

Essbar Equipment Company and Sheet Metal Workers International Association, Local Union 19. Case 4-CA-21299

October 31, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND COHEN

On April 25, 1994, Administrative Law Judge Bruce C. Nasdor issued the attached decision. The Respondent filed exceptions and a supporting brief and an answer to the General Counsel's cross-exceptions. The General Counsel filed cross-exceptions to the judge's decision and an answer to the Respondent's exceptions.

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

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

1. We agree with the judge that Marty Detweiler is a supervisor. In particular, we note that Detweiler independently directs the work of the Respondent's field employees when they deliver and install kitchen equipment. Detweiler gives field employees Wykpisz and Andruzzi their assignments, instructs them where to report to work, verifies field employees' hours, and solves problems that arise on the jobsite. Detweiler also gives instructions to Wykpisz and Andruzzi and is responsible for their field work. Further, as found by the judge, junior employees Wykpisz and Andruzzi require direction and, if Detweiler is not their supervisor, there would be no one to responsibly direct the field operation.

Detweiler also has the authority to grant employees time off, as established by uncontradicted evidence that he granted Andruzzi a day off without consulting higher management.

Finally, Detweiler's wages and benefits substantially exceed those of other field personnel. He is paid \$12

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

In adopting the judge's credibility findings, we find it unnecessary to rely on his characterization of Michael Lawrence as a "world class evasionist."

The judge refers to a conversation between Wykpisz and Lawrence as having occurred in "the second week in 1992." That conversation occurred in the second week of October 1992. We correct this inadvertent error.

per hour compared with \$7 for Wykpisz and Andruzzi, and, unlike other field personnel, he receives a bonus, use of a company vehicle and credit card, and a paid vacation.

On these facts, we agree with the judge that Detweiler is a supervisor under Section 2(11) of the Act.

2. The Respondent relies on *Ideal Macaroni*, 301 NLRB 507 (1991), in support of its argument that Wykpisz and Andruzzi were laid off for valid economic reasons, and not because of their union activities. We reject the Respondent's economic defense.

In *Ideal Macaroni*, the employer more than doubled its work force in response to a new promotional campaign and because of operational problems it was experiencing with newly installed, state-of-the-art packaging equipment. Once the promotional campaign concluded, and the operational problems ceased, there was a concomitant drop in orders and manpower needs. In response, the employer laid off some of its newly hired employees including the alleged discriminatees. On these facts, the Board agreed with the employer's claim that the discriminatees would have been laid off even in the absence of their union activity.

The Respondent asserts that here, as in *Ideal Macaroni*, the layoff of Wykpisz and Andruzzi was the lawful result of reduced manpower needs caused by a slowdown in its business. The Respondent claims that this reduction is reflected in the decline in its accounts receivable for the period from August to October 1992. Although the Respondent did experience a dropoff in its accounts receivable during this period, an examination of its accounts receivable for the period starting in August 1990 indicates that the Respondent experienced frequent rises and falls in its accounts receivable and that there was nothing unusual about the decline that occurred immediately prior to the layoff.²

Further, unlike *Ideal Macaroni*, Wykpisz and Andruzzi were hired as part of the Respondent's regular work force, and not to meet a temporary demand. Indeed, the Respondent's employee complement for several years has consisted of at least three full-time employees. Finally, in 22 years the Respondent has never laid off a regular full-time employee, even during slow periods.

In these circumstances, we find that the Respondent failed to establish that Wykpisz and Andruzzi would have been laid off for legitimate business reasons, even in the absence of their union activities. Rather, as found by the judge, we conclude that the Respondent violated Section 8(a)(3) and (1) by laying off these employees.

² Accounts receivable from August 1990 to October 1992 ranged from a low of \$92,737 in January 1991 to a high of \$753,177 in June 1991. The accounts receivable was \$396,440 in August 1992 and was \$101,640 in October 1992.

3. The General Counsel excepts to the judge's failure to find specifically that the Respondent violated Section 8(a)(1) by telling an employee that the Respondent did not want him talking to the Union. In the section of his decision entitled "Alleged Unfair Labor Practices," the judge discusses Wykpisz' testimony that Vice President Michael Lawrence told him that he (Lawrence) did not want them talking to the Union. Although, the judge credits Wykpisz' testimony, he does not discuss this incident specifically in his "Conclusion and Analysis" section. The judge, however, does find in his "Conclusions of Law" that the Respondent violated the Act by telling employees not to talk to the Union. He also includes a provision in his order covering this violation. In these circumstances, we conclude that the judge's failure to include this violation in the "Conclusion and Analysis" section was inadvertent. In any event, we find that Respondent violated Section 8(a)(1) by telling Wykpisz not to talk to the Union.

