

Kidd Electric Company and International Brotherhood of Electrical Workers, Local Union 342, AFL-CIO. Case 11-CA-15283

April 29, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On August 6, 1993, Administrative Law Judge Richard J. Linton issued the attached decision. The Respondent filed 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 and brief 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, Kidd Electric Company, Greensboro, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹The 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), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

No exceptions were filed to the judge's dismissal of the 8(a)(1) allegations.

Jasper C. Brown Jr., Esq., for the General Counsel.
Richard M. Greene, Esq., of Greensboro, North Carolina, for Respondent Kidd Electric.
Gary M. Maurice, Bus. Mgr. (IBEW Local 342), of Kernersville, North Carolina, for Charging Party Local 342.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. This is a termination case (ostensibly a layoff of three electricians as a regular reduction in force, or RIF). Agreeing with the Government that the three were laid off because they had become "troublemakers" for organizing on behalf of IBEW Local 342, I order Kidd Electric Company (KEC) to reinstate the three discriminatees (Donald W. Burnside Sr., Arthur Wayne Cobb, and Allan B. Younts) and to pay them backpay, with interest.

The linchpin supporting the Government's case is evidence concerning remarks of the construction superintendent, Virgil C. "Pete" Vass, which Vass made in a January 7, 1993 tele-

phone conversation with a certain "Tony." Younts overheard Vass tell "Tony" that he would "get rid of the troublemakers as soon as I can." Six days later Vass laid off Burnside, Cobb, and Younts as a RIF. On motion at close of the General Counsel's case-in-chief, I dismissed the 8(a)(1) allegation based on Vass' telephone remarks about troublemakers. I ruled that the remarks were insufficient to show a connection to the union organizing. With the whole record as context, however, I find that Vass' remarks show animus. They also disclose, I find, that Vice President Tony G. Kidd instructed Vass to "get rid of" the three union organizers, that Vass promised to do so, and that 6 days later he did so because they were organizing KEC's employees at the jobsite.

I presided at this 1-day trial on May 20, 1993, in Greensboro, North Carolina pursuant to the February 26, 1993 complaint issued by the General Counsel of the National Labor Relations Board through the Regional Director for Region 11 of the Board. The complaint is based on a charge filed January 19, 1993, and later amended, by International Brotherhood of Electrical Workers, Local Union 342, AFL-CIO, CLC (Union, Local 342, or Charging Party) against Kidd Electric Company (KEC, Company, or Respondent).

In the Government's complaint the General Counsel alleges that Respondent KEC violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), on various dates in December 1992 and January 1993 when KEC, by Supervisor Robert A. Biagini, interrogated Company's employees and (with one count as to Vass) threatened to impose various economic penalties, including layoffs and discharge, because of their activities on behalf of Local 342. The complaint also alleges that KEC violated Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3), on January 13, 1993 when it laid off three employees: Donald W. Burnside Sr., Arthur Wayne Cobb, and Allan B. Younts.

By its answer KEC admits some facts, denies violating the Act, denies the statutory labor organization status of the Union, and denies that Robert A. Biagini is a statutory supervisor.

The General Counsel and Respondent KEC filed posthearing briefs. The Government's brief includes a proposed order and notice to employees. After the hearing the due date for receipt of briefs was extended to July 12, 1993, a Monday. KEC's certificate of service states that service of its brief, dated July 12, was made that day by "overnight delivery." KEC's brief was received and filed in the Atlanta office on Tuesday, July 13, 1993. Thus, KEC's brief was both served and filed 1 day late under 29 CFR 102.111(b). The General Counsel has not objected. I have considered KEC's brief.

Unless otherwise indicated, references to dates are to the relevant timeframe of October 1992 to May 1993.

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

FINDINGS OF FACT

I. JURISDICTION

A North Carolina corporation engaged as an electrical contractor in the building and construction industry, KEC cur-

rently is performing inside electrical work at the University of North Carolina at Greensboro. As established by amendments to the pleadings at trial (1:9),¹ KEC, during the past 12 months, purchased goods and materials valued at \$50,000 or more direct from points outside North Carolina. Respondent KEC admits, and I find, that it is an employer within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION INVOLVED

In its answer to complaint paragraph 6, KEC denied that IBEW Local 342 is a statutory labor organization. No pleadings amendment, stipulation, or evidence ostensibly addressed this at the trial. Following close of the hearing the parties have stipulated (G.C. Br. at 10 fn. 3; KEC Br. 3) that IBEW Local 342 is a labor organization within the meaning of Section 2(5) of the Act, and KEC moves, in effect, to amend its answer to so admit. I grant KEC's motion to amend, and by now approving the stipulation, I make it part of the record.

In addition to the parties' stipulation, I note record evidence demonstrates that employees such as Arthur Wayne Cobb and Donald W. Burnside Sr. participate in the organization (Cobb has been the Union's president for 2 years and Burnside a member of the executive board) and, by virtue of the organizing here in part in relation to obtaining higher wage rates for the employees, I find that IBEW Local 342 exists, at least in part, for the purpose of dealing with employers concerning rates of pay. Accordingly, I find that IBEW Local 342, as alleged and stipulated, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

1. Witnesses and credibility

Eight witnesses testified. The General Counsel called five, and KEC three. Testifying as the Government's witnesses were the three alleged discriminatees (electricians or mechanics, Donald W. Burnside Sr., Arthur Wayne Cobb, and Allan B. Younts) plus electrician's helpers Wayne Lee Johnson and Jonathan Roos. Johnson and Roos testified under subpoena while current employees of KEC.

Two of KEC's witnesses are admitted management officials: Tony Garland Kidd, vice president and project manager, and Virgil C. "Pete" Vass, job superintendent on the project involved here. Robert Biagini, whose alleged status as a statutory supervisor and agent is disputed, was KEC's third witness.

Burnside, Cobb, and Younts testified at the rebuttal stage, and Vass took the stand again for the surrebuttal stage.

Having observed the witnesses closely, I find the Government's witnesses credible, and I do not believe KEC's witnesses. The witnesses called by the General Counsel testified with apparent sincerity and straightforwardness. KEC's witnesses sometimes testified evasively, and appeared to be

¹References to the one-volume transcript of testimony are by volume and page. Exhibits are designated GCX for the General Counsel's and RX for Respondent KEC's. Probably because the transcript is a bit large at 332 pages, the court reporting service divided it into two volumes. I have restrung it into a single volume.

making an effort to respond in a manner calculated to aid their employer's position rather than to give the facts. Their demeanor was unpersuasive. I do not believe KEC witnesses Biagini, Kidd, or Vass.

2. The project

The construction project here consists of adding some student housing at the University of North Carolina's Greensboro campus (UNCG). (1:20, 254). Nine three-floor buildings, identified as A through I, are being constructed, with each building containing from 6 to 14 apartments, totaling over 70 apartments, or units. (1:47, 275). The apartments are for single students, and each apartment unit has four to five students. Each student has a small (8 x 10) private bedroom, but he or she shares a common bath, shower, kitchenette, and living area with the other three or four students of that unit. (1:47, 292). At completion the nine buildings will be joined and will form a "square" for security. (1:254.) The record does not define the "square" to be made by the nine buildings, but in any event the nine buildings apparently will form a quadrangle. As of the hearing the buildings had not been completed nor the quadrangle closed. (1:253).

