

GATX Logistics, Inc. and Local No. 7, International Brotherhood of Teamsters, AFL-CIO. Case 7-CA-40799

January 10, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On September 1, 1999, Administrative Law Judge Robert M. Schwarzbart issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed 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 conclusions² and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, GATX Logistics, Inc., Kalamazoo, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Richard F. Czubaj, Esq., for the General Counsel.

Andrew J. Martone, Esq. (Lowenbaum, Bobroff, Hesse, Lindmark & Martone, P.C.), of St. Louis, Missouri, for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT M. SCHWARZBART, Administrative Law Judge. This case was tried in Kalamazoo, Michigan, on a complaint issued pursuant to charges filed by Local No. 7, International Brotherhood of Teamsters, AFL-CIO (the Union).¹ The complaint alleges that GATX Logistics, Inc. (the Respondent or Company) violated Section 8(a)(1) of the National Labor Relations Act (the Act), by threatening its employees that their efforts to seek representation by the Charging Union would be futile because a union never would represent employees at its Kalamazoo, Michigan facility while the speaker was a supervisor; by coercively interrogating its employees regarding their support for the Union; and by threatening its employees with discharge if they chose to engage in a protected concerted work stoppage to protest the disciplining of fellow employee Dennis Bury. The complaint further alleges that Bury's March 6, 1998,² termination was violative of Section 8(a)(3) and (1) of the Act. The Respondent contends that Bury was dismissed in accordance with its previously distributed work rules because he had disobeyed an order from his supervisory dispatcher by refusing without explanation to accept an assigned trucking route. In its timely filed answer, the Respondent denies the commission of unfair labor practices.

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

² No exceptions were filed to the judge's conclusion that certain conduct of the Respondent violated Sec. 8(a)(1).

In adopting the judge's conclusion that Dennis Bury's discharge did not violate Sec. 8(a)(3) and (1), we find it unnecessary to rely on the judge's comparison of Bury's and Greg Royer's discharges or the judge's statement regarding the possibility of harm to the Respondent's relationship with its customer, Mitsubishi, if it used an outside carrier to cover the route that Dennis Bury refused.

¹ The relevant docket entries are as follows: The original and first amended charges were filed on March 25 and June 11, 1998, respectively, the complaint issued on June 12, 1998, and the hearing was held on March 24 and June 8, 1999.

all parties were given full opportunity to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Briefs, filed by the General Counsel and the Respondent, have been carefully considered. On the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, with an office and place of business in Kalamazoo, Michigan, is engaged in the transportation of automotive parts. During the calendar year ending December 31, 1997, the Respondent, in conducting its business operations, derived gross revenues in excess of \$50,000 from the transportation of automotive parts from suppliers within the State of Michigan directly to points outside the State of Michigan. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. General background

The Respondent, engaged in the truck transportation of automotive parts, had terminals, or consolidated transfer centers (CTCs), in Kalamazoo, Michigan, and in Richmond and Seymour, Indiana. All its transportation traffic supervisors, or dispatchers, were located at its Normal, Illinois facility. It is undisputed that these dispatchers were the Respondent's supervisors and agents within the meaning of Section 2(11) and (13), respectively, of the Act. The events, particularly the Respondent's allegedly unlawful discharge of its shuttle driver, Dennis Bury, occurred at the Kalamazoo terminal where about 18 of its drivers were based.³

The Respondent's Kalamazoo drivers took two types of runs—day routes and shuttle routes—all for the purpose of ultimately delivering automotive parts to the Mitsubishi Motors vehicle assembly plant at Normal, Illinois. Day route drivers would depart from the Kalamazoo terminal in Company trucks, at various times between 4:30 to 10 a.m., pick up the parts at suppliers in and beyond Michigan, even going to Canada. These drivers made multiple stops before returning with full

² All dates hereinafter are within 1998 unless otherwise indicated.

³ The Richmond and Seymour facilities had approximately 10 and 15 drivers, respectively.

trailers to the Kalamazoo facility. From there, the shuttle drivers, leaving diversely between 3 to 9 p.m., would drive the loaded trucks to Mitsubishi's Normal plant and drop them. They then would drive back to the Kalamazoo terminal pulling empty trailers which had been hooked on to their tractors at the Normal plant. Accordingly, the shuttle drivers "shuttled" between Kalamazoo and Normal, their only destination. The next day the process would be repeated. The day route drivers would leave from and return to the Kalamazoo facility with trailers loaded with parts from the various suppliers. These parts then would be delivered by the shuttle drivers to Mitsubishi's Normal plant. These shuttle drivers then would return during the night to Kalamazoo with empty trailers to be refilled by the day route drivers.

The shuttle trips were more profitable to the drivers than the day routes because, although the 26 to 27 cents/mile mileage rate⁴ was the same for both types of runs, the shuttle routes afforded the most miles. As Kalamazoo was about 260 miles from Normal, a shuttle driver in addition to his hourly rate could expect to be paid the mileage rate for a daily round trip of 520 miles. Day route drivers, on the other hand, averaged between 375 to 400 miles/day. Although day route drivers received additional payments from the Respondent for each of the stops made at the various suppliers, while the shuttle drivers, as noted, had but one destination, this supplement still did not bring the day route drivers' earnings up to that of the shuttle drivers.

Absent an acceptable reason, the Respondent's drivers were required to take the truck runs assigned to them on penalty of discharge. In this regard, the Respondent's Uniform Rules and Regulations, article 2, contained in the driver's manual given to every employee, provided in relevant part as follows:

Violation of the following rules and regulations are subject to discharge:

2. Disobeying of orders from qualified personnel designated by GATX Logistics, Inc.

Michael D. Reindl was the Respondent's general manager; Todd Drought its operations manager; and Jim Overton the operations manager of the Kalamazoo terminal. Andrew R. Sorenson and Gregory K. Miller were the second- and third-shift dispatchers, respectively.

2. Board history

In GATX Logistics, Inc.,⁵ the Board found that the Respondent, in late 1994, violated Section 8(a)(1) of the Act by threatening an employee with unspecified reprisals for having worn to work a jacket bearing the logo or insignia of a local union of the International Association of Machinists. The Machinists Union is not involved in the present proceeding. It further was found in that case that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging that same threatened employee for his union activities.

The Union in the present matter was unsuccessful in the March 13, 1997 representation election conducted in Case 7-CA-21009 among all full-time and regular part-time drivers employed by the Respondent at its Kalamazoo, Michigan facility. The results of that election were certified by the Board's Regional Director for Region 7 on August 19, 1997. This repre-

sentation case concurrently was severed from the unfair labor practice Case 7-CA-39406, the subsequent settlement of which was approved on December 30, 1997.

3. Dennis Bury's union activities; alleged statements affecting him

Dennis Bury⁶ testified that in early 1997 he and some of the Respondent's other drivers, having decided to try to bring in a union, contacted the International Brotherhood of Teamsters, AFL-CIO. Bury thereafter handed out three or four union authorization cards to the drivers and wore a Teamsters Local Union No. 7 pin. Subsequently, as noted, the Union lost the March 13, 1997 representation election. After the election, Bury talked to the other drivers about how different things would have been had the employees been able to get the Union.