4. The General Counsel also excepted to the judge's reference in his remedy and order to the "discharge" of Wykpisz and Andruzzi and to the judge's failure to make specific findings in his conclusions of law and order that Respondent unlawfully laid off and failed to recall the discriminatees. We find that the portions of the remedy, order, and notice that refer to the "discharge" should refer to "layoff" and "failure to recall the employees." The conclusions of law, order, and notice shall be modified accordingly to reflect that the Respondent unlawfully laid off and failed to recall employees Wykpisz and Andruzzi.

Amended Conclusions of Law

Substitute the following for paragraph 3 of the conclusions of law.

"3. By discriminating in its layoff and failure to recall employees Joseph Andruzzi and Daniel Wykpisz because of their union activities, the Respondent has violated Section 8(a)(3) and (1) of the Act."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Essbar Equipment Co., Wilmington, Delaware, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Laying off and failing to recall or otherwise discriminating against employees Daniel Wykpisz and Joseph Andruzzi or any other employee for supporting Sheet Metal Workers International Association, Local Union 19, or any other labor organization."

2. Substitute the following for paragraph 2(b).

"(b) Expunge from its files any references to the layoffs and failure to recall employees Wykpisz and Andruzzi and notify them in writing that this has been done, and that the evidence of their unlawful layoffs and failure to recall shall not be used as a basis for future personnel action against them."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

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

WE WILL NOT lay off and fail to recall or otherwise discriminate against employees Daniel Wykpisz and Joseph Andruzzi or any other employee for supporting Sheet Metal Workers International Association, Local Union 19, or any other labor organization.

WE WILL NOT interrogate employees about their union activities.

WE WILL NOT tell employees that we do not want them speaking to the Union.

WE WILL NOT threaten employees with job loss for talking to the Union.

WE WILL NOT threaten employees with discharge if they engage in union activities.

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

WE WILL offer to Joseph Andruzzi and Daniel Wykpisz immediate and full reinstatement to their former positions or to substantially equivalent positions without prejudice to their seniority or other rights and privileges and compensate them for any loss of pay suffered by reason of their layoffs, with interest.

WE WILL expunge from our files any references to the layoff and failure to recall of the above-named employees, and notify them in writing that this has been done and that evidence of their layoff and failure to recall shall not be used as a basis for future personnel action against them.

All of our employees are free to become, remain, or refrain from becoming members of any union.

ESSBAR EQUIPMENT COMPANY

Peter Berrochi, Esq., for the General Counsel.
Frederick M. Walton, Esq., for the Respondent.
Dennis P. Walsh, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

BRUCE C. NASDOR, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on October 7 and 8, 1993. Sheet Metal Workers International Association, Local 19, AFL-CIO (the Union) filed a charge and amended charge on December 16, 1992, and February 19, 1993. Complaint issued with amendments on February 18 and September 16, 1993. Counsel for the General Counsel, at the commencement of the hearing, further amended paragraphs 5(a) and (b) of the complaint. The complaint and the amendments allege that Respondent laid off its employees Daniel Wykpisz and Joseph Andruzzi, and subsequently refused to call them in violation of Section 8(a)(1) and (3) of the Act. The failure to recall allegation is alleged as an independent violation. The amended complaint also alleges that Respondent engaged in other independent acts which were violative of Section 8(a)(1) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs,¹ I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, Respondent, a Delaware corporation, with an office and place of business in Wilmington, Delaware, has been engaged in furnishing, delivering, and setting up commercial kitchen equipment.

During the past year, Respondent, in conducting its business operations described above, derived gross revenues in excess of \$500,000, and during the same period purchased and received at the facility goods valued in excess of \$50,000 directly from points outside the State of Delaware.

At all times material, Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

At all times material, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent was engaged in the selling, delivery, and installation of restaurant equipment and supplies. It sells primarily to institutional customers such as schools, prisons, nursing homes, and hospitals. It maintains a warehouse and office at 104 East Lea Boulevard, Wilmington, Delaware.

C&D Contractors (C&D) leases space to Respondent and maintains its own warehouse next door to the Respondent and an office several blocks away. Most of Respondent's projects are governed by State prescribed prevailing wage requirements.

