

Ace Cab, Inc., ABC Union Cab Company, Inc., Vegas Western Cab, Inc., a North Las Vegas Cab Company and United Steelworkers of America, AFL-CIO-CLC. Cases 28-CA-9970 and 28-CA-10028

January 15, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND OVIATT

On July 18, 1990, Administrative Law Judge Michael D. Stevenson issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed answering briefs.

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

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

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Ace Cab, Inc., ABC Union Cab Company, Inc., Vegas Western Cab, Inc., a North Las Vegas Cab Company, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

“(a) Offer Pat Panaccione immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of

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

In affirming the judge's 8(a)(3) finding with respect to Panaccione's discharge, we do not consider Panaccione's offer of a tip (or a bribe) to Supervisor Brooks to be acceptable, much less protected, conduct. We note, however, that the evidence presented here that Brooks had not discharged others who engaged in such activity previously and had never stated to any driver Brooks' own aversion to such conduct (if that, in fact, was Brooks' view) requires but one conclusion—that Brooks did not consider Panaccione's conduct to be grounds for discharge. Thus, we conclude that Panaccione's offer of a “tip” was not the true reason for discharge. Neither do we rely on the fact that the company rules do not specifically prohibit employee tipping of supervisors.

² We shall modify the judge's reinstatement language to conform to that traditionally used by the Board.

the discrimination against him, in the manner set forth in the remedy section of the judge's decision.”

2. Substitute the attached notice for that of the administrative law judge.

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 terminate employees because they engaged in union or other protected concerted activities.

WE WILL NOT threaten our employees with unspecified reprisals because of their union activities.

WE WILL NOT threaten our employees with the cessation of operations before we will sign a contract with the Union.

WE WILL NOT tell employees that we will not come to terms with or sign a contract with the Union.

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

WE WILL offer Pat Panaccione immediate and full reinstatement to his former position or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make Pat Panaccione whole, with interest, for any loss of pay suffered as a result of our discrimination against him.

WE WILL remove from our files and records any references to the discharge of Pat Panaccione and notify him in writing that this has been done and that evidence of this termination will not be used as a basis for future personnel action against him.

ACE CAB, INC., ABC UNION CAB COMPANY, INC., VEGAS WESTERN CAB, INC., NORTH LAS VEGAS CAB COMPANY

Cornele A. Overstreet, for the General Counsel.

Kevin C. Efroymson, of Las Vegas, Nevada, for the Respondent.

Henry M. Willis (Schwartz, Steinsapir, Dohrmann & Sommers), of Los Angeles, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at Las Vegas, Nevada, on February

22 and 23, 1990,¹ pursuant to two separate complaints issued by the Regional Director for the National Labor Relations Board for Region 28 on November 15 (Case 28-CA-9970) and on December 19 (Case 28-CA-10028) and which are based on charges filed by United Steelworkers of America, AFL-CIO-CLC (Union or Charging Party) on October 5 (Case 28-CA-9970), November 17 (Case 28-CA-10028), and on December 19 (amended charge Case 28-CA-9970). An order consolidating cases was issued by the Regional Director on December 20. The complaint alleges that Ace Cab, Inc., ABC Union Cab Company, Inc., Vegas Western Cab, Inc., and a North Las Vegas Cab Company (Respondent) have engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

Issues

(1) Whether Respondent violated Section 8(a)(1) of the Act because on or about September 16, its supervisors committed one or more of the following acts:

- (a) Threatened employees with unspecified reprisals because of their union sympathies or activities;
- (b) Threatened employees with the cessation of operations before Respondent would sign a contract with the Union;
- (c) Informed employees that it would be futile for their representative to engage in further collective bargaining with Respondent.

(2) Whether Respondent violated Section 8(a)(1) and (3) of the Act when it terminated its employee Pat Panaccione because Panaccione joined, supported, or assisted the Union, or engaged in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, and in order to discourage employees from engaging in such activities or other concerted activities for the purposes of collective bargaining or other mutual aid or protection.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and to cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of General Counsel, Charging Party, and Respondent.²

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits that Ace Cab, Inc., ABC Union Cab Company, Inc., Vegas Western Cab, Inc., and a North Las Vegas Cab Company are affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered a common labor policy affecting employees of those operations; have shared common premises and facilities; have provided services for and made sales to each other; and have held themselves out to the public as a single integrated business enterprise. Accordingly, the companies named above constitute a single integrated business enterprise and a single employer within the meaning of Section 2(2) of the Act. Respondent further ad-

mits that Ace Cab, Inc., ABC Union Cab Company, Inc., Vegas Western Cab, Inc., and a North Las Vegas Cab Company, are Nevada corporations which operate a taxicab business and which have maintained a place of business located in Las Vegas, Nevada. Respondent further admits that during the past year, in the course and conduct of its business, that its gross volume exceeded \$500,000 and that annually it purchases and receives at its Las Vegas facility goods and materials valued in excess of \$50,000 from firms located outside the State of Nevada. Accordingly it admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that United Steelworkers of America, AFL-CIO-CLC is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

On or about September 16, the alleged discriminatee, Pat Panaccione, a union supporter and organizer, experienced a traffic accident while driving a brand new taxicab. Although Panaccione's injuries were minor, the damage to the cab was extensive. After receiving medical attention for his injuries at a local hospital, Panaccione returned to Respondent's yard where he engaged Respondent's owner, Charles Frias, in a conversation. On November 10, Panaccione was terminated by Road Supervisor Richard Brooks. The content of the earlier conversation is allegedly linked to the motivation for the discharge. To decide these and related questions, I turn to the record.