The witnesses agree that the general contractor must set metal studs (as the wall framing, presumably) before KEC's electricians can begin their rough-in of installing conduit, pulling wire or cable, mounting electrical boxes, and making electrical joints by connecting the wires. (1:22, 57, 118, 155, 260). A key issue is whether, at the time of the January 13, 1993 layoffs, no more rough-in work was available to be done because metal studs had not yet been installed in certain buildings by the general contractor.

3. Personnel

KEC's officer in charge of the electrical contract on the UNCG project is Tony G. Kidd. Vice President Kidd testified that he looks after project costs, including materials and labor, and monitors productivity to determine whether work is on schedule in relation to the man-hours on which KEC based its bid for the electrical work. (1:209-210). Kidd testified that he visits the jobsite most every day, and usually three to four times a day. (1:242).

Virgil C. "Pete" Vass was hired about April 1992 as the job superintendent at the beginning of the project. (1:209-210, 248-249). Vass testified that his duties include responsibility for hiring and firing. (1:249). Kidd testified that he leaves staffing to Vass unless productivity drops to the point it interferes with KEC's billing (to, presumably, the general contractor). (1:210).

Kidd (1:210) and Vass (1:249) testified that Robert Biagini was the first person hired after Vass. Although Biagini was an electrician, there as yet was no need for an electrician, and Biagini was hired in a helper/laborer's position at about \$7.50 to \$7.75 per hour. (1:211, 250, 296). When electrical construction began around May, Biagini was reclassified to electrician at \$10.50 per hour. (1:212, 250-251, 296).

Alleged discriminatees Burnside (1:17), Cobb (1:161), and Younts (1:116) were hired in mid-October 1992. Immediately before and after the three were hired, KEC was at its full complement of 22-23 persons on the project payroll. (1:217; RX 3).

4. Union organizing activity

Arthur Wayne Cobb, an electrician for 28 years (1:161), has been president of IBEW Local 342 since June 1991. (1:29, 175-176). Cobb's office in the Union is an unpaid position. (1:176). Younts has been a member of the Union's executive board for 2 years—also an unpaid position. (1:136). Younts has some 20 years' experience as an electrician. (1:120). Also a member of the Union, Donald W. Burnside Sr. has over 31 years' experience as an electrician, beginning his apprenticeship in 1961. (1:26-27). Burnside, Cobb, and Younts are close friends. (1:64, 137). They have organized together on other jobsites. (1:64).

Cobb hosted two organizing meetings at his home, the first meeting being on November 12 and the second on December 9. (1:30, 120, 166-167). Burnside testified that about late November Robert Biagini, while conversing with him, began complaining about pay for electricians in the Greensboro area. Burnside told him of the forthcoming union meeting of December 9, told him he was welcome to attend, and suggested that he go and speak with Cobb about the Union. (1:31, 60, 62). About 10 employees, including Burnside, Cobb, Younts, and Biagini attended the second meeting, and Burnside testified, an unspecified greater number attended the first meeting. (1:30, 59).

There is no dispute that Biagini attended the second meeting and signed an IBEW 342 authorization card there. (1:30, 139, 167, 176, 178, 298, 310). After an evasive fashion, Biagini denies that he initiated conversation on the topic with Burnside by complaining about pay for electricians in the Greensboro area. (1:313-314). I credit Burnside that he did.

B. Supervisor/Agent Issue

The parties litigated the status of Robert Biagini as a statutory supervisor, with the General Counsel alleging and advocating the affirmative, and KEC arguing the negative. As the party asserting that a statutory exclusion (supervisor) applies to worker Biagini so as to exclude him from the general class of employee, the General Counsel has the burden of persuasion. This is the Board's longstanding rule. *Adco Electric*, 307 NLRB 1113, 1116 (1992).

Turning now to the question of supervisory status, I note that Biagini's situation is one of those borderline cases in which he may be a statutory supervisor, but might not be. I need not resolve the supervisor question because it is clear he is KEC's statutory agent. (The parties do not address the agency status in their posthearing briefs.) Thus, Superintendent Vass testified that he frequently used Biagini to convey "what I needed done;" (1:251); to "convey my words or my wishes." (1:270). Biagini confirms such and testified that he carried out those instructions. (1:306). Thus, KEC, by Vass' express assignments to Biagini, invested Biagini with the actual authority of agency to act on Superintendent Vass' behalf. *Communication Workers Local 9431 (Pacific Bell)*, 304 NLRB 446 fn. 4 (1991).

This actual authority covered a range of activities, including obtaining and laying out materials, checking on work, assigning anyone working with him the task of repairing any work deficiencies found by Biagini (1:271-273, 275), and at other times to transfer employees, at Vass' instruction, from one job or area to another. (1:284). Vass also had given Biagini the responsibility to open and close the trailer, where

supplies were kept. (1:271, 275, 284). All this is without looking to the more expansive versions given by the General Counsel's witnesses.

Finally, Vass asserts that when he was not at work on December 31, apparently deer hunting, he previously had directed Biagini to let the employees take the afternoon off for New Year's Eve. (1:285-286). Biagini contradicts Vass, testifying that he did it on his own. (1:300). Aside from that dispute, the point here is that Vass claims he gave Biagini the actual authority to grant the time off.

The extensive actual authority which Vass admittedly vested in Biagini also clothed Biagini with the apparent authority to act as KEC's agent. So pervasive were work assignments by Biagini to the employees that Arthur Wayne Cobb testified he looked upon Biagini as a job foreman. (1:181). Donald W. Burnside Sr. testified that while he saw Biagini two to three times a day, he saw Vass no more than once every 2 to 3 days. (1:25). Significantly, Younts describes how Biagini sometimes would use his independent judgment to countermand Vass' instructions. (1:157). At other times Vass would tell Younts to see Biagini for work assignments. (1:157-158). Clearly the employees reasonably believed that whatever Biagini said or did reflected KEC's policy and Superintendent Vass' directives. Accordingly, I find that at all relevant times Biagini was acting as KEC's statutory agent by virtue of both actual and apparent authority. Because of that agency status, KEC is responsible for Biagini's actions. *Tyson Foods*, 311 NLRB 552 fn. 2 (1993); *Albertson's*, 307 NLRB 787 (1992).

C. Alleged 8(a)(1) Coercion

1. Eight of ten allegations disposed of at trial

a. Six withdrawn

Complaint paragraph 8 alleges 10 incidents of conduct by Robert A. Biagini and Superintendent Vass (one only) independently violating Section 8(a)(1) of the Act. At the close of the Government's case-in-chief, the General Counsel, based on the absence of a witness in support of certain allegations, moved to withdraw six of these, paragraphs 8(b)[two incidents], (c) as to January 19, 1993, (d), (e) as to January 19, 1993, and (f). The items were allegations of mid-January 1993 threats by Biagini that employees had been or would be laid off, subjected to unspecified reprisals, or the project closed because of their union activities. I granted the General Counsel's unopposed motion to withdraw the six allegations. (1:185-187).

b. Two others dismissed at trial

(1) December 17, 1992 interrogation by Biagini

KEC thereafter moved to dismiss the remaining allegations. (1:188). I granted the motion respecting two. First, paragraph 8(a) alleges that on December 17 Biagini interrogated employees concerning their activities on behalf of the Union. Allan B. Younts testified in support. On KEC's motion (1:198), I dismissed the allegation because the incident reasonably would not tend to coerce. (1:200, 204).

