

Advance Transportation Company and Harry Bidwell. Case 13-CA-28575

October 29, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND DEVANEY

On April 20, 1990, Administrative Law Judge Nancy M. Sherman issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and brief, and has decided to affirm the judge's rulings, findings,¹ and conclusions,² and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Advance Transportation Company, Bedford Park, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

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

²In adopting the judge's finding that the Respondent unlawfully discharged employee Bidwell, we rely in particular on the credited evidence establishing that the Respondent knew about Bidwell's protected concerted activities, that it harbored animus and an unlawful motivation to discharge Bidwell because of these activities, that Bidwell complied with the Respondent's "call-in" rule, that the Respondent knew that he complied with the rule by his call on April 24, 1989, when he reported that he would be attending, under subpoena, a Board hearing that might last 2 or more days, and that the Respondent did not meet its burden of showing that it would have discharged Bidwell absent his having engaged in protected concerted activities.

Andrew Iserson, Esq., for the General Counsel.
Leonard R. Kofkin, Esq., of Chicago, Illinois, for the Respondent.
Harry P. Bidwell, of Lockport, Illinois, pro se.

DECISION

STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge. This case was heard before me on October 5 and 6, 1989, in Chicago, Illinois, pursuant to a charge filed by Harry P. Bidwell on April 27, 1989, and a complaint issued on June 7, 1989. The complaint alleges that Respondent, Advance Transportation Company, violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act) by discharging Bidwell because of his protected concerted activities; because he joined, supported, or assisted the Highway Drivers,

Dockmen, Spotters, Rampmen, Meat, Packing House and Allied Products Drivers and Helpers, Office Workers and Miscellaneous Employees, Local Union Number 710, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (the Union); and because he testified in Cases 13-CA-28088, 13-CA-28143,¹ and 13-CA-28362, *Advance Transportation Company & Daniel A. Tuffs Jr., an individual, Richard Kubat, an individual, and Donovan Bauldry, an individual (the Tuffs case)*. The transcript of testimony in the *Tuffs* case, which was heard by Administrative Law Judge David L. Evans, was received in evidence as an exhibit in the case before me.

On the basis of the entire record, including the demeanor of the witnesses who testified before me, and after due consideration of the briefs filed by Respondent and by counsel for the General Counsel (the General Counsel), I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with an office and place of business in Bedford Park, Illinois. Respondent is engaged as a motor carrier in the transportation of commodities in interstate commerce. During the calendar year preceding the issuance of the complaint, Respondent derived gross revenues exceeding \$50,000 for the transportation of freight and commodities from Illinois directly to points outside Illinois. I find that, as Respondent admits, Respondent is engaged in commerce within the meaning of the Act, and that assertion of jurisdiction over its operations will effectuate the policies of the Act.

The Union is a labor organization within the meaning of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Union and Respondent have had a contractual relationship, with respect to drivers, since about 1948. Between April 1985 (at least) and March 31, 1988, there existed a voluntary stock ownership program for all Respondent's employees represented by the Union. Employees who elected to be covered by this plan underwent a deduction of 12 percent of the contractual wages paid them. Of these sums, 10-percent points were returned to Respondent and 2-percent points were used to purchase stock in Respondent for the participating employees.

Regional Manager Thomas Horvath, who is the highest ranking company official at Respondent's Bedford Park terminal and is admittedly a supervisor, testified before Judge Evans that Horvath talked to just about every employee in an effort to induce them to join the voluntary plan. He testified that he did this in order to enable Respondent to stay in business and that deregulation in 1979-1980 had caused many competitive companies to go out of business. In February 1986, Horvath told employee Daniel Tuffs Jr., who had refused to participate in the stock ownership plan, that Respondent wanted 100-percent participation in the plan. Tuffs replied that he could not afford it and was not interested. Horvath asked whether Tuffs' wife worked. Tuffs, who had

¹The complaint inaccurately gives this docket number as "18143."

two small children, told Horvath that she stayed home to look after the Tuffs' children. Horvath suggested that she should get a job so she could help out. Tuffs rejected this proposal. Then, Horvath told him that if he did not participate in the program, there would be a layoff and it would be Tuffs' fault. Between the beginning of 1985 and February 1986, Company Vice President Ronald Lindner, Company Treasurer Richard Lindner, and Operating Manager Glen Carroll (admittedly a supervisor) unsuccessfully tried to convince Tuffs that he should participate in the program.

In late 1987, during negotiations for a 3-year bargaining agreement to replace the agreement which was scheduled to expire in March 1988, Respondent proposed to substitute for the voluntary stock ownership program a compulsory profit-sharing program which was to be in effect for a 5-year period to begin in April 1988. The Union said that it could agree to such a proposal only if it was approved by a majority of the employees in a special referendum. Such a referendum was scheduled for December 18, 1987.

About December 11, 1987, Regional Manager Horvath and Operations Manager Carroll conducted a meeting of about 60 drivers, dockmen, and clerical workers at Respondent's Bedford Park facility. Carroll told the employees that if more than half the employees voted in favor of the profit-sharing plan, all the employees would be contractually required to permit a 12-percent deduction from their pay to go toward the plan. Carroll stated that in order to operate, Respondent needed the money which it would receive if the profit-sharing plan were made compulsory. Management also said that Respondent needed additional funds to support its expansion plan, and stated that several competing trucking companies had gone out of business.

Questions regarding the plan were addressed to Carroll by about 20 employees, including Bidwell, Tuffs, Denny Thomas, Charles Coleman, and Dale Miller. Carroll answered some of the questions, and ignored others. Bidwell, who asked the most questions, asked Carroll exactly what Bidwell's benefits would be, how much he would be contributing, what would happen to his contributions if he died while the plan was in effect, whether the plan had ever been submitted to any governmental regulatory agency for approval, and why (in view of the Union's wage concessions since 1982) participation in the plan had to be mandatory rather than voluntary. Carroll answered a few of Bidwell's questions, but avoided most of them. Coleman, who asked the second largest number of questions, asked why Respondent needed the money, in view of the fact (at least according to Coleman) that Respondent's owners also owned the leases on the terminals and, by raising rentals, could eliminate any profits which Respondent would otherwise receive. Coleman asked those who did not want the program to raise their hands, and almost all the employees raised their hands. Tuffs asked those who favored the program to raise their hands, and two did so. Tuffs told them that he needed his money to support and educate his small children. Toward the end of the meeting, Bidwell became angry. He told Carroll, "all of this is reversed Robin Hood economics. You are stealing from the poor and you are giving to the rich. And that is not the way things are supposed to be in this country." At this point, Bidwell walked out of the meeting for a few minutes.

On the morning of the Union's referendum, a petition drafted by Tuffs was circulated among the employees by

Bidwell, Tuffs, Coleman, Miller, and employees identified in the records as "Ed" and "Fred." More than 80 employees signed this petition. Tuffs offered it to Michael Zudycki, who at that time occupied the admittedly supervisory position of office manager; Zudycki said, "Get that thing away from me." The referendum was conducted at the terminal by Union Business Agent James Ramirez; the Union provided the ballot box and ballots for the vote, appointed employees to an election committee to serve as ballot watchers, and supervised the counting of the ballots. The profit-sharing plan proposal was defeated by a vote of 123 to 67.

During the subsequent negotiations, Respondent insisted that it needed the compulsory program for economic survival, and asked the Union to join in conducting another vote on the matter. The Union refused, but suggested that the program might be more palatable to the employees if its duration were no longer than the 3-year agreement then being negotiated and if it included a pay raise above whatever would be called for by the National Master Freight Agreement, which at that time was also under negotiation. Then, Respondent campaigned among the employees for the compulsory program, proposing a duration which was the same (3 years) as the bargaining agreement then under negotiation, and further proposing a wage increase of 35 cents an hour. Although refusing to participate in a second referendum, the Union did, through Union Steward George Leicht, furnish ballots and give advice on the proper voting procedures. The second referendum was conducted by Respondent on February 25, 1988, with about four-fifths of the eligible voters participating. The revised compulsory profit-sharing proposal was approved by a tally of 142 to 52. The Union accepted the vote and entered into a compulsory profit-sharing agreement.

After the February 1988 ratification vote, Bidwell and his attorney prepared form grievances eventually filed by at least 51 drivers, dockmen, and clerical employees. The grievances were directed against both the profit-sharing plan and the way it had been instituted. At a grievance meeting on April 27, 1988, before a 6-man joint management and union grievance panel, Bidwell stated that his money was his personal property, that he had the right to his personal property, and that the Union and Respondent did not have the right to enter into a collective-bargaining agreement deciding the disposition of his property. At this meeting, opposition to Respondent's plan was also expressed by about nine other employees, including Tuffs, Coleman, Jim Wydatt, Dominic Sentoro, and Alfredo Ricci. The grievances were deadlocked at that meeting, and were submitted to arbitration.

The compulsory profit-sharing plan became effective on April 1, 1988. More than 30 employees, including Bidwell and Tuffs, failed to cash the checks made out to them in connection with this plan.