1. Background

Respondent maintains a single facility for all cabs from its four constituent companies. This facility or "yard" is located about 1-1/2 miles from the so-called Las Vegas Strip, a section of Las Vegas Boulevard where most of the major hotel-casinos are located. All cabs are required by state law to be licensed through the issuance of medallions by the Nevada Taxi Cab Commission. Respondent, through its owner, Frias, holds 140 medallions, broken down as follows: 25 to Vegas Western, 51 to Ace, and the remainder divided between ABC Union Cab and A North Las Vegas Cab. During particularly busy periods, such as the annual computer convention (Comdex), beginning the weekend of November 10, the Taxi Cab Commission issues temporary medallions. Respondent received authority to operate 40 additional cabs during this convention week. Respondent's 10 competitors also received temporary authority to operate additional cabs.

Except for a North Las Vegas Cab, the operation of the other three Respondent companies is essentially the same. That is, drivers may pick up fares and drive them in and around the greater Las Vegas area without major restrictions. A North Las Vegas Cab drivers, on the other hand, cannot work the strip, nor pick up fares at the airport, although they may drive fares to the airport. Generally, only new drivers work for a North Las Vegas Cab while they learn radio procedures and the geography of the area. When openings occur

¹All dates herein refer to 1989 unless otherwise indicated.

²The transcript in this case skips from p. 231 to p. 300. General Counsel should ensure that the NLRB was not inadvertently charged for the missing pages.

in the other three companies, drivers from North Las Vegas Cab are transferred, usually by seniority. Driver income then increases quite substantially.

During the hearing, Frias was called by General Counsel as an adverse witness. Frias testified that he spends much or most of his working time driving the streets of Las Vegas to police the driving habits and honesty of his drivers. While so engaged, Frias leaves the day-to-day management of the Company to General Manager Ed Schenkel, who did not testify. Schenkel works primarily in the office, hiring and firing drivers and ensuring that Respondent's cabs are fully manned around the clock, 7 days a week. Occasionally, a "shift is blown," i.e., due to a shortage of drivers, not all available cabs are on the street during a given shift.

Schenkel is assisted by a midlevel of supervision consisting both of road supervisors and shift supervisors. Richard Brooks, who terminated Panaccione on November 10, was then working as a road supervisor, whose primary duties were various hotel-casinos, to drive his vehicle on the streets of Las Vegas policing the driving habits of drivers, and to attend to driver traffic accidents. Brooks and other road supervisors were also generally responsible for ensuring driver compliance with company rules and policies.

To drive the 140 authorized cabs, Respondent maintains a roster of about 500 drivers. Yearly turnover of drivers runs between 35 to 40 percent. This high rate is based partly on discipline of drivers as more thoroughly discussed below, and partly on occasional availability of more desirable jobs, as for example, when a new hotel opens in Las Vegas. Although a few drivers have worked for Respondent for over 20 years, the nature of the business dictates that a driver with years or more seniority is considered a long-term employee.

At the beginning of each shift, shift supervisors set up driver trip sheets, and oversee the assignment of cabs to individual drivers. In theory, cabs are assigned to drivers for 90 days pursuant to a seniority-based bid system. This procedure and other company procedures have been altered by a long-established practice of tipping supervisors for more desirable cabs, as more fully explained below.

Drivers are paid approximately 45 percent of total daily receipts (book), less \$6 per day for gas. Respondent receives 55 percent of book and drivers keep all tips. A good day for drivers is \$300 book and about \$100 in tips. An average day is \$150 book and \$30-\$40 in tips. Generally drivers work a 10- or 11-hour shift up to 6 or 7 days per week. If Respondent is short drivers on a given shift (blowing a shift), a driver might be asked to work on his day off, perhaps with a promise of future favors.

By contrast to drivers, shift and road supervisors are paid a salary, usually \$55 per day and work 5 or 6 days per week. Some but not all supervisors formerly worked as cab drivers. The apparent discrepancy between supervisor income when compared to driver income will be explained below.

2. Discipline

Respondent's drivers are closely supervised, to say the least. In addition to Frias' long hours on the road, supplemented by shift and road supervisors, Frias also receives reports on drivers' activities from supervisors employed by other cab companies and from hotel security supervisors—although he does not necessarily take disciplinary action against drivers based on these reports. In addition, drivers

must contend with traffic police (Metro) and with agents of the Nevada Taxi Cab Authority. For the most part, drivers are cautious in their driving habits, since supervisor writeups or police citations could well lead to suspension or termination. This close supervision is based in part on the fact that Frias carries only liability insurance but no insurance for property damage to his cabs. Accordingly, when his cabs are damaged in traffic accidents, Frias must absorb the loss out of company profits.

