

Advance Waste Systems, Inc. and Private Sanitation Union, Local 813, a/w International Brotherhood of Teamsters, AFL-CIO¹ and Vincent Harris. Cases 2-CA-24382, 2-CA-24507, 2-RC-20854, and 2-CA-24447

March 31, 1992

DECISION, ORDER, AND CERTIFICATION
OF RESULTS OF ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY, OVIATT, AND RAUDABAUGH

On August 13, 1991, Administrative Law Judge Eleanor MacDonald issued the attached decision. The General Counsel and the Union filed exceptions and supporting briefs, and the Respondent filed an answering brief.

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,² findings,³ and conclusions as modified and to adopt the recommended Order as modified.

The judge found that the Respondent did not violate Section 8(a)(1) of the Act when Vice President Paul Filipelli interrogated employee Vincent Harris about the Union because the conversation occurred in an informal setting, the two were friendly, and Filipelli did not press the point. We disagree for the reasons set forth below.

In April 1990, while driving a garbage truck, Filipelli asked Harris how the Union was getting along. Harris did not reply. Filipelli then stated that he

¹The name of the Teamsters International has been changed to reflect the new official name.

²There were no exceptions to the judge's recommendation that Attorney Bochner be warned regarding his conduct at the hearing. A warning is included in the Order, *infra*. Contrary to our colleague, we are satisfied, on the basis of the record here, that this disciplinary measure—which is precisely that recommended by the judge in whose courtroom the conduct occurred—is sufficient.

³The 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. 951). We have carefully examined the record and find no basis for reversing the findings.

Assuming for argument's sake that the General Counsel did establish a prima facie case with regard to employees Harris and Torres, we agree with the judge's finding that the Respondent met its burden of showing that it would have discharged both those employees even in the absence of any union or other protected activity. Similarly, in the case of employee Martucci, even if the General Counsel established a prima facie case, we find based on the credited evidence, that the Respondent effectively rebutted it by showing that Martucci would not have been rehired even in the absence of any union activity on his part. *Wright Line*, 251 NLRB 1083 (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).

did not need the Union and that he was upset with employee Martucci for bringing in the Union.

Filipelli, the vice president, is one of the highest ranking officials in the Company. He questioned Harris one-on-one in a moving truck, and, contrary to the judge's finding, Filipelli did not drop the issue when Harris remained silent. Rather Filipelli stated that he did not need the Union and that he was upset with Martucci because of his organizing effort.

We find, contrary to the judge, that under these circumstances Filipelli's interrogation was unlawful. See *Rossmore House*, 269 NLRB 1176 (1984), *enfd.* sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). Given Filipelli's high company rank, the place of the questioning in an enclosed, moving truck with no other individuals present, and the expression of hostility toward the Union and disapproval of an employee's organizing activity immediately following his question, we find the interrogation coercive and therefore a violation of Section 8(a)(1).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Advance Waste Systems, Inc., Garrison, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating its employees about their union activities and desires.

(b) 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 necessary to effectuate the policies of the Act.

(a) Post at its Garrison, New York facility copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

⁴If 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."

IT IS FURTHER ORDERED that the remaining complaint allegations are dismissed.

IT IS FURTHER ORDERED that the challenges to Harris' and Martucci's ballots are sustained.

IT IS FURTHER ORDERED that Attorney Bochner is warned that he must not interrupt counsel, the witnesses, or the judge, that he must follow instructions, and that a failure to comply at future hearings will result in sanctions being imposed by the Board.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for Private Sanitation Union, Local 813, a/w International Brotherhood of Teamsters, AFL-CIO, and that it is not the exclusive representative of the bargaining unit employees.

MEMBER RAUDABAUGH, dissenting in part.

I would not simply issue a warning. Rather, I would issue a Notice to Show Cause why more severe sanctions should not be imposed. In this regard, I note that this is the second time that Bochner has engaged in apparent misconduct. See *De Jana Industries*, Cases 29-CA-14349, et al., Board order dated October 19, 1990. (Bochner issued an apology, sanctions not imposed.) In addition, based on the judge's account in the instant case, there is at least reasonable basis for a conclusion that Bochner's actions constituted aggravated misconduct within the meaning of Section 102.44 of the Board's Rules. In these circumstances, I am not content with a mere warning.

My colleagues rely on the fact that the judge recommended only a warning. In my view, the Board should show deference to the *immediate* efforts of the judge to restore order in the hearing. Hence, I agree that the judge acted properly in ousting Bochner from the proceedings. However, there is a separate issue as to what, if anything, should be done *subsequently* to punish the alleged misconduct. In my view, that is a responsibility of this Board. For the reasons indicated above, I do not believe that a mere warning is sufficient.

I also wish to express my disappointment concerning the fact that counsels for the General Counsel did not support, indeed they opposed, the judge's removal of Bochner from the proceedings. Concededly, the General Counsel was on the same "side" as the Charging Party in this case. However, counsels for the General Counsel are also officers of this Board and members of the Bar. As such, in my view, they had an obligation to support, not oppose, the judge's admirable effort to restore decorum in the proceedings.

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate you regarding your union activities and desires.

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.

ADVANCE WASTE SYSTEMS, INC.

Mindy E. Landow, Esq. and *David A. Pollack, Esq.*, for the General Counsel.

Andrew A. Peterson, Esq., and *Michael J. Stief III, Esq.*, (*Jackson, Lewis, Schnitzler & Krupman*), of White Plains, New York, for the Respondent.

Stuart Bochner, Esq., of New York, New York, for the Union.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was tried in New York, New York, on February 12, 13, 14, and 15, 1991. The complaint alleges that Respondent, in violation of Section 8(a)(1) and (3) of the Act, interrogated its employees, discharged its employee Peter Martucci, discharged its employee Vincent Harris, and imposed more onerous working conditions on, and discharged its employee Nestor Torres. The hearing on the unfair labor practice complaint was consolidated with a hearing on challenges to the ballots cast by Martucci and Harris in an election conducted in Case 2-RC-20854 on May 18, 1990. Respondent denies that it has violated the Act.¹

¹ After the hearing closed, counsel for the General Counsel submitted a motion to amend the complaint in Case 2-CA-24382 to delete par. 7(b) relating to an alleged promise of a wage increase. General Counsel's motion is hereby granted. In addition, counsel for the General Counsel withdrew in her brief the allegation that Respondent

Continued

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent in April 1991, I make the following²

FINDINGS OF FACT

I. JURISDICTION

Respondent, a domestic corporation, with its principal office in Garrison, New York, is engaged in the operation of a private sanitation company providing refuse collection services and containers used for debris removal. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Catherine DiSalvo, the owner and president of Respondent, is married to Paul Filipelli, the vice president of the Company. DiSalvo and Filipelli run the business from their home. The company office is attached to their residence and the garbage trucks are parked in an area near the house. Filipelli has been in the refuse collection industry since the age of 18 and has been a member of Local 813. DiSalvo's family was in the business as well.

The record establishes that DiSalvo purchased the Company in 1986. In February 1989, certain questions were raised in the surrounding community relating to the proper zoning of the property on which the business is conducted and whether a refuse company could be conducted on the property. Although a refuse collection business had been located on the property for a number of years, the Company was obliged to prepare and submit to the town planning board a proposed site plan showing, inter alia, the various uses to which the property would be put and limiting the activities which could be carried on there. There was substantial community opposition to the carrying on of a refuse business at the Company's location both on esthetic grounds and due to fear of contamination of the ground water. DiSalvo attended several meetings of the town planning board beginning in November 1989, at which the Company's proposed site plan was discussed, public comments were received, and changes were debated. The site plan was finally approved by the town planning board in December 1990 or January 1991. In order to obtain board approval of the site plan, DiSalvo had to respond to a large number of objections to the Company's mode of running its business and DiSalvo had to incorporate into the site plan her promises that certain changes would be made and certain practices abandoned. The planning board required numerous commitments by the Company; the two that are relevant to this proceeding related to the storage of garbage in trucks on the company property and

the transfer of garbage from one truck to another on the property.

In the conduct of its business, Respondent uses a large garbage truck which is operated by a driver and a helper. There is also a smaller truck, called a chaser or satellite truck, which is operated by a single driver. The chaser truck can maneuver into smaller spaces than the large garbage truck and it can be driven over certain country roads that would be difficult for a larger truck to negotiate. Since the chaser truck has a limited capacity, it must dump its load of refuse several times a day. This is done when the chaser truck makes radio contact with the large truck and arranges to meet it somewhere on its route in order to dump into the larger truck.³ The routes for the large truck and the chaser truck are coordinated so that the chaser can dump regularly into the larger truck. Respondent owns a rolloff truck which is used to deliver construction debris containers and pick up the containers when they are no longer required. The rolloff is operated by a single driver. Respondent also operates a recycling truck, but the record does not contain details as to its operation.