(2) January 7 threat by Superintendent Vass

The second complaint paragraph which I dismissed at the hearing on Respondent's motion (1:196-197), paragraph 8(e) as to January 7 by Vass, alleges that on January 7, 1993, Superintendent Vass threatened employees with termination if they engaged in union activities. I describe the matter here because the evidence figures later in my decision, as I noted at the outset.

Younts testified that before lunch on January 7, 1993, he went to KEC's jobsite trailer to get some wire nuts to use in splicing wire. KEC's office is at the rear of the 45-foot trailer, and the wire nuts are stored close to the office door. As Younts entered the trailer and arrived at the parts area near the office door he heard Vass' voice through the closed door to the office. Vass seemed to be talking to someone on the telephone. Younts heard Vass say:

Tony, I will get rid of the troublemakers as soon as I can.

After a pause Vass again spoke, saying "O.K. Whatever." Hearing noise, as if someone were about to emerge from the office, Younts left the trailer. Younts testified that he was not aware of any "troublemakers" on the job. Vass never otherwise identified the "Tony," Younts testified, nor did he identify the "troublemakers." Younts concedes that he has no direct knowledge that Vass' promise to get rid of the troublemakers had anything to do with the employees connected with the job. (1:128-129, 146-149).

I granted KEC's motion to dismiss on the ground there was insufficient connection of the threat to get rid of the "troublemakers" to any employees or protected activity. (1:196). In dismissing the 8(a)(1) allegation, I explained that the evidence could be argued in support of the 8(a)(3) allegation. Even so, Vass did not address this incident when he testified. I will consider it when I discuss the 8(a)(3) allegation.

2. Two remaining allegations dismissed

a. *Interrogation on December 23, 1992*

Complaint paragraph 8(a) alleges that on December 23, 1992, KEC, by Robert A. Biagini, interrogated its employees concerning their activities on behalf of the Union. Respondent denies. Arthur Wayne Cobb testified in support of this allegation. I denied KEC's motion to dismiss. (1:204).

Department in which Cobb was working and asked Cobb, "When are you Union guys going to do something?" Cobb said that they could not do it by "ourselves," that they needed "their" help if they wanted anything done. The brief conversation apparently ended with Biagini's saying that he did not think a union could ever be brought in. About 2 weeks later, in early January 1993, Biagini asked the same question and Cobb responded as before. Cobb concedes that there was nothing in Biagini's manner of asking the question to suggest that he was antagonistic toward the Union. (1:168-169, 179-180). Biagini did not address this incident when he testified on direct examination. In a brief reference on cross-examination he denies what possibly was this allegation, although he could have been referring to other events. (1:311-312). In any event, Cobb was a persuasive witness, but Biagini was not. I credit Cobb.

This incident must be considered in light of the earlier date, apparently December 15 or so, when Younts and Cobb

confronted Biagini over the report that Biagini had betrayed the employees by informing Superintendent Vass about the December 9 union meeting at Cobb's home. Biagini admitted he had told Vass. Fewer than 10 days later Biagini interrogated Cobb about when were "you" union guys going to do something. Clearly the question was designed to get information, and the circumstances were such as to indicate that Biagini was asking on behalf of Superintendent Vass. Biagini even sought to discourage the organizing by expressing the opinion that it would fail.

Cobb was the president of IBEW Local 342, but the organizing, and his participation, had not been open and public. Cobb did not react to Biagini's question by asking if Biagini would run with the answer to Vass (he even suggested that the organizing could not proceed further if Biagini and others did not help), and in fact said he did not feel threatened. (1:179). However, the test is not whether the interrogation succeeded in coercing Cobb, but whether the words and context would reasonably tend to coerce an employee.

There is no evidence that KEC had unlawfully opposed unionization, or even opposed it at all. The type of information requested (when are the "Union guys" going to do something) could be indicative of a violation because, in light of background events, it is designed to inform management of the Union's plans. The question seems far less likely to have come only from Biagini's inquiring for his personal interest that the Union's organizing get off the ground. Indeed, Biagini quickly added a note designed to discourage any organizing.

Biagini's company rank at KEC was that of, at most, a first line supervisor. Construction unions represent foremen and first line supervisors, and no doubt this explains why the employees, who viewed Biagini as a construction foreman (1:181-182, Cobb) or leadman (1:81, Johnson), invited him to attend the December 9 union meeting at Cobb's home. The company rank factor points toward a finding of noncoercion. Similarly, the location of the interrogation, at Cobb's workstation rather than the construction office, points toward a finding of noncoercion.

While the manner of the interrogation was not hostile, Biagini's reference to "you Union guys" possibly reflects that he had separated himself from the others and, in light of background events, suggests that Biagini is inquiring on behalf of Superintendent Vass. That would suggest coercion. However, it can be inferred that Biagini had learned at the December 9 meeting that Cobb and Burnside were officials of IBEW Local 342. Based on that knowledge, his "Union guys" would be nothing more than a factual reference to their positions as officials of the Union. Also on December 17 Biagini told Younts that "you Union boys do a whole lot better work than the others." (1:121). It appears that Biagini used the phrase as a factual, noncoercive reference.

So far as the record shows, Cobb's response to Biagini was truthful. No evidence discloses what plans the Union had for its next step in the organizing. Presumably the organizing never reached the point that the Union could demand recognition or file an election petition. The nature of Cobb's answer does not, I find, indicate either coercion or noncoercion.

KEC denies responsibility for Biagini's conduct, and the record contains no direct evidence of the purpose behind Biagini's question. Of course, Biagini announced no purpose

and gave no assurance that no reprisals would be taken even if the employees supported the Union.

In light of all the circumstances, I find that Biagini's question did not rise to the level of coercion. Accordingly, and having dismissed the December 17 incident at the hearing, I now shall dismiss complaint paragraph 8(a) in its entirety.

b. Layoff threat of January 18, 1993

Complaint paragraph 8(c) alleges two incidents. At the hearing the General Counsel withdrew as to the date of January 19, leaving the date of January 18, 1993. (1:186-187). Thus, it is alleged that on January 18 KEC, by Biagini, "advised its employees that their fellow employees had been laid off because of their activities on behalf of the Union." I interpret this statement to allege an implied threat that, as with the three laid off on January 13, the other employees would be terminated if they too were foolish enough to support the Union. Electrician's helper Johnathan Roos testified in support of this allegation. Biagini did not address this allegation when he testified.

Roos, who was assisting electrician Terry Carver (1:104, 110), testified that the morning of January 18, as he and Carver were preparing to begin work in the stairwell, third floor, H Building, Biagini came by and remarked to Carver, "The Union boys are gone." Carver replied, "What good is a union now." Carver and Biagini then laughed. Roos said nothing. (1:102-104). Roos testified with a favorable manner, and I credit him.

The exchange between Biagini and Carver, in the presence of Roos, falls short of a threat, or implied threat, of discharge by KEC. It appears to have been more of a mutual expression, by like-minded individuals, of satisfaction at seeing the departure of three employees who supported the Union. Nothing in the remark suggests that KEC, through Superintendent Vass, terminated Burnside, Cobb, and Younts because they supported the Union. I therefore shall dismiss paragraph 8(c) in its entirety.

