ratified the call to and presence of the police the second time and continued to seek Dudik's and De Santis' removal from the site with the backing of the police officer even after he learned the nature of their visit was to transact union business at Roadway Express.

Aside from crediting Dudik that he was unaware of any ABF claim of nonunion office clericals in the bargaining unit until February 23, 1996, when he received notice of ABF's position on Deborah Fee, I credit Faust and Blake that the Avenel clericals were informed by Dan Smith, the Linden terminal manager before the September 25, 1995 transfer, that the Linden ABF office clericals would be placed elsewhere after performing training assignments. As a result, the continued appearance of Fee on an irregular basis for some days after the move, as well as Pankiw for a limited period at Linden was not a matter of concern for the shop stewards

or union business agent. In the absence of any notice from ABF of continued rights to return to Linden, and given the "office" seniority list provided to Dudik in November, the union could reasonably rely on the bargaining unit at Linden comprising the seven union members, including the two on layoff, aside from confidential employee Knipe and even with Fee's return in February, to replace Knipe. When Dudik learned of ABF's belated claim to include Fee, Knipe, Pankiw, and Kulinich in a revised seniority roster in February 1996, he immediately sought information about them in his demand of March 4, 1996, and contested ABF's position at the Joint Area Committee hearing.

I also credit Blake's testimony attributing an attempt by Platt to obtain her withdrawal of the union grievance filed on her behalf. At their second meeting in his office, the day following Platt's initial meeting with her on the grievance. Platt failed to deny he held such a meeting and failed to offer any testimony disputing Blake's version of it. Furthermore, his admission of great surprise at receiving the grievance, his practice of meeting personally with grievants, his assertion that the office was nonunion and the union contract only applied to the union members on an individual basis, as well as his acknowledgment that he may have told Blake that if the situation occurred again he would ask her to switch her hours again and that there were office policies in this [non]union office, all support the credibility resolutions I have made.

I finally credit Blake attributing to Platt the comments she said accompanied his wiping his hands in satisfaction after Dudik's arrest and being led away, testimony to which Platt did not respond.

Analysis and Conclusions

The first issue I will consider is whether since April 18, 1996, by refusing to recognize the Union as the collective-bargaining representative of the office clerical employees at Avenel and by refusing to apply the 1994 to 1998 labor agreement to all of these employees, ABF has violated Section 8(a)(1) and (5) of the Act.

The counsel for the General Counsel argues that, initially, an accretion to the bargaining unit of office clericals employed at Avenel and recognized by ABF as successor employer to Carolina Freight took place when ABF transferred the five active and two laid-off Avenel employees to its Linden facility effective September 25, 1995, where four non-represented office clericals had been employed, and at least two of them continued working, one off and on, for a period of a week to 10 days, and a third continued working as a stipulated nonunit confidential employee. Inasmuch as the seven Local 701-represented employees constituted a majority of the unit employees, Local 701 continued as exclusive representative of the accreted unit.

The General Counsel then argues that when ABF closed the Linden and East Brunswick terminals and transferred and consolidated those operations, including the clerical work, at its previously operated but discontinued Avenel Terminal effective April 1 and April 15, 1996, another accretion occurred pursuant to which the 4 transferred East Brunswick nonrepresented office clericals were now absorbed by accretion into the previously represented 10 employee clerical unit transferred from Linden. Thus, the Union represented a majority of the Avenel unit office clericals, and ABF, by refus-

ing to recognize Local 701 as the unit representative and refusing and failing to apply the preexisting contract to all of the employees, in its April 19, 1996 written answer to the union's April 18 grievance, has refused to bargain under the Act.

I am persuaded by the existing case law and the principles of law those decisions represent as applied to the facts of this case that the government's argument is sound and that ABF has violated Section 8(a)(1) and (5) as alleged.