As is more fully discussed below, the record shows that Filipelli drove the rolloff truck until a per diem rolloff driver was hired in June 1989, that he drove other trucks when necessary, that he did some work for the Company in the office, and that he tried to sign up new customers for the business. After the rolloff driver was hired, Filipelli had more time for sales and for office work, although he continued to drive the Company's vehicles whenever necessary.

The large garbage truck and the chaser truck have daily residential pickup routes. The rolloff truck is operated according to customer demand, which fluctuates according to construction industry activity as determined by the weather and the economy. In addition to the scheduled residential routes, the Company also performs "special" pickups for customers who have a large item such as a sofa or refrigerator to be hauled away. A special pickup is scheduled when the customer calls Respondent's office and makes the arrangements; tickets are posted next to the timeclock showing the date and time of the special pickups. Since the local landfill is closed on Mondays, the Company does not schedule large special pickups for Mondays because extra expense would be incurred if refuse had to be hauled to a landfill farther away.⁴

Before the Company was involved in the site plan approval process before the town planning board, the chaser truck would often transfer its load of refuse to the larger truck while on the company property and in full view of any passing townspeople. In addition, the chaser truck would be left full of refuse overnight on the property. Both of these practices came in for heavy criticism while Respondent was seeking site plan approval from the planning board. DiSalvo made repeated promises to the planning board and to community residents attending board meetings that garbage would no longer be transferred on the property and that garbage would no longer be stored on the property overnight. The record shows that after DiSalvo made these promises,

ent eliminated the privilege of Torres to make personal stops during the workday.

²The reporting service delivered a record of the proceedings in February 1991. Errors in the transcript have been noted and corrected.

³The chaser truck cannot be dumped without making use of certain equipment on the larger truck which is designed to lift and dump the chaser truck container.

⁴The record does not disclose what the Company does with the residential refuse it collects on its normal Monday routes.

members of the board and of the community observed Respondent's property and the conduct of its business and that they complained if they saw refuse being transferred or stored on the premises.

The first meeting of the planning board which DiSalvo attended in connection with approval of the site plan took place in September 1989. At a subsequent meeting, held on November 16, 1989, questions were asked whether garbage was stored on the property, and DiSalvo assured the board that although it had happened in the past, garbage would no longer be stored in trucks on the Company's premises. At a planning board meeting held on March 22, 1990, Respondent's site plan was discussed again. The chairman of the planning board said that on March 13, he had watched garbage being transferred on the property from a container into a garbage truck and he stated that the truck was still on the same spot at 5 p.m. The chairman stated that garbage was still being transferred and stored on the Company's premises. DiSalvo responded that Respondent would not store garbage in the trucks and that garbage would not be transferred on the premises. She also agreed that other activities prohibited by the site plan would not be carried out; these included washing the trucks, performing maintenance and repairs, and fueling trucks.

DiSalvo testified that the Company was entitled to take 1 year to bring itself into conformity with the site plan. At the time of the instant hearing, there was still a fuel pump located on the property to which diesel fuel was regularly delivered and at which the trucks used to fill up. In addition, DiSalvo admitted that employees changed flat tires on the Company's premises, and added oil to the trucks. However, DiSalvo maintained that the planning board was more concerned that large overhauls not take place on the property than it was with minor work.

According to DiSalvo, after the November 1989, planning board meeting she told her employees that garbage could no longer be stored or transferred on the company property. DiSalvo testified that if garbage was stored on the property after that time, it was because the garbage truck was out of order and the chaser truck could not be dumped.

B. Alleged Interrogation and Discharge of Vincent Harris

Vincent Harris testified that he worked for Respondent as a part-time employee in 1986 and 1987. Harris stated that he was called to fill in when employees Robert Brown and Daryll Lassic were absent. Harris maintained that if he was needed he would be called between 7 and 7:30 a.m. on the day he was required to work. This occurred about once or twice a week. Harris stated that he did not receive a weekly salary, he was paid by the day. Sometime in 1987, Harris informed Filipelli that he intended to return to school and that he would be quitting. In the event, Harris quit but instead of attending school he worked for a manufacturer. In March 1988, the Company hired Harris as a full-time helper on the garbage truck. Harris not only helped on the garbage truck, but he also did special residential pickups.

Respondent's payroll records show that Harris was hired in March 1987 and that he was paid a weekly salary of \$280 and received an increase to \$300 per week in May 1987. He quit in August to go to school and was rehired in March 1988, at \$300 per week and was given regular raises there-

after. DiSalvo denied that Harris was ever a per diem employee. I credit DiSalvo based on her testimony as supported by the payroll records.

In February or March 1990, Harris learned from his fellow employee Peter Martucci that the latter was in contact with Local 813. Harris attended a meeting with a union representative at the Reef & Beef Diner in Peekskill and he signed an authorization card.

Harris testified that in April 1990, after the filing of the Union's petition, he was working on the garbage truck with Filipelli.⁵ Filipelli asked how the Union was going along. Then Filipelli stated that he didn't need the Union and that he was upset with Martucci for bringing in the Union. Harris testified that before that occasion, Filipelli had made similar comments, but he was not specific as to the time or the place. Harris stated that he got along well with Filipelli; they had often worked together on the garbage truck, especially when Harris first worked for Respondent and Filipelli was more involved in the operation of the Company. Filipelli could not recall if he had asked Harris about the Union.

After the filing of the Union's petition, DiSalvo conducted meetings at the office at which she expressed her opposition to the Union and handed out informational leaflets. General Counsel does not contend that Respondent engaged in any unlawful activity in connection with these meetings. According to Harris, he spoke at the meetings, saying that the Union was good for the family because it provided benefits. Harris' affidavit given to a Board agent in connection with the instant proceeding does not refer to the fact that Harris spoke up at any meetings. Harris stated that in early May 1990, DiSalvo called Harris and fellow employee Nestor Torres to the office; she told them that Martucci had come in to see her and that Martucci had told her that he was going to vote against the Union.

Soon after this, Harris called DiSalvo one evening and told her that he wanted to leave early the next day as he had an appointment with a lawyer concerning a child custody matter. According to Harris, DiSalvo said he would be paid if "the work is done or up to par." After speaking to DiSalvo, Harris decided to meet with the lawyer earlier in the day and he called DiSalvo back that evening to inform her that he would not be coming in at all the next day. Harris testified that when he called DiSalvo no one picked up the telephone. Harris then called Torres, with whom he usually rode to work in the morning, and Harris asked Torres to inform Filipelli in the morning that Harris would not be at work. Harris testified that he began work at 6:30 a.m. and that Torres arrived at work at 6 or 6:30 a.m., and that this would give the Company enough time to arrange for a replacement.

Harris stated that on the evening of the day he did not report for work, he called DiSalvo to see if she had gotten his message that morning and if the work had been done. According to Harris, DiSalvo screamed a profanity at him and he and DiSalvo had an argument over the telephone. Then DiSalvo said that Harris had encouraged the men to go Union and that he was the one who kept the guys going on with the Union. Harris told DiSalvo that they should discuss this face to face. DiSalvo told Harris not to take days off without calling her and letting her know whether he was coming in or not coming in. Harris testified that there had

⁵ The petition was filed on March 6, 1990.

been arguments in the past when DiSalvo shouted and cursed about things that went wrong at the Company.

DiSalvo testified that on May 8, Harris had asked for the next afternoon off. Harris wanted to work only until 11 a.m. the next day and he asked DiSalvo if he would be paid. DiSalvo said he would be paid and that he should come in and see what he could do on the route before 11 a.m. But Harris did not come to work at all on May 9. Later DiSalvo heard that Torres told Filipelli that Harris was not coming to work that day. DiSalvo spoke to Harris after this and asked him why he had not called the Company to say he would not be there. Harris told DiSalvo he had tried to telephone her but that no one answered. DiSalvo told Harris that she had been home all evening; DiSalvo has two small children and she was home taking care of them.⁶ In addition, the telephone has a "call waiting" feature so she would have known if someone was trying to reach her while she was speaking on the telephone.⁷ After DiSalvo told Harris that she had been home all evening, a heated discussion ensued. DiSalvo denied that she mentioned anything about the Union during this discussion.

Filipelli testified that he and DiSalvo discussed Harris' failure to report to work on May 9. Filipelli had had to work on the truck himself that day. He and DiSalvo decided that Harris should be discharged.

