

Accent Moving & Storage, Incorporated and Tulsa General Drivers, Warehousemen & Helpers, Local Union 523, affiliated with the International Brotherhood of Teamsters, AFL-CIO.¹ Case 17-CA-15221

September 30, 1991

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

On June 12, 1991, Administrative Law Judge William J. Pannier III issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a brief in support of the judge's decision.

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,² and conclusions 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, Accent Moving & Storage, Incorporated, Broken Arrow, Oklahoma, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order.

¹ The name of the Charging Party has been changed to reflect the new official name of the International Union.

² 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), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Francis A. Molenda and *Milford Limes*, for the General Counsel.

Jeff Nix, of Tulsa, Oklahoma, for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM. J. PANNIER III, Administrative Law Judge. I heard this case in Tulsa, Oklahoma, on December 13, 1990.¹ On October 25, the Regional Director for Region 17 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing, based upon an unfair labor practice charge filed on September 19 and amended on September 27, alleging violations of Section 8(a)(1), (3), and (4) of the National Labor Relations Act, 29 U.S.C. § 151 et seq.

¹ Unless stated otherwise, all dates occurred in 1990.

(the Act). All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record,² on the briefs that were filed and the oral argument made during the hearing, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, Accent Moving & Storage, Incorporated (Respondent) has been a corporation with office and place of business in Broken Arrow, Oklahoma, where it engages in the business of moving and storage of household and commercial items. In the course and conduct of those Oklahoma business operations during the 12-month period ending September 30, 1990, Respondent derived gross revenues in excess of \$50,000 for the transportation of freight and commodities in interstate commerce pursuant to arrangements with and as agent for Mayflower, Inc., a common carrier which operates between and among various States of the United States. Therefore, I conclude, as admitted in the answer, that at all times material Respondent has functioned as an essential link in the transportation of freight and commodities in interstate commerce and, further, has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

At all times material, Tulsa General Drivers, Warehousemen & Helpers, Local Union 523, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (the Union) has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Issues*

Essentially, this is a dispute between two families. On one side is alleged discriminatee Robert Schneider, his ex-wife Loretta Fry, and his brother Danny Ray Schneider. On the other side is Respondent's president, Jack Davis, and his daughter, JoAnn (Jodi) Davis. The only other witness who gave consequential testimony is Respondent's general manager of operations, Maynard Walters. Respondent admits that at all times material, Jack Davis, Jodi Davis, and Walters had been supervisors within the meaning of Section 2(11) of the Act and its agents within the meaning of Section 2(13) of the Act.

² The General Counsel's unopposed motion to correct transcript is granted so the phrase "just continue" is substituted for the word "discontinue" on p. 16, L. 16 of the transcript. It should be noted that there are some other incorrect transcriptions of statements made during the hearing, including in some instances incorrect attributions of statements to counsel and to me, when in fact those particular statements were made by someone else. Nevertheless, with the exception noted in sec. III, B, *infra*, the testimony is sufficiently clear that—without regard to who put particular questions to a witness and regardless of the sense of particular statements interposing, opposing, and ruling on objections—it was unnecessary to make added corrections.

Since May 1989 Robert Schneider had been employed as a driver/helper by Respondent. In the latter half of August he contacted the Union. On August 22, authorization cards were sent to him for distribution among Respondent's employees. Additional cards were sent to him after Labor Day. So far as the record discloses, Schneider had been the only employee who solicited employees' signatures on cards. On September 12 he returned to the Union cards signed by 21 of Respondent's 27 employees. In turn, the Union sent a letter to Respondent requesting recognition as the representative of a majority of the latter's drivers, warehousemen, helpers, janitorial employees, and other nonexcluded employees. On September 13, the Union filed the petition in Case 17-RC-10574, seeking an election in a bargaining unit encompassing those classifications.

According to the complaint, as amended, Jodi Davis unlawfully interrogated employees concerning union activities on August 31 and in late August or early September. A similar allegation of unlawful interrogation is leveled at Walters, assertedly on August 27 or 28. The complaint further alleges that Jodi Davis threatened employees with unspecified reprisals in early September and that her father, Jack, made a statement on September 24 to the effect that Robert Schneider would not be assigned work because he filed an unfair labor practice charge. By the foregoing conduct, not all of which is denied by the testimony, Respondent is alleged to have violated Section 8(a)(1) of the Act.

Purported unhappiness with the number of work assignments received after Labor Day led Schneider to file a claim for unemployment benefits with the Oklahoma Employment Security Commission on Friday, September 14. The Commission's notice to Respondent of that fact recites that Schneider "applied for Unemployment Compensation Benefits under the Oklahoma Employment Security Act. The individual stated that separation from employment on 09-14-90 was a result of: LACK OF WORK." Upon receiving this notice on Tuesday, September 18, Jack Davis testified that he had construed it as notification that Schneider had resigned and Respondent admittedly scheduled no further work for Schneider.

