First Legal Support Services, LLC *and* Warehouse Union Local 6, International Longshore and Warehousemen's Union, AFL–CIO. Case 20–CA–29922–1

June 30, 2004

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND MEISBURG

On June 12, 2002, Administrative Law Judge James M. Kennedy issued the attached decision. The General Counsel filed exceptions and a supporting brief pertaining to the judge's recommended remedy and Order. The Charging Party filed similar cross-exceptions and a supporting 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, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, and to adopt his recommended Order.

This matter arose from an organizing drive by the Charging Party, Warehouse Union Local 6, conducted among the Respondent's bicycle and driver couriers working in the Respondent's San Francisco operation in November 2000.[2] As of November 24, the Respondent employed 20 bicycle and driver couriers assigned to its San Francisco office.[3] As found by the judge, the Respondent responded to the Union's campaign by committing numerous violations of Section 8(a)(1) and (3) of the Act. To remedy these violations, the judge recommended an Order with standard cease-and-desist language, reinstate/instate provisions and make-whole remedies for certain employees unlawfully mistreated, and the cancellation of the Respondent's unlawful conversion of its field employees to independent contractor status. The Respondent did not except to any of the judge's findings of violations or his recommended remedy for these violations.

The judge concluded that a remedial bargaining order was inappropriate under *NLRB v. Gissel Packing Co*.[4] because a majority of the Respondent's bicycle and driver couriers had not executed authorization cards designating the Union as their collective-bargaining representative. The judge found 10 of the 20 unit employees had signed authorization cards prior to the commencement of the Respondent's unfair labor practices on November 24.[5] In this connection, the judge specifically rejected an eleventh card, an undated authorization card purportedly signed by employee Casey Cook before November 24. The judge found that the Cook card had "too many infirmities to be regarded as trustworthy" for purposes of establishing the Union's majority status. In light of his conclusion that the Union failed to establish majority status on November 24, the judge also declined to award a nonmajority bargaining order. The judge relied on prevailing Board precedent reflected by *Gourmet Foods*, 270 NLRB 578 (1984). The General Counsel, joined by the Union, excepts to the judge's refusal to recommend a remedial bargaining order of any kind. They also except to the judge's findings pertaining to the Cook card. We agree with the judge and find no merit in these exceptions.[6]

[1] The General Counsel and the Charging Party have excepted to some of the judge's credibility findings pertaining to the judge's recommended remedy and Order. 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.

In the absence of exceptions, we adopt all the judge's unfair labor practice findings and conclusions.

[2] All dates are in 2000 unless other indicated.

[3] For the reasons stated by the judge, we agree with the inclusion of Dennis Kittelson in the bargaining unit of bicycle and driver couriers found appropriate by the judge.

[4] 395 U.S. 575 (1969).

[5] There are no exceptions to the authenticity of these 10 authorization cards.

[6] The General Counsel also requests the following extraordinary access and notice remedies. Specifically, the General Counsel requests that the Board order the Respondent to: (1) have the owner, Elisha Gilboa, and the regional manager, David Tait, read the notice to employees; (2) allow the Union reasonable access to the Respondent's bulletin boards; (3) give the Union notice of, and equal time and access to respond to, any address made by the Respondent regarding union representation; (4) afford the Union access prior to the election to deliver a 30-minute address to employees during their working time; (5) mail copies of the notice to all employees during their working time; (5) mail copies of the notice to all employees on the payroll, going back to the commencement of the unfair labor practices; (6) publish the notice in the San Francisco Daily Journal; and (7) supply the Union with the names and addresses of the unit employees.

Upon careful examination of the particular circumstances of this case, we find that the extraordinary remedies requested by the General Counsel are unwarranted here. In our view, such remedies go beyond what is needed to fully rectify the unfair labor practices committed against the Respondent's employees. Because these remedies are "extraordinary," it must be demonstrated, as a precondition for granting them, why traditional remedies will not sufficiently ameliorate the effect of the unfair labor practices found. See *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995) ("such remedies are necessary 'to dissipate fully the coercive effects of the unfair labor practices found'"). Neither the General Counsel nor our dissenting colleague has shown that traditional remedies are so deficient here to warrant imposing the extraordinary remedies requested by the General Counsel. In Member Meisburg's view, the traditional remedies supplemented by the broad order are sufficient in this case to ensure that the employees will have the opportunity to participate in a free and fair election. Nevertheless, Member Meisburg notes that the judge was incorrect in suggesting that

Initially, we adhere to established Board precedent on the issue of nonmajority bargaining orders. Contrary to our dissenting colleague, we are of the view that *Gourmet Foods*, supra, was correctly decided, and we would not overrule it. We, therefore, do not impose a nonmajority bargaining order in this case.

Thus, we must examine whether the judge properly rejected the Cook card for purposes of calculating whether the Union had attained majority status as of November 24. Without the Cook card, the Union does not have the card majority necessary for the issuance of a bargaining order. For the reasons more fully stated in the judge's decision, we find that the General Counsel failed to establish that the Cook card was executed on or before November 24. We agree with the judge that the uncertainty and confusion over the Cook card could have been cleared up in several ways, including having Cook, the card signer, verify the card and testify when he signed it and what he did with it after he signed it.

The judge found that the Cook card was an undated photocopy, and the date of execution could not be fixed extrinsically with any confidence. Cook did not testify at the hearing. Two different witnesses, Damon Votour and Charles Annen, offered two different stories regarding how the Cook card came into existence. However, there is no other witness testimony or identifying mark on the Cook card that connects the document to either Votour or Annen. Votour and Annen each testified that he gave an authorization card to Cook in November. Votour testified that Cook signed an authorization card during the second or third week of November and then Votour turned the card over to the Union prior to November 21. Annen testified that he gave a card to Cook and discussed it with him on November 24. Annen originally stated in his pretrial affidavit that Cook signed the card and then handed it to Annen on November 24. When he was confronted with his affidavit, Annen testified that the affidavit was in error because he did not recall if Cook had signed or handed him the card on November 24. According to his trial testimony, Annen had no idea when the Cook card had been executed. Finding no assurance from the conflicting trial testimony of Votour and Annen that the Cook card offered into evidence by the General Counsel was a card passed out by either Votour or Annen and executed by Cook on or before November 24, the judge discredited both card solicitors' versions.[7] As more fully explained in his decision, the judge simply had no collateral evidence (e.g. other witness testimony or an official Board time and date stamp on the photocopy) to authenticate the undated Cook card and establish when it had been signed.

Accordingly, we agree with the judge that a remedial bargaining order is inappropriate in this case because the General Counsel failed to establish the Union's majority status.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, First Legal Support Services, LLC, San Francisco, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER LIEBMAN, dissenting in part.

The Respondent answered its employees' exercise of their statutory rights with a torrent of unfair labor practices so egregious, and so clearly established, that the Respondent has declined to file exceptions to the judge's finding that "category one unfair labor practices" were committed here. The Supreme Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613 (1969), defined this category as involving "'exceptional' cases marked by 'outrageous' and 'pervasive' unfair labor practices. . . . of 'such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had'" (Citations omitted). My colleagues nevertheless refuse to issue a remedial bargaining order based on the judge's dubious finding that the General Counsel failed to establish the Union's majority support. My colleagues also turn a blind eye to the compelling need for special remedies to undo the lasting effects of the Respondent's misconduct. I respectfully dissent.[1]

In my view, the Respondent's violations demand special remedies. Further, the Board may and should issue a remedial bargaining order because the judge erroneously refused to count employee Casey Cook's decisive authorization card. Even assuming, however, that the General Counsel failed to establish that a majority of unit employees supported the Union, the Board still should issue a bargaining order.

I. THE BOARD MUST GRANT SPECIAL REMEDIES

The Board may order extraordinary or special remedies when the respondent's unfair labor practices are "'so

he was foreclosed from recommending special remedies because he was precluded from recommending a remedial bargaining order.

[7] Contrary to our dissenting colleague, any potential evidentiary problem with Annen's pretrial affidavit was cleared up during the hearing when the General Counsel recalled Annen as a witness to testify about the Cook card and to explain his pretrial affidavit on this subject.

[1] I join my colleagues in adopting the judge's unfair labor practice findings and the judge's issuance of a broad cease-and-desist order, for the reasons he states.

numerous, pervasive, and outrageous' that such remedies are necessary 'to dissipate fully the coercive effects of the unfair labor practices found.'" *Federated Logistics & Operations*, 340 NLRB 255, 256 (2003) (citations omitted). If ever a case satisfied this standard, it is this one.

"[N]umerous, pervasive, and outrageous" does not even begin to describe the Respondent's unfair labor practices. The found violations include the Respondent: forcing employees to sign independent-contractor agreements to strip them of their employee status; repeatedly threatening employees with discharge if they did not sign the agreement; actually discharging two employees because they supported the Union, and conditioning their reinstatement on signing the agreement; repeatedly threatening to close the facility if the organizing effort continued; promising employees additional benefits if they abandoned the Union; refusing to hire an applicant because his spouse was associated with the Union; threatening to discharge employees if they engaged in a strike; warning employees that discussing the Union was "harassment"; denigrating the Union and union officials; and threatening employees that their organizing effort was futile because, even if the "NLRB issues an order, for compliance, . . . , they bring that order to us and we say 'fuck your order' and then go to federal court for years."

With due respect to my colleagues, it is wishful thinking to conclude that the Board's traditional remedies, even supplemented with a broad cease-and-desist order, are adequate to permit a fair election. By its egregious misconduct, the Respondent demonstrated its intolerance for its employees' Section 7 rights—not to mention its disregard for the Board. Apparently still not satisfied that the employees got the message, the Respondent threatened that their organizing effort was futile: even if the "NLRB issues an order, for compliance, . . . , they bring that order to us and we say 'fuck your order.'" The Respondent thereby laid bare its determination to frustrate any attempt by its employees to exercise their statutory rights. It is clear to me that the extraordinary relief is necessary to counter the lingering coercive effects of this misconduct.

Certainly, the Board has issued extraordinary relief in recent cases of comparable employer misconduct. See, e.g., *Federated Logistics & Operations*, supra; *Excel Case Ready*, 334 NLRB 4 (2001); *Blockbuster Pavilion*, 331 NLRB 1274 (2000); *United States Service Industries*, 319 NLRB 231 (1995), enfd. 107 F.3d 923 (D.C. Cir. 1997). Accordingly, I would grant the special remedies sought by the General Counsel.[2]

II. THE GENERAL COUNSEL ESTABLISHED THE UNION'S VALID CARD MAJORITY

The Board may and should issue a remedial bargaining order because, as I will explain, the judge erroneously refused to count employee Casey Cook's decisive authorization card.

The relevant facts are straightforward. The Union obtained 11 signed authorization cards, including employee Cook's card, in a bargaining unit composed of 20 employees. Copies of the signed cards were admitted in evidence at the hearing. To authenticate the cards, the General Counsel in some instances called the employee-signer, e.g., employees Jerry Webb, Chris Young, and Damon Votour. In other instances, the General Counsel called the person who solicited the card from the signer, e.g., employee Young to authenticate Erik Freeland's card and employee Votour to authenticate the cards of employees Chris Williamson and Agostino Trolezi. The judge accepted 10 such cards, and made an affirmative finding that they were valid for purposes of establishing the Union's majority. The judge even accepted Trolezi's card, which was illegibly dated, based on Votour's testimony that he solicited the card before November 24. No exceptions have been raised before the Board regarding the authenticity of these 10 cards, or the judge's reliance solely on Votour's testimony to authenticate several of them.

Consistent with the above, the General Counsel introduced employee Cook's signed authorization card through direct examination of employee Votour. Votour testified that he handed the card to Cook, that he observed Cook sign the card, and that Cook then returned the card to him. Cook did not date the card, but Votour testified that he obtained the card from Cook in about the second or third week of November and passed it along to the Union prior to the filing of its petition on November 21. The judge admitted Cook's card into evidence over the Respondent's objection.

On cross-examination, Votour was confronted with the affidavit of another employee, Charles Annen, in which Annen stated that he provided an authorization card to Cook and that he also obtained the signed card back from Cook on November 24. Annen's affidavit was never admitted into evidence, but counsel for the Respondent

[2] Those remedies are listed in fn. 6 of the majority opinion. I would not require the Respondent to publish the notice in the San Francisco Daily Journal. The General Counsel's request that the Respondent mail the notice to all affected employees would make it unnecessary to publish the notice.

read the relevant portions to Votour. This led to the following exchange:

> Q. The question is very simple, Mr. Votour, could you explain why both you and Mr. Annen apparently contend that you handed to and received back, and observed the signature of Mr. Cook's card at two different times?
>
> A. I can't explain what Charles put in his affidavit, but as I said previously, I handed Casey the card and watched him sign it.

