Joseph Stallone Electrical Contractors, Inc. *and* International Brotherhood of Electrical Workers, Local Union No. 269, AFL–CIO. Case 4–CA–30370

August 1, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND COWEN

On November 26, 2001, Administrative Law Judge William G. Kocol issued the attached decision. The Respondent filed exceptions and a supporting brief. The Charging Party filed an answering brief, and the General Counsel filed a brief in support of the judge's decision.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified below.[3]

1. For the reasons set forth in the judge's decision, as further explained below, we agree that the Respondent violated Section 8(a)(1) when Owner Joseph Stallone made statements indicating that employee Andrew McIlvaine's layoff and recall were connected to the union activity of other employees. We also agree that the Respondent violated Section 8(a)(3) by laying off McIlvaine on May 15, 2001.

On that date, Stallone called McIlvaine to his office and informed him that he was laid off. According to McIlvaine's credited testimony, Stallone said that "he was having some financial problems and that there were some things going on with the Union that he had to take care of." Stallone specifically mentioned that employees had talked to the Union and that it had allowed them to talk to him. He repeated that "when I get this straightened—When I get this taken care of, maybe in a couple of weeks, call me. Maybe I can hire you back."

Stallone then asked if McIlvaine had met with anyone from the Union and if he had signed a card. After McIlvaine answered, "yes" to each inquiry, Stallone's face flushed red. Stallone was previously unaware of McIlvaine's union affiliation.

We agree with the judge that Stallone, in his conversation with McIlvaine, linked McIlvaine's layoff with the fact that other employees and the Union were presenting grievances to the Respondent.[4] It is clear that this activity was protected by Section 7. It is equally clear that the Respondent, through Stallone, violated Section 8(a)(1) by telling McIlvaine that his layoff was linked to this Section 7 activity of the other employees.

As to the 8(a)(3) allegation concerning the layoff of McIlvaine, we agree that the General Counsel has shown, by the 8(a)(1) statement above, that the Section 7 activity of the other employees was reason for the layoff of McIlvaine.[5] We recognize that the decision to layoff was made prior to the meeting with McIlvaine and prior to the Respondent's knowledge of McIlvaine's union activity. However, inasmuch as this alleged 8(a)3) violation is based on the union activity of others, it is clear that the lack of knowledge of *McIlvaine's* union activity is irrelevant. As to Respondent's defense, although Respondent contends that "financial problems" were another reason for the layoff, it has not shown that these problems, by themselves, would have caused the layoff of McIlvaine.

Further, and quite apart from the foregoing, it is clear that the Respondent's failure to recall McIlvaine was based not only on the union activity of others but also on his own union activity. Stallone originally told McIlvaine that he would consider the rehire of McIlvaine in a couple of weeks. Stallone then unlawfully interrogated McIlvaine about his union activity and, upon learning of that activity, grew visibly angry. Thereafter, and contrary to its original promises, the Respondent did not consider the recall of McIlvaine and did not recall him. Accordingly, we agree with the judge that the Respondent violated the Act by not recalling McIlvaine.

2. Although the Respondent's exceptions contest some of the judge's unfair labor practice findings, the Respondent makes no claim in exceptions or on brief that a bargaining order is not an appropriate remedy for the

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

[2] No exceptions were filed to the judge's finding that the Respondent violated Sec. 8(a)(1) when its owner accused an employee of disloyalty because of the employee's union activity.

[3] We shall modify the recommended Order and notice to include reference to a Sec. 8(a)(1) violation found by the judge but not mentioned in those sections of his decision. We shall also substitute a new notice in accordance with our recent decision in *Ishikawa Gasket American, Inc.*, 337 NLRB 175 (2001).

[4] Contrary to our dissenting colleague, we find that any arguable ambiguity in Stallone's initial remarks to McIlvaine was removed by his follow-up questions —whether McIlvaine had met with anyone from the Union and whether he had signed a card —particularly given the change in Stallone's demeanor (his face flushed red) after McIlvaine responded, "yes" to each question.

[5] Further, contrary to our dissenting colleague, we believe that Stallone's angry reaction to McIlvaine's union activity is relevant to the issue of whether Stallone laid off McIlvaine because of the union activity of other employees.

unfair labor practices found, and it offers no mitigating evidence with respect to the judge's analysis under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). The Board has discretion to reach remedial issues not raised by the parties, but under all of the circumstances presented, including the reasons articulated by the judge and the absence of argument from the Respondent, we agree that the *Gissel* bargaining order is appropriate.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Joseph Stallone Electrical Contractors, Inc., Bristol, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(d) and reletter subsequent paragraphs.

"(d) Threatening to lay off employees because of their union activity."

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

MEMBER COWEN, dissenting in part.

Contrary to my colleagues, I would reverse the judge's finding that the Respondent told employee Andrew McIlvaine that his layoff and recall were connected to the union activity of other employees and I would also reverse his finding that McIlvaine's May 15, 2001 layoff violated the Act. And, while I would adopt the other unfair labor practices the judge found, I would not issue a bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), because the General Counsel has not demonstrated why traditional remedies (including the posting of a cease and desist notice, make-whole remedies, and reinstatement) are inadequate in this case.

Regarding employee McIlvaine, the judge found that the Respondent was not aware of his union activities at the time it laid him off. The General Counsel has not excepted to that finding. However, the judge found that McIlvaine was laid off in connection with the union activities of other employees, of which the Respondent did have knowledge. In this regard, the judge found that, on May 15, Stallone called McIlvaine into his office and, in essence, told him that he was having some financial problems and that there were some things going on that he had to get taken care of with the Union and when things straightened out that maybe he could hire McIlvaine back. The judge found that Stallone thereby connected McIlvaine's layoff and recall to the union activity of other employees in violation of Section 8(a)(1). I disagree. Given the fact that the Respondent was unaware of any union activity by McIlvaine when the statement was made, this is too slender a reed on which to hang an 8(a)(1) violation. It seems clear that the things that the Respondent could get "straightened out" would be its own financial affairs and not its employees' union activity. At the most, the statement is ambiguous but that would not establish a violation of the Act.[1]

Since there was no 8(a)(1) violation in Stallone's statement, and since that finding was one of the key elements in the judge's finding that the General Counsel had met his initial burden under *Wright Line*[2] in showing that McIlvaine's layoff was unlawful, I would reverse the judge; find that the General Counsel did not meet this initial burden; and reverse the judge's ensuing 8(a)(3) violation regarding McIlvaine's layoff.

And, notwithstanding that I would adopt the remaining unfair labor practices found by the judge, as noted, I would not issue a *Gissel* bargaining order in this case. I start from the premise, set out by the Board itself in *Hausner Hard-Chrome of KY, Inc.*,[3] that

> [a]t the outset, it is important to understand that the normal and customary procedure for determining employee representation is an election. Ordering union representation based on authorization cards and the commission of unfair labor practices is an extraordinary remedy and the General Counsel has the burden of showing that the unfair labor practices were so serious and pervasive as to warrant a bargaining order because the possibility of conducting a fair election is slight.

