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DECISION

Preliminary Statement of the Case

BENJAMIN SCHLESINGER, Administrative Law Judge. This Decision constitutes the resolution of the issues that remain after and follow my earlier Decision in JD–5–98 ("*Overnite I*"), which decision and the record on which it is based are hereby incorporated herein by reference. *Overnite I* held, inter alia, that the nationwide announcement on February 10, 1995, and grant on March 5, 1995, by Respondent Overnite Transportation Company ("Respondent" or "Overnite" or "Company") to all of its employees of an unprecedented, second substantial wage increase in 1995, about two months after the first increase, timed at the peak of the Teamsters' organizing drive, was an unfair labor practice in violation of Section 8(a)(1) and (5) of the National Labor Relations Act, 1947, as amended, 29 U.S.C. Sec. 151 et seq. The violation was so serious that it alone warranted the relief of bargaining orders at four of Respondent's service centers under the authority of *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), and established Board precedent.

Implicit in *Overnite I* was that the conduct engaged in nationally by Overnite was also sufficient to warrant bargaining orders in other unfair labor practice cases that constituted part of this consolidated proceeding and which concerned additional service centers of Overnite, provided that there was proof that the International Brotherhood of Teamsters, AFL–CIO ("International"), or its affiliates, represented a majority of the employees at those service centers. This Decision involves, in the order that the hearings were held, eight additional service centers located at Dayton, Ohio; Chattanooga, Tennessee; Nitro, West Virginia; Richfield, Ohio; Parkersburg, West Virginia; Nashville, Tennessee; Rockford, Illinois; and Bensalem, Pennsylvania.[1]

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[1] The consolidated complaint also sought, in this phase of the proceeding, bargaining orders at Lafayette, Indiana, and Elmsford, New York. Near the end of the hearings, the General Counsel moved for orders, which I granted, severing and dismissing those cases. In addition, the parties settled the complaints in Cases 18–CA–13394–65 (formerly 9–CA–32869), 18–CA–13394–10 (formerly 10–CA–28205), and 8–CA–28126 during trial, and those complaints were severed from this proceeding.

The relevant docket entries are as follows: The charge in Case 18–CA–13394–63 (formerly 9–CA–32770) was filed by Local 957 on March 27 and amended on May 11 and June 5, 1995. On June 8, 1995, an unfair labor practice complaint issued, which was amended on June 13. Thereafter, on June 28, 1995, Case 18–RC–15815 (formerly 9–RC–16517) was consolidated with the unfair labor practice proceeding. The charge in Case 18–CA–13394–67 (formerly 10–CA–28455) was filed by Local 515 on May 10, 1995. The charge in Case 18–CA–13394–49 (formerly 10–CA–28360) was filed by Local 515 on April 3 and amended on April 20, 1995. On May 24 and July 12, 1995, unfair labor practice complaints issued. On June 8, 1995, Case 18–RC–15817 (formerly 10–RC–14601) was consolidated with the two earliest unfair labor practice cases. The charge in Case 18–CA–13394–37 (formerly 9–CA–32731) was filed by Local 175 on March 27 and amended on May 8, 1995. The charge in Case 18–CA–13394–66 (formerly 9–CA–32940) was filed by Local 175 on May 24, 1995. On May 10, 1995, an unfair labor practice complaint issued and was amended on May 24 and 30, 1995. On May 17, 1995, Case 18–RC–15785 (formerly 9–RC–14601) was consolidated with the unfair labor practice case. The charge in Case 18–CA–13394–88 (formerly 8–CA–27314) was filed by Local 24 on April 17. The charge in Case 18–CA–13394–89 (formerly 8–CA–27379) was filed by Local 24 on May 10 and amended on May 19, 1995. On November 30, 1995, an unfair labor practice complaint issued. Thereafter, on December 7, 1995, Case 18–RC–15881 (formerly 8–RC–15191) was

Continued

On July 29, 1995, the General Counsel and Respondent formally settled, with certain exceptions, all the numerous Section 8(a)(1) unfair labor practices alleged in the various complaints consolidated in this proceeding. Specifically left for resolution in the earlier portion of this proceeding were the so-called "national" allegations which related to all of Respondent's facilities and other allegations that, the General Counsel contended, supported bargaining orders under *Gissel*. The General Counsel also specifically reserved the right to use any competent, relevant, material, and otherwise admissible evidence to support the bargaining orders, even if the evidence pertained to allegations that had been previously settled.

Having determined that the national unfair labor practices warranted bargaining orders at all the service centers, I must, therefore, also consider whether any of the various Section 8(a)(1) allegations support the additional bargaining order requests; but those allegations become relevant and material only if I find that the Teamsters represented at a critical time a majority of the employees at the particular service centers. *Gourmet Foods*, 270 NLRB 578 (1984). If there was no majority, then the Section 8(a)(1) allegations support nothing and have already been settled; and there is no further relief that I might properly grant, because the relief has already been agreed on. I, thus, turn first to the Locals involved and their alleged majority status at each of Respondent's service centers.

I. The Unions Involved

Respondent admitted, and I conclude, that Teamsters Local Union No. 957, an affiliate of International Brotherhood of Teamsters, AFL–CIO ("Local 957"),[2] is a labor organization within the meaning of Section 2(5) of the Act. The following employees constitute a unit appropriate for purposes of collective bargaining:

> All full-time and regular part-time road drivers, city drivers, and dock workers employed at Overnite Transportation Company's Dayton, Ohio facility, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

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consolidated with the unfair labor practice case. The charge in Case 18–CA–13394–53 (formerly 6–CA–27132) was filed by Local 175 on March 16 and amended on June 21, 1995. On June 28, 1995, the unfair labor practice complaint issued; and the representation case was consolidated with the unfair labor practice case. The charge in Case 18–CA–13394–83 (formerly 26–CA–16837) was filed by Local 480 on May 30 and amended on June 27, 1995. On July 7, 1995, the unfair labor practice complaint issued. Thereafter, on July 19, 1995, Case 18–RC–15822 (formerly 26–RC–7696) was consolidated with the unfair labor practice case. The charge in Case 18–CA–13394–84 (formerly 33–CA–11151) was filed by Local 325 on April 11 and the complaint issued on June 28, 1995. On the same day, Case 18–RC–15823 (formerly 33–RC–3975) was consolidated with the unfair labor practice case. The charge in Case 18–CA–13394–3 (formerly 4–CA–23519) was filed by Local 107 on February 15 and amended on February 17 and April 6, 1995. The unfair labor practice complaint issued on April 13 and was amended on April 17, 1995. Thereafter, on May 1, 1995, Case 18–RC–15767 (formerly 4–RC–18525) was consolidated with the unfair labor practice case. The hearing was held in Dayton, Ohio; Chattanooga and Nashville, Tennessee; St. Albans and Parkersburg, West Virginia; Cleveland, Ohio; Atlanta, Georgia; Rockford, Illinois; and Philadelphia, Pennsylvania, for 30 days, starting on June 29, 1998, and ending on February 18, 1999.

[2] This Local, as well as the other Locals, are often separately referred to herein as the "Teamsters" or "Union." Hopefully, the reference to the appropriate Local is obvious.

Respondent admitted, and I conclude, that International Brotherhood of Teamsters, Local 515 ("Local 515"), is a labor organization within the meaning of Section 2(5) of the Act. The following employees constitute a unit appropriate for purposes of collective bargaining:

> All full-time and regular part-time city drivers, road drivers, dockmen, dock leadmen, jockeys and mechanics employed at Overnite Transportation Company's Chattanooga, Tennessee terminal, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

Respondent admitted, and I conclude, that Truck Drivers, Chauffeurs and Helpers Local Union No. 175, an affiliate of International Brotherhood of Teamsters, AFL–CIO ("Local 175"), is a labor organization within the meaning of Section 2(5) of the Act. The following employees constitute units appropriate for purposes of collective bargaining:

> All full-time and regular part-time over the road drivers, city drivers, jockeys, dock workers and mechanics employed at Overnite Transportation Company's Nitro, West Virginia facility, excluding all office clerical employees, sales employees and all professional employees, guards and supervisors as defined in the Act.

> All full-time and regular part-time over the road drivers, city pick-up and delivery drivers, hostlers, yard workers and dock workers employed at Overnite Transportation Company's Parkersburg, West Virginia facility, excluding all guards, mechanics, supervisors, professional workers, office clerical employees and any other employees excluded by the Act.

Respondent admitted, and I conclude, that Teamsters, Freight Drivers, Dockworkers and Helpers, Local Union No. 24, affiliated with International Brotherhood of Teamsters, AFL–CIO ("Local 24"), is a labor organization within the meaning of Section 2(5) of the Act. The following employees constitute a unit appropriate for purposes of collective bargaining:

> All full time and regular part time city drivers, road drivers, dock lead men, dock workers, and jockeys employed at Overnite Transportation Company's 3495 Brecksville Road, Richfield, Ohio facility, excluding all office clerical employees, professional employees, mechanic lead men, mechanics, guards and supervisors as defined in the Act.

Respondent admitted, and I conclude, that Teamsters, Freight Employees, Local Union No. 480, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO ("Local 480"), is a labor organization within the meaning of Section 2(5) of the Act. The following employees constitute a unit appropriate for purposes of collective bargaining:

> All full time and regular part time city drivers, dockworkers, road drivers, leadpersons, and mechanics employed at Overnite Transportation Company's Nashville, Tennessee facility; excluding all office clerical, professional employees, guards and supervisors as defined in the Act.

Respondent admitted, and I conclude, that Teamsters Local Union No. 325, affiliated with International Brotherhood of Teamsters, AFL–CIO ("Local 325"), is a labor organization within the meaning of Section 2(5) of the Act. The following employees constitute a unit appropriate for purposes of collective bargaining:

> All full-time and regular part-time truck drivers, dock workers and dock leadpersons employed at Overnite Transportation Company's Rockford, Illinois facility, but excluding office clerical employees, confidential employees, professional employees, guards and supervisors as defined by the Act, and all other employees.

Respondent admitted, and I conclude, that Teamsters Local Union 107, affiliated with International Brotherhood of Teamsters, AFL–CIO ("Local 107"), is a labor organization within the meaning of Section 2(5) of the Act. The following employees constitute a unit appropriate for purposes of collective bargaining:

> All full-time and regular part-time drivers and dock workers employed at Overnite Transportation Company's Cornwell Heights, Pennsylvania facility, but excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

II. The Union's Majority

A. Preliminary Statement – The Law and Credibility

Respondent attempted to prove that the Teamsters obtained authorization cards and petitions fraudulently from many of Overnite's employees by representing that the cards were to be used for the sole purpose of obtaining an election. In *Gissel,* 395 U.S. at 606-608, the Supreme Court approved the Board's *Cumberland Shoe* doctrine[3] for determining the validity of authorization cards, describing Board law, 395 U.S. at 584, as follows:

> Under the *Cumberland Shoe* doctrine, if the card itself is unambiguous (i.e. states on its face that the signer authorizes the Union to represent the employee for collective bargaining purposes and not to seek an election), it will be counted unless it is proved that the employee was told that the card was to be used *solely* for the purpose of obtaining an election.

The authorization cards and petitions used by the Teamsters do not refer to an election or make any statement inconsistent with the stated single purpose of designating the Union as collective-bargaining representative. In all instances, I find that they were unambiguous and had a single purpose, with the meaning of *Cumberland Shoe*.

The Board wrote in *DTR Industries*, 311 NLRB 833, 839-840 (1993), enf. denied on other grounds 39 F.3d 106 (6th Cir. 1994):

> The *Gissel* Court fashioned the following rule for unambiguous single-purpose authorization cards:
>
> > [E]mployees should be bound by the clear language of what they signed unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature.

[3] *Cumberland Shoe Corp.*, 144 NLRB 1268 (1963), enfd. 351 F.2d 917 (6th Cir. 1965), reaff. in *Levi Strauss & Co.*, 172 NLRB 732 (1968), both approved in *Gissel*, 395 U.S. at 606–608.

395 U.S. at 606. Thus, where the card on its face clearly declares a purpose to designate the union as collective-bargaining representative, the only basis for denying face value to the authorization card is affirmative proof of misrepresentation or coercion. *Levi Strauss & Co.*, 172 NLRB 732, 733 (1968).

In *Levi Strauss*, the Board explained and reaffirmed the *Cumberland Shoe* doctrine in the context of unambiguous, single-purpose authorization cards. The Board stated:

> Declarations to employees that authorization cards are desired to gain an election do not under ordinary circumstances constitute misrepresentations either of fact or of purpose. As in the instant case, where the Union did use the evidence of employee support reflected by the cards to get an election, such declarations normally constitute no more than truthful statements of a concurrent purpose for which the cards are sought. That purpose, moreover, is one that is entirely consistent with the authorization purpose expressed in the cards, as well as with the use of the cards to establish majority support. A point sometimes overlooked is that in basic purpose there is no essential difference between cards that are needed for a showing of interest to gain an election and cards that must be used to support a majority designation showing in a Section 8(a)(5) complaint proceeding. . . .
>
> Thus, the fact that employees are told in the course of solicitation that an election is contemplated, or that a purpose of the card is to make an election possible, provides in our view insufficient basis in itself for vitiating unambiguously worded authorization cards on the theory of misrepresentation. [311 NLRB at 839.]

. . . .

. . . [W]e reject the Respondent's argument that even assuming, for merits sake, that . . . [the] . . . union solicitors said that the cards were "for an election," and did not state that the cards were "only for an election," an assumption that we find supported by a preponderance of the testimony of the employees here, that the cards are invalid because the employees were misled about the purpose of the authorization cards.

Rather, we apply *Gissel's* rule that employees are bound by the clear language of what they sign unless there is a deliberate effort to induce them to ignore the card's express language by telling them that the sole and exclusive purpose of the card is to get an election. [311 NLRB at 840.]

Much of Respondent's proof came from employees who testified that the only purpose given for the cards was that they were going to be used to obtain an election. That is not enough. In *DTR Industries*, 311 NLRB at 840, the Board accepted cards signed by 23 employees, whose testimony:

> establishe[d] that even though they were told that the cards were for an election or a vote, they were not told either explicitly or in substance that the cards would

> be used only or solely for an election or vote or for no purpose other than to help get an election or a vote as required to invalidate the cards under Gissel.

See also *Jeffrey Mfg. Division*, 248 NLRB 33 (1980), enfd. as modified sub nom. *Dresser Industries v. NLRB*, 654 F.2d 944 (4th Cir. 1981); *DTR Industries*, 311 NLRB at 843 (Selby, Weis, McVetta). Some employees' testimony that they did not read the authorizations "does not necessarily invalidate the Board's reliance on the cards as evidence of majority support." *DTR Industries*, 311 NLRB at 841 fn. 39, citing *Ona Corp.*, 261 NLRB 1378, 1410 (1982), remanded 729 F.2d 713 (11th Cir.1984); *Jeffrey Mfg. Division*, supra; *Keystone Pretzel Bakery*, 242 NLRB 492 (1979), enfd. 696 F.2d 257 (3d Cir. 1982). In *DTR Industries*, 311 NLRB at 839, the Board noted the Supreme Court's consideration in *Gissel* of *General Steel Products*, 157 NLRB 636 (1966), one of the four cases consolidated in *Gissel*, in which the trial examiner rejected the company's contentions:

> that cards should be invalidated because employees were told one or more of the following: (1) that the card would be used to get an election; (2) that an employee had the right to vote either way, even though he signed the card; and (3) that the card would be kept secret and not shown to anybody except to the Board in order to get an election.[21] These statements, singly or jointly, do not foreclose use of the card for the purpose designated on their face.

FN21 157 NLRB at 645, cited at 395 U.S. 584-585 fn. 5 and 608.

On the other hand, a misrepresentation that a card is only for an election disqualifies the card from consideration as a true reflection that an employee has authorized union representation. When this series of cases began, Respondent attempted to prove that the Teamsters distributed a leaflet that said just that. The leaflet, captioned with two portly industrialists smoking cigars, and a large Teamsters logo, advised the employees that Overnite was not telling the truth:

DON'T BE MISLED BY UP/OVERNITE HALF TRUTHS

> 1. By signing a Teamsters authorization card <u>you</u> are only saying that *you* want to have an election conducted by The National Labor Relations Board.
>
> 2. Despite what management may be telling <u>you</u>, the only people who see <u>your</u> authorization cards are *the Teamsters*, and The National Labor Relations Board.
>
> 3. <u>You</u> are not obligated to *The Teamsters* at all by signing a card.[4]
>
> 4. The NLRB will hold a secret ballot election, what that means is neither management or *the Teamsters* will know how <u>you</u> voted.
>
> 5. Don't be misled, if UP/Overnite thought <u>you</u> would get less in negotiations they would pay *the Teamsters* to come in, but that's not what they were worried about, management is worrying about <u>you</u> having a voice in <u>your</u> future.

[4] This paragraph may, depending on the wording of the authorization card or petition or the words of the solicitor, invalidate a signature. *Silver Fleet Motor Express*, 174 NLRB 873, 873-74 (1969); *Eckerd's Markets, Inc.*, 183 NLRB 337, 338 (1970); *Fort Smith Outerwear, Inc.*, 205 NLRB 592, 593, fn. 2 (1973), enfd. as modified on other grounds 499 F.2d 223 (8th Cir. 1974).

> 6. The reason management gets the gold mine and workers get the shaft is, without a *union* you have no voice in your future, you only have broken promises. You can't plan your future on a broken promise.

.5

Get *your* promises in writing
With a ***Teamsters contract!!***

The testimony in the first hearing, involving the Dayton facility, was far from clear that the Teamsters had actually distributed the leaflet. Only a few of the many witnesses called by Respondent could identify it; and their recollections of it were weak indeed, so hesitant that I was not, and still am not, inclined to believe them. Of additional importance was the fact that there was no evidence of anything that occurred in Dayton that would have created an issue and prompted the Teamsters to write such a response. The hearing next moved to Chattanooga, where Overnite's case accelerated. Witnesses were still uncertain, but more of them — never that many at any of the locations — identified the leaflet, which I received in evidence because of their identification, albeit somewhat tentative. That did not necessarily end matters, however. When the leaflet again became an issue at the hearing involving the Richfield service center, the Counsel for the General Counsel gave one witness, who had identified the leaflet, a different leaflet that appeared at first glance to be the same as the first. And the witness then changed his earlier testimony, stating that he could no longer identify the first leaflet as the one that the Teamsters passed out and that the Teamsters could have passed out the second leaflet, which contained one profound difference from the first. That was the first paragraph, which in the first leaflet openly represented that the cards were not being sought to show interest in the Union but were being solicited to obtain an election. Instead, the second leaflet stated:

> 1. By signing a *Teamsters* authorization card *you* are authorizing the Teamsters to represent you for all matters pertaining to wages, hours, and conditions of employment. Our intention is to file the cards with the National Labor Relations Board for an election.

Neither the Teamsters nor Respondent offered any evidence that would explain the reason that the Teamsters would have thought it important to distribute this leaflet, making the second leaflet as curious as the first. More problematic was the later revelation that the second leaflet was one that Respondent, in response to a subpoena duces tecum served by the General Counsel, had produced from its files early in this proceeding, more particularly from its file maintained at its Chattanooga service center. Yet that was not shown to the Chattanooga employees, those whose testimony may conceivably have been affected, to affirm facts that were really quite different. They were shown, instead, the offensive first leaflet.

Nonetheless, the issue continued to be litigated up to the hearing in Nashville, with more employees identifying the first leaflet, and not one representative of the Teamsters testifying about the first leaflet or any of the other leaflets. At Nashville, Respondent served subpoenas not only on Local 480 but also on the International. The subpoenas sought the appearance of any person who had knowledge of the preparation and distribution of the first leaflet. The subpoenas were answered with the response that there was no one who had such knowledge.

There was thus, in this record, no rebuttal of any evidence that the first leaflet, with its direct statement that the cards were being solicited only for an election, was distributed as the witnesses testified. Although there continued to be, among the employees who identified the first leaflet, some uncertainty in their testimony, I have credited many of Respondent's

witnesses, even though I have substantial doubts about their testimony. If the Teamsters represented in the first leaflet[5] that the cards (and petitions) would be used solely for the purpose of obtaining an election, the solicitors at the service centers where the leaflets were seen may have made the same representations, and I have credited the testimony of many of those witnesses called by Respondent who testified that they were told the content of that first leaflet (hereafter "Teamsters leaflet").

There was one final problem with the testimony about the authorization cards and petitions, and that problem is more about the construction of the English language than it is about legalities. There were a substantial number of witnesses who used the word "just" (some simply by habit) or "only" or "solely" or "merely" not to limit the purpose for which the cards were to be used but to indicate that a certain comment was the only comment that was made. It makes a difference at law. If a solicitor stated only that the card was to be used for an election, that does not misrepresent the purpose of the card and is not inconsistent with a union's proof that it has been authorized to represent employees. On the other hand, if it is clear that the card or petition is being presented for signature to be used only to obtain an election, then it is not being presented to obtain the signatory's authorization of the union as his representative.[6]

Respondent called numerous witnesses to contest their authorizations. As in *Overnite I*, their testimony — that they did not know how their signatures ended up on the documents shown to them; or that they did not sign the documents that were placed before them, even though their signatures appeared on the documents; or that they signed different documents; or that the writing on the cards or petitions were covered — was weak, often confused, frequently inconsistent, sometimes bordering on the silly, and uniformly unbelievable. That they so testified was not necessarily unexpected. The Supreme Court commented in *Gissel*, 395 U. S. at 608, that: "[E]mployees are more likely than not, many months after a card drive and in response to questions by company counsel, to give testimony damaging to the Union, particularly where company officials have previously threatened reprisals for union activity in violation of Section 8(a)(1)." (Footnote omitted). Here, although there were no alleged violations of *Johnnie's Poultry*, 146 NLRB 770 (1964),[7] Respondent "directed" its current employees to see its counsel, and, only when they arrived, were they given their *Johnnie's Poultry* protective instructions. The employees who agreed to testify were paid their witness fee plus their normal wages. Knowing of Overnite's desire to prevent union organization, they could be expected to tailor their testimony to explain away their signing of Union authorizations.

Regarding the testimony about the alleged unfair labor practices, I found most of the employees called by the General Counsel sincere, truthful, and generally reliable. Various incidents occurred, often repetitive of conduct exhibited throughout this consolidated

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[5] Although no one identified the leaflet as being prepared by the Teamsters, because of the testimony that it was distributed by Teamsters members and other supporters of the Union, it may fairly be assumed that it was in fact a Teamsters document, for which the Teamsters were responsible.

[6] Perhaps the emphasis on language is too much, for in *Jeffrey Mfg. Division*, 248 NLRB 33 (1980), employee Bell was told that the card did not mean that he was joining the Union but that "it was just to get a representative to explain the purpose of the Union to us at a meeting." The Board counted Bell's card, refusing to find that statement sufficient to cancel the unambiguous language on the card, which Bell read, indicating that the signer authorized the union to act as a collective-bargaining representative.

[7] The General Counsel attempted at a late date to add such a violation in Nashville; but the Regional Office had not even investigated it yet, and I refused to permit the amendment.

proceeding; and, although sometimes I had difficulty finding that the General Counsel's witnesses accurately perceived those incidents, I also find that they did not make them up from nothing. So, I have more often credited them than not, wholly independent from, but certainly consistent with, Board law, which recognizes that the testimony of current employees that contradicts statements of their supervisors is likely to be particularly reliable. *Flexsteel Industries*, 316 NLRB 745 (1995), enfd. mem. 83 F.3d 419 (5th Cir. 1996). The testimony of current employees that is adverse to their employer is ". . . given at considerable risk of economic reprisal, including loss of employment . . . and for this reason not likely to be false." *Shop-Rite Supermarket*, 231 NLRB 500, 505 fn. 22 (1977).

