

Quality Abestos Removal, Southeast, Inc., and International Association of Heat & Frost Insulators and Asbestos Workers, Local Union No. 55, AFL-CIO. Case 15-CA-11714

April 30, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On November 25, 1992, Administrative Law Judge Richard J. Linton issued the attached decision. The Respondent filed exceptions, and the General Counsel filed an answering brief and a motion to strike the exceptions.¹

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 brief and has decided to affirm the judge's rulings, findings,² 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, Quality Asbestos Removal, Southeast, Inc., Mobile, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹The General Counsel has moved to strike the Respondent's exceptions for failure to comply with Sec. 102.46(b)(1) of the Board's Rules and Regulations. Sec. 102.46(b)(1) provides in pertinent part:

Each exception (i) shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken; (ii) shall identify that part of the administrative law judge's decision to which objection is made; (iii) shall designate by precise citation of page the portions of the record relied on; and (iv) shall concisely state the grounds for the exception.

Sec. 102.46(b)(2) of the Board's Rules states that any exception which does not comply with the requirements of the foregoing section "may be disregarded." Although the Respondent's exceptions include argumentation not specifically linked to any finding of the judge or evidence in the record, we find that the exceptions adequately contest the judge's credibility findings, and we will consider them to that extent.

²The 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.

Charles R. Rogers, Esq. and (trial only) *Mark J. Kaplan, Esq.*, for the General Counsel.
Brenda Walker (Owner, QAR Southeast, Inc.), of Mobile, Alabama, for the Respondent Employer.

Gerald R. Driskell (Bus. Mgr., Asbestos Workers Local 55), of Mobile, Alabama, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. This case involves Quality Asbestos Removal, Southeast, Inc.'s (QAR) July 1991 discharge of two industrial insulators (W. A. Ross and B. E. Corrales) and the layoff of three others (W. L. Fitzgerald, B. Cayton, and J. D. Pierce) shortly after Local 55 began an organizing campaign among QAR's employees working at Degussa Corporation's Theodore, Alabama chemical plant.

Crediting the Government's witnesses, and disbelieving QAR's sole witness (former) Superintendent Scott Overstreet, I find in favor of the Government. Because, as the parties agree, QAR has gone out of business, I shall order conditional reinstatement, that QAR make whole, with interest, the five discriminatees from their termination to the date, as determined in compliance, each would have been laid off had he not been unlawfully terminated in July 1991. Finally, I direct that QAR mail copies of the notice to employees to each employee employed at its Degussa jobsite at any time from July 1 through July 17, 1991.

I presided at this 2-day trial, August 10-11, 1992, in Mobile, Alabama, pursuant to the January 28, 1992 complaint issued by the General Counsel of the National Labor Relations Board through the Regional Director for Region 15 of the Board. The complaint is based on a charge filed December 13, 1991, by International Association of Heat & Frost Insulators and Asbestos Workers, Local Union No. 55, AFL-CIO (Union, Local 55, or Charging Party) against Quality Asbestos Removal, Southeast, Inc. (QAR, Respondent, or Company). All dates are for 1991 unless otherwise indicated.

The General Counsel alleges in the complaint that QAR violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1) by issuing "verbal" warnings to William Fitzgerald and Andy Ross about July 3; about July 5 by laying off Fitzgerald; about July 6 by terminating Ross; about July 8 by terminating B. E. Corrales Jr.; and about July 17 by laying off Bruce Cayton and Jerry Pierce. Admitting the facts alleged, QAR denies any violation.

The General Counsel and QAR filed posthearing briefs. The General Counsel attached a proposed order and a proposed notice to the Government's brief. QAR was represented by its owner, Brenda Walker, at the hearing and in the submission of QAR's brief. Although the General Counsel has not filed a reply brief pointing to factual statements by Walker on brief which are outside the record (such as an experiment and a posthearing investigation by Walker, Br. at 2, 4, and company history, Br. at 7), nor to a document, attached to the brief, which was not identified or offered in evidence at the hearing, I shall disregard these items and attach no weight to them. At the same time, I note that Walker's submission appears entirely sincere and, for someone not an attorney or management consultant experienced in NLRB proceedings, Walker seems to have represented QAR rather ably.

In addition to disregarding the items in QAR's brief, I also shall disregard statements in the Government's brief referring

to matters outside the record, such as whether an election petition ever was filed (Br. at 4).

