

**Daniel J. Ellis, d/b/a Ellis Electric and International
Brotherhood of Electrical Workers, Local 288.
Case 18-CA-12634**

December 30, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

On December 21, 1993, Administrative Law Judge William J. Pannier 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,¹ findings,² and conclusions only to the extent consistent with this Decision and Order.

1. We agree with the judge that employee Jeffrey Hicks did not forfeit his right to reinstatement because he overstated his work experience on his job application. As the judge noted, the Respondent knew about Hicks' overstatement of his work experience with one employer—Delta Diversified—for almost a month before the March 9 layoff, but took no adverse action against Hicks—including the layoff—based on that knowledge. In fact, the layoff notice reads in part, "In the event our work load picks up you will be eligible for rehire."

In its brief, the Respondent argues that it did not discharge Hicks because of the overstatement regarding Delta Diversified because it was still awaiting information from a second employer—Fluor Daniel. However, the Respondent's office manager, Janet Ellis,

testified that she had received the information from Fluor Daniel "within a day or two, before he (Hicks) got laid off." Regarding a third employer "JBJ" that Hicks had listed on his application, Janet Ellis testified she did not know the company or how to contact it.

In view of this testimony, we conclude that, prior to Hicks' layoff, the Respondent was aware that Hicks had overstated his work experience. Despite this knowledge, the Respondent laid off Hicks rather than terminating him, did not cite the overstatement as a basis for the layoff, and indicated that Hicks was eligible for rehire. Further, the Respondent has not produced evidence of any policy or practice of terminating employees who overstate their prior employment experience. Accordingly, the Respondent has failed to satisfy "its burden of establishing that the discriminatee engaged in unprotected conduct for which the employer would have discharged any employee." *Marshall Durbin Poultry Co.*, 310 NLRB 68, 70 (1993). We, therefore, agree with the judge that Hicks has not forfeited his right to reinstatement.³

2. We disagree with the judge that employees Peter Arbic, Ritchie Kurtenbach, and Jon Mariani should not be considered as part of the unit for purposes of determining whether the Union had majority support during the time when this showing of support is at issue (between February 26 and March 6).⁴ The judge did not include them because, by the pertinent dates, they had not worked sufficient days under the eligibility formula for the construction industry set forth in *Steiny & Co.*, 308 NLRB 1323 (1992). However, the purpose of that formula is to determine which employees in the construction industry who are laid off at the time of an election are eligible to vote, "in addition to those eligible to vote under the standard criteria,"⁵ i.e., those employees hired and working on the pertinent date.⁶

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

²In affirming the judge's finding that the credible evidence establishes a prima facie case of unlawful motivation for the March 9, 1993 layoffs, we make clear that we rely on the pretextual nature of the reasons the Respondent asserted as its defense. See *Wright Line*, 251 NLRB 1083, 1088 fn. 12 (1980) (absence of an legitimate basis for an action may form part of the proof of the General Counsel's case), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See also *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 699 (8th Cir. 1965) ("[W]hen every other plausible motive has been eliminated and the reasons advanced are not persuasive, the union activity may well disclose the real motive behind the employer's action."). *Property Resources Corp. v. NLRB*, 863 F.2d 964, 967 (D.C. Cir. 1988) ("Board's decision that the layoffs would not have occurred but for the antiunion animus is supported by evidence . . . that the reason given for the layoffs at the time . . . was implausible.").

³See also *Western Stress, Inc.*, 290 NLRB 678 fn. 3 (1988) (remedies are not forfeited where the evidence fails to show the employer would have otherwise terminated an employee for the alleged misconduct); and *NLRB v. O'Hare-Midway Limousine Service*, 924 F.2d 692, 698 fn. 5 (7th Cir. 1991), enfg. *O'Hare-Midway Limousine Service*, 295 NLRB 463 (1989) (where the court rejected the employer's contention, apparently raised for the first time, that the unlawfully discharged employee had forfeited his remedies because he did not list all traffic violations within the prior 3 years on his job application; the court relied, in part, on the fact that the employer did not discharge the employee until 2 or 3 months after it discovered the first of two omitted traffic violations).

We note that no party has excepted to the judge's finding that the Respondent's offer to reemploy laid-off employees Jeffrey Fisher and Jon Mariani "does not relieve Respondent of its obligation to offer them reinstatement."

⁴There are no exceptions to the judge's finding that there were no laid-off employees who were part of the unit during the pertinent period for determining whether the Union had majority support.

⁵*Steiny & Co.*, supra at 1326.

⁶See *S. K. Whitty Co.*, 304 NLRB 776 fn. 5 (1991). (Although *Steiny & Co.* reversed *S. K. Whitty Co.* to the extent that case revised the eligibility formula for laid-off employees, it reaffirmed the

Continued

Arbic, Kurtenbach, and Mariani, who had started working for the Respondent on February 22, 3, and 9, respectively, were all actively on the Respondent's payroll between February 26 and March 6, when the Union's showing of majority support is at issue. Therefore, they were in the unit at the pertinent time without regard to the application of the *Steiny & Co.* formula for laid-off employees, and should be considered in determining whether the Union enjoyed majority support.

Including these three employees with Jerry Fox, Kendall Jacobs, Jeffrey Fisher, and Jeffery Hicks, who the judge found were in the unit between February 26 and March 6, the unit between those dates, including March 2, consisted of seven employees.

All but one of these employees—Fox—signed cards: Jacobs (February 25), Fisher (February 26), Hicks (February 26), Kurtenbach (March 2), Mariani (March 6), and Arbic (March 18). The Union, therefore, evinced majority support on March 2—the date the fourth card in the unit of seven employees was signed.

We adopt the judge's finding that by February 26, the Respondent had engaged in unfair labor practices affecting five employees.⁷ In addition, we agree with the judge that the Respondent has committed serious and pervasive unfair labor practices and that the lingering effects of the unfair labor practices warrant a bargaining order. Accordingly, we shall order the Respondent to bargain as of March 2, 1993, the date on which the Union achieved majority status, and by which date the Respondent had begun its unfair labor practices.⁸ *Peaker Run Coal Co.*, 228 NLRB 93 (1977).

ORDER

The National Labor Relations Board orders that the Respondent, Daniel J. Ellis, d/b/a Ellis Electric, Independence, Iowa, its officers, agents, successors, and assigns, shall

1. Cease and desist from

Board's well-settled principle that this formula, whatever its content, does not apply to those employees who meet the standard eligibility criteria. *Steiny & Co.*, supra at 1326.) See also *Daniel Construction Co.*, 133 NLRB 264, 267 (1961), as modified at 167 NLRB 1078, 1081 (1967).

⁷As discussed above, we find all five of these employees to have been unit employees by that date.

⁸We amend the judge's recommended Order and notice to date the bargaining order as effective March 2, 1993. Consistent with the bargaining order, we also amend the recommended Order and notice to include a broad cease-and-desist order. We also correct the judge's inadvertent omission of an omission of an expunction remedy for the unlawfully laid-off and discharged employees. Finally, we add express language: (1) requiring the Respondent to cease and desist from denying wage increases to discourage employees from engaging in union activity; and (2) requiring the Respondent to make Kendall William Jacobs whole, with interest, for any loss of pay suffered by its denial of a wage increase to him to discourage his support of the Union.

(a) Laying off, discharging, or otherwise discriminating against Ritchie V. Kurtenbach, Jon Mariani, Jeffery Hicks, Jeffrey Fisher, Melissa Jacobs, and Kendall William Jacobs, or any other employee, because of activity on behalf of or support for International Brotherhood of Electrical Workers, Local 288, or any other labor organization.

(b) Interrogating job applicants and already employed employees about their own and other employees' union activity and sympathies, threatening closure and denial of wage increases and denying wage increases to discourage employees from union activity, granting and promising to grant wage increases to encourage opposition to union activity, prohibiting display of pronoun insignia and covering insignia that are displayed, and directing that 911 be called if employees display insignia on company premises.

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

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

(a) Recognize and bargain collectively, effective March 2, 1993, with the International Brotherhood of Electrical Workers, Local 288, as the collective-bargaining agent of employees in the appropriate unit set forth below and, if an agreement is reached, sign a written contract embodying the terms of that agreement. The appropriate bargaining unit is:

All employees performing electrical work for Daniel J. Ellis, d/b/a Ellis Electric, but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Offer Ritchie V. Kurtenbach, Jon Mariani, Jeffery Hicks, Jeffrey Fisher, Melissa Jacobs, and Kendall William Jacobs immediate and full reinstatement to the positions from which they were laid off or discharged, dismissing, if necessary, anyone who may have been hired or assigned to perform the work of any of them or, if one or more of their positions no longer exists, to a substantially equivalent position, without prejudice to seniority or other rights and privileges, and make each of them whole for any loss of pay suffered by the discrimination against them, including the denial of a wage increase to Kendall William Jacobs to discourage his support of the Union, with interest on the amounts owing, in the manner set forth in the remedy section of the decision.

(c) Remove from its files any reference to the unlawful layoff of Ritchie V. Kurtenbach, Jon Mariani, Jeffery Hicks, and Jeffrey Fisher, and the unlawful discharge of Melissa Jacobs and Kendall William Jacobs, and notify them in writing that this has been done and that the layoffs or discharges will not be held against them in any way.

(d) Preserve and, on request, make available to the Board and its agents, for examination and copying all payroll records, social security payment records, time-cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Independence, Iowa office copies of the attached notice, marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

⁹If 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 any representative of their own choice
- To act together for mutual aid or protection.
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate you about your own and other employees' union activities or sympathies.

WE WILL NOT threaten to close our business or to deny wage increases, or deny wage increases because you or other employees engage in activity on behalf of International Brotherhood of Electrical Workers, Local 288, or on behalf of any other labor organization.

WE WILL NOT grant or promise to grant wage increases to encourage you to oppose or not support the above-named or any other labor organization.

WE WILL NOT prohibit you from displaying insignia supporting the above-named or any other labor organi-

zation, cover up such insignia that you choose to display, nor direct that 911 be called if you display prounion insignia on our premises.

WE WILL NOT lay off, discharge, or otherwise discriminate against you because of activities on behalf of the above-named or any other labor organization.

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

WE WILL recognize and bargain collectively, effective March 2, 1993, with International Brotherhood of Electrical Workers, Local 288, as the collective-bargaining agent of employees in the appropriate bargaining unit set forth below and, if agreement is reached, sign a written contract embodying the terms of that agreement. The appropriate bargaining unit is:

All employees performing electrical work for Daniel J. Ellis, d/b/a Ellis Electric, but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL offer Ritchie V. Kurtenbach, Jon Mariani, Jeffery Hicks, Jeffrey Fisher, Melissa Jacobs, and Kendall William Jacobs immediate and full reinstatement to the positions from which they were laid off or discharged, dismissing, if necessary, anyone who may have been hired or assigned to perform the work of any of them or, if one or more of their positions no longer exists, to a substantially equivalent position, without prejudice to seniority or other rights and privileges, and WE WILL make each of them whole for any loss of pay suffered by our discrimination against them, including the denial of a wage increase to Kendall William Jacobs to discourage his support of the Union, with interest on the amounts owing.

WE WILL remove from our files any reference to the unlawful layoffs of Ritchie V. Kurtenbach, Jon Mariani, Jeffery Hicks, and Jeffrey Fisher, and the unlawful discharge of Melissa Jacobs and Kendall William Jacobs, and notify them in writing that this has been done and that the layoffs or discharges will not be held against them in any way.

DANIEL J. ELLIS, D/B/A ELLIS ELECTRIC

A. Marie Simpson, for the General Counsel.
David A. Roth (Gallagher, Langlas & Gallagher), of Waterloo, Iowa, for the Respondent.
David Althaus, of Dubuque, Iowa, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge. I heard this case in Waterloo, Iowa, on July 13 and 14, 1993.¹

¹Unless stated otherwise, all dates occurred in 1993.

On May 25 the Regional Director for Region 18 of the National Labor Relations Board (the Board) issued the complaint and notice of hearing in the above-captioned matter, based on an unfair labor practice charge filed on April 9 and amended on May 25, alleging violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record, on the briefs that were filed, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Since January 1, 1992, Daniel J. Ellis, d/b/a Ellis Electric (Respondent) has been a sole proprietorship engaged as an electrical contractor in the building and construction industry, with an office and place of business in Independence, Iowa. In the course and conduct of those operations during calendar year 1992, Respondent purchased and received, at its Independence place of business and at its Iowa construction jobsites, goods valued in excess of \$50,000 directly from points outside the State of Iowa. Therefore, I conclude that at all times material Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

At all times material, International Brotherhood of Electrical Workers, Local 288 (the Union) has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Issues*

Section 8(a)(1) of the Act prohibits employer interference with and restraint or coercion of employees in the exercise of their statutory rights, inter alia, to self-organization; to form, join, or assist labor organizations; and to bargain collectively through representatives of their own choosing. "Since about December 7, 1992," alleges the complaint, Respondent has engaged in a series of actions—interrogation of employees about union membership and sympathy, threats to have nothing to do with a union and to cease operations or close if its employees became represented by the Union, threats to withhold wage increases because of its employees' union activities, prohibition of display of union insignia on its property and a direction to call the police if any employee did so, and a promise to grant and the actual grant of a wage increase to discourage union activity—that violated the prescriptions of Section 8(a)(1) of the Act.

Section 8(a)(3) of the Act prohibits, inter alia, employment discrimination against employees to discourage their membership in any labor organization. The General Counsel alleges that Respondent violated that prohibition by laying off four employees on March 9, by discharging another employee on March 23 and by discharging the latter employee's husband on April 2.

Section 8(a)(5) of the Act proscribes employer refusals to bargain collectively with, and upon demand by, bargaining agents chosen by a majority of employees in appropriate bar-

gaining units. The complaint alleges that the Union demanded recognition by Respondent on March 18, and alleges that Respondent has refused to recognize and bargain with the Union on and after that date. However, the General Counsel's brief urges that, "The bargaining order sought would be effective on March 6, 1993, the date on which the Union obtained support of a majority of Respondent's unit employees." That argument is based on decisions holding that, even without a bargaining demand by a labor organization, an employer can be directed to bargain with a bargaining agent selected by a majority of its employees, in an appropriate bargaining unit, if that employer engages in unfair labor practices so serious and substantial that it is not possible to erase their effects by conventional remedies and to conduct a representation election to determine employee sentiments free of the taint of those unfair labor practices.

B. *Events Prior to March 8*

Respondent commenced operations on January 1, 1992. At all times material, its owner has been Daniel Ellis and its office manager has been his wife, Janet Ellis. Both are admitted statutory supervisors and agents of Respondent within the meaning of the Act.