In making these and other credibility findings, I have fully reviewed the entire record and carefully observed the demeanor of all the witnesses. I have also taken into consideration the apparent interests of the witnesses; the inherent probabilities in light of other events; corroboration or the lack of it; the consistencies or inconsistencies within the testimony of each witness and between the testimony of each and that of other witnesses with similar apparent interests. Testimony in contradiction to that upon which my factual findings are based has been carefully considered but discredited. See, generally, *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). Where necessary, however, I have set forth the precise reasons for my credibility resolutions, bearing in mind the oft-quoted advice: "It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all." *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950).

B. Dayton

On February 7, 1995, Local 957 requested that Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the Dayton unit, but Respondent failed and refused to do so. Local 957 also mailed to the Regional Office a petition for an election the same day. The election was held on March 30, 1995, which Local 957 lost, 27–21, with 1 void and 3 challenged ballots; and the Union filed timely objections. The objections case was consolidated in this proceeding, and the parties stipulated at the hearing to certain relief, which is incorporated in this Decision.

As of the date of Local 957's request for recognition, Respondent employed 54 employees in bargaining unit positions.[8] In order to prove a majority, Local 957 had to prove 28 cards. Thus, the parties' disagreement over the status of Ted Gutwein, whose name appears for the first time on the payroll ending February 18, 1995, is of no moment. Whether he is to be included in the unit or not, Local 957's majority would still be established once it attained 28 valid cards. In any event, Gutwein was terminated (not temporarily laid off, as Respondent contends) for lack of work on September 11, 1994, and did not work again until February 13, 1995. "[I]n order to be 'employed during the payroll period' and be eligible to vote, an employee must perform unit work during the payroll period," with certain limited exceptions. *Dyncorp/Dynair Services*, 320 NLRB 120, 121 (1995). Assuming that Gutwein was laid off, Respondent showed no practice in Dayton regarding the recall of laid-off employees.[9] Gutwein performed no work in the relevant payroll period and thus may not be included in the unit.

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[8] This computation includes Joe Kitchen, a part-time dockworker, who, the General Counsel notes, has no hours listed for the payroll ending February 11, 1995, or for the payrolls preceding and subsequent to that date. However, there was written on the payroll sheets "n/w," which I understand means "no work," and not that he was no longer employed.

[9] *Riviera Manor Nursing Home, Inc.*, 200 NLRB 333 (1972), enf. granted in part and denied

Continued

The cards were actually envelopes, which could be folded and then returned to the Teamsters.[10] On the inside was written:

AUTHORIZATION FOR REPRESENTATION

I, the undersigned employed by _____
_____hereby authorize the Teamsters Union _____
to act as my collective bargaining representative.

_____
Signature of employee

_____
Home Address City State Zip Code

Phone _____ Date _____

Be Wise — Organize

Early in this proceeding, counsel agreed that, in order to save time, Respondent would supply to the General Counsel (pursuant to subpoena or stipulation) exemplars of the signatures of the employees whom the General Counsel claimed had filed authorization cards and petitions for the Teamsters in the various locations where *Gissel* bargaining orders were being contested. The General Counsel's handwriting expert, who was Richard Shipp, would then compare the signatures on the cards and petitions with the exemplars. After his analysis, the cards and petitions and the exemplars would be sent to Respondent's counsel so that Respondent's expert could perform the same review. Although there is a paucity of exemplars in evidence, compared to the boxes of material that were at each of the hearings, the exemplars

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in part mem. 487 F.2d 1405 (7th Cir. 1973), and *Koons Ford of Annapolis, Inc.*, 282 NLRB 506 (1986), enfd. 833 F.2d 310 (4th Cir. 1987), cert. denied 485 U.S. 1021 (1988), cited by Respondent, do not support its position. The employees whose status was questioned in *Riviera Manor* "were undisputably working in the unit on the day the union made its bargaining demand, and the only question was whether their cards were valid if signed prior to the date they began working." *299 Lincoln Street, Inc.*, 292 NLRB 172, 180 (1988). The Board declined in *Koons Ford*, at 282 NLRB at 509 fn. 17, to rule on Administrative Law Judge's determination of the validity of the authorization card of employee Epling, and that is the finding on which Respondent relies. Finally, Gutwein did not make an application to return to work before he actually returned, so he had no nexus to the service center.

[10] Respondent contends that the "General Counsel's card case fails because many of the cards do not clearly identify Local 957 as the signer's designated collective bargaining agent." The designation of a parent union instead of the local union does not invalidate the petition. *Cam Industries*, 251 NLRB 11 (1980), enfd. 666 F.2d 411 (9th Cir. 1982). Furthermore, the return address on the envelope clearly identified the Teamsters in Dayton. A number of employees attended meetings at the Dayton Union office. Respondent's claim that Jones testified to a different address of the Local is specious. The Official Transcript is obviously in error, reporting "2219 Armstrong Lane," rather than "2719 Armstrong Lane," the correct address on the authorization cards, on the petition for a representation election, the original unfair labor practice charge, and all the rest of the pleadings, as well as exhibits in this proceeding. There is no factual basis in this record to sustain Respondent's suggestion that the employees were at all confused about what union they were authorizing to represent them.

consisted of W–4 forms; applications for employment; vehicle accident reports; employee reports of work injury; forms for enrollment in Overnite's health plan; stock subscription agreement cancellations and requests for refunds; hazardous material certifications; employee eligibility verifications required by the Immigration and Naturalization Service; and receipts of Overnite's drug and alcohol employee information packet, employee handbook, and absentee and tardiness and on-the-job injuries policies. Generally, no less that 10 exemplars were produced for each employee.

Shipp compared the signatures on the Dayton authorization cards (except for one, which was not signed) with exemplars produced from Respondent's personnel files of employees whom it employed and who had the same names as those persons whom the General Counsel asked for. Respondent contends that the exemplars were never authenticated as the genuine signatures of the employees whose signatures were being compared and that, therefore, no comparison of signatures could be conducted.

Rule 901(a) of the Federal Rules of Evidence, titled "Requirement of Authentication or Identification," provides: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." In *United States v. Mangan*, 575 F.2d 32, 41–42 (2d Cir. 1978), cert. denied 439 U.S. 931 (1978), the court wrote:

> [S]subdivision (b) [of Rule 901] gives several illustrations of sufficient authentication, one of which is
>
> > (4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.
>
> Weinstein & Berger's Commentary on the Federal Rules states, ¶ 901(b)(4)[01] at 901–47, that "Wigmore's conclusion that mere contents will not suffice unless only the author would have known the details is contrary to the federal rules and unsound" (footnote omitted) and that "[T]he common law prejudice against self-authenticating documents is not carried over into the Federal Rules."

The question is whether the exemplars bear the signatures of the employees who signed the cards. I find that they did. As stated in *United States v. White*, 444 F.2d 1274, 1280 (1971), cert. denied 404 U.S. 949 (1971), quoted with approval in *Scharfenberger v. Wingo*, 542 F.2d 328, 336 (6th Cir. 1976):

> There is no precise method by which a specimen must be proved to be genuine and the proof may be either direct or circumstantial. *Dean v. United States*, 246 F. 568, 576 (5th Cir. 1917) The courts have not restricted the manner in which specimens may be proved genuine and each case must be viewed on its own facts. See *Annot.* 41 A.L.R.2d 583, 589 (1955).

Accord: *United States v. Reed*, 439 F.2d 1, 3 (2d Cir. 1971), where the Court held that exemplars "could be shown either by direct or circumstantial evidence or by a combination of both," citing *United States v. Swan*, 396 F.2d 883 (2d Cir. 1968), cert. denied 393 U.S. 923 (1969). In *Scharfenberger v. Wingo*, the exemplars were copies of withholding exemption certificates, a job application, and a signed letter of resignation. The court noted, 542 F.2d at 337, that they were taken from the individual's employer, which was the Commonwealth of

Kentucky, they were prepared long before the litigation began, and there was no evidence tending to show that the documents were not written by the individual.[11]

The Board rule is no different. In *Aero Corp.*, 149 NLRB 1283 (1964), enfd. sub nom. *Auto Workers v. NLRB*, 363 F.2d 702 (D.C. Cir. 1966), cert. denied 385 U.S. 973 (1966), the employer, just as Overnite, would not stipulate to the authenticity of documents subpoenaed from employee personnel files, such as W-4 forms, employment applications, skills certification forms, paycheck endorsements, or signed personnel forms of another type regularly used by the employer. The Board held that the exemplars were authentic based on the nature of the documents, *i.e.*, employees were required by law to sign them, or because the employer relied on them in the course of its business. "If the [employer] wished to attack the genuineness of the signatures on these forms, it could have come forward with some evidence indicating that they are not genuine," the Board wrote, at 1287, relying on *Reining v. United States*, 167 F.2d 362, 364 (5th Cir. 1948). *Aero Corp.* has been consistently followed. *Naum Bros.*, 240 NLRB 311, 320 fn. 79 (1979), enfd. 637 F.2d 589 (6th Cir. 1981); *Highland Light Steam Laundry*, 272 NLRB 1056, 1066 fn. 19 (1984), enfd. mem. 765 F.2d 136 (2d Cir. 1985); *Somerset Welding & Steel*, 304 NLRB 32, 53 fn. 61 (1991).

Be-Lo Stores v. NLRB, 126 F.3d 268, 279-80 (4th Cir. 1997), relied on by Respondent, does not require a different result. The court was critical of an administrative law judge's comparison of several cards with signatures on the employees' W-4 forms. The court was not presented with an entire personnel file containing many kinds of documents submitted by employees in obvious compliance with the dictates of their employer. Respondent also contends that the basis of *Aero Corp.* is the Board's conclusion that documents contained in personnel files are self-authenticating, a ruling that was abrogated by Rule 902 of the Federal Rules of Evidence, adopted in 1973, after the *Aero Corp.* decision, which does not list as self-authenticating documents, an employer's personnel files. However, once the parties stipulated that the contested exemplars came from Respondent's personnel files, certain conclusions follow. They are business records of Respondent. They were submitted by the employees because Respondent asked for them to be signed. Respondent maintained them for certain purposes: one, because the law required some of them; and another, because Overnite needed others to avoid liability. Circumstantially, therefore, by the nature of the documents, in a case involving the very party against whom the documents are being used, the documents have been authenticated.[12]

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[11] I asked Respondent's counsel "if these aren't the samples of these particular people, who do they represent." Counsel's brief contends that "the inquiry begs the question," that the Federal Rules of Evidence do not permit judges to simply infer authenticity where a document "appears" from "common sense" to be authentic, and that whether the Federal Rules of Evidence are "common sense" friendly is beside the point. Counsel's argument assiduously avoids proof by circumstantial evidence, which relies on common sense. It also is contrary to the Second Circuit's pointed argument, in *United States v. Mangan*, supra at 42, that the appellant there "advances no explanation as to who else could have written the material in [the] personnel files . . . . "

[12] Respondent's counsel suggests that the General Counsel "might have met his burden under Rule 901(b)(3) simply by introducing the personnel records into evidence or developing a basic factual record about them." In fact, Respondent offered, and I received, all the exemplars in the hearing of the Chattanooga case. Later, by letter, Respondent moved to withdraw them, with the consent of the General Counsel. With the parties' stipulations, and in light of my disposition of the Chattanooga proceeding, I see no reason to burden the record with more than 400 additional documents. I grant Respondent's motion to withdraw its exhibit.

Implicit in counsels' arrangement for the exchange of the documents is the acknowledgement that they are the authentic exemplars of the signatures of the employees. Otherwise, Respondent would not have wanted to compare the signatures on the authorization cards with the exemplars. The fact that the signatures of the employees on the authorization cards match the signatures of the persons who signed the exemplars is no coincidence. They were written by the same persons. As the court stated in *United States v. Liguori*, 373 F.2d 304, 305 (2d Cir. 1967), "Only baseless speculation could assign these documents to any hand[s] other than" those of the signatories of the cards. Furthermore, with almost no exceptions, the two hundred or more employees who testified in this proceeding acknowledged that they had signed the cards that Shipp opined that they had signed. Finally, I find persuasive the General Counsel's argument that: "To grant Respondent's objection . . . would require a finding that . . . Respondent routinely collects forged signatures on documents used for tax, safety, motor vehicle driving certification, payroll and other critical purposes." Accordingly, I find that the exemplars were what they purported to be and reject Respondent's contention, made at all the hearings, that none of the authorizations were properly authenticated.

Shipp testified at each location and divided his opinions of the identification of signatures into five categories (his opinions will be referred to in this Decision by those categories): (1) a definite identification, that the questioned signature on the authorization was written by one and the same person who wrote the known signatures; (2) a probable identification, that the same person probably wrote the authorization, when the questioned signature was compared with the known signatures; (3) an inconclusive identification, that Shipp was unable to say whether the person did or did not write the authorization; (4) that the signature on the authorization was probably not the signature of the person who signed the exemplars; and (5) that the person who signed the authorization did not sign the exemplars.

Of the 38 cards Shipp examined in the Dayton proceeding, he identified 32 signatures as category 1 signatures, those written by the same persons who wrote the exemplars. Regarding the cards of Kenneth Leslie, Michael Reuber, and Carl Williams, Shipp testified that the same person who wrote the exemplars probably signed the authorization cards (category 2). Shipp could express no opinion (category 3) as to three cards: the first, purportedly the card of Michael Hartzell, which was not signed; the second, the card of Larry Joe Boyd, but Shipp's comparison of the printing indicated that the person who printed the material on the card was the same as the one who printed on the exemplars; and the third, the card of Joseph Colley.

Respondent contends that Shipp's testimony that Leslie, Reuber, and Williams probably signed the cards was legally insufficient proof that they did sign the cards, reasoning that Shipp must testify to a reasonable degree of scientific certainty[13] that the signatures are those of the three employees. Whatever bearing Respondent's legal citations may have on the expert testimony of a scientist, those do not nor should they apply to a handwriting expert. There is some difference of legal opinion whether handwriting analysis is a science;[14] but, by virtue of Shipp's studies and experience, he is, if not a scientist, nonetheless an expert, helpful in being of aid to discerning the similarities and differences of handwriting samples. Of necessity, his review can reveal both. As he recognized over and over in this hearing, various factors cause people to write their signatures in different ways. A person may be more careful in writing a

[13] Respondent relies on, among others, *Porter v. Whitehall Laboratories, Inc.*, 9 F.3d 607, 614 (7th Cir. 1992); and *Grant v. Farnsworth*, 869 F.2d 1149, 1152 (8th Cir. 1989).

[14] Compare *United States v. Jones*, 107 F.3d 1147 (6th Cir. 1997), cert. denied 521 U.S. 1127 (1997), with *United States v. Fleishman*, 684 F.2d 1329, 1336–1337 (9th Cir. 1982), cert. denied 459 U.S. 1044 (1982).

signature on a last will than on a FedEx receipt. Depending on the room available, one may write differently on a golf scorecard than on a check. A card signer, who is trying to keep secret his union activities, may write differently when writing on the hood of a car or in the cab of a truck than on a voter's register. Nonetheless, similarities occur, and even if there are dissimilarities, there may be enough similarities to cause the expert to state that the writings were "probably" written by the same person (as did Respondent's expert witness at the Rockford hearing), as opposed to "definitely." Such testimony is nonetheless sufficiently probative so as to be admissible under Rule 702 of the Federal Rules of Evidence. *United States v. Hardrich*, 707 F.2d 992, 994 (8th Cir. 1983), cert. denied 464 U.S. 991 (1983) (expert testimony that defendant "probably wrote" endorsements on certain checks); *United States v. Fleishman*, 684 F.2d 1329, 1336–1337 (9th Cir. 1982), cert. denied 459 U.S. 1044 (1982) (expert testified that there were definite indications that defendant wrote a certain note, but could not testify to a "definite conclusion"). "An expert opinion regarding handwriting need not be based upon absolute certainty in order to be admissible." *United States v. Herrera*, 832 F.2d 833, 837 (4th Cir. 1987), citing *United States v. Baller*, 519 F.2d 463 (4th Cir.1975), cert. denied 423 U.S. 1019 (1975).

Respondent does not contend that Shipp's definite opinion, for example, that a card was signed by the particular employee, is not evidence that that employee signed the card, even in the absence of any other evidence. The issue, here, is the weight, if any, that should be given to Shipp's equivocal "category 2" opinion, *United States v. Herrera*, at 837, which Shipp could not define,[15] testifying that the probability could be as little as a fraction above 50 percent. That, however, is evidence that a particular employee signed a card and is sufficient to meet the Board's requirement that facts be proved by a preponderance of evidence. *Blue Flash Express*, 109 NLRB 591, 592 (1954).

Once the General Counsel has proved by a preponderance that the cards were probably written by the employees whose names appeared on them, it was incumbent on Respondent to demonstrate that the opinion was incorrect. It could do so by calling its own expert (as it did in the hearings leading up to *Overnite I*), by offering the exemplars to me for my examination under Rule 901(b)(3) of the Federal Rules of Evidence, or by calling its employees to testify that they did not sign the cards. Respondent did not do so. I credit the cards in category 2, taking some comfort that throughout this proceeding, there was never a dispute between Shipp and Respondent's expert and that no employee whose card he opined was probably written by that employee credibly testified that he did not sign that card. I thus consider Shipp's testimony reliable, and I rely on it.[16] I conclude that the category 2 signatures are the signatures of the employees whose names appear. (At the hearing involving the Nitro service center and at all subsequent hearings, the General Counsel called almost all of the category 2 signatories and all identified their signatures.)

Regarding the category 3 cards, employee Bob Staton testified that he gave authorization cards to Boyd and Colley and that they returned the cards to him minutes later. He

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[15] In the Rockford hearing, Respondent's expert handwriting similarly testified as to the probabilities that someone wrote a particular document. He declined to give percentages.

[16] Shipp gave inconclusive opinions regarding a number of other signatures, and he testified that some ofthe signatures were probably not the signatures of the employees or definitely were not. However, almost all the employees testified that they did, indeed, sign their cards; and I have credited them. Those findings do not demean the expert opinion of Shipp, but reflect, for a variety of reasons, that the employees wrote their signatures in ways that were not consistent with their exemplars.

gave a card to Hartzell, who he saw writing on the hood of a car and then returned a card to him. The fact Staton did not actually witness the signing (or, in the case of Hartzell, printing) of these cards is not an impediment to their recognition as true authorizations of the Union. As long as a signed card is returned by the signer to the solicitor, that is normally sufficient. What is troubling is that Staton, although identifying the three cards during his direct testimony, testified on cross-examination that he never looked at the cards when they were returned to him and so could not testify that what was returned had any writing on them; nor is there any proof that Staton was testifying about the three cards that the General Counsel was attempting to authenticate as being signed by the three employees, none of whom testified. Accordingly, I will not count them. In sum, I find that there were 35 cards with valid signatures, 32 in category 1 and 3 in category 2.

Of these, Respondent attacks the cards of Bob Hooten, Jay Manns, Randy Meyers and C. Tucker, because they were not dated; and the card of Richard Roehm, which was dated "12/8." On February 7, 1995, Local 957 mailed its petition and cards to the Board's Regional Office, which received them the following morning, so the cards had to be signed by February 7. I will credit them,[17] noting that, regarding Roehm, there is no evidence that Local 957 made an attempt to obtain authorization cards other than during its campaign, which began on October 16, 1994, at the first meeting held by the Union. Furthermore, Staton gave Roehm the card one morning in 1994 and Roehm returned it in the evening of the same day. In addition, Hooten, Manns, and Meyers attended the first Union meeting and signed their cards there. Finally, by December 18, 1994, Local 957 had obtained almost all the cards that it would ever receive, so it is probable that these cards were signed before then. For this latter reason, the card signed by Frank Rose, although dated January 5, 1994, was undoubtedly signed in 1995, and Rose mistakenly and by habit wrote the old year, and not the new. I will count all these cards

Respondent also contends that various employees were misled into signing their cards. Although Tim Diehl did not sign a card, he testified that in late 1994 he was approached by Staton (in the presence of Ed Lane, Roy Cockrell, and Mike Hartzell), a day or two later by Hooten, and a day or two later by Mike Rueber, each of whom told him that the card did not mean anything, that it just for a union vote. From this, Respondent contends that I should not credit the cards of Lane, Cockrell, and Hartzell, whose card was never properly authenticated. Cockrell signed his card on October 16. Even if Staton made the statement attributed to him, that statement would not have been made before Cockrell signed at the Union October 16 meeting, because cards were not distributed before then. On the other hand, Lane signed on December 30. It is thus more than likely that the statement to him, if credited, was made before he signed; but there was no proof that Lane signed as a result of Staton's solicitation or heard the same words as Diehl did. He may well have signed as a result of a solicitation from another person who told him that the card authorized the Union to represent him. I find that Diehl's testimony was insufficient to switch the burden back to the General Counsel to prove that Lane signed the cards under circumstances that would invalidate his card.[18]

In addition, Brian Terry testified that Staton told him that he needed the card "just so we can have an election." He also testified that he did not read the authorization card because he trusted Staton's representation; but an examination of the card indicates that Terry neatly filled in all the blanks and could hardly avoid seeing the writing in the text and the caption, particularly

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[17] *Pilgrim Life Insurance Co.*, 249 NLRB 1228, 1241 (1980), enfd. mem. 659 F.2d 1070 (3d Cir. 1981).

[18] I would have made the same ruling regarding Hartzell, had I not already refused to credit his card.

the words “bargaining representative” immediately above where he signed. Staton testified that he never mentioned to any of the employees that the cards were going to be used to support the Union’s petition for an election, but he admitted that Teamsters business agent Keith Jones said at the October 16 meeting, at which 10 employees signed cards, that not only were the cards for Union representation but also, if enough cards were signed, the cards would support the petition for an election. In the face of this acknowledgement, it seems improbable that Staton should have had any inkling, as he insisted, that it was somehow improper to tell employees that cards were also to be used to get an election. It is also improbable that Staton merely handed employee cards, did not even ask them to sign, and never talked to anyone about the benefits of the Union, as he insisted.

I do not believe him, but that does not mean, as Respondent contends, that Staton was so unbelievable that I should find that he told not only what Diehl and Terry testified to but also expressed the same words to all the other card signers. In fact, no one else testified to what Diehl and Terry said. Mark Burnett asked Staton the purpose of the card, and Staton replied: “[I]t’s for [an] election . . . to see if we wanted to have the Teamsters in there.” Bart Ullmer originally testified three times that Staton told him that the purpose of the card was to get a vote. Later, Eric Manns also told him that the card was for a vote. It was only after Respondent’s counsel showed Ullmer the Teamsters leaflet that Ullmer qualified his answer to add the word “just.” I find his original answers, rather than the suggested answer, closer to the truth.