Bury related that, in mid-January, then shuttle driver Greg Royer, in the drivers' room at the Kalamazoo terminal, mentioned to him something about filling out a form to help the men get better insurance. Bury replied that Royer had had a chance to change that about a year before. When Royer asked what he meant, Bury told him that he knew what he meant. When Royer persisted that he did not, Bury declared that he could have voted for the Union and Bury knew that he had not. Royer said, "Oh!" When Bury looked to his right, he saw the Kalamazoo terminal operations manager, Jim Overton, standing about 8 feet away.

Driver John Burgeon⁷ testified that, in January while both he and Bury were running shuttle routes, they spoke in the driver's room. At the time, they were about 5 feet away from Overton's office, the door to which had been left "cracked open." Bury told Burgeon that he could not wait for April to come so that there could be another vote. Overton then came out of his office and stated that as long as he was supervisor there wasn't going to be a Union in there. Bury said we will just have to wait and see. Overton laughed and stood in his doorway.

Bury averred that, in late January, Overton had asked him why he was so pronoun. At the time, they were alone in the drivers' lounge, sitting "out by the door away from everybody." Bury told Overton that he never had been pronoun until lately. The way the Company had started to treat its employees left no recourse. Overton declared that the Union was divisive; driving a wedge between management and personnel.

Overton respectively denied that he had ever seen Bury wear union hats, buttons, or logos; that he had asked Bury if he was a union supporter; that Bury ever had told him that he was supporting a union or trying to organize for a representation election; or that he had told Bury, Burgeon, or anyone, that there would be no union at GATX while he was a supervisor there.

4. Bury's termination

Before March, Bury, through seniority, had obtained regular assignment to the more remunerative shuttle driver's position, driving daily between Kalamazoo and Normal. This approxi-

⁶ Bury, the third driver hired at the Respondent's Kalamazoo terminal when a new operation, had been with the Respondent since January 2, 1996.

⁷ Burgeon, employed by the Respondent since May 1996, had been running day routes for about 3 weeks at the time of the hearing. In the course of his employment, Burgeon has run both shuttle and day routes. Before the 1997 election, Burgeon had been visibly supportive of the Union, having given out two union authorization cards and having worn a union button on his GATX hat. Apparently, all of Burgeon's union activities had predated that election.

⁴ The mileage rate paid was based on the driver's seniority rather than on the types of runs made.

⁵ 323 NLRB 328 (1997), *enfd.* 160 F.3d 353 (7th Cir. 1998).

mately 520-mile round trip customarily took about 10 hours. Bury also would spend about 30 to 45 minutes at Normal in dropping off his loaded trailer and in locating and attaching an empty one for the return. Although, as noted, shuttle runs left Kalamazoo usually between 3 to 9 p.m., Bury always tried to get the earliest one, never leaving at 9 p.m.

On March 4, while driving back from Normal, Bury received the first of what were to be four Qualcomm messages⁸ from the Respondent's second-shift dispatcher, Andrew R. Sorenson.⁹ The first message Bury received that night was sent at 8:34 p.m. (CST)/9:34 p.m. (EST),¹⁰ and, as were all four messages, received less than a minute later. This message read, "DENNIS, I NEED YOU TO COVER A DAY ROUTE TOMORROW. CAN YOU CALL WHEN YOU ARRIVE AT TERMINAL AND WE CAN TALK ABOUT IT?" Bury declared that he could not safely read the screen while driving and, timewise, was not certain as to when he did so. At some point, he did pick up the Qualcomm, read it and put it down.

The second Qualcomm message Bury received that evening, forwarded at 8:49 p.m. (CST), or 9:49 p.m. (EST), was, "DENNIS, FORGET PREVIOUS MESSAGE YOU ARE ON YOUR SHUTTLE.—ANDY." Bury again read this communication at some point during his return trip.

The third March 4 message was sent to Bury at 9:07 p.m. (CST), or 10:07 p.m. (EST). This read, "DENNIS, YOU MUST CALL DISPATCH UPON ARRIVAL AT Z-ZOO YARD." The fourth Qualcomm message, transmitted at 9:36 p.m. (CST), or 10:36 p.m. (EST), read, "DENNIS, PLEASE CONFIRM RECIEPT [SIC] OF PREVIOUS MESSAGE." While still on the road, Bury did not reply to any of these messages. He made one rest stop about 3 miles before finally reaching the Kalamazoo terminal at 10:58 p.m. (CST), or 11:58 a.m. (EST).

Bury testified that, after parking the truck in Kalamazoo, he called the Dispatch office in Normal, speaking to third-shift dispatcher Miller. According to Bury, when Miller stated that he needed him to take a day route for him "tomorrow," Bury answered, "No." Miller said, "Okay." Bury then asked, "Greg, how have you been?" Miller replied that he was busy and had to go, ending the conversation.

Bury went to work the next day, March 5, between 3:30 to 4 p.m. As usual, he got into his tractor and trailer and left for Normal. About 20 miles down the highway, Bury received a Qualcomm message to return to the terminal to talk to Overton.

⁸ The Respondent's method of definitively locating its trucks and communicating with the drivers while in transit was through Qualcomm, a computerized satellite tracking and messaging unit installed near the passenger's side in the cabs of its trucks. Each cab-mounted Qualcomm unit had a screen and keyboard. The appearance of incoming messages on the screen was announced by the flashing of lights and a beeping sound. Drivers could lift the Qualcomm unit from its resting-place to read such messages and respond, which they did by typing on the keyboard.

⁹ Sorenson, as the Respondent's second-shift dispatcher, worked from 2 to 10 p.m. at which time he was relieved by the third-shift dispatcher, Gregory K. Miller, on duty from 10 p.m. to 6 a.m.

¹⁰ Although the Respondent's Normal and Kalamazoo facilities are under central and eastern standard times (CST and EST), respectively, its transportation records, prepared and maintained at Normal, show its drivers' departures and arrivals based on that locality's central time. This is so even with respect to locations in the eastern time zone, such as Kalamazoo. For clarity, the relevant corresponding times in both the central and eastern zones are provided without reference to the 24-hour military timing system actually utilized in those records.

Accordingly, Bury turned around and brought his loaded trailer back to the Kalamazoo terminal.

Bury related that when he met with Overton at the terminal, he asked why he had been recalled. Overton told him that G & D Transportation¹¹ was going to take that trailer to Normal; it earlier had run the relevant day route. When Bury asked why he had not been told this before he had left, Overton replied that it had been his (Overton's) fault; he had not checked his voice mail. Overton then asked what had happened the night before. Bury told him of the four messages received on his truck's Qualcomm and his conversation with Miller when calling him on his return to the terminal. Overton asked why he had refused the run. Bury replied that he had done so because his wife was sick and because he had wanted to be home during the day in case she had to go to the hospital.¹² Overton asked if Bury had told this to Miller. When Bury said that he had not, Overton asked why. Bury answered that it really had been none of his business. If Miller had wanted to know why, he should have asked him and Bury "probably would have told him just as he had told (Overton) why." Bury explained that when Miller had said, "Okay," he understood this to mean that his not taking the day route was agreeable to the Respondent and that he had been excused.¹³ Overton then informed Bury that he was being suspended for 3 days,¹⁴ that he should go home and that he would call Bury the next day. Bury then left the Respondent's premises.