As noted by the Board, several factors are considered by it in determining whether in a transfer of operations, an accretion to a preexisting contractual unit has taken place so that the combined employees constituted an enlargement of the contractual unit requiring the employer to bargain collectively with the representatives of the original contractual unit. Those factors include whether there was any substantial change in operations following the relocation or consolidation. Another factor the Board relies on is whether the employees in the original contractual unit comprise a majority of the newly combined work force. Another critical factor is whether the asserted accreted employees were already represented by another labor organization. For Example, in *Massachusetts Electric Co.*, 248 NLRB 155 (1980), the Board refused to apply normal accretion principles where, after the transfer, the function and classifications renamed essentially unchanged, because the employees transferred to a facility where the employees were covered by a collective-bargaining agreement were themselves represented previously by different labor organizations. As the Board noted at 157, "In these circumstances, statutory policies will not be effectuated if, through the application of ordinary principles of accretion, a bargaining agent is imposed on either unit of the newly integrated operated found appropriate." [Footnote omitted.] A final factor of note is whether the alleged accreted employers share a substantial community of interest with the employees employed in the contractual unit following the transfer or consolidation. Application of these factors to the facts in *Central Soya Co.*, 281 NLRB 1308 (1986), led the Board to find a valid accretion that perpetuated the employer's obligation to bargain with the union which represented the employees in the preexisting contractual unit.

The facts in *Central Soya Co.* parallel those in the instant proceeding. Just as in *Central Soya Co.*, the Respondent purchased a competitor, relocated and consolidated operations at a facility, Linden, without making any substantial changes in operations, the transferred employees in the contractual unit constituted a majority of the combined work force after the move, no other labor organization represented the employees who already worked at Linden, and they shared a strong community of interest with the previously represented employees.

There is no question that the same trucking operation that existed at Avenel continued at Linden and that the office clerical employees continued to perform the same functions after the move. The fact that certain work at Avenel was transferred to terminals other than Linden is insignificant in determining that the Linden operation was a continuation of the work performed at the Avenel facility. The seven transferred employees (including two laid-off employees retaining contractual seniority rights to recall) constituted a majority of this combined work force, for a significant period of time comprising the sole work force, until February 1996, or later

when Fee returned to Linden, and even as to Fee the Union and stewards claimed with good reason that Fee was performing confidential duties in place of Knipe who was on maternity leave. Even including Fee, as well as Kulinch and Pankiw, as laid-off employees with rights to return to Linden as claimed by ABF, the union still comprised a substantial majority in the office clerical unit. These three employees were unrepresented by any labor organization. Finally, once part of the office clerical work force, Albeit with groups of them starting at different but overlapping starting times, it is self evident they all shared a substantial community of interest. They all were supervised by the same terminal manager, retained related and easily transferrable work assignments, worked in close proximity to each other in the same office, shared the same office procedures, and dealt with each other on a daily basis.

I thus find a valid accretion that continued the Union as exclusive representative on and after the relocation to Linden.

The same factors which govern the Board's application of the accretion principle apply with equal force to the next relocation to, and consolidation of both the Linden and East Brunswick office clerical operations at, Avenel in April 1996. The work remained basically the same, even if some of the geographic areas previously covered at Avenel were assigned elsewhere by ABF. The 10 Linden office clericals, constituting a valid bargaining unit, now joined four office clericals relocated from the East Brunswick Terminal, thereby retaining their majority in a newly configured 14-person clerical unit. Further, the four transfers from East Brunswick were unrepresented and shared a strong community of interest with the unit employees who transferred from Linden, even though 5 of them (Lupton, Hawlett, Pankiw, Apruzzi, and Kulinch) were then on layoff. Thus, I conclude, the Union now represented a combined 14-person unit of office clericals employed at Avenel and ABF's refusal to recognize the Union or apply the contract to them constitutes a violation of its bargaining obligation under the Act.

The Union, in its brief, proposes an alternate basis for concluding that Respondent's withdrawal of recognition of Local 701 as the exclusive bargaining representative of the office clerical employees at the Avenel facility in April 1996, violates Section 8(a)(1) and (5).

Under a line of cases, which I find applicable to the facts on the instant proceeding, an existing contract will remain in effect after a relocation, if the operations at the new facility are substantially the same as those at the old facility, and if transfers from the old facility constitute a substantial percentage, approximately 40 percent or more of the new facility's complement. In *Harte & Co.*, 278 NLRB 947 (1986), the Board commented that it had developed standards in its contract-bar and failure to bargain cases to determine when there is sufficient continuity of operations to justify applying an existing agreement to a new location. "These cases hold that an existing contract will remain in effect after a relocation if the operations at the new facility are substantially the same as those at the old and if transferees from the old plant constitute a substantial percentage—approximately 40 percent or more—of the new plant employee complement *Westwood Import Co.*, 251 NLRB 1217, 1214 (1960), *enfd.* 681 F.2d 664 (9th Cir. 1982); *General Extrusion Co.*, 121 NLRB 1165, 1167–1168 (1958). See also *Marine Optical*, 255 NLRB

1241, 1245 (1981), *enfd.* 671 F.2d 11 (1st Cir. 1982)." *Id.* at 948–949. In accord: *Rock Bottom Stores*, 312 NLRB 400 (1983).