I also find that Staton told Terry, as he told the others, that the purpose of the card was to get an election; but I do not find that he told Terry that the only purpose for the card was to obtain an election. I find that Terry’s use of the word “just” was not a quotation. Rather, Terry peppered his testimony with the word “just” so that it lost all meaning. For example, “I just put the card up in my mailbox, because I just didn't sign it at the time.” “I was just getting off, and he was still there.” “I just went ahead and signed it.” “I just — I just got it, because Bob Staton is a pretty good friend — well, his son's a real good friend of mine and, you know, I just knew — I just figured Bob would never do anything to jeopardize my job. So, you know, it was just for an election, I just didn't think I was really getting into anything.” “I just know that he needed enough cards.” “I just like to keep my nose out of things.” “I just don't like getting in the middle of things.” “It was just a regular workday back in ‘94.” I will count his card.

The testimony closest to what Respondent urges was the gratuitous (and somewhat suspect) musing of Charles Steiner, who attended two Union meetings, and who stated, in answer to the question whether what he was being shown was an authorization card, that he “was under the impression that [the authorization card] was just more or less like a petition-type thing and, you know, unless we voted the Union in, that that didn’t mean anything — was the impression [he] had.” Later in his testimony, however, Steiner stated that Rueber asked him to sign a card, stating: “[Y]ou need to sign this card to see how serious we are about having the election. The Hall needs to know just, you know, before they get involved, how — just how many of us want to have — you know, want to — want representation.” I find that Steiner knew that what he was signing sought representation by the Union. I will count his card.

As to that October 16 meeting, one of Respondent’s witnesses, employee Don Marshall, testified that Jones stated: “I was told that, you know, if I signed the card, it was to see how many people wanted the — the Teamsters representation, and when they got enough cards, they would hold an election. And that the — it was for representation by the Teamsters.” His change of testimony, after he was shown the Teamsters leaflet, that the card was only for an election because he heard it from Jones or read it, was clearly intended to ingratiate himself with Respondent’s counsel, after upsetting him so with his earlier answer. Marshall’s stark admission, at least at first, was consistent with the testimony of Steve Hutchinson, who attended

the October 16 meeting "to know what we could do in terms of forming some type of a body with a voice." At first, Hitchinson could not recall anything specific of what Jones said, but understood as a result of going to the meeting that the Union wanted "to get most of our employees to sign the cards, and [they] would be sent to Washington, D.C., to the National Labor Relations Board, and we would need a certain percentage to get the cards sent in to be signed to declare for a vote." I find that there was nothing stated at that meeting that would controvert the language of the card or misrepresent its purpose.

As a result, I credit 35 cards.[19] The General Counsel needed to prove 28 cards. The Union thus represented a majority of the employees at the Dayton service center.

C. Chattanooga

On March 22, 1995, Local 515 filed a petition for a representation election of the employees at Respondent's Chattanooga service center. A stipulated election was held on April 27, 1995, which Local 515 lost, 34–23, with 4 challenged ballots; and the Local filed timely objections. The objections case was consolidated in this proceeding, and the parties stipulated at the hearing to certain relief, which is incorporated in this Decision.

"The burden is on the General Counsel to show that a majority of employees supported the Union." *Abbey's Transportation Services*, 284 NLRB 698, 703 (1987), enfd. 837 F.2d 575 (2d Cir. 1988). In order to prove that the Union represented a majority of the employees that was dissipated by Respondent's unfair labor practices, if any, the General Counsel has the burden of proving the number of employees in the unit, so that the number needed to constitute a majority can be computed. The General Counsel proves nothing by showing that numerous employees signed cards if those persons do not represent a majority.

The evidentiary problems begin with the Counsel for the General Counsel's failure to offer payroll records to show who was employed. The General Counsel moved early at the hearing to amend the complaint to change what was originally alleged — that the Union represented a majority of Respondent's employees on March 12, 1995 — by adding the alternate date of March 21. Over Respondent's objection, based in part on counsels' problem of preparing to litigate changes in the composition of the unit because, perhaps among others, one supervisor may have been demoted to an employee's position, I granted the motion. From then on, it was assumed that the two relevant and material dates were March 12 and 21. Undoubtedly, when preparing the brief, the General Counsel recognized that the record lacked the important payrolls. Thus, the brief argues that I should use the *Excelsior* list, which "with certain exceptions, reflects which employees were employed by the Employer during the relevant period."

Skipping Respondent's objection that under no circumstances may an *Excelsior* list be used to determine majority status,[20] a proposition that is dubious, there are three problems that

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[19] In doing so, I find that the Teamsters leaflet did not affect any of the cards. The Union did not start distributing literature until late January 1995, well after the Union's card majority had been secured. Even if the leaflet had been distributed, as a number of Overnite's witnesses testified, they could not remember when. Steiner could not even recall whether he saw it before or after the election. Both Jones and Staton denied having seen the document; and I am not persuaded, from the hesitancy and lack of clarity of their testimony, that Steiner, Ullmer, Dye, Hutchinson, or Marshall saw it, either.

[20] In a brief involving a different service center, the Counsel for the General Counsel

Continued

are insurmountable. First, Respondent's *Excelsior* list is based on the employees in its employ on April 8, and that is not one of the two dates that the complaint alleges and that the parties agreed to litigate. Second, the parties could not agree that the *Excelsior* list was accurate. They could not agree that those on the list were actually employees. And the Counsel for the General Counsel could not agree that there should not have been others added to the list. She said: "There also may be an issue because there are individuals who are not included on the [E]xcelsior list and will need to be included." Third, the Counsel for the General Counsel specifically committed to the principle that the *Excelsior* list would not be used as the basis for determining the composition of the unit. The following confirms that understanding:

> JUDGE SCHLESINGER: . . . I didn't know whether General Counsel intends to supplement the [E]xcelsior list but I take it that I am not to consider the [E]xcelsior list as submitted to me for the purposes of computation of majority status.
>
> [The Counsel for the General Counsel]: No, but I'm hoping that we might be able to shorten my examination of the custodian by reaching a stipulation because I know those people they want to include in the unit for the relevant period and I don't think it's - I'm hoping that we won't have to go through every individual on the list.

No stipulation was reached and no evidence was introduced proving the employees who were employed on the dates alleged in the complaint. It is impossible to determine, therefore, how many employees would have had to authorize the Union to represent them as their collective-bargaining representative to determine whether the Union represented a majority. Even the Counsel for the General Counsel could not state in her brief who was properly included in the unit. Thus, she wrote: "Counsel for the General Counsel agreed, at the hearing, that the Excelsior List, with certain exceptions, reflects which employees were employed by the Employer during the relevant period." Accordingly, I conclude that there is no proof that Local 515 represented a majority of the employees in the appropriate unit on the dates alleged in the complaint. Accordingly, *Gissel* relief is inappropriate. I will not determine whether Respondent committed the additional two unfair labor practices that the complaint alleges. I have, however, ordered a remand of the representation case to the Regional Director for a new election, as the parties stipulated.

D. Richfield

On February 15, 1995, the day that the complaint alleges, in the alternative, that Local 24 represented a majority of Overnite's Richfield employees, the Union requested that Respondent recognize and bargain with it, but Respondent refused to do so. The Union filed a petition for an election the following day, and an election was held on April 19, 1995, which the Union lost, 79–53, with 4 challenged ballots, insufficient to affect the election's results. There were 138 employees employed on February 15, so 70 constituted a majority. Shipp identified 82

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contended: "As argued below, the General Counsel rejects Respondent's position that majority support must be established as of the date of the election at which time some 142 voters were listed as eligible on the *Excelsior* list. In *Daumann Pallet, Inc.*, 314 NLRB 185 (1994), the Board adopted the Judge's finding of a *Gissel* bargaining order and his conclusion that it is inappropriate to use the *Excelsior* list to determine majority status."

cards[21] in category 1 and 7 in category 2, which excludes the card of Robert Koneval, who purposely did not sign his card. The General Counsel is not relying on it. The card of Robert Wilkinson, placed by Shipp in category 3, was authenticated by the solicitor of the card. So, there are a total of 90 valid cards, at least as to signature.

The cards read:

AUTHORIZATION FOR REPRESENTATION UNDER THE THE NATIONAL LABOR RELATIONS ACT

I, the undersigned employee of the _____
(Print full name of Company)
hereby authorize Freight Drivers, Dockworkers & Helpers Local Union No. 24 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, to represent me in all matters pertaining to hours, wages and conditions of employment in accordance with the provisions of the National Labor Relations Act.

When the Union filed its petition on February 16, 1995, it supported it by filing 75 authorization cards. On September 25, 1995, it filed an additional 18 cards, bearing dates that precede not only the holding of the election but also the date of the filing of the petition. Eight of the cards were signed on or after February 16. Respondent contends that the dates on the remainder of those cards must be false, because the Union would have filed all of them with the petition. Accordingly, the Board's presumption that the dates on cards are valid should not apply. Respondent does not cite any legal precedent, and its argument is not persuasive. First, the Board's presumption does not flow from the fact that the cards were filed with the Region. There is a presumption of regularity when it is proved that the cards are signed by the employees whose signatures appear on the cards. Second, Respondent's position makes little sense. All the Union had to do in order to file its petition was to show that it had an interest, and it could have done so by producing cards from 30 percent of the employees. The Union had no other obligation to produce any of its cards, except to prove that it had majority support if the Region was to pursue a bargaining order. So it was entitled to hold back its authorization cards. That does not make them any the less valid. Third, an examination of the formal papers makes it obvious what happened here. The complaint did not issue until November 1995. It must have been that the Region, during its investigation of the charge in Case 18–13394–89, asked for all of the Union's evidence that would be needed to support the Union's request for a bargaining order. The Union supplied the additional cards in September, two months before the complaint issued. Fourth, one of the 18 cards demonstrates the inaccuracy of Respondent's contention. Charles Satterwhite signed his card on February 14 and returned it by mail to the Union on February 16, as demonstrated by a postmark on the reverse side of his card.[22] I will count all of these cards towards the Union's majority.

Respondent attacks the validity of the cards signed by Steve Durgala and Kathy Ryncarz on the ground that they are dated "1994." The cards are dated on February 11 and January 21, and I take notice of the well-known fact that people, after the turn of the year, sometimes err by

[21] I omit in this calculation the duplicate cards of Steve Predojev, Chad Tomaiko, and Daniel Reed.

[22] None of the other 17 cards bear a postmark or any other marks showing the reason that they were not submitted by the Union with its original submission. However, it may well be that cards signed before February 16 were not given to the Union until afterwards.

force of habit and write the previous year, rather than the current year. Furthermore, in light of the unrebutted testimony of Charles Ball that the distribution of authorization cards began in November or December 1994 and that no cards had been distributed since a prior Union campaign in 1988, I find that these two cards were signed in 1995 and will credit them.

Respondent also objects to five cards on the ground that the Teamsters misrepresented the nature of the cards. The General Counsel concedes that Bruce Ramsey's card should not be counted. Ronald Brogan was given his card by Teamsters' representatives (although not identified by name, they wore Teamsters' buttons and jackets) and was told to sign the cards: "This is just to get a vote." Although Brogan read the card, the specific statement to him invalidates his card. John Barnum was told by Tom Ball that his card was "just to get a vote to Richfield." (I do not credit Barnum's embellishment that Ball said "that was it, not for representing.") It is true that, later in his testimony, Barnum had trouble recalling Ball's exact words, but Barnum repeated the essence of Ball's statement sufficiently for me to credit his testimony and not count his signature. I note that Respondent's counsel had given Barnum the Teamsters leaflet to review long before the hearing. That may have colored his testimony. However, Ball was not called to deny Barnum's statement.

Former employee John Lauer (spelled this way in the briefs, but referred to in the Official Transcript as "Lower") solicited cards from Eric Ashe and his brother-in-law, Howard Davis. He asked them whether they had filled out cards. They answered that they had not, and he gave them cards, saying: "Well go ahead and fill it out. It's just for information purposes to be sent to your house." The General Counsel contends that the statement was "highly ambiguous," but I disagree. The card's purpose was explained as one limited to the receipt of Union literature, nothing more or less. As to Ashe, that statement negates his card. I do not find, as Respondent urges, that there is sufficient proof that Davis's card should also not be counted. Thee is no evidence that he was listening to or heard what Lauer said or that Davis was not told other purposes of the card that might have impacted on his signing. I will not exclude Davis's card. Finally, Respondent contends that Robert Koneval made a conscious decision not to sign his card and, as a result, did not authorize the Union to represent him. The General Counsel agrees, and I will not count his card.

Accordingly, of the 90 cards with authenticated signatures, I exclude from my computations the cards of Ramsey, Brogan, Barnum, Ashe, and Koneval, all of whose cards were dated before February 15. Thus, there are 85 valid authorization cards dated before March 10, the alternate date alleged in the complaint, when there were also 138 employees in the unit, and 77 valid authorization cards dated before February 15. On both dates, the Union had authorizations from more than the 70 employees it needed and thus represented a majority of Overnite's employees.

E. Nitro

On January 27, 1995, Local 175 requested that Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the Nitro employees, but Respondent failed and refused to do so. The Union also filed a petition for an election on January 30. The election was held on March 20, which the Union lost, 60–27, with 3 challenged ballots; and it filed timely objections. The objections case was consolidated in this proceeding.

The card used in the Nitro and Parkersburg campaigns was different from cards used elsewhere. It was headed by the caption, in bold capital letters: "AUTHORIZATION FOR UNION REPRESENTATION BY TEAMSTERS LOCAL UNION 175." What followed is the language —

particularly the word "improved" — that Respondent contends removes the card from a valid authorization card to a card that cannot form the basis for a *Gissel* bargaining order:

> I, the undersigned employee of _____ voluntarily and of my own free will, hereby authorize Local 175, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, to represent me for the purpose of collective bargaining as to improved wages, hours, and working conditions.

Respondent contends that this language:

> expressly limits the Union's authority as a bargaining agent to bargaining about "improved" wages, hours, and working conditions. The card does not give the Union authorization to represent the card signers with regard to many of the topics for which a collective bargaining representative under the Act becomes the employee's exclusive representative - dealing with an employer's demands to reduce wages and diminish benefits, bargaining with regard to benefits or conditions that will remain the same, representing the employee in grievances or disciplinary situations, bargaining for the employee in dealing with the employer about changes in operations such as subcontracting, layoffs and plant closings. An employee who signed [one of these cards] legally could advise Local 175 that the Union had no authority to represent the employee on any of these matters.

I do not agree. The card's heading states clearly that the card was for "union representation." The body of the card says no less. "[I]mproved," the word that Respondent deems offensive, was inserted to reflect nothing more than employees' hopes that the Union would help them to improve their lot. Respondent reads far too much into the improvements that employees seek at their jobs. The point of organization is not only to obtain higher wages and more and greater benefits and less hours, but also protection from all the actions of an employer that may seem deleterious to the working environment, whether that be protection from discipline or prevention from the possible reduction and diminishment of working conditions. All improve the workers' terms and conditions of employment.[23]

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[23] Respondent's reliance on *Nissan Research and Development, Inc.*, 296 NLRB 598, 599 (1989), is misplaced. There, the card was not a single-purpose card which clearly and unambiguously authorized the union to represent the employees. Although it authorized the union to represent the signer in collective bargaining, it also stated that the purpose of signing it was to have a Board-conducted election. The General Counsel's authority is no more compelling. Although the cards in *Ferland Management Co.*, 233 NLRB 467, 472 (1977), were entitled "Authorization Card For Better Working Conditions And Job Security" and deemed to be valid cards sufficient to support a bargaining order, the cards also stated, *Id*. at fn. 12: "I designate and authorize the Rhode Island Workers Union to act as my collective bargaining representative with my employer." *Grey's Colonial Acres Boarding Home*, 287 NLRB 877 (1987), is inapposite. There, the Board held that the execution of dues-checkoff cards, which contained no specific reference to the union's authority to represent employees for "collective bargaining purposes," nonetheless could be used to demonstrate the union's majority support among the unit employees. Here, Respondent's claim is not that the employees did not desire to have the Union act as their representative, but that they limited the Union to do only certain functions for them.

As of the payroll ending the week of January 28, Respondent employed 90 employees in bargaining unit positions. In order to prove a majority, the Union had to prove 46 cards. Shipp identified the signatures on 56 authorization cards[24] as being in category 1 and 7[25] in category 2, which included Kenneth Cox's printing of his signature. In sum, Shipp authenticated the handwriting on 63 cards. In addition, one employee, Jerry Gillispie, whose signature Shipp was unable to form a firm opinion (category 3), also testified that he signed his card. Thus, 64 cards were identified.

Thirty-nine of them were obtained at a Union meeting held on December 10, 1994. Respondent attacks all these cards on the basis that Union business agent Harry Deems, who presided, told the employees that the cards were solely for the purpose of an election. Deems denied doing so, testifying that he explained that, if the cards were signed, the Union would be the bargaining agent for the Nitro service center and that, when a sufficient number was signed, the Union would then send the cards to the Board; and the Board would run an election. Respondent's witnesses, all current employees, except for one, did not uniformly support Respondent's contention. In fact, the exception, retired employee Gordon Sargent, corroborated Deems, recalling that he said: "The only reason you were signing that card was to be represented. I mean, authorizing the Teamsters to represent you."

The other witnesses were of little help,[26] in part because they gave no uniform testimony about what Deems said. I found that Douglas Canterbury was generally confused about dates and persons and certainly did not have a clear recollection of the events in late 1994 and early 1995, as he was free to admit. Although he was a Union supporter and, indeed, a Union leader among his peers, and I suspect that he handed out the Teamsters leaflet setting forth the fact that the cards were to be used only for obtaining an election (on cross-examination, he admitted that he could not be certain that he handed out the specific document), he could not recall when he handed it out and never related how many copies he distributed. (He did state that he gave them out to those that wanted it.) There is thus nothing to show that the Union obtained cards as early as the December meeting based on the leaflet's misrepresentation of their purpose. Rather, Canterbury simply could not remember, and there is no logical inference that I can draw based on his testimony that would lead to setting aside the Union's clear majority.

The other witnesses, all current employees, and thus under *Gissel* more apt to favor their employer in their testimony, were also of little comfort to Respondent's contention. It is true that current employee Ralph Gragg used the magic word "just," when he initially testified: "[A]ll I was told was that they wanted a card signed just to show interest. If they had so many, x

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[24] In making of these calculations, I have not considered two cards signed by employees Michael McNally and Kenneth Shull, who were stipulated not to be within the unit.

[25] The General Counsel called these employees, who identified their signatures (or printing).

[26] Respondent requests an adverse inference from Deems' failure to produce, pursuant to subpoena, notes of the December 10 meeting. Deems testified that he had no such notes, and he did not recall that he had notes. In his investigatory affidavit, Deems referred to notes, as follows: "According to my notes of December 10, 1994, there was an organizing meeting held at Local 175's office." However, his affidavit also contained the following language which was crossed out: "Attached is a copy of my notes for that meeting as Charging Party's Exhibit B." No Exhibit B was attached. It would appear that notes of the meeting were unavailable, at least as of September 11, 1996, the date of that affidavit. What the first "notes" refers to is unclear, but might very well be merely a calendar reference to the day of the meeting. I cannot on the basis of this ambiguous material find that Deems did not comply with the subpoena, and I refuse to draw any inference from his failure to produce notes of the meeting.

amount of cards signed they could hold a — it was authorization for a vote." But immediately after, he did not use that word, at least in the sense of qualifying the purpose of the vote: "Like I said, I don't even remember who offered me the card to sign, but I'd say whoever offered me the card to sign, it was just — are you interested in having Teamsters represent you, if you are interested, sign the card. If we get x amount of cards signed then we can hold a vote." I credit this later response. There is accordingly nothing here to indicate to indicate that Gragg should have disregarded the card's clear authorization nor was Gragg assured that the card would be used for no other purpose than to get an election.[27] Timothy Bailey, who saw the Teamsters' leaflet after he had signed his card, testified that Deems said that the purpose of the cards was "to be able to petition the NLRB for a vote" at the Nitro service center. Bailey admitted that: "[M]ostly the meeting was about was talking about some problems that Overnite that were discussed. How things could be handled, why the employees were so upset, why they were there. Just different things like that were discussed." In all the circumstances, no one told Bailey to disregard the card or that the sole purpose of the card was to obtain an election.

Brian Johnston testified that Deems said: "[T]he purpose of signing a card was to assure all of us that we would have our day in the voting booth to vote yes or no for the Union." Deems also said: "[I]f we did vote and . . . the Union did get representation of Overnite . . . they wouldn't settle for anything less than the National Freight Motors Agreement, for nothing less." Johnston read the card, and no one told him to disregard it. I find nothing here to indicate that Deems limited the purpose of the card solely to use for an election. Finally, John Hodges testified that the person who was the spokesman (his description did not match Deems' appearance, but Deems had been ill and the hearing took place four years later) said that the employees "were there to get as many cards signed as possible to get a vote." Hodges read the card. There was nothing said that limited the use of the card.

In sum, I will count all these cards, totaling 64, and will not reject any of the cards signed at the first Union meeting. In light of Sargent's corroboration, corroboration from the only witness called by Respondent who was not a current employee and who had little reason to fabricate his testimony, I credit Deems, who I found was credible and experienced in organizing activities.[28] In doing so, I reject Respondent's contention that the testimony of Kenneth Cox was "most damning" to the General Counsel's case. Rather, Cox filled out a questionnaire sent to him by the Regional Office in which he stated that he was told that the "purpose of the card was to represent me in collective bargaining." That is quite different from Cox's exposition at the hearing, which I do not credit. As a result, the 64 authorizations was more than the 46 cards that the Union needed for a majority.

F. Parkersburg

On January 27, 1995, Local 175 requested that Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the Parkersburg employees, but Respondent failed and refused to do so. The Union also filed a petition for an election on January 30. The election was held on March 21; and the Union lost, 25–3, with 1 challenged ballots, and filed timely objections. The objections case was consolidated in this proceeding.

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[27] Gragg's testimony that he was told that the card was not legally binding was extracted from him as a result of leading questions, and was soon recanted, only to be resurrected by a statement that he "could have heard" it but could not truthfully answer. I disregard his answer.

[28] Respondent contends that, despite the fact that Deems is retired, he "had a substantial incentive to vindicate his actions." I have taken that into account, as I have with other witnesses who had left Overnite's employ.

As noted above, the card used in the Parkersburg campaign was the same as that used at Nitro. Respondent interposes the same defenses regarding the validity of the card for the purposes of bargaining-order relief, and I rule the same way as I did above. Respondent also contends that Deems, in soliciting signatures, conditioned their taking effect on the Union winning the election. However, employee Stanley Mincks stated repeatedly that Deems said only that the card "was authorizing the Union to be our bargaining agent in a contract negotiations." That does not controvert the language of the card nor misstate its purpose.

As of the payroll ending the weeks of January 21 and 28 and February 4, 1995, Respondent employed 28 or 29 employees in bargaining unit positions.[29] In order to prove a majority, Local 175 had to prove 15 cards. Shipp identified the signatures on 18 authorization cards, 17 cards as being in category 1 and 1[30] in category 2. The Union represented a majority of the Parkersburg service center employees.

G. Nashville

On February 8, 1995, Local 480 filed a petition for a representation election which resulted in a stipulated election held on March 29, 1995. Local 480 lost the election, 71–53, with 6 challenged ballots, and filed timely objections. The objections case was consolidated in this proceeding. The parties also stipulated that, during the period from January 20 through February 9, 1995, Respondent employed at least 128 employees in bargaining unit positions; and, until January 27, 1995, Lee Graf was also employed by Respondent, making a total of 129 employees. Respondent contends that Graf, after January 27, and six others should be included in the unit, because they were laid off and had a reasonable expectation that they would be recalled.

