

Siracusa Moving & Storage Service Co., Inc and Teamsters Union Local 671 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO ¹ Case 39-CA-3338

September 30, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
JOHANSEN AND CRACRAFT

On October 14, 1987 Administrative Law Judge Joel P Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed cross exceptions and a supporting brief. The Respondent then filed a response to the General Counsel's cross exceptions.

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

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

1 The complaint alleges that the Respondent violated Section 8(a)(1) of the Act about November 4, 1986 by threatening its employees with discharge for engaging in union activities. The evidence presented by the General Counsel to prove this allegation reveals, however, that the alleged threat occurred in September or October 1986. The judge found that this discrepancy between the complaint and testimony was de minimis, that the Respondent had adequate notice of the allegation, that the Respondent had litigated the issue and that the Respondent was not therefore prejudiced by the discrepancy. The Respondent excepts to this conclusion, stating that it did not cross examine the General Counsel's witness on this issue because it did not relate the allegations in the complaint to the testimony that the threat had occurred in September and October 1986 and as a result that it was prejudiced by the discrepancy. We agree with the Respondent.

Although a discrepancy in dates of the type that exists here would not be sufficient by itself to find that a respondent has been prejudiced, the circumstances surrounding the litigation of this complaint allegation lead us to that conclusion. The record indicates that in response to a suggestion by the judge that he elicit testimony regarding the alleged threat in chronological order, counsel for the Gen-

eral Counsel stated that he wanted to present evidence of threats that are not alleged in the complaint for purposes of showing animus only. Counsel for the General Counsel then conducted his direct examination of the witness (the only witness appearing for the General Counsel in this case) and immediately elicited testimony that the Respondent in either September or October threatened that anyone having anything to do with a union would be terminated. The Respondent did not cross examine the General Counsel's witness on this testimony.

The General Counsel's statement regarding evidence of threats not alleged in the complaint—which was immediately followed by the testimony regarding the September/October allegation—when coupled with the date discrepancy in the complaint, reasonably could have led the Respondent to conclude that the testimony alleging the September/October threats related to incidents not alleged in the complaint and thus did not warrant closer examination. Consequently we conclude that the unique combination of circumstances in this case shows that the Respondent was prejudiced by the discrepancy in dates between the complaint and testimony.

Accordingly, we dismiss the 8(a)(1) allegation that the Respondent about November 4, 1986 threatened its employees with discharge for engaging in protected concerted activities.²

2 The judge also found that the Respondent violated Section 8(a)(3) of the Act by discharging Ralph Curtis about December 16, 1986.³ We agree with the judge that the General Counsel established a prima facie case by showing that the Respondent threatened to fire employees who were union activists a week before firing Curtis (a known union activist). We also agree with the judge for the reasons set forth herein that the Respondent has failed to carry its burden of showing that it would have discharged Curtis even in the absence of his union activity. Instead we find that the asserted justifications for Curtis' discharge were in fact, not relied on by the Respondent at the time the Respondent terminated Curtis and

² Our dismissal of this complaint allegation does not necessitate a change in the judge's Order as we affirm his finding that the Respondent violated Sec. 8(a)(1) of the Act about December 8, 1986 by threatening to fire employees engaged in union activities and by threatening to close its facility rather than deal with a union. In light of the cumulative nature of this finding, Member Cracraft finds it unnecessary to pass on whether the Respondent was prejudiced by the discrepancy in dates between the complaint and testimony.

³ Curtis was hired in mid August 1986 and shortly thereafter the Respondent became aware of his union activity. We agree with the judge's finding that Curtis was an employee within the meaning of Sec. 2(3) of the Act and not an independent contractor as the Respondent contends.

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

therefore we conclude that Curtis discharge violated Section 8(a)(3)

The Respondent contends that Curtis was discharged for his failure to obtain a weight ticket on the Flock job. To substantiate this contention the Respondent notes that Curtis had been discharged in September 1986 for the same reason in connection with the Fraser and Sawyer jobs which apparently were combined in one assignment. The record shows that Curtis was discharged by Steve Siracusa in September 1986 for failing to obtain weight tickets for both those jobs⁴ and also that he was immediately reinstated by Dan Siracusa. Curtis and Dan Siracusa gave different versions of the reason for the reinstatement however. According to Curtis version Curtis met with Dan after he was terminated by Steve and told him. It is not fair that I'm fired because of a weight ticket. It happened many times with different companies. Not only myself as a driver but other drivers have too. After talking to Curtis Dan stated that Curtis had been fired unjustly and reinstated him.⁵

Dan's version of this incident claims that Curtis reinstatement was in the nature of a second chance. Further the Respondent argues that Curtis knew upon being reinstated that another failure to obtain a weight slip would result in discharge if he made no effort to avoid the problem or to explain it away to those who might discharge him.⁶ While the judge does not explicitly credit Curtis or Dan's version of this incident even under Dan's version we would not conclude that the Respondent has carried its burden of showing that it would have discharged Curtis for his failure to get the weight ticket in the absence of union activity.⁷ This is because the Respondent's behavior

⁴ Curtis did secure a weight ticket for one of the jobs. He testified that he failed to obtain a weight ticket for the other job because there were no weigh stations open where he could obtain a weigh master's signature. Curtis testified that Steve Siracusa had told him not to obtain unsigned weight slips. Curtis explained that no weigh stations were open because the job was performed late in the day and delivery was to be made before the stations would open the next day. Curtis also testified that he thought the Respondent would calculate the weight by using the industry's standard method of figuring 1000 pounds per page of inventory.