Under Oklahoma law it appears that unemployment benefits can be received not only by employees who quit or are discharged, but also during periods when employees received too little work, i.e., are underemployed. Schneider testified that he had claimed benefits on that basis and had not intended to quit when he had applied for them. The complaint alleges that Respondent unlawfully refused to assign work to Schneider from September 14 to 24. The charge underlying this proceeding was filed on Wednesday, September 19, and was received by Respondent the following day. On September 24, Jack Davis allegedly told Schneider that the latter would not be assigned work because that charge had been filed. The complaint alleges that Davis' remark violated Section 8(a)(1) of the Act and, further, constituted a discharge for motives proscribed by Section 8(a)(3) and (4) of the Act.

Although I do not credit Robert Schneider, for the reasons set forth post, I conclude that a preponderance of the evidence does establish that there were instances of unlawful interrogation, an unlawful threat of unspecified reprisals, and attribution of refusal to assign work to the filing of an unfair labor practice charge. Furthermore, while I credit Jack Davis' testimony that he genuinely believed that Schneider had re-

signed on September 14, and do not conclude that Respondent unlawfully refused to assign work to Schneider prior to September 24, I do conclude that Respondent refused on and after that date to schedule work for Schneider solely because of the charge filed on his behalf in violation of Section 8(a)(4) and (1) of the Act. A preponderance of the evidence, however, does not support the allegation that Respondent's conduct had been motivated by considerations proscribed by Section 8(a)(3) of the Act.

B. Evidence

Robert Schneider, Loretta Fry, and Danny Ray Schneider each described conversations during which they had been asked about union activities. Thus, the latter testified that at approximately 8 or 8:30 a.m. on August 27 or 28, when he went to the back office to ask Walters if there was any work, the latter had asked "if Robert was trying to start a union and I said, yes, sir." According to Danny Ray Schneider, before anything more could be said, the telephone had rung and he quickly exited while Walters was occupied in conversation. Walters denied having talked to Danny Ray Schneider during a closed-door private conversation in late August regarding Robert Schneider and, further, having ever talked to Danny Ray Schneider about Robert Schneider being active on behalf of the Union and about Robert Schneider trying to start a union.

Three conversations were described in which Jodi Davis assertedly asked questions concerning Robert Schneider's activities on behalf of the Union. Thus, Loretta Fry testified that on September 4, 5, or 6, she had been invited by Davis into the latter's office where Davis had asked if Fry knew anything about Robert Schneider starting a union. Fry testified that she had responded in the negative because "I figured it was better not to say anything to start any trouble until we found out about the union." Jodi Davis denied flatly having participated in any conversation where she had spoken to Fry about Robert Schneider and the Union.

She did not dispute, however, accounts of two other conversations in which remarks regarding unionization were attributed to her. As a result, it is uncontroverted that between September 1 and 6, during the course of a conversation initiated as Danny Ray Schneider was picking up his paycheck from her, Jodi Davis asked, "is it true Bob's trying to start a union?" Schneider responded that it was true: "You know, I'm not gonna lie to the lady, you know." Second, it is unrefuted that, at about the same time in September as he had sent the signed authorization cards back to the Union, Robert Schneider had been asked by Jodi Davis to come into her office where she inquired, "if I was trying to put a union in the company." Schneider replied affirmatively, adding that "when 21 out of 27 people . . . sign cards . . . something's got to be wrong with the company." Jodi Davis, it is uncontroverted, concluded this conversation by warning Schneider "not to make waves."

In an obvious effort to strengthen his own case against Respondent, Robert Schneider testified about another conversation with Jodi Davis occurring, he claimed, one Wednesday afternoon after he had filed for unemployment benefits. According to Schneider during direct examination, she had telephoned him to obtain his correct name, address, and telephone number. After he had provided that information, he asked why he wasn't working. Davis, testified Schneider, re-

plied that “it was a slow down at the time,” adding that “she shouldn’t be talking to me because her attorney advised her not to talk to me.” Asked if Davis had said anything else, Schneider testified, “That was it,” but then added hastily, “She told me don’t make waves.” This answer obviously caught counsel off guard, especially as there was no allegation of threats during the last half of September:

Q. Did you continue—she said that during that conversation?

A. I don’t—There were two different times she told me not to cause any trouble and stuff.

Schneider then was asked to again recite what had been said during this conversation. This time, after testifying that Jodi Davis had said that he was not working due to the slow-down in work, Schneider inserted that he had, “said 21 out of 27 people signed up for the union. There’s gotta be trouble.” The record shows that counsel continued by asking the questions succeeding that answer. But, in fact, the next two or three questions were put to Schneider by the me, because I did not believe that he suddenly would have made such a remark in the context of a conversation in which Davis had just explained why he was not getting work. Asked what Jodi Davis had replied to that asserted remark by him, Schneider testified that she had made the comment about her attorney advising her not to talk to Schneider and, further, had said “there wasn’t no work.” However, at that point, he made no mention of her purported admonition not to “make waves.”

In an apparent effort at damage control, Schneider was asked by counsel if he recalled anything else that had been said. He orally took himself again through this conversation:

She called me up. Asked for my name and address and phone number. I asked her how come I wasn’t working and she says you know why you’re not working.

