

Association of Community Organizations for Reform Now (ACORN) and Sarah A. Stephens and Erin Marie Howley and Gigi Nevils. Cases 16–CA–21007–1, 16–CA–21007–2, and 16–CA–21173

March 27, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND ACOSTA

On June 24, 2002, Administrative Law Judge Jane Vandeventer issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief answering the exceptions.

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

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

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.

In light of our finding that the Respondent, by Kimberly Olsen, violated Sec. 8(a)(1) on March 1, 2001, by interrogating employees Sarah Stephens, Erin Howley, and Clede Kemp about their union activities, we need not decide whether Olsen unlawfully interrogated Stephens and Howley on February 26, 2001, as any such finding would be cumulative.

Chairman Battista agrees with his colleagues that Olsen's March 1 statements to Stephens, Howley, and Kemp that the Union would bring Respondent down, and that she was willing to work with employees individually, violated Sec. 8(a)(1) of the Act. He notes, however, that Olsen's remarks are more aptly characterized as an implied threat of closure, rather than a threat of futility.

For all the reasons given by the judge, we adopt her finding that the Respondent violated Sec. 8(a)(3) and (1) by laying off Gigi Nevils, Sarah Stephens, and Erin Howley. We find particularly significant the following: the timing of Nevils' layoff shortly after she informed Supervisor Kent Smith that Dallas employees were supporting the Union, notwithstanding assurances of continued employment she had been given by Supervisor Olsen; the timing of the layoffs of Sarah Stephens and Erin Howley shortly after their meetings with Olsen about the Union and employee concerns about working conditions; the lack of urgency with which the Respondent addressed the financial management of the Dallas office, until employees began pressing for union representation; the "uncharacteristic" and unprecedented decision to layoff employees in response to its "relatively commonplace financial crises," as shown by National Field Director Helen O'Brien's testimony that she was unaware of any layoffs from any Respondent offices during her employment at the Respondent; and O'Brien's sudden "specific and directive" instruction to Olsen to lay off two employees, without consideration or discussion of the fact that several employees had recently quit, and without resort to traditional methods used by ACORN to improve finances, such as increased fundraising activity and voluntary layoffs. The Respondent has not explained why it did not employ

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Association of Community Organizations for Reform Now (ACORN), Dallas, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except the attached notice is substituted for the administrative law judge.

APPENDIX

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

The National Labor Relations Board has found that we violated 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 imply to that selecting a union to represent you would be futile.

WE WILL NOT threaten you with discharge if you try to organize a union.

WE WILL NOT interrogate you about your union activities or your reasons for supporting a union.

WE WILL NOT inform you that employees have been discharged because of their union activities.

WE WILL NOT layoff or discharge employees because they support the Union or try to organize a union.

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

WE WILL, within 14 days from the date of the Board's Order, offer Gigi Nevils, Sarah Stephens, and Erin Howley 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.

these traditional tools to improve its financial picture. We agree with the judge that, far from proving the Respondent's defense that it would have laid off these employees even in the absence of their union activities, the facts show the opposite.

² We correct the inadvertent misspelling of employee Gigi Nevils' name in par. 2(b) of the judge's Order. We have conformed the administrative law judge's notice to her Order.

WE WILL make Gigi Nevils, Sarah Stephens, and Erin Howley 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 layoffs of Gigi Nevils, Sarah Stephens, and Erin Howley, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the layoffs will not be used against them in any way.