Following Votour's testimony, the General Counsel recalled Annen. (The General Counsel had called Annen to testify about other issues but, according to the General Counsel's brief, deliberately did not ask Annen about Cook's card because the General Counsel had concluded that Annen was mistaken as to this portion of his affidavit.) On recall, the General Counsel elicited from Annen testimony that he still believed he gave a card to Cook, but that he never truly recalled seeing Cook sign the card or receiving a signed card from Cook. No party called Cook to testify about his card.

The judge refused to count Cook's card. The judge commented that, "since the critical date here is the date of the first unfair labor practice, November 24, I would not normally be much concerned about the Votour-Annen discrepancy." But the judge was concerned about the discrepancy because, as he put it, "Cook's authorization card leaves much to be desired." The judge observed that the card was undated by Cook, and that Cook did not testify. The judge also recounted the circumstances applicable to all the cards—they were not originals, etc.—but the judge specifically stated, "I do not find the Cook card to be the product of [fraudulent] abuse." Nevertheless, the judge discredited *both* Votour and Annen regarding Cook's authorization card, and refused to count it.

The General Counsel and the Union argue that the judge erroneously relied on Annen's affidavit to discredit Votour's testimony as to Cook's authorization card. I agree. With respect to the factual issues of whether and when Cook signed his card, all the statements in Annen's affidavit were hearsay statements under Rule 801 of the Federal Rules of Evidence[3] at the time the affidavit was used to impeach Votour's testimony, because they were not prior inconsistent statements by Votour.[4] As a result, and irrespective of whether the Federal Rules of Evidence are binding on the Board, Annen's affidavit was of marginal significance on the issue of Votour's credibility. Votour, himself, effectively made this point when, upon being confronted with Annen's affidavit, he responded, "I can't explain what Charles put in his affidavit." The judge nevertheless treated Annen's affidavit as substantive evidence that contradicted and discredited Votour's testimony—but only as to the matter of Cook's authorization card. In my view, this was error.

The judge's reliance on Annen's affidavit is problematic, moreover, because the judge failed to articulate why Annen's affidavit necessarily contradicted Votour's testimony regarding the solicitation of Cook's card. In fact, it is entirely possible that both Annen and Votour solicited Cook to sign an authorization card and that Cook actually signed two cards, a suggestion that the General Counsel had made at the hearing. Alternatively, as the General Counsel concluded in his investigation, Annen could have been mistaken when he declared in his affidavit that he received a signed card from Cook. On recall, Annen confirmed this possibility. The point is that the judge discounted an otherwise valid authorization card based on a contradiction that may not have been a contradiction at all.

Moreover, even if there was a contradiction, it was a sidelight at best. There is no doubt Cook signed an authorization card; again, the judge specifically ruled out the possibility of fraud. The question of *when* Cook signed the card was the only potentially relevant discrepancy between Votour's testimony and Annen's affidavit. But, the judge, himself, discounted the significance of this discrepancy (and properly so) because under *either* Votour's testimony or Annen's affidavit the card was signed by November 24, the critical date for the Union's showing of majority support.

Last, the judge's rejection of Votour's testimony based on this minor discrepancy is wholly inconsistent with his acceptance of Votour's testimony in every other respect. The judge did not hesitate to rely on Votour's testimony about the cards of employees Williamson and Trolezi, or Votour's testimony as to his own card. The judge drew no adverse inferences based on the fact that neither Williamson nor Trolezi testified, although such an adverse inference is implicit in the judge's pointed observation regarding Cook's absence at the hearing. Indeed, aside from its being undated, all the additional circumstances surrounding Cook's card apply equally to all the other

[3] Fed.R.Evid. 801(c) defines hearsay as an out of court statement "offered in evidence to prove the truth of the matter asserted." Subsec. (d) removes certain out-of-court statements from the definition of hearsay, including a prior statement of a witness where the "the declarant testifies at the trial . . . and the statement is (A) inconsistent with the declarant's testimony." Under this rule, Annen's affidavit (hearsay) may not be used to impeach Votour, as the judge did, but only Annen (the declarant).

[4] Although Annen testified about soliciting Cook's authorization card, this testimony was presented on recall, after Annen's affidavit was used during the cross-examination of Votour.

cards found by the judge to have been properly authenticated. And, although Cook's card was undated, the judge similarly relied on Trolezi's illegibly dated card, authenticated solely by Votour's credited testimony.

While the Board does not apply the Federal Rules of Evidence in their most stringent form, this does not mean that the Board may, or ought to, ignore the Rules altogether. This is especially true here, where hearsay statements from the affidavit have been further called into question by the declarant himself, and where the declarant's testimony at the hearing is completely consistent with that of the "impeached" witness, who was otherwise credited in all respects.

For these reasons, I would reverse the judge and count Cook's decisive card as establishing the Union's majority. Accordingly, I would grant the remedial bargaining order that the judge, himself, found was so clearly warranted, if a card majority had been established.

III. A BARGAINING ORDER IS APPROPRIATE IN ANY EVENT

Regardless of whether the General Counsel managed to demonstrate the Union's card majority, I would find that a *Gissel* bargaining order is appropriate under the circumstances here. To grant such an order, I would overrule *Gourmet Foods*, 270 NLRB 578 (1984).

The Respondent does not dispute the judge's finding that the Respondent's "course of conduct qualifies as a category one level of misconduct." Nor does the Respondent contest the judge's findings that its violations were "so serious and pervasive that ordinary remedies will not reach them," and that its misconduct "rendered a fair election impossible." In these circumstances, I fully concur in the judge's conclusion that an "extraordinary remedy such as a bargaining order is the only way to deal with it." This is no less true, in my view, even if the Union was one card short of demonstrating its majority support.

It is true that, in *Gourmet Foods*, supra, the Board determined that it lacked the remedial authority to issue so-called nonmajority bargaining orders. However**,** I would overrule *Gourmet Foods* in line with the views expressed by former Chairman Gould in *Nabors Alaska Drilling, Inc.*, 325 NLRB 574, 574–577 (1998) (dissenting in part) (union came within a "hairsbreadth of a showing of majority support" before being undercut by a campaign of severe unfair labor practices).

In *Gissel*, the Supreme Court did not hold that the Board lacked the authority to issue nonmajority bargaining orders. Quite to the contrary, the Court accepted the notion that, "in 'exceptional' cases marked by 'outrageous' and 'pervasive' unfair labor practices," *Gissel*, supra, 395 U.S. at 613, the Board could issue a bargaining order, "'without need of inquiry into majority status on the basis of cards or otherwise.'" In *Nabors Alaska*, supra, former Chairman Gould urged the Board to reclaim its discretionary authority, asserting, "the situation here demands our revival of a potent remedy that the Board wrongly discarded 14 years ago." As he explained:

> [I]n many areas the Board lacks effective remedies to combat unlawful behavior by employers and unions and therefore cannot fully serve the Act's purposes. In some instances, only Congress can redress this situation. In the present case, however, I see no good reason to refrain from using a remedial tool that the Supreme Court and several courts of appeals have suggested or held is within the Board's authority to use under circumstances such as these. As the preceding analysis demonstrates, the Respondent's unfair labor practices are of a nature that precludes any rational expectation that a fair election among the employees can possibly take place in the foreseeable future. We should utilize our remedial authority to its fullest extent here and in future exceptional cases of outrageous and pervasive misconduct when it is reasonable to infer that an uncoerced employee majority would otherwise have chosen union representation. Not to do so would only reward this Respondent for its serious and extensive flouting of the Act, encourage others to engage in similar violations, and thus ultimately to undermine and frustrate the policies and purposes of the Act.

Nabors Alaska, supra at 577.

These views apply with equal, and perhaps even greater, force here. Not only has the Respondent demonstrated its disdain for its employees' Section 7 rights, it has expressly declared its intention not to comply with the Board's order. "The situation here demands our revival of a potent remedy that the Board wrongly discarded," now 20 years ago.

Jonathan J. Seagle and *Michael L. Smith, Esqs.*, for the General Counsel.

Michael J. Shelley, of Los Angeles, California, and *Wesley A. McClure*, of Braintree, Massachusetts, for the Respondent.

William H. Carder (Leonard, Carder, Nathan, Zuckerman, Ross, Chin & Remar), of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried in San Francisco, California, on January 8 and March 6–7, 2002, upon an amended complaint (the complaint) issued on August 28, 2001 (further amended December 14, 2001), by the Regional Director for Region 20. The complaint is based

upon an unfair labor practice charge originally filed by Warehouse Union Local 6, International Longshore and Warehousemen's Union, AFL–CIO (the Union) on November 28, 2000,[1] and amended several times thereafter. It alleges that Respondent, First Legal Support Services, LLC, has violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). Respondent denies the allegations. The complaint asserts that Respondent's misconduct is so serious and substantial that ordinary remedial steps are insufficient and that these unfair labor practices can be remedied only by the imposition of a bargaining order in addition to the usual cease-and-desist and make-whole remedies.

Issues

Respondent has decided not to defend the unfair practice allegations of the complaint, choosing at the conclusion of the General Counsel's case-in-chief to rest without presenting any evidence. It principally asserts that the General Counsel's evidence is insufficient to warrant the finding of any unfair labor practices. It also maintains that even if some unfair labor practices have been proven, a bargaining order is unnecessary as, in its view, the General Counsel has failed to prove that its converting employees to independent contractor status was unlawful. Furthermore, citing perceived irregularities in the Union's authorization cards, it contends a bargaining order is unwarranted, arguing that the Union never enjoyed majority status at material times.

This case concerns Respondent's reaction to the Union's organizing drive which began in November, covers three management meetings with employees, and scrutinizes two discharges, and an alleged refusal to hire. During all three of the meetings conducted by management, the principal topic was the conversion of its bicycle messengers from employee to independent contractor status. The General Counsel and the Charging Party assert that the conversion was nothing but a sham.

The complaint also recites a variety of 8(a)(1) conduct aimed at the employees. These include threats to discharge, threats to close the business, and promises and/or grants of benefits, all to coerce them to abandon their interest in the Union and to accept their conversion to independent contractor status.

All parties have filed briefs which have been carefully considered. Based upon the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a California corporation having offices in San Francisco, Los Angeles, Sacramento, Santa Ana, and Riverside. It is in the business of providing courier services and court records research for law firms and other customers. It admits that during the calendar year ending December 31, 1999, it provided such services valued in excess of $50,000 directly to customers located outside California. It further admits that it is, or has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Lastly, it admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

This complaint is directed at Respondent's San Francisco operation. It has an office located at 8th and Howard Streets. From that location it directs its field employees in the performance of their daily tasks. These individuals provide legal support services to law firms in six Bay Area Counties and their respective county seats, San Francisco, Santa Clara (San Jose), San Mateo, Alameda (Oakland), Marin (San Rafael), and Contra Costa (Martinez).[2]

In the third week of November 2000, Respondent employed 20 field employees who worked out of the San Francisco office. Respondent characterizes them as bicycle messengers, drivers, and court researchers. In large part, these three classifications are interchangeable although some bicycle messengers are not experienced in court research. However, the two San Francisco court researchers during that time were also bicycle messengers. All three of these classifications worked closely with one another, passing and picking up deliveries to and from each other both in the field and at the office. All three are subject to the radio directives of the dispatcher, Romana Macalinao. The drivers, having a longer range than the bicycle messengers, made deliveries outside the city of San Francisco, driving to nearby counties to perform their deliveries. These individuals did court research in the outlying county seats and also performed some process serving. When doing research, the two[3] court researchers took directions from the research department supervisor.[4] Regional Manager David Tait[5] regards them as part of the office staff. Clearly they are not office staff, as they perform their duties in the field.

