

**Foley Material Handling Co., Inc. and International Brotherhood of Electrical Workers, Local 1340, AFL-CIO.** Case 5-CA-23605

May 12, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS  
AND TRUESDALE

On January 13, 1995, Administrative Law Judge Marvin Roth issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs. We have decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt his recommended remedy and Order as modified.

As part of the remedy, the judge recommended that discriminatees Carl Morrissette, Bill Wilson, Timothy Quail, and Earl Stephenson be made whole for any loss of earnings or benefits they suffered due to the Respondent's discriminatory layoffs and discharges. The judge, however, did not order reinstatement as a remedy because their employment was for a limited duration of approximately 6 months.

Contrary to the judge, we find that conditional reinstatement is an appropriate remedy for unlawful discharge or layoff from an allegedly temporary project under the principles established in *Dean General Contractors*<sup>2</sup> and *Casey Electric, Inc.*<sup>3</sup> In those cases, the Board declined to apply a precompliance presumption against reinstatement in the construction industry, holding that reinstatement and backpay issues should ordinarily be resolved by a factual inquiry at the compliance stage of the proceeding. Consequently, we are including a conditional order of reinstatement that entitles the Respondent to avoid the reinstatement obligation and terminate the backpay obligation at the completion date of the project in question if the Respondent shows at the compliance stage that, under its established policies and practices, employees hired into positions like those held by the discriminatees would not have been transferred or reassigned to other jobs after the project at issue ended.<sup>4</sup>

<sup>1</sup> 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.

<sup>2</sup> 285 NLRB 573 (1987).

<sup>3</sup> 313 NLRB 774 (1994).

<sup>4</sup> We note that at least one employee, a nonunion member, hired for the project at issue, remained in the Respondent's employ at the time of the hearing, approximately a year after the project's scheduled completion.

AMENDED REMEDY

Having found that the Respondent has violated Section 8(a)(1) and (3) of the Act, we shall order the Respondent to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully laid off Carl Morrissette and Bill Wilson and unlawfully discharged Timothy Quail and Earl Stephenson, we shall order it to offer them reinstatement to the same or substantially equivalent positions at other projects as close as possible to Newport News, Virginia. In addition, we shall order the Respondent to make them whole for any loss of earnings and other benefits they may have suffered as a result of the Respondent's unlawful discrimination against them from the date of their layoff or discharge to the date that the Respondent makes them a valid offer of reinstatement or employment. Such amounts shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and shall be reduced by net interim earnings, with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). This portion of the remedy is subject to resolution at the compliance proceeding of the issues outlined in *Dean General Contractors*, above. Consistent with that decision, the Respondent will have the opportunity in compliance to show that under its customary procedures the discriminatees would not have been transferred to another project after the one for which they were hired was completed, and that the Respondent's obligation for backpay and reinstatement would therefore not extend beyond completion of the project where the discrimination occurred. We shall require the Respondent to preserve and make available to the Board or its agents, on request, payroll and other records to facilitate the computation of backpay and reimbursement due.

We shall also order that the Respondent expunge from its records any reference to the employees' unlawful layoffs or discharges and inform them that its unlawful conduct will not be used as a basis for further personnel actions against them. See *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

As the Respondent has completed its Newport News Shipyard crane project, we shall order that the Respondent, in addition to posting an appropriate notice at its present office and principal place of business, mail copies of the notice to all current and former employees employed on the project in 1993.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Foley Material Handling Co., Inc., Ashland, Virginia, its officers, agents, suc-

cessors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a):

“(a) Make whole Carl Morrisette, William (Bill) Wilson, Timothy Quail, and Earl Stephenson for any losses they suffered by reason of the discrimination against them and offer them full and immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, as set forth in the amended remedy section of this decision.”

2. 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.

WE WILL NOT discourage membership in the International Brotherhood of Electrical Workers, Local 1340, AFL-CIO, or any other labor organization, by laying off or discharging employees, imposing more onerous working conditions or times of work, or otherwise discriminating against employees because they engage or participate in picketing, strike activity, protests concerning terms or conditions of employment, or other lawful union or concerted activity.

WE WILL NOT threaten employees with such reprisal because they or other employees engage in lawful union or concerted activity.

WE WILL NOT interrogate employees concerning their union activities, affiliation, or support or that of other employees.

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 make whole Carl Morrisette, William (Bill) Wilson, Timothy Quail, and Earl Stephenson for losses they suffered by reason of the discrimination against them, with interest, and WE WILL offer them immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent ones.

WE WILL notify Carl Morrisette, William (Bill) Wilson, Timothy Quail, and Earl Stephenson that we have removed from our files any reference to their layoffs

or discharges and that the layoffs or discharges will not be used against them in any way.

FOLEY MATERIAL HANDLING CO., INC.

*Brenda Valentine Harris, Esq.*, for the General Counsel.  
*Jay Levit, Esq.*, of Richmond, Virginia, for the Respondent.

## DECISION

### STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge. This case was heard in Hampton, Virginia, on October 3 and 4, 1994. The charge was filed on June 7, 1993, by International Brotherhood of Electrical Workers, Local 1340, AFL-CIO (the Union).<sup>1</sup> The complaint, which issued on January 25, 1994, alleges that Foley Material Handling Co., Inc. (the Respondent or the Company), violated Section 8(a)(1) and (3) of the National Labor Relations Act. The gravamen of the complaint is that the Company allegedly threatened and coercively interrogated employees, discriminatorily changed break procedures, and discriminatorily terminated employees Carl Morrisette, William (Bill) Wilson, Timothy Quail, and Earl Stephenson because of their union and concerted activities. Respondent's answer denies the commission of the alleged unfair labor practices.

All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally, and to file briefs. The General Counsel and the Company each filed a brief.

On the entire record in this case,<sup>2</sup> and from my observation of the demeanor of the witnesses, and having considered the arguments of counsel and the briefs of the parties, I make the following

### FINDINGS OF FACT

#### I. THE BUSINESS OF RESPONDENT

The Company, a Virginia corporation with an office and place of business in Ashland, Virginia, is engaged in the manufacture, installation, and servicing of overhead cranes. In the operation of its business, the Company annually purchases and receives goods and materials valued in excess of \$50,000, directly from points outside of Virginia. I find, as the Company admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. THE LABOR ORGANIZATION INVOLVED

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

<sup>1</sup> All dates are 1993 unless otherwise indicated.