Bury testified that Overton did phone him the next day, and read aloud a March 6 letter addressed to Bury from Operations Manager Todd Drought. This correspondence notified Bury of Drought's finding, after investigation, that Bury had failed to contact the second-shift dispatch supervisor when he had returned to the Kalamazoo terminal, as instructed in Qualcomm

¹¹ The Respondent, in the past, had contracted with G & D, an outside carrier, to transport some of its loads.

¹² Bury testified on rebuttal that his wife suffered chronically from diabetes and asthma and that her condition had worsened. At the end of the preceding February, Mrs. Bury had developed bronchitis, missing 18 days' work from her job with the local school system. Cortisone treatments given at the time had elevated her blood sugar, affecting the corneas of her eyes so that she could not focus. Bury explained that he rejected the proffered day routing because he had wanted to be at home during the day should an asthma attack necessitate taking his wife to the hospital. If necessary, someone was available to take her there at night while he was working, but he had felt the need to be with her during the day.

¹³ Bury explained that he had not told the dispatcher of his wife's illness because of a previous incident where "rumors had spread." When pressed as to whether it had been his responsibility at the time to have given an explanation to the dispatcher as his assigning supervisor, Bury replied, "If he would have asked why you are not going to, I probably would have told him, yes. I would have told him my wife is sick and I can't do it, but he said okay."

¹⁴ Overton's account of this conversation differed from Bury's in the following respects. First, when Overton, on hearing Bury's reason for refusal, had asked if Bury had given this information to the dispatcher. Bury's reply was that his personal life was none of the Company's business. Second, contrary to Bury's statement that he had been told that he had been suspended for 3 days, Overton stated that he informed Bury, with no reference to time period, that the Company was suspending him until it investigated the situation. Overton related that, earlier on March 5 after Bury had set out with his truck for Normal, he received a call from General Manager Reindl advising that Bury had been suspended pending investigation of his refusal to run a route. Accordingly, Bury was recalled on the Qualcomm and he returned to the Kalamazoo terminal where Overton then met with him.

messages sent to him. The letter continued that, once Bury did contact him, the supervisor had asked him to cover a daytime pickup route for Thursday morning advising that, "This change was needed due to another Driver calling off sick. You told him 'NO.' The Supervisor then explained in detail what the situation was and why we needed you to cover the other route. You again said 'NO, you would not.' This is considered a blatant refusal to work." The letter noted that the "above mentioned incident is grounds for immediate discharge under the 'Standards of Conduct' policy in the GATX Employee Handbook pages 21 through 25 . . . Item #2—Insubordination and also under the 'Uniform Rules and Regulations' in the GATX Drivers Manual page 21 Article #2, Item #2—Disobeying of orders from qualified personnel designated by GATX Logistics, Inc." Drought announced in his March 6 letter that, because Bury had violated these policies, he was terminating his employment with GATX Contract Carriers, Inc., effective that date. Bury received a copy of Drought's letter by certified mail a few days later.

During the next week, Bury went to see Overton at the Kalamazoo terminal, telling Overton that the reason he had not had anything to say on the phone was that he had been shocked about what had happened. Bury asked if Overton had told "them" what he had told him about his wife. Overton affirmed that he had.¹⁵

On May 20, 1998, approximately 2-1/2 months after Bury's discharge, Overton, at the Company's request, prepared a memorandum to Reindl memorializing his account of his March 5 and 6 conversations with Bury regarding the latter's refusal to run the day route. The memo noted that Overton had informed Bury that the Company was suspending him until it investigated the situation. Overton then asked if Bury indeed did refuse to switch routes. Bury confirmed that when asked to take the day route, he had answered, "No." Bury then told Overton that his wife had been ill and that he had to be at home to care for her. In answer to Overton's query, Bury stated that he had not explained his situation to Dispatch when asked to switch routes, because "he felt that it wasn't anyone's business about his personal life."

Overton's memo further related that when Bury had called him on March 6 to learn what the Company had decided about disciplining him, Overton read the letter of termination. When Bury had asked if there was any way they could work this out, Overton replied that Bury's refusal to switch routes without any explanation was "blatant insubordination," and that GATX Contract Carriers was terminating his employment effective that day, March 6.¹⁶

Dispatchers Sorenson and Miller described how and why Bury was selected for the March 5 day route. Sorenson testified that during his March 4 shift, driver Roy Hess had called in sick, unable to work his pickup run the next morning. Sorenson did what he could to cover Hess' route. Under U.S. Department of Transportation (DOT) regulations, drivers are permitted to operate their trucks for no more than 10 hours without having 8

hours of rest before again being sent out.¹⁷ Sorenson reviewed the schedules of his shuttle drivers to determine which of them would be returning to Kalamazoo in time to allow them to have 8 hours off before taking the 9 a.m. run.¹⁸ From Sorenson's review, having also, *inter alia*, checked the availability of Kalamazoo-based shuttle drivers Robert A. Harp, Dannie Field, Matt Nance and Timothy Roberts, only Bury could have returned in time to meet the DOT rest requirement before the 9 a.m. departure.

Accordingly, Sorenson sent Bury the four above-described Qualcomm messages. Sorenson explained that he had sent the second message, effectively rescinding the first, because he then had believed that he would be able to cover that route using G & D Transportation. When this arrangement initially fell through because it would not enable him to run the route on time, Sorenson sent Bury a third Qualcomm message directing that he call Sorenson when he got back to the terminal. Sorenson's fourth message, asking that Bury confirm receipt of the previous message, was sent because Bury had not been responding.

Sorenson sent his last message to Bury at 9:20 p.m. When Sorenson's relief dispatcher, Miller, came on duty at 10 p.m., Sorenson told him about Hess' illness and the Company's resultant need to cover the 9 a.m. route for that morning. Sorenson informed Miller that he had tried outside carriers and that he had gone through the schedule of GATX drivers to ascertain those who could be eligible to run the open route the next morning. He had found that Dennis Bury was the only Company driver who could be expected to return to the Kalamazoo terminal at least 8 hours before the scheduled departure time of the open day route. However, as Bury had been ignoring his messages, Sorenson had been unable to talk to him.

Miller explained that the Company schedule for its Kalamazoo-based drivers was set up to provide the dispatchers with ready access to drivers' routes and their times of departure and arrival from and at various destinations. This enabled the dispatchers to instantly determine their status. From that schedule, Miller saw that only four drivers—Harp, Field, Roberts, and Bury—were then running shuttles round trip between Kalamazoo to Normal that night, and that only Bury could return to the Kalamazoo terminal in time to get the mandated 8 hours' rest before taking the 9 a.m. day route on March 5.

According to Miller, although there were appreciably more day route drivers, who had not driven overnight, working out of Kalamazoo than there were shuttle drivers, these day route drivers generally could not have filled in because already assigned to day runs for March 5. Even on Miller's nocturnal third shift, many routes were being run, the number being dependent on production levels at Mitsubishi. Therefore, the Re-

¹⁵ The Respondent's general manager, Michael D. Reindl, confirmed that Overton had conveyed to management Bury's stated reason for refusing to take the route.

¹⁶ Overton testified that Reindl had made the decisions to recall Bury from his final March 5 shuttle run and as to how to cover what would have been Bury's shuttle route later that day.

¹⁷ The mandated 8-hour rest period between runs does not require that much sleep, but only that that much time pass between when the driver brings his truck back to the terminal and when he next departs.

