

**Freeman Decorating Company and International Association of Stage and Theatrical Employees, Greater New Orleans Stage, Motion Picture, Television and Exhibition Employees Local 39, AFL-CIO**

**GES Exposition Services, Inc. and International Association of Stage and Theatrical Employees, Greater New Orleans Stage, Motion Picture, Television and Exhibition Employees Local 39, AFL-CIO**

**Expo Services, a Division of David H. Gibson Co., Inc., d/b/a Expo Services/USA and International Association of Stage and Theatrical Employees, Greater New Orleans Stage, Motion Picture, Television and Exhibition Employees Local 39, AFL-CIO**

**Expo Emphasis, L.L.C. and International Association of Stage and Theatrical Employees, Greater New Orleans Stage, Motion Picture, Television and Exhibition Employees Local 39, AFL-CIO**

**Convention Service, Inc. of Pennsylvania and International Association of Stage and Theatrical Employees, Greater New Orleans Stage, Motion Picture, Television and Exhibition Employees Local 39, AFL-CIO**

**Sho-Aids, Inc. and International Association of Stage and Theatrical Employees, Greater New Orleans Stage, Motion Picture, Television and Exhibition Employees Local 39, AFL-CIO**

**Czarnowski Display Service, Inc. and International Association of Stage and Theatrical Employees, Greater New Orleans Stage, Motion Picture, Television and Exhibition Employees Local 39, AFL-CIO**

**W. H. Bower Spangenberg, Inc. and International Association of Stage and Theatrical Employees, Greater New Orleans Stage, Motion Picture, Television and Exhibition Employees Local 39, AFL-CIO**

**Renaissance Management, Inc. and International Association of Stage and Theatrical Employees, Greater New Orleans Stage, Motion Picture, Television and Exhibition Employees Local 39, AFL-CIO**

**Zenith Labornet, Inc. and International Association of Stage and Theatrical Employees, Greater New Orleans Stage, Motion Picture, Television and Exhibition Employees Local 39, AFL-CIO**

**Eagle Management Group, Inc. and International Association of Stage and Theatrical Employees, Greater New Orleans Stage, Motion Picture, Television and Exhibition Employees Local 39, AFL-CIO**

**United Brotherhood of Carpenters & Joiners of America, Louisiana Carpenters Regional Council, AFL-CIO and International Association of Stage and Theatrical Employees, Greater New Orleans Stage, Motion Picture, Television and Exhibition Employees Local 39, AFL-CIO.** Cases 15-CA-14420-1, 15-CA-14420-2, 15-CA-14420-3, 15-CA-14420-4, 15-CA-14420-5, 15-CA-14420-6, 15-CA-14420-7, 15-CA-14420-8, 15-CA-14598, 15-CA-14608, 15-CA-14609, 15-CA-14610, 15-CA-14693, 15-CA-14722-3, 15-CA-14722-4, 15-CA-14722-6, 15-CA-14722-7, 15-CA-14722-8, 15-CA-14722-9, 15-CA-14722-10, 15-CA-14722-11, 15-CA-14722-12, 15-CA-14722-13, 15-CA-15079, 15-CB-4392, 15-CB-4422, and 15-CB-4535

September 28, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS  
LIEBMAN  
AND WALSH

On March 31, 1999, Administrative Law Judge Pargen Robertson issued the attached decision. The General Counsel, Charging Party International Association of Stage and Theatrical Employees, Greater New Orleans Stage, Motion Picture, Television and Exhibition Employees Local 39, AFL-CIO (Local 39 or the Local), 10 of the Respondent Employers, and Respondent Carpenters, Louisiana Regional Council, AFL-CIO (the Carpenters) all filed exceptions and supporting briefs.<sup>1</sup> Local 39, Respondent GES Exposition Services, Inc. (GES), and the Carpenters filed answering briefs; and Local 39 and the Respondent Employers filed reply briefs.

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

<sup>1</sup> GES Exposition Services, Inc. filed its own exceptions and briefs in this proceeding. The other Respondent Employers filed their exceptions and briefs jointly. (Eagle Management Group, Inc. did not initially join but subsequently adopted the other Respondent Employers' exceptions and briefs.) Expo Emphasis, L.L.C. is in bankruptcy and did not file exceptions. In addition, while the case was pending before the Board, Respondent W. H. Bower Spangenberg, Inc. filed for bankruptcy. Spangenberg's trustee in bankruptcy subsequently negotiated a settlement of the case with the Regional Director, which the bankruptcy court approved. Accordingly, on June 4, 2001, the Board granted a joint motion by Spangenberg and the General Counsel to sever and remand the case with respect to Spangenberg for the purpose of settlement.

The Board has considered the decision and the record in light of the exceptions and briefs<sup>2</sup> and has decided to affirm the judge's rulings,<sup>3</sup> findings,<sup>4</sup> and conclusions as modified, and to adopt the recommended Order as modified and restated below.<sup>5</sup>

In essence, we affirm the judge's key finding that the alleged discriminatees did not lose their statutory protection as a result of the application of Section 8(d) of the Act to the labor dispute involved in this case. We also affirm his finding that the Respondent Employers violated Section 8(a)(3) and (1) when they announced the terminations of the alleged discriminatees, and Section 8(a)(5) and (1) when they withdrew recognition of Local 39 as the collective-bargaining representative of unit employees. Further, we adopt the judge's findings that Zenith Labornet, Inc. (Zenith) and Eagle Management Group, Inc. (Eagle) violated Section 8(a)(5) and (1) by refusing to provide relevant information to Local 39; that GES and Freeman Decorating Company (Freeman) violated Section 8(a)(2) and (1) by recognizing the Carpenters as the collective-bargaining representative of their respective employees at a time when both Employers were still obligated to bargain with Local 39; and that the Carpenters violated Section 8(b)(1)(A) by acting as those employees' collective-bargaining representative. We also find, contrary to the judge, that GES, through its counsel, violated Section 8(a)(1) and the rule in *Johnnie's Poul-*

*try*<sup>6</sup> by interrogating employee witnesses in preparation for this proceeding without the required safeguards. We reverse, on procedural grounds, the judge's finding of violations regarding additional individuals whom the General Counsel consistently refused to allege as discriminatees.

### I. BACKGROUND

Before June 1997,<sup>7</sup> Local 39 had virtually identical contracts with each of approximately 80 employers, including the 11 Respondent Employers, providing installation and related services for convention and trade show exhibitions in the New Orleans area.<sup>8</sup> The two largest Respondent Employers, Freeman and GES, operated as general service contractors; the others operated in a more limited installation/removal capacity.

The contracts required the employers to obtain employees exclusively from Local 39's hiring hall. For the period including 1997 and preceding years, the hiring hall had a registry of more than 2300 journeymen and helpers, including both union members and nonmembers.<sup>9</sup> As a matter of contract, anyone registered with Local 39 could be referred to any signatory employer. However, in sending a work order to the hiring hall a signatory employer could request a number of individuals by name. Although those requested by name could comprise only a specified fraction of the total number of referrals requested, in practice many registrants tended to get referred repeatedly to the same employer. Some had never been referred to work for any of the 11 Respondent Employers before the events at issue. Given the nature of the convention business, an installation or removal operation for which individuals would be referred was for a finite duration, as short as a single day.

All of Local 39's contracts with the Respondent Employers expired on June 30. For some time before that date, some or all of the Respondent Employers—particularly Freeman, Czarnowski, CSI, Sho-Aids, and Eagle—were dissatisfied with Local 39's hiring hall due to its alleged inability to refer sufficient numbers of qualified individuals. In February, at a prenegotiation

<sup>2</sup> The Respondent Employers have requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

<sup>3</sup> After the hearing, the General Counsel moved to consolidate certain additional charges and to amend the complaint with respect to the contract that Respondent Employer Expo Services entered into with the Carpenters in December 1997, and certain alleged coercive activities in connection with the signing of Carpenters' authorization cards. The judge denied these motions and also found that the charges concerning Expo Services' contract with the Carpenters were time-barred under Sec. 10(b) of the Act. We deny the General Counsel's exceptions on these issues for the reasons stated in the judge's decision, and because (with respect to the motions to consolidate and amend) the judge acted within the scope of his discretion.

In addition, the Respondent Employers have moved to strike two briefs filed by, respectively, the General Counsel and Local 39 because these filings allegedly contained a smaller-than-usual font and violated the page length, footnote, and spacing limitations established under Board Rules 102.46(b)(1), 102.46(d)(1), and 102.46(j). We find no merit in these contentions, and we accordingly deny the motions to strike.

<sup>4</sup> The General Counsel, Local 39, and the Respondents have each excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>5</sup> In the absence of exceptions, we adopt the judge's decision and recommended Order with respect to Expo Emphasis.

<sup>6</sup> 146 NLRB 770 (1964).

<sup>7</sup> Unless otherwise indicated, all dates are in 1997.

<sup>8</sup> Local 39's contracts uniformly defined the covered employees and the Union's work jurisdiction as including "those employees who are engaged in the installation, dismantling and operation of scenery, curtains, properties, electrical effects and the operation of spotlights; installation and dismantling of exhibits, displays, booths, decorations; and the installation, dismantling and operation of sound accessories, motion picture, T.V. and video tape productions where the Company has the contract and responsibility for the installation, dismantling and operation of such equipment."

<sup>9</sup> The record does not establish the precise period of time over which these 2300 individuals were registered with Local 39's hiring hall.

meeting of industry employers, including the Respondent Employers, Freeman Vice President Stephen Hagstette raised the question of whether there was any legal way to “fire the Union,” to which the employers’ counsel replied that this was possible “if certain things happen.” The possibility of using the Carpenters as an alternative source of referrals was also discussed. By March, the Respondent Employers’ counsel had begun “preliminary preparation of proposals and legal research into whether the employer group could realistically entertain overtures by competing unions to provide labor.” In addition, the employers’ demand for increased discretion to select individuals referred by Local 39 and to recruit employees from alternative sources became a key issue in the 1997 contract negotiations.

In April, Local 39 sent timely notice to the Respondent Employers of its intent to renegotiate the contracts. Bargaining proceeded over the following 2 months and, consistent with past practice, the 11 Respondent Employers coordinated their bargaining activities.<sup>10</sup> Although other employers whose contracts with Local 39 were expiring reached new agreements over this period, all of the Respondent Employers’ contracts expired on June 30 without successor agreements being reached. On that date Local 39 rejected the Respondent Employers’ latest joint offer and took a strike vote. Beginning on July 1, Local 39 refused to make referrals in response to the Respondent Employers’ work requests; by July 2 it had set up picket lines at the New Orleans Convention Center and at some Respondent Employers’ offices and warehouses. The record indicates that as of June 30, Local 39 had 446 journeymen and 1885 helpers on its referral roster. Because Local 39 was still bargaining with some other employers, it was not clear to many of Local 39’s registrants, at least at the outset, which employers were being struck and which were not.<sup>11</sup>

For the next 3 weeks, Local 39 referred no registrants from its hiring hall to any Respondent Employer. The Local did refer registrants in the established manner to other employers with whom it had reached new agreements, although the convention business in New Orleans

was relatively slow during this period.<sup>12</sup> From the onset of the strike until July 22, no registrants with Local 39’s hiring hall contacted the Respondent Employers to seek work or to disassociate themselves from the strike. Local 39 and the Respondent Employers held a bargaining session on July 13 or 14, at which the Respondents submitted and Local 39 rejected another contract proposal.<sup>13</sup> During the first 3 weeks of the strike, several of the Respondents conducted some convention operations and complained of incidents of individual misconduct that allegedly occurred on the picket lines.

On July 15, some of the Respondent Employers, including Freeman and GES, met with the Carpenters to discuss an “alternative employment source.” At that meeting the Carpenters’ representatives expressed interest in a referral relationship but said they did not want a merely “temporary” arrangement, which would end with the conclusion of Local 39’s strike.

Between July 15 and 22, the Respondent Employers made inquiries with the Federal Mediation and Conciliation Service (FMCS) to determine whether Local 39 had filed the written notice with that agency required by Section 8(d)(3) of the Act.<sup>14</sup> They were informed that no such notice was on file. At a bargaining session on July 22, the Respondent Employers raised this issue and refused to bargain further unless Local 39 could produce a copy of a timely filed 8(d)(3) notice. Later the same day, Local 39’s counsel informed the Respondent Employers by telephone message that he “couldn’t locate” a copy of the notice, which he claimed to have sent. The judge found from the evidence, and we agree, that the FMCS did not receive the required notice from Local 39 before

<sup>12</sup> In fact, the record establishes that on July 1, the day the strike began, only Freeman and GES employed referrals from the hiring hall. This employment was limited to three individuals, none of whom are included among the alleged discriminatees.

<sup>13</sup> We will refer to the proposal rejected by Local 39 at this session as the July 14 proposal.

<sup>14</sup> With respect to FMCS, Sec. 8(d) provides, in relevant part:

[W]here there is in effect a collective-bargaining contract . . . the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification.

....

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later .

<sup>10</sup> There is no contention that the Respondent Employers engaged in multiemployer bargaining in a single overall unit.

<sup>11</sup> Donald Gandolini, Local 39’s business agent who was one of the two picket captains for the strike, testified that at first he himself “didn’t know which ones they [the struck employers] were,” and that due to the other negotiations that were going on “it wasn’t until over a period of time that we determined which ones were basically signing with us and which ones were not.” Most of the signs displayed on Local 39’s picket lines listed seven employers—Freeman, GES, Czarnowski, Expo Emphasis, Convention Services, Inc., Expo Services, and Spanenberg—as the targets of the strike.

July 22, and that the strike consequently did not comply with the provisions of Section 8(d).<sup>15</sup>

A few hours later, eight of the Respondent Employers (commonly referred to as the “Big Eight,” including Freeman and GES) faxed a letter to Local 39 noting the Union’s failure to comply with Section 8(d) and stating that in consequence “all employees covered under the Local 39 Labor Agreement with any of the signatory employers indicated below are hereby terminated for participating in an illegal strike.” This letter was jointly signed by representatives of each of the Big Eight Respondents. The letter also stated that “we intend to operate our business by utilizing other sources for our employment needs,” and that “[w]hile we regret having to take such drastic action . . . we have assessed the actions of the Union and its members, and we feel our response is warranted and appropriate.” Witnesses for five of the eight Respondent Employers who were signatory to the July 22 letter—Freeman, Sho Aids, Czarnowski, Expo Emphasis, and Convention Services, Inc.—testified that one of their purposes in sending it was to “fire” or “discharge” Local 39, or to “terminate” the Employer’s relationship with Local 39 and with the “employees covered under the Local 39 Labor Agreement.” Witnesses for two of the other signatories—Expo Services and Spangenberg—testified that they considered their relationship with Local 39 terminated after the letter was sent.

Over the next few days, the Big Eight Respondent Employers mailed copies of the July 22 letter to as many individuals represented by Local 39 as they could locate. To compile their mailing list of terminees, the Respondents used the names and addresses appearing on three different lists. By far the longest, which they obtained from the IATSE Local 39 Health and Welfare Fund, contained the names of 2663 individuals for whom 1 or more of the approximately 80 employers under contract with Local 39 had forwarded contributions to the fund. Freeman Vice President Hagstette, who requested a copy of this list on behalf of the Big Eight Respondents on July 22, confirmed that the list was not confined to employees who had worked for the Respondent Employers but was a list of “everybody that worked through the Local based on the hours that had been paid to the Fund.” The two shorter lists included the employees whom Local 39 had previously referred to Freeman and GES, respectively.<sup>16</sup>

<sup>15</sup> A labor organization that calls a strike less than 30 days after notifying the FMCS of a dispute violates Sec. 8(d)(4) and also Sec. 8(b)(3). *Retail Clerks Local 219*, 120 NLRB 272 (1958), *enfd.* 265 F.2d 814 (D.C. Cir. 1959). In view of Local 39’s failure to provide timely notification to the FMCS, the General Counsel and Local 39 do not contend that the strike that began on July 1 was lawful.

<sup>16</sup> The actual time periods covered by the three lists were not established in the record.

Each person named on any one of these three lists was mailed a copy of the discharge letter.

Before July 22, some Respondent Employer supervisors had recognized former employees who appeared on Local 39’s picket lines. However, the judge found from the credited evidence, and we agree, that in compiling their mailing list for the discharge notice, the Respondent Employers made no effort to ascertain whether any individual on the list had actually participated in the strike or committed misconduct of any kind.

On July 23 or 24, GES Vice President Singer had a telephone conversation with IATSE International President Tom Short, in which Short said that Local 39 would accept any offer from the Respondent Employers that was still on the table. Singer replied that the last offer had been withdrawn and there was no offer on the table; that “we no longer recognize Local 39”; and that GES had terminated “all of GES’s Local 39 employees for failure to file the 8(d) notice.”

On July 26, Local 39 sent a letter to the Respondent Employers purporting to end the strike and “accept” the contract proposal that it had rejected on July 14. Local 39 and the General Counsel contend that the July 14 offer was still open for binding acceptance on July 26 because the Respondent Employers had never taken it off the bargaining table. However, in a response dated July 28, the Respondent Employers’ counsel replied in essence that the July 14 offer had been withdrawn; that they had “no obligation to bargain with Local 39”; and that “the Union’s failure to file a timely and effective 8(d) notice prior to the strike rendered the strike illegal and the strikers unprotected and subject to termination, and our clients have exercised their right to implement their termination.” Later that day, Local 39 declared an unfair labor practice strike. This strike was never formally terminated.

Zenith, Renaissance, and Eagle, who had not signed the Respondent Employers’ July 22 termination letter, sent similar letters to Local 39 on August 7, 11, and 12, respectively. These three Respondent Employers did not try to send copies of their “termination” letters to individual employees.<sup>17</sup> Witnesses for these Respondent Employers, like the others, each testified that their intent was to “fire” or “discharge” Local 39, or to “terminate” the Employer’s relationship with Local 39 and with the individuals Local 39 represented.

<sup>17</sup> In order to be consistent with the parties’ characterizations and the complaint allegations, we refer to the Respondent Employers’ actions as “terminations” even though, as discussed below, the actions were, in their practical effect, more in the nature of refusals to hire the alleged discriminatees in the future.

On August 19, Local 39 sent Zenith and Eagle written requests for the names of the individuals affected by their respective termination letters and other related information.<sup>18</sup> Both Employers refused to provide this information.

From July through December 1997, the Respondent Employers obtained employees from referral sources other than Local 39. After further negotiations, Freeman, GES, and Expo Services each signed a contract with the Carpenters.<sup>19</sup> GES's contract was agreed to on October 31 without a showing of majority employee support. Subsequently, on the basis of a showing of authorization cards, GES recognized the Carpenters as its employees' majority representative on November 11. Freeman entered into a similar agreement on December 1, also on the basis of a card showing.

## II. LOSS OF PROTECTED "EMPLOYEE" STATUS UNDER SECTION 8(d)

Before we consider whether the Respondents violated Section 8(a)(3), we must determine whether the employees covered by the Respondents' notice of termination lost the protection of the Act as the result of the operation of Section 8(d).<sup>20</sup> If so, then even unlawfully motivated adverse action against the employees could not be redressed under the Act.<sup>21</sup>

Section 8(d) provides, in relevant part:

Any employee who engages in a strike within any notice period specified in this subsection . . . shall lose his status as an employee of the employer engaged in the

<sup>18</sup> It is not alleged, and the record does not indicate, that Local 39 sent a similar request for information to Renaissance.

<sup>19</sup> As indicated in fn. 3, above, the General Counsel's allegation with respect to Expo Services entering into a contract with the Carpenters was found to be time-barred and is therefore not at issue here.

<sup>20</sup> As a general matter, employees who are referred through hiring halls are protected employees for the purpose of Sec. 2(3) of the Act. E.g., *Teamsters Local 357 v. NLRB*, 365 U.S. 667 (1961); *Houston Chapter, AGC.*, 143 NLRB 409 (1963), enf. 349 F.2d 449 (5th Cir. 1965), cert. denied 382 U.S. 1026 (1966). It has long been recognized that Congress made the definition of "employee" expansive in order to protect individuals in contexts outside direct employment relationships. E.g., *NLRB v. Town & Country Electric*, 516 U.S. 85, 90-92 (1995); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 564 (1978); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 190-193 (1941).

<sup>21</sup> As discussed below, the judge found that the Respondent Employers discharged the discriminatees for the unlawful purpose of terminating their bargaining relationship with Local 39, rather than to punish employees for engaging in an illegal strike. Accordingly, in the judge's view, Sec. 8(d) did not operate to deprive the discriminatees of protected status under the Act. However, Sec. 8(d)'s loss-of-status provision, by its terms, is operative even if the employers' motive was unlawful within the meaning of Sec. 8(a)(3). Sec. 8(a)(3) therefore is relevant here only if the alleged discriminatees are found not to have lost their statutory protection.

particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act.

Local 39 failed to timely notify the FMCS of the contract disputes here. The Respondents contend that, pursuant to Section 8(d), all of the employees covered by its notice of termination forfeited their status as protected "employees" under the Act by engaging in an unlawful strike. In the Respondents' view, after the strike began, each registrant was required to contact each of the 11 Respondent Employers to seek work and affirm that he/she was not a strike participant. Since none of the alleged discriminatees met this requirement, the Respondents argue each was subject to immediate "termination," i.e., disqualification from future employment by every Respondent Employer.

We reject the Respondents' position, based on our interpretation of Section 8(d) and our application of that reading to the unusual facts of this case. For the reasons that follow, we conclude that Section 8(d) requires the existence of an actual employment relationship before a loss of protected status can occur as the result of engaging in an unlawful strike. Because the loss of the Act's protection is involved, it is appropriate that the burden of proof fall on the purported employer to show both the existence of an actual employment relationship and engagement in a strike. Here, the Respondent Employers cannot show either element necessary to establish a loss of protected status.

The Respondents correctly observe that the Board has applied Section 8(d)'s loss-of-status provision on several occasions. See *Bechtel Corp.*, 200 NLRB 503 (1972), and *Marathon Electric Mfg. Corp.*, 106 NLRB 1171 (1953), enf. 223 F.2d 338 (D.C. Cir. 1955), cert. denied 350 U.S. 981 (1956). However, in previous cases there was no question that the alleged discriminatees were actually employed by the respondent employer at the time and were engaged in an unlawful strike. We have not applied the loss-of-status provision to individuals like those involved here, who at some point had been referred for work through the Union's hiring hall on a project-by-project basis and some of whom never had an employment relationship with any of the Respondents.<sup>22</sup>

### a. *The loss of protected status under Section 8(d)*

The loss-of-status provision in Section 8(d) is carefully circumscribed. It refers explicitly to an employee "who engages in a strike"; to the employer who is "engaged in the particular labor dispute"; and to the employee's loss of status "as an employee of the employer" so engaged. Because eligibility for the Act's protection is at issue, the

<sup>22</sup> In addition, *Bechtel* and *Marathon* each involved a strike that was unlawful due to the union's violation of both Sec. 8(d)(1)'s 60-day notice-to-employer requirement and a no-strike clause in a CBA.

burden of establishing these criteria and the resulting loss of protected status is properly placed on the party asserting it.<sup>23</sup>

We read the language of Section 8(d) to require that before an individual can be affected by the loss-of-status provision, he must be actually employed by the employer who is the subject of the unlawful strike. Only someone who first *has* the status of an employee of a particular employer can *lose* that status, by virtue of engaging in an unlawful strike within the notice period. By the same token, where the loss-of-status provision is operative, it deprives the employee of protected status only with respect to that employer.<sup>24</sup>

Section 8(d) also refers to an employee “who engages in a strike” within the notice period. We read that language to require a volitional act by the employee (deliberately withholding labor) sufficient to make the employee complicit in the unlawful strike. We need not decide the precise contours of engaging in a strike for purposes of Section 8(d) because, as we will explain, the facts here do not suggest a volitional act of any sort on the part of the discriminatees. Without more, simply having been represented by a union that calls an unlawful strike will not suffice to trigger the “loss of status” provision.

This interpretation of the language of Section 8(d) is consistent with the Supreme Court decisions construing that section. In several different contexts, the Court has construed the section narrowly, noting that “we must not

<sup>23</sup> It is well established that the party claiming the benefit of one of the recognized exceptions to Sec. 2(3)’s definition of protected “employee” has the burden of showing that the exception is applicable. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 709 (2001). This burden allocation is derived in part from the general principle that one who claims the benefits of a statutory exception has the burden of proving it is applicable. *Id.*

<sup>24</sup> Our dissenting colleague argues that an actual employment relationship is unnecessary for the loss-of-status provision to apply. His interpretation of the language of Sec. 8(d), however, turns on an artificial division of the relevant sentence into a broad “‘coverage’ portion” and a narrow “‘consequences’ portion.” In our view, the sentence should be read as an integrated whole. And Sec. 2(3), invoked by our colleague, actually supports our reading of the loss-of-status provision.