<sup>2</sup> The General Counsel's motion to correct the transcript is granted. Certain errors in the transcript have been noted and corrected.

### III. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. *Company Supervisors Involved and Events Preceding the Picketing*

Dale Foley is company president and the Company's chief executive officer. The Company is nonunion. In February 1993, the Company obtained a contract to completely dismantle and rebuild the electrical and mechanical systems for a 310-ton gantry crane at the Newport News Shipyard. Work was scheduled to commence on March 15 and, as testified by Foley, to be completed within 6 months of May 15 (i.e., by November 15). Company Service Supervisor Bill Bartholomew was in charge of the project. His supervisory personnel included two electrical foremen: Ronald Pilcher and Timothy Hawkins. Pilcher was hired for the job and worked for the Company from February through August 1993. The present record does not indicate whether Hawkins was employed by the Company on a permanent or temporary basis.

Company President Foley testified that he discharged Bartholomew in November 1993, that he last spoke to him in the spring of 1994, and that Bartholomew presently lives in Alaska. Bartholomew was not subpoenaed or otherwise summoned or requested to testify in this proceeding, although he played a critical role in the events of this case. In light of the circumstances described by Foley, I am not inclined to draw an adverse inference by reason of the Company's failure to summon him as a witness. At all times material, however, Bartholomew was a supervisor of the Company within the meaning of Section 2(11) of the Act and an agent of the Company within the meaning of Section 2(13) of the Act. The Company was responsible for his statements and actions, including termination of the alleged discriminatees. In the absence of his testimony, important elements of the General Counsel's case are uncontroverted or inadequately controverted, and much of the Company's asserted position rests on hearsay. Indeed, Bartholomew's own memoranda tends, in certain respects, to corroborate the General Counsel's case and to contradict the Company's position.

The crane job required electricians. On February 21 and 22, the Company placed a newspaper ad for "ELECTRICIAN/apprentices" for the job, described as a 6-month project. Prospective employees were advised they needed conduit, wire installation, termination, and controls experience, and to send in their resumes or call the Company's office.

Union Business Manager Richard Adams and his subordinate, Union Organizer Raynard Wood, saw the ad. Wood was knowledgeable about the project, having worked on the crane's construction as an apprentice electrician. They each telephoned the Company, identifying themselves and indicating they had electricians who would be interested in working on the project. The woman who answered Adams' call (whom Adams could not identify), told him: "We don't hire Union people." Company President Foley subsequently told Adams, however, that the union members could apply for work on the same basis as other applicants and should provide their resumes.

On March 3, pursuant to Adams' instructions, Wood, accompanied by two prospective applicants, went to the Company's office. He presented Bartholomew with resumes of 15 union member journeymen electricians, together with Wood's cover letter to the Company. The letter stated in sum that the

15 applicants were qualified journeymen who were "willing to work under the same terms and conditions" as the Company's other qualified electricians. The letter stated that any protected activity in which the applicants might choose to engage following their employment by the Company would be conducted in accordance with the law "and will not interfere with their efficiency and productivity as employees." The letter also indicated that the Union might file unfair labor practice charges against the Company if it discriminatorily refused to consider the applicants for employment. The letter further advised the Company to notify Wood if the applications were deficient in any respect.

Supervisor Bartholomew told Union Business Manager Wood that the resumes looked good. He said he would speak to President Foley, although he thought that Foley did not want any union involvement on the job. The following day, Bartholomew and Wood had a luncheon meeting. Bartholomew said that the shipyard coordinators and inspectors were pleased with the prospect of union electricians on the project. Bartholomew expressed concern that the hired applicants remain for the duration of the project, however, indicating that the project had a 6-month timetable. Wood replied that the Company's concern would be addressed. Wood agreed to schedule application interviews, and he did so. Bartholomew said that the wage scale would be below union scale, and there would be no fringe benefits.

Before the applicants went for their interviews, Wood told them they were expected to serve out the duration of the project, behave as good journeymen, and do a good job. He also emphasized that their main objective was to get a project agreement with the Company. Wood previously lectured the union members on their rights under the Act.

The Company conducted individual interviews with the 15 applicants on March 5. No union representative was present. Each applicant was interviewed and each filled out a job application indicating, among other things, their types of work experience. The Company hired seven of the applicants: Carl Morrisette, Bill Wilson, Timothy Quail, Earl Stephenson, John Futrell, Joel Hosey, and Darrell Ames.

Morrisette, Wilson, Quail, Stephenson, and Hosey, who were presented as the General Counsel's witnesses, testified in sum concerning the interviews as follows: Project Manager Bartholomew and Foremen Hawkins and Pilcher or one of them conducted the interviews. Bartholomew did most of the talking for the Company. None of the General Counsel's witnesses indicated that Company Regional Sales Manager Doug Jackson was present or participated in the interviews. Bartholomew described the work involved. He said that the project was expected to last about 6 months and asked if they were willing to work for that duration. The employees agreed to do so. The employees were not told that they would be assigned to specific job functions. Bartholomew said they would begin at \$13.50 per hour (below union scale) and would receive no fringe benefits, although they could expect to receive a wage increase of about 50 cents per hour in a few weeks if they worked out. Wilson testified that Bartholomew said the project would probably last until August or September, but that some others (unidentified) might remain longer. He asked Wilson whether he minded climbing, but did not otherwise question Wilson's ability to perform any of the work. Wilson answered that he was agile and could climb well. Quail testified that Bartholomew said

Foley did not want to hire union labor, but Bartholomew was going to do so anyway.

Foreman Pilcher and Sales Manager Jackson, who were presented as company witnesses, also testified concerning the job interviews. Pilcher testified that he, Bartholomew, Hawkins, and Jackson were present at the interviews, and that they indicated the project probably would run about 6 months. Pilcher did not, in his testimony, indicate that Bartholomew or anyone else said that employees would be hired for any particular job function or functions. Jackson testified that he was present at the interviews, and that he and Bartholomew asked most of the questions. Jackson testified that they asked the applicants whether, if hired, "they would stay with us through the duration as far as with their functions that they were hired for til [sic], you know, their job was over with." Jackson further testified that they said the Company had 6 months to complete the job, but did not promise any time period.