¹⁸ The dispatchers did some schedule rearranging in the effort to make it possible for Bury to legally depart on the 9 a.m. run following his midnight return. Another day route driver was reassigned from his regular 9 a.m. routing to Hess' 6 a.m. run, thereby providing the designated shuttle driver with 3 hours additional rest time before filling in on the day route. The successive dispatchers on duty at the time, Sorenson and Miller, were anxious to cover the run using the Respondent's own drivers and trucks, rather than those of an outside contract carrier, like G & D Transport, so that it would be the Respondent, rather than the contractor, that was paid.

spondent's use of the remaining 14 Kalamazoo-based day route drivers for that purpose would have necessitated rotating the whole shift. Miller pointed out that it was more difficult to reschedule day drivers than shuttle drivers because the day drivers stopped at many locations, while the shuttle drivers only had one destination—Normal. Accordingly, it had been necessary to assign Bury to take the 9 a.m. route even if it took him out of rotation for the next night's shuttle run to Normal. Since time was pressing, with the relevant destination suppliers opening for business at 6 or 7 a.m., Miller had to be concerned only with serving the customer. In the past, where shuttle drivers had been reassigned to day routes, and thereby prevented from legally leaving later in the day on their regular shuttle runs, the resultant difficulties were resolved by someone higher in the Respondent's organization than Miller. Miller just was concerned with covering the next open route and with having the trucks leave on time. To accomplish this while still using the Respondent's drivers, Bury had been the Company's only alternative.

Miller's description of his conversation with Bury differed principally as to what Bury was told at the time as to why he was needed, since both he and Bury agreed that Bury, without stated reason, had refused to take the proffered day route. Miller related that, when Bury did call him at the Respondent's main office in Normal at around midnight (EST) on the night in question and asked what was up, Miller told him, "I need you to run a route at 9 a.m." Bury answered, "No, I'm not going to do it." Miller then informed Bury that driver Roy Hess had called in sick; that the Company needed to have his route covered; and that he was the only one who could legally run that route at the given (departure) time. Miller asked Bury to, "Please run the route. If you don't, that is refusal of a route." Miller iterated that that would be a refusal, which could lead to disciplinary action. Bury again said, "No, I'm not going to do it." While Bury might have said something more, all Miller could remember was his own response, that he had told Bury that he was very busy and that he had to go. Miller never intimated to Bury that his not taking the run would be okay. During this conversation, Miller explained the situation to Bury three times in repeated efforts to get him to take the route.¹⁹

Miller testified that because he knew the consequences of a driver's refusal to run a route, he had attempted to call Bury at home about an hour later but that no one answered and there had been no answering machine to take a message.²⁰

Miller thereafter orally reported Bury's refusal to take the run to Overton and to General Manager Reindl. He also sent a March 4 memorandum of the incident to his immediate supervisor at the time, Operations Manager Todd Drought. In the first paragraph of his memo to Drought, Miller described what Sorenson had told him about his efforts to cover Hess' route after that driver had called in sick. As recorded in Miller's memorandum, Sorenson's unsuccessful attempts included his talking to Overton; his checking with three there-named out-

side carriers; and his message to Bury to call Dispatch upon his return to the Kalamazoo terminal. When Bury did call Miller at 10:15 p.m. (CST)/11:15 p.m. (EST),²¹ Miller's memo reported that Miller then had told Bury, "We need you, Dennis, to cover a route," to which Bury had replied, "No." Miller then told Bury that, "Roy Hess is ill, and we could not find another carrier to cover the load. Also, you, Dennis, would be the only driver that would legally have a eight-hour break before Route 1204-03 departed at 9:00." Miller "then again asked him politely a second time, 'would you please cover Route 1204-03 departing at 9:00 and 1446-03 at 11:45,' he again refused." Miller's memo ended as follows:

Dennis Bury has been a problem driver in the past. He is one of the many at Kalamazoo that has nothing good to say about the company and the management staff! He always tries to put himself into situations that would require him to shut down in the middle of normal and Kalamazoo due to a delay at the shop or waiting on a trailer. He refuses to use his off duty card²² for such delays as previously stated.

No one use [sic] to refuse a route! Refusal of a route was subject to immediate termination! There are too many drivers in Kalamazoo that have gotten too far out of hand in the past year!²³ If Dennis does not receive any disciplinary action for not doing what was asked of him, this will set a standard for other drivers to do as they wished.

When the controversy over Bury reached Reindl, he asked Drought to investigate and to report back to him with a recommendation.

Drought testified that, under the Respondent's disciplinary investigations procedure, subject employees were suspended without date until inquiry was completed. Then, Reindl would make the final decision. Accordingly, Bury initially was suspended, not for 3 days, but for an unspecified period pending Drought's investigation.

When Drought finished his investigation, he made an oral report to Reindl summarizing the results of his inquiry, what he had learned from Overton, from Sorenson and Miller, from Miller's above memorandum²⁴ to him and from the Qualcomm records for Bury's truck for the March 4 run. Drought recom-

²¹ As will be discussed, Miller's memorandum contains a variety of exaggerations and misstatements. In this context, the Qualcomm record for Bury's truck shows that he actually did not return to the Kalamazoo terminal until 10:58 p.m. (CST), as opposed to the 10:15 (CST) time referenced in Miller's memo.

²² The Respondent gave off duty cards to each of its drivers to enable them to assume off duty status should they be delayed by some problem encountered on the road, such as a needed mechanical repair. Since, by using that card to show that, although in transit, they were not actually driving during that "down period," under DOT regulations, drivers could be permitted more worktime.

²³ Miller could provide no instances where Bury had engaged in the "problem driver" conduct complained of in his memo to Drought. In fact, from what he actually knew or could recall of Bury, Miller admittedly was not situated argue that the negative performance aspects he had attributed to Bury ever had occurred. Miller also could not factually support his representation that "there were too many drivers in Kalamazoo that had gotten too far out of hand in the past year!"

²⁴ Contrary to Miller's memorandum, Drought testified that he, personally, had not had any problems with Bury in the past and that none had been reported to him by the dispatchers. However, in conducting his investigation, he did not speak to Bury.

¹⁹ Miller testified that, prior to March 4, he had had a good professional relationship with Bury. Bury never had told Miller that he was a union supporter and Miller had neither seen Bury wear a union hat or logo, nor had he discussed the union campaign with him.

²⁰ Bury disputed Miller's statement that he later had called him at home. Bury pointed out that he, in fact, did have an answering machine, which was always on because necessary in his wife's work. Contrary to Miller, there was no indication on the Burys' answering machine that Miller had called.

mended to Reindl that Bury be terminated for having refused to run a route for no justifiable reason—a dischargeable offense.