On November 7, 1994, sometime prior to October 10, 1994, and January 27, 1995, dockworkers Louis Goodman, Jr. and James Fields and city driver Lee Graf, respectively, voluntarily resigned from their employment. Whether their resignations were caused by their having little work to do, as Respondent suggests but has not proved, is beside the point. They quit. They had, and should have had, no expectation of being recalled. That Overnite employed Goodman again on September 25, 1995, does not change this result. There was no evidence of the circumstances of that employment. Goodman may have merely applied for a job again. In any event, Board law makes clear that I am not to look at events that occurred after the relevant date or dates for determining eligibility.[31] I will not include these individuals in computing the number of employee in the unit.

There is some basis in the record for finding that road driver Mark Damron left his job on August 17, 1994, but unlike three other employees, there is no business record of the reason for his departure. There are records that on August 13 and September 6 and 17, 1994, road driver James Uzzle, dockworker Scott Bolden, and road driver David Hatley, respectively, were laid off

[29] The parties were unable to agree on whether Pamela Jeffrey should be included in the unit or not. A resolution of her status is unnecessary because it will not affect the number of cards needed to prove a majority.

[30] The General Counsel called the solicitor of this card, who identified the card.

[31] The Board rejected the notion that the rehire of the employees "perforce establishes the temporary nature of the layoff, obviating the need to evaluate the employees' expectancy of recall." *Apex Paper Box Co.*, 302 NLRB 67, 68 (1991).

due to lack of work. Uzzle was recalled on February 13, 1995;[32] Hatley, on March 22, 1995; and Damron, on April 24, 1995. Bolden never was.

Temporarily laid-off employees may be eligible to vote if objective factors support "a reasonable expectancy of recall in the near future, which establishes the temporary nature of the layoff." *Apex Paper Box Co.*, 302 NLRB 67, 68 (1991). The Board looks at the employer's past experience and future plans, the circumstances surrounding the layoff, and what the employees were told about the likelihood of recall. The record here is rather scanty. Office manager Ron Cunningham was not all that helpful because he was not testifying from personal knowledge. For example, the following appears in his testimony:

> Q. And if someone is laid off due to lack of freight, are they told anything about their — generally now. I'm not talking about any particular individual — generally about their possible future with the company?
>
> A. Oh, yeah. It's a possibility that they could be re-called, yes.

So, what these employees were told is not definitive. Nor is his testimony that the practice at the Nashville service center is that employees are told that, if freight picks up, they will be called back first. In fact, the record was not even clear that there was a lack of work in the fall of 1994. Cunningham did not know what the freight volumes were. And, assuming that there was a need for a layoff, there was no proof that these employees were recalled from that layoff or whether they were simply rehired as a result of attrition. To Cunningham, recall and rehire was the same, and Overnite's personnel form treated both the same.

The Nashville service center maintains no list of laid-off employees. Although Cunningham testified that there is no length of time limiting the right to a recall, personnel records are disposed of after three years, so his testimony is somewhat suspect. And, even if a laid-off employee should decline a recall offer, his name is maintained, according to Cunningham, on the list (which does not exist), even five years, indicating that these persons are used more as a source of employees rather than as employees entitled to the job again, from which they were laid off. On the other hand, he testified that no employees are hired with people on layoff; but the rehire or recall of the three road drivers was not in the order that they were laid off. In addition, when they are rehired, their original date of hire (adjusted for part-time work) is used for determining seniority; but Cunningham, who as office manager should have known, did not know whether the original date of hire was used for the purposes of benefits, such as vacations.

Although there are some indications that there is a policy regarding the "recall" of laid-off employees, on balance there seems to be nothing more here than the use of laid-off employees to fill openings for road drivers when Overnite has a need for them. There is no doubt that Overnite has a turnover of employees. (Indeed, Overnite attempted to use that turnover to support its contention that *Gissel* bargaining orders are inappropriate.) But attrition and the rehiring of employees who have previously been laid off is a far cry from the recall of employees when work picks up, and there has been no showing of that here. Besides, there was no solid proof that the employees were told anything; and, even if I should accept Cunningham's testimony that the employees were told of a "possibility that they could be recalled," there was clearly no estimate of the duration of the layoff or specific indication of a time when the employees should have anticipated being called back. In these circumstances, the vague

[32] The parties stipulated that Uzzle should be included in the unit from this date.

statements, if made, do not provide an adequate basis for concluding that any of them had a reasonable expectancy of reemployment in the near future. *Data Technology Corp.*, 281 NLRB 1005, 1006 (1986), citing *Foam Fabricators*, 273 NLRB 511 (1984), and *Tomadur, Inc.*, 196 NLRB 706 (1972).

As a result, I do not include these employees in the bargaining unit during the period of the claimed majority and find that, with 129 employees in the appropriate unit through January 27, 128 through February 12, and 129 from February 13, 1995, the Union must prove 65 signatures. The General Counsel submitted 92 signatures on petitions which read:

Yes! We want a voice through collective bargaining.

> We believe that only through collective bargaining can we have a voice in our work place, achieve fair treatment for all, establish seniority, job security, benefits wages and working conditions. Therefore, this will authorize the *International Brotherhood Of Teamsters, Local 480, Nashville, TN* to represent me in collective bargaining with my employer. This will also authorize said union to use my name for the purpose of organizing.

Employees of Overnite Transportation Co. Nashville, TN.

That was followed by eight boxes, with spaces to be filled in for the printed name, address, department, shift, phone, job, rate of pay, signature, and date. Some pages were signed by only one employee. On others, all the boxes were filled in.

Shipp identified 71 signatures as being in category 1 and 14 in category 2, all of which I have credited.[33] In addition, there were 5 signatures that Shipp opined as being in category 3, those which he could not affirmatively state were or were not the signatures of the employees whose they purported to be. Two of those signatures were identified by the employees themselves, and 2 others were identified by the solicitors. Finally, there were 2 signatures for which Respondent supplied no handwriting samples. One signer identified his own signature; the other was identified by the solicitor. In sum, I find that 91 signatures have been authenticated.[34]

Overnite attacks the cards on numerous grounds. The first is on the basis of the Teamsters leaflet, which was identified by several witnesses as not only being distributed at the service center but also posted on the employees' bulletin board[35] and taped in the cab of a truck. Respondent claims that, because of the widespread distribution of the leaflet, all the cards were tainted and none should be counted. One difficulty with this contention is that very few of the Respondent's own witnesses testified that they saw the leaflet, although a number testified about the common knowledge that cards were sought only for the election. Another difficulty is that no one who saw the leaflet could identify when they saw it, although assuredly they saw it

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[33] Of the category 2 signatures, 6 of the signatories identified the signatures as theirs, and the solicitors identified 5 of the other signatures. The only ones not otherwise authenticated, except for Shipp's opinion, were Steve Cope, Spencer Davis, and Gary Thornton.

[34] The only card that I have not credited is the one allegedly signed by Joe Elkins.

[35] Although, because of the Teamsters' noncompliance with the subpoenas, I am willing to credit many witnesses who testified that they saw the Teamsters leaflet, I cannot believe that the leaflet was posted on the bulletin board. Surely, more than one person would have seen it posted there.

before the election. Thus, the record does not make clear that, if the leaflet misled any employees, it did so with respect to all the employees. Merely because the leaflet misrepresented the purpose of the petition does not mean that all the employees received that message. Accordingly, I reject Respondent's contention that I ought not to consider any of the cards signed by the Nashville employees.

Overnite also objects to the counting of all the petitions that were signed at the Union's first meeting on January 21, 1995, bearing about 41 signatures. It relies solely on the testimony of Clifton Harris, a current employee who was a strong Union supporter, who stated that at the meeting, a Union representative — he did not recall who — told the employees that: "We had to have a percentage of our employees out of the Nashville service center to sign those cards before we could take a vote for representation of the union." In addition, he testified, with some lack of sincerity, that: "[T]hey assured us that these were not really, you know, signing a union card. . . . [T]his was not signing your union card; this was just signing to get a petition up to take a vote." Literally within a few minutes, on cross-examination, Harris could not remember specifically that the Union representative made any specific statements at this meeting. "I can't remember exactly what he did speak about." When asked: "You testified that someone said you needed a percentage in order to get a vote. Who made that statement?" Harris answered that he could not remember. He then said that he had met with Respondent's counsel days before and counsel called his attention to a particular point of what he identified as the Teamsters leaflet. Then, he denied his testimony; "I don't really recall whether he brought, you know, brought out any particular point. He just asked me if I had seen this pamphlet at one time or another."

Lawrence Perry, the Teamsters International organizer, did not recall the meeting the same way. He testified that he read the petition verbatim, and the petition clearly stated that the employees were authorizing the Union to represent them. Union activist, employee Ben Lay, recalled that Perry said that the "petition was for an election to get union representation." He also recalled: "[A]t a meeting, I think it was Larry Perry that read the paragraph at the top of" the petition. Although there were some problems with Perry's testimony, Harris never denied that Perry read the petition to the employees; and no one else, of the over 40 employee witnesses called by Respondent, corroborated what Harris initially testified to. I credit Perry and find that nothing was said that would negate the clear language of the petition authorizing the Union to represent the employees. Because I discredit Harris's testimony about what "a Union representative" stated at the January 21 Union meeting, there is nothing else in his testimony that would indicate that his signature was obtained by any misrepresentation. Rather, he read the petition and recalled enough of the meeting to testify that there was discussion about retirement and wages. Afterwards, he wore a Union hat and button and otherwise supported the Union. I will count his card.

Respondent attacks the petitions of over 40 other present and retired employees who testified at the hearing. Those who were no longer working for Respondent had, unlike the others, no reason to fear that their testimony might harm them in their employment relationship and thus did not evidence the bias of some of the other witnesses. Yet their testimony was not the model of clarity and, understandably, coming four years after the events, was not fresh in their minds.

George Billiter, who believed that he read the petition, was badgered by some coworkers that "they needed a petition and they had to have so many names to get a union vote." Only after Respondent's counsel showed him the Teamsters leaflet did he testify that one unidentified employee told him that the petition was only for an election. Although that obviously may have refreshed his recollection and may have represented more of what was going on in Billiter's

mind ("[t]hat's what they was trying to do") rather than fact, Phillip Holland ("Phil"), who gave him the petition that he signed, told him that he was "not obligated to the Teamsters at all," an indication that the petition's purpose was limited to the election, exactly what Billiter had been hearing so much about. In these circumstances, I will not count his signature.

I did not find the testimony of Bobby King particularly persuasive. It is true that he recalled numerous, but unidentified employees, saying to him that the purpose of the petition was for a vote, but I did not find convincing that little portion of his recollection that the petition was *only* for a vote. For example, he testified that the solicitors "had talked about getting the petition signed, get all the names they could on it to ask for a vote" and "that was just the talk of the petition being to ask for a vote, that's all." I found Ben Lay's testimony convincing that he told King the reasons that he thought the Union would be good for the employees and that he gave King a petition page and asked him to read it and return it to him if he wanted to sign it. King returned the signed petition page about 10 to 15 minutes later. King had ample time to read the petition, and it is likely that he did. I will count his signature.

Duel Holland ("Duel") persistently asked Willis Bradford to sign a petition, pointing out the benefits of the Union but failing to convince Bradford. So, one time, he told him: "I don't care whether you vote for it or not, [but] . . . [y]ou owe it to us to sign a card so we can call it to a vote, because we know you're going to retire pretty quick." Bradford replied that he did not "owe him a damn thing" and told Holland three times a week that he would not sign. Finally, Bradford did sign, after Duel told him once again that "if he just signed, it would help us get our vote." I will count his signature. Nothing that Duel said advised Bradford to disregard the clear language of the petition. In so doing, I do not credit Bradford's testimony that he did not read the top of the petition because it had been folded to obscure the writing. I find that it was not folded that way.

I reject the petition of Henry Foster, who was told, if not by all the solicitors, by Duel and Ralph Lane: "Sign the paper, the only thing you're doing is allowing them to come in and vote for the union." That instructed Foster to disregard that language of the petition. I also reject the petition of Thomas Harris, who was asked by Melvin Owens to sign the petition "so we could have a union vote." Harris asked Owens "would me signing the petition bring anything about," and Owens replied, "No, it's just to say that you would like to have a vote." Owens thus told Harris to disregard the other language on the petition. The General Counsel contends that Harris answered differently on cross-examination, but his answers to a question[36] were ambiguous and indicate that Harris thought that he was being asked about discussions of the relative merits of the Union. I do not regard those answers as changing the testimony he gave on his direct examination.

Jerry Summers' testimony changed frequently, but what was consistent was that he made known his views against the Union several times. Testifying about Phil's efforts to convince him to sign a card, Summers quoted Phil as saying: "Was to get the votes. It wasn't an actual vote. It was just to — that they had to have a certain percentage of cards to sign to even have a vote." Then, when asked a leading question about whether he and Phil had a conversation about whether or not he was interested in the Union at the time that Phil was asking him to sign the petition, he answered that he did, and when asked what was said, answered: "Oh, I don't remember. I mean, it was just give him a chance to vote, that it didn't matter if I was for it or against it, it was just to get a vote, signing that card didn't mean anything, that it was just to get a vote and then I could vote either way I wanted." Then, when asked

[36] The question was: "And is it possible that your understanding that this was to have an election was based on those kinds of conversations and not what Mr. Owens said to you?"

whether that was what Phil said when he asked Summers to sign the petition, he answered: "I believe so." In the totality, Phil knew that Summers was opposed to the Union and told Summers that, despite his opposition, he should sign because the only purpose of the petition was to obtain a vote. Phil thus advised Summers to disregard the writing on the petition. I will not count his signature.

The remainder of the employees were currently employed by Overnite. Steve Searcy testified that either Phil or Billy Joe Trauber or Lane "were trying to get enough people to sign the card to have the election." That is insufficient to find that Searcy was misled into believing that the card was not for the purpose of representation. Besides, Lane, who testified that he gave Searcy the card, said that he asked him to sign a petition for Union representation. I believe him and particularly believe that he did not hide the top of the petition, as Searcy suggested. I will count his card.

I will also count the card of Donnie Anderson who testified that either Phil, Duel, or Lane told him: "It was just to get enough names for – if we got a majority of names of people at the local – I mean, at the Nashville terminal here, if they got enough names, then we could get an election to vote." The word "just" in this context has no meaning. Indeed, Anderson testified on cross-examination that he did not think the word "just" was said. Besides, Anderson repeatedly used "just" in his testimony. Anderson stated that he normally reads writings before he signed. I find that he did here, too.

Phil, in asking Frances Conrad to sign, said: "[T]he only thing that I was doing when I signed that, no matter where I stood, for or against the union, was that all I was doing was authorizing them to use my name for a petition to bring in an election." Conrad replied: "[F]ine, for the election, yeah, that's a good idea." Conrad was familiar, if not with the Teamsters leaflet, the language in it limiting the use of the petition to support a vote. I will not count his signature.

Phil asked Jerry Hare if he was interested in signing the petition, which was "a petition to get an election date." Hare said that, as a result, he did not read the petition, which he nonetheless filled out in detail. And he conceded that he usually reads documents that he signs. So I do not believe him; but, even if I did, no one told him not to read the petition[37] and no one misrepresented the purpose of the petition. I will count his petition. I will also count the petition of Justin Garver, despite his testimony that Phil told him that the petition "was only to get a vote in to the terminal." In other portions of his testimony, Garver did not limit the use of the petition. Thus, he stated that Phil and Lane "said it was for – to get a vote in" and "[t]hat was for a vote." I am convinced that "to get a vote" was the only purpose told to Garver, and not that the petition's only purpose was to get a vote.

Phil asked Wayne Gower three or four times to sign a petition, at one point advising Gower that he was about the only city driver who would not sign. During his conversations, Phil told him that the Teamsters had better retirement benefits, that the Teamsters would credit each employee with the years they had been with Overnite, and that employees would get "more pay." Phil said in one of his conversations, according to Gower, that the purpose of the petition was "so they could get enough cards so they could get a vote, so, you know, they'd be able to have a vote." In another conversation, Phil explained the purpose as "other than just the chance to have a vote, you know, they had to have so many cards signed so they could get a petition to have a vote to see if we wanted a union or not." I find that Gower was never told that the sole

[37] In fact, witnesses uniformly denied that the solicitors directly told them to disregard the language of the card or petition.

purpose of the petition was to get a vote and was never advised to disregard the plain and unambiguous language set forth in the petition. I will count his signature. In doing so, I find that, even if Phil's statement that Gower was "about" the only city driver who had not signed was untrue, there was no showing that Gower relied on that statement in signing his card or that the statement was a material misrepresentation.

There is no question that Duel repeatedly solicited Doug Kelly to sign the petition, but I find that Duel did not say that it was "just for the election." Although Kelly testified that that was what Duel told him, Kelly (who had been awake for more than a day, testifying after a long-distance truck run) also explained repeatedly that the card was for an election, without using the word "just." For example, Kelly quoted Duel as saying: "It was for the election" and "[W]e need so many signatures to have enough names up for the election." I find that Duel's admitted discussion of the benefits of representation (fringe benefits, wage increases, better retirement plan) made clear to Kelly that something more that the election was at stake and am not persuaded by his testimony that Duel made statements to him that would have led him to disregard the clear language of the petition. In addition, Kelly testified that Duel represented that he needed a certain number of signatures to get an election, but Kelly could not recall what the number, or perhaps percentage, was. Thus, even if Kelly told Duel that he would sign when Duel needed one more signature to have enough for an election and that eventually Duel told him that he needed one more signature, that testimony, without any relation to fact, has no significance, because it cannot, on the basis of this record, be shown to be untrue.[38]

I will not count the card of Sam Sanderlin. Duel talked to him numerous times about signing a petition, so much that Sanderlin described Duel as "pushy." When Duel asked how Sanderlin felt about the Teamsters, Sanderlin told him that he "didn't particularly care" about the Union. Duel said that employees were having problems with management and wanted the right to vote; and, if Sanderlin signed, employees would have that right. Sanderlin then told Duel that he did not want to be represented by the Union, and Duel promised that "this was going to be confidential." Sanderlin then told Holland that he did not want his "name to appear on anything." Duel said that it would not. I recognize that Duel and others spoke to Sanderlin of the benefits of Union representation; but once Duel agreed that the petition was going to be confidential, he was implicitly saying that he agreed that Sanderlin's signature was not going to signify his authorization. By doing so, Duel changed the purpose of the petition from its plain language to one that was intended to be solely for an election.

Lay, Larry Newton, and Mike Copeland asked Max Hughes to sign a petition. Before Hughes signed, Newton told him that the petition "was to get enough people to sign the cards to get a vote." On direct examination, Hughes followed this answer with "is the only thing it was for," which I find was not said by Newton, as Hughes' testimony on cross-examination demonstrates. Rather, those words constituted his description of the only purpose that Newton gave. In these circumstances, there is nothing which compels the conclusion that the clear language of the petition should be disregarded. I will count Hughes' signature. I will also count the petition of Jimmy Summers, whom Phil told that the purpose of the petition was "to get so many names so they could have a vote." Summers signed the petition for another employee who told him that, if he would sign the petition, the Teamsters could "get enough names for a vote." Neither statement should have misled Summers from the clear purpose of the petition. I will count his signature.

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[38] For this reason, I find that the petition of Donovan Tucker, who was present during this conversation, is not invalid, as Respondent suggests. In addition, there was no evidence that Tucker heard what Duel said or relied on it.

On about February 2, 1995, Newton told Jerry King that "he was trying to get cards signed to get an election." More than a week before, Phil told King the same purpose, that "they wanted to try to get as many signatures and cards signed to where they could get an election at the terminal." About three to four before King signed, he testified, Jimmy Ruffin said that the purpose of the petition was "Just to, you know, get enough signed to get an election."[39] King's use of the word "just" was his limitation on what Ruffin said, and, as I understood what he was saying, not a limitation on the use to which the card would be put. I conclude that his petition should be counted.

Dean Snow signed a petition at the January 21, 1995, Union meeting at the Union hall, but came in late. He testified that someone, he was sure working for the Teamsters, asked him to sign the petition, and he asked what the petition was for. Apparently, he received no answer, but told the person: "I will not join. I will sign for a vote." Later, the petition was "passed around" and, according to Snow, he again asked: "What's it for?" adding "The only thing I'll sign for is a vote"; so someone, he believed a driver from a trucking company (not Overnite), said, "Well, this'll get you a vote." I have little faith in Snow's testimony; but even if I believed it, no one told Snow to sign, and no one representing the Union told him to disregard the language or misrepresented that the sole purpose of the petition was to get an election. I will count his signature.

I will not count the card of James Gilley, if for no other reason than the fact that he saw the Teamsters leaflet before he signed. That was sufficient to invalidate his petition. According to Tim Heming (who, when he testified, was a supervisor), Phil "told me that all this was was — that the card was only to get an election is all he told me. He said it didn't mean that that's what you were wanting, but it was just saying that we would be able to get an election at the terminal." Heming conceded, however, that he did not remember Phil's exact words and that it was possible that Phil said "We need you to sign to obtain a vote." Obviously, that makes a big difference. But, in this instance, I believe Heming's first recollection and will not count his signature.

I will count the signature of Terrence Fields, who first testified that Roy Shelor asked him to sign, saying that "they needed so many signatures to have a vote at the terminal for the union." Shelor also said that Bobby Hill, a friend of Fields, had just signed, adding: "You know you ought to go and jump on board. This is just for us to have a vote. We need an X-amount of signatures." Then, on cross-examination, Fields testified that he had not given a direct quotation, but knew "as far as saying this is — 'Sign this to get a vote,' yeah, that's what he said." and then "'We need X-amount of people to sign to have the right to have a vote for the union.' That's how he put it." I thus find that Shelor did not misrepresent the purpose of the petition.

Both Duel and Lane asked Jeffrey Hinkle to sign on numerous occasions. At first, Hinkle said that he "didn't want any part of the union and that [he] was for the company." Holland and Lane, however, persisted in asking him to sign, finally telling him: "Just give us a chance to have an election. By signing this card, it's saying that you want the right to vote either way." So Hinkle signed. The essence of what they told him was to disregard the language of the petition, because he still had the right to vote against the Union. And so, even though he expressed that he was for the Company, the signing of the petition would only authorize a vote in which Hinkle could maintain his opposition. I will not count his signature.

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[39] King's recollection of time was exaggerated, because cards were first signed at the January 16 Union meeting.

Darius Rogers' testimony was exaggerated. He said that Lane and Kenneth Mace had hounded him for a month and one-half or two to sign a petition, when there is no evidence that the Union tried to get petitions signed any earlier than at the Union meeting of January 21, 1995, and Darius signed nine days later. In addition, Darius used the word "just" a little too much to ensure the accuracy of his recollection of the alleged limitation by Lane of the purpose of the card. But his brother Darrin corroborated the fact that Lane told them that the petition "was merely to have an election to vote on whether we wanted the Teamsters or not." I will not count the signatures of either brother. In doing so, I deny the General Counsel's motion to strike the testimony of Darius on the ground that Respondent's counsel refused to turn over a document he showed to him during pre-trial preparation. Considering the nature of the testimony and the fact that the word "only" and "just" and the like is so critical to the resolution of the issues presented in this proceeding, I examined the document in camera and found it relevant to the witnesses' testimony. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613, 615–616 (U.S.D.C. S.D.N.Y. 1977). Nonetheless, the content of the Teamsters leaflet is about as direct a suggestion to a witness of what should be said as there could be. I have considered in my credibility resolutions Respondent's refusal to produce the document, just as I have weighed the Teamsters' refusal to acknowledge authorship of the leaflet and to testify about its distribution.