I credit the testimony of the employee witnesses, as summarized above. I do not credit Jackson's above assertions concerning what was allegedly said or not said in the interviews. Assuming that Jackson was present and participated in the interviews, which is questionable, it is unlikely that Jackson played any significant role in the interviews. None of the employees recalled his presence, and the project did not fall within Jackson's area of responsibility. His assertions were not corroborated by Pilcher, the Company's only other witness concerning the interviews. Assuming that the employees were hired to perform anything less than all phases of the electrical work, then it is probable that there would have been some discussion of their specific functions. No witness indicated that there was any such discussion, however, either in the interviews or at any other time.

On March 9 Bartholomew informed Adams that he was hiring several of the applicants. Bartholomew said they would be working 6 or 7 days a week and 10 to 12 hours a day, and that he might hire them for future jobs. Bartholomew told Wood this was a 6-month project, and it was imperative that the work be done in a timely fashion. Wood assured Bartholomew that the union members would work for the duration of the project. Wood testified that he acted as representative of the union member applicants but did not represent them after they were hired.

The seven union members hired by the Company commenced work on March 15. The Company also had nonunion mechanics, helpers, and apprentices on the project. The electricians commenced working a 10-hour day, from 7 a.m. to 5:30 p.m., 5 days a week. During the first 4 weeks, and briefly thereafter, there were delays in the progress of work caused by material shortages. As these problems ceased, the employees worked longer hours and commenced working on Saturdays and Sundays.

The employee parking lot was located at a shipyard entrance, about 1 mile from the crane. Foremen Pilcher or Hawkins arranged to meet the employees at the parking lot, and one of the foremen drove the employees to the crane in a company truck. Employees who arrived late had to walk to the crane.

The employees had three breaks during their 10-hour workday: at 9 a.m., a lunchbreak at noon, and an afternoon break at 3 or 3:30 p.m. Each break was for 15 to 20 minutes. Employees working in the crane, together with their foremen,

normally took their breaks in the control room of the crane. The employees preferred this location because the control room was clean and ventilated, whereas their immediate work areas were often hot, dark, and dirty. Employees working on the ground usually took their breaks on the ground.

Employee Bill Wilson testified in sum as follows. Beginning in late April, Foreman Pilcher excused him from working on Saturday mornings to enable him to attend a welding course. Wilson missed work on 2 or 3 days because of illness and was late for work a couple of times. During his illness he called in to report that he would be absent but could not reach anyone. The Company never warned or disciplined him or told him that he had an attendance or any other problem.

On March 9, before the employees began work, Company Supervisor Bartholomew went to the union hall at Adams' request. Adams showed Bartholomew a proposed arrangement whereby the Company would pay union scale and benefits, but the Company, according to Adams, could save money by using a larger complement of electricians, including apprentices, and thereby eliminating or reducing overtime. Bartholomew seemed impressed and agreed to explain the proposal to Company President Foley. A few weeks later, not having heard from the Company, Union Business Manager Adams called Foley. Foley said he was satisfied the way things were and did not want to sign a union contract. Foley testified that he never saw the union proposal. About 4 weeks into the job, the Company gave the electricians a 50-cent-per-hour wage increase.

Meanwhile, the union electricians on the project formed themselves into an "organizing committee." The employees met from time to time with organizer Wood at the union hall. They discussed conditions on the job. Wood testified in sum that this was a union committee, but was not authorized to take strike or other action on behalf of the Union.

On April 29, Wood drafted a letter which the committee wished to present to the Company. The letter, addressed to Bartholomew, stated as follows:

We, the undersigned employees of Foley Material Hand[li]ng, are requesting the opportunity to address our concerns that have arisen during our employment with the Company. Some of those concerns are: Wage increases and health insurance.

Due to the amount of concerns, we ask that these meetings start as soon as possible in order that these issues may be resolved.

Employees Morrissette, Quail, Wilson, Stephenson, and Ames signed the letter. Morrissette and Stephenson personally presented the letter to Bartholomew.

Some of the employees testified that they previously discussed their concerns with their supervisors. Morrissette testified that Bartholomew said he would try to get the employees a \$1-per-hour raise, but they received only a 50-cent-per-hour increase. Wilson expressed concern to Foreman Pilcher about a reported radiation spill on the project.

Bartholomew told Wood and Adams that he received the employees' letter. He did not otherwise respond to the letter. Having received no response, the "organizing committee" decided to conduct informational picketing at the project site. Adams provided them with blank picket signs, and advised

them concerning the wording on the signs. The signs, as written by the employees, stated that the Company paid unfair wages and no health benefits.

#### B. *The Picketing and Bartholomew's Response*

On May 10 picketing commenced on public property adjacent to a shipyard gate leading to the parking lot used by the employees. The picketing continued on May 11–14 and 17–18, following the same pattern. On each day, two employees conducted the picketing from about 6 a.m. to about 6:42 a.m. The employees then reported to work. Organizer Wood was present during the picketing. Employees Morrissette and Stephenson picketed on May 10, Wilson and Hosey on May 11, and Ames and Quail on May 12. There were no work stoppages during, or as a result of, the picketing. Wood testified that he reported to Business Manager Adams on the picketing, because Adams “wanted it done properly.”

On May 11 Bartholomew went to the union hall and spoke to Adams and Wood. He was visibly angry. He said Foley did not want to see his name on the street. Bartholomew said that if the picketing did not stop, he would get the union members and “troublemakers” off the job, by reduction in force or some way. He said he would take away the employees’ breaks, and quit driving them to and from the jobsite. He said he could get employees from a nonunion firm.

Earlier that day, at 7:15 a.m., Bartholomew assembled the company employees on the project to a meeting in the crane control room. Foremen Pilcher, Hawkins, and another supervisor were present. The General Counsel’s witnesses, employees Morrissette, Quail, Wilson, Hosey, and Stephenson, and the Company’s witness, Foreman Pilcher, testified concerning the meeting. There is no material dispute about what was said at the meeting, except in one respect, which will be discussed. Pilcher, in his testimony, partially corroborated the testimony of the employee witnesses, did not contradict their testimony in other material respects and did not purport to give a full account of the meeting. I find that the testimony of the employees together reflects the substance of what transpired at the meeting.

Bartholomew’s remarks were consistent with and substantially the same as what he later told Adams and Wood. He was, as with the union officials, visibly angry.