In addition, Respondent employs individuals in a capacity known as "in-house." Persons performing this task are officed in a specific law firm and remain at that location throughout the day. These individuals, essentially coordinators, receive assignments directly from the law firm's legal secretaries, and in turn contact Respondent's office by computer message or telephone. The bicycle messenger then picks up or delivers items to him or her. In November 2000, only one law firm was being served in this fashion, Lillick & Charles, a large corporate practice located in the Embarcadero district. The in-house at Lillick & Charles at that time was Dennis Kittelson, who was filling in for the regular in-house, Meredith Crawford. Crawford had been temporarily assigned to administrative duties at the 8th

[1] All dates are in the year 2000 unless otherwise indicated.

[2] The seventh Bay Area County, Solano (Fairfield), was not mentioned, perhaps being served by Respondent's Sacramento office. Solano County's largest city, Vallejo, sits on the northeast end of San Francisco Bay, just a freeway commute to Oakland/San Francisco, but Fairfield is much closer to Sacramento.

[3] Usually two in San Francisco, according to Tait, but the record shows that there were three, Sam Roberts, Charles Annen, and Damon Votour who performed the task in San Francisco. All rode bicycles.

[4] The court research supervisor job during this time seems to have been unfilled although Irene Livai, may have been performing its tasks. At one point, Horacio Dimanlig also performed that duty.

[5] Tait's region is every office in California except Los Angeles. Therefore, he has oversight, in northern California of San Francisco and Sacramento, and in southern California of Riverside and Santa Ana.

and Howard headquarters. She did not return to Lillick & Charles until early 2001.

In late November 2000, the office manager for San Francisco was Brian Malouf.[6] He was later succeeded in mid-2001 by Andy Lazalde. Lazalde, originally hired as the process server manager, says that in November 2000 he was the assistant office manager.

The San Francisco Bike Messengers Association (SFBMA) is a loose organization of bicycle messengers. Apparently one can be a member simply by being a bicycle messenger; some pay dues, many do not. One of Respondent's bicycle messengers, Damon Votour, was or had been, the president of that association. A few years earlier, the Union, which had an office on 9th Street, not far from Respondent's office, had provided the SFBMA with office space and a telephone, for the apparent purpose of utilizing that group as an organizing steppingstone. By mid-November the Union had succeeded in obtaining sufficient authorization cards to support a petition for a representation election at one of Respondent's competitors, Express Network, and it filed its first petition with the Regional Office on November 16.

Tait had previously been Express Network's regional manager covering San Francisco and other locations. Although Tait denied it, it is clear that he was aware of the organizing at that company because of the small number of employers in the industry and his close connection to Express Network. Indeed, at the November 25 meeting, he is quoted as admitting that one of the reasons Respondent decided to convert its messengers to independent contractors was because it was afraid of the organizing drives involving both itself and Express Network.

During the first part of November, union official Fred Pecker gave a number of union authorization cards to Votour. Votour passed several out and on November 10, bike messenger Chris Young obtained the signature of Fred Harris, also a biker. Young signed his own card on November 15 and biker Jeff Webb signed on November 16.

Almost immediately after the Express Network petition was filed, Respondent's employees began hearing from the office that it was going to convert them into independent contractors. Already spurred by self-interest, other employees responded to that rumor by signing more authorization cards. Eventually, Young returned a number of cards to Votour and he in turn gave them to union organizer Jerry Martin.

Martin filed an election petition with the Regional Office on November 21 (Case 20–RC–17636), seeking a unit of Respondent's bike messengers and drivers. He did not, however, support the petition with the original cards, using photocopies instead. Counsel for the General Counsel have stated that during the time in question the Regional Office was accepting photocopies in lieu of originals. They now report that the originals from which the photocopies were made can no longer be found. The copies in evidence are Martin's file copies which he had made sometime earlier, perhaps at the same time he made the photocopies to support the petition. Curiously, the photocopies used to support the petition were not offered in evidence either, although if handled properly they would have been date-stamped, assuming that the Regional Office was following standard procedure.

One of the cards, that of Casey Cook, is undated and another, that of Agostino Trolezi has a marked-over month. In addition, there is conflicting evidence regarding who solicited the Cook card and when. Votour says he solicited it on November 21; Annen's affidavit says he solicited it on November 24, giving some credible detail about the circumstances. Annen testified that he had uncertainties about the accuracy of what he reported in his affidavit, but acknowledges that he did not register them with the Board agent. He now says he believes the affidavit to be mistaken. Cook was not called and we do not have the benefit of his recollection.

Martin testified that he believed he had given the original authorization cards to the Board agent, but was not entirely certain. Two messengers, Charles Annen and Sam Roberts testified that when the Board agent interviewed them in April 2001, he showed them the originals of their cards and asked about the circumstances of their signing. As a result, counsel for the General Counsel have stated for the record that the Board agent has no recollection about the original cards nor were they found in the Regional Office safe. The intensity and the length of the search has not been otherwise described for the record.

Nonetheless, because a witness authenticated each of the eleven photocopied cards and asserted that they were accurate copies of the original, I received them in evidence, being obligated to do so by Fed.R.Evid. 1003. This is not to say that I do not have any reservations about the weight to be given them. This issue will be discussed in more detail, infra.

A. Votour and Washington are Discharged and Rehired

Damon Votour testified that on November 24 (a Friday) that he had a conversation with Andy Lazalde, the assistant office manager in the office. According to Votour, Lazalde presented him with a choice, either sign an independent contractor agreement, or be fired. He testified: "He said that he was told that if we didn't switch, sign the papers to become an independent contractor, that my services were no longer needed, and I said, '[D]oes that mean I'm fired?' and he said, '[Y]es.'"

Votour then testified that on November 26, about 10 a.m., he had another conversation with Lazalde. Since November 26 was a Sunday, I believe Votour to be mistaken about the date, as the conversation no doubt occurred on Monday. Nevertheless, the two conversations straddled the November 25 meeting described below. According to Votour, the following occurred during his second conversation with Lazalde:

> WITNESS VOTOUR: [Lazalde] told me that he would hire me back, but it would have to be under pretense that I was an independent contractor, and that I would have to sign the papers, and that he never really wanted to fire me to begin with.
>
> Q. And did you then sign the independent contractor papers?
>
> A. Yes, I did. But as I put at the top of it, "signed under duress and protest."

[6] At some point, not shown in the record, Malouf became the assistant regional manager. In that capacity he executed an affidavit which is in evidence.

Votour then returned to work and has continued to work as a bike messenger since that time. Lazalde did not deny Votour's description of what occurred.

Kai Washington was another bicycle messenger. He signed an authorization card on November 17. He recalls receiving a radio page or message advising him of a meeting concerning the National Independent Contractors Association (NICA) and the independent contractor issue. He attended the November 25 meeting and says that shortly thereafter[7] he had a conversation with Lazalde in which he told Lazalde he was not going to sign the NICA agreement because he understood from organizer Jerry Martin that the entire concept of converting employees to independent contractors was illegal. He testified: "[Lazalde] basically told me that he would have to terminate my employment, and he asked for my radio, and I handed it to him and I left."

A few days later Washington, accompanied by Martin, someone he called "Punk Rock Jim," and possibly Chris Young, returned to the office for his paycheck. Martin was barred from coming into the office.

More than a week later, after discussing the situation with Martin, Washington called the office to see if he could get his job back. Lazalde agreed that he could return if he signed the NICA agreement. Washington told Lazalde he would, but explained that he could not return to work right away, as he had suffered some burns while working on his car's radiator. Lazalde told him that was okay and he could return when he was ready. When the burns had healed sufficiently, about December 11, he returned to the office with a doctor's slip and attempted to sign the NICA contract under protest. Dispatcher Romana Macalinao told him that was not acceptable. As a result he signed it without any written reservation. He worked for about 3 days, until December 14, when Macalinao told him he was being discharged because of his attendance record.

The attendance issue had come up much earlier. Washington lived in Oakland and commuted from that city to San Francisco via the rapid transit system, BART. BART prohibited passengers from bringing bicycles aboard during commute hours. As a result, Respondent had earlier reached an accommodation with him. Washington tried to explain this to Lazalde, but Lazalde would not change the decision. Washington pursued the matter a little further and Lazalde told him, "[T]he main—the real reason was because Dave Tait specifically wanted—wanted to get rid of somebody, they were looking to get rid of somebody, and that it was because I didn't sign the NICA contract in time. And he said that he tried to actually salvage my job for a while, and Dave Tait actually told him to terminate my employment weeks before that . . . ." This testimony stands unrebutted.

Washington has not worked for Respondent since that time.

B. The Meetings of November 25 and 29

According to bike messenger Jeff Webb, about 1-1/2 weeks after he signed his authorization card on November 16, he, like Washington, received a pager message advising him of a company called employee meeting to discuss the independent contractor issue. The meeting was actually held on Saturday, November 25. Thus, the pager message which he received probably occurred within a day or so after the Union's election petition was filed on November 21.

Webb surreptitiously tape-recorded most of the meeting, although the meeting continued after the tape ran out. Webb authenticated both the tape and a typescript of the tape. I have reviewed the typescript, comparing it with the audio, and have determined it to be reasonably accurate. Both are in evidence; see General Counsel's Exhibits 5 and 6.

Tait announced that Respondent had decided that its employees would join the National Independent Contractor Agency (sic). He said that Respondent's owner had determined that his only alternative was to go with NICA, which could supply substitute insurance which would allow Respondent to remain in business. He painted a picture describing the dire consequences an accident might have, not only on the messengers, but on the Company as a whole if a large judgment were entered against it. He concluded by saying, "I find myself being here for another 20 years, this is where I'm gonna our raise my children, pay my mortgage. I want to ensure that I'm going to have a job next year, 5 years, and 10 years down the road. The only way I can do it, the way I see it, is to convert to NICA. I don't have a choice. That is the way the ownership have decided to handle their insurance."

The typescript also shows that Tait told the employees that Respondent's owner, Elisha Gilboa, had determined that he could no longer afford to pay for workers' compensation insurance. He asserted that workers' compensation insurance was so costly that it didn't leave Respondent with a sufficient profit to remain in the industry.

He then introduced a NICA representative, who on this record was only named "Bob." The NICA representative sought to explain what the conversion to independent contractor status would mean to each of them and explained the benefits of NICA membership. He embarked upon an explanation of what NICA was, how it operated, and what benefits it offered to its members. He explained that for a weekly fee of $19.75, NICA offered its independent contractors occupational/accident insurance coverage.[8] It also would serve as a payroll agency, directly paying the messengers biweekly based upon Respondent's contributions to NICA's payroll system. Membership also allowed for assistance with each member's State and Federal tax returns, allowing for a withholding to make the quarterly payments to the tax agencies. It also offered assistance in preparing the annual tax returns.

Toward the end of the meeting, biker/court researcher Chris Young asked Tait if the employees were being required to convert to independent contractors because the Company was afraid of the union drive. He also asked Tait if the conversion was due to the Company's fear of the organizing drive at the

[7] Washington testified that his conversation with Lazalde occurred the day after the NICA meeting. Since that was on Saturday, November 25, I believe him to be mistaken. More likely, this conversation occurred on Monday, November 27.

[8] Tait announced that Respondent would offset the weekly fee by a $100 increase in monthly remuneration for all of the bike messengers. The drivers were to be handled somewhat differently, because the program was said to be slightly different for them.

competitor, Express Network. Young testified that Tait answered, "[Y]es," to both questions. Webb, Votour, and Roberts all corroborate him. By that time Webb's tape had run out. Tait never denied the accuracy of their testimony.

A second meeting was conducted on Thursday, November 29. Webb surreptitiously tape recorded it as well. The meeting was conducted by Elisha Gilboa and he introduced Tom McGrath as the owner of NICA. Gilboa amplified what Tait had said before. He repeated that insurance was the primary reason for the conversion. He also tried to persuade the couriers that conversion was to their advantage, claiming that in many cities he had couriers who worked for more than one company, implying that the same flexibility would be available and beneficial to the San Francisco staff. There was a short debate regarding whether that would be allowed, or whether what Gilboa was saying was inconsistent with what Tait had said earlier. It soon became clear that Respondent wanted the messengers to be available to Respondent to the exclusion of outside work; it would continue to pay them showup time to force them to be on hand when Respondent needed them. According to Gilboa, no one would lose any pay in this changeover.