⁵ The Respondent also claims that an alleged discrepancy between the weight ticket and inventory sheets on the Fraser and Sawyer jobs in September contributed to Curtis' discharge in December. There is no indication however that this alleged discrepancy played any part in Curtis' dismissal in September. Because the alleged discrepancy was not used to support Curtis' September dismissal we find that the Respondent's reliance on it now is pretextual.

⁶ The Respondent's brief in support of exceptions in 6 at 25. In this regard Curtis testified that he had not obtained a weight slip on the Flock job for the same reasons he had failed to obtain one in September. The Respondent states however that Curtis never communicated to it the reason for his failure to secure a weight slip for the Flock job.

⁷ Clearly under Curtis' version Dan's rescission of Steve's discharge action and his rejection of Steve's reason for taking that action as unjust seriously undermine the Respondent's attempt at substantiating Curtis' discharge in December assertedly for the same reason he was dismissed in September.

subsequent to Curtis' failure to get the weight ticket for the Flock job and up to and including the discharge fails to support the claim that Curtis was fired at that time because he blew his second chance.⁸

In this regard while Curtis acknowledged that Steve Siracusa was angry with him for not obtaining a weight slip for the Flock job and although he admitted talking to Dan Siracusa about Steve's reaction Curtis stated that he did not believe his termination occurred the same day he talked with Dan about Steve's reaction. Thus the evidence suggests that Dan was not only aware of Curtis' failure to obtain the Flock job weight slip but that he also was aware that Steve was upset about it yet he did not terminate Curtis until Curtis on a later date in an unrelated incident described infra made a statement regarding the need for a union.⁹

The credited testimony¹⁰ reveals that the day he was discharged Curtis went to the Respondent's facility and noticed that newly hired drivers were being given assignments although he had been told earlier that there was no work. Curtis then made the following comment to a secretary (Jill): If there was a union in here then people that have been employed for any length of time would work before—they would have seniority. Curtis then left the Respondent's facility but returned a short time later to talk to Dan Siracusa about the job assignments. When Curtis went into Dan's office Curtis testified that Dan said: I heard you tell

⁸ In its brief the Respondent cites two other incidents that it purportedly relied on to terminate Curtis' employment: that Curtis charged for boxes he had not packed on the Griswold job and that Curtis overcharged the Respondent for the cost of having a truck towed. Neither of these alleged incidents offer the Respondent support. In neither one did the Respondent discipline Curtis—indeed it appears that with respect to the Griswold allegation the Respondent never even mentioned the problem to Curtis. Regarding the towing allegation the Respondent asked Curtis about it and appeared to accept his explanation. It did not seek to recover any of the money it had given to Curtis as reimbursement for the towing charge and took no adverse action against him. Because the Respondent did not view these incidents as being sufficiently serious to warrant discipline at the time the problems arose the Respondent's reliance on these allegations now is pretextual.

⁹ Steve's testimony contradicts Curtis on this point by stating that Dan fired Curtis shortly after being told by Steve about Curtis' failure to obtain the weight slip for the Flock job. Dan's testimony does not address this issue. We rely on Curtis' testimony as to the timing of these events because the judge generally discredited Steve's testimony regarding the 8(a)(3) issue. In any event regardless of how long Dan knew of Curtis' failure to get the weight slip prior to discharging him the testimony we rely on regarding the discharge interview does not show that Curtis was fired because of his failure to obtain the weight slip.

¹⁰ Although the judge set out three versions of the discharge interview (Dan's, Steve's, and Curtis') without explicitly crediting any version we rely on Curtis' account of this event. We do so because the judge credited Curtis over Dan twice in making his threat of discharge findings and because he generally discredited Steve's testimony regarding the discharge issue. Therefore we interpret the judge's reference in sec. IV of his decision in which he states that the Respondent's *Wright Line* defense is impaired by *inter alia*, the statement Dan made to Curtis when he returned to the facility in mid-December as an implicit crediting of Curtis' version of his discharge.