Bartholomew said that if the employees did not want to work under current conditions on the job, they could leave. He showed them a stack of resumes from another nonunion firm, and said he could use these to replace the employees. Bartholomew said the picketing was hurting Foley’s reputation, and he wanted it stopped. He said if the picketing did not stop, he would get rid of the employees, or take away their breaks and make them walk to the jobsite on their own time. He said he would make this a “minute” job (i.e., that employees would have to account for every minute of their time). Bartholomew suggested that the employees were puppets of the Union.

Employees Morrissette and Wilson spoke up at the meeting in response to Bartholomew. Morrissette denied that they were union puppets. He said that he needed more money and insurance. Wilson asked if the Company wanted volunteers for layoff. Bartholomew asked if Wilson was some kind of a joker. He added that he did not, because he had a job to finish.

#### C. *Layoff of Morrissette and Wilson*

As indicated, the following morning (May 12) Ames and Quail resumed the picketing. That morning, after the employees reported to work, the Company laid off Morrissette and Wilson. Morrissette testified that Foreman Hawkins, his supervisor, gave no reason, but told him that Foreman Pilcher said he believed Morrissette was an instigator and troublemaker from the start of the job. This was the first time that Morrissette heard any complaint about his attitude there. Morrissette testified that Bartholomew previously told him he was doing fine. Wilson testified that Pilcher, his supervisor, told him they had to get rid of a couple of people because there was not much to do then, but he hated to get rid of Wilson because Wilson was one of his best workers. Pilcher, in his testimony, did not deny any of the statements attributed to him by Morrissette and Wilson. Foreman Hawkins was not called as a witness in this proceeding. I credit the testimony of Morrissette and Wilson.

After the Union filed the present unfair labor practice charge, Company President Foley requested Bartholomew to submit letters of explanation concerning the termination of the four alleged discriminatees. With regard to Morrissette and Wilson, Bartholomew asserted in sum as follows. On May 12 he decided that the job was overmanned by journeyman electricians. There were not enough helpers. He and Pilcher decided that seven or eight journeymen working together was not beneficial. He had to make a decision. He selected Wilson for layoff because of excessive absenteeism and tardiness, and Morrissette “due to poor attitude towards on site supervision and non union F.M.H. [the Company] . . . .”

In the absence of any other explanation for Morrissette’s allegedly poor attitude toward supervision and the nonunion company, Bartholomew’s explanation constituted a virtual admission that he selected Morrissette for layoff because of his outspoken role in complaining about terms and conditions of employment, in particular, the wage rate and lack of health insurance coverage.

Foreman Pilcher in his testimony did not corroborate Bartholomew’s assertion that they reached a mutual decision to replace journeymen with helpers. In fact, by June 8 (less than 3 weeks after the termination of Quail and Stephenson) the Company had reduced its total complement of journeymen electricians by no more than one, if at all. On May 15, prior to the termination of Quail and Stephenson, the Company hired nonunion journeyman Gary Dye to work on the project. He continued to work on the project and intermittently on another company project until some time in October. He was employed by the Company at the time of the present hearing. Dye, a company witness, testified that during his first week, there was a “night shift with people pulling wire” (i.e., doing electrical work). As apprentices or helpers could not perform electrical work without a journeyman, it is evident that the Company had at least one unidentified journeyman working that night shift.

In early June electricians Michael Hughes and Mark Fornwald began working for the Company on the crane project. Hughes and Fornwald each testified in sum that he was a journeyman electrician and union member, that the Union suggested that he could apply for work with the Company, and that on applying for employment, he did not disclose his union membership. Hughes further testified in sum

as follows. On applying for work, he showed Foreman Pilcher his State certification, issued on April 21, 1993, indicating he was a journeyman electrician. Pilcher hired Hughes at a rate of \$11.50 per hour, which was the rate for a classified fourth-year apprentice. On the project, Hughes performed work at a journeyman level. Hughes testified without contradiction that Pilcher told him he had some trouble with the union people (employees) and had to let some of them go. Fornwald testified in sum as follows. On applying, he told Bartholomew and Pilcher that he could do journeyman work but, in response to Bartholomew's question, said he was not affiliated with any union. Fornwald was certified as a journeyman about 2 months earlier. Bartholomew hired Fornwald at a rate of \$13 per hour, which was 50-cent-per-hour less than the Company's starting rate for journeymen but substantially above apprentice rates. Fornwald assumed he was hired as a journeyman.

Hughes worked on the crane project until laid off about August 20, and Fornwald until laid off at the end of September. Pilcher testified in sum as follows. Hughes was hired as a third-year helper, and Fornwald as a top helper. Neither said he was a journeyman. Fornwald performed work including running conduit and pulling cable (i.e., journeyman level work). Hughes worked with employee Theodore Taylor, described by Pilcher as a top helper.

I credit Hughes and Fornwald. Both presented documentary evidence indicating they were journeymen electricians (Hughes presented his state certification, and Fornwald presented a union dues' receipt, dated July 7, 1994, indicating he was a journeyman wireman). Fornwald's starting rate of pay indicates that the Company either knew he was a journeyman or anticipated he would be working at a journeyman level. If Pilcher believed that Hughes was not a journeyman, then it is unlikely he would have assigned him to work with a helper. Rather, it is more probable that Pilcher would have assigned Hughes to work with one of the remaining journeymen. I find that the Company hired Hughes and Fornwald with the understanding that they were journeymen or otherwise expected to perform work at the journeyman level.

The Company, through the testimony of Dye, Pilcher, and Foley, presented or suggested other reasons why Bartholomew laid off Morrissette and Wilson on May 12. Dye testified that Pilcher told him that he was hired because of his special skills, specifically in testing and starting up the crane after the conduits were fully installed (i.e., after the work of demolition, laying of pipe, and wiring was completed).

Company President Foley, in his testimony, asserted that he played no part in the decision to terminate any of the alleged discriminatees. Rather, Foley testified in sum that his knowledge of the reason or reasons for the terminations was based on what Bartholomew told him. According to Foley, Bartholomew explained that he laid off Morrissette and Wilson "due to lack of work." Foley testified that by the first week of May, most of the major conduit runs were complete. Foley estimated that about 75 percent of this work was complete. Pilcher, not to be outdone by Foley, testified that in his opinion 90 percent of this work was completed by mid-May.

