

D & T Limousine Service, Inc., and D & T Limousine Service, Inc., Debtor-In-Possession, Single Employer and/or Alter Ego to D & T Limousine Service, Inc. and International Brotherhood of Teamsters, Local Union 777, AFL-CIO. Cases 13-CA-36057, 13-CA-36058, and 13-CA-36129

June 23, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On January 29, 1998, Administrative Law Judge William G. Kocol issued the attached decision. The Respondent filed exceptions and a supporting brief with exhibits; and the General Counsel filed an answering brief to the Respondent's exceptions and a motion to strike the Respondent's exhibits.¹

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

The Board has considered the decision and the record in light of the exceptions and briefs² and has decided to affirm the judge's rulings, findings,³ and conclusions,⁴ and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, and orders that the Respondent, D & T Limousine Service, Inc., and D & T Limousine Service, Inc., Debtor-In-Possession, Single Employer and/or Alter Ego to D & T Limousine Service, Inc., Cleveland, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Richard Kelleher-Paz and Usha Dheenan, Esqs., for the General Counsel.

¹ We grant the General Counsel's motion to strike the R. Exhs. A and B which were attached to its exceptions. The attachments were not introduced into the record at the hearing. The Respondent does not contend that this evidence was unavailable during the hearing or that it is evidence newly discovered since the close of the hearing. See Sec. 102.48(d)(1) of the Board's Rules and Regulations.

² The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

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

⁴ In adopting the judge's conclusion that the Respondent is subject to the Board's jurisdiction, we additionally rely on the Respondent's failure to show any changed factual circumstances which would require us to depart from the Board's previous decisions that the Respondent is subject to Board jurisdiction. See *D & T Limousine Service*, 320 NLRB 859, 860 (1996); *D & T Limousine Co.*, 207 NLRB 121 (1973).

In adopting the judge's conclusion that City Supervisor Peggy Metz is a Sec. 2(11) supervisor, we find it unnecessary to rely on the judge's findings regarding her role in the evaluation of employees.

Kathleen M. Minahan and Ellyn Tamulewcz, Esqs. (Licata & Associates Co., L.P.A.), of Independence, Ohio, for Respondent.

James T. Glimco and William P. Logan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Chicago, Illinois, on December 3 and 4, 1997.¹ The charge, first amended charge, second amended charge, and third amended charge in Case 13-CA-36057 were filed on May 12, June 4, July 3, and October 23, 1997,² respectively; the charge, first amended charge, second amended charge, and third amended charge in Case 13-CA-36058 were filed on May 12, June 4, July 3, and October 23, respectively; the charge, first amended charge, and second amended charge in Case 13-CA-36129 were filed on June 4, July 3, and October 23, respectively; and an amended consolidated complaint (the complaint) issued on October 24. The complaint alleges that D & T Limousine, Inc. (Respondent) failed to hire employees Lacy McSwain and Edward Benedetto in violation of Section 8(a)(3) and (1) of the Act, and failed and refused to recognize the International Brotherhood of Teamsters, Local Union 777, AFL-CIO (the Union)³ as the collective-bargaining representative for a unit of driver employees in violation of Section 8(a)(5) and (1) of the Act.

Respondent filed a timely answer that denied the substantive allegations of the complaint. In addition, Respondent denies that the Board has jurisdiction over it; instead it contends that it is covered by the Railway Labor Act. Respondent also denies that the bargaining unit as described in the complaint is appropriate for purposes of collective bargaining. Finally, Respondent denies that Peggy Metz is its supervisor and agent within the meaning of Section 2(11) and (13) of the Act.

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

FINDINGS OF FACT

I. MIDWEST TRANSIT

The General Counsel contends that Respondent is a successor to Midwest Transit, Inc. (Midwest). Midwest conducted its operations from Ottumwa, Iowa, and transacted business in the Iowa and Minnesota area. Its director is Boyd Caster. Midwest also maintained a place of business at 707 York Road, Elmhurst, Illinois (the Elmhurst facility), where it provided transportation services to railroad personnel. Specifically, Midwest would receive calls from a railroad to pick up railroad personnel, usually railroad crews, and transport those persons to another location. Midwest dispatchers would then contact a Midwest driver by pager or two-way radio, and the driver would go to the location and, using Midwest vehicles, transport

¹ The complaint initially named another respondent as well—Midwest Transit, Inc. At the start of the trial Midwest Transit, Inc. entered into a settlement agreement that was approved by the Regional Director; the General Counsel's subsequent motion to sever those portions of the case pertaining to Midwest Transit, Inc. was granted. In accordance with that motion, I have amended the caption of the case to reflect the remaining named Respondent.

² All dates are in 1997 unless otherwise indicated.

³ The parties stipulated, and I find, that the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

the railroad personnel and their luggage to the desired location, such as a hotel or a railroad base of operation. Frequently Midwest drivers transported railroad crews from one location in the railroad yard to another location in the same yard. While working in the railroad yard, Midwest drivers were expected to follow safety and other rules promulgated by the railroads. Midwest employed about 85 to 90 employees; approximately 30 worked at the Elmhurst facility.

Midwest had a contract with Crew Transport Services (CTS) to provide the services to the railroad; CTS acted a broker for the railroad concerning those services. The contract between Midwest and CTS covered services provided by Midwest for CP Rails Systems, a railroad. Under the contract Midwest was obligated to furnish and maintain passenger vehicles and licensed drivers to transport the railroad's crews between points specified by the railroad, and to be subject to call by the railroad at all times to do so. Midwest agreed to obtain and maintain all licenses and permits needed to perform the transportation services and to comply with all pertinent laws, ordinances, and vehicle inspection requirements. The contract specified that Midwest must require all passengers to be seated in an upright position and wear a seat belt before the vehicle could be operated. The railroad was permitted to inspect Midwest vehicles upon 24 hours' advance notice. The contract specified that Midwest and its employees were not employees of either CTS or the railroad; instead Midwest was considered to be an independent contractor. Midwest was required to "remove from service any driver for incompetence, neglect of duty, or misconduct, or for behavior detrimental to Railroad operations." The contract permitted CTS or the railroad to report inadequate performance by Midwest drivers and terminate the contract for failure of competent and efficient performance by the drivers, but that CTS and the railroad "shall have no control over the employment, discharge, compensation for, or service rendered by" Midwest. The contract further specified that in the event that Midwest exercised "its sole and exclusive right to discharge any of its drivers" and thereafter CTS or the railroad were sued by the discharged employee, Midwest would reimburse CTS and the railroad for its costs in defending the lawsuit. The contract required Midwest to obtain and maintain certain specified insurance, preserved for the railroad the right to use the services of other transport businesses, required a response time of 30 minutes subject to weather and highway conditions, and specified the manner in which mileage charges were to be calculated. The contract specified in detail the type of vehicles Midwest was to use to transport the railroad personnel, including requirements that the vehicle have air conditioning, a cage or netting between the rear seat and the back door for luggage storage, a "2.5 lb. (ABC) fire extinguisher," and other details.

Elmhurst is a suburb of Chicago, Illinois. The geographic area covered by the Elmhurst facility extended into Madison and Milwaukee, Wisconsin, to the north, Terra Haute, Indiana, to the east, and Davenport, Iowa, to the west. Most of the runs, however, consisted of local transport.

The Elmhurst facility office is located on a strip mall; it contained two desks. One desk was a dispatch desk that operated 24 hours a day; the other desk was used by Peggy Metz, office manager. Caster was not permanently stationed at the Elmhurst facility, but he did frequently visit the Chicago area. Other than Metz, Midwest employed only dispatchers and drivers at the Elmhurst facility. On very rare occasions, Metz would drive a

vehicle. While employed by Midwest, Metz was responsible for hiring, training, disciplining, evaluating, scheduling, and terminating the dispatchers and drivers. As Caster described Metz' duties "She ran the whole operation here."⁴ Metz reported directly to Caster. All the drivers and dispatchers at the Elmhurst facility were hourly paid; Metz was the only person at that facility who received a salary.

An organizing campaign was conducted by the Union among the drivers employed by Midwest. The campaign began in about February, when Lacy McSwain, then employed by Midwest as a driver, contacted William Logan, business agent and organizer for the Union, by telephone. McSwain told Logan that some of the employees of Midwest wanted to meet to discuss joining the Union. On February 11, a meeting was held at a nearby fast food restaurant. Present were Logan, McSwain, and two other employees. The employees asked questions and each signed an authorization card; they also took about 30 cards with them to distribute to other employees. During this time McSwain also talked to several employees about the Union. In about 2 weeks, McSwain returned about 12 or 13 signed authorization cards to Logan, who then filed a petition with the Board.⁵

On March 31, the parties entered into a stipulated election agreement for a unit of "All regular and full-time and part-time drivers employed by [Midwest] at its facility located at 707 York Road, Elmhurst, Illinois, 60126; but excluding all office clerical employees, technical employees, management employees, and guards and supervisors as defined in the Act." In that agreement Midwest stipulated that it was an employer engaged in commerce within the meaning of the Act. A mail ballot election was conducted by the Board beginning April 9 and the ballots were counted on April 25. The results were that 16 employees cast ballots in favor of the Union and 9 employees voted against the Union; challenged ballots were not sufficient to affect the outcome. Present at the counting of the ballots were representatives of the Union, Midwest, and the Board; the only employee present was McSwain. On May 16, the Regional Director for Region 13 certified the Union as the collective-bargaining representative for the employees of Midwest in the unit described above.