When a driver is hired by Respondent, he receives a copy of Respondent's "General Rules and Regulations" (R. Exh. 1), and signs a receipt attesting to the receipt. On September 23, 1987, Panaccione signed a receipt for his copy of these Rules and Regulations (R. Exh. 4).

Respondent's General Rules and Regulations include the following (R. Exh. :

2Page 1

- 3. There will be no gambling on company time.
- 4. Always yield the right of way. Observe all speed zones . . . Drive with extreme caution during heavy traffic

Page 2

- 3. All trip sheets must [contain] time of pick-up, place of pick-up, number of passengers, time of destination and destination.
- 6. Cabs will be called once by cab number and once by your name and number. If no answer, dispatcher will place you out of service . . . unless you are out of service for lunch, charter, breakdown, disciplinary action may be taken against you. . . .
- 9. We request and expect your fullest cooperation particularly on radio procedure. Cooperation with the dispatcher on duty is half the battle. Please cooperate.

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- 6. At anytime a driver is given a radio call he must pick up the said call. You are to inform the dispatcher when you pick up your radio call and inform him of your destination.
- 7. . . . Your radios are there for a reason, and should be operating at all times.
- 8. Radios are to be used to inform dispatcher of your location

Any driver that fails to use above said rules will be subject to disciplinary action up to and including discharge.

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Rules for Discipline

Any of the following acts are grounds for disciplinary action up to and including immediate discharge. The acts listed below are not all inclusive—

- Any violation of the company's rules and regulations.
- Driving in a reckless manner.
- Deliberate abuse of company property.
- Failure to follow company radio procedures.
- Gambling while on duty.

Any other acts of misconduct of a similar magnitude as the above.

The company shall be the sole judge of the competence and of the efficiency of all employees, and may apply in each case, at the unlimited discretion, such standards in the measurement of competence and efficiency as are reasonable.

For any given offense, except for drunk driving or theft, Respondent's supervisors have virtually unlimited discretion, ranging from an oral warning to termination with a "Do Not Rehire" recommendation. In many instances, employees who have been fired are ultimately rehired sometimes several months later. For example, both Supervisor Brooks, and former supervisor, Wayne Wendt, a General Counsel witness, had been terminated. Then after a change in supervisory personnel, they were rehired by Frias.

According to Wendt, Brooks had a reputation as a strict supervisor, given to nit-picking, while Wendt was much more lax. Thus, Brooks might fire someone that Wendt would merely reprimand. Both Brooks and Wendt have fired numerous employees for various violations of Respondent's rules. In the past year, Brooks terminated about 4-5 employees and suspended 10-15, for traffic violations and abuse of equipment. For the most part, disciplined employees are newer and work for a North Las Vegas Cab.

3. Driver tipping of supervisors

Entwined with the question of supervisory duties and enforcement of company discipline is the curious and pervasive practice of offering tips (tokens), gratuities, or bribes³ to supervisors in return for a present or future service or favor. It is important to examine this practice because the offering of money to a supervisor was a factor in Panaccione's discharge, which has not yet been fully described in these facts.

In his testimony, Frias appeared to recognize the existence of tipping. To express his disapproval of it, Frias testified that when he catches anyone involved with giving or receiving a tip, he fires both the driver and supervisor immediately. Frias gave the names of two former supervisors he allegedly fired for accepting tips—Kahn and Reid. No other details are available.

In detailing this practice, I begin with the un rebutted testimony of former Supervisor Wendt. During his two separate periods of employment by Respondent, the last of which extended from September 1988 to May, Wendt served in different supervisory positions, including for 6 months that of general manager. After a few months, Wendt left the position of general manager at his own request due to job dissatisfaction and returned to shift supervisor. His last separation from Respondent was by way of resignation to accept a position as a security supervisor at a Las Vegas hotel. I found him to be a very credible witness.

Wendt both observed others and participated as a recipient in the practice of tipping. The amounts tendered ranged from \$1 or \$2 up to \$10 or \$20 for routine matters. The usual favors desired was a day off or a better cab than the one as-

signed. Sometimes extraordinary services were desired. For example, if a driver desired a week off at Christmastime, \$100 was the going rate, as received by Wendt on one or more occasions. The highest amount known to Wendt was the \$200 offered and accepted by General Manager Schenkel in return for allowing an a North Las Vegas Cab driver to jump over more senior drivers and receive a cab from one of the three other Respondent companies.

On one occasion Wendt caught a driver gambling while on duty. The driver offered Wendt a sum of money in return for not being fired. In accord with his personal philosophy, Wendt refused the money but gave the driver a verbal warning for gambling, contrary to the usual practice of other supervisors who were likely to terminate drivers for the first offense of gambling on duty. Shortly after this, Wendt caught the same driver gambling on duty a second time. Again the driver offered money to Wendt, but Wendt again refused. This time Wendt fired the driver for gambling on duty.