somebody you were going to put a f—king union in here Curtis replied no and Dan said you re a f—king liar Jill just told me that you said you were going to put a union in here I want you out of my place of business—you re fired When asked if Dan said anything else Curtis stated He said that he would bury me before a union would come in here Thus there is no indication contemporaneous with the event that Curtis firing resulted from his failure to get a weight ticket or any other reason asserted by the Respondent ¹¹ Given these circumstances we find that the Respondent has failed to establish that it would have discharged Curtis absent his union activity and that instead the record reveals that Curtis was discharged solely because of his union activities ¹² that the reasons asserted by the Respondent as justification for the discharge have been offered merely to conceal the real reason for its action

Accordingly we find as did the judge that the Respondent's discharge of Curtis violated Section 8(a)(3) of the Act ¹³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent Siracusa Moving & Storage Service Co Inc East Hartford Connecticut its officers agents successors and assigns shall take the action set forth in the Order After a hearing in which all parties were afforded the opportunity to present evidence it has been found that we violated the National Labor Relations Act in certain respects and we have been ordered to post this notice

¹¹ At the hearing the Respondent cited two additional reasons alleged by justifying Curtis discharge The Respondent alleged that Curtis had smoked marijuana on one of his runs and that the women at its facility were afraid of Curtis When the Respondent asked Curtis about the alleged marijuana smoking he denied it and offered to resign if the Respondent did not trust him Dan Siracusa refused this offer and stated that they did not believe the person making the accusation as he was a convicted cocaine addict With respect to women being afraid of Curtis there was no evidence offered directly supporting this assertion The only evidence even remotely connected to this claim was the testimony of Wendy McAvoy the Respondent's office manager to the effect that Curtis refused to leave on an assignment she had given him until he received his travel advance

¹² See *Wright Line* 251 NLRB 1083 1089 (1980) *enfd* 662 F 2d 899 (1st Cir 1981) cert denied 455 US 989 (1982) See also *Limestone Apparel Corp* 255 NLRB 722 (1981) *enfd* 705 F 2d 799 (6th Cir 1982)

¹³ The General Counsel's request for a visitatorial clause is denied as the circumstances of this case do not demonstrate a likelihood that [the] Respondent will fail to cooperate or otherwise evade compliance See *Cherokee Marine Terminal* 287 NLRB 1080 (1988)

Mark W Engstrom Esq for the General Counsel
Jeffrey J Mirman Esq (Tarlow Levy Mandell & Kostin PC) for the Respondent

DECISION

STATEMENT OF THE CASE

JOEL P BIBLOWITZ Administrative Law Judge This case was heard by me on 10 and 11 August 1987 in Hartford Connecticut The complaint issued on 5 March 1987 and was based on an unfair labor practice charge filed on 21 January 1987 alleges that Siracusa Moving & Storage Service Co Inc (Respondent) violated Section 8(a)(1) and (3) of the Act by threatening its employees with discharge for engaging in activities on behalf of Teamsters Union Local 671 a/w International Brotherhood of Teamsters Chauffeurs Warehousemen and Helpers of America AFL-CIO (the Union) creating an impression among its employees that their union activities were under surveillance by Respondent and terminating its employee Ralph Curtis on or about 16 December 1986 ¹ because of his activities on behalf of the Union

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

FINDINGS OF FACT

I JURISDICTION

Respondent a Connecticut corporation with its principal office and place of business located in East Hartford Connecticut is engaged in the intrastate and interstate transportation of freight and commodities During the 12 month period ending 31 January 1987 Respondent in the course and conduct of its business operations performed services valued in excess of \$50 000 in States other than the State of Connecticut I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2) (6) and (7) of the Act

II LABOR ORGANIZATION STATUS

I find that the Union is an organization in which employees participate that it represents employees and deals with employers regarding inter alia rates of pay hours and conditions of employment of employees and is therefore a labor organization within the meaning of Section 2(5) of the Act

III CURTIS EMPLOYMENT STATUS

Curtis was employed by Respondent as a driver from about mid August through mid December A majority of the work he performed for Respondent was long distance compared to local driving Respondent initially defends that Curtis was a commission driver who was an independent contractor and therefore is not an employee within the meaning of Section 2(3) of the Act During the entire period of his employ with Respondent Curtis drove trucks owned and insured by Respondent Respondent was also responsible for repairs and routine maintenance of the trucks as well as any incidental towing expenses

Curtis was interviewed for his position by Daniel Siracusa (Dan) Respondent's president and Steve Siracusa (Steve) its operations manager. He testified that he was told that they were looking for a company percentage driver there would generally be 40 hours per week of work and that he would be eligible for Respondent's safety incentive program and Christmas bonuses. Respondent was in the process of preparing a contract for its percentage drivers but it was not then complete. He was told that he would receive 42 percent of the moving fees Respondent received for long distance jobs he performed; this figure was proposed to him without negotiation. He could accept or refuse these jobs. Local work was paid for on an hourly basis on a separate paycheck. During the period of his employment with Respondent approximately 80 to 90 percent of his work was long distance commission driving compared to hourly paid local driving. He punched a timeclock while driving locally and taxes² and social security were to be deducted from his wages for local driving only; this procedure was followed for a week or two at which time Respondent commenced paying Curtis with one check for all driving with no deductions. Curtis testified that shortly after he began working for Respondent he told them "wouldn't it be just as easy if we put everything on one check and do it that way" and they agreed. Respondent's office manager Wendy McAvoy testified that after about 1 week's employment Curtis told her that he did not want to be on the payroll and if he had hourly pay it should be included on his commission check; that was the procedure she followed for the remainder of his employment and no payroll deductions were made thereafter. At the same time he ceased punching a timeclock.