Meanwhile, on or about April 8, McSwain had a conversation with Metz. McSwain asked Metz if the rumor was true that Caster was closing down the business if the Union got in, and Metz answered yes, Caster is locking the doors if the Union came in. Metz also said that they knew that McSwain and employee Edward Benedetto had gone out and organized for the Union. McSwain asked Metz if she had proof, and Metz responded that she just knew that they had gone out and gotten the Union. Benedetto, however, had not in fact been involved

⁴ These facts are based on the testimony of Caster, who I conclude is a credible witness in this regard. His testimony on this matter was corroborated by employee William Newberry. I have considered the testimony of Metz that she did not act in a supervisory capacity and that she merely presented Caster with the facts and Caster then made the decisions. I reject this testimony. Not only is it contradicted by Metz' superior, Caster, and an employee, Newberry, it is contradicted by records maintained by Midwest. See, e.g., G.C. Exhs. 17, 18, and 19. Her testimony on this matter is so unsupportable that it tends to undermine her credibility on other matters as well.

⁵ These facts are based on the uncontradicted testimony of McSwain. I note that this testimony was corroborated in pertinent part by the testimony of William Logan, business representative, and employees William Newberry and Rita Andrews.

in the union organizing campaign.⁶ About 2 days later, on April 10, Midwest gave CTS notice that Midwest was canceling its contract with CTS effective 30 days later. At the request of CTS, Midwest agreed to continue to operate until May 15, at which time Midwest ceased to operate the Elmhurst facility.⁷

Respondent took over the operation of the Elmhurst facility on May 15. About a week before that time, Helen Spinner, Respondent's regional manager, began interviewing Midwest employees at a nearby hotel. Caster encountered Spinner in the hotel and told her that she could use Midwest's office to hand out applications to Midwest's employees. About that same time Midwest employee William Newberry encountered Spinner and Darrell Stanley, Respondent's director of safety and training, at a railroad yard. Stanley was there to assist Spinner in interviewing employees and to conduct orientation programs for newly hired employees. At the conclusion of one conversation that Newberry, Stanley, and Spinner had, Spinner commented that there was a union being voted on at Midwest, and Newberry said yes.⁸

On or about May 9, employee McSwain encountered Metz, Spinner, and Stanley at the Elmhurst facility. Metz identified McSwain to Spinner and Stanley by saying "that's Lacy there", and Metz told McSwain that they were taking over the Company. McSwain later talked directly to Stanley and was told about Respondent's operations and benefits; she was given an application for employment. Stanley also told McSwain that the railroad did not want any union drivers because if they went on strike they would stop transporting the crews, and that Respondent did not want the Union either. McSwain told Stanley that he was misinformed; that the employees had just voted a union in and were union employees. Stanley answered that their attorneys had told them that it had nothing to do with Respondent; that they were union under Midwest. McSwain filled out the application that evening and returned it to Stanley the next day. Stanley said that he was glad that McSwain had decided to fill out the application and that he would let McSwain know when Respondent was interviewing employees. At the hearing, Stanley acknowledged that before he interviewed McSwain he was aware of the fact that the employees of Midwest were represented by a union. Stanley also admitted that when he first interviewed McSwain, he was favorably impressed, but that McSwain returned some time later and "started saying that we have a union here and if you don't, you know, allow us to have a union we're going to do this and we're going to do that." Stanley further admitted that after he listened to McSwain talk about the union, "I went back in and I changed my judgment on her at that point in time because of her actions."⁹ Stanley passed these opinions about McSwain on to Spinner.

⁶ These facts are based on the testimony of McSwain, who I conclude is a credible witness in this regard. I have considered the testimony of Metz that she did not make any antiunion statements. Based on my observation of the demeanor of the witness, the conclusory nature of the testimony, as well as other defects in Metz' credibility described elsewhere in this decision, I reject that testimony.

⁷ These facts are based on the uncontradicted testimony of Caster.

⁸ These facts are based on the credible testimony of employee Newberry.

⁹ Stanley also denied that he told McSwain that Respondent's attorneys had told him that they did not have to worry about a union because that was with Midwest. I do not credit that denial. As described below, Stanley's testimony at trial differed significantly from a pretrial affidavit he signed concerning events in this case.

On or about May 10, McSwain had an encounter with Metz. McSwain had worked a 24-hour shift and had left a note for Metz that Metz should give McSwain's paycheck to another employee so that McSwain would not have to return to the facility that day to pick up her check. McSwain returned home and had just lain down to rest when the employee called and said that Metz did not give the employee McSwain's check. McSwain had to get up and return to the Elmhurst facility from her residence in the city of Chicago to get her check. While at the facility McSwain asked Metz about the note she had left concerning her check, Metz answered that McSwain did not write the note. McSwain responded that she had, in fact, written the note. Metz made McSwain sign for her paycheck despite the fact that McSwain had never been required to do so in the past. This encounter occurred in the presence of Spinner. Also, McSwain admitted that as a general matter she did not get along well with Metz.¹⁰

After McSwain heard that Respondent was meeting with employees and she had not been invited, McSwain asked Metz about that subject. Metz explained that if someone tried to bring a union in at Respondent, it would do the same as Midwest had, that it would fire you or try to find a way to get rid of you. On about May 14, McSwain went to the hotel where she heard that Respondent was meeting with employees. She first encountered Caster at the hotel, who "busted out and laughed" when he saw McSwain at the hotel. She then went to the door of the room where Respondent was conducting the meeting and met Spinner. Another employee was at the door with McSwain, and Spinner let the other employee in the room. Spinner told McSwain that some of the employees were not selected and McSwain was one of them. McSwain asked why, and Spinner answered that she did not have to give a reason. McSwain said thank you and left.¹¹

Turning to McSwain's work history while she was employed at Midwest, McSwain received an "Employee of the Month" award based on her work performance in March 1995, and she received a cash award of \$100 at that time. Metz asserted that McSwain had problems abiding by Midwest's policy concerning watching television in Midwest's vehicle while working. However, McSwain credibly explained that during the time she worked for Midwest she would watch a portable television in her vehicle while working. However, Midwest then prohibited employees from having a television in their vehicles while there were passengers in the vehicle. After that time McSwain did not use her television again in her work vehicle. Metz also claimed that McSwain would "click" her radio in an effort to avoid receiving calls, and that McSwain was reprimanded for that reason. McSwain credibly denied that had ever done so or that she was ever reprimanded for "clicking" the radio in her vehicle. She explained that if someone was "clicking" their

¹⁰ The foregoing facts are derived from the testimony of McSwain. Metz' testimony concerning this incident again appears exaggerated; it is not credited. Spinner did not testify at the hearing. Although the complaint alleged and Respondent admitted that Spinner was a supervisor and agent at all times material, the evidence shows that at the time of the hearing Spinner was no longer in a supervisory position but instead was a driver. Under these circumstances, I do not draw a negative inference from Respondent's failure to call Spinner as a witness.

¹¹ These facts are based on the testimony of McSwain, who I conclude is a credible witness in this regard. As stated, I have considered the general testimony of Metz that she never made antiunion statements, but I do not credit that testimony.

radio, it was impossible for the office to know which vehicle was causing the “clicking.” Metz also claimed that McSwain had called her a “white bitch” and that McSwain had told Metz to “shove the white jimmy up my white ass.” McSwain credibly denied that she ever called a fellow employee a “white bitch” or that she made the other statement described above.¹²

Turning now to the facts concerning alleged discriminatee Edward Benedetto, at the hearing Stanley testified that the only contact that he had with Benedetto was when Stanley was closing his last orientation class. Benedetto walked into the hotel room and Stanley asked Benedetto who he was. Benedetto answered and asked for an interview. Stanley gave Benedetto a time and place when he would be interviewing employees. Benedetto said okay, fine, and left.¹³ However, Stanley did not interview Benedetto because Stanley had to abruptly leave town due to a family emergency.

On or about May 10, employee Benedetto gave Spinner an employment application at the Elmhurst facility. Spinner explained that Respondent was officially taking over at midnight on May 15, and she explained some of Respondent’s procedures. Spinner said that they were going to check the driving records of the employees and look over the applications and that most of the employees of Midwest would be hired. Spinner said that they would contact the employees the following week. Respondent then conducted a search of Benedetto’s driving record and discovered that he had a good driving record. At the hearing, Stanley admitted that Respondent would not incur the expense of a driving record search if after the interview it had been decided not to hire the applicant. The next week Benedetto did see a sheet of paper which listed the drivers scheduled for orientation meetings with Respondent, but his name was not on the list. Benedetto was not hired by Respondent.¹⁴

Turning to Benedetto’s work record while he was employed at Midwest, on November 26, 1996, Benedetto received a written note from Metz that listed several problems that had come to Metz’ attention. Among the problems noted was that Benedetto had referred to other employees as “niggers.” Metz indicated that these problems could not continue, and that Caster had spoken with Benedetto about his use of this racially

¹² The foregoing facts are again based on the credible testimony of McSwain. Metz’ testimony is totally uncorroborated and unsupported by documentary evidence. Even more importantly, as described below, it is clear that these alleged defects in McSwain’s work history were not asserted as reasons for Respondent’s failure to hire McSwain until after the hearing opened as an obvious afterthought. For these reasons as well as a pattern of difficulty I have described concerning Metz’ credibility, I do not Metz’ testimony.