The General Counsel did not meet this burden in this case. Assuming the 8(a)(3) violations in this case involving loss of employment are considered "hallmark" violations, the Board has indicated that "hallmark" violations "will not always mandate the imposition of a bargaining order."[4] Here, as in *Charlotte Amphitheater Corp. v. NLRB*, 82 F.3d 1074 (D.C. Cir. 1996), the judge has not articulated why the requirement that the Respondent "reinstate the unlawfully discharged employees with backpay, when combined with the other traditional remedies at [the Board's] disposal, are not enough to mitigate the

[1] Mixing motivational apples with oranges, my colleagues find clarity in the fact that after informing McIlvaine that he would be laid off, Stallone asked McIlvaine whether he had met with anyone from the Union or had signed a union card. However, neither the General Counsel, the judge, nor my colleagues argue that McIlvaine was laid off because of *his own union activity*. Rather, they assert that he was laid off because of the *union activity of other employees*. In this regard, the judge found that Stallone was surprised to learn of McIlvaine's union activity. Simply stated, post layoff questions about McIlvaine's *own union activity* have no bearing on the question of whether the layoff itself was motivated by the *union activity of other employees*.

[2] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[3] 326 NLRB 426, 439 (1998).

[4] *Phillips Industries*, 295 NLRB 717, 718 (1989) (citations omitted).

effects of [the Respondent's] actions."[5] Such reinstatement with backpay along with a cease and desist order to cover the 8(a)(1) violations have not been shown to be inadequate in this case. I would accordingly enter these remedies instead of the bargaining that my colleagues have issued.

APPENDIX

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT tell employees that their layoff and recall are connected with the union activity of other employees.

WE WILL NOT coercively interrogate employees concerning their union activities.

WE WILL NOT accuse employees of disloyalty because they engaged in union activity.

WE WILL NOT threaten to lay off employees because of their union activities.

WE WILL NOT threaten to discharge employees if they did not end a lawful strike.

WE WILL NOT discharge, lay off, or otherwise discriminate against employees for supporting the International Brotherhood of Electrical Workers, Local Union No. 269, AFL–CIO, or any other union.

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

WE WILL, within 14 days from the date of the Board's Order, offer Andrew McIlvaine, Daniel Spickler, Robert Fiorelli, and Richard Spickler full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Andrew McIlvaine, Daniel Spickler, Robert Fiorelli, and Richard Spickler whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges and layoffs of Andrew McIlvaine, Daniel Spickler, Robert Fiorelli, and Richard Spickler, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges and layoffs will not be used against them in any way.

WE WILL, on request, bargain with the International Brotherhood of Electrical Workers, Local Union No. 269, AFL–CIO and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

> All full-time electricians and electrician helper/ apprentices employed by us, but excluding all other employees, and managerial employees, confidential employees, seasonal employees, guards, and supervisors as defined by the Act.

JOSEPH STALLONE ELECTRICAL CONTRACTORS, INC.

Randy M. Girer and *Anjali P. Enjeti-Sydow, Esqs.* for the General Counsel.
James A. Downey III, Esq. (Begley, Carlin & Mandio), of Langhorne, Pennsylvania, for the Respondent.
Richard T. Aichor, for the Union.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on October 2 and 4, 2001. The charge, first amended charge, and second amended charge were filed May 24, 31, and September 14, 2001,[1] respectively and a second-amended complaint (the complaint) was issued October 1. The complaint alleges that Joseph Stallone Electrical Contractors, Inc. (Respondent) violated Section 8(a)(1) by interrogating an employee concerning the employee's union activity, threatening that the employee's layoff would continue until the employees ceased seeking union representation, accusing an employee of being disloyal because the employee engaged in union activity, announcing to employees that an employee was a paid union organizer, threatening to lay off the employee because the employee was engaging in union activity, and threatening employees with termination and loss of benefits if they did not cease engaging in a strike. The complaint also alleges that Respondent violated Section 8(a)(3) by laying off employees Andrew McIlvaine and Daniel Spickler and discharging employees McIlvaine, Spickler, Richard L. Spickler Jr., and Robert Fiorelli. As part of the remedy the

[5] 82 F.3d 1074, 1080 (D.C. Cir. 1996) (emphasis in original).

[1] All dates are in 2001 unless otherwise indicated.

complaint seeks the issuance of a bargaining order. Respondent filed a timely answer that admitted the filing and service of the charge and amended charges, jurisdiction, labor organization status, and the agency status of Joseph Stallone; it denied the substantive allegations of the complaint.

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

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, is engaged in the business of performing electrical repair and installation services for commercial and industrial customers at its facility in Bristol, Pennsylvania, where it annually performs services valued in excess of $50,000 outside the Commonwealth of Pennsylvania. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the International Brotherhood of Electrical Workers, Local Union No. 269, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

As indicated, Respondent is engaged in the business of providing industrial and commercial electrical repair and installation services. It provides these services within a 50-mile radius of Bristol, Pennsylvania, where it maintains its offices. Joseph Stallone is Respondent's president and sole owner.

As of May, Respondent employed eight full-time electricians and helpers: Vincent Stallone (Joseph's brother), David Rago, Richard Spickler, Jeffrey Maier, Robert Fiorelli, Daniel Spickler (Richard's son), Robert Ditmars, and Andrew McIlvaine.

Tom Bates is an assistant business manager/organizer for the Union. In September 2000, he and Steven Aldrich, who is an organizer for the Union, visited a jobsite and encountered Fiorelli and Daniel Spickler. Fiorelli thereafter went to the union hall and on September 22, 2000, Fiorelli signed an authorization card for the Union. Before Fiorelli signed the card Bates told him that it would authorize the Union to represent him and might be used for an election. Bates also showed Fiorelli the wages that employees received who worked for union employers. Daniel Spickler then visited the union hall on September 27, 2000, and he too signed an authorization card for the Union.

In January or February Stallone told some employees that he had talked with Chico Marciante, the Union's business manager, and that if the majority of employees decided to go union there was a possibility that Respondent would go union too. Later, however, at some time in March Stallone told Fiorelli that he thought it was not a good time to become a union contractor.[2]

On about February 2, McIlvaine visited the union hall to find work. He was given a list of nonunion contractors and was told that he should try to obtain employment from them. Respondent's name was on the list. That same day McIlvaine went to Respondent's facility where Stallone interviewed him. Stallone explained the work that they were doing and he mentioned several specific jobsites. Stallone said that he had a lot of work and some big jobs were coming up. McIlvaine completed an employment application and Stallone hired him as an electrician helper. As McIlvaine was leaving Stallone stopped him and asked how he had heard of Respondent. McIlvaine answered that his uncle referred him and that he got the name from the telephone book. Stallone said that he wanted to let McIlvaine know that Respondent was a nonunion company and that all the employees were nonunion. McIlvaine said that that was fine. On February 6 McIlvaine signed an authorization card for the Union. McIlvaine began working for Respondent on February 26. The delay between the time he was hired and the day he started work was due to the fact that McIlvaine was considering working for another employer and needed time to make up his mind.[3]

Stallone testified that in March 2001, he reviewed the financial statement for the previous year and concluded that Respondent's business position was worse than he had thought in that Respondent was having difficulty getting paid for work that had been performed. That statement showed that Respondent experienced an operating loss of $95,675 for the year 2000. It also showed that Respondent had accounts receivable of $90,205 as of December 31, 2000. That amount did not include money owed for jobs in progress. The financial statement showed stockholder's equity in the amount of $109,868 and longterm liabilities owed to shareholder of $156,719. Stallone testified that after he reviewed the financial statement he laid off part-time office employees Dorothy Bailey and Veronica LaRosa on March 20. But he explained that Respondent allowed them to work a certain number of hours per week even though they were laid off because Pennsylvania law allows employees to work some hours and still receive unemployment compensation. Thus, during their "lay off" Bailey's hours were reduced from about 15 hours per week to about 3–4 hours per week and LaRosa hours were reduced from about 30 hours to 7–8 hours per week. Unlike other employees who were laid off, there were no layoff notices in the files of LaRosa or Bailey. All the electricians continued to work 40 hours per week until the layoff beginning May 15, described more fully below.