The next day, both DiSalvo and Filipelli spoke to Harris early in the morning when he reported for work. According to Harris, Filipelli told Harris that he was going to discharge him because he was losing sleep over what Harris had said and his wife was nagging him. According to Filipelli, he told Harris that he could not plan his work if Harris did not report to work as scheduled and that Harris was being discharged. Harris said he was sorry and that it would not happen again, but Filipelli said it had happened in the past and that he would not accept this. Filipelli told Harris that early morning notice through Torres was not acceptable. If Harris had changed his mind about working the day before, he should have called DiSalvo again. Both Filipelli and DiSalvo testified that Harris was fired for failing to call the Company when he did not intend to come to work the next day; they denied that union activity had anything to do with the discharge.

Harris testified that earlier in 1990 he had missed a day of work without calling in. Harris had assumed that Martin Luther King Jr. Day was a holiday and he had not come to work. The next day, Filipelli told him he should have called and that Harris must let the Company know if he was not coming to work. Harris was not paid for the day he missed. Harris acknowledged that it was very important to call the Company if he were going to be absent from work; he recalled that when Filipelli hired him in 1988, Filipelli said that the helper's job was important and that he needed Harris there every day. Harris stated that he always calls if he plans to be absent the next day.

DiSalvo testified that twice in 1989, Harris had not come to work and had not called the Company to say he would

not be in. On both occasions, Harris had been arrested and circumstances had made it impossible for Harris to reach a telephone. But aside from those occasions, Harris always called the night before if he could not come to work.⁸ DiSalvo denied that during Harris' employment she had ever received a message from another employee as the morning shift was beginning to the effect that Harris would not be coming to work. The Company needs time to find a replacement worker and it is not acceptable for DiSalvo to be told at 6:30 a.m. that an employee will not be reporting for work that day.

According to Harris, it was common practice at the Company for employees to notify management in the morning that they will not be at work that very day. Harris testified that he has carried similar messages for former employees Steve Romano and Daryll Lassic, and he has called Torres in the past to tell him that he would not be going to work that morning. In addition, he has left messages at the deli next door to the Company to the effect that he would not be coming to work. Harris did not specify whether these occasions when he and other employees were absent were days that he or the others were sick, were arrested, or were taking a day off for other reasons. In the absence of any specific details, it is not possible to evaluate the supposed practices testified to by Harris. Further, without any details concerning the absences of Romano and Lassic, I cannot determine whether they were similar to the facts of the absence leading to Harris' discharge and whether the discharge was an occasion of disparate treatment by Respondent. I shall not rely on Harris' testimony concerning the purported common practice at the Company.

Torres testified that when he could not come to work, he would call the Company and notify management that he planned to be absent. But Torres also testified that there were times he called Harris and asked Harris to give the Company a message that he would not be coming in to work that day. Torres denied that he was supposed to notify the Company personally the day before a planned absence. However, Torres acknowledged that he was absent only twice during all the time he worked at the Company. I find it hard to credit his testimony that sometimes he notified the Company before an absence and sometimes he just sent a message via Harris. If Torres was absent only two times it is impossible to believe that he had so much experience with different methods of making his absence known to management. I shall not rely on Torres' testimony with respect to this issue.

General Counsel presented the testimony of Daryll Lassic concerning the practices at the Company relating to the obligation of employees to call in prior to being absent from work. Lassic's employment ended in 1988. Lassic testified that employee Robbie Brown was fired for failing to report to work everyday. Lassic also testified that he used to call in if he were going to be absent from work but that Filipelli told him not to do that anymore for fear of waking DiSalvo. After that, according to Lassic, he sent word via a coworker or left a message. Lassic did not specify what time of day these calls were made, when the calls were made in relation to a proposed absence nor what he meant by leaving mes-

⁶Torres testified that when he told Filipelli that Harris would not be coming to work on May 9 and that Harris had tried to telephone the Company the night before, Filipelli replied that "we were home all evening."

⁷I note that Harris testified that there was no answer when he telephoned DiSalvo, not that the line was engaged.

⁸The only exception to this rule was in case an employee woke up sick in the morning; then, he would call DiSalvo in the morning to say he could not work due to illness.

sages when he planned to be absent. Lassic's testimony did not provide any details linking Lassic's practices to the actual facts at issue in this case; thus, Lassic's testimony could mean almost anything. I shall not rely on Lassic's testimony because practices in effect in 1988, at the latest, are too remote from the circumstances of Harris' discharge in 1990 and because Lassic's testimony was not specific enough to be of any value. I do find it significant, however, that Respondent has fired at least one employee in the past for failure to report to work.

In the absence of a denial by Filipelli, I credit Harris' testimony that in April 1990, while Harris and Filipelli were working on the garbage truck together, Filipelli asked Harris how the Union was going along.⁹ Filipelli also stated that he did not need the Union and was upset with Martucci for bringing in the Union. General Counsel urges that Filipelli's question about how the Union was going along was coercive and violated the Act. It is well established that in evaluating an alleged interrogation a "totality of circumstances test" must be used. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). In the instant case, the Company is small and family run; Harris had often worked side by side with Filipelli on a garbage truck and the two men got along well. Although Filipelli is the vice president of the Company and married to the owner, these bare facts do not make him a formidable figure to Harris in light of the actual friendly and working relationship between Harris and Filipelli. Employees may generally be credited with the knowledge that no employer wants or welcomes a union, and this was true of the Company herein as expressed by Filipelli's comments; but the Company has no history of antiunion hostility or discrimination. Filipelli asked his question of Harris in a garbage truck where the two were working side by side. The location was thus the least formal setting for an interrogation one could imagine and hardly a place where Harris would likely feel intimidated. Finally, Filipelli did not ask for specific information; he merely asked a general question as to how the Union was going along and he did not press the point at all. There is no basis for General Counsel's contention that the question was designed to elicit information about which employees had signed union cards. Filipelli's question was casual and under the circumstances I find that it was not unlawful. I do not find that Respondent violated Section 8(a)(1) of the Act in this instance.

I find that Respondent has established that it had a practice of requiring its employees to notify management in advance of a planned absence so that Filipelli could schedule his workday and so that a replacement worker could be obtained if necessary. Harris testified that he always calls if he is going to be absent the next day and that he knows it is important to call the Company with advance notice. DiSalvo testified that the only exceptions to this rule have to do with sudden illness on the morning of the workday or with circumstances where the employee is physically unable to make a telephone call. Harris had been warned in January 1990, that he must not be absent without informing the Company in advance. The Company has in the past discharged an employee for absenteeism. As set forth above, I do not credit the testimony of Harris, Torres or Lassic that it was permis-

sible to give the Company last minute notice of a planned absence from work.

The facts show that Harris notified DiSalvo on May 8, 1990, of his intention to work a short day on May 9. After speaking to DiSalvo, Harris decided not to work at all on May 9. Although Harris testified that he tried to phone DiSalvo but got no answer, both DiSalvo and Filipelli stated that they were home all evening but received no telephone call. Whether or not Harris did in fact attempt to reach the Company, it is clear that he did not speak to DiSalvo or Filipelli on the evening of May 8. I find that DiSalvo and Filipelli were sincere in their belief that they were home all evening and that Harris did not call them.

General Counsel relies on Harris' testimony that on the night of May 9, DiSalvo screamed at him for being absent, told him not to take days off without letting her know and said that Harris was the one who kept the guys going on with the Union. DiSalvo denies mentioning the Union in this conversation. I credit DiSalvo concerning the subject of this conversation. The record establishes that it was not unusual for DiSalvo to engage in screaming matches with her employees and she does not deny it. My observation of DiSalvo convinces me that she was a truthful witness; she attempted to testify accurately despite strong challenges from counsel for the other parties. Further, although Harris stated that he spoke up for the union benefits at a meeting held by DiSalvo, there is no evidence that he kept the men going with the Union and DiSalvo's purported comment would thus make no sense. Harris' testimony does not show how the subject of the Union came up during this screaming match with DiSalvo when DiSalvo was justifiably exercised by a legitimate complaint against Harris. In short, Harris' testimony is not such as to shake me from a conviction that DiSalvo was telling the truth. Thus, I find that DiSalvo did not mention the Union to Harris the day before he was fired. Finally, I credit Filipelli as to the conversation he had with Harris when he fired him.