D. The January 13 Layoff Decision

1. Introduction

a. Overview of positions

The complaint alleges that on January 13, 1993 KEC laid off Donald W. Burnside Sr., Arthur Wayne Cobb, and Allan B. Younts, and thereafter refused to reinstate them, because of their activities on behalf of the Union. Admitting the termination, KEC denies all else. As described by Vice President Kidd (1:218, 224, 241-242) and Superintendent Vass (1:256-258, 283), KEC's position is twofold. First, a layoff was necessary because work at the jobsite had reached a slack point, and second, the three were selected because of seniority (Kidd) or seniority, poor work habits, and attendance (Vass).

b. Vice President Tony G. Kidd

Vice President Kidd testified that he decided a reduction in force was necessary (1:241), and that Superintendent Vass selected the individuals for layoff (1:224, 229, 230). Vass did not discuss the selection in advance with him. (1:227, 230-231). Work actually began slowing down before Christmas, but he and Vass, and particularly Vass, wanted to hold off

until after Christmas before having a layoff. (1:229, 247). Work was slack because KEC had caught up with the general contractor. That is, KEC could not do the rough-in for Buildings G, H, and I because the general contractor had not yet installed metal studs in those buildings. (1:224, 242). As earlier noted, there is no dispute that metal studs have to be installed before rough-in work can proceed. The general contractor did not get the metal studs installed in Building H until 3 weeks before the hearing, or about April 29. (1:224).

Kidd testified that there was no problem with the three laid off. While there had been an attendance problem, the slack in the job was able to absorb their absences. But there was no problem, at least none reported to Kidd, about the quality of their work. (1:229-230, 243). From Kidd's perspective, it was a matter of economics. KEC could not afford to keep \$10-an-hour electricians on the payroll doing virtually nothing. Whatever work remained available could be done by helpers. (1:224, 241, 245). Kidd explains that helpers' pay ranges up to \$8 per hour, while pay for electricians ranges from just over \$8 to \$11 an hour. On this job, however, Biagini has been the top-paid electrician at \$10.50 per hour, and during November through January he was the only one earning that rate. (1:222-223).

Kidd testified that as a "rule of thumb" the last employee hired is the first to be laid off. (1:231). As of January 13, and continuing as of the hearing, KEC was working 4-day weeks of 10-hour days at this jobsite. (1:247). Even so, from a 1993 high of 23 on the payroll for the week ending Wednesday, January 13 (with the last previous high of 23 being the week ending Wednesday, October 21), employees on the payroll dropped in the following weeks to 19, 15, 14, and 13 before moving up to 16 the week ending April 21 and to 18 the week ending Wednesday, May 5, 1993. (RX 3). Thus, Kidd testified, from January on there has been a general decline in the numbers of employees on the job with no electrician hired after January until April 21. (1:227, 240, 241).

c. Superintendent Pete Vass

Superintendent Virgil C. "Pete" Vass testified that as of January 1993 KEC had roughed-in Buildings A, B (second floor only), C, D, and F. Rough-in on the second and third floors of Building B were completed the week before the hearing. Installation of the metal studs in Building G had just begun in January 1993. Part of Building I, a bit less than three apartments, was available for work. Buildings E and H were not ready for roughing-in. Work had gotten so slack by January that Vass had six employees rather than two working in some apartments. As a result, "I cut my forces." (1:256-258).

Agreeing with Kidd, Vass testified that he did not discuss his decision beforehand with Kidd. (1:258). Normally he does not discuss with Kidd layoffs or problems with employees. (1:287). Later the day of the layoff Vass informed Kidd that he had laid off the three. (1:287). Vass' description appears to suggest that, contrary to Kidd's testimony, he not only made the selection decision but the economic decision (to have a reduction in force) as well. However, the testimony is not precise on this point because the questions did not distinguish between the economic decision to reduce forces and the secondary decision of whom to select.

Contrary to Kidd's assertion of no problem with the three laid off, Vass testified that he selected Burnside, Cobb, and Younts for two deficiencies, in addition to the fact they were the last electricians hired (Kidd's LIFO). First, and apparently the main problem, they wandered around the jobsite and were "never" at their work areas. (1:259, 263, 265, 279). Second, they had poor attendance. As to attendance, Vass testified that Cobb was absent "several" times and Younts was out probably more than any employee. (1:265-266). Vass' reason is unclear for lumping Burnside with the other two on attendance. Vass concedes that Burnside's attendance was "pretty good," and that he usually was at work except for the days he missed after sustaining an on-the-job injury. (1:266). Burnside fell at the jobsite on December 9, broke a rib, and was off work until Monday, January 5. (1:38, Burnside; RX 3). Younts concedes he missed some 10 days (1:150), or 2.5 weeks' of work (at 4-day weeks). Cobb testified that he was off work 1 week for surgery. (1:167; RX 3).

d. *The layoff*

On Wednesday, January 13, 1993, at the close of a pay period, KEC laid off the alleged discriminatees, Donald W. Burnside Sr., Arthur Wayne Cobb, and Allan B. Younts. Toward the end of the day, after the three had been directed by Biagini to meet Superintendent Vass in the parking lot, Vass notified Burnside and Cobb that the three were laid off. Younts was off work that day with a cold. Vass gave Younts' paycheck to Burnside and asked him to deliver it to Younts. Later that afternoon Vass telephoned Younts and told him of his layoff and that Burnside would deliver his paycheck. This much is undisputed.

The dispute centers on what Vass said or did not say respecting a reason for the layoff. Burnside's description is a bit disjointed, but he appears to assert that Vass gave them their checks and said, "That's it." When Cobb (perhaps because checks normally were distributed on Thursdays) asked for the reason, Vass said, "That's it. We came to the end." Vass gave no reason, Burnside later asserts. (1:33). On cross-examination Burnside, initially denying that Vass told the two that the work was "caught up," then testifies that Vass answered Cobb, "We're caught up," and concedes that his pretrial affidavit so states. (1:50-51).

According to Cobb, Vass just said "It's that time." When Cobb asked why, Vass replied, "Well, somebody's got to go." (1:170). He does not recall Vass' saying the work was "caught up." (1:184).

Younts testified that Vass called and said that it had come that time on the job that he was going to have a layoff and Younts and his "buddies" were the ones being let go. Younts asked if this was a regular reduction in force and Vass answered yes. (1:129).

According to Vass, he told them, "Gentlemen, we've caught up with the building, as you know, and I'm going to have to lay some people off." They did not object and said they understood. This presumably was the conversation with Burnside and Cobb, for Younts, Vass recounts, was absent that day. (1:259-260).

What actually was said on this occasion, I find, was a combination of Burnside's corrected version as corroborated by the first half of Vass' account. The bottom line is that Vass, on a question by Cobb, told them that they were

"caught up" with the work. I turn now to address KEC's reasons.

2. Discussion of KEC's reasons

a. *The evidence*

KEC advances a layoff dictated by economics. The Government attacks the layoff decision itself by seeking to show that there was no slack period in the work because the buildings were ready for more roughing-in. Evidence adduced on the question of whether a layoff was needed focuses generally on status of the work at the jobsite. A finer focus is on how many buildings needed further rough-in work. That leads to the inquiry of whether metal studs had been installed in any of the remaining buildings. If so, there was rough-in work to be done.