During this same time period Stallone told Richard Spickler that Respondent was not receiving the money that was due from its customers and that things were tight. Stallone had made similar comments in the past.[4] During this same time period Stallone and Daniel Spickler had a conversation in Stallone's office. Stallone showed Daniel some financial records and said that Respondent was losing money, there was the possibility of layoffs, and Daniel would be one of the employees laid off. Daniel asked when the layoff would happen, and Stallone replied that he was not sure because it depended on whether he received the money he was owed. Daniel asked to see the financial records but Stallone did not allow him to do

[2] Stallone did not deny any of this testimony.

[3] These facts are based on McIlvaine's credible testimony. Stallone did not deny the statements attributed to him by McIlvaine.

[4] These facts are based on Richard Spickler's credible testimony. Stallone did not deny this testimony.

so.[5] Stallone also had a similar conversation with Ditmars.[6] McIlvaine also had a conversation with Stallone in Stallone's office. Stallone announced that there might be layoffs but that it wasn't going to involve McIlvaine; that he shouldn't worry. Stallone said that if there were layoffs McIlvaine should drive out to the worksite instead of reporting for work in the morning (so that it would appear that McIlvaine was laid off too). Stallone said that Ditmars and Daniel Spickler might be the employees who were laid off. Stallone also said that he could not afford to lose McIlvaine because he was a good worker.[7] None of the electricians, however, were laid off at that time. In April, about a month after her "lay off," Respondent recalled office employee LaRosa to work full time.

Bates and Aldrich encountered other employees of Respondent on jobsites. On April 27, Richard Spickler, Daniel Spickler, Ditmars, and Maier went to the union hall where Richard Spickler, Ditmars, and Maier signed authorization cards for the Union.[8]

On about April 30, Bates called Stallone and asked to meet with him to discuss how Respondent could become union; Stallone agreed to meet. After the telephone call the Union sent four or five union members to apply for employment with Respondent. They applied on about May 2 or May 3, but none were hired. One of the applicants was Guy Miliziano. He applied on May 2 and had a conversation with Stallone at the time. Miliziano gave his work experience and explained that he was looking for employment closer to his home. After some small talk Stallone commented that Respondent was a nonunion employer and Miliziano said ok. Stallone said that he was not hiring right then but that in about 2 weeks he had some work coming up. He asked if he could call Miliziano then.[9]

On May 8, Bates and Aldrich met with Stallone; Stallone's brother Vincent was also present. Bates explained that he had been in contact with Respondent's employees and they were receptive to the Union. Stallone asked for the names of the employees that the Union had talked to, but Bates declined to give Stallone that information. Instead, Bates said that the Union had signed statements of support from some of the employees. During the meeting the Union gave Respondent written information concerning the Union's standard wage and benefit package. Bates told Stallone how the Union might be able to help Respondent gain more business. Vincent Stallone asked if his son, who worked as a summer helper for Respondent, would be able to continue to do so. Bates explained the Union's practice concerning summer helpers. The union representatives also explained that both Stallone and Vincent could become members of the Union. At some point during the meeting Stallone told the union representatives to tell Chico Marciante not to send any more union applicants to Respondent. Marciante is the Union's business manager. Aldrich replied that Marciante did not send the applicants, he did. During the meeting the union representatives said that they were either coming in the front door or coming in the back door. Stallone became angry and asked if they were threatening him. Bates then explained that the Union could either be voluntarily recognized or it could gain representation rights through the election process. Stallone ended the meeting by saying that he would get back to the Union.[10] After Stallone did not call the Union, Bates called Stallone on about May 11. Stallone said that he was not ready to become a union contractor and that if he got any jobs that the Union was interested in, he would back off of them. It should be noted that at no time during these discussions did Stallone indicate that Respondent was undergoing financial distress.

On May 15, Stallone called McIlvaine to his office. Stallone said that he was having some financial problems and that there some things going on with the Union that he had to take care of. He said that apparently some of the employees had been talking to the Union and that had allowed the Union to come to Stallone's office and talk to him. Stallone said that when he got this taken care of, maybe in a couple weeks, McIlvaine should call him and maybe he could hire McIlvaine back. Stallone then asked McIlvaine if he had met with any of the guys from

[5] The facts concerning this conversation are based on Daniel Spickler's credible testimony. Stallone did not specifically deny Daniel Spickler's version of this conversation except to claim that he showed portions of the financial statement to him. Stallone, however, testified that he was uncertain of when these conversations occurred but he thought they occurred about a month or so after he had laid off the office employees.

[6] Stallone testified that he discussed the matter with them "about the time" he laid off the part-time office employees. He fixed that time in March. Yet he also testified that he had laid off McIlvaine "prior to that announcement," apparently referring to the discussions with Daniel Spickler and Ditmars. Yet McIlvaine was not laid off until May 15. However, later Stallone testified that he had the conversations with Daniel Spickler and Ditmars about a month before he laid them off. They were laid off on May 16. Then Stallone clarified that at the time he had these conversations he had not yet laid off McIlvaine. When asked by Respondent's counsel, Bates testified that he thought it was true that on or about March 26 the Spicklers and Ditmars were told that it was likely that they would be laid off. I conclude that these conversations occurred in March after Stallone reviewed that financial statement.

[7] McIlvaine testified that this conversation occurred in early May. I conclude that he is mistaken as to the date. From the substance of the conversation I conclude it occurred around the same time that Stallone had advised Ditmars and Daniel Spickler of the possibility of their layoff. McIlvaine was admittedly an outstanding employee. Vincent Stallone described him as an excellent worker and a "go getter." Stallone said that he liked McIlvaine and that he was a "pretty good worker." I conclude that McIlvaine's testimony concerning the substance of the conversation was credible. Stallone testified that he discussed that matter of layoffs with Ditmars and Daniel Stallone because he said that they the least senior at the time. However, McIlvaine in fact was the least senior employee at that time. Stallone explained that he did not advise McIlvaine of a potential lay off since McIlvaine had just been hired whereas he felt that Daniel Spickler and Ditmars were entitled to advance notice. I do not credit that testimony; it is at odds with the record as a whole as well as my assessment of the relative demeanor of the witnesses.

