

Synergy Gas Corp. and Stephen Brady, and Local 456, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO. Cases 2-CA-23558, 2-CA-23640, 2-CA-23795, and 2-CA-23868

September 30, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND
RAUDA BAUGH

On October 21, 1991, Administrative Law Judge James F. Morton issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Synergy Gas Corp., Cold Spring, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

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

In agreeing with the judge that the Respondent failed to pay DePolito for his overtime work in violation of the Act, we note that DePolito had since at least March 1989 requested to be transferred to hourly status from salary status, as part of his effort to receive pay for the overtime work he was being required to do. The judge found, and there are no exceptions, that "[a]ll the other servicemen were getting overtime pay." DePolito's request was approved by memo from Regional Manager Churchill on July 15, 1989. Two days later, the Respondent withdrew its approval. We agree with the judge that the Respondent's argument that its actions toward DePolito in this respect were in accordance with the Board's Order is without merit. The Board's Order required the Respondent to reinstate DePolito to his former job with backpay. The Order did not mandate that he remain a salaried employee despite his requests to become an hourly employee. Rather, we find in agreement with the judge that the Respondent's denial of DePolito's requests were in retaliation for his protected activities.

In adopting the judge's finding that the Respondent's April 7, 1989 layoff of three employees, without first bargaining with the recently certified collective-bargaining representative of its employees, was in violation of Sec. 8(a)(5) of the Act, we find it unnecessary to discuss the propriety of the judge's citing *Adair Standish Corp.*, 292 NLRB 890 (1989), which relied on *Lapeer Foundry & Machine*, 289 NLRB 952 (1988). See *Holmes & Narver/Morrison-Knudsen*, 309 NLRB 146 fn. 3 (1992).

Gail T. Auster, Esq. (Belinda Lerner, Esq. on the brief), for the General Counsel.

Elliot J. Mandel, Esq., Peter A. Schneider, Esq., and Claire E. Boland, Esq. (Kaufman, Maness, Schneider & Rosensweig, P.C.), for the Respondent.

Dana L. Pomerantanz, Esq. (Roy Barnes, P.C.), of Hempstead, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. The complaint, as amended, in these cases which were consolidated for hearing, alleges that Synergy Gas Corp. (the Respondent) has engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), (4), and (5) of the National Labor Relations Act (the Act). The Respondent's answer, as amended, denies the commission of any unfair labor practice.

The pleadings place in issue whether the Respondent, to discourage its employees at its facility in Cold Spring, New York, from supporting Local 456, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (the Union) (a) threatened to rescind a pay raise promised to an employee and (b) told employees that it was futile for them to support the Union. Also in issue are whether the Respondent unlawfully discriminated against employees by (a) allegedly rescinding a promised pay raise to an employee, (b) refusing to pay an employee for overtime work performed, and (c) discharging an employee. The amended complaint further alleges that the Respondent failed to bargain collectively with the Union respecting the layoff of three employees.

The hearing was held before me on various dates, beginning June 26, 1990, and ending May 15, 1991. On the entire record, including my observation of the demeanor of the witnesses and after due consideration of the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The Respondent sells bottled propane gas to commercial businesses and to individual consumers. In its operations annually, it meets the Board's nonretail jurisdictional standard.

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

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Respondent has many branches throughout the country from which it distributes propane gas. The only one involved in this case is its Cold Spring, New York facility. Its approximately six employees there had been unrepresented for purposes of collective bargaining until March 8, 1989, when the Union was certified in Case 2-RC-20597.

B. *The Pay Raise Allegation*

The complaint alleges that, on or about February 28, 1989, the Respondent, by its regional manager, John Churchill, unlawfully threatened to withhold a pay raise promised to an

employee and that, since that date, it has unlawfully failed to pay its employee, Stephen Brady, a raise promised him.

Churchill is responsible for all branches on the east coast. Various area managers report to him. Area managers are each responsible for a group of branches and each branch is supervised by a branch manager.

Brady began working for the Respondent on April 19, 1988. He started as a yardman at the Cold Spring branch, earning \$6 an hour. He also helped the then branch manager, Wayne Bumstead, in performing some of the duties of a serviceman, such as installing stoves and repairing hot water heaters. As he was then not yet 21 years of age, he could not qualify for a class III license which is required in order to drive a propane truck. In August 1988, he secured a learner's permit as the first step in qualifying for a class III license. A month later, he was given a \$1-an-hour raise. Brady testified that Bumstead and also the area manager then, Tom Corrigan, promised him then that, when he passed the class III test, he would be assigned to drive a propane truck and would then be paid at the same rate as the other drivers at Cold Spring received, \$10 per hour.

