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Action Carting Environmental Services, Inc. and Local 813, International Brotherhood of Teamsters Local 621, United Workers of America and Shafi Gadson

Action Carting Environmental Services, Inc. and Local 813, International Brotherhood of Teamsters, Petitioner and Local 621, United Workers of America, Intervenor. Cases 22-CA-28197, 22-CA-28211, 22-CA-28337, 22-CB-10530, and 22-RC-12875

September 30, 2009

DECISION, ORDER, AND DIRECTION OF
SECOND ELECTION

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On May 8, 2009, Administrative Law Judge Steven Davis issued the attached decision. The General Counsel filed an exception and supporting brief. Local 621, United Workers of America (Local 621), filed exceptions with supporting argument. The General Counsel filed an answering brief to Local 621's exceptions. The Respondent filed an answering brief to the General Counsel's exception.

The National Labor Relations Board¹ has considered the decision and the record in light of the exceptions and briefs² and has decided to affirm the judge's rulings,

¹ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed ___ U.S.L.W. ___ (U.S. September 11, 2009) (No. 09-328); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), petition for cert. filed 77 U.S.L.W. 3670 (U.S. May 22, 2009) (No. 08-1457); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. August 18, 2009) (No. 09-213). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petitions for rehearing denied Nos. 08-1162, 08-1214 (July 1, 2009).

² We question whether Local 621 has standing to challenge the merits of the judge's unfair labor practice findings in the "CA" portion of this consolidated proceeding that form the basis for his recommendation to sustain Petitioner Local 813, International Brotherhood of Teamsters' Objection 6. However, as no party has moved to strike Local 621's exceptions on this basis, we have considered, and rejected, them on their merits.

findings,³ and conclusions,⁴ to adopt his recommended Order as modified,⁵ and to direct a second election.⁶

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Action Carting Environmental Services, Inc., Newark, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

³ The General Counsel, implicitly, and Local 621, explicitly, have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The General Counsel excepts only to the judge's finding that the Respondent did not constructively discharge Frank Madden in violation of Sec. 8(a)(3). Local 621 excepts to the judge's recommendation to sustain Petitioner Local 813's Objections 2 and 6 and to set aside the election based on the conduct found objectionable, and to the judge's unfair labor practice findings upon which Objection 6 was based, i.e., that the Respondent unlawfully discharged Shafi Gadson and unlawfully transferred Frank Madden. There are no exceptions to the judge's disposition of all other unfair labor practice and objections allegations.

⁴ In adopting the judge's conclusion that the Respondent did not constructively discharge Frank Madden, we disavow his analysis to the extent that he found that the General Counsel established the first element of a constructive discharge under *Crystal Princeton Refining Co.*, 222 NLRB 1068 (1976). The first element requires the General Counsel to show that the "burdens imposed on the employee must cause, and be intended to cause, a change in working conditions so difficult or unpleasant as to force the employee to resign." *Id.* at 1069. The judge found, and we agree, that Madden quit because of his confrontation with fellow driver Mac Johnson and Supervisor Daniel Alfano, not because of the change in his working conditions resulting from his discriminatory job transfer. Thus, the General Counsel failed to prove the first element of the *Crystal Princeton* test. Member Schaumber, moreover, would not find that the discriminatory transfer imposed working conditions "so difficult or unpleasant as to force [Madden] to resign." Having found causation not established, Chairman Liebman finds it unnecessary to pass on the severity of the burden imposed on Madden.

⁵ We will amend the judge's remedy, modify his recommended Order, and substitute a new notice adding a requirement that the Respondent make whole Frank Madden, with interest, for any additional commuting expenses he incurred as a result of the unlawful transfers to Brooklyn and the Bronx from the time he was transferred until he quit his employment. See *CWI of Maryland, Inc.*, 321 NLRB 698 (1996) (remedy included "any increased commuting expenses incurred by [employee] as a result of the discriminatory change of his reporting site"), enfd. in relevant part 127 F.3d 319 (4th Cir. 1997); *Illinois Institute of Technology*, 201 NLRB 941 (1973) (requiring reimbursement for additional travel costs resulting from discriminatory transfers).

⁶ Absent adequate explanation for the timing of adjustments to Action Carting's safety bonus program that resulted in large bonus payments to employees immediately prior to the election, we adopt the judge's recommendation to sustain Objection 2, and we set aside the election on this basis. We therefore need not pass on whether Objection 6 would constitute a basis for setting aside the election.

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

“(b) Make David Zengewald, Shafi Gadson, Kevin Meadows, and Frank Madden whole for any loss of earnings, other benefits, and increased commuting expenses suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge’s decision as amended.”

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

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board’s Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during the period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the election directed herein and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the date of the election directed herein, and employees engaged in an economic strike that began more than 12 months before the date of the election directed herein and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by Local 813, International Brotherhood of Teamsters, or by Local 621, United Workers of America, or by neither union.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by

the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Dated, Washington, D.C. September 30, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate you about your union sympathies.

WE WILL NOT promise you benefits if you support Local 621, United Workers of America, and if you refuse to support Local 813, International Brotherhood of Teamsters.

WE WILL NOT create an impression among you that your union activities are under surveillance.

WE WILL NOT threaten you with reprisals if you support Local 813 and if you fail to support Local 621.

WE WILL NOT discharge or otherwise discriminate against you because you support Local 813.

WE WILL NOT transfer, change your starting time, or change your route assignment because you support Local 813.

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

WE WILL, within 14 days from the date of the Board's Order, offer David Zengewald, Shafi Gadson, and Kevin Meadows full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make David Zengewald, Shafi Gadson, Kevin Meadows, and Frank Madden whole for any loss of earnings, other benefits, and increased commuting expenses suffered as a result of the discrimination against them.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges, and WE WILL, within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

ACTION CARTING ENVIRONMENTAL SERVICES,
INC.

Tara Levy, Newark, NJ, for the General Counsel.
Patrick Stanton and Christopher R. Coxson, Esqs., (Ogletree, Deakins, Nash, Smoak & Stewart, P.C.), Morristown, NJ, for the Respondent Employer.
Bryan C. McCarthy, Esq. (O'Connor & Mangan, P.C.), for Respondent Union Local 621.
David M. Glanstein, Esq. (O'Donnell, Schwartz, Glanstein & Lilly, LLP), New York, NY, for Local 813.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge: Based upon a charge and an amended charge filed in Case No. 22-CA-28197 on January 11, 2008, and February 21, 2008, respectively, by Local 813, International Brotherhood of Teamsters (Local 813), and based upon a charge and an amended charge filed in Case No. 22-CA-28211 on January 18, 2008 and March 3, 2008 by Local 813, and based upon a charge filed in Case No. 22-CA-28337 on April 24, 2008 by Local 813, and based upon a charge filed in Case No. 22-CB-10530 on February 5, 2008 by Shafi Gadson, An Individual, a complaint was issued by Region 22 of the Board on June 30, 2008 against Action Carting Environmental Services, Inc. (Employer) and against Local 621, United Workers of America (Local 621).

The complaint alleges essentially that the Employer interrogated employees about their union sympathies; promised employees benefits if they supported Local 621 and if they refused to support Local 813; created an impression among its employees that their union activities were under surveillance; and threatened employees with reprisals if they supported Local 813 and if they failed to support Local 621. The complaint also alleges that the Employer unlawfully discharged David Zengewald, Shafi Gadson, Kevin Meadows and Dominic Madden, and caused the termination of Frank Madden by transferring him and changing the start time and route assigned to him,

because of their activities in behalf of Local 813. Finally, the complaint alleges that Local 621 unlawfully failed to process a grievance over the discharge of Gadson.

On July 3, 2008, the Acting Regional Director issued a Report on Objections, and Order Consolidating Cases and Notice of Hearing in Case No. 22-RC-12875.¹ The Order consolidated for hearing the above complaint and the objections case. The objections that are before me allege that the Employer (a) changed the timing of periodic safety bonuses paid to employees (b) distributed a forged letter purporting to be from Local 813 which addressed the relative seniority rights of employees (c) discharged Gadson and Dominic Madden and transferred Frank Madden in retaliation for their support for Local 813 and failure to support Local 621 and (d) had its supervisors position themselves outside the entrance to the voting area where voters had to pass in order to enter the voting area, and that representatives and employee-supporters of Local 621 positioned themselves in the same area, and that Local 621 supporters repeatedly chanted "vote for 621" and mentioned the name of the observer for Local 813, Shafi Gadson."²

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Employer, a corporation having an office and place of business in Newark, New Jersey, has been engaged in the collection of waste and recyclable materials. During the twelve-month period ending January 4, 2008, the Employer purchased and received at its Newark facility goods and materials valued in excess of \$50,000 directly from suppliers located outside New Jersey. The Employer admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that Locals 621 and 813 are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

In October, 2007, the Employer had about 40 trucks which were located in and dispatched from its facility in Newark, New

¹ Pursuant to a petition filed on December 14, 2007 by Local 813 and a Stipulated Election Agreement, an election was conducted on January 23, 2008 in a unit consisting of "all full-time and regular part-time roll-off drivers, packing drivers, helpers, mechanics, welders, painters and related employees employed by the Employer at its Newark, New Jersey facility... but excluding all office clerical employees, sales employees, guards and supervisors as defined in the Act." The election resulted in a vote of 36 votes for Local 813, 74 votes for Local 621, 1 vote for neither union, and 7 challenged ballots which did not affect the outcome of the election. Local 813 filed objections to the election.

² The Report on Objections erroneously states that this Objection alleges that agents of the Employer conversed with employees and permitted agents of Local 621 to converse with employees who were preparing to vote, urging them to vote against Local 813 and in favor of Local 621, and threatening them if they did not support Local 621.

Jersey. Separate vehicles were used to pick up garbage, cardboard, and food waste called “vegetation” from restaurants. The Employer also had “roll-off” trucks which were used to deliver containers to customers’ locations. The garbage trucks consisted of packers in which garbage was placed in the rear of the truck and front-loading trucks which picked up bins containing waste.

The hierarchy of the Employer’s operation consists of president and co-owner John Glauda, chief operating officer and co-owner Mike DiBella, director of operations Brian Malinari, operations manager Frank Rizzo, night supervisor Robert Staada, and supervisor Daniel Alfano.³

On October 5, 2007, the Employer acquired the assets including the trucks and customer routes of Waste Management Corp., a waste and recycling collection company having a facility in Varick Avenue, Brooklyn. Virtually all of the drivers and helpers of Waste Management were members of Local 813, and all were offered jobs and were hired by the Employer.⁴ The wages of the drivers and helpers employed by the Employer were less than those paid by Waste Management.

The Employer was given 60 to 90 days, until early or mid January, 2008 to remove the trucks from the Waste Management Brooklyn facility. In late November or early December, the Employer obtained a facility in the Bronx, New York. The Employer continued to operate from its Newark facility. Operations manager Rizzo stated that whatever routes could appropriately be dispatched from the Bronx (“whatever made geographic sense”) would be run from the Bronx. By early to mid January, 2008, the Employer left the former Waste Management Brooklyn facility. Some trucks were moved from Brooklyn to Newark. Some trucks were moved from Brooklyn to the Bronx.

The acquisition resulted in a doubling of the size of the Employer, in employees, vehicles, and customer routes. In order to attain greater efficiency, the Waste Management routes were consolidated with the goal of reducing the number of drivers and helpers. Immediately after the purchase, there were 180 drivers and helpers. At the time of the hearing, only 140 were employed. By late 2007 and early 2008, nearly all the routes had been consolidated.

Immediately after the purchase of Waste Management, the Employer’s trucks were still being dispatched from its Newark yard, and the former Waste Management’s trucks from Brooklyn. At first, the Employer planned to transfer the trucks that were dispatched from Newark to Brooklyn, and then it was decided to dispatch the trucks from Newark because picking up stops in Manhattan would be closer to Newark than from Brooklyn. Regarding stops in other boroughs which were formerly done by Waste Management, trucks would be dispatched from Brooklyn. There were fewer former Waste Management routes in Manhattan than in the other boroughs, while at the same time the Employer had mostly Manhattan stops.

³ All references to “Alfano” will be to supervisor Daniel Alfano unless otherwise stated. Daniel Alfano’s brother Nick, is a driver.

⁴ Other unions which represented the Waste Management’s employees include Local 116 for the recycling employees, and Local 282, Teamsters for one roll-off employee.

The Employer employs drivers and helpers. Drivers drive the truck while the helpers ride in the truck and get out at the stop and empty the garbage into the truck. Occasionally a driver will leave the truck to assist the helper. Typically, the drivers work from 8:00 p.m. until their route is finished, usually at 5:30 or 6:00 a.m. However, the drivers and helpers are scheduled to work a 10 hour day and are paid for 10 hours regardless of when they finish their route. Thus, if they finish work early they can leave and are still paid for 10 hours work.

Not all of the helpers work a regular full-time schedule. The people who are not assigned to a regular full-time route are “shape” employees - they are not regularly assigned every day to work as helpers. Rizzo stated that shape employees come in and “hang out” until they are asked to go on a truck. If they are not asked, they leave the yard. Shape employees should be at the yard by 7:30 or 8:00 p.m. If a shape worker is not sent out that night he is not paid because he is a day-to-day worker. On some trucks if a helper is not present a shape employee is used. It has been the practice of the Employer that if a shape employee consistently comes to the yard day after day, he will, if needed, be assigned to a truck on a more frequent basis and, if he does a good job, may become a regular helper who is assigned to a regular route on a regular, daily basis and receive a uniform and benefits. A shape worker may work one to three days per week, and when he works is paid for a ten hour day.

Manager Rizzo further categorized shape workers into two types: “a regular shapeup” is a person who is at the yard at least four or five days per week and waits for assignments. He is “consistent,” is always available and would be assigned to a truck if needed. He was given preference in assignment compared to other shape workers who did not appear at the yard regularly.

B. Local 813 Organizes the Employees

Rizzo stated that in November, 2007, before the petition was filed by Local 813 in December, he was introduced to Juan Cruz by Employer official Malinari as a labor consultant who would educate the employees as to unions. Malinari told Rizzo at the time that the Employer supported “our” union, Local 621.

Rizzo stated that he learned from some drivers in about December, 2007 that Local 813 was trying to organize employees by obtaining signed authorization cards. Rizzo informed Malinari who told him that Local 813 filed a petition for an election. The petition was filed on December 14, 2007. Rizzo stated that he saw Cruz in December when he (Cruz) addressed 15 to 20 drivers in a 15 to 20 minute group meeting over a couple of days at the Employer’s Newark yard. Rizzo also introduced many employees to Cruz individually on a couple of occasions in December. Rizzo did not hear what Cruz told the workers, but he did not understand that Cruz would attempt to persuade employees to support Local 621, believing that he was simply there to educate employees concerning unions, being “completely neutral on that subject.”