[8] Ditmars' card incorrectly bears the date of April 26.

[9] These facts are based on Miliziano's credible testimony. Here again, Stallone did not deny these statements.

[10] These facts are based on Bates' credible testimony. The testimony of Stallone and Vincent Stallone is not materially different. For example, Vincent Stallone admitted that during the meeting Stallone said to tell "Chico" not to send over more union applicants.

the Union. McIlvaine said yes. Stallone asked if McIlvaine had signed a union card, and McIlvaine again answered yes. At that point Stallone became upset. McIlvaine was the least senior employee among the electricians at the time of his lay off.[11]

After McIlvaine was laid off Bates met with Daniel Spickler at the union hall. Bates gave Spickler a union hat and t-shirt and asked him to wear them to work the next day. He also gave Daniel a letter on union letterhead advising Respondent that he was a voluntary union organizer. That next morning, on May 16, the Union faxed Respondent the letter. That same day Daniel Spickler wore the union hat and T-shirt to work. Both the hat and t-shirt clearly identified the Union. Daniel Spickler and Stallone then met in Stallone's office. Daniel gave Stallone a copy of the letter that Bates had prepared and had faxed to Respondent that day. Stallone read the letter and asked what it meant. Daniel answered that it meant exactly what it said. Stallone said that he thought he told Daniel that he would take care of the matter, but Daniel replied that Stallone talked to other everyone else about this but never talked to him. Stallone then said that Daniel did not have to go and stab him in his back. Daniel responded that he did what he had to do. Stallone and Daniel Spickler later came out of the office and Stallone called the employees together and announced to the employees that he had received a letter from the Union that Daniel was voluntary union organizer. Stallone read the letter to the employees. Stallone and the employees then discussed the work that was to be done that day. Several minutes later Stallone asked Daniel Stickler to return to Stallone's office. Stallone asked if Daniel remembered what he had said about layoffs. Stallone continued, saying that in Daniel's situation Stallone would let Daniel know at the end of the end what his status was. Daniel Spickler then worked the rest of the day. When Daniel returned to the shop at the end of the workday Stallone handed him a pamphlet concerning unemployment compensation and told him that he was laid off.[12] That same day Stallone also laid off Robert Ditmars. Ditmars, however, was recalled to work about 2 weeks later and his layoff is not alleged to be unlawful. Daniel Spickler had worked full time for Respondent since January 1999. Ditmars and Daniel Spickler were the least senior employees among the electricians at the time of their layoffs. Prior to these lay offs Respondent had not laid off any employees since 1997.

The next day Bates and Aldrich met with Fiorelli, Richard Spickler, Daniel Spickler, and McIlvaine. At this meeting McIlvaine explained that Stallone had asked him if he had signed a card. Bates explained that this was an unfair labor practice. Bates also voiced his view that the layoffs of McIlvaine and Ditmars were unfair labor practices and that Daniel Spickler's being paraded in front of the other employees was also unlawful. Bates explained that the employees could decide to go out on strike to protest the unfair labor practices. Bates and Aldrich left the room and after discussion the employees decided to strike to protest the alleged unfair labor practices. Handmade signs were then prepared. The signs read: "Stallone Electric Employees On Strike Unfair Labor Practices."

On May 18, Fiorelli and Richard Spickler engaged in a strike and together with Daniel Spickler and McIlvaine, they began picketing at Respondent's facility shortly before 7 a.m. Bates and Aldrich were also present. Stallone came out to the picket line and asked Fiorelli and Richard Spickler for their keys to the facility; both employees gave the keys to Stallone. Later Stallone again appeared on the picket line and presented letters to Richard Spickler and Fiorelli that read:

> Today May 18, 2001 you did not report to work. You are being directed to report to work now. If you do not report to work now, there could be disciplinary action taken against you. This action could be termination of job, termination of medical insurance benefits, and termination of vacation benefits.

After Stallone gave out the letters he invited Bates to come into the shop and discuss the situation, but Bates declined. The picketing lasted until midmorning and did not occur again. Fiorelli and Richard Spickler remained on strike and did not return to work. The Union found employment for the alleged discriminatees at union shops.

On May 22, Respondent sent Daniel Spickler and McIlvaine a letter advising them that because they had been laid off their health insurance would be terminated and telling them that they must return all company property in order to receive his final check. That same day Respondent sent a letter to Richard Spickler and Fiorelli advising them that they had been terminated. No reason was given for the termination in the letter. Richard Spickler had been employed with Respondent for almost 18 years. Fiorelli had worked for Respondent since January 1997.

A few days after the picketing McIlvaine called Stallone and told him that he needed his paycheck. Stallone replied that McIlvaine would not receive his check until he returned the keys and credit card that belonged to Respondent. On about May 23, McIlvaine went to Respondent's facility to return the keys; while there he spoke with Stallone. Stallone said that he was disappointed in McIlvaine and that McIlvaine had lied to him from the very beginning. Stallone said that they had sat down and figured out that McIlvaine had been talking to the Union well before McIlvaine started with Respondent. Stallone wished McIlvaine good luck and commented that he believed that McIlvaine would make a good electrician. Respondent did not recall McIlvaine for work.

In early June Respondent recalled Ditmars from layoff. Ditmars had not participated in the strike. Effective June 3, Respondent gave wage increases to five employees. Rago, Vincent Stallone, and Maier received a $2-per-hour increase, Ditmars a $1.90-per-hour increase, and James Stallone a $1 per hour. Respondent's employees had generally received annual increases of 50 cents per hour for the past several years, if they received a wage increase at all.

[11] These facts are based on McIlvaine's credible testimony. Stallone did not deny the key elements of McIlvaine's testimony. Instead, Stallone testified that medication he takes for high blood pressure makes him get "red in the face."

[12] The preceding facts are based on Daniel Spickler's credible testimony. Stallone agreed with much of Daniel Spickler's testimony. Significantly, Stallone did not deny Daniel Spickler's testimony concerning the conversations that occurred between the two of them that day.

At the time the employees were laid off or terminated Respondent was working on a number of projects. Among the projects were the First United Methodist Church in Princeton and a doctor's office in Bristol. These were projects were about 50-percent completed. A project involving waste management in Hamilton Township was about one-third completed. The work on a Dodge dealership in Burlington had just started. Respondent was working on project involving the conversion of a gymnasium to a theatre; this project was about 45-percent completed. A project for Jones New York, located in an industrial park near Respondent's facility, involved the installation of a new uninterrupted power system. This project too had only just started. Respondent was also working on two projects in Kingston. They involved the renovation of a lawyer's office and an apartment complex. Both were about 50-percent completed.[13]

Since mid-May Respondent has used a number of other electricians and electrician helpers. Steven Van Doren was hired as a full-time electrician helper on July 25. Respondent has used Anthony Maruccci as a part-time apprentice beginning July 16; he has worked about 30 hours per week for about 5 weeks as needed. Daniel Maleney and Andrew Maleney are part-time journeyman electricians who have worked about 2 weeks for Respondent beginning September 10; they averaged about 20 hours per week.