At one point, an employee began a discussion concerning whether they could sign the independent contractor agreement with language of reservation, such as "under duress" or "under protest." The employee explained that they had been given no time to make the decision. Gilboa replied that he did not want them to sign under duress, going on to say, "No, what I would really like . . . my colleagues is [sic] to explain to [you] and hopefully be able to convince you. If I don't accomplish that, then you can make a decision or you can tell me, 'You know it did not convince me, I don't buy what you're selling me. I don't care [for] what you want. But I will sign it anyway' or you can tell me, 'No, I don't want to sign.' And then you will go and work for a different company . . . then it's okay." An employee responded: "So, we'll get fired if we don't sign it, is [that] what you're saying?" Gilboa replied: "Yes."

Another employee[9] then interjected, "So we'll get fired if we don't sign it, well, I already got fired once this week. Again, one week later here I am again. That's a shame." Gilboa then went on to say, "It's on the same issue. We need for our peace of mind. I need to make sure that I can provide insurances. Right is right. If something going to happen to you, and you're not part of NICA in a legally [sic] the way. Unfortunately, we don't have insurance to cover you. It's a matter of life or death for [the San Francisco] office."

C. Christopher Atkinson

Christopher Atkinson was a bicycle messenger and process server who had worked for Respondent during 1999 and early 2000. While with Respondent he had performed process serving, court filings, and performed court research. In January 2001, in the course of his subsequent employment with another firm, he had run into Meredith Crawford as she served as the in-house at Lillick & Charles. They had previously worked together both at another firm and for Respondent. She had been his boss at the other firm and was very familiar with his capabilities. She told him that she thought he would be the perfect person to replace her at Lillick & Charles, as she expected to be transferred to another law firm. They had several telephone conversations about this subject and on January 26, 2001, he telephoned her in a continuation of that discussion. During the call Crawford told Atkinson that the Company wanted him and asked how much money he would be willing to take. They haggled. He jokingly said that he wanted $30 an hour, to which she responded that she didn't know about that much, but half that would be fair, $15 an hour. Eventually, they settled on a salary of $2300 per month plus a percentage of the gross of the Lillick business.

She told him that he would need to dress well and train for a week on the computers at the office and another week at Lillick. She told him he was to report to the office at 9 a.m., Monday, January 29, 2001. He agreed.

On that Monday, he reported about 15 minutes early. He spoke first to Romana Macalinao who told him to wait. About an hour later, David Tait came out and asked him to wait some more. Eventually, Tait told him that they were extremely busy and he did not have anybody to help train him. Tait asked him to come back tomorrow or the next day, saying, "We want to get you started the next day or two, but we can't—we just don't have enough extra people to get you on a computer right now."

That same morning, January 29, 2001, an article had appeared in the San Francisco Daily Journal, concerning the organizing drive at Express Network. It suggested that union organizing may have caused Express Network to have gone out of business a week earlier. In addition, the article included a photograph of Maria Atkinson, Christopher's wife. Also a bike messenger, she is shown posing on her bicycle. The cutline under the photograph says that she had been spat upon by the Express Network dispatcher. The story recites employee claims of harassment because of their union organizing efforts and further observes that Maria Atkinson had reported the spitting incident to the NLRB.

Respondent did not call Atkinson back to complete the hiring process. Atkinson heard nothing further until he called Crawford about 3 days later. He testified that Crawford "sounded like she was very angry, and she said that they did not want to hire me because of our—they thought that I was involved with the Union. They saw my wife's picture in the Journal, and they didn't want to get involved with anybody that had union ties." Atkinson responded that he didn't have any union ties and that his wife had just happened to get her picture taken.[10] He asserted that the article didn't have anything to do with him at all. His appeal was to no avail. He realized then that he had been dismissed on the very day that he had appeared for work.

Tait denied any knowledge of union organizing elsewhere in the industry in San Francisco. He also denied any knowledge of stories on that subject printed in any local newspapers. His denial is rejected as entirely improbable. Furthermore, he was

[9] It seems likely that this employee was Votour, as his discharge/rehire followed the pattern described here.

[10] Christopher and Maria Atkinson had been married about a year at the time the article was published. It is reasonable to infer that Respondent, through Crawford, was aware of the marriage.

most unimpressive on the witness stand with regard to this matter. His presentation was clipped and defensive. I find that he not only was aware of the organizing at Express Network, I also find he had seen the Daily Journal article on the morning it was published. That newspaper is a mainstay for the legal profession in the Bay Area. Indeed, I further find it was that article which caused Tait to stop dealing with Chris Atkinson that day.

D. The Meeting of April 19, 2001

Both Tait and the members of the union organizing committee had their own reasons for wanting a meeting in mid-April 2001. Tait had heard that some employees were unhappy with the NICA situation and were considering a strike. The organizing committee was concerned about the recent discharge of bike messenger Sandro Mascarenhas. As a result, about 5:30 p.m. on Thursday, April 19, 2000, Tait conducted a staff meeting. There was some misunderstanding concerning the purpose of the meeting and who the attendees were supposed to be. Members of the union organizing committee were present, thinking they were going to be discussing the Mascarenhas discharge and they were initially concerned that nonmembers of their committee were also present.

Most of the meeting was surreptitiously recorded by court researcher Charles Annen on a voice-activated microcassette recorder. Both the cassette and a typescript are in evidence as General Counsel's Exhibits 13 and 14. Shortly after the meeting, Annen gave the cassette and the recorder to union organizer Jerry Martin. Shortly afterwards, Martin began listening to it while sitting in his personal vehicle. He was interrupted by a cellular telephone call. Unfamiliar with the operation of the device, he mistakenly set it to "record," instead of turning it off. As a result, a portion of the meeting was recorded over by the cellular conversation. That portion also appears in the typescript. It is readily separable from the meeting itself.

As can be seen from the typescript, beginning on the bottom of page 2, Tait has some issues with the employees. He says he didn't want to call the meeting, but had heard through the grapevine that he had a disgruntled labor force. He said that made him "nervous." He observed that he knew people were still having issues with the NICA independent contractor situation, but said there was nothing he could do about it. He did not want the "meeting to go down that road," observing that the matter was in litigation. He said, "[I]t's in the courts, nothing you say to me or I say to you, is going to change anything 'cause my owner is going to stand hard where he is regardless. This whole company can shut down tomorrow and he is not going to change his fuckin' mind.'" He asserted that further discussion of the topic would be a waste of time.

He then said he believed some other issue was bothering them. "What bothered me, from a management point of view, was that my labor force was going to strike without calling me up and saying, 'Hey, Dave, we got an issue, do you feel like listening to us or should we just tell you to fuck off and strike.' . . . You give me that phone call, I'm going to respond. I'm going to sit down and I'm gonna give you that time . . . . But I'll tell you that I got upset enough to the point, if my labor force ever wants to strike without trying to settle the differences with me first and giving me that respect, you might as well consider it your last day of employment. I'm not going to put up with that shit. . . . I wouldn't treat you that way and I don't expect you to treat me that way."

He continued in a similar fashion:

> Now [if] we have a meeting about something that is your concern and we can't settle it and you feel adamant and you feel strong and you still decide to strike, there may be a soft part in my heart, if I see any validity toward your concerns. But if I feel that you're just creating problems and you're a burden to me, the inevitable is going to happen. We are not a union organized company. We are not. I know some of you want, or all of the want it to be, but the bottom line, we are not. The word strike amazes me because you can't strike if you aren't the union. [Interrupted by an employee who disagrees.] Well, you can if you want but I mean . . . . Yeah, I mean you can call it a strike. I mean you can call it anything you want. But the bottom line is I will terminate anybody and everybody who strikes. I'm 100 percent prepared to do so. I've got three companies in the city, willing to back me up. Do my work, yes, bicycle messengers included, already set up. I got five drivers coming in tomorrow from one end. Five drivers coming from another end. I could fly up a truckload of messengers . . . . You guys are not going to disrupt my business. It's not going to happen. I'm raising a family, I'm paying a mortgage, I got car payment[s]. So do ten or twelve other people in this office. I'm not going to allow somebody to fuck that up, without giving me the opportunity to resolve the issues verbally in the meeting first. So I was upset, I have aired it to you guys, you understand why I got upset? The floor is yours, why the hell are we striking?

At this point there was some commentary from the floor that related to the discharge of Mascarenhas and whether it was appropriate to have noncommittee members present. Eventually, the conversation turned to Tait's claim that he had never heard of the union organizing committee until the day before when he had been asked to go down to the union hall. When an employee asked what was wrong with that, Tait replied, "What's wrong with that? I'll tell you the same thing that's wrong with you asking my employees or labor force or management to leave this room. This is my company. I run it. There is no Union. I am the last say in this office." An employee then asked if they were being paid for their time at the meeting, cajoling Tait to "meet us halfway." Tait replied, "[M]eeting you halfway is giving you the opportunity to salvage your job right now in this meeting. Because you can walk out this door. You guys can all unite together and strike. Tomorrow, next day, next week, next month, bottom line, what you created, a jobless day. That is what you create. Every single one of you." An employee asked if Tait had just threatened to fire them and he responded, "Absolutely, absolutely."

Tait then tried to turn the matter in a different direction asking an employee (presumably Charles Annen) if he had threatened to strike. The employee responds that he had not and another employee asserts that he didn't even recollect anybody ever using that word. A third employee said, "We didn't even use that word. What are you talking about?"

Tait then claimed to have a list of eleven people in his back pocket and said, "[Y]ou guys are harassing them." That was disputed vociferously. When challenged, Tait refused to reveal who the employees were, saying it was probably members of the committee who were committing the acts he was hearing about. When told that the entire committee was there in the room, he tried to say that it was some other committee. ("Not necessarily your committee. Whatever committee.") Tait went on:

> I don't know how the union works. They tell me I'm on the organizing committee of the Union and I don't know all . . . and the technical terms, if we wanted to throw them out right now we could use, IC, labor force, we could use employees, we can use fire, we can use terminate contract, ... You['re] taking this to [a] level that it doesn't exist at. This is not a union company. This is an "at will" company that hires employees by the California state law "at will" and subcontracts to independent contractors. That is what this company does. If an independent contractor purposely prevents, or does something malicious to affect my business during the day, that person will no longer get jobs from us. That is why Sandro was fired.

Tait then asserted that Mascarenhas had been fired because he turned down work because it didn't pay enough. He contended Mascarenhas had attempted to make his own schedule.

Tait repeated that he minded being threatened with a strike without being asked for his input. The employees responded once again that they had not ever threatened to strike. Tait claimed it was so well known he had heard about it on airplane 500 miles away. He then asserted that Jerry Martin had told him that, momentarily misspeaking and using the name of a celebrity, daring the employees to call Martin on the phone, asserting that Martin had told him the day before that a strike was imminent.

The meeting started to break down over accusations of lying, but an employee, using a speaker phone, was almost immediately able to reach Martin. Martin's voice is heard saying that he had told Tait that a "work action" was imminent, but had never use the word strike. The phone conversation was then terminated. Tait accused Martin of changing his words. There was a short disagreement over what the phrase "work action" meant and Tait accused the group of "playing a game."

The conversation then became a little more civil and turned to Mascarenhas's situation again. Once more, Tait addressed employees expressing the right of independence in the way they chose to work. Alleging that refusals to work were disrespectful, he said, "This is a professional place of work. If you come in and tell us that you are going to work, we expect you to work. Not what you want to do, but what we want you to do."

He repeated that there was harassment coming from the union people and that he was attempting to protect others from that harassment. "As long as it's the Union versus Management and anybody who sides here or sides there, is an outcast one way or the other. I won't have that." This resulted in a debate between Tait and Annen concerning whether the discussion of unionizing qualifies as harassment. Tait then said that his primary interest was to protect the Company and that was the reason he had made his arrangements with other companies to obtain cover in case of a strike. He concluded: "The owner [Gilboa] . . . if the courts came down, the owner would tear the fuckin' door down."

Tait swung his commentary to independent contractor status. He said, "[Gilboa's] company does business this way [using independent contractors] in four states, nineteen other offices; it's all explained in the court literature. It's all backed up by case precedent. This is the way we do business. We are not going to lose the fuckin— hearing, regardless. At that time that you guys were asked, correction, you were employed, asked to be [ ] independent contractors. What did the president of the company say? . . . if you don't want to work here, I will pay you until you go and find another job." Some employees argued that Gilboa had not said that. Tait maintained that he had, but went on to say he would "supersede" what Gilboa had said, offering anyone who had been employed prior to the NICA changeover, 2 weeks' pay to go find another job. He even offered to call competitors on behalf of anyone who took him up. He then pointed to the three leaders and repeated the offer. He continued:

> We are not forcing you to work at this company. I will do everything I can, that will make it as easy as possible. I don't have to set up that account with Road Rage [presumably one of the deductions under the NICA contract]. I don't have to do that. Its a fuckin pain in the ass to monitor that and take it out of you guys' check. I do it as a convenience for you guys. I don't have to pay the wages I pay. I still can get employees in here. I don't have to be . . . I don't even have to have this fuckin meeting with you guys, I can just let you guys do whatever . . . I can just fire everybody. . . .