Michael Lawrence has been vice president of Respondent for the last 22 years. His principal involvement is administration, bidding on jobs, purchasing equipment, and scheduling projects. More than 90 percent of his time is spent in the office, although occasionally he visits the worksites he does not participate in the delivery or installation of the equipment.

Don Clagg is the Union's organizer in Delaware. As such he is responsible for monitoring nonunion contractors adherence to prevailing wage conditions, to ensure that union contractors are not economically disadvantaged in bidding against nonunion competition on government projects. Respondent has signed project agreements with the Union on union jobs. Clagg and Lawrence know each other personally, and prior to the fall of 1992, Clagg tried to persuade Lawrence to sign a collective-bargaining agreement with the Union. Lawrence declined giving as his reason the competitive market pressure on his business and that he could not compete if he were a union contractor.

Clagg had never attempted to solicit Respondent's employees to sign union authorization cards, because until September 1992, he never had an employee list. In September a fellow organizer, James White, provided Clagg with the Respondent's wage certification at a job in Harrisburg, Pennsylvania. Also included was a list of the names and addresses of Respondent's employees. Clagg decided to solicit signatures and, on September 23, Clagg and White made separate house visits to Wykpisz and Andruzzi. They discussed employees' prevailing wage violations on the companies jobs, union benefits, the NLRB election process, and at some point Wykpisz and Andruzzi signed authorization cards and handed them back to Clagg. Later that evening Clagg left a telephone message at employee Jonathan Murphy's house wherein he asked Murphy to call him. Murphy did not return the call. Clagg eventually spoke to Murphy and Marty Detweiler about becoming union members but they were not interested. The only employees who signed union authorization cards were Wykpisz and Andruzzi.

Approximately 1 week after the above-named employees signed authorizations cards Clagg received a telephone call from Lawrence in which Lawrence indicated he was aware that Clagg had been talking to some of his employees. He asked Clagg whether there was anything he could do to help him. Clagg acknowledged that he had spoken to an employee about becoming a union member. Lawrence stated he had no problem with that and the conversation ended after some small talk. Lawrence's version of the conversation is basically the same as Clagg's except Lawrence says he told Clagg that two of his employees had told him that Clagg was trying to make contact with them. Lawrence said that Wykpisz and Andruzzi came to him complaining about Clagg's calls to them. They denied they had complained to Lawrence about being contacted by Clagg. During the second week in November 1992, Clagg had another occasion to speak to Lawrence asking him to sign a union contract. Lawrence again declined saying he could not compete in the market as a union contractor.

¹ Counsel for the General Counsel's unopposed motion to correct the transcript is granted.

During the relevant times, Respondent employed four full-time regular field employees involved in delivery and installation of kitchen equipment: Martin Detweiler, Jonathan Murphy, Daniel Wykpisz, and Joseph Andruzzi. Respondent also utilized temporary employment usually in the summer and journeymen from the Sheet Metal Workers Union on union jobs where it was required that union tradesmen be utilized.

Detweiler has been with Respondent for approximately 10 years. Murphy and Wykpisz were hired around December 27, 1991, and January 24, 1992, respectively. Andruzzi worked for Respondent during the summer of 1991 while he was still in high school and was subsequently hired as a full-time regular employee around June 12, 1992. Wykpisz and Andruzzi were laid off at the same time on October 23, 1992.