The Company's various proffered explanations, like that of the alleged imbalance between journeymen and helpers, were demonstrably fallacious. Bartholomew, in his letter of explanation, never claimed that he laid off Morrissette and Wilson

because of lack of work or because he needed someone else with expertise in startup and testing. Moreover, the Company was well aware that both Morrissette and Wilson were qualified to perform this work. Both employees indicated in their job applications that their areas of experience included electrification. No evidence was presented to indicate that the Company ever questioned either employee about whether he was competent to perform this work. Organizer Wood testified that he had previously supervised Morrissette in performing such work and knew him to be qualified. Wood further testified that the work was not a specialized skill and that nearly all journeymen are at some time required to perform setup and testing. Significantly, the Company's own production schedule, as revised on June 7, indicated that none of the work of startup and testing had been performed by that time, and that nearly all of such work was scheduled to be performed during the weeks of July 23 through September 3, in the last stages of the project. The Company's daily activity schedule indicates that startup and testing began during the week ending July 30.

As indicated, Foley testified that Bartholomew told him he laid off Morrissette and Wilson because of lack of work. Foley also testified that Bartholomew realized he did not have enough helpers. The two explanations are inconsistent. Helpers (i.e., apprentices), like journeymen, perform electrical work, albeit at a lower level of skill, and requiring greater on-the-job supervision. If there was a lack of work, then there was no need to hire more helpers.

In fact, there was ample work for all the journeymen electricians, at least through the months of May, June, and July. Morrissette testified that at the time of his termination he had been working as much as 16-hour days, working weekends, that he was running conduit, the piping was about 50-percent complete, and that there was plenty of work. Quail also testified that he was working long hours, and there was plenty of work. Hosey testified that, beginning about July 1, he was working 10 and sometimes 12 hours a day, 7 days a week, and that his schedule dropped to 6 days a week only toward the end of his employment. Hosey was not laid off. Rather, he testified that on September 26 he went on strike and did not return to the project. Fornwald testified that he was working 7 days a week, 10 hours a day, until the end of September. Quail and Hosey, in their testimony, estimated that as of mid-May, the piping, which preceded the wiring, was about 50-percent complete. Hughes testified that, when he began work on June 8, the project appeared to be about half-way completed.

The Company's own records tend to corroborate the testimony of the General Counsel's witnesses. The Company's projected construction schedule, as revised June 7, when compared to the projection as revised March 5, indicates that the project was behind schedule, evidently because of material shortages. Entries on the June 7 projection confirm that major work was performed in late May and early June, and more major work scheduled to be performed in June and July. Entries on the March 5 projection confirm that there were material shortages during April. The Company's project timebook, portions of which were presented in evidence, confirms that in July the employees were regularly working 10- and 12-hour days, working on weekends, and working as much as 74 hours a week.

I find that the Company laid off Morrisette and Wilson in reprisal for the employees' picketing and the evident leading role played by Morrisette and Wilson in complaining about existing terms and conditions of employment, including their actions in speaking up at the May 11 control room meeting. I further find that the Company hired Gary Dye and his son, "helper" Troy Dye, as replacements for Morrisette and Wilson, and subsequently hired Hughes and Fornwald as replacements for Quail and Stephenson. On the basis of the employee activity, the timing of the layoffs, and Bartholomew's threats and other statements, the General Counsel presented a prima facie case that the Company laid off Morrisette and Wilson because of the employees' union activities. As the reasons advanced by the Company for the layoffs were demonstrably false or pretextual, the Company failed to meet its burden of establishing that it would have laid off Morrisette and Wilson in the absence of the employees' union activity.

#### *D. Alleged Changes in Working Conditions*

The complaint alleges, and the answer admits, that on or about May 12 the Company changed the procedure by which employees took breaks by restricting the areas and places in which employees could take breaks. As indicated, the employee witnesses present at the May 11 control room meeting testified, in sum, that Company Supervisor Bartholomew threatened that if the picketing did not stop he would, among other reprisals, take away their breaks.

Employee Quail testified that, the day after the control room meeting, Foreman Pilcher said that the employees could take their breaks in their work areas, but even this was not allowed, and if caught, they would be terminated. Pilcher also said they could not be on the ground before 5:25 p.m., although until then they were permitted to come down from the crane about 5:15 p.m. Thereafter, Quail sneaked his breaks in his work area, deep in the crane, where it was hot and dirty. Hosey testified that Foreman Hawkins told him they were not allowed to take breaks and, if caught, they would be terminated. Hosey further testified that (like Quail) he secretly took breaks, but that later, things got lax and employees took breaks wherever they wanted. Stephenson testified that Foreman Hawkins initially said they could not take breaks, but later said they could take breaks only at their work stations. He further testified that Hawkins said they could not leave the crane before 5:25 p.m., although previously they had been permitted to leave at 5:15 p.m. Fornwald testified that when he began on the project he was told not to take breaks in the open, but that eventually breaks became more regular and the employees took them as a group.

Pilcher, the Company's only witness with respect to these matters, testified in sum as follows. He was concerned because production was dropping, although the project was proceeding on schedule. He timed the employees and found they were taking 35 to 45 minutes on their breaks. He did not keep a record of his survey. He told a couple of employees, individually, to cut down on their breaks, but did not speak to the employees as a group. About a week before the May 11 control room meeting he reported and discussed his findings with Bartholomew and Hawkins. No decision was reached, however.

Pilcher further testified in sum as follows: At the May 11 meeting Bartholomew said he was upset because of the picketing, it was hurting the Company, and he would not stand for it. He said he had given the employees "break after break," let them off early and given them rides, although he did not have to drive them to the jobsite. Bartholomew announced that therefore he was cutting out all breaks on the job and that employees caught taking a break might be terminated.

Pilcher further testified in sum as follows. Immediately following the meeting, he told the employees that he would not enforce elimination of breaks, but they should take their breaks in their work areas, because "anyway," they were losing production time. He said he would speak to Bartholomew and he did so the same day. Pilcher calmed him down. Pilcher said the employees needed breaks, but should take them at their work areas. Bartholomew agreed. Pilcher offered no explanation for the change in quitting time. It is undisputed that Bartholomew never publicly retracted or otherwise spoke to the employees concerning his statements at the May 11 meeting.