Sec. 2(3) provides that the “term ‘employee’ shall include any employee *and shall not be limited to the employees of a particular employer*, unless the Act explicitly states otherwise.” The loss-of-status provision in Sec. 8(d) is such an explicit statement. Its reference to “*any employee who engages in a strike*” must be read in light of both the provision as a whole—which speaks in terms of a loss of “status as an employee of the employer engaged in the particular labor dispute”—and the language of Sec. 2(3). As a result, the phrase “any employee” in Sec. 8(d) cannot be read in isolation to refer to any employee who comes within the Act’s definition of “employee” (a status held by the workers involved in this case), but rather must be understood as referring only to an employee of a particular employer. In other words, the loss of protected status presumes the existence of an actual employment relationship.

be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.”<sup>25</sup> Indeed, in *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956), the Court specifically interpreted the loss-of-status provision not to affect employees who engaged in an unfair labor practice strike within Section 8(d)(1)’s 60-day notice-to-employer period, even though the latter provision makes no exception for unfair labor practice strikes. *Id.* at 285.

Section 8(d) is clearly intended to create a very strong incentive for unions to provide the notice required by that provision, raising a last opportunity to avoid the disruption of a strike. Where the provision applies, consequences for employees are severe—and here, the result might seem especially harsh, since it would follow from an apparent ministerial error by the Union or its counsel in failing to give notice, as opposed to some action that would suggest culpability on the part of the Union or complicity on the part of represented employees.<sup>26</sup> This case, however, does not turn on the fairness of the result the Respondent Employers seek, but on whether that result is consistent with the language of Section 8(d). As we explain, it is not.

*b. The alleged discriminatees were not “employees” of the Respondent Employers*

The Respondent Employers have not established the existence of an actual employment relationship between any of the Respondent Employers and the alleged discriminatees covered by the notice of termination. Some of these workers may have had past employment relationships with certain Respondent Employers, and some workers may have had potential future relationships with other Respondent Employers. But at the time of the strike, no actual employment relationship could be said to exist. There were none of the reciprocal rights and duties (for example, the duty to report to work and the right to be paid for work performed) that define such a relationship. As we have observed, Section 8(d) must

<sup>25</sup> E.g., *Allied Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 185 (1971) (Sec. 8(d)(4) applies only to mandatory subjects of bargaining); *NLRB v. Lion Oil Co.*, 352 U.S. 282, 288 (1957) (Sec. 8(d)(4) does not bar a strike during the term of a contract which provides for a reopener).

<sup>26</sup> The parties here appear to have assumed that employees lose their protected status where they engage in a strike which is unlawful solely due to the union’s failure to file timely notification with the FMCS, under the authority of *Fort Smith Chair Co.*, 143 NLRB 514 (1963), *enfd.* on other grounds 336 F.2d 738 (D.C. Cir. 1964), *cert. denied* 379 U.S. 838 (1964), cited by the Respondent Employers. In light of our finding that the alleged discriminatees were not shown to have been employees of the employer or to have engaged in the strike, we need not consider the application of *Fort Smith* to this case.

contemplate a definite relationship, if it is to be meaningfully applied.<sup>27</sup>

The record establishes that the alleged discriminatees in this case had a significantly different relationship with the Respondent Employers than the employees in *Bechtel* and *Marathon* (the cases on which the Respondent Employers rely) had with their employers. *Bechtel* and *Marathon* each involved a single employer and a permanent work force in a fixed, plant-type setting. Those employees were therefore continuously present working on the employer's premises before they affirmatively exercised their right to strike. Here, in contrast, none of the alleged discriminatees was actually working for a Respondent Employer on July 1, when the strike began,<sup>28</sup> and none had been referred from Local 39's hiring hall to work for a Respondent Employer at a show/convention worksite on that date.<sup>29</sup> Nor did any alleged discriminatee enter into an employment relationship with a Respondent Employer between July 1 and August 12, 1997, when the last termination notice was sent to Local 39. Indeed, at the time of the strike, only 1331 alleged discriminatees—about half—were currently registered with Local 39 for work referrals. Quite apart from the considerations already discussed, those alleged discriminatees

<sup>27</sup> Accord: *WBAI Pacifica Foundation*, 328 NLRB 1273, 1275 (1999) (finding that unpaid radio staff members were not "employees" for purposes of determining bargaining unit and observing that "employee status must be determined against the background of the policies and purposes of the Act").

<sup>28</sup> Local 39 conceded at the hearing that on July 1, three individuals who were then on referral to a Respondent Employer from its hiring hall—Nevell Choina, Fred Perez, and Donnell Chagnard, referred to in fn. 12, supra—refused to return to work. Those employees are not included among the alleged discriminatees in this proceeding.

<sup>29</sup> The record establishes that 17 alleged discriminatees who worked at Czarnowski's warehouse on June 30 did not return the following day, when the strike began. However, although these employees were registered with the hiring hall, they had not been referred by the hall for the warehouse work they were performing at that time; and such work, by Czarnowski's own admission, was a jurisdictional "grey area" under Local 39's contract. The record therefore does not establish that these employees were in the bargaining unit, or that they were affected by Local 39's failure to comply with Sec. 8(d)(3) or deprived of protected status.

The record also establishes that on June 30 Freeman had several employees referred from the hiring hall working on the McKesson Drug show. However, that work assignment ended that day, without a call-back for July 1, and consequently was not affected by the strike.

On July 3, 2 days after the strike began, GES sent a work call to the hall for 10 people to work at a show called CA World. At that time, a contract offer was pending from GES to extend the contract that had expired on June 30. On the supposition that the offer would be accepted and the strike would soon end, Local 39 Business Agent Don Gandolini began the referral process for this work call by contacting hiring hall registrants. However, those initial contacts were based on the assumption that the strike was about to end, and the referrals were never completed. It is therefore not established that the hall registrants whom Gandolini contacted entered into actual employment relationships.

who were not registered, and whose contemporaneous employment status is not shown in this record, could not—even arguably—be employees of the Respondent Employers for the purpose of Section 8(d).

Further, the alleged discriminatees here were present at a Respondent Employer's worksite only if and when they were referred there, and then only for a limited duration. Under the established employment procedure, a Local 39 registrant had to wait for the hiring hall to contact him/her with periodic referrals. The registrants did not seek work directly from the Respondent Employers, and were in fact contractually prohibited from doing so. Some of the alleged discriminatees had been referred only to signatory employers other than the 11 Respondent Employers; and the others were employed by one or more of the Respondent Employers on an intermittent, show-by-show basis.

Each of the Respondent Employers implicitly asserts that, for the purpose of Section 8(d), each of the alleged discriminatees was its current employee at the time of the strike. It is clear, however, that this was not the case. The Respondent Employers compiled their lists of individuals to "terminate" completely without reference to their current employment status or even their current registration status with Local 39's hiring hall. On the sole basis of Local 39's unlawful strike action, the Respondent Employers assert that any individual who was ever referred from the hiring hall to work for *any* of the approximately 80 employers under contract with Local 39 lost his/her protected employee status. Because 8(d)'s loss-of-status provision affects only "employees of the employer engaged in the particular labor dispute," this assertion is untenable.<sup>30</sup>

We therefore find that the alleged discriminatees were not employees of the Respondent Employers at the time of the strike within the meaning of Section 8(d)'s loss-of-status provision. Consequently, none of them could have been deprived of protected "employee" status by operation of that provision.

Our dissenting colleague suggests that our position forecloses the operation of the loss-of-status provision of Section 8(d) in hiring hall situations. This is not so. The issue here is not whether the provision applies when workers are referred through hiring halls—clearly it does. Rather, the issue is which individual workers will lose the protection of the Act, by virtue of their employment relationship and their conduct. In concluding that the Act's loss-of-status provision applies only where

<sup>30</sup> Moreover, as discussed at fn. 35 infra, the Respondent Employers undercut their own assertion by emphasizing, for the purpose of negating their bargaining obligations to Local 39, that only a relatively small number of the discriminatees were their actual employees.

individual workers can fairly be regarded as complicit in an unlawful strike, we do not (as our colleague suggests) imply that Congress intended to create a statutory loophole. Instead, we believe that Congress could not have intended the draconian result that our colleague would permit in this case.

*c. The alleged discriminatees did not “engage in a strike”*

We agree with the judge that, even if we were to assume the alleged discriminatees to have been “employees” of the Respondent Employers at the time of the strike, none were shown to have “engage[d] in a strike” by their affirmative actions. In determining whether an alleged discriminatee “engaged in a strike” against the employer, we consider whether the individual deliberately withheld labor from that employer, notwithstanding a duty to work that would otherwise exist as a condition of employment. We thus reject the Respondent Employers’ argument that because the alleged discriminatees failed to disavow the strike, or because some of them appeared on picket lines, they must have been “engaged in the strike” within the meaning of Section 8(d).

In *Bechtel* and *Marathon*, as the Respondent Employers emphasize, the employers were permitted to presume that all members of the bargaining unit were engaged in the unlawful strike because they were absent from the workplace and did not contact the employer to seek work. However, more recent cases have established that an employer cannot presume that an employee who is absent from work during a strike is a striker simply on the basis of the employee’s absence. *Park Manor Nursing Home*, 312 NLRB 763, 766–767 (1993) (employer unlawfully discharged employee on authorized absence during strike); *Toledo (5) Auto/Truck Plaza*, 300 NLRB 676 fn. 2 (1990) (same), affd. 986 F.2d 1422 (6th Cir. 1993). See also *Texaco, Inc.*, 285 NLRB 241, 246 fn. 25 (1987) (employer unlawfully terminated accrued disability benefits for employees disabled from working during strike); *Conoco, Inc.*, 265 NLRB 819, 821 (1982) (same); *Emerson Electric Co.*, 246 NLRB 1143, 1143 (1979) (same), enfd. in relevant part 650 F.2d 463 (3d Cir. 1981). Nor can an employee who is absent from work during a strike be presumed to be a striker simply because the employee appears on the picket line. *National Football League Management Council*, 309 NLRB 78, 86, 109 (1992) (employer unlawfully withheld accrued benefits to injured reserve players who picketed or attended the picket line during strike). See also *Conoco*, supra.

These cases undercut the reasoning of *Bechtel* and *Marathon* by clearly establishing that a presumption of strike participation is unjustified where other, reasonable

grounds for an employee’s absence from work exist.<sup>31</sup> We see no reason why this principle would not be as applicable in the context of Section 8(d) as in the context of a lawful strike, particularly in the situation of the alleged discriminatees in this case. As explained, these workers were not employed continuously, but rather were referred by Local 39’s hiring hall on a show-by-show basis. The established hiring procedure to which they were accustomed did not involve, or even permit, their soliciting employment directly from the Respondent Employers. Only about half of the alleged discriminatees were actually registered with the hiring hall at the time of the strike. It is not clear how many even knew which employers were being struck. In this setting, none of the alleged discriminatees can be treated as having “engaged in a strike” simply because they failed to solicit employment directly from each of the Respondent Employers after the union refused to operate its hiring hall.<sup>32</sup> Indeed, failure to actively solicit work was the norm. Nor, consistent with the authority cited above, could we presume that the alleged discriminatees engaged in a strike solely because some of them appeared on a picket line. Without evidence of individuals’ actual withholding of labor that the Respondent Employers specifically could expect to be forthcoming, we cannot say that any of these particular employees engaged in the strike.

For all of these reasons, although the strike called by Local 39 was unlawful, the Respondent Employers have not met their burden of establishing that the alleged discriminatees were deprived of protected status under Section 8(d). Accordingly, we resolve this threshold issue against the Respondent Employers and find that the alleged discriminatees did not lose their eligibility for protection under the Act. It is thus necessary for us to decide whether the Respondent Employers’ actions violated Section 8(a)(3).

### III. TERMINATION OF THE ALLEGED DISCRIMINATEES

The judge found that the Respondent Employers violated Section 8(a)(3) and (1) by “terminating” the alleged discriminatees for the purpose of escaping their obligation to recognize Local 39 as the discriminatees’ collective-bargaining representative. The Respondent Employ-

<sup>31</sup> See *Teamsters Local 357 v. NLRB*, 365 U.S. 667, 677 (1961) (under NLRA, unlawful action is not assumed but must be proven); *United Scenic Artists Local 829 v. NLRB*, 762 F.2d 1027, 1033–1034 (D.C. Cir. 1985) (same); *Plumbers Local 741*, 137 NLRB 1125 (1962) (same).

<sup>32</sup> We also reject GES’s contentions that Local 39 was the “agent” of the alleged discriminatees for the purpose of the unlawful strike, particularly where it has not been shown that any of these employees were actively employed in a unit position for which Local 39 was the bargaining representative.

ers assert that they “terminated” all of the alleged discriminatees because these individuals, through their affiliation with Local 39, participated in the Local’s unlawful strike and thus lost their protected status as the result of Section 8(d). We have rejected application of the loss-of-status provision here. The Respondent Employers, then, had no license to discriminate. It follows almost as a matter of course that the termination of the alleged discriminatees violated the Act. That step was “inherently destructive” of employees’ Section 7 rights, and it was unlawfully motivated.

*a. The Respondent Employers’ action was “inherently destructive” of Section 7 rights*

Under Section 8(a)(3), liability for an adverse action against an employee turns on whether the employer acted with union animus. In most cases, the General Counsel has the burden of independently showing an unlawful motive. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). However, it is well established that some employer actions may be so “inherently destructive” of the rights protected by Section 7 that the Board may fairly infer unlawful animus directly from those actions. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 701 (1983); *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33–34 (1967); and *Tracer Protection Services*, 328 NLRB 734 fn. 2 (1999). We have previously found, with judicial approval, that such actions include terminating or refusing to hire some or all of the applicants or employees in a bargaining unit solely because they are affiliated with and referred by a union.<sup>33</sup>

Under this authority, the Respondent Employers’ collective action in “terminating” all of the alleged discriminatees and denying them future employment solely on the basis of their past affiliation with and representation by Local 39, without affirmative evidence of punishable misconduct, was “inherently destructive” of Section 7 rights within the meaning of *Great Dane*. We therefore infer unlawful union animus from this action and find it unlawful.<sup>34</sup>

<sup>33</sup> *Blockbuster Pavilion*, 314 NLRB 129, 141 (1994), enfd. in relevant part 82 F.3d 1074 (D.C. Cir. 1996); *Catalytic Industrial Maintenance Co.*, 301 NLRB 342, 347 (1991), enfd. 964 F.2d 513 (5th Cir. 1992); *D&S Leasing, Inc.*, 299 NLRB 658, 659–661 (1990), enfd. 954 F.2d 366 (6th Cir. 1994); *National Fabricators*, 295 NLRB 1095 (1989), enfd. 903 F.2d 396 (5th Cir. 1990); *Borg Warner Corp.*, 245 NLRB 513, 519 (1979), enfd. 663 F.2d 666 (6th Cir. 1981), cert. denied 457 U.S. 1105 (1982); and *Loomis Courier Service*, 235 NLRB 534, 535–536 (1978), enfd. denied on other grounds 595 F.2d 491 (9th Cir. 1979).

<sup>34</sup> The Respondent Employers have not asserted that their dissatisfaction with the performance of Local 39’s hiring hall constituted a legitimate business justification for the mass terminations. Accordingly it is unnecessary for us to engage in a balancing test

*b. The Respondent Employers’ motive was shown to be unlawful*

Moreover, even if we did not view the Respondent Employers’ action as inherently destructive of rights protected by the Act, we would find the motive for their action unlawful in view of the evidence on record. We agree with the judge’s conclusion that the Respondent Employers’ real motive for the mass “termination” was to rid themselves of Local 39 and its hiring hall, and that Local 39’s failure to comply with Section 8(d)(3) merely provided a convenient vehicle for reaching that goal.

Although the Respondent Employers contend that their only purpose was to punish the discriminatees for engaging in the unlawful strike, the “terminations” they issued en masse constituted an effective blacklist of every person who had used Local 39’s hiring hall at some point during an undefined period. Every discriminatee was included on the termination list regardless of whether he/she had actually been employed by a Respondent Employer, was still registered with Local 39’s hiring hall, or took action in support of the strike. The Respondent Employers simply collected the names of individuals who had worked for any of approximately 80 employers under contract with Local 39.<sup>35</sup> As noted above, they did not attempt to ascertain whether any discriminatee was unavailable for work for reasons apart from Local 39’s refusal to make referrals through its hiring hall.<sup>36</sup> Nor did they even attempt to match the names on their composite list of terminees with the individuals who actually engaged in strike support activities. The failure to conduct a meaningful investigation or to give an employee an opportunity to explain suspected misconduct is an indication of unlawful motive. *Valmont Industries*, 328 NLRB 309 (1999), enfd. in relevant part 244 F.3d 454

it is unnecessary for us to engage in a balancing test between such an asserted justification and the significantly destructive impact of the Respondent Employers’ actions. *NLRB v. Great Dane*, 388 U.S. at 33–34.

<sup>35</sup> In fact, for the purpose of justifying withdrawal of recognition from Local 39, each Respondent Employer emphasizes that it never employed most of the discriminatees and that some who were employees did not work enough hours to be included in its bargaining unit. The Respondents cannot rely on those facts in order to exclude most of the alleged discriminatees from their bargaining units, while at the same time treating all of them as employees engaged in an unlawful strike for the purpose of Sec. 8(d).

<sup>36</sup> For example, Rene Bruno testified for Renaissance that he included Rick Bonomo, a frequent Renaissance employee before the strike, in the mass discharge even though he knew that Bonomo was disabled from work and was collecting workers’ compensation. (The documentary evidence refers to Bonomo as either “Richard Boneno” or “Nicholas Bonomo.”) The record also showed that Eric Okun, one of the discriminatees, was included on the Respondent Employers’ list of terminees even though he had lived in Germany since 1996.

(5th Cir. 2001); *K&M Electronics*, 283 NLRB 279, 291 fn. 45 (1987).

Significantly, the Respondent Employers were discussing whether and on what basis they could lawfully “fire the Union” and obtain referrals from the Carpenters or other unions months before the strike.<sup>37</sup> When they met with the Carpenters to discuss obtaining employee referrals during the strike, they were told that the Carpenters had no interest in a referral relationship solely for the strike’s duration but would consider a permanent relationship.<sup>38</sup> A few days later, immediately on concluding that that Local 39’s strike action was unlawful under Section 8(d)(3), the Big Eight Respondents acted to bar from further employment every person who had been affiliated with the Local through the hiring hall and, on that basis, to withdraw recognition from Local 39. The remaining three Respondent Employers took identical action shortly afterward. Moreover, the witnesses for eight of the Respondent Employers—Freeman, Czarnowski, Zenith, Eagle, Renaissance, Sho-Aids, CSI, and Expo Emphasis—testified that, apart from the mass termination of individuals, they intended to “discharge,” “fire,” or “terminate” their relationship with the Union itself. It is clear from this evidence that ending that relationship was the Respondent Employers’ primary, if not sole objective.

The asserted deficiencies in the operation of Local 39’s hiring hall constituted an entirely legitimate topic for collective bargaining. These referral deficiencies did not, however, establish a lawful excuse for discriminating against each and every individual who was represented by and obtained employment through Local 39. Denying employment on the basis of a person’s union affiliation, and for the purpose of avoiding or withdrawing recognition of the union, constitutes “discrimination to discourage membership in a labor organization”

<sup>37</sup> Two employer witnesses who were present at the employers’ February 1997 meeting, Philip Liuzza (Nth Degree) and Ed Douglas (Respondent Czarnowski), testified that the possibility of using the Carpenters was discussed. The judge found, on the basis of Liuzza’s testimony, that Freeman Vice President Hagstette asked whether Local 39 “could be fired.” The judge clearly found Liuzza to be credible, and also found that “those discussions included the possible removal of a recognized bargaining representative,” but did not believe Liuzza’s testimony was material to a finding of union animus. We agree that Hagstette’s query would not independently establish animus. However, we believe that query, the discussion of “possible removal” of Local 39, and the documentary evidence that the Respondent Employers were actively seeking a means to “entertain overtures by competing unions to provide labor,” support our conclusion that the Respondent Employers’ motive for the mass termination was unlawful.

<sup>38</sup> We do not suggest that it was unlawful for the Respondent Employers to attempt to obtain work referrals from the Carpenters or from alternative sources for as long as Local 39 refused to refer registrants to them.

within the meaning of Section 8(a)(3).<sup>39</sup> E.g., *Systems Management*, 292 NLRB 1075 fn. 2 (1989), enf’d. in relevant part 901 F.2d 297 (3d Cir. 1990); *Blue Cab Co.*, 156 NLRB 489 (1965), enf’d. 373 F.2d 661 (D.C. Cir. 1967), cert. denied 389 U.S. 837 (1967). Denying employment to a group of individuals en masse for the same purpose only aggravates the unfair labor practice.

The Respondent Employers contend, consistent with their burden in a *Wright Line* analysis, that all of the discriminatees would have been terminated in connection with the unlawful strike even if they had not been affiliated with Local 39. However, the Respondents offered no evidence to support this contention. They rested rather on the assertion that they could lawfully presume that every discriminatee “engaged in the strike” within the meaning of Section 8(d) and thereby forfeited protection under Section 8(a)(3). But, as explained, an employer cannot lawfully presume that even a permanent employee is “engaged in a strike” simply on the basis of the employee’s absence from the workplace and/or presence on a picket line. Accordingly, the mass termination of all the discriminatees on the basis of a general presumption that they all “engaged in the strike” at issue would have been unlawful even if the Respondent Employers had been motivated only by the fact of Local 39’s unlawful strike.

The Board has previously indicated that employees protected under Section 7 of the Act have the right not to declare their support or nonsupport for a strike. An employer who requires an employee or job applicant to declare such nonsupport violates that right. *Conoco*, 265 NLRB at 820; *Emerson*, 246 NLRB at 1143. However, to the extent that the Respondent Employers were faced with exigent circumstances as a result of Local 39’s refusal to refer hiring hall registrants during the unlawful strike, they could have used the employee lists they obtained to inform former employees and other registrants that employment was available. Instead, they chose to terminate every individual known to have been represented by Local 39. By penalizing the discriminatees for failing to indicate nonsupport for the strike, the Respondent Employers violated Section 8(a)(3). For all of these reasons, we conclude that the mass termination of the discriminatees was unlawful.<sup>40</sup>

<sup>39</sup> Although the judge characterized the alleged discriminatees’ protected union activity as consisting solely of “inclusion in Local 39’s hiring hall,” the protected activity more accurately included each alleged discriminatee’s representation by Local 39 through its collective-bargaining agreement, including referral through the hiring hall.

<sup>40</sup> The discriminatees’ failure to seek employment from the Respondent Employers did not constitute affirmatively protected activity. This is therefore not a situation in which the employer acted in the erroneous belief that an employee, in the course of engaging in protected activity, committed unprotected misconduct that removed him from Sec. 7’s

#### IV. REMEDIAL ISSUES RELATED TO THE DISCRIMINATEES

We turn next to two remedial issues: (1) which individuals are to be included in the remedy; and (2) what remedy the discriminatees are entitled to.

##### 1. Modifications to the listing of discriminatees

We find merit in the exceptions of the General Counsel and the Respondent Employers to the judge's inclusion in his remedy of 357 individuals whom the General Counsel had excluded from the list of alleged discriminatees in the consolidated complaint, except to the extent that the General Counsel later requested that certain of these individuals be included. As a procedural matter, under Section 3(d) of the Act, the General Counsel has "final authority on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10, and in respect to the prosecution of such complaints before the Board." It is well established that the Board cannot rule on matters which the General Counsel has consistently refused to include in the complaint or to litigate at the hearing. *Frito Co. v. NLRB*, 330 F.2d 458, 463–465 (9th Cir. 1964); *Sheet Metal Workers Local 104*, 311 NLRB 99, 107–108 (1993); *GTE Automatic Electric*, 196 NLRB 902, 902 (1972); and *Hughes Tool Co.*, 147 NLRB 1573, 1576–1577 (1964).

