Preferred Transportation, Inc., d/b/a Supershuttle of Orange County, Inc. *and* General Truck Drivers, Office, Food & Warehouse, Local 952 International Brotherhood of Teamsters, AFL–CIO. Case 21–CA–33407

May 14, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On February 20, 2001, Administrative Law Judge Karl H. Buschmann issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed cross-exceptions, a supporting brief, and an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The judge's decision addresses complaint allegations that the Respondent committed three unlawful discriminatory acts in 1999 against employee driver John Petrichella because he engaged in union activities, filed charges with the Board, and testified at a representation hearing. We affirm the judge's finding—as to which there are no exceptions—that the Respondent did not violate the Act by giving Petrichella a verbal warning in June 1999. We also affirm, for the reasons stated in the judge's decision, his finding that the Respondent unlawfully suspended Petrichella in July. We reverse the judge, however, to find that the Respondent unlawfully discharged Petrichella in August.

Petrichella's discharge followed an investigation of his failure to maintain proper communications with the dispatch office while on duty in the afternoon of August 21. During this investigation, Petrichella filed two incident reports containing misstatements that the Respondent's manager, Todd Emmons, asserted were grounds for the driver's discharge. Emmons undisputedly bore considerable personal animus against Petrichella for his past protected union and Board-related activities. We agree with the judge's finding that the General Counsel has met the initial burden under the *Wright Line*[2] test of proving that this animus was a motivating factor in the Respondent's decision to discharge him. We disagree with the judge's further finding that the Respondent has established that it would have discharged Petrichella even in the absence of his protected activities because of the false statements made in the incident reports. We base our determination on the fact that Petrichella's false statements were elicited by the Respondent as the result of its antiunion animus toward Petrichella. As we explain, that animus led to the investigation and, in turn, to the incident reports. Petrichella's false statements in those reports constituted misconduct only in the context of Respondent's tainted investigation. Such bad faith by an employer cannot create good cause for the discharge of an employee. Accord: *Business Products-Division of Kidde, Inc.*, 294 NLRB 840 fn. 3 (1989) (employee misconduct discovered during investigation undertaken because of employee's protected activity cannot make resulting discharge lawful) (collecting cases).

As the judge found, the involvement of Manager Emmons is central to evaluating the legality of Petrichella's discharge. It was Emmons who made the unlawful decision to discharge Petrichella. We find that Emmons' involvement in the process leading to that discharge decision was so integral to the decision that the Respondent cannot sustain its *Wright Line* defense.

On August 21, Emmons encountered Petrichella 40 miles away from the dispatch office in what the judge described as a "fairly innocuous scenario." Apparently, Emmons immediately called the dispatcher to inquire about Petrichella's status, directing the dispatcher to communicate with Petrichella and to monitor the situation. Emmons also asked the dispatch office to notify Respondent's owner, Steve Allen, about the matter.

When Petrichella returned with his shuttle van to the Respondent's facility, he spoke with Dispatch Supervisor John Schlee. Schlee suspended Petrichella and directed him to fill out an incident report. According to Petrichella's uncontradicted testimony,[3] he tried to explain that afternoon's events, but Schlee said, "I'm only doing what I'm told. You can call the office on Monday morning and talk to Todd [Emmons]. He will be handling it."

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

[2] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983). See also *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996).

[3] Schlee did not testify in this proceeding.

Petrichella's suspension notice cited two infractions of the Respondent's general work rules.[4] These rules are contained in an addendum to the Respondent's contract with the Union. The addendum explains that "[f]ailure to abide by the following General Rules is unacceptable but, we feel is generally correctable through the progressive counseling/discipline process." Another contract addendum lists major work rules. Violations of these rules are defined in this addendum as "serious or flagrant offenses which may necessitate discharge without corrective counseling/progressive discipline." The listed offenses include "6) Willfully falsifying any Company records."

When Emmons arrived at his office on August 23, he undertook a detailed investigation of Petrichella's conduct. Emmons compared the incident report with the Respondent's computerized tracking records of the movements of Petrichella's van on August 21. This comparison, coupled with Emmons' own observations of Petrichella on that date, led Emmons to believe that Petrichella had falsified information of his whereabouts. Emmons met with Petrichella and requested that he provide a second incident report, which again contained information at odds with the Respondent's records and Emmons' recollection.

The Respondent contends that Emmons discharged Petrichella for misrepresentations he made in the two incident reports. Significantly, the Respondent did not argue that Petrichella would have been discharged for his underlying conduct, which even his suspension notice identified as only violations of two general work rules. Emmons testified that he made the decision to fire Petrichella because "there was really a flagrant offense here and so much so that on two different reports that I asked him to provide he just continued it [the misrepresentations]."

The judge clearly concluded that Emmons' involvement in the investigation was motivated by Petrichella's protected activity. He referred to "Emmons' contrived handling of the entire matter" and expressed "doubt [about] Emmons' sincerity and motivation." As a result, the Respondent was required to demonstrate that the investigation was not tainted by the involvement of Emmons. The judge apparently concluded that dispatch supervisor Schlee's initial involvement in the disciplinary procedure sanitized Petrichella's discharge. Contrary to the judge, we find that the Respondent failed to make such a showing. Instead, the entire disciplinary procedure seems to have been shaped by Emmons' concern about a notorious union adversary.

It is true that Schlee met individually with Petrichella on August 21, asked the driver to file the first incident report, and suspended him. On the other hand, Petrichella, who provided the only account of this meeting in the record, testified that Schlee said, "I'm only doing what I'm told" and identified Emmons as the official who would handle Petrichella's situation. Furthermore, Emmons admitted that not only did he contact the dispatch office on at least two occasions about Petrichella's situation that afternoon, but he also asked them to notify Respondent's owner. Under these circumstances, it is reasonable to infer that Schlee acted pursuant to directions from Emmons in dealing with Petrichella that evening.