Respondent contends that Detweiler is a "working foreman," rather than a supervisor within the meaning of the Act. Detweiler, who is married to Karen Detweiler the bookkeeper and the corporate secretary, did not testify. He was originally hired as an installer and assumed his current position in late December 1991, when Robert Crimian retired from Respondent. At that time Crimian was designated the "working foreman." In two wage certifications to the government, in the summer of 1992, Respondent identified Detweiler as its "field supervisor." At the time of their lay-off Wykpisz and Andruzzi were both earning \$7 per hour. Detweiler was earning approximately \$12 per hour on non-prevailing rate jobs. On prevailing rate jobs he probably was paid more. Detweiler, unlike Wykpisz and Andruzzi, is paid a bonus, uses the company van including the gas credit card to commute to work, and gets a paid vacation. There is no written job description for Detweiler. Respondent's witnesses testified that Detweiler was in charge of delivery and installation at the customer's worksite, and he was primarily responsible for assuring that the job was done according to the specifications. The estimator/project manager, Richard Kukulich, testified for Respondent that Detweiler is responsible for organizing the field work, assigning work to the employees, and handling any problems that arise in connection with assignments while out in the field. Lawrence testified that Detweiler gave instructions to employees on the job and that Wykpisz and Andruzzi needed to be directed in their work. He also testified that he left the details of how the work was to be done solely to Detweiler's discretion. Both Wykpisz and Andruzzi testified that they viewed Detweiler as their supervisor and Wykpisz testified that when he first began his employment with Respondent Lawrence introduced Detweiler as "the boss, the guy I would have to ask if I had any questions." Wykpisz and Andruzzi also testified that Detweiler gave them work assignments at the shop at the beginning of the day and at the jobsite throughout the day. Detweiler, utilizing blueprints, told them where to install the equipment. If there were problems for example with plumbing or electrical connections or other modifications, according to their testimony, Detweiler would decide how the problem would be solved. When employees concluded an assignment they would go to Detweiler to get their next assignment. According to the testimony, Detweiler told employees when they would take workbreaks and when they would leave the site to return to the shop. On occasion he decided that instead of leaving from the shop at the regular starting

time, they would meet at another location or that they would report to work earlier than usual. Kukulich testified that Detweiler was responsible for verifying employees hours when they returned to the shop after regular business hours. Andruzzi testified that on one occasion he needed a day off to attend court, he asked Detweiler for the day off and Detweiler immediately granted this request without checking.

Wykpisz testified that approximately a week after his having signed a union card he spoke to Murphy at Respondent's facility about joining the Union and getting Clagg a call. Murphy did not commit himself. At some point, Detweiler entered the area and told Wykpisz that Lawrence would fire employees who spoke to the Union. The version appearing in Wykpisz' affidavit states that Wykpisz said Detweiler indicated that Lawrence would fire him if he found that they had signed a card as opposed to because they spoke to the Union. On one occasion according to Wykpisz, approximately the second week in 1992, he was alone in the warehouse unpacking equipment when Lawrence approached him and asked, "What is this I hear you guys talking about the Union?" Wykpisz replied he had spoken to Clagg and according to Wykpisz, Lawrence was angry. Lawrence allegedly stated that the Union would steal your job and union members would take Wykpisz' job based on their seniority.

On another occasion Wykpisz testified that before work he was alone in the back office at the facility. Lawrence told him the Union was no good and asked whether he had signed a union card. Wykpisz answered that he had not. According to Wykpisz, Lawrence allegedly indicated that because he was talking to the Union he would lose his job based on union seniority policies.

Wykpisz also recalled a third conversation in the back office before work when Lawrence allegedly told him that Clagg was "out to stir up a lot of trouble," that he could lose his job, that unions were no good and he did not like them and that he (Lawrence) did not want them talking to the Union. Wykpisz testified further that during one of his conversations with Lawrence, Lawrence stated he did not want to be a union shop.

Andruzzi testified with respect to an occurrence in October 1992, when he was speaking to Lawrence in the coffee room and in the course of their conversation Lawrence allegedly asked him if he had "talked to the Union guys anymore." Andruzzi testified that he denied speaking to the union organizers and left the room because the question made him uncomfortable.

Lawrence testified that he never threatened any employee, he could not have because he had no knowledge of union activities. Moreover he never told them unions were no good or that they would lose their jobs if the Union was brought in. Lawrence denied the allegations made by Wykpisz that he did not want Wykpisz talking to union people. According to Lawrence, he had no indication that Wykpisz was talking to the Union.

On October 23, 1992, sometime late in the afternoon Lawrence informed Wykpisz and Andruzzi that he was laying them off because work was slow. There was some discussion of when they might return. Wykpisz testified that Lawrence discussed recalling them in 2 weeks. Lawrence recalled that he referred to the delay of the Mercer County Detention Center job and that it would be at least weeks before he could consider recalling them. He testified that he did not tell them

at any time that he did not intend to recall them. Lawrence and Kukulich testified that there was no work available for them and that when they were laid off they were essentially performing make-work jobs. Respondent also contends an economic defense and produced a financial statement showing a loss from operations of \$97,885 in the year ending 1993 representing approximately 2.6 percent of total income. Lawrence, however, conceded that he did not base the layoff on the profit-and-loss statement, moreover he had difficulty even understanding the profit-and-loss statement. Furthermore Lawrence could not have known in October 1992, that at the end of the fiscal year in June Respondent would be incurring an operating loss. In the year ending June 1991 and June 1992, documentary evidence reflects that Respondent had a gain in income from operations of \$8074 and \$55,945.