At the commencement of his employment with Respondent an escrow account of approximately \$1000 was established by deducting 10 percent of Curtis' pay. The purpose of this account was to reimburse Respondent for Curtis' possible liability for damage to household goods (he testified that his liability was for a maximum of approximately \$200 or for the expense of retrieving a truck left away from Respondent's premises). After Curtis' employ with Respondent ended this amount was returned to him. As stated supra Curtis received 42 percent of the price paid by the customer for the long distance moves he performed. Out of this amount Curtis had to pay for gas, tolls, food, lodging, and labor expenses for a helper to assist him in loading and unloading the truck. In this regard Curtis had the absolute right to hire and fire these helpers except if they were regular employees of Respondent; in that situation he needed Respondent's prior approval. Curtis was given his assignments by Steve; this would contain the shipper's name and address, the pickup and delivery dates, and the delivery address. Occasionally Steve would confer with him about the best route to travel to expedite the shipment.

McAvoy testified that Curtis was responsible for paying his own workmen's compensation for his long distance driving jobs but there was no indication that he had ever done so or that Respondent had paid it and deducted it from his commission check. Dan testified that

although Respondent provided insurance for the trucks Curtis should have had insurance although he never asked Curtis for proof of such insurance and his affidavit given to the Board states that Respondent pays for all the insurance on the trucks and Curtis and the other commission drivers do not have to pay for any insurance. During the period of his employ with Respondent Curtis performed work solely for Respondent. Dan testified that Curtis could have performed work for anyone he wanted during this period. I would not have to give him permission. Curtis would only have to give us the courtesy of a phone call to let us know. However his affidavit given to the Board states that Respondent has so much work that Curtis had little time to work for any other companies. The employer has to be able to depend on Curtis being available so he could not be allowed to work for other companies except on a very occasional basis when we worked it out together for a brief job. Respondent provided health and life insurance policies to its hourly paid employees who pay 50 percent of the cost of these policies; these policies are also available to Respondent's commission drivers but they must pay 100 percent of the cost.

In determining the status of employees the Board employs a right of control test.³ As the Board stated in *Fort Wayne Newspapers*, 263 NLRB 854, 855 (1982):

If the person for whom the services are performed retains the right to control the manner and means by which the results are to be accomplished the person who performs the services is an employee. If only the results are controlled the person who performs the services is an independent contractor.⁴

An additional factor in determining independent contractor status is the entrepreneurial interests of the agent. *NLRB v. Associated Diamond Cabs*, 702 F.2d 912 (11th Cir. 1983). The court in *News Journal Co. v. NLRB*, 447 F.2d 65, 68 (3d Cir. 1971) stated that in making this determination you must consider the type of services rendered, the possibility of realizing additional profits through the exercise of entrepreneurial skill and the ownership and maintenance of the vehicles. In *Capital Parcel Delivery Co.*, 269 NLRB 52 (1984) the Board stated that when the control issue is relatively neutral you look to the entrepreneurial characteristics.

The most obvious factor in this matter is that unlike all the other cases cited supra the trucks herein are owned by Respondent. In addition Respondent is responsible for the insurance as well as the repair of these trucks. Curtis' sole responsibility is to pay for fuel, tolls, and any labor he needs to assist him. This is not the "stuff" that entrepreneurial interests are made of. This determination is supported by a careful examination of Curtis' terms of employment. During the period in question he worked only for Respondent under Respondent's name and

³ *News Syndicate Co.*, 164 NLRB 422, 423-424. In *NLRB v. United Insurance Co.*, 390 U.S. 254 (1968) the Supreme Court stated that the general principles of the common law of agency are to be used in determining whether an individual is an employee or an independent contractor.

⁴ See also *Air Transit*, 271 NLRB 1108 (1984) *Thomson Newspapers*, 273 NLRB 350 (1984).