Someone urged Tait to calm down. He went on: "I just want to have a happy work environment. I know the labor issue with NICA is your huge issue. We know it's in the courts. God bless the courts if they can somehow get you guys back in here, the fuckin– Union comes in here and the doors stay open. God, let's go forward . . . I don't give a fuck. That is the way the owner runs the business. It don't matter how much pressure you put on me or the industry, people never change. He will shut the door before he changes."

An employee asserted that Gilboa was "absolutely scared" of the International Longshoremen and Warehousemen's Union and Tait responded, "Of course he is." The employee then said the ILWU was an honorable outfit. Tait responded that he had his marching orders and he couldn't do anything about it. There follows a short discussion concerning Mascarenhas and his perceived unwillingness to recognize what a good deal he had. At that point the tape is interrupted by the previously mentioned cell call received by Martin.

When the tape again takes up the meeting, Tait is discussing the accident insurance under NICA and the deductions connected to that. They also speak of some other matters related to the NICA agreement. Eventually, Tait said that the employees could pursue it,

> [b]ut let's be sure that we do, like Chris says, conduct a business properly so that we have a business to work for. And God forbid, that the courts end up closing us down because

> my owner is pigheaded. The courts are pigheaded . . . . It will end up in another worst-case scenario or even sooner. Once the NLRB thing winds up, let's say two out of every three cases that go to the NLRB sides with the Union. Gee, I wonder why . . . then [the] NLRB issues an order, for compliance, for union organization, blah, blah. That order is not enforceable in California. Not enforceable. Oh, they bring that order to us and we say "fuck your order" and then they have to file their petition and their judgment. Oh yeah, ask Jerry [Martin]. They might have [to] take their petition into federal court. Federal court overturns one of every three NLRB hearings—because the NLRB is obviously, prejudice[d] towards labor issues. The court is not a prejudicial entity. It hears both sides of the story and one out of every three NLRB [orders] gets turned over in federal court. And that is where we are going to end up. And that goes on for years. So we're a couple of years from here. We're months with the NLRB, but I got news for you, it ain't over there.

The meeting ends with Tait again making the 2 weeks' pay offer if anyone who had been forced to become an independent contractor wished to quit. He assured everyone that he was a good guy and would not mistreat anybody.

III. ANALYSIS AND CONCLUSIONS

A. The Independent Contractor Conversion

Section 2(3) of the Act is the starting place for analyzing the facts in this case. It states:

> *The term "employee" shall include any employee*, and shall not be limited to the employees of a particular employer, unless the Act [this subchapter] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, *but shall not include* any individual employed *as* an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or *any individual having the status of an independent contractor*, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined. [Emphasis added.]

Therefore, the Act provides its protections to employees as broadly defined but not to independent contractors.

Respondent essentially concedes that prior to late November the bicycle messengers, drivers, and court researchers were employees within the meaning of Section 2(3) of the Act and not independent contractors. Although Respondent's practice before that time was not consistent with respect to the manner in which they were remunerated, some being hourly and some being salaried, none was regarded as an independent contractor. At that time all of them reported in some manner to the dispatcher, although court researchers and the ones who had been assigned to serve process also took directives from the "supervisor" in charge of that task. Nevertheless, all assignments went through the dispatcher. Each of the field employees had been issued a company-supplied radio and were in constant communication with the dispatcher. When serving as bicycle messengers, they owned their own bicycles, each of which was valued in the $500 range. The record is silent concerning messengers who served as drivers and whether they operated company-owned vehicles or vehicles which they themselves owned. In the beginning of the day most of them reported to the San Francisco office for their initial assignments and to pick up their radio, although on occasion messengers were allowed to keep the radio overnight and report in for work by a radio message.

The evidence is uniform from each of the bike messengers, court researchers and drivers that once they had signed the NICA independent contractor agreement, the only things which changed were the paperwork requirements. On a daily basis, nothing changed. They reported to work at the usual time, obtained their radios and began to work. Respondent still owned the radios and the bike messengers continued to own their own bicycles. They continued to take their daily assignments from the dispatcher, Romana Macalinao. The only noticeable change was the manner in which they were paid. They no longer received paychecks from Respondent, instead receiving them from NICA. Moreover, those paychecks no longer showed deductions for State and Federal income tax, social security or the California State fund deductions. However, the NICA paychecks did deduct a fee for NICA membership and the substitute occupational/accident insurance.

Furthermore, as demonstrated by Respondent's treatment of Mascarenhas, it is clear that individuals who signed the independent contractor agreement were not free to determine their daily tasks. In fact, Respondent wanted exclusive access to them, insisting that they remain available even during slack periods, offering showup time payments for that purpose. As Tait said, Mascarenhas was discharged for attempting to go his own way.

It is clear that none of the so-called independent contractors was engaged in a distinct occupation or business. Certainly none of them thought that they were. They did not make a significant capital investment nor did they expect to make a profit on that investment. For the most part the only monetary outlay made by the messengers was the purchase of their bicycle. But they had done that as employees, well before the conversion. They did not have a real opportunity to solicit business on their own and did not have the time to carry it out even if they were able to generate their own customers.

In *NLRB v. United Insurance Co.*, 390 U.S. 254, 256 (1968), the Supreme Court mandated the Board to utilize the common law right-of-control test to determine whether specific individuals were, under Section 2(3) of the Act, employees or independent contractors. Much of the determination can be made by reference to the Restatement (Second) of Agency § 220 (1958). The text of § 220 is set forth below in the footnote.[11]

[11] § 220. Definition of Servant.

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in

Rather clearly, none of the messengers is in business for himself. The core of Respondent's business is providing messenger service to its customers. It can only do this by coordinating its various staff members' duties from a central location. The messengers themselves have no capability of performing that coordinating task. It must be done centrally. Thus, the messengers have no control over the manner and means in which they perform their duties. Only Respondent has that power. Furthermore, it is Respondent which is in the business of making a profit. None of the messengers has a realistic opportunity to do so, certainly not during the time frame that Respondent insists that they be available to it. Essentially, the work of the messengers, whether it be delivery or court research, is work which is "integral to and virtually coextensive with the Company's operations." *Adderley Industries*, 322 NLRB 1016, 1022 (1997). To the extent that the NICA agreements suggest that messengers are free to perform other duties or work for other messenger services, that term is illusory at best.

Without regard to whether the conversion was discriminatory, it is clear that no conversion ever occurred. Under the common law test required by *United Insurance*, supra, no independent contractor relationship was ever created. These individuals were and are employees, not independent contractors. I therefore agree with the contentions of the General Counsel and the Charging Party that the paper transactions purporting to convert the employees to the status of independent contractors was, and is, a sham.

B. The Conversion to Independent Contractor Status was Discriminatory

Section 8(a)(3) of the Act makes it an unfair labor practice to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ." Furthermore, Section 8(a)(1) prohibits employers from interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act. Section 7, of course grants employees the right to self-organization, to form, join, or assist a labor organization.

The facts recited above rather clearly show that Respondent, when first faced with an organizing drive at a competitor, simultaneously becoming aware that the organizing drive was going to include it, decided to respond by requiring all of its employees to become independent contractors. It acted precipitously, telling its employees that if they did not sign the NICA agreement, they would no longer be able to work for Respondent. Indeed, Tait admitted to the staff that one of the reasons for the conversion was a direct response to the organizing drive.

Since converting the employees to independent contractors would remove them from the definition of employee under Section 2(3) of the Act, it had the necessary impact of stripping them of their Section 7 right to form, join, or assist a labor union. This is a clear violation of Section 8(a)(3) as it directly disrupted the hire and tenure of the employees. Instead of being employees, enjoying Section 7 rights, they found themselves treated as if they were nonemployees without any rights whatsoever. Not only did they lose their Section 7 rights, they also lost state protections such as unemployment insurance, workmens' compensation insurance, the right to complain to the State Labor Commissioner concerning wage matters and the like. This was no slight adjustment in position; it was a fundamental change of status.

Therefore, since it was done in direct reprisal for the employees seeking the assistance and representation of labor organization, on that basis alone this change was discriminatory and a clear violation of Section 8(a)(3) and (1). However, it is much more than that.

By requiring the employees to sign the NICA agreements, which stripped them of the right to be employees under the Act, and, therefore, the right to organize as granted by Section 7 of the Act, Respondent was essentially forcing them to sign an old-fashioned "yellow dog" contract. "Yellow dog" contracts were lawfully used from the late 1880s until 1932. These contracts of employment prohibited employees from joining labor unions, and made continued employment conditional on the employees' refraining from union activity. Such contracts were deemed pernicious, and a common source of labor strife, since a fundamental cause of labor disputes was, and still is, the refusal of employers to recognize labor unions. In 1932, the Norris-LaGuardia Act declared such contracts to be unenforceable in the Federal courts.

They were also a principal factor which Congress considered when passing the Wagner Act (the 1935 predecessor to the National Labor Relations Act). While the "yellow dog" contract was not declared illegal per se by the Wagner Act, Section 7 of the Wagner Act for the first time gave employees the specific right to engage in union activity, making it an unfair labor practice to condition employment on the relinquishment of that right. Thus, de facto in 1935, the "yellow dog" contract became and has remained illegal as a violation of first, Section 8(1), and as of 1947, Section 8(a)(1). Similarly, insistence

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the performance of the services is subject to the other's control or right to control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant;

(j) whether the principal is or is not in business.

upon such a contract became a hire and tenure violation under Section 8(3), now Section 8(a)(3).[12]

Respondent knew perfectly well that independent contractors fell outside the purview of the Act. Its knowledge is clearly set forth in the Tait and Gilboa speeches. In essence, the NICA agreement is nothing more than a yellow dog contract in disguise. Instead of forcing the employee to affirmatively forswear unionization, the NICA agreements simply redefined these employees as something other than employees—independent contractors who by definition cannot enjoy the protection of the Act. The result was the same, employees were prohibited by agreement from engaging in union organizing activity. They were forced to relinquish the rights guaranteed them by §7 of the Act. *Don Brentner Trucking Co.*, 232 NLRB 428, 434 (1977) (forcing employees to sign individual contracts requiring them to abandon the union); see generally *Ra-Rich Mfg. Corp.*, 120 NLRB 503, 506–507 (1958), enfd. 276 F.2d 451 (2d Cir. 1960); *Superior Sprinkler, Inc.*, 227 NLRB 204 (1976); *Karsh's Bakery*, 273 NLRB 1131 (1984); *Hoffman Air & Filtration Systems*, 316 NLRB 353 (1995), and many others. Nothing could be more pervasive or permanent. Moreover, the perniciousness of such an approach perceived in the 1930s remains just as inimical to employee rights today as it did then. This is a bell that cannot be unrung.

C. Interference, Restraint, and Coercion

The complaint, under paragraphs 7, 8, and 9, including the amendment of December 14, 2001, recites a series of similar and interrelated conduct connected to Respondent's conversion of employees to independent contractors. The paragraph 7 allegations are aimed at Tait's conduct on about November 21. The evidence actually shows that Tait's conduct did not begin until the November 25 meeting. At that point he told employees that they must sign the NICA contract because, among other things, Respondent feared a union organizing drive. In addition he conditioned continued work with Respondent upon the messengers' signing the NICA agreement and becoming independent contractors.

Paragraph 8 of the complaint essentially tracks the same type of allegation, assigning it to Lazalde about November 24. This is the date on which Lazalde told Votour he had to sign the NICA agreement and become an independent contractor. Lazalde discharged Votour when he refused. Similarly, Lazalde, in mid-December told Washington that he was being discharged because he had not timely signed the NICA agreement and become an independent contractor.

Paragraph 9 is aimed at Gilboa's meeting with employees on November 29.[13] Gilboa, too, threatened to discharge employees who failed to sign the NICA agreement or who wished to sign it under duress and protest. He also threatened to close the facility if the employees selected the Union as their collective-bargaining representative. Furthermore, the complaint alleges the NICA membership perks to be an unlawful inducement or grant of benefits to induce the employees to abandon union representation. Similarly, the complaint alleges that the paycheck deduction to pay for the NICA membership and/or insurance was also unlawful. Tait, in conjunction with Bob the NICA representative, had made a similar statement during the November 25 meeting, but it first appears in the complaint here.