¹³ Respondent, in its brief, refers to this testimony as support for its contention that “Benedetto interrupted a new employee orientation and placed demands on Mr. Stanley.” Of course, this testimony does not support Respondent’s contention.

¹⁴ These facts are based on the uncontradicted evidence in Benedetto’s affidavit. Portions of that affidavit were admitted into evidence pursuant to Rule 804(b)(5) of the Federal Rules of Evidence. Counsel for the General Counsel represented that Benedetto was unavailable to testify because he was hospitalized undergoing treatment for cancer and a heart ailment. Respondent accepted that representation. Counsel for the General Counsel also provided the affidavit to Respondent prior to the hearing with Benedetto’s address at the hospital. Portions of the affidavit were received to show what Benedetto and Respondent said and did concerning Benedetto’s application for employment with Respondent.

derogatory language.¹⁵ On December 11, 1996, Benedetto received a written note from Metz that listed several occasions when Benedetto arrived late to pick up crews for long haul runs. Metz indicated that this was not acceptable and Benedetto must be on time to pick up the railroad crews. On May 8, 1997, Benedetto was given a written note from Metz concerning his refusal to take certain runs. Metz instructed him to take the runs.

In a statement of position supplied to the Regional Director during the investigation of the charge in this case, Respondent’s attorney gave the reasons why Respondent failed to hire McSwain and Benedetto, and attached to that position statement an affidavit signed by Stanley dated June 23. Concerning McSwain, the position statement indicates:

During her interview, Ms. McSwain “put other applicants down,” “challenged that Midwest’s city supervisor exhibited favoritism to certain drivers” and “complained about the manner in which Midwest ran its business.” Prior to the interview, Ms. Spinner also witnessed an incident between Ms. McSwain and Peggy Metz wherein Ms. McSwain threatened to “raise Cain” if Midwest did not give her what she demanded. Ms. Spinner viewed Ms. McSwain’s conduct inappropriate and not in keeping with the environment she intended to foster at the Elmhurst facility.

....

Mr. Stanley also interviewed Ms. McSwain and initially considered hiring her. However, Ms. McSwain returned to the dispatch office the next day before a hiring decision had been made and angrily confronted Mr. Stanley. As a result of the disrespectful attitude, Mr. Stanley decided not to hire her.

Concerning Benedetto, the position statement reveals:

Mr. Benedetto’s conduct during his interview was equally brash. He too criticized fellow applicants and showed no respect for management.

....

Mr. Stanley never interviewed Mr. Benedetto. His only encounter with Mr. Benedetto was when Mr. Benedetto rudely interrupted an orientation meeting and demanded to know when he would be interviewed.

The position statement concludes:

Ms. Spinner and Mr. Stanley’s negative encounters with Ms. McSwain and Mr. Benedetto were consistent with the employment problems that Boyd Caster, owner of Midwest, experienced with Ms. McSwain and Mr. Benedetto. In fact, Mr. Caster had advised D&T that he did not recommend hiring Mr. Benedetto and Ms. McSwain because of problems such as unexplained mileage on vans, unavailability by radio and unexcused work absences.¹⁶

Stanley, in an affidavit attached to the position statement, states the following concerning McSwain and Benedetto:

¹⁵ The General Counsel, in his brief, urges that I discredit the evidence concerning Benedetto’s use of racially derogatory language. I decline to do so. Unlike much of Metz’ other testimony, this incident is supported by specific, detailed, documentary evidence.

¹⁶ Only par. 10 and attachment C of the position statement were received into evidence.

When I first interviewed Lacy McSwain, my initial thought was that we should hire her. However, the next day (before I made a hiring decision), Ms. McSwain returned to our facility and angrily confronted me about a conversation she had had with her union representative. After I observed Ms. McSwain's confrontational attitude and disrespectful demeanor, I decided not to hire her.

....

Ms. McSwain was refused employment because she displayed a poor and unprofessional attitude and did not comport herself in a manner befitting a D&T employee. Ms. McSwain was not refused employment because she was a union advocate. My only contact with Mr. Benedetto was when he interrupted a new employee orientation I was conducting and demanded to know when he would be interviewed. I advised Mr. Benedetto that I was in the middle of a class and could not interview him at that time. Boyd Caster, the owner of Midwest, told me that he did not recommend that D&T hire Ms. McSwain or Mr. Benedetto because he experienced several problems with them during their employment with Midwest including unapproved absences from work and unexplained mileage on Midwest vans. Mr. Caster also related that he had problems reaching these individuals by radio.¹⁷

Employee Newberry picked up an application for employment with Respondent on a desk at the Elmhurst facility on about May 15; Spinner and Metz were present in the office at the time. Metz then told Newberry that there was going to be a meeting at a nearby hotel for applicants, and Newberry attended the meeting on about May 16. Present at this meeting were several former drivers of Midwest, Spinner, and Stanley. Spinner told the applicants what the pay rate and benefits would be as an employee of Respondent. Specifically, Spinner said that the pay rate would be \$6.25 per hour and \$6.50 per hour after 90 days, and there would be no overtime pay. Newberry had been paid \$6.40 per hour, with paid overtime, as an employee of Midwest. Spinner also announced that the employees would use the same forms that they had used with Midwest to complete their paperwork and they would report to

¹⁷ Metz testified to various alleged problems that occurred during McSwain's employment at Midwest (testimony that I have not credited above), and that she advised Spinner of these problems before the employees were hire by Respondent, but that she did not discuss the employees' union activities with Spinner. I conclude that opposite is true. The foregoing statement of position makes no reference to any input from Metz concerning the McSwain's or Benedetto's alleged poor work record, nor does it assert those alleged infractions as reasons why Respondent failed to hire them. I conclude that Metz' testimony is nothing more than an afterthought designed to buttress Respondent's case at hearing. I do conclude that Metz spoke with Spinner about certain employees, but I do not credit Metz' denial that they discussed the union. It seems unlikely that she and Spinner would discuss the employees but omit to comment on the employees' union activities, activities that played a part in the shutdown of Midwest and Metz' loss of her job with Midwest. I have also considered the testimony of Padgett that he was advised by Caster of Midwest that Benedetto used racial slurs and was an "aggravator" and that Caster had concerns about a worker's compensation claim made by McSwain. I do not credit this testimony. It was not corroborated by Caster. Of course, Padgett denied that he and Caster discussed the Union. I also do not credit Padgett's rather incredible testimony concerning the role he had in decision not to hire Benedetto and McSwain.

Metz. Spinner said that if the union came in, or was voted in, Respondent "would fold up, it would be out of there."¹⁸

In early May, Midwest employee Rita Andrews heard that Respondent was giving out employment applications. She called Metz at the Elmhurst facility, who advised Andrews that Respondent was having an orientation meeting at a nearby hotel. Metz advised Andrews to bring her driver's license and birth certificate. Andrews brought those documents to the Elmhurst facility and showed them to Metz, who recorded Andrews' license number and date of birth. Metz said that Andrews could go to the meeting at the hotel and that Spinner would be expecting her there. Andrews then went to the meeting that was attended by several drivers and Spinner. However, this was a different meeting from the one described above that Newberry had attended. Spinner explained Respondent's pay-scale and benefits, and she explained that because Respondent was short staffed, employees would be working 12-hour shifts for a period of time. While employed at Midwest, the employees had worked 8-hour shifts, although they sometimes worked back-to-back shifts. Employees were given a written road test and filled out an application. Spinner also said that Respondent was nonunion and there would not be a union at Respondent.¹⁹

On May 14, Respondent approved the hiring of Metz as Respondent's "Local supervisor" for the Elmhurst facility, effective May 16. She was later told that her title was "city supervisor."

On May 15, Caster met with Thomas Padgett, Respondent's president, at a restaurant near Midwest's office. They discussed Respondent's desire to take over Midwest's office space, and Caster gave Respondent information on that subject. Respondent thereafter entered into a lease for the same facility with the property owner. Respondent also agreed to purchase Midwest's communication system, consisting mostly of two-way radios, and that communication system was then removed from Midwest vehicles and placed in Respondent's vehicles. Respondent also purchased all the office equipment used by Midwest at the Elmhurst facility; this consisted of two desks, chairs, a fax machine, a copy machine, a file cabinet, and telephone equipment.

Respondent thereafter operated out of the same office that Midwest had operated out of, using the same office and communications equipment. The parties also stipulated that of the drivers in the unit described in the complaint hired at the Elmhurst facility by Respondent, a majority had formerly worked as unit employees for Midwest.

¹⁸ These facts are based on the testimony of Newberry, who, at the time of the hearing was employed by Respondent as a driver. I conclude that Newberry is a credible witness. As indicated above, Spinner did not testify at the hearing. I note that counsel for the General Counsel stated that he was not alleging any statement made by Spinner at this meeting as an unfair labor practice, and no such allegation is made in the complaint.