Electricians employed by Respondent during 1992 were unrepresented by a bargaining agent. However, it is uncontroverted that the Union did make contact with Respondent regarding that subject during the spring of that year, when David Althaus, organizer for the Union, encountered Daniel Ellis. During their ensuing conversation, it is not disputed, the latter mentioned "that he had been a union contractor in Ohio," but "at this time he was not interested in the [U]nion." Ellis testified that he had been "involved with the" International Brotherhood of Electrical Workers "back in the '70's" and, based on past experience, that he had not found union labor to be of high quality.

During at least the latter half of 1992, Respondent had advertised for electrician applicants. All interviews of responding applicants were conducted by Daniel Ellis. Electrician Kendall William Jacobs testified that during his interview in August 1992, in the course of a discussion about prior experience, "Dan asked if I was union, or what I thought about the unions," to which Jacobs had replied that he was not in a union and that there had been an organizing a campaign at a Wisconsin job where he had previously worked, but that he "didn't have feelings one way or the other, that I have never really been involved with one."

In the course of an October 1992 telephone conversation inquiring about employment with Respondent, Jeffery L. Hicks testified that Ellis had "asked me if I had been through any union apprenticeship programs," "if I was part of the IBEW," and "what I thought about unions." In essence, testified Hicks, he had responded that he had not been through any union apprenticeship programs, "was not at that time" part of the IBEW and had "no opinion of [unions], because I have never worked for a union contractor." Nonetheless, according to Hicks, when he had filed his application with Respondent during the following month, Ellis "again asked me if I had any union affiliation" and Hicks "told him I didn't."

Jon B. Mariani also testified that when he had applied for employment during January, Ellis "kind of asked me how I felt about the unions," explaining that the subject had arisen

as a result of a portion of the application form questioning the union or nonunion status at each prior employer for whom Mariani had worked. Yet, when his application was produced during cross-examination, Mariani admitted that no question about the union status of prior employers, nor of himself while working for each one, appeared on the form that he had completed. Further, Mariani ultimately conceded that he did not know if his recollection about the discussion with Ellis of unions “was exact” and, moreover, that maybe he had volunteered that he had previously been involved with a union. Nevertheless, he continued to assert that, in response to that volunteered information, he had been asked by Ellis if he still was a union member or was involved with a union.

Electrician Ritchie V. Kurtenbach, like Mariani, had been interviewed during January. He testified that in the course of reviewing the application, Ellis had remarked that “if I was as good as my application stated, that the union would gobble me up.” However, Kurtenbach testified that he had not responded and that Ellis had said nothing more regarding the subject.

Ellis testified that he had no problem with hiring people who had been involved previously with a union. He further asserted generally that he had never asked if applicants were union affiliated nor had he asked if they planned to become members of a union, because, “It is against the law.” To support that assertion, Respondent presented four employees—Terry Fox who had commenced working for Respondent on October 6, 1992; Peter Arbic who had begun work with Respondent on the following February 22; Virgial D. Lewis Sr. who had been hired during March; and Jerald B. Moore, who had worked for Respondent from May 18 to October 30, 1992, and who again began working for Respondent on March 16—each of whom denied that he had been asked about union affiliation and attitude when seeking employment with Respondent.

Of course, an employer’s failure to violate the Act wholesale, whenever the opportunity is presented, does not, of itself, establish that it had not done so on particular occasions. See, e.g., discussion, in the context of discriminatory acts, in *Hogan Mfg.*, 309 NLRB 949, 956 (1992), and cases cited therein. The reasoning there is no less applicable when evaluating alleged violations of the Act’s other proscriptions. Furthermore, the reliability of those four employees’ denials, particularly with regard to the interview of Moore before he had been rehired on March 16, is diminished by Janet Ellis’ undenied comment to then-secretary and bookkeeper Linda Peterson that Daniel Ellis had “question[ed] Jerry Moore about whether he was interested in joining a union” and, according to what Peterson had been told by Janet Ellis, Moore had “said he wasn’t.”

Daniel Ellis denied having asked Jacobs about the Union, if Jacobs was a member of the Union, if Jacobs had any plans to become a member of the Union, and having talked at all about the Union during the initial interview with Jacobs. Ellis did acknowledge that the subject had arisen when Mariani had been interviewed. But, he testified that it had been discussed when Mariani volunteered “that he had been working as an apprentice in the IBEW in Chicago,” but had been “booted out” of that labor organization. Ellis denied having asked during that interview if Mariani was in the Union, was a member of the Union, was involved in the Union in any way, and if Mariani planned to join the Union.

However, Ellis did admit that he had made the above-quoted remark attributed to him by Kurtenbach in the course of the latter’s January job interview. Ellis claimed that he had intended his remark as “a purely complimentary remark,” because Ellis had been so impressed by “what he show[ed] on his application and the interview we had, I was impressed with his presentation.”

In fact, the Union was quite interested in Kurtenbach and his employment by Respondent. He and the Union had agreed that, while employed by Respondent, Kurtenbach would serve as the Union’s “salt”—an employee who would attempt to ascertain union sentiments of other employees and assist in organizing them, should the Union choose to pursue that course.² Following commencement of his employment with Respondent on February 3, Kurtenbach did not disclose that role to Respondent nor to any of its employees during February. However, on February 16 or 17, Althaus visited the V.A. Hospital site in Iowa City where he spoke with Jacobs, Mariani, and Hicks who were working there with Kurtenbach.³ Then, on Friday, February 19, Althaus visited Kurtenbach and Jeffrey J. Fisher at the Vinton Public Library site.⁴ On neither date did Althaus solicit employee signatures on authorization cards.

Ellis admitted that the librarian at the Vinton Public Library had reported the visit by Althaus to that project. Moreover, Ellis admitted that, thereafter, he had spoken to all of his employees about the Union. In fact, he confirmed many of the remarks attributed to him by Kurtenbach during two conversations on Monday, February 22, one occurring when the latter reported for work that day and the second as he checked out that evening.

According to Kurtenbach, during the morning conversation, Ellis had asked “why he wasn’t informed that the union organizer was on the job Friday,” and had said that the organizer’s presence there “was important and was serious, that he could be made to go union and he didn’t want that,” that it was unfair that union members obtained a better opportunity to pass the test for a journeyman’s license, and “that he was a union contractor before, and he would have nothing to do with it again, and that he would shut his doors.” During the evening conversation, Kurtenbach testified, Ellis had

² Kurtenbach was not paid by the Union for doing so. Even if he had been paid, that would not have deprived him of employee status under Sec. 2(3) of the Act. See *Town & Country Electric*, 309 NLRB 1250 (1992).

³ Althaus placed the date of his visit there on February 4. Kurtenbach testified that it had been on February 16. Jacobs testified that it had been about February 20 and Mariani believed that it had occurred on February 22, while Hicks testified that it had occurred early to mid-February. As discussed *infra*, Respondent maintains what it calls labor sheets for each project. Those documents record by date who had worked on each particular project. The labor sheets for the V.A. Medical Center and the V.A. Chapel projects disclose only 2 days, February 16 and 17, when all four of those employees—Jacobs, Mariani, Hicks, and Kurtenbach—had worked there during February.

⁴ Again, there was a discrepancy regarding the date of that visit in testimony provided by Kurtenbach and Althaus, with the latter placing the date on February 22, while the former testified that it had been on February 19. That project’s labor sheets show that only Kurtenbach had worked there on February 22 and, further, that the only February date when Fisher had worked there, as well, had been on February 19.

“stated, first of all, that the fellows at the VA Hospital had been visited by the union organizer also,” and had asked if Kurtenbach was a union member or “if I was union,” which Kurtenbach denied. Ellis concluded the conversation, testified Kurtenbach, by saying that Respondent had received applications from union members who could not get jobs elsewhere and, as a result, had been willing to work nonunion, adding, “You better ask these union guys about the unemployment lines.”

Consistent with Kurtenbach’s above-quoted description, Daniel Ellis admitted that “I think I stated to [Kurtenbach] that I had heard that the organizing [sic] had visited the job and I was wondering why he didn’t tell me about it.” Further, Ellis admitted, “I asked him . . . if he was a union member, and he said he was not,” and “I asked him if he had planned to become a member, and he said he was not because they would have to offer more than they were.” As described above, Ellis had testified that “[i]t is against the law” to ask an applicant if he/she had union affiliation or planned to become a union member. However, testified Ellis, he felt he had the right to ask about an already employed individual’s union membership because “he was already employed with me.” While Ellis testified “that was the end of the subject,” he did not deny with particularity having told Kurtenbach that the organizer’s presence at the Vinton Library project was important and serious, that he would be made to go union and did not want that, that he had been a union contractor before and would have nothing to do with it again, and, in the evening, that the organizer also had visited the V.A. site, that union members were willing to work nonunion, and that Kurtenbach should ask union guys about the unemployment lines.

Ellis did deny having told employees that he would close if the employees decided to join the Union. The weight to be accorded that denial is somewhat diminished by the testimony of Jacobs and Mariani—both of whom Respondent’s records show had worked on the V.A. Medical Center for 9 hours on Monday, February 22—that Ellis had come there and had threatened to “close the doors” if the employees pursued unionization. Ellis denied having made such a threat to Jacobs. However, he made no reference in that denial to Mariani. Nor did he deny having made such a threat to Jacobs and Mariani, jointly.

Discussion of the subject of unionization did not end on February 22. On a subsequent date, which appears to have been February 23 based on Respondent’s project labor sheets, he warned Jacobs that he would dock employees’ pay for time spent talking with an organizer instead of working as they were being paid to do. That warning is not alleged to have been unlawful. Alleged to be unlawful, however, was his undenied remark to Jacobs, in late February or early March, that Jacobs was due for a pay raise, “but since this union activity came about that [Ellis] didn’t think I would be able to get one now.”

If Ellis could not see his way clear to give Jacobs a raise, he did provide an alternative means of financial assistance to that employee. He testified that “to help [Kendall Jacobs and his wife, Melissa] out financially, I knew they were strapped,” he offered employment to Melissa Jacobs. She testified that, prior to starting work for Respondent on March 8, she had not worked “for the last eight years” and had “want[ed] to go to work because of the [Jacobs’] troubled

financial situation.” As a result, she testified, when her “husband came home one day and said that Dan was looking for someone to come in and take inventory, and to generally clean up the parts, get them all in order” and had asked “my husband if I would be interested in doing it,” Melissa Jacobs telephoned Ellis. He told her to come in and talk to him about the job. She did so on Friday, March 5.

Ellis testified that he had not hired Melissa Jacobs for a permanent position, but merely to “count the inventory.” Yet, he did not dispute her description that, during their March 5 conversation in his office, “he stated that there were many things that needed to be done. . . . that anything that needed to be done, [she] would be there to do it.” She accepted his employment offer and first reported for work on Monday, March 8. As it turned out, that was not the only event that day that has attracted the General Counsel’s attention.

C. *The Layoffs on March 9*

As pointed out in the immediately preceding subsection, Kurtenbach had not revealed his activity as a salt to Respondent. So far as the evidence discloses, Respondent had not learned of it from any other source prior to March 8. On Friday, March 5, however, Althaus made two moves, one of which would disclose Kurtenbach’s status to Respondent on the following Monday.

The first was to mail to the Board’s Des Moines Resident Office the representation petition that, when docketed, would become Case 18–RC–15369. With it, Althaus included four signed cards each bearing the printed legend, “I authorize a local union of the International Brotherhood of Electrical Workers, to represent me in collective bargaining with my employer.” The credible evidence shows that one had been signed by Jacobs on February 25, a second by Fisher, and a third by Hicks on February 26, and the fourth by Kurtenbach on March 2. A fifth card would be signed by Mariani on March 6 and a sixth and final one by Arbic on March 11. Those two later signed cards were then transmitted to the Resident Office by Althaus.

Althaus did not contend that he had notified Respondent that he would be filing the petition. Since it had been mailed on a Friday, and there is no evidence that the Resident Office is open during weekends, the petition would not have reached that office, until at least the following Monday, March 8. Further, there is no evidence that Resident Office personnel spoke with Respondent about it with either on that day or on the following one. However, according to a letter to Daniel Ellis on March 11 from Field Examiner Robert R. Reid, the two men had spoken by telephone about the petition on Wednesday, March 10. By that date, Ellis had been apprised of the organizing campaign from a separate source.

Ellis admitted that on Monday, March 8, his wife had signed for and had picked up from the post office a letter from Althaus, dated March 5, which stated:

The purpose of this letter is to inform you that Mr. Ritchie Kurtenbach is a member of Local 288 National Brotherhood of Electrical Workers, and that he will be talking to your employees about the benefits of joining the union.

In other words he is salting, and salting is a protected activity under the National Labor Relations Act, and he should be entitled [sic] to that protection.

Melissa Jacobs testified that, as she worked on March 8 in an area between the office and the shop at Respondent's Independence facility, she had overheard a "very angry" Dan Ellis say that "No damn union would come in and run his business," and the Kurtenbach had lied on his application. Melissa Jacobs further testified that Janet Ellis, to whom Ellis had been speaking, had "stated that that would be a reason to get rid of" Kurtenbach, but that her husband had retorted, "We have to think of another reason, we can't fire him for union activity." Peterson, whom Melissa Jacobs placed as having been present during at least the latter part of that conversation between the Ellises, testified that she did not remember Daniel Ellis having been angry on Monday, March 8, nor on Tuesday, March 9. Still, neither Daniel nor Janet Ellis denied that the conversation described by Melissa Jacobs had taken place on Monday, March 8. And neither one of them disputed Melissa Jacobs' description of what they had said during it.

Hicks testified that during the morning of March 8, he had telephoned Respondent's office and had spoken with Peterson. As he was telling her that he would not be able to report to work that day, he testified, "I heard, in the background, Mr. Ellis cussing—throwing a fit, I guess," and that, among other remarks, Ellis had said, "if the f_____g [U]nion comes in, I am closing the doors." According to Hicks, he also overheard Janet Ellis attempting to calm down her husband. While Peterson could not remember Daniel Ellis having been angry that day, she did not contradict Hicks's description of Ellis having spoken those words, overheard as he had spoken with her. Nor did either Daniel or Janet Ellis deny having spoken the words on March 8 that Hicks attributed to them.

If Peterson could not remember Daniel Ellis having been angry on March 8 or 9, she did remember that on March 9 he had told Melissa Jacobs that he was going to close the doors if the Union got in there. Melissa Jacobs did not confirm that Ellis had made those remarks to her on March 9, but did testify that on the preceding date he had told Peterson and her, together, "not to go out and buy any large appliances, that we could be unemployed very shortly. And he just made several references that the union would not be there." However, whatever the exact date of his remarks, Ellis did not deny having spoken the words attributed to him by Melissa Jacobs and, of perhaps greater significance, evidence was supplied that confirmed Peterson's account. Thus, though he testified that he had not stated to Peterson that he would close if the employees decided to join a union, he admitted that he stated in a prehearing affidavit, "Once I discovered that the [U]nion was trying to organize my employees, I did not tell my employees that I would close the employer's doors if they joined the [U]nion. I did make this comment to Linda Peterson, the employer's office secretary at the time."