Employer supervisor Staada stated that as part of his duties, he occasionally follows the drivers as they make their pickups, and stops the trucks to speak to the crew about new stops on their routes or a complaint the Employer might have received concerning the pickup. He testified that about two months

before the election, labor consultant Cruz accompanied him on two separate occasions while he was checking on the routes. Staada drove Cruz while checking on the drivers' work and stopped the trucks so that Cruz could speak to the drivers and helpers. Their conversations with the workers lasted five to ten minutes. Staada introduced Cruz as someone who could answer their questions about the union matter. Some questions the workers asked were whether they would be laid off if they had little seniority, whether safety bonuses and wages would increase, and the truth of the rumor that Local 813-represented employees earn \$28.00 per hour. Cruz or Staada replied that if Local 813 won the election it would have the right to negotiate with the Employer and any rates would have to be negotiated. Another employee asked whether if Local 813 was elected they would be working without a contract. Cruz replied that they had a contract with Local 621 now so if that union won, the contract currently in place would remain the same. However, if Local 813 won, the "negotiations have to start all over again..."

Staada testified that he did not believe that Cruz was present in order to help persuade employees to vote for Local 621. Rather, his purpose was to answer employee questions about the election. Cruz had literature including public records concerning the amount of dues collected by Local 813 and money spent by it, and statements made by Local 813 that were not true.

Rizzo stated that the Employer decided to support Local 621 and was opposed to Local 813's effort to represent the employees, and told the workers that if they wanted "things" to remain the same they should vote for Local 621.

Supervisor Alfano testified that during the election campaign he told the workers that Waste Management did not employ shape employees and that the workers would have to get a Commercial Driver's License if they wanted to remain employed at the Employer. He further stated that he told them that there would be no more shape program if Local 813 was elected or "that's the way Waste Management worked."

Employee Gadson testified that in December, 2007 he attended a meeting at which Rizzo and Alfano and about 30 employees were present. Local 621 president Stephen Sombrotto spoke, telling the workers that if they voted for Local 621 they would be guaranteed 60 hours work per week, but that if they voted for Local 813, the helpers would be at the bottom of the seniority list and they would lose their "spot" on the list.

On January 16, 2008, seven days before the election, Employer official Glauda wrote a letter to the employees in which he urged them to vote for Local 621 as the union recognized by the Employer, and also stated that Local 813 tried to "push companies" into its pension plan even though the plan had a \$70 million deficit, and that Local 813 had participated in a nearly four month strike at Waste Management causing a loss of money to the workers.

C. David Zengewald

Zengewald, a driver who was employed in the garbage industry for 41 years and a member of Local 813, was employed by Waste Management prior to being hired by the Employer on October 5, 2007. Rizzo stated that he knew that Zengewald worked in the industry for more than 20 years.

Zengewald's first route at the Employer was his old Waste Management route in Brooklyn. Then, when that facility was closed, he was dispatched from Newark and, as the routes between the two companies were consolidated, some stops were removed from his route, and he was given additional stops.

Zengewald testified that in late October and early November, he distributed about 20 authorization cards in behalf of Local 813, received back about 12 to 15 signed cards and spoke to employees about that Union. He also attended meetings with Local 813 agent Cliff Lewis in the Fall of 2007 at which his helper was present, and met with Local 813 agents about five or six times in November, 2007 during working time.

Zengewald worked Sunday night through Friday night. On Monday night, December 17, he began his shift, noting that someone must have used his truck because it was dirty and not in the same condition he left it the day before. That was the first time another driver used his truck.

He completed his route, finishing on Tuesday morning, December 18, when Rizzo asked him to meet with Cruz. In the meeting were Rizzo, Alfano and Cruz. Zengewald stated that he felt uncomfortable during the meeting because supervisors Rizzo and Alfano were present. Cruz spoke to him about the good points of Local 621 and the negative features of Local 813. Cruz further told Zengewald that employees should vote for Local 621, the union recognized by the Employer. Zengewald stated that he replied that he was in Local 813 for many years and nearing his 55th birthday when he would be eligible for retirement. He added that he had the least to gain by being in any union, and that he was not interested in what Cruz had to say about Local 621, noting that he was not interested in either union at that time. Specifically, Zengewald, in a slightly raised voice, stated that he told the men "I don't give a flying fuck about the company or the unions or what goes on here between the unions. I'm not interested in joining the unions. As soon as the electrician's union calls me, I'm getting out of here and going with them."

At hearing, Zengewald explained that an electrical contractor friend offered him a job conditioned on his rehiring certain electricians he had laid off. The contractor told him that if he recalls those workers and if openings occur, he "could use" Zengewald.

That evening, Tuesday, Zengewald appeared for his regular shift. He saw Cruz speaking with other employees including Sal Dalgoni. Zengewald heard Cruz tell the employees that the Local 813 pension fund was going bankrupt and that they would be throwing their money away by joining that union. Zengewald and Dalgoni answered Cruz by saying that they received a form from the government each year which stated that the pension and other Local 813 funds were sound. Zengewald told Cruz "If you don't know what you're talking about, don't spread rumors."

The next morning, Wednesday, Zengewald finished his route and Rizzo told him he was fired. Zengewald asked why. Zengewald quoted him as follows: "Well, what you said yesterday about you don't give a fuck about what goes on here and you're going to go someplace else, to the electrician's union, I can no longer have you here. I can't invest any more time in you and I can't trust you out there with our equipment."

Zengewald protested that no time had to be invested in him since when he was hired he was already trained and knew the route, the area and the equipment. Zengewald added that he did not mean to indicate that he did not care about the company, just that he did not care about the unions and did not want to be part of that discussion. He added that the electrician's job was speculative – first, employees had to be rehired, and then if an opportunity arose, the owner would call him.⁵

Zengewald asked to meet with official Malinari and a meeting was arranged with the three men. Malinari told him that he was fired because of his “don’t give a fuck attitude, that they could no longer trust me on the street with a \$230,000 piece of equipment, that I might run it into a building or damage it in some way.” Zengewald replied that he is not that way and would not put “a 41 year career on the line just to spite someone.” He noted that sometimes his mouth “gets me in trouble,” noting that his remarks the previous day applied to the union situation and not his attitude toward the performance of his job or servicing the customers. Zengewald reminded the men that he had spoken with them about a vacation in the summer of 2008, and noted that if he was thinking of leaving he would not have been concerned about a vacation.

Zengewald had not received any criticism or discipline during his 2½ month work tenure with the Employer.

Manager Rizzo described the incident. He stated that he saw Zengewald immediately after he completed his route. Rizzo noted that Zengewald appeared “all pissy,” upset that someone had driven his truck and left it “messy.” Rizzo introduced him to Juan Cruz, identifying Cruz as a labor consultant who would “educate you about what goes on with union matters.” According to Rizzo, Zengewald immediately threw up his hands saying “I don’t give a fuck about unions or anything. As soon as the electrical union calls me, I’m going.” Zengewald then left.

That day, Rizzo spoke to his superior, Malinari, about the incident, telling him that Zengewald was “irate,” and recommended to Malinari that he did not think that Zengewald should be driving a truck, further noting that if he was leaving the company they should not “invest the time in keeping him.” They decided to terminate Zengewald.

That evening, Zengewald drove his regular route without incident. Rizzo was not present when Zengewald went on his route at 8:00 p.m. because Rizzo’s day ends in the late afternoon. Although Rizzo has the power to terminate employees he did not do so at the time of his meeting with Zengewald but wanted to speak to his superior, Malinari, about the incident. Rizzo did not tell anyone to caution Zengewald about driving when he was angry. Rizzo further testified that Zengewald is not an angry person, and also that it is not unusual for the employees to be angry. In this respect, supervisor Alfano testified that “everybody is upset. Nobody wants to be there picking up garbage it’s the middle of the night, it’s raining, it’s cold, it’s hot, I don’t know what kind of personal problems people got at

home.” It should be noted that employee Frank Madden was suspended for one day for having a fist fight with another worker. In another instance, employee Mac Johnson testified that he argued with his helper and the Employer transferred him to another route.

Rizzo stated that he may have considered ordering Zengewald not to drive that night but wanted to speak to him in person, conceding that he could have spoken to him by radio when he began his route that evening or could have left him a termination notice before he began his route.

The following morning Rizzo told Zengewald that he was fired, telling him that he was no longer needed because he would not let him drive a \$230,000 truck “in that state.” Zengewald asked to speak to Malinari and when they met said that he was just upset and that his “mouth gets me in trouble. I have a temper and that’s why I said what I said.” Malinari said that he was no longer needed. No termination letter was given.

Rizzo conceded that Zengewald was a good employee, and that the route he drove for the Employer was his former Waste Management route, which he knew and for which he needed no training. Rizzo further admitted that the Employer “valued” the former Waste Management drivers because they knew their routes and the customers.

Rizzo stated that his decision to terminate Zengewald was not based on any union considerations, especially since Zengewald stated that he did not care about either union since he was leaving the Employer’s employ. Rizzo was aware that Zengewald was a member of Local 813 for many years.

D. Shafi Gadson

Gadson stated that he began work in late February, 2006 as a shape employee. He came to the yard every night and waited to be sent out. In the first three weeks he received assignments two to three days a week, and then four and then five days. At that point in time, Rizzo stated that Gadson was a “regular shape” someone who he defined as a consistent worker, someone who was “always there” who was given preference on assignment to a truck over other, casual shape workers.

The Employer then sent him on a truck with Johnson to be “tried out” as a helper. According to Gadson, Staada told him that Johnson gave him a good report. On March 26, 2006, Rizzo told him that he had become a “permanent” helper. He received uniforms, health insurance benefits, safety bonuses and holiday pay, extras which are not given to shape employees. He was assigned to driver Peter Chang who he worked with every day for about seven months. Thereafter, he was assigned to driver Ronald Conover for two to three months and then with driver Darius Brian or Jimmy Tindle for about three months in March or April, 2007. He received two warnings, one on September 13, 2006 and one on February 14, 2007 for “no call-no show.”

Thereafter he worked regularly, either five or six days each week until July, 2007 when a change occurred in his assignments. Although he was a full-time employee he was not being sent out each day. Some weeks he worked a full week, others only a couple of days. He asked Alfano and dispatcher Michael O’Donnell why he was not being sent out but they did not

⁵ The evidence concerning dispatcher Michael O’Donnell’s request that Zengewald prepare a list of the order of his stops will not be discussed since it was not a factor in his discharge. The General Counsel’s argument that he was disparately asked to make such a list is not supported by the evidence.

know. O'Donnell testified that there was no problem with Gadson's attendance before July, 2007.

The Employer's supervisors, Rizzo, Alfano and dispatcher O'Donnell testified that after Gadson was assigned to a route as a regular helper, he "disappeared for a while" and was very inconsistent in appearing for work. They stated that he became "unreliable" in about August, 2007. For example, when he was assigned to a truck and the truck was ready to depart he disappeared, "just walked off and left." The next day he would return, explaining that he had a family emergency, among other excuses. O'Donnell suspected that Gadson simply did not like the route he was assigned and left for that reason. O'Donnell further testified that he could not keep him on a permanent route because he would not come to work for "weeks at a time" because of family problems and other reasons. For this reason, O'Donnell testified that he recommended "many times" including in October, 2007 that Gadson be moved from regular helper to shape.

Although Gadson's misconduct was apparent from August, 2007 no action was taken against him until December. The reason offered was that he and others asked that he be given another chance since he was having some problems and would "straighten out." However, in December, Rizzo was of the opinion that Gadson's poor performance was "tolerated much too long" and decided to demote Gadson to the position of shape employee. Dispatcher O'Donnell stated that he told Gadson that he was being moved from regular helper to shape because he did not come to work. Rizzo explained that he did not discharge Gadson, but rather demoted him to shape employee because he still appeared at the yard "once in a while." When Gadson reappeared, the dispatcher asked Rizzo if he should put him to work and Rizzo said "let him work a couple of days here and there" and "bring him back as a shape." Rizzo noticed that Gadson still wore his uniform but did not ask that it be returned.

Gadson identified himself as a "swing man" as of July, 2007, which is a worker who does not have a regular route but works from "truck to truck" but is nevertheless a "permanent" worker. He conceded that no supervisor told him that he was a swing man, and the Employer's supervisors testified that it does not use that term. Gadson first testified that a swing employee works every day, but conceded that during this period of time he was not sent out each day. Gadson injured his wrist in mid October, 2007 and was out of work for one month. When he returned his schedule decreased.

Gadson stated that in the first week of January, 2008, he and supervisor Alfano traveled to the Bronx yard to move some furniture. During their trip back to Newark, Alfano asked Gadson which union he was supporting and whether he would support Local 621. Gadson replied "no, stop pressuring me." Gadson stated that Alfano said that he was going to keep it "real with me, if I don't vote 621 I'll be fired - I could kiss my job good-bye." Gadson answered that Alfano could not say that because he was "supervision" and Alfano said that "if I go 813

or vote for non union that I'll be fired."⁶ Gadson told employees Kevin Meadows and Jimmy Tindle about Alfano's remarks.

Alfano admitted taking Gadson to the Bronx in early January, but denied asking Gadson which union he was supporting, and Gadson did not volunteer any such information. Alfano also denied telling him that if he did not vote for Local 621 or voted for Local 813 or no union he would be fired. However, Alfano conceded telling him that "things would definitely be different" if Local 813 was selected. For example, he would no longer extend personal courtesies or give "leeway" to employees such as picking Gadson up because he had to go home or grant a request by an employee to leave work after he had been on a route for two hours. At hearing, Alfano explained that he was simply telling Gadson how things worked at Waste Management which was a more strict operation.

Gadson stated that he was not at work on January 6, 7, and 8, 2008, and returned to the yard on January 9. That day, Gadson saw Local 621 president Sombrotto and asked if he was the Local 621 representative. Sombrotto said he was. Gadson asked him to explain the union's benefits. Sombrotto said that as a member of the union he would be guaranteed 60 hours work per week. Gadson asked about job security. Sombrotto replied that Gadson was "working here, that's job security enough." Gadson asked him who appointed him to represent the shop, and Sombrotto replied that he had been employed by the Employer for three years. Gadson persisted, asking who elected him. Sombrotto did not reply and walked away.

