

A.P.R.A. Fuel Oil Buyers Group, Inc., Prudential Transportation, Inc. and Amer-National Heating Service, Inc. and Local 553, International Brotherhood of Teamsters, AFL-CIO¹ and Jesus Campos and Albert Guzman and Damaris Gomez. Cases 29-CA-15517, 29-CA-15589, 29-CA-15446, 29-CA-15459, 29-CA-15571, 29-CA-15518, 29-CA-15467, 29-CA-15482, and 29-RC-7760

November 12, 1992

DECISION, ORDER, AND DIRECTION

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On November 8, 1991, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed exceptions and a supporting brief, a brief in support of the judge's decision, and an answering brief.²

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,³ and conclusions, as modified below, and to adopt the recommended Order as modified.⁴

1. The General Counsel has excepted, inter alia, to the judge's failure to find that the Respondent violated the Act when management officials Vincent and Robert Latora informed employee Jesus Campos that the Respondent would work in its manner, with or without the Union, that Campos would be terminated when the Union came in, and when Vincent and Robert Latora offered Campos recall from layoff and increased vacation pay if he withdrew his unfair labor practice charge against the Respondent. We find merit in the General

Counsel's exceptions. Concerning the first statement, it is well established that an employer violates Section 8(a)(1) by conveying the message to employees that it would be futile to join or support a union. *Ideal Elevator Corp.*, 295 NLRB 347, 351 (1989). Concerning the second statement, it is equally well established that promising benefits to employees in order to induce them to withdraw charges filed with the Board violates Section 8(a)(1). *Alfa Leisure, Inc.*, 251 NLRB 691 (1980).⁵

2. In view of the Respondent's numerous violations of the Act, including the additional findings above, we agree with the judge's recommendation that a *Gissel*⁶ bargaining order is warranted.⁷ As of December 31, 1990, the Union enjoyed the support of a majority of the Respondent's employees.⁸ Shortly after the cards were signed, the Respondent embarked on a campaign to destroy the support the Union enjoyed among the Respondent's employees. As set forth above and in the findings of the judge that we adopt, the Respondent: (1) illegally discharged 6 unit employees in a unit of 19 within 5 weeks of first learning of the union campaign; (2) threatened employees with a plant shutdown if the Union came in; (3) threatened to discharge em-

⁵ With regard to the General Counsel's remaining exceptions concerning violations the judge failed to find, we find these to be either unsupported by record evidence or cumulative to those violations already found.

⁶ *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

⁷ In the course of finding a *Gissel* bargaining order appropriate, the judge considered and rejected the Respondent's contention that Supervisor Zarkos' participation in the union campaign tainted a sufficient number of cards to dissipate the Union's majority status. Subsequent to the issuance of the judge's decision, United States Magistrate Judge Zachary W. Carter denied a 10(j) application for a preliminary injunction ordering the Respondent to recognize and bargain with the Union principally because he found that Zarkos' participation tainted the cards. In this regard, we note that determinations in cases involving a 10(j) application for a preliminary injunction are not binding on the Board. See *NLRB v. S.E. Nichols, Inc.*, 862 F.2d 952 (2d Cir. 1988).

Further, for the reasons set forth by the judge, we find that Zarkos' participation in the union campaign did not taint a sufficient number of cards to dissipate the Union's majority status. In reaching that conclusion, however, we do not rely on the judge's finding that Zarkos was a low-level supervisor. See *Cal-Western Transport*, 283 NLRB 453, 454-455 (1987).

⁸ As discussed below, because we find employees Gomez and Muniz to be dual-function employees, we find that the judge properly included them in the unit and counted their authorization cards for purposes of determining the Union's majority status. We further find it unnecessary to pass on the Respondent's contention that Novillo, a supervisor, solicited and secured authorization cards from three employees and that therefore these cards are tainted and should not be counted. In this regard, we note that the Union has established, without reliance on these cards, that at least 13 unit employees out of a unit of 19, a clear majority, had signed authorization cards.

Finally, the judge, in his discussion of the Union's card majority, failed to mention card signer McClain. We find this omission harmless error because as a statutory supervisor, McClain would not be included in the unit and her authorization card would not be counted.

¹ On November 1, 1987, the Teamsters International Union was readmitted to the AFL-CIO. Accordingly, the caption has been amended to reflect that change.

² The Respondent also submitted a letter requesting that the report and recommendation of United States Magistrate Judge Zachary W. Carter, a copy of which the Respondent attached to its letter, be made a part of the record.

³ We note that at sec. III.F, par. 27, the eighth sentence should in relevant part state, "However, Novillo never testified about his relationship with Benavides"

⁴ Chairman Stephens and Member Devaney agree that Board precedent dictates rejection of the Respondent's exceptions regarding the effect of the alleged unlawful alien status of employees Victor Benavides and Alberto Guzman on their reinstatement rights. Because this case involves a *Gissel* bargaining order and is subject to an outstanding 10(j) injunction, they would leave to another case any reconsideration of the Board's law in this area.

For the reasons articulated by the court in *Del Rey Tortilleria v. NLRB*, 140 LRRM 2826 (7th Cir. July 17, 1992), Member Oviatt finds that Victor Benavides and Alberto Guzman are not entitled to reinstatement.

ployees supporting the Union; (4) interrogated employees concerning their union sympathies; (5) promised employees raises and vacation pay if they would abandon their support for the Union; (6) created the impression of surveillance; (7) coerced affidavits from employees to revoke their authorization cards; (8) conveyed the message that it would be futile for employees to join or support the Union; and (9) offered employees benefits in exchange for their withdrawal of unfair labor practice charges.

These unfair labor practices, which commenced so rapidly after the Respondent learned of the employees' union activity on December 31, 1990, include many examples of "hallmark violations,"⁹ including some of the most pernicious—threats of plant closure and discharge, and subsequent discriminatory discharges. These are the most flagrant forms of interference with Section 7 rights and are more likely to destroy election conditions for a longer period of time than are other unfair labor practices because they tend to reinforce the employees' fear that they will lose their employment if union activity persists.¹⁰

In issuing the bargaining order here, we do not rely solely on the number and nature of the unfair labor practices that the Respondent committed. We have also considered the fact that most of the violations were committed by individuals at the top of the management hierarchy—the great majority by Vincent and Robert Latora, president of Prudential Transportation, Inc. and general manager of APRA, Prudential, and Amer-National Heating Service, Inc., respectively. Further, we have considered the small size of the unit involved. Thus, the judge found that at the time the Respondent learned of the employees' union activity, there were 19 persons in the unit. Given the entirety of the circumstances here, we conclude a bargaining order is fully warranted.

The Respondent argues, however, that the judge erred in rejecting its Exhibit 9, a chart showing employee turnover. It contends that the Board should consider whether substantial turnover of employees in the bargaining unit has sufficiently cured the effect of any employer misconduct and allows for the holding of a fair election. Although, contrary to the judge, we admit Respondent's Exhibit 9, we note that the Board has specifically held that "the validity of a bargaining order depends on an evaluation of the situation as of the time the unfair practices were committed"¹¹ Thus, "the evidence the Respondent proffers regarding changes of this nature [i.e., a change in the composi-

tion of the unit] . . . [is] irrelevant . . . when assessing the propriety of issuing a *Gissel* bargaining order [citations omitted]."¹²

Even assuming the relevance of the evidence of turnover that the Respondent relies on, we find this evidence would not remove the basis for issuing a bargaining order for the following reasons. First, we note that most of the misconduct in this case was committed by the Respondent's highest officials, who are still in charge of the Respondent's operations, and the breadth of their unfair labor practices shows that the Respondent, through these officials, is deeply committed to opposing the Union without regard to the lawfulness of its means and is not likely to retreat from that strategy.¹³ Their conduct indicates the substantial likelihood that they will renew their unlawful tactics among current or future employees to keep out the Union or any other labor organization as an employee bargaining representative. Moreover, the Latora brothers' continued presence "can serve only to reinforce in the minds of the employees the lingering effects of the Respondent's violations."¹⁴ In addition, we again note that the Respondent's violations were "numerous and pervasive in nature and that many of them were 'hallmark' violations, including threats of discharge and numerous threats of plant closure, which are 'among the most flagrant' of unfair labor practices."¹⁵ For all the above reasons, we agree with the judge that a *Gissel* bargaining order is warranted here.

3. The judge found that the unfair labor practices alleged as objectionable conduct also warranted setting aside the election in the consolidated representation case. Because he had set aside the election, the judge also recommended that the representation proceeding be dismissed. Contrary to the judge, although we agree that a *Gissel* bargaining order is warranted, we do not agree that the representation proceeding should therefore be dismissed.

We adopt the judge's recommendation to overrule the challenges to the ballots of employees Campos, Medina, Benavides, and Alberto Guzman. We further agree with the judge that challenges to the ballots of Muniz and Gomez should be overruled, but for the following reason. We find that Muniz and Gomez are dual-function employees because they are regularly employed for sufficient periods of time to demonstrate that they have a substantial interest in the unit's wages,

⁹ See, e.g., *NLRB v. Jamaica Towing*, 632 F.2d 208 (2d Cir. 1980); *Highland Plastics*, 256 NLRB 146, 147 (1981).

¹⁰ See *Koons Ford of Annapolis*, 282 NLRB 506, 508 (1986), enfd. mem. 833 F.2d 310 (4th Cir. 1987), cert. denied 485 U.S. 1021 (1988).

¹¹ See *Highland Plastics*, supra.

¹² *Salvation Army Residence*, 293 NLRB 944, 945 (1989), enfd. mem. 923 F.2d 846 (2d Cir. 1990).

¹³ *Salvation Army*, supra at 945; *Amazing Stores*, 289 NLRB 163, fn. 2 (1988), enfd. 887 F.2d 328, 331 (D.C. Cir. 1989).

¹⁴ *Salvation Army*, supra at 945.

¹⁵ *Action Auto Stores*, 298 NLRB 875 (1990) (quoting *Indiana Cal-Pro, Inc. v. NLRB*, 863 F.2d 1292, 1301-1302 (1988), enfg. 287 NLRB 796 (1987)).

hours, and conditions of employment.¹⁶ In this regard, we note that Muniz, whom the judge found to be a credible witness, testified that, while employed by the Respondent, she spent approximately 35–40 percent of her time dispatching oil deliveries and another 10–15 percent of her time dispatching service calls. Similarly, Gomez, whom the judge also found to be a credible witness, testified that while employed by the Respondent, she spent approximately 40 percent of her time operating the dispatch radio for both service and delivery calls. Clearly, Muniz and Gomez, regularly employed as dispatchers, have a substantial interest in the unit's wages, hours, and conditions of employment and are properly included in the unit.¹⁷

We find that the overruled challenged ballots should be opened and counted. If, on the basis of these ballots, the Petitioner wins the election, it is entitled to a certification of representative. This certification of representation shall be in addition to our bargaining order. See *Eddyleon Chocolate Co.*, 301 NLRB 887 (1991).

Accordingly, we shall remand Case 29–RC–7760 to the Regional Director.

AMENDED CONCLUSIONS OF LAW

Add the following to paragraph 4.

“(j) Conveying the message to employees that it would be futile for them to join or support the Union.

“(k) Promising employees benefits to induce them to withdraw charges filed with the Board.”

ORDER

The Respondent, A.P.R.A. Fuel Oil Buyers Group, Inc., Prudential Transportation, Inc. and Amer-National Heating Service, Inc., Brooklyn, New York, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Interrogating its employees regarding the Union's organizational campaign.

(b) Interrogating its employees about their union sympathies and the union activities of their fellow employees.

(c) Threatening to fire its employees for failing to disclose their union activities.

(d) Offering to give raises and additional vacation pay to its employees if they would withdraw their support for the Union.

¹⁶See *Oxford Chemicals*, 286 NLRB 187 (1987).

¹⁷We note that the judge did not recommend any disposition of the challenges to the ballots of Novillo and Torres. The judge, however, found Novillo to be an “admitted supervisor.” The judge also noted Torres' testimony, which is uncontradicted, that he possesses the authority to hire and fire employees. On the basis of that testimony, we find that Torres is a supervisor within the meaning of Sec. 2(11) of the Act. In light of the finding that Novillo and Torres are both statutory supervisors, they are not properly included in the unit and we sustain the challenges to their ballots.

(e) Directing and assisting its employees to sign an affidavit to withdraw support from the Union.

(f) Threatening to cease operating the Company if the Union is certified as the employees' representative.