In the foregoing cases, the General Counsel did not maintain such a refusal, and the Board found that it could properly address the matters litigated. Here, however, the General Counsel never sought to include most of the individuals in question, and the Respondent Employers accordingly did not attempt to litigate the case with respect to those individuals. Section 3(d) therefore precludes our including them among the discriminatees. Although the record in this case does not show exactly how the list of 357 people initially excluded was compiled, it appears that the General Counsel relied on information received from Local 39 that these individuals had engaged in picketing activity or otherwise supported the strike. The judge included these people in his recommended remedy on the basis of his findings that "no one was discharged for actually engaging in strike activity including picketing" and that "all employees covered under the Local 39 Labor Agreement" were terminated in violation of Section 8(a)(3). However, because the Gen-

eral Counsel declined to litigate the complaint allegations with respect to these individuals, the judge exceeded his authority.

The General Counsel also stipulated that the following individuals should be excluded from the list of discriminatees: Frank Golemi, Mike Pappas, Fay Bares, Joseph Caldenado, and Herbert McGee. Pursuant to Section 3(d), we therefore exclude these individuals from the remedial order in this proceeding.

However, there is no such procedural bar to our adopting the judge's inclusion in the remedial order of five other discriminatees who were found to have picketed, but were named in the complaint: Augie Lapara, Randy Hilburn, Steve Huth, David Leibe, and Sal Napolitano Jr. Although these individuals engaged in picketing activity, the General Counsel contended that they were discriminatees, the material facts were litigated, and it was not established that they were employees of any Respondent Employer at the time they picketed. We therefore include them in the remedy on the basis of our findings with respect to the other protected discriminatees.

In addition, toward the end of the hearing GES moved for partial summary judgment concerning 23 other individuals whom the General Counsel had named as alleged discriminatees. The motion was based solely on the fact that their names appeared on the list of 357 people the General Counsel initially declined to include. The General Counsel did not respond to GES's motion, and the judge did not rule on it. Since five of these individuals—Carole Goodson, Stephen Huth, Leslie Jackson, Stephen Moity, and Carlton Shell III—were included in the General Counsel's motion to amend the complaint during the hearing, and two others—Ron Pradat and Julius Wollfarth—are included in the General Counsel's exceptions, we will not treat them as barred from inclusion in the remedy under Section 3(d). Similarly, because the 16 other individuals at issue in GES's motion were named in the complaint, we will not treat them as barred under Section 3(d) on the ground that they were also on the list of 357. Because the Respondent Employers offered no additional evidence to distinguish any of these individuals from the group that we have found suffered unlawful discrimination, we will also include them in the remedial order.

GES also excepts to the judge's inclusion of 259 individuals whom the General Counsel added to the list of discriminatees by oral amendment at the hearing. The judge accepted the amendment based on the General Counsel's explanation that those names had not been available at the outset and that the Respondent Employers had received advance notice that the oral amendment would be made, including a list of the 259 individuals.

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zone of protection. Consequently *Burnup & Sims, Inc.*, 379 U.S. 21 (1964), which applied Sec. 8(a)(1) to protect employees in that setting, is not directly applicable here. *Burnup & Sims* does confirm, however, that an employer may not take coercive action against employees who are engaged in protected activity—e.g., as here, employees maintaining their individual affiliations with a union for the purpose of representation—in the mistaken belief that the employees have engaged in unlawful conduct that would deprive them of protection for that activity.

The judge's ruling was proper. See *Performance Friction Corp.*, 319 NLRB 859 (1995), reversed in part on other grounds 117 F.3d 763 (4th Cir. 1997), cert. denied 523 U.S. 1136 (1998).

Finally, the General Counsel and Local 39 except to the judge's unexplained failure to include in his remedy 81 other individuals who were listed in the complaint as discriminatees. We agree that this was a clerical oversight and will include them in the remedial order.<sup>41</sup>

## 2. The remedy

With respect to the remedy, it is our standard practice to require an employer who has violated Section 8(a)(3) by discharging employees to offer reinstatement and to provide backpay, benefit contributions, and other payments necessary to restore the discriminatees to the positions they would have been in absent the violation. In this unusual case, however, we cannot determine from the record whether or to what extent the discriminatees were denied employment as a consequence of the Respondent Employers' unlawful conduct. At the time of the terminations, none of the discriminatees were actively employed by the Respondent Employers, and approximately half of them were not even listed on Local 39's referral roster. As to those discriminatees who were listed on the referral roster, the record clearly shows that the hiring hall remained inoperative as a source of employees for each of the Respondent Employers after the strike began on July 1, several weeks prior to the Respondent Employers' unlawful conduct. In the absence of additional evidence, we cannot conclude, on this record, that the Respondent Employers' actions deprived these discriminatees of employment opportunities which they would have otherwise sought and accepted.

Although the record clearly establishes the discriminatory discharge violations alleged in the complaint, we find that the General Counsel bears an additional burden to justify a backpay and reinstatement remedy here. In practical terms the violations, although characterized as terminations, were more in the nature of announcements that the referenced employees would not be hired or even be considered for hire in the future.

In *FES*, 331 NLRB 9 (2000), the Board established the criteria which the General Counsel must meet in order to establish the appropriateness of reinstatement and backpay in cases involving refusals to hire:

<sup>41</sup> The judge's "Appendix B" has been modified to reflect the changes set out above and to list the discriminatees in appropriate alphabetical order. See appendix F, attached. Duplicate names have also been deleted without prejudice to any determination in the compliance stage of this proceeding that more than one individual might be covered by a listed name.

[The General Counsel] must show that there were openings for the applicants. Consequently, if . . . there is evidence that the respondent has hired employees or had openings available, the General Counsel must show at the hearing on the merits the number of openings that were available, that the applicants had the training or experience relevant to the openings, and that antiunion animus contributed to the respondent's decision not to hire the applicants for the openings. Once the General Counsel makes this showing, the burden shifts to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation.

Id. at 14. We find these criteria to be applicable here. It has been our practice to remand those cases that were pending before the Board at the time *FES* was decided in which the judge found unlawful refusals to hire, for further consideration in the light of *FES*. See, e.g., *HVAC Mechanical Services*, 333 NLRB 206 (2001). Cf. *Pirelli Cable Corp.*, 331 NLRB 1538 (2000) (remanding case for determination of number of job vacancies employer unlawfully failed, under *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970), to make available to strikers who had been permanently replaced).

Consistent with this practice, we will remand the issues of eligibility for backpay and reinstatement in this case to the judge for further consideration, with the discretion to reopen the record to obtain additional material evidence if necessary. However, we will remand the case solely with respect to these remedial issues because they do not otherwise affect any of the unfair labor practices established here, and we will issue a final decision on the allegations in the complaint. See *Kamtech, Inc.*, 333 NLRB 242 (2001); *Masiogale Electrical-Mechanical, Inc.*, 331 NLRB 534 (2000).

## V. WITHDRAWAL OF RECOGNITION UNDER SECTION 8(a)(5) AND (1)

In their July 22 notice of the mass terminations, or no later than July 28, the Big Eight Respondent Employers withdrew recognition from Local 39.<sup>42</sup> In their respective

<sup>42</sup> We agree with the judge that the Respondent Employers were not required to negotiate with Local 39 for as long as it maintained an unlawful strike. *Arundel Corp.*, 210 NLRB 525 (1974). We also agree that, in view of the events that occurred between July 22 and 26, the contract offer which Local 39 refused on July 14 cannot be viewed as having remained open for acceptance through July 26, when Local 39 attempted to accept it. Thus, no contract was formed on that date. Because the precise date on which the Big Eight withdrew recognition is not material for any other purpose, it is unnecessary for us to determine that date.

However, because the July 1-28 strike was unlawful, we do not adopt the judge's finding that the strike beginning on July 28 was an unfair labor practice strike. Local 39's action of July 26 did not result in

notices of August 7, 11, and 12, the other three Respondent Employers (Zenith, Renaissance, and Eagle) similarly withdrew recognition. The Respondent Employers assert that this action was justified because each of their respective bargaining units was reduced to zero—or, at a minimum, to less than a majority of the former unit—in consequence of the mass terminations. Accordingly, they contend, Local 39 did not retain majority support in the respective bargaining units.<sup>43</sup>

As we have found, however, the terminations were unlawful. We therefore find that Local 39's presumptive majority status was not adversely affected by this unlawful conduct and consequently continued past contract expiration.<sup>44</sup> For the purposes of this case, an employer may withdraw recognition from a bargaining representative only when there is an actual, demonstrated loss of majority support or when the employer has a good-faith, reasonable uncertainty, based on objective considerations, that majority support no longer exists. E.g., *NLRB v. Curtin Matheson Scientific*, 494 U.S. 775, 778 (1990); *Sahara-Tahoe Hotel*, 229 NLRB 1094 (1977).<sup>45</sup> Moreover, the burden is on the employer to show that there was an actual loss of majority support or that it had an objective basis for having reasonable uncertainty at the

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the formation of a contract. Therefore, its action was at most an offer to end the strike on the basis of the terms of the Respondent Employers' withdrawn offer of July 14. In our view, Local 39's attempt to convert the economic strike to an unfair labor practice strike cannot be separated from its own initial violation of Sec. 8(d), notwithstanding the Respondent Employers' violations of Sec. 8(a)(5), (3), and (1).

<sup>43</sup> GES's witness testified that its bargaining unit with Local 39 consisted of 400 to 450 employees. According to their respective witnesses, before the strike Freeman employed approximately 300 employees on a "regular" basis; Expo Services employed approximately 50; and the other Respondent Employers employed smaller numbers. None of the bargaining units had previously been certified by the Board, and it is not even clear what the witnesses meant when they used the term "regular." Accordingly, the record does not establish the actual size of any Respondent Employer's bargaining unit. Nor do we accept the General Counsel's and Local 39's contention, which the judge appears to have adopted, that each of the Respondent Employers' bargaining units consisted of all the discriminatees. However, in view of our conclusion that the withdrawal of recognition was unlawful in any case, it is unnecessary for us to define the precise scope of the bargaining units at issue in terms of the numbers of employees included.

<sup>44</sup> The judge found and the parties do not dispute that the bargaining relationship between Local 39 and the Respondent Employers was governed by Sec. 9(a) of the Act. There is therefore no contention that the Respondent Employers were privileged to withdraw recognition under Sec. 8(f) after their contracts with Local 39 expired on June 30, 1997. See *John Deklewa & Sons*, 282 NLRB 1375 (1987), enf. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1987), cert. denied 488 U.S. 889 (1988).

<sup>45</sup> *Levitz Furniture Co.*, 333 NLRB 717 (2001), in which the Board eliminated good-faith doubt of majority support as a lawful basis for withdrawing recognition, is not applicable to cases which, like this one, were pending before the Board when it was decided.

time it withdrew recognition. *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359, 361 (1998); *Auciello Iron Works v. NLRB*, 517 U.S. 781, 786–787 (1996); *NLRB v. Curtin Matheson Scientific*, 494 U.S. at 778; *Liquid Carriers Corp.*, 319 NLRB 317 (1995), enf. 101 F.3d 691 (3d Cir. 1996). The Respondent Employers have made no such showing here.

It is also well established that an employer is privileged to withdraw recognition only in an environment free of unfair labor practices. E.g., *Detroit Edison Co.*, 310 NLRB 564 (1993); *Riverside Cement Co.*, 305 NLRB 815 (1991), enf. 976 F.2d 731 (5th Cir. 1992). The Respondent Employers' withdrawal of recognition did not occur in such a setting, but was the direct result of a mass "termination" that violated the rights of hundreds of employees.

We find the decisions invoked by the Respondent Employers—*Marathon*, supra, and *Boeing Airplane Co. v. NLRB*, 174 F.2d 988 (D.C. Cir. 1949), which permitted employers to withdraw recognition from unions that engaged in unlawful strikes—to be inapplicable here. Most important, in those cases there was no finding of significant unfair labor practices by the employer that tainted the union's alleged loss of majority support. This was also true in *Granite Construction*, 330 NLRB 205 (1999), which recently applied *Marathon* with respect to withdrawal of recognition after a mass discharge. Each of these cases also involved violations by the union of contractual no-strike clauses and of more than one 8(d) notification requirement; and each involved a plant setting where employees were permanent and the bargaining unit was both clearly delimited and largely unchanged over time. These cases did not address a hiring hall setting in which there is a constant turnover of employees from a much larger referral pool and the exact size and membership of the bargaining unit changes frequently over time.

For these reasons, we agree with the judge that the Respondent Employers' withdrawal of recognition violated Section 8(a)(5) and (1). We also agree with the judge that, in view of this finding, Respondents Zenith and Eagle also violated Section 8(a)(5) and (1) by refusing to provide information relevant to the mass "termination" requested by Local 39.

## VI. THE AGREEMENTS BETWEEN FREEMAN, GES, AND THE CARPENTERS

Freeman and GES defend their negotiating and entering into contracts with the Respondent Carpenters on the basis of having lawfully withdrawn recognition from Local 39 several months earlier; on showings of respective majorities of employee support; and on their right to enter into collective-bargaining agreements under Sec-

tion 8(f) of the Act without such showings. We agree with the judge that the contracts between these two employers and the Carpenters were unlawful because the Respondent Employers' previous withdrawal of recognition from Local 39 violated Section 8(a)(5) and (1). GES and Freeman consequently violated Section 8(a)(2) and (1), and the Carpenters for the same reason violated Section 8(b)(1)(A). It is therefore unnecessary for us to address the alleged majority showings of support for the Carpenters, or to determine whether the contracts would have been permissible without majority showings under Section 8(f) of the Act in the absence of the 8(a)(5) and (1) violation.

We find merit in the General Counsel's exceptions seeking disgorgement of dues, fees, and contributions made by or on behalf of employees who performed work for GES and Freeman falling within Local 39's bargaining unit jurisdiction, to the extent that such payments are not shown by the Respondent Employers to have been noncoercive. We defer this issue to the compliance stage. See *Polyclinic Medical Center of Harrisburg*, 315 NLRB 1257 (1995), *enfd.* 79 F.3d 139 (D.C. Cir. 1996).

#### VII. INTERROGATION OF EMPLOYEE WITNESSES

During February and March 1998, E. Jewell Johnson, an attorney for GES, contacted by telephone a number of the alleged discriminatees whom GES had subpoenaed for the hearing in this case. Johnson testified that she explained to these witnesses the purpose of the subpoenas and the nature of the NLRB proceeding, and that she was calling to prepare for the hearing. She told each person that he/she did not have to answer her questions, but did not affirmatively state that the witness would suffer no reprisal for failure to cooperate. She believed the latter assurance to be unnecessary because the witnesses were no longer employed by GES and consequently, in her view, were not subject to coercion. In her questions to each witness, Johnson inquired into, *inter alia*, participation in and support for the strike, and membership and affiliation with Local 39.

The judge found that although Johnson admittedly did not give an affirmative assurance against any reprisals, and even though she inquired into each witness's relationship with Local 39 and activity relating to the strike, she did not violate Section 8(a)(1) on behalf of GES. In the judge's view, the interrogations were permissible because, at the hearing, "the GES attorneys did pursue questions and argument that employees did engage in strike activity by supporting the strike through other than overt means. Therefore . . . that line of questions did not extend the questioning beyond those necessary to prepare for the hearing."

We find merit in the General Counsel's exception to this finding. The Board has generally taken a bright-line approach in enforcing the requirement established in *Johnnie's Poultry*, 146 NLRB 770, 774-776 (1964), that an employer interrogating an employee witness in preparation for a Board hearing must give explicit assurance against reprisal for refusing to answer or for the substance of any answer given. We established this requirement to ensure that employers' legitimate interest in obtaining relevant evidence will not encroach on employees' rights to protection under Section 7. E.g., *WXGI, Inc.*, 330 NLRB 695, 712, 713 (2000), *enfd.* 243 F.3d 833 (4th Cir. 2001). Even if Johnson's questions were relevant to matters litigated at the hearing in this case, this would not eliminate the need for an assurance against reprisal. Johnson's statement to each witness that he/she was not required to answer her questions did not, by itself, convey such assurance. Moreover, her explanation at the hearing that the witnesses were not subject to coercion (or, by implication, reprisal) because they were no longer employed by GES would effectively eliminate the *Johnnie's Poultry* requirement with respect to any alleged discriminatee who was discharged by a respondent employer. We find that GES has provided no basis to justify not complying with this requirement, and that it violated Section 8(a)(1) by engaging in interrogations without adherence to the *Johnnie's Poultry* safeguards.<sup>46</sup>

#### ORDER

The National Labor Relations Board orders that

A. The Respondent Employer, Freeman Decorating Company, New Orleans, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they have been represented by International Association of Stage and Theatrical Employees, Greater New Orleans Stage, Motion Picture, Television and Exhibition Employees Local 39, AFL-CIO, or referred from Local 39's hiring hall.

(b) Withdrawing recognition from Local 39 as exclusive collective-bargaining representative for its employees in the below-described bargaining unit:

Including those employees who are engaged in the installation, dismantling and operation of scenery, curtains, properties, electrical effects and the operation of spotlights; installation and dismantling of exhibits, displays, booths, decorations and the installation, dismantling and operation of sound accessories, motion picture, T.V. and video tape productions where the Com-

<sup>46</sup> This additional violation is reflected in a separate order set out for GES.

pany has the contract and responsibility for the installation, dismantling and operation of such equipment.

(c) Failing and refusing to bargain in good faith with Local 39, on request, as the exclusive collective-bargaining representative of the above-described unit employees.

(d) Recognizing, bargaining, or contracting with United Brotherhood of Carpenters & Joiners of America, Louisiana Carpenters Regional Council, AFL-CIO, to represent the above-described unit employees.

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

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

(a) Within 14 days of this Order, rescind all unlawful discharges of the employees named in Appendix F of this Order.

(b) Rescind its recognition and contract with United Brotherhood of Carpenters & Joiners of America, Louisiana Carpenters Regional Council, AFL-CIO, and, on demand, recognize and bargain in good faith with International Association of Stage and Theatrical Employees, Greater New Orleans Stage, Motion Picture, Television and Exhibition Employees Local 39, AFL-CIO as the exclusive collective-bargaining representative of its employees in the above described bargaining unit and, if agreement is reached, prepare and sign that agreement in writing.

(c) Jointly and severally disgorge all dues, fees, and benefit contributions made by or on behalf of employees who performed work for the Respondent falling within Local 39's bargaining unit jurisdiction while they were represented by United Brotherhood of Carpenters & Joiners of America, Louisiana Carpenters Regional Council, AFL-CIO, to the extent that such payments are not shown by the Respondent to have been noncoercive.

(d) Post at its facilities in New Orleans, Louisiana, copies of the attached notice marked "Appendix A."<sup>47</sup> Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respon-

<sup>47</sup> If this Order is enforced by a Judgment of the United States court of appeals, the words in the notice "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."

dent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all employees listed on Appendix F, and all current employees and former employees employed by the Respondent at any time since July 22, 1997.

(e) Within 21 days after service by the Region, file with the Regional Director, Region 15, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

B. The Respondent Employer, GES Exposition Services, Inc., New Orleans, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they have been represented by International Association of Stage and Theatrical Employees, Greater New Orleans Stage, Motion Picture, Television and Exhibition Employees Local 39, AFL-CIO, or referred from Local 39's hiring hall.

(b) Withdrawing recognition from Local 39 as exclusive collective-bargaining representative for its employees in the below-described bargaining unit:

Including those employees who are engaged in the installation, dismantling and operation of scenery, curtains, properties, electrical effects and the operation of spotlights; installation and dismantling of exhibits, displays, booths, decorations and the installation, dismantling and operation of sound accessories, motion picture, T.V. and video tape productions where the Company has the contract and responsibility for the installation, dismantling and operation of such equipment.

(c) Failing and refusing to bargain in good faith with Local 39, upon request, as the exclusive collective-bargaining representative of the above-described unit employees.

(d) Recognizing, bargaining, or contracting with United Brotherhood of Carpenters & Joiners of America, Louisiana Carpenters Regional Council, AFL-CIO, to represent the above-described unit employees.

(e) Coercively interrogating employee or former employee witnesses in upcoming NLRB proceedings in violation of their rights guaranteed them by Section 7 of the Act.

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

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

(a) Within 14 days of this Order, rescind all unlawful discharges of the employees named in appendix F of this Order.

(b) Rescind its recognition and contract with United Brotherhood of Carpenters & Joiners of America, Louisiana Carpenters Regional Council, AFL-CIO, and, on demand, recognize and bargain in good faith with International Association of Stage and Theatrical Employees, Greater New Orleans Stage, Motion Picture, Television and Exhibition Employees Local 39, AFL-CIO as the exclusive collective-bargaining representative of its employees in the above-described bargaining unit and, if agreement is reached, prepare and sign that agreement in writing.

(c) Jointly and severally disgorge all dues, fees, and benefit contributions made by or on behalf of employees who performed work for the Respondent falling within Local 39's bargaining unit jurisdiction while they were represented by United Brotherhood of Carpenters & Joiners of America, Louisiana Carpenters Regional Council, AFL-CIO, to the extent that such payments are not shown by the Respondent to have been noncoercive.

(d) Post at its facilities in New Orleans, Louisiana, copies of the attached notice marked "Appendix B."<sup>48</sup> Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all employees listed on appendix F, and all current employees and former employees employed by the Respondent at any time since July 22, 1997.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 15, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

C. The Respondent Employers, Expo Services, a Division of David H. Gibson Co., Inc., d/b/a Expo Services/USA, New Orleans, Louisiana; Convention Service

Inc. of Pennsylvania, New Orleans, Louisiana; Sho-Aids, Inc., New Orleans, Louisiana; Czarnowski Display Services, Inc., New Orleans, Louisiana; and Renaissance Management, Inc., New Orleans, Louisiana; their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they have been represented by International Association of Stage and Theatrical Employees, Greater New Orleans Stage, Motion Picture, Television and Exhibition Employees Local 39, AFL-CIO, or referred from Local 39's hiring hall.

(b) Withdrawing recognition from Local 39 as exclusive collective-bargaining representative for their respective employees in the below-described bargaining unit for each employer:

Including those employees who are engaged in the installation, dismantling and operation of scenery, curtains, properties, electrical effects and the operation of spotlights; installation and dismantling of exhibits, displays, booths, decorations and the installation, dismantling and operation of sound accessories, motion picture, T.V. and video tape productions where the Company has the contract and responsibility for the installation, dismantling and operation of such equipment.

(c) Failing and refusing to bargain in good faith with Local 39, upon request, as the exclusive collective-bargaining representative of the above-described unit employees.

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

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

(a) Within 14 days of this Order, rescind all unlawful discharges of the employees named in appendix F of this Order.

(b) Recognize and, on demand, bargain in good faith with International Association of Stage and Theatrical Employees, Greater New Orleans Stage, Motion Picture, Television and Exhibition Employees Local 39, AFL-CIO as the exclusive collective-bargaining representative of their respective employees in the above-described bargaining units and, where an agreement is reached, prepare and sign that agreement in writing.

(c) Post at their respective facilities in New Orleans, Louisiana, copies of the attached notice marked "Appendix C."<sup>49</sup> Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by each Respondent's authorized representative, shall be

<sup>48</sup> See fn. 47, above.

<sup>49</sup> See fn. 47, above.

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. In the event that during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all employees listed on Appendix F, and all current employees and former employees employed by the Respondent at any time since July 22, 1997.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 15, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that each Respondent has taken to comply.

D. The Respondent Employers, Zenith Labornet, Inc. and Eagle Management Group, Inc., their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they have been represented by International Association of Stage and Theatrical Employees, Greater New Orleans Stage, Motion Picture, Television and Exhibition Employees Local 39, AFL-CIO, or referred from Local 39's hiring hall.

(b) Withdrawing recognition from Local 39 as exclusive collective-bargaining representative for their respective employees in the below-described bargaining units:

Including those employees who are engaged in the installation, dismantling and operation of scenery, curtains, properties, electrical effects and the operation of spotlights; installation and dismantling of exhibits, displays, booths, decorations and the installation, dismantling and operation of sound accessories, motion picture, T.V. and video tape productions where the Company has the contract and responsibility for the installation, dismantling and operation of such equipment.

(c) Failing and refusing to bargain in good faith with Local 39, upon request, as the exclusive collective-bargaining representative of the above-described unit employees, including failing to supply the Union with relevant and necessary information requested by the Union since August 19, 1997.

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

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

(a) Within 14 days of this Order, rescind all unlawful discharges of employees named in appendix F of this Order.

(b) Recognize and, on demand, bargain in good faith with International Association of Stage and Theatrical Employees, Greater New Orleans Stage, Motion Picture, Television and Exhibition Employees Local 39, AFL-CIO as the exclusive collective-bargaining representative of their respective employees in the above-described bargaining units and, where an agreement is reached, prepare and sign that agreement in writing, and upon demand, supply the Union with relevant and necessary information requested by the Union since August 19, 1997.