Burnside testified that nearly half the buildings remained to be roughed-in. (1:33-35, 49-50). As far as Burnside knows, KEC never caught up with the metal studs being installed by the general contractor, or other subcontractor. (1:50). Although he did not enter and inspect each of the remaining buildings (1:48), he testified that the building next to the one they were working on at layoff had metal studs and was ready for rough-in. (1:52, 54). Indeed, they still had rough-in work to do on the building they were in. (1:53). At trial Burnside was unable to match letters with buildings without a set of (not present) prints. (1:49, 52-54). Burnside testified that, so far as he knows, two other electricians (apparently meaning two crews of a mechanic and a helper) also were doing rough-in work. (1:35, 55).

Younts gave a similar percentage, about 45 percent, of rough-in remaining. He gives the number of buildings remaining as three. A building by the parking lot was ready for rough-in. (1:131-132). On cross-examination Younts conceded, in effect, that he did not know which remaining buildings had the metal studs because it had not been his job to make that inspection (1:154). Younts' last day at work was Monday, January 11. (1:153). Biagini told him his last day at work that the following week KEC would begin roughing-in one of the remaining buildings. (1:154). Younts testified that as of January 13 he had about 4 days left of wire pulling. (1:155). Presumably Younts means that there was that much available to do then rather than how much would be needed for the remaining buildings. Cobb did not describe the status of the buildings.

Electrician's helper Wayne Lee Johnson, called by the General Counsel, testified that he and Burnside were roughing-in kitchens on January 13. As of the layoff, there was one building to be done, no more than 2 days' work. (1:95). Johnson did not identify the building, and apparently meant that the 2 days' work remaining was what was then available to do. Earlier, however, he identified Building H as untouched, with three apartments on each floor. (1:76, 89). He conceded, on cross-examination, that Building H did not have the metal studs installed as of January 13 and that the building was not then ready to be roughed-in. (1:90-91). In fact, Johnson testified that as of the January 13 layoff KEC had caught up with the metal studs and work had slowed. (1:92).

However, Johnson testified that in the past when KEC caught up with the metal studs KEC would have the electricians do odd jobs until the apartments were ready for

roughing-in. (1:91). Vass agrees with this concept, but apparently to the extent there is something to do. Thus, he testified that Cobb, who normally made joints, assisted with the rough-in the last few days because “we’d caught up.” (1:283-284).

Electrician’s helper Jonathan Roos testified that the project had other work to be done other than roughing-in as of January 13. (1:108). He gives no specifics, however, and concedes that other electricians remained on the jobsite. (1:108). Earlier Roos testified that much of Building H had not been roughed-in. (1:105). On cross-examination Roos initially testified that he thought the first floor, and possibly the second floor, had not been studded, but then said he could not remember. (1:107).

b. Discussion

The testimony of the General Counsel’s witnesses is generalized and usually marked by an inability to identify specific buildings. None testified from a set of prints, and the three alleged discriminatees apparently had not made a recent visit to the jobsite. Much of the testimony indicates that the witnesses did not know whether metal studs had been installed. I find that Kidd and Vass are more reliable witnesses in this respect.

Some rough-in work may have been available for the days following January 13. However, KEC had other crews on the job to handle the work. That takes us to the next group of topics. To conclude here, although the layoff is highly suspect, I find that the evidence fails to show an artificial factual basis for KEC’s decision to reduce its payroll at the end of the pay period on January 13, 1993.

E. KEC’s Selections for Layoff

1. Introduction

KEC contends that the three individuals laid off were selected for lawful considerations—seniority, wandering, attendance. The General Counsel must make a prima facie showing that a motivating factor in the selection for layoff of Burnside, Cobb, and Younts was their union activities. The burden then shifts to KEC to demonstrate that the three would have been selected even in the absence of union activity.

The Government attacks here primarily against the seniority ground, arguing that junior employees were retained. The General Counsel seeks to refute the stated ground of wandering, but makes no effort to show that others wandered more or had worse attendance records than Burnside, Cobb, or Younts.

2. Seniority

Superintendent Vass testified that one of the reasons he selected Burnside, Cobb, and Younts for layoff was that, except for one other mechanic, they were “the last electricians hired.” (1:259). The other electrician, or mechanic (1:217), was Wayne E. Frazier, hired January 11, 1993. (1:218, 232, 267, 327, GCX 2 at 6.) Vass testified that he hired Frazier for pulling heavy cable at the jobsite. (1:267, 327.) The work of pulling heavy cable seems to be less than fully described, and appears to involve something more than the occasional (1:327) pulling of heavy cable off reels. In any event, al-

though Frazier expressed a desire to work no more than “a few weeks” (1:267), he soon left, on January 21. (GCX 2 at 6). Following Frazier’s early departure Vass hired, as Frazier’s substitute, a mechanic named Edward O. Collins Sr. for an indefinite period on January 25. However, Collins left after only 2 days. (1:268-269; GCX 2 at 8).

Vass testified that he did not offer the heavy cable pulling job to any of the three because he did not think they were capable of the job even though they had at times assisted in pulling the cable. He never told them this because he had no reason to do so. (1:267, 278). On rebuttal, Cobb testified that he had done the work on many other jobs, and that a lot of strength is required. (1:320). Cobb described the physical portion, such as moving reels and lifting and pulling the cable (1:320), but Vass mentions experience (1:267) and on surrebuttal implies specialized knowledge having to do with a “terminix switch gear” (1:327) not addressed by the other witnesses.

Like Cobb, Burnside testified that he has pulled heavy cable on other jobs, but he does not address the matter of special skills or knowledge required. (1:323).

Younts testified that on several occasions during the first week of January he assisted in pulling heavy cable at the jobsite. (1:324-326). Younts apparently worked on the physical pulling that was needed at times. He did not address anything having to do with special skill or knowledge associated with the project. Indeed, Vass testified that for the occasional physical pulls, anyone available, mechanic or helper, was drafted to assist—a half dozen at a time. (1:327).

During cross-examination at surrebuttal, Vass testified that (on January 13) he did not ask any of the three to do the heavy cable work because of their injuries or illnesses. Thus, he did not want to expose Burnside to the heavy labor when Burnside had just recently returned to work after being off with a broken rib; nor Cobb who, in December, had been out for surgery; nor Younts who that very day was off work sick with a cold. (1:328).

Although Wayne Frazier was the only mechanic hired in the days before the layoff, several helpers were hired. Indeed, the General Counsel (Br. at 12) points to hires of electricians (mechanics) and helpers (also called laborers by Vass and Biagini) from January 4 to 25, for a total of two electricians and five helpers. “This evidence clearly refutes Respondent’s assertion that there was no work available in January.” (Br. 13). The General Counsel also asserts (Br. at 14), no names specified, that there were several employees with less seniority than the three alleged discriminatees. Except for Wayne Frazier, the record does not show any mechanics with less seniority than Burnside, Cobb, or Younts.