(g) Offering to reinstate an employee to his former job if he votes against the Union in the Board election.

(h) Interrogating its employees about the leaders of the union campaign among the employees.

(i) Discharging its employees because of their membership in, and activities on behalf of, the Union.

(j) Creating an impression among its employees that their union activities were under surveillance.

(k) Conveying the message to employees that it would be futile for employees to join or support the Union.

(l) Promising employees benefits to induce them to withdraw charges filed with the Board.

(m) Refusing to recognize and, on request, bargain with the Union in the following appropriate unit:

All full-time and regular part-time drivers, servicemen, dispatchers and mechanics employed by the Respondent at its Brooklyn, New York location, excluding all clerical employees, managers, guards and supervisors as defined in the Act.

(n) In any other manner interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights

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

(a) Offer Muniz, Gomez, Campos, Medina, Benavides and Alberto Guzman immediate reinstatement to their former positions of employment or, if those positions are no longer available, to substantially similar positions without prejudice to their seniority or other rights and privileges and make them whole for the loss they suffered as a result of the discrimination in the manner set forth in the remedy section.

(b) Expunge from its files any reference to these terminations and notify these employees in writing that this has been done and that the evidence of this unlawful activity will not be used as a basis for future actions against them.

(c) Preserve and, on request, make available to the Board or its agents for examination or copying, all records and documents necessary to analyze and determine the amount of backpay owed to Muniz, Gomez, Medina, Campos, Benavides, and Alberto Guzman.

(d) Recognize and, on request, bargain with the Union in the appropriate unit set forth above.

(e) Post at its facility in Brooklyn, New York, copies of the attached notice marked “Appendix.”¹⁸ Cop-

¹⁸If 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.”

ies of the notice on forms provided by the Regional Director for Region 29, after being signed by 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 Respondent to ensure that the notices are not altered, defaced or covered by any other material.

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

IT IS FURTHER ORDERED that the challenges to the ballots of Vasillios Zarkos, Pedro Guzman, Pedro Santana, Eduardo Torres, Patricio Novillo, and Angel Marquez are sustained, and that the challenges to the ballots of the following employees are overruled: Luz Muniz, Damaris Gomez, Jesus Campos, Ismael Medina, Victor Benavides, and Alberto Guzman, and Ramon Lajara.

IT IS FURTHER ORDERED that Case 29-RC-7760 is severed from Cases 29-CA-15517, 29-CA-15589, 29-CA-15518, 29-CA-15446, 29-CA-15459, 29-CA-15571, 29-CA-15467, 29-CA-15482, and that it is remanded to the Regional Director for Region 29 for action consistent with the Direction below.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 29 shall, within 10 days from the date of this decision, open and count the ballots of Luz Muniz, Damaris Gomez, Jesus Campos, Ismael Medina, Victor Benavides, Alberto Guzman, and Ramon Lajara and that he prepare and serve on the parties a revised tally.

If the final revised tally in this proceeding reveals that the Petitioner has received a majority of the valid ballots cast, the Regional Director shall issue a certification of representative. If, however, the revised tally shows that the Petitioner has not received a majority of the valid ballots cast, the Regional Director shall set aside the election, dismiss the petition, and vacate the proceedings in Case 29-RC-7760.

APPENDIX

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

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

WE WILL NOT interrogate our employees regarding the organizational campaign of Local 553, International Brotherhood of Teamsters, AFL-CIO.

WE WILL NOT interrogate our employees about their union sympathies and the union activities of their fellow employees.

WE WILL NOT threaten to fire our employees for failing to disclose their union activities.

WE WILL NOT offer to give raises and additional vacation pay to our employees if they would withdraw their support for the Union.

WE WILL NOT direct and assist our employees to sign affidavits to withdraw their support from the Union.

WE WILL NOT threaten to cease operating the company if the Union is certified as the employees' representative.

WE WILL NOT offer to reinstate an employee to his former job if he votes against the Union in the Board election.

WE WILL NOT interrogate our employees about the leaders of the union campaign among the employees.

WE WILL NOT discharge our employees because of their membership in, and activities on behalf of, the Union.

WE WILL NOT create an impression among our employees that we are engaging in surveillance of their union activities.

WE WILL NOT convey the message to our employees that it would be futile for them to join or support the Union.

WE WILL NOT promise employees benefits to induce them to withdraw charges filed with the Board.

WE WILL NOT refuse to recognize and, on request, bargain with the Union in the unit described below.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their Section 7 rights.

WE WILL recognize and, on request, bargain with the Union in the following appropriate unit:

All full-time and regular part-time drivers, servicemen, dispatchers and mechanics employed by us at our Brooklyn, New York location, excluding all clerical employees, managers, guards and supervisors as defined in the Act.

WE WILL make whole Luz Muniz, Damaris Gomez, Jesus Campos, Ismael Medina, Victor Benavides, and Albert Guzman, with interest, for any loss of earnings they may have suffered as a result of our discrimination against them, and we will offer them full and immediate reinstatement to their former jobs or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges.

WE WILL expunge from our files any reference to the discharges of Muniz, Gomez, Campos, Medina, Benavides, and Guzman, and will notify them, in writing, that this had been done and that evidence of this

unlawful action will not be used as a basis for future personnel action against them.

A.P.R.A. FUEL OIL BUYERS GROUP,
INC., PRUDENTIAL TRANSPORTATION,
INC., AND AMER-NATIONAL HEATING
SERVICE, INC.

Craig Cohen, Esq. and *Sandra Rattner, Esq.*, for the General Counsel.

H. Elliot Wales, Esq. and *Lionel Marks, Esq.*, for the Respondents.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me in New York, New York, from August 14¹ through August 21, 1991. Consolidated complaints and notices of hearing issued on March 11 and 18 and May 16 and 28 based on unfair labor practice charges filed by Local 553, International Brotherhood of Teamsters, AFL-CIO (the Union), and Jesus Campos, Albert Guzman, and Damaris Gomez between January 8 and March 21. On July 18, the Regional Director for Region 29 issued a Supplemental Decision on objections and challenges, order consolidating cases, and notice of hearing. This order consolidated the above-mentioned complaints with challenges and objections filed by the Union. The petition was filed by the Union on December 26, 1990; at an election conducted on March 6, the Union received 5 votes, 7 votes were cast against the Union, and there were 13 challenged ballots. The Union filed timely objections on March 13. The Regional Director's order directed that I hear and decide the Union's Objections 1 through 11 as they appear to involve the same facts as the unfair labor practices alleged in the consolidated complaint. The order also directs that I hear and rule on challenges to the following employees, who are also named in the consolidated complaint as alleged discriminatees: Vasillios Zarkns, Luz Muniz, Victor Benavides, Albert Guzman, Jesus Campos, Damaris Gomez, Pedro Santana, Pedro Guzman, and Jamael Medina.

The consolidated complaint alleges numerous violations of Section 8(a)(1) of the Act by Vincent Latora, president of Prudential Transportation, Inc. (Prudential), Robert Latora, general manager of A.P.R.A. Fuel Buyers Group, Inc. (APRA), Prudential and Amer-National Heating Service, Inc. (Amer-National and, at times, collectively called Respondent or Respondents), and Susana Wong, president of APRA. This activity is alleged to include threats, interrogation, the creation of an impression of surveillance, the promise and granting of benefits in exchange for voting against the Union or withdrawing their support for the Union, and conditioning an employee's recall on the employee withdrawing an unfair labor practice charge. The consolidated complaint also alleges the nine above individuals and Efraim Rosarin as discriminatees; it is alleged that Campos was discriminatorily laid off, while the others were discharged, in violation of

¹Unless indicated otherwise, all dates referred to herein relate to the year 1991.

Section 8(a)(3) of the Act. Finally, the consolidated complaint alleges that all this unlawful activity warrants a *Gissel*² bargaining order.

On the entire record, including briefs received and my observation of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

APRA, Prudential, and Amer-National are each New York State corporations located at a common facility in Brooklyn, New York (the facility). APRA is engaged in the cooperative purchase of heating fuel oil for its members; Prudential is engaged in the transportation and delivery of fuel oil to APRA's members and to other customers; and Amer-National is engaged in servicing oil and gas burners for APRA members and other customers. During the past year, APRA derived gross revenue in excess of \$100,000 and, during the same period purchased and received at its facility goods, materials, and fuel oil valued in excess of \$10,000 from other enterprises located within the State of New York, each of which other enterprises had received said goods, materials, and fuel oil valued in excess of \$10,000, directly from points outside the State of New York. During the past year, Prudential derived gross revenue of approximately \$300,000 and during the same period, purchased and received at its facility goods, supplies, materials, and repair parts valued at approximately \$20,000 from other enterprises located within the State of New York, each of which other enterprises had received said goods, supplies, materials, and repair parts valued at approximately \$10,000 directly from points outside the State of New York. During the past year, Amer-National derived gross revenue of approximately \$400,000 and during the same period purchased and received at its facility goods, materials, and oil and gas burner parts valued at approximately \$20,000 from other enterprises located within the State of New York, each of which other enterprises had received said goods, materials, and oil and gas burner parts, valued at approximately \$20,000 directly from points outside the State of New York. Respondents are each employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

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

III. THE FACTS

Respondents stipulated that for the purpose of this proceeding, APRA, Prudential and Amer-National constitute a single integrated business enterprise and a single-employer within the meaning of the Act. On December 26, 1990, the Union filed a petition to represent certain of Respondent's employees; on February 6, the Regional Director issued a Decision and Direction of Election in which he found appropriate a unit of all full-time and part-time drivers, servicemen, dispatchers, and mechanics employed by the Respondent, but excluding all other employees, managers, guards and supervisors as defined in the Act. As stated above, at the

²*Gissel Packing Co.*, 395 NLRB 575 (1969).

election conducted on March 6, the challenges before me were found to be determinative; the following timely objections were also filed by the Union:

1. The Employer interrogated employees regarding their knowledge of Local 553's organizing efforts, and their support for and activities on behalf of Local 553.
2. The Employer threatened employees with discharge and discontinuance of operations as a consequence of Local 553's organizing efforts.
3. The Employer created the impression that the activities of employees in connection with Local 553 were being kept under surveillance.
4. The Employer promised employees improved terms and conditions of employment, including increased wages and vacation time, in an effort to dissuade employees from supporting Local 553.
5. The Employer granted wage increases to employees in an effort to dissuade employees from supporting Local 558.
6. The Employer impliedly promised employees increased benefits in an effort to dissuade their support for Local 553 by soliciting their complaints and grievances.
7. The Employer initiated and circulated among their employees affidavits for them to execute which contained disclaimers of interest of Local 553 and revocations of authorization for Local 553 to act as the employee's collective bargaining representative.
8. The Employer coerced the employees into signing the affidavits described above in paragraph 7 and threatened the employees with discharge if they refused to sign the affidavits.
9. The Employer promised employees increased wages and benefits if they would refrain from filing unfair labor practice charges and giving testimony to the Board.
10. The Employer provided employee Lucy Muniz with closer supervision than she was previously subject to because of her perceived support for and assistance to Local 553.
11. The Employer engaged in a massive discharge campaign to eliminate perceived union supporters from the bargaining unit and to discourage bargaining unit employees who were not discharged from supporting Local 553.

As stated above, the Regional Director found that as these objections mirror the unfair labor practices alleged herein, he directed that I hear and decide these objections as well. Together with these objections and challenges are the numerous 8(a)(1) allegations, the 10 alleged discriminatees, and a request for a *Gissel* bargaining order remedy. As a defense to this request for a bargaining order and one of the 8(a)(3) allegations, Respondent alleges that one of the alleged discriminatees, Vasillios Zarkos, who allegedly solicited some of the union authorization cards, was a supervisor within the meaning of the Act and that many of the Union's cards are therefor tainted. General Counsel defends that while Zarkos was a supervisor during a prior period of employment with Respondent (May 1987 through June 1988), he was not a supervisor during the period of employment that preceded the events in question herein.

A. The Unit

By a Decision and Direction of Election dated February 6, the Regional Director found that the following of Respondents employees constitute an appropriate unit:

Included: All full-time and part-time drivers, servicemen, dispatchers and mechanics employed by the Employers at their Brooklyn, New York facility.

Excluded: All other employees, notice clerical employees, managers, guards and supervisors as defined in the Act.

The complaint alleges that the above constitutes a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act; Respondent simply denied this allegation. As the Board stated in *Kline's Potato Chips*, 274 NLRB 628 at 629:

It is well settled that in the absence of newly discovered and previously unavailable evidence or special circumstances, a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues that were or could have been litigated in the prior representation proceeding.