Confronted with that statement in his affidavit, Ellis testified that "there was more to it than that," because Respondent's financial situation had been precarious at that time. Also, he testified, Respondent was encountering difficulty compiling information to support its application for a Small

Business Administration loan which, Ellis contended, had given rise to concern about whether there would be enough money for Respondent to meet its current payroll. This situation, he testified, had "very much" led him to say that he might have to close; that his comments on March 8 had been the result of his financial situation, having "Nothing at all" to do with his employees' union activities. If so, that does not square with the admission in his affidavit that he told Peterson "that he would close the employer's doors if [the employees] joined the [U]nion." Indeed, his plea in avoidance regarding that affidavit's statement is further undermined by his own admission that when Peterson asked if he truly meant that he would close the doors, he told her that he did not really intend to do so, but had just been upset when he found out that his employees were thinking about the Union. With regard to that particular remark, Peterson testified that his remark to her had been that he had only made the comment about closing the doors so that Melissa Jacobs would communicate to her own husband what Ellis had said.

During the afternoon of March 9, Ellis made another approach to Melissa Jacobs concerning the Union. She testified that he had told her that he wanted to have a conversation with her "that never took place. And he plainly asked me which way my husband was going to vote," to which she responded that while the two of them had discussed the pros and cons of the Union, both believed that the choice was a private one that was her husband's to make. Ellis did not deny having made those statements to Melissa Jacobs on March 9. To the contrary, he conceded that he had asked her how Kendall Jacobs was going to vote.

The most memorable event of Tuesday, March 9, occurred at the end of the workday when Respondent laid off Kurtenbach, Hicks, Mariani, and Fisher. A notice "TO ALL EMPLOYEES" about the layoffs was prepared by Respondent and, in pertinent part, reads:

Effective 3/9/93-5:30 pm the following employees are regretfully laid off due to the completion of 2 projects and lack of new work to start.

In the event our work load picks up you will be eligible for rehire. . . .

The employees are:

1. Jeffrey Fisher
2. Ritchie Kurtenbach
3. Jeffery Hicks
4. Jon Mariani

However, as the hearing progressed, Respondent's "completion of 2 projects and lack of new work to start" defense encountered heavy going. And, ultimately, Daniel Ellis, testifying as Respondent's last witness, abandoned it altogether.

With respect to the March 9 notice's layoff reason, Respondent adduced evidence that two Iowa projects—the Jesup Public Library and the Vinton Public Library—had been completed by March 9, that two other projects—the Grundy Maintenance Garage and Solon Secondary Schools—had been scheduled to start in March, but commencement of both had been delayed, and that bids on two remaining projects—the Feather Light and phase two of Cresco Hospital—had not come through, leaving Respondent as of March 9 with work to be performed only on phase one of Cresco Hospital, at Manchester Public Library, and on the

chapel and eighth floor medical center of the Iowa City Veterans Administration Hospital. That portrayal of Respondent's supposedly limited work and prospects for work on March 9 began to unravel in the light of certain other evidence.

Most prominent was a conversation that had occurred between Kurtenbach and Daniel Ellis 5 days earlier, on Thursday, March 4. Unbeknownst to Ellis, Kurtenbach had tape-recorded the remarks exchanged. That tape was introduced as an exhibit, along with a transcript of it, and was played during the hearing, with the record of what was played appearing on pages 63 to 71 of the transcript. Aside from exchanges of some personal comments, most of that conversation's first portion's remarks between Ellis and Kurtenbach pertained to the situation at the V.A.

Toward the end of the tape, there was a discussion of Respondent's general work outlook. Substituting "K" for Kurtenbach and "E" for Ellis, in lieu of the transcript's "VOICE A" and "VOICE B" designations, the following statements are shown to have been made during that conversation:

E: If you have anything that you need to talk about it, I will be here Friday—well, Saturday,—I will be here Saturday.

K: Saturday, okay.

E: Because I got a bid to put out. Tomorrow I am busy. Trying to get some more work.

K: More? Man.

E: I will get it if you guys do it.

K: All right.

E: That work out at PMX [phonetic] is coming up real soon, some nice work.

K: Is that that motor or that pump?

E: I have got that, they are not ready to do that yet, I got some more stuff—

K: De-scaler???

E: —there is one that is going to be let this month, the 22nd, they want to let the contract, and it is going to be a big one. It will be six months of work right there. Going to be a nice one.

K: How about the Solon School, then, when are we starting that?

E: That is going to start Monday if the weather holds out.

K: No kidding? How about the deal over in Grundy then?

E: That is supposed to start the 18th, but, you know, they have a lot of things to do before we are ready to go in there.

K: Yeah.

E: We got a couple of months over there, at least.

K: Okay. March, yeah?

E: The 18th is when they are supposed to set the panels up, precast, the Grundy job. All hell is breaking loose right now—I love it.

Several points about that exchange are noteworthy in the context of the "lack of new work to start" portion of the March 9 layoff notice.

First, according to Ellis' above-quoted statement, as of March 4 Respondent intended to begin work on the Solon Secondary Schools project "Monday if the weather holds

out." In fact, by Monday, March 8, Virgil D. Lewis, Sr. had begun work for Respondent—on the Manchester Public Library project—having been hired for the specific purpose of supervising or coordinating work at the Solon project, once it commenced. To be sure, midwestern weather soured throughout the spring and summer, with the result that steady work on the Solon Schools project did not actually begin until May. Yet, while the disruptive effect of weather in that area is by now well known, there is no evidence that Respondent had known or could have known on March 9 that the weather would become so bad through the spring that commencement of work on the Solon Schools project would be precluded for the next 2 months. That is, Respondent can hardly latch on to subsequent events to retroactively supply a state of mind for actions it took on March 9.

Second, as his above-quoted tape-recorded words show, on March 4 Ellis had believed that the Grundy Center Maintenance Garage project would "start the 18th," although he recognized that "they have got a lot of things to do before we are ready to go in there." Nevertheless, although Ellis anticipated on March 4 that some delay in beginning work at Grundy Center might be encountered, there is no indication that he had anticipated any such delay to be substantial in length. Consequently, even though it turned out that the Grundy Center project did not actually start until May, it cannot be said that Ellis had realized on March 9 that so substantial a delay in starting that project would occur.

In sum, as to the two delayed start projects pointed to by Respondent, the evidence shows that commencement of each one had been delayed, but does not show that Respondent had known or could have anticipated on March 9 that those delays in commencement would be other than of short duration.

Third, Ellis testified that with respect to PMX Industries, "We had several jobs down there that were small in magnitude, but they were—still we weren't low bidders on them." However, as quoted above, on March 4 he said "I have already got" the motor or pump mentioned by Kurtenbach and, further, that a decision would be made on March 22 regarding "a big" contract. So far as the evidence discloses, nothing happened in the intervening 5 days, between March 4 and 9, to change that situation at PMX described by Ellis.

The record reveals certain additional evidence pertaining to PMX that should not pass unnoticed. As pointed out above, Respondent maintains what Janet Ellis referred to as "labor sheets" for each of its projects. In each instance, those sheets list by date the name of the employee or names of employees who worked on a project and the number of hours worked there by each employee for each date. Based on that daily record, the labor sheets list the monetary amount that Respondent charges for the work performed on a project by Respondent's personnel. Since Daniel Ellis testified that he rarely charges a contractor for work that he personally performs and since the labor sheets only rarely list Ellis as having worked on a project on a particular date, apparently the labor sheets do not disclose work that is performed by Respondent but is not charged to the contractor for a project.

During the hearing, Respondent introduced labor sheets for a number of projects on which its personnel had worked: Solon Secondary Schools, Vinton Public Library, V.A. Chap-

el, V.A. Medical Center, Grundy Center Maintenance Garage, Jesup Public Library, Manchester Public Library and Cresco Hospital. However, it did not produce labor sheets for PMX projects. Yet, it is clear from another set of records produced by Respondent that its employees, in fact, had worked on a PMX project or projects in the wake of the March 9 layoffs.

In addition to the labor sheets, Respondent produced a daily calendar log for the period March 8 through May 9. On them is listed for each date the identities of employees assigned to projects on that date and the particular project to which each one was assigned. In contrast to the labor sheets, however, the calendar log does not disclose the number of hours worked on those projects by employees assigned to them. The significant point of that log with regard to PMX is that review of it reveals that Terry Fox had been referred to PMX on Friday, March 12, Saturday, March 13, and Friday, March 19. Moreover, the then-newly rehired Jerald B. Moore was assigned there on Monday, April 5, and on Tuesday, April 6. In other words, consistent with Ellis' above-quoted remarks to Kurtenbach on March 4, Respondent had actually possessed PMX work and had performed it after the layoffs.

Standing alone, of course, dispatch of a couple of employees for a few days' total work at PMX does not show sufficient "new work" to necessarily refute the March 9 notice's assertion of lack of it. Yet, PMX was not the lone project to which Respondent had assigned employees following the layoffs, but for which no labor sheets were produced. According to Respondent's calendar log, three employees—Jacobs, Peter Paul Arbic, and Fox—had been assigned to ICBP, also referred to as the Cob House, on Friday, March 19. Ten days later, on March 29, Lewis and Arbic were sent there. The only pertinent testimony provided by Respondent concerning that project was Janet Ellis' account that ICBP was a maintenance-type project and her husband's testimony that work there had not been available on March 9. Yet, no labor sheets were produced to show how much work had been performed for and charged to ICBP after March 9. Neither were such sheets produced for "Kum 'N Go" or "Come & Go"—a project described by Janet Ellis as "more or less a service kind of project that we were doing"—to which, according to the calendar log, Fox had been dispatched for part of Friday, March 12.

The possible existence of two additional projects is revealed by examination of a list provided by Respondent (G.C. Exh. 19) showing the job status of its projects as of April 27. Included on it are an addition and remodeling project for Immanuel Lutheran Church, and also, an addition to the Howard Co. Medical Office. The list recites that, by April 27, the former had been 100 percent complete and the latter 95 percent complete. However, no evidence whatsoever was produced by Respondent to show when the work on those two projects had been performed.

Inasmuch as it is listed as 95 percent complete on April 27, obviously the medical office project had been ongoing as of that time. As to the church project, the only testimony regarding it was that of Fox. But, while he testified that it had started on October 6, 1992, he claimed that he could not remember when it had been completed. The fact that Respondent had chosen to include those two projects on a list that also enumerates the, as of March 9, recently completed

Vinton and Jesup Library projects, the then-ongoing Manchester Library and V.A. medical center and chapel projects, and the then-soon to commence Solon Secondary Schools and Grundy Center projects, coupled with the failure to produce labor sheets for the church and medical office projects, raise legitimate doubt concerning the completeness of Respondent's portrayal during the hearing of the work available to its employees during March.

Additional evidence was presented that casts doubt on the reliability of Respondent's testimony that it did not need Kurtenbach, Mariani, Fisher, and Hicks for work after March 9 on projects that Respondent acknowledged having then been in progress. For, then-secretary Peterson described telephone calls from the general contractor at both the V.A. and at the Manchester Public Library projects seeking employees to perform available work.

As to the latter, she testified that "Ray" had called after the layoffs "wondering when someone was going to come to the job site." Although Respondent's records show that Lewis and Arbic had worked at the Manchester Library on March 10 and 11, they disclose that none of Respondent's employees had worked there on Friday, March 12. Respondent produced no explanation of where, or even if, those two employees had worked on March 12. Lewis and Arbic again worked at Manchester Library on Monday, March 15, through Wednesday, March 17. But none of Respondent's employees worked there again, according to the labor sheets for that project, until Wednesday, March 24, when Lewis returned to it. In the interim, Arbic had worked at Cresco Hospital on Thursday, March 18, and at ICBP on Friday, March 19, while Lewis had worked at V.A. on Thursday, March 18, at ICBP on Friday, March 19, and at V.A. on Monday, March 22, and on Tuesday, March 23. Significantly, with regard to the assignment of Lewis to V.A., it had been at that site that Kurtenbach had worked, both on the medical center and chapel projects, fairly steadily since February 23: 11.5 hours on that date, 8 hours on February 24, and 10 hours each day on March 1, 2, 3, 4, and 8.

It had been from the V.A. general contractor's representative, Bud, that Peterson testified she had received a couple of calls on 1 or 2 days a week after the March 9 layoff. According to Peterson, Bud "was very upset because no one had been down there." In fact, while Kurtenbach had worked there during the approximately 2-week period prior to March 9, thereafter Jacobs worked there for 5 hours on Wednesday, March 10, and for 10 hours on Thursday, March 11. But, none of Respondent's electricians worked at either the medical center or chapel on Friday, March 12. Jacobs resumed working there from Monday, March 15, through Thursday, March 18, the latter being a date when Lewis also worked there. No one worked at the V.A. on Friday, March 19, when, according to the calendar log, Jacobs and Lewis, as well as Arbic, had been sent to ICBP.

Neither Daniel nor Janet Ellis contested Peterson's descriptions of the calls from Ray and Bud. That is, neither officially expressed any doubt that they had occurred. Moreover, neither Daniel nor Janet Ellis advanced any explanation concerning the calls from Bud. However, both testified that the Manchester Library project had involved only intermittent work and that Ray would call whenever an electrician was needed there. Yet, the labor sheets for that project disclose that a relatively significant amount of work had been per-

formed there throughout March, sometimes by two employees and other times by only one electrician. Thus, total time worked at the Manchester Public Library during March had amounted to 7 hours on March 1, 11.5 hours on March 8, 10 hours on March 9, 10 hours on March 10, 20 hours on March 11, 16 hours on March 15, 20 hours on March 16, 20 hours on March 17, 11 hours on March 24, and 10 hours on March 25. Moreover, during the first part of the tape-recorded conversation on March 4, Kurtenbach and Ellis had reviewed several matters at the V.A. that could soon be undertaken. Indeed, that particular conversation is also significant to another aspect of the March 9 layoff notice's explanation.

As described above, in connection with a lack of work assertion, Respondent pointed to two projects that had been substantially completed by close of business on March 9: the Vinton Public Library and the Jesup Public Library. However, Daniel Ellis placed completion of the Vinton project as having occurred toward the end of February and his wife precisely placed it as having occurred on February 22. In fact, her testimony is confirmed by the labor sheets for that project. They show that after February 22 there had been no work there again until May 17, for that single day. However, since that project's last day had been February 22, that means that Respondent had been aware of its completion by the time of the March 4 conversation between Kurtenbach and Ellis. Yet, while the two men discussed future work during the conversation, as reproduced above, Ellis made no mention whatsoever of the Vinton Library's completion nor, more specifically, of any possible adverse impact of its completion on future work that would be available for Respondent's electricians.