J.C. Tidwell asked John Ball to sign a petition, but Ball said that he was not interested in the Union or for it. Tidwell then said that "all [the petition] was for was to have an election . . . just so we can have an election." He further said that "it didn't mean that I would be voting for the union; we were just having an election." Although Ball appeared on cross-examination to back off from his recollection of precise words, I was impressed that from all the circumstances he was not designating the Union as his collective-bargaining representative but was merely trying to support an election. I will not count his signature.

James Copeland, who attended two to four Union meetings, had little recall of the events at issue, and what he remembered was that he was told that the petition was for a vote. That does not mean that the language of the petition was to be disregarded. I will count his card. Although Shawn Allison testified that Phil told him that the petition was "just to be able to vote" and that both Duel and Lane told him that the petition was "just to vote," Allison was unable to recall on cross-examination that anyone used the words "just" or "only." For example, Allison answered "Yes" when asked whether "the only thing [he was] told by Duel and Phillip and Ralph Lane was that the petition was to be able to vote." I am not convinced that he was misled in that respect. But he was also told that his father had already signed a petition and he found out later that that was not so. Although he was unable to identify who told him, it appeared from his testimony that it was one of the solicitors. I find that that was a material misrepresentation that was made to get him to sign the petition, and I will not credit his petition.[40]

Phillip Nation habitually used the word "just" so that it is entirely unclear whether Lay told him to sign a card "just to give him a right to have an election to, you know, carry a vote. Just to have an election." Thus, although he stated: "That's all I can remember him saying is just to have an election," he also answered in the affirmative when asked: "Is it your testimony that that's the only thing he said was it was to have an election?" Later he stated that Phil "just asked

[40] Allison's alleged attempt to revoke his card was supported by testimony so lacking in detail that, although I find that he called someone, I am unsure whom he called.

me to sign the petition to have a election." I am not persuaded that Nation was misled to ignore the language of the petition.[41]

Darrell Cleaver, while unbelievably denying that he signed the two petitions that bore his name, testified that Paul Doubler, who did not testify, told him that the petition was "for an election only" or "only for an election" and that he responded "if it's only for an election, I'd sign it." Doubler told him that that was the only purpose of the petition and that he was not obligated to vote for the Teamsters if he signed. I will not count it because he was being asked to disregard the language of the petition.

Jerry Smart originally testified that Clifton Harris told him to sign "to get a vote into the terminal." Then, after Respondent's counsel asked him a leading question, he testified that Harris said that the petition was "only to get a vote." I accept his first recollection, which was free of counsel's suggestion. I will count his petition.

Duel solicited Steve Cantrell's signature, saying that "there was nothing the company could do to" him, that he could not be fired or disciplined, and that it was "perfectly safe" for him to sign it. He added that "it was not a vote for the union. It was a card saying that we were going to vote, that we wanted the vote to happen." Finally, Duel said that the petition "doesn't mean that you want the union. This doesn't mean that you don't want the union. This means that all you want is a vote." The substance of what Duel was saying is that Cantrell was not showing his allegiance to the Union but was showing his support solely for a vote. I will not count his petition.

According to Larry Powers, Duel asked him to sign the petition, and he signed it. Then, Powers testified that Lay told him that the purpose of the petition "was to get enough votes to — or cards signed to get a vote on the union." Then, he said that Duel told him "it was to get enough cards signed to have a vote on the Union." He added, in answer to a leading question, that Duel also said that Powers would have a chance "to vote whichever way I wanted to vote." None of the solicitors' statements misrepresent the plain language of the petition. In any event, I do not credit Powers' testimony for three reasons. First, he could not recollect signing the petition, so I doubt that he would have had any credible recollection of what led up to his signing.[42] Second, he began to testify that someone came to his house after the election to solicit his card, testimony that cannot be believed. Finally, I credit the testimony of Tony Butler, who no longer worked for Overnite and had no reason to fabricate his testimony. He testified that he made no comment at all about the purpose of the petition but merely asked Powers if he wanted to sign the petition and gave the petition to Powers. I credit Power's signature.

Charles Black's testimony is troubling because Respondent's counsel engaged in a few leading questions. But it has less of the fault of Smart, whom I discredited, because Black, who appeared sincere, related that he had had a bad experience working for an employer that had been represented by a union and was not ready to join the Union, to which Harris replied that this "was not to join the Union [but] to force the company to give us a vote." That implied that the petition was not to show Black's feeling about union representation, but to obtain his support solely to get a vote. I will not credit his signature.

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[41] Respondent contends that the signature of Gerald Vaughan should not be counted because "[i]n all likelihood" Vaughan signed at the same time as Nation. I refuse to do so, first, because I do not believe Nation and, second, because I cannot find that Vaughan heard the same words that Nation testified to.

[42] The way that the petition is folded did not permit the top of the petition to be obscured, as Respondent suggests in its brief.

I conclude that, of the 91 authenticated signatures, 15 should not be credited, leaving 76 which should, a majority of the 129 employees. Even if Respondent correctly urged the addition of the 7 employees discussed above, there would still be a majority of employees who supported the Union.

H. Rockford

On February 6, 1995, Local 325 requested that Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the Rockford employees, but Respondent failed and refused to do so. The Union filed a petition for an election the next day, supported by a showing of interest of 12 authorization cards. The Union and Overnite stipulated to an election, held on March 28, which the Union lost, 12–6. The Union filed timely objections, some of which were consolidated in this proceeding and all of which are alleged as unfair labor practices in the complaint.

Gissel relief is proper only where the union has filed timely and proper objections to the election. *Irving Air Chute Co.*, 149 NLRB 627 (1964), enfd. 350 F.2d 176 (2d Cir. 1965). Respondent moves that the Union's objections be dismissed on the ground that they were filed by facsimile transmission which was then prohibited by Section 102.114(e) of the Board's Rules and Regulations.[43] The document was either a fax or a copy of one, because it bears at the top of each page a fax line of "April 04 '95 03:02 pm Local #325 815 874 9694." Although that line shows the location of the sender of the fax, it does not show to whom the fax was sent. So there is no proof that the fax was sent to the Regional Office. Moreover, the fax bears the original signature, or at least the writing, of Art Bell, which indicates that whatever was delivered to the Regional Office (there is an original receipt stamp on the back of the objections) was not a fax delivered directly to the Region on its fax machine. Rather, in a different fax from Local 325, which was addressed to Bell, Tony Viren of Local 325 instructed Bell to file the objections with the Board's Regional Office. The message on the transmission letter reads:

> To whom it may concern at the NLRB Region 33 - Peoria, IL on behalf of Local 325 and Tony Viren, Art Bell Local 627 is filing objections in regards to the Overnite election. (sgd. Ted Sh . . .)

Thus, the fax was received elsewhere, signed by Bell or whoever wrote his name, and then delivered to the Regional Office.[44] I find, therefore, that Respondent did not prove that the Region, by accepting the objections, violated the Board's Rules and deny Respondent's motion.

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[43] The Rules now permit the filing of documents by facsimile transmission.

[44] Respondent contends that "the Board's date stamp on the Objections' back side shows that the Board received the objections only 18 minutes after the 3:02 p.m. facsimile transmission, suggesting the Objections were faxed directly to the Board and not somewhere else first. . . .This evidence, at a minimum, raised a rebuttable presumption that the Union faxed its Objections to the Board." Respondent's contention is based on nothing but surmise. In addition, Respondent wanted the opportunity to call as a witness someone who would prove that one could not travel from Local 627 to the Regional Office in 18 minutes, and that was one of the reasons that the third hearing (in Philadelphia) was adjourned to Nashville. The Counsel for the General Counsel was prepared to call a witness to rebut such evidence there. Then, Respondent determined not to call a witness, and so the Counsel for the General Counsel called none.

As of the date of the Union's request for recognition, Respondent employed 18 employees in bargaining-unit positions. In order to prove a majority, the Union had to prove 10 cards. Shipp identified, under category 1, the signatures on 10 cards. He could not reach an opinion regarding the authenticity of the signature of Mark Sornsin, who was called by the General Counsel and credibly testified that he signed the card attributed to him a month or month and one-half before the election at a meeting where other employees signed their cards.[45] Nickolas Kapotas identified the card of Dennis Whitmire as one that he solicited. Accordingly, 12 Union authorization cards were authenticated.

Respondent attacks Terrance Cunningham's and Whitmire's cards on the ground, which I find to be proved not only on the basis of expert witness testimony but also my own examination, that the dates were not written by the employees. However, that fact does not invalidate the cards, because Board law holds that it is not uncommon for employees to sign cards that have been dated by others and that different handwriting, without more, is insufficient to overcome the Board presumption that the card was signed on the date appearing on it. *Zero Corp.*, 262 NLRB 495 (1982), enfd. mem. 705 F.2d 439 (1st Cir. 1983); *Jasta Mfg. Co.*, 246 NLRB 48 (1979), enfd. mem. 634 F.2d 623 (9th Cir. 1980). It is unclear when Whitmire signed his card, but he applied for employment on November 13 and was hired on November 16, 1994; and Kapotas, whose card was dated February 4, 1995, was sure that he signed a card before Whitmire did. There was no testimony about the date that Cunningham signed his card; but, once again, the Teamsters' campaign did not begin until the latter part of 1994, so Cunningham would not have signed before then. More importantly, the Local, as part of its showing of interest, sent all the cards to the Regional Office and all the cards, including these two contested cards, were received by the Regional Office in the morning of February 7, 1995, as shown by the time stamps on the reverse side of the cards. Accordingly, both Cunningham and Whitmire signed their cards no later than February 6, 1995, and their cards shall be counted to support the Union's majority. I credit 12 cards, 2 more than a majority of Respondent's Rockford employees.[46]

I. Bensalem

On January 4, 1995, Local 107 requested that Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the Bensalem (also known as Cornwell Heights) employees. On the same day, the Union filed a petition for an election, which was held on February 14, 1995. The Union lost the election, 59–46, with 16 challenged ballots, sufficient to affect the results of the election, and filed timely objections. The objections case was consolidated in this proceeding. The Board agent challenged the ballots of the jockeys, whom the parties agreed should be excluded from the unit. With those exclusions, there are only 10 remaining challenged ballots, which are insufficient to affect the results of the election.

The parties agreed that, as of December 21, 1994, Respondent employed at least 117 employees in bargaining-unit positions, but disagreed at the hearing, although Respondent did

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[45] Admittedly, Sornsin also testified that he put the correct date on the card, February 4, 1994, but there is no indication in this proceeding, including the earlier hearings leading up to *Overnite I*, that the Teamsters' organization drive anywhere started earlier than September 1994.

[46] . I specifically reject Kapotas' testimony that Whitmire filled out the entire card in his presence. The date of the card "10-24-94" was in a different ink and written by a different person. I accept Kapotas' testimony, however, that Whitmire signed his card during the time when the Union was attempting to get employees to sign authorization cards.

not brief its position, about the status of three dock leadmen, Sean McCaffrey, Mark Taylor, and Michael Daily. The General Counsel contended that they were employees; Respondent, that they were supervisors. They also disagreed about Daniel Gallo, who was a road driver but lost an eye in an accident and, by reason of that injury, could not be licensed to drive. Respondent assigned him to work in the office, it contends temporarily, until Respondent could determine what he could do. In the meantime he was retained on the books as a road driver. The General Counsel contends that he was an office worker and not a road driver, as Respondent contends (although not in its brief), and is thus not to be counted.

Gallo should be excluded from the unit. As of the day of his accident, March 9, 1994, almost a year before the election, he ceased to be a driver because, as a result of his injury, Pennsylvania law prohibited from driving. That Respondent continued to pay him as a driver, and label him as such, does not vary the duties to which he was assigned, namely, doing clerical work, whether office (specifically excluded from the unit) or plant (because he worked not in the office but in the area where the dispatcher worked); and he subsequently became the night dispatcher. He lost his community of interest with the drivers when he was injured, and he had no community of interest with any of the employees in the appropriate bargaining unit. He was not a dockworker, which he became after the election, or a jockey, which he subsequently became, and which the parties agreed was excluded, anyway. Indeed, Joseph Moran, the assistant service center manager, did not know whether Gallo, after his injury, was physically able to do a dockworker's job or whether there were any openings for a dockworker. Most convincing is the profs note sent to the Bensalem service center, indicating that on December 4, 1994, the safety department at Overnite's headquarters in Richmond advised the center that Gallo's classification "needed to be changed to a non-driver. His physical expired on 12/3/94. If this employee is not qualified to drive he must be changed to a non-driver, non-cdl class." I find that he was not a driver and was not in the bargaining unit. *Mrs. Baird's Bakeries, Inc*., 323 NLRB 607 (1997).

As to the dock leadmen, I note that all of them were included on Respondent's *Excelsior* list and all of them voted in the election, without challenge. It was only at this stage of the proceeding that their status became an issue. Daily was the dock leadman on the a.m. shift, working with two other leadmen and a crew of about 20 to 25 dockworkers from 5 a.m. to about 2 p.m. on the inbound freight. When he reported to work, he immediately began loading freight with the other dockworkers. When trucks became full, if there was extra freight, Daily would ascertain where it was going. At 9 a.m., his dock supervisor would leave, and Daily took over at the shack, reviewing records, adding up time cards, figuring how many hours the employees had worked, and computing production statistics. At 12 noon, he performed a yard check, writing the name of every truck and matching freight with bills to ensure that no freight was unaccounted for.

Evidence of supervisory function is lacking. For his duties, Daily, like the other dock leadmen contested by Respondent, was paid $16.45 per hour, 25 cents more than regular dockworkers. Otherwise, he received the same fringe benefits and was not paid a flat salary, as other supervisors were, and was paid for overtime, as other supervisors were not. He did not attend management meetings and went to the same mandatory meetings that other employees were required to attend.[47] Between 9 a.m. and 2 p.m., no supervisor was present. Between 9 a.m. and 12 noon, Daily handed out loads; or, if a truck came in late, he would get it stripped. Each day, Daily assigned 4-5 trucks, particularly those that had items on them that required

[47] Part of Overnite's pre-election campaign at each of the service centers was a series of meetings that employees were required to attend ("mandatory meetings").

delivery without delay; but the assignment was to the employees who had completed their work. On Saturdays, Daily also worked the same hours, with 6-7 other dockworkers, but without a supervisor present. “I’m it,” he answered.

The dockworkers were told to follow his directions. If a dockworker had a problem, he was to come to Daily. Months before the election, Daily was permitted to issue written warnings which constituted corrective actions. However, about four or five months before the election, his supervisor, Gary Labor, told him that he could no longer write up employees. If there were a problem, Daily was to tell Labor.

Sean McCaffrey worked the midnight to 8:30 a.m. shift, with two other leadmen, dealing with inbound freight, making sure that the freight went on the correct trucks. But his supervisor, Labor, came in at 11:00 p.m., so McCaffrey, unlike Daily, was never without supervision. McCaffrey was responsible for getting in touch with the jockey to back a trailer needed for a specific freight, and then McCaffrey loaded and unloaded freight for half his day, in the same way as any of the other dockworkers. McCaffrey was also responsible for tracing “hot” shipments (shipments that had to be delivered the next day), which he found out about from the computer. He also did the setup when Labor said that he was not going to be there or it was going to be busy. McCaffrey also covered for Labor when he was on vacation or was sick.

McCaffrey would keep an eye on the other dockworkers, ensuring that they were using the correct type of equipment so that they did not damage the goods that they were moving,[48] work among them, and see that they received help, if they needed it. And the dockworkers would come to him if they needed help. McCaffrey assigned work to the dockworkers about once a week, when his supervisor was not there. Normally, that entailed only the dockworker grabbing a trailer, at which point McCaffrey would write his name on a Form C provided by Respondent. He also assigned trucks throughout the night. During his employment, McCaffrey could only suggest write-ups; and he was involved in writing up an employee about 4–5 times, when the supervisor would tell him to write up an employee. In only one instance did McCaffrey somewhat instigate a write-up, when for a half dozen times an employee had not cleaned up and on the seventh occasion, when the employee left freight behind, McCaffrey complained to his supervisor, who told him to write up the employee. McCaffrey did so and gave the form to his supervisor.

Mark Taylor worked with only one other leadman on the afternoon outbound shift, starting at 1:00 p.m. and ending at 11:00 p.m. His supervisor was John Madden, who came in at about 3:30 p.m. and finished at about 1:00 a.m.; so for two and one-half hours, Taylor worked without supervision. He spent his first two hours making sure that the trucks that he needed were on the dock and in the right place and finding out what trucks were needed. He prepared his Form Cs, writing the numbers of the trucks to record what trucks were available and to whom the trucks were going to be assigned. The arrival of the 15 dockworkers who worked on Taylor’s shift was staggered: the first two to report began at 3:00 p.m., and others came in hourly up to 6:00 p.m. At 3:00 p.m., when the other leadman reported for work, Taylor left his administrative duties and, like the other dockworkers, stripped and loaded the rest of his shift, sometimes (once every two weeks) returning to the shack — assigning trucks — when he wanted a break from the more physical demands of his job.

[48] Examples that McCaffrey gave were the incorrect use of a forklift to move a rug, rather than a rug pole, and the incorrect use of a forklift to move bales, rather than a handtruck.

Taylor talked to dockworkers who were not working hard or damaging something, but he reported any problem that he had to his supervisor. Overnite did not permit him to fill out write-up forms. One of the things that Taylor watched for was hot freight, which was handed out first. Typically, he assigned it to those he considered faster workers, and sometimes transferred a better worker off a job to handle a hot shipment.

The Board, with court approval, has found that the assignment and direction of employees in connection with the loading and unloading of trucks, and in connection with the storing of goods, is generally routine in nature. *Millard Refrigerated Services*, 326 NLRB No. 156, slip op. at fn. 3 (September 30, 1998), citing *Piggly Wiggly*, 280 NLRB 1160, 1166-1169 (1986), enfd. 827 F.2d 1098 (6th Cir.1987); *Sears, Roebuck & Co.*, 292 NLRB 753 (1989); *Highland Superstores, Inc.*, 927 F.2d 918 (6th Cir.1991), enfg. 297 NLRB 155 (1989). The employees' work is repetitive and requires little supervision. They perform the same job tasks on a continuous basis. The trailers are loaded and unloaded routinely, and the employees are assigned in the order that they arrive at the facility or are ready to handle a new trailer. Priority for handling new shipments is based on records which dictate which shipments need to be delivered early. That the lead dockworkers assign other dockworkers to various tasks does not reflect their ability to responsibly direct employees. They are experienced employees who know which of their fellow employees have the greater skill and experience. Their use of this information when assigning work does not establish that they exercise independent judgment. *Sears, Roebuck & Co.*, supra at 755. I conclude that the three lead dockworkers should be included in the unit.

The parties agreed that, as of December 21, 1994, Respondent employed 114 employees in bargaining unit positions. Adding the three lead dockworkers, there were 117 employees in the unit, so the Union had to prove 59 cards. The authorization card contained requests for the usual information (name, address, phone and social security numbers), and contained at the top the following:

TEAMSTERS LOCAL 107

> I, the undersigned, of my own free will, desire to become a member of Local 107, Affiliated with International Brotherhood of Teamsters, AFL–CIO and by so doing designate said Union as my chosen representative in all matters pertaining to wages, hours and working conditions.

Respondent contends that this card is ambiguous and should not be counted because the card becomes effective only when the employee becomes a member of the Union. However, the Board has granted bargaining orders based on authorization cards employing identical language. *Comcast Cablevision*, 313 NLRB 220, 257 (1993); *Eastern Steel Co.*, 253 NLRB 1230, 1240 (1981), enfd. 671 F.2d 104 (3d Cir. 1982). I conclude, therefore, that the card is a valid authorization of the Union as the employees' representative. The remainder of Respondent's arguments have no validity. That the card stated at the bottom that all the replies were to be kept confidential does not require the nullification of the employees' will. That language was meant to ensure that Overnite would not learn of the employees' union activities and desires and to protect the employees who signed cards. As noted above, telling an employee that signing will be kept confidential does not invalidate an authorization card. And it is not a "lie," as Respondent charges, if the Union uses the cards to obtain a *Gissel* order. The original intent of authorization cards is to support a showing of interest for an election or to show an employer (normally through a third party, so the employer will not know who signed the cards) that the Union represents a majority. The reason that the cards must be shown in a *Gissel* case is that an employer is alleged to have violated the Act in such an egregious manner

that there can no longer be a fair election. For Respondent to take advantage of its own violations of the Act, as found in *Overnite I*, to thwart the employees' will is utterly unjustified. I reject, therefore, Respondent's attack on the cards.

The General Counsel submitted 69 cards, 51[49] of which were identified by Shipp as being in category 1. I credit all of them as bearing the signatures of the employees and specifically find that Andrew Everk, whose card is undated, mailed his card in 1994, as shown by the postmark and as confirmed by his testimony that he signed the card about four months before the election, which would place the date in October 1994, which the postmark shows, and about a week after another employee, Dan Maier, signed his card, again placing the date in October. The other undated card was signed by Robert Tucker. The postmark bears a date of November 28, but the year is illegible. The card bears a receipt by the Regional Office as January 4, and the parties cannot agree whether an arrow pointing between the numbers 4 and 5 around the perimeter of that stamp indicates the year, perhaps the end of 1994 and the beginning of 1995. In any event, most of the cards bear that same receipt stamp, making it convincing that all the cards were filed to support the petition, which was filed on January 4, 1995. In addition, Tucker signed another card, which is dated December 9, 1994, and he testified that that card was signed two or three months after his first card. Although his testimony about the time gap appears to be inaccurate, I find that the December card was signed after the earlier card and that both cards can be used to support the Union's majority. Accordingly, as of December 21, 1994, there were 51 cards positively identified by Shipp, and I credit them.

There were also 13 cards that Shipp identified as being in category 2, which I would have credited, based on Shipp's testimony, in any event. Here, each of the employees, with the exception of Christian Tomlinson,[50] testified that he signed the card; and I credit all of them. I also credit the cards of David Stauffenberg and Randie McDonough,[51] whose signatures, in Shipp's opinion, were in the categories 3 and 4, respectively; but the employees testified that they signed the cards, and I have no reason to doubt them. I will count the card of Richard Mucerino, despite the fact that he did not sign the card. He authorized his wife to sign the card, which he read and identified as a "Teamsters card," and that is sufficient to validate the card. I also credit the unsigned card of Herbert Capps, who did not fill in any of the spaces on the card. Instead, he specifically authorized his wife to fill in the card. Capps knew what the card was for. He was a member of the Union for 31 years and was on withdrawal status. In addition, Capps mailed the card, but testified that he forgot to sign it. The Board has held that the mere fact that an employee forgets to sign a card is no reason to disqualify it. *Skyline Transport*, 228 NLRB 352, 354 fn. 11 (1977). I do not count the card of Michael Frontantaro, whose card was dated "1/14/95" by someone else, as being signed on that day. Frontantaro's testimony was confused about the date that he signed the card. It is probable that it was backdated, because he testified that he signed it on the day that he was "called down" by the Union to vote. Because he voted, although challenged, it is probable that he signed on the day that he "answered the request to come down and vote," that being February 14, 1995. The total number of cards that I credit as of December 21 is 68 (51 in category 1, 13 in category 2, and the 4 discussed in this

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[49] Edwin Burgos and Michael Cottrell each signed two cards. I have included in this computation only one card for each employee.