I find that General Counsel has not made out a prima facie case that Harris was discharged for union activity. I can find no antiunion animus in any of the Company's dealings with Harris and there is no evidence that Harris' support for the Union or the fact that he mentioned union benefits at a meeting were motivating factors in the Company's decision to discharge him. Moreover, had General Counsel shown that Harris' protected activities were a motivating factor, I would find that the Company would have fired Harris for being absent without prior notice even if he had not engaged in any union activity. The Company has previously discharged an employee for absenteeism, Harris himself had been warned a few months before that he must not be absent without notice and Harris had told DiSalvo on May 8 that he would be present the next day to work at least a partial day but then had failed to show up at all. *Wright Line*, 251 NLRB 1083 (1980), enf. 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).

C. Departure of Peter Martucci

There are many points at issue concerning Peter Martucci's hiring, his job duties, his disability and his failure to return to work. The witnesses disagreed about many facts relating to all of these issues.

⁹I do not rely on Harris' vague testimony that on previous unspecified occasions Filipelli had asked a similar question.

Martucci testified that Filipelli hired him to drive the roll-off truck in the spring of 1989. He was paid \$500 per week and then granted a raise to \$600 per week in September 1989. Martucci's hours were from 6:30 a.m. until whatever time was required for completion of his duties. Martucci picked up and delivered steel containers to construction sites, hospitals and the like.¹⁰ According to Martucci, he was required to jump 4 to 6 feet to put the cover on the container, to open the container door when dumping the trash and to lift refuse into the container when necessary. Occasionally, Martucci drove the large garbage truck. When this happened, Martucci and the helper on the garbage truck would have to roll the steel containers to the truck in order to dump them.

Contrary to Martucci's testimony, DiSalvo testified that Martucci was hired as a per diem employee. The rolloff work was not consistent, and when the demand for containers was slight, Filipelli was able to perform this work himself. When there were a lot of rolloff jobs, Martucci would be called in to work. Martucci's payroll card shows that he began work in June 1989, earning \$100 per day and that in August 1989, he was raised to \$120 per day. In 1989, he worked a full week for 14 out of the 26 weeks after he was hired. In 1990, he worked a full week for only 1 week out of the 7 weeks that went by until he injured himself on February 13, 1990. DiSalvo testified that the rolloff business declined after January 1990.

Based on the Company's payroll records and on DiSalvo's testimony, which I credit, I find that Martucci was a per diem employee.

Martucci was a member of Local 813 and he had obtained a withdrawal card from the Union.¹¹ In February 1990, Martucci contacted Local 813 in order to organize the Company: he spoke to the other employees about the Union and they signed cards.

On February 13, 1990, Martucci fell from the top of a container and injured his neck and back. Martucci went on medical disability. He consulted the Brewster Medical Group and then he was referred to Dr. Fauser, a specialist in orthopaedic medicine. The medical notes and other records in evidence show that through some time in the spring of 1990, Martucci's doctors held that the date of his eventual return to work was "undetermined." However, Martucci told DiSalvo that he would be able to return to work on Monday, February 26. On that day, Martucci worked a few hours; but his neck soon started hurting and he left work.

On March 14, DiSalvo wrote to Martucci saying that she had been trying to get in touch with him about returning to work but that his number had been changed. On March 22, Martucci called DiSalvo and said he was feeling better. DiSalvo said she wanted a doctor's note indicating that he could perform his job duties. According to DiSalvo, whom I credit as to this issue, on about March 26, 1990, she received from Martucci a number of medical notes: these consisted of forms dated from February 15 to March 23 stating that Martucci's ability to return to work was undetermined. DiSalvo also received forms from the worker's compensation system showing that during this time Martucci was rated totally disabled and that his date of return to work was unde-

termined. The last such form was signed by Martucci's doctor on March 23, 1990.

On March 22, 1990, DiSalvo wrote to Martucci's doctor at the Brewster Medical Group requesting assurance that Martucci could perform his job. The letter listed certain tasks as pertaining to the job, including "to push smaller containers that can weigh as much as 300-400 lbs." Filipelli supplied DiSalvo with the description of tasks. DiSalvo testified that at this time the construction industry was slow and there was a lot less rolloff work than there had been in 1989. Filipelli was able to perform whatever rolloff work was available. Filipelli had been driving the large truck, but the Company wished to hire a truckdriver. A truckdriver was responsible for, among other jobs, dumping containers into the large garbage truck. DiSalvo informed Martucci that she had sent the letter and she told him that as soon as she received a response, Martucci could come back to work if there was still a position available. Martucci denied knowledge of the March 22 letter; however, it is clear from a letter to the Company from Martucci's physical therapist that Martucci had possession of copies of the March 22 letter and that he had carried a copy to the physical therapist in May 1990. I find that Martucci's recollection and testimony concerning the documentation is unreliable and I credit DiSalvo's testimony on this issue.

On April 4, 1990, DiSalvo spoke to Martucci again. He told her that he would be going to a physical therapist for 3 weeks. He did not say he was able to go back to work.

Martucci testified that on April 11, 1990, he went to the Company and met with DiSalvo in her kitchen.¹² Martucci testified that he wanted to discuss DiSalvo's opinion of the Union and of the Union coming in to Advanced Waste. Martucci testified that he wanted DiSalvo's position on the Union before a decision was made. According to Martucci, when he told DiSalvo that he wanted her opinion on how she felt about Local 813 being part of Respondent's operation she replied that he was costing her a lot of money in legal fees and that he was causing problems with her neighbors because the discussions were taking place in the deli.¹³ Martucci testified that he apologized to DiSalvo "for any inconvenience that we may have been causing but we needed to know for our own personal vote how she felt about" the Union "to compare with what we had learned about the Union." According to Martucci, DiSalvo said that it was important to have a unanimous "no" vote and that she wanted the Union totally out of the Company and not allowed back.

DiSalvo testified that Martucci stopped by and wanted to talk about the Union. Martucci told DiSalvo that he had signed a union card and that he was not the only one. DiSalvo said she knew the Union needed 30 percent to proceed. Then, Martucci said he was sorry for signing the card, that he was trying to solve his financial problems through the Company and that he would vote "no" in the election. DiSalvo said that was good and that she hoped for a unanimous vote.

¹²The Union had filed its petition on March 6, 1990. Subsequently, hearings were held and the Decision and Direction of Election issued on April 20, 1990.

¹³The only specific reference to a union meeting in the record places it not in the deli across from the company property but at a restaurant in Peekskill.

¹⁰The record establishes without contradiction that the containers could weigh 300 to 400 pounds.

¹¹Martucci had informed Filipelli of this fact when he was hired.

I find Martucci's testimony about the April 11 meeting with DiSalvo incredible. Martucci was an experienced Local 813 member and he was the employee responsible for bringing the Union to the Company. Martucci has not explained why, as an experienced union member and the union organizer at the Company, he would need or want DiSalvo's opinion. The idea that he would seek DiSalvo's opinion before deciding how to vote is laughable. I do not believe that Martucci went to see DiSalvo for the purpose of asking her opinion of the Union and I therefore do not credit his version of the conversation. I credit DiSalvo's testimony that Martucci told her he had financial problems and that he would vote against the Union. Likely, Martucci wished to ingratiate himself with the owner of the Company while he was on disability and perhaps Martucci hoped that some financial reward would come his way.

During this conversation, DiSalvo asked Martucci when he would be able to return to work; there was still a truckdriver job open at this time. Filipelli was driving the garbage truck because the rolloff work was not heavy and Filipelli had ample time to do whatever rolloff work was necessary.¹⁴ At the instant hearing, Martucci produced a note from Dr. Fauser's office dated April 24, 1990, stating that Martucci could return to work on April 30. DiSalvo testified that she had never been given such a note.¹⁵ Martucci testified that he gave DiSalvo the note during the week of April 24. He also testified that he had never seen the letters DiSalvo sent to his doctors requesting information as to his fitness to perform his job duties.¹⁶ However, the evidence shows that Martucci himself handcarried at least once such letter to a doctor and DiSalvo testified credibly that she had informed Martucci that she had prepared such a letter. I also find it significant that in February 1990, Martucci told DiSalvo that he could return to work and that he did return for part of 1 day even though his doctor had not cleared him to return to work. It seems that Martucci was not exact in his own mind concerning his ability to work, the content and dates of the documents relating to his disability, the necessity of obtaining and adhering to advice from doctors and the like. Because of Martucci's inexact recollection, a recollection that is often at variance with the documentary evidence, I am convinced that Martucci did not recall accurately the facts relating to the various forms and notes concerning his disability. Therefore, I credit DiSalvo that she had never been given the form dated April 24 from Dr. Fauser's office.