And then I asked her is there gonna be any work for me tomorrow? She says no. It is a slow down. So that was the end of the conversation. She advised me that she couldn’t talk to me because of her attorney said she shouldn’t talk to me.

Of course, that account omits both his own asserted remark about the number of card signers and her purported warning not to “make waves.”

Counsel pursued questioning Schneider about what had been said and, finally, he testified again about his remark concerning the number of card signers. However, at no point did Schneider again mention the “don’t make waves” admonition:

Q. Okay. Now after she said to you that she shouldn’t be talking to you because her attorney told her not to—okay? Was that the end of the conversation?

A. I think so.

Q. You both just said goodbye and terminated it?

A. Yeah. I went home.

That last comment, about going home, is not without significance. For, when interrogation about this purported conversa-

tion had commenced, Schneider had testified that Jodi Davis had “called me at home.”

Robert Schneider’s credibility was not enhanced by his testimony in connection with the alleged deprivation of work that he claimed to have suffered. He testified that he had been assigned work on the first 2 days after Labor Day, but thereafter had been assigned only 3 hours’ work on September 18 “by mistake.” But the complaint alleges that Respondent’s refusal to assign available work to Schneider had not commenced until on or about September 14—not on September 6, the third day after Labor Day of 1990. More important, Respondent’s records for the weekly payroll period ending Wednesday, September 13, show that Robert Schneider had been paid for 36-3/4 hours, 28 of which had been worked during the 7-day period ending on that date, with the remainder carried over for work performed during the immediately preceding pay week—facts which hardly are consistent with Schneider’s assertions that he had been assigned no more than 3 hours’ work after September 5.

Nor can it be said that 28 hours’ work for 7 days somehow shows a deprivation of work assignments when compared to workweeks preceding Labor Day of 1990. For, Schneider had averaged 29.36 weekly hours of work during the weekly payroll periods from May 31. Accordingly, the 28 hours that he had worked during the payroll period ending September 12 is relatively consistent with his average weekly work hours for the preceding 3-1/2 months. Moreover, of the six other helpers dispatched on the same basis as Schneider (Bill Camron, Rodney Grove, Jason Harris, Robert Mullens, Mike Price, and Marlan Parks), two of them received less work than Schneider during the payroll period ending September 12: Mullens worked only 18.5 hours and Camron but 7.25 hours. Yet, there is no showing that either one had been active on behalf of the Union. In addition, three of the four helpers who received more work than Schneider during that particular payroll period had received more work on the average than Schneider since May 31. In sum, Robert Schneider’s testimony concerning a purported lack of assignments on and after Labor Day is unsupported by other evidence and, more significantly, is contradicted by the payroll records.

With respect to the September 14 to 24 period actually alleged in the complaint, the evidence shows that after Robert Schneider had crated for approximately 3 hours on September 13, a date not encompassed by the allegation, he had not been scheduled to work on September 14. While there is no explanation for the fact that Schneider had not been scheduled to work that day, neither is there evidence that there had been available work that he had been deprived from performing. To the contrary, as set forth in the preceding paragraph, he regularly had averaged less than a full 40 hours of work since May 31. No evidence has been adduced to show that September 14 had been other than a normal day during this particular payroll period when, as in preceding payroll periods, he did not work for Respondent.

Of course, as set forth in subsection III,A, supra, September 14 had been the day on which Schneider had filed his unemployment compensation claim. However, Respondent did not actually receive notice of it until midmorning on Tuesday, September 18. Meanwhile, Schneider did not work on Monday, September 17. It is unclear whether or not he had been scheduled to work that particular day. It is clear

that he rendered himself unavailable for any assignment when work began that morning—though it took some effort to get him to admit that fact. Thus, Respondent's workday commences at 7 a.m., when employees are supposed to be at the Broken Arrow facility available for dispatch. Initially, Schneider asserted that he had reported for work at 7 a.m. on September 17. However, Jodi Davis denied that assertion, testifying that Schneider had not reported at the scheduled starting time that day, but instead had telephoned between 8 and 9 a.m. and had said that he would be reporting late for work.

When this subject was raised during cross-examination, Schneider flatly denied that September 17 had been the date on which he had called in late. However, further examination generated facts that ultimately led Schneider to admit, in effect, that Jodi Davis' testimony had been truthful:

Q. And then you said that you reported for work as usual the following Monday?

A. Yes, sir.

Q. Which would be the 17th?

A. Yes, sir.

Q. But that isn't actually accurate; is it? You called in late that morning; didn't you?

A. No, sir. It wasn't the 17th[.]

. . . .