ASSOCIATION OF COMMUNITY ORGANIZATIONS
FOR REFORM NOW (ACORN)

Laurie Hines-Ackermann, Esq., for the General Counsel.
Arthur J. Martin, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

JANE VANDEVENTER, Administrative Law Judge. This case was tried on December 3 and 4, 2001, in Ft. Worth, Texas. The complaint alleges Respondent violated Section 8(a)(1) of the Act by interrogating employees about a union, threatening employees with the futility of organizing a union, and threatening termination of employees because of the union. The complaint also alleges Respondent violated Section 8(a)(3) of the National Labor Relations Act (the Act) by laying off or discharging three employees, the three individual Charging Parties. The Respondent filed an answer denying the essential allegations in the complaint. After the conclusion of the hearing, the parties filed briefs which I have read.¹

Based on the testimony of the witnesses, including particularly my observation of their demeanor while testifying, the documentary evidence, and the entire record, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is an Arkansas nonprofit corporation with approximately 37 offices in 23 States, including offices in Dallas, Texas, and Portland, Oregon. During a representative 1-year period, Respondent received at its Dallas, Texas location goods and services valued in excess of \$50,000 directly from points outside Texas.

Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The International Workers of the World (referred to in the record herein and in this decision as the Union, the IWW, or the Wobblies) is a labor organization within the meaning of Section 2(5) of the Act.

¹ The General Counsel also filed a reply brief which I have not relied on, as the filing of such additional arguments with the administrative law judge is not provided for in the Board's Rules and Regulations.

II. UNFAIR LABOR PRACTICES

A. *The Facts*

1. Respondent's operation

Respondent's activities include organizing community groups and individuals, primarily low and moderate income families. Respondent seeks to serve this constituency by organizing around issues of importance to these individuals and groups in efforts to make political and economic changes beneficial to its constituency. Examples of issues it has worked on in the past few years include lobbying banks to lend money in communities it serves, i.e., not to engage in "red-lining" certain areas, and working on behalf of "living wage" city ordinances.

Respondent operates under its bylaws, and has a national head, called the chief organizer. Each local office has a head organizer, who runs the office on a day-to-day basis, including the hiring of employees. Both the national organization and the local organizations are supervised by elected boards of directors. Local offices have employees called field organizers who perform organizing functions and raise money with which to support these functions. The three individuals involved in these proceedings were employees of the Dallas, Texas office. Kimberly Olsen was the head organizer of that office. Some oversight of local offices was provided by Helene O'Brien, Respondent's national field director. During the latter part of 2000 and all of 2001, some financial oversight of local offices was provided by former Texas organizer, Liz Wolff.

At the time of the events herein, field organizers were expected to work long hours each week—54 hours—and were paid at a salary of \$16,000 annually until January 2001, when the salary was raised to \$18,000 for field organizers nationally. Their work consisted of: (1) recruiting members and collecting membership dues from them; (2) canvassing, which means knocking on doors in more affluent neighborhoods in order to request donations; (3) organizing campaigns and actions around issues; and (4) for some employees, attempting to secure grants from foundations, churches, businesses, and other organizations. The first two tasks are referred to as "internal" fundraising, and the last one is called "external" fundraising." It appears from the record evidence that various Dallas employees could raise as much as half of their own salaries, and possibly more than half. Some employees were more successful than others at recruiting members and securing donations. The employees generally worked in afternoons, evenings, and weekends.

Respondent nationally, and certainly at the Dallas office, had an extremely high turnover rate among employees. In 2000, significantly less than 10 percent of Dallas office employees stayed in the job for as long as 6 months. Most did not even complete their training period, but quit within a few days or weeks of being hired.

Respondent operated its finances centrally, but each office was expected to be self-sustaining. Each office had an account from which its bills were paid. The head organizer was expected to manage the office's finances: to make a budget and keep to it, to make sure that all income was sent to the central finance administration in New Orleans, and that all obligations

were submitted for payment to the same place. As will be described below in more detail, the head organizer of the Dallas office was singularly inept at performing this function.