² Curtis' tax return states "non-employee and self-employment."

under terms promulgated by Respondent Curtis control over the manner and means by which the results are to be accomplished is extremely limited or nonexistent. Curtis' discretion is practically limited to the route he would take and even that is previously discussed with Steve. Respondent's degree of control is further illustrated by the fact that they fired Curtis on two occasions for failure to obtain a weight ticket as will be discussed infra. That he was paid a percentage of his long distance jobs and was responsible for fuel tolls and any labor he needed to assist him is not enough to exclude him from the Act's coverage as an independent contractor. I therefore find that he is an employee within the meaning of Section 2(3) of the Act. *Standard Oil Co.* 230 NLRB 967 (1977)

IV THE ALLEGED UNFAIR LABOR PRACTICES

Curtis had been a member of the Union at his previous job. When that employment ended in August 1984 he ceased paying dues to the Union; however, he did tell Dan and Steve in August that he had been a member of the Union. Beginning about that time he spoke to his fellow employees about how they felt about obtaining a union to represent them; subsequently he met with a union representative who gave him authorization cards to distribute to his fellow employees, which he did. Steve testified that Curtis informed him of his prior union membership a few days after he commenced working for Respondent. Dan testified that right at the beginning of Curtis' employment with Respondent he saw Curtis' union card. Additionally, on or about 1 September two of his employees told him that Curtis was trying to start a union. He also testified that he has other employees who are or were union members and who attended meetings regarding unionization. He testified the fact that I do not agree with—with unions is my personal opinion. I do not hold anything over anybody's head for what their affiliations are. I personally cannot run my company on a—on a budgetary purpose using a union. In December he made a list of the positive and negative attributes that Curtis brought to Respondent; he listed Curtis' union affiliation and the fact that he discussed it with others as a negative attribute.

Steve fired Curtis in September for his failure (for the second time) to obtain a weight ticket⁵ on a job. Curtis appealed to Dan, who told Steve to take him back as there was a need for drivers—he said well, we'll just have to live with it. Dan testified that Curtis told him that his wife was having a baby; he wanted to keep his job and it would not happen again.

I looked at my brother and I said the day that we stop giving people a second chance is the day that I don't want to live with myself anymore. I say he's working no matter what you say or do. That's how Mr. Curtis got his job back.

⁵ A weight ticket obtained at a privately run or governmental weight station states the weight of the fully loaded truck. By subtracting the known weight of the truck empty, the parties determine the weight of the shipment.

Curtis testified that he did not obtain a weight ticket for this job because at the time of day of this trip the weight stations were closed. Truckstops with weight stations were open, but Steve had told him not to use them because you cannot get a weight master's signature on these tickets. Steve and Dan testified to the importance of weight tickets in determining the weight of shipments as compared to the estimates obtained from inventory sheets. Dan testified that while it can be difficult at times to locate an open weight station (especially weekends in some areas) a driver should call Respondent's office where they would look through their directory for an open station. In Curtis' situation in September, it is general knowledge to probably every driver in the State of Connecticut that a scale is open 24 hours a day in Milford, Connecticut, about 45 miles from Respondent's premises. Mileage would not be a consideration as far as I'm concerned if the driver did have to go that far to get a weight ticket, even if the customer had to wait an extra day for delivery. If I had to go 150–200 miles, I'd make the guy go. I would probably give the guy a little extra money, you know, to cushion the blow a little bit because it is difficult.

Curtis testified that in either September or October⁶ Dan called him into his office. Steve was present.

they strongly stated to me that they had heard that I was trying to organize a union within the work force of Siracusa Moving and Storage. They also stated to me that anyone having anything to do with a union would be terminated.

Dan testified he never told employees that they would be discharged if they were found to be engaged in union activities.

Curtis testified that on 8 or 9 December he and a fellow employee, Kenny Smith (who did not testify), were called into Dan's office. Steve was also present. Dan said that he had received a letter from the Union⁷ and that there was no fucking way that a union was going to be put into his shop. He also said that employees organizing for the Union would be terminated and rather than deal with a union, he would close his doors and become a booking agent without any employees. He asked Curtis and Smith to each write a letter to the Union stating that they were satisfied with their working conditions and benefits and that they did not want a union in the shop. They said that they would do so. Curtis did not write any letter to the Union.

Steve testified that on 9 December Respondent received a letter from the Union saying that their employees were being paid below scale. He and his brother

⁶ The complaint alleges that on or about 4 November Dan Siracusa in his office threatened employees for engaging in union activities and created an impression among its employees that their union activities were under surveillance by Respondent.

⁷ This letter states that their investigation reveals that Respondent is paying below standard wages and asks for a response within 72 hours. Failure [sic] to hear from you we shall proceed to inform the public of these facts. The letter continues: I want to inform you that our organization does not intend to interfere with the rights of your employees to work without becoming members of this union, nor does it make any demand upon you to sign a contract with the union.

called in various employees to ask them a question about who was trying to start a union. He told Curtis and Smith

that in no way would anybody's job security be imperiled whether they had been the ones directly approaching our personnel or if they themselves wanted to join the Union.