I credit the testimony of the employee witnesses, and I do not credit Pilcher's assertion that the ensuing change in break policy had anything to do with productivity. In the context of Bartholomew's remarks, including the May 12 layoffs, it is more probable that (as testified by the employees) Bartholomew said he would eliminate breaks and take other reprisals if the picketing did not stop, rather than (as testified by Pilcher) that Bartholomew flatly stated that he was eliminating breaks. No objective evidence was presented that would indicate that the practice of taking breaks in the control room adversely affected production. Quail, Hosey, and Stephenson testified in sum that when working in the crane, they needed little time (1 to 5 minutes, depending on work location or the elevator) to go between their work locations and the control room. As indicated, employees working on the ground took their breaks at their work locations. For nearly 2 months, from March 15 to May 11, employees and their foremen took breaks together in the control room. It is also significant, as indicated by the testimony of Hosey and Fornwald, that after the Company terminated Quail and Stephenson and the picketing ceased, the Company gradually restored the pre-May 11 break practice, although there was much work to be done.

I find that on and after May 12 the Company prohibited employees from taking breaks in the control room, forced them to take breaks secretly, under threat of discharge if caught, and prohibited them from leaving their work locations before 5:25 p.m., instead of the previous quitting time of 5:15 p.m., in reprisal for the employees' continued picketing. On the basis of Bartholomew's statements, and the timing of the Company's actions, the General Counsel presented a prima facie case that the Company made these changes because of the picketing. As the reason suggested by Pilcher in his testimony was demonstrably false, it follows that the Company failed to meet its burden of establishing that it would have made these changes in the absence of the employees' picketing.

#### *E. Termination of Quail and Stephenson*

The complaint alleges, and the answer denies, that about May 21 the Company discharged Quail and Stephenson. The

Company inferred by its answer that the employees quit their employment. At the hearing, however, the Company conceded that both employees were discharged. The Company's position is that "Quail and Stephenson were fired for failure to report for work." (R. Br. 19.)

The picketing, as previously described, continued through May 18. That day Quail and Stephenson conducted the picketing.

At the end of the next workday, May 19, Quail and Stephenson had a conversation with Foreman Pilcher. The substance of their conversation, as indicated by the testimony of the three participants, is substantially undisputed. The employees told Pilcher they would not be at work the next day because they were going on strike. They said they were striking because of changed conditions on the job, the layoff of Morrisette and Wilson pursuant to Bartholomew's threat, and the Company's failure to respond to the employees' April 29 letter. They said they felt they had to do this. Pilcher replied that if they did not show up, they were subject to termination. He said that if they struck they could be terminated because Virginia had a right-to-work law. Pilcher advised, but did not require the employees to "cover their butts" by calling in that they would not be at work.<sup>3</sup>

The next day, May 20, Quail and Stephenson did not report to work. Beginning at 6 a.m., they picketed at the same location where picketing was previously conducted. They used signs stating: "Foley Material Handling, unfair labor practices and below area wages," and that they were not requesting anyone else to engage in a work stoppage. Quail and Stephenson picketed until 7 a.m. (i.e., after the other employees reported to work). There were no consequent work stoppages or refusals to cross the picket line, other than that of the two picketing employees. The two employees then joined Organizer Wood, who had been present at the picketing, at breakfast at a restaurant, and went home. Quail and Stephenson testified in sum that they did not call in because they had notified Pilcher the previous day, and were not aware of any rule that required them to call in when such advance notice was given.

Organizer Wood and Business Manager Adams testified in sum as follows. The strike was not an officially sanctioned union strike, as that would require the International Union's approval and appropriate notices. The strike was a form of union activity, however, in that the employees were union members. The strike was called by the employee "organizing committee," and Wood was present at the picketing as a union observer. Adams provided the material for the signs and advised the employees with respect to the wording on the signs. Quail and Stephenson struck because the employees received no response from the Company concerning their grievances, and further because of the termination of Morrisette and Wilson, loss of breaks, and other changes in working conditions on the job. Quail and Stephenson said they would stay out 1 day and then abandon the strike and return to work. The Union did not promise that there would

be no strike. Quail and Stephenson testified, in sum, that they intended to return to work the next day.

The following day, May 21, Quail and Stephenson reported for work. They told Pilcher they were willing to return to work under existing conditions. Pilcher told them they were terminated because they did not call in. Pilcher testified that Bartholomew told him to terminate the employees because they did not show up for work and hurt work progress. Before leaving the jobsite, the employees spoke to Bartholomew. Pilcher was not present at this conversation. The employees testified in sum as follows. Stephenson asked Bartholomew why they were terminated. Bartholomew asked, "Were you here yesterday?" Stephenson answered no. Bartholomew asked, "Were you up on that hill holding that sign[?]" Stephenson answered yes. Bartholomew replied, "Well, you're out of here." Bartholomew added that they refused to work and were terminated.

In his letter of explanation to Company President Foley concerning the terminations, Bartholomew stated in sum as follows. On May 19 Quail and Stephenson told Pilcher they were going on strike. The next day, they were observed picketing with on strike signs. This was "absolute garbage." The two employees did not report for work on May 20. Bartholomew took this as "a refus[al] to work and voluntary quit," as they were physically able to work. The next day Quail and Stephenson returned to work "as if nothing happened." Bartholomew told them he considered them as quitting "because they were seen at the entrance with on strike signs and did not report to work." The employees said they never had any intention of quitting. Bartholomew replied that they did not have a job there anymore. Foley testified that he did not consider the employees' action as a strike.

Pilcher testified that the Company had a rule that required that employees call in before 8 a.m., if they did not intend to work that day, and that failure to do so was grounds for termination. In fact, the Company's own records indicate that the Company had no practice of terminating or even disciplining employees who were absent without calling in, even in the absence of prior notice. The Company's project timebook indicates that Bill Wilson was absent without calling in on April 27 and 28 and that apprentice Bart Crawford was absent without calling in on April 23. Nevertheless, Crawford remained on the project until August and, as discussed, Wilson was laid off on May 12, ostensibly because of lack of work.

Even if the Company had a call-in rule, it would make no sense to apply that rule to a situation when the employees gave prior notice that they would not be reporting to work. Rather, it is evident from the employees' May 19 conversation with Foreman Pilcher, including Pilcher's own version of that conversation, that Pilcher advised the employees to protect their jobs by calling in the next day in order to provide some excuse for their absence, other than their assertion that they were going to strike. Pilcher made it clear that the Company regarded striking as grounds for termination, ostensibly because Virginia had a right-to-work law.