In his testimony, Brooks described experiences with tipping very similar to Wendt's. Brooks noted that frequently drivers will give \$1 to a supervisor for a cup of coffee even when no specific favor was desired. Brooks also has seen \$10 or \$20 payments from drivers to supervisors for the same reasons described by Wendt.

With respect to Brooks' personal experiences as a recipient of tips, Brooks testified that he "don't like to take gratuity. You really don't want to take anybody's money because I am the type of person that I don't need money. I don't need money for anything . . . Money is of no value to me. It never has been." (Tr. 169-70.) Despite Brooks' general attitude toward tipping, from time to time, he does accept the money from drivers. (Tr. 169.) As to what determines when he takes and when he doesn't take, Brooks answered, "Nothing in general. I mean, just the mood of the day." (Tr. 170.) When his mood is not to take money, Brooks politely says to the offering driver, "No, I don't want this. Take it, you keep it." (Tr. 170.)

Brooks, like former Supervisor Wendt, knows that Frias allegedly disapproves of tipping supervisors. In fact, Brooks was in the hearing room when Frias testified how he treats drivers and supervisors caught giving and receiving tips. Brooks testified he believes he would be fired on the spot if caught by Frias accepting money from a driver (Tr. 172). So anytime Brooks is inclined to accept a tip, he first ascertains that Frias isn't around. (Tr. 173.)

Brooks denied ever accepting a tip from a driver to overlook a violation of company rules. On one or more occasions Brooks has caught a driver gambling on duty and been offered money by the driver to overlook the matter. Brooks declined the money and took some form of disciplinary action (Trs. 179-180.)

Panaccione also testified to his experiences with the practice of tipping. Prior to November 10, he had given money to all company supervisors except for Brooks. In Panaccione's experience, \$20 "is a kind of general fee that they charge." (Tr. 357.) He has paid for a day off (\$20), a week off (\$60-\$70), and a replacement cab (\$10). Before he was assigned a brand new cab—the one involved in a traffic accident—Panaccione paid \$10 for a replacement cab three to four times a month at least. (Tr. 356.)

³It is outside the scope of this decision to examine the legal, ethical, moral, or practical ramifications of this practice. Nor must I determine when a tip or gratuity becomes a bribe. Hereinafter, I will use the word "tip" to describe the practice in question.

Finally, Panaccione testified that he was aware of no company rule prohibiting tipping. I find that no such rule existed. Frias' personal philosophy while known to some supervisors like Brooks and Wendt who ignored and evaded it, was not generally disseminated to drivers. No supervisor ever refused Panaccione's tip nor warned Panaccione that offering a tip violated company policy. On the other hand, Panaccione knew of no prior occasions where drivers have offered supervisors tips to overlook violations of company rules (Tr. 218.)

4. Respondent and unions

(a) *Past experience*

Respondent was first organized by the Teamsters in the mid-1950s. A series of collective-bargaining agreements followed and extended into the late 1970s, when, for unknown reasons, the Teamsters abandoned Respondent's drivers. The National Maritime Union (NMU) attempted to fill the void and won a representation election with Respondent's drivers. No labor agreement was ever signed, however. Subsequently, a labor organization called the Southern Nevada Taxicab Drivers Association won a Board-supervised election and replaced the NMU. Again no agreement was ever signed. During these campaigns, union proponents made no complaint of unfair treatment by the Company. This was not the case however, when the organizing campaign with Charging Party began.

(b) *Current experience (Steelworkers)*

Panaccione began working for Respondent in September 1987. In January, Panaccione contacted representatives of the Union who were participating in a Las Vegas convention. After discussions, Panaccione began distributing union representation cards and soliciting drivers' signatures. Ultimately Panaccione obtained 70 to 100 signed cards which he returned to a union representative.

Later in 1989, the Board conducted a hearing regarding the corporate relationship of the four cab companies comprising Respondent. Panaccione testified in that hearing as a union witness; as a result of his testimony and other evidence, Respondent was found to be a single employer.

Between the hearing and the election date on May 18, Panaccione continued to engage in prounion activities. On May 18, Panaccione and one other employee named Bob Breidenbach, who did not testify, acted as election observers on behalf of the Union.

After the Union won the election, Panaccione, Breidenbach, and two other drivers, Al Bernardino and Pat Miller, neither of whom testified here, were elected to the union negotiating committee. In his role as a union negotiator, Panaccione attended all negotiating sessions held prior to his discharge. No contract has, as yet, been agreed to.

As a result of Panaccione's high profile union activities, certain supervisors expressed their view of the union organizing activity in general and Panaccione in particular. One of these was Ed Schenkel who, prior to the election, told Wendt that other unions had tried to organize Respondent's drivers, but that Frias had told Schenkel that no contract would ever be signed. Schenkel went on to say that Frias planned to use his attorneys to tie up the negotiating process until the union effort fizzled out.