In *Harte & Co.*, the Board applied these standards in concluding that the charging union's contract at the old facility continued to apply at the new. Besides finding that the two operations were substantially the same and the employees at the former location constituted more than 40 percent of the new facility's complement, the Board also noted, *inter alia*, that no other union had advanced any claim to represent the employees at the new facility. "Thus Harte was not presented with rival claims from competing union, and its recognition of [the charging union] at [the new facility] did not implicate the types of considerations we have addressed in *RCA Del Caribe, Inc.*, 262 NLRB 963 (1982), and *Bruchner Nursing Home*, 262 NLRB 955 (1982). [Footnote omitted.] *Id.* At 950. Both *RCA Del Caribe, Inc.*, and *Bruckner Nursing Home* established new Board policy with respect to the requirements of employer neutrality when an incumbent union is challenged by an "outside" union, a conflict clearly not present in either *Harte & Co.* or the instant proceeding.

Thus, applying the teachings of *Harte & Co.* to the instant facts, since the seven former Linden employees clearly covered by the Local 701 collective-bargaining agreement were joined at Avenel by seven nonrepresented employees as of April 1 and 15, 1996, (Fee, Todaro, Petruzzello, Pankiw, Kulinch, Soltis, and Dolby) the represented employees under the agreement comprised 50 percent of the total complement, and the Local 701 contract should apply to all of them. Under this formulation, Fee's limited employment at Linden for approximately a month and a half before the relocation to Avenel as of April 1, 1996, was as a confidential and both Pankiw and Kulinch had never been employed on the Linden unit, except for Pankiw as trainer from September 25 until October 3, 1995.

Respondent asserts a number of defenses to forestall the legal conclusion that the Union is the valid exclusive representative of the Avenel office clerical unit. First, Respondent claims that the time limitations contained in Section 10(b) of the Act prevents General Counsel from asserting the union's current valid collective-bargaining status for the Avenel unit. Since the alleged accretion as of September 25, 1995, took place more than 6 months before the Union filed its initial charge on May 6, 1996, alleging a refusal to bargain, the charge and thus the complaint allegation on which it must be based is time barred. But the charge alleges April 23, 1996, as the date of violation, by which time Respondent refused to provide the information the Union sought on April 18, 1996, about the seven employees ABF listed on its April 15 seniority roster, interfered with Dudik's attempts to service unit employees, and refused to recognize the Union and honor its agreement.

The September 25, 1995 date is not a date alleged as one on which a violation took place. It is the date that the Respondent transferred the union-represented employees to a facility at Linden where they outnumbered the existing non-union complement. The accretion which followed as a matter of law did not constitute an unfair labor practice but only an event which, when combined with others well within the 10(b) period, must notably Respondent's relocation and transfer of Linden and East Brunswick Terminals to Avenel and its rejection of the Union's claim to apply its agreement

to all Avenel office clericals, the Union asserts as unfair labor practices.

The Respondent answers that in failing to apply the union contract to Pankiw and Kulinich after the change of operations, which it opposed, the union failed timely to assert Respondent's position as violative of its bargaining obligation under the Act. However, because of their layoffs on or shortly after September 25 no instance arose after September 25, 1995, where Respondent failed to apply the contract to them or where a contract term could have been applied to them, other than their possible recall from layoff which never arose. Since Fee was not recalled until February 1996, and the Union ultimately sought unsuccessfully to obtain information as to her status as well as those of Knipe, Pankiw, and Kulinich whose names Respondent now included for the first time, in February 1996 on its Linden seniority roster, Respondent cannot claim that the Union failed to assert contract rights as to them or failed to file a timely charge on May 6, 1996. Before Fee's inclusion on the revised February 1996 roster, the Union reasonably believed her to have been a confidential employee. Furthermore, as Dudik explained, laid-off employees had no obligation to maintain good standing in the Union until their recall and therefore the Union had no reason to question Pankiw's or Kulinich's nonunion status.