Similarly, Ellis did not express any concern during that March 4 conversation about Respondent's failure to succeed on the Feather Light bid. But Daniel Ellis testified that he had learned on Monday, March 1, that Respondent's bid had not been selected. In sum, despite both completion of the Vinton Library project and failure to successfully bid for the Feather Light project, during the March 4 conversation, when Kurtenbach expressed surprise that Ellis was bidding for even more work—"More? Man."—Ellis replied optimistically, "I will get it if you guys do it," concluding discussion of the subject of future work by exclaiming, "All hell is breaking loose right now—I love it." At no point on nor prior to March 9 does the evidence show that Respondent had viewed the Vinton Library's completion and the failure to bid successfully for the Feather Light project as any basis for concern about the availability of future work for its employees.

To the contrary, Ellis' above-quoted words to Kurtenbach reveal nothing but optimism about future work based on its bids for additional projects. In fact, Ellis testified that the plans for a second phase of the Cresco Hospital project had come out in February or March and that Respondent had been preparing in February to bid on that phase of that project. As it turned out, cost overruns on phase one of it caused phase two to be postponed. However, there is no evidence that the postponement had occurred by March 9. Nor is there evidence that Respondent likely would have anticipated that postponement on that date.

Although the Jesup Public Library project had been substantially completed on March 9, there was work there that

remained to be done after that date. Hicks estimated the amount of it to be 40 hours each for two employees; Jacobs estimated approximately 50 hours of work that remained at Jesup after March 9. In fact, both Daniel and Janet Ellis agreed that there had remained punch list work—items that needed to be finalized as a result of the contractor's walk-through—to be performed at the project after March 9. Moreover, consistent with Hicks's estimate, Daniel Ellis testified that he and his wife had spent "about four or five days" doing it. Both of them testified that Daniel Ellis ordinarily did punch list work. If so, that left the Ellises fairly busy during March, for they testified that they also had replaced stranded wire that had been mistakenly installed at the V.A. project. Since Respondent did not charge the contractor for any of that work, there is no labor sheet record that would disclose that the actual number of hours spent by Daniel and Janet Ellis rewiring had been insignificant in number.

The evidence reviewed in the preceding paragraphs tends to seriously diminish, if not undermine completely, the "completion of 2 projects and lack of new work to start" explanation advanced by Respondent's March 9 layoff notice. Having sat through the hearing observing receipt of that evidence, Daniel Ellis then took the stand as Respondent's witness and, questioned during direct examination, abruptly disavowed his own layoff notice's explanation:

Q. As of March 9, 1993, what was the state of your economic situation at Ellis Electric with regard to work being conducted?

A. Well, we didn't have enough money in the payroll to keep people on.

Q. How many—did you have enough jobs to go around?

A. We had plenty of work.

To be sure, thereafter counsel got Ellis back on the track of the explanation advanced in the layoff notice. However, while Ellis then testified that Respondent had work only at Cresco, Manchester, and the V.A., he never retreated from his testimony that, as of March 9, "We had plenty of work." To the contrary, his testimony regarding his choice of employees laid off on March 9 pertained more to the "hav[ing] enough money in the payroll" defense, than to a lack of work one.

On its face, Ellis' assertion about lack of sufficient funds to meet Respondent's payroll during the week of March 8 through 12 conflicted with the admitted fact that both Lewis and Melissa Jacobs had started work on March 8 and had been allowed to work throughout that week. Moreover, in contrast to the lack of work assertions, in support of which considerable documentation was produced by Respondent, no documentary evidence was produced to support Ellis' testimony that, as of March 9, "we didn't have enough money in the payroll to keep people on." Respondent did produce a balance sheet for its operations "as of May 31, 1993, and the related statements of income for the five months then ended." Yet, that date is almost 3 months after the decision had been made and implemented to lay off Kurtenbach, Mariani, Fisher, and Hicks.

It is not possible to ascertain from a review of the balance sheet and related statements Respondent's payroll situation as of March 9. Moreover, the reliability of recitations in those

documents was carefully qualified by the certified public accountants who had prepared them. Thus, in their June 23 cover letter those accountants stated:

A compilation is limited to presenting in the form of financial statements information that is the representation of the owners. We have not audited or reviewed the accompanying financial statements and, accordingly, do not express an opinion or any other form of assurance on them.

The owners have elected to omit substantially all of the disclosures and the statements of proprietor's capital and cash flows required by generally accepted accounting principles. If the omitted disclosures and statements were included in the financial statement, they might influence the user's conclusions about the Company's financial position, results of operations, and cash flows. Accordingly, these financial statements are not designed for those who are not informed about such matters.

In sum, other than the testimonial assertions of Daniel Ellis, there is no evidence whatsoever to support the belatedly-raised defense that on March 9 Respondent "didn't have enough money in the payroll to keep people on."

D. *The Terminations of Melissa and Kendall Jacobs*

The March 9 layoffs did not deter the Union from continuing its campaign to organize Respondent's electricians. As set forth in subsection III.C, *supra*, it secured a signed authorization card from Arbic on March 18. Also as stated in that subsection, on March 11, Field Examiner Reid sent a letter to Daniel Ellis confirming their preceding day's telephone conversation. Included with Reid's letter was a Stipulated Election Agreement. It provided for an election on April 16 in a unit of all employees performing electrical work, but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act. That same unit has been pled as appropriate in the complaint. Respondent admits that it is.

Nor did the March 9 layoffs put an end to Daniel Ellis' statements to employees about the Union. Melissa Jacobs testified, without contradiction, that on Friday, March 19, she asked Ellis for a duplicate key for her husband's locked gang box and that, as he gave the key to her, he remarked, "that no union supervisor would have done that for me."

After initially waffling about the subject, when interrogated by the General Counsel, Arbic ultimately acknowledged that he believed, as stated in his prehearing affidavit, that on Saturday, March 20, at the Manchester Library project, he had overheard Ellis saying to Virgil Lewis that he (Ellis) would close his doors if the Union organized his employees. Neither the project labor sheets nor the calendar log show that any employees had worked at Manchester Public Library on March 20. However, the labor sheets for that project do disclose labor charges for Lewis and Arbic having worked there for 5 hours each on March 10, for 10 hours each on March 11, for 8 hours each on March 15, and for 10 hours each on both March 16 and 17.⁵ Thus, though

⁵Interestingly, the calendar log for March 10 makes no mention of Arbic and Lewis having worked at the Manchester Public Library site on Wednesday, March 10. Instead, it shows them as having

Arbic obviously erred about the exact date of Ellis' remarks to Lewis, Respondent's own records show that Lewis and Arbic had both worked on the Manchester Public Library project on dates proximate to March 20. More importantly, aside from his general denial of having threatened to close if Respondent's employees became unionized, Ellis did not specifically deny having made such a threat to Lewis at that project.

Arbic also described another conversation in March, this time between Ellis and himself. During it, Arbic had requested a raise. According to Arbic, Ellis had responded that "he needed me on the 16th, on the vote, he needed me, but he didn't tell me which way to go on it." Further, testified Arbic, "he asked me what would make me happy," after which Arbic "told him I wanted a dollar," and Ellis "agreed to give me 50 cents. He says he knew that I was worth more, and I had an attitude problem, and he was willing to go ahead and give me 50 cents now and 50 cents in 30 days." In fact, according to Arbic, he did receive a 50-cent raise in his paycheck for April 1 and another 50-cent raise 30 days later. Daniel Ellis did not testify regarding this conversation and, consequently, Arbic's description of what had been said is uncontroverted.

As might be expected, the General Counsel emphasizes Ellis' remark that "he needed [Arbic] on the 16th, on the vote." However, Arbic denied that either of the raises had been conditioned in regard to the Union. The problem with that denial is that, as Arbic was testifying, it appeared that he was attempting to do so in a manner that would cause the least injury to Respondent's interest and, perhaps, to his own interest in continued employment with Respondent. As a result, both in connection with Ellis' above-described overheard remark to Lewis and with respect to a later statement to Arbic, while giving the latter a gang box key, "This involves a lot of trust. I am still going to need you, Pete, on April 16," Arbic initially claimed that he could not remember what Ellis had said on either occasion. In consequence, his "memory" had to be refreshed from his prehearing affidavit.

After being shown his own descriptions in that affidavit of what Ellis had said, Arbic fell back on the explanation that "I was pretty drunk when I gave the [affidavit]"; that "I would say I was drunker than a two-ton tank by the time I was giving my [affidavit] there" and "I would have probably signed anything right there that night." Nonetheless, pressed by the General Counsel, Arbic grudgingly conceded that he "for the most part" did recall the events described in his affidavit and, in fact, that Daniel Ellis had made those statements, at least "somewhere along those lines."

worked at the Solon Secondary Schools project on that date. According to the Solon labor sheets they did work there on March 10, but, as at the Manchester Public Library on that same date, only for 5 hours each. The calendar log does contain entries on March 11, 16, and 17 for Arbic and Lewis working at Manchester Public Library. However, for March 15 it contains no mention that they worked there, though the labor sheets for that project show that each one did 8 hours' work there on that date. Instead, the calendar log for March 15 lists Arbic and Lewis as working at Solon Secondary Schools. In fact, the labor sheets for that project do show that they had worked at Solon on March 15, but only labor of 2 hours for each man in charged to that project for that date.

With respect to the 50-cent raises, Arbic claimed that he had requested a raise because Respondent had begun sending him to the Cresco Hospital project and that assignment forced him to begin "spending \$12.00 a day in gas, and I wanted either driving time or gas paid or a pay increase to compensate for the extra travel." In addition, testified Arbic, when he had approached Ellis concerning the raise, he had also "wanted to hear the issues. I wanted to hear his side of the story" concerning the representation election then scheduled, pursuant to the Stipulated Election Agreement, for April 16. Yet, Arbic's seeming effort to portray discussion of the raise and the election as separate and distinct aspects of a single conversation falters on the above-recited description of Ellis' remarks about needing Arbic "on the 16th, on the vote, he needed me," and on the sequence of his immediately following question as to "what would make [Arbic] happy." Furthermore, at no point did Ellis, himself, provide testimony that he had regarded and had treated the two subjects as having been separate aspects of a single conversation. Nor did Ellis even claim that his effort to "make [Arbic] happy" with raises had been related to Arbic's displeasure at having to drive to the Cresco project or, conversely, unrelated to their undisputed discussion of the upcoming election during that same conversation.

Prior to March 10, aside from signing an authorization card and engaging in limited discussion with other employees, Kendall Jacobs had kept private his attitude about the Union and its organizing campaign. So far as the evidence discloses, Daniel Ellis had no knowledge of Jacobs' feelings concerning the subject. However, on Friday, March 19, Jacobs affixed to his truck's rear bumper a sticker which read: "America works best on union." When the truck's brakes malfunctioned before he and Lewis left Respondent's Independence facility for the V.A. projects on Monday, March 23, Jacobs left the truck in Respondent's parking lot. From the facility's front door the bumper sticker could be read.

Daniel Ellis admitted that later that same day he had covered the bumper sticker with what former secretary Peterson described as duct tape. He testified that he had done so because a customer had come into Respondent's facility during that day and had said that "he wasn't aware of our union affiliation at all, and that if we were going to be a union contractor that he wouldn't deal with us anymore." Ellis further testified that Peterson may have overheard that purported comment by the customer, but Ellis asserted that it had been made to him, not to her.

That latter testimony pertained to Peterson's earlier account that she had not heard any one speak that day to Daniel Ellis about the bumper sticker. But she testified, a friend of the Ellises, who was not a customer of Respondent, had dropped by the office that day and had observed to her (Peterson) that "Kendall shouldn't be allowed to park his vehicle on Dan's property with that bumper sticker on. That he should park it across the road." Respondent never did call as a witness the purported customer who supposedly had announced withdrawal of his business after having seen the bumper sticker. Yet, there was no representation that such an individual was not available to Respondent as a witness. In fact, at no point did Ellis even identify that asserted person by name.

In the course of his telephone conversations with Respondent's office personnel during March 23, Kendall Jacobs had

learned that tape had been placed over his bumper sticker. However, most of it had been removed by the time that he had returned to Respondent's facility at approximately 5:15 p.m.

Daniel Ellis was still at the facility when Jacobs returned to it on March 23 and a conversation ensued between the two men. Among the comments exchanged, according to Jacobs, Ellis said that after seeing the bumper sticker a customer said that he did not want to do business with Respondent, that Ellis did not want Jacobs' vehicle on Respondent's property and around its equipment as long as it had the bumper sticker on it, and that, "This is the type of gratification that [Jacobs] gave [me] for helping you out in your troubled times, giving your wife a job, keeping you on the high-paid jobs down in Iowa City." Ellis did not contest Jacobs' description of the words spoken during that conversation. To the contrary, he admitted having told Jacobs not to park his truck on Respondent's property so long as the sticker remained affixed to its bumper.

After that conversation with Ellis, Jacobs went home and his wife informed him that she had been fired. Melissa Jacobs testified, without contradiction by Ellis, that the latter had telephoned her about 6 p.m. on March 23 and had said, "I think it would be better if you no longer worked here," to which she had responded "Okay" and had hung up.

In his prehearing affidavit, Daniel Ellis stated that he had decided "to terminate Melissa because she was a trouble maker and was nosy, and since Kendall was involved with the [U]nion, and there was a lot of talk and activity going on about the [U]nion at that time," he had "felt [he] did not need the extra hassle of having Melissa as an employee[.]" Asked if that statement in his affidavit had been accurate, Ellis replied that it was only "partially correct." Asked to explain that answer, he testified:

She was away from her work area. When the phone would ring, she would come up front to see who was on the phone. And the door would open up, she would rush up to see who was coming in. And she was just disrupting the whole flow of work up front.

. . . .

She did a lot of walking up front to the office there, whether it was for information or what.

. . . .

She just disrupted the work flow up in the office.