Gadson stated that one or two days later, Alfano asked him if he signed the Local 621 contract. Gadson said that he had not, and told Alfano to "stop pressuring me." Alfano then said that he heard that Gadson was "gathering everybody telling them to go for 813." Gadson denied it, saying everyone has a mind of his own. He entered the office where he saw Local 621 steward Freddie Gonzalez who asked him if he signed the Local 621 contract. Gadson replied that he had not. Alfano entered the room and Gonzalez said that he had a contract. Gadson stated that he signed it at that time because he felt pressured.

Supervisor Alfano testified that he spoke briefly with Gadson regarding his attendance, mentioning that he was "in and out" and was unreliable. For example, he would work three days in a row and would not appear at the premises for one week. Alfano testified that he told Gadson that this would not be tolerated - he could not simply "fly in and out." Dispatcher O'Donnell recommended that Gadson be terminated. Gadson stated that on January 14, dispatcher O'Donnell gave him a termination letter and told him that Rizzo said that he was fired for stealing from the Employer because the "record" showed that he was punching in and being paid for time he was not working.

In contrast, O'Donnell stated that he told Gadson that he was fired because after being assigned to a truck he would "disappear" because he did not like the route, thereby leaving the driver without a helper until one could be located. However, O'Donnell could not recall any specific route he assigned to Gadson that he did not appear to work at, or the name of any

⁶ Gadson's father was a long-time union member and taught him about the "rules" concerning remarks by supervisors.

driver who had to wait for him. Similarly, Rizzo stated that he decided to terminate Gadson because he did not “show up” for work and was “inconsistent” but could not recall any specific dates that he did not appear. Rizzo stated that in late December, 2007 or early January, 2008 he decided to terminate Gadson on the recommendation of the dispatchers who complained that Gadson told the dispatcher that he was ready to work, and when he was assigned to a truck he would “disappear” for one or more hours or not come back at all. Rizzo cited a case when a driver waited 3½ hours for him to return but he did not and no one else was available to take the assignment. After that incident Rizzo decided to fire him. Rizzo admitted, however, that between October and December, 2007 Gadson had committed the same misconduct but was not disciplined for any of those instances. Further, Rizzo could not recall the names of the drivers Gadson had “stood up.” Gadson denied being asked to go on a route and refusing or being assigned to a route and then just disappearing.

The termination letter, dated January 7 and signed by Rizzo stated that his “position as helper was terminated. Your position has been eliminated due to lack of work.” Rizzo and dispatcher O’Donnell admitted that there was no lack of work at that time since the Employer had just purchased the routes of Waste Management. However, Rizzo said that that reason was given to permit employees to collect unemployment insurance.

After receiving the letter and leaving the office, Gadson saw Sombrotto and asked if he represented Local 621. Sombrotto said he did. Gadson asked whether if he had been fired he would “fight” for him. Sombrotto said he would. Gadson answered “start fighting because I just got fired.” Sombrotto seemed surprised and Gadson showed him the letter. Sombrotto said that he would see what he could do. The following week Sombrotto told Gadson that he spoke to Rizzo who said he was busy and refused a meeting until after the election. Shortly after the election Gadson called Sombrotto who said that Rizzo was still busy. That was the last time Gadson spoke to Sombrotto.

Rizzo stated that after Gadson was discharged he discovered, or O’Donnell told him, that according to the Employer’s crew sheets which showed when an employee worked, Gadson was paid for days that he was not listed on the crew sheet. Rizzo concluded that Gadson had scanned in and left his name but did not work that night, and then returned the following morning and scanned out. The decision to discharge Gadson was not based on his alleged stealing time because that alleged information was discovered after Gadson’s discharge.

Two or three days after he was fired, Gadson went to the Employer’s office and met Rizzo who told him “there’s no work” for him and that he should collect unemployment insurance. Rizzo told him that he was “stealing from the job; punching in and not working.” Gadson retorted that “everybody punches in, that’s how we get paid.” Rizzo denied telling him that there was no work, but told him that he was stealing time and was “inconsistent,” appearing at the yard whenever he “felt like it.”

Rizzo stated that if a shape employee does not appear at the yard for 30 days in a row, he does not taken any action against the worker because he is not a permanent employee and has no

right to a job, but goes to the bottom of the list in terms of being assigned to a truck.

Rizzo testified using the Employer’s records that Gadson was paid for the following number of workdays in the following weeks: August 21 – 3 days; August 28 – six days; September 5 – four days; September 11 – two days; September 18 – one day; October 2 – four days; October 16 – none; October 30 – one day; November 20 – one day; November 28 – four days; December 4 – three days; December 11 – two days; December 18 – one day; January 2 – four days; January 8 – five days; January 10 – four days; January 15 – two days.

The Respondent attempted to show from these records that Gadson’s work was “inconsistent” – that he was worked sporadically. However, as Rizzo testified, Gadson, as a shape employee by definition, works intermittently depending upon when he is assigned to a truck. He comes to the yard when he wishes and waits there for an assignment. He could have appeared to shape every day yet not be assigned to a truck and therefore would not have earnings that day. Indeed, according to Rizzo, when a shape employee such as Kevin Meadows stopped appearing at the yard no further action was taken against him.

Rizzo admitted that this record only shows on what days Gadson worked and was paid for. As a shape worker he may have appeared at the yard every day but was sent out, and hence paid, for only those days listed above. Thus the record shows only how many days he was assigned to a truck, not how many days he reported to work.

Rizzo denied knowing which union, if any, Gadson supported. Rizzo first testified that he saw Gadson wearing a Local 621 hat, but then stated that he did not know and did not believe that he saw Gadson wearing such a hat.

Sombrotto did not recall any conversation with Gadson regarding his employment. He stated that at times he saw Gadson congregate outside the dispatch office with other shape employees, adding that he never saw him go out on a truck. Sombrotto stated that sometime in January, Gadson told him, letter in hand, that he had been fired. Sombrotto was confused because he was a shape employee but he was listed as an eligible voter, but told him that he would try to talk to Rizzo in a few days about his discharge. Sombrotto then called Rizzo and left a message telling him that he wanted to speak to him regarding a “couple of things.”

Sombrotto stated that Rizzo called him about one week before the election and told him that he was busy with the election and that they would meet after the election was held. Rizzo did not call him back to speak about Gadson and Sombrotto did not call Rizzo. Sombrotto stated that he called Gadson and left a message that he heard from Rizzo, and further stated that he saw Gadson at the yard and told him he hoped to meet with Rizzo after the election. Rizzo testified that no one from Local 621 contacted him about Gadson’s termination.

Sombrotto reviewed the dues invoice received from the Employer which showed that the Employer classified Gadson as a shape employee, and also stated that dispatcher Michael O’Donnell told Sombrotto that he was a shape employee. Thereafter, Gadson called Sombrotto immediately after the election asking about the meeting with Rizzo. Sombrotto testi-

fied that at that time he believed that Gadson was a shape employee who was not covered by the Local 621 contract and that there was nothing he could do for him, but that if he heard from Rizzo he would still try to help him if he could. He called Gadson and left him a message to that effect, and did not contact Gadson thereafter. Nor did Gadson return his call. He stated that Gadson did not ask him to file a grievance in his behalf and none was filed.

Sombrotto testified that he knew that at some point Gadson was a regular helper and then a full member of Local 621. However, at the time of his discharge he believed that Gadson was a shape employee because he had not seen him go out on any trucks, he was listed on the dues remittance report as a shape, he congregated with the shape employees and then would leave without Sombrotto seeing him being sent to work on a truck, although Sombrotto conceded not being at the facility every evening. It should be noted that Sombrotto accepted shape employees as Local 621 members when he received their applications.

The collective-bargaining agreement does not contain or define the term "shape" employee. However, it contains the following provision, as relevant:

On Call / Temporary Employees:

- A. Nothing herein shall preclude the Employer from hiring or assigning on call or temporary employees. An on-call employee is one who fills in on an as needed basis. A temporary employee is one who has been hired for a specified period of time or project not to exceed 60 calendar days.
- B. On call and temporary employees are not entitled to any of the terms, conditions or benefits set forth in this Agreement. During said period of on-call or temporary employment . . . the Employer may discharge any such employee at will for any reason, with or without cause, and such discharge shall not be subject to the grievance and arbitration provision of this Agreement.

E. Kevin Meadows

Meadows began work as a shape employee for the Employer on July 16, 2007, reporting each day at 7:00 to 7:30 p.m. Rizzo stated that Meadows was a "regular shapeup" who was consistently at the yard every night and was given preference in assignment to a truck over other, more casual shape employees.

An issue arose concerning whether Meadows should wait outside the gate to the yard where the shape employees congregated, or inside the gate. Alfano told him to wait outside the gate, but Meadows asked Rizzo who told him that he was no longer a shape employee, but was "permanent" and could wait inside the yard.

In the summer of 2007, Meadows was assigned as a regular helper with driver Vincent Garrison with whom he worked for about 2 to 2½ months until October or November. Meadows received a uniform and a dental card which bears the Employer's name.

Meadows stated that in October or November, on a day when a substitute driver replaced Garrison, Meadows was asked by Alfano and O'Donnell whether he knew all the stops. Meadows answered that he knew most but not all the stops. Alfano ap-

peared upset and replied "you've been on the route two months and you don't know it?" Alfano sent another truck and split the route. Thus, two trucks completed the route that night, and Meadows completed as many stops as he remembered.

Meadows stated that after this incident he was assigned fewer days to work. Whereas he began at six days, he was reduced to five, then four, then three and finally to two days per week. However, he was not given a disciplinary notice for any misconduct.

Meadows testified that when he arrived at work in late November while he and other employees stood in the yard, Alfano approached them and said: "whoever goes to 813 they will lose they [sic] job." Meadows further stated that about one week later, he saw Alfano distribute Local 621 hats to workers.⁷ Alfano walked directly to him and asked if he wanted a hat. Meadows replied "no, I'm going to 813. Alfano replied "well, you're going to lose your job."

Meadows further testified that some time before the election, as he arrived at work, Alfano stopped him and asked him to come into the dispatch office and sign a Local 621 contract. Meadows refused. One day shortly after the election, Meadows entered the office to punch in. Alfano told him "we know who went 813, but 621 got it anyway." Meadows asked him how he knew who he voted for, and Alfano said "punch out, you shape up now."

On January 29, six days after the election, Meadows entered the office. Alfano told him that dispatcher O'Donnell "is not going to work you. No point of you coming back."

Alfano testified that Meadows began as a shape employee. He impressed Alfano as being a good worker and was assigned as a regular helper to a truck with driver Garrison. Alfano told him when he began his employment that he must learn the route and if not he would not be kept on a steady route. Garrison was absent one day and the replacement driver told Alfano that Meadows only knew the first five stops on the route. Alfano stated that the replacement driver told him "this guy has no idea where we're going, he's riding me around in circles. I'm looking at the route sheet, we're not picking up the right stops. It was a disaster." Alfano stated that he took Meadows off the route immediately, and demoted him to a shape position.

Alfano stated that after the election Meadows did not appear in the yard for five weeks, but then returned and asked Alfano for a letter stating that he was discharged. Alfano replied that he was not fired, he "abandoned" his job since he had not appeared to shape for five weeks. Meadows replied that he left because he was not being sent out every day so he needed to earn money and apparently worked elsewhere. Alfano told him to return to work and wait to be sent out like the other shape workers. Meadows replied that he did not have time for that and needed to earn money.

Alfano denied that Meadows told him that he was going to vote for Local 813. He also denied telling Meadows that anyone who supported Local 813 would lose their jobs, however he conceded telling him that Local 813 and Waste Management did not employ shape workers who would eventually become

⁷ Meadows was confused about the date. He also testified that this incident occurred one week before the election in January.

full-time employees as was the practice at the Employer, stating that he told them “there would be no more shape-up program.” Alfano further denied telling him that he knew who voted for Local 813 but Local 621 won anyway, but Alfano admitted telling Meadows at the election after the votes were counted that it did not matter who voted for Local 813 because Local 621 won.

Rizzo stated that Meadows was a shape employee, a good worker who was given an opportunity to become a regular helper when he was working on a regular route for six weeks with driver Garrison. However, he did not become a regular helper because he did not know the route after six weeks. Rizzo stated that Meadows’ employment ceased when he stopped coming to work. After not having come to work for one week he called Rizzo, asking if he could work full-time, and could not work only one or two days per week. Rizzo replied that he could work for one to three days per week if he is needed, but there was no “permanent” spot for him. Rizzo stated that when Meadows called he was a shape employee and Rizzo had made no decision to terminate him and had no reason to discharge him for not appearing at the yard because “a shape up guy just stops coming in.”

F. Frank Madden

Madden was a Waste Management employee who was hired by the Employer in June, 2006 and drove the vegetation route. He was dispatched from the Employer’s Newark yard, working six days per week, Sunday through Friday nights, from 6:00 p.m. to 1:30 or 2:00 a.m.

Madden stated that in the Fall of 2007 he distributed a couple of cards for Local 813, having received them from that union’s agents. Before the election, Rizzo asked him how he felt about Local 813. Madden replied that he was not in favor of any union because “my work represents me; if you’re a good worker, why would you need a union? I don’t need a union because my work is good.” Rizzo told him to “stand by your own union, we have a union, the union has no problems.” During the conversation, Madden told Rizzo that he heard that a new vegetation truck was being delivered to the Employer, and asked him if “the truck was mine.” Rizzo replied “you do right by me and we’ll do right by you.” Rizzo denied any conversations in which he told employees that they would be assigned to a new truck if they supported one union over another but did not deny asking Madden how he felt about Local 813.

Rizzo testified that in his discussion with Madden about unions Madden said that he did not care about unions because he is a good worker. Rizzo told him that if he liked things the way they are he should vote for Local 621. At hearing, Rizzo stated that his belief was that if Local 813 won the election the parties would begin negotiations and that “anything could happen in negotiations.”

Staada, a route supervisor, stated that his job included following drivers and checking their routes. During the union campaign he also carried labor consultant Juan Cruz with him, ostensibly to “educate” workers as to unions. Madden testified that Staada and Cruz pulled up to Madden’s truck. They handed him booklets and told him that Local 813 was losing members and it “had no future.” Staada asked him whether any Local

813 members were “harassing” him. Madden asked what he meant and Staada said by going on the routes and stopping employees from doing their work and distributing pamphlets for Local 813. Madden replied “isn’t that the same thing that you’re doing to me, you’re stopping me from doing my work and passing out pamphlets about Local 813.” Staada replied “I know where your vote is” adding that he heard from other people that he was voting for Local 813. Madden asked Staada whether he would be assigned the new vegetation truck. Staada replied “if you do right by the company the truck is yours.” Staada conceded that he probably spoke to Madden that night about his own truck which frequently broke down, but denied speaking about whether he would be assigned the new truck.