See also *Venture Packaging*, 294 NLRB 544 (1989), Respondent either could have, or did, litigate the unit issue in the prior representation matter. It denied the appropriate unit allegation herein without alleging any newly discovered and previously unavailable evidence. I therefore find that the unit alleged in the complaint and found appropriate by the Regional Director in his Decision and Direction of Election, is an appropriate unit herein.

B. The Organizing Campaign

Zarkos (who is usually called Billy by his fellow workers) testified that in about the summer and fall of 1990 he spoke with many of Respondent's English-speaking employees about the need for a union; they talked about the long hours and what they considered to be inadequate pay. Shortly thereafter, Zarkos learned that one of Respondent's drivers had met William Ness, the Union's president and business agent while at an oil terminal; the driver gave Ness' telephone number to Zarkos who called him, in about October 1990. Ness asked him if Respondent's employees were interested in joining the Union and he said that they were. Ness asked how many employees there were and Zarkos said about 20. Ness asked Zarkos to find a place where he could meet with the employees away from Respondent's facility and Zarkos chose a bakery in Brooklyn where they met on November 15, 1990. Zarkos informed the English-speaking employees of the meeting; Muniz informed the Spanish-speaking employees.

Ness came to the meeting with two of the Union's business agents and a Spanish interpreter. In addition to Zarkos and Muniz, the following employees attended this meeting: Nelson Zuleto, Heriberto Echevarria, Alberto Guzman, Pedro Guzman, Jesus Campos, Bernardo Campos, Angel Marquez, and Pedro Santana. Ness told the employees of the contracts that it has with other employers and the benefits that it hoped to achieve for the employees. During this meeting, the interpreter translated Ness' speech into Spanish. Ness also asked

if there were any supervisors present and the answer was no. Ness (and the interpreter) then explained about how union authorization cards work. The above-mentioned 10 employees signed the cards; Muniz looked over each of them and gave them to Ness.³ The cards state (in English): "I hereby authorize [the union] to be my exclusive representative for purposes of collective bargaining." Zuleta was called by Respondent as a witness. He testified that when the union representative handed him a card to sign he asked Zarkos what he should do and Zarkos told him to fill out the information on the card and sign it. At one point, he testified that he signed the card voluntarily; at another point, he testified that he did not sign the card because he wanted to join the Union. Rather: "He was new working there so he was afraid if he didn't signed he would be fired"—by Zarkos. After these two employees executed the authorization cards, Muniz, Alberto, and Pedro Guzman asked Ness for additional cards. We gave them cards and told them that cards were not to be signed on Respondent's time or premises and that employees should not be pressured to sign the cards.

Between the time of this meeting, and the filing of the petition, December 26, 1990, Ness received another 10 signed authorization cards. Muniz testified that she asked Ness for additional cards because she knew of employees who wanted to sign cards, but could not attend the meeting because they were working. Within the next few days she spoke to a number of employees at work who had not been to the meeting. In this manner within the next day or two, she obtained signed union authorization cards from Santos Santana, Mohamed Kwara, Edgar Romaro, Gomez, Antonio Coronel, Ramon Lajara, Benavides, Abdul Karim Atrach, and Ishmael Medina. She testified that Pedro Guzman obtained an authorization card from Rosario; Rosario testified that Muniz gave him the union authorization card he signed on November 16, 1990. In addition, Muniz obtained a signed authorization card from Margie McClain, an admitted supervisor for Amer-National. She also asked Patrick Novillo, an admitted supervisor, to sign a card, but he refused. Other than these above-named individuals, the only other employees employed by Respondents on about November 15, 1990, were Jose Monta, Wilson Cuesta, and Emily Williams. Medina testified that he first spoke to Zarkos about the Union in about September 1990: "Because we saw so much abuse." They decided to wait until the wintertime, Respondent's busiest period, before speaking to the Union. He signed a union authorization card on November 16, 1990, at Respondent's facility; Muniz gave it to him. He knew of the benefits the Union was offering, so he signed. Benavides also signed a union card given him by Muniz at Respondent's facility on that day. Kwara testified that Zarkos gave him the union authorization card to sign and Muniz and Novillo told him that it would be good to sign it.

Novillo initially testified that he asked Atrach, Romaro, and Coronel to sign cards for the Union; subsequently, he appeared to modify this by testifying that when these employees asked him if he would fire them if they didn't sign

³ Muniz testified that Santana attended the November 15, 1990 union meeting and identified his union authorization card, dated November 15, 1990, as having been signed at that time. Santana testified that he actually signed the card on November 16, 1990; Muniz gave him the card on that day at Respondent's facility and he signed it "because we might benefit."

a union card, he told them "it's okay . . . to sign the card." He testified that he never signed a union card. Muniz gave him a card to sign between Thanksgiving and Christmas; he told her that he would like to sign the card later that day or the next day because he was too busy. He asked to keep the card which he would return to her shortly, signed. She refused to let him keep the card, saying that she didn't have any more cards and she needed them to give to the other employees. Zarkos testified that he neither made any promises to the employees in exchange for signing cards for the Union, nor did he threaten them with consequences for refusing to sign union cards. All he told employees he spoke to was: "The union has benefits, they have a good salary. That's all."

C. Zarkos' Supervisory Status

Zarkos' supervisory status is relevant in two areas: his allegedly discriminatory discharge and whether his involvement in the union campaign tainted enough cards to dissipate the Union's majority status. Zarkos had two periods of employment with Respondent, separated by about a year. He testified that he began working for Prudential in about 1985 delivering oil; in about 1987, when Vincent Latora (Vincent), the president of Prudential and his brother, Robert Latora (Robert), the general manager of Respondents (both of whom basically ran Respondents), went to jail Zarkos was put in charge of the garage. He could hire, but not fire, people and he dispatched the drivers and mechanics. The parties stipulated that during this portion of his employment with Respondent he was a supervisor within the meaning of the Act. In about June 1988, Linda Wong (also called Susana Wong) fired Zarkos. In November 1989, shortly after being released from prison, Robert located Zarkos and rehired him. He testified that Robert told him that he would be a truckdriver at \$550 a week; instead, he became the dispatcher at \$500 a week.⁴ As dispatcher, his job was to assign the deliveries (through the delivery tickets) to the drivers in the most efficient way. During this second period of employment with Respondent, which lasted until January 1, he could not, and did not, hire employees. On one occasion, he fired Medina and Vincent rehired him the same day and told Zarkos that he wasn't supposed to fire anybody. He testified that "this time" he thought that he had the authority to fire Medina because he didn't make his deliveries. It was his job to see that the drivers made their deliveries properly; if they didn't, he told them so. If that was not effective, he told Vincent or Robert. Shortly before Zarkos was fired, he had a problem with the only driver for evening deliveries, Angel Marquez, calling in sick for two straight Mondays; Zarkos told him to call him before coming in next and he would tell him if he had deliveries for him to make. In an affidavit given to the board, he stated: "I did reprimand employees, but all other authority that I used to have was given back to Vinnie and Bob."

Robert testified that when he and Vincent were in prison Zarkos was managing Prudential; he had the power to hire

⁴ Only two oil drivers testified. Campos returned to Respondent's employ in August 1990; in December he received a raise to \$500 a week for 6 days, \$583 for 7 days. Medina began working for Respondent in September 1990 at \$290 a week. In December 1990 he received an increase to \$450.

and fire employees and to see “that the company worked the way it should have worked . . . He was in charge of the entire operation.” While they were away, Wong, Vincent’s wife, fired Zarkos. When Robert and Vincent returned, they rehired him for the same position he had prior to being fired—managing the Prudential operation, and he had the same powers he always had: hiring and firing drivers, purchasing and selling vehicles and parts, and seeing that the trucks were properly maintained. Robert testified that Vincent is the president of Prudential and does the dispatching for the oil drivers as well.

A number of other witnesses also testified regarding Zarkos’ employment status. Campos, who began working for Respondent in May 1988 and left a month later, returned in December 1988 and again left in April 1989 (on both occasions due to the lack of a required license), testified that during his final period of employment with Respondent he worked from May 1990 through February 4. As to whether Zarkos was a supervisor, he testified: “I don’t know if he was a supervisor or not. He assigned us the deliveries.” He testified that Zarkos did not have the title of manager. In an affidavit given to the Board, Campos stated:

I believe the title of Zarkos was manager. I never saw him hiring or firing any employee. I heard that he had this authority. I never saw him discipline, promote, transfer, layoff, recall or reprimand any employee.

Medina began working for Respondent on September 18, 1990; about 2 weeks later, he and Zarkos had a disagreement over a nondelivery and Zarkos told him that he was fired. Two days later, Medina called the facility to arrange to pick up his check and he spoke to Vincent, who asked him why he wasn’t at work. Medina told him that Zarkos had fired him and Vincent said that Zarkos didn’t have the authority to fire him and he returned to work. He testified that he worked “under Vinnie’s supervision.” As to whether Zarkos (Billy) was his supervisor, he testified: “Billy’s not my supervisor. Just my dispatcher. He just gave me my tickets, that’s all.” Miguel Marquez testified that in December 1990 Zarkos hired him to paint a truck for Respondent. Wilson Cuesta, who is employed by Respondent, testified that he was hired by Zarkos on October 1, 1990; he was interviewed by Zarkos with Muniz as the interpreter. Zarkos asked him about his experience and Cuesta said that he was a welder. Zarkos said that only cleaning work was available, told him the pay, the days and hours of work, and told him to begin the next day, which he did. Although he was employed as a cleaner, he worked on the trucks on several occasions at Zarkos’ direction. He testified that Zarkos gave out delivery tickets to the oil drivers and spent most of his time on the radio talking to the drivers about their deliveries. Zuleta testified that he was interviewed, and hired, by Zarkos.

Novillo, the manager for Amer-National, testified that during the period prior to Zarkos’ discharge, he was the manager for the oil drivers; he had the power to hire and fire the drivers, although the only individual who he could specifically remember was Medina. He also decides on the rate of pay, work schedule, and overtime for the oil drivers. He testified that Vinnie prepared the delivery tickets for the oil drivers, but Zarkos made adjustments in these deliveries the following day if he saw that certain drivers were too busy.

Eduardo Torres, who replaced Zarkos beginning January 2, and is still employed by Respondent, testified that as manager for Respondent he hires and fires employees and supervises the work of the drivers. Prior to February 1990 he worked for Respondent under Zarkos; Zarkos was the general manager for Respondent and he managed the operation and the garage. He hired and fired employees. Cesar Padilla was employed by Respondent from May 1987 through July 1990. He testified that during this entire period (except, of course, during the period when he was not employed by Respondent) Zarkos was the manager; while Torres was there, Torres was the supervisor under Zarkos. Vincent prepared the delivery tickets for the following day; Zarkos did not do dispatching. Steve Chung, chief accountant for Respondent, testified that in August 1990 he prepared job descriptions for certain positions at Respondent. In this regard, he interviewed the employees and “asked them what kind of job they have been doing.” He then prepared the job description and gave a copy to each of the employees involved. The job description for Zarkos is dated August 21, 1990, and states:

As the transportation manager, the above employee Zarkos is responsible to:

1. Open up the garage and office every morning and keep the key in a safe place.
2. Hire and discharge drivers and oversee their work in a proper manner to protect the company’s interest.
3. Negotiate salaries with drivers and make appropriate periodic adjustments.
4. Prepare work schedules and organize days-off/vacations for drivers.
5. Gather payroll information such as who has worked how many days and furnish it to the bookkeeper on Monday for payroll preparation.
6. Assign trucks to individual drivers and organize their delivery routes. Every night, Vincent Latorra will divide the delivery tickets, write down the names of the drivers on them according to their delivery routes and leave them on the counter for the drivers to pick up the next morning.
7. Order all necessary parts and supplies for the trucks.
8. Oversee operating conditions of the trucks and coordinate their repair schedules.
9. Hire and supervise truck mechanics.

Amarilho Rosa testified that he was interviewed by Zarkos and a Spanish-speaking woman (presumably Muniz) in October 1990 for a cleaning job. Zarkos hired him and directed his work as well. Respondent’s payroll records state that Rosa was employed by Amer-National.