Q. What day was it?

A. I think it was the next day.

Q. The 18th?

A. Yeah.

Q. Okay. Well, but that was the day of the drivers' meeting and you say you were there at that meeting?

A. Yeah.

Q. So you didn't call in late on the 18th; did you?

A. No.

Q. So it was the 17th; wasn't it? Just like I said?

A. Yeah.

Q. So you didn't report for work as usual on the 17th; did you?

A. No. I called in.

Q. And then when you showed up, there was no work and you left, right?

A. Yeah. But I had already called Jodi Davis and asked her if there was any work before.

Q. You think you called in late and said you'd had a rough night and would be late getting in?

A. Yes.

However, that admission does not conclude the evidence pertaining to September 17. Jodi Davis testified that during that day work had developed and, further, that she had attempted to contact Schneider, but had not been successful. Schneider, in effect, denied having received any call from Jodi Davis on September 17. However, his testimony was not based on any assertion that he had been at home recovering from a "rough night" and that his telephone had not sounded during that time. Rather, he testified only, "I got a recorder at my house and I know it was on. And I know there was no phone calls." Of course, even accepting that testimony, Davis needed someone to perform work that had developed during the day. There would have been no reason for her to leave a message hoping that Schneider might ultimately call her, as opposed to simply ascertaining that he

was not personally answering the phone and, then, calling someone else to determine if she could locate anyone available to report promptly to perform that work.

Significantly, Schneider testified that he did finally report for work on September 17, but that no work had been available. However, if, as his above-quoted testimony shows, Davis had told him that there was no work available during the course of a telephone conversation, Schneider did not explain why he had nonetheless chosen to still report for work later. Moreover, he never did testify as to the time of day that he had purportedly reported and there is no evidence that work remained available for him by whatever time he did finally show up at the Broken Arrow facility on September 17. In sum, there is no credible evidence showing that Respondent deprived Schneider of work on September 17.

Nor is there any evidence that it did so on the following day. As set forth above, Schneider did report for a drivers' meeting at the beginning of work on September 18. Jodi Davis testified that, following that meeting, Schneider had been scheduled to go out on a local move for Motorola with driver Dan Malmos, but that he had failed to report after the meeting. After she had testified, Schneider was called as a rebuttal witness. He testified that he had looked at the work schedule when he went to the drivers' meeting, but that his name was not on that schedule. He further testified on rebuttal that, after the meeting, he had asked Jodi Davis about work, but had been told that none was available.

That testimony on rebuttal tended to be contradicted by Schneider's own testimony given during the General Counsel's case-in-chief. When he testified at that point during the hearing, Schneider claimed that he had been assigned work on September 18:

Q. Okay. In terms—let's look at those three hours. Do you remember what day that was?

A. I think it was the 18th, I think.

Q. What work did you do?

A. I come in at 7:00 in the morning and there was no work scheduled. Maynard Walters told me there was no work. So I asked Jodi and Jodi told me just wait around. There might be a little bit more come up.

So about 9:00, 9:30, after everybody left there was only two of us in the room. Dempsey—Roscoe Dempsey and myself. And we was sent out on a pack job to pack two items. After that was done, she sent us home.

Neither Roscoe Dempsey nor any other witness appeared to corroborate Schneider's above-quoted account of what had occurred on September 18. Moreover, at no point during rebuttal did Schneider correct that earlier account of what he testified had occurred on September 18, by returning to it and by placing it on a different date. As a result, the record is left with still another internally inconsistent account by Schneider of events that transpired in this proceeding.

The parties stipulated that helper work of the type historically performed by Schneider had been available through September 24. Furthermore, Respondent admits that it assigned no work to Robert Schneider after September 18. However, Jack Davis testified that no work had been assigned to Schneider after that date because of the notice from the Oklahoma Employment Security Commission received mid-morning on September 18 by Respondent. Because the

notice recited that Schneider had reported to the Commission that he had been separated from employment with Respondent, and because Respondent had not fired Schneider, Davis testified that he believed that Schneider had resigned.

Yet, Davis did not simply rely passively on his interpretation of the commission's notice as constituting a notice of resignation. Instead, on September 18 he sent letters to both Schneider and to the commission. In the letter to the commission, Davis stated:

We were unaware that Mr. Schneider had quit.
We will accept his notice that he has resigned from our company.
There is a slow down in work at our business.

In his letter to Schneider, after acknowledging receipt of the commission's note, Davis stated, "We accept this notice as notification of your resignation from our firm."

Schneider denied that he had intended to resign from employment with Respondent, testifying that he had filed for unemployment benefits because of a purported decline in work assignments. But, as described above, that latter assertion is not supported by the payroll records for the payroll period ending September 12. Furthermore, while Schneider acknowledged having received Davis' letter, Schneider did not respond to it. Nor, so far as the record discloses, did Schneider take any other action to alert Davis, or any other official of Respondent, that Respondent was in error in believing that the unemployment benefits claim constituted a resignation.

Instead, on September 19 the Union filed the original charge in this proceeding, alleging that, "Since on or about September 13, 1990, [Respondent] has discriminated against Robert Schneider because of his union activities by not offering him the assignment of work when work was available." Davis testified that when he had received the charge on September 20, he had become puzzled, finding the situation "very confusing":

A. Well, at first I get a notice that he's quit.

. . . .
A. And then I turn around and I get a notice that he's filed an unfair labor charge. And how can he file an unfair labor charge if he quits?