Staada testified that after introducing Cruz to employees Daniel Mason, Jamie Matos, Henry Morales, Jonathan Prescott and Tom Barletta, they advised Staada that Frank Madden stopped their trucks and spoke to them about “this stuff” and asked why he was doing that. Cruz told them that they were free to vote for Locals 621 or 813 or for no union, but that the Employer hoped that they would support their current union, Local 621. Their conversations lasted five to ten minutes.

Staada stopped Frank and Dominic Madden on their route and introduced Cruz. Frank told Staada that he did not need a union. Cruz said that the Employer hoped that he would support Local 621 its contractually-recognized union. Frank repeated that he did not need a “fucking union” to protect his job because he does his job. Staada replied: “That’s not what I heard. Guys are telling me that you’re pulling them over on their routes trying to organize them to go to meetings for information about 813. Frank asked who was saying that, and Staada said “everybody.” Frank answered that if anyone said that he should have them speak to him (Madden).

Dominic Madden stated that while Cruz was telling them that Local 813 membership was declining, Staada told his brother that “we will give you a new truck and you should do the right thing.” Frank replied that Staada should not be “pressuring” him into voting yes or no. Dominic told Cruz that he was not in Local 621 and the matter did not concern him.

The Employer originally had two vegetation routes, both dispatched from Newark. They were driven by drivers Frank Madden and Mac Johnson. Madden’s route, later called route 801, made stops predominantly in Manhattan and was the larger route. Johnson’s route, 802, had fewer stops and picked up vegetation mostly in Brooklyn. In addition, because Johnson had the lighter route and finished earlier, he took his truck to a dump in New Milford, Connecticut. On the other hand, Madden did not have to take his truck to the dump. Another driver met his truck and took it to the dump while Madden returned to the yard.

On about January 10, Rizzo asked Madden to attend a meeting with Cruz. Rizzo was in attendance. Cruz said that Local 813 was losing members, and urged the employees to vote for Local 621 which has a contract with the Employer. Madden testified that he asked Cruz how there could be a contract if he did not vote on one. Cruz replied that it was an agreement between the Employer and Local 621. Madden then left the room.

Rizzo followed him and told Madden that he was being taken off his route 801 and given Johnson’s route 802 because

Johnson wanted that route and also wanted the new truck expected to be assigned to it. Rizzo added that Madden's route would be transferred to Brooklyn. Madden stated that he asked why Johnson was getting the Newark route and Rizzo said that he had seniority. At hearing, Madden conceded that Johnson had greater seniority with the Employer, but that he had served on the vegetation route longer than Johnson.

It should be noted that Rizzo stated that the Employer's practice has been to keep drivers on their routes indefinitely unless changes had to be made. Madden had been working on his route since June, 2006. Johnson was working on his route since 2007.

Rizzo testified that in early January, 2008, after the purchase of Waste Management, the Employer decided to move one of the vegetation routes from its dispatch area in Newark to Brooklyn where the Waste Management facility was located. At that time the Employer knew that it would have to vacate the Brooklyn facility but did not know exactly when. That route was dispatched from Brooklyn for about four to six weeks and then was transferred to the Bronx.

Rizzo testified that he decided to run one of the routes from the Brooklyn yard because the Employer wanted to expand its vegetation pick-up business into the outer boroughs. He explained that the cost to the Employer of dispatching a truck from Brooklyn to handle the Brooklyn stops was much less than dispatching a truck from Newark since the routes were closer to Brooklyn than from Newark with a savings in tolls and fuel.

Johnson testified that he asked Rizzo to be assigned to Madden's route assuming that the new truck would be associated with that route. Johnson stressed that he had greater seniority and wanted to be dispatched from Newark because it was closer to his home in New Jersey. Rizzo agreed that he had greater seniority and that he would look into it. Rizzo conceded, however, that the Employer had no "formal system" for employees to bump others through seniority. He had never, before that time, assigned a route based on seniority because no one asked to change his route based on that factor.

Rizzo stated that Johnson asked him for Manhattan route 801 because he had greater seniority. It was the first time that Johnson had asked for anything and Rizzo wanted to give it to him. However, prior to that time, Johnson asked to be taken off the cardboard route and Rizzo granted that request. He told Johnson in November or December, that a new truck was coming for a route that he wanted. About that time he first asked to change routes. In fact, Johnson stated that he had been asking for that route for one year before it was assigned to Madden.

In fact, Johnson was not assigned to the new truck or to route 801. At first, supervisor Alfano worked route 801 with the new truck after Madden was removed from the route. Thereafter, the Employer assigned Ray Houston, a new driver with no experience on the route to drive route 801. Houston started driving the route on January 24, 2008, but was capable of learning route 802 which was the route that Madden was reassigned to.

Upon the transfer to Brooklyn, Madden took Johnson's route and Johnson was assigned to Madden's route which had fewer stops and was completed earlier. Johnson testified that when he was assigned to Madden's route he told him that he had re-

quested it. Madden replied that Johnson was correct, and that Johnson should have gotten it.

Madden had to drive to the dump which was traditionally part of that route. The dump was located in New Milford, Connecticut while Johnson's truck was picked up by another driver who drove it to the dump. Prior to Madden's transfer to Brooklyn, Madden did not have to travel to the dump, but after the switch he went to the dump every day. The trip from Brooklyn to the dump was 2 to 2½ hours which extended his work day depending on the traffic. In addition, the dump opened at 4:00 or 5:00 a.m. and the driver had to wait there for about one hour. In contrast, when Johnson drove the route he had to travel to the dump only every other day. Madden stated that he asked Rizzo why he had to go to the dump each day, Rizzo explained that the truck "goes [to the dump] every day now."

Rizzo testified that Manhattan route 802 took 8½ hours compared to four hours for Madden's Brooklyn route. He stated that it took 1½ hours to 1¾ hours for a truck to go from Manhattan to the dump and a couple of hours to go to Newark, and that route 802 should have taken four hours when dispatched from Brooklyn.

Upon the transfer, Madden's work hours changed. When he worked in Brooklyn he left the yard at 6:00 p.m. or 7:00 p.m. to try to avoid the rush hour. Shortly thereafter he was told by a supervisor that the route would start at 8:00 p.m. This resulted in a slower trip to Brooklyn because there was heavier traffic on Thursday, Friday and Sunday due to the "night scene."

Madden asked Rizzo whether Johnson asked for his route and Rizzo said he did. However, Madden stated that he asked Johnson if he asked for the route and Johnson denied doing so. When Madden reported this to Rizzo, he said that it is now a Brooklyn route.

Prior to his transfer to Brooklyn, Madden drove a distance of 15 miles in 10 minutes to work in Newark from his home in New Jersey. He did not have to pay tolls during that commute. When he was dispatched from Brooklyn, it took about one hour to one hour and 45 minutes, and about 30 to 35 miles each way with tolls for the Verrazano Bridge, the New Jersey Turnpike and additional fuel consumed. He estimated that gasoline and tolls for that trip was \$200 to \$270 per week. During the time that Johnson was training Madden he had the same commute from Newark to Brooklyn.

Rizzo admitted that one week after his transfer to Brooklyn, Madden told him that the commute was too far for him. Rizzo replied "I need you to drive that route." Madden's compensation was not changed after he began being dispatched from Brooklyn.

It is significant that although Johnson was assigned to Madden's route, he never actually drove that route. Instead, Johnson rode with Madden on his new route, teaching him the stops. After Madden's transfer, his former route was driven by Ray Houston a new driver. On January 24, Madden and Johnson were both moved to the Bronx upon the close of the Brooklyn facility where Madden worked until he quit on February 4. After Madden quit, Johnson continued to drive route 802 and he was still driving that route at the time of the hearing. According to Rizzo, Johnson was not assigned to route 801 be-

cause there was no driver available who knew the 802 route which Johnson had been driving.

Madden's commute from home in New Jersey to the Bronx added 30 minutes to the commute from home to Brooklyn. Madden testified that he believed that the transfers, first to Brooklyn and then to the Bronx were made in order to harass him because of his support for Local 813.

Madden testified that on February 4, he drove to the Bronx from his home in New Jersey and was waiting for Johnson to arrive so that they could begin the route at 8:00 p.m. as scheduled. Johnson was late and Madden phoned him a couple of times and was told that he was on his way. Madden called again and Johnson said that he was with Alfano who asked him to come to Newark and was driving him to the Bronx. Madden called again and heard Alfano tell Johnson not to worry about it that they would get there "when we get there." Johnson arrived at 11:00 p.m.

There was some confusion as to who started the confrontation which began upon Johnson's arrival. Madden was waiting in the truck when the men arrived. He first testified that Alfano exited his car and laughed in his face and began "mouthing off" asking "who are you to tell me that I've got to bring Mack Johnson right away. I'm the supervisor. You do what I say. If you don't do what I say, you know where to go, you can leave right now." Madden admittedly "got into [Alfano's] face and told him that he shouldn't be disrespecting me. If you disrespect me, I'm going to disrespect you. He kept getting closer to me nose to nose [which he considered as a] threat. So I told him if you keep getting any closer to me, I was going to punch him."

Later, Madden testified and this is confirmed by Johnson, that he (Madden) began the confrontation by getting out of the truck and "mouthed off" to Alfano, asking why it took so long to get from Newark to the Bronx. Alfano replied that he had to take care of some tasks in Manhattan. Madden replied "but you are holding my route up." Alfano said that he did not care. Then words were exchanged as set forth above. Johnson physically pulled Madden away from Alfano. Madden stated that he then decided to quit and asked an employee to get the keys to his personal vehicle which he drove to the Bronx. Madden turned in his Nextel phone and left.

Madden stated that before that day he had no intention of quitting. The reason he quit was the confrontation with Alfano which was triggered by "Alfano's mouth." Madden conceded, however, that he was already angry even before the argument because he was delayed three hours because Johnson was late. Madden noted that garbage men and supervisors lose their tempers all day, drivers because of New York traffic and pedestrians, and it is not uncommon for people in the industry to curse at each other.

Johnson gave his version of the confrontation. He stated that he was carpooling with Madden, alternating days when each would drive to the Bronx. On the morning of February 3, he returned home with Madden who said that he would pick up Johnson that evening at 5:30 or 6:30 p.m. for a 7:00 p.m. shift. That night, Madden was late picking him up and Johnson called him before 8:00 p.m. Madden explained that he had a family problem and was almost ready to pick him up. Later, Johnson

called him again and was told by Madden that he was already in the Bronx. Johnson yelled at him for not picking him up, accusing him of "setting me up" and having "no intention of picking me up." They both yelled at each other. Johnson then drove to the Newark yard arriving at 9:00 p.m. and told Alfano that he wanted to meet Madden in Brooklyn at the first vegetation stop. Alfano said that he had to drop two employees off in Manhattan and would then take him to the Bronx.

During the ride, Johnson and Madden cursed each other on the phone with Madden demanding that Johnson get there quickly and Johnson accusing him of not picking him up. Johnson arrived in the Bronx just before 10:00 p.m. Johnson stated that he got into Madden's truck and announced that he would not travel to the dump with Madden because he "screwed me around." Madden then said "fuck it. I quit. I ain't gonna take this shit." Madden left the truck and approached Alfano who was about to depart. Madden said "fuck this job, I quit, I don't need this here" and threatened to punch Alfano. Johnson got between them and said that he would go to the dump with him. Madden was standing very close to Alfano and told him "I'll have my brother kick your ass. I'll ask Mike to fuck you up here. You better not go uptown." Alfano dared Madden to hit him and Madden left.

Alfano and Johnson testified that Madden was at fault for Johnson's lateness. Alfano stated that Johnson appeared at the Newark yard complaining that Madden was supposed to have picked him up on his way to the Bronx and did not. Johnson needed a ride to the Bronx. Alfano had to drop off two employees in Manhattan so he took Johnson with him. During the trip, Madden and Johnson were yelling at each other on the phone with Johnson blaming Madden for not picking him up. Madden did not deny Johnson's testimony that Madden was at fault for not picking him up.

Alfano stated that he and Johnson arrived at the Bronx yard at 9:30 or 10:00 p.m. Alfano stated that Madden "got in my face," threatened to punch him and threatened that he would not "make it out of the Bronx alive." Madden then announced that he was quitting. Madden denied telling Alfano that he should not go uptown because he was going to get him.

By letter dated February 5, the Employer wrote that Madden's employment with it "is hereby terminated as of February 4, 2008. Your position has been eliminated as a result of Job Abandonment. Additionally, you verbally assaulted supervisory personnel in a threatening manner which is also cause for dismissal."

Rizzo denied being aware that Madden or any other employee supported Local 813, and denied that supervisor Staada told him of Madden's interest in that union or that he had solicited employees to join that union.

G. Dominic Madden

Dominic Madden was hired at the request of his brother, Frank, a former Waste Management driver who became employed by the Employer in 2006. Dominic was hired specifically to be Frank's helper, and began work on November 15, 2007.

Dominic conceded that a couple of days after he began work he was told by Rizzo that he had to learn the stops so that he

could direct a replacement driver if his brother was absent. Rizzo testified that the Employer assigns helpers to a specific route with a driver on a day-to-day basis. The helper stays on the same route as long as possible so that he is able to learn the route. If he does a good job he is not replaced because it takes a period of time to learn the route which may involve hundreds of stops – knowing the specific stop, what date garbage is picked up, how many bags are there, and specifically where the garbage is located – in an alley, for example, with each stop having a specific time and location when and where the garbage must be taken from. In the event that the driver is absent, a substitute driver relies on the long-term helper on the route to assist in finding the stops. Rizzo also told him that it should take him no longer than six weeks to learn the route. Rizzo testified that upon his hire he asked Dominic how long it would take him to learn the route. Dominic replied that it should not take him long. At hearing, Rizzo stated that it should take a helper six weeks at most to learn the stops on a route.

Shortly after his hire, Dominic began to tape record the stops. He described the stops on the route as he was driving in the truck. It took two days to record the entire route. According to Dominic, dispatcher O'Donnell knew that he was recording the route. He left his recorder bag on the dispatch counter and O'Donnell asked what it was. When Dominic told him he was recording the route, O'Donnell replied that that was a "good idea."

Frank was absent for two nights, January 3 and 4. The first night, Dominic was first assigned to his regular route. Dominic stated that he told dispatcher O'Donnell that he did not know three stops on the route. O'Donnell assigned a different helper, Michael Burton, who knew Frank Madden's route to do that route and assigned Dominic to a different route in Brooklyn driven by Mac Johnson. Dispatcher O'Donnell testified that Frank called him that night, said he would be absent and advised O'Donnell that his brother did not know the route and he should assign someone else. Rizzo testified that Frank told him that night that he would be absent and that Burton should be assigned to the route as the helper because Dominic did not know the route. Rizzo asked Frank why he did not know the route. Frank replied that it was taking "a while" for him to learn it but that he should have learned it by then.