Prior to election day, Wendt had promised Breidenbach a night off from his usual shift because Breidenbach and Panaccione planned to spend a long day as union observers. When Schenkel learned why Breidenbach had been promised the evening off, he told Wendt, "Screw him. Make him work. If he can stay here all day to observe an election, he can work." (Tr. p. 393.) Wendt held firm telling Schenkel that he had promised Breidenbach the evening off, and he felt he could not go back on his word. Breidenbach got the evening off, as promised.

Before continuing with additional statements made by Schenkel, I turn to another supervisor, Jack Gambill, who like Schenkel, did not testify. Prior to the election, Gambill told Panaccione that Frias would never sign a contract with the Union. Eventually, the union effort would just fade away like the others. After the election, Gambill continued to make similar comments to Panaccione regarding Frias' intentions.

5. Panaccione's termination

Before reciting the events of November 10, I return first to Schenkel, then to Frias and relate certain surrounding facts and circumstances.

About 1 or 2 months before the election, Schenkel told Wendt per orders of Frias, that Panaccione, Breidenbach, and Miller had become highly visible in support of the Union and that they had better watch out. Schenkel continued that supervisors could get them for anything, but were instructed to make sure and document all discipline, a record of which might be needed later on. In sum, Wendt was told to keep a special watch on the three, because if he follows a cab driver long enough, Wendt and any other supervisor will find the driver doing something for which he can be fired. When any of the three targeted for a special watch, were caught doing anything wrong, they were to be fired, if possible. On one or more other occasions, Schenkel told Wendt how stupid he thought Panaccione and the other two were because they were so openly prounion while working for Frias⁴ (Tr. 394, 420-421.)

Panaccione testified to certain conversations with Frias himself, about 9:30 p.m. on September 16, after Panaccione had returned to the yard from the hospital, where his injuries from the traffic accident had been treated. Panaccione approached Frias in the yard and attempted to apologize to Frias for the damage to the new cab, even though the accident had not been Panaccione's fault. Frias responded, "I can not get you for this, but I will get you and all of your buddies. This accident would not have occurred if it was not because of the Union. I will park the cabs in the yard, all of them, before I even think about signing a contract with you folks." Panaccione remained undaunted by these remarks and attempted to explain how in his opinion, a union contract would help to improve the quality of Frias' drivers which in turn would lead to increased profits. To this Frias responded that if Panaccione had a problem with the way things are going around here, Panaccione could always come to Frias' office to discuss the matters. Frias then repeated that he would not come to terms with the Union during contract negotiations (Tr. 192-194.)

⁴Wendt originally testified this conversation with Schenkel occurred after the election, but later said he had been mistaken, and it had occurred before the election (Tr. 419.)

Frias was called as Respondent's witness and admitted to having had a conversation with Panaccione in the yard on the night in question. He denied threatening to get Panaccione, although he admitted knowing Panaccione was active on behalf of the Union. Frias went on to testify that Panaccione talked about negotiations but Frias wasn't really listening, because his attorney had been doing the negotiating. Frias added that he'd sit down with the Union when matters got down to the "nitty-gritty." He added, "I know that if I'm going to sign a contract, it's a liveable contract, I'll sign it. But I'm not just going to give the company away." (Tr. 452.)

In rebuttal, General Counsel called current Respondent employee Lawrence Stadterman, Panaccione's roommate. On September 16, he was notified of Panaccione's traffic accident and went to pick up Panaccione at the hospital. Stadterman then transported Panaccione to the yard so the latter could retrieve his personal belongings from the damaged cab. Although he could not hear the conversation between Frias and Panaccione, he observed Frias talking loudly and pointing his finger at Panaccione as though Frias were very upset.

I credit Panaccione's account of the conversation with Frias. Frias' remarks are consistent with the un rebutted testimony of Wendt with respect to Schenkel's remarks. This evidence together with the slight corroboration provided by Stadterman, a witness entitled to heightened credibility⁵ and the testimony provided by Panaccione himself whom I found to be generally credible, convinces me that Frias made the remarks attributed to him.

With the above events in mind, I turn to relate the events of Friday, November 10. As already noted, this weekend marked the beginning of Comdex, the busiest week of the year for the city of Las Vegas. Both Panaccione and Brooks were working that night. In order to monitor Respondent's cabs, Brooks parked in a parking lot of a convenience food store facing a street containing traffic exiting from the airport. After 15 to 20 minutes there, he observed a cab driven by Panaccione allegedly being driven at an excessive rate of speed. In the cab was a single passenger, a woman who was on a layover of several hours between planes. She told Panaccione that she desired to go to a casino, but she didn't know which one.

In any event, Brooks pulled out into traffic and followed Panaccione's cab for several minutes before losing Panaccione in traffic. During that time, according to Brooks' testimony, he observed Panaccione change lanes in an unsafe manner, exceed the speed limit, and hit a dip in the road at a fast rate of speed, causing the bottom of the cab to scrape the street as it bounced. In addition, Panaccione allegedly went through a red light at a pedestrian crosswalk, and made a right-hand turn from a middle lane of traffic when traffic in the right-hand lane had stalled for unknown reasons.