In September 1988 an internal union election was held among the Union's 12 or 14 thousand members. Seven members ran on the "Eagle Slate," which opposed wage concessions in bargaining agreements; and which also opposed the implementation of compulsory profit-sharing plans, and compulsory stock-purchase plans, calling for compulsory deductions from the employees' pay checks. Four Eagle Slate candidates worked for employers other than Respondent; the remaining three were Respondent's employees Bidwell, Coleman, and Al Brown. Inferentially about the first week in Au-

gust 1988, Coleman and Bidwell asked Dispatch Manager Richard Blake for a leave of absence to run for union office. Blake approved both requests, but they had to be approved by Horvath as well. The record fails to show whether Coleman asked for Horvath's approval or received a leave of absence. About mid-August, Bidwell asked Horvath's approval for a 3-week leave of absence, explaining that Bidwell needed it in order to campaign adequately. Initially, Horvath said that Bidwell would have to submit a letter, explaining why he wanted a leave of absence, 10 days before starting it. However, when Bidwell said that his need was urgent and that he knew other employees who had started a leave of absence immediately, Horvath granted the leave of absence immediately. At that election, all the incumbents were re-elected. Bidwell, who received 400 fewer votes than his opponent, received 1465 votes, and was the top vote getter on the Eagle Slate. Bidwell testified before me that management paid no attention to him and his campaign, and basically, just avoided him. Dispatch Manager Blake, Bidwell's immediate supervisor, testified in substance before Judge Evans that Blake knew that Bidwell was running for office on the Eagle Slate but did not know until at least the beginning of 1989 what the slate stood for. Judge Evans credited, in effect, Blake's testimony that he had not known about what the Eagle Slate stood for.²

B. The September 1988 Bauldry-Blake Conversation Regarding the Profit-Sharing Plan

About the last week in August 1988, Respondent's drivers received their first profit-sharing checks, which averaged \$8 or \$9. The drivers joked among themselves about the size of these checks, which amounted to less than the amounts they had put into the program. Among the jokers was employee Donovan Bauldry, who had put in about \$20 a week for about 2 months and had received a profit-sharing check for \$1.88.

About late August or early September 1988, just before the union election discussed above, Dispatch Manager Blake, admittedly a supervisor, called Bauldry into the office and said that another driver had accused him of "bum rapping the company." Bauldry denied this. Blake said that Bauldry should not be criticizing the profit-sharing program, that "It was money that [Bauldry] would not have had anyway," but that Respondent needed it "for survival." Blake said that Bauldry's action in opposing and laughing at the profit-sharing plan "wasn't appreciated." Blake further said that Bauldry "should not associate with certain people who were opposing this profit-sharing plan" because "the Company needed it." Blake went on to say that because Bauldry was a "replacement driver," he could be terminated at will.³ Blake said that employee Richard Kubat, who had been discharged in early August 1988, was not working because he did not like the profit-sharing program. In addition, Blake said that if Bauldry associated with some other employees (whom Blake did not name) who had brought a proceeding

against Respondent and the profit-sharing plan, Bauldry would be terminated. Bauldry said that he knew Bidwell because they both engaged in the hobby of restoring old cars, and that Brown said hello to Bauldry every morning. Blake told Bauldry not to even say hello to Brown, that that could get Bauldry fired. Blake further said that "there were guys from" Respondent that were running for office in the Union, and that if they ever got into office it would not be good for the relationship between Respondent and the Union.⁴

C. The Unfair Labor Practice Proceeding in the Tuffs case

On January 6, 1989, an order was issued scheduling the Tuffs unfair labor practice hearing for Monday, April 24, 1989. The arbitration hearing on the previously mentioned grievances by Bidwell and others was conducted in downtown Chicago on January 10, 1989. After Ricci and Bidwell had testified at this hearing, Bidwell went to the Board's office, in downtown Chicago, and conferred with Board Field Examiner Yvonne Coleman. Coleman and Bidwell went over Bidwell's affidavit, which he had given in September 1988, and she advised him of the date on which the NLRB Tuffs hearing was scheduled. On April 10, 1989, the arbitrator denied the grievances in their entirety.

In the morning of Friday, April 14, 1989, Bidwell had a doctor's appointment. He called in sick that morning and received sick pay for the day; Respondent's counsel stated on the record in October 1989 that Bidwell sent the money back, but the record fails to show when he did so. Bidwell's medical appointment was in Maywood, Illinois, about 5 miles from Respondent's Bedford Park facility and about 10 miles from downtown Chicago. Bidwell's home in Lockport, Illinois, is about 30 miles from downtown Chicago. After keeping his doctor's appointment in Maywood, Bidwell drove to the Board's office in downtown Chicago, where he discussed the forthcoming Tuffs case with Andrew Iserson, counsel for the General Counsel at both the hearing before Judge Evans and the hearing before me. Between 1 and 3 p.m. that day, Iserson physically gave Bidwell a subpoena ad testificandum requiring him to appear at the Board's office in downtown Chicago at 11 a.m. on Monday, April 24. At this time, Iserson advised Bidwell that it was very possible that the hearing would take more than 1 day, and that Blake, who was Bidwell's immediate superior, had been subpoenaed and would be appearing for Respondent.

Bidwell had already made vacation arrangements to attend a Long Beach, California, reunion of veterans of the Viet

²Judge Evans found that Respondent entertained animus against employees who opposed the compulsory profit-sharing program, but further found that there was no evidence that Respondent had any hostility toward the activities in support of the Eagle Slate (see sec. E, below; sec. F,1, below). Cf. infra fn. 4.

³"Replacement drivers," who are used to fill in for absent "seniority drivers," do not accumulate bargaining unit seniority and cannot file grievances.

⁴My findings in this paragraph are based on Bauldry's testimony before me. When testifying for Respondent before me, Blake was not asked about this conversation with Bauldry. Before Judge Evans, Bauldry gave a rather similar version of this conversation with Blake, and further attributed to Blake the statement (not referred to in Bauldry's testimony before me) that Respondent would eventually "get" all the drivers who opposed the profit-sharing program and the program in general, and that they "wouldn't be working at the Company." Over Blake's partial denials, Judge Evans credited most of Bauldry's testimony regarding this conversation, including the testimony about the threats to all drivers who opposed the profit-sharing plan. Although Bauldry's version of this conversation to Judge Evans did not include any reference to the union election, I do not regard this omission as sufficient to warrant discrediting Bauldry's testimony about it before me, in view of Blake's failure to deny at either hearing the remarks which in October 1989 Bauldry attributed to him regarding the union election. Before the Board, Respondent did not except to Judge Evans' factual findings as to the Blake-Bauldry conversation.

Nam police action. His packed luggage was in the automobile which he had driven that morning from his Lockport home to the Chicago downtown area to confer with Iserson and perform other errands. After leaving the Board's office that afternoon, Bidwell drove to the Maywood, Illinois, office of his wife, who used his car to drive him to pick up his plane at O'Hare Field in northwest Chicago.⁵

On Tuesday, April 18, Bidwell attended a dinner, which was followed by a lecture, in Camp Pendleton, California. As discussed in greater detail infra, Respondent has a toll-free telephone number which drivers are permitted to use to advise Respondent if they are to be absent from work. Between the dinner and the lecture, Bidwell attempted to dial this number in order to advise Respondent that he would not be coming to work on Monday, April 24, because he had been subpoenaed to testify at the Board proceeding. He received a recording that this number was inaccessible from his dialing area. Bidwell admittedly did not know whether this inaccessibility was due to the fact that he was calling from a military base. He further admitted that he knew Respondent had an ordinary commercial number, and that a telephone was in the Chicago office where on the afternoon of April 14 he conferred with and received his subpoena from Iserson. Bidwell returned from California to his home at an undisclosed hour on Sunday, April 23. Except for his unsuccessful April 18 attempt to use Respondent's toll-free number, Bidwell admittedly made no effort, between his January 10 notice that the hearing would be held on April 24 and the morning of the hearing, to advise Respondent of his anticipated absence.

Drivers who are scheduled to work on a particular day but who are not going to report for work are supposed to advise Respondent at least an hour before their scheduled reporting time that they will be absent. Bidwell's scheduled reporting hour was 8 a.m. At about 6 a.m. on April 24, Bidwell telephoned Respondent from his residence. The telephone was answered by John Harper, who was then Respondent's dock foreman and whose Monday morning duties included receiving such calls from drivers.⁶ Bidwell asked Harper to advise Dispatch Manager Blake that Bidwell would not be in that day. Bidwell said that he was just coming off of vacation, that he had a subpoena to appear before the National Labor Relations Board, that he had been advised by the Board that he would likely be there 2 or more days, and that Bidwell would call Respondent and advise it of his status. Harper, who had been on duty since about 10 p.m. on April 23 and whose duties included loading and unloading trailers on the dock and supervising dockmen as well as answering the telephone in the office, replied, "That sounds like personal business to me," and abruptly hung up.⁷

⁵My finding that his flight left on April 14 is based on his credited testimony. At the request of Respondent's counsel, Bidwell went into the witness room to fetch his personal calendar, and gave his testimony about the date of the flight after inspecting the calendar, which according to Bidwell also gave the flight number and departure time. Although Respondent's counsel had the opportunity to inspect this calendar, he made no claim that it failed to show an April 14 departure date. Accordingly, I accept Bidwell's testimony that his departure date was April 14 notwithstanding the statement in his prehearing affidavit that he "left for vacation" on April 17. Bidwell's pay for this week of vacation began on April 17.

⁶Such duties are discharged by the dock foremen on Mondays because nobody is on duty in the office on Sundays or until 7 a.m. on Mondays.

⁷My findings as to the substance of this conversation are based on Bidwell's testimony and on statements in the grievance he filed in connection

Bidwell reached the Board office on April 24 at 8:30 or 9 a.m. He saw and greeted Blake in the hall. Blake was present throughout the hearing when the record was open, and saw Bidwell in the hall during the lunch break. During the first day of that hearing, April 24, Tuffs testified that Bidwell had participated in circulating the December 1988 petition which protested the proposed profit-sharing plan; Blake testified on April 25 that until April 24 he had not known anything about the petition. Also on April 24, Tuffs testified that the Eagle Slate opposed the compulsory profit-sharing and stock-purchase plans. As previously noted, Blake testified on April 25, 1989, before Judge Evans, in substance, that although Blake had known Bidwell had run for union office on the Eagle Slate, until at least the beginning of 1989 Blake had not known about such opposition by the Eagle Slate; and Judge Evans in effect credited his testimony in this respect.