Rather clearly the General Counsel's evidence supports each of these allegations and Respondent has made no effort to rebut it. It is appropriate, therefore, to conflate all of these allegations together. In essence they are all variations along the same theme: convert to independent contractor status and pay for it or lose your job. In each case the violation is the same, although the means to effect of those changes are varied and require somewhat different, yet appropriate, remedies.

The only allegation which requires anything more than a minimal discussion is Gilboa's threat to close the San Francisco office. He does give some lip service to some business considerations and a contention that a union is more appropriate to a larger business, but he never gives any objective reason to support his statement. Under *Gissel*,[14] the analytical question is whether the remark was a threat or a "fact-based" prediction, which would be lawful as an expression of opinion. Without an objective explanation, his remark becomes an unlawful threat. Id. 617–619; *Jimmy-Richard Co.*, 210 NLRB 802, 804–805 (1974), enfd. sub nom. *Amalgamated Clothing Workers v. NLRB*, 527 F.2d 803 (D.C. Cir. 1975), cert. denied 426 U.S. 907 (1976). Also, *Weather Tamer*, 253 NLRB 293, 305 (1980), enfd. in pertinent part 676 F.2d 483 (11th Cir. 1982), and many others. Since Gilboa never offered any objective basis for his view, the remark is unlawful.

Therefore, I find all of the allegations set forth in paragraphs 7, 8, and 9 of the complaint to have been sustained and are all violations of Section 8(a)(1). Appropriate remedies will be granted.

D. Section 8(a)(3); Specific Individuals

1. Damon Votour

As noted, the Union filed its election petition on November 21. On Thursday, November 24, 3 days later, Lazalde presented bike messenger Damon Votour with a choice. He could either sign a NICA independent contractor agreement or be fired. Votour, taken by surprise, didn't see any reason to do that. Instead he declined and asked Lazalde if that meant was fired. Lazalde told him yes.

Votour attended the meeting conducted by Tait on November 25, but there is no evidence that he participated in any meaningful way. He waited until Monday, November 27, to speak once again with Lazalde. At that point, the condition was repeated. This time Lazalde told Votour he would hire him back "under the pretense" that he was an independent contrac-

[12] See, e.g., *Carlisle Lumber Co.*, 2 NLRB 248, 265–266 (1936), enfd. 94 F.2d 138 (9th Cir. 1937), cert. denied 304 U. S. 575 (1938) (requiring signing of yellow-dog contract as condition of returning to work after strike).

[13] The dates set forth in the complaint differ by a few days from those found herein due to the nature of the evidence. The dates set forth in the testimony or documentary support are those which I use here. Respondent does not assert that the deviations are significant in a due process sense. The sequence of events was well understood.

[14] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

tor. As a result Votour signed the NICA contract "under duress and protest."

In a sense, this is little different than what Tait had told the assembled group during the course of the meeting: Sign the agreement or be fired. However, this incident was precipitated by a different manager, Lazalde, not Tait. Furthermore, Lazalde actually told Votour he was fired, as opposed to Tait's generalized threats. Even so, it is not clear that Votour ever lost any work. He apparently worked on Friday, the day of the discharge, and then began working again on Monday after signing the NICA agreement. While it may be argued that since no work was actually lost, no discharge was ever effected, I am unpersuaded. Votour's discharge is not whitewashed simply because he returned to work on the next workday. Moreover, there may have been hours lost either on Friday or the following Monday. That can be determined at the compliance stage.

Clearly, Lazalde discharged Votour because he balked at signing the NICA agreement. Since the NICA agreement was an integral part of Respondent's antiunion efforts, the discharge violated Section 8(a)(3) and (1).

2. Kai Washington

Kai Washington attended the November 25 meeting and shortly thereafter told Lazalde that he wouldn't sign the NICA agreement as union organizer Jerry Martin had told him such agreements were illegal. At that point Lazalde told him that he was terminated and asked him for his radio. Washington gave it to him and left. A few days later, after discussing the situation further with Martin, Washington decided that it would be better to work as an independent contractor than be unemployed. Moreover, Martin had advised him that the Union would fight the independent contractor issue while he worked. During his time away, Washington had burned himself on his automobile radiator. When he called Lazalde to tell him he would work under the conditions being offered, he negotiated a short delay while the burns healed sufficiently. Upon his return, dispatcher Romana Macalinao gave him the NICA agreement to sign but she refused to accept his reservation that he was signing under protest. He acceded to her insistence and resumed work. It lasted only 3 days.

On the third day, Lazalde told Washington that he been instructed to fire him again, for a reason they both knew to be untrue, attendance. When Washington pressed him, Lazalde told him he didn't really want to fire Washington, but Tait had told him to do so because they were looking to get rid of somebody and Washington had been selected because he had taken so long to sign the NICA agreement.

As with Votour, Lazalde placed a condition upon Washington which is solely designed to prevent him from seeking union representation. Furthermore, the fact that Lazalde at first offered a false reason, only serves to emphasize the desperate nature of Respondent's approach to the union organizing drive. The use of a false reason only underscores the illegality. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). Both the November 25 and December 14 discharges violated Section 8(a)(3) and (1).

3. Christopher Atkinson

Unlike the other two, Atkinson was not discharged. The allegation here is that he was illegally denied employment when Respondent discovered that Atkinson's wife had been involved in the union organizing campaign at Express Network.

It is clear from the evidence that Tait (through the marketing director) had told Meredith Crawford to find a replacement for her at Lillick & Charles. She was a trusted employee who had been called upon to work in administration performing some payroll reconciliation during the end of 2000. When she ran into Atkinson during the early part of 2001, she had already been asked by the marketing director to see if she could find someone to take her place at Lillick & Charles. When she found Atkinson, whom she knew from previous employment, she began to negotiate employment terms with him. They reached an agreement on salary and he was given a reporting date.

When Atkinson reported for work on Monday, January 29, 2001, Tait gave him a runaround, claiming not to have someone available who could train him on the computer. In reality, Tait had seen the Daily Journal article concerning the organizing drive at Express Network together with the accompanying photograph of Atkinson's wife. The story even included references to Maria Atkinson's having been spat upon by the dispatcher at Express Network because of the organizing. It also referred to the fact that the Union had gone to the National Labor Relations Board and she had reported the incident there.

Based on that alone, one might reasonably conclude that the denial was unlawful. However, any lingering doubt is resolved by Crawford's admission to Atkinson 3 days later that the reason Respondent had not hired him was because management had seen the Daily Journal article with Maria Atkinson's photograph together with her quotations. Crawford told him clearly that Respondent thought he was involved with the Union.

In this circumstance I have no reservations about finding Respondent's treatment of Christopher Atkinson to have violated Section 8(a)(3) and (1). The Supreme Court held long ago that an employer violates the act when it refuses to hire employees because of their union membership. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). More recently, in *FES*, 331 NLRB 9 (2000), the Board revisited the requirements necessary to make out such a violation.

It said the elements are: 1. a showing that the respondent was hiring or had concrete plans to hire at the time of the alleged unlawful conduct; 2. the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextuous or were applied as a pretext for discrimination; and 3. antiunion animus contributed to the decision not to hire the applicants.

In my opinion the General Counsel is clearly met all three requirements. In this fact pattern, Respondent had tendered an offer of employment to Atkinson, thereby demonstrating that it was hiring. Second he had the experience and background to perform the job and third, antiunion animus not only contributed to the decision not to hire him, it was the only reason.

Respondent presented some secondhand knowledge possessed by Atkinson to the effect that the Lillick & Charles in-house opening did not occur, as the law firm to which Crawford was to transfer, did not end up contracting with Respondent for an in-house person. Atkinson's knowledge may or may not be accurate. Clearly it is not the sort of evidence upon which the Board can rely. He has no firsthand knowledge. Indeed, no firsthand knowledge was presented. Whatever occurred with respect to the business contracts between Respondent and other law firms, it is clear on this record that Respondent had offered him the in-house slot at Lillick & Charles. Once it had offered that job to Atkinson, it was not free to deny it to him for discriminatory reasons. An instatement and a make-whole remedy are appropriate here.

E. The April 19, 2001 Meeting

Then during the meeting of April 19, 2001, Tait made it all worse. He interfered with the employees' right under Section 7 to engage in protected union activity in multiple ways. Claiming that Martin had told him so, Tait had come to believe that a strike was imminent so he had called the meeting. He then went on a virtual tirade. He equated a strike with a "jobless day" and conceded that he had just threatened to fire them if they struck. He insisted on discussing whatever issue was causing the unrest and demanded an opportunity to deal with it before a strike could be called, coupled with a threat to discharge strikers who did not give him that opportunity. Both remarks violate Section 8(a)(1). The law does not require (except for health care institutions) employees to give their employer notice before striking. And, at one point he told the group that it could not strike because the Company was nonunion. This, too, violates Section 8(a)(1).

Tait said all this before learning that Martin had only said that a "work action" was being considered (apparently over the Mascarenho discharge). Tait basically accused Martin of being a liar, and then characterized prounion conversations among employees as being "harassment" which he had a right to interdict. Here he first denigrated a union official, violating Section 8(a)(1)[15] and followed it by asserting that employees who spoke to other employees about the Union were harassing them and he wanted it stopped. Such a directive, hinting of discipline, is unlawful. Section 7 gives employees the right to talk to one another about, among other things, union organizing. Interdicting it by such an order violates Section 8(a)(1).[16] It may even be characterized as the issuance of a "no union talk" directive, also a violation of Section 8(a)(1).[17]

This was followed by a further discussion of the independent contractor issue, again offering employees 2 weeks' pay if they didn't wish to work under the NICA agreement. He also said it did not matter how much pressure the employees put on him, Gilboa would never change. "He will shut the door before he changes." This is a repeat of the unlawful threat to close down in the event of unionization.

Then, he raised as a specter, the likelihood that any shutdown would be caused, not by Gilboa, but by the courts. "God forbid, that the courts end up closing us down because my owner is pigheaded. The courts are pigheaded . . . . It will end up in another worst-case scenario." From a legal point of view, this is another threat of a shutdown if Respondent is obligated to recognize and deal with the Union. But it is much more florid. Now Tait is not only blaming the Union for the potential shutdown, he is blaming the law and the law enforcement agencies. He has become entirely defiant of the obligations imposed on employers by the Act.

His defiance increased. He then went on to assert that the NLRB proceedings were without any force or meaning. He falsely asserted that the order was not enforceable in California and that the Company could simply say to the Board, "[F]uck your order." Then he asserted that if the Board took its order to the courts for enforcement, that there was one chance in three that the court would not enforce it. He accused the Board of being prejudiced toward labor. Finally, he haunted the employees with his vision that the entire matter would take years, implying that it would all end fruitlessly. The latter remarks are unlawful as an expression to employees that the entire concept of unionization is futile. *Wellstream Corp*., 313 NLRB 698, 706 (1994), and many others.[18]

Moreover, Tait's offer to pay employees 2 weeks' pay to quit if they didn't want to work under the (nonunion) conditions being offered by Respondent also violates Section 8(a)(1).

IV. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act, including a return to the status quo before it forced its employees to sign the NICA agreements. And, as Respondent discriminatorily discharged Votour and Washington, it must offer each of them reinstatement to his previous job, or if that is not available, to a substantially similar job, and make each whole for any loss of earnings and other benefits. Similarly, as it refused to hire Atkinson for the Lillick & Charles in-house position because it perceived

[15] See *Future Ambulette*, 293 NLRB 884 (1989), enfd. 903 F.3d 140 (2d Cir. 1990) (specific issue not reviewed by the court). In that case the "employer had unlawfully made disparaging remarks about a union business agent's honesty and competence. The finding of a violation was grounded, however, not only on the derogatory character of these remarks, but also on their context among other coercive statements, especially those tending to convey to employees the futility of their efforts to have the union as their collective-bargaining representative." Id. at 884. If there is no such context, name calling alone will not constitute a violation. *Sears, Roebuck & Co*., 305 NLRB 193 (1991). That context is present here, for Tait disparaged Martin's integrity for the purpose of convincing employees that he was not a trustworthy individual.