All during the period from September 25, 1995, to at least February 23, 1996, when it received ABF's revised seniority roster, Dudik reasonably relied on the information he received from his stewards and Respondent to conclude that the seven prior Avenel clericals comprised the complete unit complement of employees. The November 1995 office seniority rosters supplied by ABF, as well as the reports of the reassignments of the prior Linden clericals following their short interval of training the arriving Avenel clericals, and, in particular, the failure of ABF to inform the stewards or Dudik of any existing rights of those clericals to inclusion in the Linden unit, strongly supported the Union's belief in a unit limited to the represented employees. It was not until Respondent's application to relocate back to Avenel that the Union discovered Respondent's intent to include the four nonrepresented prior Linden work force in the office clerical roster.

Respondent also argues that such cases as *General Extrusion Co.*, cited supra; *Kroger Co.*, 155 NLRB 546 (1965); *General Electric Co.*, 170 NLRB 1272 (1968); and *Martin Marietta Co.*, 270 NLRB 821 (1984), support its position that no accretion occurred and the Union therefore only represented its members employed at Avenel. Each of these cases is inapposite. Respondent's reliance on the statement of the standard in *General Extrusion*, in which language is used to describe situations where a contract will not serve to bar an election, if the new operation involves a change from its preexisting nature or the merger of two or more operations result in the creation of an entirely new operation with major personnel changes, is not germane to the facts present on the record. Neither the Linden operation, nor the Avenel operation which followed it, changed the nature of the prior operation or resulted in the creation of an entirely new operation with many new employees. Furthermore, *General Extrusion* involved competing interest between two unions, as did the *Kroger Co.*, and *Morton Marietta Co.*, and for that reason alone, these decisions are distinguishable. Just as the Board

will not apply ordinary principles of accretion when each prior operation which is combined has a separate bargaining representative, see *Massachusetts Electric Co.*, cited supra, so too the Board will not normally permit a contract to be asserted as bar when the new operation merges two separately represented groups of employees. In such circumstances, a question concerning overall representation will normally prevail. Furthermore, in each of these cases, including *General Electric*, the Board found that new facility involved a creation of an entirely new operation with major personnel changes, not present on the instant facts.

Respondent's reliance on *Boston Gas Co.*, 235 NLRB 1354 (1978), is particularly misplaced. While the Board in *Boston Gas Co.*, at 1354 refers to directing an election at a new operation at the Lynn customer inquiry center its issues before it involving the Madden operating center it held that the employees transferred to Molden were performing functions similar to those performed in the past, although using more advanced equipment, shared common facilities, laws of supervision, and performed the same or similar duties, and thus found the employees transferred were properly deemed an accretion to the existing unit of Malden employees, refused to question the majority status of the predominant Malden union, and dismissed the employer's RM petition. The facts and holding of the case therefore support the conclusions I have reached on the record before me that Local 701 remains the exclusive collective-bargaining representative of the combined Avenel office clericals and Respondent violated the act by refusing to recognize Local 701 or apply the contract to them.

The short answer to Respondent's further contention that by acting in conformity with the decision of the Multi Region Change of Operations Committee convened under the NMFA it was shielded from any claim of accretion or later change of refusing to recognize the Union in the overall unit, is that the Multi-Region Committee lacked jurisdiction to determine unit placement of office clerical employees under Local 701's white paper agreement and could not preempt the application of that agreement to ABF's transfer of office clericals from Avenel to Linden. Neither is Respondent helped by arguing that the Union, by failing to appeal recognized that decision when from all the facts available to the Union ABF had agreed to apply the Local 701's contract to the Linden unit clericals.

Another issue arising under Section 8(a)(1) and (5), is whether Respondent breached its bargaining duty by failing to provide the Union, in response to its April 18 letter request, with the addresses and social security number of the unit employees it had added to the seniority roster in its application to the Joint Area Committee in February 1996 and the names of whom it belatedly provided to the Union by fax of April 15, 1996.