During 2000, the Dallas office staff varied between approximately 5 and 10 employees at any given time. Head Organizer Kimberly Olsen hired several employees each month, and nearly as many quit each month. Two of the employees hired in 2000 were Charging Parties Sarah Stephens and Erin Howley, in August and September, respectively. Both these employees continued their employment until they were laid off by Respondent on March 2, 2001. Stephens worked full time as a field organizer, and gradually increased her effectiveness until she could recruit two or three members each week and raise about \$100 each day she canvassed. In 2000, field organizers canvassed about once a week, although there were other offices around the country in which they did so more often. After a few months, Olsen assigned Stephens the additional task of keeping track of the members and fundraising amounts which each employee secured, and of preparing bank deposits to be sent to the central financial office. During 2000 and the first few months of 2001, Olsen and some of the Dallas office staff were spending a great deal of their time and attention working on behalf of a "living wage" ordinance which was being considered by the Dallas City Council.

Howley began work as a full-time field organizer, but soon requested to change to a part-time employee. Olsen granted her request to work part time, and assigned her to writing applications for grants and other "external" funding. According to Stephens, Howley was the most effective canvasser on the Dallas staff, able to raise more than \$100 per night.

In January 2001, Olsen hired Gigi Nevils as a field organizer. Nevils expressed great enthusiasm for the job, and Olsen was eager to add her to the staff, believing that she would be an effective employee. By January 2001, Olsen had begun to realize that her office was in poor financial condition, she made an arrangement for Nevils to train in the Portland, Oregon office. It is undisputed that having new employees train in other offices is not uncommon at Respondent. Olsen bought Nevils a bus ticket from Respondent funds, and Nevils traveled to Portland to begin her training under Portland Head Organizer Kent Smith in early February 2001. Smith had agreed with Olsen that the Portland office would cover Nevils' paycheck.

2. Union activity

At the end of 2000, Respondent convened a national meeting of its field organizers and management staff, along with representatives of the boards of directors. When not in larger meetings, attendees could choose to attend smaller meetings (caucuses), one of which involved discussion among employees about the possibility of having a staff union at Respondent. Stephens attended this caucus. She testified that the employees made no efforts to hide their union interest from the supervisors and managers, but discussed it openly with them.

Within a month of that meeting, an employee newsletter entitled *To Gather* began to appear in the Dallas office. It was published by an employee in the Philadelphia office of Respondent, and sent to other offices. The newsletter reported on union organizing efforts and working conditions which the em-

ployees wished to discuss with management through a union, such as lateness of paychecks, safety of employees when walking alone at night, and the lack of any weekends off.

Stephens, Howley, and another employee, John Rees, testified to seeing copies of the newsletter in the Dallas office during early February 2001, and to reading it. They and other employees in the Dallas office discussed the union organizing effort among themselves and with a tenant in a neighboring office, Kenneth Stretcher, who worked for the Service Employees International Union. The employees also discussed the issue of safety when they canvassed alone at night; they wanted to be allowed to canvass in pairs. They also wanted to have 1 weekend off each month, rather than working every Saturday. Employees made no effort to hide these discussions, and believed that some discussions about the Union took place in Olsen's presence.

3. Allegations of 8(a)(1) violations

The first conversation which is in issue took place on the evening of February 26, 2001,² between Olsen and John Rees.³ On that date, it had become common knowledge that employees in the Seattle, Washington office had gone on strike. Also on that date, Olsen had telephoned Nevils in the Portland office and laid her off. Olsen and Rees agreed to meet after work for a drink and to talk about the IWW drive away from the office. They met at the Lakewood Landing Bar for about half an hour. Rees told Olsen that in his opinion, a democratic organization like Respondent should practice its principles internally. Olsen responded that the IWW was "trying to destroy" Respondent. She said she shouldn't have to take orders from employees. She told Rees that people are getting fired in Seattle for union organizing, that Nevils was fired because of the Union, and that Rees was to blame. Olsen then told Rees that she was assigning him to open a new office for Respondent in Forth Worth the following month. According to Olsen, she also told Rees "this is where the rubber hits the road," and that he had to help her.⁴ Rees responded by saying that he could not continue to work for such a hypocritical organization, and that he was quitting.