During Brooks' pursuit of Panaccione, Brooks was watching his rearview mirror, making sure Metro was not going to catch him "for speeding, because I am trying to keep up with him." (Tr. 112.) Brooks also made repeated attempts to contact Panaccione by instructing the dispatcher to find out Panaccione's location. However, Panaccione did not respond

to these inquiries. Finally, Brooks returned to the convenience store parking lot where he had started from.

Meanwhile, Panaccione dropped his fare off at a casino-hotel. After pickup and delivery of other fares, Panaccione returned to the airport and again exited on the same road observed by Brooks earlier that night.

When Brooks saw Panaccione, Brooks again pulled out of the parking lot and this time caught up with Panaccione in the parking lot of Bally's Casino where a conversation ensued. Brooks told Panaccione he had been driving recklessly and too fast for conditions. Panaccione denied the charges. Up to this moment, according to Brooks, he "hadn't made up [his] mind any way, because it is my own discretion out there when I am working" (Tr. 122). Among the options which Brooks testified he was considering as he spoke to Panaccione was, "maybe a couple days off, maybe a week, maybe I ought to just let him sit out this convention, or maybe he ought to be fired. . . . I hadn't drawn any conclusions." (Tr. 122.)

According to Panaccione's testimony, he had been driving a "little bit aggressive, but still defensively." (Tr. 203). Later Panaccione expanded on his characterization: [By] driving aggressive is, . . . we don't drive like going to church on Sunday. And what I mean aggressive is defensively, but on top of what you're doing" (Tr. 353).

More specifically, Panaccione denied hitting the dip at a fast rate of speed as he was familiar with the road at that point; he denied speeding as the traffic was heavy and he knew that Metro was out in full force; he couldn't recall weaving in and out of traffic; he admitted turning right from a middle lane, only because traffic on the right-hand lane had been stalled. He also denied going through any red lights. As to Panaccione's failure to respond to the radio calls, he denied that he had been aware of any calls, but admitted that he frequently converses with his passengers, as a method of enhancing his tips, and that this may have distracted him.

In any event, after a brief discussion at Bally's, where Panaccione had denied committing any serious traffic or abuse of equipment violations, Brooks finally told Panaccione to drive his cab back to the yard. This usually meant suspension or discharge for a driver. Panaccione's further argument and protests were unavailing and Brooks drove away. A few minutes later, Brooks noticed Panaccione had maneuvered behind him and was flashing his headlights. Brooks pulled over into the parking lot of a different hotel casino, where a second conversation occurred.

This time Panaccione pleaded with Brooks that he had a wife and family to support,⁶ and asked why it wasn't possible to discuss the matter right there without having to return to the yard on this busy night. Brooks told Panaccione that he had not made any decision regarding discipline up to that minute, but again he directed Panaccione to reenter the cab and drive to the yard. At this point, Panaccione asked Brooks what it would take to forget about the matter. Panaccione then reached into his pocket and withdrew a sum of between \$300 to \$400, and again asked Brooks what it was going to take. Panaccione actually tendered \$50 or more to Brooks. Brooks described his reaction:

⁵A current employee who testifies against his employer's interest is said to be testifying against his own self-interest and therefore is more credible. *Transit Management Services*, 298 NLRB 721 (1990).

⁶In light of Panaccione's male roommate in Las Vegas, it is unknown whether the statement made to Brooks was true.

I came unglued. I absolutely lost my temper. I shoved it back in his hand. I said, "Get in that cab and get to the yard now. I am not a bum. I don't need your money. I don't want your money! I said I want you to get in that cab and get to the yard know. Mister, I have no use for you now. Just get into the yard." (Tr. 131.)

Both men then drove their cabs to the yard.

Back at the yard, Brooks completed an employee action notice which he had begun when he first pursued Panaccione. The final decision to fire Panaccione, according to Brooks, had not been made, until Panaccione had offered the money. The employee action notice reads as follows (R. Exh. 3):

Time: 9:52

V-39 Pannaccione

1083

Attended [sic] bribe w/ supervisor

x Termination NO REHIRE

- (1) Endanger lives of customers with;
 - (2) Excessive speed;
 - (3) Ran Ped. red light at Flamingo crosswalk;
 - (4) Right turn from ctr lane at Las Vegas Blvd. South off of Flamingo;
 - (5) Company abuse of equipment;
 - (6) Improper radio procedure when called on radio.
- No Answer.

/s/ R.A. Brooks

Back at the yard, Brooks gave Panaccione a copy of the form and told him never to return except to pick up his paycheck.

B. Analysis and Conclusions

1. Frias' statements of September 16

In the facts portion of this decision, I have found that Frias made certain statements to Panaccione on the evening of September 16. General Counsel has alleged that these statements violate Section 8(a)(1) of the Act. I agree.

Section 8(a)(1) of the Act provides that it is an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Section 7 of the Act." Section 7 provides that employees have the right to "form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection"

Frias' threat to get Pannaccione and all of his buddies violates Section 8(a)(1) of the Act as it suggests unspecified reprisals for Pannaccione's union activities. *Peavey Co.*, 249 NLRB 853 (1980), enfd. as modified 648 F.2d 460 (7th Cir. 1981).