¹⁹ These facts are based on the testimony of Andrews who, at the time of the hearing, was still employed by Respondent. I conclude that her testimony is credible. As noted above, Spinner did not testify at the hearing. Here again counsel for the General Counsel stated that he was not alleging any statement made by Spinner at this meeting to be an unfair labor practice nor is there any such allegation in the complaint.

II. RESPONDENT'S BUSINESS

A. The Prior Cases

Respondent, a corporation, is engaged in the business of transporting railroad personnel at various facilities located in several States, including Illinois. Respondent's gross annual revenues exceed \$500,000 and during 1997 Respondent performed services valued in excess of \$50,000 to other enterprises within the State of Illinois which meet the Board's jurisdictional standards.

Although Respondent satisfies the Board's monetary standards for asserting jurisdiction, Respondent contends that it is covered by the Railway Labor Act (RLA) and therefore not subject to the Board's jurisdiction.²⁰ The Board has dealt with this issue as raised by Respondent on two previous occasions. In *D & T Limousine Co.*, 207 NLRB 121 (1973), the Board considered the argument that Respondent was subject to the RLA. The Board noted the fact that Respondent existed solely to furnish transportation services for personnel employed by the Penn Central Railroad and submitted the issue to the National Mediation Board (NMB) for its determination of whether Respondent was covered by the RLA. The NMB decided that Respondent was not either a carrier by railroad or a company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad; it concluded that Respondent was not covered by the RLA. The Board therefore asserted jurisdiction over Respondent. More recently, in *D & T Limousine Service*, 320 NLRB 859 (1996), the Board again considered whether Respondent was covered by the RLA. The union in that case filed a petition on June 28, 1995, seeking to represent certain employees at Respondent's Selkirk, New York facility. A hearing was held on July 14, 1995, and the Regional Director for Region 3 transferred the case directly to the Board. On February 26, 1996, the Board issued its decision. The Board found that Respondent was engaged in providing transportation services to the railroad industry with its principal place of business in Cleveland, Ohio, and various other facilities located throughout the United States. The Board noted its prior decision involving Respondent and decided that it would not again submit the matter to the NMB because Respondent failed to show that it had undergone a jurisdictionally significant change since the earlier case. In doing so the Board noted that since the earlier case Respondent had grown and now contracted to provide services with several railroads as opposed to only one railroad, but the Board held that this was not a jurisdictionally significant change. The Board also rejected the contention that the contracts that Respondent had with the railroads allowed the railroads to exercise more discretion over Respondent's operations than had been the case in 1973. The Board noted that although Respondent's employees were required to comply with the railroad's rules and were often dispatched by railroad employees, and that Respondent was required to provide liability insurance and furnish and maintain a two-way radio for every van, this was not significantly different from the way Respondent operated in 1973. The Board found that Respondent was under no contractual obligation to fire employees according to the wishes of the railroads. The Board also considered Respondent's contention that it had undergone a reorganization which has centralized

²⁰ Sec. 2(2) of the Act excludes from the definition of "employer" any person covered by the Railway Labor Act. Sec. 8(a), in turn, applies only to an "employer" as defined by the Act.

control in the Cleveland, Ohio office. However, the Board found that after the reorganization Respondent's corporate officers exercised control over day-to-day operations, such as investigating a complaint about a particular employee and making the final decision about the hiring of all applicants. The Board also relied on certain contentions made by Respondent in its brief in that case as further support for the conclusion that Respondent maintained control over its own operations. Chairman Gould, in a concurring opinion, noted his position that the Board should not as a general practice refer cases involving RLA jurisdictional claims to the NMB. The Board remanded the case to Regional Director for resolution of unit issues.

The Acting Regional Director for Region 3 then issued a supplemental decision and direction of election.²¹ In that decision the Acting Regional Director concluded that a unit limited to the drivers at the Selkirk facility was not appropriate for purposes of collective bargaining. In doing so the Acting Regional Director noted the centralization of labor relations and administrative functions in Respondent's operations. Significantly, the supplemental decision found that the Selkirk drivers had a significant degree of contact and interchange with drivers employed at other facilities within Respondent's Albany division, that the drivers at the Selkirk facility did not have separate local supervision, and that the Selkirk drivers did not have a single location that was the focal point of their work. In the latter regard, the supplemental decision noted that Respondent did not have an office or other facility of its own at Selkirk; instead, the drivers visited the city supervisor at home on a weekly basis to submit their paperwork and receive their paychecks. The Acting Regional Director concluded that the smallest appropriate unit included drivers at all Respondent's facilities in its Albany division. Finally, the Acting Regional Director concluded that there was insufficient evidence to support the claim that city supervisors were supervisors within the meaning of Section 2(11) of the Act.

B. Respondent's Overall Operations

Respondent was founded in 1969 as a family owned and operated business in the Cleveland, Ohio area and then expanded operations into several states. At the time of the hearing, Respondent employed about 500 persons in several States, with its headquarters in Cleveland. It services one main railroad—Con Rail—but has several smaller contracts with other railroads. It provides services exclusively for railroads. The contract that Respondent has with Con Rail provides that Respondent is to be considered an independent contractor and not an employee or agent of the railroad. It requires that Respondent comply with all applicable laws and regulations. Respondent acknowledges its full and exclusive responsibility concerning matters such as unemployment insurance, medical and retirement benefits, etc. The contract covers matters such as the time in which

²¹ After the close of the hearing in this case, the General Counsel filed a motion to strike the supplemental decision from the record. Although the General Counsel is correct that the supplemental decision was not specifically identified and offered as an exhibit but was instead included with another of Respondent's exhibits, I will not strike the supplemental decision from the record. That decision is relevant to the issue of jurisdiction and in any event is the type of document that is subject to administrative notice. The General Counsel's other posthearing motion to strike a regional director's decision attached to Respondent's brief is also denied.

Respondent is expected to respond to requests for transportation from the railroad, the general type of vehicles to be used by Respondent, the maximum age of those vehicles, equipment that is to be maintained in each vehicle, the railroad's right to conduct inspections of the vehicles, and even includes the size of the reflective tape that is to be used on the vehicles.

As described above, Respondent provides transportation services to railroad personnel. Pursuant thereto, the railroads designate the times and places where Respondent is pick and transport the railroad personnel. The railroads even insist that the reflective tape that Respondent uses on its vehicles be the proper color. Due to the highly competitive nature of the business, Respondent feels compelled to agree to such demands since the railroads might otherwise take their business elsewhere. On one occasion, at a time not specified in the record, the railroad asked that a driver be terminated for unsafe driving; Respondent discharged the employee. The record does not reveal how often this occurs. The railroads at times requests Respondent to hire a particular employee, and Respondent attempts to comply with the request. Again, the record does not reveal how frequently this happens. The record shows that in 1991 Respondent discharged Spinner for driving under the influence. The railroad employees signed a petition requesting that Spinner be reinstated, and Respondent reinstated her under probation.

Organizationally, Respondent is run by Thomas Padgett Jr., president. Reporting to Padgett are Ray Dolish, chief operating officer; Ralph James, chief operating officer; Darrell Stanley, director of safety and training; and Brian James, vice president. Dolish's role is in planning for Respondent's operations while Ralph James handles the day-to day operations. Brian James takes care of quality assurance. Stanley travels to Respondent's facilities and teaches employees defensive driving courses. Complaints concerning unsafe driving by Respondent's drivers may be reported to Stanley's office for investigation by use of an "800" telephone number. All of these individuals work out of Respondent's main office in Cleveland. Respondent's budget is developed by personnel in the main office in Cleveland. Safety policies are also promulgated and administered through the main office. Employee compensation and benefits are developed and administered in the Cleveland office. Payroll matters are handled there and personnel files are kept there. Advertisements for hiring new employees are placed from the main office, and applicants may call an "800" telephone number for additional information. Interviewing of applicants, however, occurs at the local facility. Respondent has a central dispatch facility that can send long road trip dispatches directly to drivers. Local dispatchers handle the shorter local trips.

Respondent also employs five regional managers who exercise supervisory and managerial authority in one of five regions. Each region consists of a number of facilities. Respondent maintains a handbook for its "managers/supervisors." The manual makes clear that Respondent retains the sole ability to hire, discipline, and evaluate the performance of its employees. It is also clear from the manual that Respondent retains the ability to set the wages and benefits of its employees, subject to the marketplace considerations and the amount of money it receives from its customers for the services that it provides to them. The manual contains procedures to be followed in interviewing and hiring employees, including informing applicants that while Respondent provides services to a railroad, it is not owned by any railroad. The manual sets forth certain minimum

requirements for an applicant to be hired, such as age, a safe driving record, etc. Employees who worked for Respondent in the past may not be rehired by the "manager/supervisor" without first obtaining the approval of the main office in Cleveland.²²

Respondent employs drivers, dispatchers, and city supervisors at the individual facilities. City supervisors are generally responsible for collecting and forwarding the paperwork generated at an individual facility in the course of Respondent's operations. Respondent also maintains a handbook for its employees. The handbook indicates that Respondent is dedicated to selecting, retaining, and promoting employees based on their ability, performance, and experience, to providing a safe working environment, to do the best it can to provide employees with continuous employment, and to dealing with employees fairly and respectfully. It states "As with any service industry, the customer is the boss. In our case the boss is the railroad industry." The manual sets forth the terms and conditions of employment that Respondent has established for its employees, as well as the duties and responsibilities that Respondent expects of them. Employees receive the same standard benefits such as vacation pay, life insurance, and seniority. Pay rates vary somewhat due to the different cost of living at the various facilities.