Although Melissa Jacobs denied having rushed into the front office whenever the phone rang, Peterson testified that Melissa Jacobs had been "continually in the office. Any time the telephone rang, she would come running into the office and she would ask who was on the telephone." Yet, Daniel Ellis admitted that at no point had he spoken to Melissa Jacobs about that conduct. He further conceded that he had regarded her as a responsible employee and, in fact, that she had finished "[m]ost of the inventory" during her approximately 2 weeks of work for Respondent. More importantly, neither Ellis nor any other witness provided any particularized description as to how Melissa Jacobs' frequent trips to the front office had "disrupted the work flow" there, as he twice asserted. In fact, his wife, Respondent's office manager, did not corroborate his assertion that Melissa Jacobs had "disrupted the work flow up in the office." Further-

more, if her work activities had truly been the sole reason for her termination, Daniel Ellis never explained why he had referred to her husband's union involvement in his affidavit's above-quoted description of his motivation for having decided to fire her. Nor did he explain his above-quoted affidavit's reference to "a lot of talk and activity going on about the [U]nion at that time" in connection with that decision.

Respondent's statements pertaining to Kendall Jacobs' bumper sticker did not cease with the March 23 conversation between him and Daniel Ellis. It is undisputed that on Wednesday, March 24, or on Thursday, March 25, Janet Ellis instructed Peterson "that if Kendall comes on the property that I should dial 911" because "he wasn't allowed on the property with that sticker on his truck."

According to Respondent's records, Jacobs worked 8 hours at the V.A. project, on the chapel portion, on March 25. He testified that as he had been working on the scaffolding there, Daniel Ellis arrived and began "bitch[ing] me out" about damage done to Respondent's gang box—essentially, a large metal box on rollers in which a contractor stores its tools and supplies on a job site—complaining "that it looked like somebody took target practice at it." Jacobs testified that, at that time, he was unaware that any damage had been done to the gang box and that he said as much to Ellis: "I said, 'What are you talking about? I don't know that anything happened,'" and, when Ellis repeated "that there was damage done to his gangbox. . . . I said 'Well I don't know about your equipment. I haven't noticed it.'" Nonetheless, according to Jacobs, Ellis "continued to bitch me out," concluding with a direction to "Keep your f____g vehicles off my property," and with the assertion that, "I don't want them near my property." Daniel Ellis did not dispute Jacobs' description of those March 25 statements.

As the April 16 election date approached, Jacobs began making signs for each day: "16 days and counting, vote yes for the electrical union," "15 days and counting, vote yes for the electrical union," and so on. On approximately March 31 he taped one such sign to his personal gang box and left another propped on the eighth floor of the V.A. Medical Center where he and Lewis were then working. According to Jacobs, Ellis came to the site that day, pointed to one of the signs, asked if it was Jacobs' sign, "got very angry" when the latter apparently acknowledged that it was, and told Jacobs "to get the f____g wires pulled" on the job. Jacobs testified that when he next returned to that location of the project, the sign propped on the floor had disappeared.

Ellis acknowledged having seen both signs that day, one on Jacobs' gang box and another propped up on a light bulb case. Ellis denied generally having "confront[ed] Kendall Jacobs or anybody else about the" signs, but did not deny with particularity having uttered the remarks that Jacobs attributed to him. As to the one sign's disappearance, according to Ellis, Lewis "and I were up there doing the light fixtures, and [Jacobs] had the sign propped up on a light bulb case. And when we were using the case, I took it down, stuck it in the case because I didn't want to just throw it on the floor." Though called as a witness, Lewis did not corroborate that testimony by Ellis. On the other hand, Jacobs never testified that he had looked in the light bulb case when he had returned to that location that day.

Jacobs testified that he next had seen Ellis on Friday, April 2 when, during mid-morning, the latter asked Jacobs

for all of Respondent's keys "because we are going to part ways today," and "he handed me a termination letter." The text of that letter reads:

Effective today your employment with ELLIS ELECTRIC is terminated.

Reasons being are as follows:

1. Insubordination—when I directed you to work 5–8 hour days at the VA Hospital, you took it upon yourself to assume it would be alright to alter that schedule. It was not. Also, when directed to stop at the shop at 5:00 am one morning you refused to do so.

2. Malicious destruction of company property while under your responsibility. This being on federal property, this is a federal offense and the authorities are investigating. Charges will be filled.

3. Attitude—Since your return from incarceration your attitude toward me and this company has gotten worse by the day.

When he testified, Daniel Ellis was interrogated concerning his motivation for having decided to fire Jacobs:

Q. Was your decision to terminate Mr. Jacobs based on his union activities?

A. Not at all.

Q. What was it based on?

A. Can't keep a guy working for you that won't follow instructions.

Q. You had given him specific instructions?

A. Yes, sir, I did.

Q. And he hadn't followed them?

A. Yes.

With his attention thus focused specifically on his termination reason, Daniel Ellis made no mention whatsoever of the above-quoted letter's second and third grounds. As it turned out, with good reason.

With respect to the "malicious destruction of property" reason, Ellis acknowledged that he had no evidence that Jacobs had damaged the gang box. During a state hearing, arising from Respondent's appeal of a job service representative's conclusion that Jacobs had not engaged in willful or deliberate misconduct, both he and his wife pointed out that the termination letter's second reason had been not that Jacobs had actually damaged the gang box, but that it had been "under his supervision at that job cause he was the one on the [V.A.] job at the time." However, Respondent adduced no evidence that its practice had been to designate one individual at each project as a supervisor responsible for what occurred there to Respondent's equipment, especially given the rotation of employees among projects shown by the labor sheets and calendar log.

In any event, while continuing to maintain during the state hearing that Jacobs had been "responsible for all the company tools on the project," Daniel Ellis eventually retracted damage to the gang box as a reason for having terminated Jacobs on April 2: "No, no. No, no. He was not fired based on that destruction of the gang box. He was fired because he wouldn't do what he was told." If so, that also eliminates the "Attitude" reason, listed as the third enumerated ground for termination in the April 2 letter.

In contrast to the destruction of property one, however, Respondent did not altogether abandon the attitude reason during this proceeding. Jacobs denied specifically that he had displayed a poor attitude toward Respondent while employed by it. But, Respondent contends that Jacobs had admitted as much when he testified, during the state hearing, "My attitude went bad toward the company" following his return from 10 days' incarceration in Wisconsin during January. Yet, although Jacobs did make that statement, in context it appears to have been no more than a restatement of the administrative law judge's direction of the issue that he wanted Jacobs to address, rather than an admission of impropriety:

Q. The—the—Mr. Jacobs, the issue is your attitude not Mr. Ellis' attitude.

CLAIMANT: Okay. My attitude went bad toward the company. There was a union—an electrical union that was trying to be brought in. Dan had hired a guy that was in the union for 12 years and found out that he was with the union and then laid him off the next day. And—

Q: Is it—is it true, Mr. Jacobs that your attitude became negative toward the company?

CLAIMANT: No, it did not.

Q: Well, we don't want to hear any of these complaints that you have against the company. The issue is what you did, not what Mr. Ellis did.

CLAIMANT: My attitude was good. It was the attitude of the employer that changed.

With regard to its own evidence of a purportedly poor attitude by Jacobs, Respondent presented three of its current employees—Fox, Moore, and Arbic—each of whom testified that Jacobs had displayed a poor attitude toward Daniel Ellis and Respondent. Yet, at the outset, although Daniel Ellis described "some of the backfeed I was getting from my employees of the bad mouthing that was going on behind my back" by Jacobs, Ellis did not describe that asserted "backfeed" with any particularity. And, not one of those three employees testified that he had reported to Ellis any "bad mouthing" on the part of Jacobs, at least not by April 2.

Beyond that, their accounts of supposed display of bad attitude by Jacobs were either so vague as to be unreliable or at odds with the Ellis' description of the supposed problem. Thus, as to the former, Arbic testified that, from his observation, Jacobs "had a piss-poor attitude toward Dan, the way that he was running the operation." Yet, Arbic admitted that he could not "recall and state" anything derogatory that Jacobs ever had said about Daniel Ellis: "Nothing I can recall specifically, no." Indeed, in the end, Arbic's testimony seemed to show that his own characterization of "piss-poor attitude" by Jacobs related to the latter's union support. For, his least vague description of Jacobs' attitude was Arbic's assertion that Jacobs "was out to take Dan down" because Jacobs "wanted to go union so bad, I would think anybody he worked for, he just . . . would use him as a stepping stone to get into the [U]nion."

Moore testified that he regarded Jacobs' attitude as "poor" because Jacobs complained about "the way [Ellis] was running his business," and at the end of a PMX job had written in the dust on a ceiling box, which only Daniel Ellis

would see on the following day, "F__ you." If so, Ellis never testified that he had seen that dust-written statement. Nor did Moore testify that he had reported to Ellis what Jacobs supposedly had written. Moore did testify that the ceiling box incident had occurred "between October 6th . . . and October 30th," 1992, the date of Moore's 1992 layoff. The problem with that testimony is that, even if the incident had occurred, clearly the Ellises never learned about it. "Very satisfactory" was how Daniel Ellis characterized Jacobs' attitude prior to the latter's January incarceration. Both he and his wife claimed that the purported attitude problem had not surfaced until after then. And, at no point between Moore's rehiring on March 23 and Jacobs' discharge on April 2 did either Daniel or Janet Ellis claim to have learned of the asserted ceiling box incident described by Moore.

Fox testified generally that Jacobs had "a poor attitude . . . Like he didn't care," and that Jacobs would complain about Daniel Ellis' failure to bring the materials needed to jobsites. However, Fox never testified that he had conveyed those purported observations to Daniel or Janet Ellis prior to April 2. Moreover, he never described when he had supposedly observed Jacobs engaging in that conduct. In fact, he admitted that he had worked with Jacobs only "maybe one day" following the latter's return from incarceration: on January 29 at Manchester Public Library. Absent some fairly extreme conduct, which Fox never claimed had occurred on that date, a single day's observations is hardly a substantial basis for concluding that someone just "didn't care."

The only other predischarge conduct that might be characterized as a display of poor attitude by Jacobs was the testimony of Janet Ellis that, "after he came back from being incarcerated, he just didn't care. He was rude." As had been true of Fox's like assertion, she never explained what she had meant by "didn't care" and provided no descriptions of conduct displaying such an attitude. As to her testimony that Jacobs had been rude, Janet Ellis testified that he had done so "[q]uite a few times," but never described with particularity even one such instance of purported predischarge rudeness by Kendall Jacobs.

Respondent's willingness to freely charge Jacobs with rudeness, when none had occurred, was shown by an incident described by Peterson. Shortly before his termination, she testified, Jacobs had called about some material for the V.A. project that he had neglected to pick up at Respondent's Independence facility. According to Peterson, after speaking with Jacobs on the phone, Janet Ellis had told her husband that "Kendall had bitched me [Peterson] out and her out." Peterson testified, "I spoke up right away, and I just said, 'I didn't think that was bitching.'" Although not completely dispositive of Jacobs' words to Janet Ellis during that telephone conversation, Peterson also testified that she had listened to Janet Ellis speaking with Jacobs during that conversation and that the conversation had "seemed to be very cordial. Janet didn't seem that upset about it, but she did call Dan right away."

In the final analysis, as quoted above, Daniel Ellis actually discarded the property destruction and attitude reasons advanced in his April 2 letter and relied exclusively instead on the first assertion enumerated in that letter. From the sequence of events described by Daniel and Janet Ellis on April 1 and 2, that assertion of insubordination rests exclu-

sively on the number of hours worked by Jacobs at the V.A. from Monday, March 29, through Thursday, April 1.

There really is no dispute about what had occurred there that week. Earlier the general contractor for the V.A. project had given notice that it wanted Respondent's electricians to work 5 days a week there, instead of the 4 10-hour days per week that they had been working. Respondent then notified all its employees, in writing, "that no one was to work over 40 hours unless authorized by the office." According to the labor sheets for the project, Jacobs had worked there 9.5 hours on Monday, 10 hours on Tuesday, 9 hours on Wednesday, and 9 hours on Thursday, a total of 36-1/2 hours. On Friday, April 2, he worked there 2-1/2 hours, but, of course, he was terminated midmorning. However, he testified that he had already spoken to the general contractor's representative about his situation that week, saying that he would be at the site for "a couple hours in the morning on Friday," and that the representative had agreed to that arrangement, telling Jacobs, "That is fine. . . . I can understand the situation you are in."

The situation referred to by the general contractor's representative concerned certain events that had led Jacobs to remain at the site longer than 8 hours on Monday through Thursday of that week. On Monday, he had remained at the request of the general contractor who had abruptly called an afternoon meeting "to go over some changes in the blueprints and in the electrical work" and wanted someone from Respondent to attend that meeting. On that day Jacobs had been the lone employee of Respondent working there. On the following days Lewis had been sent there "to help me pull wires and get some of the piping done that had to be done so we wouldn't fall behind on the job" and, as pulling wires "takes two people" and as Lewis had been "directed . . . to work 10-hour days" there, Jacobs had stayed "to get the job done instead of putting everything away and having to get it all back out the next morning."

Jacobs testified that he had tried to contact Daniel Ellis on March 29 regarding the contractor's meeting, but had been unable to reach Ellis. Jacobs further testified that he again had attempted to contact Ellis on March 30, concerning the need to work with Lewis pulling wires, but, once more, Ellis was not at the office, having gone to a different jobsite. On March 31, testified Jacobs, Ellis had been at the V.A. project, but the two men had not spoken. Interestingly, during the state hearing, Ellis gave testimony that he did not repeat during the hearing in this proceeding. During that hearing, conducted by telephone, he testified that "I was down there with the other employee and he and I were working on another project at the same facility [as Jacobs]," and, further, that Jacobs had "asked me if he should stay over and I say no, your shift is over—leave." Ellis did not explain his reason for abandoning that supposed sequence of events during this proceeding.

Somewhat confused is the testimony concerning the other insubordination incident referred to in the April 2 termination letter: "Also, when directed to stop at the shop at 5:00 one morning you refused to do so." Indeed, ultimately Jacobs provided a perhaps better case for Respondent than did Daniel Ellis. Thus, Jacobs testified that during the evening of March 29 his wife had awakened him, saying that Ellis was on the phone. During their ensuing conversation, testified Jacobs, Ellis "asked, if possible, if I could stop at the shop

that morning to maybe pickup parts and get a tank of gas from him." Both men agreed that the time designated had been 5 a.m. But, Ellis testified that Jacobs had agreed firmly to be there, while Jacobs testified, "I didn't know why he was offering me a tank of gas at that time. Something was fishy," and, as a result, he had told Ellis merely, "Well, I will think about coming into the shop and getting a tank of gas."

According to Jacobs, after concluding the telephone conversation, he thought about "the two incidences [sic] the week before about the [U]nion" and the fact that his scheduled starting time was 7 a.m. Jacobs decided that "something wasn't right about what he was asking me to do now." In that regard, Jacobs gave a somewhat more complete explanation for that decision when testifying during the State hearing: "an employee . . . told me that [Ellis] was trying to set me up for stealing gas because . . . if I put my vehicles on the property he was going to dial the police at 911 to have me taken off." In fact, as described above, the latter had been the exact course that Janet Ellis had directed Peterson to follow if Jacobs did bring his vehicle onto Respondent's property.