Frias also threatened to cease operations by parking his cabs in the yard before signing a contract with the Union. This statement also violated Section 8(a)(1) of the Act. *Times Wire & Cable Co.*, 280 NLRB 19 (1986); *Teamsters Local 171 v. NLRB*, 863 F.2d (D.C. Cir. 1988).

Finally Frias stated that he would not come to terms with or sign a contract with the Union. Because this statement

conveyed to Panaccione the futility of further collective bargaining, I find that it violated Section 8(a)(1) of the Act. *American Furniture Co.*, 293 NLRB 408 fn. 2 (1989).

2. Panaccione's termination

General Counsel has the initial burden of establishing a prima facie case sufficient to support an inference that union or other activity which is protected by the Act was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3). Once this is established, the burden shifts to Respondent to demonstrate that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. If Respondent goes forward with such evidence, General Counsel "is further required to rebut the employer's asserted defense by demonstrating that the [alleged discrimination] would not have taken place in the absence of the employee[s] protected activities." *Wright Line*, 251 NLRB 1983 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). "[A] finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

I begin by finding that General Counsel has established a prima facie case that Panaccione's protected activities was a motivating factor in his discharge. As support for this conclusion, one need look no further than the 8(a)(1) violations found above. I have also credited Wendt's testimony regarding statements made by Schenkel and Gambill. Motive is a question of fact and the Board may infer discriminatory motivation from either direct or circumstantial evidence. *NLRB v. Nueva Engineering*, 761 F.2d 961, 967 (4th Cir. 1984). The instant case contains abundant circumstantial evidence of discriminatory motivation.

The real question in this case is whether Respondent has met its burden to show that Panaccione would have been terminated absent his protected activities. To answer this question, I first note the evidence establishing Panaccione's union activities, the knowledge of these activities by Frias and the animus toward the Union and toward Panaccione because of his union activities. In light of this background, it is difficult to believe that Brooks just happened to see Panaccione on November 10, a night when hundreds, if not thousands of cabs were on the street. Instead, it is more probable that Schenkel gave Brooks the same marching orders given to Wendt; to keep a close eye on Panaccione until an offense was discovered sufficiently serious to warrant discharge. This singling out of a high profile union proponent is a factor which strongly supports General Counsel's case. *McLane Western*, 251 NLRB 1396, 1402 (1980). A supervisor who receives instructions like this, in an attempt to curry favor with his boss, may overreach in evaluating any given disciplinary case.

Notwithstanding the above caveat, I find that on November 10, Panaccione committed one or more traffic offenses, and failed to keep in radio contact with the dispatcher as re-

quired by Respondent's rules.⁷ That none of this would have warranted discharge, or even necessarily suspension, is proven by Brooks' own testimony that when he first told Panaccione to return to the yard, he had made no final decision regarding punishment. But even assuming without finding that Panaccione did all or most of what Brooks said he did, it is difficult to understand how Brooks could justify removing the cab from the street on one of the busiest nights of the year. Respondent's loss of revenue was 55 percent of whatever Panaccione would have continued to earn, had he been given an oral reprimand only, or had he been disciplined later after his shift had ended.

According to Brooks, it was only after Panaccione offered him a sum of money to resolve the issue of his traffic and radio violations, that Brooks made the decision to fire Panaccione. Because there is no dispute that Panaccione did offer the money to Brooks, I must determine whether Respondent has now shown that when the totality of Panaccione's conduct is considered, he would have been terminated, even absent his protected activities on behalf of the Union.⁸

To answer the question presented, I look first to Brooks' testimony. His description of his reaction to Panaccione's offer of money appears disingenuous, given his prior acceptance of tips under other circumstances, when the mood struck him. It may be altogether true, that while Brooks accepted some of the tips offered to him, he harbored a mental reservation about accepting money to overlook discipline. Yet there is no evidence that this qualification was ever disclosed to drivers. In fact, when Brooks declined to accept tips from drivers, there is no evidence that the offer of money admittedly under different circumstances from those present here, caused Brooks to come "unglued." In fact, Brooks testified as Respondent's witness that when he caught certain drivers gambling on company time, he gave them a second chance (cut them some slack) because they had done favors for Brooks in the past.

The above discussion is purely academic since the offering of tips to drivers under any circumstances is not prohibited by Respondent's written rules and regulations (R. Exh. 1). It may have violated Frias' personal principles, but the existence of this practice involving Schenkel, Brooks and apparently all other supervisors undermines Frias' purported resolve to fire the giver and receiver of tips whenever they were caught. Moreover, the existence of Respondent's compensation system by which drivers earn more than supervisors surely indicates to Frias that a tip practice thrives at Respondent. When all is considered, I find that Frias tolerated and condoned the tipping system in his business.