O'Donnell testified that Dominic was not fired at that time because he was "given a chance."

On the second consecutive night that Frank was absent, Dominic was again assigned to his brother's regular route. He used the tape recorder to help him remember the stops but two hours later after 13 stops he was taken off the truck. O'Donnell called the driver and told the driver to park the truck and wait for helper Burton who knew the route. Johnson arrived at the scene with his truck and Dominic was assigned once again as a helper on Johnson's route. Dominic asked O'Donnell why they had to replace him since he knew the three stops he did not know the prior night. O'Donnell said it's not a problem.

Dispatcher O'Donnell testified that on the occasions when Frank was absent, he told Alfano that Dominic did not know the route and someone else should be assigned as helper on the route. O'Donnell assigned Michael Burton who had been Frank's long-time helper, to the route. O'Donnell also stated

that on another occasion when Frank was absent, Dominic started the route and then called him and said he did not know it.

O'Donnell stated that Frank was also absent prior to that time, on December 27, and did not know the route then. However, he was not fired at that time. Driver Johnson also testified that Frank told him at about that time that Dominic was not learning the route. It was also Johnson's opinion that by December Dominic should have known the route, stating that employees are given two to three months to learn the route depending on its size. In this case, Johnson stated that although there were 206 stops on the route, only about one-half were actually picked up and that two months were sufficient to learn the route, but that it should have been learned in one month.

O'Donnell stated that such transfers of helpers in mid-route are not common. They result in a loss of time while garbage is lying on the street. A helper who is familiar with the route must be obtained and either driven to his new assignment or the trucks have to arrange to meet where the transfer of helpers takes place. Frank Madden stated that there was an "expectation" that the helper should know the stops on the route, and that if a helper did not know the route the Employer had to locate a driver or helper who knew the stops and take the helper off his regular truck. Frank conceded that such an occurrence "slowed things up" and drivers complained when that happened.

Dominic stated that no one told him that he had done anything wrong that evening. In fact, O'Donnell and Alfano told him not to worry about it.

Rizzo testified that following Frank Madden's second absence where Dominic had to be taken off the route, O'Donnell and he discussed the matter. Rizzo stated that O'Donnell told him that if Dominic did not know the route by then he would not be able to learn it. They decided to discharge Dominic. Rizzo did not ask O'Donnell which stops Dominic did not know, and Rizzo was not aware at that time that Dominic had been recording the stops. Rizzo further testified that he was not aware of Dominic's union sympathies. They had no discussions concerning unions. The collective-bargaining agreement inconsistently provides that (a) during an employee's 90 day probationary period the employee "may be terminated for any reason without recourse by the Union" (Article XI, page 6), and "all employees covered by this Agreement shall be considered probationary for a period of 60 calendar days from their last date of hire with the Employer." (page 12). No explanation was given at the hearing for this discrepancy in the probationary period.

Dominic stated that on January 9, 2008, as he and Frank returned to the yard at the end of their work-day, they were asked by Rizzo to attend a meeting with Sombrotto and Cruz. Sombrotto gave them a "Local 621" cap and Cruz told them to do what was right for the Employer since the Employer signs their checks. Frank made some remarks which Dominic did not hear. As set forth above, at that meeting which Frank Madden said was attended also by Rizzo, Cruz mentioned the contract between the Employer and Local 621, and Frank asked how there could be a contract if he did not vote on one. Cruz replied that it was an agreement between the Employer and Local 621. The

Maddens then left the room. Rizzo told Frank that he was being taken off his route, and beginning Monday his route would be dispatched from Brooklyn. Rizzo did not deny that he was present at the meeting.

Dominic stated that when he asked Rizzo who would be driving the route that Dominic was on, Rizzo put an envelope on the counter and did not reply. The letter, dated January 10, stated that he was being terminated "as a result of your inability to learn the position." Dominic stated that prior to that evening, no supervisor asked him whether he knew the route, and denied that his brother or any supervisor said anything to him about not learning his route. Frank testified that he gave Dominic the recorder, and denied telling Rizzo that Dominic was having trouble learning the stops. Frank stated that it took him about one month to learn a Manhattan route. Their route contained about 100 stops with additions and deletions of stops being made each day.

O'Donnell testified that Dominic read the letter, and O'Donnell reminded him of the times when he was transferred to another truck because he did not know the route. Dominic replied that he knows the route now and O'Donnell replied that he said that before, and that he should have known the route by now, advising that his brother told him that he did not know the route. At hearing, O'Donnell testified that he is stricter than others and "gives people usually 30 days to learn a route."

Rizzo stated that Dominic asked him why he was fired. Rizzo replied that he did not know the route. Dominic asked for an explanation and Rizzo said that he had two days to prove he knew the route and he did not do so.

Alfano stated that Rizzo decided that Dominic should be discharged because he did not know his assigned route after working on the route for more than two months. According to Alfano, Dominic's brother Frank told him that he did not know the route. Frank denied telling anyone that his brother did not know the route. Alfano stated that Dominic called him after he was fired and asked for a "chance" to show him that he knew the route. Alfano told him to speak to Frank because he was the one who said he did not know the route.

Dominic voted in the election after his discharge. He testified that while he was on the premises on the day of the election, he and Alfano had a casual conversation about Dominic's children and things that were occurring in their lives. He was told by Alfano that he had been fired "because of my brother's vocal opinion about 813. I was terminated because they could not terminate my brother or something to that effect." This statement was not included in Dominic's pre-trial affidavit which was taken two weeks after the election because he was more concerned with a problem and incident which he had with another employee, and that there were many things that he did not discuss with the Board agent who took his affidavit because he did not remember them.

O'Donnell testified that he recommended that Gadson be demoted from regular helper to shape status because he did not learn his route. He stated that Dominic was not given that option because he was not hired originally as a shape worker. Similarly, Rizzo testified that Dominic was not offered the opportunity to become a shape worker because he was hired as

a regular employee based on the fact that he would learn the route and work with his brother.

Analysis and Discussion

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Interference with Employee Rights*

The complaint alleges essentially that the Employer interrogated employees about their union sympathies; promised employees benefits if they supported Local 621 and if they refused to support Local 813; created an impression among its employees that their union activities were under surveillance; and threatened employees with reprisals if they supported Local 813 and if they failed to support Local 621.

I begin this discussion with the undisputed fact that the Employer supported Local 621 and was opposed to Local 813 becoming the employees' representative. It mounted a campaign to persuade the unit workers to vote for Local 621, retaining a labor consultant to speak to the workers while they were working and gave them literature. In addition, Employer official Glauda's letter shortly before the election strongly supported Local 621. There is nothing illegal about this conduct but it provides the background for the allegations set forth above.

I find, as set forth above and as testified by Meadows, Alfano told him that whoever "goes to" Local 813 would lose their job, and thereafter, when Alfano asked him if he wanted a Local 621 hat. When Meadows replied that he was going to Local 813, Alfano said that he would lose his job. Thereafter, Meadows refused Alfano's request that he sign a Local 621 contract. I also find, as testified by Gadson, that Alfano told him that if he did not vote for Local 621 or if he voted for Local 813 he would be fired.

I cannot credit Alfano's denials of those statements. He conceded that he told shape workers that Local 813 and Waste Management did not employ shape employees and that there would be no more shape up program if Local 813 was elected. I do not believe that Alfano engaged in such a careful description of those two organizations' employment practices. It is more likely that Alfano bluntly told Meadows, as I find, that if Local 813 became the representative he would lose his job with the Employer because Local 813 does not recognize the job category of shape employees and that there would be no more shape program. I find that he made that comment consistent with the Employer's undisputed efforts to persuade its employees to reject Local 813 in the election.

I also note that Alfano admitted being with Gadson when the alleged unlawful statements were made and significantly testified that he told Gadson that "things would definitely be different" if Local 813 was elected, specifically he would no longer give leeway to employee's personal situations or extend personal courtesies to them. I cannot credit Alfano's explanation that he was simply describing how things worked at Waste Management and not how working conditions would change at the Employer. First, Alfano never worked at Waste Management and there was no showing as to how he knew the working relationship between Local 813 and that employer. Signifi-

cantly, he admitted that the relationship between employees and the Employer would suffer if Local 813 was selected.

I therefore find that Alfano's statements to the employees constitute threats violative of Section 8(a)(1) of the Act.

I further find that the reply by Rizzo and Staada given to Frank Madden's question whether a new truck would be assigned to him constituted a promise of benefits if Madden voted in favor of Local 621. Rizzo and Staada both said that if Madden did right by the Employer the Employer would "do right by you". It is undisputed that a new truck is a benefit to the employee assigned it. Those comments occurred in the context of Rizzo's asking him how he felt about Local 813 and Staada's and Cruz' attempts to persuade Madden to vote for Local 621. Clearly at the time that Staada spoke to Madden he was aware that Madden supported Local 813 because he told him that other drivers mentioned that Madden had spoken to them about joining Local 813.

The credibility of Rizzo and Staada were harmed by their testimony that Cruz' purpose was simply to educate the workers about the union situation. Cruz' statements to the employees in the presence of both men strongly supported Local 621 and denigrated Local 813.

Madden replied to Rizzo that he did not need a union as his work stands for itself. It is logical that Rizzo would answer, as I find that he did, that Madden should stand by his own union, in effect saying that even if he did not need a union he should support the union currently recognized by the Employer. The promise made by Rizzo and Staada that if Madden did the right thing the Employer would reciprocate clearly tended to interfere with Madden's right to vote for Local 813. Staada's denial of the promise does not ring true. He conceded speaking to Madden at that time about his own truck which was in poor condition. It is logical that while speaking about his vehicle Madden would have asked about the new truck and therefore it makes sense that Staada would have attempted to induce Madden to support Local 621 through an offer of a new truck. I therefore find that the promise of a new truck violated Section 8(a)(1) of the Act.

I find that Rizzo's question to Frank Madden as to how he "felt" about Local 813, and Alfano's question to Gadson as to which union he was supporting, whether he would support Local 621, and if he signed the Local 621 contract were improper interrogation of both employees. Similarly, Alfano's statement that he heard that Gadson was telling everyone to vote for Local 813 was also the creation of the impression of surveillance and also a form of interrogation requiring that Gadson explain whether he supported Local 813 or not.

Interrogation is not, by itself, a per se violation of Section 8(a)(1) of the Act. The test for determining the legality of employee interrogation regarding union sympathies is whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed employees by the Act. Under this totality of circumstances approach consideration is given to whether the interrogated employee is an open or active supporter of the union, the background surrounding the interrogation, the nature and purpose of the information sought, the identity of the questioner, the place and/or method of the interrogation, and the truthfulness of any reply

by the questioned employee. *Rossmore House*, 269 NLRB 1176, 1177 (1984), *enfd. sub. nom. HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). These factors are not to be mechanically applied but rather are useful indicia that serve as a starting point for assessing the totality of the circumstances. The totality of the circumstances present here persuade me that Frank Madden and Gadson were unlawfully interrogated. They were not open supporters of Local 813, they were questioned by supervisory personnel, the information sought from them was intended to learn whether they supported Local 813, and they did not express their true opinion as to which union they supported.

Alfano told Meadows following the election that he knew "who went 813..." Meadows' follow-up question inquiring how he knew was not answered. I cannot credit Alfano's denial of that statement. He conceded that he told Meadows at that time that it did not matter who voted for Local 813 because Local 621 won the election. Alfano did not explain why he made that comment. It is reasonable to infer that after Meadows asked the question, Alfano ignored it and said that it did not matter because Local 621 won. Accordingly, it is quite logical to find that Alfano told Meadows that he knew who voted for Local 813 and, in an effort to add to the mystery of how he knew, Alfano simply stated that it did not matter since Local 621 won anyway.

The Board's test for determining whether an employer has created an impression of surveillance is whether the employee would reasonably assume from the statement in question that his or her union activities have been placed under surveillance. When an employer creates the impression among its employees that it is watching or spying on their union activities, or employees' future union activities, their future exercise of their Section 7 rights tend to be inhibited. *Link Mfg.*, 281 NLRB 294 (1986), *enfd. mem.*, 840 F.2d 17 (6th Cir. 1988), *cert. denied* 488 U.S. 854 (1988). The idea behind finding an impression of surveillance as a violation of Section 8(a)(1) of the Act is employees should be free to participate in union organizing campaigns without fearing members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways.

I accordingly find that Alfano's statement constitutes the creation of the impression of surveillance of Meadows' union activities. Similarly, I credit Frank Madden's testimony that Staada told him that he understood from other people that he was soliciting for Local 813 and that he knew where Madden's vote was. Staada conceded being told by other employees that Madden sought to have them support Local 813 and admitted asking whether Madden was soliciting them. This too constitutes the creation of the impression of surveillance.

B. Discrimination Against Employees

1. David Zengewald

Zengewald was an experienced driver who engaged in activities in behalf of Local 813 by distributing about 20 authorization cards and speaking to employees in behalf of that union. He also attended meetings with Local 813 agents on working time. His membership in Local 813 was known to Rizzo. At a meeting with Cruz and supervisors Alfano and Rizzo, Zenge-

wald announced that he was not interested in hearing about Local 621 and that he was a long-term member of Local 813. He conceded telling the men that he did not care about the company or the unions and was not interested in joining the unions, adding that if he was offered a job by an electrical contractor he would quit. That evening, Zengewald accused Cruz of being misinformed when he said that Local 813's pension fund was bankrupt.

Two days later, December 19, Zengewald was fired. The discharge took place only five days after Local 813 filed its petition with the Board. This case must be analyzed under the standards set forth in *Wright Line*, 251 NLRB 1083 (1980).

Under *Wright Line*, the General Counsel bears the burden of proving by a preponderance of the evidence that the employees' protected conduct was a motivating factor in the adverse employment actions. If the General Counsel makes a showing of discriminatory motivation by proving protected activity, the employer's knowledge of that activity, and animus against protected conduct, then the burden of persuasion shifts to the employer to prove that it would have taken the same actions even in the absence of the protected conduct. See *Donaldson Bros. Ready Mix*, 341 NLRB 958, 961 (2004).

First, it is clear that Zengewald engaged in protected activity by soliciting cards and speaking to employees in an effort to encourage them to join Local 813. Although it has not been shown that those activities were specifically known by the Employer, it is undisputed that employer official Rizzo was aware that Zengewald was a member in long standing of that union. The Employer's knowledge of his membership and its animus toward the protected activity of employees who support Local 813 as demonstrated above by the interrogations, threats of discharge, promises of benefit and creation of the impression of surveillance of employees' union activities, provides a firm foundation for finding that Zengewald's protected conduct was a motivating factor in his discharge.