The Respondent has failed to make a credible affirmative showing that any phase of the investigation of Petrichella—the initial suspension and first incident report request, Emmons' detailed review of the first report, and Emmons' request for a second incident report—was a routine response in instances where the Respondent's dispatchers had been unable to contact a shuttle van driver, especially an instance where a manager actually knew where the driver was and had the opportunity to contact him. Certainly, the Respondent has not shown that it had any established procedures under which it would have investigated Petrichella's August 21 conduct in the same manner, absent Emmons' initiative. Without such a showing, there is no basis for concluding that the Respondent would have requested and closely scrutinized incident reports about general work rule infractions that are contractually defined as "generally correctable through the progressive/discipline process." And but for the requested incident reports, Petrichella could not have been accused of making misrepresentations—the crucial basis for his discharge.

As the judge found, the General Counsel established that antiunion animus was a motivating factor in Petrichella's discharge. The burden then, shifted to the Respondent to prove that it would have discharged Petrichella even in the absence of his union activities. Given the Respondent's unlawful motivation for investigating Petrichella, the Respondent has created its own barrier to satisfying its burden of proof.

The Respondent does not contend that it discharged Petrichella for the misconduct that was the subject of the tainted investigation. Indeed, given the information that was available to the Respondent prior to the investigation, there was no need to request the incident reports from Petrichella except as a means to entrap him. But the Respondent did not rely on the information in its pos-

[4] The cited rules were, in relevant part:

3) Not being at regular assigned place of work at the beginning or end of shift, lunch break, rest break, etc.

4) Unavailability to perform work duties . . . .

session. Instead, it relied solely on the misconduct *triggered by and elicited* during the investigation: Petrichella misrepresentations. In these circumstances, the reason for Petrichella's discharge can only be viewed as pretextual: the only claimed basis for his discharge, *the incident report* misrepresentations, did not exist independently of the unlawfully motivated investigation.

The situation presented here is distinguishable from those where an employer unlawfully denies an employee the right to union representation during an investigatory interview. In such cases, the Board has held that the employee may still be disciplined for the misconduct that was the subject of the interview, because there is an insufficient connection between the procedural unfair labor practice committed and the substantive reason for the discipline. E.g., *Taracorp, Inc.*, 273 NLRB 221 (1984). Cases like this one, where the investigation itself was unlawfully motivated, present quite different considerations. There is a clear and direct connection between the employer's unlawful conduct and the reason for discipline. Notably, the discharge here was not based on misconduct *uncovered* by the investigation, but rather on misconduct that was triggered by and elicited during the investigation.

Notwithstanding this distinction, the decision here is consistent with cases like *Business Products-Division of Kidde, Inc.*, supra, overturning discharges based on misconduct uncovered during unlawfully motivated investigations. It is consistent as well with cases holding that misconduct provoked by an employer's unfair labor practice is not grounds for discharge. See, e.g., *Kolkka Tables & Finnish-American Saunas*, 335 NLRB 844, 849–850 (2001). The common principle is that employers should not be permitted to take advantage of their unlawful actions, even if employees may have engaged in conduct that—in other circumstances—might justify discipline. These cases cannot easily be reconciled with the notion that the existence of a potential reason for discharge will be sufficient to justify the actual discharge, regardless of the employer's own unlawful conduct and its causal connection to the discharge.

Our dissenting colleague would distinguish *Kidde* and *Kolkka Tables* on their facts, but he has not refuted the applicability of the common principle to be drawn from these cases. The issue in this case is whether Petrichella's false statements—which never deceived the Respondent—were no more than a pretext for the discipline in question. Contrary to our dissenting colleague, we are not generally barring employers from discharging employees for lying. Rather, the record here demonstrates that it was Petrichella's union activities, not his false statements, that the Respondent really cared about.

In sum, there is a direct connection between Emmons' antiunion animus and Petrichella's discharge. None of the evidence presented by the Respondent is sufficient to sever that link. As a result of the Respondent's failure to establish that Petrichella would have been discharged regardless of the unlawful motivation shown by the General Counsel, we conclude that the Respondent violated Section 8(a)(4) (3) and (1) of the Act.

AMENDED REMEDY

Having found that the Respondent unlawfully discharged Petrichella, we shall order it to take certain additional affirmative actions designed to effectuate the policies of the Act. Specifically, we shall order the Respondent to offer Petrichella full reinstatement to his former job and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also be required to remove from its files any and all references to the unlawful discharge and to notify Petrichella that this has been done.

ORDER

The National Labor Relations Board orders that the Respondent, Preferred Transportation, Inc., d/b/a Supershuttle of Orange County, Inc., Anaheim, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending, discharging, or otherwise discriminating against employees because of their protected union activities and/or because they have filed charges with the Board or testified in a Board proceeding.

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

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

(a) Within 14 days from the date of this Order, offer John Petrichella full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make John Petrichella whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the amended remedy section of this Decision and in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any references to Petrichella's suspensions and discharge, and within 3 days thereafter notify him in

writing that this has been done and that the suspension and discharge will not be used against him in any way.

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

(e) Within 14 days after service by the Region, post at its facility in Anaheim, California, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 13, 1999.

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

CHAIRMAN BATTISTA, concurring in part, and dissenting in part.

Contrary to my colleagues, I would affirm the judge's finding that the Respondent lawfully discharged John Petrichella. I agree that animus has been shown and that Petrichella's suspensions were unlawful. However, in so agreeing, I rely on the judge's finding of disparate treatment, rather than on the evidence cited in the first paragraph of the "Analysis" section of the judge's decision. Further, in agreeing that the General Counsel established a prima facie case as to the discharge allegation, I rely on the unlawful suspension to establish animus.