Respondent's financial statement for the year ending December 31, 2000, has been described above. Respondent's financial statement for the year ending December 31, 1997, shows that it had a loss of $77,799 and accounts receivable of $141,205. The financial statement for the year 1998 showed that Respondent had a net loss of $146,991 and accounts receivable of $104,848. The financial statement for 1999 showed that Respondent net income in the amount of $81,036 and accounts receivables of $217,564. Finally, Respondent also had a financial statement for the first 6 months of 2000. That showed that Respondent had a net income of $12,602 and accounts receivable of $195,430.

Stallone testified that Respondent was having trouble getting paid and that this had been a problem for 2, 3, and 4 years. He described the Attleboro project, where Respondent did wiring work for 102 units in an assisted living facility. That customer owed Respondent over $26,000 since September or October 2000. Another customer cited by Stallone was Escher Street, a homeless shelter in Trenton. In that case Respondent was only recently paid in August, although the project had been completed in 1996. The situation continued after the alleged discriminatees had been laid off or terminated. The Sunrise project was a senior living facility consisting of two buildings located in Abington. The project was completed in around October 1999 but Respondent has still not been paid over $26,000. Respondent completed a residential apartment building project in Kingston in August, yet as of the hearing date in early October Respondent was still owed $16,000. Respondent performed work on a church in Princeton. That project was recently completed but Respondent had not been paid in full: it was owed over $5000. As Stallone explained, "[Y]ou're always waiting [for] money."

Stallone also testified that during 2001 he twice borrowed over $12,000 to meet payroll and pay expenses. Stallone was not sure of the exact date, but he thought this happened near the end of February. Respondent produced no records to support this testimony. Stallone also testified that since the first of the year he personally has loaned between $14,000 and $20,000 to Respondent. Again Respondent produced no documents to support this testimony either as to the amount or the date the loan(s) took place. Stallone testified that none of the loans had been paid back as of the hearing date. Stallone testified that since the first of the year he had to make two penalty payments to the Internal Revenue Service of about $4000 as a result of late payments. Jay Ronald Conway, Respondent's accountant, testified that Respondent had been assessed penalties from time to time over the last 2 or 3 years. Finally, Stallone testified that since the first of year he has gone without getting paid on about six or seven times. Again, no documentary evidence was produced.

Conway prepared the financial statements described above. He testified that at some unspecified time after he prepared the 2000 financial statement he told Stallone that he felt that Stallone had to tighten up in certain areas. He testified that he advised Stallone that if his cash flow was not generating enough cash to operate the business without Stallone himself having to lend the company money or extend personal credit to the business, then Stallone should think about reducing payroll. Stallone did not corroborate this testimony nor did he testify that he relied on Conway's comments in deciding to lay off employees.

III. ANALYSIS

A. 8(a)(1) Allegations

The complaint alleges that Respondent violated Section 8(a)(1) by threatening that the employee's layoff would continue until the employees ceased seeking union representation. I have set forth above how on May 15 Stallone told McIlvaine that he was having some financial problems and that there some things going on with the Union that he had to take care of. He said that apparently some of the employees had been talking to the Union and that had allowed the Union to come to Stallone's office and talk to him. Stallone said that when he got this taken care of, maybe in a couple weeks, McIlvaine should call him and maybe could hire McIlvaine back. The Board has long held that the general test in determining whether an employer's statement violates Section 8(a)(1) is whether, under all the circumstances the statement reasonably tends to interfere with, restrain or coerce employees in the exercise of their rights guaranteed by the Act. *American Freightways, Co.*, 124 NLRB 146 (1959). Here, Stallone told McIlvaine that he was being laid off, that the layoff was connected with the union activity of the employees, and that once he took care of the union matter he might be able to call McIlvaine back to work. Stallone thus clearly connected both McIlvaine's lay off and his recall to the union activities of the other employees. This the Act forbids. I conclude that by telling an employee that his layoff and recall

[13] These facts are based on a composite of the testimony of the former employees. Stallone conceded that this testimony was "pretty accurate."

were connected with the union activity of other employees, Respondent violated Section 8(a)(1).

The complaint also alleges that Respondent violated Section 8(a)(1) by interrogating an employee concerning the employee's union activity. I have described above how, as part of the same conversation set forth in the preceding paragraph, Stallone asked McIlvaine if he had met with anyone from the Union. McIlvaine said yes. Stallone asked if McIlvaine had signed a union card, and McIlvaine again answered yes. At that point Stallone became upset. This conversation took place in Stallone's office. The questioning of an employee about his union activities is not per se a violation of the Act. Rather, all the surrounding circumstances must be examined to determine whether the questioning reasonably tended to interfere with, restrain, or coerce employees in the exercise of their rights protected by the Act. *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In this case McIlvaine had not revealed his union activity to Respondent at the time of the questioning. In fact, it was apparent that Stallone was surprised by McIlvaine's answer. Stallone was Respondent's highest management official, and the conversation occurred in his office. It occurred in the context of Stallone announcing McIlvaine's layoff. Moreover, as described above, the interrogation came after Respondent had violated the Act by connecting McIlvaine's layoff and recall to the union activities of other employees. Under these circumstances, I conclude that Respondent violated Section 8(a)(1) by interrogating an employee concerning his union activities.

Next, the complaint alleges that Respondent violated Section 8(a)(1) by accusing an employee of being disloyal because the employee engaged in union activity. As indicated above, on May 16 Daniel Spickler gave Stallone a copy of the letter that Bates had prepared and had faxed to Respondent that day. Stallone read the letter and asked what it meant. Daniel answered that it meant exactly what it said. Stallone said that he thought he told Daniel that he would take care of the matter, but Daniel replied that that Stallone talked to other everyone else about this but never talked to him. Stallone then said that Daniel did not have to go and stab him in his back. The Board has held that statements that convey to employees that it is disloyal to an employer to engage in union activity violate the Act. *Crown Cork & Seal*, 308 NLRB 445, 457 (1992); enfd. 36 F.3d 1130 (D.C. Cir. 1994); I conclude that Respondent violated Section 8(a)(1) by accusing an employee of disloyalty because the employee engaged in union activity. *Golden Eagle Spotting Co.*, 319 NLRB 64, 74 (1995), enfd. 93 F.3d. 468 (8th Cir. 1996); *Sound One Corp.*, 317 NLRB 854, 857 (1995), enfd. 104 F.3d. 356 (2d Cir. 1996).

The complaint alleges that Respondent violated Section 8(a)(1) by announcing to employees that an employee was a paid union organizer. In support of this allegation the General Counsel relies on the facts, set forth above, that on May16, after the conversation described in the preceding paragraph, Stallone and Daniel Spickler came out of Stallone's office and Stallone called the employees together and announced to the employees that he had received a letter from the Union that Daniel was going to be a voluntary union organizer. Stallone read the letter to the employees. Stallone and the employees then discussed the work that was to be done that day. I do not see how this incident would reasonably tend to interfere with the employees' rights. Daniel Spickler was seeking to publicly identify himself as an open union organizer. He was, after all, wearing a union hat and a union T-shirt. He had presented Stallone with the letter from the Union conveying in writing what was already visible: that Daniel was an open union adherent. Stallone merely announced the obvious to the employees without making any other comment. Afterwards, the employees resumed normal workday activities. In support of this allegation the General Counsel cites *NLRB v. Great Dane Trailers*, 388 U.S, 26 (1967). However, I find nothing "inherently destructive" of employee's rights, as defined by the Supreme Court, in Stallone's conduct. Under these circumstances I shall dismiss this allegation of the complaint.