Brady attended the Union's first organizational meeting on December 8 and signed an authorization card then. On December 16, the Union filed its petition in Case 2-RC-20597. In that same month, Brady became 21 years of age and thus was eligible to take the class III driving test. He took it then but failed. On January 28, 1989, he took the test again, using a truck which the Union had arranged for him to drive. He passed the test.

Brady testified that, shortly after he passed the test, he asked Area Manager Corrigan when could he expect to get the driver's pay rate. He was then driving a propane truck. Brady related that Corrigan's reply was that he would have to wait until the union election was held but that the outcome of the election would have no bearing on whether he would get the raise or not. The election was held on February 28, 1989. The Union won and, as noted above, was later certified.

Brady testified as to a conversation he had with Regional Manager Churchill on the day of the election. He related that he asked Churchill for the raise promised him and that Churchill told him that, as the Union was voted in, the matter was in the hands of the lawyers and that he did not think that Brady would get the raise. In fact, he never received it.

Bumstead, who had been branch manager at Cold Spring but who was later discharged by the Respondent, did not testify. Corrigan, as area manager, was responsible from February 1988 to February 1989 for the area which included the Cold Spring branch; at the time of the hearing, he was an area manager in New England. Corrigan's testimony is that Brady asked him, before he took the class III driving test, when could he expect to earn the driver's rate of pay and that he told Brady that if he, Brady, really wanted to earn some money he should go out and get the class III license. Corrigan further testified that, when Brady did get the class III license, he asked again about getting the raise. Corrigan's testimony was that he then told Brady that he could not talk about the matter "because you are negotiating with the Union [and you] had Union activity cards." On being questioned further, Corrigan testified that all he said then, in response to Brady's request, was that "they should wait until the Union vote and then we will proceed from there."

The Respondent's regional manager, Churchill, did not testify.

I credit Brady's testimony. For that matter, it is virtually uncontroverted as neither Bumstead nor Churchill testified and as Corrigan's testimony in substance parallels Brady's account.

The credited testimony establishes that Brady had been promised by the Respondent that he would drive a propane truck and that he would be earning \$10 per hour when he passed his class III test, that Brady passed the test and drove a propane truck for the Respondent, that he was then told that he would not get the raise to \$10 in view of the union election, and that he never did get that raise. Churchill's statement to Brady on the day of the election unlawfully implied that the Union had prevented employees, who were due raises, from getting them. See *Taylor Chair Co.*, 292 NLRB 658, 663, 669 (1989).

The General Counsel's evidence establishes a prima facie case that the Respondent denied Brady a promised wage increase to \$10 an hour, on his passing the class III test, because the Union sought to represent the Cold Spring employees. Under *Wright Line*, 251 NLRB 1083 (1980), the Respondent then had the burden of proving that, notwithstanding the appearance of the Union, Brady would not have received the raise to \$10 an hour. The Respondent offered evidence to show and, in its brief has argued, that it does not automatically grant raises. I find that this is not sufficient to prove that Brady would not have received the \$10 raise he was promised. Respondent has not rebutted the General Counsel's prima facie showing and thus find that the Respondent, in order to discourage its employees from supporting the Union, has withheld from Brady his promised raise to \$10 per hour from the date he passed the class III test. See *Delta Gas*, 283 NLRB 391, 401-406 (1987).

C. The Layoffs

The complaint alleges that the Respondent has failed to bargain collectively with the certified Union by having unilaterally revised its practice of not laying off employees at Cold Spring when it laid off three unit employees on April 7, 1989. As noted earlier, the Union had been certified in March 1989.

General Counsel's witnesses testified credibly that, prior to the advent of the Union, employees at the Cold Spring branch were never laid off but that, when the busy winter season was over, the employees were assigned to yardwork until the cold weather returned. Their testimony also established that they were told by the Respondent that it was its policy not to lay off employees. Further, the Respondent's regional manager, Churchill, had urged them, shortly before the election in Case 2-RC-20597 to give the Respondent a year without the Union. It is reasonable to infer from that comment that the Respondent led them to believe that they would enjoy a good year. Instead, the Respondent laid off drivers Robert Battaglia, Edward Cronk, and Roger Demerest on April 7, 1989, a month after the Union's certification. The Respondent did not send any notice of these layoffs to the Union's office.