Under the common practice of offering and accepting tips prevailing at Respondent, I find that Panaccione could have reasonably believed not only that he would not be worse off

with Brooks for having offered the money, but that Brooks may even have been soliciting Panaccione in a subtle manner, to offer him money. On the other hand, Brooks may have been setting up Panaccione to offer the money, thereby committing in Brooks' eyes, a terminable offense. In any event, there is no evidence, that any driver was ever terminated for offering money to a supervisor to overlook discipline or for offering money for any other reason. In at least one incident involving Wendt, a driver offered money to him to overlook a gambling violation. Although Wendt declined the money, the driver was not disciplined for offering the money and he was not fired for the offense of gambling on duty. Because Frias tolerated all of this, notwithstanding his testimony at hearing, an ambiguity exists in Respondent's disciplinary policy for which Respondent must be held accountable. *La Quinta Motor Inns*, 293 NLRB 57 (1989); 299 *Lincoln Street*, 292 NLRB 172 (1988).

In sum, Panaccione was terminated pursuant to a no-tipping policy that was unknown to Panaccione and had not been consistent. Indeed, the reverse was true. Even where tips had not been accepted, no one had been fired for offering them. Both Frias and Schenkel had made statements with unmistakable overtones of a purpose to discriminate and retaliate against Panaccione because of his union activities. Note the similarity between the instant case and *Herman Bros. v. NLRB*, 658 F.2d 201, 208-210 (3d Cir. 1981). Accordingly, Respondent has not met its burden to show that Panaccione would have been fired absent his protected activities.

For the above reasons, I find that Respondent violated Section 8(a)(3) and (1) of the Act when it terminated Panaccione.

CONCLUSIONS OF LAW

1. Respondent Ace Cab, Inc., ABC Union Cab Company, Inc., Vegas Western Cab, Inc., a North Las Vegas Cab Company, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, United Steelworkers of America, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent through its Supervisor and Agent Richard Brooks violated Section 8(a)(3) and (1) of the Act by discharging its employee Pat Panaccione, because of Panaccione's support for the Union or for other protected concerted activity.

4. Respondent through its President Charles Frias violated Section 8(a)(1) of the Act by committing the following acts, which interfered with, restrained, or coerced employees in the exercise of rights guaranteed by Section 7 of the Act:

(a) By threatening to get Panaccione and all of his buddies because they supported the Union.

(b) By threatening to cease operations before signing a contract with the Union.

(c) By stating he would not come to terms with or sign a contract with the Union, thereby conveying to supporters of the Union the futility of further collective bargaining.

5. The unfair labor practices found to have been committed above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

⁷An important issue raised by this case must be left for another day, and resolved, if at all, in a different forum: whether public policy permits or condones a cab company supervisor possessing no police powers and acting solely on behalf of a private employer, to violate traffic laws and safety codes, in the course of policing cab drivers' driving practices.

⁸In *Klate Holt Co.*, 161 NLRB 1606, 1612 (1966), the Board stated,

If an employee provides an employer with a sufficient cause for his dismissal by engaging in conduct for which he would have been terminated in any event, and the employer discharges him for that reason, the circumstance that the employer welcomed the opportunity to discharge does not make it discriminatory and therefore unlawful.

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 to take certain affirmative action designed to effectuate the policies of the Act.

As I have found that on November 10, Respondent terminated Pat Panaccione, because he engaged in union activities, or other protected concerted activities, I shall recommend that Respondent be ordered to reinstate Pat Panaccione to his former position and, if his former position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges and to make Panaccione whole for any loss of earnings and other benefits suffered as a result of the discrimination against him by payment to him of a sum equal to that which he would have earned absent the discrimination, with the backpay computed on a quarterly basis, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and as reduced by any net interim earnings.

On these findings of fact and conclusions of law and the entire record, I issue the following recommended⁹

ORDER

The Respondent Ace Cab, Inc., ABC Union Cab Company, Inc., Vegas Western Cab, Inc., a North Las Vegas Cab Company, Las Vegas, Nevada, by its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating employees because they engaged in union or other protected concerted activities;

(b) Threatening employees with unspecified reprisals because of their union activities.

(c) Threatening employees with the cessation of operations before signing a contract with the Union.

(d) Telling employees it would not come to terms with and sign a contract with the Union.

⁹If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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

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

(a) Reinstate Pat Panaccione to his former position and, if his former position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges and make Panaccione whole for any loss of earnings suffered by reason of the discrimination against him, in the manner set forth in the remedy section of this decision.

(b) Expunge from its files any references to the discharge of Pat Panaccione and notify him in writing that this has been done and that evidence of this unlawful termination will not be used as a basis for future personnel action against him. *Sterling Sugar*, 261 NLRB 472 (1982).

(c) Preserve and, on request, make available to the National Labor Relations 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 effectuate the backpay provisions of this Order.

(d) Post at its facility in Las Vegas, Nevada, copies of the attached notice marked "Appendix."¹⁰ Copies of the notice on forms provided by the Regional Director for Region 28, after being signed by Respondent's authorized representative, shall be posted by the Respondent immediately on 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 Respondent to ensure that notices are not altered, defaced, or covered by any other material.

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

¹⁰If 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."