Bidwell, who testified for the General Counsel on April 24, 1989, gave testimony at least purporting to support the Tuffs complaint allegation that Tuffs had been discharged in October 1988 because of his union and protected concerted activity in connection with his opposition to the compulsory profit-sharing program. Respondent was contending that truck driver Tuffs was discharged partly for accepting during a C.O.D. delivery a company check rather than (as instructed on the freight bill) a certified check, and for taking a coffee break at an unauthorized time. Truckdriver Bidwell testified that, without being disciplined, he had on occasion accepted a company check rather than (in accordance with written instructions) a certified check,⁸ and that a driver was permitted to take a coffee break before his first stop (as Tuffs had done) if he was on a "volume run" (as Tuffs testified he had been).⁹

Iserson rested in the Tuffs case in the afternoon of April 24, whereupon the hearing was adjourned until 9 a.m. on April 25. At about 4 or 4:30 p.m. that day, he came into the witness room, where were seated all of the four witnesses whom he had called that day, and told all of them that they would have to return to the Board's office at about an hour before trial time on the following day. Iserson told Bidwell

with his discharge, which grievance was offered by Respondent, and received into evidence, without limitation or objection. See *American Rubber Products Corp. v. NLRB*, 214 F.2d 47, 52-53 (7th Cir. 1954); *Today's Man*, 263 NLRB 332 (1982). I accept Bidwell's version of this conversation for reasons set forth, infra, part II.F.1. In thus crediting Bidwell, I am aware of his testimony that he had previously been advised that at the hearing Respondent would be represented by Blake, whom Bidwell (according to his testimony) nonetheless asked Harper to advise of Bidwell's status. However, the hearing was not scheduled to open until 11 a.m., several hours after Blake usually began his work day at Respondent's facility, and that facility is about 45 minutes from the Board's office.

⁸Bidwell was able to recall only one specific instance in the preceding few years where he did this without first checking by telephone with Respondent's office. Nowever, he testified that "quite frequently" during his 15 years of service, the customer did not have a certified check available, and that when Bidwell was unable to get through to Respondent for instructions, he would sometimes accept a company check if the amount involved was less than \$1000. Judge Evans' decision does not refer to Bidwell's testimony regarding acceptance of an uncertified check. However, this decision did not issue until almost 3 months after Bidwell's discharge.

⁹Finding that what constituted a "volume" run was "murky at best," Judge Evans concluded that a driver was permitted to take a coffee break before his first stop if, but only if, he was on a one-stop run. In so concluding, Judge Evans found that Bidwell's testimony corroborated Respondent's position that the timing of Tuffs' coffee break was improper because he was on a multistop run (see sec. D, below).

that there was a very good possibility that he would be called back to the stand.

Drivers who will be absent on a particular day, or who encounter difficulties on the road, are supposed to telephone Respondent's dispatch office. When making calls for such purposes, drivers are permitted to use a toll free line which is also available to special customers. When this toll free service is operating properly, the caller receives a tape recorded answer which tells him that to reach Respondent's dispatch office, he should punch in number 210 if he is calling from a pushbutton phone, and should wait for an operator if he is calling from a rotary phone. When a caller from a pushbutton telephone punches in number 210, the telephone is supposed to ring in the dispatch office. If the telephone remains unanswered after a given number of rings (about six), the call is supposed to be routed to the switchboard. After 8 a.m., the switchboard operator handles such unanswered calls on the toll free line from pushbutton telephones, and also handles all calls on Respondent's commercial line and on the toll free line from rotary telephones. However, because no switchboard operator is on duty before 8 a.m., after about six unanswered rings a tape recorded message, "Sorry, your party does not answer," is supposed to be received by any caller before 8 a.m., whether he used the toll free or the commercial line, and whether he used a pushbutton or a rotary telephone.

At about 6:15 a.m. on April 25, Bidwell used his home pushbutton telephone to call Respondent on its toll free number. He received the usual recorded instructions to punch 210. When he did so, he heard a very short ring and then received a recorded message, "Sorry, your party does not answer." A quarter or half hour later, and still using his home telephone, he called Respondent's toll free number again. He heard static and then a dial tone.¹⁰ He did not try to call Respondent again, either through its toll free line or through its commercial line, before his departure for the Board's office at 7:10 or 7:15 a.m. At that hour, he could not have reached the dispatch office through Respondent's commercial line, but there is no evidence that Bidwell knew this.

After a drive of about an hour and ten minutes, Bidwell reached the Board's office at between 8:15 and 8:45 a.m., at least 15 minutes after the arrival time required by Iseron. Bauldry, Tuffs, and Kubat were already in the witness room. Bidwell told them that he was a little late because he had tried to telephone Respondent a couple of times and had been unable to get through.¹¹ Then, he said that he would have to try to call Respondent. He went to a pushbutton pay

phone a few feet outside the witness room, punched in Respondent's toll free number, received the usual tape recorded instructions to punch 210, and then did go. An unfamiliar voice answered the telephone. Bidwell asked to speak to a dispatcher, whereupon Bidwell was put on hold. After remaining on hold for what he testified described as a "considerable amount of time" (his grievance says 8 to 10 minutes) and Bauldry described as "quite [an] amount of time," Bidwell hung up and returned to the witness room. He said that he had been unable to call Respondent, that he was being put on hold when he did reach Respondent, and that he was going to try again.¹² Then, he returned to the telephone, again punched in Respondent's toll free number, again received the usual tape recorded instructions to punch in 210, and again punched in 210. After the telephone had rung five or six times, he got a recording, "Sorry, your party does not answer." Then, he punched 210 again. After five or six more rings, he again received a recording, "Sorry, your party does not answer." Then, he hung up.¹³

Bidwell's efforts to reach Respondent's facility by telephone ended at 10 or 15 minutes to 9 a.m. Iseron told his prospective witnesses, including Bidwell, that once the hearing had begun, they were to stay in the area of the witness room and "not to be out wandering around." Bidwell stayed in the witness room between 9 a.m. and the lunch break. He made no further efforts that day to reach Respondent by telephone, which is right outside the door to the witness room. Of the witnesses called by Iseron during his case in chief, all but Bidwell (Iseron's only witness who still worked for Respondent) testified on rebuttal. However, Bidwell did not testify on that day.

The evidence conflicts as to whether Blake saw Bidwell at the Board's office on April 25. The August 25 hearing began at 9 a.m., broke at about 11:30 a.m. for lunch, and reconvened about 1 p.m. Bidwell, and the three witnesses (Tuffs, Bauldry, and Kubat) who were called by Iseron as rebuttal witnesses on that date, sat in a room reserved for the General Counsel's witnesses during almost the entire period when the hearing was in session that day, except when testi-

¹⁰My findings as to Bidwell's April 25 efforts to reach Respondent through his home telephone are based on his testimony, which gains some indirect corroboration from the absence of evidence that during his 15 years of employment with Respondent he had ever failed to give sufficient advance notice of an absence. Although Blake testified that Respondent had had no difficulties with its telephone system since about March 1988, when Respondent installed its current telephone system, he did not specifically deny Bidwell's credible testimony that about mid-March 1989, when he told Blake about being unable to get through to "dispatch" for 2 hours, Blake said that "we are having a problem with" the telephones.

¹¹My finding in this sentence is based on the testimony of Tuffs and Bauldry. Respondent objected to such testimony on hearsay grounds, to which the General Counsel responded that he was offering it for a nonhearsay purpose. In view of this colloquy, I do not rely on such testimony to show that Bidwell in fact made such efforts to telephone Respondent. Cf. Rule 801(d)(1)(B) of the Fed.R.Evid., referred to by me at the hearing but not referred to by counsel.

¹²My findings as to the occasion when Bidwell was put on hold are based on the testimony of Bidwell and Bauldry, which I credit notwithstanding the testimony of Blake and volume dispatcher Michael Hanlon that after a line in the dispatch office is on hold for 2 minutes, a beeping ground comes on the telephone "and it has to be picked up." Respondent's pushbutton toll free service had not been operating normally that day, and, in any event, a man who is standing at a pay phone in a hallway a few minutes before a hearing at which he may testify might well overestimate the length of time he has remained on "hold." Hanlon, who was on duty in the dispatch office on the morning of April 25, denied receiving a call from Bidwell that morning. However, Bidwell testified that the telephone had been answered by an unfamiliar voice, Hanlon testified that he had spoken to Bidwell often enough to recognize his voice, and Respondent unexplainedly failed to call as a witness Ray Latza, the other dispatcher on duty that morning, whom Respondent considers to be a supervisor and who was still in its employ at the time of the hearing.

¹³My findings as to Bidwell's efforts to reach Respondent after he reached the Board's offices are based on his grievance and his testimony, partly corroborated by Tuffs and Bauldry. Bidwell's testimony varied as to whether he was put on hold during the first or during the second call. Except to the extent bearing on his credibility, this variance is immaterial. Respondent contends that as to Bidwell's efforts to reach Respondent from the pay telephone, the testimony of all three is impeached by their further testimony that neither Tuffs nor Bauldry explained to Blake (whom Tuffs and Bauldry saw that day in the Board's offices), or suggested that Bidwell explain to Blake, why Bidwell was not at work. However, Blake's failure to see Bidwell that day was an unlikely fortuity, and I credit Bauldry's testimony that at least he believed Blake saw Bidwell. Moreover, Bidwell's efforts to reach Respondent ceased on the resumption of the hearing that morning.

fying or in the men's room. A person who proceeded between the hearing room and the men's room or the elevator bank had to pass by the door to this witness room. Blake was in the hearing room at all times when the hearing was in session. I accept Blake's testimony that he did not see Bidwell at the Board's offices on April 25. Credible parts of the testimony of Blake, Tuffs, Bauldry, and Bidwell do show that at the beginning of the lunch break Blake (preceded by Judge Evans and then by company attorney, Leonard R. Kofkin) went by the witness room at a time when the door was open and Bidwell was sitting in the witness room in a position where he was visible through the doorway.¹⁴ However, in the absence of corroboration by Tuffs, I do not accept Bauldry's testimony that Blake in fact looked into the room.¹⁵ Further, in the absence of corroboration by Bidwell, I do not accept Bauldry's or Tuffs' testimony, denied in effect by Blake, that the three employees were congregated outside the doorway to the hearing room when Blake left it on the close of the hearing. Nor do I credit Bauldry's uncorroborated testimony, denied by Blake, that Blake passed by the witness room, when it was occupied by Bauldry and Bidwell and the door was open, "about five times that day minimum."