The evidence proffered by the General Counsel supports the complaint allegation that the Respondent failed in its obligation to bargain collectively with the Union as to the lay-

off, a mandatory bargaining subject. See *Adair Standish Corp.*, 292 NLRB 890 (1989).

The Respondent asserts that it gave the Union's "acting shop steward" at Cold Spring a week's notice of the proposed layoffs and that, as the Union did not request bargaining thereon, it thereby waived its right to bargain as to the layoffs. The Respondent had given a week's notice to the three laid-off employees of their layoff and, at the same time, also informed Frank DePolito, a driver at Cold Spring, of those layoffs. It contends that DePolito was the Union's "acting shop steward" at the Cold Springs branch and that, as it thereby gave notice of the impending layoffs to the Union and as the Union did not request bargaining thereon, the Union has thus waived its bargaining rights, respecting the layoffs. The bases asserted by the Respondent for naming DePolito as the Union's "acting shop steward" are its viewing him as the most active of the Cold Spring employees in supporting the Union and his having served as the Union's observer at the election conducted in Case 2-RC-20597. DePolito, as found by the Board,¹ had previously been discharged by the Respondent because of his union activities.

It is axiomatic that a party asserting a waiver must prove it by clear evidence. The Respondent's designation of DePolito as a union representative might be an attempt to interfere with the administration of the Union's business but would hardly prove a waiver. To establish a waiver, the Respondent would have had to show that the Union was aware of the pending layoff of about half the personnel in the certified unit, that it was cognizant of the Respondent's prior policy of not laying off employees at the Cold Spring branch, and that it remained silent respecting the layoffs such that the clear inference would be that the Union opted to consent to the change and to the layoffs. It is highly unlikely that the Union so consented and there is no probative evidence that it did. I therefore find that the Respondent has failed to bargain collectively with the Union as to the layoff of these three unit employees.

D. *DePolito's Overtime Pay Claim*

The complaint alleges that the Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1), (3), and (4) of the Act by having refused to pay its employee, Frank DePolito, for overtime he worked since April 1989.

In August 1985, DePolito began working for the Respondent as a serviceman at the Cold Spring branch, earning \$10.50 an hour. In December of that year, he was paid a salary of \$25,000 per annum. In January 1987, he began to discuss with other employees there the benefits of bringing in a union and was discharged a month later. As noted above at footnote 1, the Board has found that the Respondent discharged him then because of his union activities.

He was reinstated in November 1988 at a salary of \$444 per week, instead of \$481, the equivalent of the \$25,000 per annum salary he was earning prior to his discharge in February 1987. In May 16, 1989, the Respondent resumed paying him \$25,000 per annum.

On December 30, 1988, a backpay specification issued in the prior case for losses incurred by DePolito from his discharge in February 1987 to his reinstatement in November

1988 and for the \$37 difference each week in his paycheck for the period November 1988 to May 16, 1989. On March 30, 1991, the Board awarded him \$41,549 plus interest as backpay. (302 NLRB 130.)

The issue before me is whether the Respondent, for discriminatory reasons, failed to pay DePolito for overtime worked from April to October 1989 when he left the Respondent's employ. The Respondent contends that DePolito was not entitled to overtime pay as he was a salaried employee and that the Respondent was not motivated by union animus in not paying him for overtime hours worked inasmuch as, in its view, the Board had ordered DePolito's reinstatement on the same basis that he had worked in 1987, i.e., as a salaried employee.

On his reinstatement in November 1988, DePolito arranged a meeting between a union business agent and the Cold Spring employees. Based on authorization cards signed then, the Union filed a petition and in February 1989 won the election, leading to its certification—all as recounted above.

DePolito testified before me as follows concerning the amount of overtime he had worked for the Respondent. When he began in 1987, he was earning \$10.50 an hour and working a 40-hour week. With the birth then of his daughter, he had hospital bills to pay. The then area manager of the Respondent assigned him considerable overtime work so that he could pay those bills. The area manager, in December 1985, recommended and obtained for DePolito a raise to \$25,000 per annum. He was paid on that basis until his unlawful discharge in February 1987. His workweek then had generally consisted of 40 hours, with an "occasional" week where he worked but "a few hours" overtime.