The burden then shifts to the Employer to prove that it would have discharged Zengewald even in the absence of his protected activity. I find that the Employer has not met its burden. Zengewald was discharged allegedly because he was irate and could not be trusted driving a truck, and because he intended to leave the Employer's employ and it did not wish to "invest" any more time in him.

As to his being irate, Zengewald admits that he spoke about his lack of interest in the company and the unions in a slightly raised voice. His upset at being confronted by two supervisors and Cruz immediately after finishing his route is understandable. As he testified, he was uncomfortable in being put on the spot at that time. At that time he had finished driving his route and presumably would have had time to become calm before driving again the next day. In addition, the Employer did not stop him from driving again the next day. Rizzo admitted that Zengewald is not an angry person, and Alfano stated that "everybody is upset" because of the nature of the job. Moreover, Zengewald apologized for his conduct and told the officials that he did not mean to

imply that he was not interested in the employer, only that he did not want to be involved in the discussion about unions.

Other employees received less discipline for engaging in more violent conduct. Thus, Frank Madden was suspended for one day due to a physical fight with another worker. Johnson argued with a helper and was transferred to a different route. There clearly is no precedent for this discharge.

Rizzo's reason for not preventing him from driving the next day because he wanted to speak to him in person is without merit since he could have left word with him or another supervisor that he was suspended for one day until they spoke.

As to the claim that since Zengewald intended to quit, the Employer could not invest any more time in him, Zengewald credibly testified without dispute that he was already trained, was driving the same route he had when he was at Waste Management and had no disciplinary problems in the two months he had been with the Employer. Indeed, Rizzo confirmed this by stating that Zengewald was a good employee and he knew the route for which he needed no training, a benefit to the Employer. In addition, he told the Employer's officials that the offer of a job with an electrical contractor was speculative – the contractor had to first recall to work certain laid off workers and then a position must open up, and then if he was offered a job he had to decide whether to accept it. In addition, as the Employer's testified, it needed drivers who were experienced with Waste Management's routes.

I accordingly find that the Employer has not met its burden of proving that it would have discharged Zengewald even in the absence of his union activities, and that his termination violated the Act.

2. Shafi Gadson

Gadson began as a shape employee and then, because of his excellent performance, was made a regular helper. As evidence of this, he was given uniforms, received health insurance benefits, safety bonuses and holiday pay, all benefits provided for regular helpers but not shape workers.

Apparently because of performance problems including his absence from work, even after being assigned to a truck, he was taken off his regular route and demoted to shape worker in December, 2007. Shortly thereafter in early January, as set forth above, Alfano unlawfully threatened to fire Gadson if he did not support Local 621 or voted for Local 813, and then a few days later Alfano asked him to sign the Local 621 contract and unlawfully said that he was aware that he was urging other employees to support Local 813. Only a few days later, by letter dated January 7, Gadson was discharged.

Alfano clearly believed that Gadson solicited support for Local 813 and threatened him because of such activities and if he did not change his support to Local 621. Accordingly, the General Counsel has established that Gadson's dis-

charge, coming so soon after his activity in behalf of Local 813, was motivated by his conduct in support of Local 813. *Wright Line*, above.

The written reason given for the discharge, lack of work, was admitted by Rizzo, the author of the letter, to be false. Rizzo's reason for the letter was that he was permitting Gadson to collect unemployment insurance yet there was no evidence that other employees were given the same benefit. Rather, letters of termination for other employees, such as Frank Madden, were specific and detailed as to the reasons for discharge.

Employer officials testified to the alleged reason for the discharge – that Gadson did not appear for work, his attendance was “inconsistent,” and that he would “disappear” when he was assigned to a truck. These reasons do not withstand scrutiny. First, the Employer's witnesses could not identify any driver who Gadson was assigned to work with but then disappeared from the scene. In addition, Gadson engaged in the same alleged misconduct for three months, from October to December, 2007 before he was demoted to shape worker but no discipline was imposed on him.

As a shape worker at the time of his discharge Gadson was to be present at the yard and wait for an assignment. If one was not forthcoming he left. The Employer's records which showed that Gadson did not work a full week at various times show only that Gadson was not assigned to a truck more often. They did not show that his appearance was inconsistent, or how often he was at the yard as a shape worker waiting for an assignment.

Discharge for this reason was inconsistent with that given to employee Meadows. He too was a shape employee and when he did not appear for work after a period of time he was not discharged and no action was taken against him. I accordingly find that the Employer has not met its *Wright Line* burden of proving that it would have discharged Gadson even in the absence of his union activities.

The Employer alleged that it discovered, after it terminated Gadson, that he was scanning in for work and scanning out without actually working, thereby receiving pay for time not worked. Because the Employer came upon this alleged information after Gadson's discharge it is not relevant to the above discussion of the reasons for his termination. However, it may be relevant to a compliance proceeding. I do not believe that this issue is appropriate for decision at this time because the Employer has not asserted that, assuming that Gadson's termination was deemed unlawful he is not eligible for reinstatement because of such conduct. In addition, this allegation has not been fully litigated at the hearing. Accordingly, it may be raised in a compliance proceeding subsequent to this decision.

3. Kevin Meadows

I have found above that Meadows was threatened with discharge by supervisor Alfano, and was told that he (Alfano) knew who voted for Local 813, and that only six days after that

Alfano told him not to return to the yard because the dispatcher would not assign him to a truck.

It appears that Meadows was a valued shape worker who was assigned a regular route but was then demoted to shape employee when he did not learn the route after a period of time. It is undisputed that Meadows was criticized when it was discovered that he did not know the route when a substitute driver replaced the regular driver. Meadows admitted that following this incident he was sent out less often.

The first question is whether Meadows was discharged, as alleged, or just failed to come to the yard after a period of time. Meadows admits that he was assigned to a truck infrequently after the incident in which he was found to have not learned the route. The Employer denies that it discharged Meadows, arguing that he simply did not return to the yard.

I cannot credit the Employer's witnesses' testimony that Meadows was not discharged. Meadows credibly testified that shortly after the election Alfano told him that the dispatcher would not assign him to a truck and therefore he should not return. Such a direction that an employee should not come to work is a discharge. Rizzo testified that he had no reason to discharge a shape employee because such a worker comes and goes as he wishes, waiting for a night's assignment – “a shape guy just stops coming in.” However, such testimony is clearly contradicted in the fact that Gadson, a shape worker also, was discharged. Accordingly it is clear that the Employer did discharge shape employees. Further, why would Meadows return to the yard, as Alfano testified, and ask for a letter stating that he was discharged if he was not, in fact, discharged?

I have found above that Alfano threatened Meadows with discharge if he joined Local 813, and later when Meadows told him that he was supporting that union, Alfano replied that “you're going to lose your job.” Further, Meadows refused to sign a Local 621 contract and Alfano told him shortly after the election that he knew who “went 813....” Shortly after that Alfano told him that he should not return to work. The Employer's knowledge that Meadows supported Local 813, its animus toward that union and its supporters combined with a direct threat that Meadows would be fired if he supported Local 813 and the close timing between the threat to discharge and his discharge support a finding that Meadows was discharged because of his support for Local 813.

The Employer's argument that Meadows was not discharged but just failed to come to work does not withstand scrutiny. Notwithstanding the Employer's argument that it does not discharge shape employees it had fired shape worker Gadson. If the Employer's argument is true that Meadows simply failed to appear at the yard for work, it need not have fired him.

I accordingly find and conclude that the Employer discharged Meadows in violation of the Act.

4. Frank Madden

a. *The Unlawful Transfer and Changes of Route and Hours*

The complaint alleges that the Employer unlawfully transferred and changed the start time and route assigned to Frank Madden, and then caused his constructive discharge.

As set forth above, Madden was an active supporter of Local 813 by distributing cards for that union. I have found that Rizzo unlawfully interrogated him by asking how he felt about Local 813 and that he and Staada promised him a new truck if he supported Local 621. Madden's interest in Local 813 was known to the Employer since Staada admittedly told him that he heard that he was soliciting workers to join that union.

Madden was originally assigned to the vegetation route which was dispatched from Newark and made stops in Manhattan. At a meeting on January 10, Madden disputed labor consultant Cruz' assertion that the Employer had a valid contract with Local 621. Rizzo was at that meeting and immediately told Madden that he was being taken off his route and given Johnson's route which made stops mostly in Brooklyn, and that his route would be dispatched from Brooklyn. Madden further testified and I find that the time his route began was changed from 6:00 or 7:00 p.m. to 8:00 p.m. increasing the time it would take to get to his first stop because of greater traffic at that later time.

The fact that Madden was a known Local 813 supporter, combined with the Employer's unlawful interrogation and promise of a new truck coming immediately after Madden disputed Cruz' assertion about the contract supports a finding that Madden's transfer from Newark to Brooklyn was motivated by his union activities. *Wright Line*, above.

The Employer's defenses that Johnson asked for Madden's route and that he had greater seniority than Madden have not been proven to be valid. First, Johnson testified that he had been asking for that route for nearly three years, since 2005, and that he wanted it because he heard that a new truck would be assigned to that route. Why was he assigned to the route so much longer after his original request? The obvious answer was that the Employer wanted to make it more difficult for Madden who lived in New Jersey to commute to Brooklyn rather than be dispatched from the Newark yard. Rizzo also stated that he was inclined to grant Johnson's request because he had never asked for anything. However, Johnson had asked to be taken off the cardboard route after working it for two years and that request was granted although it is the Employer's policy to keep drivers on the route that they have been doing. Further, seniority has never been a factor in an Employer's assignment of a route to a driver. In addition, Johnson never actually took Madden's route. First, supervisor Alfano drove it with the new truck and then a new driver, Houston, took that route.

Both Madden and Johnson lived in New Jersey and being dispatched from that state was easier for both men because they lived near the Newark yard. One had to be chosen for transfer to Brooklyn. It is clear that Madden was chosen because of his activity in support of Local 813.

Moreover, the timing of Madden's transfer, even from a business point of view, is suspect. At the time of the transfer, the Employer was aware that it had only a limited amount of time in the former Waste Management Brooklyn

yard before it had to vacate that facility. The Employer could have continued to run the route out of Newark as it had in the past.

Additional burdens were placed on Madden as a result of the transfer. Because he had a shorter route he had to take the truck to the dump in Connecticut whereas on his former, Brooklyn route he did not have that responsibility. According to his undisputed testimony he was required to take the truck to the dump every day whereas Johnson, who formerly had the route, took the truck to the dump every other day. Further, Madden's starting time was delayed by the Employer causing him to travel in heavier traffic to Manhattan.

The transfer to Brooklyn caused created a longer and costlier commute. Prior to the Madden's transfer he lived in New Jersey and had a short commute to the Newark yard where he was dispatched. After the transfer, he had to drive his personal vehicle to the Brooklyn yard from which he was dispatched with additional costs for fuel and tolls.

Accordingly, I find that the transfer of Madden to Brooklyn, the change of his route and start time constitute unlawful changes in Madden's working conditions.

b. The Constructive Discharge

The General Counsel alleges that Madden was constructively discharged because the cumulative effect of the changes set forth above caused him to quit his employment.

The Board requires two elements to be shown to establish a constructive discharge. First, the burdens imposed on the employee must cause, and be intended to cause, a change in working conditions so difficult or unpleasant as to force the employee to resign. Second, the burdens must have been imposed because of the employee's protected activities. *North Carolina Prisoner Legal Services*, 351 NLRB 464, 470 (2007); *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976). The Board has held that the intent element will be satisfied so long as the employer "reasonably should have foreseen" that its actions would cause an employee to quit. *American Licorice Co.*, 299 NLRB 145, 148 (1990).

The Board has found that transferring employees and requiring them to travel longer distances in the performance of their work are grounds for finding a constructive discharge. *CWI of Maryland, Inc.*, 321 NLRB 698, 707-708 (1996); See *Safety Kleen Oil Services*, 308 NLRB 208, 222-223 (1992). Madden's increased commuting costs, the distance he had to travel from home and the selection of Madden over Johnson as being the one who would be transferred to Brooklyn, particularly where it has been shown that the Employer's reasons for choosing Madden were not based in fact, establish that the transfer caused, and were intended to cause a change in working conditions so difficult or unpleasant as to force Madden to resign. It has also been shown, above, that the transfer was made immediately after Madden disputed Cruz' assertion that the Employer and Local 621 had a valid contract, and Madden's being the victim of unlawful threats and promises. Accordingly it has been proven that these burdens were imposed because of Madden's protected support of Local 813. *Wright Line*, above.

Further, as Rizzo admitted, after Madden had driven the new route from Brooklyn, he told Rizzo that the commute was too far for him. Rizzo replied "I need you to drive that route." Given Madden's complaint that the commute was too far, and the fact that the Employer knew that Madden had to commute from Newark to Brooklyn with the increased costs and time involved, a fair finding may be made that the Employer reasonably should have foreseen that its actions would cause Madden to quit.

The question then becomes whether Madden resigned because of the unlawful transfer to Brooklyn and the changes in his route and time of departure. The evidence is clear that those changes were not the reason for the quit. The transfer to Brooklyn and the increased commuting time had nothing to do with Madden's decision to quit. He was in the Bronx for nearly three weeks when he quit. The prior transfer to Brooklyn and changes in his route and departure time were thus weeks before he quit, and he had been transferred to the Bronx when he decided to quit.

It is clear that the confrontation with Johnson and Alfano was the precipitating reason for the resignation. Madden testified that he had no intention of quitting before the confrontation. Accordingly, the changes described above had nothing to do with his decision to quit.

Thus, as set forth above, Madden was angry at Johnson for being late to the Bronx yard where they would ride together on the route. Johnson's testimony that Madden was the cause of his lateness was not denied by Madden and I credit it. Thus, Johnson stated that Madden had agreed to pick him up in New Jersey and did not do so. Accordingly, Madden caused Johnson's lateness. Thus, it cannot be said that Madden was "set up" as he claimed. Apparently, Alfano did not deliberately cause Johnson's late arrival. It was either due to Madden's failure to pick up Johnson or Alfano's typical transport of other workers to Manhattan and then his delivery of Johnson to the Bronx to meet Madden.

I have also considered the General Counsel's contention that Johnson's lateness was the "last straw" which drove Madden to quit. However, as set forth above, the changes had taken place weeks before and Madden had no intention of quitting before that evening.