D. Bidwell's Discharge

The hearing before Judge Evans closed at about 3:30 or 4 p.m. on April 25. Bidwell's work shift ended at 4:30 p.m., and he did not return that day to Respondent's terminal, which is 45 minutes from the Board's Chicago offices. However, after the hearing had ended, Blake did return to the terminal. He testified that when he arrived, he checked "the sheet" to see who was off that day, April 25.¹⁶

On the morning of April 26, Bidwell arrived at the terminal between 7:30 and 7:45 a.m., and found that his timecard was not in the rack. He pointed this out to Blake, who said that he would take care of it and, "Don't worry about it. See me at 8 o'clock." Then, Bidwell got a driver's tripcard, punched it, put it into his pigeonhole mailbox, and went downstairs to drink a cup of coffee. At 8 a.m., Bidwell's starting time, he again looked at the timecard rack, and found that he still did not have a timecard.¹⁷ When he drew this to the dispatcher's attention, the dispatcher said that he did not have a load for Bidwell at that time, that Bidwell should get a cup of coffee, and that when there was a load for him the dispatcher would call Bidwell on the intercom. Bidwell did so.

At about 8:10 or 8:15 a.m. Blake used the intercom to call Bidwell to "dispatch." When Bidwell reported there, Blake

¹⁴For demeanor reasons, I do not accept Blake's testimony that at this time the door to the witness room was shut.

¹⁵Bidwell's May 5, 1989 grievance and his prehearing affidavit of May 4, 1989, stated that he had seen Blake look into the witness room. Bidwell's May 11, 1989 prehearing affidavit stated, "after further thought, I cannot say for sure that I did see him. Instead, I recall now that I saw someone go by the door of the witness room and asked Danny Tuffs who that was, and he told me he thought it was Blake." Tuffs denied making such a remark to Bidwell. Bauldry testified to having "probably" made such a remark to Bidwell, but this was not corroborated by Bidwell or Tuffs.

¹⁶The significance of the quoted words is discussed, *infra*, part II,F,1.

¹⁷Blake testified that on April 25, he put on Bidwell's timecard the notation "no call no show." As noted in the text, Bidwell did not see his timecard on April 26; nor did he see it, so far as the record shows, at any time after this notation was allegedly entered on it. The timecard was not offered into evidence, nor was its absence explained; see *infra*, part II,F,1.

told him that labor specialist William Close (admittedly a supervisor) wanted to see Bidwell in Close's office. Then, Bidwell proceeded to an office where Close and Blake were present.¹⁸ Close testified before me that Blake had told him on April 25 that Bidwell had testified at the Board on April 24.¹⁹ When Bidwell entered the office, he said, "I understand you want to gee me," whereupon Close "just looked at" Bidwell. Then, Bidwell said, "I am Harry Bidwell. I understand you want to talk to me." Close asked him to sit down; Bidwell said that he was more comfortable standing. Close said that there was a problem, that Bidwell had called in sick Monday (April 24) and that on Tuesday (April 25) he had not shown up for work or telephoned to advise Respondent of his status. Bidwell said that on both Monday and Tuesday he had been at the National Labor Relations Board, and that he had been subpoenaed to appear as a witness on behalf of Tuffs. Bidwell went on to say that on Monday, April 24, he had reached someone at Respondent's facility who had identified himself as a dock supervisor named John, and that Bidwell had told him that Bidwell had a subpoena from the NLRB to testify that day, the hearing would likely take 2 or more days, and he would call Respondent advising it of his status. Bidwell further said that on Tuesday, April 25, he had repeatedly telephoned Respondent from home without being able to get through. Bidwell said that later that day he had reached someone at Respondent's facility who (he thought) was Jerry Meyers, a driver whose doctor had put him on light duty and who was working in the dispatcher's office. Bidwell said that the supposed Meyers had put him on hold, and he had hung up when he had to go to the witness room. Close said that Respondent had no record of Bidwell's being under subpoena, and that Bidwell had called in Monday, April 24, saying he was sick. At Close's request, Bidwell then left the office. There is no evidence that Blake said anything during this conference.²⁰

About 5 minutes later, Terminal Manager Thomas Harper (admittedly a supervisor, but no kin to then Dock Foreman John Harper) went into the office where Bidwell had left Close and Blake. A few minutes later, Close and Thomas Harper went to the latter's office, into which Blake escorted Bidwell. Close told Blake to fetch Union Steward Leicht. After Leicht had arrived, Harper told Bidwell that he was being suspended "pending investigation." Bidwell asked why he was being suspended. Harper said that Bidwell was being suspended for failure to follow instructions. Bidwell asked what instructions he had failed to follow. Harper said that Bidwell had failed to call in the previous morning. Bidwell said that he had been subpoenaed by the NLRB to appear as a witness. He further said that on April 24 he had so advised a dock foreman named John, and had also told

¹⁸My finding that Blake was present is based on Close's testimony and Bidwell's grievance, which, because it was closer in time to the event than was Bidwell's testimony, I believe to be more reliable than his hearing testimony that Blake was not there. Blake's testimony at least implies that he was not there. Close testified that Thomas Harper was present during this conference. Because of ambiguities in Harper's testimony as to this matter, I accept Bidwell's denial.

¹⁹For reasons set forth, *infra*, part II,F,1, I do not credit Close's testimony in this respect. However, for reasons there indicated, I find that by the time that this conference began, Close knew that Bidwell had testified on April 24 and had been at the Board's offices on April 25.

²⁰My findings as to this conversation between Close and Bidwell in Blake's presence are based on a composite of Bidwell's grievance and credible parts of his and Close's testimony.

“John” that the hearing would likely take at least days. Bidwell went on to say that he had tried to telephone Respondent the previous morning at about 6:30 a.m. from his home, and had also tried to telephone Respondent later that morning but had been unable to get through except on one occasion, when he had been left on hold by someone who he thought was Meyers. Then, Bidwell asked Leicht for the Union’s position on Bidwell’s suspension. Leicht shrugged, and said that under the circumstances this was a normal procedure. Bidwell said that he wanted Respondent to give him immediately a letter stating the reason for his suspension. Close said that he would send Bidwell a certified letter.²¹

Later that morning, management decided to terminate Bidwell. At about 11 that morning, Bidwell telephoned Union Business Agent Ramirez, and told him that Respondent had suspended Bidwell. Ramirez asked why. Bidwell said, “Failure to follow instructions.” Ramirez asked what had happened. Bidwell said that he had been “petitioned” to appear on Tuffs’ behalf at the Board, that Respondent said Bidwell had not called in on April 25, and that Bidwell had tried to call in but had not been able to get through to anyone. Ramirez put Bidwell on hold and telephoned Close, who said that Respondent had decided to discharge Bidwell. At Ramirez’ request, Close agreed to meet with him and Bidwell on the following day, April 27. Then, Ramirez picked up on Bidwell’s line, told him that he had been discharged, and, inferentially, advised him of the arrangements to meet Close on April 27.

On the following day, Close met with Bidwell, Ramirez, and Leicht. During this meeting, Bidwell again said that he thought the person who had put him on hold on April 25 was Meyers, and someone accurately said that Meyers had not been on duty that morning. Also during this meeting, Bidwell asserted that Blake had seen him at the Board’s office on April 25. Close thereupon called in Blake, who said that he had seen Bidwell on April 24 but not on April 25. Close testified that those present “reviewed the facts again in reference to what had transpired the previous two days. And there didn’t seem to be any really new evidence or things that I hadn’t heard before. So I advised [Ramirez] that basically we would have to go to grievance hearing on it to get them to make a decision.”

Regional Manager Horvath testified before Judge Evans on April 25, 1989, that “recently,” Respondent’s main office had arranged for computerized files which enabled management to “pull up” all of the reprimands and letters of warning issued to any individual employee. Two or three days after being orally advised of his discharge, Bidwell received by certified mail the following letter from Close, dated April 26:

LETTER OF DISCHARGE

Mr. Bidwell:

On April 24, 1989, you called in to the Terminal advising that you were sick and would not be at work. You made no reference to your illness being extended beyond that day. On April 25, 1989, you failed to show up for work or call in.

²¹ My findings in the paragraph to which this footnote is attached are based on a composite of Bidwell’s grievance and credible parts of the testimony of Bidwell, Close, and Blake. Harper was not asked what was said at this conference.

You have had previous warnings for failure to follow instructions. You were warned and suspended on October 21, 1988 for failure to follow instructions. On November 16, 1988, you were sent a warning letter for failure to follow instructions. On November 17, 1988, you were advised of a one day suspension for failure to follow instructions.

The above record indicates your lack of concern in following Company instructions and you leave us no alternative but to discharge you for the above offense, effective immediately.

Close testified before me that “really contractually” Respondent could discharge employees for three infractions within a 9-month period. Later, he testified that the bargaining agreement says “you only need one prior warning unless it is for intoxication or drugs.” He went on to testify:

Q. [by counsel for the General Counsel] When you refer to one prior warning, one prior warning for what type of offense?

A. For anything. You know say an accident, whatever. For no show, no call.

Q. You are referring to more egregious offenses then aren’t you when you are talking about they can be fired for one offense if it is intoxication?

A. Well, that you don’t need a prior warning.

Q. Okay.

JUDGE SHERMAN: It is your position that except for egregious offenses you can have one warning for one offense and for another a second entirely different offense the employee can be discharged?