It is well settled that an employer is obligated to provide requested information to a union "if there is a probability that such data is relevant and will be of use to the union in fulfilling its statutory duties and responsibilities as the employees' exclusive bargaining representative." *Associated General Contractors of California*, 242 NLRB 891, 893 (1979), *enfd.* 633 F.2d 766 (9th Cir. 1980); The standard applied in determining the union's right to information is "a broad discovery type standard." *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 *fn.* 6 (1967). Information about terms

and conditions of employees actually represented by a union is presumptively relevant and necessary and is required to be produced. *Ohio Power Co.*, 216 NLRB 987 (1975), enfd. 531 F.2d 1381 (6th Cir. 1976). Unit employees' addresses and social security numbers are likewise presumptively relevant to a union's performance of its duties as the unit's collective-bargaining representative. *MBC Headwear, Inc.*, 315 NLRB 424 427 (1994); *Honda of Hayward*, 314 NLRB 443, 449 (1994); *Radisson Plaza*, 307 NLRB 94, 110 (1992).

Where the data requested relates to employees not represented by the union, there is no presumption that the information is necessary and relevant to the union's representation of employers, and the union is under a burden to establish its relevance, *Ohio Power*, cited supra; *Duquesne Light Co.*, 306 NLRB 1042, 1043 (1992). However, that burden is not especially heavy. Id at 1043-1045, citing *Leland Stanford Junior University*, 262 NLRB 136, 139 (1982), enfd. 715 F.2d 473 (9th Cir. 1983). And an employer's obligation is not excused by the union's ability to access the information independently. If the union has a sufficiently objective basis for believing that bargaining unit work is being done by nonunit employees, the burden is met. *Duquesne Light Co.*, at 1044.

Here, ABF claimed the seven employees whose addresses and social security numbers the Union sought, were part of the office clerical seniority roster. Thus, it was including them in the office clerical unit. By virtue of the Union's rights to represent the overall unit as I have concluded, it was presumptively entitled to that information so that it might seek to apply the union seniority provision of its agreement to them and have a unique record of their identity for purposes of record keeping. Even assuming that these seven employees would not be deemed part of the overall unit represented by the union it still had the right to seek this information to investigate their statutes. Finally, although not argued by the Union, it had the right, in conformity with the Respondent's April 19, 1996 grievance response, to seek to obtain these seven employees' voluntary membership in Local 701 and thereby expand the agreement to cover them.

Thus, under any formulation, regardless of their unit or nonunit status, the Union either had the presumptive right, or has met its burden of establishing its right, to the information it sought regarding the seven employees. Accordingly, Respondent's failure to respond to the Union's request to supply the information violated its bargaining duty under the Act.

I turn now to the allegations that in causing Dudik's arrest and in later attempting to eject and arrest him again Respondent violated Section 8(a)(1) of the Act.

As noted earlier, the Union's contract concerning the unit employees at Avenel contains a provision, in article 26, section 5, providing that "[a]uthorized representatives of the union shall have access to the Employer's establishment during working hours for the purpose of adjusting disputes, investigating working conditions, collecting dues, and ascertaining that the Agreement is being adhered to, providing there is no interruption of the Employer's business."

As noted in *American Commercial Lines*, 291 NLRB 1066, 1072 (1988). "The Board has long held that a union's access to represent employees on an employer's premises is a mandatory subject of bargaining and that an employer's

unilateral modification of contractual access provisions violates Section 8(a)(5) 3 of the Act."³ [Citations omitted.]

The access provision at issue is clearly broad enough to encompass the Union's purpose in visiting the facility to solicit memberships and dues from the newly transferred and recalled from lay off clerical employees now working at Avenel. Collection of dues is specifically mentioned in the provision as is the Union's right to seek adherence to the terms of the agreement, without limitation, thereby encompassing the Union's effort to obtain compliance with the union-security provision by the seven previously unrepresented employees. While the specific permitted purposes for the Union's visit spelled out in article 26, section 5, are narrower than the more broadly phrased contract provisions at issue in such cases as *West Lawrence Care Center*, 308 NLRB 1011, 1012 (1992), and *Gilliam Candy Co.*, 281 NLRB 624 (1987), the Board's approach has been to broadly interpret such provisions that permit access as against employer attempts to unduly restrict them. This positive approach to affirming union access is exemplified most recently in a decision, *Frontier Hotel & Casino*, 309 NLRB 761 (1992), enfd. *NLRB v. Unbelievable*, 71 F.3d (9th Cir. 1995), in which the access provision contained language very similar to that contained in the Local 701 agreement by permitting "visits . . . to see that this agreement is being enforced and to collect union dues, assessments and initiation fees." In addition, like the instant provision, this access provisions prohibited or restricted access that interfered with the conduct of the employer's business or with the performance of work by employees during working hours. Finally, just as in the instant proceeding, the employer justified its ejection of the union representative from its premises for allegedly harassing nonunion employees and the employer similarly was unable to support that claim by any probative evidence. Both the Board and the Court in affirming the Board, held that the ejection of the union's representative interfered with union related communication in violation of Section 8(a)(1).