Because QAR was represented by Owner Walker, a person neither an attorney nor experienced in unfair labor practice trials before the Board, I advised the parties that the proceeding would accord QAR fundamental fairness and due process (1:9, 156–157.)¹ See *American Cleaning Co.*, 291 NLRB 399 fn. 1 (1988). Indeed, going beyond fundamental fairness at times, I informed Walker, for example, that she was entitled to ask to see any statements of the Government's witnesses when they had completed their direct examination. (1:40, 64.)

In ancient Egypt the highest official appointed by a Pharaoh was the vizier. The vizier's duties were so important and so numerous that the Pharaoh personally installed him in a public ceremony at which the Pharaoh gave the vizier a formal charge. M. Lichtheim, 2 *Ancient Egyptian Literature* 11 (University of California Press, 1976). Aside from duties which compare with a modern chief of staff and secretary of state, the vizier served as the Pharaoh's chief justice. J. White, *Ancient Egypt* 47–48 (1970).

Ptahhotep was one of the earliest viziers. He served a king of the Old Kingdom's Fifth Dynasty, the Pharaoh Isesi, around 2350 B.C. As one of Ancient Egypt's earliest and most famous sages, Ptahhotep left 37 maxims, or wisdom instructions. From across the centuries, through the translation of Professor Miriam Lichtheim,² Chief Justice Ptahhotep bequeaths to all judges his ancient pearl of grace and wisdom:

Not all one pleads for can be granted,
But a good hearing soothes the heart.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and QAR, I make the following

FINDINGS OF FACT

I. JURISDICTION

A corporation, QAR's principal office is, or was during the relevant time, at Mobile, Alabama. QAR, a contractor, applies and removes industrial insulation in the construction industry. During calendar year 1991, QAR performed services valued at \$50,000 or more outside Alabama. I find that QAR is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION INVOLVED

Record evidence establishes, and I find, that the Union is a labor organization with the meaning of Section 2(5) of the Act.

¹ References to the two-volume transcript of testimony are by volume and page. Exhibits for the General Counsel are designated G.C. Exh. and for the Respondent are designated R. Exh.

²M. Lichtheim, 1 *Ancient Egyptian Literature* 61, 68 (University of California Press 1973, 1975).

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Credibility Resolved

Nine witnesses testified, eight called by the General Counsel and one, Scott Overstreet, called by QAR. The General Counsel recalled one witness at the rebuttal stage, and QAR called no witnesses in surrebuttal.

Having closely observed the witnesses, I credit those called by the Government. I disbelieve Scott Overstreet on disputed matters. Accordingly, in the pages which follow, my findings are based on the version given by the Government's witnesses.

B. Organizing Begins; Terminations Follow

Headquartered in Germany, Degussa Corporation operates a large chemical plant at Theodore, a town situated a few miles southwest of Mobile. (2:239–240.) Degussa's Theodore plant is the situs of the work involved in this case. QAR began working at the plant before June 1991. (2:299.) The work in this case was done by teams of two insulators. (1:56, 86, 144.) The teams wrapped strips of spun glass insulation around 18- to 24-inch piping. (1:44, 56, 71–74, 181.)

Gerald R. Driskell is Local 55's business manager and financial secretary. (1:19.) In response to a June 5 newspaper advertisement (G.C. Exh. 2) seeking an insulation foreman and insulators for a "long term job" in the "Mobile area," Driskell telephoned the number shown. (No employer's name was stated.) Learning that the employer was QAR (1:21), Driskell launched an organizing campaign by referring job applicants. John P. McLellan was one of two referred the following day, with McLellan applying for the foreman's position. (1:22.) McLellan was hired as the foreman over the south end of the job, reporting to Scott Overstreet. (1:23, 99–100.) Over the next 2 to 3 weeks, Driskell sent 19 employees to apply, and 15 were hired. (1:22.)

Scott Overstreet was the job superintendent for QAR at Degussa. (2:198, 241.) Assisting Overstreet were two foremen, Harold Cawthorn and McLellan, and a leadman, Willie Parker. (2:241–242.) Overstreet testified that he reported to Brenda Walker. (2:241.)