However, I conclude that the prima facie case as to the discharge was rebutted. In this regard, my colleagues do not appear to disagree with the proposition that Petrichella was discharged because he filed two false incident reports. My colleagues argue that the false statements were elicited pursuant to a discriminatorily motivated investigation. I assume arguendo that the investigation was discriminatorily motivated. However, that assumed fact does not give a license to an employee to lie to his employer. Nor does it mean that the lie is immune from discipline. In this regard, I note that where an employer violates the *Weingarten*[1] principle and conducts an unlawful investigation of employee misconduct, the fruit of that investigation can nonetheless be used to discipline the employee for the misconduct.[2] Phrased differently, the fruit of the poisoned investigation can be used to discipline the employee. This is because Section 10(c) permits an employer to discharge an employee for cause. Inasmuch as misconduct revealed during an unlawful *Weingarten* investigation can be used as a basis for discipline, it follows a fortiori that a lie told during the investigation can similarly be used. For, under Section 10(c), the lie is "cause" for the discharge. The fact that the lie was discovered during an unlawful inquiry does not change the result.

My colleagues rely on *Business Products-Division of Kidde, Inc.*, 294 NLRB 840 (1989). That reliance is misplaced. The case holds that employee misconduct discovered during an unlawfully motivated investigation cannot form the basis for a lawful discharge. The Eighth Circuit has indicated disagreement with that view. See *NLRB v. Fixtures Mfg.*, 669 F.2d 547, 552 (8th Cir. 1982). In my opinion, there is much to be said for the Eighth Circuit's view. However, even accepting arguendo the Board's view, that view is not controlling here. Under *Kidde*, if an employee truthfully admits misconduct during an unlawfully motivated investigation, the employer cannot rely on the misconduct to support a discharge. However, the instant case involves *a lie* during the investigation, and the employer relies on the lie to support the discharge. The issue is whether an employer can discharge an employee for lying. I would answer the question in the affirmative. My colleagues apparently disagree.

Similarly inapposite is *Kolkka Tables & Finish-American Saunas*, 335 NLRB 844 (2001). That case deals with the situation where an employer's unlawful action *provokes* the employee to such an extent that he commits an act of misconduct. The employer, having

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

[1] *NLRB v. J. Weingarten*, 420 U.S. 251 (1975).

[2] *Taracorp, Inc.*, 273 NLRB 221 (1984).

provoked the misconduct, cannot rely on the misconduct as the basis for a discharge. However, that is not the case here. The Respondent did not provoke the employee to lie.

My colleagues say that *Kidde* and *Kolkka* stand only for the proposition that a discharge is unlawful if it is motivated by union activity. However, that elemental proposition is well settled, and was *not* the more difficult matter raised in those two cases. Rather, the issue involved in *Kidde* was whether a discharge that is *motivated by employee misconduct* can nonetheless be condemned as unlawful if the misconduct is uncovered during an unlawful investigation. Similarly, the issue in *Kolkka* was whether a discharge that is motivated by employee misconduct can nonetheless be condemned as unlawful if the misconduct was provoked by the unlawful conduct of the employer. Unlike my colleagues, I have dealt with the real issue in those cases, and I have shown why, consistent with those cases, there is a violation here.

Finally, my colleagues say that the lie did not exist independently of the unlawfully motivated investigation. I disagree. Notwithstanding the unlawful motive for the investigation, there was neither warrant nor need for the lie. The discharge should stand.

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT suspend, discharge, or otherwise discriminate against our employees because they have engaged in union activities and/or because they have filed charges with the Board or testified in a Board proceeding.

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

WE WILL, within 14 days of the Board's Order, offer John Petrichella immediate reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make him whole for any loss of earnings and other benefits resulting from our discrimination against him, less any net interim earnings, plus interest.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the July 13 and August 21, 1999 suspensions and the August 24, 1999 discharge of John Petrichella, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the suspensions and discharge will not be used against him in any way.

PREFERRED TRANSPORTATION, INC., D/B/A SUPERSHUTTLE OF ORANGE COUNTY, INC.

Jean Libby, Esq., for the General Counsel.
Steven J. Prough, Esq. (Jenkens & Gilchrist, LLP), of Los Angeles, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. This case was tried in Los Angeles, California, on June 12, 13, and 14, 2000, on a complaint dated December 8, 1999. The underlying charges were filed on July 13, 1999, as amended on September 15, 1999, by the Union, General Truck Drivers, Office, Food & Warehouse, Local 952, International Brotherhood of Teamsters, AFL–CIO. The complaint alleges that the Respondent, Preferred Transportation Inc., d/b/a Supershuttle of Orange County, Inc., violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act), by issuing a verbal warning to its employee, John Petrichella, suspending Petrichella and discharging him because of his union activities, and because he filed charges with the National Labor Relations Board and gave testimony in a Board proceeding.

The Respondent filed a timely answer, admitting the jurisdictional aspect of the complaint, and admitting that it took the adverse job actions against its employee, but the Respondent denied that it committed any unfair labor practices.

Based on the entire record in this case, including my observation of the demeanor of the witnesses, and considering the briefs filed by counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Supershuttle, located in Anaheim, California, is a corporation, engaged in the business of transporting passengers. With gross revenues in excess of $500,000, it has purchased and received at its Anaheim, California facility goods valued in excess of $50,000 directly from points outside the State of California. The Company is admittedly an em-

ployer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

II. BACKGROUND

The Respondent, Supershuttle, employs approximately 175 drivers in its ground transportation business, where passengers are driven in vans or buses in and out of the Los Angeles International Airport, often referred to as LAX. Dispatchers located at the Company's facility in Anaheim, California, usually instruct drivers by radio or by onboard computers about their daily assignments.