I find that the Company discharged Quail and Stephenson because they said they would strike on May 20, picketed at the jobsite that day, and were ostensibly absent from work that day because they were on strike. In sum, the Company discharged the employees because of the declared reason for their absence, rather than their mere failure to report to work.

<sup>3</sup>In his letter of explanation concerning the terminations of Quail and Stephenson, Bartholomew stated that the employees told Pilcher they would not return to work until the alleged unsatisfactory company policies were resolved. None of the three participants to the conversation corroborated this assertion, however.

On the basis of the employees' statements and course of conduct, and the statements of Pilcher and Bartholomew, the General Counsel presented a prima facie case that the Company terminated Quail and Stephenson because of the proffered reason for their absence (i.e., that they were on strike). As the reasons advanced by the Company for their terminations (i.e., failure to call in or mere failure to report to work) were demonstrably pretextual, the Company failed to meet its burden of establishing that it would have terminated the employees in the absence of their asserted strike.

I further find that Quail and Stephenson did in fact engage in a strike on May 20, specifically, a concerted refusal to work on that day, in protest over their asserted grievances against the Company, and that the Company was on notice of that fact. See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). As *Washington Aluminum* makes clear, it is not necessary, as a requirement for such conduct to constitute protected concerted activity, that the employees picket, continue to picket, or otherwise post themselves at or in the vicinity of the employer's premises or their place of work. Rather, as in *Washington Aluminum*, such activity may be statutorily protected even if the employees simply decide to go home. Therefore, I attach no significance to Quail's testimony in his unemployment compensation hearing that, after picketing for 1 hour, he and Stephenson decided to take a break and they just did not return. At the present hearing, Quail explained that he meant they decided to take a break from the picketing. Their decision did not alter the declared purpose of their 1-day work stoppage, namely, as a means of protesting alleged unfair labor practices and unsatisfactory terms and conditions of employment.

As *Washington Aluminum*, supra, 370 U.S. at 12, also makes clear, it is not necessary that all employees participate in the work stoppage, for the stoppage to constitute protected concerted activity. Two or more employees may engage in a concerted and protected work stoppage. As is central to the holding in *Washington Aluminum*, it is also not necessary for the employees to afford their employer an opportunity to redress their grievances before walking out, although in the present case, the employees provided such opportunity.

#### F. *Subsequent Correspondence Between the Terminated Employees and the Company*

Following their respective terminations, Morrisette, Wilson, Quail, and Stephenson each sent a letter to Company President Foley requesting reemployment on the crane project. Foley did not respond to the letters.

In mid-June, Ames, Hosey and Futrell, the three remaining openly union electricians on the project, signed and presented Company Supervisor Bartholomew with a letter similar to that presented him by the union employees on April 29. The letter requested meetings to discuss the employees' concerns, including health insurance and morning and afternoon breaks. By letter dated June 18, Foley responded to the employees' letter. Foley requested that the employees state their concerns in writing, and in full detail, for him to determine whether a meeting should be held.

By letter dated June 23 the three employees responded to Foley's letter. The employees stated, in sum, that they wanted a \$1.50-per-hour wage increase, health insurance coverage for all employees, compensation for breaktime taken away during the period from May 12 to June 18, rehire of

Morrisette, Wilson, Quail, and Stephenson, who were allegedly terminated because of their protected concerted activities, and a pension fund.

By letter dated July 21 Foley replied to the employees as follows:

I have your letter of June 23, 1993. I appreciate the final sentence in your letter stating that if I need additional information to please send you a letter and you will respond. This letter is to request from you, in writing, additional information which I need:

1. Which of you, if any, has been designated as the exclusive collective bargaining representative for "all employees"?

2. If there has been such a designation, how has it been accomplished? That is, has there been an NLRB designation, or have you been designated by employees, etc.

3. What do you mean when you refer to "all employees"? Who does "all employees" include?

4. (a) Do you represent a union, and if so, what union?

(b) Are you union officers or agents?

(c) Is any union itself claiming that it is the exclusive bargaining agent for employees?

(d) If so, on what basis is this claim made by such union?

(e) Have you or such union received signed and dated authorization cards from a majority of employees authorizing you or a union exclusive representation rights?

5. Your letter refers to "protected concerted activities" twice. Please specify, completely, in detail, giving names, dates, substance of conversations, events and locations relevant to each and every "protected concerted activity" to which you refer, but which you have not yet so defined.

6. (a) Did you or the union authorize, request, aid, or encourage Msrs. Quail and Stephenson to walk off the job at any time?

(b) If so, why and by what authority?

7. Were you hired for a limited period of time, such as for no more than six months?

Thank you for your cooperation, and as you have stated you will do, I await your full and complete written response to all of the above requested information, which I ask of you.

As of July 21, Ames, Hosey, and Futrell were still working for the Company on the project. The General Counsel contends that items 4(c), (d), (e), 5, and 6 of Foley's letter constituted unlawful interrogation.

#### G. *Analysis and Concluding Findings*

The Company does not dispute that the union employees, including the alleged discriminatees, were entitled to the protection of the Act, or that the employees' picketing was activity protected by the Act, or that the employees had a statutorily protected right to engage in a strike against the Company. Rather, the Company contends, in sum, that this case turns on questions of credibility, and that I should find that Morrisette and Wilson were laid off for lack of work, Quail

and Stephenson were fired for refusal to report to work, and that the Company changed its employee break procedure to facilitate production. For the reasons previously discussed, I am rejecting those contentions, finding, in sum, that the Company laid off Morrisette and Wilson and changed working conditions on the job, in reprisal for their picketing and expressions of grievances, and terminated Quail and Stephenson because they declared, and subsequently engaged in, a 1-day strike against the Company.

If the union members were initially hired as nonunion employees, without having been referred through the Union, they plainly would be entitled, as employees, to full protection under the Act. As union members, they were and are entitled to the same protection. It is immaterial that they were union members, or referred for employment through the Union, or that a reason for their seeking employment with the Company, or even the principal reason, was to obtain a project agreement. *Windemuller Electric*, 306 NLRB 664, 668, enf'd. in pertinent part 147 LRRM 2303, 2313 (6th Cir. 1994). Moreover, the union members were not paid organizers, they received no pay from the Union, and the Union did not control the terms or duration of their employment. Therefore, no issue is presented with respect to such matters. The union members were journeymen electricians who needed jobs. Their decision to present their grievances, and to picket and subsequently to strike, was their own.