The General Counsel has highlighted only a portion of the evidence respecting staffing. To put matters in perspective, an inspection should include December 1992. And if we are to look at January 25, then all of January should be considered. When hires and departures for December 1992 through January 1993 are reviewed, the totals are as follows (GCX 2): 8 hires, 11 departures, not counting the 3 alleged discriminatees. Monthly it was one hire and three departures in December and seven hires and eight departures in January. The figures separate to show that in December KEC hired one helper on December 1 (Wesley Harris) and no mechanics; three helpers left (Burnside’s son on December 16, Timothy G. French on December 23, and Jeffrey Williams on

December 30), but no mechanics left. In January two mechanics were hired (Wayne Frazier on January 11 and Edward O. Collins Sr. on January 25) as were five helpers (Carl W. Carver on January 4, Keith Burkhalter Sr. and Theodore Lee Loring on January 5, Michael Maynard on January 11, and Edward O. Collins Jr. on January 25).

January departures were four mechanics and four helpers, the mechanics being Wayne Frazier on January 21, Edward O. Collins Sr. and Charles F. Price on January 27, and Isaiah Harris on January 28. The departing helpers were Lynn Terry Chase on January 6, Wesley Harris and Theodore Lee Loring on January 21, and Edward O. Collins Jr. on January 27.

In January before the January 13 layoff KEC had a net gain of three helpers, but recall that three helpers had left within the last 2 weeks of December. As already summarized, one mechanic, Wayne Frazier, was hired shortly before the layoff. Collins Sr. was hired on January 25 when Frazier left. Thereafter the staffing level (RX 3) dropped to 14 by February 24 and to 13 by April 7. (Kidd apparently states that the staffing level includes everyone on the project, not just mechanics and helpers. (1:221) Later in April some hiring resumed so that by May 5 there were 18 on the payroll. Kidd testified, without contradiction, that in the final stages of construction that hiring would increase. (1:225).

Both Kidd (1:245) and Vass (1:270) make the point that helpers are paid less than mechanics. Kidd testified that pay for helpers ranges up to \$8 an hour with the pay for mechanics ranging from that point to \$11. (1:222). Aside from Biagini's \$10.50 (1:223), the other electricians named in the record appear to have been paid a project standard of \$10 per hour. Record figures for the helpers start at \$5.50, for several, and \$7 to \$8 for the "experienced" helpers such as Timothy G. French, Wesley Harris, Carl Carver, and Edward Collins Jr. (GCX 2).

At their January 13 layoffs the three received paychecks apparently for the previous pay period. A final check was yet to issue. Receiving a call on January 21 from Kidd that his final check was ready, at the end of the day Burnside went to the jobsite to get it. While there Burnside, seeing Vass, asked Vass if he was hiring. "No, I'm not hiring," Vass answered. Burnside told him he was available for recall. Burnside then took his check and left. (1:37-38). Vass did not specifically address this point in his testimony. As we have seen, January 21 was Wayne Frazier's last day. Vass does not explain why he did not that day at least discuss the heavy cable job with Burnside. They could have discussed whatever skill and experience is necessary and whether Burnside's rib was by that point fit for any heavy pulling.

3. Attendance

I shall not dwell on attendance. The General Counsel offered no data to compare the attendance records of employees. Nothing in the record contradicts Vass' testimony about the attendance of the three alleged discriminatees. As already noted, Vass describes Younts as having the poorest attendance record of all employees. Younts admits to being out 10 days. As to Cobb, Vass asserts he was out "several" days. (1:265-266). Cobb missed about the second week of December to have surgery. (1:167). He possibly missed all or part of the week ending December 2. (RX 3). Other than time missed because of his on-the-job broken rib, Burnside, in Vass' view, had "pretty good" attendance. (1:266).

Although KEC never issued any attendance warnings, oral or written, to Cobb or Younts, and certainly not to Burnside, there is no evidence that KEC had a written warning system. Indeed, Kidd describes KEC's records system as, in effect, bare bones, with the "personnel file" consisting of the employee's job application. (1:213-214). As we soon shall see, Vass does on occasion orally caution an employee, but such an event apparently is not memorialized by anything in writing or on computer. Finally, employer toleration of employee conduct does not mean that such conduct is exempt from becoming a factor in a decision to lay off or to not recall. Evidence showing disparity is important, but there is no disparity evidence here.

I find no surface taint in Vass' inclusion of attendance as a factor respecting Cobb and Younts. However, Vass' initial broad brush (1:259) does not exclude Burnside from the poor attendance category, and he later (1:266) admits that Burnside's attendance was "pretty good, except for the time he was out hurt." I find that Vass' general inclusion of Burnside in the poor attendance category is tainted by a desire to get rid of one of the union organizers notwithstanding his rather good attendance.

4. Wandering

a. Facts

Superintendent Vass' primary complaint about Burnside, Cobb, and Younts is that they frequently wandered from their work areas. Vass concedes that wandering by many employees to other buildings, where bull sessions would occur, had become a general problem by early January. About the first week of January, therefore, in addressing all employees, about 20, at a safety meeting, Vass told them that "Christmas is over," that there was too much wandering to other apartments, and that they were to stay in their work areas. Vass had problems with several employees in the group respecting this, and not just the three. (1:263-264, 290). Younts places the safety meeting as about early December. (1:134). I find that it was early January based on Vass' specific reference to Christmas.

Vass testified that after this general direction to the entire group, which he hoped would resolve the problem (1:290), he had occasion to orally warn each of the three on this topic. (1:278-279). He spoke to Cobb in the first floor corner unit of Building G in early January when Cobb should have been in F Building making joints. Cobb was talking to another employee on the occasion. Vass told Cobb he needed to "get back to his workplace and stay there and do his job." Cobb defended on the basis he was just asking a question. Working there was an electrician and a helper, but Vass does not recall their names. (1:279-281).

With some minor difference on details, Cobb admits this, although placing it about 2 weeks before he was laid off. (1:320-322). It is unclear whether Cobb disputes that this occurred after the group meeting. Crediting Vass, I find that the incident occurred after the early January safety meeting.

I should note that Robert Biagini testified on cross-examination (he did not address the topic on direct) that on occasion he had asked the three what they were doing out of their work areas. He reported to Vass that the three were "floating." Vass acknowledged this with an "Okay." Biagini never memorialized this in writing, and he cannot recall any

dates. (1:315-318). Cobb denies that Biagini even spoke to him about being out of his work area. (1:322). It seems clear that whatever report Biagini made, if any, occurred before Vass' general safety meeting in early January.

Vass testified that on one occasion after the early January safety meeting he met Burnside emerging from Building E when there was no work to be done there. He told Burnside that he needed to stay in his work area. "We were just taking a break," Burnside replied. (1:281).

Burnside testified that he would have to leave his work area to go to the restroom and to obtain materials such as junction boxes, pipe couplings and connectors, metal track, and conduit straps. Instead of going to the trailer for supplies, the electricians would go to a nearby apartment. Other than for these two purposes, Burnside never left his work area. (1:39, 47-48). Wayne Johnson, Burnside's helper the last 2 weeks before the layoff, confirms that Burnside left only to get materials. (1:75, 78). On occasion workers from other apartments would come share breaktimes with Burnside in whatever apartment he was working. (1:40). Burnside denies that any "supervisor" said anything to him about leaving his work area and going to another work area (1:38-39) or that either Vass or Birgini ever verbally (orally) warned him for being out of his work area. (1:323). I credit Burnside.

Vass only generally claims that after the early January safety meeting he personally spoke to Younts about wandering. (1:263-264). He gives no specifics. Younts denies that anyone, including Vass or Biagini, ever spoke to him about not visiting other apartments. (1:133-134, 324). I credit Younts.