The complaint next alleges that Respondent violated Section 8(a)(1) by threatening to lay off an employee because the employee was engaging in union activity. I have described above how, after incident set forth in the preceding paragraph, Stallone asked Daniel Stickler to return to Stallone's office. Stallone asked if Daniel remembered what he had said about lay offs. Stallone continued, saying that in Daniel's situation Stallone would let Daniel know at the end of the day of his status. It should be recalled that earlier Stallone had advised Daniel Stickler that there was the possibility of layoffs, and Daniel would be one of the employees laid off. Daniel had then asked when the layoff would happen, and Stallone replied that he was not sure because it depended on whether the he received the money he was owed. Thus Stallone had earlier advised Daniel that he could be laid off, but in fact Daniel had not been. It was only after Daniel's visible display of support for the Union that Stallone resurrected the issue. Stallone also alluded to Daniel's "situation." In context that was a reference to Daniel's newly open support for the Union. Under these circumstances Stallone's remarks were a not-too-subtle warning that because of Daniel's union activity he would again be considered for layoff. I conclude that by threatening an employee that he might be laid off because he engaged in union activity, Respondent again violated Section 8(a)(1). *H. B. Zachary Co.*, 319 NLRB 967, 969 (1995), enfd. 127 F.3d 1300 (11th Cir. 1997).

Finally,[14] the complaint alleges that Respondent threatened employees with discharge because they engaged in a strike. It will be recalled that after Fiorelli and Richard Spickler engaged in a strike and picketing in front of Respondent's facility, and after he had requested that they turn in there keys, Stallone gave them a letter that threatened them with disciplinary action, including termination and loss of benefits, if they did not end the strike. The right to engage in a concerted work stoppage is activity protected by the Act. *NLRB v. Washington Aluminum*, 370 U.S. 9 (1962). An employer may not threaten to discharge

[14] In his brief the General Counsel moves to amend the complaint to allege that the wage increases that Respondent gave to its employees in June violated Sec. 8(a)(1). That motion is denied. Due process requires that a respondent have notice of the allegations against it so that it can present a defense. No notice was given to Respondent, nor was the legality of the wage increase fully litigated.

employees if they do not end a lawful strike. *MCI Mining Corp.*, 283 NLRB 698, 704–705 (1987), enfd. 849 F.2d 609 (6th Cir. 1988). By threatening to discharge employees if they did not end a lawful strike Respondent violated Section 8(a)(1).

B. 8(a)(3) Allegations

The shifting burden analysis set forth in *Wright Line*[15] governs the determination of whether Respondent violated Section 8(a)(3) and (1) of the Act by discriminating against Daniel Spickler and McIlvaine. The Board has restated that analysis as follows:

> Under *Wright Line*, the General Counsel must make a *prima facie* showing that the employee's protected union activity was a motivating factor in the decision to discharge him. Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in absence of the protected union activity.[7] An employer cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.[8] Furthermore, if an employer does not assert any business reason, other than one found to be pretextual by the judge, then the employer has not shown that it would have fired the employee for a lawful, nondiscriminatory reason.[9]

[7] *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400 (1983).

[8] See *GSX Corp. v. NLRB*, 918 F.2d 1351, 1357 (8th Cir. 1990) ("By asserting a legitimate reason for its decision and showing by a preponderance of the evidence that the legitimate reason would have brought about the same result even without the Illegal motivation, an employer can establish an affirmative defense to the discrimination charge.").

[9] See *Aero Metal Forms*, 310 NLRB 397, 399 fn. 14 (1993).

T & J Trucking Co., 316 NLRB 771 (1995). This was further clarified in *Manno Electric*, 321 NLRB 278 (1996).

Turning first to McIlvaine's layoff, it is clear that he engaged in union activity by obtaining employment with Respondent as part of the Union's organizing effort and by signing an authorization card. However, the question is whether Respondent knew or suspected of McIlvaine's union activity. The General Counsel concedes that there is no direct evidence that Respondent was aware of his union activities before he was laid off. He argues, however, that the circumstances here warrant an inference of such knowledge. In support of this argument, the General Counsel points out that Stallone had knowledge of the union activities of the employees in general as a result of his meeting with the union representatives on May 8. The General Counsel also relies on McIlvaine's testimony that a short time before he was laid off he and Ditmars were talking about the Union in a bar after work. A man approached them and identified himself as a friend of Stallone's and said that he had heard the conversation; he asked McIlvaine his name. McIlvaine saw a picture of this person in Stallone's office. However, there is no evidence that Stallone's friend actually told Stallone anything about what he heard. McIlvaine also testified that shortly thereafter Vincent Stallone began questioning him about his work history, how long he intended to stay with Respondent, and how he learned of the job opening at Respondent. However, the General Counsel does not contend that Vincent Stallone is Respondent's agent. Most importantly, however, is the fact that the General Counsel ignores compelling evidence to the contrary. At the time of McIlvaine's layoff Stallone said that after he took care of the union situation McIlvaine should call him and maybe he could hire McIlvaine back. This is hardly consistent with the conduct of someone with acting upon antiunion animus. Moreover, Stallone then asked McIlvaine if he had met with any of the union representatives. McIlvaine said yes. Stallone asked if McIlvaine had signed a union card, and McIlvaine again answered yes. At that point Stallone became upset. It seems clear that this behavior shows that Stallone only then, for the first time, learned of McIlvaine's support for the Union. Under these circumstances I reject the General Counsel's argument that he has established Respondent's knowledge of McIlvaine's union activities prior to its decision to lay off McIlvaine. This conclusion is buttressed by the fact that later Stallone told McIlvaine that he was disappointed in McIlvaine and that McIlvaine had lied to him from the very beginning. Stallone said that they had sat down and figured out that McIlvaine had been talking to the Union well before McIlvaine started with Respondent.[16] The General Counsel cites *Hospital San Pablo*, 327 NLRB 300, 309 (1998), enfd. 207 F.3d 67 (1st Cir. 2000). However, in that case there was no contrary, affirmative evidence to support the conclusion that the respondent only learned of the union activity of the discriminatee after the decision was made to terminate him.

However, the absence of knowledge of is not fatal to the General Counsel's case because he also argues that the unlawful statements made by Stallone on May 15 show the unlawfulness of McIlvaine's layoff. As I have concluded above, Stallone's unlawful threat to McIlvaine clearly connected his layoff and recall with the union activity of the other employees. The Board has held that the discharge of an employee to give the appearance of regularity to other unlawful discharges is itself unlawful. *Crucible, Inc.*, 228 NLRB 723, 729 (1977). McIlvaine was regarded as an excellent employee and had earlier been assured that he would not be laid off despite the fact that he was the least senior among the electricians. Under these circumstances I conclude that the General Counsel has met his initial burden under *Wrigh tline* in showing that McIlvaine's layoff was unlawful.