On May 3, 1990, Martucci called DiSalvo and said he was ready to return to work. DiSalvo asked for a doctor's note to that effect. She sent a copy of the letter of March 22 to Dr. Fauser and to the physical therapist requesting assurances that Martucci could safely perform his job duties and she informed Martucci that she had done so. On May 12, DiSalvo telephoned Martucci and offered him the helper's job on the

garbage truck.¹⁷ The helper's job was full time but it paid less than a driver's job. There was not enough rolloff work to justify hiring a rolloff driver. DiSalvo told Martucci she would need a doctor's note before he could come to work. Martucci told DiSalvo that "a job is a job" and that he would go to the doctor himself in order to obtain a note stating that he was able to return to work. On Monday, May 14, Martucci called DiSalvo and said the doctor was too busy to write a note and that he would do so soon. Although someone else was interested in the helper's job, DiSalvo wanted to hold it open for Martucci. However, on May 15, DiSalvo got a message from Martucci to the effect that he did not know when the doctor would be sending a letter permitting his return to work. At this point, DiSalvo hired the other candidate.

DiSalvo testified that she had asked Martucci for written medical authorization to return to work because he had told her he could do his job in February but had become incapacitated after only a few hours work. DiSalvo stated that her request for medical releases was not made as a result of Martucci's union activities.

Martucci testified that he did push containers weighing 300 to 400 pounds when he was on the large garbage truck. He stated that the containers have wheels, that the driver and helper together push the containers and that the truck is equipped with a winch to raise containers and dump them. Martucci denied that he ever had to push a container without wheels. Harris testified that as a helper he pushed the containers by himself and that it was not unusual for the containers to lack wheels. In these cases, the container had to be maneuvered by pushing it from side to side. Harris also testified that sometimes when he drove the truck he had no helper at all. Filipelli testified to the same effect as Harris: the wheels on the containers may be broken or jammed and they are very hard to move.

DiSalvo stated that after she hired a helper for the large truck on May 16, there were no more job openings at the Company.¹⁸ There was no need to hire a rolloff driver since the small amount of rolloff work performed by the Company could easily be done by Filipelli.¹⁹ As of the day of the election on May 18, 1990, Martucci was "permanently laid off" because Respondent did not expect a position to be available for him. After the election, DiSalvo asked Martucci to return the company uniforms and keys in his possession.

¹⁷This was Harris' old job. DiSalvo received a letter dated May 15, from Martucci's therapist stating that Martucci had just given him DiSalvo's letter dated March 22 listing the job tasks. The therapist said that although Martucci could perform the other job tasks, he could not push containers weighing 300 to 400 pounds. DiSalvo also received a letter dated May 25 from Dr. Fauser stating that Martucci "is able to return to work at full activity with the exception of pushing smaller containers that can weigh as much as 300-400 lbs."

¹⁸The record shows that a new employee was hired on June 21 and two new employees were hired on August 20, 1990. The record does not reveal what jobs these new employees performed.

¹⁹Because the construction industry had slowed down, there was a lot less rolloff work in 1990 than there had been in 1989. In May 1990, Filipelli drove the rolloff truck as necessary. Also in May, the Company hired Christopher McNamara, an old friend of Filipelli's, to haul rock and fill in an old pond on the property. In June, McNamara drove the rolloff for 14 days.

¹⁴DiSalvo stated that the truckdriver position was eventually filled on April 25, 1990.

¹⁵The April 24 note is a small piece of paper with a short form apparently filled in by the doctor's secretary and stamped with his signature: it contains no details specific to Martucci's condition or treatment and it does not refer to any specific job or job duties Martucci may have had to perform.

¹⁶These letters are the one dated March 22 referred to above and similar letters sent in May 1990, described below.

General Counsel maintains that Respondent refused to give Martucci back his job because of his support for the Union and that Respondent used Martucci's disability to mask its unwillingness to permit him to return to work. General Counsel urges that there was enough rolloff work for Martucci, and that, in any case, Martucci could have driven the large truck or helped on the large truck without being required to push 300 to 400 pound containers. General Counsel sees a nefarious motive in DiSalvo's insistence that Martucci's doctors certify his ability to push such containers.

I find that DiSalvo was amply justified in requiring Martucci to submit medical opinion that he could indeed return to work. In February, Martucci had returned to work prematurely when he was still certified as totally disabled. Contrary to General Counsel's assertion that by returning Martucci was acting in a responsible manner and sheltering Respondent from increasing insurance liability, Martucci in fact was acting recklessly and setting up the Respondent for the possibility of much greater liability if he should aggravate his injuries. DiSalvo was trying to protect her business as well as incidentally protecting Martucci when she required medical clearance for him to return to work.

I further find that the ability to push containers weighing up to 300 or 400 pounds was required in order to perform the truckdriver and helper jobs. I credit the testimony of Filipelli, Harris, and Martucci himself that the containers had to be manhandled by the men. Further, both Filipelli and Harris stated that the containers sometimes were lacking wheels and were very difficult to push. Thus, I find that in order to return to work as a driver or helper, Martucci had to show that he could push these containers.

DiSalvo credibly testified that she told Martucci he could come to work as a driver in March 1990 with the proper medical clearance and again on April 11 she told Martucci the driver position was still open. Martucci did not produce the necessary medical clearance. The Company thus made a good-faith effort to return Martucci to work in a driver position. After this position was filled on April 25, the Company again offered to return Martucci to work in mid-May as a helper and it requested medical clearance from Martucci's doctor and physical therapist. Martucci wanted the job: he told DiSalvo "a job is a job" and he apparently made efforts to have his doctor write to DiSalvo in response to her inquiry about his ability to perform the job. However, the last time DiSalvo heard from Martucci in connection with the helper's job the message was that Martucci did not know when the doctor would write the letter.

Although DiSalvo knew about Martucci's support for the Union by April 11, she still offered Martucci the driver's job on that date and she offered Martucci the helper job in mid-May. The only condition was the eminently reasonable one that Martucci produce medical clearance. I find that General Counsel has not shown that Respondent was motivated by Martucci's support for the Union when it failed to give him the driver's or helper's jobs. *Wright Line*, supra.

General Counsel urges that Respondent should have given Martucci a job as a rolloff driver and that it was motivated by his protected activities in its failure to do so.²⁰ General

²⁰ The rolloff driver is not required to push containers in the same manner as the members of the crew who work on the large garbage truck.

Counsel's argument is based on the contention that there was rolloff work to be done. As discussed above, Martucci had never worked full time at his rolloff position. Further, on some of the days he worked for the Company, he filled in for other employees as a driver or helper on the large garbage truck. The uncontradicted testimony shows that rolloff work was in a decline in 1990 due to the economy; the construction industry was slow and there was less call for containers used to hold construction industry debris. General Counsel has not controverted this evidence. Rather, General Counsel's position is that Filipelli should have ceased doing the rolloff work and instead given it to Martucci. But General Counsel's position ignores the fact that Filipelli had been doing the rolloff work since Martucci was injured in February 1990, and that he was able to accomplish it himself. Although the Company did employ McNamara to drive the rolloff in June 1990, this was for 14 days only and there is no reliable evidence that McNamara worked on the rolloff at any other time.²¹ General Counsel's brief is full of innuendo and conclusions, but I cannot ignore the fact that the record shows that Filipelli performed the rolloff work on all but 14 days in 1990 after Martucci was injured. Confining my findings to facts actually in the record, it is clear that Filipelli had done the rolloff work before Martucci was hired, that Filipelli and DiSalvo hired Martucci when the rolloff work increased and Filipelli decided to devote more of his time to a search for new customers and office work, but that when rolloff work decreased Filipelli was able to perform it himself for the most part. There are simply not enough facts in the record for me to find that there was as much rolloff work in the spring of 1990 as there had been when Martucci was hired by the Company in 1989. Although General Counsel refers to the performance of certain amounts of rolloff work in 1990, no comparison is permitted by the actual record before me of the number of rolloff calls in any given period in 1990 as compared with 1989. If General Counsel had wished me to make such a comparison, it would have been necessary to place an adequate factual basis in the record. Not only can I not find any antiunion motivation in the Company's failure to give Martucci a job as a rolloff driver in the spring or summer of 1990, I cannot find that there was a job open for a rolloff driver at that time. Nor is there any evidence that a rolloff job will be available in the future.²² In summary, General Counsel has not made a prima facie showing that Respondent was motivated by antiunion animus when it did not offer Martucci a position as a rolloff driver.

D. Discharge of Nestor Torres

Nestor Torres was hired by Filipelli in August 1987, to drive the chaser truck. At that time Torres' cousin, Daryll Lassic, was employed by the Company.

In February 1990, Martucci told Torres that he was organizing for Local 813 because the Company did not pay for

²¹ Contrary to the General Counsel, I find that the record establishes that in May 1990, McNamara hauled rock and did not drive the rolloff.