On Monday, July 1, some of QAR's insulators began wearing a large button (G.C. Exh. 7, some 2.25 inches across) with red capitalized lettering, on a white background. The big red letters read: "VOLUNTARY UNION ORGANIZER," with "Union" appearing in larger print than the other two words. The employees wearing the buttons included Fitzgerald (1:48), Ross (1:76), and Bernard E. Corrales Jr. (1:117). They wore the buttons openly on their outer garments. (1:165–169.) Because they attended an asbestos abatement class on July 1 (G.C. Exh. 6), others did not appear with their buttons until July 2, including Bruce Cayton (1:160–161, 180) and Jerry D. Pierce (1:170, 174). Solicitation to sign authorization cards also began. Card signing usually occurred, in the words of several witnesses, at "dinnertime," the noon meal.³ (1:49, 175.)

³ "Dinner: The meal Southerners eat while Northerners are eating lunch. When the Northerners are eating dinner, Southerners are eat-

Continued

By termination slips dated (Friday) July 5, and signed by Scott Overstreet, QAR laid off (G.C. Exh. 9, "R.O.F.") Fitzgerald, fired Ross for absenteeism (G.C. Exh. 11), and fired Corrales because he "Walked off job." (G.C. Exh. 14.) Termination (layoff) slips, with "Reduction In Force" checked, and dated (Wednesday) July 17, were issued to Bruce Cayton (G.C. Exh. 15) and Jerry Pierce (G.C. Exh. 17).

C. The July 5, 1991 Terminations

1. Foreman McLellan fired; Union delivers letter

Shortly after work began on Friday, July 5, Superintendent Overstreet fired Foreman McLellan, purportedly over time-sheets. (1:104-105.) Because McLellan and Corrales alternated driving to work (1:105, 127), and Corrales had driven that morning, McLellan, advising Overstreet of that fact, asked if it would be permissible for Corrales to drive him home. As McLellan lived a far distance, he suggested that Corrales simply return to work the next day. That would be fine, Overstreet answered. (1:105-106.) [Overstreet denies, 2:202, but I do not believe him.] McLellan went to Corrales, informed him of the situation, and they left, passing within 15 feet from where Overstreet and another person were standing. Neither pair spoke to the other. (1:105-107, 127-129, 136.)

Proceeding to the Union's office, McLellan and Corrales reported to Driskell that McLellan had been fired. (1:23, 108-109, 129.) Driskell then prepared a letter (G.C. Exh. 3) which he, accompanied by McLellan, delivered about 9 o'clock that morning to Brian Walker. [Although the pleadings establish that Brian Walker is QAR's vice president, when McLellan answered the newspaper ad on June 6, Brenda Walker ushered McLellan into Brian Walker's office where Brian Walker interviewed him and referred him to Overstreet for the hiring decision.] (1:100, 109.)

Addressed to Brian Walker at QAR, Driskell's letter, on the Union's stationery, advised that the Union was trying to organize QAR, named seven employees who were the "Voluntary Union Organizers," warned that the Act protected the seven from harassment and "deferential" treatment ["discriminatory" treatment presumably intended], asserted that because the Union had the "required 30% of representation cards signed, I formally request that you negotiate with Local 55 and I will be filing a petition for election with the NLRB."

Of course, Driskell's letter reflects a confusion of the need to have majority support for a recognition demand with the Board's requirement for a 30-percent showing of interest to conduct an election. Granting recognition to a minority supported union violates Section 8(a)(2) of the Act (so majority support is necessary for lawful recognition),⁴ and the Board, implementing the statutory [29 USC 159(c)(1)(A)] requirement for a "substantial number," requires a 30-percent showing of interest to justify the Agency's processing a petition for a representation election. 29 CFR 101.18(a); 2 NLRB Casehandling Manual 11020, 11022.3a (Sept. 1989);

ing supper." Steve Mitchell, *How To Speak Southern* (Bantam Books, 1976).

⁴Norris and Shershin, *How To Take A Case Before the NLRB* 55-56 (6th ed. BNA, 1992).

Hardin, 1 *The Developing Labor Law* 378 (3d ed. 1992, ABA, BNA).