[50] The Counsel for the General Counsel represented that he had made extensive efforts to locate Tomlinson and had been unable to do so.

[51] This card was dated November 10, 1994. McDonough signed another card eight days later.

paragraph),[52] more than the 59 cards needed for a majority. Therefore, a majority of the Bensalem employees authorized the Union to be their representative.

III. The Unfair Labor Practices

A. Dayton

Most of the unfair labor practices alleged in the Dayton complaint were withdrawn by the General Counsel. Only two remain, and both, testified to by Bob Staton, are familiar subjects and dealt with at length in *Overnite I*. One involves vice president of safety Bobby Edwards speaking in March, before the election, to a meeting of about 20 employees and saying that the employees in Chicago had been in the Union and had been negotiating with Overnite for 13 years and Overnite still had not agreed on a contract with the Union. The other involved the March wage increase. In early February 1995, shortly after the Union's representation petition was filed, service center manager Chuck Littleton held a series of meetings with employees to announce the March 1995 wage increase and allegedly advised the employees that service centers that had voted in the Union, such as Indianapolis, Kansas City, and Sacramento, would not receive the raise.

Edwards did not testify; and, although Staton's testimony was minimal, there is still there the sense that, if the Overnite had not entered into an agreement with the Teamsters after 13 years, there would be little hope for any progress in Dayton. I conclude that Respondent violated Section 8(a)(1) of the Act by threatening that bargaining would be futile.

On the other hand, Littleton testified and denied Staton's allegations. Rather, he said that employees asked him whether the raise would be paid to represented employees, and he first answered that any wage increase would have to be negotiated and said nothing more. On cross-examination, he said that he told his employees that the employees at the facilities that had voted in the Union would not necessarily receive the increase at the same time. Littleton thus changed his testimony, but Staton was not wholly credible. I have previously found that, contrary to his denials, he told employees that the authorization cards were going to be used for an election. That is contrary to his testimony that he merely handed cards to employees and never asked them to sign. He testified that he brought McCarty's card to the Union representative, when the card had been mailed. He first testified that he did not receive a letter from a Union representative, and later changed his testimony.

I have found this identical violation previously, and the allegation is clearly the type of conduct that Respondent has engaged in. I do not trust either witness, but it appears that Respondent's strategy was to make known to its employees that those of them who had not voted for the Teamsters were going to get a raise and those who had voted in the Union were not, because they had to negotiate and Overnite was not going to sign a contract with the Union. Overnite made that known not only in its meetings, but, as pointed out in *Overnite I*, made it known in *The Overniter* for only one reason — to tell its employees of the danger of voting for the Union. And, if that were the strategy, it is curious that none of Overnite's service managers raised the subject first. Rather, according to them, the employees would always ask whether someone else was getting a raise. I do not believe that happened. I conclude that Littleton violated Section 8(a)(1) of the Act, as Staton testified.

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[52] Richard Mucerino, Francis Oquendo, and Robert Tucker signed valid second cards, which could also be counted.

B. Richfield

Several times during the mandatory meetings, service center manager Jerome Ruediger[53] emphasized that nothing was automatic if the Teamsters won the election and that the employees would not automatically get what the Teamsters had been promising. He did not believe that Overnite would ever sign the Teamsters' National Master Freight Agreement ("NMFA") or that Overnite and the Union could ever agree on paying overtime or granting superseniority. Ruediger stated that other companies had gone out of business because they signed the NMFA and that signing that contract would be a "bad thing" because it would be "economically unsound." Overnite would not sign anything that would weaken it "economically or competitively." These statements, which were supported by examples, do not violate the Act. In so finding, I reject the contention that Ruediger specifically stated that Overnite would not agree to any labor contract.

However, Ruediger told the employees that the service centers that had voted in the Union would not be receiving the March 5 wage increases because the parties had to negotiate the increase first. That was accompanied by the familiar Chicago refrain, discussed at length in *Overnite I*, that Overnite and the Union had been negotiating for 13 years and had yet to agree on terms of a contract. It was thus evident that bargaining would be futile, that Overnite would not sign an agreement, and that the selection of the Union as their representative would cost employees their wage increases. I conclude that in these respects Respondent violated Section 8(a)(1) of the Act.

According to former employee Lawrence Keith, Ruediger delivered the "Give Jim a Chance" theme, also dealt with at length in *Overnite I*, that, if the employees would give Respondent's new president and chief operating officer, Jim Douglas, a chance and vote against the union, "things would turn around and [Overnite] would be a lot better place" and "things would get better . . . once we got past the union thing." Ruediger imparted the thought that, if the employees rejected the Union and gave Douglas and Overnite the opportunity, conditions would improve. That constituted an implied promise of benefits, aimed at discouraging support for the Union, in violation of Section 8(a)(1) of the Act. *Reno Hilton*, 319 NLRB 1154, 1156 (1995).

About a week before the election, dock supervisor Dan Mitchen threatened Keith that, if the employees voted in the Union, the only way the Union could get any wage increases or other improvements would be to go on strike; and, if they went on strike, they could either lose their jobs or be replaced for a while. In one of the mandatory meetings, Ruediger said that, if the Union and Overnite could not agree on a contract, the primary weapon that the Union had available to put pressure on Overnite was to strike. An employer may not lawfully state to employees that a union's sole leverage to obtain anything from it is to strike. *Fred Wilkinson Associates*, 297 NLRB 737 (1990) That is what Mitchen told Keith, but not what Ruediger said at the mandatory employee meeting. I conclude that Mitchen's statement violated Section 8(a)(1) of the Act, but Ruediger's did not; and I will dismiss the allegation of the complaint as to him.

[53] In making credibility resolutions, I find that, from certain admissions of the General Counsel's witnesses, Ruediger followed the scripts that had been given to him for the mandatory meetings. That is not to say that Ruediger did not make comments that had not been written for him, but, taken in context, the General Counsel's witnesses inaccurately recalled what Ruediger said.

A few weeks before the election, supervisor Jesse Young told Keith that, if the Union won the election, Overnite would more than likely ship freight around the Richfield service center to avoid the higher Union wages.[54] The allegation is supported by the similar threat of human resources manager Steve Bias at a mandatory meeting that, if Richfield became a Union terminal, the Company could run freight around it which would reduce the employees' working hours. I find that these threats, which were denied by Respondent's witnesses, were not the kinds of statements that the employees would concoct from nothing. I credit the General Counsel's witnesses and conclude that the threats of Young and Bias to divert work and thus reduce the wages of the Richfield employees were made to discourage their support for the Union, in violation of Section 8(a)(1) of the Act.

The General Counsel relies on additional, allegedly unlawful statements of Ruediger about the negative consequences that would result if employees selected the Union to represent them. Charles "Tom" Ball testified that at one of the mandatory meetings, this one two weeks before the election, Ruediger told employees (in essence repeated by Ruediger the following week) that the Union might "negotiate" a contract that Overnite could not afford and, if so, Overnite might have to go out of business. I find that Ruediger said no such thing. In fact, as Ball admitted, Ruediger was referring to the NMFA and made clear, in predictions backed by examples and references to particular provisions of that agreement, that Overnite could not afford that agreement which would weaken it economically and competitively. For example, Ruediger stated:

> Moving to the NMFA wage rate alone would put Overnite in the *red*. That's right. Do the math yourself ($2.36 x 2,300 x 12,000 employees = $65,136,000). Now, you figure it out. Would you take a mortgage or rent a house if the monthly payment was more than your total take home pay? Of course not. Well, that's exactly what the Teamsters want you to believe Overnite will do. And remember, that was only the cost of wages. It did not include pension, insurance, restrictive work rules, etc. It is just that kind of crazy thinking that resulted in a month long strike in 1994 and put 41 of the top 50 carriers out of business. (Emphasis in original.)

I conclude that these allegations of threat of closure and refusal to sign an agreement cannot be sustained and must be dismissed.

Finally, a week before the election, in one of the mandatory meetings, Ruediger placed on the table before him notes from employees whom the supervisors had helped with various problems and said that the notes were confidential — he could not read them — but, if the Union was voted in, according to Ball, employees could no longer take any issues to their supervisors and Overnite would not be able to help the employees any more. However, Ruediger denied that, insisting that he told the employees what would be the result of the NMFA on the relationship between employees and management. I find that, although Ruediger may have been thinking about the effect of the NMFA of grievances (incorrectly, it turns out), he did not refer to the NMFA, which resulted in a threat that Respondent would cut off access to its supervisors, even for temporary changes in shifts or hours to suit an employee's needs, if the employees voted for the Teamsters. That violated Section 8(a)(1) of the Act.

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[54] Respondent sent its employees a mixed message. If the Union was voted in, Respondent threatened that it would not grant the increases that the non-Union service centers were going to be paid.

C. Nitro

Posted at the Nitro service center for several days in early February 1995 was a poster of a "Teamsters Graveyard," featuring the gravestones of Teamsters trucking firms that had gone out of business and Overnite's headstone with an open grave and a "?". The poster thus represented that the Teamsters caused the companies to go out of business and predicted that, if employees selected the Union, Overnite would go the same way. I found in footnote 10 of *Overnite I* that the poster violated Section 8(a)(1) of the Act.[55]

Gissel teaches that predictions of the dire consequences that unionization may have on a company are not necessarily violations of the Act, but an employer has to make sure that its threat is reasonably based on fact and is grounded on more than surmise. Thus, the Court wrote, 395 U.S. at 618–619:

> [A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.' He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based upon misrepresentation and coercion, and as such without the protection of the First Amendment. . . . As stated elsewhere, an employer is free only to tell 'what he reasonably believes will be the likely economic consequences of unionization that are outside his control,' and not 'threats of economic reprisal to be taken solely on his own volition.' [Citations omitted.]

The record is barren of any proof to support Respondent's representation that the Teamsters caused the demise of these companies or its dire prediction that Overnite would follow, after unionization. Accordingly, the poster's threat that, if the Union was successful, Overnite would close its business was based on no objective facts, and was, in the words of *Gissel*, that Respondent would "take action solely on [its] own initiative for reasons unrelated to economic necessities and known only to it"; and the poster's threat is "no longer . . .a reasonable prediction based on available facts but a threat of retaliation based upon misrepresentation and coercion." *Eldorado Tool*, 325 NLRB No. 16, slip op. 1–3 (November 9, 1997).

The complaint alleges that service center manager Dennis Cole engaged in numerous threats and promises from the commencement of the Union campaign up to the March 20, 1995, election. One was his emphasis on the "Give Jim a Chance" campaign, which was promoted on t-shirts and hats worn by Respondent's supervisors and in fliers and handbills.

[55] Admittedly, the witnesses in the Nitro hearing described the poster somewhat differently, with a figure of a "grim reaper" getting ready to bury Overnite. I find, in the context of this entire proceeding, and considering the evidence decided on in *Overnite I*, that the leaflet posted in Nitro was identical to the one described in my earlier Decision.

Cole announced that Overnite had a new chief operating officer, that Douglas was a good man, that he had come to Overnite to make it more profitable, and that he would relinquish some of the authority back to the service center managers in order for them to take care of the immediate problems at each center, as contrasted with his predecessor, Boswell, who "had had the [t]erminal [m]anagers' hands tied and they had to get authorization from Richmond in order to take care of any immediate problems that we had at each individual terminal." Cole said that if the employees did not tell him what the problems were, he would not know what to fix. Despite his statements that he could not and was not promising anything, he was doing just that, and he actually did.

When Cole arrived, the practice was that employees were allowed to bid for the time during which they would take their vacations. Employees with greater seniority and who were entitled to at least two weeks were allowed to bid on the first round of bidding on their first two weeks. On the next round they could bid for another week, and they could do so on the following rounds. Cole changed that, saying that it was against company policy, which permitted employees to bid only on one week for each round. During the campaign, an employee asked why employees were not allowed to bid for two weeks, as they had done before. Cole said that he would look into this and later, before the election, suggested that the employees vote on that. In fact, one day, between the end of February and the beginning of March, when employees were given their work assignments, they were given a ballot on that question that they turned in to their dispatcher. The city drivers also objected that they had in the past been allowed to bid on routes once a year, but they no longer were. Cole promised to check into that, too. In the same questionnaire, employees were asked their preference about bidding on routes. The employees voted for both changes, and Respondent announced that both votes had passed. The vacation bidding was changed after the election, effective for vacations taken during 1995; but the city drivers were not allowed to bid for their runs. I conclude that Respondent violated Section 8(a)(1) of the Act by soliciting employee grievances[56] and by implication promising to remedy them and, in fact, remedying one of them.[57] Respondent's claim that this new system for picking vacations was not a benefit, because some employees were hurt by it, has no substance. Cole pleased the majority of the employees, at least those who voted for the change.

Some of the allegations relate to Cole's alleged threats about the consequences of selecting the Union. There was testimony that Cole advised the employees that they were then allowed to work more than 40 hours per week; but, if the Union won, Overnite would not allow them to work over 40 hours. Cole credibly denied that. Rather, what he told them was that, if Respondent were compelled by contract to pay overtime, Overnite would control its overtime so that it would not have to pay time and one-half. That is in accord with the script that had been prepared for him to use at the mandatory meetings and which I find he followed. I will dismiss the allegations pertaining to this threat.

On the other hand, I do not believe that the employees concocted their recollections (or misunderstood) that Cole, often holding up a blank piece of paper, said both in and out of the mandatory meetings, that Respondent's bargaining would "start at zero" or "ground zero" or "would start with a blank sheet of paper and everything was up for negotiations." He added: "[T]he company did not have to agree to anything. All they had to do was bargain in good faith."

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[56] Cole's direct solicitation of grievances to resolve or refer to Douglas during this campaign was not part of Overnite's normal practice of encouraging employees to file complaints.

[57] I have fully considered the testimony of former operations manager Mike White, who, I find, was mistaken in his recollection that the ballot occurred the previous fall.

That was coupled by Cole's reference to Chicago, where Overnite had been bargaining in good faith for 9 or 10 years (he said), but there had been no contract or anything decided.

An employer violates Section 8(a)(1) by statements that bargaining will start from scratch or from zero or from a blank sheet of paper, where, in context, they are not explained or they reasonably lead employees to believe that their then current benefits would be lost or reduced, and could only be regained through negotiations with the employer. *Lear-Siegler Management Service*, 306 NLRB 393 (1992), citing *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980), enfd. 810 F.2d 638 (9th Cir. 1982). Cole, in fact, related the nature of the negotiating process, but he left a logical concern by his numerous repetitions of starting bargaining "from scratch" and "ground zero," without repeating the nature of the bargaining process, that the employees were justifiably concerned that they would lose their current benefits. Adding the narration of the Chicago experience could only bolster their belief that bargaining would be futile. So, the election of the Union would mean a bargaining process which began with the loss of their current benefits and bargaining which had no hope of getting anywhere. I conclude that this threat of the punishment for and futility of a Union victory violated Section 8(a)(1) of the Act.[58]

D. Parkersburg

Respondent's principal defense to much of the conduct alleged in the complaint is that what it did was simply part of its normal, everyday procedure, nothing out of the ordinary, and certainly nothing to find a violation about. The facts do not support Respondent's position. One of the issues that had been troubling the Parkersburg employees was Respondent's failure, despite the weekly complaints of employees, to supply for up to four years various pieces of equipment that some of the dock employees claimed they needed in order to properly perform their work. Some was somewhat basic, like a hammer and a working crowbar (it was bent) and a power saw. The employees needed palettes. Lights on the dock needed replacement and switches and jacks were broken. Other equipment consisted of a tow motor (the engine smoked excessively, giving employees headaches) and a lift truck.

After the election petition was filed, officials from Overnite's Richmond headquarters, as they and Overnite's "quality team" or "troubleshooters," referred to in *Overnite I*, did in many other locations, suddenly began to pay attention to what was troubling the employees. Perhaps once a year, or even every two years, an executive from Richmond would visit the Parkersburg service center for an hour or so; but with the Union campaign, for the first time in years, a group of top officials came to Parkersburg to see what were the problems. In particular, Edwards told employee Richard Woody:

> he had been sent down to talk to me. Because Mr. [Paul] Heaton [senior vice president], with my work record and being a good employee, that he knew that Parkersburg terminal must have had a real problem for me to be involved in the organization of the Teamsters Union. And that he come down to see what the problem was.

The obvious implication of Edwards' remarks was that there would not have been union activity had things been alright, and Woody readily admitted that the employees were very upset and that he had signed a card and was supporting the Teamsters. He said that the employees

[58] My review of Cole's testimony and his notes and overhead slides from the mandatory meeting convinces me that he did not threaten that strikes were inevitable, but rationally spelled out all the Union's options.

were dissatisfied with their service center manager, Fred Hutchins, and city dispatcher, Rick McIntosh, and were very upset and worried about their job security, with Respondent's downsizing and restructuring, taking runs away from Parkersburg and giving them to the larger terminals and reducing the workforce by about 20 employees. Edwards asked Woody to relate these complaints to Heaton. He also asked for Woody's help in combating the Union campaign. Edwards said that he had intended to retire, but after meeting with Overnite's new chief operating officer, Douglas, Edwards decided that he would remain to help the Company fight the Union, because he believed from his heart that what Douglas told him would be the truth and that changes would be made, and would Woody help and give Jim a chance. Woody agreed, discarding his Union hat and pin that he had been wearing up until then.

Within a few days, Heaton and vice president of operations John Fain came to Parkersburg and talked with the employees. In particular, Heaton had a lengthy talk with Woody, whom he asked what was going on, what kind of problems was he encountering, and how Heaton could fix them. Heaton, like Edwards, also said that Overnite had a new chief operating officer, Douglas, who (he believed) would make changes. Woody told him about what was broken and needed to be replaced and what needed to be updated, such as broken dock and other lights, inoperable switches, a leaking roof, tow motor forks that were too short, one tow motor that was smoking excessively and gave everybody a headache, the lack of a functional rug boom and equipment to move linear shaped steel objects, and bent and broken pilot jacks, hammer, and crowbar. Woody asked if he could make him a list of all things that he needed, and he would give it to Heaton.

The two then went out on the dock to look at some of the items that Woody had mentioned and returned to where they had been talking, when driver Phillip Zigler came in from a run, and they, with Fain, who had also joined the conversation, talked about runs being changed and shortened. Zigler complained that he could not understand why he had to take a run of six hours, and then stay in bed for 17 to 20 hours before he returned, rather than adding another run onto his Parkersburg to Harrisburg run. Heaton and Fain could not understand why the drivers were not running longer runs. Heaton then went into the dispatch office and called Mickey Kelly, Overnite's service center manager in Harrisburg, and asked if there would be any problem in adding Philadelphia to the Harrisburg run. Kelly had no problem with that. Heaton then called central dispatch and reported to Zigler and Woody that the expanded run had been approved and that the run would start immediately — and it did, that night. Shortly after, Heaton pinned a "Give Jim a Chance" badge on Woody.

Woody left the meeting to complete cleaning up and prepare his list, which he gave to Heaton, who said that he would telephone Overnite's facility in Charlotte that rebuilds motors and fabricates some of the equipment that Woody was requesting. Soon after, Heaton summoned Woody to explain to the foreman in Charlotte, who was on the telephone, exactly how he wanted the equipment made, and Woody did so. Heaton told Woody that some of smaller items, such as hammers and crowbars, could be bought locally. The products from Charlotte should be coming in immediately. Heaton would ship the old smoking tow motor out that night for evaluation

These complaints had never been addressed prior to the Union campaign. Even Heaton expressed his amazement. He could not understand why Hutchins had not taken care of these problems. Woody promised to advertise Overnite's new policy, telling Heaton that he would tell all the employees that they were going to get new equipment, and that would make everybody happy. Woody told at least three-fourths of the employees. And Overnite followed up on all its promises, delivering to the service center, starting immediately after these events and before

the election, everything on Woody's list, except the dock vacuum, and repairing the items that he had complained about.

Several other allegations of the complaint dealt with implied promises of changes for the better. After one of the mandatory meetings, Mincks and two other employees stayed to voice their concerns and complaints about seniority and pensions to Edwards and Roanoke service center manager Jerry Gallimore. Edwards responded that a lot of the problems that the employees were expressing had been raised at other service centers, that Overnite knew of some of those problems, and Overnite "was working on resolving some of the problems." Mincks knew of Overnite's campaign centering on "Give Jim a Chance" about the second or third mandatory meeting when the slogan appeared on hats and t-shirts. It also arose in another conversation with Edwards after the first meeting. Edwards asked to see Mincks and told him about all the changes that Douglas had promised Edwards would come about and what Overnite was going to do for the employees. Edwards believed Douglas (that was the reason that Edwards was not going to retire) and, as a result, thought that the employees ought to back off from what they were doing. The employees should "give him a chance" and give him a year to do what he says he's going to do. If, after a year, it did not work out, then Overnite "deserve[s] what they get."

Edwards' promises, albeit in the abstract, were made to influence the results of the election and to discourage the employees from their support of the Union. What Heaton and Fain did was not so implied and indirect. Rather, they openly solicited the complaints of the employees, turned Woody from his support of the Union by promising to correct what was troubling him and the rest of the employees, and then corrected within days the inaction of up to four years. They bought or repaired equipment and added hours to one driver's route. That cannot be legitimized by Respondent's defense that it was merely making normal repairs and capital improvements. There was nothing normal about what Respondent did. Nor were the improvements made to benefit customers. The impetus for the purchases and repairs was the employees' petition for representation.[59] I conclude that Respondent violated Section 8(a)(1) of the Act by soliciting complaints, making implied and direct promises, and resolving grievances, all in an attempt to influence the results of the election.

E. Nashville

In early March 1995, then service center manager Lonnie Lane held a meeting with a group of employees. During the course of this meeting Lane asked the employees to tell him their problems that they thought would be solved by having a union, that "we could talk it out and we didn't need [any] outside in[ter]ference." The employees raised issues of seniority rights and favoritism. The Union, Lane said, could not guarantee to fix them. He blamed many of Overnite's problems on Boswell, who had been fired, and said that Douglas, a "people person," was now leading Overnite and asked the employees to "give Jim a chance." A similar conversation took place about March 23, when Gary McGuire, then Overnite's district human resource manager, and Lane met with Ben Lay, who was wearing a Union shirt and hat, and

[59] Gallimore testified that the motor began smoking excessively a month after he first arrived in Parkersburg, which would place the event in March; and it was Heaton who had the motor replaced. Even if that were true, Gallimore did nothing to fix the problem, nor did Heaton testify, so there is no way of knowing whether Gallimore's testimony was accurate. I believe Woody, who, when he testified, was no longer employed by Overnite, but had left to obtain a better job. I find, then, that it took Woody's complaint to Heaton to resolve the issue, a finding which is really not inconsistent with Gallimore's testimony.

McGuire and later Lane asked him why he was supporting the Union. Lay could not recall his answer precisely but answered Lane that he thought that the employees needed representation to keep what they had and not lose anything. McGuire asked him "if [he'd] wait and give Jim Douglas a chance, to wait a year and the union would be there after that year." McGuire also asked Lay what he thought of a tape of a portion of a Ron Carey interview that had been played at one of the mandatory meetings. Lay answered that he "thought the tape sucked, . . . that he [Knoxville, Tennessee service center manager Tony Sneed] should have played the whole tape not just part of it."[60] The final alleged violation was by Heaton, who, on March 27, asked Shelor if he had any complaints or gripes about Overnite and stated that, in light of the fact that Shelor had been with the Company for 22 years, he did not understand why Shelor was wearing a Teamsters' hat and supporting the union.