In addition, I have also weighed the theory that but for Madden's unlawful transfer to Brooklyn he would still have been in Newark and the confrontation would not have occurred because he would have arrived at the Newark yard, ready to drive his original route, on his own. Such a theory is purely speculative, however, and cannot substitute for the actual facts here. Such facts support a finding that the confrontation between Madden and Johnson was the sole reason that Madden resigned.

Accordingly I will recommend dismissal of the allegation that Madden was constructively discharged.

5. Dominic Madden

Dominic Madden was hired as the helper for his brother Frank. It is undisputed that he was directed to learn the route and that he did not do so. It has been established that it is essential for a helper to learn the route so that if his regular

driver was absent he would be able to tell the substitute driver where the stops were.

It is true that in late December, no action was taken against him when it was discovered that he did not know the route. Instead another helper, who knew the route, was assigned. However one week later, on January 3 and 4 when Frank was absent two consecutive nights, Dominic had to be replaced with a helper who knew the route. The substitutions resulted in a loss of time to the Employer and to the driver in picking up the waste.

Apparently no action was taken against Dominic until January 10 when the Maddens attended a meeting with Cruz and Rizzo and in which, as set forth above, Frank questioned the validity of the Local 621 contract. I cannot credit Dominic's testimony that he was told by Alfano that he was fired because of Frank's support of Local 813, and because he could not terminate Frank. The last statement makes no sense. The Employer could have discharged Frank. Further, that important comment was not included in Dominic's pre-trial affidavit taken only two weeks after the comment was allegedly made.

Even if I find that Dominic was discharged because of his union activities, I find that the Employer has established that it would have discharged him even in the absence of his union activities. Thus, the requirement that he learn his route within six weeks was known to Dominic. He did not know the route within six weeks. On three occasions he demonstrated that he did not know the route which forced the Employer to transfer him to another truck and assign a helper who knew the route to his route.

I accordingly find and conclude that Dominic Madden was not unlawfully discharged.

C. The Alleged Failure to Represent Shafi Gadson

The complaint alleges that Local 621 failed to process a grievance over the discharge of Shafi Gadson for reasons that are unfair, invidious and has breached its fiduciary duty to Gadson.

It is admitted that Local 621 represents the unit employees. As set forth above, Gadson was discharged and asked Local 621 president Sombrotto to represent him. Sombrotto phoned Rizzo and asked to meet. Rizzo said he was too busy. That was the last time he spoke to Rizzo. Sombrotto then did some research and learned that at the time of his discharge Gadson was a shape employee who was not covered by the contract and not entitled to utilize the grievance provision of the contract. Sombrotto was somewhat confused at this discovery because he knew that Gadson was on the voting eligibility list. However, Sombrotto signed up shape employees and they became members of the union, admitting that at one point Gadson was a full dues-paying member. Accordingly, Sombrotto decided that he did not have to represent Gadson because he was a shape employee. The contract excludes "on-call" and "temporary" employees from its coverage.

Section 8(b)(1)(A) requires that a union owes represented employees a duty of fair representation. *Miranda Fuel Co.*, 140 NLRB 181 (1962). To establish a breach of that duty, the General Counsel must show that the union's conduct towards him was "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967); *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65 (1991). For representation purposes, a union's conduct is "arbitrary" only if, "in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a wide range of reasonableness as to be irrational." *O'Neill*, above, at 67. *Stage Employees IATSE Local 720*, 332 NLRB 1, 2 (2000). This stringent test applies to review of a union decision not to file a grievance or to settle a grievance short of arbitration. *Vaca*, 386 U.S. at 191. In reviewing union decisions regarding handling of grievances, a court or the Board may not substitute its judgment for that of the union, instead, courts apply a "highly deferential" standard of review, "recognizing the wide latitude that [unions] need for the effective performance of their bargaining responsibilities." *O'Neill*, above, at 78; *General Motors Corp.*, 297 NLRB 31, 32 (1989). Mere union negligence does not breach the duty of representation. *United Steelworkers of America v. Rawson*, 495 U.S. 362, 372-73 (1990). To establish "discriminatory" conduct violative of the duty of fair representation, a plaintiff must establish that the union discriminated on "invidious" grounds, "*O'Neill*, above, at 81.

I do not believe that the General Counsel has established that Local 621 has discriminated against Gadson on "invidious grounds." The evidence does not establish that Sombrotto refused to represent Gadson because of his innocuous question to Sombrotto as to who elected him president. In addition, Sombrotto did not tell Gadson that he would not represent him. The cases cited by General Counsel, *Newport News Shipbuilding & Dry Dock*, 236 NLRB 1470, 1471 (1978) and *Service Employees Intl. Union, Local 579*, 229 NLRB 692 (1977), involved cases where the unions based their decisions not to process grievances virtually totally on the employers' versions of the incidents involving the employees.

Here, in contrast, Sombrotto considered the question of whether Gadson was a regular employee and consulted the Employer's records in order to determine the question. He investigated the matter and believed, in good faith, that, at the time of his discharge, Gadson was a shape employee and not a member of the bargaining unit or a regular employee who was covered by the collective-bargaining agreement. Sombrotto's conduct therefore fell within the "wide range of reasonableness" permitted a union's conduct.

I will therefore recommend that this allegation be dismissed.

III. THE REPRESENTATION CASE

A. The Objections to the Election

Relevant Principles

When an objection is filed asserting that the "laboratory conditions" of an election were violated by a party to an election, the decisional standard is whether "the conduct reasonably tends to interfere with the employees' free and uncoerced choice in the election. *Baja's Place, Inc.*, 268 NLRB 868, 868

(1984). As the objecting party, Local 813 has the burden of proving interference with the election. See *Jensen Pre-Cast*, 290 NLRB 547 (1988). The test, an objective one, is whether the employer's conduct has the tendency to interfere with the employees' freedom of choice. See *Taylor Wharton Division*, 336 NLRB 157, 158 (2001).

1. Objection No. 2

This Objection, in relevant part, states that the Employer committed objectionable conduct by "paying to all its employees during the week prior to the date of the election 'safety bonuses' of at least \$400 per employee. These payments were not scheduled to occur during the election period and the Employer has never regularly paid to its employees such bonuses. ... The Employer also told the employees [sic] the week prior to the election they would regularly received [sic] bonuses four times a year from now on."

Operations Manager Rizzo testified that the Employer began a "safety bonus" program in 2005. The program was suggested by the Employer's insurance agent to reduce the number of vehicle accidents and to encourage safety among the drivers and their helpers, who operate as a team. A notice to employees at the time stated that it would be a "monthly bonus" pursuant to which a driver would receive \$100 and a helper \$50 if their vehicle had no accidents which were their fault, be involved in no hit and run accidents, and receive no "unnecessary" traffic tickets. Accidents which were not the fault of the driver would not be counted against the driver or helper. The notice stated that the employees "will each receive a bonus every month" if they have no accidents, etc.

As stated in the notice, employees were supposed to be issued a check each month based on their prior month's performance. Rizzo stated, however, that so much time was consumed in determining whether the employee was entitled to the bonus that the payments were delayed for months at a time. Employee Frank Madden testified that he did not receive a safety bonus check for two to five months, Rizzo telling him that he had not "caught up" with the paperwork.

For example, accident reports were sent to the Employer's administrator who decided who is eligible for the bonus. The administrator investigates the matter by obtaining the police reports to see if the driver was at fault in causing the accident. By the time the report was received and examined, the month in which the bonus was due had past. Often, a payment of \$200 or \$300 was made to a driver for two or three months' accident-free work. Rizzo testified that when the checks were delayed, "all" the drivers asked when they would be receiving their payment.

Rizzo stated that in late August or early September, 2007, he spoke with Ken Levine, the Employer's controller about changing the bonus program so that more time would be permitted to obtain the data necessary to determine whether the employee earned his bonus. They decided that payments would be made on a quarterly basis every three months rather than monthly. The amount and the basis of the bonus remained the same: the employee would earn a monthly bonus based on his performance that month, but the payment would be made quarterly. Rizzo testified that he informed two drivers, Freddie Gonzalez

and Jamie Matos, of this change.⁸ Local 621 president Sombrotto testified that the matter of the change in distribution of the payments was not raised during collective-bargaining negotiations which were ongoing at that time.

Rizzo stated that in determining in August or September when the next checks should be issued pursuant to the quarterly distribution, he believed that the checks would be distributed in late December, 2007 or early January, 2008. Because of this, the quarterly checks would be for the period September through November, 2007. Rizzo then reasoned that the Employer should “finish the whole [annual] cycle” by issuing a check for an additional fourth month – the month of December, and “start fresh in January.” Accordingly checks for four months were issued in early January in the week before the election. Frank Madden testified that he received a bonus check on the day of the election, but Rizzo denied distributing any bonus checks that day but conceded distributing all of them in the week before the election.

Rizzo stated that neither union had any impact on the distribution of the bonuses. However, Sombrotto stated that in early January, shop steward Gonzales told him that he was “not happy” that the Employer was late in distributing the safety bonuses. Sombrotto called Employer officials Glauca and DiBella, telling them that “you guys owe this bonus and you’ve been giving it, why don’t you give it.” They responded that they would “take care of it.”

The amounts of the checks varied according to whether the employee was involved in an accident in any of the four months. Twenty four drivers received checks of \$400 each in early January, representing a \$100 safety bonus per month for four months. According to the Employer’s records, 67 employees received safety bonus payments in January, shortly before the election.⁹ Of those, 59 received a bonus check for the fourth month, December, 2007, in January, 2008. There were 129 employees on the eligibility list.

Employer supervisor Staada testified that prior to the election the safety bonus was one of the most frequently asked questions by employees. Frank Madden testified that he asked Staada about the bonuses and Staada replied that the Employer could not distribute the bonuses at this time because it would be a “bribe.” Rizzo stated that Frank Madden “always” asked about the safety bonuses.

“The Board will infer that an announcement or grant of benefits during the critical period is coercive, but the employer may rebut the inference by establishing an explanation other than the pending election for the timing of the announcement or bestowal of the benefit. *Uarco, Inc.*, 216 NLRB 1 (1974). In making a determination, the Board will examine the size of the benefit conferred, the number of employees receiving it, the timing of the benefit, and how employees reasonably would view the purpose of the benefit. See *B & D Plastics*, 302 NLRB 245 (1991).

Here, it is clear that the Employer had a long-standing policy of granting safety bonuses for the legitimate reason of encouraging employees to drive safely and avoid accidents. The bo-

nuses were earned monthly with the employees’ good safety record, and according to the document announcing the program, they were to “receive a bonus every month.” The Employer maintained that it was unable to pay the bonus each month because of the time-lag in examining the reasons for accidents. If an accident was not the employee’s fault he was entitled to the bonus, but if the accident was the fault of the worker, he would not receive it. The Employer explained at hearing that obtaining a police report, examining it and determining whether an accident was the employee’s fault was time consuming, resulting in the late payment of bonuses.

First, the Employer’s explanation as to why it changed its payment system to a quarterly basis is suspect. The Employer claims that it did so because it could not obtain police reports to establish an employee’s responsibility for an accident early enough to enable it to make the bonus payment in the month following the month it was due. However, it made December’s payments in January, but offered no explanation why it was able to determine the employee’s eligibility for December’s payment so quickly. I accordingly find that the Employer’s change in its payment system to a quarterly system was objectionable.

Further objectionable conduct is the Employer’s payments of the bonuses in the week of the election and the fact that a fourth month, December, 2007, was included in the quarterly payment made at that time. According to the changed policy, only three months of bonus payments were to be made at one time, however, allegedly in order to “finish the cycle” and “start fresh” in January, a fourth month’s payment was made at that time. Regardless of the legitimacy of those explanations, the additional month’s payment must have been viewed as an extraordinary and unprecedented payment by the employees.

Thus, the timing of the payment, the amount paid, and the number of employees receiving the payment that is objectionable. The size of the bonus, \$400 to 24 employees whereas the maximum they should have been paid according to the changed policy was \$300, was substantial and unprecedented. *Star, Inc.*, 337 NLRB 962, 963 (2002). A total of 67 of 129 employees eligible to vote received some bonus payment in January, and 59 received a bonus check for the fourth month, December, 2007 shortly before the election.

In addition, no announcement was made in advance of the distribution of the checks that the manner of the payment was changed – either as to the timing of the distribution on a quarterly basis or that a fourth month would be included. The two employees who Rizzo stated he told of the change did not testify. Even if they did, apparently none of the other 127 eligible employees were told of the change. An employer cannot time the payment of a bonus in order to discourage union support. *Mercy Hospital*, 338 NLRB 545, 545 (2002).

It is clear that the payment of the bonuses in January, in the week before the election, or on the day of the election as testified by Frank Madden, would reasonably be viewed by employees as tending to influence their choice in the election.

The Employer has not established a legitimate reason for the payment of the bonuses so close to the election. Its claim that it wanted to finish the cycle and start fresh in January are not

⁸ Gonzalez and Matos did not testify at the hearing.

⁹ Charging Party Exhibit 7.

justifications for the unprecedented payments made in the week of the election.

I accordingly find and conclude that the bonus payments made in January, 2008 had a tendency to interfere with employees' free choice in the election and such conduct was objectionable. I accordingly will recommend that Objection No. 2 be sustained.

2. Objection No. 3

This Objection, in relevant part, states that the Employer and Local 621 committed objectionable conduct by "preparing and distributing to the employees a forged letter less than one week before the election date purporting to come from Local 813's president. This forged letter...contained alleged statements from Local 813 on matters of concern to eligible employees, namely their seniority rights if Local 813 won the election, which were never made."

The letter, dated January 14, 2008, written on Local 813's letterhead and bearing the purported signature of Sylvester Needham, president of Local 813, and addressed to Michael DiBella, an official of the Employer, states as follows:

I am writing this letter on behalf of the many members of this Local Union that are in your employ in Brooklyn, NY, and also members of this Local Union who have been transferred to Newark. These Local 813 members have vast experience in the garbage industry and have put their time in on the streets of New York. Many are concerned about where they will stand at your company in Newark.

We strongly urge you to consider recognizing their seniority on the job and within our local union, and ensure that all of these employees have positions to work in Newark. To start these employees with "New Hire" Seniority is completely unacceptable to our Local Union, and when we are successful in gaining bargaining rights we fully intend to protect the rights of Local 813 IBT members and their families, through any and all legal means including strike action.

Employee Frank Madden testified that he was given the letter by Local 621 steward Gonzalez a couple of days before the January 23 election. Madden testified inconsistently that he also saw the Employer's supervisor Staada handing out the letter, and then stated that he did not know if that was the case. Staada denied seeing the letter before the hearing or distributing it. Madden also saw the letter posted on a bulletin board near the Employer's dispatch office and on the counter of the dispatch office. Employees report to the dispatch office each evening for their assignments.