C. Respondent's Operations at the Elmhurst, Illinois Facility

On May 2, Respondent signed a contract with Crew Transport Services, Inc. to provide the service formerly provided by Midwest. Other than relatively minor changes in the indemnity provisions and the minimum trip charge provision, the contract was identical to the contract described above between CTS and Midwest.

Beginning May 16, Respondent performed the work formerly done by Midwest. The employees at the Elmhurst facility continued to perform the same work that they had done for Midwest—pickup railroad personnel for the railroad and transport them to another location. They used vehicles owned by Respondent instead of by Midwest, but the vehicles were similar in kind. The drivers were paid \$6.25 per hour for the first 90 days, thereafter they received \$6.50 per hour. This compared to the rate of \$6.40 per hour that had been paid by Midwest. They worked out of the identical facility using the same office equipment that Midwest had used. They use the same forms to complete their paperwork as they used with Midwest. From the employees' perspective, Respondent runs the operation in about the same manner as Midwest had.²³ As indicated above, Respondent maintains a central dispatch facility from which it dispatches drivers for long trips. However, records show that in the Elmhurst facility only a very small fraction of the total dispatch may originate from the central dispatch of-

²² To the extent Padgett's testimony concerning Respondent's operations is inconsistent with the description contained in the manager's/supervisors manual, it is not credited.

²³ For example, employee Andrews testified that just the name had changed and that "everything else is practically the same. It's all the same." Employee Newberry testified that he did the same work he did before in essentially the same way. I have considered the testimony of Metz concerning the changes and degree of interaction among Respondent's employees that occurred after Respondent began operations at the Elmhurst facility, but I do not credit that testimony. It was given in response to leading questions, it was conclusory in nature, and Metz was not an otherwise credible witness.

fice; the overwhelming majority of dispatches are handled locally.

The Elmhurst facility was included in Respondent's Dearborn region, which includes facilities in Chicago and Kankakee, Illinois; Detroit, Lansing/Jackson, and Jackson, Michigan; Elkhart and Fort Wayne, Indiana; and Toledo, Ohio. The Chicago facility is located nearly 20 miles from the Elmhurst facility; the Kankakee facility is located about 68 miles from the Elmhurst facility; the other facilities in the region are located from 129 to 303 miles from the Elmhurst facility. The entire region employs 145 employees, the largest number of employees in all of Respondent's regions. The Elmhurst facility currently employs 43 employees, the second largest facility in the region. The Elmhurst facility is the only facility in the region that has an office; the other locations operate out of a railroad yard.

On one occasion since he has been employed by Respondent, employee Newberry encountered two drivers from another location of Respondent's working in the Elmhurst area. Also, two employees from the Elmhurst facility have worked as part of Respondent's "A team." This resulted in the drivers traveling to Respondent's facility in Elkhart, Indiana on about two occasions for periods of from 5 to 7 days to 3 weeks. Metz has visited several of Respondent's other facilities. Stanley, Respondent's director of safety and training, has visited the Elmhurst facility on two occasions. The first time was to assist Spinner in setting up the operations, as described above. The second occasion Stanley visited the office, he spoke with the dispatcher who on duty at the time, checked a couple of vehicles, spoke with the railroad officials, and conducted a training class for employees at the Elmhurst facility.²⁴

At some point around, the time Respondent began operations at the Elmhurst facility, Newberry asked Metz whether Metz would be employed by Respondent. Metz answered that she was not sure. Spinner was in the office at the time talking on the telephone. Spinner completed her conversation and then told Newberry that Metz was his boss. While employed by Respondent, employee Newberry was accompanied in his vehicle on one occasion by Metz. This was so that Metz could ascertain whether Newberry was driving safely. Metz completed a two-page form reporting on whether Newberry was driving in a safe manner. Metz also assessed Newberry's performance as "satisfactory" and signed the form in a space set for the "examiner." After working for Respondent for approximately 3 months, Newberry received a written performance review. This review was completed and signed by Metz; it identified Metz in two places as "supervisor." Metz rated employee Newberry on a scale of 1 to 4 in 10 listed categories. Metz also wrote concerning Newberry: "Worked extra hours—will work any hours when asked. Has been overseeing the drivers keep their vehicles clean on a daily basis, also the area where we park vehicles. Keeps me advised of any problems w/ RR or drivers. Big help to our company." Metz orally reviewed the contents of the evaluation with Newberry.²⁵

As indicated above, Rita Andrews worked as a driver for Midwest and also was hired by Respondent. She works 4 days

a week for Respondent at the Elmhurst facility and was assigned that schedule by Metz. She described Metz as her "boss." At the time of the hearing Andrews was on a 2-month leave of absence from Respondent. Andrews contemplated quitting her position with Respondent due to personal difficulties, and she spoke to Metz about the matter. Metz asked Andrews whether she liked her job with Respondent, and Andrews said that she did. Metz then suggested that Andrews request a leave of absence instead of resigning, which Andrews did. The form documenting the leave of absence contains the signatures of Andrews and Metz, with Metz being described as "supervisor." Metz wrote on the form "[Andrews] has a serious family problem that requires her immediate attention. She has requested 2 months off. [Andrews] will stay in touch with me and advise me on her status. [Andrews] is a very good employee and we wish her the best." Andrews, like Newberry, was evaluated by Metz. On the same form as described above, Metz wrote concerning Andrews: "Very reliable—comes in does her shift, has great repore [sic] with ALL crews dispatch [sic] will request her for certain P/U due to her ability to find hard locations All [sic] drivers speak highly of her. True asset. Work well with all fellow employees & dispatchers." Andrews received a pay raise at about this time and she met with Metz concerning the raise. Metz is the only person at the Elmhurst facility who conducts these evaluations of new employees, and she does this by gathering information concerning the employee from the dispatchers, coworkers, and railroad personnel concerning the employee's performance. Andrews, like Newberry was also evaluated by Metz concerning Andrews driving safety practices.

Unlike the situation at Midwest, when Metz' superior, Caster, would visit the Elmhurst facility regularly, after Respondent took over Metz' new superiors rarely visited the Elmhurst facility.²⁶

Respondent's records show that on September 15, Metz signed a "Personnel Report" as "supervisor" that advised employee Angel Ayala that he was suspended for "dozing off" while driving. In the document Metz writes "I'm giving you 3 day suspension and you will be removed from Long Hauls." There is no credible evidence that Metz consulted with anyone before she issued the discipline. To the contrary, Metz signed another form as "manager" that appears to simply advise Stanley that she had suspended Ayala for his misconduct. Stanley, in turn, sent a letter to the complaining customer which advised

²⁴ Padgett's testimony concerning the frequency of interchange and interaction among Respondent's drivers is not credited. I note that this testimony was not supported by documentary evidence, and I have already indicated difficulties elsewhere concerning Padgett's credibility.

²⁵ These facts are based on the testimony of Newberry who, as described above, I have concluded is a credible witness.

²⁶ The facts in the two paragraphs above are based on the testimony of Andrews. While at the time of the hearing Andrews was on a temporary leave of absence, she remained a valuable employee of Respondent. I credit her testimony. I have considered Metz' testimony concerning her duties for Respondent. I do not credit that testimony. Much of it was in response to leading questions and was conclusory in nature. Some was blatantly exaggerated. For example, Metz was asked "You don't have ultimate authority to anything as [Respondent's] City Supervisor, for the most part, is that pretty accurate?" Metz' answered "This is very accurate." When I pointed out to Metz that she had earlier testified that she had the authority to do certain things on her own, she then conceded that she did have certain authority to act on her own. I have also considered the testimony of Padgett concerning Metz' duties. Based on my observation of his demeanor, especially in answering questions that I asked of him, and based on the inherent likelihood of the testimony, I conclude that Padgett's testimony was designed to understate Metz' duties. I conclude that the testimony of the employees who work at the facility with Metz on a regular basis is more credible than Padgett's testimony.

advised the customer of the “action taken by our city supervisor regarding the safety complaint.” On September 25, Metz signed a “Personnel Report” discharging employee Gloria Nicholas for unsafe driving. Metz wrote, “Her driving is a danger to crews and our company.” On November 13, Metz signed another “Personnel Report” discharging employee Charles Manchen for causing damage to a vehicle. Again, there is no credible evidence that anyone other than Metz effectively made the decision to discharge these employees.²⁷ Metz is the only salaried worker regularly employed at the Elmhurst facility.

Metz admits that she conducts interviews of applicants for employment. Respondent, in a section of its brief unrelated to Metz’ duties, states “The interview phase was a key component of the application process as it provided the means to evaluate an applicant’s attitude and his/her ability to work with others . . . D&T viewed getting along with management and co-workers necessary for fostering a healthy environment, especially one like Elmhurst where quarters were tight.” The managers/supervisors manual described above provides that city supervisors such as Metz “should be trained in the correct methods to recruit, screen and hire new employees.” The manual further provides that area managers will find it necessary to delegate responsibility to city supervisors on occasion. The manual indicates that the interviewer should be comfortable with the applicant and the answers that the applicant has provided before the applicant is hired, that the city supervisor should conduct a road test and use common sense in determining whether the applicant passes that test.