[16] *Liberty Nursing Home of Lynchburg*, 245 NLRB 1194, 1197 fn. 5 (1979); *W. F. Hall Printing Co.*, 250 NLRB 803, 804 (1980); *General Electric Co.*, 255 NLRB 673, 680 (1981); *ACTIV Industries*, 277 NLRB 834 (1985); *Frazier Industrial Co.*, 328 NLRB 717 (1999).

[17] *Opryland Hotel*, 323 NLRB 723 (1997), citing *Teksid Aluminum Foundry*, 311 NLRB 711, 713–714 (1993); *T & T Machine Co.*, 278 NLRB 970 (1986); *Orval Kent Food Co.*, 278 NLRB 402 (1986); and *Cerock Wire & Cable Group*, 274 NLRB 888, 897 (1985).

[18] To the extent I have found 8(a)(1) violations not alleged in the complaint, I simply observed that the findings were made because the issues were admitted or fully litigated.

him as a likely union activist, it will be ordered to offer Atkinson instatement to that or a substantially equivalent job, together with backpay. Respondent shall take this action for all three named individuals without prejudice to their seniority or any other rights or privileges they may have enjoyed. Backpay shall be computed on a quarterly basis from the date of the discharge or the refusal to hire to the date Respondent makes a proper offer of reinstatement/instatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In addition, Respondent will be ordered to make whole all the employees converted to independent contractor status for monies lost due to the improper payroll deductions made under the NICA agreements. Moreover, in the event there are negative income tax consequences, including lost social security payments, arising from the discriminatory conduct, Respondent shall be ordered to make those corrections as well. Furthermore, it will be ordered to make the payments it should have made on behalf of each employee to the appropriate State funds benefiting employees.

Finally, I address the bargaining order issue. A bargaining order is an extraordinary remedy. The Supreme Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), stated that in considering whether a bargaining order is appropriate the Board needed to look at the three categories of unfair labor practices which it then delineated. The categories are based upon the relative gravity of the unfair labor practices which had been committed. In the first category, the unfair labor practices are those which must be regarded as so outrageous and pervasive that a representation election has been rendered impossible. In this circumstance it would not matter whether the Union ever enjoyed majority status during the course of the organizing campaign—"without need of inquiry into majority status on the basis of cards or otherwise." Id. at 613. In the second category are cases "marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." In this category a bargaining order could still be appropriate. This category, by implication, requires proof of majority status through cards or some other persuasive evidence. Here it might be said that the employer, by its conduct has forfeited the opportunity for an election. The third category involves unfair labor practices not so serious as to reach the first or second category, allowing for ordinary remedies to be applied. Upon the completion of a remedial period, the Board may safely direct an election which would no longer occur in an atmosphere contaminated by unfair labor practices, thereby assuring that employees can freely choose union representation or not.

Here, the Union filed a representation petition on November 21. The first unfair labor practice charge was filed on November 28, only 4 days after the first unfair labor practice was committed, Lazalde's discharge of Votour. The record does not reflect what happened to the petition; it may have been withdrawn, or possibly it is blocked by the unfair labor practice charges. In any event no election has ever been conducted. Indeed, there is no evidence that the election petition has been processed in any way, either by a Stipulated Election Agreement or by a directed election. It certainly has not been consolidated with the unfair labor practice cases here.

At the outset, let me say that I believe this case falls within the Supreme Court's first category. Without question the entire proposed bargaining unit was affected by these unfair labor practices. Indeed, virtually all of them are victims of Section 8(a)(3). All of the bike messengers and drivers were required to sign NICA agreements or if you will, "yellow dog contracts." The testimony shows that only one court researcher (Chris Young) was not directed to sign.

In addition, two individuals were discharged in violation of Section 8(a)(3). Given the size of the proposed bargaining unit, only 20, that is an outright discharge of 10 percent of the staff. Furthermore, Respondent compounded these 8(a)(3) violations by refusing to hire an individual because of his perceived prounion proclivities. Rather clearly Respondent is sending a message to the remainder of its staff that favoring a union, or representation by a union, will result in denial of employment. This, too, is a bell which cannot be unrung.

And, if the message was not heard by these examplars, the Tait and Gilboa speeches were crystal clear on the subject. They said that Respondent could not tolerate a union and if the employees did not sign the NICA agreement the Company would shut down. Gilboa used as an excuse his inability to obtain insurance coverage. This, too, appears to be nothing more than a ruse. If NICA can find competitive insurance, surely Respondent can, as well. In any event, threatening to shut down the business in response to unionization is a hallmark violation supporting the conclusion that a category one series of unfair labor practices has occurred. *NLRB v. Jamaica Towing*, 632 F.2d 208 (2d Cir. 1980); *Horizon Air Services*, 272 NLRB 243 (1984); *Action Auto Stores*, 298 NLRB 875 (1990) (citing *Indiana Cal-Pro. Inc. v. NLRB*, 863 F.2d 1292, 1301–1302 (6th Cir. 1988), enfg. 287 NLRB 796 (1987); and *State Materials, Inc.*, 328 NLRB 1317, 1330 (1999). In November, threats of that nature were uttered by Tait in his first meeting and again by Gilboa in the second meeting; they were repeated with greater vehemence a third time during Tait's April 19, 2001 meeting.

In the final analysis, it is clear Respondent, through its highest management officials, has simply rejected the national policy protecting collective bargaining. It has emasculated the employees' very right to be employees; it has threatened them with loss of jobs for seeking union representation; it has threatened them with discharge for striking; it has discharged two and refused to hire a third employee because of their union sympathies; it has equated merely talking about the Union with harassment; it has threatened to shut down its business to avoid unionization; and finally it has denigrated the law itself and those charged with enforcing the law, both the Board and the courts, for the simple purpose of trying to prove to the staff what a futile act unionization is.

Clearly this course of conduct qualifies as a category one level of misconduct as defined by the Supreme Court in *Gissel*. Ordinary remedies simply will not suffice. It is clear to me that this conduct has rendered a fair representation election impossible.

A. The Proposed Bargaining Unit

The Union's petition sought a bargaining unit of "all full-time and regular part-time bicycle and driver couriers employed in the employer's San Francisco operation." It excluded all other employees, guards and supervisors as defined in the Act. Respondent asserts that it should also include those employees who were employed as in-house, such as Crawford and/or Dennis Kittelson who were employed at Lillick & Charles during late 2000 and early 2001.

First it is clear from the language of the petition that the Union has not sought to represent the in-house employees. Second, the in-house employees do not have a clear community of interest with the messengers and drivers. These individuals serve more as salespersons, coordinators, and administrators than as messengers. They do not operate in the field and are not subject to the same sort of directives as the messengers and drivers. Indeed, rather than taking directions from the dispatcher, they give the dispatcher information concerning pick-ups and other matters for assignment. At Lillick, Crawford served as a coordinator and sales contact person, handling both incoming and outgoing deliveries. Only on very rare occasions did she actually make a delivery herself, and then only to a recipient within easy walking distance of the Lillick office and in circumstances where a bicycle messenger could not be called upon. It was certainly not part of her regular duties. Furthermore, as observed in the Atkinson hire, Crawford seems almost to have been a supervisor, having been given authority to find and hire (or recommend for hire) a candidate to replace her. It may be that she was only given hiring authority on the one occasion, but it nonetheless demonstrates that Respondent regards her as something more than a rank-and-file employee. Furthermore, during the November–December period she was called to the office to perform payroll reconciliation duties, clearly an administrative responsibility.

During her absence, Kittelson was asked to serve as the in-house at Lillick & Charles. Kittelson was normally a driver who served outlying counties. As a driver, he was included in the bargaining unit sought by the Union. It appears that his assignment to the in-house job at Lillick & Charles was only as a fill-in while Crawford was temporarily working in the headquarters office. Like hers, his was clearly a temporary assignment and the obvious expectancy was that he would return to his normal driving duties when she returned to Lillick. He is a bargaining unit member. See *Mrs. Baird's Bakeries*, 323 NLRB 607 (1997).[19] And, as expected she did return.

I find the unit which the Union proposed to be an appropriate unit for collective bargaining. In-house and other administrative staff do not share a community of interest with these drivers and messengers. I suppose it may be said that there might be other appropriate units which could be chosen, but it has been said innumerable times that the union does not have to seek a bargaining unit which is the most appropriate, only that it be an appropriate one. *Overnite Transportation Co.*, 322 NLRB 723 (1996).

[19] The record does not actually disclose where Kittelson went when Crawford resumed her duties at Lillick. That, of course, does not change the expectancy as it existed on November 24.

B. Majority Issue

As of November 24, there were 20 individuals in the bargaining unit. Alphabetically, they were: Charles Annen, Mark Beach, Gregory Chua, Casey Cook, Erik Freeland, Jaime Gonzalez, James Harris, Dennis Kittelson, Robert Larrison, Sandro Mascarenhas, Adolfo Mendez, Sergio Ramos, Sam Roberts, Charles P. Smith, Agostinho Trolezi, Damon Votour, Kai Washington, Jeff Webb, Chris Williamson, and Chris Young.[20] Ten of these signed authorization cards before November 24. Indeed, only the eleventh card is in serious question here, that of Casey Cook. [21]

Cook was not called as a witness to authenticate the photocopy of his card. Instead, there is some conflicting evidence concerning it. Votour testified that he solicited it about a week after he himself had signed on November 17 and that it was one of those given to Martin on November 21. Oddly, however, Charles Annen gave an affidavit to the Board agent in which he stated that he had solicited it on November 24. His affidavit describes the surrounding circumstances in some persuasive detail. In front of me Annen repudiated the affidavit saying that it must have been in error, that he even had reservations about his accuracy when the affidavit was being drafted, yet curiously he kept those doubts to himself.

Since the critical date here is the date of the first unfair labor practice, November 24, I would not normally be much concerned about the Votour-Annen discrepancy. However, Cook's authorization card leaves much to be desired. First it is undated. Second, Cook did not authenticate it. Instead, it has been authenticated by two different people in two different circumstances. Those individuals are at odds in a way that cannot be easily reconciled. There is no reason to accept either version. This becomes even more clear when one looks at the evidence which was presented versus the evidence which could have been presented.

I earlier noted that Martin did not support the petition with the original authorization cards when he filed it with the Regional Office. Instead, he substituted photocopies. Presumably the photocopies which he submitted are still in existence and have been date stamped by the Regional Office in the ordinary course. Yet those were not offered in evidence. Had they been presented, the issue of the date Cook signed his authorization card would have been resolved. It either would or would not have been included. Had it been included, its existence prior to November 21 would have been conclusive. Votour's testimony would have been confirmed, and Annen's purported error understood.

As it is, however, there is no explanation for the missing photocopies which Martin submitted. Furthermore, there is

[20] Respondent has also provided the names of several others whom it believes should be included. Four of these were hired on November 27: Aaron Curry, Dan Drake, Olivia Ferucci, and Chris McCombs. A fifth, Amaury Rivera, does not appear on the payroll for that pay period.

[21] Respondent argues against the consideration of Trolezi's card, whose date shows a strikeover for the number of the month. I am satisfied that it was signed on the 11th month. Accordingly, I consider it to be a valid card.

testimony from two witnesses that a Board agent, during the course of the investigation had the originals in his possession while investigating their verities. Counsel for the General Counsel has asserted that those originals cannot be found. These are two curious errors by the Regional Office.

Counsel for the General Counsel point to Votour's testimony that he gave Cook's card, together with the others, to Martin on November 21, asserting that the testimony should be credited in the absence of other more credible evidence. I do not believe I can do so.

First, it appears that the Regional Office was permitting photocopies of authorization cards during this period of time as a matter of routine. I am unsure why this was done, and the General Counsel has offered no explanation. Certainly it is a departure from the Board's traditional practice to accept only originals. Second, photocopies carry with them risks that originals do not. Over the years the Board has occasionally faced accusations that it was relying on forged documents, specifically authorization cards. While it is no doubt true that the vast majority of such accusations have been meritless, nonetheless there have been situations in which forgeries have been proven. There have been several recent incidents. See *Tecumseh Corrugated Box Co*., 333 NLRB 1 (2001). Also *Multimatic Products*, 288 NLRB 1279, 1319 (1988) (two employees backdated authorization cards show majority status; backdating not always fraudulent); *U.S. Plastics Corp.*, 213 NLRB 323, 341 (1974) (administrative law judge finds three forged cards); *Missouri Meat Packers*, 197 NLRB 176, 182 (1972) (altered dates); and *Raymond Buick*, 173 NLRB 1292, 1307 (1968) (fraudulent backdating). In addition, in the not so distant past the Board has seen union misrepresentation of majority status. *Royal Coach Lines*, 282 NLRB 1037 (1987), enf. denied 838 F.2d 47 (2d Cir. 1988).