The complaint alleges that these conversations constituted the solicitation of grievances from employees and that McGuire, in conveying the "Give Jim a Chance" slogan, by implication promised to address the employees' concerns. Respondent contends, however, that its solicitation of grievances was part of its past practice and that it may continue doing so, relying on *Recycle America*, 308 NLRB 50, 55-56 (1992). Unlike that case, there is no evidence here of any past practice, unless one considers Heaton's normal practice of asking employees how things were going and ending his brief encounters with employees by saying that in case they had any problems, they should telephone him. Here, however, the solicitation was specifically aimed at resolving the grievances and problems that brought about the Union organizing campaign and, at least in the first two conversations, coupled with implied promises that Douglas would resolve those problems from the Overnite's Richmond headquarters. I conclude that Overnite violated Section 8(a)(1) of the Act regarding the first two conversations. The third, between Heaton and Shelor, although merely a minor interrogation of a Union adherent without any hint that what Shelor replied would be cured, continued the earlier implied promises and also violated the Act. *Flexsteel Industries*, 316 NLRB 745, 745 fn. 1 (1995), enfd. mem. 83 F.3d 419 (5th Cir. 1996).

On March 1, 1995, Lane mailed a form letter to all Nashville service center employees, which stated, in part, as follows:

> FACT: Negotiations are a two-way street. Each side tries to make their best deal in negotiations. The union will attempt to negotiate a union security clause (you must join the union or lose your job), dues checkoff (dues money automatically deducted from your paycheck . . . .

That letter was followed by a mandatory meeting on March 14, during which Sneed read the following:

> [A] Teamster victory could possibly cost you your *job* - in one of three ways: . . .
>
> Second, if the union is successful in negotiating a union security clause, Overnite could be forced to fire you if you became delinquent in your dues payments to the union.

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[60] The complaint alleges that McGuire interrogated an employee, but the General Counsel did not brief the allegation. If the conversation with Lay is alleged to violate the Act, I dismiss it. See the discussion of *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), in *Overnite I.*

Both the March 1 letter and Sneed's speech threaten that employees could lose their jobs. The message underlying this threat, as the General Counsel correctly contends, was that employees who desired Union representation to ensure greater job security would succeed only in giving Respondent additional grounds to terminate their employment. However, Tennessee is a "right to work" State. Union-security provisions are unenforceable, and Respondent would violate the law if it discharged an employee for failure to pay dues. Accordingly, Respondent's threat that employees could lose their jobs as a result of the application of a union-security clause had no factual basis and violated Section 8(a)(1) of the Act.[61]

Some of the allegations relate to McGuire's discussion of Respondent's 401(k) plan and the alleged promise of benefits. I find that neither Shelor nor Lay fully comprehended what McGuire was saying and that their general factual perceptions and recollections were inaccurate. Rather, the following constitute the facts: On March 23 and 24, 1995, McGuire was speaking at a mandatory meeting about the possibility of withdrawing contributions made to an employee's 401(k) plan to provide for the education of the employee or employee's spouse or children. Shelor interrupted, telling the other employees what McGuire said was not true, that he had previously tried to withdraw 401(k) funds, but he did not get the amount that he was entitled to. McGuire said that he knew nothing about Shelor's prior problem and that he did not discuss specific individual problems at group meetings, but he would be glad to talk to Shelor and look into the problem. After the meeting, McGuire e-mailed Overnite's director of compensation and benefits, Syd Spencer, asking about Shelor's previous attempt to withdraw his 401(k) funds. The next day, before McGuire had received any information from Spencer, he saw Shelor, who explained that he had applied for his 401(k) funds in 1993 to pay for his daughter's college tuition, but had not received all the funds to which he was entitled. McGuire said that he would look into the issue.

A few days later, McGuire reviewed the information relating to Shelor's 401(k) fund with Spencer, and they determined that Shelor had received about $140 less than he should have. This was caused by the fact that Overnite funded the Plan only quarterly, so at the time that Shelor applied, not all of Overnite's contributions had been credited to his account. The following Monday, March 27, McGuire returned to Nashville and spoke with Shelor, explained the mistake, and told him that he could file a new hardship application for 401(k) funds, based on his daughter's need for tuition in 1995, not 1993; but Overnite could not correct the 1993 mistake. That same day, Shelor filled out an application for a new hardship withdrawal for 401(k) funds, showing his daughter's 1995 class schedule, and submitted it to Overnite. The 401(k) plan committee approved Shelor's application in May 1995, after the Nashville election was over. As a result, contrary to the allegations of the complaint, McGuire never promised Shelor access to his 401(k) funds or to remedy Shelor's grievance.

At another mandatory meeting, Lay asked McGuire why Shelor had not been allowed access to his 401(k) funds when he had previously applied. McGuire told Lay that he would not discuss another employee's benefit issues; but, if Lay had general questions about the 401(k) plan, he would talk to him after the meeting. The next day, McGuire found Lane and Lay already talking about Overnite's 401(k) plan. Lane told Lay that McGuire could answer Lay's questions. Lay then asked McGuire general questions about how employees could get their money out, and McGuire answered Lay's questions. Lay never asked McGuire to obtain his 401(k) funds, and McGuire never told Lay that he could obtain Lay's funds for him. Lay had no hardship for

[61] Respondent's reliance on *New Process Co.*, 290 NLRB 704 (1988), and *John W. Galbreath & Co.*, 288 NLRB 876 (1988), is misplaced. Neither decision arose in a "right-to-work" jurisdiction.

which he needed his 401(k) funds and had not applied for and did not even want access to his 401(k) funds. In these circumstances, there is no conceivable reason that McGuire should have promised Lay that he could have all his 401(k) funds, a promise that would have been completely contrary to the regulations governing the funds. I dismiss this allegation, too.

Employee J.C.Tidwell testified that on March 27, Fain said to him, "I feel like slapping your jaw because you are wearing that shirt and cap," referring to the Teamsters' insignia that Tidwell was wearing. Tidwell then asked Fain to give him the opportunity to remove his eyeglasses because it was against the law to hit someone wearing glasses. Fain turned and walked away, and Tidwell returned to his work. Tidwell stated that several employees had seen this exchange and asked Tidwell what had happened, and he told them. None of them testified.

I do not know of any reason that Tidwell would fabricate this testimony. On the other hand, I was impressed by Fain's testimony and demeanor and have no reason to believe that he, an attorney and a senior official of Overnite who was clearly aware that the Teamsters would file charges regarding activities far less serious that the one of which he was accused, would possibly engage in such conduct. Appearances may be deceiving, but, if Tidwell were told what he said he was told, he was told by someone other than Fain. On the basis primarily of demeanor evidence, but also because of the lack of corroboration, I dismiss this allegation.

On March 29, the day the election was held, there were several dozen persons in front of the Nashville service center, some of whom identified themselves or were identified as employees from Respondent's other terminals. As Shelor walked past, one told him that, once the Union got voted in, there would be no working over 40 hours and no overtime. In other locations, Overnite encouraged employees from other terminals to come to its service centers on the day before and the day of the Board-conducted election. Overnite's position statement acknowledged that it reimbursed these out-of-town employees for hotel and rental car costs in Nashville. Overnite assuredly did not have these employees present in Nashville for any other purpose than to support the Company. I find that these persons were Overnite's agents and that Overnite is responsible for their comments either because they are its agents or that they had the apparent authority to act on Overnite's behalf. The comment complained of threatened that Respondent would discontinue assigning overtime in the event that the Teamsters won. That constitutes a threat of loss of income, discouraging employees' support of the Teamsters in violation of Section 8(a)(1) of the Act. Two other of the demonstrators told Phil not to vote for the Union but to "give Jim a chance," a repetition of the illegal promise of unspecified benefits made by Respondent during the election campaign. I find that this promise also violates Section 8(a)(1) of the Act.

F. Rockford

In January or February 1995, Nickolas Kapotas, Patrick McKee, and Earl Williams were preparing to leave for the day, and city dispatcher Brian Ross walked up to them. One of the employees asked Ross what he thought would happen in the event the employees voted in the Union. Ross said that he thought that Respondent would probably close the service center.[62] Ross did not testify. I conclude that Respondent's threat to close Respondent's facility violated Section 8(a)(1) of the Act. Unlike *Standard Products Co.*, 281 NLRB 141 (1986), modified on

[62] Williams did not testify to this incident at all. Kapotas's recollection was less than clear. His testimony changed when he was shown his investigatory affidavit on cross-examination. I do not credit his recollection, unsupported by the other two employees, that Ross also stated that service center manager Dave Radnoti would lose his job.

other grounds 824 F.2d 291 (4th Cir. 1987), the principal authority relied on by Respondent, Ross, one of only two supervisors at the Rockford service center, did not couch his answer as his personal opinion, and not as a spokesperson for management. The employees were warranted in finding his statement as a threat.

Three days after the Union's representation petition was filed, February 10, then service center manager Dave Radnoti met with 5–6 drivers and read Douglas's letter announcing the 55 cents wage increase and asked the drivers what they thought of the raise. Someone asked if the raise had anything to do with the Union, and Radnoti answered that it did not. But, if the raise indicated what Douglas was going to be, that was a good indication. He added that Douglas was going to make some changes, but Radnoti could not tell them what changes. The employees then raised some problems they were having, including one involving their routes. Radnoti said that he did not know that the employees had all these problems, and he would look into them. He hoped that the employees would come to him any time to solve these problems. (There is no record evidence that Radnoti ever rectified the problems that were raised at this meeting or even discussed them again with the employees.) Despite Radnoti's disavowal, this meeting was arranged to praise the Company and to convince the employees to abandon the Union. Thus, Radnoti encouraged the employees to come to him with their problems, promised to look into them, and promised that Overnite would make changes, all in violation of Section 8(a)(1) of the Act.

About two or three weeks before the March 28 election, on separate days, Radnoti rode with city drivers Kapotas and Williams all day (8–10 hours), trying to persuade them to vote for the Company.[63] Radnoti told Kapotas that Boswell was not good for the Company, Douglas was new, he was starting out fresh, and Kapotas should give him "a chance." Radnoti asked Kapotas what he thought of the recent 55 cents per hour wage increase that Douglas had announced in his letter of February 10. Kapotas said that it was "nice," but Overnite should also pay overtime to its employees. Radnoti replied that Overnite would never do that, because it had to remain competitive. It was a matters of economics. If Overnite had to agree to pay overtime, it was cheaper to use more trucks and hire more drivers and pay them straight time, rather than pay time and one-half to its employees. When Kapotas continued not being happy about Overnite's wages, Radnoti reminded him that the wages were "frozen" and the increase was not being paid in locations where the Teamsters had won elections: "[W]e got ours because we . . . didn't have the union in." At service centers where the employees had voted in the Union, wages were a subject of negotiations; and the parties there had to negotiate any increases. Kapotas also testified that Radnoti told him that if he (Kapotas) did not like working for Respondent, he could probably find a job somewhere else. Kapotas's pre-complaint investigatory affidavit purportedly related his full conversation with Radnoti, but omitted this threat. I credit Radnoti's denial that he made any threat and dismiss this allegation. I find that Radnoti's praise of Douglas for the increase and urging that he be given a chance, especially when considered in light of Radnoti's earlier meeting with the employees, is a promise of further, albeit unspecified, benefit increases to dissuade Kapotas from supporting the Union, in violation of Section 8(a)(1) of the Act. As to the other allegations of the complaint, with the way Kapotas related this conversation and Radnoti denied it, I find nothing in this conversation that violated the Act.

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[63] Kapatos's memory was not particularly accurate, and Williams' testimony had its faults, too. They were generally reliable; and I have generally credited them, but not everything that they testified to. I have generally discredited Radnoti, but find that some of what he testified to was truthful. In general, this narration constitutes an amalgam of the testimony of the witnesses and what I deem probably occurred.

Radnoti's daylong conversation with Williams was filled with some of the same talk. Radnoti used the same sales pitch of "give Jim a chance," pointing out the $1.05 total raise that Overnite had given or announced in the first two months of 1995 as a demonstration of Douglas's good deeds. He said, "[A]in't that good." Boswell gave only 50 cents per hour, but Douglas raised wages another 55 cents. Williams said that, if Overnite paid time and one-half, the Union campaign might not have started. Radnoti said that overtime impacted on Overnite's ability to compete with other carriers that did not pay overtime; that Overnite would not pay time and one-half; and that, if Overnite were forced to pay, the employees would not be able to work overtime; but the employees would be brought back to the terminal after 39½ hours. Williams said that Overnite was not paying it now and added: "I guess we'll just have to sit back and wait and see what was going to happen." At some point during the day, Radnoti said that Douglas was going to make some other changes, but he could not tell Williams what they were. As to this last statement, I conclude that Radnoti specifically promised further beneficial changes to dissuade Williams from supporting the Union, in violation of Section 8(a)(1) of the Act. I also conclude that Radnoti committed the same violation found above, regarding Kapotas. I find no other violations alleged in the complaint.

At one of the mandatory meetings, Mike Knight, then the regional director for Respondent's central region, told the employees that Douglas would "untie" the hands of the local managers and let them run their service centers; that Douglas had taken the governors off the trucks, allowing the road drivers, who are paid by the miles that they drive, to drive more miles quicker; that Douglas had already announced the additional 55 cents increase and that, if this demonstrated the type of person Douglas was, then employees should give him a chance. A city driver asked whether the governors could be taken off the city trucks. Knight said he had not heard of such a complaint before, and Radnoti asked why employees would want that. The driver said that it would enable them to travel faster because the city drivers also had to drive the "big roads," and they could get back to the terminal and home quicker. Both Knight and Radnoti told the employees that they would look into the matter. Although Radnoti expressly stated that he could make no promises and could not rectify any grievances during the Union organizing campaign, his statement that he would look into the complaint, coupled with Knight's urging Douglas be given a chance, left the logical inference that Radnoti's looking into the matter would result in action after the election. Knight's reminder to the employees of the wage increase and the revision of the speed limit, coupled with asking them to give Douglas a chance, implied that Overnite would provide additional, although unspecified, future benefits in violation of Section 8(a)(1) of the Act. *National Micronetics*, 277 NLRB 993 (1985), relied on by Respondent, did not involve any earlier unlawful conduct, such as the wage raise and permission to drive at higher speeds, on which Knight's new promise was predicated.

G. Bensalem

Bobby Edwards said at a meeting in mid-December that, just because employees vote for a union, nothing changes. The union still has to bargain for a contract. Overnite had to bargain in good faith, but Overnite would not sign a contract. All the employees needed to look at was Overnite's bargaining experience in Chicago. The employees there had a union for years and still did not have a contract.

In so finding, I do not believe the testimony of Larry Tadlock, Respondent's then safety supervisor and current (as of the hearing) human employee relations manager, who said that he had been with Edwards on a number of campaigns and that Edwards, who never testified at any of the hearings, said only that Respondent would not sign a contract that would put Overnite out of business. Although Tadlock said that he was not paying attention, he testified that Edwards

probably mentioned Chicago to the Bensalem employees, because he mentioned in every other campaign that he had been with him that Overnite had bargained in good faith with the union in Chicago for 12 or 13 years, and Overnite was challenged once and the Board ruled in Overnite's favor. Furthermore, bargaining had taken several years and that the parties had arrived at a local contract, but the International turned it down. Edwards said, according to Tadlock, at the meeting with the Bensalem employees, "[W]e would be glad to bargain in good faith, and we would sign a contract if it was acceptable by both parties." If Edwards made these statements, Tadlock's experience is unique.[64] In *Overnite I*, I found that Respondent's and, in particular, Edwards' lack of narrating the full story of what occurred at the Chicago negotiations was what got Respondent into trouble. Tadlock's testimony supplies some of the story that was missing, perhaps because he read *Overnite I*, and is so utterly inconsistent with what I heard narrated before, and in this proceeding, too, that I find that it simply did not happen. I discredit him, therefore, and find that Edwards threatened the futility of bargaining in violation of Section 8(a)(1) of the Act, as he had not only throughout this campaign, but before.[65] *Overnite Transportation Co.*, 296 NLRB 669 (1989), enfd. 938 F.2d 815 (7th Cir. 1991).

Employee Thomas McGinley testified that in early February Tadlock spoke at a mandatory meeting about seniority and responded "yes" in answer to an employee's question whether, if the Union won, other people could come in and take the jobs of the employees. Tadlock explained that, if there were a layoff at another facility or work was slow, Union people who had more seniority than Overnite employees could take their jobs. Jim D'Alessio, Overnite's regional vice president for the northeast region, who was at that meeting, allegedly confirmed Tadlock's answer. McGinley's testimony was not supported by any other witness. Tadlock denied that McGinley asked him anything, but testified that at one of the meetings someone asked about whether there would be people displaced if the Union were voted in, to which Tadlock answered that everything would have to be negotiated. Bensalem service center manager Edward Warters, who was present at all of these meetings, was never questioned about this allegation. Although I have considered the fact that no one corroborated McGinley's testimony, I nonetheless, in light of my disbelief of Tadlock's narration of Edwards' conduct, as well as the discrepancy between his initial denial that he advised the employees that "seniority would be within the bargaining unit" and Respondent's position statement, do not believe his denial of this allegation, either, and conclude that Respondent violated Section 8(a)(1) of the Act.

The complaint alleges that Respondent's letter to its employees, dated February 8, 1995, unlawfully threatened employee with closure of the Bensalem facility and the inevitability of strikes and indicated that bargaining would be futile. In part, the letter[66] read:

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[64] His testimony that whatever Edwards stated was in response to an employee's question was not unique. Respondent's witnesses generally testified that Chicago became a subject only as a result of questions and was never first raised by Edwards, testimony that I have previously not believed — and still do not.

[65] Thus, even though the General Counsel presented only one witness to support this testimony, Edwards' actions throughout the campaign were so consistent that no further corroboration is necessary.

[66] This letter is quoted in *Overnite I*, where it is referred to as a letter from Overnite to its Philadelphia employees.

1. **The Teamsters Can Guarantee Nothing But Trouble.**

People very often have the wrong impression as to what a union can do. Often they are told, and often they believe, that if they vote a union in, then automatically they will receive higher pay and benefits of various kinds. We understand that some of the employees who are pushing for the Union have already begun making promises that if it is voted in there will be immediate pay increases and benefit changes. Such an idea as that is absolutely in error. Voting for the Teamsters Union will not automatically bring any wage increases or other benefits to you.

Let's look at a couple examples:

Chicago. In 1982, our local drivers, after being promised all sorts of pay increases and benefits, voted the Teamsters union in. And two years later, when their wages, benefits and working conditions were no different from those of any other local drivers in the Company, the Union called them out on strike.

The strike lasted for sixteen months during which time there were countless fire bombings and other acts of violence and destruction, but the Company did not yield to a single demand of the Union. Today, eleven years later, the wages, benefits and working conditions of the Chicago local drivers are still the same as those of every other city driver in the Overnite system.

. . . .

The only way the Teamsters can try to bring pressure on the Company is to call you employees out on strike. However, we want everyone to understand that we have no intention of giving in to any strike pressure.

. . . .

You may ask, if the Union cannot force the Company to do anything it does not wish to do, why is the Company opposed to the Union?

The answer is that our whole future here in Philadelphia — expanding and making a success of this operation — increasing your satisfaction with your work — strengthening your security in your job — all definitely depend upon our pulling together and not pulling apart. The close relationship we are trying to build is absolutely essential. Whatever tears down that sort of relationship will prove fatal in the long run.

We have a new President at Overnite and we are definitely trying to listen and to solve problems with you. Give us that opportunity. . . .

. . . .

5. **The Teamsters Can't Provide Job Security.**

We know that everyone is interested in job security. But what a lot of people don't realize is that job security is possible only with a successful company — that is, a company that is well operated and sufficiently profitable to

> generate the ability to reinvest in new trucks, trailers, tow motors, terminals and technology to stay in business. We have been a part of the transportation industry for a long time and have seen firsthand what the Teamsters have done to unionized companies — the dilapidated and obsolete equipment — run-down terminals, thousands of employees without jobs, only occasional work for many others, and in the end financial disaster and shutdown for many of them.
>
> Look at all of the closed trucking terminals in the Country. Look at Churchill, St. Johnsbury, PIE, Standard Trucking, Spector-Red Ball, American/Smith, Eazor Express, Akers-Central, Eastern Express, Mercury Motor Express, Branch, Interstate, IML, Mason Dixon and Smith Solomon to name only a few — all of them forced into bankruptcy in the face of unreasonable demands and pressures from the Teamsters Union. In fact, since 1980, there have been more than 150 unionized carriers who have gone out of business resulting in loss of jobs for over 170,000 persons. And there will be more in the future.

Overnite I found a number of unfair labor practices in this letter:

> [T]he letter . . . threatened that bargaining would be futile by telling the employees that local drivers at its Chicago service center had earlier voted for representation; that, despite a 16-month strike at the Chicago facility, "*the Company did not yield to a single demand of the Union*" . . . ; and that the wages, benefits, and working conditions of the Chicago local drivers were still the same as those of every other Overnite city driver. [It] repeated the threat of the inevitability of strikes and further threatened that the Teamsters' would tear down the close relationship between Overnite and its employees that "*will prove fatal in the long run*" and that a Teamsters' victory ran "the risk of tearing apart everything you now have." . . . Taken together, the message was that a Teamsters' victory would be fatal to Overnite and that the Teamsters in any event could not deliver on its promises, but Respondent would.[67]

Finally, the last-quoted paragraph of the letter, specifically naming Teamsters' companies that had gone out of business and indicating that "more than 150 unionized carriers" had gone out of business and threatening that there would be "more in the future" merely attempted to put the blame on the fact that the Teamsters or the fact that the companies were "unionized" caused the companies to go out of business. This is a written "Graveyard Poster." I conclude that the paragraph constitutes an implicit threat that Overnite would close, too, if the Teamsters won the election. *Eldorado Tool*, 325 NLRB No. 16, slip op. at 1–3 (November 9, 1997).

A number of the unfair labor practice allegations involved the additional threats that, if the Union were voted in, Overnite would lose business. At a mandatory meeting about two

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[67] The cases relied upon by Respondent, *Louis-Allis Co.*, 182 NLRB 433 (1970), and *J. R. Wood, Inc.*, 228 NLRB 593 (1977) are distinguishable, because the employer did not state or imply that union representation would inevitably lead to strikes or loss of jobs. Thus, in *Louis-Allis Co.*, the employer pointed out that plant closings were not confined to unionized plants. In *Wood*, the Board found that the employers merely asserted that they would not yield under strike pressure to unreasonable demands, 228 NLRB at 593-594. Overnite's letter implied that it would not bargain and threatened that the only way that the Union could possibly obtain anything was to strike, and that would do no good because Overnite would not bend under a strike.

weeks before the election, Warters threatened that Overnite could or would lose two of its customers, Cardone Industries and Schwartz Paper, if the employees voted in the Union. These, he explained, were big accounts for his terminal; and both customers had said that they would not deal with Union carriers because they were afraid of a strike. At a later mandatory meeting, D'Alessio said that, if the employees voted to let the Union in, "we would lose business," according to employee Robert Sheppard and corroborated by Warters, or that Overnite could lose as much as 30 or 40 percent of its business. D'Alessio did not support his threat with any fact.