D. Respondent’s Knowledge of the Union Campaign

As stated above, the Union filed its petition on December 26, 1990; the supplemental decision incorrectly states that the petition was filed on December 16, 1990. A copy of the petition with the accompanying information was sent to Respondent by certified mail on December 26, 1990. The return receipt states that it was received by Gomez on December 31, 1990. Gomez testified that she signed for the letter (a big yellow envelope) on that day, showed it to Muniz (they were expecting it) and then placed the letter on the counter where

all the mail is placed. Later that day she saw Robert pick up this mail and take it to the back of the office. Gomez, who was Respondent's receptionist at the time, also testified that at the end of December 1990 she handled many calls from Ariella Bernstein (the Board agent handling the representation case) for Robert and he spoke to her during this period. Muniz testified in a similar fashion that Gomez signed for the letter because Muniz was busy, showed it to Muniz, and placed it on the counter "until Bob Latora pick it up." It is not clear from this testimony whether Muniz actually saw Robert pick up the letter. Medina testified that on the afternoon of December 31, 1990, he saw Vincent with a letter in his hand; it was a yellow envelope about 11-by-14 inches.

As stated above, Ness instructed the employees not to solicit union authorization cards during work time at Respondent's facility; Muniz, obviously, did not follow these instructions. Benavides, Alberto Guzman, and Rosario each testified that they were told not to talk to Robert or Vincent about the Union. Santana testified that on about November 17, 1990, he told Novillo that he and everybody else had signed a union card and asked Novillo if he wanted to sign a union card; Novillo declined to do so, but said that he wouldn't "rat" on them. Novillo testified that he spoke to employees about the Union during this period, but he never told Robert or Vincent that the employees were signing for, or were interested in the Union and, as far as he knows, in November and December 1990 Robert and Vincent were not aware of this union activity.

Robert testified that he did not receive the Board's certified letter until January 2; on that day he found the envelope and the enclosed letter in the photostat machine in Respondent's office. Shortly after finding this letter in this manner, Wong questioned Muniz (in Robert's presence) whether she had received and opened the envelope; she refused to answer. Robert testified further that earlier on that same day he had received phone calls from Bernstein asking questions about Respondent. He didn't know who she was or who she represented; she said that she represented the government, but her questions were "very ungovernment like." Later that day when he found the letter in the photostat machine he realized that she was a representative of the Board.

E. *The 8(a)(1) Allegations*

As stated above, the consolidated complaints contain too many 8(a)(1) allegations to recite verbatim herein; many of them correlate with the objections filed by the Union that are also before me. All of these allegations except one involve Vincent and Robert; the remaining one involves Wong. The only allegations that will be discussed herein are those that are supported by testimony.

Muniz testified that at about lunchtime on January 2, Wong called her into the office and asked her what was going on with the Union. She also asked about the union meeting; Muniz denied everything. Wong then called Vincent into the office and said: "She doesn't want to cooperate." Vincent said that Novillo and Marquez had spoken to him about the Union and they knew what was going on. Vincent then wrote down names of employees whom he said attended the union meeting. Neither Vincent nor Wong testified. I find that this interrogation and impression of surveillance violated Section 8(a)(1) of the Act.

Zarkos testified that on the evening of January 1, Vincent and Robert came to see him and asked: "Who started this mess?" When he asked what mess, they asked: "Who called the union?" Zarkos denied any knowledge. They then asked him how much money he wanted to withdraw from the Union. Zarkos refused this offer. This testimony is uncontroverted. If Zarkos is found to be an employee herein, I find that this violates Section 8(a)(1) of the Act.

Campos testified that on December 31, 1990, he received a telephone call from Vincent at about 11 p.m.; this was the first time that Vincent had called his home. Vincent said that two people had told him that they had been at the union meeting and had asked forgiveness and he had forgiven them. Vincent told Campos that he should tell him everything about the Union: who called the Union, who signed the cards, and who attended the meeting. He said that if Campos didn't tell him he would fire him and that he should think it over since he had a family. I find that this violates Section 8(a)(1) of the Act.

Campos testified further that on January 3, Robert called him into the office; Vincent, who was also present, did most of the talking. They asked who called the Union and if Muniz was the one; he should tell them everything. They wanted him to be the third person to beg forgiveness because he was a good worker and they didn't want to lose him. If the Union offered him a \$1 raise, they would give him \$1.50. That he would be without a job if the Union came in. Campos said that he didn't know anything. Vincent said that if he didn't know anything, he had a paper for him to sign. The paper was in English and Campos had difficulty understanding it, and he asked what it was. Vincent said that it simply said that he didn't know anything about the Union and that if the Union won, Respondent would shut down. He said: "Jesus, who is against me, or who wishes to harm the company, will be fired." These statements are uncontroverted and I find that they violate Section 8(a)(1) of the Act. The paper and statement that Campos referred to (and Benavides and Alberto Guzman also testified about) states:

I _____, the undersigned, an employee of Prudential Transportation, Inc. state that I have not petitioned, nor signed any petition or card requesting Local 553-I.B.I. AFL-CIO to represent me for purposes of collective bargaining.

If Local 553-I.B.I. AFL-CIO has filed any card with the NLRB bearing my signature for the purpose of representing me in support of any petition for collective bargaining, I hereby state that my signature was obtained through misrepresentation, fraud or duress by my supervisory employee William Zarkos under threat and implication of losing my job, and that it is not my intention to have Local 553-I.B.I. AFL-CIO file a petition for collective bargaining for me, and *I hereby revoke any such authority.*

Sworn to before me

_____ this day of January 1991 _____

Notary Public

Robert testified regarding these affidavits; he testified that Nelson Zuleta and other employees told him that Zarkos

(whom Respondent alleges was a supervisor) pressured them to sign union authorization cards. He was informed by counsel that the way to attack the Union's cards and showing of interest was through notarized affidavits from the employees stating that they were not interested in the Union and had never asked the Union to represent them. On about January 4, his attorney faxed him the above affidavit and he had it retyped and duplicated. On January 8, copies of these affidavits were placed in two places at the facility: for the drivers they were placed in the front of the facility where they pick up their delivery tickets and for the servicemen and mechanics they were placed in the back where the parts are distributed. On that day he made an announcement over the loudspeaker about the availability of these statements for employees who signed something that they didn't agree with or had been forced to sign a union card, and a notary was present at the facility to verify signatures of any employee who signed the affidavit. He never spoke to any of the employees personally about the affidavits. The affidavits remained in these places for the entire day. As to whether he knew who had signed a union card, he testified:

No. No. I was told by my attorney to make sure not to approach anybody individually so that not to give the impression that people had to sign them or were forced to sign them. To make sure that there was no misunderstanding or impropriety involved. Everything had to be 100 percent above board and everything had to be done extremely so that nothing could happen. So that the government couldn't twist it."

He testified that he never told any employee of benefits that they would receive if the Union were not brought in.

In an affidavit that Robert gave to the Board, he states: "On January 8, 1991, waited in my office for the people to come in. The Employees came in individually and into the office to sign the affidavits. No one told them to enter the office." On cross-examination, he testified that he didn't see the employees sign these affidavits in his office, because his office is "pretty big." As to whether the notary he hired for the day was sitting in his office that day, he testified: "She might have been standing. I wasn't looking at her . . . I didn't want to give the impression that I was watching over her shoulder or that I was watching what the employees did." After some additional bantering by Robert, he testified that the employees came into his office to sign the affidavits, the notary was there to notarize their signatures and that he was in the room at this time, as well, although he did not see the employees sign the affidavits.

Benavides signed an identical affidavit on January 8; he testified that on that day, Vincent called him into his office and asked him if he had attended the union meeting, and Benavides answered that he had not. Vincent then asked him if he had signed a card for the Union and he said that he did because all had signed it. Vincent then gave him the affidavit, said that he should sign it if he wished to continue working for Respondent, otherwise, "I should look for a job elsewhere." The affidavit in evidence has his name typed at the top and is notarized. He testified that it wasn't notarized in his presence and he doesn't know whether his name was on the top at the time that he signed it.

Alberto Guzman also signed an identical affidavit on January 8; he testified that on that day Vincent gave him the affidavit outside his office. He told him to sign it because he would lose his job if—he didn't sign it. The affidavit that he signed which is in evidence is notarized; Guzman testified that it was not notarized in his presence.

In cases such as this an employer may allow its employees to exercise their Section 7 rights without violating the Act; in this regard, an employer's ministerial acts in assisting employees does not necessarily violate the Act. *Central Washington Hospital*, 279 NLRB 60 (1986). However, in the instant matter, Respondent initiated and was the sole participant in the attempt to destroy the Union's majority status. The employees were simply told to sign, or they would lose their jobs. In addition, the requests to sign the affidavit were accompanied by a threat of discharge if the employees failed to comply with the request. By these actions Respondent violated Section 8(a)(1) of the Act. *Texaco, Inc.*, 264 NLRB 1132 (1982). The accompanying interrogation and threats to Benavides and Albert Guzman also violate Section 8(a)(1) of the Act.

Campos also testified in support of other allegations as well. He testified that in mid-January he was called to Robert's office; Robert told him that a Government agency was going to investigate to determine whether the employees wanted the Union and that "we should think well about it because if the Union would win, he would shut down the company and we would be left without a job." He told Campos that if the Union came in, it would bring in its own drivers "and they would leave us without a job." Campos testified that during this period he informed one of the other employees that Zarkos had won his case with the Board;⁵ the following day, Vincent called him into his office and told him that he was going to fire him for saying that Zarkos had won his case. Vincent also told him that if the Union won the election he would fire him anyway because he would discontinue his route. Campos was terminated on about January 14; the nature of this will be discussed further below together with the other terminations. Campos testified that on March 4, 2 days before the election, Robert told him that if he voted for Respondent, he would receive 2 weeks paid vacation, instead of 1, and that he would get his job back. Robert testified that he never discussed any union matters with Campos and told the employees that they had the right to sign or not to sign the cards; "That it was entirely up to them." For reasons stated more fully below, I found Robert to be a witness lacking credibility. I therefore credit Campos regarding the above incidents and I find that by this activity, Respondent violated Section 8(a)(1) of the Act.

Medina testified that in about mid-December, Vincent asked him if he knew anything about the Union. Medina denied any knowledge of the Union. Vincent said that if the Union got in it would kick all the employees out and put its drivers in. I find that this undenied threat and interrogation violates Section 8(a)(1) of the Act.

Alberto Guzman testified that sometime after January 8, Vincent called him into his office and asked him to tell him the names of the union leaders; Guzman said that he didn't

⁵On January 8, the Union filed the initial unfair labor practice charge alleging that Zarkos' (as well as other) discharges violated Sec. 8(a)(1) and (3) of the Act.

speaking English well and could not understand him. Vincent asked him why he was knifing him in the back. He testified further that about a day later, Robert called him into the office and told him that he would shut down the business because of the problems that the Union had caused and that Guzman could go back to his country. I find that by the above two statements to Guzman, Respondent violated Section 8(a)(1) of the Act.

In addition to the above, including the promise of benefits to employees for withdrawing their support from the Union, there is also an allegation that on about the week of January 7, Respondent, by Robert and Vincent, promised and granted wage increases to its employees if they abandoned their support for the Union. Campos, whose final period of employment for Respondent began in August 1990, testified that at the end of December 1990 he asked for a raise; he told Vincent that he was working long hours and was entitled to more money and overtime pay. This was the first raise he had requested during his 1990 employment with Respondent. He was given a raise in January; at that time, his salary was increased by \$150 and Respondent began to pay him overtime. This increased his weekly salary by about \$300 to about \$900. He was not told why he received the increase and the overtime pay. Medina, who began working for Respondent in September 1990 delivering oil, testified that when he was hired he was told that he would be paid \$450 a week, but he was only paid \$290 a week. In early December 1990 he was increased to \$450 because he was doing additional deliveries.

Eduardo Torres, who replaced Zarkos on January 2, testified about raises; however, his testimony on this subject is very confusing. On direct examination he testified that Campos asked him for a raise and he gave it to him (without specifying an amount) 2 weeks before he told Campos to take a week off. Subsequently, he testified that Campos asked for a raise, but he never gave it to him. On cross-examination his testimony became somewhat clearer: apparently, Campos asked for a raise and when Torres informed Campos of his layoff for 1 week, he told him that when he returned to work he would receive the increase. Because Campos refused to return (according to Torres) he never received the increase. Robert testified that three employees received wage increases after the petition was filed; the two that he named were Campos, whose salary was increased from \$583 to \$650 a week and "Areberto," whose salary was increased from \$500 to \$600 or \$650 a week. The third, apparently, was Nelson, whom Torres referred to in his testimony. Robert testified that the employees were given the increases because they threatened to quit if they were not granted.