Peterson testified that she had been told by Janet Ellis that an arrangement had been made between her husband and Jacobs whereby the latter would be given a tank of gas for transporting tools to the V.A. site. If so, that would mean that Jacobs' failure to show up at 5 a.m. could have been construed as a failure to perform the work of transporting tools to a site. But, when Daniel Ellis appeared as a witness, he testified that his March offer of a tank of gas had been "for hauling materials down to the job site about three weeks prior to this." Further questioning led him to reaffirm that Jacobs had already transported the materials to the job and that the offer of gas had been made strictly for Jacobs' benefit. When it then was pointed out that, in effect, that answer meant that Respondent had suffered no detriment as a result of Jacobs' nonappearance, Ellis answered that it had been "an inconvenience for me, I didn't have to be there at 5:00 in the morning." However, that ended all further mention of insubordination by virtue of the failure of Jacobs to be at Respondent's facility that morning.

A series of incidents accompanied distribution to Jacobs of his final paycheck on Friday, April 9. Respondent acknowledges that it ordinarily distributes paychecks on Thursday of each week. It is not disputed that, when she had arrived for work on Thursday, April 8, Peterson had been handed Jacobs' final paycheck, but had been instructed by Janet Ellis to tell Jacobs, when he called about the check, that it would not be ready until after 1 p.m. on the following day. Peterson testified, without contradiction, that when she inquired about the reason for that instruction, Janet Ellis had "said that they were going to give Kendall his last blow."

Not only did Janet Ellis not dispute Peterson's description of those words, but she never explained what her "last blow" statement had meant. Instead, her husband, in effect, attempted to explain what she had meant: "Well, everybody else was paid on Thursday, but with Kendall working five days, I paid him on Friday to give him an extra day to blow off steam." According to Daniel Ellis, because of two purportedly threatening phone calls Jacobs had made to the Ellises, "I didn't want him to come in there and disrupt the

business.” However, that testimony created somewhat of a quagmire for Daniel and Janet Ellis.

He described a telephone call that he had received from Jacobs during which the latter purportedly had said, “‘Watch your back, you are dead meat,’ and hung up.” Tending to corroborate that description was Peterson’s testimony that “‘Early in the morning” she had been told by Daniel Ellis “‘that he had a threatening telephone call that night about 10:00” and that she had been instructed to write down the date and time of the call in Respondent’s log of calls to its 800 number. However, other evidence tends to show that Ellis had been attempting to create “‘another reason” for, in this instance, penalizing Jacobs.

The problem with Ellis’ testimony about such a call is that he placed it as having occurred “‘April the 8th.” Yet, April 8 was a Thursday. If Jacobs had truly made a threatening call to Daniel Ellis at “‘about 10:00” that night, it would have occurred after his wife had already told Peterson “‘they were going to give Kendall his last blow.” In short, a supposed call at 10 p.m. on April 8 could not have motivated a remark made approximately 12 hours earlier that same day.

Although she never testified that it had been the basis for the “‘give Kendall his last blow” statement, Janet Ellis did testify that “‘about the 7th, 6th or 7th of April, [Jacobs] called in” and “‘made a comment about me calling his attorney and told me that I had better watch my back.” Indeed, Peterson testified that on one day after Jacobs’ termination, she did not recall the date, Janet Ellis had indicated that she had been threatened over the telephone by Jacobs. There is no doubt, under Respondent’s version of these events, that the supposed call to Janet Ellis had occurred before the one to her husband on “‘April the 8th.” For, in the course of testifying about the call made to him, Daniel Ellis testified that “‘prior to that” his wife had “‘received one, also.” Since Janet Ellis described only a single threatening call from Jacobs, that call would have had to be received, if at all, before April 8. However, Janet Ellis’ testimony and her statements to Peterson are not as dispositive as they might appear at first glance.

The above-mentioned telephone log maintained at that time by Peterson contains two “‘threatening call” entries, one at 10:04 p.m. on April 7 and the other at 10 p.m. on April 8. In addition, Respondent’s statement from the telephone company does show a call from Jacobs’ phone number at 10:11 p.m. on April 8. But, that occurred after Janet Ellis’ “‘last blow” remark that same morning. And inasmuch as Respondent’s telephone company statement showed an April 8 call from Jacobs, presumably it would also contain a like record of Jacobs’ phone number for the supposed April 7 “‘threatening call,” consistent with the entry in Respondent’s telephone log, at approximately 10 p.m. on April 7. Yet, though Respondent produced the complete telephone statement for April 8, that statement covers only the final telephone calls to Respondent’s 800 number on April 7. As to that portion of the calls on April 7, none of them reflect Jacobs’ telephone number, as was the fact for April 8.

In fact, Jacobs never denied having made a telephone call to Daniel Ellis at approximately 10 p.m. on April 8. However, neither did Daniel Ellis deny that, as Melissa Jacobs who overheard her husband’s side of that call testified, Kendall Jacobs had said only, “‘I want to come in and pick up my last paycheck and I want all this to be over.” Indeed,

at the time of that telephone call, Respondent admittedly had been withholding Jacobs’ last paycheck. That Jacobs logically would have placed such a call to Daniel Ellis during the evening of April 8 is shown by the testimony that, at approximately 9 o’clock that same evening Peterson had told Jacobs that she had the check in her desk at work and, also, informed him of the “‘last blow” statement of Janet Ellis, cautioning that “‘it would be better if he didn’t go to get his check . . . because I don’t know what they had in mind.” Peterson’s testimony provides a logical basis for the telephone remarks that Melissa Jacobs testified had been made by her husband.

Tending to further support concern by Jacobs as a result of Peterson’s visit was an event that occurred the following morning. It is not disputed that when she overheard Peterson volunteer during a telephone conversation to bring the check to her home, where Jacobs could pick it up, Janet Ellis interjected, “‘Oh, no, you are not,” and insisted that Jacobs pick it up at Respondent’s office. In the end, Jacobs did so and there was no problem. However, he had brought two of the Union’s officials with him when he went to pick up the check.

IV. DISCUSSION

Although there might be some basis for questioning the accuracy of some remarks attributed to Daniel Ellis, a preponderance of the credible evidence supports most of the unlawful statements attributed to him. Indeed, many of those statements went undenied. Other words and actions were admitted by him. For example, Ellis acknowledged having used tape on March 23 to cover the sticker that Kendall Jacobs had affixed to his truck’s bumper. Respondent produced no evidence that it had a rule prohibiting employees from displaying insignia on vehicles and equipment. To be sure, Ellis testified that he had covered the bumper sticker as a result of a customer’s withdrawal of business after having seen it. However, no weight can be accorded to that explanation.

As he testified, Daniel Ellis did not appear to be doing so candidly. A review of the record serves to support that impression of lack of candor. By way of illustration, as pointed out in subsection III,C, supra, when the already produced evidence raised some doubt of Respondent’s ability to maintain the “‘lack of new work to start” reason advanced in his notice of the layoffs on March 9, Ellis reversed direction by claiming that there had been “‘plenty of work” and he advanced an entirely different reason for those layoffs. Similarly, despite the three reasons enumerated in the April 2 letter terminating Jacobs, Ellis completely disavowed that one of them had truly been a reason for doing so, equivocated as to another one, and specified that, actually, insubordination had been the sole reason for firing Jacobs. In a like vein, in his prehearing affidavit, Ellis connected Melissa Jacobs’ termination to the then-ongoing union activity, in general, and to her husband’s then-newly disclosed support for representation in particular. Then, as described in subsection III,D, supra, he advanced a wholly different, and unsupported, reason for that termination.

Aside from his testimonial inconsistencies with his own previous statements, Daniel Ellis advanced many assertions that went uncorroborated. For example, his wife, Respondent’s office manager, never corroborated his claims that Melissa Jacobs’ frequent trips to the front office had “‘just

disrupt[ed] the whole flow of work up front.” And no evidence was produced to support his testimony that Respondent “didn’t have enough money in the payroll to keep people on” after March 9. As to the taping of the bumper sticker on Kendall Jacobs’ truck, Ellis never identified the supposed complaining customer, no such individual was produced as a corroborating witness for Respondent, and Respondent never produced any documentary evidence, such as labor sheets, that would show a discontinuance of a particular customer’s business after March 23 on a specific project. Indeed, given Ellis’ own conceded dissatisfaction with union labor, it seems somewhat unrealistic that Ellis would have allowed such a purported customer to simply walk away, without at least trying to explain that he shared the supposed views of that individual.

I do not credit Daniel Ellis. Specifically, as to the bumper sticker incident, I conclude that his own opposition to unionization of Respondent’s employees had led him to affix tape over it and to order Jacobs not to bring that vehicle on Respondent’s premises or around its equipment so long as the sticker remained on the bumper. Furthermore, it is undisputed that Janet Ellis later instructed Peterson that, since Jacobs’ truck was not allowed on the Independence premises with that bumper sticker on it, Peterson should call 911 if Jacobs brought the truck on those premises. Employees have a statutory right, subject to certain limitations not credibly shown to have been present here, to display union insignia on their persons and property at their workplaces. By prohibiting an employee from displaying prounion insignia on Respondent’s premises, by covering such insignia with tape, and by directing that 911 be called if that employee brought a vehicle bearing prounion insignia on Respondent’s premises, Respondent interfered with the exercise of statutory rights and violated Section 8(a)(1) of the Act.

As described in subsection III,B, supra, Daniel Ellis never denied having told Jacobs that Respondent would not be able to give the latter a raise for which he was due because of the union activity that had surfaced. In some situations, employers can withhold pay and benefit increases to avoid the appearance of improperly trying to influence employee choice regarding selecting or not selecting a bargaining agent. However, Ellis never voiced such a concern to Jacobs when making that statement to him and, further, Respondent has not advanced it as a reason for that statement to Jacobs. Moreover, considering that Ellis had not been reluctant to award an increase, and to promise another one, to Arbic approximately 1 month later, with the scheduled representation election less than 3 weeks away, any defense that the merited increase for Jacobs had been withheld because of concern about an appearance of impropriety would not withstand scrutiny. Therefore, I conclude that Respondent violated Section 8(a)(1) of the Act by telling an employee that he could not receive a wage increase that was due him because of union activity that was in progress. Furthermore, since the wage increase was admittedly due Jacobs, and inasmuch as it was withheld for no reason other than ongoing union activity, I shall order as part of the remedy that backpay for Jacobs include the amount of that withheld increase.

As pointed out above, Arbic was granted a wage increase and was promised another one in 30 days. Ellis informed Arbic of those facts after asserting that “he needed [Arbic] on the 16th,” when the representation election was then

scheduled, inquiring “what would make [Arbic] happy,” and hearing Arbic’s request for a one dollar increase. A connection between those statements and the announced increase and promise of another one may not have been explicitly stated, as Arbic testified. Still, such a connection plainly follows from the sequence of subjects in that conversation. Therefore, I conclude that Respondent violated Section 8(a)(1) of the Act by conferring and promising wage increases to discourage employee support for the Union in a Board-conducted representation election.

Daniel Ellis denied generally that he had threatened to close the business if the employees became unionized. However, he contradicted that denial by admitting in his prehearing affidavit that he had told Peterson “that I would close the employer’s doors if [the employees] joined the [U]nion.” His attempt, when testifying during the hearing, to relate that closure statement to Respondent’s asserted financial difficulties simply does not square with his admitted mention of employees joining the Union in conjunction with that closure warning. In the final analysis, that explanation serves only to further show the unreliability of Ellis as a witness.

In fact, he never denied specifically having told Kurtenbach on February 22 that he would not be made a union contractor again and that Kurtenbach should ask union guys about unemployment lines, having said on March 8 that a reason other than union activity had to be found to fire Kurtenbach, and having said to office employees on that date and to Lewis on March 20 that, in effect, he was “closing the doors” if the Union “comes in.” Threats of closure if employees become represented by a union are regarded as being among the most severe violations of the Act. Therefore, I conclude that Respondent violated Section 8(a)(1) of the Act when Daniel Ellis made such threats.

Essentially two categories of interrogation are alleged. The first pertains to interrogation of job applicants, specifically Hicks and Mariani. Daniel Ellis denied having asked those applicants, or any applicants, about union membership, sympathies and activities. Yet, as concluded above, his testimony was not reliable. True, other employees testified that they had not been subjected to such interrogatories when interviewed. But, as pointed out in subsection III,B, supra, if so, that shows no more than that Ellis did not choose to violate the Act during every interview. In fact, Janet Ellis admitted to Peterson that her husband had interrogated Moore regarding the latter’s union sympathies during a rehire interview.

Respondent points to the fact that Ellis would have had no occasion to question Hicks in October 1992 and Mariani during the following January, because the Union had not then been organizing Respondent’s employees and Ellis did not learn about Althaus’ contacts with Respondent’s employees until the latter half of February, after Hicks and Mariani already had been interviewed and hired. However, such an argument loses some persuasion in the face of Ellis’ admission that he had raised the subject of union during his interview of Kurtenbach occurring during the same month as the one with Mariani. Of course, Ellis did not question Kurtenbach on that occasion. Nevertheless, his injection of “union” into that interview shows that he was not oblivious to the subject before Althaus visited Respondent’s employees in February.

It must be remembered that, as described in subsection III,B, supra, Daniel Ellis had not been uninformed about unions before the Union commenced its campaign to orga-

nize Respondent's employees. As he told Althaus during the spring of 1992, he had been a union contractor in the past. Obviously the very occurrence of that conversation alerted Ellis that the Union might eventually become interested in attempting to organize Respondent's employees. And it had been not too many months later that Jacobs had been interviewed and, according to Jacobs, had been questioned about his union membership and sympathies. Ellis' assertion that he would not question an applicant about such matters, because "It is against the Law," was undermined by his wife's uncontroverted admission to Peterson that her husband had done exactly that when interviewing Moore for rehire.

To be sure, on his employment application Hicks flagrantly overstated his prior work which, if nothing else, displays a disposition to take liberty with facts to secure employment with Respondent. That, of course, is what a reinstatement order would confer on Hicks. Yet, Mariani impressed me as an honest individual, albeit one whose memory was not certain and precise. Thus, while he conceded that the interview could not have progressed as he remembered and initially described it, he nevertheless continued to assert adamantly that he had been asked about his union membership and involvement while being interviewed by Ellis. Mariani's seemingly candid testimony in that regard and that of Jacobs to the same effect tend to support Hicks' description of the questions directed at him during his interview by Ellis. Therefore, I conclude that the credible evidence supports the allegation that Respondent, through Ellis, interrogated job applicants about their union membership, activities and sympathies, and, accordingly, that Respondent violated Section 8(a)(1) of the Act.