Wykpiasz and Andruzzi testified that the layoff came without any warning and at the time they were involved in productive work. Wykpiasz testified that there was still a substantial amount of work for them to do and that it was not particularly slower than it had been during prior periods. Documentary evidence reflects that Respondent's sales are irregular with frequent peaks and values. Andruzzi testified that they were performing work in the warehouse and in the field. Respondent's Exhibit 6 also reflects that they were engaged in field workweeks prior to the layoff.

Lawrence also attributed the layoff to a delay in the Mercer County Detention Center job. Lawrence acknowledged that this was a union job and Wykpiasz and Andruzzi would not have been permitted to work on it because they were not union men.

Lawrence admitted that in his 22 years as Respondent's vice president he had never laid off a regular full-time employee. Kukulich admitted that the Respondent has in the past experienced slow periods. Documentary evidence reflects that Respondent's work complement for the last several years has generally been at least three employees.

There is no evidence that Respondent considered any other alternatives to laying off Wykpiasz and Andruzzi including reducing their hours or laying off one or the other.

Although the time of the event is not clear, David Connor the shop manager at C&D Warehouse next door to the Respondent had a conversation with Detweiler. A short while prior to the conversation, Wykpiasz had been doing work on Connor's truck stereo in the parking lot at the facility. Soon after Wykpiasz left, Detweiler and Connor struck up a conversation wherein Detweiler asked him why he had hung around with Wykpiasz. Detweiler referred to Wykpiasz as a "trouble maker" Connor answered that Wykpiasz was doing him a favor by working on his truck. At some point in the conversation, Connor asked if the Respondent was going to hire Wykpiasz back and Detweiler responded no "because he is either talking or associating with that union organizer." Connor admitted that either Clagg or Wykpiasz asked him to question Detweiler to find out if the Respondent intended to hire Wykpiasz back. Clagg and Wykpiasz confirmed that Connor reported this incident to them around the time that it happened. Detweiler was not called as a witness in this case.

A few weeks after the layoff, Wykpiasz and Andruzzi returned to ask when they might be recalled. Lawrence told them that things were slow and it might be another week or two. Wykpiasz said he had heard that because of the Union

the Respondent was not recalling them. Lawrence denied this.

Sometime after the layoff, Lawrence became aware that Clagg was at C&D talking to C&D's employees. His explanation for this was that C&D was the Respondent's landlord and that he and Ryan (of C&D) had an excellent business and that it was in Ryan's best interest to know that Clagg was there. Lawrence testified later that Clagg's presence at C&D did not make sense because Wykpiasz and Andruzzi were no longer around and that he was simply curious to see what business Clagg might have at C&D.

The Respondent also contends through its witnesses that Wykpiasz' and Andruzzi's driver qualifications, i.e., their lack of a commercial driver's license precludes their employment with Respondent. At the time of the layoff Respondent utilized three vehicles, a van, a station wagon, and a box truck approximately 20 feet in length and 20,000 lbs. in weight. It still utilizes the same vehicles except the box truck has been replaced by a newer one which is approximately the same size. At the time of the layoff, none of the field employees retained a commercial driver's license. Lawrence acknowledged that with respect to driver licensing requirements none of the vehicles it uses in its field operations, then or presently, requires a CDL license driver to operate it. The U.S. Department of Transportation requires operators of commercial vehicles in excess of 26,000 lbs. have a valid commercial driver's license. In the face of not having a CDL licensed driver, Respondent made the commercial driver's license a prerequisite of employment when it advertised for new field employees on March 15, 1993. In its ad it gave a telephone number to call instead of a P.O. Box number as was done in a 1993 ad.

Respondent's witnesses could offer no explanation for requiring a CDL license. The applicants who responded to the ad had such licenses but they were unsuited to perform the field work itself. Eventually Respondent hired an individual, Rocky Caldeira, on a recommendation of one of the salesman. At the time of his hire Caldeira did not have a commercial driver's license nor did he have prior equipment installation experience. He subsequently obtained a CDL on June 2, 1993. There is no evidence that Respondent took any action to require that Detweiler or Murphy obtain a commercial driver's license.