One other item, also bearing on animus, needs to be summarized here. Helper Johnson testified that about early December on the first floor in Building A Biagini stopped and spoke about work. Biagini then said that the Burnside's (father and son) had better be careful if they wanted to keep their jobs. (Recall that Burnside Jr. departed on December 16. GCX 2 at 4.) Biagini said nothing about Burnside's walking around the jobsite. Asked at trial whether he saw any justification in Biagini's remark, Johnson said he did not know because he worked away from the Burnside crew and could not observe them work. (1:76-78, 85-88).

Asked on cross-examination whether he had told Burnside's helper [no name specified] that he thought they were "floating around" and would be in trouble if they kept it up, Biagini answered, "No, I never told them that they were in trouble or anything. I just asked them why they were here when they weren't supposed to be there." (1:315).

On brief the General Counsel argues that the statement Johnson attributes to Biagini "represents a clear threat of discharge since Biagini was well aware of Burnside's union activity at that time. . . . Biagini's statement . . . reflects the strong animus Respondent had toward the three alleged discriminatees who were attempting to organize the job. It is submitted that the statement should be found violative of Section 8(a)(1) of the Act as well."

The General Counsel improperly requests an unfair labor practice finding. First, the General Counsel stated on the record that he was not seeking to amend the complaint respecting the matter. (1:78). That is, at most it would be used to show animus. Indeed, the General Counsel suggested that it was only a preliminary matter. (1:78). Second, the General

Counsel makes no contention the matter was fully litigated. In fact it was not fully litigated. The question the General Counsel asked Biagini on cross-examination was not objected to, but it is not at all clear that the question related to the early December statement which Johnson attributes to Biagini.

I deny the General Counsel's motion for an unfair labor practice finding. Moreover, although I credit Johnson, I find the evidence insufficient to find animus because Biagini never stated whether he was talking about work problems (such as wandering), union activities, or something else.

b. Discussion

Other than where I have found otherwise, I credit Burnside, Cobb, and Younts. Except for his January conversation with Cobb, Vass, I find, never spoke to any of the three about being away from their work areas. Similarly, I find that Biagini never spoke to them about the matter either. It was not until early January that Vass deemed he had a problem which warranted his addressing employees. He concedes that several employees were doing the wandering. His remarks at the January safety meeting were, I find, his first statement on the topic to anyone. The complaint does not allege that KEC's restricting employees to their work areas was designed to inhibit union organizing.

The record does not show whether Cobb, thought that the rule Vass announced at the January safety meeting did not apply if someone was seeking materials. As seeking materials would be a likely excuse, and as Biagini's job including furnishing materials, it seems unlikely that Cobb would have misunderstood Vass' announced order for employees to stay in their work areas. Factually, therefore, I find that Cobb violated Vass' rule on that January occasion. Discounting most of Vass' testimony, however, I later must decide whether Vass seized on this as a pretext to mask an unlawful motive.

F. Analysis and Conclusions

1. Employer knowledge and motivation

a. Facts

Biagini admits that the morning after the December 9 union meeting, or the morning of December 10, he told Superintendent Vass that he had attended a union meeting at Cobb's house. This occurred in a "normal" conversation as they were drinking coffee. According to Biagini, he gave no further details, not even to say that employees were organizing, and Vass asked no questions. After that occasion, according to Biagini, he had no further conversation with Vass or KEC officers concerning union organizing. (1:298-299, 311-312). Aside from testifying evasively, Biagini did not testify with a favorable demeanor. I do not credit him.

Superintendent Vass places the conversation with Biagini the morning of Monday, December 14. (1:261, 277-278). According to Vass, Burnside was not at work (Kidd's records summary, RX 3, shows that Burnside was absent on December 16, not December 14), and Vass asked if Biagini had seen him. Biagini said he had seen him over the weekend at a union meeting at, as Vass recalls, Younts' home. Vass claims that Biagini did not identify all the attendees, or describe the purpose of the meeting. That supposedly is the only conversation which Vass has had on this project with

Biagini or anyone about union. And on January 13 when he laid off the three, he did not know they were involved in union activities, but he did know that they ate lunch together. (1:261-263, 276-277). Vass testified with an unpersuasive demeanor, and I generally do not believe him.

b. Discussion

As I discussed earlier, at the hearing I granted KEC's motion to dismiss complaint paragraph 8(e), an 8(a)(1) count alleging that on January 7, 1993, Superintendent Pete Vass threatened employees with termination if they engaged in union activities. That was the telephone conversation, recall, which Younts overheard in the trailer. Younts heard Vass promise "Tony" that he would "get rid of the troublemakers as soon as I can." Not finding enough in Younts' account to show that Vass was referring to Burnside, Cobb, and Younts when he promised "Tony" to "get rid of" the "troublemakers," I dismissed the allegation. (1:196). In dismissing the allegation, I assured the General Counsel that he could include the incident in his argument in support of the 8(a)(3) allegation because then "all circumstances will be considered." That is to say, as of the motion to dismiss I did not have the benefit, if any, of the all the evidence which would follow.

Although KEC was on notice that I would consider this incident in relation to the discharge allegation, neither Kidd nor Vass referred to this allegation in their testimony. Thus, my dismissal of the 8(a)(1) allegation as to this event does not insulate KEC from my considering this incident when I weigh the evidence on the 8(a)(3) layoff allegation. Moreover, one reasonably would expect that Vass and Kidd, when testifying, would explain, deny, or admit the attributed "troublemakers" conversation. They did not. Their failure to deny or explain, I find, constitutes an admission that the conversation occurred, and that Burnside, Cobb, and Younts were "troublemakers" because of their union organizing at the jobsite.

First, some law about motions to dismiss and waiver. As earlier noted, when the General Counsel rested the Government's case-in-chief, KEC moved to dismiss, among other allegations, the 8(a)(3) layoff allegation. (1:205-207). I denied the motion. (1:207). At that point KEC was faced with making an election: it could rest on its motion, or it could proceed with its case-in-chief. It could not eat its cake and keep it too. A respondent or defendant tests the sufficiency of its motion to dismiss by resting on it. See, for example, *American Bakeries Co.*, 280 NLRB 1373, 1374 (1986). If a respondent or defendant, rather than resting on its motion, proceeds with its own case-in-chief, then it waives its motion to dismiss and the trier of fact weighs all the evidence in the entire record in reaching a decision on the merits. *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 103 S.Ct. 1478, 31 FEP Cases 609 (1983); *Greco & Haines Inc.*, 306 NLRB 634 (1992); *Reed v. State*, 794 S.W.2d 806, 809 (Tex. Crim. App. 1990). By proceeding here rather than resting, KEC waived its motion, and I have weighed all the evidence in the entire record in reaching my decision.

Now having the benefit of the entire record, including observing Kidd and Vass testify (they generally testified unpersuasively), I find that on January 7, when Younts overheard Superintendent Vass speaking over the telephone to "Tony," Vass was speaking to KEC's vice president, Tony

Garland Kidd. I further find that when Vass promised Kidd that he would get rid of the "troublemakers," Vass was referring to union activists Burnside, Cobb, and Younts. The only evidence of any trouble or troublemakers on the job other than the organizing which Cobb, Younts, and Burnside were spearheading was the alleged wandering. However, the wandering became such a general problem with so many employees that Vass spoke about it to all employees at the early January safety meeting. That is, Burnside, Cobb, and Younts were not the focus of the wandering problem. To "get rid of" the wandering troublemakers Vass would have had to lay off many more than the three. I therefore find that his telephone reference to "troublemakers" was not to wanderers on the job.