He testified that Dan asked either Curtis or both he and Smith if Respondent was unfair to them and they said no. Dan asked them if they would write a letter to the Union to that effect and they said that they would. He testified further that he does not recall Dan saying at this meeting that if a union came to his company he would close the doors. Dan testified that he asked Curtis and Smith to come to his office to ask for their help. He told them of the Union's letter and "I need you to write me a letter stating that I'm paying you well and he [Curtis] says absolutely I'm making a fortune here." He testified that he also told them "Under no circumstances is anyone going to get fired for—for helping me out or giving me any information under no circumstances is your job in jeopardy because of union activity." On direct examination he testified that he never told any of his employees that they would be discharged if he found they were engaged in union activities. On cross examination he testified that at this 9 December meeting he said

You are going to decide whether we have a union or don't have a union, you're going to decide whether we stay in business or go out of business. If a Union comes in here I will close my doors.

Respondent fired Curtis on or about 16 December several days earlier. Curtis called Respondent's premises to get his next assignment and was told that there was no work. He went to Respondent's premises and saw that additional employees had been hired. He told one of the secretaries that if a union represented the employees they would be protected by seniority. He left for a short time and returned to speak to Dan in his office. Dan Siracusa said "I heard you told somebody you were going to put a fucking union in here." Curtis denied it and Dan called him a liar and said that he would bury him before a union would come into his shop. "I want you out of my place of business. You're fired." Dan testified that he fired Curtis because the last time he failed to get a weight ticket (on the Flock job discussed *infra*) along with numerous other things (also discussed *infra*) that he did was the straw that broke the camel's back. Steve testified that the Flock job that he assigned to Curtis was a shipment from New Hampshire to Connecticut; it was a good assignment for Curtis (and Respondent) because Curtis had a shipment on the way up north as well. Curtis returned with the truck on Sunday 14 December. He gave his paperwork to Steve (presumably the following day) without a weight ticket. Steve told him that he was upset because it was his third infraction for a weight ticket. He told Curtis that he was in trouble because Dan had rehired him in September with the understanding that the problem would not recur. They all went into Dan's office and Dan told him that he was fired because of his failure to obtain a weight ticket.

Curtis testified the reason that he did not obtain a weight ticket for Flock was that the pickup was Saturday and delivery was Sunday and there were no scales (where he could get a signature as well as a weight) in the areas that he was traveling. He also testified that the Flock job was his last trip for Respondent and when he returned without the weight ticket Steve was angry with him; however, it wasn't until about 10 days later that he was terminated by Dan. Steve testified that he is not sure that on Sundays there are attended weight stations open between Curtis pickup and dropoff point for the Flock job. However, Curtis should have called him and driven to the Milford weight station which he was familiar with even though he would have to drive an extra 90 miles to do so.

Another factor allegedly relied on by Respondent in firing Curtis was the Griswold job which involved a November pickup and delivery both in Virginia for an individual who 6 months earlier had been moved by another company. Shortly after obtaining the job Respondent obtained a copy of the list of objects and boxes from this individual's prior move. Curtis was assigned to this job and returned with the proper papers as well as a weight ticket for the job. Dan testified that after Curtis returned he (Siracusa) looked at the bill of lading for the job and said "no way. Curtis could not have packed that many cartons in such a brief time; in short he suspected that Curtis took credit for (and the customer was charged for) packing cartons when in reality Curtis had loaded onto the truck unopened cartons from the prior recent move." He testified that a post-move survey performed for him supported his suspicions. Respondent gave the customer a \$650 credit on the job (approximately 25 percent of the total). Dan did not speak to Curtis about this situation. It was near the end. So many things had come. To say one more thing would have

Curtis testified that after he was fired he heard that Respondent claimed discrepancies on the Griswold job. He testified that he did not take credit for cartons that he did not pack. In his judgment he felt that a number of cartons were improperly packed in the prior move and he repacked them. In addition he had to pack dried flowers which must be packed carefully and in large cartons.

An additional alleged factor in Respondent's decision to discharge Curtis is a towing bill dated 16 October. On that date his truck became inoperative in Maryland and required a tow. Curtis arranged for the tow and called Respondent's office and informed them that the towing charge was \$225 which Respondent approved. Curtis paid this amount and was reimbursed for it by Respondent when he returned to their facility. Respondent introduced into evidence two copies of this towing bill through Curtis; they introduced a bill (pink copy entitled "job invoice") for \$255: \$150 for the tow and \$75 for service and labor for repair. Through McAvoy they introduced a bill (yellow copy entitled "work order") for \$150: \$100 for the tow and \$50 for labor. Both have the same invoice number, Curtis signature and Respondent's name and the date in apparently identical writing. The only apparent differences are the amounts listed for

towing service and labor and total. There are no cross outs or apparent erasures on these bills. The only explanation by Respondent for how they learned of this alleged discrepancies and what they did about it was through McAvoy who testified that Steve called the towing company to verify the amount⁸ and Mr. Hitt said that he could not verify it because his son who did the services for him was not back to the shop yet. He said well when he does get back please forward us a copy of your invoice. About 6 weeks later Respondent received the yellow copy of the invoice. When they showed Curtis the two bills he insisted that he had paid \$225 and that the original bill was correct.