THE WITNESS: If it is within a category such as failure to follow instruction. Yes, Your Honor. Such as a daily trip card. Let’s say they fill that out wrong. We spend a lot of time telling them how to fill this card out and go forth. Eventually, somebody just doesn’t care to fill it out correctly. We send them a warning letter on that. That is failure to follow instructions. If you don’t call in or show up for, that is very clearly stated a serious offense. We send them a warning letter for that.

Close went on to testify that except for egregious offenses (such as intoxication, drugs, burning a building, or maliciously hurting someone else), Respondent’s policy (somewhat more liberal than permitted by union contract) has been to give a warning, then a suspension, and then discharge.

Regional Manager Horvath, who did not testify before me, testified before Judge Evans that Respondent observes the following procedure for issuing disciplinary letters to drivers:

we will take dispatch for an example If [Blake] finds there is an absenteeism or tardy problem. Or a problem with the driver out in the street, he would research the individual’s folder If [the driver has done it before he would be issued a letter. We have a process of three letters for the union contract. Three letters would result in a termination for any one item. Failure to follow instructions, or tardiness, or absenteeism. And that has to be within the nine month period.

However, Blake testified as follows before Judge Evans:

A. 710's policy is that you cannot suspend a driver or terminate a driver, unless he has got three offenses for the same three letters for the same offense. Now I can be tardy today. I can be absent tomorrow. I can get in an accident the week after and be issued three letters. But I am not suspended or day off because they are three different offenses. Now if I get another letter for absenteeism within six months say I get two more, I can get suspended and terminated.

If I have a couple of more accidents within the six month period you are issued a letter and you get terminated. But I have four different letters but nothing will come of it because they are not the same offense.

Q. [by Respondent's counsel] What is the significance then of the phrase that we have seen in a number of documents called, "Failure to follow instructions?" Does that make it a continuance single one type of offense?

A. Yes, it does. It is the same offense time and time again.

Q. And consistent with 710's policy, the union policy, you understand that you are in a position to terminate?

A. We can terminate them after three letters. Within a six month period though. If it is over six months, you can't.

Q. [by counsel for the General Counsel] Mr. Blake, consistent with 710's policy then regarding then how many disciplinary warnings are required before an employee can be terminated. It is true isn't it that an employee who receives nine disciplinary warnings, as long as each one relates to a completely different incident that that person need not be terminated?

A. It all depends how they categorized it. Failure to follow instructions. You have to watch it. There are so many things that that could be under.

Q. Let's say if each category was separate and distinct for each warning then for each other warning.

A. It is very possible, but there aren't that many occasions where you can get nine different letters. There aren't nine different things you can do.

Q. Let's take it down to four letters. If an employee got four warning letters and each one was completely unrelated to the other warning letter, separate incidents. That employee would not be terminated.

A. If they are different, yes. Definitely he would not.

Q. Then your ability to terminate an Advance employee depended upon how you categorized each offense that that driver was charged with.

A. If it was a repeated offense, yes.

Judge Evans found, "Blake testified . . . that Respondent and the Union have an agreement that employees who commit three violations of the same rule within a 6-month period are subject to discharge." Respondent did not except to this finding and in August 1989, more than 2 months after the issuance of the instant complaint as to Bidwell, stated in connection with Respondent's contention that Tuffs was lawfully discharged, "The Judge [Evans] found that Respondent's uncontradicted policy is to subject to discharge employees who commit violations of the same rule within a six month

period" (see R. Br. 15 to the Board in the *Tuffs* case).²² Nevertheless, Respondent's brief to me states, "it is erroneously noted that a six-month period applies, rather than nine months." (As noted, before Judge Evans Blake three times testified to a 6-month period. However, before Judge Evans Horvath testified to a 9-month period, as did Close before me.) The October 21, 1988, warning/suspension referred to in Bidwell's discharge letter was issued by Blake more than 6 months, but less than 9 months, before April 24, 1989. That October 21 warning letter, of which Close and Horvath were sent courtesy copies, read, in part:

SECOND WARNING LETTER WITH ONE DAY SUSPENSION

On August 1, 1988 you were issued a warning letter for tardiness.²³ Again on October 21, 1988 you were late for work.

This letter is your warning for the offense and carries with it a one day suspension. The day of suspension is Monday, October 24, 1988.

Be advised that your failure to follow instructions in the future will subject you to stronger disciplinary action up to and including discharge.

The November 16, 1988 warning letter referred to in the discharge letter was also issued by Blake with courtesy copies to Close and Horvath, and stated, in part:

WARNING LETTER FAILURE TO FOLLOW INSTRUCTIONS

A review of your daily trip card on November 15, 1988 indicates that you failed to show your last delivery, your lunch period and where taken, your coffee break is also not shown.

You have been instructed in the past on filling this form out properly. This is a warning letter for failure to follow instructions. Further violation of failure to follow instructions shall result in more severe disciplinary action up to and including discharge. Please govern yourself accordingly.

The November 17, 1988 warning letter referred to in the discharge letter was also issued by Blake with courtesy copies to Close and Horvath, and stated, in part:

ONE DAY SUSPENSION FAILURE TO FOLLOW INSTRUCTIONS

A review of your tachography for November 15, 1988 indicates that you took an unauthorized stop from 4:00 pm to 4:30 pm.

You have been previously instructed in reference to unauthorized stops.

This letter is to advise you that you are being suspended for one day. That day being Friday, November

²² However, as to *Tuffs*, whether the relevant period was 6 months or 9 months would appear to be immaterial to Respondent's case.

²³ The August 1 letter, also issued by Blake, was captioned "Warning Letter Tardiness" and stated, inter alia, that the warning was "for excessive tardiness and . . . future violations of this nature could result in more severe disciplinary action, up to and including discharge."

18, 1988. Future incidents of failure to follow instructions shall result in more severe disciplinary action.

Govern yourself accordingly.

Bidwell also received a warning letter from then Office Manager Zudycki (with a courtesy copy to Horvath) on March 18, 1988, for "excessive absenteeism" with respect to four dates between December 1, 1987, and March 18, 1988. The letter stated, *inter alia*, that "future violations of this nature could result in more severe disciplinary action." On August 9, 1988, Bidwell received another warning letter, signed by Blake with courtesy copies to Close and Horvath, for "excessive absenteeism . . . since April 1, 1988," citing eight dates between April 6 and July 13, 1988. This letter stated, *inter alia*, "a continued practice will result in further disciplinary action up to and including discharge." Respondent makes no contention that either the March 18 or the August 9 letter played a part in the discharge decision. The August 9 letter was issued less than 5 months after the March 18 letter but did not refer thereto. Nor was either the March 18 or the August 9 letter referred to in any of the warning notices which (Respondent contends) form part of the basis for the discharge decision.²⁴

Bidwell filed grievances with respect to an undisclosed number, but not all, of the warning letters and suspensions he received between August 1, 1988, and his April 1989 discharge. All these grievances were denied. On undisclosed dates between his October 1973 date of hire and August 1, 1988, he received two warning letters because of motor vehicle accidents. No contention is made that these two warning letters had anything to do with his discharge.

In July 1987, Respondent wrote the following letter to Union Business Agent Ramirez, with a copy to, *inter alia*, Union Steward Leicht:

Due to the amount of tardiness and failure to call in at least one hour before an intended absence the following guidelines are being posted:

- 1st. Offense—Warning letter
- 2nd. Offense—Final warning letter with one day suspension
- 3rd. Offense—Discharge.

Close testified that this was Respondent's policy of progressive discipline, that it was enforced "all of the time," and that it was in effect when Bidwell was terminated.

E. *Aftermath*

As previously noted, Bidwell filed the instant charge with the Board on April 27, 1989, the day after his discharge. On May 5, 1989, he filed a grievance, with respect to his discharge, under the Union's bargaining agreement with Respondent. Thereafter, his grievance came before the contractually established grievance committee, which deadlocked the case to arbitration. At the Union's request, a scheduled arbitration hearing on the grievance was canceled because of the

pendency of the instant Section 8(a)(1), (3), and (4) complaint.²⁵

In May 1988, regional manager Horvath had posted a notice that an employee who missed work because of being sick would automatically be paid sick pay (if he had it coming) for that day, unless he notified his supervisor and marked his timecard "sick no pay." As previously noted, when Bidwell reported to the terminal on the morning of April 26 after his absence on April 24 and 25, his timecard was not in the rack; that same morning, he told Close, Blake, and Harper that Bidwell had not called in sick on April 24; and later on April 26, Respondent decided to discharge him. On an undisclosed date, Respondent paid Bidwell for April 24. Respondent's counsel stated on the record (about 4-1/2 months after Bidwell's discharge) that he had sent the money back. The record fails to show when he did so.

As of April 24, 1989, Respondent's active employees included "Fred," who had participated with Bidwell in the December 1987 circulation of a petition against the compulsory profit-sharing plan, and Brown, who (like Bidwell) had run for union office on the Eagle Slate. Bidwell testified on October 5, 1989, more than 5 months after his discharge, that so far as he knew, Respondent's active employees still included Thomas, who (like Bidwell) had asked questions during management's December 1987 meeting about the profit-sharing plan, Wydatt and Sentoro, both of whom (like Bidwell) during the April 1988 grievance meeting had expressed opposition to the profit-sharing plan, and Ricci, who had expressed such opposition at that meeting and (like Bidwell) had testified for the grievant at the January 1989 arbitration hearing protesting that plan. Also on October 5, 1989, Bidwell testified that Miller (who had participated with Bidwell in circulating the petition against compulsory profit-sharing, and like Bidwell had asked questions during management's December 1987 meeting about the matter) was still in Respondent's employ when Bidwell was terminated in April 1989, but that Bidwell had heard "rumors" Miller was no longer with Respondent.