Reindl, in conducting his review, had asked Miller about the Bury incident only after a chance encounter with him. Reindl admitted that, since he previously had not heard of any of Bury's negativisms as referenced in Miller's memorandum, he had recognized that certain of the allegations therein were not true. Accordingly, Reindl had passed off Miller's exaggerations as "a dispatcher's frustrations." Reindl also knew at the time that Bury, at a customer's behest, earlier had received a written commendation for services rendered. Reindl further had been aware that, although Bury had not given a reason to the dispatcher at the time that he refused to take the day route, he later explained to Overton that he had not accepted the run for the reasons associated with his wife's poor health. Reindl related that, while inquiry as to Bury's failure to respond to any of the above March 4 Qualcomm messages sent to him had been included in the investigation, he actually was dismissed for having refused, without explanation, to run a route.²⁵

The Qualcomm records for Bury's truck revealed that, on March 4, he pulled out from the Kalamazoo terminal at 12:23 p.m., Normal time, or 1:23 p.m., Kalamazoo time, and arrived at Normal at 5:16 p.m., central time, or 6:16 p.m., eastern time. Bury had left Kalamazoo on this run earlier than was his custom. Returning, these records showed that Bury departed from the Normal terminal at 5:49 p.m. (CST), or 6:49 p.m. (EST), and arrived at Kalamazoo at 11:58 p.m., Kalamazoo time. Since, as noted, Bury and the other shuttle drivers generally took ten hours to drive the round trip distance between Kalamazoo and Normal and Bury usually spent between 30 to 45 minutes at Normal while switching trailers, the period between his 1:23 p.m. (EST) departure from Kalamazoo to his 11:58 p.m. (EST) return there was within the established operating schedule.

5. Alleged unlawful threats to discharge other drivers

The General Counsel contends that, during a taped telephone conversation with driver Dannie Field,²⁶ Drought²⁷ twice unlawfully threatened to discharge Field and, through Field, any other employees who thereafter might engage in a work stoppage to protest Bury's having been disciplined. Drought's controversial statements made during this conversation are italicized below.

²⁵ No reliance is placed on the testimony of driver Robert A. Harp who, as a Respondent's witness, described two conversations he assertedly had had with Bury on or about March 5, shortly after the latter had refused to take the day route. In discounting Harp's above testimony, I note, in agreement with the General Counsel, that Harp admittedly did not inform the Respondent of his conversations with Bury until the day before he testified about them in this proceeding. Since Harp did not so advise the Respondent until more than a year after Bury's discharge, the Respondent's decision to discipline Bury could not have been based in any way on Harp's information. In addition, Harp's testimony to the effect that Bury had conceded deliberately delaying his return to the Kalamazoo terminal on the night in question so as to cause the Respondent to find someone else to take the open day route was unsubstantiated by the Qualcomm records for Bury's truck. As indicated below, these show that Bury had made the round trip to and from Normal in standard time.

²⁶ Field, employed by the Respondent as a truckdriver since September 1996, continued to hold that position at the time of the hearing.

²⁷ Drought, the Respondent's operations manager since 1995, voluntarily resigned in January 1999 to become a police officer in Normal.

Field testified that, on March 5, he had learned from other drivers, including Matt Nance, that Bury had been suspended for 3 days for refusing to take a route. According to Field, Nance, who did not testify, told him that he, too, had been asked to take the run but had turned it down. At the time, Field, like Bury, had been operating shuttle runs. When Field returned to the Kalamazoo terminal, he, Nance, and Timothy Roberts²⁸ called Drought. Field taped that conversation without Drought's knowledge, using equipment furnished for that purpose by Nance.²⁹ Although Nance and Roberts were present when Field spoke to Drought, only Field, who was holding the receiver, could hear Drought's words.

Summarizing the transcript of the tape, Field, after announcing himself on the telephone to Drought as Dan from Kalamazoo, told Drought that he was calling about Bury having then been suspended for 3 days³⁰ for not doing a route and "that the guys are thinking about standing up to it." Field told Drought that the guys were pretty upset with this suspension because they did not think it was right that Bury, who had not wanted to run that route, should be suspended for not taking it. Drought explained that this was the Company's policy everywhere; the Company had freight to pick up. Drought continued that:

[A]nother driver had called off sick, and we did all the changing we could to get everything covered and he (Bury) was the only one that had a legal break that was able to run that pick up route and keep it on time. And if we didn't cover it with him then we would have to give it away and Greg (Miller) explained that to him twice and he still refused to run it and gave us no reason for not wanting to run it. Just said no. He didn't explain anything. So I had no choice at that time. Now I had to give the whole thing away to G & D because nobody could run it up there. And had he ran the pickup route, I could have covered the shuttle from this end and we would not have lost . . . nothing. Now I lost two-day routes and a shuttle run that I had to give to G & D. So . . . I don't know what anybody could expect me to do.

Field pointed out that other drivers, such as Nance, had been asked to take the route but were not suspended. Field also de-

²⁸ Roberts, married to Bury's niece, was a driver with the Respondent from January 1997 until he resigned in May 1998 because of "conflicts with Overton." At the time of the hearing, Roberts was working elsewhere.

²⁹ Field explained that he had taped the conversation to learn from Drought, as the individual who had given the directive to suspend Bury, the reasons for his having done so. This was motivated by the questions assertedly raised "by so many employees" about Bury's having been disciplined. Since, as Field testified, Bury had not known about this taped phone call to Drought, the Respondent's "clean hands" defense to Bury's termination, amended into its answer, was rendered moot and the parties did not litigate whether proof of Field's taped call to Drought, without the latter's knowledge, should be excluded from the record as a violation of Michigan criminal law. However, even if the manner in which this conversation had been taped had violated state law, this still would not have precluded the use of this conversation to establish in a Federal tribunal other violations of Sec. 8(a)(1) of the Act developed during its course. As noted in 10 Moore's Federal Practice, § 400.12[6] (2d ed. 1996), "while state rules of *admissibility* . . . were controlling in the federal . . . courts . . . state *exclusionary* rules were not . . ."

³⁰ Although, as noted, the Respondent contends that Bury initially had been suspended, not for 3 days, but for the duration of the investigation, Drought did not correct Field's references to a 3-day suspension.

clared that although he, himself, had returned to the Kalamazoo terminal at around 1:30 a.m., he was not asked.³¹ Drought replied that neither Field nor Nance had returned to Kalamazoo in time to run the route. Drought corrected Field's statement that "the story is that the route was due out at ten o'clock," and Field's expressed opinion that he might have been able to leave at that time. Drought's response was:

That's not true. The route is due out a[t] nine and he was the only one because he was the first one to run the shuttle that was back on . . . scheduled time . . . and what actually happened he was the only one who would have been back in time to have a legal eight hour break and able to run it. And when they asked him to do it he said no and they told him that was the only option we had he still said no and didn't The bad thing is he didn't offer us any reason why other than no. He just said no. That's all he said to Greg.

Drought reassured Field that if there was "a good solid reason" why a driver could not take a route, such as having a doctor's appointment, that would be taken into account. However, when "you flat refuse to run something . . . that a whole nother [sic] story. And that's what went down and I don't think everybody has the whole story." Field then told Drought that:

[A] majority of drivers now, and that doesn't include some of the day drivers, they've been talking about not coming to work until this is over.

To which Drought answered:

And that would be a bad decision. But I know, from what you've just explained to me they don't have the whole story either. And, like I said, had he run the route I would have to give nothing away and we would have run as normal, And we have routes every day that we have to change. Just because you run the shuttle doesn't mean you (are) stuck on that we have the right to change you if things come about. We can't control everybody coming off sick, we don't have enough part-timers here to cover every little thing so changes do have to take place. We change routes down here every day

When Field stated his belief that the 3-day suspension then in effect for Bury was unfair, Drought asked:

What do they want me to do? I've got to service the customer and now I had to give all that away . . . I had to run the route from here with an outside carrier, so I lost a shuttle and two pickup routes to an outside carrier because I couldn't get anybody to run it.