As I have found, the Union was entitled to the information it sought in writing from Respondent. When Respondent rejected the union's request, the union, without other recourse, was well within its rights under its access clause to seek to obtain the same information and to seek to enforce its union-security clause directly at Respondent's facility. See *McDermott Marine Construction*, 305 NLRB 617 (1991). I have also found that in arranging for Dudik's initial arrest and ejection, in the presence of unit employees, Respondent's agent Platt was seeking to limit the union's access to the nonunion employees to prevent it from enforcing the union-security provision and representing all unit employees and was not legitimately relying on any harassment of the employees. Such conduct is violative of Section 8(a)(1) of the Act. *Frontier Hotel*, supra. The only claim Platt made was that one employee, Fee, behaved, without foundation, that the letter she received was a form of harassment, Platt could point to no threatening conduct on Dudik's part. Nor could Platt show any interference with ABF's business. The

³Inasmuch as Respondent denied union access on one occasion only and Dudik continued to have access thereafter, the General Counsel is not alleging this conduct as violative of Sec. 8(a)(5) but only violative of Sec. 8(a)(1) which is independently and derivatively violated by conduct violative of Sec. 8(a)(5).

government's evidence was uniformly to the contrary. Thus, Respondent's defense, just as in *Frontier Hotel*, is flimsy and insufficient to support or justify the union agent's ejection or arrest. Respondent's arrest of Dudik and its ejection of him was thus also a unilateral change in the scope of the access provision in violation of Section 8(a)(1) of the Act.

Similarly, the attempt I have found Platt made later in the same day to cause Dudik's rearrest and ejection from its Avenel Terminal was also unlawful. There is here even greater reason to reject any justification Respondent could offer to remove Dudik from the area since his purpose at the time was to service employees in another bargaining unit employed by another employer, Roadway Express, Inc., and to police the Union's contract with that employer which leased its facility at the same location from Respondent. See *CDK Contracting Co.*, 308 NLRB 1117 (1992).

In its brief, the Union urges that I conclude, in accordance with case law it cites at page 54, particularly, *Loehmann's Plaza*, 305 NLRB 663 (1991), that Respondent has independently violated Section 8(a)(1) of the Act by continuing to pursue a state court action—the criminal trespass complaint still pending in Woodbridge Municipal Court at close of hearing—that has been preempted by the issuance of the instant consolidated complaint. While such a claim may otherwise indeed have merit, I am compelled to reject this request. The General Counsel has not alleged nor sought to amend the complaint to allege the Respondent's continued pursuit of the criminal proceeding as a violation of the Act and it alone determines the content and parameters of the pleading it issues. Furthermore, the matter, not having been previously raised at trial, has not been litigated and due-process requirements also dictate that I make no finding and issue no legal conclusion on this allegation. See, e.g., *Albert Einstein Medical Center*, 316 NLRB 1040 (1995).

However, the same constraints do not prevent in appropriate remedy from being included in the order I shall recommend.

Finally, I rule now on the allegations that Respondent expressed a belief in the futility of supporting the Union and threatened an employee with reprisals for not withdrawing a grievance.

Under the Board's well-settled test, interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or no whether the coercion was successful or not. The Board looks to whether the employer engaged in conduct, which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act. *American Freightways Co.*, 124 NLRB 146, 147 (1959).

When Platt walked through his office after Dudik's arrest and removal from the terminal, wiped his hands while commenting, "Well, I got rid of that one," and then told Blake she no longer had a leader, that he got rid of him, Blake could reasonably conclude that the terminal manager's comments maligning the union representative and his ability to continue to represent her and the other unit employees effectively conveyed the message that it was futile to support or remain a member of the Union, particularly in such a divided and divisive work place. Particularly in the setting in which their main agent had been forcibly removed from the terminal because he was seeking to enforce the union-security provision and enlarge its membership to include all employees,

such comments would reasonably tend to chill union support among the office clericals. I conclude that Platt's comments violated Section 8(a)(1). See *Albert Einstein Medical Center*, cited supra.