(c) Post at their respective facilities in New Orleans, Louisiana, copies of the respective attached notice in "Appendix D."<sup>50</sup> Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by each 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. In the event that during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all employees listed on appendix F, and all current employees and former employees employed by the Respondent at any time since August 7, 1977.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 15, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that each of the Respondents has taken to comply.

E. The Respondent, United Brotherhood of Carpenters & Joiners of America, Louisiana Carpenters Regional Council, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Engaging in collective bargaining with Respondents Freeman Decorating Company, New Orleans, Louisiana, and GES Exposition Services, Inc., New Orleans, Louisiana, regarding employees in the below-described collective-bargaining units:

Including those employees who are engaged in the installation, dismantling and operation of scenery, cur-

<sup>50</sup> See fn. 47, above.

tains, properties, electrical effects and the operation of spotlights; installation and dismantling of exhibits, displays, booths, decorations and the installation, dismantling and operation of sound accessories, motion picture, T.V. and video tape productions where the Company has the contract and responsibility for the installation, dismantling and operation of such equipment.

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

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

(a) Within 14 days of this Order, withdraw from all collective-bargaining relationships regarding employees in the above-described collective-bargaining agreements, including contracts, with Respondents Freeman Decorating Company, New Orleans, Louisiana, and GES Exposition Services, Inc., New Orleans, Louisiana.

(b) Jointly and severally disgorge all dues, fees, and benefit contributions made by or on behalf of employees who performed work for Freeman Decorating Company or GES Exposition Services, Inc., falling within Local 39's bargaining unit jurisdiction while such employees were represented by United Brotherhood of Carpenters & Joiners of America, Louisiana Carpenters Regional Council, AFL-CIO, to the extent that such payments are not shown by the Respondent to have been noncoercive.

(c) Post at its offices and meeting halls in New Orleans, Louisiana, copies of the attached notice marked "Appendix E."<sup>51</sup> Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representatives, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members 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) Forward immediately to the Regional Director for Region 15, signed copies of the notice for posting by Respondents Freeman Decorating Company, New Orleans, Louisiana, and GES Exposition Services, Inc., New Orleans, Louisiana, if they are willing, for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted.

(e) Within 21 days after service by the Region, file with the Regional Director, Region 15, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

CHAIRMAN HURTGEN, dissenting.

In this case, the Union called a strike within the meaning of Section 8(d), and the Union failed to give the notices required by Section 8(d). The strike took the form of a refusal to refer employees through the Union's exclusive hiring hall. The issue is whether these employees thereby lost their status as employees of the Employers (Respondents here). If they did, the Respondents could lawfully discharge them and refuse to hire them in the future.

My colleagues say that the "loss-of-status" provision of Section 8(d) does not cover the employees involved here because they were not working for the Respondents at the time of the Union's action. I disagree.

The language of Section 8(d) is directly contrary to the position of my colleagues. Section 8(d) provides:

Any employee who engages in a strike within any notice period specified in this subsection . . . shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act.

As is evident from this language, "any employee" who engages in a strike is covered by the provision, i.e., is subject to a loss of status. However, the loss of status is itself more limited. The employee loses his status only vis-à-vis the employer involved in the labor dispute. As to the rest of the world, he retains his employee status. In sum, the *coverage* of the provision is broad; the *consequence* of the provision is narrow. My colleagues have confused the two concepts. They say that the *coverage* is limited to employees of the employer. As discussed, the language of Section 8(d) is to the contrary.

Section 2(3) of the Act further supports my view. Under that section, "[t]he term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise." As discussed above, the "coverage" portion of Section 8(d) embraces "any employee." The "consequences" portion provides otherwise. It is restricted to employees of the particular employer.

Further, as to the "coverage" of Section 8(d), the term "any employee" obviously embraces any statutory employee. That would include applicants for employment.<sup>1</sup> Indeed, the persons involved here (eligible for referral through an exclusive hiring hall) have an even greater potential for hiring than does a mere applicant. Thus, all who are eligible for referral through the hiring hall are covered by Section 8(d).

<sup>1</sup> *Phelps Dodge v. NLRB*, 313 U.S. 177 (1941).

<sup>51</sup> See fn. 47, above.

My colleagues say that some of the employees involved here never worked for the Respondents. Assuming that this is true, it is irrelevant. All of the employees were at least *Phelps Dodge* applicants. Indeed, because of the exclusive hiring hall, they were more than that.

My colleagues also say that “only someone who *has* the status of an employee of a particular employer can lose that status.” (Emphasis in original.) As shown by the statute and by this case, the statement is incorrect. Under Section 2(3), the term “employee” is explicitly broad. By contrast, the phrase “employee of a particular employer” is a subset thereof. Any employee who engages in a strike without 8(d) notices loses the subset part of the term “employer” (he is no longer an employee of the employer), but he otherwise remains an employee.

Further, these employees engaged in a strike. A strike is a withholding of labor. Labor is withheld when a union calls employees off of a job. It is similarly withheld when the union refuses to refer employees through an exclusive hiring hall. In both cases, the employer is deprived of employees.<sup>2</sup>

The purpose of Section 8(d) is consistent with the above. Section 8(d) is designed to give the governmental mediation services an opportunity to prevent the loss of production attendant to a strike. The loss of production is the same irrespective of whether it is because of an absence of employees through walking off the job or through a nonreferral. To adopt the position of my colleagues would mean that the loss-of-status provision of Section 8(d) does not operate in hiring hall situations. I would not conclude that Congress intended to leave such a gaping hole in Section 8(d).

My colleagues also assert that it was improper for the Respondents to require employees to disassociate themselves from the strike in order to avoid Section 8(d). In my view, the Respondents thereby demonstrated the lawfulness of their conduct. The Respondents thereby showed that they were not motivated by union membership or union representation. An employee could avoid the consequences of Section 8(d) simply by disassociating himself from the strike.<sup>3</sup>

<sup>2</sup> I agree that the mere absence of an employee from the workplace does not necessarily show that the employee is on strike. As shown by the cases cited by my colleagues, the employee may be disabled or may be on an authorized absence. However, these facts are not present here. All of the employees were subject to referral through the hiring hall, and the Union would not refer them.

<sup>3</sup> I do not reach the issue of motive. Since the alleged discriminatees lost their employee status vis-à-vis the Respondents, they did not enjoy the protection of the Act vis-à-vis the Respondents. Thus, the Respondents’ motive is irrelevant. However, I note that the Respondents were motivated by the 8(d) strike, not by union representation or membership.

## APPENDIX A

### 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 discharge employees because they have been represented by International Association of Stage and Theatrical Employees, Greater New Orleans Stage, Motion Picture, Television and Exhibition Employees Local 39, AFL-CIO, or referred from Local 39’s hiring hall.

WE WILL NOT refuse to recognize and bargain in good faith with Local 39 as your exclusive collective-bargaining representative

WE WILL NOT recognize and bargain with United Brotherhood of Carpenters & Joiners of America, Louisiana Carpenters Regional Council, AFL-CIO, as your bargaining representative.

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

WE WILL recognize and, on request, bargain in good faith with Local 39 as the exclusive collective-bargaining representative of our employees in the below-described bargaining unit:

Including those employees who are engaged in the installation, dismantling and operation of scenery, curtains, properties, electrical effects and the operation of spotlights; installation and dismantling of exhibits, displays, booths, decorations and the installation, dismantling and operation of sound accessories, motion picture, T.V. and video-tape productions where the Company has the contract and responsibility for the installation, dismantling and operation of such equipment.

WE WILL withdraw recognition from United Brotherhood of Carpenters & Joiners of America, Louisiana Carpenters Regional Council, AFL-CIO.

## DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

WE WILL, jointly and severally, disgorge all dues, fees, and benefit contributions paid by or on behalf of employees who performed work for us falling within Local 39's bargaining unit jurisdiction while they were represented by United Brotherhood of Carpenters & Joiners of America, Louisiana Carpenters Regional Council, AFL-CIO, except for payments that are shown to have been noncoercive.

## FREEMAN DECORATING COMPANY

## APPENDIX B

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 discharge employees because they have been represented by International Association of Stage and Theatrical Employees, Greater New Orleans Stage, Motion Picture, Television and Exhibition Employees Local 39, AFL-CIO, or referred from Local 39's hiring hall.

WE WILL NOT refuse to recognize and bargain in good faith with Local 39 as your exclusive collective-bargaining representative

WE WILL NOT recognize and bargain with United Brotherhood of Carpenters & Joiners of America, Louisiana Carpenters Regional Council, AFL-CIO, as your bargaining representative.

WE WILL NOT coercively interrogate employee or former employee witnesses in NLRB proceedings in violation of their rights guaranteed them by Section 7 of the Act.

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

WE WILL recognize and, on request, bargain in good faith with Local 39 as the exclusive collective-bargaining

representative of our employees in the below described bargaining unit:

Including those employees who are engaged in the installation, dismantling and operation of scenery, curtains, properties, electrical effects and the operation of spotlights; installation and dismantling of exhibits, displays, booths, decorations and the installation, dismantling and operation of sound accessories, motion picture, T.V. and video-tape productions where the Company has the contract and responsibility for the installation, dismantling and operation of such equipment.

WE WILL withdraw recognition from United Brotherhood of Carpenters & Joiners of America, Louisiana Carpenters Regional Council, AFL-CIO.

WE WILL, jointly and severally, disgorge all dues, fees, and benefit contributions paid by or on behalf of employees who performed work for us falling within Local 39's bargaining unit jurisdiction while they were represented by United Brotherhood of Carpenters & Joiners of America, Louisiana Carpenters Regional Council, AFL-CIO, except for payments that are shown to have been noncoercive.

## GES EXPOSITION SERVICES, INC.

## APPENDIX C

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 discharge employees because they have been represented by International Association of Stage and Theatrical Employees, Greater New Orleans Stage, Motion Picture, Television and Exhibition Employees Local 39, AFL-CIO, or referred from Local 39's hiring hall.

WE WILL NOT refuse to recognize and bargain in good faith with Local 39 as your exclusive collective-bargaining representative.

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

WE WILL recognize and, on request, bargain in good faith with Local 39 as the exclusive collective-bargaining representative of our employees in the below-described bargaining unit:

Including those employees who are engaged in the installation, dismantling and operation of scenery, curtains, properties, electrical effects and the operation of spotlights; installation and dismantling of exhibits, displays, booths, decorations and the installation, dismantling and operation of sound accessories, motion picture, T.V. and video-tape productions where the Company has the contract and responsibility for the installation, dismantling and operation of such equipment.

EXPO SERVICES/USA  
CONVENTION SERVICE, INC. OF  
PENNSYLVANIA  
SHO-AIDS, INC.  
CZARNOWSKI DISPLAY SERVICES, INC.  
RENAISSANCE MANAGEMENT, INC.

#### APPENDIX D

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 discharge employees because they have been represented by International Association of Stage and Theatrical Employees, Greater New Orleans Stage, Motion Picture, Television and Exhibition Employees Local 39, AFL-CIO, or referred from Local 39's hiring hall.

WE WILL NOT refuse to recognize and bargain in good faith with Local 39 as your exclusive collective-bargaining representative.

WE WILL NOT refuse to supply Local 39 with relevant and necessary information requested by the Union for the purpose of bargaining.

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

WE WILL recognize and, on request, bargain in good faith with Local 39 as the exclusive collective-bargaining representative of our employees in the below-described bargaining unit:

Including those employees who are engaged in the installation, dismantling and operation of scenery, curtains, properties, electrical effects and the operation of spotlights; installation and dismantling of exhibits, displays, booths, decorations and the installation, dismantling and operation of sound accessories, motion picture, T.V. and video-tape productions where the Company has the contract and responsibility for the installation, dismantling and operation of such equipment.

WE WILL, on request, supply Local 39 with relevant and necessary information requested by the Union for the purpose of bargaining.

ZENITH LABORNET, INC.  
EAGLE MANAGEMENT GROUP, INC.

#### APPENDIX E

NOTICE TO MEMBERS  
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 engage in collective bargaining with Freeman Decorating Company, New Orleans, Louisiana, and GES Exposition Services, Inc., New Orleans, Louisiana, regarding employees represented by International

## DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

Association of Stage and Theatrical Employees, Greater New Orleans Stage, Motion Picture, Television and Exhibition Employees Local 39, AFL-CIO, in the below-described collective-bargaining units:

Including those employees who are engaged in the installation, dismantling and operation of scenery, curtains, properties, electrical effects and the operation of spotlights; installation and dismantling of exhibits, displays, booths, decorations and the installation, dismantling and operation of sound accessories, motion picture, T.V. and video tape productions where the Company has the contract and responsibility for the installation, dismantling and operation of such equipment.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL withdraw from all collective-bargaining relationships regarding employees in the above-described collective-bargaining units, including contracts, with Freeman Decorating Company, New Orleans, Louisiana, and GES Exposition Services, Inc., New Orleans, Louisiana.

WE WILL, jointly and severally, disgorge all dues, fees, and benefit contributions paid by or on behalf of employees who performed work for Freeman Decorating Co. or GES Exposition Services falling within Local 39's bargaining unit jurisdiction while we represented them, except for payments shown to have been noncoercive.

UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA,  
LOUISIANA CARPENTERS REGIONAL  
COUNCIL, AFL-CIO

## APPENDIX F

Courtney Aaron	Avery Anderson Jr.	Darryl Arthur
Charles Abate	D. Anderson	L. J. Arthur
Sam Abelar	Daisy Anderson	David H. Ashburn
Desmond M. Ables	George Anderson	James Ashcraft
Ronald J. Abney	John A. Anderson	Cheryl F. Atkinson
Russell G. Abney	Robert Anderson	Clarke H. Atkinson
Loren Acosta	Terrence Anderson	J. Audibert
Clayton M. Adams	David Anding	Randy Audibert
Floyd Adams	Robert D. Anding	Charles Audler Jr.
James Adams	Jason Andres	Brett Augusta
Michael Adams	Octavia Y. Andres	Charles Austin
Patrick J. Adams	Julius Andrews	Gordon Austin
Wendell W. Adams	Thomas Andrews II	Guy Authement
Ricky Addison	Aaron Andrus	Jerry Autin
David Aggeman	Michael Ann	Gloria J. Babcock
Lee Aguilar	Cecil Annaloro	Nolan Babineaux
Byron Aguillard	Gina Annaloro	James Bailey
Bobby Aguirre	Dorothy A. Antoine	Elizabeth Baker
George Airline	Steve Antoine	Frank Ballero Jr.
Lewis Albarado	James Antonni	Patrick Balsler
Nathan Albert	Steve Antonio	Delrio Banks
Charles Albright	Robert J. Applegate	Edward Banks Jr.
Charlen Alexander	Ronald R. Arcement	Henry Banks
Rodney Alexander	Carl Ard Jr.	Sylvester Banks
Rhodie Alexander	Gordon Ard	Paul Bankston
Wilfred Alexander	Christopher Armand	Edward Bannon
Paul Alexis	James Armstrong	Byron Baptiste
Herman Alfonso	Michael Armstrong	Kip Barard
Raymond Alfonso	David Amaud	Cardell Barbarin
Gerald Alleman	Gregory Arnold	Kirk Barbarin
Harold Allen Jr.	Terry A. Arnold Sr.	Lance Barbier
Harold Allen Sr.	Alphonse Arnone	Earl Barkemeyer

Dennis Alley	Michael Arnouville	Arthur Barnes
Booker Allison	Matthew Arntz	Donna Barnes
Robert R. Allnet	Klebert Bergeron	Michael Barnes
John Ally	Larry Bergerton	Scott Barnett
Mario Alvarado	Frederick Berkley	Curtis Barracco Jr.
David Amaid	Allen Bernard Sr.	Randy Barras
Armando Amaya Jr.	Richard A. Berns	Rusty Barras
Maryann Amedeo	Walter Berns III	Thomas Barre
William J. Barre	Walter Berns Jr.	Nicholas Bonomo Sr.
Terry Barrilleaux	Glen Bertoniere	Richard H. Bonono
Wade Barrios	Larry Bertrand	Joseph Bonvillain
Cathleen K. Barsky	Peter Bertucca	Davis Boos
Leona Bartholomew	Felmo Bethancourt	Anthony Bordelon
Mark Bartholomew	Barry Bickham	Curtis Bordenave
Pamela Bartholomew	Keith L. Bien	Gabriel Bordenave
Eddie Bartley	Harold Bierria	Raymond Boss
Gregory Barton	Joseph Bigg	Scyler Bostick
Dwight A. Bastian	Juanita A. Billiot	Danny Boswell
Ryan Bascle	Robert Billiott	James Boswell
Jessie L. Bates	Shamaine Billiott	Felix A. Botsay
Lloyd D. Bates	Louency Billot	Ronad W. Botsay
Joseph Batiste	Mark Billot	Eddie P. Boudeaux
Roland Batiste	Nolan Billot	Jon Boudreaux
Ronald Batiste	Stanley Billot	Rodney Boudreaux
Michael G. Bauer	Cornel Bingham	Ronald Boudreaux
Robert Bauer	Lionel Bivalacqua	Ronald J. Bouffine
Tammany Baumgarten	Leisa Black	Jerald Bouie Sr.
Jesse Baumler	Michael Blackburn	Armand Bourdais
Bryan Baummy	Velvet Blady	Charles Bouska
Glenn Bavchemin	Edward Blakes	Robert A. Bouterrie
Terry Beamon	Walter Blanchard	John L. Boyce
Dale Bear	Christopher Blappert	Scott Boyce
Kenneth C. Behr	Darrell Blappert	William Boyd
Arven Bell	Ruth M. Blazio	Sandra Boykin
Jennie Bell	Shephen Blobaum	Claudia Boyle
Juan Bell	Larry Blouin	Robert S. Boyle
Lloyd Bell	Robert Bodenheimer	David M. Boynes
Michael G. Bell	Burton Boihem	Shannon Bozeman
William (Wayne) Bell	Donald Bolling	Beth A. Brackett
Thorton Bellard	Glenn Bollinger	Jewell A. Bradford
Angela Bendana	Brandon Bonck	Paul Bradford
Joseph L. Benfiglio	Frances M. Bonck	William R. Bradley
Robert Benitez Sr.	Rene' Bruno	George Brady Jr.
James Bennett	Charles Bryant	Gerald Brady
Allison Benson	Lionel Buchanan	Larry Branch
Glenn Bergeron	Eric Buckley	D'Laine Brannan
J. Bergeron	Barbara A. Buie	David Braquet
James A. Braxton	Donald Bulen	William P. Brashear
Robert Breaud Sr.	Shawn W. Bulen	Robbie Callahan
Charles Breaux	Karen L. Bullock	Karen Callais
James Brennan	Arthur F. Buras	David Callaway
Johnny Bridges	Clint Buras	Richard Callaway

## DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

Jeffery Bright	Craig Buras	Alan J. Campbell
Stephen J. Brindle	James Burgess	Egbert Campbell
Trevor C. Brister	Paul D. Burglass	Marcus S. Campbell
Arthur S. Brock Jr.	Bonnie Burkardt	Anvoine Cambie
Glenn Brodie	Jilda Burmaster	Vidal Cambre
Kevin Brody	Mitchell Burmaster	Allen Cameron
Robert Brooks	Arthur Burns	Charles Cameron
Terrance Brouillette	Thomas Burns Jr.	Frank Campina
Valerie Broussard	Marion M. Burrell	Armon Campo
Alan Brown	Roy Burtchaell	Joseph A. Campo
Albert Brown	Chad Busby	Kevin Campo
Arthur Brown	Debbie Bush	Marian Campo
Arthur T. Brown	Edora Bush	Nicholas Campo
Bryan H. Brown	Michelle D. Bush	Stephen Campos
Curtis Brown	Herbert Butcher	Ronald Camus
Demon D. Brown	Andrew Butler III	Joseph Canfill
Dwayne Brown	Jerry Butler	Philip Cannella
Edmund J. Brown	Harold A. Buttone	Russell Cannino
Eric V. Brown	Keith Buttone	John Cannon IV
George Brown	Clyde Byrd	Reynold G. Cannon
Javettia Brown	Thomas Byrd	Keith Cantrell
Kenneth C. Brown	Raymond Byrnes	John E. Canty Jr.
Kenneth H. Brown	Joe A. Cabrejo	Mare T. Canty
Lisa Brown	Beverly D. Cafiero	Daniel Capra
Marilyn E. Brown	Robert Cager	Carlos Carcamo
Michael Brown	Charles A. Caldwell	Charles Cardaronella
Paul Brown	James Caldwell	Christopher Cardella
Pearl Brown	Paul Caldwell	Steven Cardwell
Raussan Brown	Richard Call	Gerald J. Carlini Jr.
Randolph Brown	Richard Call	Bradley W. Carlton
Edward Browne	Ronald J. Chimento	Phil Carnely
Lisa Browning	Russel Choina	Mark W. Carpenter
Karl Bruder	Phillip Chuter	Jeremiah Carroll
Farnk Brugier	Ricky Chuter	Jerry Carroll
Juan Bruna	Damian S. Ciecierski	Eurine M. Carter Sr.
Leon Carter	John M. Cieutat	Kendall Carter
Rickey Carter	Charles Clark	Dale Conravey
Ronald O. Carter	Courtney Clark	Michael A. Cook
Sherwin Carter	Donna Clark	Ray A. Cooks
Michel Cascio	Ronald S. Clark	James E. Cooper
Donald Case	Theron J. Clark	Kester Cooper
John Caserta	Anthony Clavier	Theaodo Cooper
Peter Caserta	Alfred Clayton	Glenn Cordes
Graylin T. Cass	Joseph Clement	Victor Cordes
Irvin Cassanova Jr.	Robert E. Clement	Gregory Cordier
John Casse	Patrick Clemons	Bruce Corne
Evans Casso	Alton Clivens	John E. Cosse`
Humbert Castaneda	Michael Coates	Ashton Coston
Luis Castaneda	Corneilus Coburn	Tasha Coston
Harry Castille	Charles Coffman	Larry Cottil
Gregory C. Castle	Christian Coffman	David Cottrell
Harold Caston	Michael Cofield	Frank Couforto

Antoinette Catalano	Emile Cola	Thomas Coulton III
Joe Catalano Jr.	Herbert O. Colar	Wayne Counillion
Carlo Catalanotto	Wade Colclough	James J. Courtney
Joseph Catalanotto	Christopher J. Cole	Donald Courville
Michael Catalanotto	Frank Coleman	Joshua Courville
Samantha Caudle	Gail Coleman	Morris B. Couully
Russel Cavalier	William S. Coleman	Glen Couvillion
Anthony Caviness	David Collins	Wayne Couvillion
Adrian Cazenave	Wayne Collongnes	Andrew Cowart
Laura M. Cellini	Robert Colomes	Jason Cox
Jim D. Cento	Jeffrey P. Colon	Troy Craft
Jerry Chaisson	Steven Comeaux	Samuel Craig
William Chambers	Martin Comer	Bobbie Crawford
Gregory R. Chapman	Frank J. Conforto	Lloyd Crawford
Gilly Charbonnet	Edward Connelly	Jason R. Creppel
Jimmie R. Cheek	Dwight Conner	Wayne Crial
Howard Chenevert	Jeffrey B. Conner	Wayne P. Croal
Tristan Cherry	Jamie Conrad	Dennis Crocker
Matthew Chiasson	Floyd Degrange	Cedric A. Cross
Lamar K. Childress	Jason Degruy	Edward Cross III
Jason Childs	Babbrette Delafont	Melba Cruz
John Childs	Michael Delise	James Culver
Craig Chilton	Rudy Delliveniri	Stanley H. Culver
Timothy Cunningham	Gerald Dellucky	Fernannndo Cundin
Benjamin Curet	Reyes Delos	Murray Dixon
Samuel J. Curley	F. Delucky	Raymond J. Dixon
Ryan Currer	Pamela J. Delvalle	Allisa Dolese
Michael Currera	John Demarest	Joe Domino
J. D. Cutrer	John Demaria	Charles J. Dominick
Bernard D'Arcangelo	William Demouy Jr.	David R. Donaldson
Vic D'Arcangelo	Allen Dequair	Richard Donovan
Daniel J. Dabovel	Steven Dermody	Tommy B. Dooley
Charles Daigle	Arthur Derrie	Karl Dorand
Charles Dalferes	Joseph Desmares	John P. Dossett
Christopher Dalgo	James Despenza	John Dotson III
Steven J. Dalier	Wendy F. Desroche	Carlton Douglas
Shawn Dalmado	Larry Desrochers	Arthur Douglass
Dustin Dalon	Troy Desselles	Pamela U. Dozier
Sean M. Dalrymple	John W. Deuchert III	William Dreis Jr.
Mark Damian	Carl J. Devoe	Prentiss Drenning
Janene Damiano	Donald Dewald Sr.	Larry Drewett
Leonard Daniels III	Fernando Diaz	Al J. Dubroc
Jules J. Dantin	James A. Diaz	Robert Duckworth
Anthony Daranda	Margaret A. Diaz	Scott Duckworth
Stanley Daranda	Raul Diaz	Eugene Dudenhefer
Frank Davis	Bruce Dichiaro	Eric M. Dudley
James Davis	Donna Dickens	Eric Dufrene
Lisa Davis	Wayne C. Dickens	Errol Dugar
Marc Davis	Dolorus Dickerson	Edith Dugars
Mark A. Davis	Brent Diecedue	Ronaldo Dugars
Michael Davis	Vincent Diecidue	Gerald Duggan
Paul Davis	Henry Dierker	Kenneth Duhe`

## DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

Samuel Davis	Geron P. Diette	Norman Duhe
Jimmy Dawson	Frederick T. Dietz	Joseph Dullary
Millard Day	Anthony Dileo	Gilbert Dumams
Andrea Dean	Jay Dileo	Casey R. Dumas
Joseph Dean	Joseph Dilosa Jr.	David P. Dumont
Roger Dean	Bruce Dinwiddie	Andrew J. Dunham Jr.
Lloyd J. DeCuir	Robert Etharidge	John. Dunham
Charles Deen	Bryon Evans	Stanley S. Dunn
Greg C. Dees	Robert Evans	Robert Duphis
Edward L. Deffes III	Sidney Evans	Lambert Duplessis
Ralph Deffes	Kimyetta Ewell	Matthew J. Dupont
Robert Duran	Frederick Faasch	Stanley Dupuy
Lucy A. Durna	Priscilli Falahpour	Ted Fischer
Ronald P. Duroso Jr.	David Falcon	Bryan R. Fisher
Joseph Duvigneaud II	Stan Farragut III	Kendall Fisher
Ronald Duvoison	Hal Faulkner	Robert Fisher
Chris Dyess	Louis Faust	James Fisk
John Dyess	Lee A. Favalora	Brian Flaherty
Patsy Dykes	Joseph Favaza	Robert Flauss
Carl Dyson	Nicholas Favaza	Barry Flippen
Edward Dzierwinski	Linda S. Favron	Carl J. Flippin
Tanya L. Eagan	Thomas Fayard	Bennie Flowers
Sutart P. Eagle	Anna Fazzio	James Flowers
Ann Eaker	Michael Feasel	Kathleen Floyd
Larry Early	Troy Felder	Kevin Ford Sr.
Robert "Eric" Eason	Francis Fenasci	Lance D. Ford
Gary Eastman	Harold Fenasci	Roy Forest Jr.
Melvina Eddington	Nicole Fenasci	Kent Forrest
Chris B. Ederson III	Thaddeus O. Fenasci	Joe Fortenberry
Michael Edgeworth	Barry Fenner	Bertrand Fos
Darryl W. Edwards	Chris M. Ferand	Clinton R. Foster
Robert Eisorlett	Debbie Ferger	Emmett Foster
Brian H. Elam	Timmy Ferguson	Frank Foto
Jack R. Elder	Marti Fernandez Jr.	Chad Fradella
Jack Eleuterius	Anthon Ferrantelli	Robert Fradella Jr.
Barbara Ellis	Michael L. Ferrell	Anthony P. Frances
Lisa C. Ellis	Erik Ferro	Ashley Frank
Charley Engel	Alonzo Field	Bruce Frank
Gregory Engle	Andrew Fife	Keefe C. Frank
Karen Engram	Daniel Figueroa	Patty R. Frank
Lindell A. Engram	Wayne A. Filmore	Charles Franklin
Anthony Ray Enna	Joseph Fincher	Jeffrey A. Fraser
Darin Epperson	James Fink	Anthony Frederick
Jim K. Erickson	Lea Fink	Dan Freeman
Michael Ernst	Claude Fischer	Jonathan Freeman
Mark Eshete	Staphan A. Giacona	Joy Frey
Kay Esler	Cyril Giarrusso	Whitney Frilot
Michael Esnault	Anthony Giglio	John Frisard
Malcolm Esquerre III	Clarence Gilbert Jr.	Kenneth Fritscher
Joseph Estopinal	Augustus Gill	Gary Fritzs
Edwin Fucci	Bernard Gill	David Fruge
Robert Fucci	William L.E. Gillespie	Christie L. Gowland

Susan Fuest	Allison L. Gilmore	Henry Gowland
Clifford Fuller	Ronald Gilmore	Joseph T. Gracianette
Chris Gabourel	Derrick M. Ginn	Richard M. Gracin
Apple Gaffney	Robert Giovengo	James Graham
Blaise Gagliano	Patrick Giravo	Larry Graham
Dan Gai	Bryan C. Giroir	Gramelspacher
Barry Gaines	Daniel Gisevius	Hymel Grant
David W. Gaines	Karen Gisevius	Charles Gras
Christopher Gale	Glenn Gitz	Glenn J. Gray
Don Galiiano	Jerry Givens	Joseph E. Grayson
Eddie Galjour	Timothy Gleason	Joseph G. Grayson
Joseph W. Galliano	William P. Glynn Jr.	Charles Gredston
Jeffery Galon	Samuel Goff III	John Green
Donald Gandolini Sr.	Kelly Golden	Patrica Green
Burt R. Gangolf	Donald G. Goldman	Lori Greenwood
Gilberto Garcia	Larry G. Goldman	Lymon Greenwood
Anna Gardener	Charles Goldston	Gary B. Greer
Desiree J. Garner	Kevin L. Goldston	Oscar M. Greer
Robert Garrett	Anthony Gomez Jr.	Jerome Grego
Thomas E. Garrity	Antonio Gonzales	Joseph Gregory
Isaac Gary	Jo A. Gonzales	Kevin Grelle
Dane L. Gascon	Robert P. Gonzales	Willie Griffin Jr.
James Gaudet	Theresa Gonzales	Phillip Grilletta
Wayne Gauthé	Carole Goodson	Peter Grimshaw
Lawrence Gautier	Bryon N Goos	Michael J. Grisaffi
Sharon Geeck	John E. Gordon	Luke Gross
Wayne Gelpi Jr.	Mary O. Gordon	Bobbie Grubbs
Steve Genard	Torrey Gorman	Peter Guarino
Andrew F. Genna	Emile Gourgues	Guy Guerra
Carkie M. George	Eddie Goutierrez	Norbert Guerra
Kevin George	Luca J. Governale	Ricky Guerra
Michael George	Sue Governale	Roy Guerra
Roger George	Jeffery Harris	Louie Guertin
Gerald Gervais	Dave Harrison	Jules P. Guidry
Glenn Getscher	Larry Harrison	David Guilbeau
Betty Ghiloni	Raymond Harrison	Carlos Guillen
John Ghiloni III	Dwan J. Hart	Robbie Guillot
James Guizlo	Robert H. Hart Jr.	Willard Guillot
Ralph Gunn	Scott F. Hartman	Amy Hefley
Steven Gunther	Frederick Hartwick	Mark Hefley
Lloyd Gutierrez	Ellis Harwell III	Walter Heidel
Bonnie Haasase	John Hatcher	Michael Heim
Luis Hagans	Daniel R. Hatfield	Elliott Heimel
Greg Haley	Emma C. Haulard	Gerald Heinemann
Dove L. Hall	Chanda F. Hawkins	Gerald Hellmers
Frederick Hall	Gregory L. Hawkins	John Hellmers
John R. Hall	James Hawkins	George Helm
Thomas Halley	Barron Hay	Milton J. Helmke III
Sabrina Hamann	Gary Haydel	Huey Helmstetter
Scott D. Hambrice	Charles Lee Hayes	Mark L. Hemstad
Leonard Hamilton	Don R. Hayes	Charles Henderson
David Hamlet	Harold Hayes	Trahan Henderson

## DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

Robert Hammond	Joseph S. Hayes Jr.	Justin K. Henne
Helen Hampton	Marcus Hayes Sr.	Howard Heno
Thomas Hand	Samuel Hayes Jr.	Donald J. Henritz
Michael B. Haney	Roy Haylock	Charles Henry
Nolan Hankton	John Haynen	Claude Henry
Weldon Hankton	Maurice Haynes	James Henry
Sean Hanley	Tim A. Haynes	Tyrone Henry
Scott Harding	Andre Hearty	Wilmer Henry
Susan Hare	Charles J. Hebert	Charles Herbert
Leon Harmann	David Hebert Jr.	Roland Herbert
Jason Harp	Edward Hebert	George Herbold
Charles E. Harper	Gary Hebert	Terri Herkes
Alfred Harris	Richard Hebert	Alcide Hernandez
Alton Harris	Robert Hebert	Angel Hernandez Jr.
Angelique M. Harris	Roland O. Hebert	Henry Hernandez
Bobbie Harris	Gary M. Hedrick	Marc Herring
Chad Harris	Ronald Hughes	Marc G. Herring
Claudia Harris	Timothy T. Hughes	John Herron III
David Harris	Joseph Hults	Emile Hessler
Earl Harris	Michael Hum	Todd Hew
James Harris	Chester Hunter	Randy Hilburn
Luc Hill	Sonnie Hunter	Dennis Hill
Michael Hill	Steven Hupp	Clyde Johnson
Thomas. Hill	Earl Hurst	Cory Johnson
Tod C. Hill	John Hurst	Donald Johnson
John Hillburn	Marvin Husser	Douglas Johnson
Chad Hingle	Stephen Huth	Joseph Johnson
William Hippler	Terry Huth	Joyce Johnson
Edison Hockaday	Renee Hyer	Larry Johnson
Edison Hockaday Sr.	Brent Hymel	Lavor J. Johnson
Jesse J. Hodges	Grant E. Hymel	Michael Johnson
Allan Hoey	Jorge Infantes	Philip Johnson
Dennis M. Hoffman	Lawrence Ingram	Rahsaan Johnson
Roderick Holley	Michael Ipser	Richard Johnson
Thomas Holley	Roger Irion	Rosabelle Johnson
Charles Holmes	Nevil Irvin	Terrance Johnson
Silas Holmes	Shirly Irvin	Louis Joichin
Herbert Honses	Ceolia Mae Irving	Charles Jones
Robert Hood	Louis Irwin	Danny Jones
Vincent Hood	Anthony Jackson	Derrick Jones
Donald L. Hooker	Donnis Jackson	Earnest Jones Sr.
Ronald Hookfin	Frank Jackson	Ernest Jones
Rondell Hopkins	Gail Jackson	Frank Jones
Dawn Horold	John D. Jackson	G. Jones
Mark Horton	Lanette Jackson	Herman Jones Jr.
Mark Hosli	Leslie Jackson Jr.	Leonard Jones
Herbert A. Houses	Norman A. Jackson	Marcus Jones
Jerome Howard	Richard Jackson	Michael Jones
John Howard	William F. Jackson	Tina Jones
Johnny Howard	Antonio James	Tyrone Jones
Stanley E. Howard	Damon A. James	Walton M. Jones Jr.
Wayne Howard	David James	Ronald W. Jordan

Louis Hoyt Jr.	Francis James	Gary Jordana
John Huber	Hurtis James	Aaron Joseph
Adonis J. Hudson	Walter James III	Charles Joseph
Milton Hudson	Walter James Jr.	Ernest Joseph
Margaret Huete	Robert Knowler	Gaynell Joseph
Paul M. Huff	Christoopher Koelsch	Michael Joseph
Dewayne Hughes	Ronnie Koffler	Wilson Joseph
Keith W. Hughes	David Kott	Paul Jourdan
Richard Hughes	James D. Kragle	Archillie Julian
Patrick Kadow	William Kramer	Ivory Jupiter
Dennis Kahoe	David Kraus	Alvin Langsford Jr.
Lonnie Kahoe	Myron Kraus	Gian Lanier
James R. Kaiser	Troy Kraus	Joseph Lanitia
Margue Karajulles	Todd Kruebbe	Lionel O. Lanu
Frank C. Keefe	Wayne Kruebbe	Augie Lapara
Stevens M. Keith	Duane Kube	Gordon Laporte
Darryl Keller	Lynne Kurilovitch	Stanley Laque Jr.
Shelia Keller	Clifford Kurucar	Brian C. Larce
Richard Kellerman	Perry A. Labat	Carl LaRosa
Brenton Kelley	Philip Labruyere	Carl V. LaRosa
Laverne Kelley	Paul Lacassagne	Joseph Larosa
Bernard J. Kendrick	Mary LaCaze	Stewart Larson
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Frank Sams	James Soderman	Roger Silva
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Joseph Sanchez	Wayne Softley	Stanley Simeon
Randy J. Sanchez	David Sohn	David Simmon
Riccardo Sanchez	Wayne J. Soignier	Christophe Simmons
Reggnel Simmons	Bruce Solomons	Donald Simmons
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Darrel Simpson	Mark Songy	James Stortz
Jeffery R. Simpson	Stephen Songy	John Stortz Jr.
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Mark Thomas Smith	Michael J. Stanley	Gene Tarzetti
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James Snee	Jason Toups	Michael J. Taylor

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Jared Snyder	Richard Toups	Sharon Taylor
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Gerald Thomas	John Trobino	Feliciano Vigoa
Jenard Thomas	Brockton Tross	Margar Villanueva
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Glen Weiland	Steven Williams	John Wright
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James White	Kondwani Winston	
Marie White	Shelia Winston	

*Lesley A. Troop, Esq.*, for the General Counsel.  
*William Lurye, Esq.*, of New Orleans, Louisiana, for Respondent Carpenters.  
*Philip Franco, Esq., Brooke Duncan III, Esq., Mike Duran, Esq., and Bill Kelly, Esq.*, of New Orleans, Louisiana, for Respondents Freeman, Spangenberg, Expo Services, Sho-Aids, CSI, Czarnowski, Eagle, Renaissance, and Zenith.  
*Curtis Mack, Esq., Jack L. McLean, Esq., and E. Jewelle Johnson, Esq.*, of Atlanta, Georgia, for Respondent GES.  
*Robert S. Giolito, Esq. and Jeffrey D. Sodko, Esq.*, of Atlanta, Georgia, and *Don Gandolini*, of New Orleans, Louisiana, for the Charging Party.

### DECISION<sup>1</sup>

This hearing was held in New Orleans, Louisiana, on several days beginning on October 26 and ending on December 11, 1998. After the hearing closed, the General Counsel moved to consolidate cases and amend the consolidated complaint on February 5, 1999.<sup>2</sup> I have considered the full record and briefs of the parties<sup>3</sup> in preparing this decision.

### I. JURISDICTION

The Respondent Employers are occasionally referred to as Freeman, GES, Expo Services, Expo Emphasis, Convention or CSI, Sho-Aids, Czarnowski, Spangenberg, Renaissance, Zenith, and Eagle. Freeman, Spangenberg, and GES are general service contractors in the convention and trade show industry with facilities in Louisiana. During the 12 months that ended November 30, 1997, each purchased and received goods valued in excess of \$50,000 directly from points located outside Louisiana. CSI, Czarnowski, Expo Emphasis, Expo Services, Renaissance, Sho-Aids, Zenith, and Eagle have been engaged in the business of installing and dismantling in the convention and trade industry in Louisiana. During the 12 months ending November 30, 1997, each of those installation and dismantling companies purchases and received goods valued in excess of \$50,000 at its Louisiana facility directly from points outside Louisiana and each provided services in excess of \$50,000 for GES and Freeman.<sup>4</sup> I find that each of the Respondent Employers was an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (the Act) at all material times.

<sup>1</sup> Since close of the hearing there have been requests for oral argument. After fully reviewing the record and the briefs of the parties I conclude that oral argument is not necessary.

<sup>2</sup> On February 5, 1999, the General Counsel moved to amend consolidated complaints in Cases 15-CA-14598, 15-CA-14693, 15-CA-15079, 15-CB-4392, and 15-CB-4535 and to consolidate Cases 15-CB-4547-1, 15-CB-4547-2, and 15-CB-4547-3 with the cases here. Those motions are opposed and are discussed below.

<sup>3</sup> Briefs include ones from counsel for the General Counsel, Charging Party, Carpenters, Freeman, Expo Services, DSI, Sho Aids, Czarnowski, Zenith, Renaissance, and Eagle, and a corrected brief for GES.

<sup>4</sup> There was testimony and other evidence that Expo Emphasis, L.L.C. performed services outside Louisiana over the 12-month period that exceeded \$50,000. All other Employers stipulated that each met the Board's commerce and jurisdictional standards.

### II. LABOR ORGANIZATIONS

The two Unions admit and no one disputes that International Association of Stage and Theatrical Employees, Greater New Orleans Stage, Motion Picture, Television and Exhibition Employees Local 39, AFL-CIO (Local 39) and United Brotherhood of Carpenters & Joiners of America, Louisiana Carpenters Regional Council, AFL-CIO (Carpenters) are labor organizations as defined in the Act.

### III. THE UNFAIR LABOR PRACTICE ALLEGATIONS

The complaint includes allegations that the Respondent Employers discharged over 2000 employees, declined to agree to Local 39's acceptance of a contract, and withdrew recognition from and refused to bargain with Local 29. The complaint alleges that Freeman and GES granted recognition to the Carpenters; and that the Carpenters entered into collective-bargaining agreements with those Respondent Employers, in violation of provisions of the Act.

IATSE Local 39<sup>5</sup> was the recognized collective-bargaining representative of specifically named employees<sup>6</sup> of the Respondent Employers before July 22, 1997. Collective-bargaining contracts between Local 39 and the Employers expired on June 30, 1997. Local 39 notified those Employers of its desire to open contract negotiations and negotiations started with the "Big Eight"<sup>7</sup> Employers before June 30. On June 30 Local 39 members voted to reject Respondent Employers' contract offers and to strike on July 1, 1997.<sup>8</sup> Picketing started on July 2

<sup>5</sup> Charging Party International Association of Stage and Theatrical Employees, Greater New Orleans Stage, Motion Picture, Television and Exhibition Employees Local 39, AFL-CIO. Only journeymen were eligible for membership in Local 39. However, its hiring hall included over 1850 helpers in addition to approximately 446 journeymen.

<sup>6</sup> The contracts' recognition provisions include those employees who are engaged in the installation, dismantling, and operation of scenery, curtains, properties, electrical effects, and the operation of spotlights; installation and dismantling of exhibits, displays, booths, decorations, and the installation, dismantling, and operation of sound accessories, motion picture, T.V., and video take productions where the Company has the contract and responsibility for the installation, dismantling, and operation of such equipment. I find that the record evidence failed to show that the above bargaining unit is not an appropriate unit (See *Blockbuster Pavilion*, 314 NLRB 129, 142 (1994)). The parties have historically bargained and contracted with that same bargaining unit. *Trident Seafoods*, 318 NLRB 738 (1995).

Freeman argued that each Employer maintained separate and distinct bargaining units and that none of those units included 2300 employees. The evidence does show that no one employer employed all the hiring hall employees and most employed only a few employees from the hiring hall at any one time. However, the record did show that Local 39 selected employees for referral to the Employers and Local 39 could have selected anyone from its hiring hall list of approximately 2400 employees under lawful selection procedures.

<sup>7</sup> Freeman, GES, Expo Services, Expo Emphasis, Convention or CSI, Sho-Aids, Czarnowski, and Spangenberg. None of the Employers belong to a multiparty bargaining association. For convenience some of the Employers negotiated as a group.

<sup>8</sup> The General Counsel contended that of the 446 Local 39 journeymen, only 294 were union members. Only members were permitted to vote in the June 30 strike vote and only 126 members attended that meeting (GC Exh. 114).

against the Big Eight Employers. On and after July 1 several Respondent Employers phoned Local 39 and requested workers pursuant to the hiring hall arrangement. Those requests were rejected. The Employers were told Local 39 was on strike and no workers were supplied. Picketing continued until July 26.

Contract negotiations between Local 39 and the Big Eight continued during the strike. On July 13<sup>9</sup> the Employers made a contract offer. Local 39 did not accept that offer before another meeting planned for July 22. Before that July 22 meeting the Employers met together. The Employers had prepared another contract proposal but Ken Singer from GES asked Attorney Brooke Duncan<sup>10</sup> if he had received an 8(d) notice.<sup>11</sup> During the negotiation session the Employers asked if Local 39 had submitted a FMCS notice. Local 39 Attorney Harry Forst replied that a notice had been sent<sup>12</sup> and he agreed to supply the Employers with a copy of that notice.

Attorney Forst testified that Brooke Duncan and a couple of the other attorneys asked him to produce the FMCS letter after a break in the July 22 meeting. The attorneys told Forst they had been checking and FMCS either could not find or did not have his notice. Brooke Duncan told Forst,

Until you can produce the letter, we don't want to negotiate with you and—until you can produce the letter. So we broke; it was around lunch time. And I think Brooke said, If you can produce the letter, you can—you know, we can come back around one o'clock.

The Employers did not make a contract offer during the July 22 meeting. Representatives of the Employers phoned FMCS on July 22 and were told that FMCS had not received an 8(d) notice from Local 39.<sup>13</sup>

Shortly thereafter Harry Forst left word on Brooke Duncan's answering machine that he had been unable to find the letter to FMCS. Later in the afternoon of July 22 the "Big Eight" Respondent Employers<sup>14</sup> faxed Local 39 that the July 1 strike was in violation of the 8(d) notice provisions and was illegal; and

<sup>9</sup> That offer was mistakenly dated July 14, 1997. Oftentimes that offer is referred to as July 13 or 14. In those cases the reference is to the same offer which was made on July 13 but dated July 14.

<sup>10</sup> An attorney for Freeman, Spangenberg, Expo Services, Sho-Aids, CSI, Czarnowski, Eagle, Renaissance, and Zenith (oftentimes referred to collectively as Freeman).

<sup>11</sup> Singer was referring to a notice Local 39 was required to send to Federal Mediation and Conciliation Service in accord with Sec. 8(d) of the Act.

<sup>12</sup> Former Local 39 Attorney Harry Forst testified that he wrote and mailed a letter to FMCS on April 22, 1997 (GC Exh. 56). The letter was sent by regular mail and copies were not mailed to either Local 39 or any of the Employers.

<sup>13</sup> FMCS wrote on July 23, 1997, and on February 12, 1998, that it was unable to locate a notice regarding Local 39 and any of the Respondent Employers (J. Exhs. 2 and 4).

<sup>14</sup> Representatives of Freeman, GES, Expo Services, Expo Emphasis, Convention Services (CSI), Sho-Aids, Czarnowski, and Spangenberg signed a July 22 letter to Local 39. The letter advised Local 39 that the Employers were terminating all employees covered under their collective-bargaining agreements, that the Employers would no longer utilize the Local 39 hiring hall, the Employers would seek to recover damages caused by the Union's strike and the Employers demanded the Union cease all strike and picketing activity (J. Exh.1).

that all the employees covered by their labor agreements with Local 39 were terminated for participating in an illegal strike.<sup>15</sup>

GES Vice President Ken Singer testified that IATSE International President Tom Short phoned him on Wednesday or Thursday after July 22. IATSE Executive Vice President Emeritus Eddie Powell<sup>16</sup> was also on the phone. Short told Singer that Local 39 was no longer the decisionmaker and that that he was now speaking as agent for Local 39. Short offered to accept any contract offer that was on the table. Singer replied that there is no offer on the table "It's withdrawn; We no longer recognize Local 39, Unfortunately, we've terminated all of G.E.S.' Local 39 employees for failure to file the 8(d) notice."

The Respondent Employers mailed copies of termination notices to more than 2300 bargaining unit employees.<sup>17</sup> The General Counsel alleged that the Employers engaged in conduct in violation of Section 8(a)(1) and (3) by terminating bargaining unit employees. The General Counsel does not dispute that employees that voted to strike or that engaged in picketing between July 1 through 26 were engaged in a strike in violation of a prohibition of Section 8(d) of the Act.

On July 26 Local 39 advised the Employers that it accepted the July 14 contract offer and that it ended its strike (GC Exh. 5).<sup>18</sup> The Big Eight Employers rejected the Local's acceptance and withdrew recognition of Local 39 by letter dated July 28.<sup>19</sup>

<sup>15</sup> Respondents Zenith, Renaissance, and Eagle discharged all unit employees on August 7, 11, and 12, 1996.

<sup>16</sup> The testimony of Singer about his phone conversation with Short and Powell is not in dispute. Neither Short nor Powell testified about that conversation. After Respondents rested, the General Counsel attempted to call Powell as a rebuttal witness to Singer's testimony regarding his phone conversation with Short and Powell. I granted Respondents' motion and did not permit Powell to testify in that regard. Singer had testified about that phone conversation after being called by the Charging Party before the Charging Party rested and before the Respondents started their defense. Therefore, I ruled that Powell's testimony regarding the phone conversation did not constitute rebuttal evidence.