The final incident allegedly contributing to Curtis discharge was an incident in which he demanded some money in advance from McAvoy before taking a shipment. McAvoy testified that early in the morning (I'd say November I don't know) Curtis was leaving the terminal to pick up a shipment in Connecticut and then returning to the terminal. Curtis demanded his expense money at about 8:30 a.m. before leaving the terminal for his pickup. McAvoy told him that the bank was not yet open and when he returned to the terminal she would give him his money. Curtis refused to leave until he was given money and McAvoy located \$60 in cash and gave it to Curtis at which point he left. McAvoy testified further that Curtis' actions were improper because he was not entitled to this expense money until he returned to the terminal if he had to pay a helper to assist him in loading the truck—you don't have to pay him until the labor's done and the labor wasn't done until he came back to the office—and since he was traveling intrastate there was little chance he would have to pay for fuel and even if he did he could charge it at some stations where Respondent maintains accounts. Curtis testified that he never declined to take the job he told McAvoy that he needed the money before leaving in order to pay his helper who was going to assist him in loading the truck.

The complaint alleges that Respondent through Dan on or about 4 November threatened its employees with discharge for engaging in union and other protected activities and created an impression among its employees that their union and protected activities were under surveillance by Respondent. The sole testimony supporting these allegations is Curtis' testimony that in either September or October Dan told him (with Steve present) that they heard that he was trying to organize a union within the work force of [Respondent] and that any one having anything to do with a union would be terminated. The sole testimony by Respondent in defense of this allegation is the following testimony of Dan:

Q Now did you ever have occasion to tell any of your employees that if you found them engaging in union activities they would be discharged?

A Absolutely not.

⁸ No testimony was offered by Respondent as to what, if anything, caused them to suspect that the bill was inflated.

Because this is the sole evidence regarding these allegations I find insufficient evidence to support the allegation regarding an impression of surveillance and therefore recommend that the allegation be dismissed. Regarding the alleged threat of discharge I initially find that the de minimis variance between the date in the complaint allegation and the testimony is not fatal to this allegation. Although the complaint alleges that the threat occurred on or about 4 November and Curtis testified that it occurred in September or October Respondent had adequate notice of the nature of the allegation and had an opportunity to and did litigate it. The complaint placed Respondent on notice that Dan had made a threat on or about 4 November. That this threat was made in September or October rather than 4 November did not prejudice Respondent for the reasons stated supra *Man gurias Inc* 227 NLRB 113 (1976) *Strozer Inc* 232 NLRB 937 (1977).

With little difficulty I credit Curtis' testimony over that of Dan Siracusa. My observation of them and a review of their testimony convince me that Curtis was frank and direct in his testimony while Dan Siracusa's testimony was somewhat flowery and less than frank. For example Dan Siracusa testified that he never told an employee that he would be fired if he discovered that they were engaged in union activities (absolutely not). And yet he admitted (I assume because it was in an affidavit he had given the Board) that shortly before he fired Curtis he told him: "If a union comes in here I will close my doors. For this reason and others discussed below regarding Curtis' discharge I credit Curtis' version of this incident. Because it is a threat to discharge employees in retaliation for their union activities it clearly violates Section 8(a)(1) of the Act."

The next allegation is that on or about 8 December Respondent by Dan threatened its employees with discharge and plant closure for engaging in union and other protected concerted activities. Curtis testified that at this meeting Dan told him and Smith that there was no way a union would get into his shop that he would fire employees active for the Union and would close his doors rather than deal with a union. Dan testified that he told them that if a union came in he would close his doors. For the reasons stated above I credit Curtis and find that the statements made at this 8 December meeting violate Section 8(a)(1) of the Act.

Turning to the 8(a)(3) allegation in *Wright Line* 251 NLRB 1083 (1980) the Board set forth the rule it will henceforth apply in discrimination cases such as the instant matter. First we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Once this is established the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. Without a doubt the General Counsel has satisfied his initial burden. On the day that Respondent received the letter from the Union he threatened to fire employees who were active for the Union and would close his doors rather than deal with a union. He knew that Curtis was