Also on February 26, Stephens and Howley approached Olsen and told her that they wanted to be constructive and to discuss issues of local interest, such as canvassing in pairs and getting their paychecks. Olsen asked them why they needed a union. She agreed to meet with them in a few days' time.

On March 1, Olsen met with Stephens, Howley, and Cledell Kemp, another employee, at the request of Stephens and How-

² All dates hereafter are in 2001, unless otherwise specified.

³ While Respondent introduced some evidence at the hearing with the apparent view to showing that Rees was a supervisor, Respondent did not contend in its brief that he was a supervisor. From all the evidence, it is clear that Rees was, at most, a lead person. He did train new employees, but most field organizers with any experience participated in training to some degree. I find that he was an employee.

⁴ The General Counsel contends that this last statement of Olsen's, although unalleged in the complaint, violates the Act because it was requesting Rees to stop talking about or organizing for the Union. The General Counsel urges that it was fully litigated, and should be found a violation of Sec. 8(a)(1). I disagree. From the context, the remark appears to refer to opening a new office in Forth Worth, rather than to Rees' admitted union support.

ley. Kenneth Stretcher was also present. Howley began by discussing the issue of safety while canvassing alone at night. Olsen defended the safety of the neighborhoods in which they worked and scoffed at the employees' fears. Stephens supported Howley's contention, and opined that canvassing in pairs would also provide moral support for one another, would decrease employee turnover, and would help employees develop a relationship with the community. The subject of employees having 1 weekend a month off was also raised. Olsen said that she might consider the 1 weekend a month off, and allowing trainees to canvass in pairs for the first month. She said she was willing to work with them individually. Olsen then raised the issue of the union drive in other offices, and asked the employees what they thought of the Union, and why they needed it. Stretcher spoke generally about the benefits of having a union. Olsen responded that he had mentioned only positive aspects; there were negative aspects, too. Olsen said that employees did not need a union to accomplish their goals, that a union would just "bring ACORN down." She called the employee who wrote the union newsletter a "poison pill" and told the employees that they were not workers, but were people who believe in "The Movement" and who should make sacrifices for this. Finally, Olsen appeared to lose interest, began to read her mail, and said, "[T]his isn't going anywhere." She ended the meeting.⁵

4. Layoff of Gigi Nevils

Nevils was hired at the end of January by Olsen, and for her first week trained by accompanying Dallas employees in fundraising and signing up members. She exceeded her goals for members and for fundraising. During that time, she recalled that Olsen commented on a letter which had appeared on the IWW website about the union organizing drive at Respondent. She joked about a member of Respondent who had been a "Wobbly" and wondered if he would picket the office. She also stated that if John Rees organized the employees, he was organizing against her.

On about February 7, Nevils went to Portland and began her training there. She kept in touch with Olsen and with Rees by telephone. Rees openly discussed the Union with Nevils and told her that all the Dallas employees were in favor of the Union. During the second week in February, Nevils participated in a training session with the Seattle head organizer and Seattle employees. After the training, she and the other employees discussed the Union and the work issues raised by the Union. During this time, Nevils was unhappy being away from Dallas, and repeatedly asked Olsen if she could return to Dallas. After a couple of weeks, Olsen told her that she would have to finish her training in Portland. During the succeeding week, Nevils and other Portland employees discussed a rumor that an em-

ployee in the Philadelphia office was fired for union organizing. Head Organizer Kent Smith denied that this was the reason for her discharge. He commented that the union trouble would now be over because of her discharge. Nevils said that it was not over, because the Dallas employees were organizing.

A few days later, on about February 23, Smith told Nevils that the Dallas office was "out of money," but told Nevils that they would "work it out" so that she could stay employed. On February 26, Olsen called Nevils on the telephone and told her that she had to lay her off because Portland was out of money and they can't have her there without paying her. Nevils asked how could they have money the previous Friday, but not on Monday. Nevils offered to go to another office to continue her training, but Olsen told her that there wasn't an office that she could train in. Nevils said that there must be something more going on that Olsen was not telling her. Olsen agreed that there was.