Respondent also took the position that Andruzzi's age and Wykpiasz' inability to drive the box truck precluded them from being rehired. The Department of Transportation requires that to drive an interstate commercial vehicle weighing in excess of 10,000 lbs. one must be 21 years of age. Kukulich testified that he became aware of this requirement sometime in the fall of 1992, prior to the layoff when a Department of Transportation official, Cathy Carlin, visited the facility and provided him with documents setting forth the Department of Transportation requirements. Murphy did not turn 21 until 1993. Nor was Andruzzi old enough to drive a box truck out of State. Wykpiasz met the age requirement, but was not capable of driving a stick shift vehicle properly. Kukulich testified that after one driving experience with Wykpiasz he concluded that he was an unsafe driver. He considered him reckless. Lawrence testified that he was aware of Andruzzi's age disqualifications and Wykpiasz' driving deficiencies when he laid them off, although he did not indicate to either of them that he could not recall them for those rea-

sons. He merely took the position that there was not enough work. His explanation for not pointing out the other deficiencies was that "the thought never occurred to me."

Department of Transportation requirements also provide that drivers take a written exam and pass a road test. Kukulich, who testified that he was in charge of Department of Transportation compliance, had no idea whether Detweiler, Murphy, or the other field employees who drove the box truck had complied with either requirement. The Department of Transportation compliance review dated November 12, 1992, suggested other deficiencies with respect to Detweiler's driver qualifications yet Kukulich had no idea whether the deficiencies had been cured.

Conclusion and Analysis

In my opinion, Andruzzi was a credible witness. He made a sincere attempt to recount details without magnification or enhancement. Moreover, he was forthright when he could not recall a detail.

By way of contrast, Lawrence impressed me as a witness who distorted and concocted his testimony. Moreover, he evidenced a proclivity for memory lapse. Furthermore, I view him as a world-class evasionist.

I therefore conclude that Respondent's vice president, Lawrence, violated Section 8(a)(1) of the Act by interrogating Andruzzi about his union activity.

Prior to the interrogation, Andruzzi had not divulged his contact with the Union and he had not discussed the Union with Lawrence. Indeed he denied talking with the Union.

Detweiler controlled and was responsible for the delivery and installation of the kitchen equipment. Accordingly, he directed field employees Andruzzi and Wykpisz in their work, although he worked along with them. Obviously someone had to be in charge and that was Detweiler. But for him, there would have been no one at the site without any authority. Although he did not have the authority to hire, fire, or recommend same, he enjoyed higher wages and substantially more benefits than the field employees. Both Wykpisz and Andruzzi consider him their "boss." Moreover, he was identified as a supervisor on Respondent's wage certification.

I therefore conclude that Detweiler was a supervisor within the meaning of Section 2(11) of the Act, and was acting as an agent and on behalf of Respondent.

The un rebutted testimony of Wykpisz is that Detweiler stated that Lawrence would fire an employee who spoke to the Union. Although his affidavit reflects a threat with respect to signing a union card, I would not discredit him on that basis neither Detweiler nor Murphy came forth to rebut his testimony. Murphy appeared as a witness, Detweiler did not.

I conclude that Detweiler violated Section 8(a)(1) of the Act by threatening an employee with discharge because of his union activity.

I was impressed by Wykpisz' effort to be honest in recounting events as he remembered them. There was no tendency on his part to embroider or color the facts. I fully credit his testimony.

My opinion of Lawrence's credibility has been discussed earlier. Accordingly, I find that Lawrence violated Section 8(a)(1) of the Act by threatening discharge, job loss, and unlawfully interrogating an employee.

In my opinion counsel for the General Counsel has met its burden under *Wright Line*, 251 NLRB 1083 (1980), by establishing a prima facie case and Respondent has failed to show that it would have laid off and not recalled Andruzzi and Wykpisz even in the absence of discrimination. The layoffs were pretextual and Respondent's weak defense was compounded by its shifting reasons.

The facts include all the elements to support a case of discrimination.

There is clear evidence that Respondent (Lawrence) was disturbed and fearful of the threat of unionization. Lawrence expressed his fears to Clagg on two occasions.

It is equally clear that Lawrence knew or suspected that the discriminatees were union supporters.

Animus was expressed by Lawrence's and Detweiler's expressions which are independent violations of Section 8(a)(1) of the Act.

The Respondent has never had a layoff of full-time regular employees in 22 years, and the only two employees chosen to be laid off were the individuals who signed union authorization cards. Documentary evidence and testimony reflect that over some years there have been slow periods, but no layoffs. Moreover, at the time of the layoff, Respondent had no way of ascertaining whether or not there would be a loss at the end of the fiscal year. Furthermore, the loss was minimal, 2 to 3 percent.