Respecting the employees Driskell names in his letter, the seven are, in the order listed:

William Fitzgerald Jr.
William Ross
Bruce Cayton
Jerry Pierce
Michael Hamilton
Curtis Hamilton
Gene Corrales

Responding in their office meeting, Vice President Walker told Driskell (1:24) and McLellan (1:110) that with so many nonunion contractors as his competitors there was no way he could consider recognizing the Union, and that if his company were organized he would pack his bags, close the doors, and shut it down. Vice President Brian Walker did not testify.

About 1 p.m. that day Driskell received a telephone call from Brenda Walker advising him that she owned QAR. Driskell therefore mailed to "Mrs. Walker, Owner," a duplicate letter. (G.C. Exh. 4; 1:26-27.) The following Monday, July 8, Driskell received Owner Walker's letter of July 5 (G.C. Exh. 5), in which she asserts that the Union is short its "needed votes" and reminds, as she informed him during their telephone conversation, that "QAR Southeast is a minority, woman-owned Alabama Corporation, and I am enclosing a copy of my certificate for your records." (1:28.)

According to Superintendent Overstreet, before he received a call from Vice President Walker the afternoon of July 5, informing him of the visit by Driskell and McLellan, Overstreet had never seen anyone wearing union organizer buttons, and no one had informed him of any union activity. (2:199-200.) I do not believe Overstreet.

2. Fitzgerald laid off; Ross fired

a. General

Hired around June 20 (1:44-47, 68), Fitzgerald and Ross worked as one of the insulating teams. (1:56.) They worked under Foreman Harold Cawthorn. (1:45.) During his first week on the job Fitzgerald and Ross notified Overstreet of a class to be held on July 2 to train and certify, or recertify, for removing asbestos. Overstreet said that would be fine, that they could go, that QAR needed employees who were certified in asbestos removal. (1:59-60, 82-83.)

The training classes, sponsored by the Union, are conducted by a firm at the Union's hall in Mobile. The training and testing firm notifies the State of Alabama which then issues a certification which authorizes the person to remove asbestos in Alabama. The Union also is notified of the certification because all employees referred for asbestos abatement must be certified by Alabama. (1:27-32.)

Either in that same conversation (1:89, Ross), or possibly a different one (1:61-62, Fitzgerald) that same first week of the employment of Fitzgerald and Ross, Superintendent Overstreet came and asked Fitzgerald and Ross how long they had been members of Local 55. Fitzgerald said 15 years, and Ross answered 20 years. Overstreet said he had been a member of the Houston Local. He complimented their

work, saying he knew by looking at their work that they were experienced insulators. Although he did not address this conversation, Overstreet testified that in 1983, he had taken a withdrawal status from the the Houston Local. (2:199, 295.)

Notwithstanding Overstreet's having complimented Fitzgerald and Ross on their work, apparently the week preceding the week of Monday, July 1, the morning Fitzgerald and Ross came to work wearing their union organizer buttons, Foreman Cawthorn approached Ross and told him that "the man" (meaning Overstreet) said that he would be fired if he did not "pick up" his work. Ross said they were doing as much as the others. (1:84-85). This testimony is uncontradicted.

On July 2, Fitzgerald and Ross attended the Union's asbestos removal class. (G.C. Exh. 6.) The next day, Wednesday, July 3, Cawthorn, with Overstreet present, told Fitzgerald and Ross, in the presence of insulators Curtis Hamilton and his brother Michael, that they were not producing enough, that they had wrapped ("run") only 40 to 50 feet the previous day, whereas the Hamilton brothers had run some 120 feet. Not so, Curtis Hamilton spoke up, for the Hamiltons had wrapped only about 60 feet. (1:53-55, Fitzgerald; 85-86, Ross.) Curtis Hamilton confirms this. (1:143.) At that time the Hamilton brothers were not wearing the union buttons and did not begin wearing theirs until after Ross was fired. (1:147, 164.)

Complaint paragraph 7, with conclusory paragraph 13, alleges that QAR violated Section 8(a)(3) and (1) of the Act by the July 3 oral warning issued by Cawthorn/Overstreet.

b. *William L. Fitzgerald*

(1) Facts

When the job was rained out about 1 p.m. on Friday, July 5, Cawthorn gave Fitzgerald a copy of a July 3 memo (G.C. Exh. 8) from Overstreet to all employees that beginning (Sunday) July 7, employees would begin 12-hour days with the possible necessity of double shifts. At the same time Cawthorn gave Fitzgerald his termination notice (G.C. Exh. 9) for "R.O.F.," meaning, Fitzgerald testified (1:51), reduction of force. (1:50-53.) Proceeding to the office Fitzgerald asked Overstreet why he had been terminated. "You got a reduction in force. That's all you need to know," Overstreet replied. (1:51.) The following Monday, July 8, Bernard E. Corrales (1:133-134), Curtis Hamilton (1:144-145), and Jerry D. Pierce (1:176), observed that QAR had hired some 6 to 12 new employees.