As noted above, when he was reinstated in November 1988, he was paid a weekly salary of \$444 (equivalent to \$23,000 per annum) instead of the correct amount, \$481 (equivalent to \$25,000 per annum). The Respondent attributed to "clerical oversight" its failure to pay DePolito the correct sum for the period November 1988 to May 1989. The backpay specification that noted the discrepancy had issued in December 1988. There is no explanation before me as to why it took the Respondent at least 5 months to rectify it.

DePolito made several efforts with his immediate supervisors to get compensation for his overtime work. All the other servicemen were getting overtime pay. The Respondent's area manager submitted DePolito's request to the Respondent's headquarters to be paid for overtime but he experienced "a hard time" getting an answer. Finally, the area manager was informed by the head office that DePolito would be paid only his salary as, "per a court order" and was told that was how it would be done.

The evidence before me discloses that the Respondent continued to harbor an animus toward DePolito when it reinstated him in November 1988 after having unlawfully discharged him in February 1987. It paid him, on his return, \$37 a week less than it had paid him in February 1987 and did so for a 6-month period. I find it difficult to accept the Respondent's explanation for that discrepancy as the result of a mere clerical oversight on its part. I find equally untenable the Respondent's explanation for not paying overtime to DePolito that it was acting "per a court order." Rather, I find that the Respondent had refused to pay DePolito for his overtime hours because he brought the Union in with him on

¹ See *Synergy Gas Corp.*, 290 NLRB 900 (1988).

his reinstatement and supported it thereafter and because the Respondent harbored *animus* against him because he had pursued with the Board the matter of his unlawful discharge in February 1987. Based on the record before me, the General Counsel has made out a *prima facie* case establishing these reasons for the Respondent's failure to pay DePolito overtime pay. The Respondent has not offered any persuasive evidence to show that, nonetheless, it would still not have paid him for his overtime assignments. Accordingly, I find merit to this allegation of the complaint.

E. Alleged Threat by Branch Manager Bollick

The complaint alleges that, on about April 13, 1989, the Respondent, by its Cold Spring branch manager, Reid Bollick, threatened its employees that it would be futile for them to support the Union.

Thomas Nastasi, a serviceman at Cold Spring testified that, during a conversation he had with Bollick in April 1989, Bollick stated that the Respondent "would not allow the Union to get into that branch under any circumstances at all." Bollick did not testify. I credit Nastasi's account and find that the Respondent thereby interfered with, restrained, and coerced its employees in the exercise of their rights under Section 7 of the Act.

F. Nastasi's Discharge

The Respondent is alleged to have discharged Thomas Nastasi because of his activities on behalf of the Union. The Respondent contends that he was discharged because of his negligence in driving his truck which resulted in an accident.

Nastasi was hired on June 21, 1988, by the Respondent and worked at the Cold Spring branch, principally as a driver delivering propane gas.

As earlier noted, five of the six Cold Spring employees signed union authorization cards in December 1988. Nastasi was one of those five. The only employee who did not sign a union authorization card was Robert Crissey who made it known to the Respondent's branch manager shortly before the election in Case 2-RC-20597 on February 28, 1989, in language that was quite vivid, that he did not want to have anything to do with the Union. The Union won that election by a 5 to 1 vote.

In April 1989 the Cold Spring branch manager, Reid Bollick, said to Nastasi that he hoped Nastasi would cross the picket line if the Union called a strike; Nastasi told him that he would not cross a picket line. Bollick, as earlier noted, then stated that the Respondent would not allow the Union to get into the Cold Spring branch under any circumstance.

On September 20, 1989, a hurricane had passed through the Cold Spring area, bringing heavy rains. It was still raining somewhat on September 21. Nastasi was operating a six-wheel bobtail truck that day delivering in a hilly area on roads which one driver had characterized as "goat trails." Nastasi had made about eight deliveries and then drove up a steep, narrow dirt road to make another delivery. On the way back, as he was guiding his truck down at about 1 to 2 miles per hour, it suddenly dropped into a washout. His head hit the door jamb and he lost consciousness. He woke up to find out that the truck had gone down an embankment and was resting against two trees. He shut the ignition off,

checked for leaks, found none, and walked to a nearby residence where he called his office. He returned to the scene of the accident. An ambulance arrived and took him to a hospital where he was examined and released. He was driven back to the accident scene and observed that the front fender and a door were dented and the fiberglass nose of the cab had been cracked. Later, Nastasi filled out an accident report describing the incident as related.