As previously noted, Judge Evans' Decision issued on July 18, 1989. He found that Respondent's discharge of Bauldry and Kubat did not violate the Act. However, Judge Evans found that Respondent did violate the Act by discharging employee Tuffs because of his protected concerted activity of opposing the compulsory profit-sharing program; by creating an impression to employee Bauldry (through Blake) that the employees' protected concerted activities in opposition to the compulsory profit-sharing program were under surveillance; by threatening Bauldry (through Blake) that employees would be discharged, and employee Kubat would lose job advancement, because of opposition to the compulsory profit-sharing program; and by instructing Bauldry (through Blakenot to associate with other employees because of their opposition to that program. Respondent reinstated Tuffs on an undisclosed date between April 25, 1989 (the second day of the hearing before Judge Evans) and October 5, 1989 (the first day of the hearing before me). At the time that the instant decision was signed, Judge Evans' decision was pending before the Board on exceptions by the General Counsel, Respondent, and Bauldry.

²⁴In making my credibility findings, I have taken into account Bidwell's testimony, before Respondent had these absenteeism warnings marked for identification, that he had never had a problem with his absenteeism record.

²⁵*Cf. Superior Forwarding Co.*, 282 NLRB 806 fn. 1 (1987); *Postal Service*, 282 NLRB 686, 693-694 (1987).

F. Analysis and Conclusions

1. The April 24 conversation between Bidwell and John Harper, and related matters

At the outset of the hearing, Respondent's counsel expressly disclaimed any contention that Respondent discharged Bidwell because, when telling Dock Foreman John Harper on April 24 that Bidwell was not going to report to work that day, he allegedly gave the false explanation that he was sick. However, for reasons which will appear, whether Bidwell made such a representation to Harper nonetheless presents an issue significant to the result here.

As previously indicated, I accept Bidwell's testimony that he told Harper that Bidwell would not be in that day because he was under subpoena to appear before the Board, that he had been advised by the Board that he would likely be there 2 or more days, and that he would call Respondent and advise it of his status. I do not accept Harper's testimony that Bidwell said he would be absent because he was sick and made no reference to possible absence on subsequent days. Even disregarding Bidwell's credited testimony that he had previously been informed by Iserson that Bidwell's immediate Supervisor, Blake, was going to attend the NLRB hearing, Bidwell must have realized that he would be observed by a representative or representatives of Respondent when he was testifying, and that his action in this respect would have shown Respondent that his absence was not in fact due to illness and have caused Respondent to suspect, at the very least, that his illness claim was due to a desire to cheat Respondent out of pay for that day even though he was not entitled thereto.²⁶ Furthermore, Blake testified before Judge Evans that in order to assist Respondent in deciding how many replacement drivers must be called in for a particular morning, the dispatcher will "make up an absentee form *the day before*. We know who is on vacation. Who is off on job injury. *Who may be off the following day*, on birthday anniversary, miscellaneous absenteeism" (emphasis supplied). Notwithstanding John Harper's denial of Bidwell's testimony that he told Harper on April 24 that Bidwell was under subpoena and would likely be absent on April 25 as well, Respondent unexplainedly failed to offer into evidence the copy of this form prepared on April 24 to help Respondent determine how many replacement drivers to call in for April 25. Moreover, although Close routinely sees every morning a single-page "absentee report" which includes the dispatchers' compilation of every "office form" prepared by the dock foreman for each driver who called in that morning to say he would be absent,²⁷ Respondent unexplainedly failed to offer into evidence this compiled "absentee report" for April 24. Further, although both the anticipatory "absentee form" and the compiled "absentee report" are prepared by the dispatchers, whom Respondent regards as supervisors, when calling dispatcher Hanlon as a witness Respondent did not ask him what entry as to Bidwell had been made on ei-

²⁶ Respondent's drivers' manual states, "Do not use illness claims as a method of taking time off from work. Proven false claims of illness . . . will result in disciplinary action."

²⁷ The term "office form" was used by former dock foreman John Harper. For the purposes of clarity, this term will be used herein to refer to such forms, even though they are headed "Employee Absentee Report." The compilation is referred to in the record as the "absentee report," and will be so referred to herein.

ther report, and did not call as a witness either of the other dispatchers who were on duty on April 24.²⁸ Moreover, although Close testified that the notation made by the person who receives a call, which notation states that a driver called in and the reason why he was not going to come to work, is transferred to the driver's personnel file and "into the computer," Respondent failed to produce either the relevant portions of Bidwell's personnel file or the relevant computerized records.²⁹ I infer that these records, if produced, and the testimony of these dispatchers, if adduced, would have shown that according to such records, on April 24 Bidwell gave attendance under subpoena at the Board hearing as the reason for his absence and said that for this reason, he would likely be absent on April 25 as well. Further, I infer, from Respondent's failure to produce Bidwell's timecard for April 25 or the "sheet" whose April 25 examination by Blake allegedly led him on April 25 to write "no call no show" on the timecard, that such documents would have impeached Blake's testimony that he made that notation.³⁰

In view of the foregoing, and for demeanor reasons, I do not accept John Harper's testimony that on April 24, and without making any reference to April 25, Bidwell advised him that Bidwell "would be off today. He would be sick. Please inform Rick [Blake] in dispatch." Although Harper was no longer in Respondent's employ at the time of his October 1989 testimony before me, he was in Respondent's employ when Respondent tied down his testimony by inducing him (through Close and Office Manager JoAnne Budnick) to sign under oath a statement, typewritten by her, which in some respects corroborated the testimony which he gave before me.³¹ It is true that Respondent offered into evidence a purported "office form" for Bidwell on April 24 (in this connection, the only document offered by Respondent which even resembles an ordinary business record) which states that he had called in sick on that day and bears Dock Foreman Harper's purported signature. It is also true that when called by Respondent, Harper testified that this "office record" was an accurate transcription, made in accordance with ordinary business practice, of a notation which, in accordance with ordinary business practice, he put on a blank pad of paper upon receiving Bidwell's telephone call and was destroyed after being transcribed. However, Respondent unexplainedly failed to call as a witness Dock Foreman David Hoffner,

²⁸ One of these dispatchers was Ray Latza, who at the time of the hearing was still working for Respondent as a dispatcher. However, the third individual on duty in the dispatch office may have been rank-and-file employee Neyers, a driver temporarily assigned to work there for medical reasons.

²⁹ Close testified that after these transfers were made, "I would assume sometime after that the record [prepared by the person who received the call] is no longer necessary." It is unclear whether he was referring to the office form. As discussed *infra*, Respondent offered into evidence a purported office form for Bidwell on April 24. At the hearing before Judge Evans on April 25, 1989, the day before driver Bidwell's discharge and a week before Respondent received his charge, Respondent produced a company record which showed (*inter alia*) the reasons for all absences of each regular driver for various periods in 1988. See Tr. 209-210, which was received as an exhibit in the instant case.

³⁰ *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 173-174 (1973); *NLRB v. Dorothy Shamrock Coal Co.*, 833 F.2d 1263, 1269 (7th Cir. 1987); *Zapex Corp.*, 235 NLRB 1237, 1239 (1978), *enfd.* 621 F.2d 328 (9th Cir. 1980).

³¹ Harper's typewritten statement times Bidwell's call as "approximately 6:00 a.m."; the slip handwritten by Dock Foreman David Hoffner which allegedly constituted a transcription of the note which Harper made immediately upon receiving Bidwell's call times the call as 6:50 a.m.; and Harper's testimony gives the time as approximately 6:30 a.m. See also, material attached to fn. 32, *infra*.

who according to Harper wrote Harper's name on and otherwise filled in this "office form." Nor did Respondent call as a witness any individual who would have been able to testify whether this "office form" had in fact been preserved in Respondent's records as a matter of business routine; indeed, Close's testimony suggests that such documents are ordinarily destroyed (see *supra* fn. 29). Furthermore, a sham document of this kind would be easy to prepare, and John Harper, who authenticated the document, had necessarily seen a number of "office forms" during the 9 or 10 months he worked for Respondent as a dock foreman; indeed, at the hearing Harper's recollection of the purported Bidwell "office form" was so poor that before seeing it, he inaccurately testified, "My name is not on it, I don't think." Moreover, the suggestion that Dock Foreman Harper's April 26, 1989, notarized statement constituted merely a memorialization of his own honest, disinterested, and independent recollection is undermined by Respondent's failure to call Office Manager Budnick to explain why, in typing that statement, she included the indicated underlining in the statement that Bidwell "told me he would be off Monday because he was sick. He also told me to inform Rick Blake in dispatch that *he would not be in Monday.*"³² This underlining, which was not proposed by Harper, seems crafted to anticipate Respondent's eventual contention that Bidwell was discharged at least partly because of his admitted failure to call in on April 25 that he would be absent on that day, and to meet Bidwell's claim that his admitted call on Monday, April 24, alerted Respondent to his probable absence on Tuesday, April 25, because of his subpoena.

My finding as to what Bidwell told Dock Foreman Harper on April 24 is to some extent supported by certain peculiarities in the testimony of Respondent's witnesses. Thus, although Close testified that after the April 26 meetings with Bidwell Close asked Dock Foreman Harper about his alleged "sick" note regarding Bidwell, Harper did not testify to any conversation with Close on April 26.³³ Moreover, Close testified that his "investigation into the situation" began on April 25 because of the alleged "no call no show" notation on the compiled April 25 "absentee report" which he saw that morning, and that Blake told Close later that afternoon that Bidwell had testified at the Board on April 24—allegedly, Close's first information that Bidwell had testified at the Board. If Close had in fact been conducting a good-faith investigation of a genuine Bidwell April 25 "no call no show" notation and in the course of that investigation had in fact learned for the first time, from Blake, that Bidwell had been absent on April 24 because he had testified before the Board, it would have been natural for Close to ask Blake (who had thus shown himself knowledgeable about the events at the April 24 hearing, and who Close must have known had just come in late because of attendance at the hearing on April 25) to ask whether the allegedly "no call no show" Bidwell had attended the hearing on April 25 as well as April 24. However, Close did not testify to asking

such a question. Moreover, Blake did not corroborate Close's testimony about this alleged April 25 conversation. Accordingly, I do not credit Close's uncorroborated testimony about his alleged April 25 conversation with Blake. Also, I note that although Close testified to having asked Regional Manager Horvath (who on April 25 testified for Respondent before Judge Evans) on April 26 whether Horvath had seen Bidwell at the Board office the previous day, Close did not testify in terms to what Horvath told him and Horvath unexplainedly did not testify before me.