By informing Blake, during the second meeting Platt held with her in his office, after Blake refused to withdraw the grievance claiming a contract breach arising from her change in starting time, that this isn't a union office and he would transfer her again under a similar situation, Platt was, in effect, threatening an employee with a reprisal of a change in hours to night shift for asserting rights under the labor agreement to grieve an alleged breach. By tying his unlawful demand that she withdraw the grievance with the adverse consequences arising if she did not, Blake could reasonably interpret Platt's statements as an unlawful threat for exercising the Section 7 protected right of filing a grievance. *Industrial Supply Co.*, 289 NLRB 639, 643 (1988).

By thereby bypassing Blake's acknowledged bargaining representative and dealing directly with her regarding the grievance, Respondent, by its Manager Platt, has violated Section 8(a)(5) of the Act. *Gratiot Community Hospital*, 312 NLRB 1075, 1079–80 (1993). In dealing directly with Blake, it is clear that Platt was treating her as a unit employee, and not as alternate steward, particularly since the union business representative had filed the grievance and Blake was described as the employee who had been denied her contract rights by virtue of the breach.

CONCLUSIONS OF LAW

1. ABF Freight System, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Local Union 701, International Brotherhood of Teamsters, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

All office clerical employees and building and property maintenance employees employed by the Employer at its Avenel, New Jersey facility, but excluding the following: Office Managers, Assistant Office Manager, Personnel and Payroll Managers, Traffic Supervisors, Terminal Service Manager, Dispatchers, Confidential Secretaries to the Terminal Manager and Safety Supervisor, General Supervisory Trainees and other salaried supervisory administrative and professional employees with the meaning of the Act and employees covered by existing labor agreements.

4. Local Union 701, International Brotherhood of Teamsters, AFL–CIO, is now, and at all times material herein has been, the exclusive representative of all the employees in the above described appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act
5. By making statements to employees indicating that it would be futile to support the Union; causing the arrest of the Union's agent Robert Dudik; later the same day attempting to eject, and cause the rearrest of Union Agent Dudik; and threatening an employee with reprisals if the employee did not withdraw a grievance, the Respondent has interfered

with, restrained, and coerced employees in the exercise of their rights guaranteed in Section 7 of the Act and have engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

6. By withdrawing recognition from the Union as the collective-bargaining representative of the above-described unit; failing and refusing to continue in effect all of the terms and conditions of the collective-bargaining agreement effective from April 1, 1994, to March 31, 1998, between the Union and the Respondent as successor employer by failing to apply them to all employees in the above-described unit; failing and refusing to furnish the Union with the addresses and social security numbers of certain unit employees it requested in writing on or about April 18, 1996; and by bypassing the union and dealing directly with an employee in the unit by attempting to resolve a grievance directly with that employee, the Respondent has engaged in unfair labor practices and violation of Section 8(a)(1) and (5) of the Act.

7. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent violated Section 8(a)(1) and (5) of the Act, I recommend that it be ordered to cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

I recommend that Respondent be ordered to recognize the Union as the exclusive bargaining representative of the em-

ployees in the appropriate unit and apply its terms and conditions, retroactively, to all unit employees and maintain in effect, the collective-bargaining agreement with the Union that was legally in force at the Avenel, New Jersey facility since April 1, 1996. I shall recommend that nothing in this order is to be construed as permitting Respondent to deprive employees of any benefits they may have received as a result of its refusal to apply the contract terms to all of the unit employees at the Avenel facility.

I also recommend that Respondent be directed to supply the Union with the names, addresses, and social security numbers of all unit employees.

I further recommend that, as sought by the Union in its brief, Respondent be ordered to withdraw, with prejudice, the pending complaint in the Municipal Court of the Township of Woodbridge (Docket No. S-1996-000572-1225). Since the filing and pursuit of the criminal complaint by its terminal manager is an extension and construction of the arrest of Union Agent Dudik which I have concluded Respondent unlawfully caused, and is thus inextricably intertwined with the illegal conduct alleged, I conclude that I may remedy the unlawful arrest, in part, by prohibiting Respondent from receiving any benefit from its illegal conduct that may result from a conviction of Robert Dudik on the charge of defiant trespass.

[Recommended Order omitted from publication.]