The General Counsel argues in the alternative that even if McIlvaine's initial layoff was not unlawful, Respondent's failure to recall him was unlawful. I find merit in that argument too. The evidence shows that Stallone had told McIlvaine, before he learned of McIlvain's support for the Union, that he hoped to recall McIlvaine from layoff in a few weeks. However, after Stallone learned of McIlvaine's union support, both

[15] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[16] The General Counsel also contends that the fact that Respondent sent out a letter on May 15 to a former employer of McIlvaine requesting a job reference further supports his argument. However, I credit Stallone's testimony that it was part of Respondent's normal procedure and that the office staff stamped his signature on the letter.

in the layoff conversation on May 15 and on the picket line the next day, McIlvaine was not recalled. Instead, Respondent recalled Ditmars, who did not participate in the strike, within 2 weeks. Thus, the timing of Respondent's failure to recall McIlvaine supports the General Counsel's argument. Respondent's hostility towards the Union is shown by the numerous unlawful statements it made, as more fully described above.

I again conclude that the General Counsel has met his initial burden of showing that Respondent's failure to recall McIlvaine from layoff was unlawful.

Turning to the layoff of Daniel Spickler, it is clear that Spickler engaged in union activity by meeting with the union representatives and signing an authorization card. Any doubt concerning Respondent's knowledge of Daniel's prounion sympathies were resolved when he appeared at work wearing the union cap and T-shirt and presented Stallone with the letter from the Union.[17] Respondent's antiunion animus is shown by the many unlawful statements it made concerning the Union. Indeed, Stallone's statements on the day Daniel was laid off linked Daniel's layoff with his union activity. Daniel's lay off came on the very same day that he openly displayed his support for the Union. Thus, the element of timing strongly supports the General Counsel's case. I conclude that the General Counsel has met his initial burden under *Wright Line* of showing that the layoff of Daniel Spickler was unlawful.

I now examine whether Respondent has shown that it would have laid off McIlvaine and Daniel Spickler even in the absence of their union activity. Respondent contends that it laid off these two employees because it was experiencing a cashflow crisis. In assessing Respondent's defense, it is important to note that there is no persuasive evidence to explain why the layoffs occurred on May 15 and 16. The overdue accounts were of long duration and overdue accounts appear to be a normal part of Respondent's business. Indeed, the evidence shows that Stallone knew the details of Respondent's cash flow problem in early 2000, yet he did not lay off the electricians until mid-May. In the interim Respondent reduced the hours of the office staff in March, but then later increased the hours of LaRosa in April. In early May, before he met with the Union, Stallone told applicant Miliziano that he was not hiring right then but that in about 2 weeks he had some work coming up and asked if he could call Miliziano then. Thus, it appears Respondent endured a financial crunch in March, but by April it had lessened to the extent that Respondent was able to increase the hours of one employee and by May Respondent was considering putting another employee on the payroll. There is no evidence to explain how the cash flow situation had suddenly worsened so as to precipitate the layoffs. From the record, the only change during that period of time was Respondent's knowledge that its employees were seeking union representation. After the layoffs and discharges, Respondent quickly recalled Ditmars in early June and at the same time gave its employees unusually high wage increases. Even considering the fact that two employees had been fired after the layoffs, this conduct appears inconsistent with an urgent cashflow crisis. Moreover, there is no evidence concerning the magnitude of the cashflow problem on May 15 or how the layoffs of the three employees dissipated the problem. I also note that in September Respondent hired a full time employee rather than recall one of the employees from layoff. It should be recalled that Respondent admitted that McIlvaine was an excellent employee; he was not recalled. All these facts tend to show that a cashflow problem did not trigger the layoffs that occurred in mid-May. To sure, Respondent was experiencing financial losses, but it is important to note that Respondent does not contend that the losses, as opposed to a cashflow problem, caused the layoffs. Moreover, Respondent had experienced losses in previous years yet it did not lay off employees. Furthermore, Respondent conceded that it had enough work for the employees and the layoffs did not result form lack of work. Under these circumstances, I conclude that Respondent's assertion that a cashflow problem compelled it to lay off McIlvaine and Daniel Spickler was a pretext to disguise the unlawful nature of the those layoffs.

Respondent also argues that it made the decision to lay off the employees before it had any knowledge of their union activities. When asked about why he decided to lay off two employees on the day that Daniel Spickler appeared wearing the union apparel and bearing the union letter, Stallone testified that the decision had already been made because he was very concerned about not having cash to pay his employees. Respondent points to the fact that in March Stallone had advised Daniel Spickler and Ditmars that they might be laid off. But this fact only serves to undermine Respondent's argument because it does not explain why Respondent decided not to lay off the employees in March but instead decided to do so in May. It is important to note that Stallone never provided specific testimony as to when he actually made the decision to layoff the employees. I therefore reject the testimony that Respondent made the decision to lay off the employees before it had knowledge of any union activity. Respondent has failed to show that it would have laid off Daniel Spickler and McIlvaine even in the absence of their union activity.[18] Finally. Respondent points out that the lay offs were made in order of seniority. This fact might be of considerable weight if the General Counsel were contending that Respondent had unlawfully selected the employees for lay off. But here the evidence shows that Respondent has not established that it had a nondiscriminatory reason for laying off any employees on May 15 and 16. Under these circumstances, the fact that the employees were laid off by seniority is not determinative. Accordingly, by laying off and thereafter failing to recall Daniel Spickler and Andrew

[17] Respondent points out that it did not have actual knowledge that a majority of the unit employees had signed authorization cards on behalf of the Union until the start of the hearing in this case. Respondent argues that this is significant because it is relevant and probative of what Stallone knew at the time he laid off the employees. Granted that Stallone did not know for a fact that a majority of employees had signed cards, but other evidence shows that Stallone had knowledge of the union activities of his employees.

[18] I note that Respondent does not contend that McIlvaine's reinstatement or backpay should be limited because of any inaccuracies in his job application. In any event, Respondent has failed to show that it maintains a policy of discharging employees under those circumstances.

McIlvaine because they engaged in union activity, Respondent violated Section 8(a)(3) and (1).

Turning now to the discharges of Fiorelli and Richard Spickler, it will recalled that on May 16 they engaged in a strike and picketing. Respondent unlawfully threatened to discharge them if they not end the strike. On May 22, Respondent fulfilled its earlier unlawful threat and discharged the employees for refusing to end the strike. The strike was clearly protected under the Act. *Washington Aluminum,* supra. It is unlawful to discharge employees for refusing to return to work while on strike. *Christopher Co.,* 288 NLRB 1272, 1275–1276 (1988). Respondent points out that picketing occurred for only a few hours on May 16 and did not recur thereafter and that no one ever advised Respondent that the strike was continuing. Respondent also points out that the employees immediately found work thereafter and never returned to work as Stallone had requested in his letter. From this Respondent argues that it was "sandbagged" by the Union. However, Respondent's termination letter to the employees makes no mention of a claim that they had abandoned their jobs. To the contrary, the termination letters appears to have been a direct result from Respondent's earlier letters that threatened the strikers with discharge if they did not return to work. Although Respondent relies on the fact that the employees had found other work, there is no evidence that Respondent was aware of this fact when it sent them the termination letter. Under all the circumstances, I conclude that the contention that Respondent terminated the employees because it believed that they had abandoned their jobs is an afterthought. By discharging Fiorelli and Richard Spickler because they refused to end a lawful strike, Respondent violated Section 8(a)(3) and (1).