The drivers were represented by successive unions. Initially the drivers were represented by the Drivers Action Committee, (the DAC). On September 13, 1996, the Union, Teamsters Local 952, filed a petition with the Board's Region to represent the drivers. In an election on February 6, 1997, the Union won, but on April 17, 1997, in a runoff election, the DAC won and was certified. On March 16, 1999, Teamsters Local 952 filed a new petition. The parties stipulated to the following (Tr. 21):

> A new petition was filed by the same Charging Party on March 16, 1999. A hearing was held on that petition on June 10, 1999. The discriminatee in this matter John Petrichella testified on June 10, 1999, in that proceeding. A decision and direction of election was issued. In June 1999, requests for review were filed by more than one party. The Board rendered a decision on July 22 of '99 directing that a new hearing be held. On July 23, 1999, an election was held. The ballots were impounded from that election. Mr. Petrichella was an observer in that election.
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> On July 29, 1999, a new hearing was ordered by the Region. And subsequently, the Board rendered a decision finding there was a contract bar and the ballots have never been opened.

Respondent's employee, John Petrichella, was admittedly one of the principal union activists. Soon after his employment in July 1995 as a shuttle van driver, he became active on behalf of Teamsters Local 952 (GC Exh. 11). He also became involved in the internal affairs of the DAC. He was particularly active in deciding whether or not union officials should be selected by election of its membership or by appointment of union officials. He was instrumental in preparing a petition, which he circulated among the DAC membership for submission to the Respondent (GC Exh. 12). At the election among DAC members in December 1996, he was elected to the executive board. In that capacity, his "responsibilities involved the filing grievances and unfair labor practices, investigating disciplinary actions" (Tr. 48). He filed a charge with the Board's office on May 17, 1997, accusing the Respondent of repudiating the collective-bargaining agreement, refusing to process grievances and of dismantling the DAC union and officers (GC Exh. 18). Petrichella became president of the DAC in 1997. He negotiated with Respondent's representatives, including Respondent's manager, Todd Emmons, a successor agreement. He filed charges on behalf of the DAC on November 24, 1997, and again on January 23, 1998 (GC Exhs. 19, 20, and 21).

Petrichella received letters from Todd Emmons, highly critical of his activities on behalf of the DAC. For example, on May 13, 1997, Emmons sent a memorandum to all employees explaining the reasons for the lack of progress in the negotiations. In that memo, Emmons refers to a posting by Petrichella, and accused him of making "bold misrepresentation" (GC Exh. 13). A letter dated November 5, 1997, by Emmons to Petrichella is critical of Petrichella's role as negotiator on behalf of the DAC (GC Exh. 14). And by letter of January 26, 1998, Emmons expressed his criticism of Petrichella's conduct as union representative and particularly his propensity of filing "unmeritorious" unfair labor practice charges (GC Exh. 16). Petrichella continued to file charges even after he was ultimately removed from the executive board of the DAC as a result of an internal dispute between him and Barry Hansen, DAC's president (GC Exh. 23).

In 1998, Petrichella renewed his union activity on behalf of the Teamsters. By letter of March 3, 1999, Teamsters Local 952 informed the Respondent that Petrichella and another employee had joined and would be assisting in the organizing activities of the Union (GC Exh. 17). On March 16, 1999, the Union filed a petition with the Board and an election decision was issued on July 23, 1999. Petrichella functioned as an observer at the union election on July 23, 1999. However, a decision by the Board, finding that the election was barred because of the existence of the collective-bargaining agreement between the Respondent and the DAC, prevented the opening of the ballots cast in the union election.

In short, the record shows, as correctly observed by the Respondent, a "sometime acrimonious relationship between Emmons and Petrichella" (R. Br. p. 3).

Petrichella's tenure as a shuttle van driver was also not free from controversy. His employment began in July 1995. Several months later, on November 3, 1995, he was cited by the Respondent for insubordination (R. Exh. 1). In 1996, he received several written warning notices for damaging company property, such as driving away from the gas station with the nozzle still attached, thereby causing accidents (R. Exhs. 4, 5, and 8). On February 2, 1996, he received a warning for having caused a traffic accident while operating a company van (GC Exh. 3). On August 28, 1997, he was suspended indefinitely for threatening Todd Emmons and for insubordination (R. Exh. 7). On March 25, 1999, Respondent suspended Petrichella for failing to report for work on March 19, 1999. The suspension was reviewed by upper management (R. Exh. 16).

The three subsequent forms of discipline received by Petrichella were, according to the General Counsel, the results of his union activities. The Respondent admits that Petrichella received a verbal warning in June 1999, for starting his shift early, that he was suspended on July 24, 1999, for his "Infraction of Major Workrules" and ultimately discharged by "Termination Notice," dated September 1, 1999, following a suspension of August 21, 1999.

III. ALLEGED UNFAIR LABOR PRACTICES

Petrichella incurred a verbal warning in June 1999, for starting his shift early and for ending his shift early, without com-

pany approval. According to the General Counsel, other drivers similarly started their shift early but were not disciplined.

Petrichella's regular shift commenced at 1 p.m. He testified that he usually arrived much earlier, namely at 10 or 11 a.m., and then reported to the dispatcher. According to company policy, contained in the collective-bargaining agreement, drivers were prohibited from reporting earlier than 15 minutes before their designated starting time (GC Exh. 15, p. 5). However, according to the testimony of several other drivers, the common practice was to start the shift about 1 hour early. For example, Lawrence Haecherl testified that his shift started at 2 p.m., but that he usually reported for work at about 1 p.m. He also testified that other drivers routinely commenced their shift about 1 hour early. Driver Glenn Noell testified that his start time was 1 p.m. and that he would often show up at 11 or 11:30 a.m. and check in with the dispatcher who would frequently tell him to wait for the 12 o'clock drivers to begin their shift. Thereafter, he would often be allowed to begin his shift. His testimony confirmed that other drivers similarly reported early for their shift. Another driver, Charles Villela, testified that his start time was noon. He would usually start at noon but many times he would come in anywhere from 30 minutes to 1 hour earlier.