On the next day, Nastasi reported for work. He asked Branch Manager Bollick what would happen to him. Bollick told him that, as far as he (Bollick) was concerned, nothing would happen as he (Nastasi) was a good employee with a good record. He was told to go home and rest.

On the next scheduled workday, Monday, September 25, Bollick told Nastasi, when he arrived at the Cold Spring facility, that he (Bollick) was waiting for a phone call and that he thought that "they wanted to fire [Nastasi]." At lunchtime, Nastasi went to the office. Bollick was on the telephone. Bollick made a gesture to Nastasi, indicating that Nastasi was being fired. Later that day, Bollick handed Nastasi a notice which stated that he was terminated for gross negligence which caused the accident on September 20.

Nastasi testified that several Cold Spring servicemen, whom he named, had been in truck accidents but had not been discharged therefor. He related further that Robert Crissey, who as noted above had made it clear to the Respondent that he opposed the Union, had once pulled a wrong lever while operating a hydraulic lift and that resulted in a 500-gallon propane tank crashing through a windshield. Crissey was not discharged.

The foregoing evidence establishes that Nastasi supported the Union and the overall circumstances compel a finding that the Respondent was aware that he did. Further, the Respondent, on more than one occasion, has exhibited its union animus. The suddenness of Nastasi's termination, despite the stated belief by the Cold Spring branch manager that nothing would happen to him and as no one from the Respondent pointed out to him the basis for its assertion that he was guilty of gross negligence in making deliveries right after a hurricane and while driving on treacherous roads, indicates that the Respondent seized on the incident as a pretext to conceal a discriminatory reason to discharge him. Based on the foregoing factors, I find that the General Counsel has established, *prima facie*, that Nastasi's support of the Union was a factor in the Respondent's decision to discharge him.

Under *Wright Line*, *supra*, the Respondent has the burden of proving that, absent the Union, it would still have discharged Nastasi. To that end, the Respondent asserted that the extent of the damage done by Nastasi to the truck on September 20 was a major factor in the Respondent's decision to discharge him. At one point in the course of the hearing, the Respondent indicated that the extent of the damage, costing \$5000 for repairs, was the sole reason for his discharge. The Respondent's corporate administrator, Kevin Mitchell, testified that he made the decision to discharge Nastasi. However, he also testified that the extent of the damage to Nastasi's truck was not a factor in his decision. He related too that he was not aware, when he made the decision, of the extent of the damage that had been done to the truck. These conflicting positions do little to enhance the Respondent's efforts to meet its *Wright Line* burden.

For that matter, Mitchell's testimony that he made the decision to discharge Nastasi was not persuasive. He works at the Respondent's corporate headquarters in Farmingdale, New York, and is in charge of processing insurance claims, maintaining personnel records, and overseeing safety programs and related administrative matters. Also at the corporate headquarters are the members of the Vogel family, owners of the Respondent. Sherman Vogel is president. His three sons are the vice presidents. John Vogel is vice president in charge of operations.

In an effort to demonstrate that Nastasi's discharge was consistent with the Respondent's past practice, Mitchell testified that he discharged Nastasi because he viewed the September 20 accident as avoidable and attributable to Nastasi's gross negligence and further he identified various corporate documents as ones which contained records of instances where he discharged drivers under similar circumstances. On further questioning, it became apparent that Mitchell had no independent recollection of the events recounted in these records as to the reasons stated there for the discharges. More significantly, some of these records reflected that Mitchell did not make the discharge decision but that he made recommendations to John Vogel. On a few, his recommendations were overruled. Other records indicated that various managers in the Respondent's operations section had discharged drivers and later notified Mitchell's section of those discharges.

The circumstances which Mitchell recounted as the basis for his decision to discharge Nastasi also do not persuasively support his account. He related that he decided to discharge Nastasi during the course of a telephone conversation with Regional Manager Churchill when the matter was first reported to him. There is no evidence that Churchill himself had questioned Nastasi as to the accident. Mitchell acknowledged that he never sought Nastasi's version of the incident. Mitchell related that the Respondent has no set guidelines to be applied in discharging employees.