Nevils learned the following day from John Rees what Olsen had told him about the reason Nevils had been laid off.⁶

5. Layoff of Sarah Stephens and Erin Howley

On March 2, Olsen informed Stephens and Howley that they were laid off. She met with each one separately. She told Howley she was laid off because the organization did not have enough funds to keep her, not because of the Union. She told her that she might be called back to work in a month or so, but there was no guarantee. Howley then saw Olsen take a letter supporting the Union which was in the office, crumple it, and throw it in the trash. Olsen told Stephens that the organization was "broke," and told her the same thing about a possible recall.

6. Respondent's economic defense

Respondent's finances, always in somewhat straitened circumstances, became unusually precarious during mid-2000 through mid-2001. As outlined above, Respondent's income comes entirely from dues, fundraising of various kinds, and grants. According to the testimony of Liz Wolff, who was a generally credible witness, the entity which handled the bank accounts, bill paying, and bookkeeping for all the local offices was not doing its job properly and basically collapsed. Wolff was Respondent's Texas coordinator in 2000, but was drafted by the national organization to help straighten out the accounting and bookkeeping shambles which occurred in 2000. While many of Respondent's offices were in poor financial shape, the Dallas office was among the worst off, Wolff testified, because Olsen had failed to submit certain expenses, such as employee health insurance contributions, which were expected to be paid out of the Dallas office's funds. She had also neglected to have her staff do an appropriate amount of fundraising, according to Assistant Director Helene O'Brien, because she was so busy with the Dallas "living wage" campaign. According to Respondent, it was this unusual financial situation which caused Olsen to lay off Nevils, Howley, and Stephens. O'Brien testi-

⁵ I have credited Erin Howley, a most impressive witness, as to this conversation. Her testimony is corroborated by Sarah Stephens and Clede Kemp. Wherever the testimony of Olsen differs from the testimony of these witnesses, or of John Rees, it is discredited. Olsen was a casual witness who barely paid attention to the questions asked of her, and who took no trouble to respond either fully or carefully. I do not credit her testimony in any respect where it differs from that of any other witness.

⁶ On cross-examination, Nevils testified about her postlayoff requests to be allowed to continue her training in another office and about Respondent's responses to these requests. I leave this issue to the compliance stage of the proceeding.

fied that she instructed Olsen to lay off two additional employees after the layoff of Nevils. I do not credit Olsen as to her testimony that she did not inform O'Brien about the prouinion sentiments of Howley and Stephens. In any case, Olsen's knowledge of their prouinion sentiments is imputed to Respondent.

B. Discussion and Analysis

1. Olsen's meeting with Rees

I find that Olsen's statements to Rees on February 26 to the effect that employees in Seattle were being fired because of the Union, and that Nevils was fired for this reason were coercive and violated the Act. In addition, her remarks to the effect that the Union was "trying to destroy" Respondent and that she should not have to take orders from employees demonstrate her determined animus towards the Union and employee attempts to support the Union.

2. Olsen's meetings with Stephens and Howley

Olsen's questions to Howley and Stephens on February 26 and again on March 1, as to why they needed a union, and what its benefits would be are coercive interrogation and violate the Act. *Rossmore House*, 269 NLRB 1176 (1984); *Twin City Concrete, Inc.*, 317 NLRB 1313, 1317 (1995). Although Howley and Stephens openly supported the Union, supervisory questioning as to the motives or reasoning underlying employees' sentiments about the Union have been held to be coercive. Her statement that the Union would bring Respondent down, joined with her stated willingness to work with the employees as individuals (implying rather than dealing with the Union) was a threat that selecting the Union would be futile. It is well settled that threats of serious harm in text of other unfair labor practices are coercive and violate Section 8(a)(1). *Reno Hilton Resorts Corp.*, 319 NLRB 1154, 1155 (1995). Her reference in the same conversation to the employee who wrote the union newsletter as a "poison pill" is an expression of animus towards the Union and its employee supporters.