Nevertheless, Todd Emmons, general manager, testified that drivers were not to report earlier than 15 minutes prior to starting time, as provided in the current agreement, and that drivers who came in earlier would have to seek permission from the dispatcher to obtain their keys to the vans. Emmons testified as follows about the verbal warning (Tr. 280):

> Well, there was a period of time where—Between November 16, 1998 when the contract was implemented, there was changes in hours and everything like that as far as what drivers would get different benefits and everything like that. There was some concerns over whether or not Mr. Petrichella was working appropriate hours and other drivers to qualify for different benefits and everything like that.
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> He was brought in, it was explained to him that if he was going to start his shift earlier as per memos I had put out years ago, and in the training manual, I think, that he needed to have permission. And he if he was going to end earlier than eight hours, then he needed to have permission to do that. He said to me, "Well, but if I start earlier than my start time, then that's eight hours." And I said, "Yes, when you start you have to work eight hours. If you are going to work less than eight hours, you need to have permission to do that."

Emmons also spoke to another driver, Joe King, about his habit of reporting early for his shift, telling him that "it won't happen anymore" (Tr. 281). In summary, the record shows that the Respondent issued a verbal warning to Petrichella for his violation of a company policy which was not always strictly enforced. However, considering Petrichella's habit of reporting up to 3 hours earlier than his scheduled shift, he was among the worst, if not the worst, offender of the Company's policy. Under these circumstances, I cannot find that the Respondent discriminated against this employee.

A. Petrichella's Suspension

According to a suspension notice dated July 24, 1999, Petrichella violated the Company's work rules by refusing to abide by the Company's three-stop policy at the Los Angeles International Airport (LAX). On July 22, 1999, Petrichella drove his van to LAX to pick up three passengers involving three stops. Contrary to Respondent's policy, Petrichella "went on a second loop through LAX and loaded 2 more guests as well as adding 2 more stops to [his] van" without permission from the dispatcher (GC Exhs. 26, 27).

The Respondent explained the policy as follows (Tr. 294):

> A. I'm sorry. In July of 1999, you were allowed to enter the airport and do one loop. You were always told and you were given a tag from the dispatcher that tells you what terminal to go to and for what sector. When you get to that terminal, there is a secondary dispatcher on the curb, which is known as a Customer Service Representative. You are to make contact with them—they will direct you to your passengers and at that point, they will have instructions on what you are supposed to do. But you are not supposed to make any more loops due to revenue situations unless you have permission. That's it. There is no gray area there.

Petrichella's testimony similarly referred to a three-stop rule which was designed to lessen any inconvenience to customers and which limited drivers to no more than three stops at LAX, unless there was an emergency (Declared Travel Emergency). According to Petrichella, dispatchers communicated with a driver "through our onboard data terminal, through the two-way radio or a PA system with the loudspeaker outside the booth" (Tr. 73). But drivers did not always require the permission from a dispatcher to deviate from the three-stop rule. Petrichella testified that drivers "could do 2 loops but had to have permission for a third." As a practical matter, Petrichella would ordinarily find out from the dispatcher or the customer service representative the identity or the number of passengers when he arrived at LAX. If he had made three stops on his first loop, he would indicate on his Mobile Data Terminal (MDT) the onboard computer, that he would be going outbound. If he failed to have three stops on his first loop, he would try to contact the dispatcher. And if he failed to make contact with the dispatcher which happened at least 50 percent of the time, then he would start the second loop and try to locate additional business while trying to contact the dispatcher at a later time when the radio was clear. If he still had not been able to make three stops after completion of the second loop, he could make a third loop only with the approval of the dispatcher. Otherwise, he would go outbound with the passengers he had in the van. Petrichella testified that he never made a second circular loop at LAX without a dispatcher's approval if he had been able to make the three stops on his first circuit.

On July 22, the day of the alleged infraction of the three-stop policy, Petrichella drove to LAX and was told by the dispatcher that he had two stops. According to Petrichella, he picked up two passengers on his first loop while making the two stops. He then tried contacting the dispatcher but "there was too much radio traffic," so he decided to make a second loop. He located three additional passengers on his second loop. After they had

boarded, he found that the five passengers had to be delivered to five different locations. He contacted the dispatcher as he "exited" the airport and delivered the passengers.

On July 24, 2 days later, the Respondent handed Petrichella a suspension notice, signed by Richard Powers, Supershuttle's manager, and on July 26, 1999, another, amended suspension notice signed by Steve Russell, a supervisor, stating as follows (GC Exhs. 26, 27):

> While at LAX you were sent in on Sector 11 to pick up 3 guests, 3 stops. You were also told when you loaded all guests you were to call out at terminal 7 with your count. You went on a second loop through LAX and loaded 2 more guests as well as adding 2 more stops to your van. This was done without permission from the dispatcher and the supervisor at LAX.
>
> . . . .
>
> Any further incidents of this nature can and will result in suspensions and or termination.

Although Russell did not testify about these events, Respondent's general manager, Powers, explained the Company's policy in effect in July 1999 as follows (Tr. 426):

> At that time in July of 1999, the loop policy was that we could do a maximum of two loops or circuits of the lower level of LAX picking up passengers and that it was policy that the drivers had to call in at the end of their first loop for permission for a second loop.
>
> . . . .
>
> Well, the biggest reason is that it costs $5 per loop each time the van does it, it is automatically recorded by an AVI transponder system. It gets quite expensive for us.
>
> . . . .
>
> The goal was to load as many passengers as you could on the first loop and then only send the vans around for a second if necessarily.