The sole evidence in this regard involves three or four employees: Campos received a raise in about early January; however, he requested the raise (for the first time during this final employment period) and was given the raise without any mention of the Union. Medina received an increase in early December 1990, prior to the time that I find Respondent learned of its employees' union activity. He testified that he received the increase (to the amount he had been promised months earlier) because he was taking additional deliveries. Again, no mention of the Union was made to him when he received the increase. Finally, Areberto and Nelson Zuleta received increases, but there is no evidence regarding

these increases. It is, of course, an unfair labor practice for an employer to grant a wage increase to its employees in the midst of an organizing campaign where the purpose is to convince the employees that there is no need for the Union, that benefits are granted without the Union. In the famous words of Justice Harlan in *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964), "the suggestion of a fist inside the velvet glove." The grant or promise of benefits made during an organizational campaign will be considered unlawful unless the employer can provide an explanation, other than the organizational activity, for the timing of the grant or announcement of such benefits. *Village Thrift Store*, 272 NLRB 572 (1984). The evidence establishes that 3 or 4 employees received increases in a unit of about 25 employees. The two employees who received increases who testified about it, testified that they had requested the increases and were doing extra work entitling them to the increases. In addition, it is clear from the evidence described above (as well as evidence that will be described below) that this was not an employer expert in the art of subtlety; from about January 1, Robert and Vincent were extremely busy making threats and promises to employees and interrogating them, all involving the union campaign. The fact that none of these wage increases were accompanied by a comment about the Union indicates to me that they were as Campos and Medina saw them, deserved increases and nothing more. For this reason, I recommend that this allegation, together with Objection 5, be dismissed.

F. *The 8(a)(3) Allegations and the Challenges*

The consolidated complaint alleges that Respondent terminated 10 employees in violation of Section 8(a)(3) of the Act. There are nine challenged voters whose eligibility must be determined herein; the only one alleged discriminatee whose status as a challenged voter is not an issue herein is Rosario.

The principal actors in this matter were Robert and Vincent. Vincent did not testify. While Robert was questioned on direct examination he appeared to be knowledgeable, articulate and, apparently, fairly credible. During questioning on cross-examination he became a different person; to say that he was hostile, evasive, uncooperative, sarcastic and arrogant would not capture the full flavor of his testimony. For example, prior to Robert's testimony, there was testimony that Robert and Vincent had been imprisoned in about 1987. When Robert was asked about this on direct examination, he spent four pages of—transcript principally blaming the district attorney for this conviction before interrupted the testimony. He testified as he wanted to, not in response to questions asked of him. For these reasons, I discredit his testimony. One of the issues involved in the 8(a)(3) allegations is when Respondent (Robert and Vincent) first learned of the Union's organizing campaign. General Counsel alleges that they learned of it in about mid-November 1990 or, at the latest, on December 31, 1990, when they received the Board's letter notifying them of the petition. I find that the evidence is insufficient to establish knowledge prior to December 31, 1990. Although McClain and Novillo, admitted supervisors, were asked to attend the meeting and sign cards, there is no evidence that this information was conveyed to Robert or Vincent, and I believe Novillo's denial that he informed them of the union solicitations. McClain did not testify. An additional reason for finding that Respondent had no knowl-

edge of this union activity prior to December 31 is the precise reason for finding that it learned of the union activity on December 31, 1990 (in addition to the fact that I found Muniz and Gomez to be credible witness)—the extent of Respondent's antiunion conduct beginning on that day. An employer who engaged in unfair labor practices to the extent that Respondent did commencing on December 31, 1990, and January 1, would not have waited to do so if they learned of the Union's organizing campaign a month to 6 weeks earlier. Respondent's actions establish that it went "in full gear" immediately upon learning of its employees' union activities. I find that this occurred on the afternoon on December 31, 1990. As regards each of the 10 alleged discriminatees, Robert testified that none were discharged for any reason connected to their union activities.

Zarkos

As stated above in the discussion of Zarkos' status, he returned to Respondent's employ in about November 1989; at that time he was told that he would be a driver being paid \$550 a week. Instead, he was paid \$500 and, he testified, he was made the dispatcher for the oil deliveries. Also, as stated above, he was very active in contacting the Union and notifying the employees of the meeting on November 15, 1990. On January 1 (none of Respondent's employees worked that day) at about 8 p.m., Vincent and Robert came to see Zarkos at the bakery that Zarkos' girlfriend owns. Zarkos testified that they went inside and asked him: "Who started this mess?" Zarkos asked what mess and either Robert or Vincent asked: "Who called the Union." Zarkos said that he didn't know. They then asked him how much he wanted to stop being in the Union. Zarkos said that they hadn't given him money before when he worked long hours and he didn't want any now. He told them that he couldn't stop the Union. They told him that he was fired and asked him to return the keys to the garage, which he did. They then mentioned an oil spill and he said that it wasn't his fault. He testified that during the last 2 months of his employment with Respondent there were problems with truck maintenance, trucks breaking down, and oil spills. Wilson Cuesta, who began working for Respondent on October 1, 1990, as a cleaner, testified that in about the middle or end of December 1990 he found oil delivery tickets and customer account cards in the waste basket next to Zarkos' desk. He showed them to Zarkos, who said that they were no good. Cuesta never informed Robert or Vincent about these cards.

Torres, who left Respondent's employ in February 1990 and returned on January 1 to replace Zarkos, testified that on the evening of December 31, 1990, or January 1, he received messages from Robert and Vincent that they wanted to talk to him. He returned the calls and they met that evening at Robert's home. They asked him if he would be interested in returning to Respondent's employ; he said that he was. It is unclear from his testimony whether they told him at this meeting that he would replace Zarkos, although that is what he did the following day. Initially he testified that they told him that he would replace Zarkos; then he testified that they didn't tell him this. Finally, he testified that they said he would replace Zarkos and he would be doing his job. Miguel Marquez, testified that in December 1990 he was hired by Zarkos to paint one of Respondent's trucks. While he was there he observed Zarkos and a Mexican man loosening the

tires of a truck. He asked the Mexican man if they were changing the tire and he said that they weren't, they were just trying to leave them loose. Marquez said that was dangerous, but the Mexican told him not to worry, if the truck was damaged they would get another one. On December 24 or 25 he met with Robert and told him of what he had seen.

Robert testified that Zarkos was fired on January 1; prior to that time, "there had been a long series of complaints from drivers that the trucks were in a state of disrepair." He was also aware of a large number of trucks breaking down on the road. He considered it mismanagement until December 31, when Marquez told him that he had seen Zarkos loosening the bolts and tires of one of the trucks. The next day he and Vincent went to the home of Zarkos' girlfriend and told him that he was fired and that somebody would be hired to replace him. Nothing was said to him about the Union because they did not know at the time of the union campaign at the facility. It was not till the following day that they learned of the campaign. In addition to this alleged sabotage of Respondent's trucks, Robert testified that from the mid-1990 they were dissatisfied with his work:

There were trucks breaking down in the middle of the street. Oil spills all over the place. He used to get drivers to complain about everything. It looked as if he was harassing the driver. Insulting everybody. He was treating everybody like a dog that worked for him. He always had an imperial attitude, but somehow it got worse and worse.

He testified that in June 1990 he and Vincent spoke to him and told him that as soon as they could find a replacement he would be let go; "Somehow that made things worse."

On cross-examination, Robert testified that he and Robert gave Zarkos the warning in June that he would be fired as soon as they could locate a replacement because he was doing a terrible job. The only reason they kept him as an employee was because "he was Vinnie's best friend and they had known each other for many, many years." and that they needed time to find a replacement. He testified that Torres was hired on January 1 to replace Zarkos.⁶ As to the fact that Torres was hired the same day that Zarkos was fired, he testified that they had to "beg" Torres to work for them, although it was Vincent who spoke to Torres.

In this and all the subsequent 8(a)(3) allegations I shall be following the Board's guidelines as set forth in *Wright Line*, 251 NLRB 1083 (1980). The only fairly credible testimony is Marquez' testimony about observing Zarkos sabotaging Respondent's trucks. Even that testimony is questionable, however. Why would they admit sabotage to an employee who had been hired only a few days earlier. An additional question is the timing; Marquez testified on a number of occasions that he told Robert of what occurred on the days before Christmas; why did Respondent wait until January 1, the day after they learned of the union campaign, to fire him. It

⁶ At the representation hearing on January 16, Robert testified:

Q. Who is the principal supervisor of Prudential?

A. Until recently the principal manager and supervisor was William Zarkos. Right now the company is without such a supervisor manager.

Q. So there is not a manager now?

A. Not at this moment. They're in the process of seeking one.

is the timing that convinces me that Zarkos was fired because of the union campaign; he was fired the day after they became aware of it. I find unbelievable Robert's testimony that they had informed Zarkos in June 1990 that he would be fired when they found a replacement. It, apparently, only took them 1 day to convince Torres to return to their employ. Why couldn't they hire him in June 1990 to replace Zarkos? An additional reason supporting this finding is the statements Robert and Vincent made to Zarkos on January 1. For all these reasons I find that Zarkos' discharge violated Section 8(a)(3) of the Act, if he was not a supervisor within the meaning of the Act.

Zarkos testified that he was the dispatcher for the oil drivers, without the power to hire or fire. On the one occasion when he fired Medina, Vincent rehired him, telling Zarkos that he was not supposed to fire employees. In his affidavit he stated that he reprimanded employees. This comports with his warning to Marquez to call in before reporting next for work, after Marquez called in sick on two straight Mondays. Campos testified that Zarkos assigned the deliveries to the drivers and he heard that he had the authority to hire and fire, although he never saw him exercise this authority. Medina testified that Zarkos was his dispatcher, not supervisor. Vincent was his supervisor. When he returned to work after being fired by Zarkos, Vincent told him that Zarkos didn't have the authority to fire him. Marquez, Cuestra, and Rosa each testified that Zarkos hired them in late 1990, without apparent approval from anybody else. Chung testified that when he prepared job descriptions for the employees in August 1990 he interviewed the employees to determine what they did. His job description for Zarkos includes the power to hire and fire.

With some hesitation, I find that Zarkos was a supervisor within the meaning of the Act. The reason for my hesitation is that I found Zarkos to be a generally credible witness and his weekly wages were similar to the drivers. In addition, when he fired Medina, that decision was overturned by Vincent. However, the fact that he did fire Medina and gave a warning to Marquez establishes that he had, or thought he had, some of these powers. In addition, there was nothing to refute the testimony of Rosa, Zuleta, Questa, and Marquez that Zarkos hired them. Finally, Chung testified credibly that the job description that he prepared for Zarkos stating that he had the power to hire and fire employees was based on what Zarkos told him, and when the job description was completed a copy was given to Zarkos, apparently, without dissent. For all these reasons I find that Zarkos was a supervisor within the meaning of Section 2(11) of the Act and that his termination, otherwise unlawful, does therefore not violate Section 8(a)(3) of the Act. Having found Zarkos to be a supervisor within the meaning of the Act, I recommend that the challenge to his ballot be sustained.

Muniz

Muniz began working for Respondent in September 1988; originally, she was taking phone orders for oil and service. From the middle of 1989 (when Respondent began employing computers) until her termination on about January 1, she prepared the automatic delivery tickets for the drivers and would occasionally assist on a service call. As stated above, she was active for the Union in obtaining signed authorization cards from the employees. Zarkos used to drive her to

work and did so on January 2 even though he had been fired the prior day. When she arrived at work that morning, Robert and Vincent asked her who brought her to work that day and she said Zarkos they did not respond. She began answering the phones and doing the automatic delivery tickets, as usual. At about 10 a.m. that morning, Emily Williams, an office employee who usually did not report for work until about noon, asked Muniz to show her how to do the automatic delivery tickets; Muniz refused, saying that if she made a mistake, she (Muniz) would be blamed for it. She testified that on that morning Robert stayed in the office where she worked all morning, paying "closer attention to what I was doing." At lunchtime, Wong called her into her office and asked what was going on; Muniz asked about what? Wong said that Muniz knew what she was referring to, and she should talk to her about it. Wong then asked her about the Union and the meeting; Muniz denied any knowledge of it. Wong then called Vincent into the office and told him that Muniz didn't want to cooperate. Vincent then wrote on a piece of paper the names of employees whom he said attended the meeting and said that Novillo and Angel had told him what was going on with the Union. Wong then told her that this was her last day working for Respondent. Muniz asked for her paycheck and, as she was leaving, she was stopped by Robert who tried to convince her to talk to him, but she again said that she didn't know anything. He then asked her about an incident a week earlier when a customer was told to buy her oil elsewhere. Muniz told him that it could not have been her, as the call came in at 2 a.m. As she was leaving, Robert told her not to leave, saying, "Go back to work, you're not my enemy." She returned to work and worked for the remainder of the day. When she reported for work the following morning Williams told her that Robert said that she should sit next to Muniz at the computer to learn how to do the automatic oil delivery tickets. After lunch that day, Robert called her into his office and began to question her as he had the day before; she told him that she didn't want to talk about it. She had enough the prior day. Wong then handed Muniz her checks and told her to take 2 weeks off "until everything settles down." Vincent and Robert were also present. She left shortly after noon. When she got home she realized that the checks were not signed. She returned to the office on January 5, at which time Wong signed and cashed the checks. Two weeks later she called Wong and asked if she could return; Wong told her to take 1 more week. One week later she again attempted to call Wong. She was unable to reach her and spoke to Vincent, who told her that business was slow and that she should go to the unemployment office in the meanwhile. Respondent's answer states that Muniz was fired because she was unable to properly operate the computer that issued the automatic oil delivery tickets. Muniz testified that from January 2 until Vincent told her to go to unemployment because work was slow, neither Vincent, Robert, or Wong complained about her inability to perform the job.