The General Counsel introduced evidence of management e-mail communications in March 2001 in which Helene O'Brien, among others, expressed some antipathy to the union organizing effort. While this evidence is from a period after the three layoffs at issue here, it was shortly after the layoffs and I find that it is some evidence of animus on the part of Respondent.

3. Olsen's layoff of Gigi Nevils

During her 3 weeks in Portland, Nevils displayed her support for the Union openly, telling the Portland supervisor, Kent Smith, that the Dallas employees (of whom she was one) all supported the Union. The General Counsel has therefore established the first two prongs of a prima facie case under *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1982), cert. denied 455 U.S. 989 (1982). The third element, that of antiunion animus, has been shown by the remarks of Olsen about the Union described above.

Olsen laid off Gigi Nevils after weeks of assuring her that even though the Dallas office was low on funds, that something would be worked out. She was laid off shortly after Kent Smith's assurances to her that she would be kept on, and within

a day or two of her remark to Kent Smith that the Dallas employees were supporting the Union. Thus, the timing of her layoff tends to show a connection between her avowed union support and her layoff. Other evidence of such a nexus can be found in the fact that on the same day Olsen informed Nevils of her layoff, Olsen told John Rees that the reason Nevils was fired was the Union. I find that the General Counsel has established a prima facie case that Nevils was discharged because of her announced support for the Union.

4. The layoffs of Howley and Stephens

As with Nevils, it is clear that both Howley and Stephens showed Olsen that they supported the Union, both by talking about their support openly, and by requesting a meeting with Olsen to discuss implementing some of the Union's demands in the Dallas office. Again, Olsen demonstrated her animus towards the Union. The timing of the two layoffs, coming within a day of the meeting concerning the Union and the employees' desires for changes in some of their working conditions, is evidence of a connection between the decision to lay off Howley and Stephens and their union support and activities. I find that the General Counsel has established a prima facie case that Howley and Stephens were laid off because of their support for the Union.

5. Respondent's defenses

Respondent has raised two primary defenses, first, that it could not have been motivated by antiunion animus in its separation of the three employees because of its principles as an organization, and second, that the financial condition of Respondent was the only motivating factor, or was such that the three employees would have been laid off even absent any union activities.

Respondent's defense that it could not possibly have harbored antiunion animus nor acted upon such animus because to do so would have been against its principles is entitled to very little weight. Respondent is presumed to be neither more nor less prone to unfair labor practices than any other respondent. Respondent's status as a nonprofit organization rather than as a for-profit enterprise endows it with no extraordinary presumptions in the eyes of the law. Furthermore, its avowed pursuit of ameliorative works in the community does not insure that every individual in its organization will invariably act in accord with complete moral and legal correctness. Human nature is more complicated than that.

Respondent's economic defense requires careful consideration. It is clear that the Dallas office was in extremely poor financial shape in February 2001. It is not clear, however, that its financial condition at that time was significantly worse than its financial condition during the preceding 12 months. If it was worse, the evidence does not show in what proportion it differed from the financial condition of the recent past, or that layoffs were the only or even the normal response to the situation.

The Dallas office had been operating without sufficient funds for several months at the time of the layoffs. Late paychecks for the employees were relatively commonplace at the Dallas office, and were not unknown at many other offices. Liz Wolff testified that she had informed Olsen of the severity of

the financial problem repeatedly from December 2000 through February 2001. Wolff and O'Brien both urged Olsen to come up with a plan to deal with the financial shortfall. Another Respondent supervisor, Beth Butler, suggested increased fundraising strategies to Olsen. Olsen ignored this advice, and in both December 2000 and January 2001 hired additional employees. On cross-examination, she testified that she "didn't realize" the office was \$20,000 behind in its accounts, and didn't remember to allocate money for required costs such as health insurance. Neither Wolff nor Helen O'Brien told Olsen that she could not hire employees, nor did either of them give Olsen specific directives about finances.