Powers further testified that he became aware of Petrichella's decision to make the second loop without the dispatcher's permission, when another driver who had been dispatched, called to report that there were no passengers at the terminals. Powers, who was the operations manager at that time, prepared an incident report about Petrichella's conduct. Powers explained that other drivers have similarly violated company policy in that regard and that he has written up another driver for the same violation (R. Exh. 18).

Powers conceded that Petrichella had tried to call the dispatcher after his first loop, but that he made the second loop without authorization. He also conceded that company policy was subsequently changed, so that presently drivers are permitted to make the second loop without express authorization.

Emmons made the decision to suspend Petrichella, the day after the union election on July 23, 1999. His explanation was as follows (Tr. 296):

> When the information came in Thursday night, we reviewed it briefly. I couldn't get a hold of the dispatcher at LAX. I came in the following morning, reviewed it and in the Company's opinion, we found it to be meritorious, however, there was an interesting little thing going on with an NLRB election that day. We had known prior to that that Mr. Petrichella was going to be an observer of the election. I made a choice not to suspend him and let him go ahead and go through his duties as an observer as not to create a situation that day.

The record contains the testimony of other drivers about the Company's policy. Glenn Noell testified that he was familiar with the Company's three-stop rule. He testified that he usually complied with that rule and would exit LAX after three stops and so notify the dispatcher. He also testified that if he had made less than three stops on his first loop, he would make a second loop without the dispatcher's permission. He was unaware of anyone ever being disciplined by the Company for violating the three-stop rule unless they were trying to cheat the Company. Charles Villela similarly testified that the Company had a three-stop rule.

Powers' testimony was at odds with that of Petrichella that he made two stops on his first loop. According to Powers, Petrichella made three stops on his first loop and then proceeded to make a second loop without authorization, although Powers agreed that Petrichella had called the dispatcher during his first loop. Powers prepared the incident report about Petrichella's violation of the three-stop policy, but he took no part in the decision to discipline Petrichella.

On balance, I credit Powers' testimony rather than Petrichella's recollection of the number of stops made on July 22, 1999, during his first loop. Powers' incident report and the Supershuttle base log support Powers' testimony. The record also shows that the three-stop policy existed at that time, generally prohibiting a second loop without a dispatcher's authorization. I therefore find that the Respondent formed a reasonable conclusion that Petrichella had violated that policy. However, the record also shows that the policy was not uniformly enforced. Emmons testified that warnings or suspensions would be issued to other drivers who violate that policy, but he could not recall any specific instances. Indeed, Powers estimated that three or four drivers per week similarly violated the policy but none of the Respondent's approximately 100 disciplinary records from 1998 to 1999 reflect any violations of the three-stop rule (GC Exh. 36).[1] Since the record shows that the Respondent had failed to discipline other drivers for their violations of the three-stop rule, even though such violations occurred routinely, I find that the Respondent engaged in disparate treatment of Petrichella when it suspended him.

B. The Discharge

On August 21, 1999, Petrichella was suspended and on September 4, 1999, he was discharged. The General Counsel argues that the Respondent was motivated by antiunion animus. The Respondent submits that Petrichella failed to make himself

[1] Counsel filed supplemental briefs relating to Powers' testimony of how many policy violations were the subjects of incident reports. Under the Board's Rules, documents filed after the due date are generally disallowed. However, I have considered the arguments made therein. I find that Powers' testimony in this regard was given in his capacity as Supershuttle's general manager in Los Angeles, which included four offices (R. Exh. 18).

available for business and attempted to cover up his unavailability.

Respondent's suspension notice, dated August 21, 1999, and signed by John Schlee, a supervisor with the Company, cites certain work rules and explains that the driver never showed clear and available from this run, and that he did not respond to repeated requests to contact dispatch. The notes also state that the van was observed, and that the driver made no contact with dispatch to return to base and had not called for permission to take an extended break.

The notices concludes that (GC Exh. 31):

> Driver is suspended for wasting time during working hours without permission (Addendum A work rule 2) and unavailability to perform work duties (Addendum A work rule 4).

The Respondent discharged Petrichella following the suspension. The termination notice, dated September 1, 1999, cities Petrichella's violations of several work rules and adds (GC Exh. 32):

> Finally, you falsified Company records in connection with your misrepresentations regarding your activities at the times in question. Accordingly, please consider your employment with Supershuttle served as of this date.

Petrichella's version of the events on August 21, 1999, was that he began his shift at 10:30 a.m. that day. After delivering a passenger in Huntington Beach in the afternoon, he went for his lunchbreak at Boston Market. He took his lunch across the street to the parking lot of the Home Depot store, ate in his car, and used the bathroom facilities. He then met his son who was employed there and spoke to him for a period of time, 45 minutes to 1 hour. He returned to the Company's base at about 6 p.m., checked in, and completed his paperwork, including the counting of his receipts. He was then asked to see John Schlee, the dispatch supervisor. Schlee requested that Petrichella fill out an incident report accounting for the time following the delivery of his last passenger. Petrichella completed a short incident report and handed it to Schlee (GC Exh. 28). Schlee informed him that his van had been seen at a certain location that he tried to make contact with Petrichella by radio and by data terminal but was unsuccessful, and that he would be suspended. Schlee indicated that Todd Emmons would handle the matter.

On Monday, August 23, 1999, at a meeting between company officials and Petrichella, as well as a union representative, Emmons requested another incident report from Petrichella. He completed another incident report and delivered it to Emmons (GC Exh. 29). On August 23, 1999, Petrichella submitted a typed "Addendum" to his incident report (GC Exh. 30). On September 3, 1999, at a meeting with Emmons and other officials, Petrichella was informed that his employment was terminated. The principal reason underlying Respondent's decision to discharge Petrichella, according to Emmons, was the falsification of company documents.