Respondent is at a loss to explain several inconsistencies. For example, Lawrence testified that Wykpisz and Andruzzi were unfit to drive which precluded their employment yet he told them on two occasions that they would be recalled to work. Furthermore, Respondent contended that Wykpisz was an unsafe driver who was unable to drive the box truck yet Respondent did nothing to correct these problems nor did it terminate Wykpisz because of his unsafe driving. Respondent contended it was concerned with complying with the Department of Transportation regulations when two of its witnesses, Lawrence and Kukulich, did not know if its other drivers had complied with the road and written tests requirements.

I also note that Respondent has no vehicle which requires a CDL licensed driver and, until April 1993, it had no driver who possessed a CDL license, yet in the face of this it made possession of a CDL license a prerequisite for its new hire in March 1993, but not for Detweiler and Murphy. Respondent offered no rationale why the new hire needed a CDL license and why the others did not. Respondent advanced the excuse that Andruzzi could not be recalled because he had not turned 21 and was therefore too young to drive the box truck outside the State. This does not explain why Murphy who did not turn 21 until sometime this year was also not disqualified. Respondent also has other vehicles it utilizes for field work which Andruzzi and Wykpisz are both old enough and able to drive.

Connor, who I consider to be a credible witness, testified that Detweiler confirmed that Wykpisz would not be recalled because he was viewed as a troublemaker involved with the Union. This I believe is the real reason. Wykpisz and Andruzzi were terminated and not recalled to work.

I therefore find and conclude that Respondent violated Section 8(a)(1) and (3) of the Act by laying off and failing to recall Wykpisz and Andruzzi.

CONCLUSIONS OF LAW

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

2. Sheet Metal Workers International Union Association Local Union 19 is a labor organization within the meaning of Section 2(5) of the Act.

3. By discriminating with regard to the tenure of employment of employees' Joseph Andruzzi and Daniel Wykpsz because of their union activities, Respondent has violated Section 8(a)(1) and (3) of the Act.

4. By refusing to offer Andruzzi and Wykpsz immediate and full reinstatement to their former or substantially equivalent positions, Respondent has engaged in conduct violative of Section 8(a)(1) and (3) of the Act.

5. By interrogating an employee about his union activity Respondent has violated Section 8(a)(1) of the Act.

6. By telling an employee he did not want him speaking to the Union and threatening him with job loss for talking to the Union Respondent has violated Section 8(a)(1) of the Act.

7. By interrogating an employee about his union activity Respondent has violated Section 8(a)(1) of the Act.

8. By threatening an employee with discharge if he engaged in union activity, Respondent has violated Section 8(a)(1) of the Act.

9. The aforesaid unfair labor practices affect commerce within the meaning of Sections 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that the Respondent be ordered to offer Wykpsz and Andruzzi immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges. Respondent shall expunge from its files and records any references to the discharges of these individuals, and notify them in writing that this has been done, and that evidence of their unlawful discharges shall not be used as a basis for future personnel actions against them.

In addition, Respondent shall make whole these employees for any losses they may have suffered by reason of the discrimination against them, by payment to them, a sum of money equal to that which they would have normally earned from the date of their discharges, less net earnings during the period. Loss of earning shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950). Interest shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

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

²If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and rec-

ORDER

The Respondent, Essbar Equipment Co., Wilmington, Delaware, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminating in regard to the tenure of employment of Wykpsz and Andruzzi because of their union activity.

(b) Interrogating employees about their union activity.

(c) Telling employees that they are not to speak to the Union and threatening them with job loss for talking to the Union.

(d) Threatening employees with discharge if they engaged in union activity.

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

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

(a) Offer Wykpsz and Andruzzi immediate and full reinstatement to their former positions or, if such position no longer exist to positions which are substantially equivalent thereto, without prejudice to any seniority or other rights and privileges, and make them whole for any loss of pay they may have suffered by reason of the discrimination against them with interest as provided for in the remedy section above.

(b) Expunge from its files any references to the discharges of Wykpsz and Andruzzi and notify them in writing that this has been done, and that evidence of their unlawful discharges shall not be used as a basis for future personnel action against them.

(c) Post at its facilities copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 4, 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.

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

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

ommended 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.

³If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."