(2) Discussion

QAR's complimentary attitude toward Fitzgerald and Ross, expressed by Overstreet in late June, began to sour the following week when the two came to work wearing their union organizer buttons. Criticism of the two quickly followed, including the oral warning of July 3. On Friday, July 5 (July 4 was a scheduled holiday, 1:158), just 4 hours after the Union had delivered its letter including Fitzgerald's name as one of the organizers, and while QAR was distributing an Overstreet memo advising of expanded hours and possible double shifts, QAR terminated Fitzgerald as a reduction in force—as if there were insufficient work available.

No sooner had Fitzgerald departed than QAR hired several new employees. With these facts, plus the July 3 false accusation of low productivity, and the antiunion animus expressed the morning of July 5 by Vice President Walker, I find that the General Counsel established a strong prima facie case that the union activities of Fitzgerald and Ross were a motivating factor in their discharges. I turn now to determine whether QAR carried its burden of demonstrating, by a preponderance of the evidence, that it would have taken the same action absent any union considerations.

Scott Overstreet testified that QAR found it necessary to cut back because Degussa did not release a tie-in schedule, that the overtime was never worked, and that on the basis of productivity, absenteeism, and seniority he selected Fitzgerald for layoff. (2:201-202.) No records were introduced to support Overstreet's testimony. The credited evidence shows that the Fitzgerald/Ross team was as productive as the others. As for absenteeism, Fitzgerald missed only 2 days, the first being his second day on the job, and the second being the approved attendance at the asbestos abatement certification class. (1:58-60.) I find Overstreet's reasons to be false. QAR having failed to meet its burden of proof, I shall order that it make Fitzgerald whole, with interest.

I also find that, absent the union activities of Fitzgerald and Ross, QAR would not have issued to them the oral warning of July 3, 1991. By this oral warning, QAR violated Section 8(a)(3) and (1) of the Act.

c. *William Andrew Ross*

(1) Facts

As mentioned earlier, the July 5, 1991 termination slip (G.C. Exh. 11) which Overstreet signed for Ross reflects that Ross was fired for absenteeism. Ross missed 3 days. His first absence occurred in his first week when Fitzgerald became ill. Because his own vehicle was disabled, Ross was riding with Fitzgerald. (1:81.) Fitzgerald called QAR and reported that both he and Ross would not be at work. (1:58-59.)

Ross was absent on Tuesday, July 2, when he and Fitzgerald attended the Union's asbestos abatement class for his recertification by Alabama. (1:82.) As I have found, in the days before Fitzgerald and Ross began wearing their union organizer buttons, Superintendent Overstreet personally approved their attending the recertification class on July 2. Ross is unable to confirm whether he reminded Overstreet on July 1 that he would be absent the following day. (1:91.)

For his third absence Ross was sick on Friday, July 5. (1:83.) Not only did Fitzgerald report to Foreman Cawthorn that Ross was ill and would not be in (1:60-61), but Curtis Hamilton, who earlier had learned from Fitzgerald that Ross was sick, also told Cawthorn and Overstreet as well. (1:146-147, 152-153.) Ross testified that he never received any warnings about absenteeism. (1:83.)

Testifying that he does not "recall" receiving any message that Ross would miss work (2:200), Superintendent Overstreet admits that he never (personally) warned Ross about his absenteeism (2:248, 252), and that QAR had no written attendance policy (2:249). According to Overstreet, he generally followed the "three strikes and you're out" rule, although (2:249-252) he also weighed the circumstances of whether the employee called in and whether his work performance was good.

QAR offered no evidence that Ross' job performance was less than satisfactory. As I discussed respecting Fitzgerald, the July 1 and July 3 complaints by Hawthorn and Overstreet were false accusations created as pretexts to justify future discipline because the two had begun wearing union organizer buttons.