C. Bargaining Order

As indicated above, the General Counsel seeks the issuance of a bargaining order as a remedy for the unfair labor practices. The first matter to be resolved in disposing of that contention is to define the appropriate unit. The parties agree that a unit of electricians and apprentice/ helpers is an appropriate unit. That unit may be appropriately described, as generally alleged in the complaint as:

> All full-time electricians and electrician helper/apprentices employed by Respondent, but excluding all other employees, and managerial employees, confidential employees, seasonal employees, guards and supervisors as defined by the Act.

The parties agree that Rago, Richard Spickler, Maier, Fiorelli, Daniel Spickler, Ditmars, and McIlvaine are all properly included in the unit. Of those, Richard Spickler, Maier, Ditmars, Fiorelli, Daniel Spickler, and McIlvaine signed authorization cards for the Union. The parties disagree only as to the unit placement of Vincent Stallone. The General Counsel argues that he should be excluded as a relative of management. However, I find it unnecessary to resolve that matter, because the evidence shows that the Union had obtained majority support in the unit whether or not Vincent Stallone is included. In addition, the General Counsel made this assertion at the trial, and I am not confident that the matter was fully and adequately litigated. Under these circumstances I conclude that this issue should be left to the Union and Respondent to resolve in the first instance and through the appropriate unit clarification procedure if necessary.

Having identified the appropriate unit and concluded that the Union enjoyed majority support in that unit, I turn now to determine whether the unfair labor practices are serious enough to warrant the issuance of a bargaining order. In *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969), the Supreme Court authorized the issuance of bargaining orders to remedy unfair labor practices. Bargaining orders could be issued to remedy outrageous and pervasive unfair labor practices without regard to whether or not the union enjoyed majority in the unit. But in cases of less pervasive and outrageous unfair labor practices, bargaining orders could issue only upon a showing that the union enjoyed majority support. Because the union has established majority support among the unit employees in this case, I need determine whether the unfair labor practices met the lesser standard. The test is whether the unfair labor practices have the tendency to undermine the majority support among the employees for the union and make it only slightly likely that a free and fair election can be had if only the traditional remedies were ordered.

I have concluded that Respondent violated Section 8(a)(1) by telling an employee that his layoff and recall were connected with the union activity of other employees, coercively interrogating an employee concerning his union activities, accusing an employee of disloyalty because the employee engaged in union activity, and threatening to discharge employees if they did not end a lawful strike. The last violation, given to the employees in writing, was a particularly blatant violation of the Act. Threats of employment retaliation against employees because they engage in union activity are also very serious violations of the Act that tend to require the issuance of a bargaining order. *Overnite Transportation Co.,* 329 NLRB 990, 991 (1999), enfd. 240 F.2d 32 (4th Cir. 2001). These violations are likely to remain in the minds of the employees notwithstanding the issuance of traditional remedies of notice posting and a cease and desist order.

I have also concluded that Respondent violated Section 8(a)(3) and (1) by laying off and thereafter failing to recall Daniel Spickler and Andrew McIlvaine because they engaged in union activity and by discharging Robert Fiorelli and Richard Spickler because they refused to end a lawful strike. The Board has held that unlawful discharges and layoffs are among the most flagrant unfair labor practices. *Aero Detroit, Inc.,* 321 NLRB 1101, 1117 (1996). These violations strongly support the issuance of a bargaining order.

Other factors also support the General Counsel's remedial request. The unit is small and the unlawful discharges and layoffs affected no less than 50 percent of the unit. All the unfair labor practices were committed by Respondent's top official, it's sole owner Joseph Stallone. Factors that may weigh against the issuance of a bargaining order are absent in this case. For example, Respondent has not voluntarily taken steps to remedy any of its unlawful conduct. Importantly, Stallone remains in charge of Respondent's operations. There is little evidence of employee turnover. Less than 6 months have passed since Respondent committed the violations.

Considering all the circumstances, I conclude that the possibility of holding a fair election with only the traditional remedies is slight. I further conclude that on balance the employees' majority support for the Union as expressed in the authorizations cards is best protected by the issuance of a bargaining order. This bargaining obligation shall have commenced on May 15, the date Respondent commenced it unlawful activity. *Trading Port*, 219 NLRB 298, 310 (1975).

CONCLUSIONS OF LAW

1. Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act by:

(a) Telling an employee that his layoff and recall were connected with the union activity of other employees.

(b) Coercively interrogating an employee concerning his union activities.

(c) Accusing an employee of disloyalty because the employee engaged in union activity.

(d) Threatening to discharge employees if they did not end a lawful strike.

2. Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act by:

(a) Laying off and thereafter failing to recall Daniel Spickler and Andrew McIlvaine because they engaged in union activity.

(b) Discharging Robert Fiorelli and Richard Spickler because they refused to end a lawful strike.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Respondent having discriminatorily discharged, laid off, and failed to recall employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Because of Respondent's serious misconduct demonstrating a general disregard for the employees' rights under the Act, I find it necessary to issue a broad Order requiring Respondent to cease and desist from infringing in any manner on the rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[19]

ORDER

The Respondent, Joseph Stallone Electrical Contractors, Inc., Bristol, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that their layoff and recall are connected with the union activity of other employees.

(b) Coercively interrogating employees concerning their union activities.

(c) Accusing employees of disloyalty because they engaged in union activity.

(d) Threatening to discharge employees if they did not end a lawful strike.

(e) Discharging, laying off, or otherwise discriminating against any employee for supporting the International Brotherhood of Electrical Workers, Local Union No. 269, AFL–CIO, or any other union.

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

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

(a) Within 14 days from the date of this Order, offer Andrew McIlvaine, Daniel Spickler, Robert Fiorelli, and Richard Spickler full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Andrew McIlvaine, Daniel Spickler, Robert Fiorelli, and Richard Spickler whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges and layoffs, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges and layoffs will not be used against them in any way.

(d) On request, bargain with the International Brotherhood of Electrical Workers, Local Union No. 269, AFL–CIO as the exclusive representative of the employees in following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time electricians and electrician helper/apprentices employed by Respondent, but excluding all other employees, and managerial employees, confidential employees, seasonal employees, guardsand supervisors as defined by the Act.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board of its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

[19] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(f) Within 14 days after service by the Region, post at its facility in Bristol, Pennsylvania, copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. 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 current employees and former employees employed by the Respondent at any time since May 15, 2001.

(g) Within 21 days after service by the Region, file with the Regional Director 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

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