The second category of allegedly unlawful interrogations centers on questioning of Respondent's already employed personnel. Ellis admitted that, after learning from the Vinton Library librarian that Althaus had spoken to Respondent's electricians at that site, he had spoken to all of them about the Union. He also admitted having asked if Kurtenbach, and presumably others as well, was a union member and planned to become one. Further, Ellis admitted having asked Melissa Jacobs on March 9 how her husband would vote concerning the Union, during a conversation that he told her "never took place."

Daniel Ellis is Respondent's owner. None of those questioned employees had displayed any union involvement before they had been questioned. Accordingly, they cannot be characterized as having been openly active on the Union's behalf at the time Ellis chose to question them. Obviously, Kurtenbach was a salt at the time that he had been interrogated on February 23. But, that had not been revealed to Respondent when Ellis questioned him. Ellis advanced no legitimate purpose for his questioning. Nor, so far as the record discloses, did he assure any one of those questioned employees that there would be no reprisals taken against them because of their answers. Most importantly, that questioning was conducted in an overall context of Ellis' repeated statements of opposition to unionization of Respondent's employees and, moreover, of threats to close the business should that occur. Therefore, I conclude that a preponderance of the evidence shows that his interrogation of employees had been coercive and, as a result, that Respondent violated Section 8(a)(1) of the Act.

Turning to the alleged violations of Section 8(a)(3) of the Act, the credible evidence establishes a prima facie case of unlawful motivation for the March 9 layoffs and for the subsequent terminations of Melissa and Kendall Jacobs. In each instance, those actions had been effected abruptly and in the immediate wake of disclosures about union activity: the layoffs after notice that Kurtenbach was a salt, Melissa Jacobs' termination immediately after the prouion bumper sticker on her husband's truck had been noticed and taped over by Ellis, and Kendall Jacobs' termination after that event and after displaying the "days and counting" signs at the V.A. site. It is settled that "abruptness of a discharge and its timing are persuasive evidence as to motivation." *NLRB v. Montgomery Ward & Co.*, 242 F.2d 497, 502 (2d Cir. 1957), cert. denied 355 U.S. 829. Accord: *NLRB v. Sutherland Lumber Co.*, 452 F.2d 67, 69 (7th Cir. 1971); *NLRB v. Elias Bros.*, 325 F.2d 360, 366 (6th Cir. 1963); *United Dairy Farmers Coop. Assn. v. NLRB*, 633 F.2d 1054, 1062 (3d Cir. 1980).

Specifically with regard to the March 9 layoffs, there is no direct evidence that Respondent had been aware that Mariani, Hicks and Fisher had signed authorization cards, or were otherwise favorably disposed toward the Union's organizing campaign, at the time that they were laid off. However, the only four employees laid off on that date had signed authorization cards. In contrast, as of March 9 only one of the four retained employees had signed an authorization card. Further, aside from Jacobs, the four employees laid off had been the ones that Althaus had visited at the V.A. and Vinton Public Library sites during mid-February. As he conceded during the hearing, and to Kurtenbach on February 22, Daniel Ellis had become aware of those mid-February visits to both sites and, obviously, Ellis knew the identities of the employees working at them. Even if Ellis had not possessed actual knowledge that Mariani, Hicks and Fisher were supporting the Union, a layoff decision motivated by suspicion or belief about such support is no less unlawful than one motivated by actual knowledge. For, "the Act is violated if an employer acts against the employees in the belief that they have engaged in protected activities, whether or not they actually did so." (Citations omitted.) *Henning & Cheadle, Inc. v. NLRB*, 522 F.2d 1050, 1052 (7th Cir. 1975). See also *NLRB v. Ritchie Mfg. Co.*, 354 F.2d 90, 98 (8th Cir. 1965).

A third, perhaps even more accurate, description of Respondent's motivation for the layoffs of Mariani, Hicks and Fisher is suggested by the undenied remarks of Daniel Ellis on March 8. As quoted in subsection III.C, supra, in the letter from Althaus received on that date by Respondent, Althaus had cautioned that "salting is a protected activity under the National Labor Relations Act, and [Kurtenbach] should be [e]ntitled to that protection." Thus, when his wife suggested discharge for a reason connected with that activity, Daniel Ellis replied, "We have to think of another reason." That was the effect of the following day's layoffs when Kurtenbach was included among a group of four employees abruptly laid off. In other words, the evidence supports a conclusion that the other three employees were laid off as an integral part of a scheme devised to create "another reason" for laying off Kurtenbach. See *Armcor Industries*, 217 NLRB 358 (1975).

Ultimately, Respondent's defense of lawful motivation for the March 9 layoffs seemed to implode as the hearing pro-

gressed. In the layoff notice and for most of the hearing Respondent advanced a lack of work defense for those layoffs. Yet, as reviewed in subsection III,C, supra, its supporting evidence turned out to be less supportive than Daniel Ellis might have hoped. For example, despite substantial completion of the Vinton Public Library project, imminent substantial completion of the Jesup Public Library project, and the March 1 notice that Respondent had not succeeded on its Feather Light bid, his March 4 tape-recorded statements reveal that he remained optimistic—indeed, excitedly so: “All hell is breaking loose right now—I love it.”—about prospects for continued work to keep Respondent’s employees fully occupied “if you guys do it.” Respondent produced no evidence that any event occurred between that conversation and March 9 that would have left Ellis less confident about work prospects on and after the latter date.

Obviously, adverse weather led to postponement of the Solon Secondary Schools and Grundy Center Maintenance Garage projects. But Respondent produced no evidence that by March 9 it had foreseen that week after week of inclement spring and summer weather would be occurring and, as a result, would delay commencement of both those projects for so prolonged a period. To the contrary, Lewis was permitted to start work on March 8 in the expectation that work would soon begin at Solon Schools. Further, after March 9 Respondent rotated its employees among jobs and the Ellises worked relatively steadily on the other jobs to keep abreast of work that needed to be done and for which contractors’ representatives were calling for electricians. In sum, the supporting evidence fell short of supporting Respondent’s assertions of lack of work on March 9.

In the end, of course, Daniel Ellis simply abandoned that defense completely, admitting that “We had plenty of work” on March 9. However, while he substituted a completely different defense—lack of “enough money in the payroll to keep people on,” as the motive for the layoffs—Respondent produced no documentary evidence to show as much. Further, Ellis never explained why, had that been his actual motive for the March 9 layoffs, he had chosen to advance a completely different reason in the notice of them distributed to Respondent’s employees.

Respondent’s fortunes fare no better respecting the motive it advanced for firing Melissa Jacobs. As noted in subsection III,B, supra, it is difficult to escape the conclusion that she had been hired to attract the loyalty of her husband, in light of the merited increase that he had been denied because “this union activity came about.” During a conversation with her husband minutes before she had been told that she was discharged, her husband had been reminded specifically that Daniel Ellis “help[ed] you out in your troubled times, giving your wife a job.” Moreover, as was true of the layoffs earlier that month, Melissa Jacobs had been terminated abruptly and at a time when, Ellis acknowledged, work remained available for her to perform.

True, Peterson supported the contention of Daniel Ellis that Melissa Jacobs came frequently to the front office, whenever the phone rang or someone entered there. But neither his wife, Respondent’s office manager, nor any other evidence supported Ellis’ further assertion that those frequent trips to the front office had “disrupted the work flow” there. Furthermore his own testimony contradicted any assertion that her frequent visits there had impaired her own work per-

formance. For he admitted that he had regarded her to be a responsible employee who had finished “[m]ost of the inventory” assignment that she had been given. In fact, at no point, he admitted, had Ellis seen fit to speak with her about her frequent front office trips from the back of Respondent’s facility.

When his wife’s discharge apparently failed to deter Kendall Jacobs from actively supporting the Union, and instead he began displaying signs that enumerated the number of days to the representation election and advocated support for the Union, Respondent terminated him, as well. It is difficult to escape the conclusion that, in its April 2 termination letter, Respondent simply hurled whatever charges against him that happened to come to mind. By the time of the hearing in this proceeding, those termination reasons already, in effect, had been subjected to a dry run during the state hearing. In his decision arising from that hearing, Administrative Law Judge Bruce Graham concluded that Respondent had produced no evidence of responsibility by Jacobs for destruction of Respondent’s property and of improper attitude. Indeed, although at one point during this proceeding Daniel Ellis referred to “an ongoing thing . . . the attitude deterioration and the gangbox. . . . And I think that, in light of the past performance . . . [the extra hours work on March 29 through April 1] was the straw that broke the camel’s back basically,” as reproduced in subsection III,D, supra, when his attention was focused on his motive for firing Jacobs, Ellis replied only, “Can’t keep a guy working for you that won’t follow instructions.”

That was not an unreasonable course for Ellis to follow in the circumstances. By the time that he testified in this proceeding, Ellis had the benefit of Judge Graham’s reasoning—specifically, that the evidence to support the purportedly damaged gang box and the supposedly deteriorating attitude had not been convincing. Thus, reminiscent of his tack in connection with the March 9 layoffs, Ellis sidestepped excess reasons advanced in his April 2 termination letter. He relied exclusively on the by then admitted extra work at V.A. on those 4 March and April days. Yet, in doing so, Ellis tacitly conceded that there had been no basis for one of the reasons, gang box destruction responsibility, advanced for firing Jacobs. Respondent provided no explanation for why such an unsupported reason would have been included as a termination reason. Moreover, while Respondent did make some effort to support the asserted deteriorating attitude reason, that testimony was either at odds with objective considerations—for example, assertions of poor attitude at times when Daniel Ellis testified that he had regarded Jacobs to be displaying a good attitude—or unsupported by specific evidence, as with respect to Janet Ellis’ testimony about Jacobs being rude to her prior to his termination.

Notwithstanding Jacobs’ concession that he had violated Respondent’s prohibition against working extra hours on March 29 through April 2, Respondent’s defense based on that reason is not all that persuasive. Rather, it appears that Respondent simply took advantage of what Jacobs had done to effect a termination that there is no credible evidence would otherwise have occurred, but for Jacobs’ undeterred union support. At no point did Respondent challenge Jacobs’ reasons for having worked extra hours on those days: the contractor’s hastily convened meeting and the need to help Lewis perform work that “takes two people[.]” So far as the

record discloses, at no point on April 1 or 2 did Daniel Ellis attempt to ascertain from Jacobs why he had remained at work on those 4 days for more than 8 hours. Such a failure to question an employee and to obtain his explanation for his conduct is some evidence of unlawful motivation. See, e.g., *NLRB v. Lone Star Textiles*, 386 F.2d 535 (5th Cir. 1967); *Auto Workers v. NLRB*, 455 F.2d 1357, 1367 (D.C. Cir. 1971).

Beyond the undisputed validity of the reasons for having worked late advanced by Jacobs, nothing refutes his testimony that he had not intended to work more than 40 hours during the week of March 29 through April 2. He had cleared with the general contractor's representative working only part of Friday, April 2. That clearance is significant. For, Respondent's employees had begun working Monday through Friday at the V.A. because the general contractor had wanted electricians on the project for 5 days a week. By securing the general contractor's approval to leave early on Friday, Jacobs had removed any possible basis for criticism of Respondent for not having someone there through the end of the workday on Friday, April 2. And by leaving early that day, Jacobs would have avoided working more than 40 hours during that workweek. Of course, that all went unexplained to Respondent, since Jacobs had been unable to get hold of Daniel Ellis when he had attempted to contact him on each of the earlier weekdays and, more importantly, since Ellis did not see fit to speak with Jacobs about the latter's timecard's disclosure of extra hours worked on March 29 through April 1.

In another setting, an employee's unexplained failure to follow instructions might well be a lawful termination reason. Here, however, Daniel Ellis was not a credible witness; I do not credit any assertion by him that, standing alone and had Jacobs not been a union supporter, Respondent would have so promptly fired Jacobs on discovering the extra hours worked on 4 days, without asking Jacobs why he had done so. Ellis had been actively and firmly opposed to unionization of Respondent's employees. Many times he made hostile statements to employees to deter their support for the Union. He unlawfully laid off four employees and unlawfully terminated Melissa Jacobs in response to earlier disclosures of union activity and of continued union activity by Respondent's employees. He had been specifically upset by the bumper sticker displayed by Kendall Jacobs, as shown by his remarks to Jacobs during the early evening of March 23.

Respondent never did dispute Jacobs' testimony that he had tried unsuccessfully to contact Ellis through the office earlier that week, to explain the need to work more than 8 hours at the V.A. on those days. While he came to the site midweek, Daniel Ellis made no effort to speak with Jacobs about the extra hours revealed by the latter's timecard. Instead, similar to his wife's suggested pretext for firing Kurtenbach for lying, Daniel Ellis simply seized on those extra hours and promptly fired Kendall Jacobs. But, apparently uncertain as to how that reason might stand up if subjected to closer examination, Ellis tried to fortify Respondent's defense by adding other reasons that, in the end, it could not support. In fact, apparently so desperate for valid discharge reasons had been Ellis, he added as an example of insubordination a "direction" to stop at Respondent's facility that even Ellis conceded had been an arrangement, not a direction, that would have benefited only Jacobs.

Therefore, I conclude that a preponderance of the credible evidence supports the conclusions that Respondent's motivations for laying off four employees on March 9 and for terminating Melissa and Kendall Jacobs had been unlawful and that those actions violated Section 8(a)(3) and (1) of the Act. That leaves for consideration two aspects pertaining to the remedial order arising from Respondent's unlawfully motivated March 9 layoffs. During the following spring Respondent offered to rehire Fisher and Mariani. However, an offer of reemployment is not the equivalent of an offer of reinstatement, which the Act requires whenever there is an unlawfully motivated layoff or termination. See *Shelly & Anderson Furniture Mfg. Co. v. NLRB*, 497 F.2d 1200, 1204 (9th Cir. 1974); *Colorflo Decorator Products*, 228 NLRB 408, 420 (1977). Consequently, the fact that Respondent offered to reemploy two of those discriminatees does not relieve Respondent of its obligation to offer them reinstatement.

Second, Respondent argues that Kurtenbach and Hicks engaged in misconduct that should bar an order to reinstate them. As to Kurtenbach, that argument is based on his purported desire to be discharged by Respondent and, further, his "Lie[s] to Dan Ellis on several occasions." But, Respondent's first argument concerns a conversation in which Kurtenbach had said no more than that if Respondent intended to retaliate against anyone because of the organizing campaign, as the salt he wanted to be the employee who attracted Respondent's ire. At no point did his remarks constitute a declaration of open-ended desire or intention to be terminated for any reason whatsoever. Indeed, had Kurtenbach been seeking termination for any reason whatsoever, so that he could later obtain backpay for a period when he had not worked, it is unlikely that he would have kept secret from Respondent until March his role as salt and, moreover, it is unlikely that he would have performed his work to Respondent's satisfaction. Yet, both before his layoff and during the hearing, Janet and Daniel Ellis expressed satisfaction with Kurtenbach's job performance.