In response to Field's statement that "the drivers are pissed," Drought replied:

I understand that but until they get the whole story, to look at the big picture then I guess they're going to be that way. And I just hope for their own benefit they don't pull something on me and all call in sick tomorrow because if

that happens, from what I'm hearing today, there's going to be a lot more ending up in the same boat.

Drought thanked Field for, at least, trying to get the facts, whether or not he agreed. He concurred with Field's statement that Bury had been one of the Company's top drivers; that he had come to work every day and that he never had been late. Drought told Field that he personally had not had a problem with Bury but that the rules were the rules. Drought concluded by telling Field that:

I hope it doesn't happen and people try to get the big picture first but if it does this, there will be consequences for those as well (parenthesized material and emphasis added).

Field told Drought that he would pass along what he had told him to the drivers, ending the conversation. The tape of this conversation later was given to Roberts as Bury's nephew by marriage.

6. Administration of the route refusal policy

The record reveals that Bury conceded in testimony that he had known that refusal to accept an assigned route was ground for dismissal; that, before Bury, no driver had refused to accept a run without giving the dispatcher valid reason,³² and that all other identified drivers, whether testifying as witnesses for the General Counsel or the Respondent, who did not accept routing assignments had been careful to immediately furnish the dispatchers with reasons for not taking them. It further is noted that, after Bury's discharge, the Respondent also terminated Greg Royer, another driver who did not take an assigned route for reasons which the Respondent deemed unsatisfactory.

Driver Harp testified that because, of mechanical problems, he had been one of the last of the shuttle drivers to return to Kalamazoo on the night in question. While at Normal earlier that evening, Sorenson had asked if Harp could do the 9 a.m. day run. Harp replied that his truck was being worked on in the garage. When the dispatcher asked if he could leave Normal within the next 15 minutes, Harp told him that he did not think so but would ask the mechanic. After checking with the mechanic, Harp reported to Sorenson that his truck would not be ready to leave for at least an hour. In response to Sorenson's query as to what time that would put him back in the (Kalamazoo) terminal, Harp declared that by the time he returned to the terminal and had his 8 hours off, he would be ready for dispatch sometime between 10:30 and 11 a.m. If that was acceptable to Sorenson, he would do the run. Sorenson told him that that would be way too late.

Burgeon testified that subsequently, on the night of February 24, 1999, on arriving at Normal with the shuttle run, a dispatcher told him that he had written up driver Joe White because of White's refusal to drive a day route.³³ He then asked if Burgeon could do it. Burgeon replied that he was not refusing the run. He was not feeling well and, when he got back to Kalamazoo, he would let the dispatcher know whether or not he could take the run. Burgeon explained that he had made a point of then telling the dispatcher that he was ill, but was not refusing a route, because he had not wanted to be written up. En

³¹ Field's Qualcomm printout for the night in question showed that he actually had returned to the Kalamazoo terminal on March 5 at 1:21 a.m. (CST), or 2:21 a.m. (EST). Accordingly, Field, contrary to his assertions to Drought, did not get back to Kalamazoo in time to have taken the 9 a.m. day route.

³² Dispatcher Sorenson explained that drivers have been excused from taking assigned runs to attend medical and dental appointments, graduations, and birthday parties.

³³ White, however, still was in the Respondent's employ at the time of the hearing.

route back that night, due to sickness, Burgeon had had to stop three times by the side of the road. When he returned to his base terminal, Burgeon advised the dispatcher that he could not run the day route because ill. He went to a physician the next day.

Overton testified, without contradiction, that Joe White, a Kalamazoo-based driver, had reported to him why he had declined to take a run. On February 24, Dispatch had called, asking if White would take a route that had to be covered from Kalamazoo. White had replied that he was on scheduled vacation and, therefore, not on the drivers roster for the day in question. He informed the dispatcher that, in addition to being off from work, he had prior commitments arising from a small computer business he had been operating out of his home. Driving that day would have caused him to lose money on his business. Because White was on vacation at the time, the Company had accepted his reason for not taking the run and did not press the matter further.

Overton further testified, also without contradiction, that the Respondent had terminated Greg Royer in September because he had refused a route. Royer had arrived at work early on the morning of September 16 to drive a day route. However, Royer's departure was delayed because the truck he was to use had not yet returned to Kalamazoo from Normal. Royer had informed Miller that he was not going to wait around; that he was going home. Royer then left, having given no reason other than that he was tired of waiting. In Overton's termination memorandum to Royer, which set forth the details of this incident and noted that his discharge was effective September 23, Overton pointed out that the truck and trailer had arrived at the Kalamazoo terminal at 6:03 a.m., shortly after Royer's 5:15 a.m. call to Miller announcing that he would not wait any longer and was going home.

The Respondent's general manager, Reindl, confirmed that, after Bury's termination, he had made the September decision to discharge Royer because he had left the terminal, having refused to wait for the truck he was to take out to arrive there. As this was not deemed a valid reason for refusing to run a route, Royer was terminated.

B. Discussion and Conclusions

1. Acts of interference, coercion, or restraint

From the testimony of driver John Burgeon, I find that the Respondent violated Section 8(a)(1) of the Act when, in January, Overton, in reacting to Bury's statement to Burgeon that he could not wait until April came so that there could be another (union) vote, told the two drivers that as long as he was supervisor, there wasn't going to be a union in there. As in *Gravure Packaging, Inc.*,³⁴ Overton's decree, that the Union's presence at that facility would be irreconcilable with his continued career there as a supervisor, with its "either the Union or him" import, could reasonably be understood (as being a threat) to use unlawful means, if necessary, to defeat the Union. His statement also constituted a threat that the employees' efforts to gain representation would be futile.³⁵

In crediting Burgeon's account of this incident over Overton's denial, it is noted that Burgeon, when he so testified, was

employed by the Respondent. The Board long has held that "the testimony of current employees, which contradicts statements of their supervisors, is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests."³⁶

While, as noted in *Flexsteel Industries*,³⁷ a witness' status as a current employee may be a single significant factor among the many used in resolving credibility issues, Burgeon's above account is further supported by the additional unlawful conduct attributed to Overton, considered below.

I accept the General Counsel's contention that Overton interrogated Bury in violation of Section 8(a)(1) of the Act by asking why Bury was so proud. Although Bury was known at the time to be an open union supporter, this questioning did not occur in isolation. By the time of this incident, the Board only recently had issued its decision adjudicating this Respondent's prior violations of Section 8(a)(3) and (1) of the Act for respectively having discharged an employee for his union activities and for having threatened its employees with unspecified reprisals for wearing to work jackets bearing a union's insignia.³⁸ Also, as found above, Overton, in the present matter, unlawfully had threatened, inter alia, that it would be futile for the employees to support the instant Union by telling Burgeon and Bury that as long as he was supervisor, there would not be a union in the Kalamazoo facility. Burgeon's credited account of this earlier incident supports Bury's testimony with respect to the interrogation. Since the Respondent already was aware of Bury's support for the Union, Overton had no valid purpose in obtaining the information sought from him. Finally, Overton did not reassure Bury that no reprisals would be taken against him if he supported the Union. Therefore, even if Bury, at least before the 1997 election, had worn union insignia to work and, as overheard by Overton, more recently openly had encouraged other employees to support the Union in any subsequent election, I conclude that Overton's questioning of him was unlawful.³⁹

The Respondent further violated Section 8(a)(1) of the Act by each of Drought's two threats, during his taped telephone conversation with Field, to take punitive action against the drivers should they proceed with a predicted work stoppage protesting the Respondent's having disciplined Bury for not accepting an assigned route. Field, in threatening a work stoppage by the employees unless Bury's then-suspension was lifted, had been engaged in protected Section 7 activity in opposition to actions taken by his employer.⁴⁰ Since Field was employed in the same job classification as at the time was Bury and was faced with the same work rules, Bury's suspension had been of consequence to Field and the other drivers who had facilitated the call and/or were present when it was made.