Robert initially testified that when Wong questioned Muniz and Gomez about the allegedly misdirected Board envelope on January 2, Muniz refused to answer any of the questions. "That infuriated Linda, and Linda fired her." Subsequently, he testified to two other problems. One involved a call from a customer asking for the price of the oil; she gave the customer the price and the customer said that

another company had offered oil at 5 cents a gallon cheaper. Muniz told the customer that if he didn't like the price, he should buy the oil from the other company. Robert testified that he overheard this conversation, criticized Muniz for her actions and told her that she was fired. He discussed it with Wong and she agreed and gave Muniz her checks. Robert also testified to Muniz' difficulty with the computer that issued the automatic delivery tickets for the oil deliveries. In this regard, Muniz testified that she, occasionally, made mistakes with the computer, but that was due to the lack of training they gave her. Robert testified that Muniz was fired because of her difficulty with the computer that prints the automatic oil delivery tickets. It was not a difficult system to learn, but Muniz could not properly operate it, even though he sent her for training on "numerous occasions." There were "constant complaints" from customers about running dry when they should have received automatic deliveries; in addition, she pressed a wrong key on the computer and wiped out Respondent's customer's accounts, which took a great deal of time to correct. Because of this, the fact that she had recently "developed a terrible attitude," the telephone call where she allegedly told a customer to buy his oil elsewhere and the Board letter situation, Muniz was fired. He testified that her discharge was not related to her union activities and that he never discussed her union activities with her.

I have no difficulty crediting the testimony of Muniz over Robert. I have previously discussed why I found Robert to be a generally incredible witness. In contrast, I found Muniz to be an articulate and credible witness. The first workday after Respondent learned of the Union she was questioned about the Union and told to go home; this order was later rescinded. The next day there was another attempt to question her and she was told to take 2 weeks off, then told to take another week off, and then basically told that she was terminated. From a credible Respondent, free of additional unfair labor practices, these facts might satisfy its burden. With this Respondent I find that General Counsel has clearly satisfied its burden and that Respondent has not. I therefore find that by discharging Muniz on January 3, Respondent violated Section 8(a)(3) of the Act. I also recommend that the challenge to her ballot be overruled.

Gomez

Gomez began working for Respondent on November 7, 1990, as a receptionist. She testified that prior to January 14 Respondent had never complained about her work, although she was having some difficulty with the new phone system Respondent had installed. On that day, she was called into the back office and Robert told her that there were complaints about the phone not being answered; he also asked her if she had spoken to Muniz. He handed her a check for the prior week's pay and for the pay for that day, Monday, January 14. As to how she knew that she was being fired, she testified that it was a combination of "the smirk on his face," complaining about her work and giving her the check.

Robert testified that prior to the employment of Gomez, Respondent had installed an automated phone system that was supposed to automatically transfer calls to the requested department, but the training wasn't going well and they decided to hire somebody for a short period until their employees could learn how to properly operate the new system. He

testified that this was the job that Gomez was hired for and when she was interviewed by Chung he told her that the job would only be for a couple of weeks or a month and "until we got comfortable with the system." Gomez testified that she was never told that the job would be temporary. Robert testified that when the new phone system was operating properly, in January, he told Gomez that her services would no longer be required because the new phone system was working properly.

Although not as obvious as the discharges of Zarkos and Muniz, I find that the discharge of Gomez violates Section 8(a)(3) of the Act. I found Gomez to be a direct, articulate, and credible witness and credit her testimony over that of Robert. I therefor credit her testimony that when she was hired she was not told that the job would be temporary. That, together with the timing of the discharge, about 2 weeks after Respondent learned of the Union and fired Muniz, and Robert's question to Gomez when he fired her, whether she had spoken to Muniz, convince me that this discharge was in retaliation for the union campaign, and therefor violates Section 8(a)(3) of the Act. I also recommend that the challenge to her ballot be overruled.

Campos

As stated above, Campos had three periods of employment with Respondent. He left the first two times in order to obtain a higher form of license. For his last period, he began in August 1990 as an oil driver. Campos testified that on February 4, he was called into Robert's office, and Robert told him that work was slow and he should take a week's "vacation." He testified that work was not slow at the time, although in an affidavit he gave to the Board he stated: "Business is a lot slower this year." Robert said that he was going to ask a different driver to take off a week at a time. Campos asked why he was going first and Robert said that he had been working a lot and he wanted him to rest. Campos asked for the pay for the week he was going to take off and Robert said that there was no money for it. He had never before taken off during the winter. He returned to Respondent's facility on February 11 at 8 a.m. At that time, Robert told him to take another week off because work was still slow. Campos asked why he should take another week off when Robert said that he would give a week vacation to another driver the second week. Robert said that it was because he wanted the Union. Campos asked if that was a problem and Robert said that it was.

Campos testified that he next spoke to Robert on February 18; at that time and at subsequent meetings in March, he asked Robert if he would put him back to work and Robert said that he would, but with a new payment system. He would pay him 2 cents a gallon for each gallon delivered. Afterward, Campos would purchase the truck and Respondent would pay him 5 cents a gallon for each gallon delivered. He said that the truck that Campos was driving cost \$80,000; Campos said that he didn't have such money. Robert said that he could lend him the money which Campos could repay over a period of time. Robert gave Campos a New York State Business Certificate which Robert had filled out under the name of "Campos Transportation Co." Campos refused to sign it saying that he had no money to pay for it, but that he would rather return as an employee. Robert said that he no longer wished to have employees. During one of these

meetings in March, Robert asked him if he was still going to the meetings. On about March 1, Torres called Campos and asked him if he wanted to work. Campos said that he did, because he had no job and he had a family to support. Torres told him to come to the facility and talk to Robert. When he spoke to Robert, he repeated about Campos buying the truck and said that he could earn \$15,000 a year. Campos returned on March 4 and asked Robert whether he really wanted to give him a job. Robert told him that he was a good worker, and if he voted for Respondent at the election 2 days later, he would give him his job back.

Respondent's answer alleges that Campos was hired as a seasonal employee in 1990 and that he was on furlough and failed to return to work at the end of that period because he was collecting unemployment benefits and taking English lessons. Torres testified that shortly after he returned to Respondent's employ on January 2, he instituted a system that when work was slow he would ask the drivers to alternate taking a week off at a time. Business conditions in January were: "It was in between. Not really so good. Last winter, you know, the weather was not so good." Under this new system he told Campos to take a week off and return the following week. Campos returned the following week and Torres had work for him, but Campos said that he wouldn't work unless he got paid for the week he was out. He called Campos on about 15 occasions to work ("I really need him"), but he refused to return because he wasn't paid for the week and he wanted to go to school to learn English. Because Campos never returned, he was the only driver who was told to take a week off during the winter season. Robert testified that Torres had arranged for each oil driver to take 1 week off; Campos was paid the most so he was chosen to be first, but after taking the week off he quit. Subsequently, Robert had conversations with his lawyer and the Board agent about rehiring some of the employees to settle the unfair labor practices that were filed or alleged in the complaints. Robert said that he would rehire Campos because he had quit, he had not been fired. Robert testified that he told the Board agent that he could not rehire Campos "as an individual," but "could something be worked out whereas if he didn't actually work for us, that if he has his own company, if I could give him work through his own transportation company." He sent the business certificate to the Board agent who was unsure of its legality. He testified: "I made sure that everything was above-board and that they were appraised every minute of anything that we were going to do and make sure that it was legal." On cross-examination he was asked whether he established these kind of subcontracting relationships with any of Respondent's other drivers. Initially, he was evasive and denied knowledge; subsequently, he testified that he could not recall any.

An exhibit submitted by Respondent establishes that, in January, Prudential hired six employees (presumably drivers) and fired four.

Because I do not find credible Robert and Torres' testimony that they asked him to take a week off and he never returned, I find that Respondent fired Campos in violation of Section 8(a)(3) of the Act. Initially, I credit his testimony that he wanted to return and contacted Robert on numerous occasions to do so; on two of these occasions Robert informed him that his termination was due to the Union and his attendance at the union meeting. Respondent's economic

defense to this layoff is belied by the fact that during the prior month it hired six drivers. Additionally, I discredit Robert's version of the business certificate incident; it strains credulity to believe that Campos, who 2 months earlier was earning \$500 a week, would be interested in buying his own oil delivery truck and working as a subcontractor with Respondent, and that a Board agent would promote such an arrangement. Finally, it must be remembered that Campos was the principal target of Respondent's 8(a)(1) conduct as described above. For all these reasons, I find that Respondent unlawfully terminated Campos on February 4 and also recommend that this challenge be overruled.

General Counsel also alleges that Campos was denied a week's paid vacation, in violation of Section 8(a)(1) of the Act. The evidence establishes solely that he received a week's paid vacation in May 1990 and not in February. I find that this allegation is not supported by sufficient evidence.

Medina

Medina began working for Respondent in about September 1990 as an oil delivery driver. He testified that the only problem that he had at work was on one occasion, Robert asked him to do a delivery after 5 p.m.; he refused because Respondent wasn't paying for overtime hours. Vincent told him that he was in his "black book" because of the incident. No date was given for this incident, but it was, apparently, before December 1990 when he was given an increase in salary for doing additional deliveries. Other than the above "black book" incident, the bosses never complained about his work and he never heard of any customer complaints regarding his deliveries. He testified that on his final day of work, January 3, Robert told him that he wanted to speak to him. While he was waiting outside the office he saw Campos, who told him that they were asking him about the Union. Robert and Wong met with Medina in the office. Robert had oil delivery tickets in his hand and asked Medina how many tickets he was doing; Medina said that he was doing 21. Robert said: "Good, but not good enough." He said that Campos was doing 30. Medina said that Campos was working long hours and that he would work long hours as well if Respondent would pay him overtime. Medina said that he did all the deliveries assigned to him and did not return delivery tickets. Robert told him that he was fired; the only reason he gave was "productivity."

Respondent alleges that Medina was fired on December 29, 1990, "during his probationary period for his inability to fulfill the duties of his job. He returned delivery tickets instead of making deliveries, resulting in many customer complaints." Robert testified that Medina was fired because of the customer complaints that he failed to make their deliveries. "What happened is that he kept bringing deliveries back." Vincent told him that he was fired for this reason. On cross-examination he testified that it was both Vincent and Torres who told him that he was fired for his difficulty in making deliveries. Although this situation is not as obvious as some of the others discussed above, I find that the evidence establishes that Medina's discharge violates Section 8(a)(3) of the Act. He was fired the second day after Respondent became aware of the union campaign. Although Respondent alleges that he was fired for his many uncompleted deliveries, he was given a raise a month earlier.

Respondent's answer alleges that he had not completed his probationary period; other than Benavides, all of the employees who were questioned about the subject testified that they were never told of any probationary period. Medina's answer to this question was not responsive. Finally, Medina testified that Vincent asked him if he knew about the Union and said that if the Union got in they would kick off the existing drivers and put their drivers in. Although Medina placed this in the middle of December 1990, I find it more likely that it occurred on December 31, 1990, or January 2. For all these reasons I find that Respondent unlawfully discharged Medina on January 3. I would therefor also overrule the challenge to his ballot.