²² Although, as described above, the Company hired new employees in June and August 1990, there is no evidence concerning their job duties. There is no basis for assuming they were performing work that should have been offered to Martucci.

health benefits.²³ In April 1990, according to Torres, Filipelli asked him if he knew who was the “foreman” for the Union. When Torres denied knowledge on this subject, Filipelli said he would ask everyone who was the “foreman” for the Union. Then Filipelli said it was Martucci because Martucci had been asking for health benefits for his family. Also during this conversation, according to Torres, Filipelli told him that Martucci had been to see him and that he was not voting for the Union: Martucci was sorry for everything he had done and he would vote “no.” Torres later changed his testimony to say that it was DiSalvo who told him that Martucci had changed his mind and would vote against the Union. Filipelli testified that he recalled asking Torres if he knew anything about the Union when the Company first received notice that the Union was organizing the men. Torres replied that he knew nothing about it.

Torres testified that on May 11, 1989, DiSalvo conducted a meeting after work. She said she hoped they would vote “no” in the election and she handed out certain documents. Torres did not speak at this meeting.

According to Torres, after he attended a meeting at the Board’s Regional Office, the Company changed its practice relating to customers who had not put their garbage out on time for pickup by Torres as he performed his daily route. Torres also testified that the change took place after the election at which he served as an observer for the Union. Torres explained that it sometimes happened that customers would not have their garbage ready for pickup at the appointed hour and that he would not be able to collect their refuse. When this occurred, Torres would inform Filipelli that certain customers had not had their garbage out when he went on his route. Filipelli would call the customers and remind them of the hour by which they should have put their garbage out for pickup. Filipelli would make a decision on those occasions whether Torres should go back out in the chaser truck to make the missed pickup. It might be that Torres would return to make the pickup in order to avoid having a lot of garbage next time he went to that location. If the customer had a good excuse for not putting the garbage out on time or if Filipelli wished to please the customer, then Filipelli would instruct Torres to go back and make the pickup. On occasion, Filipelli went back with Torres to pick up the missed refuse. Torres testified that DiSalvo became more involved with the men and the running of the Company in 1990. DiSalvo began to make the decision whether Torres had to go back over his route to pick up refuse from people who had neglected to put out their garbage on time. But DiSalvo did not explain things in a nice way as Filipelli had done. Instead of explaining the situation to Torres, DiSalvo just came out and told Torres “go back and get these customers.”

DiSalvo testified that Torres was reluctant to go over his route a second time to collect garbage from customers who had not been timely in putting their refuse out for collection. Torres tried to convince DiSalvo that he was never required to go back for this purpose. DiSalvo was angry with Torres because he was paid for a full week’s work and it was not for him to decide what work he would and would not do.

In June 1990, Filipelli was driving the rolloff truck and he noticed that Torres had not picked up garbage from some customers on his route. He told the dispatcher to instruct Torres to collect the refuse. After Torres returned to the yard, Filipelli saw DiSalvo speaking to Torres and telling him that he must go back and get the garbage from the customers as instructed by management. While DiSalvo was still speaking to Torres, the latter rudely turned his back on her and walked away. Filipelli then went over to Torres and remonstrated with him. Filipelli told Torres that he should have gone back to pick up the garbage from the customers when he had first been instructed to do so. At that point, Torres said he would take the truck out but Filipelli sent him home instead.

Torres testified that generally when his chaser truck was full he would radio the driver of the large garbage truck and arrange to meet it somewhere on its route in order to dump his load into the large truck. On occasion, according to Torres, he was told to leave the chaser in the Company yard so that it could be dumped into the larger truck when that truck returned to the yard. This was so that the large truck could continue on its route without interruption. Torres stated that it was not unusual for him to be instructed to leave the chaser in the yard until the large truck arrived; then, the chaser would be taken across the street to the area adjacent to the deli and it would dump its load into the truck in that location.²⁴ For years, he left his chaser full for others to dump, and it was not unusual for him and Filipelli to go across to the deli to dump the chaser. Torres acknowledged that he was told not to leave the truck full of refuse in the company yard overnight.

Harris testified that Torres met the large truck three or four times a day in order to dump his chaser truck. If Torres was finished with his rounds in the chaser truck and he found that the large truck was out of town, then Torres would be told to leave his chaser truck in the yard and it would be dumped later.

DiSalvo testified that on the Friday of the Memorial Day weekend in 1990, Torres brought the chaser truck fully loaded into the Company yard and that he then punched out and left for the day. DiSalvo was not on the premises when this occurred, but she saw the truck as she came home that afternoon. On the next Tuesday, she told Torres that garbage cannot be stored on the property. She explained that she was trying to get a site plan approved and that he could not continue to work for the Company if he did not follow instructions. Filipelli testified about this incident to the same effect as DiSalvo. He stated that when he arrived at the company yard that evening, he drove the chaser truck across the street and dumped it into the large truck. This was not an ideal solution, however, because the local dump was closed and it was also closed on Monday. When he spoke to Torres after the weekend, he told him not to bring his truck back to the yard without first dumping it into the large truck.

Torres at first stated that he did not recall bringing his fully loaded chaser truck back to the yard on the Friday of Memorial Day in 1990. He did not recall that DiSalvo and Filipelli spoke to him on Tuesday, May 29, about his truck and he did not recall being told that he was not permitted

²³ The evidence shows that the Company paid for health coverage for the individual employees, but that employees had to pay for coverage for members of their families.

²⁴ Apparently, this was a practice adopted so that the Company could avoid transferring refuse in its yard and thus remain in compliance with its new site plan and the promises made there under.

to leave his loaded truck in the yard. Then, Torres did recall that he left his truck with garbage still in it overnight, but he was not sure if that had happened in May or June. Although Torres testified that he was indeed told not to leave the loaded chaser in the yard overnight, he maintained that he was not warned in connection with this incident.

Torres testified that one policy change was made in that management instructed the employees that refuse could not be transferred on the property. Torres stated that even though it was forbidden, the Company still transferred garbage on the premises. He stated that this had happened in 1990, but he could not recall when it happened with reference to any date or other event. I do not credit Torres; I find that he had no reliable memory whether the garbage was transferred in 1990 or in a prior year.

Filipelli testified that on Monday, June 18, 1990, Torres did a special pickup at the Kingsley residence. When Torres returned to the yard with his loaded chaser truck, Filipelli told him that there was no ticket for that special pickup and that it was unauthorized. According to Filipelli, Torres' attitude during this incident was arrogant; he replied that Kingsley had wanted the job done. Filipelli told Torres that he must not do this sort of thing again. He reiterated that special pickups are not done on Mondays because the local dump is closed on Mondays. Filipelli dumped the chaser truck into the large garbage truck that day. When he related the incident to DiSalvo, they both agreed that Torres should be given a final warning. DiSalvo testified that when Filipelli told her about this problem she ascertained that the Kingsley special pickup had been on the Board for that Thursday. On Tuesday, June 19, DiSalvo spoke to Torres. She told him that work had to be scheduled through the office and that he must not do work that had not been assigned to him. She also told Torres that he must not bring a truck full of garbage back to the yard and that he would no longer have a job if he brought back a loaded truck.

Torres testified that he did indeed perform a large special pickup for Kingsley on June 18, but he denied that he took it upon himself to schedule this job. He stated that Filipelli instructed him to do the work. At first Torres testified that it was unusual to perform special pickups on Mondays, but then Torres changed his testimony and said that Filipelli often made mistakes and scheduled large special pickups for Mondays. Although Torres agreed that there was good reason not to schedule special pickups on Mondays because the local dump was closed, he was unwilling to say that it was unusual to have large special pickups on that day. Torres testified that neither DiSalvo nor Filipelli reprimanded him for performing the Kingsley pickup on Monday, June 18.

Torres testified that he was fired for leaving the chaser truck full of refuse in the company yard on July 16. DiSalvo fired him the next morning. Torres testified that the driver of the large garbage truck had told him to leave the chaser in the yard and that he would dump it when he returned.