then or had been a member of the Union. About a week later he fired Curtis. This creates an exceptionally strong inference that Curtis' union activities and Respondent's antipathy toward the Union caused Curtis' discharge. Having made that finding, it is necessary to determine whether Curtis would have been fired regardless of his union activity and the Union's 8 December letter. The strongest argument in this regard for Respondent is that it fired Curtis for allegedly the same reason (failure to obtain a weight ticket) in September before his union activity became an issue. That argument initially is very convincing— We fired him in September for failing to get a weight ticket. We rehired him and gave him one more chance. In December he again failed to obtain a weight ticket; therefore we were justified in firing him. Without more, this argument would be persuasive. What impairs this argument, however, are the threats made to Curtis and Smith a week earlier to fire anybody active for the Union and to close rather than deal with the Union, and the statements Dan made to Curtis when he returned to the facility in mid-December, as well as the earlier threat made to Curtis. The ultimate issue is whether Respondent fired Curtis solely because he failed to obtain a weight ticket on the Flock job or whether Respondent seized on that opportunity to discharge him when the real reason was his union activity. In making this determination, it is necessary to look at the seriousness of the offense. In September, Curtis was fired for the same reason and rehired. The Flock job was performed on a weekend, however, when no reasonably accessible attended scales were available. In addition, unlike the Griswold job, there apparently was no dispute about the bill at the time he was fired. Steve testified that Curtis should have driven to the Milford weight station approximately 90 miles roundtrip out of the way; however, Steve also testified, however, that at the 9 December meeting, he does not recall Dan telling Curtis and Smith that he would close the doors rather than dealing with the Union. I therefore find him not a credible witness and find his testimony regarding the weight station not practical, as well. Knowing that it was a weekend job when Curtis would have difficulty locating a weight station, he could have previously informed him to use the Milford station and told him that he would be compensated for the extra fuel consumed to get there; however, he did not do so.

For all these reasons, I find that Respondent has not sustained its burden, and by its discharge of Curtis violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

- 1 The Respondent, Siracusa Moving & Storage Service Co. Inc., 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 The Respondent violated Section 8(a)(1) of the Act about September or October by threatening its employees with discharge for engaging in activities on behalf of the Union.

4 Respondent violated Section 8(a)(1) of the Act about 9 December by threatening its employees with discharge for engaging in activities on behalf of the Union and by threatening to cease its business operations rather than dealing with the Union.

5 The Respondent violated Section 8(a)(1) and (3) of the Act by discharging Curtis about 16 December.

6 The Respondent did not violate the Act as further alleged in the complaint.

THE REMEDY

Having found that Respondent has engaged in and is engaging in certain unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act, to wit: that Respondent offer Curtis immediate reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges. It is also recommended that Respondent be ordered to make Curtis whole for any loss of earnings he sustained by reason of his discharge. Backpay shall be computed in accordance with *F W Woolworth Co.*, 90 NLRB 289 (1950); *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1950). I find the visitatorial clause requested by the General Counsel unnecessary. *O L Willis Inc.*, 278 NLRB 203 (1986).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommendation⁹:

ORDER

The Respondent, Siracusa Moving & Storage Service Co. Inc., East Hartford, Connecticut, its officers, agents, successors, and assigns shall:

1 Cease and desist from:

(a) Threatening its employees with discharge or ceasing operations because of their activities on behalf of the Union.

(b) Discharging its employees in retaliation for their activities on behalf of the Union.

(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) Offer Curtis immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

⁹ 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.

(b) Remove from its file reference to the termination of Curtis and notify him in writing that this had been done and that the evidence of this unlawful activity will not be used as a basis for future actions against him

(c) Preserve and on request make available to the Board or its agents for examination or copying all records or documents necessary to analyze and determine the amount of backpay owed to Curtis

(d) Post at its East Hartford Connecticut facility copies of the attached notice marked Appendix ¹⁰ Copies of such notice on forms provided by the Officer in Charge for Subregion 39 after being signed by Respondent's authorized representative shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted Reasonable steps shall be taken by Respondent to ensure that said notices are not altered defaced or covered by any other material

(e) Notify the officer in charge in writing within 20 days from the date of this Order what steps the Respondent has taken to comply

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations not specifically found herein

¹⁰ 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

APPENDIX

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

After a hearing in which all parties were afforded the opportunity to present evidence it has been found that we violated the National Labor Relations Act in certain respects and we have been ordered to post this notice

WE WILL NOT threaten to discharge our employees in retaliation for their activities on behalf of Teamsters Union Local 671 a/w International Brotherhood of Teamsters Chauffeurs Warehousemen and Helpers of America AFL-CIO or any other labor organization

WE WILL NOT inform our employees that we will cease our business operations rather than deal with the Union or any other labor organization

WE WILL NOT in any like or related manner interfere with restrain or coerce our employees in the exercise of their rights guaranteed them in Section 7 of the Act

WE WILL make whole Ralph Curtis with interest for any loss of earnings he may have suffered as a result of our discrimination against him and we will offer him full and immediate reinstatement to his former job or if that job no longer exists to a substantially equivalent position without prejudice to his seniority or other rights and privileges

WE WILL remove from our files any reference to the termination of Curtis and we will notify him in writing that this has been done and that evidence of this unlawful action will not be used as a basis for future personal action against him

SIRACUSA MOVING & STORAGE SERVICE
CO INC