By picketing the Company in furtherance of their grievances over wages and benefits, the employees engaged in protected concerted and union activity. Therefore, the Company violated Section 8(a)(1) and (3) of the Act by laying off Morrisette and Wilson in reprisal for the picketing and the evident leading role played by them in complaining about existing terms and conditions of employment. *Wolfie's*, 159 NLRB 686, 694-695 (1966). Company President Foley himself admitted that he regarded the picketing as union activity, asserting his belief that the Union was thereby "double-crossing" him. The Company further violated Section 8(a)(1) and (3) by prohibiting employees from taking breaks in the control room, forcing them to take breaks secretly, under threat of discharge if caught, and prohibiting them from leaving their work stations before 5:25 p.m., all in reprisal for the employees' continued picketing. See *Indiana Hospital*, 315 NLRB 647 fn. 3 (1994). I further find that the Company violated Section 8(a)(1) when Bartholomew threatened the assembled employees that the Company would replace or otherwise get rid of them, take away their breaks, make them walk to the jobsite on their own time, or make this a "minute" job, if the picketing did not stop.<sup>4</sup>

I further find that Quail and Stephenson engaged in protected concerted and union activity by engaging in a 1-day

<sup>4</sup>Morrisette testified that on May 10, the first day of picketing, Foreman Hawkins said that if Bartholomew found out about it, something would be done. Counsel for General Counsel, in her brief (G.C. Br. at 10, fn. 5), moves to amend the complaint to allege that this statement was "an implied threat" by the Company "to its employees of unspecified reprisal if they engaged in union and protected concerted activities." As indicated, Hawkins was not called as a witness in this proceeding. The complaint does not charge Hawkins with any other unfair labor practices. I find that the Company was not given adequate notice of the proposed allegation. Hawkins' statement may be considered as background evidence. However, the motion to amend the complaint is denied.

strike against the Company. *NLRB v. Washington Aluminum Co.*, supra. There was no collective-bargaining contract in effect between the Union and the Company covering the employees on the crane project, either with or without a no-strike agreement. Indeed, Company President Foley made it clear to Union Business Manager Adams that he did not want to sign a union contract. Even if there were such contract in effect, Quail and Stephenson would nevertheless be free to engage in their strike insofar as they were striking in protest of company unfair labor practices, specifically, the discriminatory layoffs of Morrisette and Wilson, and discriminatory changes in working conditions. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956). Therefore, I find that the Company violated Section 8(a)(1) and (3) of the Act by discharging Quail and Stephenson in reprisal for their protected activity. I further find that the Company, by Foreman Pilcher, violated Section 8(a)(1) by telling Quail and Stephenson that they could be terminated if they went on strike.

With regard to the alleged unlawful interrogation, I find that Company President Foley violated Section 8(a)(1) by questioning his employees with regard to items 4(c), (d), and (e), 5, and 6 of his July 21 letter. Foley had no legitimate reason for interrogating the employees concerning these matters, which involved the employees' protected concerted and union activities. If Foley wanted to know whether the Union was claiming representative status, and on what basis, he should have asked the Union. Foley did not give the employees any assurance against reprisal. The interrogation occurred in the context of employer unfair labor practices. In this regard, items 5 and 6 were particularly intimidating, in that the Company had terminated four employees for engaging in the activity in question.

#### CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By discriminating in regard to the tenure of employment of Carl Morrisette, William (Bill) Wilson, Timothy Quail, and Earl Stephenson and discriminatorily imposing more onerous working conditions and times of work, thereby discouraging membership in the Union, the Company has violated and is violating Section 8(a)(3) of the Act.
4. By interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act, the Company has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that the Company has committed violations of Section 8(a)(1) and (3) of the Act, I shall recommend that it be required to cease and desist therefrom and from like or related conduct, and to take certain affirmative action designed to effectuate the policies of the Act.

As the employment involved was temporary, I shall not recommend a reinstatement remedy. I shall recommend,

however, that the Company be ordered to make whole Morrisette, Wilson, Quail, and Stephenson for any loss of earnings or benefits they may have suffered by reason of the discrimination against them. I shall further recommend that the Company be ordered to expunge from its records any reference to the employees' unlawful layoff or discharge, and to inform them that its unlawful conduct will not be used as a basis for further personnel actions against them. See *Sterling Sugars*, 261 NLRB 472 (1982). Backpay shall be computed in accordance with the formula approved in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).<sup>5</sup> It will also be recommended that the Company be required to preserve and make available to the Board or its agents, on request, payroll and other records to facilitate the computation of backpay and reimbursement due.

Because the Company has completed its Newport News Shipyard crane project, I shall recommend that, in addition to posting an appropriate notice at its present office and principal place of business, the Company be directed to mail copies of such notice to all current and former employees employed on the project in 1993.

On the findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>6</sup>

#### ORDER

The Respondent, Foley Material Handling Co., Inc., Ashland, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in International Brotherhood of Electrical Workers, Local 1340, AFL-CIO, or any other labor organization, by laying off or discharging employees, imposing more onerous working conditions or times of work, or otherwise discriminating against employees, because they engage or participate in picketing, strike activity, protests

<sup>5</sup>In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

<sup>6</sup>If 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.

concerning terms or conditions of employment, or other lawful union or concerted activity.

(b) Threatening employees with such reprisal because, or if, they or other employees engage in lawful union or concerted activity.

(c) Interrogating employees concerning their union activities, affiliation or support, or that of other employees.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

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

(a) Make whole Carl Morrisette, William (Bill) Wilson, Timothy Quail, and Earl Stephenson for any losses they suffered by reason of the discrimination against them as set forth in the section of this Decision entitled "The Remedy."

(b) Expunge from its files any reference to the layoff or discharge of Morrisette, Wilson, Quail, and Stephenson, and notify each of them in writing that this has been done and that evidence of such unlawful actions will not be used as a basis for future personnel actions against them.

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

(d) Post at its office and principal place of business in Ashland, Virginia, copies of the attached notice marked "Appendix."<sup>7</sup> Copies of the notice, on forms provided by the Regional Director for Region 5, 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) Mail copies of the aforesaid notice, postage prepaid, to each of its present and former employees who were employed on its Newport News Shipyard crane rebuild project at any time during 1993.

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

<sup>7</sup>If 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."