Although Overstreet never (personally) warned Ross about absenteeism, he asserts that he told Ross' foreman, Cawthorn, to do so and Cawthorn reported back that he had done so. This was for the first two absences. (2:255-257.) I do not believe Overstreet.

Contained in the personnel file QAR maintained for Ross are three warnings purporting to be from Overstreet to Ross for violating "QAR Policy" respecting absenteeism. The first (G.C. Exh. 19) was for violating that policy on (Wednesday) June 26; the second (G.C. Exh. 20), for July 2; and the third (G.C. Exh. 21), for July 5. Overstreet concedes that he has never seen these documents and cannot identify the handwriting on them. (2:254-255.) The General Counsel argues (Br. at 26) that QAR fabricated the three documents as a fraudulent scheme to deceive the State of Alabama when QAR filed its July 19 response (G.C. Exh. 22) opposing (on the basis Ross had been warned three times) Ross' claim for unemployment compensation. (Of course, as Ross' third absence came on July 5, he was not present to receive any third warning that day.)

Although the job was rained out when Ross reported for work on July 6, Cawthorn handed him his check and the termination slip signed by Overstreet. (1:79-80.)

(2) Discussion

As I have described earlier when discussing the Fitzgerald Ross team, I find that the General Counsel established a strong prima facie case of unlawful motivation. Crediting the employees and disbelieving Overstreet, I find that the Fitzgerald Ross team had been complimented in late June, only to be criticized as soon as they began wearing their union buttons. The criticism reached the blatantly false level on July 3 when Cawthorn, with Overstreet present, falsely asserted—with the Hamilton brothers present—that the Hamilton brothers had wrapped twice as much pipe the previous day. Curtis Hamilton, not then wearing a union button, corrected Cawthorn.

The animus expressed by Vice President Walker was reflected in the false basis for Fitzgerald's layoff, and Overstreet's (discredited) denial of ever receiving notice that Ross would be absent. Indeed, Overstreet himself had given advance approval for Ross to attend the July 2 class. While Overstreet was not opposed to an insulator being a union member, his reaction, and that of QAR, was strongly different when a member began organizing QAR.

Even if Ross can be faulted for not reminding Overstreet (or Cawthorn) on July 1 that he would be attending the Union's recertification class the next day (and assuming he failed to do so), the evidence is still heavily weighted toward unlawful motivation. Because Overstreet falsely (I have found) denies receiving notice that Ross would be absent in June and again on July 5, I infer that QAR seized on absenteeism as a pretext to mask its real motive of getting rid of a union activist.

Did QAR carry its burden to demonstrate that absent any union activities by Ross that it would have fired him any-

how? The answer is no. Overstreet's reasons for termination (absenteeism, failure (implied) to call in, and (implied) less than good work performance) have all been found to be false. Accordingly, I shall order that Ross be made whole, with interest.

3. Bernard E. Corrales Jr. fired

a. Facts

As I mentioned in discussing Ross's case, rain canceled the work for Saturday, July 6. Corrales went to the job but could not get in to work. (1:129-130.) When Corrales reported to work on Monday, July 8, Overstreet handed him a termination slip (G.C. Exh. 14) and told Corrales that he was terminated. The reason stated on the slip states "Walked Off Job." When Corrales protested that McLellan had told him that Corrales was leaving the site with McLellan, Overstreet responded that it "makes no difference" and "You're terminated." Overstreet turned and walked away. (1:131-132.)

Supplementing his (discredited) denial of approving Corrales' July 5 departure with McLellan, Overstreet asserts that he first learned of Corrales' departure when the Degussa security guard at the gate called and reported that Corrales had left the site without moving his timecard and that Overstreet himself had to go move it. (2:202, 271-274.) Without going into detail, I note that such a failure, had it occurred, could have been a safety problem because the discrepancy could have interfered with Degussa and QAR obtaining a correct count of personnel ("head count") on the site in the event of an explosion or other disaster. However, this factor is lessened by knowledge that the guard at the second, outer, gate keeps a sign-out book (2:296) for employees leaving the job. (No party offered evidence concerning whether Corrales signed out.)