<sup>17</sup> As shown above the Big Eight Employers terminated hiring hall employees on July 22. The July 1 strike clearly involved the Big Eight Employers. The evidence showed that Local 39 was also striking against Zenith, Renaissance, and Eagle. (For example Local 39 learned that Renaissance was transporting replacement workers across the picket lines around the second week of the strike. Thereafter, some of the picket signs named Renaissance.) Those three Employers notified Local 39 of their respective terminated of all hiring hall employees on August 7, 11, and 12, 1997.

<sup>18</sup> The evidence is not in dispute but that Local 39's letter ending the strike was read to Freeman Attorney Duncan on July 26.

<sup>19</sup> The July 28 letter was from an attorney for some of the Employers. It restated that FMCS had verified that it had no record of any 8(d) notice from Local 39. The letter also stated:

With regard to suggestions to negotiate and the Union's attempt to accept the Employers' July 14 offer, we state the following. On July 14, the Union did not accept our offer, and indeed the Union's continuation of its illegal strike constituted a rejection of that offer and it is no longer on the table. Even though you asserted and represented that the employer group had had no obligation to bargain because of the 8(f) status of the expired contract, the contractors negotiated in good faith and over a protracted period in an attempt to arrive at a fair and balanced agreement. As a consequence of these facts and the applicable law, we believe that the Employers have no obligation to bargain with

The General Counsel alleged that Respondent Employers engaged in conduct in violation of Section 8(a)(1) and (5) by declining Local 39's acceptance of their contract offer and by withdrawing recognition of Local 39.<sup>20</sup>

On July 28, 1997, Local 39 started what it termed an "unfair labor practice strike"<sup>21</sup> in protest of the discharge of unit employees and withdrawal of recognition.

Beginning as early as July 1997 some of the Employers had discussions with the Carpenters regarding the Carpenters supplying labor for New Orleans work. Late in 1997 Freeman and GES recognized the Carpenters<sup>22</sup> as exclusive bargaining representative of unit employees.<sup>23</sup> Those Employers and the Carpenters reached agreement and executed collective-bargaining contracts. The General Counsel alleged that Freeman and GES engaged in conduct in violation of Section 8(a)(1) and (2) and that the Carpenters engaged in conduct in violation of Section 8(b)(1)(A).

#### Findings and Credibility

The parties agreed that many of the facts underlying the issues here are not in dispute. As to others, the parties could not agree but the record illustrated there was no dispute. I have stated those facts here. As to areas of actual dispute, I have made credibility determinations in the conclusions.

#### Conclusions

##### The Alleged Discharge of Unit Employees

The General Counsel has the burden of proving that the Employers were motivated to discharge employees<sup>24</sup> because of union protected activities. See *Manno Electric*, 321 NLRB 1 fn.

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Local 39. Accordingly, the Union's offer to accept the Employers' July 14 proposal is rejected. With regard to the Union's offer to return to work, the Union's failure to file a timely and effective 8(d) notice prior to the strike rendered the strike illegal and the strikers unprotected and subject to termination, and our clients have exercised their right to implement their termination.

<sup>20</sup> The complaint alleges that Renaissance, Zenith, and Eagle illegally withdrew recognition and refused to bargain with Local 39 on December 23, 1997. It alleges that Eagle and Zenith unlawfully refused to supply Local 39 with relevant information since August 19, 1997.

<sup>21</sup> The picket signs were changed from complaining of "unfair conditions" before July 26, to "unfair labor practices" after July 28. As shown here, I find that the discharge of hiring hall employees was an unfair labor practice. Therefore the July 28 strike was an unfair labor practice strike.

<sup>22</sup> United Brotherhood of Carpenters & Joiners of America, Louisiana Carpenters Regional Council, AFL-CIO.

<sup>23</sup> The term unit employees is used to designate those employees included in the contractual bargaining units between the Employers and Local 39 before June 30, 1997.

<sup>24</sup> As shown here, by discharging employees each Employer was actually notifying that employee that he or she would not longer be used under hiring hall or other referral conditions. Local 39 supplied employees for some 70 additional employers and Respondent Employers did not employ anywhere near the total complement of the hiring hall. For example Freeman pointed to record evidence showing that it normally employed 300, CSI normally employed 6, Czarnowski normally employed 40, Eagle normally employed 3, Expo Services normally employed 50, Renaissance normally employed 15, Sho-Aids normally employed 5, and Zenith normally employed 5 unit employees. GES contended that its unit employees numbered 400.

12 (1996); *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

On July 22 Freeman, GES, Expo Services, Expo Emphasis, Convention, Sho-Aids, Czarnowski, and Spangenberg (Big Eight Employers) and on August 7, 11, and 12, 1997, Zenith, Renaissance, and Eagle notified Local 39 that all the employees<sup>25</sup> covered by their labor agreements were terminated because Local 39's July 1 strike<sup>26</sup> violated Section 8(d) of the Act.

The Employers based their decision to discharge the alleged discriminatees on Section 8(d) of the Act. Section 8(d) would provide in the instant case (1) that Local 39's July 1 strike was illegal because Local 39 did not give timely and proper notice to FMCS as required by Section 8(d) and (2) that employees that engaged in that unlawful strike ceased to be employees.

The General Counsel argued that representatives of some Employers met before expiration of the Local 39 contracts and planned to terminate their Local 39 relationship out of animus. Philip Liuzza, operations manager for Nth Degree, another employer, testified that he attended two meetings with attorneys and other exhibition industry contractors before March 18, 1997. They discussed the upcoming contract negotiations with Local 39. Respondent Employers including Expo Services, Czarnowski, Sho-Aids, Expo Emphasis, Spangenberg, CSI, and Freeman were present at those meetings. Counsel for General Counsel pointed to Liuzza's testimony that Stephen Hagstette from Freeman Decorating asked if Local 39 could be fired and Hagstette said that Local 39 did not have enough men.

I have examined Liuzza's testimony regarding two meetings with attorneys and representatives of other employers. It is clear that discussions included expressions of concern with Local 39's ability to supply sufficient labor through the hiring

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<sup>25</sup> Representatives of the Employers testified to the effect that each Employer actually discharged only those employees that had worked for that respective employer. However, as to that issue the only direct evidence as to what actually occurred is the letter from the Employers. The Big Eight Employers wrote Local 39 on July 22. Authorized representatives of Czarnowski, CSI, Spangenberg, Sho-Aids, Freeman, Expo Services, Expo Emphasis, and GES signed that letter. That letter represents the actual discharge action and is probative of what the Employers said contemporaneous with the terminations. Among others things the July 22 letter stated:

By copy of this letter, all employees covered under the Local 39 Labor Agreement with any of the signatory Employers indicated below are hereby terminated for participating in an illegal strike.

Zenith, Renaissance, and Eagle wrote letters dated August 7, 11, and 12, 1997.

<sup>26</sup> Even though Local 39's attorney eventually provided a copy of a letter to Federal Mediation and Conciliation Service, the evidence shows that FMCS had no record of receiving such notice and FMCS advised the Employers of that fact. On the basis of that evidence I find that FMCS never received notice from Local 39. Jurisprudence shows that actual receipt as opposed to evidence of mailing is required. *Teamsters (Dar San Commissary)*, 223 NLRB 1003 (1976); *Alumni Hotel Corp.*, 306 NLRB 949 (1992); *NLRB v. Vapor Recovery Systems Co.*, 311 F.2d 782 (9th Cir. 1962). I find that Local 39 engaged in conduct in violation of the provisions of Sec. 8(d) when it struck the Employers from July 1.

hall. Stephen Hagstette asked if they could use two labor sources and whether Local 39 could be fired. An attorney for Freeman explained that it would be difficult to use two labor sources and he mentioned circumstances under which the Employers could legally discharge Local 39. I am not convinced that Liuzza's testimony establishes animus beyond the evidence showing that the alleged discriminatees were fired because of their inclusion in Local 39's hiring hall. The discussions during the meetings attended by Liuzza involved clients questioning their lawyers about possible options in dealing with labor relations problems. Although those discussions included the possible removal of a recognized bargaining representative, the record evidence does not support a finding that the possible removal was based on hostility toward Local 39. Instead it appears those discussions may have been rooted solely in the Employers' concern with whether Local 39 could supply sufficient labor to meet their needs. Don Gandolini from Local 39 admitted that the Union did have some problems filling labor calls on occasion. Therefore, I am not convinced that Liuzza's testimony added to a finding of animus.<sup>27</sup>

Nevertheless, the record does include evidence of the Employers' motivation in discharging the alleged discriminatees. The Employers' July 22 letter to Local 39 (J. Exh. 1) states "all employees covered under the Local 39 Labor Agreement with any of the signatory Employers indicated below are hereby terminated for participating in an illegal strike." The Employers listed below are all the Big Eight Employers. Those Employers mailed letters to all Local 39 hiring hall employees stating that the respective employee was discharged because of Local 39's unlawful strike. Subsequently, Renaissance, Eagle, and Zenith notified Local 39 of its discharge of unit employees, in August (GC Exhs. 8, 17, and 20).<sup>28</sup>

The Employers' letters to Local 39 and the employees state that the employees were allegedly discharged for two reasons: (1) Local 39 was engaged in an unlawful strike and (2) each discharged employee was a member of Local 39's hiring hall.

As to the first point, the record shows that the Employers learned on July 22, 1997, from the Federal Mediation and Conciliation Service that FMCS had no record of receipt of an 8(d) notice from Local 39. On that information the Employers determined that the July 1 strike was an unlawful strike.

As to the determination of which employees to discharge, the Employers used three sources in compiling the mailing list of terminated employees. Stephen Hagstette testified the Employers used Freeman's payroll records, GES' payroll records, and

<sup>27</sup> In finding that the Employers were motivated to discharge all members of the hiring hall because Local 39 engaged in an unlawful strike, I find this matter must be distinguished from *ABC Automotive Products Corp.*, 307 NLRB 248 (1992). Unlike that situation, there was no showing here that Respondents encouraged the Union or the employees to strike. The evidence shows that Local 39 engaged in an economic strike on July 1 and that strike was called in violation of the prohibitions of Sec. 8(d) of the Act.

<sup>28</sup> GC Exh. 8 is an August 11 letter from Renaissance, GC Exh. 17 is an August 7 letter from Zenith, and GC Exh. 20 is an August 12, 1997 letter from Eagle to Local 39, stating that all employees covered under the respective agreements are terminated for participation in Local 39's illegal strike.

records from the various benefit funds.<sup>29</sup> (Tr. 2020.)<sup>30</sup> Hagstette testified that the decision was made to terminate "employees that were referred to us through Local 39 and to terminate our bargaining relationship with Local 39."

That evidence shows that the sources for determining which employees to discharge were limited to records containing the names of bargaining unit employees. No sources were used which would show which employees engaged in strike activity during July 1997. Moreover, a complete review of the evidence revealed that no effort was made by the Employers to identify employees that engaged in any type of strike activity for use in determining which employees to discharge on July 22.

I find that the General Counsel has satisfied its *Manno Electric* burden<sup>31</sup> in view of the evidence that the Employers discharged unit employees because of Local 39's strike. The evidence revealed that employees were selected for discharge because of their inclusion in the hiring hall without regard to whether the employees actually engaged in strike activity.<sup>32</sup> This situation must be distinguished from the matters discussed in *Dow Chemical Co. v. NLRB*, 636 F.2d 1352, 1358 (3d Cir. 1980), where the court discussed responses to protected as op-

<sup>29</sup> Stephen Hagstette testified that the benefit funds maintained a list of everybody that worked through Local 39 based on the hours that had been paid to the fund.

<sup>30</sup> The parties stipulated that J. Exh. 3 is the list of discharged employees.

<sup>31</sup> Respondent Employers argued that *Marathon Electric Mfg. Corp.*, 106 NLRB 1171 (1953), established the standard that should apply in this matter. Respondents Freeman, et al. also cited *Bechtel Corp.*, 200 NLRB 503 (1972). In *Marathon* first-shift employees engaged in a walk out and the employer reacted by locking out all its employees. The Board found the union and employees had violated terms of their collective-bargaining agreement by walking off the job and that the employer's subsequent lockout was not an unfair labor practice. Moreover, the Board held that all shifts and employees on the first shift that were both at work and not at work on the day of the walkout, had participated in a strike in breach of the collective-bargaining agreement. In *Bechtel* there was also evidence that all the unit employees had engaged in 10 previous strikes and it was found "pipefitters working on the project constituted a strong and militant group who judging by their past strike conduct, displayed an unswerving unanimity of action." Here, unlike in *Marathon* and *Bechtel*, the employees did not report for work on a routine regular basis. Instead, the Union called members of Local 39's hiring hall on occasions when they were needed. There was no walkout as was the case in *Marathon* and there was no discrete group of regular employees that would report for work within a few hours of the walkout. Moreover, there was no showing that the approximately 2400 employees in the unit constituted a strong and militant group who displayed an unswerving unanimity of action. Instead I find here that the Employers bear the burden of proving their 8(d) defense by showing that respective discharged employees engaged in strike activity.

<sup>32</sup> Additionally, the evidence shows that all Respondent Employers withdrew recognition from Local 39 shortly after terminating all hiring hall employees. I find this situation similar to that in *Blue Cab Co.*, 156 NLRB 489 (1965), cited by the General Counsel, where the Board stated:

Respondent's action had as its specific intent that permanent severance of the employment relationship with the elimination of the Union as the bargaining representative and the discouragement of union membership.

posed to unprotected activity. As shown here those employees that actually engaged in the Local 39 strike were engaged in unprotected strike activity because of the prohibitions of Section 8(d). However, as shown here all the unit employees were members of the hiring hall and entitled to treatment without discrimination because of their membership in the hiring hall. I find here that those employees were discharged because Local 39 called a strike and those employees were members of Local 39's hiring hall. Discharge because of union activity is unlawful.<sup>33</sup>

In view of the above I find that the General Counsel proved the alleged discriminatees were discharged because of their inclusion in Local 39's hiring hall. Such a determination without more would show that the employees were illegally discharged in view of the fact that inclusion in a union hiring hall does constitute protected activity.

There remains a question of whether the employees would have been terminated in the absence their membership in the hiring hall. *Manno Electric*, 321 NLRB 1 fn. 12 (1996); *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

The Employers contended that the employees engaged in conduct prohibited by Section 8(d) of the Act.<sup>34</sup> Section 8(d) prohibits strike action in violation of that section's notice requirements and provides that employees that engage in a strike in violation of those provisions lose their status as employees of employers involved in the particular labor dispute.<sup>35</sup>

Normally where employee misconduct is an issue, the burden is that set forth in *Burnup & Sims, Inc.*, 379 U.S. 21 (1964); *Rubin Bros. Footwear*, 95 NLRB 610 (1952); *American Cyanamid Co.*, 239 NLRB 440 (1978); *Murco, Inc.*, 266 NLRB 1175 (1983). The General Counsel has the burden of proving that discharges resulted from protected activity. Respondents may then show that the discharges resulted from misconduct during protected activity. The General Counsel may then show that the misconduct did not actually occur. (*Durham Transpor-*

<sup>33</sup> *Aero Metal Forms, Inc.*, 310 NLRB 397 (1993); *Board Ford*, 222 NLRB 922 (1976).

<sup>34</sup> The General Counsel concedes that Local 39 struck on July 1 without having submitted a legally sufficient notice to FMCS as required in Sec. 8(d) of the Act. The General Counsel conceded the notice was insufficient because it failed to identify any of the Employers that were engaged in the labor dispute. *Mar-Len Cabinets, Inc.*, 262 NLRB 1398 (1982).

<sup>35</sup> The evidence and findings here illustrate that the strike at issue was Local 39's July 1 through 26, 1997 strike against the Big Eight Employers and, late during that strike, against Renaissance. There is evidence that the strike also included Eagle and Zenith. Thomas Stephenson testified that a Local 39 representative told him on July 1 that the Local was on strike against Eagle. Aubry Neeb testified that he called for labor from Local 39 during July 1997 and was denied workers until he signed the Nth Degree contract. I find that Local 39 did call an unprotected strike that extended from July 1 through 26 and included the Big Eight Employers and Zenith, Renaissance, and Eagle.

Zenith, Renaissance, and Eagle discharged all hiring hall employees during August 1997. At that time Local 39's strike in violation of Sec. 8(d) had ended and an unfair labor practice strike started on July 28.

*tation*, 317 NLRB 785 (1995).<sup>36</sup> Here the question is not precisely one of misconduct.<sup>37</sup> Instead the question falls under the following language from Section 8(d):

Any employee who engages in a strike within any notice period specified in this subsection . . . shall lose his status as an employee for the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act. . . . [See for example *Metal Workers Local 49*, 291 NLRB 282 (1988).]

Local 39 announced that it was striking against some of the Employers<sup>38</sup> on June 30, 1997. Subsequently, beginning on July 2 some but not all the hiring hall employees engaged in overt strike activity including picketing.

Respondent Employers contended that all the unit employees did strike from the time of Local 39's announcement and that striking employees ceased to be employees and were discharged because Local 39 and the employees engaged in a prohibited strike. (*Electrical Workers Local 1113 v. NLRB*, 223 F.2d 338 (D.C. Cir. 1955), cert. denied 350 U.S. 981 (1956).) The Employers contended that regardless of whether all employees engaged in overt activity the Employers were entitled to presume that all unit employees engaged in the strike. Their argument in that regard is supported by the Board in *Marathon Electric Mfg. Corp.*, 106 NLRB 1171 (1953), and *Bechtel Corp.*, 200 NLRB 503 (1972). As shown here, I find that neither *Marathon* nor *Bechtel* represent the current law. Instead the decisions noted here, *Emerson Electric Co.*, 246 NLRB 1143 (1979), and *Conoco, Inc.*, 265 NLRB 819 (1982), illustrate that the Board will not presume that employees are engaged in a strike absent actual evidence that the particular employee is engaged in withholding his or her labor. I find that the Employers were mistaken in relying on *Marathon* and *Bechtel*. Instead, where an employee is allegedly fired for engaging in a strike in violation of Section 8(d), the evidence must show that the Employers relied on a good-faith belief that the respective employee(s) was engaged in withholding labor and that the discharge was based on the employer's good-faith belief. Once the Employers show that, the line of cases including *Burnup & Sims, Inc.*, supra, become applicable. Here, although the Employers had a basis to believe that specific employees were engaged in strike activity, the Employers decided to discharge everyone in Local 39's hiring hall without regard to overt strike

<sup>36</sup> I agree with Respondent Freeman's contention that the proper test for striking involves the withholding of labor and that it is not always necessary to prove picketing. However, as shown here there is a question of whether certain employees withheld labor. The General Counsel concedes that some did by overtly supporting the strike.

<sup>37</sup> GES alleged in its brief that some of the strikers engaged in misconduct. However, there was no showing that anyone was discharged for misconduct.

<sup>38</sup> As shown throughout this decision there was evidence that Local 39 struck all 11 Respondent Employers. For example, Thomas Stephenson testified that he was unaware of any picket signs naming Eagle as a struck employer. However, Union Representative Kraus told Stephenson around July 1, 1979, that Local 39 was on strike against Eagle and that Eagle would not be able to get labor from the Union (Tr. 263). Subsequently, later in July, Kraus told Stephenson that the Union would not furnish labor to Eagle for the CA World job.

activity. As shown here, the Employers used Freeman's payroll records, GES's payroll records, and records from the various benefit funds. Those records showed hiring hall employees and had nothing to do with which employees engaged in strike activity.

The Employers also contended that the discharges were legal because numerous employees actually engaged in strike activity. Although there was evidence that some of the employees engaged in strike activity including picketing, the Employers did not consider that evidence in making their decision to discharge all bargaining unit employees. Instead, as shown here, the Employers relied solely on three records showing hiring hall participants in determining which employees to discharge. Those three records dealt exclusively with membership in the hiring hall and none of the three showed anything regarding picket or other strike activity. The record established that none of the Respondent Employers discharged anyone for actually engaging in strike activity.

On the other hand, the General Counsel does not dispute that some 357 employees engaged in that strike by voting to strike or by picketing.<sup>39</sup> The Employers contended that those excluded by the General Counsel and the remaining hiring hall participants engaged in strike activity<sup>40</sup> as specified in Section 8(d).

I am convinced that both the Employers and the General Counsel are mistaken in that regard. By its notice of discharge (J. Exh. 1) the Employers discharged "all employees covered under the Local 39 Labor Agreement with any signatory Employers." I find that no one was discharged for actually engaging in strike activity including picketing.<sup>41</sup> Although employees

<sup>39</sup> Counsel for the General Counsel contended there were 2331 employees including 446 journeymen and 1885 helpers, in the bargaining unit described in the collective-bargaining contracts that expired on June 30, 1997, and that 357 of those walked the picket line at some point from July 1-26, 1997.

<sup>40</sup> Counsel for GES argued that it had been deprived of an opportunity to prove strike participation (Tr. 2381). (In that regard see the discussion that started at Tr. 1572 and especially at Tr. 1578 and Tr. 1579 regarding any strike participation and the state of mind issue.) There was evidence in the record that some employees had a "state of mind" of not crossing any picket line. I indicated that I would not permit continued examination to determine if the employees had a state of mind of not crossing a picket line. However, at Tr. 1578 and Tr. 1579, I specifically advised the Employers they might put on any evidence showing that employees engaged in the strike or withheld labor. No one was ever restrained in showing actual participation in the July 1 strike.

<sup>41</sup> As shown here I find that the discharges were based on the employees' inclusion in the Local 39 hiring hall. However, in the event that finding is overturned, there is also evidence in the file regarding employees' action in striking or not striking. The Employers cited *Marathon Electric Mfg. Corp.*, supra, for the proposition that all employees are included when their bargaining representative calls a strike in violation of Sec. 8(d). I find that *Marathon* is inapposite in this situation. Here, unlike in *Marathon*, there was no walkout by unit employees. The situation was different with the hiring hall arrangement from the routine practice of reporting to work each day, as was the case in *Marathon*.

The Board considered what constitutes strike activity in *Emerson Electric Co.*, 246 NLRB 1143 (1979), in determining whether the em-

ployer engaged in unfair labor practices by terminating sick and accident benefits for employees where other employees went on strike. Among other things the Board stated:

For all practical purposes, any employee, disabled or sound, who affirmatively demonstrates his support of the strike by picketing or otherwise showing public support for the strike, has enmeshed himself in the ongoing strike activity to such an extent as to terminate his right to continued disability benefits. Accordingly, we now hold that for an employer to be justified in terminating any disability benefits to employees who are unable to work at the start of a strike it must show that it has acquired information which indicates that the employee whose benefits are to be terminated has affirmatively acted to show public support for the strike.

The Board distinguished those findings in *Conoco, Inc.*, 265 NLRB 819 (1982). In *Conoco*, the union commenced a strike on January 8. The Board found that action did not constitute strike activity by an employee that was on medical disability. Subsequently, before being released to return to work, the employee appeared on the picket line in support of the strike. The Board found that even that activity did not constitute withholding labor because the employee was unable to return to work at that time due to her medical condition. Eventually, she was released by her physician to return to work before the end of the strike. The Board found that her picket activity after that time did constitute withholding labor and she was not eligible for backpay benefits from the time she first picketed after being released by the physician to return to work. The Board stated:

picketing for the Union, or otherwise participating in the strike, does not render an individual a striking employee. The key is whether that employee is withholding services from the employer in support of a labor dispute.

Both *Emerson* and *Conoco* show that it is necessary for employees to engage in some public show of support for a strike in order to be deemed strikers.

The Board and Courts have consistently required specific evidence of prohibited acts when considering unfair labor practice allegations against Employers and unions. The prohibition of Sec. 8(d) dealing with employee actions should require nothing less. Employees should not be held to a higher burden than either employers or unions.

In view of the record and the above jurisprudence, I find that Local 39's decision to strike and its communication of that decision did not show that the employees were engaged in the strike. Absent some public show of support evidencing they were withholding labor, the employees were not shown to have engaged in strike activity.

Although the Local 39 members voted to strike on June 30, the only immediate public declaration of that action came from the Union. Local 39 announced the strike. Unlike situations in many cases cited by the Employers, there was no walkout or clear showing that the employees were withholding their labor. The first public action taken by employees was apparently the July 2 picket line.