As he had done upon receiving the commission's notice, Davis prepared and mailed a responding letter, this time to the Board agent assigned to investigate the Union's charge. In that letter, after stating that Respondent's counsel was out of town, Davis explains,

We have been advised per the enclosed that Mr. Robert Schneider experienced a "separation from employment on September 14, 1990" due to a "lack of work." We are thus at a loss to determine his employment status.

In an apparent effort to refute Respondent's assertions of confusion as to whether or not he had resigned, Schneider claimed that he had reported for work at between 6:30 and 7 a.m. each workday after September 14. However, as discussed above, he ultimately was obliged to retract that assertion with regard to September 17. Nor is there any objective evidence that tends to support Schneider's testimony concerning daily reporting after that date. True, it is undisputed

that on September 24 there had been a conversation between Schneider and Jack Davis in the drivers' room at the Broken Arrow facility. However, Schneider testified that the conversation had occurred at approximately 9 a.m. Consequently, its occurrence hardly shows that Schneider had reported earlier that morning when work was scheduled to begin.

With respect to that particular conversation, testified Schneider, Davis had "said, Schneider, you might as well go home. I'm not going to work you until I hear anything from the Labor Board." Davis denied specifically that he had made the statement that he was not going to work Schneider anymore until hearing from the Board. However, he testified that he had told Schneider, "in my opinion, he quit. And I asked him to leave until we heard from the NLRB." When pressed to explain Respondent's position at that point, the following sequence of testimony was forthcoming:

Q. So it was your intention you didn't want him coming back the next day and sitting in there again?

A. That's correct. Until we heard from the NLRB.

Q. Okay. So you weren't going to work him on any jobs until you heard from the NLRB; correct?

A. That's correct.

C. Analysis

When he testified, Robert Schneider appeared more concerned with fortifying his case against Respondent than with truthfully recreating the events and conversations that he had witnessed. As must be evident from the descriptions of his testimony in section III,B, *supra*, a review of the record confirms that impression. Consequently, I do not credit Robert Schneider's testimony, save to the extent that particular portions are corroborated by, or consistent with, other credible evidence. In contrast, I do credit the accounts of Danny Ray Schneider and of Jack and Jodi Davis. Each one appeared to be testifying honestly concerning the events in which he or she participated.

Although Jodi Davis credibly denied having questioned Loretta Fry, she did not deny having asked Danny Ray Schneider if his brother was "trying to start a union" and, similarly, having later asked Robert Schneider if he was trying to start a union, as well as warning him "not to make waves." Given the credible nature of her testimony, the fact that she did not deny having questioned these particular employees on those two occasions is some indication that, in fact, she did make the statements attributed to her by the Schneider brothers and Respondent chose not to have her admit having done so. Moreover, as stated in the preceding paragraph, Danny Ray Schneider was a credible witness and Robert Schneider's description of her questioning was similar to that given by Danny Ray Schneider. Consequently, I credit the accounts of Danny Ray and Robert Schneider concerning the questions put to them by Jodi Davis, as well as Robert Schneider's uncontroverted testimony that she also had warned him not to "make waves."³ Furthermore, I credit

³ However, as should be obvious, I do not credit Robert Schneider's account of Jodi Davis' purported telephone remarks. Although she did not deny having participated in that conversation and having made those statements, his description of those purported remarks was confused, internally inconsistent, and appeared to be advanced

Continued

Danny Ray Schneider's testimony concerning the question by Walters as to whether Robert Schneider was trying to start a union.

A determination of whether interrogation violates the Act is dependent on "whether under all the circumstances the interrogation reasonably tends to restrain, coerce or interfere with the rights guaranteed by the Act." *Rossmore House*, 269 NLRB 1176, 1177 (1984). Here, as concluded in the preceding paragraph, questioning of employees occurred on three occasions. Although there is no history of hostility and discrimination by Respondent, on one occasion Danny Ray Schneider was questioned by the general manager of operations. Further, the daughter of Respondent's president—who happens to dispatch employees and, thus, has the power to control their scheduling and income—put the questions to employees in the other two conversations. Indeed, one of those conversations took place as Jodi Davis was distributing a paycheck to Danny Ray Schneider. Moreover, it is uncontroverted that, after receiving an answer to her question, she had explicitly warned Robert Schneider not to "make waves."

Both Robert and Danny Ray Schneider answered truthfully the questions put to them. Yet the latter appeared uncomfortable with being questioned, as shown by his hasty departure from Walters' office and by his defensive reaction when explaining his answer to Jodi Davis's question: "I'm not gonna lie to the lady, you know." In so testifying, Danny Ray Schneider appeared to be less an unconcerned employee than one who had felt cornered, with no alternative but to be truthful with Jodi Davis. In each instance, the employee had been alone with the questioning supervisor. In each instance, the questioning had occurred in an office. In each instance, the question had sought to identify the leading proponent in organizing Respondent's employees. No legitimate explanation was advanced to the employees for seeking such information, leaving them to speculate that Respondent's purpose for seeking this information was to act upon it by retaliating against Robert Schneider, thereby "extinguish[ing] seeds, [so] that it would have no need to [later] uproot sprouts." *Ethan Allan, Inc. v. NLRB*, 513 F.2d 706, 708 (1st Cir. 1975). At no point were the two questioned employees assured that such action would not be taken. In fact, at no point were they even told why Respondent's officials were attempting to ascertain if Robert Schneider was attempting to organize Respondent's employees. Nor were they assured on any of the three occasions that they could decline to answer without reprisal and that no reprisals would be directed at them for any answer that they did give.