Vass never otherwise directly indicated that he considered union organizing to be trouble or union activists to be troublemakers. Indeed, although Cobb listed his union membership on his job application, Vass said nothing about it and hired Cobb on the spot. (1:172-173). However, a union member is not someone unusual on a construction job. But when an employee becomes active in organizing that employer, perspectives may change. Moreover, even if Vass was inclined to tolerate a union member on the job, there is no evidence Vice President Kidd was so inclined. I need not speculate on this. Finding that the telephone conversation occurred, it simply is a matter of determining who Vass was describing as troublemakers. It was not those wandering on the job. The only other "trouble" on the job was the union organizing. Contrary to Vass' denial, I find that Biagini's report to Vass on December 14 included the fact that the meeting at Cobb's home over the weekend was about union organizing among KEC's employees at the jobsite. That organizing, I find, was the trouble, and I find that Vass, in speaking with Vice President Kidd on January 7, used the term "troublemakers" as a code word for the union activists, Cobb, Younts, and Burnside. Six days later Vass kept his word by "getting rid of" the three.

I also find it more Freudian by Kidd, rather than a poor choice of words by him as he was discussing the staffing levels, when Kidd testified (1:217) that on January 13 "we got rid of" Burnside, Cobb, and Younts. I find that Kidd's unwitting use of that particular phrase, rather than using a term of layoff, ties directly to his January 7 telephone conversation with Vass. In that telephone conversation, I find, Kidd instructed Vass to "get rid of" the union "troublemakers." Vass promised that he would, and he did shortly thereafter. The Board frequently has found "troublemakers" to be an epithet used to signify distaste for union activists. See *Kinder-Care Learning Centers*, 299 NLRB 1171, 1175 fn. 27 (1990).

At his peril a man disregards the ancient wisdom instructions. Some 4,200 years ago, Ptahhotep (Pharaoh Isesi's vizier) delivered this instruction among his teachings: "Do not scheme against people." Miriam Lichtheim, *1 Ancient Egyptian Literature* 64 (1975, Univ. of Calif. Press).

2. Prima facie case not rebutted

As discussed, KEC had knowledge of the union organizing and of the leaders Cobb and Younts. Burnside was identified with the leaders because he invited Biagini to the December 9 meeting, attended that meeting himself, ate lunch with the other two, and was their "buddy." KEC also had expressed

animus (troublemakers) and a promise to "get rid of" the union troublemakers. Timing is an important factor here, for in only 6 days following Vass' promise to Kidd to get rid of the troublemakers, he did so. Pretext is shown respecting KEC's failure to follow its past practice of retaining its mechanics during slack times and work them on odd jobs until the regular roughing-in became available. I do not credit Kidd's denial that there was nothing for them to do. The fact that KEC was busy hiring employees in early January demonstrates that in fact KEC did have work to do. Although they were helpers, for the most part, they also participated in some of the roughing-in work. Their retention on the payroll, even if a layoff were necessary, deprived the three discriminatees of work. I do not credit Kidd or Vass that the difference in wage rates was an important factor in their retention and the layoff of the three. The overriding factor, I find, was KEC's desire to get rid of the three union troublemakers.

Pretext is also shown respecting Burnside on the matter of Vass' including him in the category of poor attendance. Falsity is also present in Vass' January 21 statement to Burnside that Vass was not hiring when in fact he clearly knew that he would be hiring a replacement for Wayne Frazier and did so 4 days later.

I therefore find that when KEC laid off the three on January 13, a motivating factor was their organizing activities on behalf of IBEW Local 342. In short, I find that the Government has shown a prima facie violation of the statute. When the Government has made that prima facie showing, the burden shifts to the Respondent, KEC here, to demonstrate by a preponderance of the evidence, in the nature of an affirmative defense, that it would have laid off the three even in the absence of any union activities. I find that KEC failed to carry its burden.

For the most part, the stated reasons for selection have been found to be pretexts. Poor attendance did not apply to Burnside, yet he was lumped into that category. He was included, I have found, because KEC viewed him as one of the organizers, and indeed he was even though he is not an officer of IBEW Local 342. Although Vass did speak once to Cobb about wandering, after the January group meeting, I find that he did not do so to the other two. Vass' effort to lump the other two into that category with Cobb as having been spoken to after the January safety meeting demonstrates that Vass was stretching in order to get all three on this ground. In other words, Vass used it as a pretext. Absent the union activities, Vass would not have selected any of the three for layoff, even if a layoff would have occurred.

Overall it is clear that KEC seized on whatever available pretexts existed to mask its desire to "get rid of" the three union activists. I find that, consistent with KEC's past practice, Burnside, Cobb, and Younts, absent their union activities, would have remained on the payroll, pulling heavy cable and performing odd jobs for a few days until the other rough-in became available. To the extent that any layoff would have occurred on January 13, recently hired helpers would have been laid off. I find that KEC has failed to carry its burden to show that it would have terminated the three even in the absence of any union activities. Accordingly, I find that, as alleged, KEC violated Section 8(a)(3) and (1) of the Act by terminating them on January 13, 1993. KEC must reinstate them and make them whole, with interest.

CONCLUSION OF LAW

By terminating Donald W. Burnside Sr., Arthur Wayne Cobb, and Allan B. Younts on January 13, 1993, Respondent KEC has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and 2(6) and (7) of the Act.

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.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, 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).

The UNCG construction project involved here no doubt will have been completed by the time this decision, if affirmed, becomes final. The question arises, however, whether the three discriminatees (Burnside, Cobb, and Younts) would have been transferred to any other construction project where KEC may have been working or about to work. A related question is when backpay would have ended at this job (in the absence of a transfer policy) absent the discrimination against the three. Under standard Board policy, such questions are deferred to the compliance stage. *Trans Tech Electric*, 293 NLRB 711 fn. 1 (1989). The policy applies to the construction industry. *Fluor Daniel*, 304 NLRB 970, 981 (1991) (job applicants); *Dean General Contractors*, 285 NLRB 573 (1987) (dischargee), as well as to other industries. *Daka Inc.*, 310 NLRB 201 and fn. 2 (1993); *Mark Industries*, 296 NLRB 463 fn. 3 (1991); *Dean General Contractors*, supra at 575.

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

ORDER

The Respondent, Kidd Electric Company, Greensboro, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off or otherwise discriminating against any employee for supporting IBEW Local 342 or any other union.

(b) 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 Donald W. Burnside Sr., Arthur Wayne Cobb, and Allan B. Younts immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substan-

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.

tially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them 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.

(b) 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.

(c) 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.

(d) Post at all of its jobsites or other hiring facilities within a 75-mile radius of Greensboro, North Carolina, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 11, 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.

(e) 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.

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 lay you off or otherwise discriminate against any of you for supporting IBEW Local 342 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 Donald W. Burnside Sr., Arthur Wayne Cobb, and Allan B. Younts 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, and WE WILL make them whole for any loss of earnings and other benefits resulting from their January 13, 1993 terminations, less any net interim earnings, plus interest.

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

KIDD ELECTRIC COMPANY