The Employers argued that more employees than the 357 employees excluded by the General Counsel actually engaged in the strike. For example, the Employers point to other evidence as proving strike activity including a "state of mind" theory. In that regard some employees testified that even though they were not actually confronted with the issue, they would not have crossed a picket line. Additionally, several employees admitted they made no effort to contact any of the Employers and seek work during the strike. Others admitted they made no effort to disavow the strike and the employer representatives testified that none of the unit employees contacted them and disavowed the strike.

The above arguments would result in the inclusion of all the alleged discriminatees in an illegal strike. Some admitted they would not cross a picket line if confronted with one and none of the alleged discrimina-

tees offered their services to any of the Employers between July 1 and 26, 1997. I find *Conoco*, supra, controlling as to that argument.

The relevant portion of Sec. 8(d) limits itself to any employee that engages in a strike prohibited by that section. I am convinced that an employee does not engage in a strike by his or her thoughts about a picket line. Moreover failing to disavow a strike does not constitute participation in that strike. Current jurisprudence does not support the proposition that employees are engaged in a strike simply on the basis of their state of mind or that the employees had an affirmative obligation to show they were not engaged in the strike. Therefore, I reject Respondent's argument.

Secondly, I shall consider whether anyone in addition to the 357 employees excluded from the complaint allegations by the General Counsel was shown to have openly engaged in the "strike." The General Counsel contended that employees that did not actually engage in strike activity were wrongfully discharged in violation of Sec. 8(a)(1) and (3) of the Act.

As shown above, the General Counsel does not dispute that the picketing employees were withholding labor and were engaged in the strike. As shown above, there was other evidence of some additional employees showing public support for the strike. Ed Douglas from Czarnowski testified that he saw Juan Bruna on the picket line in July 1997.

Todd Dalmado of GES testified that he saw Robert Benitez, Tom Piatolly, and Felix Vigoa picketing during July 1997. He denied then testified that he also saw Lavern Kelly picketing during July.

Frank Gallodoro testified that he saw several regular GES employees picketing. Those included Charles Coffman, James Fink, Randy Hilburn, Augie Lapara, Robert Perkins Sr., and possibly Alfred McGee and Charles Steele picketing during July 1997.

GES argued that Frank Gallodoro and Todd Dalmado identified 12 GES employees that were included in the General Counsel's complaint discriminatees, as having appeared on the picket line. Those included Laverne Kelly, Thomas Piatolly, Felix Vigoa, Charles Kaufman, James Fink, Randy Hilburn, Steve Huth, David Leibe, Alfred McGee, Sal Napolitano Jr., Robert Perkins Sr., and Kelly Golden. GES admitted there was evidence disputing that Charles Kaufman, Robert Perkins Sr., and Laverne Kelly engaged in picketing. Several employees testified in rebuttal and I am convinced that none of the following employees engaged in strike activity: Thomas Piatolly, Felix Vigoa, Robert Benitez, James C. Fink, Juan Bruna, Charles Coffman (or Kaufman), Robert Perkins Sr., Lavern Kelly, and David Salva testified that they did not engage in picket activity. Augie Lapara testified that he picketed at the convention center but that his work partner John Hilburn did not picket. Donald Gandolini testified that he and Henry Guzman served as Local 39 picket captains and that James Fink, Charles Coffman, Brian Flaherty, Alfred McGee, Charles Steele, Lucien Mistrot, Michael Toups, and Joseph R. Meyer did not picket during July 1997. Of those listed by GES only Randy Hilburn, Steve Huth, David Leibe, and Sal Napolitano Jr. were not disputed as having picketed and I find that of all those named only Randy Hilburn, Steve Huth, David Leibe, and Sal Napolitano Jr. engaged in picket activity.

Ed Douglas testified that he talked with a number of unit employees. Nick Levine, Tony Pelicano, Darren Imbaguglio, Danny McCormick, Richard Hurtus, Mike Susano, Joe Fabaza, Edwin Fucci, Clifton Moore, Dwayne Segels, Juan Bruna, William Dreis, Malcolm Munster, Robert Rivas, and Michael Standish told Douglas they would not cross the picket line to go to work for Czarnowski in New Orleans.

Robert Rivas denied that he attended a meeting of employees held by Douglas before or after the strike started. He testified that he never told Douglas or Nick Levine that he would not cross a picket line to work for Douglas. Malcolm Munster denied that he attended a meeting before the strike or during December 1997 with Douglas and firefighters in which the employees told Douglas they would work out of town but would not cross a picket line and work for him in New Orleans.

may forfeit employment rights by striking in violation of the notice provisions of Section 8(d), the employers may waive that forfeiture<sup>42</sup>. Here the Employers did waive their rights under that provision by discharging the employees because of their hiring hall affiliation as opposed to their participation in an unlawful strike. Only by accepting the employers' argument that all hiring hall employees were automatically included in the strike without regard to overt strike activity, may it be determined that the employers legally discharged the hiring hall employees. As shown here, I do not accept that argument. Instead I find that the Employers discharged all the hiring hall employees without regard to whether each respective employee engaged in strike activity.

I find that the Employers failed to show they had relied on evidence that employees engaged in conduct in violation of Section 8(d) in discharging those employees. Under the *Burnup & Sims* line of cases (see above), the Employers failed to establish a good-faith belief that any bargaining unit employee had engaged in strike activity and that the Employers had relied on that evidence in discharging the respective employee.

Moreover, the evidence failed to show that all unit employees engaged in the strike. Respondent Freeman<sup>43</sup> argued that the Employers need only show an employee failed to report to work in order to prove strike activity<sup>44</sup> and that there was no showing that the nonpicketing employees engaged in any protected activity. That first point is unrealistic in the instant situation. Employees did not routinely report to work, as was the case in *Marathon* and *Bechtel* (see above). Employees came only after being called through the hiring hall. As to the argument that nonpicketing employees did not engage in protected activity, I find here that inclusion in Local 39's hiring hall did

Clifton Moore Jr. denied that he ever discussed whether or not he would cross the Local 39 picket line, with Ed Douglas.

In view of the confusion and conflicts in his testimony I am unable to credit Ed Douglas. I find that Robert Rivas, Malcolm Munster, and Clifton Moore Jr. did not tell Douglas they would not cross a picket line to work for Czarnowski. Moreover, I find that Douglas made no specific job offer to Levine, Pelicano, Imbaguglio, McCormick, Hurtus, Susano, Fabaza, Fucci, Segels, Bruna, Dreis, or Standish. None of those were shown to have engaged in overt strike activity.

There was also testimony that some employees refused offers to return to work. In that regard I find those negative comments to specific work offers do constitute strike activity and if made during the July 1 through 26 period, constitute strike activity in violation of Sec. 8(d). I find that Steve Johnson's testimony that Jay Dileo rejected a work offer does not constitute an 8(d) violation. Johnson's testimony varied during direct and cross-examination, but he admitted that he asked Dileo what was his position regarding the strike. Therefore, Jay Dileo did not refuse a specific offer to return to work and he is not disqualified under Sec. 8(d) on the basis of Johnson's testimony.

<sup>42</sup> *ABC Automotive Products Corp.*, 307 NLRB 248 (1992). Sec. 8(d) also provides for waiver by stating that loss of employment status shall terminate if reemployed by the employer.

<sup>43</sup> Respondent Freeman refers to the brief filed by attorneys for Freeman, Expo Services, CSI, Sho-Aids, Czarnowski, Zenith, Renaissance, and Eagle.

<sup>44</sup> See *Heinrich Motors*, 166 NLRB 783, 785-786 (1967), cited by Local 39 for the proposition that an employee joins a strike by rejecting a legitimate offer of work and not merely by holding subjective personal opinions about a work stoppage.

constitute protected concerted and union activity.<sup>45</sup> The record showed that the Employers used lists of hiring hall employees and notified first Local 39 then the employees themselves of the discharges. Therefore, the record evidence shows that the Employers knew of the employees' association with the hiring hall, and that the employees were fired because of that association in view of Local 39's unlawful July 1, 1997 strike.

In view of the full record I find that Respondent Employers failed to show that hiring hall employees would have been discharged in the absence of their hiring hall membership. I find that the Employers engaged in conduct in violation of Section 8(a)(1) and (3) of the Act by discharging employees included in Local 39's hiring hall even though some of those employees engaged in strike activity prohibited by Section 8(d).

#### The Alleged Refusal to Agree to Local 39's Acceptance of the Contract Offer

The Employers last made a collective-bargaining contract proposal to Local 39 during a July 13<sup>46</sup> negotiation session. The General Counsel alleged that Local 39 accepted that offer on July 26 and that the offer had not been withdrawn.

However, several important events occurred before July 26. A few days after making the offer the Employers investigated into whether Local 39 had given proper FMCS' notice as required in Section 8(d) of the Act. FMCS' notice was required from Local 39 before striking. Subsequently, the Employers notified Local 39 that its strike was illegal. Harry Forst, who represented Local 39 at that time, testified about a conversation he had with Employers' attorney, Brooke Duncan, during a July 22 negotiation. Duncan told Forst that the Employers did not want to negotiate with Local 39 until Forst produced evidence of notice to FMCS. Duncan went on to tell Forst that if he produced a FMCS letter they could return and resume negotiations. In addition to Forst, Curtis Mack, Stephen Hagstette, and Brooke Duncan testified about that conversation. I find that Duncan's comments were to the effect that the Employers were breaking off negotiations pending production of the FMCS letter.

On July 23 or 24, GES Vice President Ken Singer had a phone conversation with IATSE President Tom Short.<sup>47</sup> Short offered to accept any contract offer that was on the table and Singer replied there was no offer on the table.<sup>48</sup> Singer told Short that GES had withdrawn recognition from Local 39. I was impressed with Singer's demeanor. As shown above Singer testified after being called by the Charging Party. I credit Singer's testimony in that regard.

<sup>45</sup> See *NLRB v. City Disposal Systems*, 265 U.S. 822, 831-832 (1984), cited by Local 39.

<sup>46</sup> As shown here, the offer was incorrectly dated July 14 and is oftentimes referred to as either the July 13 or the July 14 proposal.

<sup>47</sup> I credit the un rebutted testimony of Ken Singer regarding the phone conversation and find that the International president told him on July 23 or 24, that he was speaking as agent for Local 39. In view of that evidence I find that Short was an agent of Local 39 at that time. *Carpenters (Carpenters Representation Federation)*, 316 NLRB 553 (1995).

On July 26 Local 39 notified some of the Employers<sup>48</sup> that it accepted their July 14 collective-bargaining contract offer and that it was ending the strike. On July 28 the Employers notified Local 39 that they had withdrawn recognition and that no contract offer was outstanding.

#### Conclusions

The General Counsel contended that the Employers' contract offer remained outstanding until accepted by Local 39 on July 26<sup>49</sup> but the General Counsel's position is a difficult one. After their July 13 contract offer the Employers started questioning whether Local 39 had complied with the law in calling the July 1 strike. They told Local 39 they would not continue bargaining unless the Local produced proof that it had actually given proper notice to FMCS.

Thereafter, the Employers notified Local 39 that FMCS had confirmed that it had no record of a notice from Local 39 and that the strike was illegal. Before Local 39 ended the strike, Ken Singer talked with IATSE president Short. Short said he would accept any contract offer but Singer replied that he no longer recognized Local 39 and that there was no offer on the table. All those events happened before Local 39 ended its strike on July 26.

I find that the Employers ceased negotiations because of Local 39's illegal strike. Local 39 started an illegal strike on July 1 and continued that strike even though the Employers made a good-faith offer on July 13. The Employers first explored whether Local 39 had notified FMCS<sup>50</sup> on July 22. When they became convinced that the Local had not complied with the notice requirements of Section 8(d) the Employers broke off negotiations.

May Employers refuse to negotiate with their employees bargaining representative during an illegal strike by that Union? In *Marathon Electric Mfg. Corp.*, 106 NLRB 1171 (1953), the Board held that where the Union engaged in a walkout prohibited by the collective-bargaining agreement, the employer was justified in refusing to bargain until such time as the Union

<sup>48</sup> The letter was faxed to representatives of all the Respondent Employers except GES.

<sup>49</sup> Counsel for the General Counsel cited *Pepsi-Cola Bottling Co. of Mason City Iowa v. NLRB*, 659 F.2d 87, 89 (8th Cir. 1981), as showing that a contract offer is not automatically terminated by the other party's rejection or counterproposal but may be accepted within a reasonable time unless expressly made contingent upon some condition subsequent or was subject to intervening circumstances which made it unfair to hold the offeror to his bargain.

<sup>50</sup> Curtis Mack, Brooke Duncan, Stephen Hagstette, and Harry Forst all testified about the July 22 meeting including some discussions involving all four of them in the hall. After examining all that testimony, I am convinced and find that Forst was told that the Employers refused to negotiate further unless he produced proof of FMCS' notice. However, in view of the total evidence including position statements submitted by Duncan (GC Exhs. 30 and 87), I am not convinced that the Employers told Forst that they were withdrawing recognition at that time. I am influenced in part by the Employers' subsequent actions. After Forst left the Employers remained, waiting for word from Forst regarding his search for the FMCS' notice. It doesn't make sense for the Employers to wait for Forst if in fact, they had already withdrawn recognition. Therefore, I credit the evidence showing that the Employers did not withdraw recognition at that time.

notified the employer that its strike had been terminated. The Board cited *Higgins, Inc.*, 90 NLRB 184 (1950), in support of that holding. In *Arundel Corp.*, 210 NLRB 525 (1974), the Board found that the Union engaged in an unprotected strike in violation of a no-strike agreement and that the employer's refusal to bargain during the existence of that strike did not constitute an unfair labor practice.<sup>51</sup>

The Employers were justified in refusing to negotiate during the July 1 strike.<sup>52</sup> Under the circumstances it is apparent that all offers made during that strike were taken off the table by the Employers' discovery that the strike had always been illegal and by their refusal to continue negotiations. Before Local 39 made its July 26 offer to accept the contract proposal, GES had told IATSE President Short that no offers were on the table. The entire course of action by the Employers after they discovered the strike was illegal, showed intent to break off negotiations. That evidence plus Ken Singer's comment to the IATSE president, illustrate that the Employers had withdrawn everything from negotiations including their July 13 offer. I find that the Employers did not engage in unlawful action by refusing to bargain during Local 39's unlawful strike and I find the Employers had lawfully withdrawn their July 13 contract offer before acceptance by Local 39.

#### The Alleged Unlawful Withdrawal of Recognition

As shown above, I find that the Employers did not unlawfully break off negotiations during the illegal strike. However, there remains a question as to whether withdrawal of recognition<sup>53</sup> or continued refusal to recognize, after the strike ended on July 26, constitutes unfair labor practices. The evidence shows that the Employers did withdraw recognition and they have continued to refuse to recognize and bargain with Local 39 since the end of the July 1–26 strike.

On Wednesday or Thursday after July 22—(July 23 or 24)—GES Vice President Singer had a phone conversation with IATSE President Short and Eddie Powell. Short offered to accept any contract offer that was on the table but Singer replied there was no offer on the table and that “we no longer recognize Local 39.” That conversation followed one on July 22 where Brooke Duncan told Harry Forst that the Employers would not negotiate until Forst produced his notice to FMCS. Freeman argued the Employers terminated their relationship with Local 39 by July 22 letter. However, there is nothing in that letter which terminated the bargaining relationship (J. Exh.

<sup>51</sup> *Dow Chemical Co. v. NLRB*, 636 F.2d 1352 (3d Cir. 1980); *Boeing Airplane Co. v. NLRB*, 174 F.2d 988 (D.C. Cir. 1949).

<sup>52</sup> Local 39 argued that the Act does not provide sanctions against a union striking in violation of Sec. 8(d). However, its is doubtful that Congress intended to permit a union to engage in an 8(d) strike, thereby secure concessions and then use Sec. 8(d)'s lack of sanctions, to justify the union's quest to hold on to the concessions made by the employer.

<sup>53</sup> Neither the General Counsel nor the Employers contend there was not a 9(a) recognition relationship between Local 39 and the Employers. Perhaps as discussed below regarding the subsequent relationship between the Employers and the Carpenters, there may have existed an 8(f) relationship at some time, but that is not at issue here. If there was ever an 8(f) relationship, the parties do not dispute that the relationship had become 9(a) before the events alleged here. See *Triple A Fire Protection*, 312 NLRB 1088 (1993).

1). On July 26 Local 39 advised the Employers that it had ended its strike and accepted the Employers' July 14 collective-bargaining proposal. I find that offer had been withdrawn before acceptance. On July 28, 1997, the Employers wrote Local 39 of their withdrawal of recognition of the Union.

In view of the above and the full record, I find that GES withdrew recognition from Local 39 on July 23 or 24, 1997, when Ken Singer told the Union that the Employers had withdrawn recognition. The remaining seven of the “Big Eight” withdrew recognition on July 28.

In *Marathon Electric Mfg. Corp.*, supra, the Board found the employer did not violate Section 8(a)(5) by withdrawing recognition. However, among other things the Board in that case found the Union failed to notify the employer when it ended its strike.<sup>54</sup> Subsequently in *Air Vac Industries*, 282 NLRB 703 (1987), Marathon was cited for the proposition that withdrawal of recognition was permitted only on evidence that the Union had lost its majority.<sup>55</sup>

The court in *Dow Chemical Co. v. NLRB*, supra, cited *Marathon Electric Mfg. Corp.* for the rule that “unilateral cancellation of a collective-bargaining agreement following a breach of an applicable no-strike agreement, is not an employer unfair labor practice.” The *Dow Chemical* case involved the employer's cancellation of a contract and discharge of striking employees but the employer did not withdraw recognition of the union until it was petitioned by a majority of new employees and employees returning from the strike. The Board has consistently found that a lawful withdrawal of recognition must be based on objective evidence of doubt concerning the union's continued majority status in a context free of unfair labor practices.<sup>56</sup> The discharges found unlawful here are of the type unfair labor practice that affect the union's status or improperly affect the bargaining relationship itself.<sup>57</sup> Indeed but for the unlawful discharges there would not be a change in the size of the unit.<sup>58</sup>

I find that the record failed to establish that the Employers were justified in refusing to continue recognition of Local 39. The Big Eight Employers engaged in unfair labor practices by beginning and/or continuing<sup>59</sup> their withdrawal of recognition

<sup>54</sup> See also *Lincoln Technical Institute*, 256 NLRB 176 (1981).

<sup>55</sup> Freeman argued that none of the individual bargaining units actually included more than 400 employees and therefore, the legal discharge of some 357 employees that engaged in overt strike activity proved that Local 39 had lost a majority. However, that argument is specious. As shown here the hiring hall included approximately 2300 to 2400 employees and the discharge of 357 of those employees would simply result in Local 39 referring from the remaining 2000 or so employees. There was no showing that those remaining employees did not support Local 39. Cf. *Beacon Upholstery*, 226 NLRB 1360 (1976) where the Board found a majority of the unit employees had been discharged for cause.

<sup>56</sup> *Riverside Cement Co.*, 305 NLRB 815 (1991); *Detroit Edison Co.*, 310 NLRB 564 (1993); and *Master Slack Corp.*, 271 NLRB 78 (1984).

<sup>57</sup> *Master Slack Corp.*, 271 NLRB 78 (1984).

<sup>58</sup> As shown here the General Counsel alleged that 357 of the discharges were lawful. However, even then the remaining hiring hall employees totaled approximately 2000.

<sup>59</sup> I find that GES did not engage in unlawful activity to the extent it refused recognition during the existence of the July 1–26 strike. How-

from Local 39 after the strike ended on July 26. The record also illustrated that Zenith and Eagle have unlawfully failed and refused to provide Local 39 with relevant and necessary information requested by that Union since August 19, 1997, and that Zenith, Eagle, and Renaissance unlawfully withdrew recognition on December 23, 1997.<sup>60</sup>

**The Alleged Violative Conduct by the Carpenters, the Alleged  
Illegal Recognition and Collective-Bargaining Agreements  
between Employers and the Carpenters**

It is alleged that Freeman, GES, and Expo Services and the Carpenters engaged in unfair labor practices when those parties engaged in bargaining, recognition and contracts.

During the strike some of the Employers contacted the Carpenters regarding the possibility of the Carpenters supplying temporary labor to fill unit jobs during the labor dispute.<sup>61</sup> The Carpenters replied it was not interested in supplying labor without a collective-bargaining contract. Ken Singer phoned Ken Viscovich of the Carpenters in August or September 1997 and told him the New Orleans contractors were still looking for a source of labor to replace the striking unit employees. In view of the situation with the Stagehands (IATSE, Local 39), they may be interested in either a temporary or a permanent labor source. Viscovich said that the Carpenters would not come to work as temporary labor but if they could work out and begin to negotiate the terms of a collective-bargaining agreement, they would consider establishing a relationship with GES.

The Employers proposed a collective-bargaining agreement to the Carpenters in August 1997 (CP Exh. 1). The parties met and negotiated on August 21, 1997. GES submitted a contract proposal to the Carpenters on October 14. The Carpenters met with GES on that same day and engaged in negotiations. The Carpenters signed that agreement on October 29 and GES representatives signed on October 24 and 31, 1997. Subsequently, the Carpenters demanded recognition on a showing of interest and GES granted recognition of the Carpenters as majority representative of its unit employees,<sup>62</sup> on November 11.

Freeman and the Carpenters engaged in the exchange of contract proposals beginning around November 13, 1997. On December 1 the Carpenters demanded recognition and on that same date Freeman acknowledged that it had checked the Carpenters' showing of interest and it extended exclusive recognition to the Carpenters. Freeman and the Carpenters entered into a collective-bargaining agreement for bargaining unit employees on December 1, 1997.<sup>63</sup>

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ever, it did engage in unfair labor practices by continuing to withhold recognition after Local 39 ended that strike on July 26.

<sup>60</sup> Freeman correctly argued there is no question of inclusion in the bargaining unit of replacement workers used during the July 1 strike. There was not a genuine question of whether Local 39 possessed a majority status. Cf. *Curtin Matheson Scientific*, 494 U.S. 775 (1990).

<sup>61</sup> GES Vice President Kenneth Singer testified that he along with representatives of Freeman, Expo Services, and Czarnowski met with Ken Viscovich, Ken Sears, Curley, and Benny Gioe of the Carpenters on July 15, 1997.

<sup>62</sup> Unit or bargaining unit refers to the bargaining unit that existed in the agreements with Local 39 before July 1, 1997.

<sup>63</sup> 120

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In posthearing motions the General Counsel moved to amend and consolidate cases. The motion to amend involved Cases 15-CA-14598, 15-CA-14693, 15-CA-15079, 15-CB-4392, 15-CB-4422, and 15-CB-4535 and was filed on February 5, 1999. The General Counsel's motion to consolidate involved Cases 15-CB-4547-1, 15-CB-4547-2, and 15-CB-4547-3 with the current cases and was also filed on February 5, 1999. Respondents opposed those motions on several grounds including the contention that those motions involve matters prohibited by Secs. 10(b) and 8(f) of the Act. Those motions include a first time 8(a)(2) allegation against Expo Services and allegations that both the Carpenters and Carpenters Local 1846 engaged in unfair labor practices. Before that Local 1846 had not been named as a respondent in these proceedings.

The Board in *A&L Underground*, 302 NLRB 467 (1991), ruled that a contract repudiation that occurred more than 6 months before the filing of a charge, could not be alleged as an unfair labor practice in view of Sec. 10(b).

The General Counsel contended that Local 39 first gained clear, unequivocal and legally sufficient knowledge of a collective-bargaining relationship between the Carpenters and Expo Services shortly before the filing of the 15-CA-15079 and 15-CB-4535 charges. Moreover, the General Counsel argued that the charges and amendment should not be dismissed in view of the Board's decisions in *Whitewood Maintenance Corp.*, 292 NLRB 1159, 1170 (1989); *Citywide Service Corp.*, 317 NLRB 861, 862 (1995); and *Redd-I, Inc.*, 290 NLRB 1115 (1988). In *Whitewood* and *Citywide*, the Board considered charges filed more than 6 months after the alleged violation and the charges involved Sec. 8(a)(2) or 8(b)(1)(A) and Sec. 8(a)(5).

In *Redd-I* the Board looked at the circumstances underlying the charge and amendment to the complaint:

Even though Kelley's discharge occurred more than 6 months before the General Counsel's motion to amend the complaint, we would not find the amendment barred under Section 10 (b) as the judge did, because the discharge appears to be closely related to the allegations of that charge.

The General Counsel argues that *Redd-I* should be controlling in this situation. As to the question presented by Sec. 10(b), the proposed amendments are based on November 1998 charges alleging occurrences during 1997. Respondents argue that unless it is shown that those charges and amendments closely relate to the matter litigated under timely filed charges, the motions should be dismissed. Respondents also cite *Redd-I*, supra.