Both Wolff and O'Brien testified about other offices around the country which had severe financial difficulties at the same time, such as Los Angeles and Denver. In the other offices, the supervisor of the office increased the fundraising duties of the employees, in one or more offices assigning employees to do fundraising 100 percent of the time. Some employees quit under these circumstances, thus reducing the payroll in those offices. O'Brien testified that in March 2001, she instructed Kent Smith to lay off employees in the Portland office. Smith discussed the situation with the employees, two of whom volunteered for layoff, thus essentially quitting. O'Brien testified that she was unaware of any layoffs from any Respondent offices in the 3 years she has held a national management position other than those of Nevils, Howley, and Stephens, and the Portland voluntary layoffs.

O'Brien testified that she finally instructed Olsen on March 1 that she had to lay off two employees, and the two most junior employees, Howley and Stephens, were chosen. There was apparently no discussion of the fact that several employees, including John Rees, had recently quit, nor was there any discussion of alternate strategies for staying afloat, such as the full-time fundraising being undertaken by other offices. For at least 2 months, O'Brien had given Olsen no guidance, training, or directives about how to solve her office's financial problems, but had simply continued to urge her to come up with a plan. Suddenly, she gave Olsen a directive to take specific action—to lay off two employees. O'Brien changed her approach to Olsen from scrupulously nondictatorial to specific and directive. O'Brien gave no explanation for her about face in handling Olsen's financial mismanagement. Furthermore, O'Brien did not explain why Respondent ordered Olsen to lay off employees in Dallas rather than to undertake one of the alternate strategies used in other offices, such as full-time fundraising.

The facts that layoff was an uncharacteristic recourse for Respondent in its relatively commonplace financial crises, that other offices in similar financial condition did not lay off employees, but instead increased fundraising activities, and the abrupt about face of Respondent from a hands off approach to Olsen's office, to a specific directive to lay off two employees, are all facts which tend to show how unusual and unprecedented the layoffs were. Far from proving Respondent's defense that it would have acted the same even in the absence of the employees' union activities, these facts tend to show the opposite. I find that Respondent has not carried its burden of proving its asserted defense. I find that Respondent violated

Section 8(a)(3) of the Act when it laid off Nevils, Howley, and Stephens.

CONCLUSIONS OF LAW

1. By interrogating employees about their union activities, by informing employees that other employees have been discharged because of the Union, by threatening employees that selecting the Union to represent them will be futile, and by threatening employees with discharge, Respondent has violated Section 8(a)(1) of the Act.

2. By laying off Gigi Nevils, Sarah Stephens, and Erin Howley, Respondent has violated Section 8(a)(3) and (1) of the Act.

3. The violations set forth above are unfair labor practices affecting commerce within the meaning of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act.

I shall also recommend that Respondent be ordered to remove from the employment records of Gigi Nevils, Sarah Stephens, and Erin Howley any notations relating to the unlawful action taken against them and to make them whole for any loss of earnings or benefits they may have suffered due to the unlawful action taken against them, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

ORDER

The Respondent, Association of Community Organizations for Reform Now (ACORN), Dallas, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union activities, informing employees that other employees have been discharged because of the Union, threatening employees that selecting the Union to represent them will be futile, and threatening employees with discharge.

(b) Laying off employees because of their support for the IWW or any other labor organization, or because of their concerted protected activities.

(c) 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.

⁷ 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.

(a) Within 14 days from the date of this Order, offer Gigi Nevils, Sarah Stephens, and Erin Howley 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 Gigi Nevils, Sarah Stephens, and Erin Howley 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 this decision.

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

(d) 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 or 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.

(e) Within 14 days after service by the Region, post at its Dallas, Texas location copies of the attached notice marked

“Appendix.”⁸ Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent 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 February 26, 2001.

(f) 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.

⁸ If this Order is enforced by a judgment of the 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.”