Although Robert Schneider was the leading proponent of unionization, there is no evidence that he had been an open one—no evidence that he had conducted his card solicitation openly. Clearly, Danny Ray Schneider had not been an open union supporter. Consequently, this is not a situation where Respondent's officials questioned open supporters of the Union. Given that fact, and in light of the considerations reviewed in the foregoing two paragraphs, I conclude that a preponderance of the evidence establishes that Respondent's interrogation reasonably tended to restrain and coerce employees in violation of Section 8(a)(1) of the Act. Further—

simply to buttress his own case against Respondent by adding a second conversation that repeated what she earlier had actually said.

more, I conclude that Jodi Davis' warning to Robert Schneider not to "make waves" constitutes an implied threat of reprisal which also violated Section 8(a)(1) of the Act.

A preponderance of the evidence, however, does not support the allegation that Respondent unlawfully refused to assign work to Robert Schneider prior to September 24. As discussed in section III.B, above, Respondent's payroll records contradict Schneider's assertions that he had been deprived of work since September 6, the third day after Labor Day. Moreover, while helpers' work was generally available on Friday, September 14, there is no particularized evidence that Schneider, as opposed to one of the other helpers regularly scheduled by Respondent, should have been assigned to perform it. That is, there is no specific evidence that on September 14 Schneider had been deprived of work that he otherwise would have performed. To the contrary, the payroll records show that he ordinarily did not work a full 40 hours during each pay period, but usually averaged only 3 to 4 days of work for Respondent during each pay period. Indeed, it may well have been that failure to receive a full 40 hours work per pay period that had led him to file for benefits with the commission. Consequently, a preponderance of the evidence does not support the allegation that Schneider had been deprived of work on September 14.

Nor does it support a similar allegation with respect to Monday, September 17, and Tuesday, September 18. Ultimately, Schneider admitted, in effect, that he had falsely testified to having reported for work at 7 a.m. on the former date—admitted that he had not, as he testified initially, reported at his scheduled starting time on September 17. Accordingly, he rendered himself unavailable to perform work scheduled for that day. Further, I credit Jodi Davis' testimony that he had not answered his telephone when she had tried to contact him about performing work that had developed during the course of that day. As discussed in section III.B, above, her testimony in that respect is not diminished by the testimony that no message had been left on an answering machine that may have been operating during that day.

Similarly, Jodi Davis testified credibly that Schneider had been scheduled for work on September 18, but had not reported to perform it following the drivers meeting. In contrast, as described in section III.B, above, Schneider gave different, conflicting accounts of his activities on that date, in one claiming that he had gone home after having been told that no work was available, but in the other claiming that Jodi Davis had told him to wait and that he later had been assigned packing work for 3 hours. Given the state of the record, I conclude that Schneider did not report for work after the drivers meeting on September 18 and, as had been the fact on the preceding day, had rendered himself unavailable for work that day. Respondent admits that it did not schedule work for Schneider after September 18. It claims that it did not do so because on that date it had received the commission's notice which Jack Davis interpreted as notification of Schneider's resignation. In evaluating allegations of discrimination, "the pivotal factor is motive." *NLRB v. Lipman Bros.*, 355 F.2d 15, 20 (1st Cir. 1966). As concluded above, Respondent violated Section 8(a)(1) of the Act by conducting unlawful interrogations and by making an unlawful threat. Yet, to the extent that such evidence shows a disposition to discriminate, it is not determinative. "The mere

fact that an employer may desire to terminate an employee because he engages in unwelcome concerted activities does not, of itself, establish the unlawfulness of a subsequent [personnel action].” *Klate Holt Co.*, 161 NLRB 1606, 1612 (1966). As concluded above, I felt that Jack Davis was testifying candidly when he appeared as a witness. Consistent with that impression, I conclude that he was truthful when testifying that the commission’s notice had led him to believe that Schneider had resigned.

The genuineness of that belief is supported by certain objective facts. First, although Schneider had called on September 17, he had not reported for work on either that day or, more importantly, on the following one. That failure to report is consistent with a resignation on September 14. Second, while benefits may be available to underemployed workers under Oklahoma law, the notice received by Respondent states only that there had been a “separation from employment.” Neither the notice, itself, nor any other communication from the commission, modified or nullified the plain meaning of those words: that Schneider had reported to the commission that he no longer was employed by Respondent. Third, so far as the evidence shows, Schneider made no effort to contact Respondent to explain his purported purpose—underemployment—for seeking unemployment benefits. That noncommunication, coupled with his failure to report for work on September 17 and 18, objectively support the logic of Davis’ interpretation that “separation from employment” had meant a cessation of interest in further work with Respondent. Finally, Davis did not conceal that interpretation of that phrase. He immediately wrote to the commission and to Schneider, setting forth his conclusion that the notice had constituted notification of resignation. Yet, though he admitted having received Davis’ letter, at no point did Schneider contact Respondent to correct what he now claims had been, in effect, a misinterpretation.