According to DiSalvo, she arrived home on July 16, 1990, at about 3:30 p.m. and was greeted by the sight of the chaser truck loaded to the top with garbage and parked in such a way that it was visible from the public road. DiSalvo went into the office and asked the dispatcher why the truck was sitting in the yard full of garbage. The dispatcher replied that at 12:30 p.m., Torres had brought the chaser truck back full of garbage. When the dispatcher reminded him that DiSalvo

wanted the trucks emptied, Torres went into the office and used the radio to communicate with the large garbage truck. According to the dispatcher, McNamara was in the office at this time. DiSalvo then asked McNamara what Torres had said on the radio. McNamara informed her that Torres told the driver of the large truck that he was full and ready to dump the chaser truck. The driver replied by giving his location and Torres said "10-4." Then Torres told McNamara that he had to go and he punched out and left the office.²⁵

DiSalvo testified that the next morning she asked Torres why he had not emptied the chaser the night before. Torres replied that the garbage truck crew had told him to leave the chaser on the premises and that they would empty it for him later. DiSalvo told Torres that it was his responsibility to empty his own truck. DiSalvo then asked the crew members of the large truck about the incident of the day before. The crew members told DiSalvo that they had informed Torres of their location so he could meet them and dump the chaser but that they did not hear from Torres again that day. They said that when they returned to the yard they had driven both their truck and the chaser across the street and dumped the chaser.

Filipelli testified that on July 16 he was out working on the rolloff truck and that he heard over the radio the exchange between Torres and the crew of the large truck. He heard Torres call the large truck on the radio, he heard the driver give Torres the location so that Torres could meet the truck and dump the chaser and he heard Torres reply "10-4." This is the usual procedure for Torres to dump the chaser truck at the end of his day. But when Filipelli returned to the yard later that day he saw that the chaser truck was still loaded. DiSalvo was very upset over this and she said that they must fire Torres. Filipelli asked both the men on the garbage truck and McNamara what had happened, and he and DiSalvo asked Torres about the incident the next day. Torres had no explanation for his failure to dump the chaser. Filipelli and DiSalvo decided to discharge Torres.

DiSalvo testified that Torres was fired because he had been warned repeatedly not to leave the chaser truck on the premises loaded with garbage. DiSalvo stated that it was not up to Torres to decide to leave a loaded truck on the property. Proper procedure required Torres to meet the truck at the end of his route in order to dump the chaser into the garbage truck. According to DiSalvo there are only two circumstances when it is appropriate to bring the chaser truck back to the yard without dumping it; if the garbage truck has broken down and there is no way to dump the chaser and if the garbage truck has finished its route earlier and the chaser must come back to the yard to meet it.

General Counsel maintains that Respondent unlawfully interrogated Torres, retaliated against him by giving him conflicting instructions and altering the procedure by which he would be required to do additional work and then discharged Torres because he supported the Union.

As set forth in detail above, Torres testified that in April 1990, Filipelli asked him if he knew who was the "foreman" for the Union; when Torres said he did not know,

²⁵ McNamara testified that he heard the conversation between Torres and the driver of the truck. He heard Torres ask the location of the large truck and heard the reply. Then Torres ended the communication by saying "10-4" and told McNamara "I got to go, I got to go." Torres punched out and left.

Filipelli said he would ask everyone if they knew who was the "foreman" for the Union. Torres also stated that in this conversation Filipelli told him that Martucci came by the other day and said he was sorry for everything and would not vote for the Union, but then he changed his testimony to attribute this statement to DiSalvo. It is immediately striking to anyone with even the most elementary knowledge of labor relations that the use of the word "foreman" is highly unlikely. There is no such thing as a union foreman. The fact that Torres repeated the word "foreman" throughout his testimony in connection with Filipelli does not inspire confidence that he recalled the conversation with Filipelli accurately. Filipelli has been in the refuse collection business since he was 18 years old and has been a member of Local 813. I observed Filipelli testify and I have read the record carefully; Filipelli is knowledgeable concerning the industry and he is well spoken. Filipelli would never use the word "foreman." Further, Torres testified that when he denied any knowledge of a union foreman, Filipelli said that he was going to ask everyone and that he knew it was Martucci because Martucci wanted family health benefits. It does not make any sense that Filipelli would ask Torres for information and announce in advance that he was going to conduct a series of interrogations if Filipelli already knew the name of the individual he was asking about. Finally, Torres at first attributed DiSalvo's statement about Martucci to Filipelli as a part of this conversation; this also leads to grave doubts about Torres' ability to recall what Filipelli said to him. In summary, based on Torres' description of the language and the content of the alleged interrogation, I am not convinced that Filipelli said anything like what Torres testified to. Filipelli himself recalled that shortly after he heard about the Union, he asked Torres if he knew anything about the Union. In the absence of convincing testimony by Torres as to the content of Filipelli's question, and in the absence of any testimony concerning the place and circumstances of the conversation, I cannot find that the question was coercive. Most likely, when the Union filed its petition in March 1990, Filipelli did ask Torres if he knew anything about it, but there is not enough evidence in the record for me to find a violation of Section 8 (a)(1) of the Act.

Concerning the alleged change in working conditions, Torres placed the time of the change after he attended a meeting at the Regional Office and then he placed the change after he acted as an observer in the election. A careful reading of Torres' testimony about the change reveals that it amounted to a difference in style. Torres got along with Filipelli but he did not much like dealing with DiSalvo because she was more abrupt. Filipelli would explain why Torres had to go back over his route to pick up garbage from customers who were not timely whereas DiSalvo did not explain nicely, she merely instructed Torres to go back. The evidence does not support a finding that Torres' work actually increased as a result of DiSalvo's involvement in giving orders, just that Torres did not like DiSalvo's manner. This does not amount to a violation of the Act. General Counsel relies on the June incident when Torres failed to go back to pick up refuse from some customers as an example of "conflicting instructions." In that incident, Torres refused to follow instructions from Filipelli and DiSalvo and he was rude to DiSalvo; when he finally and grudgingly told Filipelli that he would go back out in the truck Filipelli sent him home

instead. General Counsel does not explain in what way this incident constitutes unlawful action on the part of Respondent and I cannot find a violation based on the incident.

As set forth above, Torres testified at great length about the Company's practice relating to the chaser truck. It is apparent from both his testimony and that of others, that it was customary to dump the chaser truck into the large truck several times a day including when Torres was finished with his route. However, on occasion, Torres would be instructed to leave the chaser truck in the yard and told that when the large truck came in, the crew would dump the chaser into it. Torres acknowledged that the Company did not want garbage stored in the chaser truck overnight. Harris also testified that although Torres was supposed to meet the large truck and dump the chaser into it, Torres might be instructed to go to the yard instead and the chaser would be dumped later. One thing is clear from this testimony—Torres was supposed to call the large truck and arrange to meet it unless he was specifically instructed not to meet the truck but to go back to the yard with the loaded chaser. Both Torres and Harris testified distinctly that the chaser was left loaded in the yard to await the large truck on specific instructions that this should be done.

Torres recalled at least one incident when he left the chaser parked in the Company yard loaded with refuse and he was told not to leave the chaser full of garbage overnight. Torres could not say whether this was the Memorial Day incident or another incident in June 1990. Torres also recalled the incident with the Kingsley special pickup on June 18, but he denied being reprimanded for this incident. Torres' testimony is not reliable. I have found above that Torres did not recall various conversations with any specificity and Torres' testimony about the May and/or June incidents leads me to conclude that he does not have a clear picture of these events. I credit DiSalvo and Filipelli that Torres was told on Memorial Day that he should not leave the chaser truck loaded in the yard when he punched out for the day. I also credit them that Torres was reprimanded for picking up large amounts of refuse from Kingsley on a Monday without being instructed to do so and because it was not convenient to empty the chaser into the large truck on Monday when the local dump was closed.

Torres was discharged for leaving the chaser truck full of refuse on July 16, 1990. I find that DiSalvo arrived home that afternoon and saw that the chaser truck was loaded and standing in full view of the main road. DiSalvo was sensitive to this event because if it were reported to the planning board she would be subject to criticism and might be hampered in her efforts to obtain approval of her site plan. Filipelli also saw the loaded chaser truck in the yard. He was surprised because he had heard Torres radio the large truck for its location that afternoon and he had assumed that, in accordance with usual practice, Torres would meet the truck and dump the chaser into it before returning to the yard. McNamara also testified that he heard Torres radio the large truck and ask for its location and he heard the crew of the truck give Torres their location. McNamara heard Torres acknowledge the transmission. But instead of going to meet the truck, Torres said "I got to go" and then he left. When DiSalvo questioned the crew of the large truck, they denied telling Torres to leave the loaded chaser in the yard. The only disputed fact is whether the crew of the large truck told

Torres to leave the loaded chaser in the yard as Torres testified herein and as he asserted to DiSalvo, or whether as is claimed by DiSalvo, Filipelli, and McNamara, the crew merely gave Torres their location so he could meet them with the loaded chaser. In this instance, I shall rely on the testimony of McNamara and Filipelli. I observed McNamara to be a conscientious and careful witness and I believe that he did his utmost to testify accurately and truthfully. Further, I find that Filipelli was a reliable witness and that he remembered the July 16 incident very clearly. As a result, I find that no one instructed Torres to leave the loaded chaser in the yard. I believe that DiSalvo and Filipelli were very upset that Torres had once again left the loaded chaser in the yard even though he had been told on previous occasions not to do so. I find that they fired Torres because he had been expected to follow the usual procedure by dumping the chaser before he left for the day and because he had not been instructed to leave the chaser in the yard with its load intact.