Respondent's contention that it had been lied to by Kurtenbach seems rooted in his denials, when questioned by Daniel Ellis, of union support. However, as concluded above, that questioning had been unlawful. Further, as the United States Court of Appeals for the Seventh Circuit recently pointed out, employees' untruthful answers to such questioning "permit[] the reasonable inference that [they] feared reprisal." (Citation omitted.) *NLRB v. Shelby Memorial Hospital Assn.*, 1 F.3d 550, 559 (1993).

Concerning Hicks, it is clear that he overstated the duration of past employment by employers named in his application. The difference between facts recited in that application and the reality contradicting them is too great to be characterized simply as error. However, the focus of inquiry here is Respondent's motivation. *Hogan Mfg.*, supra, 309 NLRB at 953, and cases cited therein.

Respondent had known of at least one such overstatement—for Delta Diversified Enterprises—for almost a month before Hicks had been laid off. Yet, it took no adverse action prior to March 9 against Hicks based on that knowledge. Moreover, Respondent has adduced no evidence whatsoever of a policy or practice of terminating employees who overstate their past experience, at least so long as those employees satisfactorily perform their jobs for it. Indeed, Hicks was

not fired on March 9 and nothing was said to him on that date about his application's recitation of past experience. Instead, he was laid off on that date and the reason advanced had nothing whatsoever to do with facts set forth on his application. Therefore, the evidence does not show that Hicks would have been either laid off or not considered for reinstatement by Respondent, absent the organizing campaign, because of misrepresentations about past employment on his employment application.

That leaves for consideration the bargaining order allegations. The complaint alleges that Respondent violated Section 8(a)(5) and (1) of the Act as of March 18. However, that allegation is, in turn, based on an alleged demand for recognition and bargaining on that same date. There is no evidence that such a demand had been made. There is evidence that the Union did make such demands 3 months later. However, there is insufficient evidence concerning composition of the bargaining unit during June. As a result, there is no basis for concluding that the Union enjoyed majority status when recognition demands actually had been made and, therefore, no basis for concluding that Respondent violated Section 8(a)(5) of the Act. Yet, that does not end the inquiry pertaining to issuance of a bargaining order. For, where an employer's unfair labor practices have been severe, pervasive and lingering in effect on employees, a bargaining order can issue as a remedy for them.

There can be no question of the severity, pervasiveness, and lingering effect of Respondent's unfair labor practices. Most of the unit employees had admittedly been interrogated during February as a result of the visits by Althaus to projects where those employees had been working. One employee was unlawfully told that he could not be awarded a wage increase, that he had merited, because union activity was then in progress. However, another employee was later awarded an increase, and promised yet another one, to encourage him to support Respondent's antiunion position. Respondent prohibited an employee from displaying union insignia on its premises, covered insignia affixed to that employee's truck bumper, and directed that 911 be called if that employee brought that truck on its premises. Most significantly, not only did Respondent threaten closure of its business if its employees became represented, but it unlawfully laid off four unit employees on March 9 and unlawfully terminated a fifth unit employee on April 2. In the interim it unlawfully terminated an office employee who is the spouse of the unit employee whom it terminated on April 2.

The layoffs, terminations, and threats of wage increase denial and closure are each serious unfair labor practices. Many affected directly most of the bargaining unit employees and their occurrence could not have escaped notice by the remaining unit employees. Accordingly, they were pervasive. Not only are their effects inherently likely to linger, but Daniel Ellis remains Respondent's owner. There is no indication that he would be reluctant to again resort to unfair labor practices should another representation election be scheduled. Therefore, a preponderance of the evidence establishes that a bargaining order remedy is appropriate in the circumstances of this case, if the Union represented a majority of the employees in an appropriate bargaining unit.

As pointed out in subsection III,D, supra, Respondent agrees to the appropriateness of a unit of all employees performing electrical work for it, but excluding office clerical

employees, professional employees, guards and supervisors as defined in the Act. However, the General Counsel acknowledges that Respondent is an employer engaged in the building and construction industry, as to which the Board pointed out in *Steiny & Co.*, 308 NLRB 1323, 1326 (1992),

in addition to those eligible to vote under the standard criteria, unit employees are eligible if they have been employed for 30 days or more within the 12 months preceding the eligibility date for the election, or if they have had some employment in those 12 months and have been employed for 45 days or more within the 24-month period immediately preceding the eligibility date.

In footnote 13 of that decision, the Board modified the formula being restored in *Steiny* so that the term "days" in the eligibility formula would mean "working" days.

As discussed in subsection III,A, supra, the General Counsel argues that a bargaining order remedy should be made effective as of March 6 when, contends the General Counsel, the Union had achieved majority support. By that date the Union had received signed authorization cards from Jacobs, Fisher, Hicks, Kurtenbach, and Mariani. However, under the "working" days interpretation of the added building and construction industry eligibility criteria, the latter two employees were not eligible as of March 6. Kurtenbach testified that he had worked only at the Jesup Library, Manchester Library, Vinton Library and V.A. projects. A review of the labor sheets for those projects discloses that he had worked at Jesup on February 3 and 4, at Manchester on February 5, at Vinton on February 10, 11, 15, 19, and 22, and at V.A. on February 12, 16, 17, 18, 23, and 25, and on March 1-4—a total of 18 working days by March 6. Similarly, by March 6 Mariani had worked a total of but 15 working days: at Jesup Library on February 9, at the V.A. Medical Center on February 10, 11, 15-17, 19, 22 and 23, at Manchester Library on February 24 and 25, and at Cresco Hospital on March 1-4.⁶

In contrast, Fox, Jacobs, Fisher, and Hicks had all worked for Respondent since 1992. Each one had worked for more than 30 working days between the time that he had begun employment with Respondent and March 6. By February 26 three of those employees had signed authorization cards and, accordingly, the Union enjoyed the support of a majority of those eligible employees. However, a determination of the unit complement must also take into account the eligibility of certain other employees whose names are enumerated on lists submitted by Respondent in connection with the representation proceeding: Angela Ellis, Victor Hyman(n), Dwight M. Mays, Faron Good, Richard Van Fossen, Sue Heintz, Virgil D. Lewis Sr., and Jerald Moore. As it turns out, none of them can be regarded as an eligible member of the bargaining unit during March.

Angela Ellis is the daughter of Respondent's owner, Daniel Ellis, and had ceased working for Respondent as of February 25. Hyman or Hymann had been a student who had worked during school breaks for 9 days between December 28, 1992, and January 15, 1993, and for 4 more days from March 8 through 11, after which there is neither contention

⁶Mariani testified that he also had worked at the Vinton Library. However, his name does not appear on the labor sheets for that project.

nor record that he again worked for Respondent. No employment is shown for Dwight M. Mays on any of the labor sheets presented by Respondent; indeed, Respondent makes no contention that Mays had been employed at any time after 1992. According to the calendar log, Faron Good worked only one day for Respondent, at ICBP on April 16. Richard Van Fossen worked for Respondent only 23 days, from June 25 through July 25, 1992. Sue Heintz' last day of employment shown by the labor sheets had been December 9, 1992, at Cresco Hospital. I conclude that none of these six individuals is eligible for inclusion in calculating the Union's majority.

Like Mariani, Arbic had been hired by Respondent during February. A review of the labor sheets produced during the hearing reveals that he did not work 30 days for it until April. Lewis first began working for Respondent on March 8 and, accordingly, would not have satisfied the 30-working days criteria until April.

Jerald Moore presents a somewhat more involved situation regarding eligibility. He had worked for Respondent during 1992, being laid off on October 30 of that year. However, he did not again begin working for Respondent until March 23. That presents the question of his expectancy of recall during the interim almost 6 months. Respondent does not contend that Moore's 1992 layoff had been regarded as temporary. To the contrary, there is evidence that Daniel Ellis had considered Moore as too slow to be considered for rehire. That Moore had been laid off for that reason tends to be supported by the circumstances under which he had been laid off. Moore testified that the layoff had occurred because the Vinton Library project "was just finishing up." Yet, in fact, Respondent had continued working there, with a fair degree of regularity, for almost 4 more months. Consequently, Moore's layoff had to be motivated by some factor other than completion of that project. Moreover, during March, Janet Ellis had told Peterson that Daniel Ellis had not rehired Moore until after the latter had been questioned about his union sympathies. Accordingly, regardless of the number of hours that Moore had worked during 1992, there is no basis for concluding that during February and before March 23 he had been a laid off employee with an expectancy of recall.

The General Counsel has selected March 6 as the effective date of a bargaining order based on a calculation of majority that includes two employees—Kurtenbach and Mariani—who, under *Steiny & Co.*, should not have been included in the unit calculation on that date. Under that case's eligibility standards, only Fox, Jacobs, Fisher, and Hicks are included in that calculation. By February 26 three of them had signed cards authorizing the Union to serve as their bargaining agent.

There is no less reason to select February 26 as the effective date of a retroactive bargaining order than March 6. By that earlier date through interrogations and threats, Respondent had committed unfair labor practices that affected at least three eligible unit employees, Jacobs, Fisher, and Hicks, and two other electricians, Kurtenbach and Mariani who had not yet worked 30 days for Respondent, but who otherwise would be regarded as unit employees. Soon after February 26 Respondent told Jacobs of the merited wage increase that he would not be receiving because of the Union. A week or so later, upon receiving notice that Kurtenbach was a salt, Respondent made renewed threats of closure and, on March 9,

unlawfully laid off half the eligible unit employees, along with Kurtenbach and Mariani. Had those two latter employees been allowed to continue working, and the evidence discloses no facts showing that they would not have continued working but for the union activity that surfaced, they also would have eventually become eligible, as would Arbic who signed a card on March 18. Accordingly, the Union's majority support would have eventually increased. Therefore, I conclude that a remedial bargaining order should issue effective February 26.

CONCLUSIONS OF LAW

Daniel J. Ellis, d/b/a Ellis Electric has committed unfair labor practices affecting commerce by laying off Ritchie V. Kurtenbach, Jon Mariani, Jeffery Hicks, and Jeffrey Fisher on March 9, 1993, and by discharging Melissa Jacobs on March 23, 1993, and Kendall William Jacobs on April 2, 1993, in violation of Section 8(a)(3) and (1) of the Act; and, by interrogating job applicants and already employed employees about their own and other employees' union activity and sympathies, threatening closure and denial of wage increases to discourage employees from selecting a bargaining agent, granting and promising wage increases to encourage opposition to selection of a bargaining agent, covering prounion insignia displayed on an employee's vehicle, prohibiting the display of prounion insignia on its premises, and directing that emergency services be called if an employee brought his vehicles onto company premises with that insignia, in violation of Section 8(a)(1) of the Act. Although it has not violated Section 8(a)(5) of the Act, the lingering effects of those serious and pervasive unfair labor practices preclude the likelihood of conducting a representation election free of their taint in the circumstances of this case and, therefore, it will be ordered to recognize and bargain with International Brotherhood of Electrical Workers, Local 288, as the bargaining agent of employees in an appropriate bargaining unit of all employees performing electrical work for it; but excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act, effective as of February 26, 1993.

REMEDY

Having concluded that Daniel J. Ellis, d/b/a Ellis Electric has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and, further, that it be ordered to take certain affirmative action to effectuate the policies of the Act. With respect to the latter, it shall be ordered to offer to Ritchie V. Kurtenbach, Jon Mariani, Jeffery Hicks, Jeffrey Fisher, Melissa Jacobs,⁷ and Kendall William Jacobs immediate and full reinstatement to the positions that they occupied before being laid off or discharged, respectively, dismissing, if necessary, anyone who may have been hired or assigned to perform the work that those employees had been performing. If one or more of

⁷While Respondent contends that she had been hired to perform a specific job, which by now must have been completed, the remarks to her described at the end of subsection III,B, supra, by Daniel Ellis indicate that he may have contemplated additional work for her to perform. A firm conclusion about that subject cannot be reached on the basis of this record. Consequently, a final determination must be deferred to the compliance phase of this proceeding.

those positions no longer exists, it shall be ordered to reinstate that employee or those employees to a substantially equivalent position, without prejudice to seniority or other rights and privileges. It also shall be ordered to make whole each of them for any loss of pay suffered because of those unlawfully motivated layoffs and discharges, with backpay for Kendall William Jacobs to include the wage increase for which he had been eligible but had not received, and with all backpay amounts to be computed on a quarterly basis, making deductions for interim earnings, *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest to be paid on amounts owing as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record in this proceeding, I issue the following recommended⁸

ORDER

The Respondent, Daniel J. Ellis, d/b/a Ellis Electric, Independence, Iowa, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off, discharging, or otherwise discriminating against Ritchie V. Kurtenbach, Jon Mariani, Jeffery Hicks, Jeffrey Fisher, Melissa Jacobs, and Kendall William Jacobs, or any other employee, because of activity on behalf of or support for International Brotherhood of Electrical Workers, Local 288, or any other labor organization.

(b) Interrogating job applicants and already employed employees about their own and other employees' union activity and sympathies, threatening closure and denial of wage increases to discourage employees from union activity, granting and promising to grant wage increases to encourage opposition to union activity, prohibiting display of prounion insignia and covering insignia that are displayed, and directing that 911 be called if employees display insignia on company premises.

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

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

(a) Recognize and bargain collectively, effective as of February 26, 1993, with International Brotherhood of Electrical Workers, Local 288, as the collective-bargaining agent of employees in the following appropriate bargaining unit and, if an agreement is reached, sign a written contract embodying the terms of that agreement. The bargaining unit is:

All employees performing electrical work for Daniel J. Ellis, d/b/a Ellis Electric; but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Offer Ritchie V. Kurtenbach, Jon Mariani, Jeffery Hicks, Jeffrey Fisher, Melissa Jacobs, and Kendall William Jacobs immediate and full reinstatement to the positions from which each was either laid off or discharged, dismissing, if necessary, anyone who may have been hired or assigned to any of those positions or, if any of those positions no longer exists, to a substantially equivalent position, without prejudice to seniority or other rights and privileges, and make whole those employees for any loss of pay suffered as a result of those discriminatory acts, in the manner set forth above in the remedy section of this decision.

(c) Preserve and make available to the Board or its agents, for examination and copying, all payroll and other records necessary to compute backpay and reinstatement rights as set forth above in the remedy section of the decision.

(d) Post at its Independence, Iowa office copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region 18, 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.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges violations of the Act not found herein.

⁸If 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.

⁹If 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."