Benavides

Benavides began working for Respondent on August 15, 1990, as a boiler mechanic. Respondent's answer alleges a number of reasons for Benavides' discharge: it is alleged that he failed to produce documentary evidence that he could lawfully be employed in the United States under the Immigration and Naturalization Act, although Robert testified that this was not a reason for his discharge. Additionally it is alleged that he was discharged for incompetent work that caused damage to customer's property, intoxication on the job, unauthorized use of Respondent's vans, failing to respond to radio calls and failing to complete his assigned work. Benavides testified that he was interviewed by Vincent; at this interview he told him that his real name was Jose Ciudad. He entered the United States on a 6-month visitor's visa and did not have a Green Card. Vincent told him that in order to work for Respondent he needed a legal name in order to be on the books and pay taxes. The real Victor Benavides, who was leaving the United States, gave him his social security card to use, and he also explained that to Vincent. His last day of work was February 3; he was not sent out to work that morning; Novillo told him to stay at the facility because he wanted to speak to him. At about 9:30 a.m., Novillo told him that work was slow and they no longer needed him. Benavides said that it was because of the Union. Novillo said, "No, it's because work is slow." Benavides testified that on the previous day he worked until 8 p.m.

In December 1990 or January, Benavides was assigned to replace an existing pipe in a basement. The super asked him to leave the old pipe until he could return to close it off. Unfortunately, nobody informed Respondent's oil delivery people of this situation, and a delivery was made into this open pipe which resulted in a basement with 100 gallons of oil. The following day Vincent told him that he was wrong for leaving the open pipe there and that he had to send someone to the building to clean the spill. Benavides also testified to another situation that occurred about a week before he was discharged. He went to a job and did the work he was assigned to perform. The customer asked him to perform an additional job requiring a glass pipe cutter, which he didn't have with him. He left the premises to purchase the tool, and when he returned, the customer told him that she had called Respondent's office and they had already dispatched another person to do the job. When he returned to the facility, both McClain and Vincent spoke to him about the incident.

As stated above, one of Respondent's alleged reasons for firing Benavides (as well as other as discussed below) is that he took Respondent's van home at night rather than leaving

it at Respondent's facility. Benavides, Alberto, and Pedro Guzman each testified that they took Respondent's vans home at night regularly and were never criticized for it, although there was a sign at the facility saying that they were not supposed to do so. Novillo testified that most of the servicemen who were working the following day took the vans home, with or without permission. Robert testified that Benavides used to leave tools in customers' basements and "never had the tools that he needed to do a job." He was present during a number of discussions that Novillo had with Benavides on these subjects. Novillo did not testify in this regard.

I find that General Counsel has sustained its initial burden under *Wright Line*, supra. As stated above, on January 8, Vincent asked Benavides to sign the affidavit disclaiming any interest in the Union under threat of discharge. In addition, he asked him if he had signed a card for the Union and he said that he had since everybody else had signed. Additionally, he was fired for the lack of work on the day after he worked until 8 p.m. Finally, any such action by an employer with this much animus, 1 month after learning of its employees' union activity must be viewed with some suspicion. I find that Respondent has not sustained its burden herein. The only evidence in this regard is Robert's testimony as to what he heard Novillo complain to Benavides about. However, Benavides never testified about his relationship with Benavides and Benavides testified to two problems—the oil spill and the lack of a proper tool at a job. Without demeaning these problems, they were the only two over a 6-month employment period. I therefore find that Respondent violated Section 8(a)(3) of the Act by discharging Benavides on February 3, and I, accordingly, overrule the challenge to his ballot.

Alberto Guzman

Guzman first worked for Respondent from mid-1989 through January 1990, at which time he was terminated by Vincent for missing 2 days of work. He was rehired by Respondent in June 1990 when Vincent looked for him because he needed him to repair a truck. He worked from that time to January 14 as a truck mechanic for Respondent. He testified that when he was first interviewed by Vincent, he told him that his real name was Jorge Bianey Diaz and that he was in the country illegally and had no papers. Vincent told him to get a social security card and he obtained it in the name Alberto Guzman. Respondent's answer alleges that Guzman resigned after stealing a van belonging to Respondent and failing to report that it was involved in an accident which destroyed the van. Respondent's answer also alleges that when he was discharged (a few sentences earlier, counsel for Respondent, in his answer, stated that he resigned) on January 14, he was in his probationary period. Guzman testified that when he was hired he was never told of a probationary period and Respondent presented no credible evidence to establish that it had a probationary period of this length. I therefore reject this defense, here, as I have elsewhere.

Guzman admittedly used the van prior to the time it was involved in an accident; he denies that he was driving it at the time of the accident. Respondent alleges that it had to be him. Guzman testified that while he was away from the facility in his van, he heard over the car radio a call from

one of Respondent's trucks asking for assistance with two flat tires. He went to assist, but could not change the tires because it was a heavy truck and he had only a jack to lift the truck, so he called for help and a lift truck was sent to assist. When Guzman informed Vinnie that he could not do the job, Vinnie was angry and asked him what he was doing there. He took the van home directly from there and parked it on the street. When he awoke the following morning the van was not where he had left it the prior evening, and he took the train to work. At this point, Guzman's testimony becomes somewhat confusing, even on direct examination. He testified that when he arrived at work he told Vincent that the van had been stolen and that Vincent was angry. Vincent told him to look for the van, "that he already had the address . . . he gave me the address of where the van was located. He wanted me to pull it with another van. I went to look for it without the van." When he saw the van, it had been involved in a serious accident and had a broken windshield. He testified that he wasn't able to do anything because the police were there, yet he did not speak to the police. Instead, he returned to the facility and Vincent told him that the damage to the van was going to cost him a lot of money and was his fault; he told Guzman to go home. He testified that he was not drunk on the prior evening when he drove the van. When Guzman went to pick up his final check, Vincent gave him the following letter, which Guzman signed:

Alberto Guzman understands and has been explained the reason for his discharge. Being for unsatisfactory performance and alcohol problems on the job. He has been advised many times to stop drinking on the job however he persisted on drinking and finally when he had an accident with the van belonging to the company a van that he took without permission and drove drunk and crashed it he was immediately discharged because of this incident.

I have received and have read and have been explained the above and are familiar with the facts.

Vincent told him to sign the paper; he didn't fully understand it, but he saw that it referred to alcohol, drinking, and being drunk. Guzman signed it and wrote, in Spanish, that he didn't know if the document was true. He testified that after he signed it Vincent crumpled it up and threw it into the garbage. Guzman retrieved it.

On cross-examination the confusion persisted. He testified that Vincent told him to go to the scene of the accident where the van was located with a van and a chain, but he did not do so. He did not explain why he failed to take a van and chain to the scene. He did explain why he did not speak to the police when he arrived at the scene: he does not have a driver's license. When he saw the van it was double parked and hit on the right side. The space between the van and the sidewalk was empty at the time he got there. He testified that he had not been involved in an accident with the van and was not drinking alcohol the last time he drove the van.

Robert testified that Guzman had developed a drinking problem on the job: "he was never sober," but Zarkos said that they should keep him and he would watch him. He testified that when Guzman went to fix the flat tires of the truck,

the driver of the truck said that he had vodka with him and when Guzman called in on the radio, he was "dead drunk." On Monday, January 14, he received a call from a tow truck company that one of Respondent's vans had been involved in an accident and had been towed to their parking lot. Robert said that he would send one of his people to pick up the van, but was told that it was demolished and would have to be towed. They asked him where he wanted it towed. He said that he would send a mechanic with a tow truck in order to save the towing cost. This was the first that he knew of the problem. At that moment he saw Guzman walking into the facility and concluded that the van that had been damaged was the one that Guzman had on the prior day. Vincent then told Guzman to take a van with a chain and bring the van to the facility. When Guzman returned to the facility he said that he quit, wanted his pay check, and would not answer any questions. They gave him his check and he left. On cross-examination Robert was, as usual, argumentative and not responsive. He testified that Guzman was drunk and was seen with a bottle of vodka by the tow truck driver although he never saw him with the bottle. He then added (in response to no question) that they found a bottle in the van on the following day. This testimony, as is true of much of his testimony, does not ring true. How would the tow truck operator see Guzman with a bottle? At the time he was towing the truck Guzman was long gone. Also, if the truck was as demolished as Robert testified, is it reasonable to assume that a bottle of vodka (or Guzman, if he was the driver when the accident occurred as Robert testified) would survive such an impact? In addition, Robert was asked how he was so certain that Guzman was driving the van at the time of the accident, when he testified that the van was stolen and then demolished. He testified that he has no definite proof, but all the facts lead to his conclusion.

I find that General Counsel has sustained his burden herein. Guzman was discharged 2 weeks after Respondent learned of the Union's campaign and, within a week of his discharge he was asked to, and did, sign the affidavit withdrawing from the Union, and was interrogated about the union leaders and threatened that the company would close if the Union won. The ultimate issue then is whether Respondent has satisfied its burden of establishing that he would have been fired even absent the union activity. This issue is especially difficult because of the credibility of the witnesses involved. I have previously discussed Robert's lack of credibility, generally, as well as specifically as regards this allegation. Guzman's credibility is also questionable regarding this allegation because of the unanswered questions remaining from his testimony. because of the timing of the discharge, within a week of three incidents of 8(a)(1) conduct directed at Guzman, as well as the lack of definitive credible proof that Guzman was driving the van when the accident occurred, I find that Respondent has not sustained its burden herein. I therefore find that Respondent discharged Alberto Guzman on January 14 in violation of Section 8(a)(3) of the Act, and, accordingly, I overrule the challenge to his ballot.

Pedro Guzman

Pedro Guzman began working for Respondent on November 2, 1990, as a boiler mechanic. He testified that he usually worked 70 to 80 hours a week, 7 days a week. His final day of employment with Respondent was December 31, when he

worked 8 hours. He testified that his assigned day off was Wednesday, although he usually worked on Wednesdays. He did not work on Tuesday, January 1 and did not report for work on Wednesday, January 2, presumably because it was his assigned day off. When he reported for work on January 3, McClain gave him a letter and told him that she didn't have any work for him. He asked who wrote the letter and she said that she didn't know, that he should ask Robert. The letter has his name at the top and is signed "Patrick." It states:

1. All of the service calls he goes to call back saying he didn't do anything.
2. Many of the customers call back saying don't send this serviceman anymore.
3. Many customers call saying send anybody except Guzman.
4. One day he had three services and all 3 customers called back saying please don't send this guy anymore.
5. Guzman takes van home with him with no permission.
6. Guzman knows that no one is allowed to take the van home because signs are posted and notices have been circulated and he's been told many, many times that he must park the van in the garage.
7. Guzman didn't show up to work yesterday and didn't bother calling, this after a long weekend. He did not tell the company that his phone # had been disconnected and we had no way of getting in touch with him.

Novillo began to write an eighth reason, but crossed it out. Guzman then met Robert and asked him who wrote the letter and Robert said that he didn't know; he later testified that Robert said that Novillo wrote the letter. Guzman testified that he told Robert that the contents of this letter was a lie, although the affidavit that he gave to the Board does not state this. Robert told Guzman to take his tools. He saw that Guzman had a beeper and asked him if he was selling drugs or taking his customers. Guzman said neither and he left. He testified that he has had his own service business and customers for 10 years using his own tools, parts, and car. This business services about 100 buildings.

Guzman testified that he is not aware of any customer complaints about his work or of any customer requests that he not return. In fact he testified that every customer was satisfied with the work that he did. On two occasions he was sent to correct work done by Novillo. In answer to questions about specific alleged customer complaints about his work, he testified that he could not remember the situations.

Novillo testified that Pedro Guzman was fired because of all the customer complaints about his work. These complaints were that he installed used parts and equipment and when a customer complained he would tell them to call somebody else to do it. He testified that between October 1990 and Pedro Guzman's discharge on January 3, he fired Kwara, Santana, Rosario, and Pedro Guzman, all servicemen, all of whom were discharged because of poor work performance rather than the lack of work. He had five servicemen remaining after these people were discharged and from that time to the date of Novillo's testimony, his department has functioned well with the five remaining servicemen. No new servicemen were hired to replace the fired employees. In-

stead, the existing employees are working overtime. Robert testified that Amer-National only uses new parts in its repair and maintenance work and they learned that Guzman was using used parts. When asked about Guzman's testimony that there were no customer complaints about his work, Robert testified: "More likely is that every single service call that he did resulted in complaints."