Furthermore, in view of Respondent's failure to produce either the compiled April 24 absentee record seen by Close that morning or the form prepared that day to anticipate the number of replacement drivers to be called in on April 25, and in view of my finding as to what Bidwell told Dock Foreman Harper on April 24, I do not credit Close's testimony that this compiled April 24 record stated that Bidwell had called in sick, or his and Harper's testimony that Harper so advised Close. Rather, I find that the compiled April 24 absentee record which Close saw that morning accurately reflected what Bidwell had told Harper—that is, that Bidwell would be absent that day because he had a subpoena to appear before the Board and would likely be absent on April 25 for the same reason—and that Harper accurately related to Close what Bidwell had told Harper. See cases cited *supra*, fn. 30. Finally, in view of my inference as to what was shown on the compiled April 24 absentee report which Close saw that morning, Close's untruthfulness about the alleged Close-Blake conversation on April 25, and for demeanor reasons, I do not credit Close's gratuitous concomitant testimony that this was his first information that Bidwell had testified before the Board.³⁴

2. Whether Bidwell's discharge was unlawful

Briefly, the credited evidence shows as follows:

At various times between February 1986 and about September 1988, Respondent expressed the view that a compulsory stock-purchase or compulsory profit-sharing plan was necessary to Respondent's survival. During an employee meeting conducted by Respondent about December 11, 1987, Bidwell stated that a compulsory profit-sharing plan would constitute "stealing from the poor and . . . giving to the rich." After Respondent's compulsory profit-sharing proposal was nonetheless ratified by the employees and accepted by the Union, Bidwell initiated grievances about the matter and stated at the subsequent joint grievance meeting that the Union and Respondent did not have the right to enter into such an agreement; opposition to the plan was also expressed by other employees at that meeting. In late August or early September 1988, just before an internal union election where employees Bidwell and Brown were to Blake's knowledge running on the Eagle Slate against the incumbent union officials, Dispatch Manager Blake reproved employee Bauldry for criticizing the profit-sharing program; told him not to associate with employee opponents of the program because Respondent needed it; told him that if he did associate with them he would be terminated; told him that he could be fired if he even said hello to employee Brown (on the Eagle Slate with Bidwell); and told Bauldry that if certain of Respond-

³² See *supra* fn. 31.

³³ Harper did testify that Close asked him to prepare a statement about the matter after asking Harper on April 25 or 26 what Bidwell had told him on April 24. However, Harper eventually dated this conversation with Close as April 25, and was not asked the date of Close's alleged request. Moreover, Harper later testified that he dictated and signed his April 26 notarized statement at the request of Office Manager Budnick.

³⁴ See *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962); *Aero Corp.*, 237 NLRB 454 fn. 1 (1978); *David's*, 271 NLRB 536, 538 fn. 17 (1984).

ent's employees succeeded in their efforts to obtain union office, this would not be good for the relationship between Respondent and the Union. In January 1989, Bidwell testified on his own behalf at the arbitration proceeding generated by his grievance against the compulsory profit-sharing program.

On April 24, 1989, during the *Tuffs* hearing conducted by Judge Evans in the presence of Dispatch Manager Blake, employee Tuffs testified that Bidwell had participated in circulating a December 1988 petition against the profit-sharing plan. When Tuffs had offered this petition to then Supervisor Zudycki, he had said, "Get that thing away from me;" Blake testified that until April 24, 1989, he had not known anything about the petition. Also on April 24, 1989, Tuffs testified that the Eagle Slate opposed the compulsory profit-sharing and stock-purchase plan; Blake testified that although he had known Bidwell had run for office on the Eagle Slate, at least until the end of 1988 Blake had not known about such opposition by that slate. Also on April 24, Bidwell gave testimony purportedly in support of the complaint allegation before Judge Evans that Tuffs had been discharged in October 1988 because of his union and protected concerted activity in connection with his opposition to the compulsory profit-sharing plan.

On instructions from Iseron, counsel for the General Counsel, who had served Bidwell with a subpoena requiring his appearance on April 24, he came to the Board's offices again on April 25, and stayed there until the hearing had ended. On the following morning, after Bidwell's timecard had been removed from the rack, Close told Bidwell in Blake's presence that Bidwell had called in sick on April 24, and that on April 25 Bidwell had not shown up for work or telephoned Respondent of his status. Bidwell truthfully advised Close that on both April 24 and 25, Bidwell had been at the National Labor Relations Board, and that he had been subpoenaed to appear as a witness on behalf of Tuffs. In addition, Bidwell truthfully said that on April 24 he had telephoned the Dock Foreman that Bidwell had a subpoena to testify before the Board on April 24 and the hearing would likely take more than 1 day, and that on April 25 he had attempted to call in but had been unable to get through. Close replied that Respondent had no record of Bidwell's being under subpoena, and that Bidwell had called in sick on April 24. Blake's silence during this exchange demonstrates his awareness that Close knew from the outset of the meeting that he was directing false charges against Bidwell; for, if Blake had believed Close was acting in good faith in asserting that Bidwell had called in sick on April 24 and that Respondent had no record of his being under subpoena,³⁵ Blake would almost certainly have interjected that Bidwell had testified in his presence on April 24 and was not sick or entitled to sick pay for that day. Close thereupon told Bidwell to leave the office, and then conferred with Blake and Terminal Manager Thomas Harper. After this conference, Harper told Bidwell that he was being suspended, "pending investigation," for failing to call in the previous morning, April 25. Bidwell truthfully said that he had been subpoenaed by the NLRB to appear as a witness, truthfully said that on the morning of April 24 he had told the dock foreman that Bidwell would likely be at the Board's offices on April 25

as well, and truthfully went on to say that on April 25 he had repeatedly tried to telephone Respondent but had been unable to get through except on one occasion, when he had been left on hold by someone who he thought (mistakenly) was Jerry Meyers. Close testified that following this conference, he asked Terminal Manager Horvath, who (like Blake) testified before Judge Evans on April 25, whether Horvath had seen Bidwell at the Board office on April 25. Close did not testify in terms to Horvath's reply, and Horvath unexplainedly did not testify. Later that morning, Respondent terminated Bidwell. Close's discharge letter to Bidwell, dated that same day, reiterated the baseless claim that Bidwell had called in sick on April 24. During an April 27 meeting about the matter, Respondent impliedly expressed doubt about the truth of Bidwell's assertion that he had been at the Board's office, under subpoena, on April 25. However, there is no evidence that Respondent ever got in touch with Iseron, or anyone else from the Board, to ascertain whether Bidwell had in fact been at the Board's regional office, under subpoena, on April 25.

At least prima facie, the foregoing credible evidence shows that Respondent discharged Bidwell, at least in part, because he engaged in the protected concerted and union activities of attempting to induce his fellow employees to petition and vote against including a compulsory profit-sharing plan in the bargaining agreement, of initiating and participating in the prosecution of a grievance which protested such inclusion, of running for union office on a slate which opposed the compulsory profit-sharing plan, and of testifying before the Board in support of a claim that Respondent had discharged a fellow employee because of his union and protected concerted activity in connection with his opposition to the compulsory profit-sharing plan. Accordingly, an unlawful discharge has been established unless Respondent can prove by a preponderance of the evidence that Bidwell would have been discharged for permissible reasons even if he had not been involved in protected activity. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400-404 (1983); *NLRB v. Del Rev Tortilleria, Inc.*, 787 F.2d 1118, 1123 (7th Cir. 1986); *Dorothy Shamrock*, supra, 833 F.2d at 1266-1267 (7th Cir. 1987); *Howard Electric Co.*, 285 NLRB 911, 912 (1987), enfd. 873 F.2d 1287 (9th Cir. 1989); *Moore Business Forms, Inc.*, 288 NLRB 796 fn. 3 (1988); *Taylor & Gaskin, Inc.*, 277 NLRB 563 fn. 2 (1985); *Springfield Manor*, 295 NLRB 17 fn. 2 (1989). Respondent has failed to discharge that burden.

In contending that Bidwell would in any event have been discharged because of his alleged "no call no show" on April 25, Respondent railgates partly on its July 1987 letter to the Union stating that as to tardiness and failure to call in before an intended absence, an employee would receive a warning letter for the first offense, a "final warning letter" and a 1-day suspension for the second offense, and a discharge for the third offense. However, Bidwell's "second warning letter" for tardiness was issued outside the 6-month limitation period testified to by Blake and, rather than unequivocally stating that Bidwell would be discharged for a third offense, advised him that "your failure to follow instructions in the future will subject you to *stronger disciplinary action us to and including discharge*" (emphasis supplied). Respondent also relies on management's testimony that Respondent follows the practice of discharging an em-

³⁵ As previously noted, Close admitted being aware, before this interview, that Bidwell had testified on April 24.

ployee upon his receiving a total of three warning letters for the same offense. However, Respondent has failed to discharge its burden of showing either that Respondent in fact follows this practice, or that Bidwell's failure to call in on April 25 constituted a third offense in the same category. Thus, although the discharge letter states that Bidwell's failure to call in constituted a "failure to follow instructions," and similarly described the offenses set forth in all three of the warning letters (dated October 21, November 16 and 17, 1988) which the discharge letter refers to, Bidwell was not in fact discharged in connection with the November 17 warning letter, which merely advised him of a 1-day suspension and that further incidents of failure to follow instructions would result in "more severe disciplinary action," without giving any specifics. Further, although the body of the October 21, 1988 warning letter for tardiness, and Close's testimony before me, characterize such tardiness as "failure to follow instructions," in April 1989 Horvath (who was sent a courtesy copy of this October 1988 letter) testified before Judge Evans, in effect, that tardiness and failure to follow instructions are two different categories of offenses. Moreover, there is no evidence, other than Respondent's action in labeling all three offenses as "failure to follow instructions," that Respondent customarily includes in the same category offenses like the unauthorized stop which was the subject of the November 17 warning letter, and the failure to make trip-card notations which is the subject of the November 16 warning letter, and the alleged "no call no show" which allegedly triggered Bidwell's April 26 discharge; indeed, Close's testimony suggests that he regards at least the latter two offenses as falling into two different categories.³⁶ Furthermore, Blake testified before Judge Evans that Blake's ability to terminate an employee depends on how he categorizes each offense that the driver was charged with.