Madden gave the letter to Local 813 representative Cliff Lewis who told him that one of the individuals listed on the letterhead was deceased, and that the letter was not issued by Local 813. The names of Local 813's trustees listed on the January 14 letterhead are Joseph Chaloupka, Pedro Nieves, and Louis Romeo.

In support of the argument that the letter was forged, Local 813 counsel produced a Local 813 letterhead from November, 2006 which listed the same trustees – Chaloupka, Nieves and Romeo. Another letterhead dated August, 2007, however, listed the trustees as Debi Luetkemeyer, Thomas Lynaugh, and Pedro

Nieves. Apparently the argument is that Chaloupka and Romeo, having been trustees in 2006 and apparently replaced by Luetkemeyer or Lynaugh in 2007, would not have been trustees in January, 2008, when the suspect letter was issued.

Madden denied that any Local 813 representative told him that the former Waste Management drivers are entitled to seniority based on their work for that company, and in fact he testified that Lewis told him that Action Carting's employees would not lose their seniority if Local 813 was elected.

Local 813 distributed a flyer which stated that "Teamsters respect your seniority; The Teamsters Union knows that your seniority is decided by the date you started work at Action. No one hired after you will be given higher seniority." The letter also contained a quote by Local 813 president Needham: "I've worked in this industry. I know that protecting seniority is one of the most important parts of a Teamster contract. When you vote to join Teamsters Local 813, you won't lose your seniority – you'll strengthen it."¹⁰

Employer official Staada testified that employees told him that they were "definitely concerned" that they would be laid off since they did not have much seniority with Action Carting. Gadson testified that Local 621 president Sombrotto told him and other employees that if they voted for Local 813 the helpers would be at the "bottom of the seniority list, and you would lose your spot."

The Objection alleges that the Employer and Local 621 prepared and distributed the January 14 letter which was forged. First, there was no evidence that the Employer or Local 621 prepared the letter. Second, Madden's testimony on this point that supervisor Staada distributed the letter cannot be credited because he also testified that Staada did not distribute it. Third, there was no evidence that the letter was forged. Its author, Needham, did not testify. In addition, no Local 813 official or agent testified that the letter was a forgery, that it was not written by Needham, or that one or more of the trustees listed thereon was deceased. Indeed there was no testimony at all by Local 813 agents concerning the letter.

Local 621 speculates in its brief that Local 813 distributed the letter in order to have a "built-in" objection if it lost the election. Local 813 argues that the letter must be a forgery since it was inconsistent with its flyer distributed prior to the letter. First there is no evidence that the flyer was distributed prior to the letter. Moreover, one could speculate that Local 813's letter was an authentic, legitimate demand that the Employer recognize the seniority of its members. But then, when other long-standing Action Carting employees objected to that union's assertion of greater seniority rights, Local 813 issued its flyer agreeing that seniority should be based upon the start of work at Action Carting.

However, I need not engage in this speculation. There is simply no evidence that the letter was a forgery or that the Employer or Local 621 prepared or distributed it. I will recommend that this Objection be overruled.

¹⁰ There was no agreement among the parties as to when this document was distributed although Local 813 counsel stated that it was distributed before January 14. No Local 813 witness testified as to the date of its distribution.

3. Objection No. 6

This Objection alleges that during the critical period, the Employer discharged Shafi Gadson and Dominic Madden, and transferred Frank Madden in retaliation for their support for Local 813 and their failure to support Local 621. Inasmuch as I have found that the Employer unlawfully discharged Gadson and transferred Frank Madden in retaliation for their support for Local 813 and their failure to support Local 621, I will recommend that this Objection be sustained.

4. Objection No. 8

This Objection alleges that agents of the Employer committed objectionable conduct by having its supervisors position themselves outside the entrance to the voting area where voters had to pass in order to enter the voting area. The Objection also alleges that representatives and employee-supporters of Local 621 positioned themselves in the same area. The Objection further states that Local 621 supporters repeatedly chanted "vote for 621" and mentioned the name of the observer for Local 813, Shafi Gadson."¹¹

The election was held inside the facility's garage which is situated next to the dispatcher's office. The entry to the dispatch office is by staircase. The entry to the garage is via a ramp. The stair case and ramp are three feet apart, separated by a railing. Voters had to pass the dispatcher's office on their way into the garage to vote. The voting table was twenty to thirty feet from the garage entrance in the center of the garage.

Gadson was the election observer for Local 813. A pre-election meeting was held at which Local 621 president Sombrotto, Employer counsel Coxson, Gadson and the Board agent were present. Gadson stated that during the election the garage door was open and he could see and hear the activities outside the garage.

Gadson testified that after the voting in the morning session began he saw supervisor Alfano standing outside the doorway to the garage for 45 to 60 minutes speaking to all the employees who were going into the garage to vote. Gadson did not hear what he said to the voters. Gadson further testified that he saw Rizzo standing in that area for two to three minutes, and also saw Sombrotto standing there for a few minutes, after which he left the area. Gadson noted that he did not believe that Sombrotto spoke to any voters. Gadson stated that periodically, every 10 to 20 minutes, he heard someone shout "vote 621" but he did not see who said that. Also standing in that area were driver Nick Alfano and Local 621 steward Gonzalez who spoke to a few people. Gadson did not know what Gonzalez said.

Frank Madden also testified that in the morning session he saw Alfano and Rizzo standing near the entrance to the garage. Madden said that Alfano and Rizzo did not speak to him as he approached the entrance, but spoke to other employees who were "ranting and raving." Madden noted that another driver yelled at him to "vote 621 or you know what's going to happen." Madden also saw labor consultant Cruz at the entrance.

¹¹ The Report on Objections erroneously states that this Objection alleges that agents of the Employer conversed with employees and permitted agents of Local 621 to converse with employees who were preparing to vote, urging them to vote against Local 813 and in favor of Local 621, and threatening them if they did not support Local 621.

Sombrotto testified that during the first voting session he stayed inside the dispatch office. He denied speaking to employees who were there to vote, and denied congregating with employees at the entrance to the garage or speaking to employees as they came to vote.

Gadson stated that during the second voting session, he saw Alfano, Sombrotto, Gonzalez, Nick Alfano and employees standing immediately outside the garage. Gadson stated that ordinarily people congregate immediately outside the dispatch office, and he has seen Sombrotto in that area at the start of a shift in January, 2008, but not before that month. However, on the night of the election, these people were standing outside the entrance to the garage, not the dispatch office.

Gadson testified that during the second session he saw Sombrotto carry a three foot by three foot sign that said "621" and he posted it. Gadson noted that the sign was not visible from where he was seated in the garage. He also heard "621" chanted during that session.

Sombrotto testified that during that session he was in the back of the premises 200 to 300 feet from the polling place and in the paint shop area. He stated that a painter who supported Local 621 painted a sheet which was four feet by five feet with the number "621." The painter carried the sign with another employee in front of the polling place. Sombrotto followed them as they tried to post it on a wall. The procession lasted about two minutes. Sombrotto told them to get rid of it and the painter destroyed it. Sombrotto believed that some employees had voted by then.

Rizzo testified that during the time the polls were open he was either in his office or in the dispatch office. Rizzo also stood in front of the building but was not near the polls and could not see the entrance to the garage. While outside he was in the company of official Malinari and possibly Alfano, but they did not speak to employees while there. He did not see Sombrotto.

Alfano testified that at times he stood immediately outside the dispatch office during the election, smoking and speaking to others. He denied speaking to voters as they approached the polls.

In order to determine impermissible electioneering, the Board considers (a) whether the conduct occurred within or near the polling place (b) the nature and extent of the alleged electioneering (c) whether it is conducted by a party to the election or by employees and (d) whether the electioneering is conducted within a designated "no electioneering" area or contrary to the instructions of the Board agent. *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118, 1119 (1982).

First, the alleged impermissible conduct did not occur within the polling place, or within a designated "no electioneering" area or contrary to the Board agent's instructions. It took place outside the garage door which was 20 to 30 feet from the voting table. The parties present included Local 621 president Sombrotto and Alfano. Rizzo's presence in that area for two to three minutes during which he was not observed saying anything to anyone is not objectionable. Significantly, there was no evidence of what was said to the voters by Sombrotto or Alfano. At most, it may be found that they were present while employees shouted "vote 621."

There was also no evidence of “prolonged conversations between representatives of a party to the election and voters waiting to cast ballots.” *Milchem, Inc.*, 170 NLRB 362 (1968). There were no prolonged conversations and there was no evidence that voters were waiting to cast their ballots or were on line.

Local 813 argues that the “continual presence” of party representatives in the area where employees have to pass in order to vote is sufficient to overturn the results of the election, citing *Nathan Katz Realty LLC v. NLRB*, 251 F.3rd 981, 983 (D.C. Cir. 2001), and *Electric Hose & Rubber Co.*, 262 NLRB 186 (1982); *Performance Measurements*, 148 NLRB 1657, 1659 (1964). It further argues that Sombrotto’s presence at the entrance to the dispatch office near the polling area for no apparent purpose is objectionable. Local 813 argues that although the dispatch area is a place where employees usually congregate, there was no showing that Sombrotto or Alfano had every stayed in that area for a prolonged period of time.

The first question is whether Alfano, Sombrotto and Rizzo were continually present during the election. The precise hours of the election were not received in evidence.¹² The voting took place in two sessions. Gadson testified that the morning election began at 5:00 a.m. and a break was taken from 7:30 a.m. to 9:00 a.m. Accordingly, it may be assumed that the morning session ran from 5:00 a.m. to 7:30 a.m. Gadson testified that Alfano stood in the area for that session for 45 to 60 minutes, Sombrotto for a few minutes only and Rizzo for two to three minutes. Accordingly, it cannot be found that in the morning session the agents of the parties were “continually present.” *J.P. Mascara & Sons*, 345 NLRB 637, 639 (2005). There was no testimony concerning the length of time the agents stood in the entrance to garage during the second session.

Although there was some evidence that Alfano and Sombrotto spoke to voters, there was no evidence that they engaged in any electioneering or that any of their conversations related to the election. They did not enter the voting area or violate any instructions of the Board agent. In sum, there was no evidence as to what Alfano or Sombrotto said to any of the voters, much less that they engaged in electioneering. The testimony that someone shouted “vote 621” periodically is too insubstantial to constitute objectionable conduct. There was no evidence that any representative of any party uttered those words or that the electioneering took place within the polling area or was contrary to the Board’s agents instructions.

As to the poster, it was paraded in front of the voting place but was not visible within the voting area. It was visible for only a couple of minutes and then destroyed. I credit Sombrotto’s testimony that it was destroyed and not posted. I do not believe that Gadson was in a position inside the voting area to see whether it was posted. It was not prepared by a party to the election, but by employees, and was ordered to be taken down and destroyed by Local 621. Unlike the situation in *Pearson Education, Inc.*, 336 NLRB 979 (2001), cited by Local 813, the poster was not erected by a party to the election, it did not list a series of strikes engaged in by the union and was not hung and

did not remain in a place in which every employee had to pass in order to vote. Here, it was visible for only two to three minutes and was paraded in front of the building before it was removed, and was not in a no-electioneering area.

I accordingly will recommend that this Objection be overruled.

Conclusions as to the Representation Case

Inasmuch as I have recommended that Objections Nos. 2 and 6 be sustained, I will therefore recommend that the election held on January 23, 2008 be set aside, and that the representation proceeding be remanded to the Regional Director for the purpose of conducting a second election.

CONCLUSIONS OF LAW

1. By interrogating its employees about their union sympathies, the Employer violated Section 8(a)(1) of the Act.
2. By promising its employees benefits if they supported Local 621 and if they refused to support Local 813, the Employer violated Section 8(a)(1) of the Act.
3. By creating an impression among its employees that their union activities were under surveillance, the Employer violated Section 8(a)(1) of the Act.
4. By threatening its employees with reprisals if they supported Local 813 and if they failed to support Local 621, the Employer violated Section 8(a)(1) of the Act.
5. By unlawfully discharging David Zengewald, Shafi Gadson, and Kevin Meadows because of their activities in behalf of Local 813, the Employer violated Section 8(a)(3) and (1) of the Act.
6. By transferring Frank Madden to a location in Brooklyn, New York, and by changing his start time and the route assigned to him, the Employer violated Section 8(a)(3) and (1) of the Act.
7. The Employer has not violated the Act by discharging Dominic Madden or by constructively discharging Frank Madden, as alleged.
8. Local 621 has not violated the Act by failing to process a grievance over the discharge of Shafi Gadson.

REMEDY

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

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Inasmuch as I have found that Frank Madden quit his employment and has not been constructively discharged, no remedy will be ordered for his unlawful transfer or for the change in his route or starting time.

¹² Neither the tally of ballots nor the Stipulated Election Agreement which would have set forth the hours, were offered in evidence.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹³

ORDER

The Respondent, Action Carting Environmental Services, Inc., Newark, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating its employees about their union sympathies.

(b) Promising its employees benefits if they supported Local 621, United Workers of America and if they refused to support Local 813, International Brotherhood of Teamsters.

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

(d) Threatening its employees with reprisals if they supported Local 813 and if they failed to support Local 621.

(e) Discharging or otherwise discriminating against employees because they supported Local 813.

(f) Transferring, changing the starting time or changing the route assignment of employees because they supported Local 813.

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

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

(a) Within 14 days from the date of the Board's Order, offer David Zengewald, Shafi Gadson, and Kevin Meadows full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make David Zengewald, Shafi Gadson, and Kevin Meadows whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in Newark, New Jersey, Bronx, New York, and any other facilities, copies of the attached notice marked "Appen-

¹³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

dix."¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 1, 2007.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(g) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

(h) It is further ordered that Case No. 22-RC-12875 is severed and remanded to the Regional Director for Region 22 for the purpose of conducting a second election.

Dated, Washington, D.C. May 8, 2009.

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate you about your union sympathies.

WE WILL NOT promise you benefits if you support Local 621, United Workers of America and if you refuse to support Local 813, International Brotherhood of Teamsters.

WE WILL NOT create an impression among you that your union activities are under surveillance.

WE WILL NOT threaten you with reprisals if you support Local 813 and if you fail to support Local 621.

¹⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT discharge or otherwise discriminate against you because you support Local 813.

WE WILL NOT transfer, change your starting time or change your route assignment because you support Local 813.

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

WE WILL within 14 days from the date of the Board's Order, offer David Zengewald, Shafi Gadson, and Kevin Meadows full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to

their seniority or any other rights or privileges previously enjoyed.

WE WILL make David Zengewald, Shafi Gadson, and Kevin Meadows whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

ACTION CARTING ENVIRONMENTAL SERVICES, INC.