Because of the timing of the discharge as well as the animus described above, I find that General Counsel has sustained its burden herein. However, I also find that Respondent has sustained its burden of establishing that Guzman would have been terminated even absent the union activity. I found Novillo to be a fairly credible witness whose testimony seemed pretty reasonable. He had 9 or 10 repairmen prior to October 1990. Four or five of them were not doing a good job and between October 1990 and January 3 he fired four or five of them. Five competent servicemen remained and since that time they have performed all the service work without any new servicemen being hired. I found that more credible than Guzman's testimony that there were never complaints about his work. Finally, there was no 8(a)(1) conduct directed at Guzman. I therefore recommend that the allegation that Pedro Guzman was unlawfully discharged be dismissed, and the challenge to his ballot be sustained.

Santana

Pedro Santana, Pedro Guzman's son, began working for Respondent on about October 15 as a serviceman. The complaint alleges and the answer admits, that he was fired on November 17, 1990. He testified that his last day of work was November 26, 1990. He testified that on that day, McClain told him that he didn't call into Respondent's facility when he completed his jobs as he was supposed to, and Santana said that he was the only one who did call in. She then spoke to Robert and told Santana to take the day off (he was paid for the day) and call in the next day. When he called the following day she told him that he was "on a vacation." After that, he called every week, but McClain told him not to return because work was slow. About 2 months later, she told him: "Why don't you find another job?" He testified that neither Robert or Vincent ever complained to him about his work and that he was never absent or late without calling in.

In its answer, Respondent alleges that Santana was fired for poor job performance, inability to fulfill his work, and failing to follow company procedures. On cross-examination, Santana testified that Vincent told him that he was working too slowly and that unless he worked faster he would be fired. Wong also told him that he would have to work faster. On November 10, 1990, he had two arguments with Robert and at about that time Novillo suspended him for a day. Novillo testified that he made the decision to fire Santana because of the numerous customer complaints that he had not done the work properly and it had to be redone. He suspended him at one time, but could not remember when or the reason. He also received complaints about Santana jayriding with friends during nonworking time in Respondent's van. As stated above, he testified that after firing Santana, Pedro Guzman, Rosario, and Kwara, he has maintained a service department of five employees that is operating well, although with overtime. Robert testified that although he did not make the decision to fire Santana, he is

aware that "there was a tremendous number of complaints" regarding his work. He testified: "He was not a mechanic. He claimed to have been trained by the father [Pedro Guzman] and I guess the pupil never exceeded the father."

I have little difficulty in recommending that this allegation be dismissed and that the challenge to Santana's ballot be sustained. Most importantly, for the reasons discussed above, I found that Respondent did not become aware of the union campaign until December 31, 1990. Santana was fired about 6 weeks earlier after only about a month's employment with Respondent. Finally, during this month, Santana's work and ability were criticized on a number of occasions and he was suspended as well. I therefore recommend that this allegation be dismissed and the challenge to his ballot be sustained.

Rosario

Rosario was employed by Respondent from October 27 through November 24, 1990, as a serviceman in Novillo's department. He testified that there were never any complaints about his work. On one occasion, Robert or Vincent informed him that they were aware that he was driving with nonemployees of Respondent in the van. He said that he was driving the people to Respondent's facility to apply for jobs. On one occasion in November 1990, a car was not visible on the right side of his van, and when he turned to the right he hit the car and damaged the van. When he told Robert of the accident he offered to pay for the damages, but Robert told him that he could take care of it if he wished, otherwise it was covered by insurance. On his last day of work McClain told him to go home because work was slow and that he should call during the week. Whenever he called after that he was told that work was slow. Respondent's answer alleges that he was fired for joyriding in Respondent's van with nonemployees and for poor job performance resulting in complaints from customers. Novillo testified that he fired Rosario because of complaints he received from Respondent's customers regarding his work, Novillo's refusal to contact him over the radio to learn of his availability, and the fact that he damaged one or two of Respondent's vans. In addition, his answers regarding Santana and Pedro Guzman apply to Rosario as well; since early January, Novillo has operated very well with just five servicemen.

As stated above regarding Santana, I find that General Counsel has not sustained its burden regarding Rosario. He was fired prior to the time that I found that Respondent learned of the union campaign, there were no 8(a)(1) comments directed at him, and Respondent apparently had some good-faith problems with his work (and driving) performance. I therefore recommend that this allegation be dismissed.

G. The Bargaining Order Request

I have found numerous 8(a)(1) and (3) violations. The final question to be determined is whether these findings are adequate to support a bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). I have already found that the appropriate unit herein is as follows:

Included: All full-time and part-time drivers, servicemen, dispatchers and mechanics employed by [Respondents] at their Brooklyn, New York facility.

Excluded: All other employees, office clerical employees, managers, guards and supervisors as defined in the Act.

The Union obtained 20 signed authorization cards from the following employees: Zarkos, Muniz, Zuleto, Echevarria, Alberto Guzman, Pedro Guzman, Jesus Campos, Bernardo Campos, Angel Marquez, Pedro Santana, Santos Santana, Kwara, Romaro, Gomez, Coronel, Lajara, Benavides, Atrach, Medina, and Rosario. At the time these cards were signed the only unit employees were the 20 above-named employees and 3 others, Emily Williams, Wilson Cuesta, and Jose Monta. The next question to be determined is whether the Union still represented a majority of the employees in the unit on December 31, 1990, when the unfair labor practices commenced. Zarkos' authorization card must be excluded since I found him to be a supervisor within the meaning of the Act. The cards of Pedro Santana and Rosario must also be excluded as they were lawfully terminated prior to that date. Although I found that the discharge of Pedro Guzman did not violate the Act, he was not discharged until January 3; since he was still employed by Respondent through December 31, 1990, his card will be counted toward the Union's majority status. Kwara was fired between October and December 1990 and (since no complaint issued regarding his discharge) therefore his authorization card will not be counted. As I have found that Muniz, Gomez,⁷ Campos, Medina, Benavides, and Alberto Guzman were terminated unlawfully, their cards will be counted toward the Union's majority status. The testimony therefore establishes that at the time the cards were signed there were 23 employees in the bargaining unit. Removing Zarkos (a supervisor within the meaning of the Act), Pedro Santana, Kwara, and Rosario (lawfully terminated prior to the effective date) leaves a unit of 19 employees as of December 31, 1990. The Union had signed authorization cards from 16 of these employees, a clear majority.

The next question is whether Zarkos' participation in the union campaign tainted enough of the cards to dissipate the Union's majority status. Zarkos was clearly the leader in the early stages of the union campaign. However, once Ness met with the employees on November 15, 1990, he appears to have taken a "back seat," possibly because of the Union's concern that he might be a supervisor. He did not take an active part at the meeting where the cards were signed and Muniz and Gomez obtained the remaining cards subsequent to the meeting. Contrary to the contention in Respondent's brief, the Union's card signing campaign was not conducted exclusively, or even principally, by Zarkos. As the (then) Trial Examiner Arthur Leff stated in *Orlando Paper Co.*, 197 NLRB 380, 387 (1972):

The Board has never held that any participation by a supervisor in a union organizing campaign, regardless of how marginal his supervisory status or how slight his participation in the campaign may be, is sufficient per se to invalidate the authorization cards of all employees having knowledge of his interest in the Union. Board precedents reflect that the Board will not invalidate designation cards for supervisory taint unless it is

⁷I find that Muniz and Gomez share a community interest with the other employees and therefore are included in the unit.

affirmatively established as a minimum, either that the participation of the supervisory personnel in the organizational campaign was of such a kind as to have implied to the employees signing the cards that their employer favored the Union, or that there is a reasonable basis for believing that the employees whose cards are sought to be invalidated were coercively induced to designate the Union through fear of supervisory retaliation.

I found that Zarkos was a supervisor within the meaning of the Act, but he was clearly a low-level supervisor; examining his pay and that of the oil drivers reinforces that finding. There is no evidence that any of the employees felt that Zarkos' participation in the campaign meant that Respondent favored the Union. In fact, at the meeting, Ness told the employees not to solicit union cards at Respondent's facility and many of the employees testified that they tried to keep the campaign secret from Robert, Vincent, and Wong. Additionally, there is no credible evidence that Zarkos coercively induced any employee to sign a union authorization card. I therefore find that on December 31, 1990, and thereafter, the Union represented a majority of Respondent's employees in an appropriate unit.

The final question is whether the above findings warrant a *Gissel* bargaining order. There can be no question but that they do. I have found that Respondent unlawfully terminated 6 employees out of a unit of 18 employees; one-third of the unit had been unlawfully fired within 5 weeks of Respondent first learning of the union campaign. In addition, Respondent unlawfully induced three employees to sign affidavits disclaiming interest in the Union and engaged in other unlawful threats, interrogation, and promises of benefits in exchange for withdrawing from the Union. These are clearly "outrageous" and "pervasive" unfair labor practices and warrant a bargaining order under *Gissel*.

IV. THE OBJECTIONS

On the basis of the above findings, I recommend that the following objections be sustained: Objections 1, 2, 3, 4, 6, 7, 8, and 11. I recommend that the remaining objections be overruled.

V. THE EFFECT OF SUCH CONDUCT ON THE ELECTION

As I have recommended that Objections 1, 2, 3, 4, 6, 7, 8, and 11 be sustained, it is recommended that the election conducted on March 6 be set aside. In view of the bargaining order found applicable herein, it is likewise recommended that the representation proceeding in Case 29-RC-7760 be dismissed.

VI. THE CHALLENGES

Based on my findings above I recommend that the challenges to the ballots of the following employees be overruled: Muniz, Gomez, Campos, Medina, Benavides, and Alberto Guzman, and that their ballots be opened and counted. I would likewise recommend that the challenge to the ballots of the following employees be sustained: Zarkos, Pedro Guzman, and Pedro Santana.

CONCLUSIONS OF LAW

1. APRA, Prudential, and Amer-National are each employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. For the purpose of this proceeding, APRA, Prudential, and Amer-National constitute a single integrated business enterprise and a single employer within the meaning of the Act.

3. The Union is a labor organization within the meaning of Section 2(5) of the Act.

4. Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct:

(a) Interrogating its employees regarding the Union's organization campaign.

(b) Interrogating its employees about their union sympathies and the union activities of their fellow employees.

(c) Threatening to fire its employees for failing to disclose their union activities.

(d) Offering to give raises and additional vacation pay to its employees if they would withdraw their support for the Union.

(e) Directing and assisting its employees to sign an affidavit to withdraw their support from the Union.

(f) Threatening to cease operating the Company if the Union was certified as the employees' representative.

(g) Offering to reinstate an employee to his former job if he voted against the Union in the Board election.

(h) Interrogating its employees about the leaders of the union campaign among the employees.

(i) Creating an impression among its employees, that their union activities were under surveillance by Respondent.

5. Respondent violated Section 8(a)(1) and (3) of the Act by terminating the employment of Muniz, Gomez, Jesus Campos, Medina, Benavides, and Alberto Guzman because of their membership in, and activities on behalf of, the Union.

6. The following unit is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act: All full-time and regular part-time drivers, servicemen, dispatchers, and mechanics employed by Respondents at their Brooklyn, New York location, excluding all clerical employees, managers, guards and supervisors as defined in the Act.

7. Since November 15 and December 30, 1990, and at all times thereafter, the Union has represented a majority of the employees in the above-described unit and has been the exclusive representative of these employees for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

8. The aforesaid are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

9. The Respondent's unlawful conduct interfered with the representation election conducted on March 6, 1991.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Respondent unlawfully terminated Luz Muniz, Damaris Gomez, Jesus Campos, Ismael Medina, Victor Benavides, and Alberto Guzman, I shall recommend that Respondent be ordered to offer each of them immediate

reinstatement to their former positions of employment or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and to expunge from its files any references to the terminations. It is also recommended that Respondent be ordered to make Muniz, Gomez, Campos, Medina, Benavides, and Alberto Guzman whole for any of earnings they suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

For the reasons set forth above, I shall recommend that Respondent be ordered to recognize and, on request, to bargain collectively with the Union as the exclusive collective-bargaining representative of the employees in the above-described unit. As a bargaining order has been found to be appropriate, it would be consistent that the election in Case 29-RC-7760 be set aside and that the petition in that matter be dismissed.

Further, I find that the egregious and widespread misconduct of Respondent herein warrants a broad remedial order. *Hickmott Foods*, 242 NLRB 1357 (1979).

[Recommended Order omitted from publication.]