According to the Respondent, Petrichella failed to show by mobile data terminal (MDT) that he was unavailable for work once he had dropped off his passenger at Huntington Beach. His failure to communicate with the dispatcher in that regard gave the impression to the dispatcher that he was still on an assignment even though he had decided to take the break for lunch at the Home Depot store. Accordingly, after Petrichella had dropped off his passenger at 4:38 p.m. he showed himself to be neither, available for assignments nor unavailable, until he had returned to base at about 6 or 6:30 p.m. Normal practice, followed by other drivers, was to notify the dispatcher after the completion of a delivery, and showed disposition or the status of their availability to accept work. That, according to the Respondent, violated company policy.

The Respondent went to great lengths in documenting Petrichella's whereabouts on the afternoon of August 21, 1999. Emmons testified that he happened to be at the Home Depot when he spotted a Supershuttle van entering the parking lot. He observed Petrichella get out of his van, enter the store and then visit with two individuals from about 4:50 until 6:01 p.m. Contrary to Petrichella's testimony that he ate lunch in his van, Emmons observed Petrichella get out of his car as soon as he had entered the Home Depot parking lot without taking a lunchbreak. At that point, Emmons called the dispatcher and was told that Petrichella had failed to communicate with the dispatcher in any way, so that he was neither available for assignments nor in an off-duty status. Emmons continued to observe Petrichella's activities in the Home Depot parking lot. Emmons called the dispatcher again to see if Petrichella had made contact.

The Respondent also monitored Petrichella's van by a sophisticated global positioning system (GPS). The record contains the computer printouts of the GPS showing the precise locations of the van at different times on that day (R. Exhs. 11, 12). The documentary evidence confirms the testimony of Emmons about the times and whereabouts of Petrichella's van. It also suggests that Petrichella never went to the Boston Market to purchase his lunch, but had entered the Home Depot lot without eating any lunch. This, according to the Respondent, was significant, because it showed that Petrichella had misrepresented the scenario of his activities and had lied to management. The Respondent, therefore, does not quarrel with Petrichella's eating habits, but expressed its outrage at the misrepresentations and lies contained in the incident reports. More specifically, the Respondent argues that Petrichella's claim of heavy traffic in the afternoon of August 21 was also false, because the documentary evidence shows that he made his deliveries within the normal time spans. The Respondent further submits that Petrichella lied when he claimed he had stopped at the Boston Market. Furthermore, Petrichella claimed that he did not receive any messages from the dispatcher on his onboard computer while he remained on the Home Depot parking lot. The Respondent accordingly argues that the termination was justified because of his falsification of documents, namely his two incident reports.

In his first incident report, dated August 21, 1999, Petrichella made three representations (1) got something to eat (lunchbreak), (2) heavy traffic all the way from LAX to H.B. and other streets, and (3) didn't see message on MDTC (GC Exh. 28). As a result of the apparent inconsistencies, Emmons decided to ask Petrichella to complete another incident report. In his second, more detailed, incident report, dated May 21,

1999, he essentially repeated the same facts, lunch, heavy traffic, and no message on the MDT, and he also stated that he was not contacted on the radio at any time (GC Exh. 29).

The Respondent argues that these representations were false, as already discussed. Emmons' surveillance as well as the GPS showed that the van made a turn into the Home Depot parking lot without making a stop at the Boston Market. The GPS also showed that the van moved at normal speeds on the freeways and side streets, which is inconsistent with any claims of heavy traffic. Finally, the Respondent demonstrated that the dispatcher had left messages on the MDT system (R. Exh. 13). According to Emmons, the driver should have seen the messages even if he was not in the van at the time. When a driver enters the van, he would have seen a message on the screen or a message waiting. Emmons described his reaction as follows (Tr. 417):

> I took it and compared it to the GPS and all the other information I had available, reviewed the different work rules and went over with him and I believe we had two meetings about it and at what point I couldn't get anything else out of him . . . it was clear to me that Mr. Petrichella was lying and trying to cover something up and we made the determination that he had falsified documents, lied and was going to be terminated.

IV. ANALYSIS

This case presents an issue of motivation. That the Respondent disciplined Petrichella with a verbal warning, a suspension, and terminated his employment is not contested. Also not in dispute is Petrichella's union activity and his participation as a witness in a Board proceeding. Indeed, the Respondent concedes that Petrichella "was an active, vocal and confrontational union supporter since 1996, and that "he participated in NLRB proceedings, negotiated on behalf of his union and was a member of the union executive committee for a time" (R. Br. p. 23). The relationship between him and Respondent's manager, Todd Emmons, was acrimonious. For example, already in 1997 Emmons wrote a letter to Petrichella accusing him of making bold misrepresentations. Emmons posted that letter in the facility (GC Exh. 13). Similarly, Emmons publicly blamed Petrichella in a letter of November 5, 1997, for an impasse in the negotiations (GC Exh. 14). Another critical letter was posted in 1998 (GC Exh. 16). In the presence of other employees, Emmons made demeaning remarks to Petrichella in July 1999 in the driver's lounge. When Petrichella complained to management about an obscene antiunion poster in the facility, the Respondent had no reaction (GC Exh. 25). It is, accordingly, clear that the Respondent has demonstrated its antiunion animus.