The Respondent has failed to meet its burden, under *Wright Line*, to show that, absent Nastasi's support for the Union, it would still have discharged him. I therefore find that its discharge of Nastasi was motivated by *union animus*.

CONCLUSIONS OF LAW

1. The 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 as defined in Section 2(5) of the Act.
3. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by having:
 - (a) Threatened to withhold a pay raise promised an employee in order to discourage support for the Union.
 - (b) Told its Cold Spring employees that it would not allow the Union to get into that branch under any circumstances.
 - (c) Engaged in the conduct described in paragraphs 4, 5, and 6 below.
4. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act by having:
 - (a) Withheld from its employee, Stephen Brady, a pay raise promised him in order to discourage support for the Union.
 - (b) Failed to pay its employee, Frank DePolito, for overtime work performed because he supported the Union.

(c) Discharged its employee, Thomas Nastasi, because of his support of the Union.

5. The Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(4) of the Act by having failed to pay its employee, Frank DePolito, for overtime work because he had filed an unfair labor practice charge against the Respondent under the Act and gave testimony in connection with it.

6. The Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(5) of the Act by having laid off three of its Cold Spring employees without bargaining collectively thereon with the Union as the exclusive representative for such purposes of a unit comprised of the Cold Spring employees of the Respondent.

THE REMEDY

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

The Respondent, having unlawfully discharged one employee and laid off three others, I find it necessary to order it to offer them reinstatement to their former jobs or, if they no longer exist, to substantially equivalent jobs, without prejudice to their seniority or their other rights and privileges and make each of them whole for any losses of earnings or other compensation that they suffered as a result of the unlawful action against them. Backpay shall be computed in accordance with the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also make whole Frank DePolito for all overtime worked, with interest as computed in *New Horizons for the Retarded*, supra, and also Stephen Brady for its failure to pay him a wage rate of \$10 per hour since the date of his class III license, with interest therein as computed in *New Horizons*, supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondent, Synergy Gas Corp., Cold Spring, New York, its officers, agents, successors, and assigns, shall

I. Cease and desist from

(a) Threatening to withhold or withholding a pay raise due any employee in order to discourage support for Local 456, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO.

(b) Telling its employees that it will not allow the Union to represent its employees at its Cold Spring, New York branch.

(c) Failing to pay any employee for overtime work in order to discourage support for the Union or because an employee files an unfair labor practice charge with the Board or gives testimony under the Act.

²If 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.

(d) Discharging employees in order to discourage membership in the Union.

(e) Failing to bargain collectively with the Union as the exclusive representative of the unit comprised of Cold Spring employees by unilaterally laying off employees in that unit.

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

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

(a) Offer Thomas Nastasi, Roger Demerest, Edward Cronk, and Robert Battaglia immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for their lost earnings in the manner set forth in the remedy section above.

(b) Make whole Stephen Brady and Frank DePolito for failing to pay them, respectively, a pay raise and overtime pay, with interest thereon as set forth in the remedy section.

(c) Remove from its files all references to the discharge of Thomas Nastasi and notify him in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, on 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 necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Cold Spring, New York branch copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 2, 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.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

³If 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 the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten to withhold or withhold a pay raise due an employee to discourage support for Local 456, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO.

WE WILL NOT tell any of our employees at our Cold Spring, New York branch that we will not allow the Union to represent them for purpose of bargaining collectively with us respecting their hours of work, rates of pay, and other terms and conditions of employment.

WE WILL NOT pay any employee for overtime work in order to discourage support for the Union or because an employee files an unfair labor practice charge with the Board or gives testimony under the Act.

WE WILL NOT discharge any employee in order to discourage membership in the Union.

WE WILL NOT fail to bargain collectively with the Union by laying off employees without notice.

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

WE WILL offer Thomas Nastasi, Roger Demerest, Edward Cronk, and Robert Battaglia their jobs back and make them whole, with interest, for all earnings they lost as a result of our unlawful acts.

WE WILL make whole and with interest Stephen Brady for our failure to pay him the pay raise due him as a class III driver and also Stephen DePolito for not having paid him for the overtime hours he worked, both because they supported the Union.

WE WILL notify Thomas Nastasi that we have removed all references to his discharge from our files that it will not be used against him in any way.

SYNERGY GAS CORP.