For the foregoing reasons, I find that by discharging Bidwell, Respondent violated Section 8(a)(1), (3), and (4) of the Act.

My analysis up to this point has assumed, sub silentio, that the legality of Bidwell's discharge turns on whether at least part of the real reason for his discharge was Respondent's resentment of his activity in connection with the compulsory profit-sharing plan and of his April 24 conduct in testifying before Judge Evans, as the General Counsel contends, or whether (as Respondent contends) the real triggering reason was solely his alleged "no call no show" on April 25. However, it is undisputed that Bidwell's absence on that day was due to the fact that he was still under Board subpoena; and by Respondent's own admission, Bidwell so advised Respondent before it discharged him. Compliance with a Board subpoena constitutes an activity protected by Section 7 of the Act.³⁷ Accordingly, Respondent could not lawfully discharge Bidwell for alleged misconduct in connection with that ab-

sence if such misconduct did not in fact occur.³⁸ I have found that Bidwell did not in fact engage in the misconduct which Respondent attributes to him in connection with his April 25 absence from work in compliance with the Board's subpoena—namely, failure to give Respondent advance notice of his absence. More specifically, I have found that at about 6 a.m. on April 24, Bidwell advised Respondent's dock foreman that Bidwell's attendance at the Board hearing would likely require his absence on April 25 as well as on April 24; I infer from Close's April 26 discharge letter, which relied in part upon Bidwell's alleged failure to advise Respondent on April 24 that he might be absent on April 25 as well as on April 24, that this April 24 notification was sufficient to comply with Respondent's call-in rule. Moreover, I have found that before Bidwell left his residence for the Board's office on April 25, he tried to telephone Respondent that he would be absent on that day but was unable to get through; indeed, it is undisputed that before his discharge, he advised Respondent of his unsuccessful efforts to call in on April 25. Accordingly, Bidwell's discharge violated the Act whether or not it was really motivated partly by Respondent's failure to receive a telephone call from him on April 25 that he would not be in that day.

My discussion up to this point has attached no particular significance to the fact that the statutorily protected activity which caused Bidwell's April 25 absence from work was his presence at the Board's office under subpoena. However, the evidence shows that Bidwell made a reasonable effort to comply with Respondent's call-in rule, by attempting to use, at about 6:15 and 6:45 a.m. on April 25, the toll free line which he ordinarily used for this purpose. Because Respondent's switchboard operator does not go on duty until 8 a.m., by the time he found out that the toll free line was not working properly there was no means by which he could have complied with Respondent's rule requiring him to call in by 7 a.m. and also reached the Board's office by 8 a.m., the hour Iserson had told him to arrive. Accordingly, and because before being discharged Bidwell told Respondent why he was absent on April 25, I conclude that Respondent violated the Act by discharging Bidwell on the basis of his April 25 "no call no show," even assuming that Respondent would have discharged him if he had been absent, without being able to call in, for other reasons. See *Western Clinical Laboratory*, 225 NLRB 725 (1976), enfd. in material part 571 F.2d 457, 460 (9th Cir. 1978); *U.S. Precision Lens*, 288 NLRB 505 (1988).

Under the circumstances of this case, I attach no significance to Bidwell's failure to attempt to reach Respondent through its commercial line. Respondent could not be reached through that line until 8 a.m., 1 hour after the latest time Bidwell was supposed to call in under Respondent's rules. Moreover, there is no evidence that Respondent would have acted differently if Bidwell had unsuccessfully tried to reach Respondent before 7 a.m. on that line, or if Bidwell had reached Respondent on that line after 8 a.m. Indeed, there is no evidence that Respondent at any material time asked Bidwell which line or lines he had tried to use. Although Bidwell did not try to use Respondent's commercial number after his 8:15 to 8:45 a.m. arrival at the Board's of-

³⁶ "Eventually, somebody just doesn't care to fill [the daily trip card] out correctly. We send them a warning letter on that. That is failure to follow instructions. If you don't call in or show up for [work], that is very clearly stated a serious offense. We send them a warning letter for that."

³⁷ *NLRB v. Western Clinical Laboratory*, 571 F.2d 457, 460 (9th Cir. 1978); *Scranton Lace Co.*, 294 NLRB 249 (1989); *Fuqua Homes (Ohio)*, 211 NLRB 399 (1974); *Longshoremen Local 1329 (Metals Processing Corp.)*, 252 NLRB 229 (1980); *Better Monkey Grip Co.*, 115 NLRB 1170, 1171 (1956), enfd. 243 F.2d 836 (5th Cir. 1957), cert. denied 353 U.S. 864 (1957). See generally *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-570 (1978).

³⁸ *NLRB v. Burnup & Sims*, 379 U.S. 21, 22-24 (1964); *Richmond Recording Corp. v. NLRB*, 836 F.2d 289, 295 (7th Cir. 1987); *Quality Inn Albany*, 283 NLRB 1146 fn. 2 (1987); *Pioneer Press*, 297 NLRB 972 (1990).

face, Respondent would not have benefitted much, if at all, from receiving at that hour any clarified or new information about whether Bidwell was coming to work that day. Most of the drivers are dispatched, like Bidwell, at 8 a.m.; and the purpose of the call-in rule is to enable Respondent to arrange for an extra or replacement driver, or another cartage company, to haul any load to which the absent driver would otherwise have been assigned after reporting to work.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has violated Section 8(a)(1), (3), and (4) of the Act by discharging Harry Bidwell.
4. Such unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom, and from like or related conduct, and to take certain affirmative action necessary to effectuate the policies of the Act. Affirmatively, Respondent will be required to offer Bidwell immediate reinstatement to the job of which he was unlawfully deprived, or, if such a job no longer exists, to a substantially equivalent job; and to make him whole for any loss of pay (less net interim earnings) or other benefits he may have suffered by reason of his unlawful discharge. Loss of pay is to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950). All sums due herein are to be paid with interest as called for in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Also, Respondent will be required to expunge from its files any reference to Bidwell's suspension and termination on April 26, 1989, his alleged action in calling in sick on April 24, 1989, and his alleged "no call no show" on April 25, 1989, and notify him that this has been done and that evidence of such action will not be used as a basis for future personnel actions against him. See *Sterling Sugars*, 261 NLRB 472 (1982). In addition, Respondent will be required to post appropriate notices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³⁹

ORDER

The Respondent, Advance Transportation Company, Bedford Park, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Discharging employees because they have engaged in protected concerted activities.
 - (b) Discouraging membership in Highway Drivers, Dockmen, Spotters, Rampmen, Meat, Packing House and Allied Products Drivers and Helpers, Office Workers and Miscellaneous Employees, Local Union Number 710, Inter-

³⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

national Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, or any other labor organization, by discharging employees or otherwise discriminating in regard to hire or tenure of employment or any term or condition of employment.

(c) Discharging or otherwise discriminating against employees because they have filed charges or given testimony under the Act.

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

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

(a) Offer Harry Bidwell immediate and full reinstatement to the job of which he was unlawfully deprived or, if such a job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights or privileges previously enjoyed.

(b) Make Harry Bidwell whole for any loss of earnings and other benefits suffered as a result of his discharge, in the manner set forth in the remedy section of this decision.

(c) Remove from its files any reference to Harry Bidwell's suspension and termination on April 26, 1989, his alleged action in calling in sick on April 24, 1989, and his alleged "no call no show" on April 25, 1989, and notify him in writing that this has been done and that evidence of such action will not be used as a basis for future personnel action against him.

(d) Preserve and, on 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.

(e) Post at its facility in Bedford Park, Illinois, copies of the attached notice marked "Appendix."⁴⁰ Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

⁴⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

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

WE WILL NOT discharge you because you have engaged in protected concerted activities.

WE WILL NOT discourage membership in Highway Drivers, Dockmen, Spotters, Rampmen, Meat, Packing House and Allied Products Drivers and Helpers, Office Workers and Miscellaneous Employees, Local Union Number 710, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, or any other union, by discharging you or otherwise discriminating in regard to hire or tenure of employment or any term or condition of employment.

WE WILL NOT discharge or otherwise discriminate against you because you have filed charges or given testimony under the Act.

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

WE WILL offer Harry Bidwell immediate and full reinstatement to the job of which he was unlawfully deprived or, if such a job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights or privileges previously enjoyed.

WE WILL make Harry Bidwell whole, with interest, for any loss of earnings and other benefits suffered as a result of his discharge.

WE WILL remove from our files any reference to Harry Bidwell's suspension and termination on April 26, 1989, his alleged action in calling in sick on April 24, 1989, and his alleged "no call no show" on April 25, 1989, and notify him in writing that this has been done and that evidence of such action will not be used as a basis for future personnel action against him.

ADVANCE TRANSPORTATION COMPANY