Another concerned first line supervisor Mark Romanoski, a dock supervisor. The day before the election, Romanoski told employee John Tyciak that he could see by what Tyciak was wearing (a Union pin) what his vote was going to be. Romanoski asked Tyciak to "give the new guy [Douglas] a chance," adding that things were going to get better. He also stated that he did not want to see what happened in Kansas City happen at Bensalem. At Kansas City, the service center lost 40 percent of its business. When, the same day, Romanoski told employee Mike Cottrell that Overnite would lose business if it went union, Cottrell told him that he was "full of it." Romanoski insisted that Kansas City had lost half of its business because the Union had won. Romanoski told employee Gerald O'Donnell that he could not believe that the employees still wanted the Union, asking "Did you hear what happened in Kansas City?" O'Donnell said that he had, and Romanoski said that Overnite had lost 40 percent of its business because the employees had voted in the Union. Sheppard, who was walking by, asked who he had heard that from and said that was "bullshit." If it were so, Respondent would have posted literature on the bulletin board. Sheppard told other employees that the rumor was false. Cottrell was the only employee who testified that Warters made the same statement about Kansas City, although Warters did not mention a percentage of the business that was lost, at a meeting and in two or three casual conversations. I credit Warters' denial, because of the lack of corroboration of Cottrell's testimony. If Cottrell were accurate about the number of Warters' repetitions, surely one of the other employees who testified would have recalled such a statement. On the other hand, I do not credit Warters' testimony that he made every effort to dispel the rumor, telling employees who raised the subject not to believe it. Surely, someone would have heard him say that, yet his testimony was uncorroborated.

Warters testified that all he told the employees was to consider the possibilities. Overnite was nonunion and publicized that fact. He asked the employees how many customers were shipping with Overnite because it was nonunion and to consider that customers had a tremendous concern over Overnite's availability to pick up their freight in case there was another Union strike. Cardone and Schwartz were customers because of an earlier Teamsters' strike. Perhaps at another meeting, maybe the same, he told the employees that 30 to 40 to 50 percent of Overnite's business was dependent on its being nonunion. The employees needed to think about the effect of their vote, how many customers ship because Overnite is nonunion, and how many would leave as customers.

Even if I fully believed Warters, there is in his statements a threat that, by voting for the Union, customers would leave. Nowhere in his testimony was there any factual basis for those statements. At best, Warters was advised that there was a possibility of concern by the clients, a concern that was never told by Warters to the employees; but there was nothing to show that their reaction would be an immediate or automatic determination to leave Overnite and go elsewhere, once the employees voted for the Teamsters. Of equal or greater concern is the fact that Warters did not even know the volume of the business of Cardone and Schwartz before or after the Teamsters strike, and his estimate at the hearing of their business was only 20 percent. Thus, his threat that Overnite would lose up to half its business had no factual basis. In sum, even if I believed him fully, I would conclude that he violated the Act. I am persuaded that

Warters tempered his testimony and that his threats were more forceful, as the employees testified. I also conclude that Romanoski, who did not testify, made exactly the threats that work would be lost if the employees voted for the Union, as the employees testified and conclude the Respondent, by Warters, D'Alessio, and Romanowski, violated Section 8(a)(1) of the Act.[68]

In mandatory meetings, Warters discussed what would be required in collective bargaining. Cottrell testified that Warters threatened that, if the Union won the election, Overnite would not give it a contract, but would just walk in, talk for five minutes, and then leave. Overnite had been doing this in Chicago for years, Cottrell quoted Warters. Warters, on the other hand, testified that he thought that the employees were convinced that, once the Union got in, there would be a contract. In an attempt to disabuse them of that notion, he told them that everything had to be negotiated, and that could take a long period of time or a short period of time, that individual sessions could take five minutes or a day or two. Although the Bensalem campaign was one of the early Teamsters' efforts at organization, and Respondent did not fully have its entire opposition prepared, I have substantial doubt that Warters said anything more than what he testified to. Certainly, no other employee heard what Cottrell heard, and Warters demonstrated candor when he refused to corroborate Tadlock's testimony about Edwards, although Warters was at that meeting. I credit him and dismiss this allegation.

IV. The 1996 Productivity Increases

Overnite I also concluded that on January 1, 1996, Overnite committed additional violations of Section 8(a)(5) and (1) of the Act by unilaterally implementing various "productivity improvements" and thus changing the terms and conditions of employment of the employees who had voted in Board-conducted elections to be represented by the Teamsters, but Overnite had not yet recognized the Union. That conclusion also applied to the four units that were the subject of the earlier *Gissel* case. Having determined that the Teamsters were entitled to bargaining orders at those four service centers, it followed that Overnite should have bargained with the Teamsters before imposing the productivity improvements. At the earlier hearing, the General Counsel asked for an order regarding all the *Gissel* locations. I withheld an order on the *Gissel* cases that are the subjects of this Decision. Having now found that the Teamsters represented a majority at seven of the facilities, I will recommend that, at the request of the exclusive representatives of the unit employees at Respondent's service centers at Dayton, Richfield, Nitro, Parkersburg, Nashville, Rockford, and Bensalem, Respondent shall rescind in whole or in part the portions of the productivity package that do not provide wage and mileage improvements.

The Objections

In order to expedite the hearings, and because almost all that was left of this proceeding was the determination of whether bargaining order relief was warranted, I suggested that the General Counsel consider withdrawing certain allegations of the various complaints that would in no event support a bargaining order. Allegations were withdrawn that would have, if found, affected the elections at the Dayton and Chattanooga service centers. The parties stipulated that, if I did not recommend a bargaining order, or, if I did, and the recommendation of a

[68] Although both Sheppard and Cottrell did not believe Romanowski, and Sheppard told other employees not to believe him, there is no evidence that all the employees felt the same way. Indeed, Tyciak feared, as a recent hire, that he would lose his job. Respondent's defense that Romanoski was merely spreading a rumor, but not actually threatening employees, is pure sophistry.

bargaining order was not adopted by the Board or was not enforced by a court of appeals, the Locals shall be entitled to a new election, without filing a new showing of interest. I, therefore, will not address specifically the objections relating to those locations, except that, in all locations, the objections to the elections included one or more of the following: the unlawful announcement on February 10, 1995 and the implementation on March 5, 1995, of the wage and mileage increase, the reinstitution of the safety bonus, and the increase in the miles that drivers could travel and the speed they could drive at. I find that conduct alone to be objectionable and reason for setting aside the election.

Specifically, Objections 1, 2, 3, 4, and 5 concerning the Richfield service center track a number of the unfair labor practices found and, to that extent, I find that the objections are meritorious. Objections 6 and 7 appear to deal vaguely with some of the conduct found above, but to that extent are duplicative, and to the extent that they allege different conduct, that conduct was not proved; and the Objections are not sustained. Objection 1 concerning the Nitro service center is sustained, to the extent that it alleges conduct which I have found violated Section 8(a)(1) of the Act within the critical pre-election period, after the filing of the petition. *Ideal Electric*, 134 NLRB 1275, 1278 (1961). No evidence was adduced to support Objections 2 and 3, and they are not sustained. Objections 1 and 5 concerning the Parkersburg service center are also sustained to the extent that they mirror the unfair labor practices that I have found. Objections 1(a), 2(b), 2(c), and 10 concerning the Nashville service center, to the extent that I have found unfair labor practices, are sustained. I dismiss Objections 1(c), 3, 5, 7, and 8. They were not proved or not even presented. Objections 1–4 concerning the Rockford service center are sustained to the extent that they mirror the unfair labor practices that I have found. Objections 1, 2, and 4 concerning the Bensalem service center are sustained to the extent that they mirror the unfair labor practices that I have found. I dismiss Objection 3, which was not presented.

Remedy

The organizing campaigns at the seven service centers took place in late 1994 and early 1995. Petitions for elections were filed between January 4 and February 15, 1995, and the elections were held between February 14 and April 19, 1995. On February 10, Overnite announced its unlawful wage and mileage rate increases and reinstatement of safety dinners and awards. Shortly after, it changed the speed limit and number of miles per dispatch for the road drivers. The increases took effect on March 5, and about the same time *The Overniter* announced that employees at the nonunion facilities would receive no increases, as representatives of Overnite had been advising employees for weeks. *Overnite I* concluded that the increase was sufficient by itself to warrant *Gissel* bargaining-order relief.[69]

The unfair labor practices found in this Decision support that recommendation, sometimes minimally, and sometime substantially. In common with the earlier proceeding, there

[69] Respondent contends that, because 22 of Local 24's authorization cards (out of 90) in Richfield are dated on or after February 10, "there is every reason to believe that a free and fair election can be held at Richfield where the wage increase announcement was outside the critical period and the Union was able to secure 22 additional cards after Overnite announced the wage increase." The fact that the Union campaign continued its momentum is hardly persuasive proof that Respondent's actions did not have their desired effect over the period culminating with the election. By election day, the employees had the increase in their pocket and were subject to the mandatory meetings where Overnite's new leadership was praised and asked to be given a chance. And, of course, the Union lost the election.

were no unlawful discharges.[70] But there were threats of closing and loss of business, "hallmark" violations, and threats that the election of the Teamsters would be futile, because one way or another Overnite would not bargain in good faith. And there were numerous examples of Overnite's solicitation of grievances, promises that the terms and conditions of employment would get better, and actual resolution of grievances to sway the feelings of its employees.[71]

Respondent contends that bargaining orders should not be granted because the 1995 increase took place four years ago. But the Board has been consistent in its approach, until relatively recently, and then only because of the "particular facts" in that case, *Research Federal Credit Union*, 327 NLRB No. 182 slip op. at 2 (March 25, 1999), that: "[T]he Board traditionally assesses whether a *Gissel* bargaining order remedy is warranted as of the time of the respondent's unfair labor practices. Historically, the Board has not considered subsequent employee or managerial turnover in this context. *Highland Plastics, Inc.*, 256 NLRB 146, 147 (1981)."[72] Furthermore, the fact that there has been delay is due in good part to the time that it takes to litigate these matters. This has been a lengthy proceeding. Since *Overnite I*, hearings have been held in nine cities. Counsel wanted time to prepare. The spring and summer of 1998 was devoted to the preparation for hearing of a mass of Section 8(a)(3) proceedings in other cities. Motions to quash subpoenas and for other relief were filed in almost every location. Now, an additional 5,200 pages of transcripts and 600 pages of briefs have been filed, as well as numerous motions and replies. The more alleged violations of law, the longer the hearing and the longer the delay. Employees should not be held to lose their rights to representation merely because an offending employer determines to commit more violations, rather than less, and thus lengthens legal proceedings, rather than shortens them.

Accordingly, I will recommend that, on request, Respondent bargain with the seven Locals that are the exclusive representative of its employees at its Dayton, Ohio; Nitro, West Virginia; Richfield, Ohio; Parkersburg, West Virginia; Nashville, Tennessee; Rockford, Illinois; and Bensalem, Pennsylvania service centers. At the request of the exclusive representatives of the unit employees there, Respondent shall rescind in whole or in part the portions of the productivity package that do not provide wage and mileage improvements.

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[70] There were numerous complaints of discharges, some at the contested service centers, but, without exception, all of those were settled, many during the spring and summer of 1998.

[71] In addition, the General Counsel urges that certain conduct at the time of the Richfield election and shortly after show that Respondent's violations continue — that Respondent was out to get a leading Union activist, Linda Moran, with the participation of night dispatcher Carolyn Sielski ("[T]he bitch is mine") and the approval of service center manager Ruediger and human resources manager Bias. Sielski, who was no longer employed by Respondent, denied the allegation; and Respondent gathered ample proof to show that Glen Pressley, the accuser, intensely disliked and threatened to get back at Overnite for what he perceived the Company had done to him. Although his testimony had appeal, there was not enough here, especially because the Moran case settled and I had no feeling that Respondent concocted a case against her. Furthermore, many of the witnesses presented by Respondent had no interest in the outcome, while there was a motive for Pressley's testimony. I do not credit it.

[72] For this reason, I deny Overnite's May 3, 10, 20, and 21, 1999 motions to supplement the record concerning changes of employees and management at the Dayton, Chattanooga, Richfield, Nashville, and Bensalem service centers. In addition, "There must be an end to litigation in Labor Board cases." *L'Eggs Products, Inc. v. NLRB*, 619 F.2d 1337, 1353 (9th Cir. 1980).

On these findings of fact and conclusions of law and on the entire record,[73] I issue the following recommended[74]

ORDER

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Respondent Overnite Transportation Company, its officers, agents, successors, and assigns, shall

10 1. Cease and desist from

(a) Bypassing the exclusive representatives of its employees and dealing directly with its employees.

15 (b) Unilaterally changing the terms or conditions of employment of certain of its employees by implementing the overtime and non-wage portions of its productivity package.

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

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

(a) On request, bargain with Teamsters Local Union No. 957, an affiliate of International Brotherhood of Teamsters, AFL–CIO ("Local 957"), as the exclusive representative of its 25 employees in the following appropriate unit concerning their terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time road drivers, city drivers, and dock workers 30 employed at Overnite Transportation Company's Dayton, Ohio facility, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) On request, bargain with Truck Drivers, Chauffeurs and Helpers Local Union No. 35 175, an affiliate of International Brotherhood of Teamsters, AFL–CIO ("Local 175"), as the

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[73] The General Counsel moved in the hearing involving the Dayton service center to strike comments in Respondent's brief, and Respondent moved to strike the motion and accompanying memorandum filed by the General Counsel. Respondent's motion is granted. 40 Reply briefs are not permitted, unless permission is granted. The General Counsel's motion is in the nature of a reply brief, albeit under the guise of a motion to strike. The parties jointly moved to correct the Official Transcript of the hearing involving the Nitro service center in various respects. The motion is granted. The General Counsel moved to correct the Official Transcript of the hearing involving the Chatanooga service center in various respects. The motion is 45 granted, except that the amendment to page 251 is denied. The General Counsel moved to correct the Official Transcript of the hearing involving the Nashville and Parkersburg service centers in various respects. There being no opposition, the motions are granted.

[74] 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.

exclusive representative of its employees in the following appropriate units concerning their terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time over the road drivers, city drivers, jockeys, dock workers and mechanics employed at Overnite Transportation Company's Nitro, West Virginia facility, excluding all office clerical employees, sales employees and all professional employees, guards and supervisors as defined in the Act.

> All full-time and regular part-time over the road drivers, city pick-up and delivery drivers, hostlers, yard workers and dock workers employed at Overnite Transportation Company's Parkersburg, West Virginia facility, excluding all guards, mechanics, supervisors, professional workers, office clerical employees and any other employees excluded by the Act.

(c) On request, bargain with Teamsters, Freight Drivers, Dockworkers and Helpers, Local Union No. 24, affiliated with International Brotherhood of Teamsters, AFL–CIO ("Local 24"), as the exclusive representative of its employees in the following appropriate unit concerning their terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full time and regular part time city drivers, road drivers, dock lead men, dock workers, and jockeys employed at Overnite Transportation Company's 3495 Brecksville Road, Richfield, Ohio facility, excluding all office clerical employees, professional employees, mechanic lead men, mechanics, guards and supervisors as defined in the Act.

(d) On request, bargain with Teamsters, Freight Employees, Local Union No. 480, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO ("Local 480"), as the exclusive representative of its employees in the following appropriate unit concerning their terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full time and regular part time city drivers, dockworkers, road drivers, leadpersons, and mechanics employed at Overnite Transportation Company's Nashville, Tennessee facility; excluding all office clerical, professional employees, guards and supervisors as defined in the Act.

(e) On request, bargain with Teamsters Local Union No. 325, affiliated with International Brotherhood of Teamsters, AFL–CIO ("Local 325"), as the exclusive representative of its employees in the following appropriate unit concerning their terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time truck drivers, dock workers and dock leadpersons employed at Overnite Transportation Company's Rockford, Illinois facility, but excluding office clerical employees, confidential employees, professional employees, guards and supervisors as defined by the Act, and all other employees.

(f) On request, bargain with Teamsters Local Union 107, affiliated with International Brotherhood of Teamsters, AFL–CIO ("Local 107"), as the exclusive representative of its employees in the following appropriate unit concerning their terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time drivers and dock workers employed at Overnite Transportation Company's Cornwell Heights, Pennsylvania facility, but excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

(f) At the request of the exclusive representatives of the unit employees at the above service centers, rescind in whole or in part the portions of the productivity package that do not provide wage and mileage improvements.

(g) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix A"[75] at its Dayton service center, "Appendix B" at its Nitro service center, "Appendix C" at its Richfield service center, "Appendix D" at its Parkersburg service center, "Appendix E" at its Nashville service center, "Appendix F" at its Rockford service center, and "Appendix G" at its Bensalem service center. Copies of the notice, on forms provided by the Regional Director for Region 18, 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 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 February 10, 1995.

(h) 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 Respondent has taken to comply.

IT IS FURTHER ORDERED that the election in Case 18–RC–15817 (formerly 10–RC–14601) be set aside and this case be transferred to the Regional Director for Region 10 for the setting of a second election at such time and place as he deems circumstances afford a free choice of a bargaining representative in the appropriate unit.

IT IS FURTHER ORDERED that the portions of the record that were placed under seal will continue to be maintained under seal.

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[75] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in this and the other notices reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

IT IS FURTHER ORDERED that the complaints ruled on in this Decision are dismissed insofar as they allege violations of the Act not specifically found.

.5 Dated: Washington, DC July , 1999

Benjamin Schlesinger
Administrative Law Judge

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APPENDIX A

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT bypass Teamsters Local Union No. 957, an affiliate of International Brotherhood of Teamsters, AFL–CIO ("Local 957") and deal directly with our employees.

WE WILL NOT unilaterally change the terms or conditions of employment of certain of our employees by implementing the overtime and non-wage portions of our productivity package.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL on request, bargain with Local 957 as the exclusive representative of our employees in the following appropriate unit concerning their terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time road drivers, city drivers, and dock workers employed at Overnite Transportation Company's Dayton, Ohio facility, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL at the request of Local 957 rescind in whole or in part the portions of the productivity package that do not provide wage and mileage improvements.

OVERNITE TRANSPORTATION COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 110 South 4th Street, Room 316, Minneapolis, Minnesota 55401–2291, Telephone 612–348–1793.

APPENDIX B

NOTICE TO EMPLOYEES

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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.

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To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT bypass Truck Drivers, Chauffeurs and Helpers Local Union No. 175, an affiliate of International Brotherhood of Teamsters, AFL–CIO ("Local 175") and deal directly with our employees.

WE WILL NOT unilaterally change the terms or conditions of employment of certain of our employees by implementing the overtime and non-wage portions of our productivity package.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL on request, bargain with Local 175 as the exclusive representative of our employees in the following appropriate unit concerning their terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time over the road drivers, city drivers, jockeys, dock workers and mechanics employed at Overnite Transportation Company's Nitro, West Virginia facility, excluding all office clerical employees, sales employees and all professional employees, guards and supervisors as defined in the Act.

WE WILL at the request of Local 175 rescind in whole or in part the portions of the productivity package that do not provide wage and mileage improvements.

OVERNITE TRANSPORTATION COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

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APPENDIX C

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WE WILL NOT bypass Teamsters, Freight Drivers, Dockworkers and Helpers, Local Union No. 24, affiliated with International Brotherhood of Teamsters, AFL–CIO ("Local 24") and deal directly with our employees.

WE WILL NOT unilaterally change the terms or conditions of employment of certain of our employees by implementing the overtime and non-wage portions of our productivity package.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL on request, bargain with Local 24 as the exclusive representative of our employees in the following appropriate unit concerning their terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full time and regular part time city drivers, road drivers, dock lead men, dock workers, and jockeys employed at Overnite Transportation Company's 3495 Brecksville Road, Richfield, Ohio facility, excluding all office clerical employees, professional employees, mechanic lead men, mechanics, guards and supervisors as defined in the Act.

WE WILL at the request of Local 24 rescind in whole or in part the portions of the productivity package that do not provide wage and mileage improvements.

OVERNITE TRANSPORTATION COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

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APPENDIX D

NOTICE TO EMPLOYEES

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WE WILL NOT bypass Truck Drivers, Chauffeurs and Helpers Local Union No. 175, an affiliate of International Brotherhood of Teamsters, AFL–CIO ("Local 175") and deal directly with our employees.

WE WILL NOT unilaterally change the terms or conditions of employment of certain of our employees by implementing the overtime and non-wage portions of our productivity package.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL on request, bargain with Local 175 as the exclusive representative of our employees in the following appropriate unit concerning their terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time over the road drivers, city pick-up and delivery drivers, hostlers, yard workers and dock workers employed at Overnite Transportation Company's Parkersburg, West Virginia facility, excluding all guards, mechanics, supervisors, professional workers, office clerical employees and any other employees excluded by the Act.

WE WILL at the request of Local 175 rescind in whole or in part the portions of the productivity package that do not provide wage and mileage improvements.

OVERNITE TRANSPORTATION COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

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APPENDIX E

NOTICE TO EMPLOYEES

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

WE WILL NOT bypass Teamsters, Freight Employees, Local Union No. 480, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO ("Local 480") and deal directly with our employees.

WE WILL NOT unilaterally change the terms or conditions of employment of certain of our employees by implementing the overtime and non-wage portions of our productivity package.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL on request, bargain with Local 480 as the exclusive representative of our employees in the following appropriate unit concerning their terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full time and regular part time city drivers, dockworkers, road drivers, leadpersons, and mechanics employed at Overnite Transportation Company's Nashville, Tennessee facility; excluding all office clerical, professional employees, guards and supervisors as defined in the Act.

WE WILL at the request of Local 480 rescind in whole or in part the portions of the productivity package that do not provide wage and mileage improvements.

OVERNITE TRANSPORTATION COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 110 South 4th Street, Room 316, Minneapolis, Minnesota 55401–2291, Telephone 612–348–1793.

APPENDIX F

NOTICE TO EMPLOYEES

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

WE WILL NOT bypass Teamsters Local Union No. 325, affiliated with International Brotherhood of Teamsters, AFL–CIO ("Local 325") and deal directly with our employees.

WE WILL NOT unilaterally change the terms or conditions of employment of certain of our employees by implementing the overtime and non-wage portions of our productivity package.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL on request, bargain with Local 325 as the exclusive representative of its employees in the following appropriate unit concerning their terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time truck drivers, dock workers and dock leadpersons employed at Overnite Transportation Company's Rockford, Illinois facility, but excluding office clerical employees, confidential employees, professional employees, guards and supervisors as defined by the Act, and all other employees.

WE WILL at the request of Local 325 rescind in whole or in part the portions of the productivity package that do not provide wage and mileage improvements.

OVERNITE TRANSPORTATION COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 110 South 4th Street, Room 316, Minneapolis, Minnesota 55401–2291, Telephone 612–348–1793.

APPENDIX G

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT bypass Teamsters Local Union 107, affiliated with International Brotherhood of Teamsters, AFL–CIO ("Local 107") and deal directly with our employees.

WE WILL NOT unilaterally change the terms or conditions of employment of certain of our employees by implementing the overtime and non-wage portions of our productivity package.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL on request, bargain with Local 107 as the exclusive representative of its employees in the following appropriate unit concerning their terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time drivers and dock workers employed at Overnite Transportation Company's Cornwell Heights, Pennsylvania facility, but excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

WE WILL at the request of Local 107 rescind in whole or in part the portions of the productivity package that do not provide wage and mileage improvements.

OVERNITE TRANSPORTATION COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

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