Under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel must establish that protected conduct was a substantial or motivating factor in the employer's decision. If this initial burden is met, the burden of persuasion shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even if the employee had not engaged in protected activity. The General Counsel persuasively argues that the timing of the discipline and Petrichella's discharge warrants a finding that the Respondent was motivated by antiunion animus. Petrichella had been a union activist for several years, and 1 day after he functioned as a union observer at a union election, the Respondent singled him out for violating the three-stop rule at LAX, which other drivers violate on a weekly basis and for which they are not penalized. Petrichella's suspension and termination followed a month later. It is well settled that the timing of an adverse employment decision is given great weight in unlawful discharge cases as an indication of antiunion motive. *TLC Lines, Inc. v. NLRB*, 717 F. 2d 461, 464 (8th Cir. 1983).

In applying the traditional criteria, however, I am mindful that Petrichella was already a union activist since early 1996 when he first met with representatives of Teamsters Local 952, and that his disciplinary record dates back to 1995 for such infractions as insubordination or accidental damage to company property. It also cannot be gainsaid that he repeatedly violated company policy. He obviously disregarded the policy against reporting early for his shift. I find that the record does not support a discriminatory motive for the verbal warning. As already discussed, Petrichella was clearly one of the most obvious offenders of the company rule. I therefore dismiss that allegation in the complaint.

With respect to the three-stop rule violations, the General Counsel has clearly shown that Respondent's antiunion sentiment was the motivating factor in the suspension. Petrichella, as correctly observed by the General Counsel, was the object of an antiunion campaign for years, which escalated in 1999 when he was treated differently than other drivers. His treatment was clearly different and harsher than that of other drivers who seemed to violate the rule with impunity. Under *Wright Line*, the Respondent has the burden to show that the discipline would have been imposed regardless of any antiunion sentiment. Clearly, the Respondent has failed to make such a showing. Accordingly, I find that the Respondent violated Section 8(a)(1) and (3) of the Act, as alleged.

Finally, with respect to Petrichella's discharge, the record shows that he took a break at the Home Depot store on August 21, while visiting his son. Whether or not he ate lunch was, according to the Respondent, not particularly relevant.

By all accounts, the record clearly shows that there was no communication between Petrichella's van and the dispatcher after the last passenger was dropped off in the late afternoon of August 21. From approximately 4:30 until 6:30 p.m. after he returned to base, Petrichella did not contact the dispatcher, nor did he accept repeated attempts by the dispatcher to contact him. As a result, John Schlee directed him to complete an incident report.

In the meantime, Emmons had personally surveyed Petrichella's activities for about 2 hours and thereafter reviewed the GPS trackings of Petrichella's van, all of which reflect certain inconsistencies with the scenario contained in Petrichella's incident reports. The General Counsel has attacked the accuracy of the GPS records, because only selected ones were produced and because they are not as accurate as Emmons' testimony would suggest. Not all printouts taken at 45-second intervals were produced. Their production would have been voluminous. Second, Emmons estimated that the GPS reports could accurately pinpoint the van's location within 100 feet.

The General Counsel disagreed and attempted to prove that the system could locate the van's position to no more than one mile's accuracy. In my view, the evidence, particularly the GPS reports which showed a trail following the van's movement were sufficiently accurate to corroborate Emmons' testimony that Petrichella did not go to the Boston Market to purchase his lunch (R. Exh. 11). Moreover, Petrichella's claim is unconvincing that he did not see any message on his onboard MDT system, even though documentary evidence shows that two messages were sent. Finally, Petrichella's representation of heavy traffic during his afternoon trips was exaggerated. This provided the Respondent with a reasonable basis to doubt the accuracy of Petrichella's incident reports.

Considering the totality of the circumstances, including Emmons' deliberate surveillance for 2 hours of a fairly innocuous scenario at the Home Depot. Emmons' request for a second incident report and his analysis with the latest technology, the GPS system, of a set of relatively inconsequential circumstances contained in the reports, I doubt Emmons' sincerity and motivation. But for his hostility towards Petrichella, Emmons might simply have greeted any other driver of a company van whom he met under fortuitous circumstances at a parking lot. And Emmons' request for the second incident report suggests that he anticipated certain inaccuracies, which could justify the accusation of falsification. In reality, Emmons was motivated by his union animus. Accordingly, I find that the General Counsel has established a prima facie case under *Wright Line*. However, I further find that the Respondent has shown that Petrichella would have been discharged even without Emmons' contrived handling of the entire matter. The evidence shows that Schlee suspended Petrichella and requested the first incident report. Without Emmons' surveillance and the GPS reports, the factual scenario would have revealed inaccuracies, such as Petrichella's failure to communicate or respond to the dispatcher's messages and Petrichella's lengthy period of unavailability. His falsifications of company documents may have been of less magnitude than those of other drivers who were terminated for that offense. For example, employee Barbara Hodgson, was discharged for falsifying documents without a showing of fraud or theft. Considering Petrichella's prior history with this Employer, the record shows that the Respondent would have discharged Petrichella for misrepresenting certain matters in the incident report combined with his violations of company policy. Under these circumstances, I dismiss these allegations in the complaint.

CONCLUSIONS OF LAW

1. The Respondent, Preferred Transportation, Inc., d/b/a Supershuttle of Orange County, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, General Truck Drivers, Office, Food & Warehouse, Local 952, International Brotherhood of Teamsters, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By suspending its employee John Petrichella, because of his union activity, because he filed charges with the Board, and testified at a representation hearing, the Respondent discriminated against this employee because of his union activities and for filing charges or giving testimony under the Act, in violation of Section 8(a)(1), (3), and (4) of the Act.

4. The unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. The other allegations have not been substantiated.

REMEDY

Having found that the Respondent has engaged in unfair labor practices warranting a remedial order, I shall recommend that it cease and desist from engaging in such conduct and that it take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily suspended John Petrichella, I shall recommend that it be ordered to make him whole for any loss of earnings and other benefits he may have suffered by virtue of the discrimination practiced against him, computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), less any interim earnings, plus interest as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]