I note that QAR's assertion at trial that Corrales failed to move his timecard was not described in Owner Walker's December 23 position letter to NLRB Region 15. (2:285-288.) I need not dwell on this point because I credit McLellan (1:108) and Corrales (1:129) that Corrales moved his timecard from the inside rack to the outside slot as he and McLellan left the jobsite on July 5.

b. Discussion

Given QAR's antiunion animus, Corrales, who began wearing the organizer button on July 1, had his fate sealed the morning of July 5 when Driskell delivered the letter naming Corrales and six others as those voluntarily organizing for the Union. Reneging on the approval he gave McLellan shortly after work began the morning of July 5 (and before Driskell delivered the letter to Vice President Walker around 9 a.m.), and, in effect, telling Corrales the morning of July 8 that the approval he gave on July 5 was immaterial, Overstreet brusquely told Corrales on July 8 that he was terminated.

The timing and demonstrated falsity (of Overstreet's denial that he approved Corrales' departure, and the falsity of Overstreet's assertion that Corrales did not move his timecard) establish a strong prima facie case that QAR unlawfully fired Corrales. As I have found QAR's reasons (no notice Corrales leaving site; failed to move timecard to outside rack) to be false, it is clear that QAR has failed to carry its

burden of demonstrating that it would have terminated Corrales even aside from his union activities. Accordingly, I shall order QAR to make Corrales whole, with interest.

4. Bruce Cayton and Jerry D. Pierce laid off

a. *Facts*

Hired about June 12, Bruce Cayton and Jerry D. Pierce were laid off on (Wednesday) July 17. Their termination slips (G.C. Exhs. 15, 17), signed by Overstreet, reflect that each was laid off because of a "Reduction In Force." However, Pierce testified without contradiction that the building he (and Cayton) were working on was far from complete, that some employees were working 12-hour days and that QAR was still hiring employees. (1:180.) When Cawthorn gave them their layoff slips he gave no explanation. (1:162, 178.)

Cayton and Pierce, who attended the Union's recertification class for asbestos removal on July 1, began wearing their union organizer buttons on July 2. They wore them where the buttons were visible. (1:164-165, 170-174.) As I have noted, their names are on the letter which Driskell delivered on July 5 listing the employee organizers. In June, Pierce testified, Superintendent Overstreet complimented Pierce, Cayton, and two others on the amount of work they were doing. (1:181-185.)

The day Ross received his termination notice, Monday, July 8, the same day QAR hired several new employees, some of whom were speaking Spanish, Pierce asked Foreman Cawthorn whether he could speak Spanish. "Yes," Cawthorn replied. This was during "dinner." "Well," Pierce said, "you got these Mexicans over here. Can you interpret this card to them so they can understand what I'm trying to talk to them about?" Cawthorn's rejection was blunt: "Well, I ain't got nothing to do with that damn union card, and I ain't got nothing to do with them unions." (1:175-177, 188.) Suggesting that he, too, had been working 12 hours a day before asking Cawthorn to interpret the union cards to the Spanish speaking employees, Pierce testified that thereafter he worked only 8 hours a day. (1:180.)

Overstreet's testimony respecting the layoff of Cayton and Pierce is very brief. According to Overstreet "Degussa was supposed to have released some lines to us and they didn't and it became necessary that we have a reduction in force." (2:226.) I disbelieve that testimony the same as I disbelieve his denial (2:226) that he ever saw Cayton or Pierce wearing the union organizer buttons.

b. *Discussion*

The Government's prima facie case consists of knowledge, animus (Brian Walker, Harold Cawthorn), timing (a few days after the Union's July 5 letter and shortly after Pierce asked Foreman Cawthorn to interpret for him so he could solicit the new employees who spoke Spanish to sign union cards), and a false reason given for the layoffs (in fact the work was incomplete and new employees still were being hired).

QAR made no effort to show that it would have laid off Bruce Cayton and Jerry D. Pierce even if they had not been active for the Union, and the reason it gave at the hearing—lack of work from Degussa—is without specifics and, I have found, false. Finding the layoffs of Cayton and Pierce unlaw-

ful, I shall order QAR to make these two whole, with interest.

CONCLUSION OF LAW

By orally warning employees on July 3, by discharging two employees on July 5, and by laying off a total of three more employees on July 5 and 17, 1991, QAR has engaged in unfair labor practices affecting commerce within the meaning of 29 U.S.C. § 158(a)(3) and (1) and 29 U.S.C. § 152(6) and (7).