In sum, I conclude that, regardless of Respondent’s attitude toward Schneider’s union activities, a preponderance of the evidence shows that Jack Davis genuinely believed that the commission’s notice meant that Robert Schneider had resigned and, further, that Respondent then acted as it would have done with regard to any resigned employee: it ceased scheduling Schneider for work. Therefore, the General Counsel has failed to establish that Respondent refused to assign work to Schneider prior to September 24 for reasons proscribed by the Act.

But a contrary result is warranted on and after September 24. On September 20 Respondent received the original charge that underlies the complaint in this proceeding. Its allegation of work deprivation since September 13 is some indication that Schneider desired to continue working for Respondent—that Jack Davis’ earlier resignation interpretation of the commission’s notice may have been erroneous. However, standing alone, the charge’s allegation is no more than that: an indication.

From the face of the charge, the alleged deprivation of work allegation could have been premised on more than one theory: that Schneider had been deprived of work only on September 13 and 14, before he resigned; that Schneider had resigned because of unlawful deprivation of work since September 13, thereby being constructively discharged; or, that Schneider was continually being deprived of work and never had resigned. The point is that although the charge’s allega-

tion is some indication of a desire to continue working for Respondent, its ambiguity gives rise to other interpretations, depending upon how it is supported by evidence and argument. Given that ambiguity and the background of events that had occurred that week before the charge had been received, there was ample basis for Jack Davis to become, as he testified, “very confus[ed]” about the meaning of the charge. Consequently, although the charge was an indication that Davis might have reached an erroneous conclusion that Schneider had resigned, standing alone, against the background of the immediately preceding events, it did not oblige Respondent to reverse Davis’ interpretation and promptly try to contact Schneider with an offer of work on Friday, September 21, and on Saturday, September 22.

However, Davis’ own testimony shows that by September 24, his encounter with Schneider in the Broken Arrow drivers’ room alerted him that Schneider was seeking to continue working for Respondent. Moreover, Davis’ own testimony shows that his sole reason for refusing to schedule Schneider for driver/helper work on and after that date had been the unresolved charge filed on behalf of Schneider. For, Davis testified during the hearing that he would not schedule Schneider for work until the Board made a determination as to whether or not Schneider had quit earlier in the month.

An employer is not free to hold an employee’s continued employment hostage to satisfactory resolution of an unfair labor practice charge. Although Davis genuinely continued to believe on September 24 that Schneider had resigned 10 days earlier, Respondent has failed to show that a prior resignation barred future employment with it. That is, Respondent has neither contended nor shown that it had a policy against employment of former employees, in general, see, e.g., *Textron, Inc.*, 302 NLRB 660 (1991), or of employees who have resigned, in particular. As a result, there is no showing that, in the ordinary course, previous employment with Respondent, of itself, would have disqualified an employee from consideration for employment with Respondent. Accordingly, it was irrelevant to future employment with Respondent whether Schneider had or had not resigned on September 14 and, concomitantly, whether the Board did or did not determine that he had done so. Nothing at stake in connection with the charge had a lawful bearing on his suitability for continued employment with Respondent on and after September 24.

Respondent has introduced evidence of certain remarks and actions by both Schneider and the Union that tend, at least, to create some suspicion about the good faith of both in some respects. However, all of these events occurred after September 24. There is no particularized showing of a lack of good faith on the part of either in connection with Schneider’s claim to the commission or with the Union’s decision to file the charge underlying the complaint in this proceeding. Nor is there any evidence that Schneider had acted in other than good faith in going to the Broken Arrow facility to seek work on September 24. At best, from Respondent’s standpoint, the record shows a misunderstanding regarding Schneider’s claim for state benefits: he filed believing that he was being underemployed and Respondent construed his claim as a resignation.

Whether or not the charge’s allegation of unlawful work deprivation had merit—as I conclude that it did not—is of “no matter.” *NLRB v. Whitfield Pickle Co.*, 374 F.2d 576, 582 (5th Cir. 1967). See also *NLRB v. Syracuse Stamping*