On June 24, the Union sent a letter to Respondent requesting that they commence negotiations for a collective-bargaining agreement. Respondent admits that it has refused to recognize and bargain with the Union as the representative for driver employees employed at the Elmhurst facility.

III. ANALYSIS

A. Jurisdiction

As indicated, Respondent contends that it is covered by the RLA and thus is not subject to the Board’s jurisdiction. An “person” is subject to the RLA if it is a if it meets the definition set forth below in pertinent part.

The term “carrier” includes any express company. sleeping car company, carrier by railroad . . . and any company which is directly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or perform any service . . . in connection with the transportation. . . .of property transported by railroad.

45 U.S.C. Sec. 151. There is no contention that Respondent is either a carrier by railroad or directly or indirectly owned by a carrier by railroad. Thus, the issue is whether Respondent is “controlled” by a railroad.

²⁷ I have considered Padgett’s testimony Metz acted pursuant to direction from Respondent’s human resource department. I reject this testimony. In addition to the general problems that I perceived with Padgett’s credibility discussed above, I note that this testimony is general in nature, lacking in foundation to establish first-hand knowledge, unsupported by any documentary evidence substantiating the assertion that discipline and discharge decisions were effectively made elsewhere, and not specifically corroborated by any other witness. Metz did not specifically testify concerning her role in these cases.

In support of Respondent’s case, it is clear that the railroads determine the time and place when Respondent will provide its service; the general nature of the vehicle which will deliver the service, as well as many details concerning what equipment and other items that will be on the vehicle. The railroads set many safety related standards. The railroads retain the ability to effectively decide whether employees can be disciplined or discharge, although the evidence in this record indicates that this is rarely done. Finally, Respondent provides its services exclusively for railroads. These facts do show the existence of customer-supplier relationship in which the customer is both demanding and specific concerning the nature of the service. This, however, is not uncommon in today’s customer focused economy and does not establish that Respondent is “controlled” by the railroads.

Respondent, on the other hand, retains a wide range of control in operating its business. Respondent, not the railroads, sets its budget, determines the wages and benefits it will pay its employees, determines who will be hired, disciplined, or fired (except for the rare cases described above), promulgates its manual for supervisors and managers, determines how many employees will be hired and what their work schedules will be. Respondent determines its operating structure and supervisory hierarchy, does its own planning, leases office space, and maintains its own payroll and personnel records. Respondent decides whether to attempt to expand to other locations, such as it did concerning the Elmhurst facility. Finally, not all aspects of the services that Respondent provides to the railroads, such as transporting personnel to hotels, is of a nature that is of the essence of what a railroad does. These facts, and the record as whole, establish that Respondent is not a person “controlled” by a railroad.

Respondent argues again the same points that the Board has previously considered and rejected, such as the increased centralization of its operations and increased competition in the industry. But Respondent fails to show why these matters are jurisdictionally significant. In fact, Respondent finds itself again in a dilemma in arguing both the jurisdictional and unit issues, for again its brief, in arguing the latter issue, persuasively sets forth the great degree of centralized control which Respondent has over its own operation.

Respondent also argues that the Board had failed to consider *Sky Valet*, 17 NMB 250 (1980); and *Sky Cap, Inc.*, 13 NMB 292 (1986). However, those cases are factually distinguishable. There the employees of the contractors worked exclusively on the carrier’s location and were expected to follow the rules and regulations of the carrier. Here, the drivers spend a considerable portion of their worktime away from the railroad yards and Respondent expects its employees to follow its own rules and regulations as set forth in its detailed manuals. Also, in *Sky Valet* the NMB noted that the carrier had access to the personnel records of the employees of the contractor, and that the contractor trained its employees to follow the carrier’s procedures, using the carrier’s training programs if available. No such evidence is present in this case. In sum, those cases show a greater degree of control by the carrier over the contractor’s operations than is present in this case.

I conclude that Respondent is not a person subject to the RLA but is instead an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Board has jurisdiction over Respondent.

B. Metz' Supervisory Status

The General Counsel contends that Metz is a supervisor as defined in Section 2(11) of the Act. The Board has long held that the criteria enumerated in Section 2(11) are to be read in the disjunctive; if an individual possesses a single attribute listed in that section, that individual is a supervisor. *Florence Printing Co.*, 145 NLRB 141, 144 (1963). However, the exercise of otherwise supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner does not confer supervisory status on an employee. *J. C. Brock Corp.*, 314 NLRB 157, 158 (1994). The Board has recently restated that in enacting Section 2(11) Congress stressed that only persons with genuine management prerogatives, as opposed to "straw bosses" and other minor supervisors, should be considered supervisors and that the Board has a duty not to construe supervisory status too broadly because that would deprive individuals of the protection of the Act. *Cassis Management Corp.*, 323 NLRB 456 (1997). The burden of proving supervisory status is placed on the party making that assertion. *Bowne of Houston*, 280 NLRB 1222 (1986). The exercise of authority which derives from a worker's status as a skilled craftsman does not confer supervisory status because that authority is not the type contemplated by Section 2(11). *Adco Electric*, 307 NLRB 1113, 1120 (1992). Finally, the secondary indicia of supervisory status are in themselves not controlling. *Consolidated Services*, 321 NLRB 845, 846 fn. 7 (1996).

The General Counsel contends and Respondent in its brief agrees that Metz was a supervisor when employed by Midwest. The evidence fully supports that conclusion, and I so find.

Turning to Metz' duties after she was hired by Respondent, I have concluded above that Metz alone conducted assessments of drivers' work performance after they had been employed for 90 days, and those assessments led to wage increases for employees. Metz also conducted assessments of the drivers' ability to operate their vehicles safely, a factor that was essential to their continued employment by Respondent. I have described above how Metz granted an employee a leave of absence, suspended an employee for falling asleep while driving, and discharged an employee for unsafe driving. I have concluded above that Metz interviews applicants for employment and, as inferred from Respondent's manual, effectively recommends the hiring of employees. The fact that Respondent's main office in Cleveland may have final authority on some of these matters does not negate the fact that Metz makes effective recommendations. There is no evidence from which I conclude that these responsibilities are performed only sporadically. Although Metz' authority while working for Respondent is somewhat less extensive than her authority while working for Midwest, I nonetheless conclude that Metz is a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.

Secondary indicia, although not alone determinative, support this conclusion. Metz is the only salaried individual employed at the Elmhurst facility, she is paid slightly more than other employees, and if she were not a supervisor, the employees at the facility, one of Respondent's largest, would have no on-site supervision. Metz clearly holds herself out to employees as a supervisor, was introduced by Spinner to employees as their "boss," and is regarded by employees as their supervisor.

I have considered *Tucson Gas & Electric Co.*, 241 NLRB 181 (1979), cited by Respondent as authority for its contention

that Metz is not a supervisor. However, that case is not on point. Concerning the ability of the alleged supervisor to discipline employees, there was specific evidence that the discipline was independently reviewed by higher officials; there is no such credible evidence in this case. Concerning the ability of the alleged supervisor to evaluate employees, the evidence showed that alleged supervisor's conduct had little impact on the employees' employment status and was, in any case, isolated. Those are factors that are not present in this case.

A good deal of Respondent's argument that Metz is not a supervisor is premised on testimony that I have not credited. Respondent also argues that the evidence does not show that Metz makes decisions independently. I disagree. I have described above how from the face of Respondent's records it is indicated that Metz is making the decisions. Respondent has presented no credible evidence that those documents are not what they appear to be. In other instances, such as interviewing applicants and evaluating employees' work performance, Metz is the only person at the facility capable of performing those functions. Respondent also points to other cases where the regional Director concluded that city supervisors were not supervisors as defined in the Act. However, each decision concerning supervisory status turns on its own facts. In those decisions the records did not show that the city supervisors exercised the degree of authority that I have concluded Metz does.

C. The Unit

Respondent correctly points out that in order to trigger any successorship obligations, the unit of employees of the predecessor employer must remain an appropriate unit for purposes of collective bargaining for the new employer. In this case Respondent argues that the former Midwest unit of employees at the Elmhurst facility no longer is appropriate. Specifically, Respondent argues that a unit of drivers limited only to the Elmhurst facility is not appropriate; instead the smallest appropriate unit must include drivers at all nine of Respondent's facilities in its Dearborn division. Respondent also argues that the former unit is inappropriate because it fails to include dispatchers and city supervisors.