There are several problems with General Counsel's motions. During the hearing Carpenters, Freeman, and GES were not confronted with questions of the Employers submitting illegal contributions to Carpenters' funds including dues based on coerced or forged authorizations, or with the Employers extending recognition to the Carpenters based on dual-purpose work orders. Expo Services was not confronted with any allegation regarding Sec. 8(a)(2).

Instead the litigated allegations involved only alleged unlawful assistance Freeman and GES gave Carpenters by recognition and bargaining. The questions of alleged illegal contributions to Carpenter funds and dual-purpose work orders may be convenient matters for inclusion in the complaint. However, those allegations do not flow naturally from the litigated issues even as to Freeman and GES.

Moreover, it is clear from the record that Local 39 did not first learn of the Carpenters' collective-bargaining agreements with some of the Employers during the hearing of this matter. Local 39 Business Agent Gandolini admitted that he prepared a leaflet in December 1997 or January 1998 contending that the Carpenters had signed a "bogus" contract with Freeman, GES, and Expo Services. That evidence illustrated that Local 39 knew of the Carpenters' contracts from January 1998 or before. That was more than 6 months before Local 39 filed the charges on November 4, 1998.

Expo Services recognized and signed a contract with the Carpenters on December 11, 1997.

#### Conclusions<sup>64</sup>

In defense to the allegations that Freeman, Expo Services, and GES improperly recognized the Carpenters. The Carpenters contended they were entitled to recognition before any of the Employers submitted to card counts, because of Section 8(f). Section 8(f) of the Act includes the following:

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members . . . because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act . . . prior to the making of such agreement.

In *Operating Engineers Pension Fund v. Beck Engineering Co.*, 746 F.2d 557 (11th Cir. 1984), where the employee under consideration was a surveyor, the court found that the parties were engaged in the construction industry and their agreements qualified under Section 8(f). The court applied a three prerequisites test: (1) The agreement must cover employees who are engaged in the building and construction industry; (2) the agreement must be with a labor organization of which building and construction industry employees are members; and (3) the agreement must be with an employer engaged primarily in the building and construction industry.

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The proposed amendments do not “flow from the same sequence of events” and do not relate back to the litigated issues. *Machinists Local 1424 (Bryan Mfg.) v. NLRB*, 362 U.S. 411, 416–417 (1960).

The General Counsel’s February 5, 1999 motion to consolidate in Cases 15–CB–4547–1, 15–CB–4547–2, and 15–CB–4547–3 name Carpenters Local 1846 as one of the Respondents. Local 1846 was not named as a respondent in any of the proceedings before that date. The allegations involve use of so called “dual purpose work orders” since October 1997. Local 39 filed the charges on November 4, 1998. Sec. 10(b) would normally bar any allegations before May 4, 1998. I am aware of no decisions that would extend the *Redd-I*, *Whitewood*, and *Citywide* rulings to entities that were not named as party respondents in the previous proceedings. *Machinists Local 1424 (Bryan Mfg.) v. NLRB*, supra.

The General Counsel’s motions to amend and consolidate are denied.

<sup>64</sup> Carpenters argued that the allegations in Cases 15–CA–15079 and 15–CB–4535 (Expo Services and Carpenters) are barred by Sec. 10(b). In that regard Expo Services recognized and signed a collective-bargaining contract with the Carpenters on December 11, 1997. Local 39 filed the relevant charges on November 4, 1998. I find in agreement with the motion to dismiss. The allegations were filed well beyond 6 months after Expo Services recognized and contracted with Carpenters. Local 39 knew of that contract in December 1997 or January 1998 when it published a handbill (GC Exh. 106). The charge is not closely related to other matters in that Expo Services was not alleged as violating Sec. 8(a)(2) before December 4, 1998. *Eye Weather*, 325 NLRB 973 (1998); *Royal Components*, 317 NLRB 971 (1995).

As to the second test from *Operating Engineers*, I take notice of the fact that Carpenters is a labor organization of which building and construction employees are members.<sup>65</sup> The remaining tests at issue are (1) and (3) and involve whether the employers and their employees are engaged primarily in the building and construction industry.

The Employers were engaged in the erection and dismantling of exposition shows including booths. That conduct involves building and construction even though it does not involve traditional construction activities such as the building of homes or offices.

The Board has never limited Section 8(f) to traditional building and construction projects. The court in *Operating Engineers*, supra, cited among other decisions, *Carpet, Linoleum & Soft Tile Local 1247 (Indio Paint & Rug Center)*, 156 NLRB 951, 959 (1966), where 93 percent of floor dealer’s revenue was derived from sale and installation of floor coverings, and that dealer was found to be primarily engaged in construction. The court found that so long as construction work constitutes more than an insubstantial part of the employer’s business, the employer may be deemed engaged primarily in the building and construction industry citing *A.L. Adams Construction Co. v. Georgia Power Co.*, 557 F.Supp. 168 (1983), aff’d. 733 F.2d 853 (11th Cir. 1984), and *Zidell Explorations, Inc.*, 175 NLRB 887, 889 (1969). The court stated:

All that is required is that they be “engaged (or . . . upon their employment, will be engaged) in the building and construction industry.” 29 U.S.C. § 158(f). As noted above, counsel have not cited to us any cases in which the inquiry focused on the degree to which the employee’s work, as opposed to the employer’s business, was construction related.

In several cases the Board has found certain employers were engaged in the building and construction industry under Section 8(e) of the Act. Section 8(e), unlike Section 8(f), required only that the employer is engaged in the industry rather than primarily engaged in the industry. See *Milwaukee & Southeast Wisconsin District Council of Carpenters*, 318 NLRB 714 (1995). However, in other cases, the Board has found employers including an employer engaged in wrecking and dismantling (*U.S. Abatement, Inc.*, 303 NLRB 451 (1991)) were primarily engaged in building and construction. In *A.L. Adams Construction Co. v. Georgia Power Co.*, 733 F.2d 853 (11th Cir. 1984), the circuit court found a company whose major business involved the production and sale of electricity and which had not individually employed any of the construction employees on a plant building project, qualified under Section 8(f) of the Act. Georgia Power used its own employees to act as general contractor in subcontracting construction work but it had signed a prehire agreement with a union regarding labor on that construction project.

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<sup>65</sup> The Board upheld the decision of an administrative law judge finding Sec. 8(f) inapplicable to a convention industry employer in *Pekowski Enterprises*, 327 NLRB 413 (1999). There the union involved was the Teamsters, which is not a union commonly associated with the building and construction industry.

In *Shepard Decorating Co.*, 196 NLRB 152 (1972), the Board upheld an administrative law judge determination that the contract did not qualify under Section 8(f) because there was a longstanding relationship including a series of collective-bargaining agreements between the parties. Apparently the judge was not concerned with whether the employer that was engaged in the production and staging of trade shows and exhibitions, was primarily engaged in the building and construction industry.

An article in January 1991 *Construction Lawyer* (11-Jan Conslaw 21) discussed qualities of the construction industry.<sup>66</sup>

Employment in the construction industry is typically transitory in nature and of short duration, with employees working for many different Employers and on various construction sites depending upon the stage of construction. It was impractical, if not impossible, for employees or Employers to utilize the normal Section 9 procedures to procure an election and certification of a union as the bargaining representative because these procedures could not be completed before the construction jobs ended. Due to the difficulties in applying the Wagner Act to this type of employment and the fact that the Board felt the construction industry was suitably organized, it refused to extend the act's protection to the employees of the industry. Citing S. Rep. No. 187, 86th Cong., 1st Sess. (1959), reprinted in 1 NLRB Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, at 423 (1959).

Unlike most manufacturing and service industries, the building and construction industry is characterized by casual, intermittent, and often seasonal employer/employee relationships on separate projects undertaken pursuant to contract let (sic) by competitive bidding. . . . The standardization of costs that result from continuous operations in the manufacturing and service fields is not present in this area and must be attained in other ways. The industry has adapted itself to these special factors pragmatically and has evolved certain institutions and practices to meet its requirements. Labor-management legislation applicable to this industry must account to these functional habits. Citing Senator Humphrey, reporting from the Committee on Labor and Public Welfare (S. Rep. No. 1509, 82nd Cong. 2d Sess. (1952).

In the December 1989 issue of the *Boston College Law Review* (31BCLS 114), the writer cited H.R. Rep. No. 741, 86th Cong., 1st Sess. 19, reprinted in 1959 U.S. Cong. & Admin. News 2424, 2442; S.; Rep. No. 187, 86th Cong., 1st Sess. 28, reprinted in 1959 U.S. Code Cong. & Admin. News 2318, 2344-2345, and stated:

Congress enacted section 8(f) in response to problems encountered in applying the NLRA to the construction industry. Prior to the enactment of section 8(f), the Act prohibited companies from bargaining with an uncertified union and, under the Act, a union could not be certified as a bargaining representative until employees were hired. De-

spite the technical illegality of prehire agreements, the construction industry continued to engage in the practice. The congressional committees that reported on section 8(f) as a proposed amendment to the NLRA recognized that the construction industry, because it often hired on a project-by-project basis, required a supply of skilled workers for quick referral. The committees also noted that the nature of the industry's bidding process made it necessary for Employers to know their labor costs before a project began. Based on these unique characteristics of the construction industry, the committees concluded that Congress should validate the industry practice of engaging in prehire contracts.<sup>67</sup>

Here as shown in the record, employment is typically transitory in nature and of short duration with employees working for many different Employers. That was especially true under the Local 39 hiring hall where the Employers had very restricted opportunities to request employees by name. The employees worked on different construction sites even though because of the nature of the industry, those sites were customarily limited to locations of trade shows and expositions. Due to the nature of the employment through the hiring hall, especially the one under Local 39, it "was impractical, if not impossible, for employees or Employers to utilize the normal Section 9 procedures to procure an election and certification of a union before the construction jobs ended." The industry appeared characterized by casual, intermittent work on projects "let by competitive bidding." The industry often involved hiring on a project-by-project basis<sup>68</sup> and required a supply of skilled workers for quick referral. It was important for the Employers to know their labor costs before projects started.

As to the employee duties involved in the Employers' primary work, Stephen Hagstette testified that the work jurisdiction outlined in article V of Freeman's contract with the Carpenters (GC Exh.15) accurately describes the work performed by members of the Carpenter's hiring hall:

The work jurisdiction covered by this Agreement when performed by the Employer shall include that work which has been contractually assigned to members of the Union. This Agreement covers all employees performing work covered by this Agreement, including, but not limited to:

(a) The uncrating, erection, dismantling and recrating of all built-up fabricated displays at the exhibit sites, rigging, and carpet installation and removal.

(b) The handling and erection of all hard wall booths, pegboards, sheetrock and/or specially build booths on the exhibit site where any material is attached together to form a display.

<sup>67</sup> See also *NLRB v. Irvin-McKehy Co.*, 475 F.2d 1265 (3d Cir. 1973), where the court explains that Sec. 8(f) was enacted because construction bidders needed to know in advance of bid what their labor costs would be and construction employers need access to an available pool of skilled craftsmen.

<sup>68</sup> As shown above, this was especially true under Local 39's hiring hall.

<sup>66</sup> See also 81 *Columbia L. Rev.* 1702 (1981).

(c) The building and/or installation of all platforms, walls, turntables, counters and/or any items fabricated or built on the exhibit sites.

(d) The laying out and marking of all lines needed to perform the above referred work.

(e) All of the above shall apply for any Trade Show, Industry Product Show, Trade Fair, Exposition, Manufacturer Show, or any other display or advertising show.

(f) At the Employer's discretion, loading, unloading, and movement at worksite of the Employer's equipment and material, operation of all fork and pallet lifts and related equipment.

(g) Any other work as assigned by the Employer.

The unit employees use staple guns, screwdrivers, and wrenches, battery operated glue guns, and tape measures. The collective-bargaining agreement lists the following required tools: hammer, pliers, pry bar, adjustable wrenches, tape measure, screw drivers, razor knife (single edge), staple gun, and Allen set. The following tools are recommended in the contract: razor knife (double edge), chalk box, socket set, box and open end wrenches, combo square, hack saw, key hole saw, drill index, hole saw, paddle bits, and speed bits. A typical job would require the employees to uncrate prefabricated booths and displays, erect those, and then, after the show, dismantle and recrate them for storage or shipment. The erection is secured with bolts and nuts, cam locks, or some type of locking system and bolts. Even though it by its very nature includes the erection and dismantling of temporary structures, there is nothing in Section 8(f) that would eliminate building and construction of structures that will last only for the duration of a show. Although the record illustrates that shows are frequently erected using prefabricated materials that is not unlike recent developments in the commercial and residential construction industries.

Freeman in its brief points to a situation that shows why 9(a) representation is unlikely in the current situation. Freeman argues that none of the Employers had a bargaining unit that approached the total of 2300 or so claimed by the General Counsel. Instead the evidence showed that the Employers used far less hiring hall employees than 2300 and that the largest used perhaps no more than 300 or 400. However, what was not shown in Freeman's argument is that Local 39 could have drawn referrals from its entire hiring hall of some 2300 people. With that in mind it is difficult to imagine how a determination could be made of majority representation when the situation is like that here where the union sometimes had difficulty meeting the Employers' demands for employees. Under those conditions it is probable that the union would search for every available employee and that in turn, would result in the various Employers using many different workers on each job. Section 8(f) may provide a solution to that dilemma.

It appears that under proper circumstances a contract between Carpenters and convention and trade show Employers may fall within the protection of Section 8(f) of the Act. However, the circumstances here are complicated by the continued question of representation by Local 39 and my findings here.

I am not convinced of a violation of the basis of General Counsel and Charging Party's arguments that the Carpenters' authorization cards were improperly gathered, or on the allegations that employees were coerced into designating the Carpenters as their representative, or that dues and other fees and funds were unlawfully deducted.<sup>69</sup> However, where Employers and a labor organization engage in collective bargaining at a time when a rival labor organization is claiming exclusive recognition, they are engaged in unfair labor practices. *Bell Energy Management Corp.*, 291 NLRB 168 (1988). Moreover, in view of my findings here, the Employers and Carpenters agreed on recognition of the Carpenters, bargained and agreed to contracts at a time when the Employers were obligated to deal exclusively with Local 39 as representative of the unit employees. That action constitutes clear unfair labor practices. *Christopher Street Owners Corp.*, 286 NLRB 253, 257 (1987); *Harbor Cottage, Inc.*, 269 NLRB 927, 931 (1984); and *Elias Mallouk Realty Corp.*, 265 NLRB 1225, 1235-1237 (1982).

The Carpenters were aware of the dispute between the Employers and Local 39 during its first meetings with the Employers in July 1997. At that time the Carpenters refused to provide temporary manpower to the Employers. Subsequently in their collective-bargaining relationship the Employers and the Carpenters were fully aware of the pending unfair labor practices alleging the Employers had an obligation to continue to recognize Local 39. In fact, GES and the Carpenters agreed how to handle events if it was determined in law that Local 39 represented the employees.<sup>70</sup>

Therefore, GES and Freeman engaged in unfair labor practices in violation of Section 8(a)(1) and (2). The Carpenters by entering into negotiations and contracting with Freeman and GES at a time when Local 39 was the exclusive bargaining agent, engaged in unfair labor practices prohibited by Section 8(b)(1)(A). *Garment Workers Union v. NLRB*, 366 U.S. 731 (1961); *Rainey Security Agency*, 274 NLRB 269, 280-282 (1985).

#### The Alleged 8(a)(1) Activity

The General Counsel alleged that GES attorneys engaged in illegal interrogation of employees. In February and March 1998 GES attorneys issued a number of subpoenas to people identified as alleged discriminatees. Some of those employees contacted the attorneys and attorneys contacted others by phone before the scheduled March 16 hearing in this matter. Attorney E. Jewell Johnson testified about phone conversations that she had with prospective witnesses. She explained there was a hearing pending before the NLRB and she was calling in prepara-

<sup>69</sup> Carpenters argued that the use of its hiring hall prior to an employer granting recognition is not unlawful in and of itself. *Shepherd Decorating Co.*, 196 NLRB 152 (1972); *Stage Employees IATSE Local 15 (Albatross Productions)*, 275 NLRB 744 (1985).

<sup>70</sup> On October 14, 1997 GES's attorney wrote Carpenters regarding their bargaining agreement:

The parties acknowledge that there are current proceedings before the National Labor Relations Board . . . which may relate to or may impact the mutual obligations and promises contained in this agreement. They further agree that if the decision by the NLRB or the Court requires GES to resume its bargaining relationship with IATSE, the promises . . . are null and void.

tion of that hearing. She told each employee they did not have to answer her questions. She did not assure the employees against reprisals because she felt the witnesses were no longer employees and in a position where the call may have been coercive. Johnson admitted that she questioned some of those employees about strike participation (picketing), membership and affiliation with Local 39 and she may have asked about strike vote meetings. She asked the employees if they supported the strike.

#### Conclusions

The Fifth Circuit Court of Appeals has frequently stated that interviews or interrogations of employees are not illegal per se.

To determine whether an interrogation tends to be coercive, we examine: (1) the history of the employer's attitude toward its employees; (2) the type of information sought or related; (3) the company rank of the questioner; (4) the place and manner of the conversation; (5) the truthfulness of the employee's responses; (6) whether the employer had a valid purpose in obtaining the information; (7) if so, whether this purpose was communicated to the employee; and (8) whether the employer assures the employees that no reprisals will be taken if they support the union.

....

a determination of whether the interrogation tends to be coercive rests on a consideration of the eight factors in light of the total circumstances of the case. . . . *TRW, Inc. v. NLRB*, 654 F.2d 307 (5th Cir. 1981).<sup>71</sup>

An employer with a legitimate cause may interrogate employees on union matters without incurring section 8(a)(1) liability. [Case citations omitted.] An interrogation becomes illegal when the "words themselves or the context in which they are used . . . suggest an element of coercion or interference." *Cooper Tire & Rubber Co. v. NLRB*, 957 F.2d 1245 (1992).

The court found that *Cooper Tire* had not assured its employees that no reprisals would be taken but most employees voluntarily offered responses. Cooper interrogated 150 employees by four supervisors during work but that did not constitute a violation of Section 8(a)(1).

I found Johnson was a credible witness. Her credited testimony shows that she interviewed several alleged discriminatees by phone; she explained the purpose of her interview, stating it was in preparation of the NLRB hearing; she explained that the employee did not have to answer her questions and she did limit her interview to questions regarding the alleged unfair labor practices.

In consideration of the *TRW* factors, I note that the record failed to show that GES historically opposed employee union activity; the information sought was relevant to matters that could arise in the unfair labor practice hearing; the person questioning the employees was not a supervisor with authority to hire or fire; the interviews occurred over the phone; and there was no showing that the employees did not answer truthfully; Johnson had a valid purpose in interviewing the employees and

that purpose was communicated to the employees. Johnson admitted that she did not give assurances against reprisals. Johnson's question about whether employees supported Local 39 extended beyond the indicia I used here to determine whether employees engaged in strike activity. However, the GES attorneys did pursue questions and argument that employees did engage in strike activity by supporting the strike through other than overt means. Therefore I find that line of questions did not extend the questioning beyond those necessary to prepare for the hearing. I find that GES did not engage in unfair labor practices through interrogations.

#### CONCLUSIONS OF LAW

1. Freeman Decorating Company, GES Exposition Services, Inc., Expo Services, a Division of David H. Gibson Co., Inc. d/b/a Expo Services/USA, Expo Emphasis, L.L.C., Convention Service Inc. of Pennsylvania, Sho-Aids, Inc., Czarnowski Display Services, Inc., W.H. Bower Spangenberg, Inc., Renaissance Management, Inc., Zenith Labornet, Inc., and Eagle Management Group, Inc. are Employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Association of Stage and Theatrical Employees, Greater New Orleans Stage, Motion Picture, Television and Exhibition Employees Local 39, AFL-CIO and United Brotherhood of Carpenters & Joiners of America, Louisiana Carpenters Regional Council, AFL-CIO are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondents Freeman Decorating Company, GES Exposition Services, Inc., Expo Services, a Division of David H. Gibson Co., Inc. d/b/a Expo Services/USA, Expo Emphasis, L.L.C., Convention Service Inc. of Pennsylvania, Sho-Aids, Inc., Czarnowski Display Services, Inc., W.H. Bower Spangenberg, Inc., Renaissance Management, Inc., Zenith Labornet, Inc., and Eagle Management Group, Inc. have engaged in conduct in violation of Section 8(a)(1) and (3) of the Act by discharging the employees listed on appendix B and those approximately 357 employees omitted from appendix B as having engaged in picketing or other strike activity, because those employees were included in Local 39's hiring hall.

4. Respondents Freeman Decorating Company, GES Exposition Services, Inc., Expo Services, a Division of David H. Gibson Co., Inc. d/b/a Expo Services/USA, Expo Emphasis, L.L.C., Convention Service Inc. of Pennsylvania, Sho-Aids, Inc., Czarnowski Display Services, Inc., W.H. Bower Spangenberg, Inc., Renaissance Management, Inc., Zenith Labornet, Inc. and Eagle Management Group, Inc. have engaged in conduct in violation of Section 8(a)(1) and (5) of the Act by withdrawing recognition of International Association of Stage and Theatrical Employees, Greater New Orleans Stage, Motion Picture, Television and Exhibition Employees Local 39, AFL-CIO.

5. Respondents Zenith Labornet, Inc. and Eagle Management Group, Inc. have engaged in conduct in violation of Section 8(a)(1) and (5) by failing to timely supply International Association of Stage and Theatrical Employees, Greater New Orleans Stage, Motion Picture, Television and Exhibition Employees Local 39, AFL-CIO, with requested information which

<sup>71</sup> See *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964).

was relevant and necessary to the Union's collective-bargaining responsibilities.

6. Respondents Freeman Decorating Company and GES Exposition Services, Inc., by recognizing and bargaining with United Brotherhood of Carpenters & Joiners of America, Louisiana Carpenters Regional Council, AFL-CIO, have engaged in conduct in violation of Section 8(a)(1) and (2) of the Act.

7. Respondent United Brotherhood of Carpenters & Joiners of America, Louisiana Carpenters Regional Council, AFL-CIO has engaged in conduct in violation of Section 8(b)(1)(A) of the Act by recognizing, bargaining, and contracting with Freeman and GES.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### THE REMEDY

Having found that Respondent Employers have engaged in unfair labor practices, I shall recommend that each be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Respondent Employers have illegally withdrawn recognition of Local 39 and have discharged the employees listed on appendix B and those approximately 357 employees omitted from appendix B<sup>72</sup> because they engaged in strike activity, in violation of sections of the Act, I shall order

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<sup>72</sup> I do not agree with arguments made by Respondents that an appropriate unit should be determined using *Davison-Paxon Co.*, 185 NLRB 21 (1970) criteria. In view of my findings here, there are no bases to question the appropriateness of the contractual unit. The evidence failed to show that the historic unit is not appropriate. *Trident Seafoods*, 318 NLRB 738 (1995). The appropriate unit is the one specified in the Employers' expired collective-bargaining agreements with Local 39.

Respondents to meet and negotiate on request with International Association of Stage and Theatrical Employees, Greater New Orleans Stage, Motion Picture, Television and Exhibition Employees Local 39, AFL-CIO and on request, to use the Local 39 hiring hall for employees in the bargaining unit described elsewhere in this decision; to immediately rescind all unlawful discharges, remove reference to those discharges from its records and notify all discharged employees in writing that has been done; to make whole those employees named in appendix B and those approximately 357 employees omitted from appendix B, for all loss of earnings suffered as a result of the discrimination against them. Backpay shall be computed as described in *Abilities & Goodwill, Inc.*, 241 NLRB 27 (1979); and *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).<sup>73</sup> Respondents Freeman and GES are further ordered to disassociate from any collective-bargaining relationship with United Brotherhood of Carpenters & Joiners of America, Louisiana Carpenters Regional Council, AFL-CIO, as regards employees in the bargaining unit described elsewhere in this decision and to render all bargaining unit collective-bargaining agreements with the Carpenters null and void.

Respondent United Brotherhood of Carpenters & Joiners of America, Louisiana Carpenters Regional Council, AFL-CIO is ordered to disassociate from all collective bargaining relationships with Respondents Freeman and GES regarding the bargaining unit described elsewhere in this decision, and to render null and void all collective-bargaining contracts regarding that bargaining unit.

[Recommended Order omitted from publication.]

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<sup>73</sup> Backpay obligations exists only where the Respondent Employer(s) actually used employees not obtained through the Local 39 hiring hall to perform unit work on and after July 26, 1997.