REMEDY

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

QAR's work at the Degussa jobsite appears to have ended in early 1992 (2:247), and it also appears that QAR has ceased operations at that time. At trial the General Counsel stated (1:78) that "The company has closed." In QAR's posthearing brief, Brenda Walker asserts that substantial losses in 1991 forced the Company to close "effective April 24, 1992." (Br. at 7.) The parties may develop at the compliance stage such matters as verifying the date of closing, whether QAR is in bankruptcy, whether QAR has any money or other assets, and whether there are any prospects Brenda Walker will resume operations at QAR (if QAR has not been dissolved) or under another corporate name.

The General Counsel has submitted a proposed order and notice requiring the usual offers of reinstatement, making whole, with interest, and posting of the notice. But QAR, if it still exists as a corporate entity, has ceased operations, and it is not even clear that QAR has an office. QAR being closed, there are no jobs to offer the discriminatees reinstatement to. There may be no money for backpay or any place to post a notice should there be job applicants to see the notice. All these details will have to be ascertained at the compliance stage.

As the parties agree that QAR has gone out of business, I shall order QAR to offer each of the five discriminatees reinstatement conditioned on QAR's resumption of the same or substantially similar business operations. *Beech Branch Coal Co.*, 260 NLRB 907 (1982). Such offers shall be for 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 any other rights or privileges previously enjoyed.

QAR having discriminatorily terminated employees, it must make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of their terminations to the date (to be determined at compliance) each, absent their unlawful termination, would have been laid off from the Degussa project, 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).

If the compliance investigation reveals that QAR maintains an office where job applicants register, then QAR shall post there a copy of the notice to employees, marked "Appendix." In any event, QAR shall mail copies of the notice to employees, marked "Appendix," to all employees employed

on its payroll at the Degussa Corporation jobsite at Theodore, Alabama, at any time from July 1, 1991, through July 17, 1991, to their last known addresses. QAR shall furnish proof to the Regional Director of such mailing. *Print-Quic*, 262 NLRB 857, 862 (1982).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The Respondent, Quality Asbestos Removal, Southeast, Inc., Mobile, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Warning employees about their work performance in retaliation for activities protected by Section 7 of the Act.

(b) Terminating or otherwise discriminating against any employee for supporting International Association of Heat & Frost Insulators and Asbestos Workers, Local Union No. 55, AFL-CIO, or any other union.

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

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

(a) Should QAR resume industrial insulation or asbestos abatement work, or both, then offer reinstatement to the five employees named below, in the manner described in the remedy section of the decision:

Bruce Cayton
Bernard E. Corrales Jr.
William L. Fitzgerald
Jerry D. Pierce
William A. Ross

(b) Make whole the five above-named discriminatees in the manner set forth in the remedy section of the decision.

(c) Remove from its files any reference to the unlawful terminations and notify the employees in writing that this has been done and that the terminations will not be used against them 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) Should QAR have an office then, as set forth in the remedy section of the decision, QAR shall post copies of the

⁵If 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.

attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 15, 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) In any event, QAR shall mail copies of the attached notice to employees, marked "Appendix," to all employees employed on its payroll at the Degussa Corporation jobsite at Theodore, Alabama, at any time from July 1, 1991, through July 17, 1991, to their last known addresses, and furnish proof to the Regional Director of such mailing.

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

⁶If 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.

Section 7 of the Act gives employees these rights.

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

WE WILL NOT warn you in retaliation because you engage in activities on behalf of International Association of Heat & Frost Insulators and Asbestos Workers, Local Union No. 55, AFL-CIO (Union), or any other union.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Local 55 or any other union.

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 reinstatement, should we resume the work of industrial insulation or asbestos abatement, or both, to the following five discriminatees, and WE WILL make each whole, with interest:

Bruce Cayton
Bernard E. Corrales Jr.
William L. Fitzgerald
Jerry D. Pierce
William A. Ross

WE WILL notify each of them that we have removed from our files any reference to his termination and that the termination will not be used against him in any way.

WE WILL mail copies of this notice to each employee employed on our payroll at the Degussa Corporation jobsite at Theodore, Alabama, at any time from July 1, 1991, through July 17, 1991, to his or her last known address, and WE WILL furnish the Regional Director proof of such mailing.

QUALITY ASBESTOS REMOVAL, SOUTHEAST,
INC.