³⁶ *Flexsteel Industries*, 316 NLRB 745 (1995); *Gold Standard Enterprises, Inc.*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304, 1305 fn. 2 (1961), enf. in relevant part 308 F.2d 89 (5th Cir. 1962).

³⁷ 316 NLRB, supra at 745.

³⁸ See *GATX Logistics, Inc.*, 323 NLRB 328 (1997), more fully cited above.

³⁹ *Rossmore House*, 269 NLRB 1166 (1984), enf. 706 F.2d 1006 (9th Cir. 1985); *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985). Also see *Fiber Glass Systems*, 298 NLRB 504-506 (1990).

⁴⁰ *Yesterday's Children, Inc.*, 321 NLRB 766, 767 (1996), enf. in relevant part 115 F.3d 36 (1st Cir. 1997).

³⁴ 321 NLRB 1296, 1299 (1996). In *Gravure Packaging, Inc.*, supra, the supervisor in question had told employees that he would do everything in his power to keep the Union out.

³⁵ *Ibid.*

2. Bury's discharge

Although the General Counsel, as found above, has established that the Respondent has violated Section 8(a)(1) of the Act in certain respects and, as also noted, the Board previously has adjudicated the Respondent's prior unlawful conduct, the weight of the evidence adduced in this matter does not warrant a conclusion that Bury was unlawfully terminated. Rather, as argued by the Respondent, it confirms that he was discharged for insubordination pursuant to published Company policy because he had refused to accept and run a designated route without timely giving his employer a valid, or here, any reason for rejecting the assignment. Written work rules, quoted above, and distributed to every driver, lists among dischargeable offenses the disobeying of orders from qualified personnel designated by the Respondent. It is undisputed that dispatchers were supervisors whose work delegations could not be disregarded under the work rule and that Bury knew this when, in the manner described, he turned down the relevant day route. The record shows that Bury was the first driver to so reject an assigned run. Contrary to the General Counsel's argument that the work rule in question was too broadly worded to be applicable, Bury, when shown that regulation during his testimony, recognized it as covering his situation.

The record is clear that, unlike Bury, other drivers, such as Burgeon and Harp, who did not accept routings had been careful to promptly give the assigning dispatcher sound reasons for not taking them. Burgeon had been ill, requiring medical attention, while Harp, on the night of March 4, had reported to the dispatcher that because his truck was under repair at the Normal facility, he could not return in time to take the 9 a.m. route out of Kalamazoo. Even the uncontradicted evidence concerning driver Joe White, initially put forward as having received more favorable treatment than Bury, shows that White, on scheduled vacation at the time of the proffered routing and, unlike Bury, not on the roster of available drivers, should not have been offered that run in the first instance.

In concluding that Bury had not been subject to discriminatory treatment, it is noted that the General Counsel relied on two incidents which both helped and hurt his cause. In the first, the General Counsel adduced Bury's January conversation with Royer. This incident, where Overton was to have overheard Bury chiding Royer for not having voted for the Union in the last representation election, was put in the record so as to identify Bury to Overton as a still-active union adherent. In presenting this incident to establish that the Company had had reason to know of Bury's continuing support for the Union almost a year after the last election, the General Counsel, at the same time, also identified Royer to Overton as an employee who had not voted for the Union. Accordingly, it must be noted that when Royer, too, was fired the following September for not taking an assigned run because too impatient to await the arrival of his truck, a reason akin to that given for Bury's March discharge, Royer's thus-identified earlier vote against the Union did not insulate him from discharge under the Respondent's relevant work rule.

The General Counsel's second "double-edged" occurrence was Field's taped telephone call to Drought. While evidence of this conversation was necessary in order to establish the above-found 8(a)(1) violations, that Drought had responded to Field's threat of a concerted work stoppage in protest of Bury's suspension by twice threatening to discipline employees who should participate, this exchange also undercut Bury. This is

because Drought there was shown to have given Field valid detailed business reasons for disciplining Bury. These factors, expressed impromptu with no knowledge of the tape recording and before any unfair labor practice charge had been filed herein, corroborated the Respondent's later position at hearing. The credibility of the Respondent's reasons in the context thus provided was enhanced by their being cited while the controversy was still raw, while the final punitive action was not yet taken and by the fact that such reasons had not been presented against the background of any then-pending litigation. Drought spontaneously also had agreed that Bury had been one of the Respondent's top drivers, with good records for punctuality, attendance and work. Nonetheless, Drought's there-stated reasons for disciplinary action included an account of why it had been necessary for Bury to take the run rather than any of the Respondent's other drivers; the fact of Bury's insubordination; its resultant scheduling dislocations; and its adverse economic impact on the Respondent, including that the Respondent had lost two day routes and a shuttle run given to G & D. Drought emphasized that "the bad thing had been that Bury had not offered the Company a reason; he just had said no."

Bury's status was not improved because he later explained to Overton that he had rejected the run when assigned for reason that his wife's poor health required him to be available to her during certain hours. The time to have raised that point was when he turned down the assignment from that Company official. His first mention of a rationale came after he already had been insubordinate to the dispatcher. By the time Bury tried to explain himself to Overton, the damage stemming from his conduct had been done. The Respondent already had been obliged to quickly find a replacement for him without knowing why that had been necessary, and of losing money because G & D, and not the Respondent, ultimately was paid for the run. Moreover, from the Respondent's standpoint, this delay could well have detracted from the spontaneity, urgency and, ultimately, from the credibility of Bury's later attempts at explanation. This is particularly so since the record does not indicate that Bury had lost any worktime because of his wife's ailments and, contrary to his stated need to be at home for his wife during the day, he voluntarily had left on his March 4 shuttle run quite early in the afternoon.⁴¹ Logically, the Respondent's relationship with its major customer, Mitsubishi, could not have been benefited by having another carrier's truck appear at Mitsubishi's premises rendering services for which that customer had looked to the Respondent.