General Counsel has not made out a prima facie case that Torres was discharged for protected activity. There is no evidence that antiunion animus played any part in the decision to discharge Torres. However, if I had found that the discharge was motivated by Torres' support for the Union, I would find that Respondent has shown that it would have discharged Torres for cause even in the absence of protected activity on his part.²⁶ Torres had been warned not to leave the loaded chaser truck in the yard without specific instructions to do so but Torres disregarded these instructions.

III. REPRESENTATION PROCEEDING

In the election, the employees voted one for and one against union representation, with two challenged ballots. I have found above that Harris was lawfully discharged before the election and therefore I recommend that the challenge to Harris' ballot be sustained. Respondent urges that the challenge to Martucci's ballot should be sustained because on the day of the election Martucci had no reasonable expectation of recall. As found above, Filipelli has been performing Martucci's old job on the rolloff truck; the rolloff work has been light and at the time of the election Respondent had no plans to hire a rolloff truckdriver. Indeed, up to the time of the instant hearing, no rolloff driver had been hired.²⁷ Concerning Martucci's expectation to be recalled to perform the other jobs described in the record, I also find that Martucci had no reasonable expectation to be recalled for any of those positions. As set forth in detail above, I have found that the Company had reasonably required Martucci to provide medical clearance to perform the tasks pertaining to the other positions including the pushing of containers weighing 300 to 400 pounds. As far as the record shows, Martucci has not received medical approval to perform this task; the latest document produced by Martucci was a letter dated May 25, 1990, from Dr. Fauser stating that Martucci could not push the containers. There is no indication that Dr. Fauser expects that Martucci will ever be able to push the containers. If Martucci is not capable of performing the driver or helper

jobs, he has no reasonable expectation of recall. Under the circumstances it can be said that Martucci's disability is "open ended" and that no definite timeframe has been established for his return to work; he had no reasonable expectation of recall on the date of the election and he was not eligible to vote in the election. *Sid Eland, Inc.*, 261 NLRB 11 (1982). I shall recommend that the challenge to Martucci's ballot be sustained.

IV. CONDUCT OF STUART BOCHNER, ESQUIRE

Attorney Stuart Bochner was directed to leave the courtroom on the third day of the instant hearing for the reason that he constantly interrupted counsel for Respondent, the witnesses and the administrative law judge despite instructions that he cease interrupting and warnings that he would be ejected from the hearing if he persisted in interrupting. Bochner did not leave the courtroom as directed and was removed by the Federal Protective Service.

Bochner's interruptions began when Harris was being cross-examined by Andrew A. Peterson, Esquire, counsel for Respondent, and the interruptions continued each time counsel for Respondent attempted to cross-examine General Counsel's witnesses. I repeatedly warned Bochner not to interrupt counsel while he was posing questions to the witness and I repeatedly warned Bochner not to interrupt witnesses while they were stating their answers. It was clear to me that Bochner's sole purpose in interrupting was to disrupt questioning by counsel for Respondent and to interfere with the presentation of facts relating to Respondent's defense. Bochner also disrupted the hearing by constantly arguing with rulings of the administrative law judge; he refused to adhere to rulings and persisted in making his arguments even after they had been rejected and he had been told to let the questioning of witnesses proceed.

At the beginning of Respondent's case, and in order that Bochner should understand fully what past conduct of his had been objectionable and was to be avoided in the future, I gave Bochner an additional warning. Bochner was instructed not to attempt to introduce documents into evidence when counsel for Respondent was questioning a witness, not to pose questions to the witness unless it was his turn to question that witness, and not to disrupt Peterson's questioning of Respondent's witnesses. I note that even while I was issuing this formal warning to Bochner, he did not refrain from interrupting me.

Despite the warnings, Bochner persisted in interrupting counsel for Respondent and witness DiSalvo. I observed that this had a devastating effect upon DiSalvo and that she became so flustered that every time she answered a question she looked at Bochner to see if he was about to interrupt her. Bochner constantly made frivolous objections, and this had the effect of disrupting the train of thought of counsel for Respondent and witness DiSalvo. Eventually, DiSalvo became almost incoherent. Although the cold record cannot show what I observed at the hearing, I recall quite clearly that DiSalvo became almost unable to testify and that she displayed an emotional reaction evincing great stress due to the constant and unnecessary interruptions by Bochner. Bochner was again warned not to interrupt DiSalvo in the middle of her answers but he persisted in doing so; in fact, Bochner then began interrupting DiSalvo to ask her whether she was finished so that he could make his comments. Fi-

²⁶ *Wright Line*, 251 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981).

²⁷ The Company's use of McNamara to drive the rolloff for 14 days in the period from February 1990 until the date of the instant hearing in 1991 does not show that it planned to hire a rolloff driver.

nally, while DiSalvo was responding to a question posed by Peterson about the events leading to Torres' discharge, she began to relate events which she had not witnessed directly but upon which she had based her decision to discharge the employee. Peterson stopped DiSalvo to make clear to her that he wished her to make a distinction between what she had personally observed and what had been reported to her by others. This was an attempt by Peterson to forestall objections by Bochner and to comply with the administrative law judge's direction that DiSalvo make this distinction in her testimony. As DiSalvo began answering Peterson's last question, Bochner again interrupted her, stating, "the record is not going to be clear if the witness is going to interrupt the question." In fact, Bochner had just interrupted the witness again. I told Bochner to be quiet but he said "no" and expressed his intention to go on interrupting the witness. At this point, I directed Bochner to leave the courtroom and told him that he was being excluded from the hearing.

Bochner refused to leave after repeated instructions to do so and at my request the Federal Protective Service escorted him from the premises.

As Bochner was being led out by the Federal Protective Service, counsel for the General Counsel stated her objection to Bochner's removal. On behalf of both counsels for the General Counsel present in the courtroom she stated, "It is our position that his zealous representation of his client does not warrant his removal at this time." Counsel for the General Counsel went on to say that she understood that Bochner was amenable "to refraining from making any appropriate objection until after the witness has spoken." Not only did Bochner fail to join in counsel's understanding, but he actually interrupted counsel for the General Counsel's remarks in his behalf by telling her not to look at him while she was speaking.

During a short recess in the hearing on the same day that Bochner was escorted out by the Federal Protective Service, I observed that he was engaged in an altercation with several uniformed officers of the New York City Police Department right outside the courtroom. The record does not disclose how this incident came about.

Later that day, witness McNamara testified that sometime after he had observed the Federal Protective Service escort Bochner off the premises he again observed Bochner in the corridor just outside the courtroom where the instant hearing was taking place. McNamara testified that Bochner said out loud while pointing to the courtroom, "they're all a bunch of fucking assholes in here and they don't know what they're talking about." Counsel for the General Counsel did not state what her position was with respect to this conduct by Bochner.

After the close of the hearing in the instant case, I became aware of the Order of the Board dated October 19, 1990, in *De Jana Industries*, in Cases 29-CA-14349 and 29-RC-7443. In that case, Bochner engaged in uncivil conduct before another administrative law judge, but the Board found that further proceedings were not warranted because Bochner had issued a form of apology to the judge.

Based on Bochner's failure to follow my instructions not to interrupt counsel in the middle of posing questions to a witness and his failure to follow my instructions not to interrupt witnesses in the middle of answering questions, and based further on Bochner's position that he would persist in these interruptions, I shall recommend that the Board issue a warning to Bochner. Bochner should be warned that he must not interrupt counsel, the witnesses or the administrative law judge, that he must follow the judge's instructions to cease his interruptions and that a failure to comply at future hearings will result in sanctions being imposed by the Board. See generally *United States v. Dinitz*, 538 F.2d 1214 (5th Cir. 1976).

CONCLUSIONS OF LAW

1. The General Counsel has not proved that Respondent, Advanced Waste Systems, Inc., violated the Act as alleged in the complaint.

2. Peter Martucci had no reasonable expectation of recall to work on the date of the election and Vincent Harris had been lawfully discharged on the date of the election and the challenges to their ballots should be sustained.

[Recommended Order for dismissal omitted from publication.]