It is well settled that in determining what group of employees constitutes an appropriate unit for purposes of collective bargaining, the Board is not required to select the most appropriate unit; it need only select an appropriate unit. *Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950), *enfd.* on other grounds 190 F.2d 576 (7th Cir. 1951). Turning to Respondent's argument that only a multifacility unit is appropriate, the Board has established a presumption that employees limited to a single facility constitute an appropriate unit. *Dixie Belle Mills*, 139 NLRB 629, 631 (1962). However, that presumption can be rebutted where the evidence shows that the employees at the single facility have been so effectively merged or functionally integrated into a larger unit that they have lost their separate identity. *D&L Transportation*, 324 NLRB 160 (1997). In determining whether the presumption has been rebutted, the Board considers all relevant factors, including the degree of central control over daily operations and labor relations, including the extent of local autonomy; the similarity of skills, functions, and working conditions; the degree of employee interchange; and the history of collective bargaining. *D&L*, *id.*

The evidence shows that Respondent does have a high degree of centralized management. It is clear that personnel in Respondent's main office determine wages, benefits, work

rules, personnel policies, and many other terms and conditions of employment. There is also a degree of functional integration of operations as shown by the "A team" program and the centralized dispatch system used by Respondent. It is also clear that drivers at all Respondent's facilities perform similar functions. All these factors tend to bind the drivers at the Elmhurst facility to drivers at other facilities.

However, the evidence also establishes the Elmhurst facility has a significant degree of local autonomy as shown by the fact that it has its own local supervisor. As more fully described above, Metz possesses considerable authority to hire, discipline, discharge, evaluate, and reward employees at the Elmhurst facility. This degree of local autonomy, by its nature exercised in a unique manner, serves to distinguish the Elmhurst facility from all other facilities. The evidence also shows that there is minimal temporary or permanent employee interchange between the Elmhurst facility and other facilities. This serves to preserve the separateness of that facility. The geographic distances between the Elmhurst facility and other facilities in Respondent's Dearborn division also tend to heighten the separateness of that facility. The nearest facility is located about 20 miles away, and even then there is no credible evidence of any significant contact with that facility and the Elmhurst facility. Distances between the Elmhurst facility and other facilities in the Dearborn division range up to over 300 miles. I also note that no labor organization seeks to represent employees in a broader unit, and there is no history of bargaining at the Elmhurst facility in a broader unit. In fact, brief as it was, there is a history of representation at that facility in a single unit. These factors all tend to show the separateness of the Elmhurst facility and outweigh the degree of integration described above.

The Board has held that the existence of centralized personnel and labor policies and procedures, or even ultimate responsibility for such matters at a centralized source, does not serve to automatically extinguish the separateness of a single facility unit. *D&L*, supra, slip op. at 3 fn. 8. Under all the circumstances, I conclude that Respondent has failed to show that a unit limited to the Elmhurst facility is not an appropriate unit for purposes of collective bargaining.

Respondent cites *NLRB v. Chicago Health & Tennis Clubs*, 567 F.2d 331 (7th Cir. 1977). However, that case is clearly distinguishable. There the two employers involved operated 16 facilities within a 28-mile radius and 21 facilities within a 30-mile radius, respectively. The evidence showed limited local autonomy at the single-facility level and a high degree of employee interchange between facilities. *Orkin Exterminating Co.*, 258 NLRB 773 (1981), is also inapposite. There the evidence showed limited local autonomy at the single-facility level, and the Board concluded that employee interchange among the various facilities was fairly common. The Respondent also refers me to two decisions by Regional Directors of the Board involving Respondent. In Case 3-RC-10290, the Regional Director concluded that a unit limited to only one of Respondent's facilities was not appropriate; and that the smallest appropriate unit consisted of employees employed at the facilities in Respondent's Albany division. The facts in that case are significantly different from the facts in the present case. There the Regional Director concluded that there was frequent interchange among the drivers at the various facilities, that the employees at the single facility did not have separate, local supervision, and most significantly, the employees at the

single facility did not use an office or other facility as a focal point of their work. Case 5-RC-13799 is similarly distinguishable.

Respondent also contends that a unit limited to drivers is not appropriate because it excludes the city manager and dispatchers. I have concluded that Metz, the city manager at the Elmhurst facility, is a supervisor; it follows that she must be excluded from the unit. Concerning the dispatchers, I find it unnecessary to resolve their unit placement. This is because even if the dispatchers were included in the unit, former unit employees of Midwest would still constitute a majority in the larger unit. Specifically, documentary evidence shows that shortly after Respondent commenced operations at the Elmhurst facility, its work force there consisted of 25 persons, including dispatchers but excluding Supervisor Metz (G.C. Exh. 24). The document identifies four persons as being dispatchers. A comparison of those 25 individuals with other records (G.C. Exh. 9) shows that at least 14 of those persons were former unit employees of Midwest, a clear majority. That does not include McSwain and Benedetto, who for reasons explained below should properly be included in the count. Thus, the resolution of the unit placement of the dispatchers is unnecessary.

My conclusion not to resolve the issue of the unit placement of the dispatchers is buttressed by the fact that there is scant testimony in the record concerning their specific terms and conditions of employment since being employed by Respondent. Dispatchers need not be included in a unit of drivers. *St. John's Associates, Inc.*, 166 NLRB 287 (1967), enf'd. 392 F.2d 182 (2d Cir. 1968). Yet, there is little reliable detail in this record to confidently resolve that issue. Under these circumstances, I conclude that it is best if the parties themselves first attempt to resolve the unit placement issue. If they are unable to do so, either party may invoke the Board's unit clarification procedures, where a full record on this issue can be developed.

D. Successorship

The remaining analysis falls easily into place. An employer who takes over a business whose employees were represented by a union and who continues to operate that business in any essentially unchanged manner is obligated to recognize that union if the employer hires as a majority of its employees in the unit employees of the predecessor who formerly had been represented by the union. *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987); *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). I have concluded above that the drivers employed by Midwest selected the Union as their collective-bargaining representative, that the unit remained appropriate after Respondent assumed the business, that Respondent operated the former Midwest business in an essentially unchanged manner, and that the former Midwest unit employees constituted a majority of those employees hired by Respondent in that unit. It follows that Respondent was obligated to recognize and bargain with the Union as the representative of those employees. By failing to do so since May 16, Respondent violated Section 8(a)(5) and (1) of the Act.

E. The Failure to Hire McSwain and Benedetto

1. The standard

The analysis set forth in *Wright Line*²⁸ governs the determination of whether Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire McSwain and Benedetto. The Board has restated that analysis in *T & J Trucking Co.*, 316 NLRB 771 (1995), as follows:

Under *Wright Line*, the General Counsel must make a prima facie showing that the employee's protected union activity was a motivating factor in the decision to discharge him. Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in absence of the protected union activity.⁷ An employer cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.⁸ Furthermore, if an employer does not assert any business reason, other than one found to be pretextual by the judge, then the employer has not shown that it would have fired the employee for a lawful, nondiscriminatory reason.⁹

⁷ *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400 (1983).

⁸ See *GSX Corp. v. NLRB*, 918 F. 2d 1351, 1357 (8th Cir. 1990) ("By asserting a legitimate reason for its decision and showing by a preponderance of the evidence that the legitimate reason would have brought about the same result even without the illegal motivation, an employer can establish an affirmative defense to the discrimination charge.")

⁹ See *Aero Metal Forms*, 310 NLRB 397, 399 fn. 14 (1993).

This was further clarified in *Manno Electric*, 321 NLRB 278 (1996).

2. McSwain

It must be noted that Respondent's own evidence, as shown through the testimony of Stanley at the hearing and in an affidavit he submitted during the investigation of this case, fully establishes that Respondent failed to hire McSwain because of her union activity. Stanley testified that he was aware of the fact that the Midwest employees were represented by a union before he interviewed McSwain. He further stated that he was initially favorably impressed with McSwain's credentials and that she should be hired, but that after McSwain raised the matter of the Union, Stanley changed his mind. In his affidavit Stanley stated that he then decided not to hire McSwain; at the hearing he testified that he passed his opinion of McSwain on to Spinner. There can be no doubt that an employee is engaging in union activity when the employee raises the matter of union representation during an interview for employment or that an employer violates the Act by refusing to hire the employee because the employee raised the matter of union representation. I note that Stanley supplied no specific evidence to establish that McSwain engaged in the union activity in such an unsupportable manner so as to lose the protection of the Act, and the fact that Stanley subjectively did not like the manner in which McSwain raised the subject of the Union does not serve as a defense to Respondent's discharged McSwain because she raised the subject of the union during her employment interview. Under these circumstances, when Respondent's testi-

mony essentially admits that it refused to hire McSwain for her union activity, further analysis is not necessary.

For the sake of completeness I will nonetheless proceed to apply the *Wright Line* standards to the allegations concerning McSwain. The evidence shows that she was the leading union proponent at Midwest. She contacted the Union, assisted in the solicitation of authorization cards, spoke to employees about the benefits of unionization, and was the only employee present, on behalf of the Union, at the counting of the ballots. Midwest was undoubtedly aware of McSwain's union activity; her appearance at the ballot count speaks for itself. In addition, Metz specifically revealed her knowledge of McSwain's union activity during the April 8 conversation when Metz identified McSwain, along with Benedetto, as the leading union adherents. Later, but still before Respondent began full operations at the Elmhurst facility, Metz told McSwain that if someone tried to get a union in at Respondent, it would do the same thing Midwest had done, namely try and fire or get rid of the employee.