Given this background, it behooves the Board to carefully guard against fraud in the use of authorization cards, particularly where employee free choice is at stake. It is one thing to charge Regional Directors to administratively determine[22] the verities of authorization cards presented in support of a petition; there, even if a forged card escapes scrutiny, the employees are free to vote their heart in choosing a union representative. It is another thing entirely to impose a bargaining agent upon employees based upon a fraudulent majority. Here, no one save a Board agent who cannot find them has seen the originals of these cards. Indeed, he may not have seen them. He did not testify; we have only the word of some employee witnesses that he possessed them. And, if their recollection is faulty, then the Regional Office has never seen the originals at all. If he did have them, the Regional Office's explanation for their disappearance is unsatisfactory and it is not hard to envision that some might well consider the Regional Office's integrity to be open to question, particularly since it already admits to routinely accepting photocopied authorization cards.

As I pointed out on the record, a photocopy machine and some correction fluid are easy and handy tools for fraud. The use of a photocopy machine as the basis for a bargaining order seems to be an unreasonable risk, given the ease of potential abuse. Now it should be said here, that I do not find the Cook card to be the product of such abuse. Yet the possibility is real. It is a critical card, one which if accepted, constitutes proof of the Union's majority status by a margin of one. It is a weak reed upon which to build an extraordinary remedy. I do not believe the Board should do so.

Accordingly, I decline to accept the Cook card as proof of the Union's majority status. It simply has too many infirmities to be regarded as trustworthy. Not only is it undated (nor can the date be fixed extrinsically with any confidence); it is a photocopy; the original is missing under odd circumstances; the photocopy used to support the petition before the Regional Director has not been presented; two different witnesses have offered two different stories regarding how it came to be in existence; and lastly, despite all these infirmities which the General Counsel must have perceived, the signer, Cook, did not testify about it. I cannot recommend that the Board issue a bargaining order based upon this card.

Therefore, I am unable to conclude that the Union has demonstrated that it had majority status on November 24 or any other date. That is not to say that the unfair labor practices are not deserving of a bargaining order as the proper remedy. These are category one unfair labor practices as the Supreme Court defined them. They are so serious and pervasive that ordinary remedies will not reach them. Moreover, this activity is supported and fostered by Respondent's highest management officials. An extraordinary remedy such as a bargaining order is the only way to deal with it. Yet, there is a serious legal impediment blocking the way.

The Board is reluctant to issue a so-called nonmajority bargaining order, particularly where, as here, there is no 8(a)(5) allegation in the complaint or where the union has not demanded recognition. See *Gourmet Foods*, 270 NLRB 578 (1984). Moreover, the Board recently declined to reconsider *Gourmet Foods* in *Nabors Alaska Drilling, Inc.*, 325 NLRB 574 (1998). At least one court has expressed disagreement with the Board's policy as established by *Gourmet Foods*. *NLRB v. Horizon Air Services*, 761 F.2d 22, 28 (1st Cir. 1985). Nevertheless, I am bound by the Board's policy. *Iowa Beef Packers*, 144 NLRB 615, 616 (1963). Therefore, despite the fact that I find this to be a category one violation under *Gissel*, warranting a bargaining order without regard to majority status, I can only recommend standard cease-and-desist, reinstate/instate, status quo ante, and make-whole remedies. And, because of the serious nature of the violations, Respondent's egregious and widespread misconduct, demonstrating a general disregard for the employees' fundamental rights, I do find it appropriate to recommend a broad Order requiring Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

If, in addition to these remedies, the Board chooses to revisit *Gourmet Foods*, supra, the foregoing bargaining unit discussion should avoid a remand on the point.

[22] The forgery of signatures on authorization cards for the purpose of demonstrating a showing of interest is normally a matter of administrative inquiry. *Perdue Farms*, 328 NLRB 909 (1999); *Gaylord Bag Co.*, 313 NLRB 306 (1993); and *Globe Iron Foundry*, 112 NLRB 1200 (1955). Nonetheless, as in *Perdue*, it could become a criminal matter.

Accordingly, based on the foregoing findings of fact, I make the following.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

3. Beginning on or about March 24, 2000, Respondent violated Section 8(a)(3) when it forced its employees to sign NICA independent contractor agreements in order to strip them of their employee status under Section 2(3) of the Act and thereby deprived them of the rights guaranteed them by Section 7 of the Act.

4. On November 24, 2000, Respondent, acting through Andy Lazalde, violated Section 8(a)(1) of the Act when it threatened employee Damon Votour with discharge if he did not sign an agreement to become an independent contractor.

5. On November 24, 2000, Respondent, acting through Lazalde, violated Section 8(a)(3) when it discharged Votour.

6. On or about November 25, 2000, and again on December 14, 2000, Respondent, acting through Lazalde violated Section 8(a)(1) when it discharged its employee Kai Washington because he refused to sign the NICA independent contractor agreement.

7. On or about November 27, 2000, Respondent acting through Lazalde violated Section 8(a)(1) when he conditioned Votour's rehire on Votour's signing the NICA agreement.

8. On November 25 and 29, 2000, Respondent acting through David Tait and Elisha Gilboa, violated Section 8(a)(1) by telling employees they must sign the NICA independent contractor agreement or be discharged.

9. On November 29, 2000, Respondent, acting through Elisha Gilboa, violated Section 8(a)(1) by threatening to close the business because of the union organizing efforts of its employees.

10. On November 29, 2000, Respondent, acting through Elisha Gilboa, violated Section 8(a)(1) by promising employees benefits such as occupational accident insurance, life insurance, and income tax assistance if they were to sign the NICA agreement and relinquish their right to union representation.

11. On or about December 11, 2000, Respondent violated Section 8(a)(1) when it conditioned its employee Kai Washington's rehire on his signing a NICA independent contractor agreement.

12. On or about December 14, 2000, Respondent violated Section 8(a)(3) when it discharged Washington because he had not promptly signed the NICA independent contractor agreement.

13. On January 29, 2001, Respondent acting through Tait, violated Section 8(a)(3) of the Act when it refused to hire applicant Christopher Atkinson because his wife was involved in union organizing.

14. On or about February 5, 2001, Respondent acting through Meredith Crawford, violated Section 8(a)(1) when it told applicant Christopher Atkinson that it would not hire him because his wife was involved in union organizing.

15. On April 19, 2001, Respondent, acting through Tait, violated Section 8(a)(1) when it:

(a) Threatened to close the business if the employees persisted in seeking union representation.

(b) Threatened to discharge employees who choose to engage in a lawful strike.

(c) Equated employees talking to each other about the Union as harassment subject to interdiction.

(d) Denigrated a union official by falsely calling him a liar in order to undermine his integrity and his effectiveness.

(e) Offered to pay employees two weeks' pay to induce them to quit in order to rid itself of union activists.

(f) Created the vision that unionization is a futile act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[23]

ORDER

The Respondent, First Legal Support Services, LLC, San Francisco, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Forcing its employees to sign independent contractor agreements in order to strip them of their employee status under Section 2(3) of the Act thereby depriving them of the rights guaranteed them by Section 7 of the Act.

(b) Giving effect to the independent contractor agreements signed by its employees.

(c) Threatening employees with discharge if they refused to sign an agreement to become an independent contractor.

(d) Discharging its employees because they refused to become independent contractors.

(e) Conditioning employees' rehire on their signing an agreement requiring them to become independent contractors.

(f) Threatening to close the business because of the union organizing efforts of its employees.

(f) Promising employees benefits such as occupational accident insurance, life insurance, and income tax assistance if they were to sign the independent contractor agreement.

(f) Refusing to hire applicants because they or their family members are engaged in union organizing.

(g) Telling applicants that they would not be hired because they or their family members are involved in union organizing.

(h) Threatening to discharge employees who choose to engage in a lawful strike.

(i) Equating employees talking to each other about the Union as harassment subject to interdiction.

(j) Denigrating union officials by falsely calling them liars to undermine their integrity and effectiveness.

(k) Offering to pay employees 2 weeks' pay to induce them to quit in order to rid itself of union activists.

(l) Creating the vision for employees that unionization is a futile act.

[23] 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.

(m) In any other 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 from the date of the Board's order cancel all of the independent contractor agreements it forced its employees to sign.

(b) Within 14 days from the date of this order restore all of its bicycle messengers, drivers and court researchers to the status of 2(3) employees which they enjoyed prior to their conversion to independent contractors, without prejudice to any earnings increases which may have been granted in the interim.

(c) Make whole its bicycle messengers, drivers, and court researchers for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of this Order, offer Damon Votour and Kai Washington full reinstatement to their former jobs or, if that job no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(e) Make Damon Votour and Kai Washington whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(f) Within 14 days from the date of this Order, offer Christopher Atkinson instatement to the in-house job which he had been offered or if that job no longer exists to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges.

(g) Make Christopher Atkinson whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(h) Within 14 days from the date of this Order, remove from its files any reference to the unlawful conversion to independent contractor status, to the discharges, and to the refusal to hire, and within 3 days thereafter notify the affected employees in writing that this has been done and that the conversion, discharges and refusal to hire will not be used against them in any way.

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

(j) Within 14 days after service by the Region, post at its office in San Francisco, California, copies of the attached notice marked "Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 20, 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 November 24, 2000.

(k) 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.

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

APPENDIX

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

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 force you to sign independent contractor agreements in order to strip you of your employee status under the law and to deprive you of the rights set forth above.

WE WILL NOT give any effect to the independent contractor agreements we forced you to sign.

WE WILL NOT threaten to discharge you for refusing to sign an independent contractor agreement.

WE WILL NOT discharge you because you refuse to become independent contractors.

WE WILL NOT condition the rehire of any employee on his or her signing an independent contractor agreement.

WE WILL NOT threaten to close the business because of your organizing activities on behalf of Warehouse Union Local 6, International Longshore and Warehousemen's Union, AFL–CIO.

WE WILL NOT promise you benefits such as occupational accident insurance, life insurance, and income tax assistance to induce you to sign an independent contractor agreement.

WE WILL NOT refuse to hire job applicants because they or their family members are engaged in union organizing.

WE WILL NOT tell job applicants that they were not be hired because they or their family members are involved in union organizing.

WE WILL NOT threaten to discharge you if you choose to engage in a lawful strike.

WE WILL NOT equate employees talking to each other about the Union as harassment which we can stop.

WE WILL NOT falsely call union officials liars in order to undermine their integrity and effectiveness.

WE WILL NOT offer you any kind of payment to induce you to quit in order to rid the Company of union activists.

WE WILL NOT say or do things to make you believe that unionization is a futile act.

WE WILL NOT in any other manner interfere with, restrain, or coerce you for exercising your rights guaranteed by the labor laws.

WE WILL within 14 days from the date of the Board's order, cancel all of the independent contractor agreements we forced you to sign.

WE WILL within 14 days from the date of the Board's order, restore all of the bicycle messengers, drivers, and court researchers to the status of employees under the law without prejudice to any earnings increases which may have been granted to them in the interim.

WE WILL pay all of the bicycle messengers, drivers, and court researchers to make up for any loss of earnings and other benefits which they incurred because of our discrimination against them.

WE WILL, within 14 days from the date of the Board's order, offer Damon Votour and Kai Washington full reinstatement to their former jobs or, if their job no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges.

WE WILL pay Damon Votour and Kai Washington for any loss of earnings and other benefits they incurred as a result our discrimination against them, plus interest.

WE WILL, within 14 days from the date of the Board's order, offer Christopher Atkinson the in-house job which we illegally denied him, or if that job no longer exists, to a substantially equivalent position.

WE WILL pay Christopher Atkinson for any loss of earnings and other benefits which he incurred as a result of our discrimination against him, plus interest.

WE WILL, within 14 days from the date of the Board's order, remove from our files any reference to the unlawful conversion to independent contractor status, to the discharges, and to the refusal to hire, and within 3 days notify the affected employees in writing that we have done so; the conversion, discharges and refusal to hire will not be used against them in any way.

FIRST LEGAL SUPPORT SERVICES, LLC