Bury's statement that he had not told Miller the reason he was rejecting the run was his concern for privacy does not vindicate his position. While the Constitution may protect certain privacies, it generally does not ensure an individual's right to work for any given employer; the employment relationship being a mutually voluntary arrangement. Bury, in disrupting this relationship by not accepting a legitimate work assignment for which he was being paid, had the burden of taking a timely initiative to furnish a worthwhile rationale for his unavailability. This is particularly so here, where even Bury admitted knowing at the time that, under the Respondent's work rules, an unjustified rejection of an assigned route was grounds for dis-

⁴¹ I accept Bury's representations that, for reasons of her health, he did have a need to be with his wife during certain daytime hours. Even so, this finding in the context of the record as a whole does not warrant a conclusion that his termination, however unfortunate, was unlawful.

charge. As indicated above, the need to provide suitable explanation also had been recognized by the Respondent's drivers Burgeon and Harp when they could not take allotted routes. Therefore, contrary to the General Counsel, in the applicable circumstances, I find no reasonable foundation for Bury's claimed interpretation of Miller's "Okay" to his refusal as meaning that Miller had excused him from that assignment.⁴²

The record of this proceeding contains appreciable testimony as to whether Bury, as directed, should or could have responded to Dispatch while in transit with respect to any of the four Qualcomm messages sent to him during the night of March 4. Bury's initial testimony on this point; that he could not safely reply while driving; that it would have been illegal to pull onto the shoulders of any of the utilized interstate highways for such purpose; that his return would have been unduly delayed by the need either to get to a truck stop or a rest area in order to safely answer the Qualcomm messages; that, being hard of hearing in the ear closest to the Qualcomm set, he could not readily hear the beeping sound which, with flashing lights, heralded the arrival of new messages; and other more exotic explanations, begs the question. Bury admittedly could have pulled off the Interstate at a convenient exit, communicated with Dispatch from the side of some more secondary road and promptly returned to the Interstate—all without undue delay. In so doing, he would have complied with the directives sent. While the messages were received within fairly short intervals, the last, requesting in transit confirmation, arrived with the customary blinking and beeping fanfare about 1 hour and 40 minutes before Bury returned to the Kalamazoo facility. Accordingly, Bury had had time to answer the last of these messages well before his rest stop 3-miles from the Kalamazoo terminal. The record does not indicate that Bury had had a history of disregarding Qualcomm messages, and he apparently was able to respond to the March 5 Qualcomm recall order by turning around and returning to Kalamazoo apparently in good time. Accordingly, Bury's explanations as to why he did not answer any of the Qualcomm messages sent to him on March 4 are not persuasive. To a dispatcher, trying at night to cover an open route for the next morning, the impact of Bury's refusal, when it came, was not lessened by this prior failure to respond while still in transit.

The General Counsel has suggested in the record that the Respondent's rigid insistence that the subject March 5 day route

⁴² While the General Counsel correctly argues that Miller's subsequent memorandum to Drought recommending that Bury be disciplined for his rejection of the route contained measurable previously noted hyperbole, I nevertheless credit Miller's account of their relevant conversation to the effect that Miller had explained to Bury why it was considered necessary for him to take the run and that he had tried more than once to persuade Bury to accept it. This is because, from the situation as it then existed, it was important to Miller, for his own sake, to get Bury to cover the route. The record shows that Bury, alone among the various shuttle drivers, for reasons stated, would return to the Kalamazoo terminal in time to take the 9 a.m. March 5 routing, and that none of the regular day route drivers could have filled in because otherwise assigned. If the Respondent had wanted to be paid for the run through the use of its own drivers and trucks, it was important in the brief remaining period to persuade Bury to take it. Therefore, Bury's testimony that Miller had excused his unexplained refusal to cover the route without uttering even a word of protest defies logic. It further is noted that both Drought and Reindl, in reviewing Miller's memorandum as part of the disciplinary process concerning Bury, had discounted the exaggerated assertions therein.

depart at precisely 9 a.m., so that only Bury could cover it, was pretextual. In support of this position, the General Counsel argues that since, in practical terms, the Respondent often had had to practice flexibility in the scheduling of its trucks because of built-in operating delays, its unyielding stance that the 9 a.m. run leave precisely at that time on March 5 so that only Bury could be situated to run it was suspect. According to this argument, the Respondent's focus on Bury had not been necessary since, had the run been only somewhat rescheduled, other drivers also might have taken it. In fact, the Respondent's trucks did experience travel delays occasioned by mechanical problems; by limited access periods to suppliers' loading docks; and by problems in locating and switching trailers. The General Counsel's contention, however, fails to recognize the difference between the Respondent's need to meet unavoidable obstacles occurring in the course of its business and the basic obligation to provide reliable service to its customer to the extent possible by dependably scheduling its trucks. In a time-sensitive enterprise,⁴³ it is not reasonable to find that, because the Respondent has had to absorb and compensate for divers scheduling interruptions arising from uncontrollable developments, it necessarily should be under some legal compulsion to not enforce timetables for its trucking operations even where it could otherwise do so. To impose such an obligation would be to mandate operational chaos.

Accordingly, I find from the above-credited evidence that, although the Respondent, as found above, has violated the Act in certain other respects, it did not violate Section 8(a)(3) and (1) of the Act by discharging Bury for insubordinately and without timely explanation refusing to accept an assigned route. In this regard, the record shows that Bury was neither unreasonably selected over other Respondent's drivers for the assignment, nor that the Respondent, in administering the relevant work rule, had subjected him to discriminatory treatment. Accordingly, even if the General Counsel had established a prima facie case that Bury was discharged in violation of the Act under *Wright Line*,⁴⁴ the Respondent has shown by a preponderance of the evidence that, consistent with its published work rules, it would have terminated him in any event for the lawful reasons established in the record.

CONCLUSIONS OF LAW

1. The Respondent, GATX Logistics, Inc., is, and at all times material has been, an Employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, Local No. 7, International Brotherhood of Teamsters, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By respectively threatening its employees that it will use unlawful means to keep out the above-named Union; that it will make its employees' efforts to become represented by a union futile; and that it will take disciplinary action if the employees engaged in protected concerted activities, the Respondent has violated Section 8(a)(1) of the Act.

⁴³ The record shows that unless the Respondent timely delivers the automotive parts to Mitsubishi, that assembly plant would be shut down.

⁴⁴ 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *Transportation Management Corp.*, 462 U.S. 393 (1983). Also see *Orbit Lightspeed Courier Systems, Inc.*, 323 NLRB 380, 400 (1997) (discharge of Mostafa Ali).

4. By coercively interrogating an employee concerning his union activities, sympathies and desires, the Respondent has violated Section 8(a)(1) of the Act.

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

6. The Respondent has not violated the Act in any manner not specifically found.

REMEDY

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴⁵

ORDER

The Respondent, GATX Logistics, Inc., Kalamazoo, Michigan, and Normal, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees that it will use unlawful means to keep out Local No. 7, International Brotherhood of Teamsters, AFL-CIO, or any other labor organization; that it will make its employees' efforts to become represented by a union futile; and/or that it will take disciplinary action if its employees engaged in protected concerted activities.

(b) Coercively interrogating its employees concerning their union activities, sympathies, and desires.

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

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

(a) Within 14 days after service by the Region, post at its facilities in Kalamazoo, Michigan, and Normal, Illinois, copies of the attached notice marked "Appendix."⁴⁶ Copies of the notice, on forms provided by the Regional Director for Region 7, 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 January 1997.

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

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

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

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

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

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

WE WILL NOT threaten you that we will use unlawful means to keep out Local No. 7, International Brotherhood of Teamsters, AFL-CIO, or any other labor organization; that we will make your efforts to become represented by a union futile; and/or that we will take disciplinary action against you if you engage in protected concerted activities.

WE WILL NOT coercively interrogate you concerning your union activities, sympathies and desires.

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

GATX LOGISTICS, INC.

⁴⁵ 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.

⁴⁶ If this Order is enforced by a judgment of the 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."