Co., 208 F.2d 77, 79 (2d Cir. 1955); *General Nutrition Center*, 221 NLRB 850, 855 (1975). Employment cannot be held hostage to the correctness of allegations in charges filed by or on behalf of employees. To allow that to occur would be to effectively permit employers to retaliate against employees solely on the basis of determinations by the Board, or the General Counsel, concerning the sufficiency of evidence to support allegations in charges, thereby allowing "the Board's channels of information [to be] dried up by employer intimidation of prospective complainants." *John Hancock Life Insurance Co. v. NLRB*, 191 F.2d 483, 485 (D.C. Cir. 1951). Section 8(a)(4) of the Act is intended to prevent an employer from "retaliat[ing] against an employee because he filed unfair labor practices or otherwise participated in the Board's processes." *Volkas Provision Co. v. NLRB*, 796 F.2d 864, 871-872 fn. 10 (6th Cir. 1986). Consequently, Respondent was not free to withhold continued employment from Schneider until a determination was made regarding the merit of the charge filed on his behalf. In sum, on September 24 Davis effectively said that Schneider would not be scheduled for employment until resolution of the charge filed on his behalf. Such a remark violates Section 8(a)(1) of the Act. Furthermore, coupled with Davis' admission that he would not resume scheduling Schneider for work before hearing from the NLRB about the charge, it establishes a prima facie violation of Section 8(a)(4) and (1) of the Act, in that it shows a withholding of future work from an employee because of the existence of a dispute, embodied in a charge, concerning past lack of work. There is no assertion of a policy of refusing to employ workers whom Respondent previously employed. Nor is there evidence that Schneider's past performance had been so unsatisfactory that Respondent would not have considered him for continued employment. There is evidence of a shortage of work during September, but Respondent presented no evidence, nor did it contend, that there was a lack of work that Schneider could have performed on and after September 24. Therefore, a preponderance of the evidence establishes that Respondent violated Section 8(a)(4) and (1) of the Act by refusing to schedule Schneider for work on and after that date. However, it does not establish that, in refusing to do so, Respondent has been motivated by reasons proscribed by Section 8(a)(3) of the Act.

CONCLUSION OF LAW

Accent Moving & Storage, Incorporated committed unfair labor practices affecting commerce by refusing to schedule Robert Schneider for work on and after September 24, 1990, in violation of Section 8(a)(4) and (1) of the Act, and by interrogating employees regarding union activity, threatening reprisals against an employee for engaging in union activity, and by telling an employee that he would not be scheduled for work because of an unfair labor practices charge filed on his behalf, in violation of Section 8(a)(1) of the Act. However, it has not violated the Act in any other respect.

REMEDY

Having found that Accent Moving & Storage, Incorporated engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and, further, that it be ordered to take certain affirmative action to effectuate the policies of the Act. With respect to the latter, it

shall be ordered to offer to Robert Schneider immediate and full reinstatement to the position of driver/helper, dismissing, if necessary, anyone who may have been hired or assigned to perform the work from which he was deprived on and after September 24, 1990. If that position no longer exists, it shall be ordered to reinstate Schneider to a substantially equivalent position, without prejudice to his seniority or other rights and privileges. It also shall be ordered to make Schneider whole for any loss of pay he may have suffered because he was unlawfully deprived of employment, with backpay to be computed on a quarterly basis, making deduction for interim earnings, *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest to be paid on the amounts owing as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, Accent Moving & Storage, Incorporated, Broken Arrow, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to schedule for work, discharging or otherwise discriminating against any employee because he has filed charges, because charges have been filed on his behalf, or for giving testimony under the Act.

(b) Interrogating employees about their own or other employees' union activities, expressly or impliedly threatening employees with reprisals because they engage in union activity, and telling employees they will not be scheduled for work until resolution of unfair labor practice charges filed on their behalf under the Act.

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

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

(a) Offer Robert Schneider immediate and full reinstatement to the position of driver/helper, dismissing, if necessary, anyone who may have been hired or assigned to that position on or after September 24, 1990, or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered as a result of his discriminatory deprivation of work, in the manner set forth above in the remedy section.

(b) 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.

(c) Post at its Broken Arrow, Oklahoma facility copies of the attached notice marked "Appendix."⁵ Copies of the no-

⁴If 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.

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

tice on forms provided by the Regional Director for Region 17, after being duly signed by its authorized representative, shall be posted by Accent Moving & Storage, Incorporated immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to ensure that those notices are not altered, defaced, or covered by any other material.

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

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not found.

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

After a trial at which all parties had an opportunity to present evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and we have been ordered to post this notice.

Section 7 of the Act gives employees these rights.

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

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

WE WILL NOT refuse to schedule you for work, discharge, or otherwise discriminate against you because you have filed unfair labor practice charges, because charges have been filed on your behalf, or because you have given testimony under the National Labor Relations Act.

WE WILL NOT interrogate you concerning your own union activity and concerning the union activity of other employees.

WE WILL NOT expressly or impliedly threaten you with reprisals because you support or assist Tulsa General Drivers, Warehousemen & Helpers, Local Union 523, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, or any other labor organization.

WE WILL NOT tell you that you will not be scheduled for work until resolution of unfair labor practice charges filed on your behalf under the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with any of your rights set forth above which are guaranteed by the National Labor Relations Act.

WE WILL offer to Robert Schneider immediate and full reinstatement to the position of driver/helper, dismissing, if necessary, anyone who may have been hired or assigned to perform the work from which he was unlawfully deprived on and after September 24, 1990, or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and *we will* make Schneider whole for any loss of pay he may have suffered as a result of the discrimination directed against him, with interest on the amounts owing.

ACCENT MOVING & STORAGE, INCORPORATED