The evidence shows that Respondent also had knowledge of the union organizing campaign at Midwest. During a conversation with employee Newberry before Respondent took over Midwest's operations, Spinner commented that a union had been selected by the employees; Newberry confirmed that this information was correct. Later, Spinner told employees that if they selected a union, Respondent would close, and that Respondent was nonunion and there would not be a union at Respondent. Also, during the May 9 conversation between Stanley and McSwain, Stanley raised the topic of a union. McSwain advised Stanley that the employees had selected the Union, and Stanley revealed his knowledge of this subject by stating that Respondent's attorneys had advised Respondent, in effect, that the selection of the Union by Midwest employees had nothing to do with Respondent. Indeed, at the hearing in this case Stanley admitted that he had knowledge that the Midwest employees were represented by a union before he completed interviewing employees. Furthermore, I conclude that Metz' specific knowledge of McSwain's union activity must be imputed to Respondent. Metz was an agent of Midwest immediately before Respondent took over the operation of Midwest, and she became an agent of Respondent immediately after Respondent took over the operation. More importantly, I have set forth above in detail the significant role Metz played in the interview and hiring process Respondent used at a time before Metz was actually hired as Respondent's agent. There is no question that Metz and Respondent's officials had conversations concerning whether Respondent should hire certain employees. It strikes me as incredible that those conversations did not include what Metz knew about the employees' union activities, especially in light of their shared hostility toward that activity. Finally, I have concluded above that Respondent violated the Act by refusing to recognize and bargain with the Union.

The evidence described above further establishes that Respondent was hostile to the activities of McSwain. Spinner and Stanley made statements to employees that clearly displayed the extent of Respondent's hostility. For the same reasons explained above, I conclude that Metz' antiunion animus must further be imputed to Respondent due to the significant role she played in the hiring process. I note also that Respondent's failure to hire McSwain came at time when Respondent was hoping to avoid union representation based on the mistaken

²⁸ 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

notion that the representational rights of the employees while employed at Midwest did not carry over to Respondent. All of these facts show that the General Counsel has met his initial burden under *Wright Line*.

Further strengthening the General Counsel's case is the fact that Respondent has given shifting reasons for its failure to hire McSwain. As described above, in its position statement Respondent contended that McSwain put down other applicants, claimed that Midwest showed favoritism, and complained about the way that Midwest did business; the position statement also points to the paycheck encounter between Metz and McSwain described above. There is no indication of any racially inflammatory remarks allegedly made by McSwain. At the hearing, Respondent did present evidence concerning the paycheck incident; it did not present any evidence to support the other assertions contained in its position statement. Instead, it then claimed that one of the reasons it failed to hire McSwain was because of the racial remarks she supposedly addressed to Metz. This type of blatant shifting defense only serves to show that Respondent is engaging in an after the fact search to discover reasons to justify its earlier decision not to hire McSwain. Under all the circumstances, the General Counsel has clearly met his burden under *Wright Line*.

Turning to whether Respondent met its burden to show that it would not have hired McSwain even in the absence of her union activity, the analysis above compels the conclusion that Respondent has failed to do so. Respondent's shifting reasons for its failure to hire McSwain, combined with my conclusion that McSwain did not engage in the misconduct as alleged by Respondent, leaves little left to Respondent's case. Certainly Respondent has not established that it would have refused to hire McSwain due to encounter she had with Metz concerning the misunderstanding about McSwain's paycheck. Accordingly, I conclude that Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire McSwain on or about May 15.

3. Benedetto

I turn now to the allegations concerning Benedetto. The evidence does not show that Benedetto engaged in union activity. However, the facts show that Metz *believed* that Benedetto had engaged in union activity when Metz told McSwain that she knew that McSwain and Benedetto were the employees responsible for the contacting the Union and the subsequent union organizing campaign. The Board has long held that an employer may not discriminate against an employee based upon the employer's *perception* that the employee has engaged in union activity. *M. K. Morse Co.*, 302 NLRB 924, 937 (1991), and cases cited therein. This same evidence also shows that Metz linked Benedetto to McSwain, who I have concluded above, Respondent unlawfully refused to hire. I have already explained above the reasons why I conclude that Metz' knowledge, or more precisely, her perception, of the employees' union activity was shared with Respondent. I have also described above Respondent's general knowledge of the employees' union activity, as well as Respondent's animus towards that activity. As described above, the timing of the refusal to hire Benedetto further supports the General Counsel's case. Finally, Respondent concedes that as a general matter, Benedetto was technically qualified to perform the work for which he was applying; of course he had performed the same work for Midwest. All this evidence, especially the explicit linkage of Benedetto with McSwain, is sufficient to meet the General Counsel's initial burden under *Wright Line*.

As was the case with McSwain, Respondent's case serves to strengthen the General Counsel's case. In its position statement Respondent asserted that the reason it refused to hire Benedetto was because he allegedly was brash, criticized fellow applicants, and showed no respect for management during the interview process. Stanley, in his pretrial affidavit, stated that he never interviewed Benedetto. Neither the position statement nor Stanley's affidavit mention any past racial remarks made by Benedetto. At the hearing, Respondent presented no evidence to support the assertions it made in its position statement, other than the fact that Benedetto walked into an orientation meeting and asked to be interviewed for employment. Instead, Respondent claimed that a reason it failed to hire Benedetto was because of the racially derogatory remarks he made in the past while employed by Midwest. These shifting reasons warrant the inference that Respondent is attempting to fabricate, after the fact, its reasons for refusing to hire Benedetto. Moreover, Stanley admitted that Respondent ran a check on Benedetto's driving record, and Respondent would not do this if, as a result of the interview alone, it had already decided not to hire an applicant. This admission further undercuts Respondent's assertion in its position statement that Benedetto's conduct during the interviewing process was the reason Respondent refused to hire him.

Turning to the matter of whether Respondent has established that it would not have hired Benedetto even absent its belief that he had engaged in union activity, I have concluded that, unlike McSwain's case, the documentary evidence does establish that Benedetto did make racially derogatory remarks while employed by Midwest. That, of course, is a serious matter that is not to be condoned. However, the issue I must decide is whether Respondent has established that it would have failed to hire Benedetto for such reason. I conclude that it has not. As of the time Respondent submitted its position statement in late June, Respondent was still not aware of Benedetto's misconduct. Respondent does not assert, nor has it proved, that it has a policy that employees who have made racially derogatory remarks in an employment situation are unfit for employment, even if, as here, those remarks were made for a different employer and were apparently not repeated after the employee was admonished. Accordingly, I conclude that by failing to hire Benedetto by May 15, Respondent violated Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By refusing to hire as employees Lacy McSwain and Edward Benedetto, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.
4. By failing and refusing to recognize and bargain with the Union as the collective-bargaining representative for employees in the unit described below, Respondent has engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.
5. The following employees of Respondent constitute a unit appropriate for purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

All regular and full-time and part-time drivers employed by Respondent at its facility located at 707 York Road, Elmhurst, Illinois, 60126; but excluding all office clerical employees, technical employees, management employees, and guards and supervisors as defined in the Act.

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 refused to hire employees McSwain and Benedetto, it must offer them employment and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of refusal to hire to date of proper offer of employment, 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). Respondent having unlawfully failed and refused to recognize the Union, I shall order Respondent to recognize and bargain with the Union as the collective-bargaining representative of the employees in the unit described above concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁹

ORDER

The Respondent, D & T Limousine Service, Inc., and D & T Limousine Service, Inc., Debtor-in-Possession, single employer and/or alter ego to D & T Limousine Service, Inc., Elmhurst, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire or otherwise discriminating against any employee for supporting the International Brotherhood of Teamsters, Local Union 777, AFL-CIO, or any other union.

(b) Failing and refusing to recognize and bargain with the Union as the collective-bargaining representative for employees in the unit described above.

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

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

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All regular and full-time and part-time drivers employed by Respondent at its facility located at 707 York Road, Elmhurst, Illinois, 60126; but excluding all office clerical employees, technical employees, management employees, and guards and supervisors as defined in the Act.

(b) Within 14 days from the date of this Order, offer McSwain and Benedetto employment as drivers or, if those

²⁹ 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.

jobs longer exists, to a substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make McSwain and Benedetto 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.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire McSwain and Benedetto, and within 3 days thereafter notify them in writing that this has been done and that the refusal to hire will not be used against them in any way.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Elmhurst, Illinois, copies of the attached notice marked "Appendix."³⁰ Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. 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 May 15, 1997.

(g) 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.

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

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

³⁰ 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."

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

WE WILL NOT refuse to hire or otherwise discriminate against any of you for supporting International Brotherhood Of Teamsters, Local Union 777, AFL-CIO, or any other union.

WE WILL NOT fail and refuse to recognize and bargain with the Union as the collective-bargaining representative of our employees in the unit described below.

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 Lacy McSwain and Edward Benedetto employment as drivers or, if those job no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Lacy McSwain and Edward Benedetto whole for any loss of earnings and other benefits resulting from

their failure to be hired, less any net interim earnings, plus interest.

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

WE WILL, on request, recognize and bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All regular and full-time and part-time drivers employed by Respondent at its facility located at 707 York Road, Elmhurst, Illinois, 60126; but excluding all office clerical employees, technical employees, management employees, and guards and supervisors as defined in the Act.

D & T LIMOUSINE SERVICE, INC.